AUSTRALIAN EMPLOYMENT LAW, WORK, CARE AND DIVERSITY

Anna Chapman

B Com (Melb), LLB (Hons) (Melb), LLM (Melb), PhD (Adel)
Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne

Australian Employment Law, Work, Care and Diversity

Anna Chapman[*]

Conflict between work and care is one of the most significant issues for workers in contemporary Australia, as in other countries. Empirical evidence reveals that employees, and especially women employees, report that a poor fit exists between the obligations and expectations of their paid working lives and their responsibilities to care for others, such as children and elderly parents.[1]

Expansion in Work and Care Legal Mechanisms

Since the early 1970s a raft of legal initiatives designed to assist workers to better manage collisions between work and care has been developed in Australian employment law. An early initiative related to unpaid maternity leave for women, which became a federal entitlement in the private sector in 1979, was extended to adoption in 1985, and became available to (male married) spouses as paternity leave in 1990. These basic standards continue in similar terms today as 'parental leave', although now extended to same sex couple relationships.[2] In 2011 these standards were bolstered by a national scheme of payment for primary carers of babies and infants whilst they are on leave from work, and from 1 January 2013 a modest additional payment, known as 'dad and partner pay', took effect.[3] In addition to leave and payment in

[*] B Com (Melb), LLB (Hons) (Melb), LLM (Melb), PhD (Adel), Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne. I thank especially Rosemary Owens, who generously gave her time, guidance and encouragement in relation to my doctoral thesis on which this paper draws. I also thank Andrew Stewart, Jill Murray and Joellen Riley. This document is a condensed version of a full paper.

[1] Conflict between work and care in Australia is now well documented through a substantial body of literature. See eg, the publications of the Centre for Work + Life, University of South Australia; B Pocock, N Skinner and P Williams, *Time Bomb: Work, Rest and Play in Australia Today*, NewSouth Books, Sydney, 2012; B Pocock, *The Work/Life Collision: What Work is Doing to Australians and What to Do about It*, Federation Press, Sydney, 2003.

[2] *Fair Work Act* 2009 (Cth) (*FW Act*) Part 2-2 Div 5. The legislation provides for up to 12 months of unpaid leave for the purpose of caring for a newborn baby or adopted child, with a right to request (but not necessarily have granted) a further 12 months of unpaid parental leave. In terms of returning to work, the employee has a right to return to her or his pre-parental leave position, or, if that position no longer exists, to another position closest in status and pay to the employee's pre-parental leave position (s 84).

[3] *Paid Parental Leave Act 2010* (Cth) ('*PPL Act*'). This scheme provides a government-funded payment of up to 18 weeks at the national minimum wage for the primary carer of a baby or adopted child. Although funded by the government, the scheme is administered in most cases by the employee's employer. The *PPL* Act was amended by the *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* (Cth). The amendments provide for an eligible working father, other partner of the birth mother or adoptive parent, to apply for up to two weeks of pay at the national minimum wage. The payment is solely funded and administered by the government. The objective is stated to be to provide financial assistance to a second parent to take more time

relation to birth or adoption, in a series of federal test cases in the mid 1990s leave in order to care for a member of the employee's 'immediate family' or 'household' was recognized. This type of short term leave, has also been continued in similar terms today as 'personal/carer's leave', 'compassionate leave' and 'unpaid carer's leave'.[4]

As well as developing new forms of leave to care, care responsibilities have been identified as a relevant factor in the industrial regulation of overtime.[5] In addition, in 2009 important extensions to existing non-discrimination protections in the industrial sphere were enacted by providing redress in relation to 'adverse action', including a form of discrimination, across all stages of employment, including hiring, training and to dismissal, on the ground of 'family or carer's responsibilities', as well as sex, sexuality and race.[6] The 2009 Act also introduced a statutory mechanism enabling parents and carers to request a change in their working arrangements in order to accommodate care responsibilities to a pre-school aged child or a child with a disability.[7]

Since the early 1970s there has also been considerable development in relation to anti-discrimination law.[8] Attributes of unlawful discrimination have been incrementally expanded, including since the 1990s grounds of 'family responsibilities', and 'carer' responsibilities and status,[9] that take their place alongside long standing attributes such as race and sex,[10] and more

---

off work to support new mothers, and to bond with the baby or adopted child (new s 3A(2)). The second parent must not be on paid leave, or at work, during the period they are in receipt of 'dad and partner pay'.

[4] *FW Act* Part 2-2 Div 7. The standard provides for 10 days of paid personal/carer's leave each year for use in relation to the employee's own illness or injury, or to care for an ill or injured member of the employee's 'immediate family' or 'household'. The legislation also provides for short periods of unpaid carer's leave (two days per occasion), in addition to paid compassionate leave in relation to the death or life threatening illness or injury of a member of the employee's immediate family or household (of two days per occasion).

[5] *Re Working Hours Case July 2002* (2002) 114 IR 390, 465 [278] (cl 1.2.2); *FW Act* s 62(3)(b). The *FW Act* provides that an employer must not request or require an employee to work more than 38 hours per week (if the employee is a full-time employee), unless the additional hours are 'reasonable' (s 62(1)). Note that the Fair Work Amendment Bill 2013 proposes to enact a requirement that employers consult with employees about proposed changes to rosters and working hours, including the impact of the proposal on family or caring responsibilities.

[6] *FW Act* s 342, s 351.

[7] *FW Act* Part 2-2 Div 4. A similar request mechanism was first developed through the *Parental Leave Test Case 2005* (2005) 143 IR 245, and owes its heritage to the UK scheme. The *FW Act* establishes a process of request, a time frame on the employer's response (21 days), and requires that where an employer rejects a request, the employer's written response must include details of the reasons for the refusal. The employer is only entitled to reject a request on 'reasonable business grounds' (s 65(5)), although the merits of an employer's rejection are not reviewable as a contravention of the legislation. See further Anna Chapman, 'Is the Right to Request Flexibility under the Fair Work Act Enforceable?' (2013) *Australian Journal of Labour Law* (forthcoming).

[8] I use 'anti-discrimination law' in the conventional sense to refer to federal, State and Territory statutory schemes designed to address discrimination and bring about equal opportunity, including the *Racial Discrimination Act 1975* (Cth) ('*RDA*'); *Sex Discrimination Act 1984* (Cth) ('*SDA*'); *Equal Opportunity Act 2010* (Vic) ('*EOA* (Vic)'); Anti-Discrimination Act 1977 (NSW) ('*ADA* (NSW)'); *Equal Opportunity Act 1984* (SA) ('*EOA* (SA)').

[9] See eg, *SDA* s 4A, s 7A, s 14(3A) 'family responsibilities' (inserted by the *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* (Cth)); *EOA* (Vic) s 6(i) 'parental status or status as a carer' (the identification of the status of 'carer' was first enacted with the enactment of the *Equal Opportunity Act 1995* (Vic)); *ADA* (NSW) s 49S 'responsibilities as a carer' (inserted by the *Anti-Discrimination Amendment (Carers' Responsibilities) Act 2000* (NSW)); *EOA* (SA) s 85T(1)(e) 'caring responsibilities' (inserted with the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA)).

[10] See eg, *RDA*; *SDA* s 5; *EOA* (Vic) s 6(m), (o); *ADA* (NSW) Part 2, Part 3; *EOA* (SA) Part 3, Part 4.

recent grounds related to sexuality.[11] As well as the recognition of new grounds, two State and Territory anti-discrimination statutes prohibit discrimination in the form of a failure by an employer to provide reasonable accommodation in relation to an employee's care responsibilities.[12]

Existing Scholarship

The gender dimension of work and care conflict in the Australian situation has been explored, both in the empirical scholarship documenting it, and in the literature examining the legal initiatives that seek to respond to it.[13] Other forms of diversity, and intersections with gender, namely sexuality and race, have also been explored in a series of papers, most of which have been written by this author. This work provides close examinations of specific initiatives of Australian employment law designed to assist workers to better manage work and care conflict, such as legal entitlements to unpaid parental leave and personal/carer's leave, the government-funded paid parental leave scheme, and working time rules that provide that care responsibilities are relevant to a consideration of whether overtime is reasonable.[14] This conference paper draws on this earlier scholarship to produce a meta-narrative across the various Australian legal

[11] See eg, *Equal Opportunity Act* 1995 (Vic) enacted a new ground of 'lawful sexual activity'; *ADA* (NSW) Part 4C 'homosexuality' (enacted in 1982); *Equal Opportunity Act* 1984 (SA) Part 3 'sexuality' (enacted in 1984). There remains no legally enforceable ground of sexuality in federal anti-discrimination law, although at the time of writing a government Bill seeks to enact such a ground into the *SDA*: Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

[12] *EOA* (Vic) s 17, s 19, s 22, s 32 (inserted into the *Equal Opportunity Act 1995* (Vic) by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)); *Anti-Discrimination Act* (NT) s 24 (which applies in relation to all attributes covered in the Act). A positive obligation on employers may be imposed by the *ADA* (NSW) s 49V(4) and s 49U, although this has not been tested in case decisions. In addition, in the context of indirect discrimination claims and the reasonableness component, the New South Wales tribunal has required employers to at least consider and sometimes to make reasonable efforts to accommodate an employee's request to alter her working arrangements for care reasons: *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [105]; *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [84].

[13] On the legal dimension, see eg, Rosemary Owens, 'Engendering Flexibility in a World of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenges to Legal Norms*, Hart Publishing, Portland, Oregon, 2006, 329; Rosemary J Owens, 'Taking Leave: Work and Family in Australian Law and Policy' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives*, Oxford University Press, Oxford & New York, 2005, 237; Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society*, Ashgate Publishing, Aldershot, UK, 2002; Beth Gaze, 'Working Part Time: Reflections on "Practicing" the Work-Family Juggling Act' (2001) 21 *Queensland University of Technology Law & Justice Journal* 199.

[14] See eg, Anna Chapman, 'Australian Anti-Discrimination Law, Work, Care and Family' (Working Paper No 51, Centre for Employment and Labour Relations Law, University of Melbourne, January 2012); Anna Chapman, 'The New National Scheme of Parental Leave Payment' (2011) 24 *Australian Journal of Labour Law* 60; Anna Chapman, 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (2009) 18 *Griffith Law Review* 453; Anna Chapman, 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (2007) 33 *Hecate* 28; Anna Chapman, 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (2005) 23 *Law in Context* 65. See also Marc Trabsky, 'Deconstructing the Heteronormative Worker or Queering a Jurisprudence of Labour: A Case Study of Family and Personal/Carer's Leave in Australian Labour Law' (2005) 23 *Law in Context* 202.

initiatives that draws out the broader picture regarding work, care, and diversity, as it relates to the subjectivities of gender, sexuality and race, including the intersections between them.[15]

Is Diversity Important?

A question might be asked as to whether it is important to examine how well the terrain of Australian work and care legal initiatives accounts for diversity. This conference paper argues that it is. Indeed, close attention to diversity is not only warranted, it is necessary. This is so for a number of reasons, including the agendas of social inclusion, equality and non-discrimination, which are now well recognized as objectives of Australian employment law. Valuing diversity is central in the goal of social inclusion.[16] Equality has been, and remains, a particular policy goal of anti-discrimination legislation, with the achievement of equality and the elimination of discrimination articulated as objectives across Commonwealth, State and Territory anti-discrimination law.[17] Indeed, the object of the federal industrial statute refers to providing a system of workplace relations that promotes 'social inclusion for all Australians' by 'protecting against' 'discrimination', as well as 'assisting employees to balance their work and family responsibilities'.[18]

Where legal rules articulate entitlements in ways that exclude forms of work and care arrangements found in diverse communities such as queer communities and Indigenous communities, this undermines the goal of social inclusion. It reduces or negates the employment entitlements of the excluded, and in this way undermines the opportunity for people to fully engage in, and enjoy the benefits of, both employment and meaningful relationships including family and community. This reinforces economic and social disadvantage in excluded communities.

The Argument of the Conference Paper

The argument of this conference paper unfolds in a number of stages. The paper takes as its starting point the breadwinner model of work and care institutionalised in Australia in the early part of the 20th Century. This model is strongly associated with a 1907 decision of the Australian Arbitration Court known as the *Harvester* judgment.[19] In this case Justice Higgins determined that for a wage rate to be 'fair and reasonable', it must be sufficient to support the 'labourer's

---

[15] The paper uses gender, sexuality and race as illustrations of diversity. The focus on these subjectivities is not intended to suggest that these are the only, or the main, aspects of diversity relevant to work and care legal mechanisms.

[16] See eg, the special issue on social inclusion in (2010) 45 *Australian Journal of Social Issues;* Boyd Hunter, 'Indigenous Social Exclusion: Insights and Challenges for the Concept of Social Inclusion' (2009) 82 *Family Matters* 52. Social inclusion is an explicit policy goal of the current federal Labor Government and diversity is recognized explicitly in the federal government's framework of action on social inclusion which includes a reference to providing support for 'strong, diverse communities free from discrimination': Australian Government, 'A Stronger, Fairer Australia', Commonwealth of Australia, Canberra, 2009.

[17] See eg, *SDA* s 3; *EOA* (Vic) s 3; *ADA* (NSW) long title; *EOA* (SA) preamble.

[18] *FW Act* s 3(d), (e).

[19] *Ex parte H V McKay* (1907) 2 CAR 1 ('*Harvester*'). For further discussion see Chapman (2005), above n 3; Anna Chapman, 'Regulating Family through Employee Entitlements' 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*, Federation Press, Sydney, 2006, 454 at 458-9.

home of about five persons'.[20] A central assumption made by the court, and adopted subsequently in the industrial system, was that the worker was the sole wage earner for himself, his wife and two or three children.

As Berns has highlighted, an often unacknowledged implicit corollary assumption underlying *Harvester*'s constitution of the worker as the male breadwinner is that the worker did not have responsibilities to undertake care, as all care needs fell to the worker's wife, who was for that reason not engaged in the labour market.[21] In this way *Harvester* presented a strongly gendered understanding of work and care, where work was constituted as male waged labour of the public world of the labour market, separated (or insulated) from care which was constituted as female and of the private world of the home and family.[22] In this way work and care were located in two different – and gendered – people, in an interdependent – married – couple relationship. Workers were male breadwinner husbands and carers were female homemaker wives.

Benchmarked against *Harvester* the legal initiatives developed since the early 1970s in Australia do recognize and support some aspects of diverse work and care arrangements. Most obviously legal support is given to women being concurrently both waged workers of the labour market and also parents. Women have a legal right to leave for the purpose of giving birth and caring for a baby or infant, with a right to return to their pre-leave position. In addition, most of the work and care legal entitlements have been framed since 1990 in a gender neutral manner.[23] Access by men to the industrial and anti-discrimination law initiatives, such as parental leave and personal/carer's leave, provides recognition that male workers may have care responsibilities, and indeed may have substantial care responsibilities, possibly being on (unpaid) parental leave for up to 24 months as the primary carer of a baby, infant or adopted child. Finally, industrial and anti-discrimination entitlements have been extended to same sex couple relationships. Generally the States and Territories acted in this regard earlier than the Commonwealth Parliament, which only moved to recognize same sex relationships in industrial law in 2009.[24] Together these three dynamics represent a shift away from the *Harvester* gendered and heterosexed model of work and care to a formally gender neutral and non-heterosexed constitution of work and care.

Although the range of Australian legal mechanisms on work and care have addressed some key aspects diversity, in other ways they have been deficient in recognizing diverse work and care arrangements. There are three main, and intersecting, categories of shortcomings. These relate to:

- law's continued separation of work and care, inherent in employment law's act of recognizing care responsibilities;

[20] *Harvester* at 6.
[21] Berns, above n 2, 4-5, chapter 6.
[22] Of course the separation of work and care can be dated to earlier times in the processes of industrialisation and the emergence of industrial law in the United Kingdom: Chapman (2006), above n 30, 456-7.
[23] Exceptions relation to physiological matters such as pregnancy related illness, miscarriage, transfer of a pregnant employee to a safe job, and breastfeeding: see eg, special maternity leave (*FW Act* s 80) and transfer to a safe job (*FW Act* s 81). See also the anti-discrimination ground of breastfeeding (*EOA* (Vic) s 6(b)).
[24] Standards of unpaid parental leave, personal/carer's leave were extended with the enactment of the *FW Act* to cover same sex 'de facto partners' who were also defined to be part of an employee's 'immediate family': *FW Act* s 12 definitions of 'de facto partner' and 'immediate family'. Note that dismissal on the ground of 'sexual preference' has been prohibited in the federal industrial statute since the enactment of the *Industrial Relations Reform Act 1993* (Cth).

- substantive limitations in the legal rules themselves relating to, for example, eligibility; the legal concept of 'reasonableness'; exemptions and exceptions and especially those that relate to religious beliefs and institutions; a lack of enforceability in the right to request a change in work arrangements;
- the definitions and concepts used to recognize care relations.

In relation to this latter, legal concepts have moved from being explicitly heterosexed to a position of recognizing same sex couple relationships. However, the terms on which recognition has been granted must be critiqued. A two adult couple and a primary caregiver model is revealed as the normative care relation of employment law. Articulations of law's couple generally reference marriage-like indicators such as living together, pooled finances and the public recognition of the relationship. This model may not sit well with relationships in queer communities, and it fails to account more broadly for diverse care relationships outside two adult couples, and arrangements where the care of babies and infants is shared more evenly between adults, such as in lesbian couples. There has been little attempt to recognize care practices in extended Indigenous care networks. In these ways the *Harvester* tradition continues.

A Proposal

The deficiencies in the legal frameworks revealed in the conference paper present challenges in thinking about how Australian work and care legal initiatives might more authentically account for diverse work and care arrangements. The continuing separation of work and care presents a complex challenge, as this separation forms part of the architecture of both industrial law and anti-discrimination law, and indeed legal liberalism itself, and for this reason remains a conundrum. Leaving the issue of work and care separation to one side, the paper offers a proposal which may address key shortcomings in the substantive dimensions of the industrial and anti-discrimination mechanisms examined, in addition to the question of how best to elaborate the definition or concept of care protected. It is a relatively modest proposal, staying largely within the confines of the legal rights and obligations as they currently exist, but reshaping them from within. The proposal would bring a more standard approach to these complex legal initiatives bestowing rights and obligations, with the benefits of certainty, consistency and clarity for workers, employers and others. The paper does not express a view on whether its proposal is politically viable, or the practical realities of implementing it, especially across different statutory schemes and jurisdictions. This would no doubt be challenging. Rather, the proposal is put forward as a broad concept, for further practical development, rather than as a detailed political plan or drafting agenda. Nonetheless, the broad concept appears feasible.

The proposal contains two main dimensions. The first addresses how best to articulate the care responsibilities recognized, and the second concerns the development of a test of justification to replace both the existing use of the concept of reasonableness in the different industrial and anti-discrimination mechanisms, and the range of existing exceptions and exemptions in those legal rules.

Conclusion

The main conclusion of this paper is that the legal initiatives of Australian industrial law and anti-discrimination law designed to address collision between work and care provide less than

adequate recognition of diversity in work and care practices. In order to take account more fully of diverse work and care arrangements, attention is needed to a number of matters. First, the substantive shortcomings of the various schemes need to be addressed. In addition, the definitions and concepts of care articulated in the legal mechanisms of industrial law and anti-discrimination law require replacement. Law's separation of work from care also presents a thorny challenge in the project of recognizing diverse work and care arrangements. This latter implicates the very foundations of industrial law and anti-discrimination law which lie in the separation of labour market work from other aspects of life.