

BARBEQUED OR BURNED?# FLEXIBILITY IN WORK ARRANGEMENTS AND THE SEX DISCRIMINATION ACT

THE HON JOHN VON DOUSSA QC* AND CRAIG LENEHAN**

I INTRODUCTION

Australian women access part-time work and flexible working arrangements more often than men. Indeed, one of the most significant features of part-time work in Australia and worldwide is its concentration among women participants in the labour force.¹ Underlying that phenomenon is the fact that Australian women continue to bear the primary responsibility for the care of their families, particularly the care of young children, and working part-time or flexibly allows women to meet these family responsibilities.²

This unequal sharing of family responsibilities between men and women is not an immutable product of women's biology. It is a social phenomenon, which benefits the members of the authors' sex. Like other commentators, it is our view that the current situation should change.

In this article, we briefly explore why women continue to experience comparative disadvantage in this area. We then critically evaluate domestic legal responses to that ongoing inequality (focussing on the area of federal

On 18 July 2002, the Prime Minister, the Hon John Howard MP, said of the debate over policies to assist families with children to better balance their work and family responsibilities: 'This is the biggest ongoing social debate of our time, I call it a barbeque stopper': John McNamara, Interview with the Hon John Howard MP (Perth, 18 July 2002), <<http://www.pm.gov.au/news/interviews/2002/interview1753.htm>> at 15 November 2004.

* President, Human Rights and Equal Opportunity Commission; Chancellor of Adelaide University.

** Deputy Director, Legal Services, Human Rights and Equal Opportunity Commission. The authors would like to thank Julie O'Brien, Jonathon Hunyor, Sally Moyle, Jodie Ball and Ula Wiszniewski for their ideas and comments on this paper, and Melanie Schwartz and Ula Wiszniewski for their research assistance. Responsibility for any errors rests with the authors. The views in the paper are the authors' own and do not necessarily represent the views of the Commission.

1 See the figures referred to in *Howe v QANTAS Airways Ltd* [2004] FMCA 242 (Unreported, Driver FM, 15 October 2004) [113]. See also International Labour Organisation, *Workers with Family Responsibilities*, Report III, pt 4B, Conference of the International Labour Organisation, 80th sess, Geneva (1993) [144].

2 Australian Bureau of Statistics, *Australian Social Trends: Family and Community – Family Functioning: Balancing Family and Work*, Cat No 4102.0 (2003). See also International Labour Organisation, above n 1, [143].

discrimination law) and make some suggestions for possible reform in light of our critique.

II DIMENSIONS OF THE PROBLEM

In its report on the inquiry into pregnancy and work, the Human Rights and Equal Opportunity Commission ('HREOC') noted that a number of participants in the inquiry had raised particular concerns about post-pregnancy issues, including inflexible working arrangements.³

Such issues appear to arise even in what one would expect to be more 'benign' work environments, such as universities. For example, in discussing her own experience at an Australian law school, Beth Gaze made the following observations about a general increase in teaching load at that workplace. She said:

[It] confronted me quite starkly with questions about the overall workload required for the job, and how, if at all, expectations and load were adjusted for someone working part time. In workplace experiences and conversations, I found that things I expected to be understood were not clear, and that many things were not very clear at all, to me or to others.⁴

What underlies the resistance to or difficulties with such arrangements? Some cast the issue in largely materialist terms. For example, Daniel Greenwood has argued that

left to their own devices, markets will demand as much time as employees are willing to give to the job, and competition will assure that standard time demands usually will be set by the least encumbered. Families, in short, need time and money that markets, even in the absence of discrimination or prejudice, will not provide.⁵

While this is undoubtedly a valid observation, we see the problem (and the solutions) as running deeper than market forces, particularly given that some commentators see flexible working conditions as promoting rather than detracting from productivity.⁶

As Gaze's comments on her own working life suggest, situations where (principally female) employees seek flexibility to accommodate family responsibilities frequently involve much confusion on all sides: on the part of employers, employees and colleagues.⁷

3 See, eg, the submission of the Women's Electoral Lobby Australia (Submission 97), extracted in HREOC, *Pregnant and Productive: It's a Right not a Privilege to Work while Pregnant* (1999) 225, <http://www.hreoc.gov.au/sex_discrimination/pregnancy/report.html> at 4 November 2004.

4 Beth Gaze 'Working Part Time: Reflections on "Practicing" the Work-Family Juggling Act' (2001) 1 *Queensland University of Technology Law and Justice Journal* 199, 201.

5 Daniel Greenwood, 'Gendered Workers/Market Equality' (2003) 12 *Texas Journal of Women and the Law* 323, 343.

6 See, eg, Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (2000) 91-4.

7 Similar comments were reported by HREOC, above n 3, 225.

Joan Williams provides a theoretical basis for comprehending some of those difficulties and misunderstandings by developing two historically based social norms: the 'ideal worker' and the domestic 'caregiver', who have a mutually exclusive but symbiotic relationship. She describes the relationship between the two as follows:

[the ideal worker] works full time and overtime and takes little or no time off for childbearing or child-rearing. Though this ideal worker norm does not define all jobs today, it defines the good ones: full-time blue-collar jobs in the working-class context and high-level executive and professional jobs for the middle class and above. When work is structured in this way, caregivers often cannot perform as ideal workers.⁸

Williams sees those characteristics as the defining elements of what she describes as a historically based 'gender system' of domesticity, with its roots in the industrial revolution. It generates and reinforces certain roles for men and women: women 'belong' in the home because of their 'natural' focus upon relationships and an ethic of care, whereas the males whom they support are more 'naturally' able to strive to become ideal workers.⁹

Building on those ideas, Gaze suggests that Australian working women are negotiating a path through a poorly defined nether region which lies between the accepted norms of caregiver and ideal worker.¹⁰ If they stray too far from the ideal worker model, they are seen not to be serious about their work and they suffer career disadvantage. On the other hand, they have a competing pressure to act consistently with the caregiver norm, or else they are open to criticism for pursuing their own 'selfish' interests through workforce participation at the cost of the interests of their children. As Gaze observes, this leaves many women in an invidious position, which will only be truly addressed when men start to recognise and act upon responsibilities for their children.¹¹

III INTERNATIONAL LEGAL OBLIGATIONS

Before moving to domestic law, we note that Australia has a number of relevant international legal obligations. Some of those obligations provide, in part, the constitutional basis for the federal discrimination provisions discussed below.

The *Convention (No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*¹² ('ILO 156') deals most directly with this area. Amongst other things, it obliges Australia:

8 Williams, above n 6, 2.

9 Ibid.

10 Gaze, 'Working Part Time', above n 4, 207–8.

11 Ibid 206–7.

12 Opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983), ratified by Australia 30 March 1990.

- to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment;¹³ and
- with a view to creating effective equality of opportunity for men and women workers, to take measures to take account of the needs of workers with family responsibilities in terms and conditions of employment.¹⁴

As is apparent from its title and from the references to creating equality of opportunity between men and women workers,¹⁵ *ILO 156* seeks to fulfil a dual purpose. That is, it seeks to create

[e]quality of opportunity ... between men and women with family responsibilities, on the one hand, and between men and women with such responsibilities and workers without such responsibilities, on the other.¹⁶

Reflecting Gaze's observations, the rationale for that approach was that

[i]t was considered that full equality of opportunity and treatment for men and women could not be achieved without broader social changes, including a more equitable sharing of family responsibilities, and that the excessive burden of family and household tasks still borne by women workers constituted one of the most important reasons for their continuing inequality in employment and occupation ...¹⁷

Further, while the unequal distribution of family responsibilities between the sexes persists, *ILO 156* permits ameliorative measures to be aimed at women workers with such responsibilities.¹⁸

Family responsibilities are also dealt with in the *Convention on the Elimination of All Forms of Discrimination against Women*¹⁹ ('CEDAW'). The preamble to *CEDAW* recognises that the upbringing of children requires a 'sharing of responsibility between men and women and society as a whole' and that a 'change in the traditional role of women in society and in the family is needed to achieve full equality between men and women'. The operative provisions of *CEDAW* require States to take all appropriate measures to ensure that family education includes the recognition of the 'common responsibility' of men and women in the upbringing and development of their children,²⁰ and to encourage necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life.²¹

CEDAW also requires States to eliminate discrimination against women,²² including in the field of employment.²³ The Committee on the Elimination of

13 Ibid art 8.

14 Ibid art 4(b).

15 Ibid. See, in addition to art 4(b), the preamble and arts 3(1), 6.

16 International Labour Organisation, above n 1, [25].

17 Ibid.

18 Provided that men are not formally barred from making use of those measures should they find themselves in the same circumstances: *ibid* [29].

19 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). The Convention is set out in the Schedule to the *SDA*.

20 *CEDAW*, opened for signature 18 December 1979, 1249 UNTS 13, art 5(b) (entered into force 3 September 1981).

21 Ibid art 11(2)(c).

22 Ibid art 2.

23 Ibid art 11.

Discrimination against Women²⁴ has made clear that it views ‘discrimination’ in that context in a very broad sense. In the Committee’s view, rather than simply looking at discrimination on the ground of sex, ‘the Convention focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women’.²⁵

Discrimination on the ground of family responsibilities is one example of those ‘various’ forms of discrimination which affect women because they are women: it does so, because women continue to bear primary responsibility for the care of their families.²⁶ Importantly, in our view, that may require that women receive greater protection in this area, at least until men accept a more equal share of the work of caring for their families. The CEDAW Committee has specifically stated that such different treatment may be required in the case of socially or historically based discriminatory practices (which is similar to the position under *ILO 156* outlined above).²⁷

IV FEDERAL DISCRIMINATION LAW

A Discrimination on the Ground of Family Responsibilities

The obligation in art 8 of *ILO 156* provided, in part, the constitutional basis for the enactment of s 7A of the *Sex Discrimination Act 1984* (Cth) (‘SDA’), which defines discrimination on the ground of family responsibilities, and s 14(3A) of the *SDA*, which proscribes such discrimination in the dismissal of an employee.²⁸ Unlike the other grounds of discrimination, family responsibilities discrimination is not proscribed in any other areas of public life. In addition, the definition in s 7A is limited to ‘direct’ discrimination. In enacting those limited protections, Parliament apparently contemplated that wider provisions would be enacted at a later stage after further consultation.²⁹ Regrettably (in our view) those wider provisions have not yet been enacted.

24 The Committee on the Elimination of Discrimination against Women is the expert body with responsibility for considering the progress made in the implementation of *CEDAW*: *ibid* art 17(1). It considers reports prepared by States Parties on the legislative, judicial, administrative or other measures adopted to give effect to *CEDAW* and the progress made by States Parties in that respect: *ibid* art 18. It also has the power to make ‘suggestions and general recommendations’ based on that material: *ibid* art 21(1).

25 *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 59th sess, Supp No 38, [5], UN Doc A/59/30 (2004).

26 To similar effect, the International Labour Organisation committee of experts has observed, in the context of *ILO 156*, that ‘discrimination on the grounds of family responsibilities or marital status was frequently judged to be a form of discrimination based on sex’: International Labour Organisation, *above* n 1, [26].

27 *Report of the Committee on the Elimination of Discrimination against Women*, *above* n 25, [11].

28 See Explanatory Memorandum, Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 (Cth) [6]–[8]; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2399 (Michael Duffy, Attorney-General) (Second Reading Speech, Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 (Cth)).

29 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2399–400 (Michael Duffy, Attorney-General).

The restriction of the current legislative scheme to termination of employment has not proved as significant as may first appear. As will be seen below, courts have taken the common sense approach of interpreting s 14(3A) as including constructive dismissals.

The legislature's decision to confine the definition of discrimination to direct discrimination has proved more significant for a number of reasons. First, like other direct discrimination provisions, s 7A(a) requires a comparison to be made between the way in which the complainant is treated, or in which it is proposed they be treated, and the way in which a person without the relevant ground of discrimination (in this case family responsibilities) is treated or would be treated in 'circumstances that are the same or not materially different'. This is referred to as the 'comparator' element. The court is required to consider whether the person alleging discrimination was treated less favourably than their comparator. It appears that 'circumstances that are the same or not materially different' will include matters such as the need to take leave or to work flexible hours.³⁰ This means that a court must consider and compare how a person without family responsibilities would be treated in a situation where they had similar requirements to the applicant (in the examples given, leave or flexible working hours), but for reasons unrelated to family responsibilities. If the court is satisfied that the applicant and comparator would be treated identically, then there is no less favourable treatment and no discrimination. As such, that approach effectively 'equalises' or excludes such needs for the purposes of the comparator test, even though they are closely connected to the proscribed ground of family responsibilities. While that approach is open to some criticism,³¹ it appears to be well established in Australian authority and is unlikely to change in the absence of amendment of the legislation.

In addition, (and again like other federal direct discrimination provisions) s 7A(b) requires a particular causal relationship between any less favourable treatment and the ground of discrimination, which is expressed in the legislation using the words 'by reason of' the person's family responsibilities. Interestingly, the causation inquiry also encompasses allegedly discriminatory acts which take place by reason of characteristics that appertain to or are imputed to persons with family responsibilities,³² which would seem to include matters such as the need to take leave or work flexible hours. This is somewhat odd, given that (as noted above) those matters are effectively excluded for the purposes of the comparator element.

The test for the relevant causal connection is not the 'but for' test. That test simply focuses upon the consequences for the complainant by essentially asking whether the less favourable treatment resulted from the respondent's actions.

30 *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186, 216–7. See also, in a different context, *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133, 185 (Gummow, Hayne and Heydon JJ, with whom Callinan J agreed). See also 137 (Gleeson CJ).

31 See, eg, in a different statutory context, the views expressed by some participants in the Productivity Commission's *Review of the Disability Discrimination Act 1992* (2004) 310, <<http://www.pc.gov.au/inquiry/dda/finalreport/index.html>> at 4 November 2004.

32 *Sex Discrimination Act 1984* (Cth) s 7A(b)(ii), (iii).

Rather, one must inquire as to the ‘true basis’ or ‘real reason’ for the respondent’s impugned actions.³³ This demands closer attention to the mental state of the respondent. The central question will be why the respondent treated the applicant less favourably. That does not mean that a discriminatory intention or motive must be shown, although it appears that those matters may be relevant.³⁴ Instead, if the less favourable treatment was consciously or unconsciously actuated by the prohibited ground, then the test will be satisfied. Note in addition that the *SDA* provides that, if an act is done by reason of two or more particular matters that include the relevant ground of discrimination, then it is taken to be done by reason of that ground, regardless of whether that ground is the principal or dominant reason for the doing of the act.³⁵

We will illustrate the difficulties that the comparator and causation elements may pose by reference to relevant federal authorities.

In *Song v Ainsworth Game Technology Pty Ltd*,³⁶ the employer refused to allow the applicant to adjust her hours so that she could take 30 minutes off at 2:55pm to collect her toddler from preschool and deliver him to another carer. The employee had at first taken this time off with her supervisor’s permission, but a director of the employer later disallowed the break, saying (erroneously) that it was contrary to the award and that there would be difficulties with workers’ compensation insurance. When the applicant continued to take the same break, the employer reclassified her as a part-time employee and reduced her wage. Federal Magistrate Raphael held that the reclassification was a constructive dismissal and that there was direct discrimination on the ground of family responsibilities.

On the comparator issue, his Honour found that the evidence established that a person without Ms Song’s family responsibilities in the same or similar circumstances would have expected some flexibility in working hours.³⁷ Although not entirely clear, it seems that his Honour had in mind employees who needed to leave the workplace to smoke or were allowed flexibility in their working hours for other reasons.³⁸ It seems to us that it was open to his Honour to have concluded that Ms Song was treated less favourably than such a person. However, the element of causation is more problematic. His Honour’s factual findings suggest that the true basis for the less favourable treatment might have been that the employer had a misguided view about the legality of allowing the applicant a mid-afternoon break, and because he misunderstood the actual hours which the applicant worked.³⁹

Those misunderstandings seem to us to illustrate the point made by Gaze regarding the lack of clarity in this area for all participants. While that lack of

33 See *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133, 138 (Gleeson CJ), 171–2 (McHugh and Kirby JJ).

34 Note, however, that there is disagreement in the High Court about the relevance of ‘motive’: see *ibid* 187 (Gummow, Hayne and Heydon JJ), 138–9 (Gleeson CJ). Cf 171–2 (McHugh and Kirby JJ).

35 *Sex Discrimination Act 1984* (Cth) s 8.

36 (2002) EOC ¶93-194.

37 *Ibid* 76,247.

38 *Ibid* 76,240.

39 *Ibid* 76,244, 76,245.

clarity undoubtedly had unfair results for the applicant and is arguably a manifestation of the difficulties to which Gaze refers, it is not entirely clear to us that it constituted family responsibilities discrimination as defined in the SDA.

Also arguably problematic, in our view, is the decision in *Escobar v Rainbow Printing Pty Ltd (No 2)*⁴⁰ ('Escobar'). That case concerned an applicant who had been in full-time employment prior to taking maternity leave and then sought to return to work on a part-time basis. The employer was at first prepared to consider that possibility, and said the issue would be discussed later. However, this did not occur, and on the day the applicant returned to work she was dismissed as she would not agree to work full-time.

As in *Song*, there are difficulties with Federal Magistrate Driver's approach to the issue of causation. His Honour sought to apply a 'but for' test and appeared to take the view that the dismissal flowed from the applicant's family responsibilities.⁴¹ As noted above, this is not the correct test in this context. However, in our view, a similar conclusion could have been supported had his Honour correctly applied the 'true basis' test, given that the causation inquiry in s 7A does include characteristics appertaining to people with family responsibilities. In particular, we note that his Honour found that the respondent was actuated in part by his unwillingness to countenance part-time work.⁴² It seems to us strongly arguable that the need to access part-time work is a characteristic that appertains generally to people with family responsibilities.⁴³

There are also difficulties in his Honour's approach to the comparator element. Federal Magistrate Driver found that the applicant was treated less favourably than an employee without family responsibilities,⁴⁴ but we have some doubts about his Honour's reasoning on that issue. For, given his Honour's findings on the respondent's attitudes to part-time work, it might have been argued that the respondent would have treated *any* employee seeking part-time work poorly (recalling, from our discussion above, that such matters will be treated as forming part of the 'circumstances that are the same or not materially different' for the purposes of the comparator test).

A more satisfactory approach to these issues may be seen in *Evans v National Crime Authority*.⁴⁵ The applicant in that case cared for a toddler whose health required her to take days off from time to time, which she did against medical certificates about the child's health or by drawing on a considerable credit of unused holiday leave. The applicant's manager expressed his dissatisfaction about her absences, including by giving her a low performance assessment and

40 (2002) 120 IR 84.

41 Ibid 93-4. His Honour cites the decision of Lockhart J in *Mount Isa Mines v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 301 as supporting that approach. However, in that decision, Lockhart J discusses the dangers in too readily applying the 'but for' test: at 326.

42 *Escobar* (2002) 120 IR 84, 93-4.

43 See, by way of analogy in the context of a direct sex discrimination claim, *Hickie v Hunt and Hunt* [1998] HREOCA 8 (Commissioner Evatt, 9 March 1998) where Commissioner Evatt said: 'In my view, there are good grounds for saying that working part time when they have small children, such as in the period after maternity leave, is a characteristic appertaining generally to women': at [6.16.9].

44 *Escobar* (2002) 120 IR 84, 93.

45 (2003) EOC ¶93-298.

saying to her that if he had known she had a sick son and would take time off he would not have engaged her. By reason of the manager's attitude and the applicant's fear that her contract might be terminated if she required further time off, the applicant relinquished her employment.

Federal Magistrate Driver held that the manager's poor handling of the applicant's situation and her grievances when she protested that she was entitled to take time off in accordance with her contract, constituted constructive dismissal.⁴⁶ He held that the dismissal was by reason both of family responsibilities and the applicant's sex.⁴⁷ His Honour's approach to causation appears open to him on the facts, particularly given his Honour's finding that the applicant's manager viewed carer's leave as some sort of 'special case'.⁴⁸ His Honour also correctly identified the comparator as being an employee who took leave within her or his entitlements for reasons unrelated to family responsibilities.⁴⁹

Evans undoubtedly sends a strong message to employers who badger those who seek to fulfil their family responsibilities. Importantly, subject to some caveats,⁵⁰ it is a protection which could be used by men who are seeking to challenge the norm of the ideal worker. However, as *Escobar* and *Song* illustrate, many situations involving substantive unfairness to those with family responsibilities will not involve such clear breaches of s 14(3A). Rather, we might expect many more matters where the evidence indicates that flexibility was refused for reasons that are less than clear (even to the participants), raising possible difficulties in terms of causation; or that all attempted departures from the ideal worker norm (be they for reasons associated with family responsibilities or for other reasons) will be met with refusals, meaning that it will be difficult to make out the comparator element.

The discriminatory effects of workplace practices which do not so clearly involve discriminatory treatment might be better dealt with as species of indirect discrimination. Indirect discrimination relates to the imposition of ostensibly neutral rules, tests and requirements which have disadvantageous effects on the members of a group defined by a relevant ground of discrimination. As we have observed above, the definition of family responsibilities discrimination is confined to direct discrimination. However, as will be discussed in the next

46 Ibid 77,404–5.

47 Ibid 77,404, 77,405. The reference to s 7 at 77,403 seems to be a typographical error – it appears that his Honour intended to refer to s 5.

48 Ibid 77,405.

49 Ibid. On appeal, Branson J did not disturb his Honour's findings on the family responsibilities claim: see *Commonwealth v Evans* [2004] FCA 654 (Unreported, Branson J, 25 May 2004) [74]–[75]. Note that Branson J also held that there was no evidence to support the finding of direct sex discrimination (based on the responsibility to care for children being a 'characteristic that appertains generally to women'). Her Honour held that there was no evidence before the Federal Magistrate that showed how a male employee who took the same, or comparable, amounts of leave as Ms Evans would have been treated by his employer: at [69]–[73].

50 The SDA has a more limited application to family responsibility discrimination claims made by men as compared to those made by women by reason of s 9. See also below n 72.

section, some women have made use of the indirect sex discrimination provisions to pursue their claims.

B Indirect Sex Discrimination

Section 5(2) of the *SDA* defines indirect sex discrimination. An applicant seeking to invoke that provision must prove that the alleged discriminator imposed or proposed to impose a condition, requirement or practice which has or is likely to have the effect of disadvantaging people of the same sex as the applicant. That definition is subject to s 7B(1) which provides that there is no discrimination if the relevant condition, requirement or practice is reasonable.⁵¹ The respondent bears the onus of proof on that issue.⁵²

In a series of federal cases, commencing with *Hickie v Hunt and Hunt*⁵³ ('*Hickie*'), and including more recently *Escobar, Song and Mayer v Australian Nuclear Science and Technology Organisation*⁵⁴ ('*Mayer*'), women who have encountered problems when seeking to work part-time upon return to work from maternity leave have successfully argued that a requirement to work full-time is a condition, requirement or practice which has the effect of disadvantaging women. The courts have accepted, sometimes as a matter of judicial notice without any specific evidence, that this disadvantage stems from the fact that women are more likely to require part-time work to meet their family responsibilities. The seminal statement to this effect comes from the decision of Commissioner Evatt in *Hickie*, in which the Commissioner inferred 'from general knowledge that women are far more likely than men to require at least some periods of part-time work during their career, and in particular a period of part-time work after maternity leave in order to meet family responsibilities'.⁵⁵

Of course, so formulated, that approach will only protect women with family responsibilities and, if not correctly understood, might create some difficulty in that it might actually entrench the gendered system of domesticity discussed above. For, if the approach in *Hickie* were to be applied in perpetuity, it may contribute to women continuing to be seen primarily as caregivers.

That potential difficulty arose for consideration in *Howe v QANTAS Airways Ltd*⁵⁶ ('*Howe*'), where the Sex Discrimination Commissioner was granted leave to appear as *amicus curiae* and argued that a flexible and fluid approach to the element of 'disadvantage' under s 5(2) of the *SDA* is required in this area. The Commissioner accepted that there will be no relevant disadvantage for the purposes of s 5(2) when the unequal sharing of family responsibilities is addressed. However, she contended that, until that time, women will continue to be disadvantaged by family responsibilities as compared to men, and that *CEDAW* obliges Australia to provide effective legal protection to affected

51 Section 7B(2) specifies, in a non-exhaustive fashion, a number of matters which are relevant to that issue.

52 *Sex Discrimination Act 1984* (Cth) s 7C.

53 [1998] HREOCA 8 (Commissioner Evatt, 9 March 1998).

54 (2003) EOC ¶93-285.

55 [1998] HREOCA 8 (Commissioner Evatt, 9 March 1998) [6.17.10]. See also *Escobar* (2002) 120 IR 84, 94 (Driver FM); *Mayer* (2003) ¶EOC 93-285, 77,328 (Driver FM).

56 [2004] FMCA 242 (Unreported, Driver FM, 15 October 2004).

women, even if that involves treating those women differently to men with those same responsibilities.⁵⁷ Provided it was understood in that flexible sense, the Commissioner contended that the construction of ‘disadvantage’ adopted in *Hickie, Escobar, Song and Mayer* was to be preferred as one which was consistent with Australia’s international obligations⁵⁸ and with the objects of the *SDA*.⁵⁹

In obiter comments,⁶⁰ Driver FM accepted the Commissioner’s submissions on that point stating:

the present state of Australian society shows that women are the dominant caregivers to young children. While that position remains (and it may well change over time) s 5(2) of the *SDA* operates to protect women against indirect discrimination in the performance of that care giving role.⁶¹

A further possible complication in this area has arisen from the decision in *Kelly v TPG Internet Pty Ltd*⁶² (*‘Kelly’*). In that matter Raphael FM held that a refusal by the respondent employer to make available part-time work upon the applicant’s return from maternity leave did not amount to indirect sex discrimination.

His Honour held that the behaviour of the respondent constituted a refusal to provide the applicant with a benefit, rather than the imposition of a condition or requirement that was a detriment. His Honour distinguished the case from others such as *Mayer*, on the basis that they concerned situations where an employer had refused benefits that were either previously made available to the applicants or were generally available to employees.⁶³

We think, with respect, that there are problems with this decision. If his Honour is correct in distinguishing the earlier authorities, an employer who consistently provides part-time work but then later refuses to do so can be liable under the *SDA* (*Mayer*) but an employer who has a policy or practice of never permitting reduced working hours cannot (*Kelly*). This would be an odd result.

More fundamentally, his Honour’s reasons are inconsistent with authority in other discrimination law contexts to the effect that ‘any form of qualification or prerequisite’ might constitute a ‘requirement or condition’.⁶⁴ His Honour’s departure from that approach appears to be the result of conflating the element of disadvantage with the imposition of a condition, requirement or practice.⁶⁵ They

57 See the discussion regarding the broad approach of the CEDAW Committee to ‘discrimination’, above Part III.

58 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

59 Section 3(a) provides that one of the objects of the *SDA* is to give effect to certain provisions of CEDAW.

60 His Honour found, on the facts, that the respondent had not imposed the condition, requirement or practice alleged by the applicant: *Howe* [2004] FMCA 242 (Unreported, Driver FM, 15 October 2004) [131].

61 *Ibid* [118].

62 (2003) 176 FLR 214.

63 *Ibid* 233–4.

64 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406–7 (McHugh J); *Daghlian v Australian Postal Corporation* [2003] FCA 759 (Unreported, 23 July 2003, Conti J) [100].

65 See *Kelly* (2003) 176 FLR 214, 233.

are separate elements of s 5(2) and must remain so if the provision is to operate effectively. In addition, his Honour did not consider whether the refusal to allow part-time work by an employer – or the insistence on full-time work – may constitute a ‘practice’ within the meaning of s 5(2) irrespective of whether it is a ‘condition or requirement’.

The correctness of the decision in *Kelly* was also considered in *Howe*. On that issue (albeit again in obiter comments), Driver FM disagreed with Raphael FM for reasons which included those outlined above.⁶⁶

Federal Magistrate Driver further observed that his conclusion did not require that all female employees with family responsibilities must be provided with part-time work upon demand. Rather, as noted above, a respondent can seek to avoid liability under s 7B by proving that the relevant condition, requirement or practice is reasonable. Interestingly, Gaze has described the reasonableness element as a weakness of the *SDA* and has noted that the equivalent legislation in the United Kingdom and United States of America imposes heavier burdens upon respondents.⁶⁷ The potentially difficult questions raised by that critique are outside the scope of this short paper. However, we do note that, as compared to proceedings brought under Australian State anti-discrimination legislation,⁶⁸ the issue of reasonableness has generally proved less of an obstacle for applicants bringing indirect sex discrimination claims relating to family responsibilities under the *SDA*.⁶⁹

V CONCLUSION

It will be apparent from the above discussion that the *SDA* does not offer a complete solution for the problems we have sketched in Part II. The family responsibilities provisions offer some degree of protection to those seeking to move on from stereotyped views of women as caregivers and men as ideal workers, at least in cases involving actual or constructive dismissal. However, depending upon the available evidence, the comparator or causation elements (when properly applied) may pose difficulties for at least some potential applicants.

Women are given some additional degree of protection through the application of the indirect sex discrimination provisions. Those protections are undoubtedly very important given the prevailing unequal distribution of family responsibilities and it is for that reason that we consider the errors identified above in *Kelly* to be

66 See *Howe* [2004] FMCA 242 (Unreported, Driver FM, 15 October 2004) [126]. See also his Honour’s additional reasons at [127]–[129].

67 Beth Gaze ‘The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionments and Alternatives’ (2004) 10(2) *University of New South Wales Law Journal Forum* 57, 59.

68 See, eg, *Equal Opportunity Act 1995* (Vic), considered in *Victoria v Schou* (2004) EOC ¶93-328.

69 See, eg, *Escobar* (2002) 120 IR 84, 94; *Mayer* (2003) EOC ¶93-285, 77,329. Cf Federal Magistrate Driver’s finding that it was reasonable for the respondent to refuse Ms Mayer’s proposal for job-sharing or working partly from home: *Mayer* (2003) EOC ¶93-285, 77,329.

of significance. However, even if *Kelly* is not followed, those provisions seem to us unlikely to provide a long term impetus for the more even distribution of family responsibilities which we would hope for. Nor have they provided a basis for addressing matters such as the career progression of women working part-time to accommodate family responsibilities.⁷⁰

Other possible legal mechanisms for achieving those changes include the federal industrial relations system. Indeed, the Australian Industrial Relations Commission currently has before it a test case in which these issues are being considered. HREOC has been granted leave to intervene in that matter.

We would like to suggest that consideration also be given to amending federal discrimination legislation, which (in our view) should continue to be seen as an important educational and protective mechanism, which complements the more systemic approach of the industrial relations system. Possible amendments which might be considered could include broadening the definition of family responsibilities discrimination in the *SDA* to include indirect discrimination and employment matters not related to dismissal.⁷¹ A further issue which might be addressed is the fact that the family responsibilities provisions currently have a more limited application to claims made by men than by women.⁷²

Perhaps more ambitiously, we think it would be worth considering the imposition of positive duties upon employers to accommodate family responsibilities. Similar duties have been proposed by the Productivity Commission in the context of the *Disability Discrimination Act 1992* (Cth) ('*DDA*').⁷³ As with the recommended amendments to the *DDA*, failure to meet those duties would constitute discrimination. The outer limits of the duties could be defined by reference to concepts of reasonableness or unjustifiable hardship.

Such an approach (and other measures, including educational strategies, which are also required by *CEDAW*) might lead to a closer examination of the values our society places upon work and childcare. This might, in time, lead to the ideal worker/caregiver norms following other outdated work practices which caused inequality, like the 'marriage-bar' and the restrictions on women working in 'male' professions.

70 See Gaze, 'Working Part Time', above n 4, 211. See also Leonie Still, *Glass Ceilings and Sticky Floors – Barriers to the Careers of Women in the Australian Finance Industry* (1997), <http://www.humanrights.gov.au/pdf/sex_discrim/glass_ceilings.pdf> at 4 November 2004.

71 See, in that regard, *Howe* [2004] FMCA 242 (Unreported, Driver FM, 15 October 2004) [128].

72 To avoid issues of constitutional validity, s 9(2), (4) of the *SDA* makes clear that the *SDA* is an Act of limited effect. Its terms have effect by the operation of s 9(3), (5)–(20), which reflects relevant heads of Commonwealth legislative power. Of particular note is s 9(10), which reflects the external affairs power. It provides that, where *CEDAW* is in force, Part II (excluding ss 19, 26 and 27) and Part III (excluding ss 28D and 28L) have effect to the extent to which the terms of the *SDA* give effect to *CEDAW*, in relation to discrimination against women. This gives the *SDA* a broad application in proceedings brought by female applicants. Men seeking to use the *SDA* must rely on other provisions in s 9 (eg, s 9(11)–(12) which reflects the corporations power). It seems to us that a further enabling provision, specific to family responsibilities discrimination and making reference to *ILO 156* (in a similar fashion to that adopted in s 9(10) in relation to *CEDAW*), could be added to the *SDA* without giving rise to issues of constitutional validity.

73 Productivity Commission, above n 31, 196 (Recommendation 8.1).