

# CONFERENCE SEX DISCRIMINATION ACT SILVER ANNIVERSARY

---

1 & 2 October 2009  
Canberra, Australia

Reproducing Discrimination:  
Promoting the equal sharing of caring work  
in CEDAW, at the ILO and in the SDA

Caroline Lambert

Hosted by the  
ANU College of Law



## **Reproducing Discrimination: Promoting the equal sharing of caring work in CEDAW, at the ILO and in the SDA**

Dr Caroline Lambert, YWCA Australia

I'd like to acknowledge that we meet today on the land of the Ngunnawal people and pay my respects to owners, past and present. Thank you to Margaret Thornton and her team for putting together this conference. It's a great pleasure to be here with my colleagues on this panel.

As we know, the profile of Australian workplaces has changed significantly in recent years as more women have entered the workforce and more women, and some men, have sought workplaces that better respond to their combined roles as workers and carers of family members.<sup>1</sup> What I am interested to explore today is how the *Sex Discrimination Act* has responded to caring work (commonly practiced by women), and to what extent it has reflected the international labour and human-rights obligations which relate to this issue.

Fundamental to my analysis of the efficacy of the SDA in responding to caring work is an engagement with the figures of the "ideal worker" and the "domestic care giver"<sup>2</sup> in liberal legal and economic theory. My colleague Sara Charlesworth argues that workplaces

"continue to be based on the presumption of an 'ideal worker' with few domestic responsibilities, full-time work and little or no time off to care for family."<sup>3</sup> The assumption of course is that the ideal worker has a corollary in the private sphere: the "full-time carer engaged in family work of housework and childcare, whose unpaid work subsidises the paid work of the ideal worker."<sup>4</sup>

---

<sup>1</sup> Sara Charlesworth, 'Managing Work and Family in the 'Shadow' of Anti-Discrimination Law' (2005) 23 *Law in Context* 88, Barbara Pocock, *The Work/Life Collision: What Work Is Doing to Australians and What to Do About It* (2003), Don Edgar, *The War over Work: The Future of Work and Family* (2005).

<sup>2</sup> Joan Williams, *Unbending Gender: Why Work and Family Conflict and What to Do About It* (2000) cited in Charlesworth, 'Managing Work', above n 1, 8.

<sup>3</sup> *Ibid.*

<sup>4</sup> Joanne Conaghan, 'Women, Work and Family: A British Revolution?' in Joanne Conaghan, Michael Fisch and Karl Klare (ed), *Women, Work and Family: A British Revolution?* (2004) cited in *Ibid.*

This dichotomy is inherently gendered with men taking on the ideal worker role and women the domestic care giver role, the “mummy track”.<sup>5</sup>

In the first section of this paper I will explore the international framework, looking to CEDAW, the ILO Maternity Leave Convention and the ILO Workers with Family Responsibilities Convention to establish their engagement with caring work. I will argue that five elements can be discerned and that these constitute a framework for assessing whether the SDA contributes to the realisation of international legal obligations with respect to caring work. In this presentation I will examine one particular component, the terms and conditions which reflect the needs of workers with family responsibilities.

### **Women’s labour**

Rights associated with women’s labour are articulated in a range of international instruments, both within the UN system and also by the ILO.<sup>6</sup> With the exception of CEDAW and the ILO Convention on Workers with Family Responsibilities, the standards relating to women’s labour have typically encompassed productive work. In considering women’s experiences of productive work, international legal instruments have addressed a range of non-discrimination issues, including pay equity and conditions at work. The focus on conditions at work has provided the entry point for consideration of reproductive labour issues, particularly discrimination on the basis of pregnancy or maternal responsibilities. The best known example is the ILO Maternity Leave Convention.<sup>7</sup>

---

<sup>5</sup> Australian Human Rights Commission, *Striking the balance: Women, men, work and family. Discussion paper*, 2005, 57.

<sup>6</sup> The ILO identifies the “key gender equality conventions” to be the “International Labour Organisation Equal Remuneration Convention (Number 100),” (Adopted 29 June 1951, ILO Document Number C100, Entered Into Force 23 May 1953), the “International Labour Organisation Discrimination Convention (Employment and Occupation) (Number 111),” (Adopted 25 June 1958, ILO Document Number C111, Entered Into Force 15 June 1960), the “International Labour Organisation Workers with Family Responsibilities Convention (Number 156),” (Adopted 23 June 1981, ILO Document Number C156, Entered Into Force 11 August 1983) and the “International Labour Organisation Maternity Protection Convention (Number 183),” (Adopted 15 June 2000, ILO Document Number C183, Entered Into Force 7 February 2002), ILO, “Women’s Employment,” 23. CEDAW, as will be discussed, addresses the issues, as does the ICESCR. For a review and critique of these documents see Valerie Oosterveld, “Women and Employment,” in *Women and International Human Rights Law*, ed. Kelly Askin and Doreen Koenig (Ardsley, NY: Transnational, 1999).

<sup>7</sup> The first convention on maternity was adopted by the ILO in 1919 (Convention Number 3), which was revised in 1952 by Convention Number 103, and revised again in 2000 (Convention Number 183).

However, most international legal instruments have struggled to articulate a notion of individual rights or state responsibilities at the point at which reproductive labour obligations have constituted an opportunity cost and have removed (predominantly) women from the productive labour sphere. The opportunity cost extends beyond lost contributions to the productive labour sphere into the loss of women from community building and leadership and political participation. The result has been that reproductive work, where there has been no intersection with the productive labour sphere, has been largely ignored by mainstream UN or ILO treaties.

In contrast, the CEDAW Committee has addressed consistently productive and reproductive labour in its general recommendations and in its Concluding Comments (CCs). Most strikingly, the recognition accorded to women's reproductive work by the CEDAW Committee has been unique. Underpinning the conceptualisation of reproductive and productive labour by the CEDAW Committee is their understanding of gender based stereotypes and the obligation, established at Article 5, to reconfigure gender relations and to challenge gender based stereotypes.<sup>8</sup>

The CEDAW Committee recognises that women's participation in the productive labour force can be significantly affected by two key reproductive labour functions: pregnancy and reproductive labour responsibilities. The relevant provisions of CEDAW are outlined on the slide. In focusing on the intersection of productive labour with reproductive labour, CEDAW shares some ground with the ILO Convention on Workers with Family Responsibilities in that both treaties call for governments to be more supportive of workers looking after children and immediate family members, again outlined on the slide.

### ***Reproductive labour***

The CEDAW Committee has addressed reproductive labour, as a stand alone issue, in two key ways: by challenging gendered assumptions about reproductive labour and through an examination of unremunerated reproductive labour in the private sphere. The latter approach in particular has assessed the opportunity costs to women (and the small number of men) who engage in unremunerated reproductive labour.

The CEDAW Committee has articulated a more theorised approach to reproductive labour than the ILO, challenging the social values ascribed to caring labour. For example, the

---

<sup>8</sup> CEDAW Committee, *General Recommendation 25, on Temporary Special Measures*, paragraph 7.

general recommendation on equality in marriage and family relations draws attention to the different value and regulation ascribed to human activities in the public and private spheres. The recommendation acknowledges the lesser value attached to women's labour: "In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior".<sup>9</sup> The CEDAW Committee has challenged the discriminatory nature of such a practice, pointing to the necessity of these forms of labour as a means for the "survival of society".<sup>10</sup>

The second way the CEDAW Committee has developed an understanding of reproductive labour is in its reflections on the contours of unremunerated reproductive labour. In particular, the CEDAW Committee has considered the impact of women's unremunerated reproductive labour on women's participation in a range of public and private sphere activities. For example, a recommendation on women in political and public life analyses the impact that reproductive labour has on women's political and public participation: "in all nations, the most significant factors inhibiting women's ability to participate in public life have been the cultural framework of values and religious beliefs, the lack of services and men's failure to share the tasks associated with the organization of the household and with the care and raising of children".<sup>11</sup> The recommendation argues that "relieving women of some of the burdens of domestic work would allow them to engage more fully in the life of their community".<sup>12</sup> It also notes that the economic dependence wrought by this arrangement, in addition to women's double burden of productive and reproductive work, diminishes their political independence and their capacity to fully engage in public life. The recommendation challenges the work cultures associated with public and political work which, it asserts, manifests in long or inflexible hours. It argues that these factors also inhibit the capacity of women to contribute effectively in public and political work.<sup>13</sup>

### **International framework to reconcile work-family responsibilities**

Taken together these conventions provide states parties with a comprehensive range of actions that should be taken to enable workers to reconcile work-family responsibilities, specifically the

---

<sup>9</sup> CEDAW Committee, *General Recommendation 21, on Equality in Marriage and Family Relations*, UN Document Number A/49/38 at 1 (New York: United Nations, 1994), paragraph 11.

<sup>10</sup> *Ibid.*, paragraph 12.

<sup>11</sup> CEDAW Committee, *General Recommendation 23, on Women in Political and Public Life*, UN Document Number A/52/38/Rev.1 at 61 (New York: United Nations, 1997), paragraph 10.

<sup>12</sup> *Ibid.*, paragraph 11.

<sup>13</sup> *Ibid.*

1. Prohibition of pregnancy-based discrimination in preparing for work, entering into work, participating in work, advancing at work (CEDAW and ILO Maternity Leave Convention)
2. Provision of paid maternity leave, for a period not less than 14 weeks (CEDAW and ILO Maternity Leave Convention for provision of paid maternity leave; ILO Maternity Leave Convention for timeframe)
3. Terms and conditions which reflect the needs of workers with family responsibilities, including the prohibition of maternity-based discrimination (CEDAW, ILO Maternity Leave Convention), breast feeding breaks (ILO Workers with Family Responsibilities Convention) and prohibition of family responsibilities being grounds for dismissal (ILO Workers with Family Responsibilities Convention and CEDAW)
4. The promotion, development or provision of child and family care by public or private means (CEDAW and ILO Workers with Family Responsibilities Convention)
5. Education to challenge social, economic and cultural values on family responsibilities and the function of maternity (CEDAW and ILO Workers with Family Responsibilities Convention).

In the remainder of this paper I will discuss the positive and negative impacts of the SDA on the terms and conditions which reflect the needs of workers with family responsibilities.

### **Terms and conditions which reflect the needs of workers with family responsibilities**

Article 8 of the ILO Workers with Family Responsibilities Convention, which provides that family responsibilities shall not constitute a valid reason for termination of employment,<sup>14</sup> was used as a basis for amending the SDA to incorporate a limited protection for workers with family responsibilities in the area of termination of employment. There was an intent at the time that this provision be extended further in the future,<sup>15</sup> and the Senate Legal and Constitutional Inquiry into the efficacy of the SDA called for the provisions to be expanded,<sup>16</sup> however to date this has not been realised.

While it is clear that, in a *de jure* sense, the SDA now meets the obligation to protect workers with family responsibilities from termination of employment by virtue of their family responsibilities, two questions remain. The first, whether the broader provisions on family responsibilities at the international level have been implemented, and the second, whether the

---

<sup>14</sup> ILO, 'Workers with Family Responsibilities Convention', art 8.

<sup>15</sup> John Von Doussa and Craig Lenehan, 'Barbequed or Burned? Flexibility in Work Arrangements and the *Sex Discrimination Act*' (2004) 27 *University of New South Wales Law Journal* 892, 896.

<sup>16</sup> Recommendations 13 and 14; see also Recommendation 30

judicial interpretation of the *de jure* provisions contributes to the *de facto* realisation of the obligations? In the discussion that follows I will discuss three key issues that arise as limitations to anti-discrimination law:

1. the challenges of the comparator and causation in the SDA
2. the limitations of indirect discrimination.
3. the model of equality pursued

### ***Challenges associated with the comparator and causation in the SDA family responsibilities provisions***

Sections 7A and 14(3A) of the SDA establishes that it is discriminatory behaviour if an employer dismisses an employee with family responsibilities because of their actual family responsibilities or because of characteristics that generally appertain to or are imputed to people with family responsibilities. The scope of family responsibilities is defined in sections 4 and 4A and relates to the responsibility to “care for or support a dependent child or immediate family member, being a spouse, adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee.”<sup>17</sup> AHRC note that the definition of a *de facto* spouse is limited to heterosexual relationships.<sup>18</sup> The judiciary have incorporated constructive dismissal into their understanding of termination of employment which has enabled its application to a broader range of facts.<sup>19</sup>

The case law arising from sections 7A and 14(3A) has proved controversial for the reasoning associated with identifying the comparator group and factors of causation.<sup>20</sup> Within the context of the comparator, the dominance of the “ideal worker” model has stymied decision-makers. Direct discrimination requires that a comparison be made between the complainant and a “straw group”, proving that the complainant would be treated less favourably than the comparator because of their family responsibilities. The difficulty has arisen in the identification of the comparator group. In *Song v Ainsworth Game Technology Group Pty Ltd* Raphael FM found that the applicant had been constructively dismissed by reason of direct

---

<sup>17</sup> AHRC, 'Striking the Balance', above n 5, 83.

<sup>18</sup> Von Doussa and Lenehan, above n 15, 901-3; AHRC, 'Striking the Balance', above n 5, 83.

<sup>19</sup> AHRC, 'Striking the Balance', above n 5, 85.

<sup>20</sup> Von Doussa and Lenehan, above n 15.

discrimination on the grounds of family responsibilities.<sup>21</sup> The applicant was of the view that she had negotiated an arrangement with her employer to leave work between 2.55pm and 3.15pm each day to move her son between kindergarten and child care. Her employer disputed the fact that she had negotiated an arrangement and directed her to work the hours as stipulated in her contract, 9.00am to 5.00pm with a lunch break from 12.00 to 12.30pm. The applicant refused and continued to leave work between 2.55pm and 3.15pm. As a result, the employer determined that her status moved from full-time to part-time and her hours were reduced to 9am to 3pm, with a half hour lunch break.<sup>22</sup> Von Doussa and Lenehan argue that, “although not entirely clear” it seems that Raphael FM found that the comparator group included such groups of people as “employees who need to leave the workplace to smoke or were allowed flexibility in their work hours for other reasons.”<sup>23</sup>

### ***Limitations of indirect discrimination***

Given the limitations inherent in the restriction of family responsibilities provisions to direct discrimination,<sup>24</sup> AHRC notes that

rather than relying on the limited family responsibilities provisions, many women complainants are using the sex and pregnancy discrimination provisions of the SDA to pursue allegations of workplace failure to accommodate family responsibilities. In particular, the indirect sex and pregnancy discrimination provisions of the SDA have proved useful to complainants.<sup>25</sup>

Sections 5(2) and 7(B1) are the relevant provisions in the SDA, defining indirect discrimination and the reasonableness test respectively. Several cases are germane:<sup>26</sup> *Hickie v*

---

<sup>21</sup> *Song V Ainsworth Game Technology Pty Ltd* (2002) Volume FMCA 122 ('Song') Australasian Legal Information Institute (Austlii) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FMCA/2002/31.html?query=song%20v%20ainsworth>, Accessed 3 September 2006.

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

<sup>23</sup> Von Doussa and Lenehan, above n 15, 898.

<sup>24</sup> HREOC, 'Striking the Balance', above n 5, 83

<sup>25</sup> *Ibid.*, 85.

<sup>26</sup> Given the focus of this paper on federal anti-discrimination law several relevant cases from state/territory jurisdictions have been excluded from discussion. The most important of these relate to the litigation of Ms Schou against the State of Victoria. For excellent arts on the issues raised and implications of please see Therese MacDermott and Rosemary Owens, 'Recent Cases: Equality and Flexibility for Workers with Family Responsibilities: A Troubled Union?' (2000) 13 *Australian Journal of Labour Law* 20, Beth Gaze, 'Context and

*Hunt and Hunt*,<sup>27</sup> *Mayer v Australian Nuclear Science and Technology Organisation*,<sup>28</sup> *Escobar v Rainbow Printing Pty Ltd*,<sup>29</sup> *Howe v Qantas Airways Ltd*,<sup>30</sup> and *Kelly v TPG Internet Pty Ltd*.<sup>31</sup> These cases have explored the principle that women returning to work following maternity leave should be able to negotiate flexible terms that enable them to maintain a workforce attachment and meet family care responsibilities. A central component of the cases has been the judicial notice that far more women than men seek part-time work to enable them to care for young children. Thus, in *Hickie* refusal to provide for part-time work arrangements constituted indirect discrimination on the basis of sex.<sup>32</sup> In *Hickie* Commissioner Evatt asserted that it was

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.<sup>33</sup>

This statement has become the authoritative articulation of the issue. In *Mayer* Driver FM drew on *Hickie* in finding that the applicants had experienced indirect sex discrimination on the basis that she was denied available part-time work which would have enabled her to reconcile work and family responsibilities.<sup>34</sup> However, in *Howe* a more limited approach was taken. While Driver FM found that the respondent had subjected the applicant to pregnancy-based discrimination in failing to allow her to access sick leave when pregnancy stopped her

---

Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review*, Fiona Knowles, 'Misdirection for Indirect Discrimination' (2004) 17 *Australian Journal of Labour Law* 1, Margaret Thornton, 'Feminism and the Changing State: The Case of Sex Discrimination' (2006) 21 *Australian Feminist Studies* 151.

<sup>27</sup> *Hickie v Hunt*.

<sup>28</sup> *Mayer V Australian Nuclear Science and Technology Organisation* (2003) Volume FMCA 209 ('Mayer') 3 September 2006 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FMCA/2003/209.html?query=mayer>

<sup>29</sup> *Escobar*.

<sup>30</sup> *Howe V Qantas Airways Ltd* (2004) Volume FMCA 242 ('Howe') 3 September 2006 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FMCA/2004/242.html?query=howe%20v%20qantas>

<sup>31</sup> *Kelly V TPG Internet Pty Ltd* (2003) Volume FMCA 584 ('Kelly') Australasian Legal Information Institute <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FMCA/2005/291.html?query=kelly%20v%20tpg> 3 September 2006

<sup>32</sup> *Hickie*.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Mayer*.

from flying, he dismissed the claim that the respondent's refusal to provide the applicant part-time work at the previous level constituted constructive dismissal on the grounds of indirect sex discrimination.<sup>35</sup> Nonetheless, he did assert that

family responsibilities is not necessarily a characteristic appertaining generally to women. The point is that 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) s5(2) of the SDA operates to protect women against indirect sex discrimination in the performance of that care giving role.<sup>36</sup>

Nonetheless, as shall be discussed below, Driver FM still dismissed the application for indirect discrimination on the basis that the respondent did not impose a condition of full-time work and was unable to offer part-time work at the previous level because of conditions established in the Enterprise Bargaining Agreement.<sup>37</sup> In *Kelly Raphael* FM argued that a part-time return to work following maternity leave was a benefit rather than a condition or requirement.<sup>38</sup> This judgment has been distinguished subsequently by Driver FM in *Howe* and caution has been expressed by lawyers and academic publications as to its veracity.<sup>39</sup> The question of whether the SDA provides for a part-time return to work from maternity leave on the basis of family responsibilities remains unresolved.

### **Equality models**

One of the most significant challenges which arises in the context of the family responsibilities cases is the model of equality which is being promoted through the decisions and the legislative provisions. Two issues arise: one, the reliance of indirect sex discrimination claims on formal equality in promoting the view that women are the primary care givers (discussed in the paper prepared for the proceedings of this conference). Two, the

---

<sup>35</sup> Ibid.

<sup>36</sup> Howe.

<sup>37</sup> Ibid.

<sup>38</sup> Kelly.

<sup>39</sup> Howe; Freehills, *Employee Relations Bulletin: Pregnancy Prohibits Promotion* (2004) Freehills, <[http://www.freehills.com/private/publications\\_2193.asp#pregnancy](http://www.freehills.com/private/publications_2193.asp#pregnancy)> Accessed 10 September 2006; Von Doussa and Lenehan, above n 15.

promotion of a formal model of equality in the line of reasoning associated with the test of reasonableness.

The CEDAW Committee have asserted, very strongly, that a formal equality approach will not satisfy the realisation of CEDAW obligations: identical treatment will not suffice, rather biological, social and cultural constructions of difference must be addressed along with a contextual consideration of the gender differences so as to ensure that measures go “towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.”<sup>40</sup> This, combined with the CEDAW obligations on challenging the gendered representation of family responsibilities, results in a clear expectation that for substantive equality to be achieved laws, policies and programs will need to transform social relations. Yet, in their review of recent court cases on family responsibilities under the indirect sex discrimination provisions of the SDA Von Doussa and Lenehan note that there may be some limitation to the legal reasoning.<sup>41</sup> While a significant component of the legal response to discrimination on the basis of parental responsibilities, Commissioner Evatt’s articulation of sex discrimination on the basis of women’s familial responsibilities, combined with the limited application of the provisions only to women, has the potential to harden community and judicial perceptions that women are the ‘natural’ providers of care for small children.<sup>42</sup> AHRC concur and note that

Together with workplace cultures that may discourage men from claiming a better balance between their paid work and family responsibilities, this failure of the federal anti-discrimination framework effectively locks men into the breadwinner model.<sup>43</sup>

While the indirect discrimination provisions of the SDA are commonly understood to be working towards the achievement of substantive equality, in this instance they contribute to the perpetuation of particular ideas about natural caring capacities of women over men. They

---

<sup>40</sup> CEDAW Committee, ‘General Recommendation 25’, above n8, paras 8, 10.

<sup>41</sup> Von Doussa and Lenehan, above n 15, 901.

<sup>42</sup> Ibid.

<sup>43</sup> AHRC, Striking the Balance, above n 5, 86.

therefore do not meet the measure of substantive equality established in the CEDAW *General Recommendation on Temporary Special Measures*.

The second issue which arises relates to the model of equality being pursued in some of the findings around reasonableness. In *Howe* Driver FM asserted that the facts did not support a finding of indirect discrimination. In the absence of part-time work at the level she had previously been employed the applicant chose to take a demotion because the lower position provided her with increased flexibility. Rather than acknowledging the invidiousness of the decision the applicant was forced to make, Driver FM asserts that

the applicant has chosen to characterise that transfer as a ‘demotion’ but, if it was, it was a demotion that the applicant sought and was granted in order to give her the flexibility she needed to provide care for her young second child.<sup>44</sup>

It is not beyond the realms of interpretation to infer from this that Driver FM is of the view that the quality of a woman’s workforce attachment is of little relevance so long as her workforce attachment is maintained. He seems to suggest that having satisfying work that will contribute to progression rather than regression in a career is to be sacrificed at the altar of family responsibilities. This view undermines the transformation of workplace culture to one which would contribute to the realisation of the substantive equality objective of CEDAW. In this respect the figure of the “ideal worker” and “domestic care giver” are not so much challenged as reinscribed.

## **Conclusion**

What conclusions can be drawn from this discussion about the contribution of sex discrimination law to the implementation in Australia of international legal obligations relating to recognition of caring work? As noted, the SDA proscribes direct discrimination on the basis of family responsibilities in the context of termination of employment. As noted in my paper, the indirect sex discrimination provisions of the SDA have also been interpreted to provide remedy against workplace practices which have discriminated against female workers with family responsibilities. However a legal lacuna remains for male workers with family responsibilities, and at one level the provisions in the SDA actually contribute to the

---

<sup>44</sup> Howe.

perpetuation of women as the primary care givers and perpetuate a model of formal as opposed to substantive equality.