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# Working Part Time: Reflections on “Practicing” the Work - Family Juggling Act

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Beth Gaze\*

Although biology is no longer destiny for women, social arrangements continue to impose many of the costs of having children on women. While recent research has documented the decline in fertility of Australian women<sup>1</sup>, many women do nevertheless choose to have children, despite the evidence that shows it is likely to exacerbate their disadvantage in both the public sphere of work, and, for many, the private sphere of the family. Women who have children are faced with the huge range of unsatisfactory choices concerning work and childcare which are usually referred to as the “work-family problem”. No longer can they attempt to conform to the male model of the ideal worker who is available for work with no limits and no domestic responsibilities.

For a variety of reasons, many parents do not choose to move in the long term to the traditional female role model of the full time home maker, financially dependent on someone else. This might come from their expectations of equality and what that might mean, as it is likely that few young women would be aware of the difficulties women face in re-entering the workforce later if they withdraw altogether while their children are young. So a common choice is to work part time, to maintain some workforce connection and financial independence while also allowing time for the vitally important nurture of children. This is known as “having it all”. What it does not have is any paradigm, social model or established pattern which is protected by social and legal policy in our society.

This article considers some aspects of the work-family dilemma. First, the dimensions of the experience are teased out. Women in this position, being part time workers and mothers, are usually short of time, so their experience is not well documented. Then different ways to understand part time work and explain the position of those who do it are examined. Developing a legitimate paradigm for part time work has the potential to undermine the male stereotype of the ideal worker (the worker who does not have domestic responsibilities to distract them from 100% commitment to their job), which is currently the measure of success and commitment for a worker. Finally, the recent

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\* B Sc (Melb) LLB (Hons) (Monash) LLM (UC Berkeley) Senior Lecturer, Law Faculty, Monash University.

<sup>1</sup> P McDonald, ‘Contemporary fertility patterns in Australia: first data from the 1996 Census’ (1998) Vol 16 No 1 *People and Place*; ‘Low fertility in Australia : evidence, causes and policy responses’ (2000) Vol 8 No 2 *People and Place* at 6.

Australian cases concerning access to part time work are considered to see what role exists for law in protecting the parent who works and balances their caring responsibilities.

## 1. The Experience of Part Time Work

This paper is about “practicing” the work family juggling act in two senses: first, it is my everyday practice as a part time legal academic; second, it is something that needs practice: the balance is never quite stable and needs constant attention. Because the system of employment is premised on the full time “ideal worker”, virtually all aspects of part time work have to be negotiated afresh. This reinforces that there is no existing paradigm or model, even within relatively benign employment such as university employment, on which part time work can comfortably rest. The choice faced by the part time worker in a position with a full time paradigm is either to keep a low profile and not draw attention to their distance from the full time ideal worker, or to accept the visibility of needing to continually resolve issues of obligations and entitlements which arise because they do not fit the full time ideal for which all procedures and entitlements are designed.

Experiencing this tension led me to reflect on how the part time worker is understood. My own view is that it has taken significant effort to maintain my connection with the workplace, and that I have frequently felt that my parenting responsibilities have suffered as a result of my commitment to maintaining my work. Women face contradictory imperatives and expectations, which are exacerbated when they become parents. But my view may not be shared by others, who may see me as uncommitted to work, as “dabbling” in the workplace. They may see the glass of workplace commitment as half empty, instead of what I see, the effort it takes to maintain the glass half (or more) full. Which of these views applies may well depend on what preconception of a working mother or parent is in the observer’s mind. An important goal for feminism is to ensure that space is made for an understanding of part time work which permits living a woman’s life without disadvantage.

Paradoxically, women who have first hand experience of the juggling act, who are engaged in trying to work out a work/family balance in their own lives, have least uncommitted time, and are the least likely to be able to reflect on and explore their experience. Full time workers, even those who are parents, have in general not undertaken the compromises involving departure from the ideal worker norm which are essential to develop understanding. Given their inability to resemble the ideal worker, part time working parents may have difficulty being taken seriously in the work place. If they fear career disadvantage, they may be reluctant to draw attention to their part time position. Most of us will be able to think of examples of colleagues who, although working part time, happily attend meetings at any time of the week, even outside normal hours, in order not to expose themselves as non-ideal workers.

The majority of mothers in part time work are, like the majority of women workers, in part time, casual or insecure positions without access to training or a career structure.<sup>2</sup>

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<sup>2</sup> See Equal Opportunity for Women in the Workplace Agency, *Equity Statistics* (compiled from December 2000 ABS data) at <[http://www.eeo.gov.au/resources\\_centre/statistics/statistics\\_index.html](http://www.eeo.gov.au/resources_centre/statistics/statistics_index.html)>, which show that 43% of employed women work part time, 32% of female

There are two main roles for part time work. One is to permit women and men in professional positions to reconcile their work and family commitments. Access to this opportunity may well be restricted by employers to those whom the employer is specifically interested in retaining in the workforce. The second, and much more common role of part time work is to maintain the reserve workforce available at the convenience of the employer. Questions about whether women are constrained into these positions, or whether they “freely choose” them, were explored in some depth by Joan Scott and Vicki Schultz in articles reflecting on the *Sears* litigation in the USA.<sup>3</sup> Ultimately Schultz argued for seeing “choices” within the context of constraints which are continually recreated and re-enforced. This would include workforce practices including sex discrimination, unequal pay and the maintenance of the ideal worker paradigm, and social policies such as a lack of non-parental sources of support for families.

This article, because it reflects on my experience, is concerned with professional women working in positions with a career structure. The university law school is my workplace; and has been relatively benign in relation to my decision to work part time after having children, which was a departure from the pattern of earlier women academics, who (both before and after the advent of maternity leave) virtually all returned to full time work within weeks or months of having children. After having children, I worked half time for six years, and recently returned to 75%. While this has allowed me the luxury of work time long enough to do more than the absolute minimum of commitments, it unfortunately coincided with a significant increase in teaching loads, which 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 others. I realised that the part time worker is not so easily understood, in theory or in practice.

Among the core issues are workload, entry to part time work, the limits of part time work, and what equality of opportunity might mean in assessing part time and full time workers. In the context of ever-increasing demands on workers in today’s workforce, what does it mean to be a part time worker in a job which is modelled on the ideal worker, where there is no limit to the number of hours which could be put in, or are expected to be put in, to show commitment or merit? This is a major issue in academic and professional work.

Secondly, for professional or senior positions, why are career track jobs only offered full time, so that the only way in which part time working parents can get a part time position is to convert an existing full time position? Not only does this limit mobility for part time workers, it rests on a pervasive underlying assumption that “real” jobs are full time, and employers should be reluctant to employ part timers (except where they

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employees are casual, and that 67% of part time casual employees are female: Work Organisation at 6.

<sup>3</sup> J Scott, ‘Deconstructing Equality versus Difference: or, the uses of Poststructuralist Theory for Feminism’ (1988) *Feminist Studies* 33; V Schultz, ‘Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases raising the Lack of Interest Argument’ (1990) 103 *Harvard Law Review* 1749.

need the flexibility of peak time only staffing). Is the assumption that senior positions cannot be undertaken part time based on fact, or is it pursued out of habit and because it serves the useful function (for some) of reserving good jobs for ideal workers? The assumptions that real work is full time and real commitment is virtually unlimited suggest that, despite lip service to the idea of merit, assessing work contribution has been measured more by quantity (or the gender or race of the worker) than quality of outputs.

When assumptions about full and part time work are challenged and deconstructed, it is less clear whether there are jobs which can *only* be done full time, and how they are to be identified. When is it unreasonable to refuse someone a part time position, either through converting an existing full time position, or at an entry position? Clearly employer preference is important, but for those arguing for a social system which takes account of families and the private lives of workers, it cannot be the only consideration, as the cases on access to part time work confirm. To move forward requires challenging the model of the ideal worker as the only worker who should be sought and rewarded, the only one who can make a worthwhile contribution to the workplace. We need new understandings of the contributions different types of workers make.

Finally, what does equal opportunity mean in this context? How does the ideal worker stereotype relate to career progression or, to put it negatively, career stagnation and the glass ceiling? Is the part time working mother inevitably on the mummy track, where it is assumed that she is not committed to work, gives it a low priority, and can be sidelined and bypassed for any challenging or developmental tasks? Is she just marking time until (if?) she returns to full time work? Is the ideal full time worker (male or female) the only one who has merit which deserves reward in the workplace?

In the next section, I look at some discussions by writers on work-family balance/conflict, and gender roles in Australia, which provide a vocabulary for analysis. Their work establishes that the requirement to work full time and excess hours in order to demonstrate commitment to the job or professionalism reflects and reinforces the male workforce norm of the ideal worker without domestic distractions or limitations, which most of us unquestioningly accept. It continues the privileging of the public sphere of work modelled on a (male) full time worker who is fully committed to work, excluding time for domestic commitment or a balanced life. It overlooks the fact that this is usually enabled by someone else's domestic efforts, especially where there are children. To continue these patterns is to reinforce the male model and to impede change.

To progress, feminists need to challenge both male and female paradigms under patriarchy, and to work out a new direction, one which allows for workers who have families as well as responsibilities to others in their lives, such as aging parents and family members with disabilities.

## 2. Theories about the role of part time workers

Virginia Held has noted that birth and death are central events of human experience,<sup>4</sup> but that they have been "misconceptualised" from a male perspective, where birth is

<sup>4</sup> V Held, 'Feminist interpretations of liberty and equality' in *Feminist Morality: Transforming Culture, Society and Politics* University of Chicago Press Chicago 1993 at 171.

seen as merely a natural process similar to animals whereas death is a distinctively human event. But while men and women all die, only women give birth. From the perspective of those who give birth, she claims, birth is a distinctive event which should lead to a world organised to be hospitable to and nurture children.<sup>5</sup> This reminds us that changing the paradigm of the worker is essential in the interests of children, not just of parents. But our society does not accept that areas such as employment policy should be designed around the needs of children. Instead, we banish children to the private sphere of the family, seeing them as only an issue for or responsibility of their parents.

In our society women's decision whether or not to have children carries a great deal of baggage which constrains choices. Many women may (quite realistically) conclude that they will only be able to succeed in the workforce/society/politics when they, like men, are not constrained by responsibility towards children, and they may decide that success is more important than having children, a choice few men confront. The unfortunate result of women making realistic choices on this basis is to reinforce the existing male and female paradigms. The paradigms are explained in slightly different ways in recent work on work/family by Juliet Bourke and Joan Williams, and some important threads have been identified by Belinda Probert.

Because part time work for mothers does not follow either of the traditional male or female paradigms (although it happens to be the most common work pattern for mothers in our society), it is undertheorised, especially in relation to the work force, the public sphere. Juliet Bourke has suggested that discrimination against women based on marital status, which began to lose influence with removal of the marriage bar on women's permanency in the public service, has transmuted in the modern world into discrimination based on family responsibilities.<sup>6</sup> While only the religious right care these days whether parents are married, many people still see mothers (but not fathers!) with children as marginal in the public sphere, unreliable, not serious about their work, and uncommitted. Alternatively, they may be seen as imposing costs on their fellow workers where they cannot themselves meet the excessive hours demanded in many jobs.

Feminists argue that the condition for women's emancipation is the demise of the male norm in every area of activity, so that difference from men should not translate into disadvantage. Equality, or freedom from discrimination requires the right to live a woman's life without disadvantage. In a workplace context this must allow for participation by parents with domestic responsibilities as one of the primary models of workforce engagement. But change is uneven and very slow, especially in the work force and other sites of public power such as the media, the boardroom and politics. Each individual living in this system has to make their decisions in relation to work and children in their own context and according to their own values. The accepted path of value in our society is to opt for achievement in the public sphere of work. This offers autonomy, visible achievement and material rewards, all of which are valued and celebrated. By contrast, engagement in the private sphere of the family may offer emotional rewards, but little sense of public value or achievement.

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<sup>5</sup> *Ibid* at 172-173.

<sup>6</sup> J Bourke, *Corporate Women, Children, Careers and Workplace Culture: The Integration of Flexible Work Practices into the Legal and Finance Professions*, Industrial Relations Research Centre, University of NSW Sydney 2000 at 20.

This is the result of the relative social valuation of paid work and child care, which feminists must challenge. For women to join the men in sole pursuit of the rewards of the public sphere of work is to accept the existing lack of balance in what is socially valued. There can be no equality unless the differential valuation of public and private, as well as male and female, is challenged. The valuation by society as a whole of the private sphere equally with the public must be a central element of feminist challenge. This is not of course to suggest that women should be confined to the private, or even necessarily associated with it. But it is essential to challenge the devaluation of the private as well as women's exclusion from the public, because both are foundations of women's disempowerment.

When women themselves continue to attach primary value to the public sphere because that is what is valued in our society, they reinforce the norm designed by and around men. I do not underestimate how difficult it is to avoid this in a society that so pervasively devalues the caring and domestic work normally done by women. Where women fail to value the private sphere equally if differently, they also devalue the unique and important capacities they have in relation to creating new life and nurturing children.

If the private and public were more equally valued (and by equally I do not mean "the same") then women's choices about having children would be less affected by the exposure to disadvantage and devaluation which is attached to becoming a mother, and they would be free to consider the rewards and benefits which it can provide, without having to sacrifice or postpone their position in the public sphere. Many suspect this will only begin to happen when men also seek the ability to balance their public and private lives, and that men's requirements will pave the way for establishment of the rights women currently need.

### *Bourke's Typology*

In her recent study of work and family practices in the legal and finance industries in Australia, Juliet Bourke used a three part typology to describe the stages of struggle over the last century by women for workforce equality, relating each to the position of family and market as gendered and hierarchically segregated locations. The story began with "honorary men" who were the exceptional women who sought access to senior "male" positions by conforming to male career patterns, and had no children as the price of their commitment to the workforce.<sup>7</sup> They were followed by "superwomen" who had both children and workforce success, but still achieved this by following male patterns of workforce commitment, remaining in full time employment. These are the women who were still completing work in hospital at the birth of their child. For both groups, the challenge was to achieve workforce success despite the prejudice against women, making compromises on other aspects of life along the way.

While the superwomen challenged the hierarchical segregation of the workforce, neither "honorary men" nor "superwomen" challenged the normative and gendered separation of the market and the family.<sup>8</sup> This challenge falls to the third group, the "neo-

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<sup>7</sup> Bourke, *ibid* at 48 gives as examples of "honorary men" the cases of *Price-Waterhouse v Hopkins* (1989) 490 US 228 and *Dunn-Dyer v ANZ Banking Group Ltd* [1997] HREOCA 52 (29 August 1997).

<sup>8</sup> Bourke, *supra* n 6 at 50-51.

superwoman” of today who is trying to dismantle “male designed work structures which separate responsibility for the family and the market, and serve to disadvantage women”<sup>9</sup> by insisting that she can have both family and market (work), through the use of family friendly policies such as part time work.

Bourke pointed out that taskforces looking at professional employment in law and the finance industry relied heavily on a male-defined concept of “professionalism” which involves full time commitment and availability for work. Thus working part time is seen as unprofessional, and is rare for lawyers and usually only achieved by renegotiation of a full time position by the incumbent. This is the pattern in all the important cases on part time work: *Holmes v Home Office*,<sup>10</sup> *Hickie v Hunt and Hunt*,<sup>11</sup> and *Bogle v Metropolitan Health Service Board*.<sup>12</sup> Bourke points out that part time work is assumed to be unavailable at senior levels, often leads to marginalised work being allocated to the holder, and the holder must return to full time work to progress their career.<sup>13</sup> Clearly, such male-serving definitions of professionalism need to be challenged as their effect is to mark the user of flexible work practices as unprofessional and not to be taken seriously.<sup>14</sup> This explains the concern of many workers with not using flexible work practices, or if they use them, concealing the fact. Bourke concludes that “the conflation of full time work with professionalism has obscured the importance of a gendered glass ceiling for neo-superwomen who take up flexible work practices to balance careers and family responsibilities”.<sup>15</sup>

Bourke’s framework does not deal with competition in the workforce, or how part time work is to be understood, and I think she is too optimistic about the chances for workforce change, given the threat to patriarchy that it would involve and men’s reluctance to lose their advantages. However, if men begin to adopt flexible work practices like part time work, then her optimism may be more justified.<sup>16</sup> Her work provides a vocabulary for discussing women’s different models of workforce attachment. I disagree with the term “neo-superwomen” which seems to me to be exactly what this group is trying to avoid: it suggests superhuman levels of effort, which is not the aim of most women who choose part time work in an effort to balance their lives and maintain a manageable commitment to both family and work. But it does highlight the fact that however we see ourselves, social stereotypes are still applied to mothers who work part time, and a decision to work part time for a period of time while her children are young and need more of her time, often still seems to disqualify a woman from being taken seriously at work.

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<sup>9</sup> *Ibid* at 51.

<sup>10</sup> [1984] 3 All ER 449.

<sup>11</sup> Human Rights and Equal Opportunity Commission [1998] HREOCA 8 (9 March 1998), digest reported (1999) EOC 92-910.

<sup>12</sup> Equal Opportunity Tribunal WA (2000) EOC 93-069 (7 January 2000).

<sup>13</sup> Bourke, *supra* n 6 at 52.

<sup>14</sup> *Ibid* at 42.

<sup>15</sup> *Ibid* at 54.

<sup>16</sup> Change will also depend on the reduction of unequal pay, since people deciding about workforce participation are likely to seek to retain maximum income with the lower income earner (at present most often the woman) more likely to leave or reduce their work.

### *Williams on Work and Family*

In her book *Unbending Gender*<sup>17</sup> Joan Williams discusses these issues in a way which contributes further to understanding. She begins by identifying two separate but mutually interdependent paradigms: the ideal worker and the domestic caretaker. Domesticity is “a gender system, comprised most centrally of both the particular organization of market work and family work that arose around 1870, and the gender norms that justify, sustain and reproduce that organization”.<sup>18</sup> The ideal worker and the domestic caretaker are constructed as both mutually exclusive and essentially interdependent: one the full time worker with no external limits on their commitment, the other the fully flexible parent who ensures the running of the family, the socialisation of children, and the domestic resourcing of both children and the ideal worker. No one who wants to have children can carry out both of these functions. The ideal worker must rely on someone else to caretake for him, and the domestic caretaker does not have time or flexibility to compete in the workplace, so she must rely on someone else for financial support. This normative structure clearly has no place for the working parent who has limited flexibility and no “wife” (domestic support worker at home).

Williams argues for the eradication of both norms. She argues that destabilising the ideal worker paradigm will lead to the fall of this interdependent structure. The role of the ideal worker is well summarised as follows:

the ideal worker can contribute financially to the family, but cannot make substantial time commitments to children or other family members without endangering his or her career. Pay and promotion systems, rules around working time, and the beliefs of those from previous generations who have succeeded as ideal workers and currently manage our organizations, are all built upon the presumption that only ideal workers should be hired, retained, and rewarded.<sup>19</sup>

The tendency to reward only the ideal worker in the workplace leads to a fear of discrimination by those who do not match up to it, and to discrimination-avoidance behaviour. This includes such features as delayed childbearing among professional women, as they seek to gain tenure, promotion or partnership before having children, and part time workers making themselves available for meetings at any time of the week to avoid drawing attention to the limits of their workforce participation, and so on. The *Pregnancy Report*<sup>20</sup> documents the reluctance of women to use maternity leave in their workplaces, to avoid being labelled uncommitted to their jobs.

For each individual a path must be chosen between the challenge they present in their own workplace to the ideal worker paradigm, and the extent to which they seek to conform to it despite the limitations of their position. On the one hand, family friendly

<sup>17</sup> J Williams, *Unbending Gender: Why Work and Family Conflict and What to do about it*, Oxford University Press New York 1999.

<sup>18</sup> *Ibid* at 2.

<sup>19</sup> R Drago, A Crouter, M Wardell and B Willits, *Final Report to the Alfred P Sloan Foundation for the Faculty and Families Project*, Pennsylvania State University, 14 March 2001 at 3. The report is available at: <<http://lsir.la.psu.edu/workfam/faculty&families.htm>>.

<sup>20</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work when pregnant*, HREOC Sydney 1999.



policies may be shunned by the ambitious as signalling lack of commitment, while on the other hand if they are effective and men still refuse to change, they risk cementing women into the double shift with full responsibility for children, and allowing men off the hook. Removing career disadvantage from part time work would make it much more attractive to both men and women. Perhaps this is only likely to occur when more men decide to take up the option, as male employers may be more able to understand the choices that men make, than those of women who will merely be understood as conforming to some element of the domestic caretaker paradigm.

### ***Conflicting Expectations of Women***

Finally, Belinda Probert has recently pointed out that aspects of Australia's gender culture are contradictory and place women in a no-win situation.<sup>21</sup> She examined attitudes to three major elements of Australia's gender culture: ideas concerning the appropriate social spheres for men and women, and how these spheres are related to each other; the way relationships between women and men are constructed and legitimated (for example, is there an expectation of financial dependency?) and finally how society determines the legitimate social spheres for carrying out caring work.<sup>22</sup> The current social expectation of women is that mothers should be moving back into the workforce,<sup>23</sup> and this is broadly accepted by women and throughout society. But at the same time:

Other critical elements of the gender culture are relatively unchanged. ... the care of pre-school children remains a matter of parental choice except for the very poor. In reality we still marginalize the care of children. In our interviews men expressed a stronger interest in forging closer emotional ties with their children, and many described their households as more symmetrical than the male breadwinner model. Yet hardly any worked hours or developed careers in ways that made any allowance for the presence of children. The revolution in expectations about women's labour market participation seems to have occurred without any corresponding revolution in the care of children and the domestic sphere.<sup>24</sup>

The contradictions flowing from current expectations that women should work, but men should still operate as ideal workers lead to a conflict faced by women trying to maintain both family commitments and work, to conform with social expectations. Probert notes the conflict between expectations that mothers should be employed, while at the same time they will act altruistically in the family in caring for children. They are then open to criticism for pursuing their own "selfish" interests through workforce participation, sacrificing the interests of their children (unlike men for whom this is acceptable). She concludes that gender equity in the workplace depends on the

development of a coherent family policy across the traditionally separate portfolios of industrial relations and social security, which removes the

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<sup>21</sup> B Probert, "'Grateful slaves' or 'self-made women': a matter of choice or policy?' *Clare Burton Memorial Lecture 2001*, RMIT University, 2 August 2001.

<sup>22</sup> *Ibid* at 4.

<sup>23</sup> *Ibid* at 7.

<sup>24</sup> *Ibid* at 10-11.

conflicting pressures on women and sets up incentives and structures to acknowledge the care of children and others.<sup>25</sup>

Work-family choices are very often discussed as, and assumed to be, the result of women's own private choices and preferences. Much of the debate about how non-parents are disadvantaged by family-friendly work practices treats children as no more than a lifestyle choice, the price of which should be paid by those who choose it. Constructing work/family as a question of individual choice attempts to put responsibility on the individual, and to undermine claims for justice on the basis that those who choose to have children should not complain, but should just accept the consequences of it, for example through discrimination avoidance behaviour. But arrangements around children should not be faced as an individual dilemma by each parent. Women cannot avoid having to make their choices about caring for their children in the context of the current organisation of the workforce and the current ideologies of gender, women's role, and the pre-eminence of the ideal worker which create unfair structures as a result of contradictory, incompatible expectations. Although individuals have to make choices, the results of those choices are constrained and conditioned by the social and policy framework within which the choices must be made. The continuance and maintenance of that framework is not neutral. An effective solution to the problem is unlikely to be found while the ideology of individual choice conceals the use of male paradigms, and inconsistent incompatible expectations of women, to limit their opportunities.

### 3. Part Time Work – Legal Approaches

This article does not aim to comprehensively state the legal position on part time work.<sup>26</sup> Instead, several recent cases concerning claims of discrimination relating to part time work or work-family conflict are examined to identify implicit understandings about part time work.

Although there have been several decided cases on access to part time work, the law provides only limited protection to mothers working part time.<sup>27</sup> In Western Australia it has been held that requiring a period of full time work to convert a temporary teaching position into a permanent one was indirectly discriminatory.<sup>28</sup> In several cases it has been decided that a refusal to allow a woman to work part time after return from maternity leave was discrimination, as the refusal had not been adequately justified according to the applicable statutory standard. The 1985 English case *Holmes v Home*

<sup>25</sup> *Ibid* at 12.

<sup>26</sup> In 1990 Australia ratified ILO Convention 156 on *Workers with Family Responsibilities* 1981, which requires governments to "make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without discrimination and, to the extent possible, without conflict between their employment and family responsibilities". But legal implementation has been limited. A ground prohibiting termination of employment on the ground of family responsibilities was added to the *Sex Discrimination Act 1984*: s.14(3A) and the *Workplace Relations Act 1996*: s. 170CK(2)(f), and see s.93. State equal opportunity legislation prohibits discrimination on the basis of family responsibilities (WA), parental or carer status (Victoria, Queensland, Tasmania, ACT, NT) or carer's responsibilities (NSW), but few indirect discrimination cases have tested these provisions.

<sup>27</sup> R Hunter in 'Part-time work and indirect discrimination' (1996) 21 *Alternative L J* 220 outlined early cases in Australia, eg where advancement depended on full time work.

<sup>28</sup> *Speering v Ministry of Education* (1993) EOC 92-513; *Nicholls v Ministry of Education* (1994) EOC 92-573.

*Office*<sup>29</sup> led the way when the refusal of the Home Office to allow Ms Holmes to return to work part time after the birth of her child was held to amount to indirect sex discrimination because no adequate justification for it had been provided. In Australia, it was held in *Hickie v Hunt and Hunt*<sup>30</sup> in 1999 that a requirement that a contract partner in a law firm work full time (when she returned to work after maternity leave) amounted to indirect discrimination. Despite its impact, this decision is disappointing as a precedent because Commissioner Elizabeth Evatt, acting as a hearing commissioner of the Human Rights and Equal Opportunity Commission, reached her conclusion on the facts of the particular case, and gave very little guidance on what principles might guide courts or tribunals in future. Although no appeal was brought against the decision, and the Hearing Commissioner's reputation gives it some authority, as a decision of an administrative tribunal it has no specific legal precedent value.

Perhaps more valuable is the decision of the WA Equal Opportunity Tribunal in *Bogle v Metropolitan Health Service Board*,<sup>31</sup> in which the issues were more fully discussed. Mrs Bogle held a full time supervisory dental nurse position, and sought to return to it part time in a job share arrangement after her return from adoption leave. While *Hickie* was decided on the basis of indirect discrimination under the *Sex Discrimination Act 1984 (Cth) (SDA)* prior to the 1995 amendments,<sup>32</sup> *Bogle* relied on the family responsibilities ground in the *WA Equal Opportunity Act 1984*. The decision contains a lengthy and useful discussion of the reasons given by the Metropolitan Health Service Board as to why part time employment was not suitable for Mrs Bogle's supervisory position. Ultimately however, the Tribunal found that the Board had made its decision on the basis of belief and intuition, which did not provide an adequate justification for concluding the job could not be done effectively through a job share arrangement. While this is only a tribunal decision, it is fully reasoned and a useful guide to dealing with prejudices or beliefs concerning the need for supervisory, managerial or high level jobs to be undertaken full time.<sup>33</sup>

Two other decisions on related work-family issues also throw light on this area. *Laz v Downer*<sup>34</sup> concerned availability for overtime without notice, a big problem for anyone responsible for child care, while *Schou v Victoria*<sup>35</sup> dealt with availability of home-based work. In *Laz*, the Federal Court upheld a claim of unlawful termination under s.170CK(2)(f) of the *Workplace Relations Act 1996* brought by Ms Laz, a personal assistant to the managing director of a company. Disputes had arisen over her obligation to work overtime at short notice. She worked overtime when it was arranged in advance, but on certain days could not do so without advance notice as her husband was studying and was not available to care for their 18 month old. Moore J held after

<sup>29</sup> [1984] 3 All ER 449.

<sup>30</sup> [1998] HREOCA 8 (9 March 1998), digest reported at (1988) EOC 92-910.

<sup>31</sup> Equal Opportunity Tribunal WA, 7 January 2000, (2000) EOC 93-069.

<sup>32</sup> Among the 1995 amendments to the *Sex Discrimination Act 1984* was the introduction of ss 7B and 7C according to which the onus of (dis)proving reasonableness as a defence to indirect discrimination was moved from the complainant to the respondent.

<sup>33</sup> The rationale that part time workers will be insufficiently available to clients or colleagues can be seen to be based on prejudice or stereotype when it is raised only in against part timers, even though full time staff are also frequently unavailable through travel, meetings with clients, attendances at court or other commitments, holidays and many other reasons. See eg. P Hutton Raabe, 'Pluralistic Work and Career arrangements' in S Lewis and J Lewis (eds), *The Work-Family Challenge; rethinking employment* Sage London 1996 128 at 134.

<sup>34</sup> (2000) EOC 93-111.

<sup>35</sup> (2000) EOC 93-100 (20 April 2000, liability) and (2000) EOC 93-101 (20 July 2000, damages).

examining her employment contract and arrangements, that a requirement to work overtime without notice was not an inherent requirement of her job, and that the constructive termination of her position was unlawful. The remedy sought, and granted, was reinstatement.

In *Schou v State of Victoria* the Victorian Civil and Administrative Tribunal (VCAT) upheld a complaint of indirect discrimination on the ground of parental status when the State failed to implement an agreement it had made with Ms Schou, an experienced Hansard sub-editor, that she could continue to work full time but undertake two of her full time days at home using a modem it would provide. She had sought this arrangement to help reconcile her work with the needs of her younger son who suffered asthma and separation anxiety, which was expected to pass over time. Ms Schou had tried to request part time work on two earlier occasions but had been told that it was not possible. These occasions were found not to involve discrimination because the Tribunal decided that she had dropped her request for part time work, it had not been refused. Thus the decision concerned home-based work as part of a full time job, rather than access to part time work. Ms Schou resigned when the modem was not provided over the following months.

The VCAT decision was set aside by the Supreme Court,<sup>36</sup> which held that the Tribunal had erred in law when it failed to consider the reasonableness of the “attendance” requirement, that Hansard employees should attend the office for all their working time. Harper J’s judgment was unsympathetic to the use of the indirect discrimination provisions to seek adjustment, even temporarily, to what he regarded as the justifiable terms of the contract of employment, to meet the domestic needs of an employee. He pointed out that that employee would be receiving a “favour” which other employees might also want, and questioned where the limits of such a requirement might be set, for example where an employee has a chronically sick child. He quoted with apparent approval the dissenting judgment of Brennan J in *Waters v Public Transport Corporation*<sup>37</sup> disapproving the potential breadth of impact of the indirect discrimination provisions of the *Equal Opportunity Act*.<sup>38</sup> Harper J commented that social changes “should nevertheless not be made by forcing the Equal Opportunity Act to do that which the democratically elected Parliament did not intend it to do”.<sup>39</sup> However it is hard to see how Harper J knew or suspected that this use of the Act would be beyond what the democratically-elected Parliament might have intended, as he did not discuss in detail the interpretation of the indirect discrimination provisions of the Act. In statutory interpretation, parliament is usually taken to have intended the consequences which a legal interpretation of its language leads to. Nor did the judgment refer to any of the relevant case law on interpreting indirect discrimination: neither the decision of the majority of the High Court in *Waters* (which upheld the broad potential of the indirect discrimination provisions), nor any of the cases where its application to similar circumstances has been explored (including *Holmes*, *Hickie*, and *Bogle’s* cases. However, many of the rather unsympathetic statements in the judgment are not part of the ratio, which merely required VCAT to rehear the case and make a finding of fact on the reasonableness of the full time attendance requirement.

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<sup>36</sup> *The State of Victoria v Shou* [2001] VSC (Unreported, Harper J, 31 August 2001) 321.

<sup>37</sup> (1991) 173 CLR 349.

<sup>38</sup> *Ibid* at 372.

<sup>39</sup> [2001] VSC 321 at para 15.

The case highlights the contradiction between the State as policy setter advocating family friendly measures generally and in its own workforce, and the reality of the State as employer, acting tenaciously in defence as a litigant. In *Bogle*, the WA Tribunal noted the existence of state government policy and publications designed to facilitate flexible work practices including part time work, while the Victorian Tribunal did not mention these at all. The major challenge in the work-family area is to ensure not only that policies are adopted which allow progress, but that those policies can be actually taken up, and used without disadvantaging workers, thereby moving into the reality of people's working arrangements.

None of the Australian decisions on part time work or job share has been directly affirmed by a court, and doubts about their precedent value must remain. Ultimately this series of cases may provide some entitlement for women already in a position to convert that position to permanent part time. But rights provided in this way are provided negatively and do not necessarily contribute to the development of new paradigms of work or new understandings of what the worker contributes. Whether law can prevent exclusion of part time workers from career progression has not yet been explored. Nor does current law provide any basis for challenging the practice of offering professional career track jobs only full time. While a complaint of discrimination could be brought, there is so little guidance on the law that it may be very difficult to combat the underlying assumptions in favour of traditional practices, such as that responsible, authoritative or powerful jobs can only be done full time, and that part timers are not suitable for senior positions. Some help may be gained from section 7C of the *Sex Discrimination Act* (SDA) which puts on the respondent in an indirect discrimination case the onus of showing the reasonableness of a challenged practice which has a disproportionate effect on a protected group. On the other hand, a case which is not conciliated under the SDA now has to go for adjudication in the Federal Court or Federal Magistrates Court, where the loser will have to pay the winner's costs. In cases against large employers like large companies and governments, it is common for an expensive legal team to be used, increasing the size of the risk of losing and paying costs that a complainant must confront. This is a disincentive to test the law in areas of uncertainty or where recognition of social change is sought and promotes use of state anti-discrimination systems where costs are rarely awarded.

The use of sex discrimination law is a very limited avenue for development of the law. What is needed is to develop policy and the legal framework for family friendly measures, as well as mechanisms to encourage their use and challenge prejudices. While there are sources at the international level, such as the ILO Convention 156 on the Workers with Family Responsibilities (ratified by Australia in 1990), which could provide a basis for developing policy, implementation has been limited and slow, perhaps because many in positions of power can see no reason to disturb existing workforce ideologies, which serve their needs well.

## Conclusion

It has been said that there has been a "massive social revolution, with women working outside the home in unprecedented numbers. Women's and children's lives have altered enormously. Astoundingly, men's lives have barely altered at all".<sup>40</sup> If full time

<sup>40</sup> C Sherry, 'Men at work leave women holding the baby' *Sydney Morning Herald*, 9 March 1998, 17, quoted by Bourke, *supra* n 4 at 39.

work and dealing with a work overload are elements of the male paradigm, it is easy to see how they can be used to exclude the majority of women who have children from positions of seniority or power in the workforce. Limited offerings of part time positions results in women concentrating in casual and insecure badly paid work which further reinforces their lack of bargaining power within the family. When women follow either of these patterns the male norm is cemented. The challenge is to increase the spread and acceptability of part time work for men and women, and to increase the acceptability of caring for children for both men and women. Developing a better model of part time work and its rationale is an important step along the way.