IT'S ABOUT TIME – FOR A NEW REGULATORY APPROACH TO EQUALITY
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Abstract

In 2007, the Human Rights and Equal Opportunity Commission (HREOC) concluded that 'it's about time for a new approach' to the problems faced by men and women in respect of work and family responsibilities in Australia. In its report, *It's About Time: Women, Men, Work and Family*, HREOC recommended the enactment of new federal legislation to promote cultural change through greater protection and support for workers with family responsibilities. The *Family Responsibilities and Carers' Rights Act* would serve to extend the current federal prohibition of discrimination on the basis of family responsibilities and provide employees with a right to request flexible working arrangments.

While the proposal is welcome there is a disjuncture in the report between the conclusion that fundamental cultural change is needed in respect of work/family norms and the legislative tool proposed which is not well equipped to achieve cultural change. The legislative recommendation is essentially an expansion of the existing anti-discrimination law framework. This amounts to an acceptance by HREOC of the existing regulatory model that relies upon victim enforcement of individual rights as the primary mechanism for achieving equality. This rights-based approached has achieved only limited success in respect of various other groups (eg, women, racial minorities) already covered by anti-discrimination legislation, in Australia and elsewhere. Around the world the limitations of this model have been recognised and supplemented with more proactive regulation and Australia is seen to be trailing behind in this regard. While a strong case for change has been made out, only a weak mechanisms for achieving that change has been proposed. There continues to exist a pressing need to consider more fundamental regulatory reform to eliminate discrimination and promote equality.

In this article, I explore the basis and nature of HREOC's legislative proposal, its merits and limitations, and the assumptions that underpin it. In the final part I provide some examples of alternative equality laws, those adopted in the UK, and draw out some principles that we might use to guide Australia toward a more effective regulatory response to inequality and work-family conflict.

I. INTRODUCTION

In March 2007, the Human Rights and Equal Opportunity Commission (HREOC) concluded that 'it's about time for a new approach' to the problems faced by men and women in respect of work and family responsibilities in Australia.[1] Based on two years of consultation, HREOC issued its final report, *It's About Time: Women, Men, Work and Family*,[2] noting that many Australians struggle to combine work and family and that workers with family responsibilities experience significant discrimination and inequality. HREOC concluded that the federal government could do more to address the difficulties faced by workers trying to satisfy both their work and family responsibilities and put forward a wide array of recommendations to this effect. Its central recommendation was the enactment of new federal legislation to promote cultural change through greater protection and support for workers with family responsibilities. The *Family Responsibilities and Carers' Rights Act*[3] would serve to bolster the prohibition of discrimination on the basis of carers' responsibilities and provide employees with a right to request flexible working arrangments.

While the proposal is welcome there is a disjuncture in the report between the conclusion that fundamental cultural change is needed in respect of work/family norms and the legislative tool proposed which is not well equipped to achieve cultural change. The legislative recommendation is essentially an expansion of the existing anti-discrimination law framework. This amounts to an acceptance by HREOC of the existing regulatory model that features individual rights as the primary mechanism for achieving equality. This approach relies upon victims standing up for their rights and prompting social change through individual litigation and its subsequent ripple effect. It assumes that victims have the capacity to identify discrimination, that an adequate norm will exist for the conduct to be understood as a legal wrong, and that the victims have the time, security and resources to pursue litigation in the event of breach.

In accepting this approach HREOC's recommendation stands in contrast to the findings of the report which stress that the dichotomisation of work and family, and the construction of the ideal worker as being one unencumbered by family responsibilities, is deeply entrenched as the cultural norm. Moreover, a central finding of the inquiry is that workers with family responsibilities are extremely time poor and thus not ideally placed to take on the additional job of reforming workplaces through litigation. HREOC has made out a strong case for change, but then recommends a weak legal tool for achieving it.

Around the world other governments have recognised that a rights or fault-based approach to achieving equality is limited and needs to be supplemented with regulatory mechanisms requiring action of those in positions to promote equality, not only those who are victims of

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[1] John von Doussa, President, Acting Sex Discrimination Commissioner and Commissioner Responsible for Age Discrimination for the Human Rights and Equal Opportunity Commission, 'It's About Time: Women, Men, Work and Family' (Speech delivered at the It's About Time: Women, Men, Work and Family Final Paper Launch, Sydney, 7 March 2007) <http://www.hreoc.gov.au/sex_discrimination/its_about_time/media/jvd_speech.html> at 5 December 2007.

[2] Human Rights and Equal Opportunity Commission, *It's About Time: Women, Men, Work and Family – Final Paper* (2007).

[3] Ibid xvii.

inequality.[4] Drawing upon lessons from Northern Ireland and Canada, in the past decade the United Kingdom has progressively developed a more proactive regulatory approach to achieving equality and is currently undertaking a review to consider furthering such developments. Leading the way at home, the Victorian government has implemented more proactive measures[5] and further amendments of this kind may be on their way.[6] As with other human rights issues, the Australian government has fallen behind comparable nations in respect of equality measures.[7] In exploring ways to emerge from this status as human rights laggard, we would do well to heed the lessons and warnings emerging from those who have been more progressive in tackling the problems.

In this article, I explore the basis and nature of HREOC's legislative proposal,[8] its merits and limitations, and the assumptions that underpin it. In the final part I provide some examples of alternative equality laws, those adopted in the UK, and draw out some principles that we might use to guide Australia toward a more effective regulatory response to inequality and work-family conflict.

II. INQUIRY, REPORT AND RECOMMENDATION

Using its education and awareness raising powers,[9] the HREOC consultation on work and family built upon earlier inquiries into various aspects of discrimination and inequality faced by women in the workplace, such as pregnancy discrimination[10] and sexual harassment.[11] In 2002, HREOC conducted a major inquiry into paid maternity leave, and issued a final report – *A Time to Value: Proposal for a National Paid Maternity Leave Scheme*.[12] The inquiry looked around the world and found that Australia was a laggard in being one of only two nations in the OECD (along with the United States) that does not have a national paid maternity leave scheme.[13] In response, HREOC put forward a comprehensive, well considered and costed proposal to introduce a paid maternity leave scheme that would have at least enabled Australia to meet the minimum international standards.[14]

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[4] Paul Chaney and Teresa Rees, 'The Northern Ireland Section 75 Equality Duty: An International Perspective' in Eithne McLaughlin and Neil Faris, *The Section 75 Equality Duty – An Operational Review*, 2004.

[5] Such as the *Charter of Human Rights and Responsibilities Act* 2006 and the *Equal Opportunity Amendment (Family Responsibilities) Act* 2008, discussed below in part III B.

[6] See State of Victoria, Department of Justice, *Equal Opportunity Review: Options Paper* 2008, 36

[7] Chaney and Rees, above n 4.

[8] For a general summary and review of the final paper, see K Lee Adams and Chris Geller, 'Work and Family: Seeking Solutions' (2007) 20 *Australian Journal of Labour Law* 312.

[9] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 11, 13.

[10] Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a Right Not a Privilege to Work While Pregnant* (1999).

[11] Human Rights and Equal Opportunity Commission, *Sexual Harassment – A Bad Business* (2002).

[12] Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002).

[13] Human Rights and Equal Opportunity Commission, *Valuing Parenthood – Options for Paid Maternity Leave: Interim Paper* (2002) [4.1].

[14] For a summary and analysis of the recommendation, see Belinda Smith, 'A Time to Value: Proposal for a National Paid Maternity Leave Scheme' (2003) 16 *Australian Journal of Labour Law* 226.

There is some evidence that the inquiry and report raised awareness and shifted community expectations about paid maternity leave and this prompted some response by employers.[15] However, this (moderate) corporate response was not matched by government. The recommendation for paid maternity leave was rejected and instead a 'Baby Bonus' was introduced granting a lump sum to parents in respect of all births.[16] This was a welcome contribution to the expenses of a newborn, but the payment that was not means tested or related to workforce participation failed to challenge the family-unfriendliness of many workplaces.

By 2005, with no paid maternity leave scheme on the horizon,[17] HREOC broadened its focus to inquire into work and care generally, launching the consultation with a discussion paper, *Striking the Balance: Women, Men, Work and Family*.[18] The aim of this inquiry was to 'broaden the "work and family debate" to better include men's role in family life; to include forms of care other than child care (such as elder care and care for people with disability); and to highlight the relationship between paid work and unpaid work'.[19]

As a result of its inquiry, HREOC made a number of key findings[20] demonstrating the costs to women, men and society arising out of the gendered division of labour as well as the failure of workplaces to adequately accommodate workers with family responsibilities:

- **Workers with family responsibilities are time starved:** Despite over a decade of economic growth and prosperity, many Australians 'are not living the lives they want and feel pressured, stressed and overly constrained in the choices they make'.[21] Many expressed dissatisfaction at being 'time poor', particularly at key points in the life cycle involving early parenting and care for elderly relatives,[22] and experience conflicting demands on time.[23]

- **An unequal division of paid and unpaid work remains:** Women have been reported as being in paid work in 'unprecedented numbers'[24]. However, the increased labour force participation rate for women has not been accompanied by a 'corresponding change in the division of unpaid responsibilities between men and women', with women in paid work experiencing the 'additional pressure of managing family life'.[25] Women with caring

[15] Sara Charlesworth, *Contributions and Limitations of the* Sex Discrimination Act *at the Workplace Level*, National Equal Opportunities Network <http://www.neon.org.nz/crownentitiesadvice/resourcelist/women/charlesworth/> (undated) at 16 June 2008; Equal Opportunity for Women in the Workplace Agency, *Equal Opportunity for Women in the Workplace Survey 2005 – Paid Parental Leave* (2006).

[16] Luke Raffin, 'Baby Steps in the Right Direction: Does the New Maternity Payment Realise the Aims of Paid Maternity Leave?' (2005) 18 *Australian Journal of Labour Law* 270.

[17] Paid maternity leave is now on the horizon with the Productivity Commission currently inquiring into the options for its introduction: Productivity Commission, *Inquiry into Paid Maternity, Paternity and Parental Leave, Issues Paper April 2008.*

[18] Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, Men, Work and Family – Discussion Paper* (2005).

[19] HREOC, 'It's About Time', above n 2, xi.

[20] For a general overview of the facts informing the inquiry, see Human Rights and Equal Opportunity Commission, *It's About Time: A Snapshot of Some of the Facts Informing this Project* (2007) <http://www.hreoc.gov.au/sex_discrimination/its_about_time/media/work_family_snapshot.html> at 16 June 2008.

[21] HREOC, 'It's About Time', above n 2, 36.

[22] Ibid.

[23] Ibid.

[24] Ibid 39.

[25] Ibid 40.

responsibilities continue to carry a 'disproportionate share of unpaid work, including child care, elder care and associated housework'.[26]

- **Men are working longer hours:** The manner in which the work-family conflict has been approached at large in the past has served to entrench long hours for men 'so they can meet their family's economic needs'.[27] The inquiry reported salaried men as facing particular difficulty regarding the issue of long hours at work, studies showing the average working hours of employed, partnered fathers with an infant to be 46 hours per week.[28]

- **Workers with family responsibilities continue to face barriers to participation in the workplace:** Within some industries and occupations, employees find it particularly difficult to meet their carer responsibilities 'due to inflexible workplace structures and cultures'.[29] Workplaces have been identified as possible contributors to a 'culture of inequality' through, eg, unequal pay, gender segregation in employment, limited or non-existent family-friendly policies (particularly with respect to paid parental leave) and male dominated work cultures with hostile attitudes toward workers with family-carer responsibilities.[30]

- The lack of accommodation provided in workplaces as well as the prejudice faced by workers with family responsibilities has been found to significantly contribute to:

    - **Underemployment and underutilisation of skills of women**: The most common arrangement for partnered women with children under 15 years of age has been part-time work, with their partners working full-time.[31] However, the inquiry noted that the nature of part-time work often failed to meet the 'individual preferences' of women, with many women wanting to work more hours as well as engage in higher quality work.[32] Further, the inquiry received evidence of women 'downshifting to lower status jobs' in order to accommodate their family and carer responsibilities, signifying both a loss of talent and skills for the labour market as well as an underutilization 'of both public and private investment in education and development'.[33]

    - **Economic dependence and poverty:** Women are more likely than men to experience a conflict between work and family responsibilities and alter their paid work commitments to accommodate their family commitments.[34] As a consequence of this, women are more vulnerable upon relationship breakdowns and less able to provide for their families.[35]

    - **Relationship and health implications of conflicting work and family pressures:** Family relationships are reported as suffering where there exists a poor balance between

[26] Ibid.
[27] Ibid 71.
[28] Ibid 71, fn 188 (citation omitted).
[29] Ibid 37.
[30] Ibid 70.
[31] Ibid 76.
[32] Ibid.
[33] Ibid 77.
[34] Ibid 40.
[35] Ibid.

paid work and caring work.[36] In contrast, the inquiry found that where work-care arrangements are balanced, Australians have reported 'a high degree of satisfaction with work and family relationships, and a general sense of wellbeing'.[37]

- **Longer hours worked by primary breadwinners, limiting their participation in unpaid work:** Men's opportunities for developing close family relationships and community connections are restricted due to less time spent in care work and concomitant pressures experienced in their capacity as 'breadwinners'.[38] Moreover, the pressure to work longer hours operates to reinforce the traditional 'breadwinner/home carer model' by upholding the ideal worker as one who is care-free and able and expected to devote more time to paid work.[39]

Drawing together these findings, HREOC concluded that workers with family responsibilities face significant difficulties in meeting both their work and family responsibilities due to ongoing prejudice and assumptions about the separation of work and family spheres, a culture of long hours, and a lack of family-friendly conditions in workplaces. Workers with caring responsibilities are unable to participate equally in paid work, often being relegated to jobs with poor reward and insecurity. Conversely, the longer hours and work intensification faced by traditional primary breadwinners has limited their opportunity to engage more fully in family caring.

Although not peculiar to women, work-family conflict is disproportionately experienced by women and is often characterised as a women's issue. As found by HREOC, jobs that are 'compatible' with caring responsibilities – short or flexible hours – are often precarious, offering low pay, low security, little satisfaction and often no career path.[40] In dealing with the lack of accommodation for workers with family responsibilities, women are left to 'choose' between not taking on caring responsibilities, delaying childbirth until they are more financially secure, or undertaking caring responsibilities with precarious paid employment and bearing the ensuing economic and social risks. A system that offers such limited choices for those who undertake women's traditional duties is a system that discriminates against women and inhibits moves by men to participate more fully in the home. As Charlesworth concludes, we cannot achieve gender equality and the minimisation of work-family conflict without enabling 'access to labour markets under terms and conditions that do not disadvantage those who undertake unpaid work'.[41]

In response to these conclusions, HREOC identified an objective of cultural change – '[w]e need to create a culture of shared work and valued care,'[42] which means 'sharing unpaid and paid

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[36] Ibid 38.

[37] Ibid.

[38] Ibid 41.

[39] Ibid 72.

[40] Rosemary Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *Australian Journal of Labour Law* 209.

[41] Sara Charlesworth, 'Managing Work and Family in the 'Shadow' of Anti-Discrimination Law' in Jill Murray (ed), *Work, Family and the Law* (2005) 88, 116 quoting Kerry Rittich, 'Feminization and Contingency: Regulating the Stakes of Work for Women' in Joanne Conaghan, Richard M Fischl and Karl Klare (eds) *Labour Law in an Era of Globalisation – Transformative Practices and Possibilities* (2002) 117, 132.

[42] HREOC, 'It's About Time', above n 2, x.

work better across the labour market and the community, in addition to better sharing between individual men and women … [and] sharing the work of caring between families, the community and public institutions'.[43] In respect of the workplace, this means changing the 'ideal worker'[44] from one who is unencumbered (with an assumed wife at home to take care of the dependents and housework) to a less gendered model of a 'worker-carer',[45] whereby it is assumed that all workers do or will at some stage have caring responsibilities for dependents, themselves or others.

To achieve this objective HREOC made a plethora of recommendations across a wide range of fields, including data collection, workplace regulation, education and training, family and health services, welfare, taxation, superannuation, early childhood and adult care, and support services for carers. The key recommendation was for legal change: the introduction of new federal legislation, the *Family Responsibilities and Carers' Rights Act*[46] (*FRCR Act*). The proposed Act would: (A) expand protection against family responsibilities discrimination and (B) establish an obligation on employers to reasonably consider requests for flexible work hours. Under the first part, the current federal prohibition on family responsibilities discrimination would be expanded to cover both direct discrimination (different treatment) and indirect discrimination (different impact), in all areas of employment. It would replicate the other federal anti-discrimination Acts in that the central regulatory mechanism would be this prohibition coupled with an associated right of victims of such discrimination to take legal action against perpetrators for compensation. HREOC's powers to promote equality, raise awareness of discrimination and alternatives, and intervene in legal proceedings to assist the courts would be extended to cover this new protected ground.

The second part of the proposed Act, a duty in respect of flexible work arrangements, would require employers to reasonably consider requests by workers with family responsibilities for accommodation of their caring commitments. Currently in Australia such a right only exists in limited form. It arises out of a number of different sources of law, all of which have significant limitations, some of which could be addressed by enacting an express 'right to request'.

III. MERITS OF PROPOSAL

Anti-discrimination laws can play an important role in enabling men and women to better balance their paid work and family responsibilities. They may do so through highlighting and addressing policies and practices that impede equality between those who have family responsibilities and those who do not.[47] Anti-discrimination laws operate in two primary ways:[48]

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[43] Ibid 42.

[44] Examples of the extensive scholarship on the notion of an unencumbered, ideal worker include Rhona Rapoport et al, *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* (2001).

[45] This term is taken from K Lee Adams, 'Indirect Discrimination and the Worker-Carer: It's Just Not Working' in Jill Murray (ed), *Work, Family and the Law* (2005) 23.

[46] HREOC, 'It's About Time', above n 2, xvii.

[47] Belinda Smith, 'Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28 *Sydney Law Review* 689.

[48] Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth) – Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation – Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 105.

by providing a legal *right of redress* for behaviour and practices that impede equality, and by promoting non-discrimination through the persuasive, normative power of a legislated, *public policy statement* of the right to equality. However, our current laws concerning family responsibilities discrimination contain significant gaps and limitations.

A *Prohibiting Family Responsibilites Discrimination*

The current prohibition on family responsibilities discrimination in the *Sex Discrimination Act 1984* (Cth) (*SDA*) is very limited, in that it only covers *direct* discrimination and only in respect of employment dismissal.[49] By extending the prohibition to indirect discrimination, and to all stages of work, the federal laws would be expanded significantly and would provide greater national consistency.[50]

A prohibition on direct discrimination offers an important protection, but its capacity to bring about substantive equality is restricted, especially under the High Court's narrow approach to this action as set out in *Purvis v New South Wales*.[51] While direct discrimination is not merely about 'intentional' or hostile different treatment, it is limited to situations of different treatment and where the reason for the less favourable treatment is the protected trait, such as sex or race or family responsibilities.

A prohibition on direct discrimination requires employers to act consistently, treating employees of one sex the same as those of the other, those with family responsibilities the same as those without, and so on. This means that traditionally disadvantaged groups who are protected by direct discrimination are not to be excluded just because of their membership of the group – jobs cannot be offered only to men and applicants cannot be excluded simply because they are Pakistani or Aboriginal. Further, assumptions or imputations of stereotypes based on group membership are not to be used instead of the actual merits or qualifications of the individual applicant. Research in the United States reveals the nature and extent of detriment experienced by workers with family responsibilties because of the assumptions and stereotypes applied to them in the workplace and recruitment[52] and there is no reason to suggest this would be different in Australia. In this way, a prohibition on direct discrimination provides some protection against being treated according to group membership rather than individual qualifications, skills, and performance.

However, while a direct discrimination prohibition requires same treatment, it requires nothing more.[53] Employers are not permitted to single out protected groups for less favourable treatment, but are otherwise free to determine the requirements of the job and the workplace and are then required merely to apply the requirements and policies consistently. So, if an employer decides that the job or promotion requires the employee to work long or irregular hours, to work on

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[49] *Sex Discrimination Act 1984* (Cth) ss 7A, 14(3A).

[50] States and territories already prohibit family responsibilities discrimination, but the nature and coverage of protection varies across the country. For a summary, see appendices, Chris Ronalds and Rachel Pepper, *Discrimination Law and Practice*, (2nd ed.) 2004.

[51] (2003) 217 CLR 92; Belinda Smith, 'From *Wardley* to *Purvis* – How Far has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3.

[52] See, eg, Joan C Williams and Nancy Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job' (2003) 26 *Harvard Women's Law Journal* 77.

[53] Smith, 'From *Wardley* to *Purvis*', above n 51.

weekends, or shifts or overtime at short notice, the employer must consider all candidates and apply these requirements consistently, but is permitted to reject any candidates who cannot meet these requirements, regardless of their reasons for being unable to meet the requirements. A prohibition on direct discrimination does not provide a means of challenging the criteria or requirements of the job, only the procedural fairness or consistency of their application. Where a candidate cannot work long or irregular hours, for instance, because of their family responsibilities, they are only entitled to ask to be treated the same as other candidates who cannot work these hours. They should do as well as unencumbered workers, *so long as* they can act like them.

While workers with family responsibilities certainly suffer from stereotyping that limits their opportunities, some of the greatest barriers lie in standard workplace practices that apply to all workers in the same way. Such practices pose barriers to access and participation for workers with family responsibilities because they expect them to conform to the ideal of an unencumbered worker. Indirect discrimination prohibitions ostensibly provide a means to challenge such seemingly neutral requirements which are applied consistently and that impact disparately on protected groups. Whilst indirect discrimination is often more difficult to identify and such actions are arguably significantly more difficult to run, extending the prohibition to include indirect discrimination would require employers not only to apply their policies and requirements consistently but also to ensure that they are reasonable in all the circumstances. Workers with family responsibilities cannot necessarily behave like unencumbered workers and therefore need the right to ask whether it is reasonable to use exclusionary job requirements and conditions. This has some redistributive implications; a reasonableness requirement can redistribute some of the risks and costs of caring work from carers to employers. The benefits of caring work do not accrue only to carers, so it makes sense that carers should not bear the costs alone.

The second significant extension to the current prohibition under the *SDA* is the proposal to cover all stages of work, not merely employment dismissal. The current coverage affords some protection against discriminatory termination, but does not address the difficulties carers face in getting employment, promotion, or fair terms and conditions. If jobs or promotions are offered only on a full-time basis, only with rigid or anti-social hours, or only to those who have demonstrated commitment by putting in long hours in the past, then workers with family responsibilities will be discouraged from even applying. The need for an expansion of the current prohibition was reflected in a multitude of the inquiry's findings. The proposal identified the requirement to work overtime as a particular barrier to promotion, applying widely to all employees within some workplaces yet having the effect of disadvantaging workers with family responsibilities within those workplaces.[54] Furthermore, submissions received by the inquiry highlighted the poor quality of part-time work in Australia, in which a majority of women in the workforce are engaged. Permanent part-time work was described as marginalised through the 'lack of higher earnings, promotion, and training opportunities' provided.[55]

Moreover, the proposal would significantly expand the protection afforded to men who have caring responsibilities. Whilst the current protection against family responsibilities

[54] HREOC, 'It's About Time', above n 2, 58.

[55] Ibid 77 (citations omitted).

discrimination in the *SDA* is not technically limited to female workers, to date, men have not asserted their rights under these provisions.[56] One possible reason for this is that it is more difficult for men to use the 'sex' discrimination provisions in litigation in the alternative to the 'family responsibilities' provisions. Despite the limited scope of the current *SDA* protection against family responsibilities discrimination, some women have used it to seek redress for family un-friendly policies and promote family-friendly policies in workplaces (although with limited success).[57] Analysis of the cases that have succeeded, however, reveals that applicants tend not to rely solely on the 'family responsibilities' provisions of the Act, but pitch alternative claims of sex discrimination.[58] In respect of caring responsibilities, the sex discrimination provisions are generally only available to women, or are at least seen this way. It is therefore arguable that men with family responsibilities do not make more use of the family responsibilities provisions because they cannot utilise the sex discrimination prohibitions in the alternative, as women can and have done.

Furthermore, in respect of direct discrimination, the *SDA* prohibits different treatment because of sex or 'a characteristic that appertains generally' to a particular sex.[59] Having family (caring) responsibilities, as defined by the Act, is arguably a characteristic that appertains generally to women, but not to men. It is women, because of their gender, who are more likely to face assumptions about *having* family responsibilities and are seen to be judged by assumptions or stereotypes of how such responsibilities might impact upon their loyalty, commitment, availability or even productivity at work. As the HREOC report reveals, men can in fact experience similar or even more intense judgments about their job commitment if they challenge the traditional gender roles by taking on greater family responsibilities.[60] However, such experiences are yet to surface in discrimination litigation.

For indirect sex discrimination under the *SDA*, the disparate impact element restricts men's usage of the action in respect of family responsibilities. An applicant must prove that the employer's (apparently neutral) condition, requirement or practice 'has, or is likely to have, the effect of disadvantaging persons' of the applicant's sex.[61] Due to the disproportionate share of family responsibilities currently borne by women, requirements that impact upon workers because of their family responsibilities are likely to have the effect of disadvantaging women, but not generally men as a class. So it has been found, even without specific evidence, that a requirement to work full-time hours (after maternity leave) disparately impacts upon women.[62]

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[56] Ibid 55-6.

[57] Belinda Smith and Joellen Riley, 'Family-Friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395; Adams, 'Indirect Discrimination', above n 45.

[58] Smith & Riley, above n 57.

[59] *Sex Discrimination Act 1984* (Cth) s 5(1).

[60] For example, the report found that cultural barriers often prevent men from 'seeking accommodation of their family-carer responsibilities despite their desire [and need] to care for their families'. Men asking for flexible work arrangements in order to undertake more caring work are not only challenging expectations that they take on a full-time workload but also challenging the norm of masculinity. The materialisation of such stereotypes was evidenced in one submission to the inquiry, detailing the experience of a father who, following a request to take a year off work to stay home and care for his child, was subject to strong criticism and ridicule from colleagues who did not view this as 'the thing for a man to do': HREOC, 'It's About Time', above n 2, 91. Employers treating male employees' requests differently to those of female employees' in such circumstances may be accused of using gender in responding to requests and would be directly discriminating.

[61] *Sex Discrimination Act 1984* (Cth) s 5(2).

[62] See, eg, *Mayer v ANSTO* [2003] FMCA 209, [70]:

Without apparent access to the associated sex discrimination provisions, men are restricted in their claims – in particular, restricted to direct discrimination in respect of dismissal – and are thus likely to see their claims as less viable. Expanding the prohibition and placing it in a separate Act of its own, thereby associating it less with 'women's' rights, could possibly serve to promote the de-gendering of family responsibilities discrimination claims and ultimately the de-gendering of paid and unpaid work.

B *Right to Request Proposal*

The proposed 'right to request' flexible work arrangements is not unfamiliar, reflecting the right established in federal awards by the Australian Industrial Relations Commission in the *Family Provisions Test Case 2005*[63] (and based upon a similar right found in the United Kingdom,[64] Germany and the Netherlands[65]). The right can also be sourced in sex discrimination legislation, can be found in the contract of employment and has recently been legislated for in Victoria.[66] However, these rights are not universally understood, widely available or readily enforceable.

Firstly, the 'right to request' established in the *Family Provisions Test Case* has effect only to the extent that a worker is covered by a federal award which was amended to include this test case provision (or equivalent state provisions) and only to the extent that the award has not been overridden by legislation or an agreement under the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices). Williams and Baird report that only 428 of approximately 2200 federal awards were varied to include the provision before March 2006[67] when the Work Choices legislation came into effect[68] and effectively stripped the AIRC of its capacity to vary awards or arbitrate test cases. Given that Work Choices caused agreements to have the effect of overriding underlying awards entirely and Work Choices removed the 'no disadvantage test' in respect of agreement making, if workers covered by the varied awards have entered into workplace agreements, there is no guarantee that they retain the right to request entitlement. It is thus difficult to identify how many workers in Australia have available to them a 'right to request' arising from the *Family Provisions Test Case*, but it is clear that this right is far from universal.

Secondly, as noted above, the sex discrimination provisions of the *SDA* have been used by some women to argue successfully that a requirement to work full-time (particularly after maternity leave) disparately impacts upon women. The requirement is therefore indirectly discriminatory for women unless it is 'reasonable' in all the circumstances. Under the *SDA*, the onus for

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> I need no evidence to establish that women per se are disadvantaged by a requirement that they work full-time. … women are more likely than men to require at least some periods of part-time work during their careers, and in particular a period of part-time work after maternity leave, in order to meet family responsibilities.

[63] (2005) 143 IR 245.

[64] Section 80F of the *Employment Rights Act 1996* (UK) provides 'qualifying' employees with a statutory right to request flexible work arrangements for the purpose of accommodating carers' responsibilities. Furthermore, s 80G(1)(b) specifies the grounds upon which an employer may refuse such a request.

[65] Jill Murray, 'Work and Care: New Legal Mechanisms for Adaptation' (2005) 15 *Labour and Industry* 67.

[66] *Equal Opportunity Amendment (Family Responsibilities) Act* 2008

[67] Sue Williamson and Marian Baird, 'Family Provisions and Work Choices: Testing Times' (2007) 20 *Australian Journal of Labour Law* 53.

[68] The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amended the *Workplace Relations Act 1996* (Cth) (WRA) and came into effect in March 2006.

justifying the requirement or proving that it is reasonable is on the employer.[69] In *Mayer v ANSTO,*[70] Federal Magistrate Driver found that ANSTO's refusal to allow Mayer to change to part-time hours was not reasonable because Mayer had been able to prove that the employer had appropriate work that could be done in a part-time capacity (noting significantly that many other employees worked part-time at ANSTO). In this way, the prohibition on indirect sex discrimination can be seen to create a duty on employers to reasonably consider requests by female employees for part-time hours after maternity leave.

However, the later case of *Kelly v TPG*[71] challenged this characterisation of full-time hours as a discriminatory requirement and also suggested that such a requirement is more likely to be reasonable when an employer has never (or rarely) allowed part-time work in the past. This creates a perverse disincentive to employers to think creatively about flexible work hours. This 'right' under sex discrimination legislation is limited in that it is only practically available to women, as noted above and, being created by (conflicting) court judgments, it is not readily discernible for employers or employees who might be affected by it.

Further, a number of cases have demonstrated that family-friendly provisions, such as a right to request flexible work arrangements, can be found in the contract of employment, in either express or even implied terms.[72] While organisations might be reluctant to expressly agree to a duty to reasonably consider a 'right to request' in their employment contracts, the duty might form part of the contract in a variety of ways. If the employer undertakes in its human resource policies to seriously consider such a request, the term could enter the contract either by incorporation of the policy, or by giving content to the implied term of mutual trust and confidence.[73] A breach of its own policy commitments may demonstrate a breach of the implied term of mutual trust and confidence and amount to repudiation of the contract. However, the limitations on this right are numerous.[74] Its availability and content are not clear – certainly not to the average employee (or employer), unfamiliar with the intricacies of contract law. Further, it is enforceable only by the individual employee as a breach of contract claim in a common law court, requiring litigation nous, time and resources. Ironically, by turning on the existence of corporate policies that espouse a commitment to family-friendliness, the right may be limited to employees of organisations that have such policies, leaving unprotected those who need protection the most.

Finally, earlier this year the Victorian government introduced such a right for Victorian workers by amending its anti-discrimination legislation along the lines recommended by HREOC. The *Equal Opportunity Amendment (Family Responsibilities)* Act 2008 imposes on employers and principles in respect of work arrangements an obligation to not unreasonably refuse to accommodate a person's parental or carer responsibilities. The Act provides that a breach of this requirement constitutes discrimination.[75] If the request for accommodation is rejected, the onus is on the employer to show why the refusal is reasonable and the Act includes a list of factors

[69] *Sex Discrimination Act 1984* (Cth), s 7C.
[70] [2003] FMCA 209.
[71] [2003] FMCA 584.
[72] Smith and Riley, above n 57.
[73] Ibid.
[74] Ibid.
[75] S. 7(1) *Equal Opportunity Act 1995* (VIC).

that can be considered in determining this.[76] The operation of the Act is, of course, limited to Victoria.

HREOC's recommendation to include in the *FRCR Act* a duty for employers to reasonably consider flexible hours requests would go some way towards addressing some of the current limitations of scope and enforcement of a right to request. Being an express duty on employers, it would provide greater clarity and certainty than the current sex discrimination rights and it would apply across Australia. It would also pertain to workers generally, not only women, which is significant in the battle to enable both women and men to participate in both home and work spheres. To support the implementation and effectiveness of this provision, HREOC recommends that it undertake a comprehensive education campaign, akin to that undertaken in the UK and the Netherlands, prior to the passing of their right to request legislation.[77] This would help to alleviate employer concerns and provide guidance on what would constitute 'reasonable consideration' of a request.

Whilst providing greater clarity and certainty are two merits of the proposal, the proposed duty is also significant in two other ways. Firstly, it reflects a shift in thinking about family responsibilities away from formal equality and toward substantive equality. Rather than merely requiring all workers to be treated the same regardless of their circumstances, the duty requires employers to reasonably accommodate the specific needs of workers with family responsibilities in order to promote substantive equality. Thus, it is akin to a duty to reasonably accommodate, although limited to the specific issue of flexible work arrangements. The proposal acknowledges that equality will not be achieved simply by treating workers with family responsibilities as if they do not have such responsibilities.

Secondly, the proposal represents a shift away from the traditional model of anti-discrimination law in which employers are required to do something only if they are identified as perpetrators of inequality. Australian anti-discrimination laws impose a negative duty *not* to discriminate, but otherwise impose no obligations on employers (as discussed further in part IV, below). Orders can be made compelling an employer to compensate a victim, but only after the harm has been done and the employer has been proven to be the cause of the harm. Under the proposal, while it is still up to the employee to lodge the request for flexible working arrangements, it is this request alone that triggers an obligation on the employer to act. The employer bears this duty, not because it is a wrong-doer, but because it is the one that has the power to grant or deny the request. It is, of course, still left to the victim employee to prosecute any failure to carry out the duty, but the proposal does represent a slight shift away from a merely victim-driven, fault-based approach to achieving equality. Given that many forms of discrimination are not traceable back to any one specific perpetrator, this shift would be welcomed as a regulatory improvement.

It looks clear that at least this part of the HREOC recommendation will be introduced by the new federal government, although within the wider context of legislating for minimum employment conditions. The Australian Labor Party had industrial relations (and 'working families') as a focal point for its 2007 election campaign. Its industrial relations election policy, *Forward with*

[76] In respect of current employees for example, see s.14A(2) *Equal Opportunity Act 1995* (VIC).

[77] HREOC, 'It's About Time', above n 2, 64, fn 181.

Fairness,[78] included a right to request flexible work arrangements as one of the universal National Employment Standards (NES) to be introduced. While the detail may be determined through Senate negotiations, the draft NES legislation issued on 16 June 2008[79] provides each employee who has 12 months' service and responsibility for the care of a pre-school child with the right to request a change in working arrangements to assist them to care for the child.[80] The employer may only refuse the request on 'reasonable business grounds',[81] a term that has been left undefined.

It is worth noting key parameters of this proposal. Firstly, the right is only to be provided to parents or carers of young children, being a subset of all workers with caring responsibilities. In this way it does not draw on the definition of 'family responsibilities' within the *SDA* which extends to all 'dependent' children and beyond children to 'any other immediate family member who is in need of care and support'.[82] It certainly does not go as far as the policy benchmarks set by the Work + Family Policy Roundtable in its election 2007 statement.[83] The Roundtable recommended to parties the adoption of 'policies that give employees the right to request changes in working time arrangements (including the quantum of hours worked, the scheduling of hours and the location of work) and confer upon employers a duty to reasonably consider such requests.'[84] Notably, they recommend that the right be provided to all employees who have caring responsibilities, for children or adults, with no express requirement that the dependants be related as 'family'. Further, the Roundtable goes on to propose that, subject to a comprehensive review of the implementation and operation of such a carer's right, it should be extended to all employees and not limited to caring responsibilities. The rationale for this is that such moves

> increase workers' general acceptance of such arrangements, enhance gender equality and facilitate a life course approach, moving from a focus on separate life events (eg, education, parenthood, ill-health, retirement) to one where the connections across life events are a central element of policy.[85]

Providing workers with caring responsibilities with flexibility or accommodation in working arrangements may serve to ease work-family conflict. It does not, however, necessarily challenge the gendered division of caring work and the disadvantage that currently flows for those who disproportionately bear the load in our society for such unpaid work.

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[78] Australian Labor Party, *Forward with Fairness – Labor's Plan for Fairer and More Productive Australian Workplaces* (2007) [8] <http://www.alp.org.au/download/now/forwardwithfairness.pdf> at 16 June 2008.

[79] Australian Government, *The National Employment Standards* 2008, 12.

[80] Ibid s13(1).

[81] Ibid s13(5).

[82] *Sex Discrimination Act 1984* (Cth) s 4A. Note the section also defines 'immediate family member' to include: '(a) a spouse of the employee; and (b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee' and 'spouse' to include 'a former spouse, a de facto spouse and a former de facto spouse'. Section 4 of the *Sex Discrimination Act 1984* (Cth) defines 'de facto spouse' to exclude same-sex couples.

[83] Work and Family Policy Roundtable, *2007 Benchmarks – Work and Family Policies in Election 2007* (2007) <http://www.familypolicyroundtable.com.au/> [5] at 16 June 2008.

[84] Ibid 5.

[85] Ibid 5-6, quoting Colette Fagan, Ariane Hegewisch and Jane Pillinger, *Out of Time – Why Britain Needs A New Approach to Working-Time Flexibility* (2006) (Research paper for the Trades Union Congress, London).

A 'right to request' is the soft-touch regulatory form of an entitlement[86] – an entitlement to a serious consideration of one's request for alternative arrangements. While still relying upon individuals to seek accommodation, in countries which have already introduced it 'there is evidence of the relatively powerful effect of this relatively weak and contingent right on employer practice "by providing a little more elbow power" in negotiations with line managers and employees'.[87] By creating a presumption that the request will be granted and shifting the onus onto the employer to justify any refusal, this regulatory mechanism challenges the separation of work and family and the privileging of work over family in the context of employment law. A positive (substantive) duty to accommodate in equality laws would similarly undermine managerial prerogative to deny the connection between productive and reproductive labours and to externalise the cost of the latter.

IV. LIMITATIONS/CRITIQUE

Anti-discrimination laws across the world can be and are being used to address gender inequality, including the marginalisation of women in the workplace because of their traditional and ongoing primary carer responsibilities.[88] Extending the protection of these laws to worker-carers is a progressive move, for the reasons noted above.

However, the HREOC recommendation suffers from a major weakness: apart from the 'right to request' proposal, it merely adds another ground of prohibited discrimination to a regulatory framework of anti-discrimination law that is widely critiqued as being ineffective at addressing systemic and structural discrimination.[89] Sandra Fredman explains that '[t]wo different models are emerging for the achievement of gender equality: an individual complaints-led model based on a traditional view of human rights; and a proactive model, aiming at institutional change.'[90] The Australian model is clearly of the former kind, in which equality is supposed to be brought about by giving victims the right to seek compensation for harm caused by individual perpetrators of discrimination.

Limitations of the complaints-based model used in Australia can be demonstrated by considering the different aspects of the regulatory framework: (a) the nature of the rule or standard set by the

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[86] Murray, 'Work and Care: New Legal Mechanisms for Adaptation', above n 65, 329.

[87] Charlesworth, 'Managing Work and Family', above n 41, 117 quoting Ariane Hegewisch, 'Individual Working Time Rights in Germany and the UK: How a Little Law Can Go a Long Way' (Paper presented at the Working Time for Working Families: Europe and the United States Conference, American University WCL, Washington DC, 7-9 June 2004) 10.

[88] Joanne Conaghan, 'The Family-Friendly Workplace in Labour Law Discourse: Some Reflections on *London Underground Ltd v Edwards*' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (2000); Williams, above n 44.

[89] See Sandra Fredman, *Discrimination Law* (2002); Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369; Sandra Fredman and Sarah Spencer, *Delivering Equality: Towards an Outcome-Focused Positive Duty – Submission to the Cabinet Office Equality Review and to the Discrimination Law Review* (2006) Equality and Diversity Forum; Christopher McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36(3) *Industrial Law Journal* 255; Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework – Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* ('the Hepple Report') (2000); Smith, 'A Regulatory Analysis of the SDA', above n 48; Smith, 'Not the Baby and the Bathwater', above n 47.

[90] Fredman, 'Changing the Norm', above n 89, 369.

legislation; (b) the actor who gets to prosecute or enforce transgressions of the rule and the process for this; and (c) the sanction imposed for such breaches.[91]

A *The Rule*

The duty imposed by anti-discrimination laws upon employers (education providers, goods and services suppliers, etc) in Australia is a general proscription not to discriminate (on particular grounds, in particular fields such as work). There is no positive duty imposed on employers to do anything – to identify potential or actual discrimination in the workplace, educate workplace participants about the prohibition, establish a policy against discrimination, or actively try to prevent discrimination or promote equality.

Of course, many employers have developed workplace discrimination policies. It is arguable that despite the legal rule being a negative one it has played a role in prompting such action. However, because the legislation does not mandate such behaviour, it has no mechanism for monitoring or evaluating it, causing initiatives to be patchy and their effectiveness untested. The corporate policies might very well be triggered by the legislation, but the extent to which they reflect business needs at the cost of human rights, fairness and the wider needs of society is not clear.

The imposition of a negative rule alone creates a fault-based system whereby an organisation is not required to do anything unless fault can be identified and attributed to it. If there are other causes of the inequality and it cannot be proven that an organisation contributes to the inequality in the specifically prohibited way, then it will bear no responsibility for addressing the inequality. The negative, tort-like rule enables redress but does not require preventative or positive measures to be taken.

B *Enforcement and Process*

The power to enforce compliance with the prohibitions on discrimination in Australian law is limited to victims, who are granted a right to sue for redress. In order to get compensation for the harm, a victim must be able to identify a breach by a specific perpetrator of discrimination, garner evidence to prove liability and harm, argue the claim first through compulsory conciliation and, failing that, a public hearing, and ultimately enforce the outcome, all without any public assistance.

HREOC has no power to initiate investigations of non-compliance, no explicit power to support complainants in breach proceedings, and no power to enforce judgements or settlement agreements that have been made. The absence of an agency with such enforcement powers distinguishes the anti-discrimination regulatory scheme from US and UK anti-discrimination schemes, which provide for advocacy by a public agency to uphold the

[91] This analysis draws on Fredman and Spencer, 'Delivering Equality', above n 89. See also Sandra Fredman and Sarah Spencer, 'Beyond Discrimination: It's Time For Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) 6 *European Human Rights Law Review* 598.

legislation.[92] It also distinguishes it from other Australian workplace regulation – eg, occupational health and safety and workplace agreement compliance.

Anti-discrimination legislation is designed to protect disempowered groups – those who traditionally experience marginalisation and exclusion. Expecting members of such groups to have the time, security and resources to pursue legal action in order to gain compensation and possibly bring about wider change represents a fundamental regulatory weakness.

This aspect of the regulatory regime is particularly problematic for those workers with family responsibilities. Firstly, those who experience family responsibilities discrimination do not necessarily identify it as discrimination. In appointing victims as prosecutors, the system relies upon the victim to 'name', 'blame' and 'claim', that is, identify that the behaviour is wrong and unlawful, identify a perpetrator who should be held responsible, and articulate and pursue a legal claim for a remedy.[93] Sara Charlesworth's research demonstrates that the notions that work and family occupy separate spheres and that the ideal worker is one who is unencumbered by family responsibilities are so entrenched that they obscure family responsibilities discrimination, leaving it unrecognised and thus unchallenged.

In empirical research, Charlesworth found that even when some unfairness is identified and complained of by a victim of family responsibilities discrimination, often the gendered social and workplace contexts mean both employees and employers see the problem in individual terms rather than as systemic discrimination and disadvantage. She found that 'employee complainants concentrated on a "reasonable accommodation" of their individual "special" needs and employer respondents on the "lack of fit" of an individual worker with a seemingly fixed organisation of work'.[94] One particular point Charlesworth draws out is how the dichotomisation of work and family is reflected in discussions of who has 'choice', whereby choice is more readily identified in respect of the employee's requests, but obscured in respect of the employer's:

> For most respondents the family responsibilities of workers are seen as outside the employer's realm of responsibility. Any requests for accommodation or for flexible working time arrangements to help employees manage paid and unpaid work responsibilities are seen as emanating from individuals' 'choices' to take on both family work and market work. Operational requirements are not, however, viewed as similarly freely chosen or as a by-product of managerial decision-making and discretion. Work organisation and task allocation appear to be naturalised and employees can 'choose' to fit in or not.[95]

Even if a victim of family responsibilities discrimination can identify discrimination and a perpetrator (ie, 'name' and 'blame'), they must still lodge and litigate the claim in order to bring about change. This takes time and energy, as well as other significant resources. Yet, the fundamental finding of the HREOC Report is that workers with family responsibilities are time

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[92] Jean Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401, 1413; Aaron Baker, 'Access vs Process in Employment Discrimination: Why ADR Suits the US but not the UK' (2002) 31 *Industrial Law Journal* 113, 118.

[93] Charlesworth, 'Managing Work & Family', above n 41, 93, drawing on the work of William L F Festiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1980-81) 15 *Law and Society Review* 631.

[94] Charlesworth, 'Managing Work & Family', above n 41.

[95] Ibid 113.

starved! The demands of paid work combined with those of family responsibilities are often overwhelming, leaving worker-carers 'frustrated and disheartened by the struggle'[96] to balance these commitments. Litigation might provide some scope for compensation to be paid ultimately, but not necessarily in a timely way and the remedy may not actually be worth the litigation effort at a time when caring responsibilities are pressing.

In summary, the absence of an enforcement agency as a public prosecutor serves to characterise discrimination as merely a private matter and one that harms only the victim, not society at large.[97] Imposing only a negative rule means that inequality will go unaddressed unless a specific perpetrator can be identified and discrimination can be proven. Limiting enforcement to victims also means that unlawful discrimination will go unaddressed unless there is a victim who is willing and able to complain.

Further, the process for identifying breaches and resolving allegations of discrimination for the most part keeps breaches out of the public eye because it commences with confidential conciliation. Only in a small proportion of cases does the matter proceed beyond conciliation to a public hearing and determination.[98] The private nature of these proceedings reinforces the characterisation of discrimination allegations as merely private, interpersonal disputes to be 'resolved' between the parties as if the conduct has no wider significance or detriment. The private nature of conciliation and the strict duties of confidentiality imposed upon HREOC staff also result in there being minimal threat of publicity for any organisation that is determined to keep an allegation out of public view.

One other implication of resolving most allegations by private agreement is that we see little judicial elaboration of what does and does not constitute discrimination. The prohibition against discrimination is a very general duty. A virtue of general duties is that they allow for flexible and innovative responses by duty holders such as employers. However, their vice is that they pose compliance difficulties – without elaboration through regulations or evidentiary standards, compliance is only certain when adjudicated after the fact. With few matters reaching court, there is little judicial elaboration to assist with compliance. Further, unlike the UK laws,[99] Australian anti-discrimination laws do not provide for evidentiary standards as guidance. HREOC has developed some guidelines in respect of sexual harassment and pregnancy (and has proposed that such guidelines be developed in respect of family responsibilities[100]). These, however, are informative, not evidentiary, so there is no official mechanism for these guidelines to be used to drive or assess employer behaviour.

C *Sanction/Remedy*

Australian anti-discrimination laws generally provide only for compensatory remedies for the victims who can prove that an individual perpetrator has discriminated and caused harm. This

[96] HREOC, 'It's About Time', above n 2, ix.

[97] Smith, 'A Regulatory Analysis of the SDA', above n 48.

[98] Anna Chapman, 'Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22 *Sydney Law Review* 321; Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992).

[99] The UK's Equality and Human Rights Commission has power to develop statutory, evidentiary codes of practice setting out legal obligations under anti-discrimination laws and recommended best practice: *Equality Act* 2006 (UK) s 14.

[100] See recommendations 16 and 17: HREOC, 'It's About Time', above n 2, xx.

has a number of implications. Firstly, it serves to reinforce the characterisation that discrimination is merely an interpersonal dispute in which only the complainant is harmed, not colleagues, family or the wider society. Further, in a victim-driven compensatory system, discrimination that is systemic is likely to go unaddressed because no individual victim has been so specifically harmed as to prompt litigation.

Secondly, by focussing only upon redressing harm done to the victim, Australian anti-discrimination laws do not require or even necessarily prompt structural and preventative change. Even if an employer is found to have discriminated, they will only be ordered to compensate the victim. 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 to set reform standards. In this way, the laws are more focussed on redressing, not preventing harm or promoting equality.[101] Having settled a complaint of discrimination, an employer may not even see a connection between the individual complaint and other equality issues in the workplace.

Finally, without a range of sanctions (and an enforcement agency), there is no capacity for discrimination to be regulated 'responsively'. As Ayres and Braithwaite,[102] and others, have demonstrated, regulation is more likely to be effective if it is responsive to the diverse motivations and behaviours of the regulated actors to both promote good behaviour and discourage undesirable behaviour. Generally, this requires an agency to have the capacity to distinguish between leaders and laggards in the field and have available to it a hierarchy or pyramid of sanctions. The soft corrective tools, such as advice and warnings, at the bottom of the pyramid would be used most and would be most effective if the agency had available to it a pointy end of the pyramid, consisting of punitive sanctions such as penalties, licensing suspensions, and government contracting exclusions. Without an enforcement agency and range of sanctions, Australian anti-discrimination legislation lacks the capacity to distinguish between the reckless, blatant and repeat perpetrators on the one hand, and the feckless perpetrators who develop policies but fail to properly implement them on the other. The focus of litigation is upon determining liability and the focus of determining a sanction is purely upon the victim, asking what the nature and value of the harm is that needs redress. There is no scope for granting a 'penalty discount'[103] to acknowledge good efforts by an employer when there are no penalties available to be ordered.

Further, while the 'enforcement pyramid' may effectively promote compliance with a rule or floor of standards, Braithwaite has gone on to suggest that the corresponding notion of a 'strengths-based pyramid' for building capacity is required to move organisations above the floor.[104] 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

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[101] Smith, 'A Regulatory Analysis of the *SDA*', above n 48.

[102] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

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

[104] John Braithwaite, 'Webs of Explanation, Webs of Regulation, Webs of Capacity' (Presentation given at the Regulation Institutions Network (RegNet), Research School of Social Sciences, The Australian National University, Canberra, 21 February 2006).

developed – such as informal praise, prizes, grants, and other resources and assistance – to expand upon these.[105] HREOC has taken some steps to identify and praise equality and human rights leaders; lacking enforcement powers, awareness raising, education and praise are its main regulatory tools. The Equal Opportunity for Women Agency has likewise developed the 'Employer of Choice for Women' certification[106] to enable best practice organisations to distinguish themselves from their competitors in respect of gender equality initiatives.

In summary, the effect of the proposed amendment is merely incremental and extends a flawed framework. HREOC's proposed *FRCR Act* is aimed at achieving the goals of eliminating discrimination against workers with family responsibilities and promoting the equal participation of men and women in both paid and unpaid work. However, for the most part, the proposed Act is to be modelled on the other federal anti-discrimination laws, leaving untouched the regulatory model that they reflect. The existing regulatory model of Australian anti-discrimination law is ill-equipped to achieve its goals and is outdated. It may work to resolve disputes over discrimination and promote formal equality – raising awareness and encouraging decision-making based upon merit rather than assumptions and stereotyping – but the model offers little to bring about substantive equality.[107] Those who are struggling to balance work and family commitments face an entrenched and persistent conception of the ideal worker as being unencumbered. They may be well placed to see the disadvantage but not sufficiently well-resourced to be the drivers of change through litigation. A system that only requires employer action if wrong-doing is found frames individual discriminatory acts as interpersonal disputes, rather than looking at inequality as a public problem that harms society at large.

V. A TRULY NEW APPROACH?

What was welcome and innovative about the HREOC report was that it took a big picture approach in its explorations and its recommendations. It recognised that gender equality depends as much on what happens in the labour market and workplace as on what happens outside it, in the home. A related acknowledgement was that work-family conflict cannot be addressed by focussing only on the workplace. The focus of anti-discrimination legislation on the public sphere only is a conceptual weakness because often women's participation in that public sphere is shaped or constrained by their obligations and identity in the private sphere. By looking at work and family and men and women HREOC recognised well the connections between the intersecting spheres and the evolving and traditional gender roles in each. HREOC also clearly acknowledged that a focus on formal equality alone would not address work family conflict or gender disadvantage; the goal needed to encompass substantive equality which might require policies and practices that not only *allow* for participation (in the workplace and the home) but also *enable* it.

What was disappointing about the HREOC recommendation was the lack of innovation and big-picture thinking in respect of the legislative recommendation. The legal proposal was too much of the same, without sufficient evidence that the existing framework of anti-discrimination

[105] Ibid.

[106] Equal Opportunity for Women in the Workplace Agency, *EOWA Employer of Choice for Women* (2007) <http://www.eowa.gov.au/EOWA_Employer_Of_Choice_For_Women.asp> at 16 June 2008.

[107] Smith, 'A Regulatory Analysis of the SDA', above n 48.

laws had proven to be effective. The proposal may be meritorious in all the ways noted above, but there is a risk that such incremental change could sap momentum for more fundamental reform. Sometimes something is not better than nothing. It must be acknowledged that the proposal was crafted in a particular political context under the former Howard government. The question now is whether the current federal Government is prepared to explore more more fully the regulatory options for addressing inequality effectively. This would, as a start, require further research and inquiry, public education and debate about regulatory alternatives in other jurisdictions.

A *Equality Regulation Trends*

Since Australia introduced anti-discrimination legislation over three decades ago, there have been significant developments in understandings of equality and how law can be used to achieve equality. Two particular trends can be identified. First, in recognition of the need to promote substantive not merely formal equality, there has been a shifting of some responsibility for change from the victims of discrimination to those in positions of power in society, such as employers, education providers and public authorities. The second related trend, reflected in the design of equality laws, is the utilisation of a growing body of regulatory scholarship[108] and theories of reflexive or responsive regulation.

Both of these trends can be seen in the emergence, as noted by Fredman, of two different regulatory models for achieving equality: 'an individual complaints-led model based on a traditional view of human rights; and a proactive model, aiming at institutional change.'[109] A pattern around the world has seen the adoption of the former and then its supplementation with the latter. This has meant addressing inequality not merely as a problem of individual acts of discrimination requiring a rights based response but also as a social, structural and cultural problem that requires institutional change. In respect of these trends, Australia has certainly lagged behind. In an international review of equality laws in 2004 it was noted:

> Within a global historical perspective, between 1950 and 1990, more sophisticated legal concepts and mechanisms developed to tackle indirect discrimination, promote equal pay between men and women, and facilitate affirmative action in the pursuit of greater equality. Such developments took place across Europe, Scandinavia, India, Canada and the USA. The measures introduced during the period were generally more complex than the pre-existing anti-discrimination laws. The latter were generally limited to retrospectively redressing an immediate wrong, rather than removing discriminatory practice across an organisation. … Amongst industrialised nations, Australia and New Zealand have been the countries with the least developed labour market equality measures.[110]

The trend toward more innovative regulatory mechanisms including the reflexive regulation[111] has been driven by the desire to address regulatory failure and increase the effectiveness of law

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[108] See e.g. Ayres & Braithwaite, *Responsive Regulation* above n102; Dorf M and Sabel C, "A Constitution of Democratic Experimentalism," (1998) 98 *Columbia Law Review* 267; Collins H, Davies P and Rideout R (eds) *Legal Regulation of the Employment Relation*, (2000); Sturm S, "Second Generation Employment Discrimination: A Structural Approach" (2001) 101 *Columbia Law Review* 458; Parker C, *The Open Corporation: Effective Self-Regulation and Democracy*, (2002).

[109] Fredman, 'Changing the Norm', above n 89, 369.

[110] Chaney & Rees, above n 4, 8-9.

[111] See McCrudden, 'Equality Legislation and Reflexive Regulation', above n 89, 259, from which I have drawn heavily here, for a summary of these regulatory approaches.

in achieving public policy goals. The key insight that has motivated these innovations is that organisations, such as corporations, operate as their own sub-systems within society, with their own inner logic; for law to be effective it must be able to recognise this inner logic and 'construct a set of procedural stimuli that lead to the targeted subsystem adapting itself'.[112] This means recognising the values, motivations, processes and constraints within an organisation and then seeking to utilise or harness these to steer it toward better self-regulation to achieve the public policy goals. A central role in this approach is given to 'deliberative, participatory procedures as a means for securing regulatory objectives.'[113] McCrudden summarises the optimistic goals of this approach:

> The benefits that supposedly derive from this 'third-way' are that it encourages each organization to engage in its own assessment of the problem, but to deliberate with others in reconsidering whether this is adequate and how far its assessment needs to be reconstructed in light of that deliberation. In doing so it supposedly encourages the organization to 'own' the solutions that it devises; it encourages mutual learning within and between organizations; it encourages each organization to deliberate on the solutions that are best for it and thus accepts that pluralistic solutions are desirable; it encourages the involvement of different stakeholders to agree to the definition of the problem and the best method of solving it in ways that stimulate consensus, and thus increases social harmony.[114]

B *The UK example*

Some of these regulatory innovations are reflected in the development of the UK's equality laws, although these are certainly not to be seen as perfect models to be transplanted uncritically to Australia. We need to develop our own responses to Australia's specific problems. This story of the UK regulatory developments is outlined briefly here simply to provide a sense of the history, public inquiry and debate, and regulatory mechanisms being used to address inequality in a comparable country.

In the UK a number of innovative equality mechanisms were developed for Northern Ireland. Under the *Fair Employment (Northern Ireland) Act* 1989 (UK), amended by the *Fair Employment and Treatment Order* 1998 (FETO), a positive obligation was placed on employers (public and private) to ensure 'fair participation' of both communities in the workplace. Specific duties to fulfill this obligation involved monitoring the composition of the workforce, undertaking periodic self-assessments, and engaging in some affirmative action to improve the integration and representation of both communities in workplaces. Importantly, there were significant and substantial investigation and enforcement powers given to an equality commission, powers which were used intensively in the early stages before a gradual move toward soft compliance and negotiation.[115] Another regulatory scheme was established, in addition to rights based anti-discrimination laws, by the *Northern Ireland Act 1998* (section 75)

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[112] Ibid. citing to: Colin Scott, 'Regulation in the age of governance: The rise of the post-regulatory state', in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation* (2004) 145; Hugh Collins, 'Book Review', (1998) 61 *Modern Law Review* 916; Julia Black, 'Proceduralising Regulation', (2000) 20 *Oxford Journal of Legal Studies* 597; and Karen Yeung, *Securing Compliance: A Principled Approach* (2004).

[113] McCrudden, 'Equality Legislation and Reflexive Regulation', above n 89, 259 quoting Karen Yeung, *Securing Compliance: A Principled Approach* (2004) 171.

[114] McCrudden, 'Equality Legislation and Reflexive Regulation', above n 89, 259-260.

[115] Christopher McCrudden, Robert Ford, and Anthony Heath, 'Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment,' (2004) 24 *Oxford Journal of Legal Studies* 363

to address other bases of inequality, such as gender and race. This approach imposed an obligation only on public authorities in carrying out their functions to give due regard to promoting equality of opportunity in respect of a range of grounds.

In respect of Great Britain, there were a number of events and pressures that led to its anti-discrimination laws being supplemented. While some of the UK reforms appear to have been prompted by European Union directives, other factors were the findings of domestic inquiries into the failures or weaknesses of existing anti-discrimination laws and research into the regulatory innovations for other jurisdictions. Inquiring into a racist policing incident the Macpherson Commission found evidence of substantial institutional racism within the Metropolitan police forces that had clearly been untouched by more than 30 years of complaints-based anti-discrimination laws.[116] Soon after, Hepple, Coussey and Choudhury[117] undertook an independent, comprehensive analysis of the UK's anti-discrimination laws and similarly found weaknesses of the regulatory model. One weakness to note is that the UK anti-discrimination laws provided very little scope for positive discrimination or affirmative action, generally lacking a 'special measures' exemption. Drawing on regulatory theory, Heppel et al explicitly recommended regulatory reform, moving away from a victim-driven complaints model toward a positive, enforceable equality duty that could be regulated responsively by an enforcement agency.[118]

In response, the UK parliament introduced for public authorities in Great Britain a positive, enforceable Race Equality Duty[119] in 2000 akin to the s.75 Northern Ireland public duty. Although not as far reaching as either the Hepple Recommendations (being limited to the public sector) or the comprehensive Northern Ireland FETO scheme for sectarian inequality, the introduction of positive duties still represented a significant regulatory change.

The Race Equality Duty applies to all public authorities, requiring them to promote race equality. It operates in conjunction with anti-discrimination laws. Specifically, each public authority 'shall in carrying out its functions have regard to the need … to promote equality of opportunity and good relations between persons of different racial groups'.[120] Specific duties can then be imposed to give effect to this general duty.[121] The Commission for Equality and Human Rights (CEHR)[122] has the primary enforcement role, but limited powers, allowing it only to issue 'compliance notices' requiring authorities to comply with the duty and, ultimately, to seek a court order to this effect. Individuals also have the right to seek judicial review[123] of public authority compliance.

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[116] Sir William Macpherson, *The Stephen Lawrence Inquiry – Report* (1999).

[117] Hepple, et al, 'Equality – A New Framework', above n 89.

[118] Ibid 18.

[119] *Race Relations (Amendment) Act 2000* (UK).

[120] *Race Relations Act 1976* (UK) s 71(1).

[121] See *Race Relations Act 1976* (UK) s 71(2).

[122] Note that the three anti-discrimination commissions in the UK – Equal Opportunities Commission (sex), Commission for Racial Equality and Disability Rights Commission – were merged on 1 October 2007 to become the CEHR, which was established by the *Equality Act 2006* (UK). With some exceptions, the CEHR has taken over the powers and functions of the three commissions and been granted further powers in respect of other grounds.

[123] But not compensatory remedies.

In contrasting this approach to the complaints-based model Fredman reflects the underlying reflexive regulation theory:

> At the root of the positive duty … is a recognition that societal discrimination extends well beyond individual acts of racist prejudice. Equality can only be meaningfully advanced if practices and structures are altered proactively by those in a position to bring about real change, regardless of fault or original responsibility. Positive duties are therefore proactive rather than reactive, aiming to introduce equality measures rather than to respond to complaints by individual victim.
>
> This has important implications for both the content of the duty and the identification of the duty bearer. In order to trigger the duty, there is no need to prove individual prejudice, or to link disparate impact to an unjustifiable practice or condition. Instead, it is sufficient to show a pattern of under-representation or other evidence of structural discrimination. Correspondingly, the duty-bearer is identified as the body in the best position to perform this duty. Even though not responsible for creating the problem in the first place, such duty bearers become responsible for participating in its eradication. A key aspect of positive duties, therefore, is that they harness the energies of employers and public bodies. Nor is the duty limited to providing compensation for an individual victim. Instead, positive action is required to achieve change, whether by encouragement, accommodation, or structural change.[124]

The Race Equality Duty was followed by the introduction of a similar Disability Equality Duty[125] in December 2006 and the Gender Equality Duty (GED) which came into effect in April 2007.[126] The Equal Opportunity Commission promoted the GED as:

> the biggest change in sex equality legislation in thirty years, since the introduction of the *Sex Discrimination Act* itself. It has been introduced in recognition of the need for a radical new approach to equality – one which places more responsibility with service providers to think strategically about gender equality, rather than leaving it to individuals to challenge poor practice.[127]

As with the race duty, in addition to the general duty to have due regard to the need to eliminate unlawful discrimination and promote gender equality,[128] specific duties are also imposed on most public authorities. These specific duties are largely procedural, a list of steps that an authority must take in order 'to ensure better performance of the [general] duty.'[129] The English specific duties require each authority to:

- Prepare and publish a **gender equality scheme**, showing how it will meet its general and specific duties and setting out its gender equality objectives.
- In formulating its overall objectives, consider the need to include objectives to address the causes of any **gender pay gap**.

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[124] Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145, 164.

[125] *Disability Discrimination Act 1995* (UK) ss 49A, 49D.

[126] The duty was introduced into the *Sex Discrimination Act 1975* (UK) by the *Equality Act 2006* (UK).

[127] Jenny Watson, Chair, Equal Opportunities Commission, *Gender Equality Duty Code of Practice – England and Wales* (2006) Equal Opportunities Commission [2] <http://www.equalityhumanrights.com/en/publicationsandresources/gender/pages/gender.aspx> at 16 June 2008.

[128] *Sex Discrimination Act 1975* (UK) s 76A(1)

[129] *Sex Discrimination Act 1975* (UK) s 76B.

- **Gather and use information** on how the public authority's policies and practices affect gender equality in the workforce and in the delivery of services.
- **Consult** stakeholders (ie, employees, service users and others, including trade unions) and take account of relevant information in order to determine its gender equality objectives.
- **Assess the impact** of its current and proposed policies and practices on gender equality.
- **Implement** the actions set out in its scheme within three years, unless it is unreasonable or impracticable to do so.
- **Report** against the scheme every year and **review** the scheme at least every 3 years. [130]

C *Lessons and Warnings*

The burning question is: are such regulatory innovations effective? It is not easy to assess the effectiveness of equality legislation given the difficulty of defining equality and the multitude of factors that contribute to it. To answer the question empirical evidence must be gathered and rigorously analysed. Further, addressing inequality is an ongoing process, where each step forward can allow for the identification of further work to be done. While it is too early to tell whether the disability and gender equality duties are effective, there is some evidence in respect of the Race duty that might provide some hope as well as lessons for reform.

Preliminary evaluations have suggested that the introduction of the Race Equality Duty has caused public authorities to take into account, to a limited extent, the impact on race inequality in developing policy and services, setting targets and performance measures, and by the audit and inspection bodies which monitor delivery. [131] However, the evidence is not unequivocal and the race duty has not been without its critics. Fredman and Spencer have argued that the race duty is 'overly bureaucratic, process-driven and resource intensive'.[132] To be more effective, they argue, the notion of equality underpinning the duty needs to be clarified and the duty needs to require an authority to do more than simply 'have due regard' for promoting equality; they recommended a duty to take necessary and proportionate action to achieve equality.[133]

Whether such criticisms and reform suggestions are used to improve these laws in the UK depends on a wide range of historical and political factors that cannot be explored here. There is at least a public debate and exploration of the issues underway. The introduction of the positive duties for Great Britain is only part of the flurry of regulatory reform and debate. The government has undertaken a major inquiry into equality in the UK, culminating in the publication of *Fairness and Freedom: The Final Report of the Equalities Review* in February 2007.[134] Following on from this, a Discrimination Law Review (DLR) was established 'to consider the opportunities for creating a clearer and more streamlined discrimination legislative

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[130] Equality and Human Rights Commission, *Gender Equality Duty: Specific Duties* (2007) (emphasis added).

[131] Fredman and Spencer, 'Delivering Equality', above n 89, 1.

[132] Ibid 2, quoting Women and Equality Unit, *Advancing Equality for Men and Women: Government Proposals to Introduce a Public Sector Duty to Promote Gender Equality* (2006) 30.

[133] Ibid.

[134] Equalities Review Panel, *Fairness and Freedom: The Final Report of the Equalities Review* (2007) http://www.theequalitiesreview.org.uk/publications.aspx at 16 June 2008.

framework which produces better outcomes for those who currently experience disadvantage.'[135] In June 2007, the DLR issued a consultation paper, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*[136], and began consultation. The DLR has yet to issue its final report.

What lessons and warnings can we take from the experiences of other jurisdictions like the UK in considering how Australia might more effectively address inequality? There is insufficient space here to explore the issues and themes arising out of the UK's experience, but a few points can be made. Firstly, it is very clear that the UK has not solved the problem of inequality. However, its efforts to do so remind us of how complex the problem is and how finding a solution in Australia is going to be a long, ongoing process that requires progressive leadership, political commitment, public engagement, a great deal of research about the issues and options, and resources to implement recommendations. Over the past decade our progress on equality has faltered and we need to get back on the path.

Secondly, the wealth of UK scholarship on equality and anti-discrimination laws may provide guidance about issues on which we need to focus in developing better equality laws. Two leading scholars summarise some of the key issues. In her extensive research into equality laws in Canada, South Africa and the UK, Sandra Fredman has consistently highlighted the importance of questioning and clarifying the underlying concepts of equality to be used.[137] Good regulatory design depends on, among other things, a clear articulation of the problem that is to be addressed. Without a thorough and robust debate about the alternative understandings of equality, any regulatory law reform proposal is likely to flounder.

Christopher McCrudden in his analysis of the UK developments and their direction,[138] offers further guidance on how we might cautiously view them in considering regulatory design. He characterises the UK regulatory approach, reflected in recent legislative developments and at least implicit in the Discrimination Law Review, as one of reflexive regulation. His warning is that 'successful reflexive regulation will need to identify "the conditions under which a deliberative process may succeed", and once identified these "must be affirmatively created, rather than taken for granted."'[139] Drawing on empirical studies of the Race Duty and the Northern Ireland schemes and echoing concerns about the effectiveness of other 'mainstreaming' initiatives, he identifies three such conditions. The first is a requirement that organisations (public authorities or private firms) 'have to examine what they are doing on the basis of evidence that is objective and comparable across the sectors in which they operate'.[140] Deliberations and reflections must be informed by evidence not only about what the organisation

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[135] Discrimination Law Review, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A Consultation Paper* (2007) Department of Communities and Local Government <http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation> at 16 June 2008.

[136] Ibid.

[137] See, eg Sandra Fredman, 'A Critical Review of the Concept of Equality in UK Anti-Discrimination Law', *Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Working Paper No. 3 (1999), paras 3.7-3.19; Fredman 'A New Generation' above n 124; Fredman, *Discrimination Law* above n 89; Fredman, 'Changing the Norm' above n 89.

[138] McCrudden, above n 89.

[139] Ibid, 263 quoting Olivier De Schutter and Simon Deakin, 'Reflexive Governance and the Dilemmas of Social Regulation', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (2005) 3.

[140] McCrudden above n 89, 265.

is doing but also how it compares with other organisations and this in turn depends upon the production and dissemination of reliable data. He asserts that the absence of an obligation on public authorities to monitor the composition of their workforces and produce objective, comparable data is the 'single greatest blow to the likelihood that reflexive regulation will be successful in the British context'.[141]

The second condition is for a requirement that organisations 'consider seriously alternative approaches that are available for them to take that will shift entrenched patterns of inequality, and this needs to be able to be monitored by some external authoritative body'.[142] This is a key component of the various schemes in Northern Ireland but is lacking in the British scheme.[143] While flexibility to consider alternative means of implementation is a part of the reflexive model, without some compulsion and a mechanism for external accountability, the approach slides toward de-regulation. This echoes the point made by Fredman and Spencer that the duty must require substantive steps not merely procedural ones of having 'due regard' or requiring transparency.[144]

The final condition is a mechanism whereby organisations 'are required to engage with other stakeholders that will regularly challenge the set of assumptions that these bodies currently adopt'.[145] McCrudden identifies as 'the single most important difference in practice between the operation of the Northern Ireland equality duty and the race relations duty in Britain' the lack of groups in Britain actively representing ethnic minorities in engagement with public authorities implementing the positive race duty.[146] There must be civil society engagement and this must be active and informed. Reiterating McCrudden's warning: a regulatory approach that relies upon a deliberative process must ensure that these conditions are affirmatively created and not simply taken for granted.

While far from being a blueprint for a future inquiry, these brief points may prompt further thinking and debate about how we can move forward in more effectively addressing inequality in Australia.

VI. CONCLUSION

The new Federal Government should, at the very least, give serious consideration to HREOC's proposal as a way of addressing the conflicts faced by those with work and family responsibilities. At present, Australia's discrimination provisions in this respect are extremely limited. Expansion of the provision could effect change both through the normative role played by equality laws, as well as the increased provision of individual rights of action. The proposed 'right to request' flexible working arrangements is particularly meritorious as it represents an incremental shift away from the traditional individual complaints-based understanding of

[141] Ibid.

[142] Ibid.

[143] Ibid.

[144] Fredman and Spencer, 'Delivering Equality', above n 89, 13.

[145] Ibid. See also Fredman 'A New Generation' above n 124, 164.

[146] Ibid, 266.

challenges faced by workers with family responsibilities, toward a positive obligation on employers to provide at least some reasonable accommodation.

In reality, however, HREOC's legal proposal is severely circumscribed in its reflection of a 'new approach'. The proposal primarily constitutes an extension of the current anti-discrimination law framework, merely expanding the existing protection against family responsibilities discrimination to cover indirect discrimination and apply to all areas of employment. At heart, the reform proposal, like the existing legislative framework, remains premised upon change in workplace culture being wrought by individual victims litigating for individual redress, usually confidentially.

Since the development of our current model of anti-discrimination law over three decades ago, regulatory thinking has undergone much change. Whilst innovations in regulatory scholarship have been applied in many other areas of law and certainly in jurisdictions overseas, their application is yet to be seen in Australia in the context of anti-discrimination law. A truly new approach would open up debate in Australia and ask whether we might better address inequality by urging or requiring those with capacity to identify and remove relevant obstacles, rather than perpetuating a rights-based model alone which places the responsibility for change upon individual victim litigation. What is needed is a truly comprehensive review enabling us to examine our current equality laws against regulatory innovations, allowing us – in assessing and (re)designing equality law – to better account for developments in regulatory thinking as well as evidence emanating from reform efforts overseas. In attaining this, the HREOC proposal, whilst deserving of credit, should not be permitted to obscure the need for focus upon the bigger picture. A change in the political context since the HREOC report may now allow for more creative, progressive thinking about how law might be used in Australia to address inequality.