

**GENDER EQUALITY FOR PARENTS  
IN AUSTRALIA AND GERMANY**

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## I INTRODUCTION

On face value, gender equality appears to be a goal of the Australian people, it is even considered an ‘Australian Value’.<sup>1</sup> But it has long been clear that there are many social and institutional barriers to gender equality in Australia, especially in the context of work and parenting.

In this essay I will look at these barriers and the approaches made by various federal governments, to achieve or even frustrate gender equality for working parents. I will then take a small tour of the same issue in a different context, in Germany, and evaluate the current approach in the Federal Republic of Germany.

In my conclusion I will suggest some appropriate changes for the Federal Government of Australia, in order to promote and eventually achieve substantive gender equality.

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<sup>1</sup>*Commonwealth of Australia Migration Regulations 1994* (Cth) sch A.

## II EQUALITY, WORK AND LIFE

This essay will essentially discuss two issues: gender equality and work-life balance. The issue of gender equality will look at how the current system disadvantages women, in particular poorer women, through discrimination based on gender roles. Achieving work-life balance involves recognising that the standard working environment is unfriendly to people who take on family responsibilities. It should be clear that these two issues are intimately related to each other and I will discuss the extent of that throughout this essay.

### A Reasoning

Reasoning for promoting work-life balance can be roughly divided into three categories:

- Equality<sup>2</sup>
- Maximising wellbeing<sup>3</sup>
- Economic prosperity<sup>4</sup>

Common approaches taken by governments can be characterised by the three ‘orientations’ proposed by Baird: ‘welfare orientation’, ‘industrial orientation’ and ‘business orientation’.<sup>5</sup> Under a welfare-oriented approach, the State provides welfare for parents (typically mothers). The other orientations leave it to private companies to offer suitable arrangements, either based on negotiations with the employee or union (‘industrial orientation’) or from management itself (‘business orientation’). Arguments of economic prosperity of course feed the business orientation, while wellbeing benefits would theoretically drive negotiations for more suitable conditions as part of the ‘industrial orientation’. A government applying the ‘welfare orientation’ seeks equality by funding women for their unpaid work. Ironically the opposite is achieved, as traditional gender roles are strengthened.

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<sup>2</sup>Economic security, health, amount of work. See also Richenda Gambles, Suzan Lewis and Rhona Rapoport, *The Myth of Work-Life Balance* (2<sup>nd</sup> ed, 2006) 36

<sup>3</sup>Of both the parents and the child. See Ibid 37.

<sup>4</sup>For example population, workforce participation and turnover.

<sup>5</sup>Marian Baird, ‘Orientations to Paid Maternity Leave: Understanding the Australian Debate’ (2004) 46(3) *Journal of Industrial Relations* 259, 264.

But these three traditional orientations lack any coherent direction toward universal equality. Just like the flawed welfare approach, the ‘business orientation’ entrenches existing inequality, only helping highly valued, skilled workers in areas where women are needed. The ‘industrial orientation’ is susceptible to a range of external influences and priorities and results often reflect the skewed balance of power between negotiators. Because of these inherent and inescapable flaws, even in a combined approach, Baird argues a new ‘equality orientation’ is required.

I will now look at the nature of the three categories of reasoning in turn. Along with their corresponding approach orientations, they will provide a basic framework and vocabulary for understanding the efforts made by the governments in Australia and Germany, discussed in the second half of this essay.

## 1 *Equality*

The central issue as far as this discussion is concerned, is the inherent inequality in the typical allocation of work and benefits. Although many Australians believe otherwise, the current system very much disadvantages women, in particular poorer women, through discrimination based mostly on gender roles. Even men suffer, albeit to a much lesser extent. Significant social pressure on men in general to dissociate from family responsibilities is in itself harmful, but these pressures also make it difficult for men who step outside of their standard gender role, a change that is necessary for gender equality. In any case, wealthier women and men very much have a choice, even if they have been trained to ignore it. It is the poorer women and men who are hit the hardest and even more recent political efforts to address gender inequalities are inappropriate for poorer families.

In Australia, women are more pressured to take on family responsibilities than men. Mothers are strongly discouraged from working to the perceived detriment of children, while fathers are not.<sup>6</sup> Male culture actively promotes behaviour that avoids family and household responsibilities, and although there has been a small increase in men’s role in ‘social reproduction’,<sup>7</sup> this is more ‘helping’ than ‘sharing’.<sup>8</sup>

<sup>6</sup>Barbara Pocock and Jane Clarke, *Can't Buy Me Love? Young Australians' views on parental work, time, guilt and their own consumption* (2004).

<sup>7</sup>Family responsibilities and housework.

<sup>8</sup>Irene Hardill, *Gender, Migration and the Dual Career Household* (2002) 22.

Because of this social pressure, women are less likely to be able to pursue a ‘career’ than men. Women are underrepresented in management<sup>9</sup> and are on average paid less.<sup>10</sup> The problem is that career advancement comes only with uninterrupted full-time work, ability and commitment (hours),<sup>11</sup> forming an ‘ideal worker’. This ideal worker emphasises cultural notions of masculinity, which means women and men need to act distinctly masculine to succeed in a valued profession and enjoy the high status it brings.<sup>12</sup> Because of the existing salary gap, in couples it is usually the male career that is emphasised,<sup>13</sup> the woman would undertake family and household responsibilities and adjust her working hours to the detriment of her career.<sup>14</sup>

Of course women too want to pursue ‘upward social mobility’ through status<sup>15</sup>, financial well-being and discretion, personal identity,<sup>16</sup> and self actualisation.<sup>17</sup> Society rewards only paid work with money and status, unpaid work is simply ‘expected’. Women who do work have to deal with a salary inequality<sup>18</sup> and when they take leave they are less likely to be promoted.<sup>19</sup>

Although men are generally in a better position than women to pursue a healthy work-life balance, most men do not. The gendered ‘breadwinner’ role is also detrimental to them, and discrimination is used to keep roles in place. The ‘breadwinner’ role comes with additional demands, stress<sup>20</sup>

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<sup>9</sup>Only 28% of Australian managers are women: Australia Bureau of Statistics, *6105.0: Australian Labour Market Statistics April 2008* (2008) 28

<sup>10</sup>The average full-time weekly wage for women is \$691.10 compared to \$1 059.70 for men. Men’s wages are also rising more quickly: Ibid 45

<sup>11</sup>Hardill, above n 8, 8.

<sup>12</sup>Ibid 9.

<sup>13</sup>Ibid 35.

<sup>14</sup>Ibid 36.

<sup>15</sup>Ibid 44.

<sup>16</sup>Ibid 2.

<sup>17</sup>Michele Paludi and Presha Neidermeyer (eds), *Work, Life, and Family Imbalance* (2007) *xvi*.

<sup>18</sup>Ibid *xv*.

<sup>19</sup>Ben Schneiders, ‘Maternity leave stalls promotion’, *The Age*; Australian Public Service Commission, *Submission to the Inquiry into Maternity, Paternity and Parental Leave* (2008); Australian Public Service Commission, *State of the Service Report 2006–07* (2007). Note that it is difficult to know why this is so, whether there is discrimination or if the women chose not to accept more demanding positions, or that they were already in senior positions with less scope to advance: Australian Public Service Commission, above n 19, 3.

<sup>20</sup>Australian Medical Association, *Position Statement on Men’s Health* (2005) 1.

and much longer hours.<sup>21</sup> Half of the men working more than 45 hours a week would like to work less hours,<sup>22</sup> fathers in particular are expressing a desire for greater involvement with their children.<sup>23</sup> Naturally, children would also prefer to have more time with their working fathers.<sup>24</sup> It is then surprising that men with dependent children tend to work on average more than men of the same age without dependent children.<sup>25</sup> The long hours at work, away from family experienced by men who fulfil the ‘breadwinner’ role affect men disproportionately and this environment causes men to be more likely to be unhappy.<sup>26</sup>

Poorer families and sole parents often find providing and caring for children alongside work particularly difficult, and have less choice about the matter than those better-off or in dual-income families. In addition to that, most of the political approaches to issues of equality and wellbeing are ineffective and inappropriate for non-standard families. For many people, financial stability depends very highly on their ability to continuously work. Those with better financial resources can avoid unpaid labour, because they can afford to commodify it, substituting some of the work for consumable goods and paid domestic services.<sup>27</sup> But those that fall outside of the expected or traditional demographic are often neglected; for example unemployed women often have their chances of finding a job reduced or eliminated during pregnancy. Political approaches to the issue have tended to promote full-time parenting over child-care solutions, which is not an option for many families. Lone parents find it on average for more difficult to pay bills,<sup>28</sup> In 2004–2006, there were on average 486 000 one-parent families with children

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<sup>21</sup>2 062 100 men work more than 45 hours a week, compared to 660 800 women: Australia Bureau of Statistics, above n 9, 32. Working more than 48 hours a week ‘represents probably the largest occupational health and safety risk faced by Australian workers today’: The Australian Council of Trade Unions, *Working Hours And Work Intensification Background Paper* (2003)

<sup>22</sup>Ibid.

<sup>23</sup>Australian Bureau of Statistics, *4102.0: Australian Social Trends* (2006); Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, men, work and family* (2005).

<sup>24</sup>Australian Bureau of Statistics, above n 23; Pocock, above n 6.

<sup>25</sup>The Australian Council of Trade Unions, *Future Of Work: Work And Family Background Paper* (2003) 6.

<sup>26</sup>Human Rights and Equal Opportunity Commission, *It’s about time: Women, Men, Work and Family – Final paper* (2007) 41.

<sup>27</sup>Hardill, above n 8, 21.

<sup>28</sup>Australian Bureau of Statistics, *4102.0: Australian Social Trends* (2007) 53.



under 15 years.<sup>29</sup> Lone parents are also much less likely to have a tertiary education,<sup>30</sup> making their ‘career’ advancement all the more difficult.

## 2 *Wellbeing*

The second set of reasoning behind promoting sensible work-life balance is individual wellbeing. Generally, wellbeing relates to physical and mental health and the wellbeing I will consider is that of both parents and children.

Addressing wellbeing means taking a broad range of considerations into account: the health of the mother, child and father, their exposure to stress, worry, concern and pleasure and any factors that may raise, reduce or limit exposure to states of wellbeing in the future. This now includes issues of poverty, freedom, equality, justice, security, harmony, access to community and self-actualisation. This scope of this sounds impossibly inclusive, but it is relatively easy to identify which aspects of wellbeing might be affected by gender inequalities and current parenting and working norms.

The importance of the wellbeing of children is well recognised. The World Health Organisation recommends that babies should be exclusively breastfed for at least 6 months.<sup>31</sup> More generally, children long for time with each of their parents, something that cannot be substituted with money or time with another parent.<sup>32</sup>

The other central figure for considering wellbeing is of course the mother. Extra health considerations during and after pregnancy are needed and have been generally afforded in Australia. Flexible working conditions and accommodations in the wider community<sup>33</sup> must be available throughout pregnancy. For the sake of the mother’s health, a recovery period after giving

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<sup>29</sup>Ibid 48.

<sup>30</sup>Australian Bureau of Statistics, above n 28, 50.

<sup>31</sup>Deborah Gough, ‘Discontent over union maternity leave plan’, *The Age*; World Health Organization, *Health aspects of maternity leave and maternity protection; Statement to the International Labour Conference* (2000); Australian Bureau of Statistics, above n 28, 133; Human Rights and Equal Opportunity Commission, *Submission to the Productivity Commission on the Inquiry into Paid Maternity, Paternity and Parental Leave* (2008) 19; Australian Breastfeeding Association; Maternity Coalition; Health aspects of maternity leave and maternity protection, *Statement to the International Labour Conference* (2 June 2000).

<sup>32</sup>Pocock, above n 6, *x*.

<sup>33</sup>For example priority parking, seating and changing rooms.

birth is recommended,<sup>34</sup> a minimum of 14 weeks leave is widely accepted.<sup>35</sup> More generally, social pressures on working mothers can cause unhealthy guilt and stress. A work-earn-consume cycle<sup>36</sup> is stimulated by the market's abuse of this close relationship between mothering, guilt and consumption.<sup>37</sup>

Any working parent is exposed to a range of unfortunate practices, such as travel and long hours. The fundamental incompatibility of work and family life can put strain on a couple's relationship; women who do the 'double shift' are more vulnerable to separation and divorce.<sup>38</sup> The sheer number of work hours in itself for these women is both physically and mentally unhealthy behaviour.

### 3 *Other justifications*

Although equality and wellbeing are two extremely important issues, and should be persuasive in themselves, many political and economic systems rely on other sources of justification for implementing changes. The most obvious of which is economic advantage. Australia's previous government and Germany's current government were only persuaded to act by declining fertility rates, which will supposedly age the population and put financial strain on our welfare systems. These justifications are only mentioned briefly for completeness, as they are out of the scope of this essay.

Of particular concern to some people is the idea that Australia's fertility rate is 'below replacement',<sup>39</sup> although it has one of the highest fertility rates in OECD countries and migration is currently feeding Australia's net population growth.

Whether or not Australia is and will be underpopulated is contested, especially between economically oriented parties<sup>40</sup> and environmentally oriented

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<sup>34</sup>ILO Maternity Protection Convention

<sup>35</sup>Australian Bureau of Statistics, above n 28, 133.

<sup>36</sup>Barbara Pocock, *The work/life collision: what work is doing to Australians and what to do about it* (2003).

<sup>37</sup>Ibid 97.

<sup>38</sup>Hardill, above n 8, 22.

<sup>39</sup>In 2008, Australia's rate is 1.79, Germany's is 1.36. Ignoring migration, replacement is considered to be 2.1 in developed nations.

<sup>40</sup>Such as the previous Liberal Government, see Peter Costello (ed), *Intergenerational Report 2007* (2007) 12.

parties.<sup>41</sup>

There are also arguments that work-life balance may be economically beneficial because of increased workforce participation (by women) and productivity, not to mention the loss of skill and talent for the labour force, from parents who leave the workforce or accept less challenging jobs for the flexibility they offer.<sup>42</sup> Leave entitlements and flexible arrangements have been shown to improve job satisfaction and help retain workers.<sup>43</sup>

## B *Doing something about it*

There are a number of ways in which a government can act to promote gender equality and work-life balance. Some of these are listed briefly below, to give an idea of the scope and nature of possible approaches. I will move through the practical details of many of these as I discuss the actual approaches taken by Australia and Germany.

They include:

- Maternity leave
- Compulsory or encouraged paternity leave
- Anti-discrimination measures for parents
- Taxation
- Childcare
- Encouraged/compulsory workplace flexibility
- Strict maximum work hours
- Transparency of company family policies
- More women in company directorship

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<sup>41</sup>Such as *Sustainable Population Australia*: <http://www.population.org.au/>.

<sup>42</sup>Human Rights and Equal Opportunity Commission, above n 26, 77.

<sup>43</sup>Ben Schneiders, 'Paid parent leave 'good for business'', *The Age*; Australian Public Service Commission, above n 19; Australian Council of Trade Unions, *Submission to the Productivity Commission's Inquiry into Paid Maternity, Paternity and Parental Leave* (2008).

- Strengthened communities
- All quality jobs available on a part-time basis (eg job-sharing)
- Gender equality education in schools, universities and workplaces

### III AUSTRALIA

Australia's current legal, political and social structures and dialogue have been shaped considerably by its history, in particular, the recent decade of the Howard Government. Australia's history goes some way to explaining why the current reform dialogue differs so much from countries like Sweden and Germany, and so I will provide a brief outline of some relevant factors of Australia's past, followed by an outline of current state of social policy for parents.

#### A *Background*

Australian (male) workers have over the years been able to secure paid sick leave, annual leave, public holidays, long service leave, (10 days) carers leave, (2 days) compassionate leave and unpaid parental leave. Few leave entitlements have been added since unpaid maternity leave in 1979<sup>44</sup>.

Australia is not part of a number of international treaties that regulate maternity leave.<sup>45</sup> Paid maternity leave has never been universally guaranteed in Australia, although there have been various payments for parents for many years,<sup>46</sup> and all public servants do have access to paid maternity leave entitlements.

The dominant approach taken by Australian Governments throughout history has been 'welfare oriented' and 'industrial oriented', embracing and encouraging existing structures and gender roles: the notions of 'male breadwinners' and 'maternal citizenship'.<sup>47</sup> This approach is thought to be progressive by conservative groups, but is more accurately described as a 'mother-

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<sup>44</sup>Pocock, above n 36.

<sup>45</sup> *Maternity Protection Convention*, opened for signature 28 June 1952, ILO C103 (entered into force 7 September 1955), recommending 12 weeks paid maternity leave; *Maternity Protection Convention*, opened for signature 15 June 2000, ILO C183 (entered into force 7 February 2002), recommending 14 weeks paid maternity leave; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 11 (with reservation).

<sup>46</sup>For example Maternity Allowance in 1912, and more recently the 'Baby Bonus' and Family Tax Benefit.

<sup>47</sup>Baird, above n 5, 265.

trap'<sup>48</sup> for supporting unequal gender roles and hindering the long-term financial independence of mothers.

## 1 *The Howard Government*

The Howard Government (1996–2007) routinely constructed women as primary carers and secondary earners,<sup>49</sup> providing significant Government support for women who stay at home to care for their children. Australia's tax system was organised to discourage mothers from entering the workforce,<sup>50</sup> with effective marginal tax rates reaching as high as 85% for secondary earners, that is women.<sup>51</sup> For every income category, families received less Government support if the parents contribute to the household more equally.<sup>52</sup>

Following the 2002 publication of *Valuing Parenthood* by the Human Rights and Equal Opportunity Commission ('HREOC'), the issue was thrust into public discussion.<sup>53</sup> As a reaction to this, the Government introduced the 'Baby Bonus' for women who left the workforce, with maximum rewards for highly paid women who stay out of the workforce for five years.<sup>54</sup> This regressive and inequitable payment ultimately failed and was replaced in 2004 by a universal bonus (Maternity Payment).<sup>55</sup> The sole purpose of the Maternity Payment was to increase the fertility rate and probably to quell maternity leave debate leading up to an election.<sup>56</sup> In any case, it only provides for the various additional costs surrounding childbirth and was not designed to address gender or wealth inequalities. The Howard

<sup>48</sup>Gunhild Gutschmidt, 'Die Mütterfalle' [1997] 1 *EMMA*; Gunhild Gutschmidt, 'Warnung: Das Babyjahr ist eine Frauenfalle' [2000] 4 *EMMA*.

<sup>49</sup>Elizabeth Hill, 'Howard's 'Choice': The ideology and politics of work and family policy 1996–2006' [2006] *Australian Review of Public Affairs Digest*.

<sup>50</sup>Patricia Apps, 'Howard's family tax policies and the First Child Tax refund' [2001] 11 *The Drawing Board: An Australian Review of Public Affairs Digest* 1.

<sup>51</sup>Hill, above n 49 These rates were reduced to 61%.

<sup>52</sup>Ibid; Elizabeth Hill, 'Budgeting for Work-Life Balance: The Ideology and Politics of Work and Family Policy in Australia' (2007) 33(2) *Australian Bulletin of Labour* 226.

<sup>53</sup>Human Rights and Equal Opportunity Commission, *Valuing Parenthood: Options for Paid Maternity Leave - Interim Paper* (2002); Marian Baird, 'Paid maternity leave in Australia: HREOC's Valuing Parenthood' [2002] 6 *The Drawing Board: An Australian Review of Public Affairs*.

<sup>54</sup>Hill, above n 49.

<sup>55</sup>Ibid.

<sup>56</sup>Baird, above n 5.

Government's subsequent workplace reforms ('Workchoices') changed the balance of power in the employment relationship, and frustrated the effect of any 'institution orientation', which has been traditionally relied on for maintaining healthy working conditions for parents.

## 2 *Recent political history*

The Productivity Commission is in the process of reviewing maternity leave in Australia and the submissions for this review have fuelled significant public interest. Interestingly, the concept of equality hardly surfaces in current discussion in the press and public discussion, most commentary focuses clearly on economic issues ('business orientation') and welfare.

## B *Current state*

Australia has no universal guaranteed maternity or parental leave, relying on an enterprise bargaining system to supply parental benefits.<sup>57</sup> Although this produces some good results, it also has some very ugly results.<sup>58</sup> Added to this are some fundamental flaws in an exclusively 'industrially oriented' system, Australia's highly segmented and casualised female workforce reduces female employees' entitlement to paid maternity leave.<sup>59</sup>

### 1 *Relevant Law*

Australia has been involved in a number of relevant international treaties, that impose relevant obligations, albeit weak.<sup>60</sup> Obligations to prohibit dis-

<sup>57</sup>'industrial orientation' and 'business orientation': Baird, above n 53

<sup>58</sup>Ibid.

<sup>59</sup>Ibid; Human Rights and Equal Opportunity Commission, above n 53.

<sup>60</sup>For example International Labour Organisation (ILO) Convention 156, Workers with Family Responsibilities through *Workplace Relations Act 1996* (Cth); ILO Recommendation 165, Workers with Family Responsibilities (not binding); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), arts 11(1), 11(2)(c); *Workers with Family Responsibilities Convention*, opened for signature 21 June 1981, ILO 156 (entered into force 11 August 1983); *Convention Concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, ILO 111 (entered into force 15 June 1960); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *In-*

crimination<sup>61</sup> and protect and assist families,<sup>62</sup> have in part lead to federal legislation such as the *Sex Discrimination Act 1984* (Cth) and the *Workplace Relations Act 1996* (Cth). One example of a non-legal initiative is the National Work and Family Awards.<sup>63</sup>

## 2 *Maternity Leave*

Currently 52 weeks unpaid maternity leave is required to be made available<sup>64</sup> and employees have a right to return to their previous position.<sup>65</sup> Paid maternity leave is of course not compulsory in Australia.<sup>66</sup> Just under half of women who were working while pregnant, used unpaid maternity leave, a quarter were ineligible, the other quarter did not take it because they left their job.<sup>67</sup>

Access to paid leave has been increasing in recent years: 41% of women had access in 2005, rising from 2003 levels<sup>68</sup> and nearly 40% of organisations provided at least 12 weeks paid leave in 2007, compared to 27% in 2005<sup>69</sup> Employees of small and medium companies miss out with only 19% offering

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*ternational Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Cairo definition of reproductive health International Conference on Population and Development (Not binding); See also Human Rights and Equal Opportunity Commission, above n 26, 29.

<sup>61</sup>*Convention Concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, ILO 111 (entered into force 15 June 1960).

<sup>62</sup>*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Workers with Family Responsibilities Convention*, opened for signature 21 June 1981, ILO 156 (entered into force 11 August 1983).

<sup>63</sup>From the Department of Education, Employment and Workplace Relations: Commonwealth of Australia, *ACCI/BCA National Work & Family Awards 2007 — Winning Workplaces* (2007).

<sup>64</sup>*Workplace Relations Act 1996* (Cth) s265.

<sup>65</sup>Under the *Sex Discrimination Act 1984* (Cth), see eg *Hickie v Hunt and Hunt* (1998) EOC 92-910 ('*Hickie*').

<sup>66</sup>Except for federal and most state public servants: *Maternity Leave (Commonwealth Employees) Act 1973* (Cth). Note that \$5 000 is paid to family by the government ('Baby bonus').

<sup>67</sup>Australian Bureau of Statistics, above n 28, 136.

<sup>68</sup>Ibid 135.

<sup>69</sup>Equal Opportunity for Women in the Workplace Agency, *Provision of Paid Maternity*



maternity leave.<sup>70</sup> Women in the public sector have access to more generous paid leave than private, and they use it.<sup>71</sup>

The increasing availability of paid leave seems to show the business and industrial oriented approaches working, but only the issues of wellbeing and economics are being addressed. Equality is missing. An example is the availability of paternity leave, a key ingredient for equality. Although 32% of organisations offered paid paternity leave in 2005,<sup>72</sup> only 3% of organisations offered 12 weeks or more,<sup>73</sup> most organisations (67%) offered only one week.<sup>74</sup> I am certain mothers might appreciate this week, but five days cannot solve Australia's problem of gender inequality.

### 3 *Flexible working conditions*

Anti-Discrimination law requires companies to allow part-time or flexible work, unless that would be unreasonable.<sup>75</sup> But anti-discrimination law only applies where there is a dismissal.<sup>76</sup> The family provisions of the *Sex Discrimination Act* do not explicitly provide relief for indirect discrimination,<sup>77</sup> but women can claim their family responsibilities under indirect sex discrimination.<sup>78</sup> This does not of course apply to men, which is a serious defect.<sup>79</sup>

Unfortunately, anti-discrimination law, which focuses on individual cases, cannot completely address the fundamental, systemic conflict between work

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*Leave in the Private Sector — Factsheet* (2008) 4. Note that many organisations do not offer to all employees: Equal Opportunity for Women in the Workplace Agency, above n 69, 3.

<sup>70</sup>Ibid 3.

<sup>71</sup>Australian Bureau of Statistics, above n 28, 134 136.

<sup>72</sup>Up from 15% in 2001: Equal Opportunity for Women in the Workplace Agency, *Paid Paternity Leave* (2006) 4.

<sup>73</sup>Ibid 5.

<sup>74</sup>Ibid 5.

<sup>75</sup>*Hickie* (1998) EOC 92-910.

<sup>76</sup>Human Rights and Equal Opportunity Commission, above n 26, 54; *Sex Discrimination Act 1984* (Cth) s14(3A). Under *Equal Opportunity Act 1995* (Vic), this also includes missed promotions, access to training or any other detriment.

<sup>77</sup>Human Rights and Equal Opportunity Commission, above n 26, 54; *Sex Discrimination Act 1984* (Cth) s14(3A).

<sup>78</sup>*Hickie* (1998) EOC 92-910.

<sup>79</sup>Indirect family responsibility discrimination is covered by the *Equal Opportunity Act 1995* (Vic) ss 6(ea), 7, 9.

and family life. Furthermore, companies enjoy the benefit of a ‘reasonable’ test<sup>80</sup> and appeals to the High Court are expensive and unlikely to succeed<sup>81</sup>

At the heart of the matter, anti-discrimination law does not by its nature grant any right to a balanced work life, neither does it discourage the continued celebration of the ‘ideal worker’. It is simply a tool to prevent overtly detrimental treatment, based on a characteristic such as sex or parental status. HREOC have argued that these inadequacies present a need for a federal act drawing power from the *Convention on the Elimination of All Forms of Discrimination Against Women*,<sup>82</sup> which imposed a positive duty on employers to accommodate family responsibilities.<sup>83</sup> The Victorian Human Rights Commission is pushing to introduce a ‘right to request’, making it easier for employees to request flexible working conditions, similar to that in the UK.<sup>84</sup>

#### 4 Hours

A serious aspect of the work-life conflict is the number of hours that (generally fathers) are encouraged to work. The inability or the unwillingness of many mothers to match these hours deepens the resulting inequality. 23.5% of men are working more than 50 hours per week, compared to 6.8% of women.<sup>85</sup> According to OECD statistics, Australians work many more hours than Germans: 1815 compared to 1362. This difference is likely due to the differences in leave entitlements<sup>86</sup> and less weekly hours compared to Australia.<sup>87</sup> Australia also has very low sick leave limits and no limit on weekly hours.<sup>88</sup>

<sup>80</sup>See eg *State of Victoria v Schou* [2004] VSCA 71 (‘Schou’).

<sup>81</sup>See Kirby J’s opening in *New South Wales v Amery* [2006] HCA 14 (‘Amery’).

<sup>82</sup>*Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>83</sup>Human Rights and Equal Opportunity Commission, above n 26, 60.

<sup>84</sup>*The Employment Act 2002* (UK).

<sup>85</sup>Australia Bureau of Statistics, *6365.3 Preferred Working Hours of Wage and Salary Earners* (2006) 8.

<sup>86</sup>Organisation for Economic Co-operation and Development, *Explaining Differences in Hours Worked across OECD Countries* (2008) 64.

<sup>87</sup>38 with a maximum of 48. Australian men work for an average of 45 hours per week: Australia Bureau of Statistics, above n 85.

<sup>88</sup>Organisation for Economic Co-operation and Development, above n 86, 73.

## 5 *Recent discussion*

Recent dialogue in Australia has centred primarily on welfare and economical issues, much like the previous Howard Government's position. Even groups who argue for paid leave highlight the economic benefits of maternity leave.<sup>89</sup> The problem with this focus is that the resulting policies do not adequately address equality and discrimination. There has been much discussion recently on what form maternity leave should take in Australia, employers are adamantly opposed to paying compulsory parental leave.<sup>90</sup> The hostility is worse in the general population, where many believe that Australia already has gender equality and curiously resent any form of welfare-like payment to mothers.

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<sup>89</sup>Australian Council of Trade Unions, above n 43; Australian Public Service Commission, above n 19.

<sup>90</sup>Productivity Commission, *Paid Maternity, Paternity and Parental Leave: Public Hearing Transcript* (2008) 879.

## IV GERMANY

Germany is a country with a colourful history of social welfare. Fittingly, a very mature dialogue has evolved from the various influences that have shaped Germany in its long history. Australia's experience in social reform is modest in comparison, and can learn from some of the current and previous successful approaches that I will briefly outline here.

### A *Background*

Germany enjoyed a number of very early social reforms under Bismarck in the nineteenth century, including three weeks compulsory unpaid maternity leave under the *Mutterschutzgesetz 1878*<sup>91</sup> and maximum working hours for women.<sup>92</sup> Bismarck's creation of a decentralised social state<sup>93</sup> shaped future policy and by 1911, even two weeks paid maternity leave was available to mothers.<sup>94</sup>

By the time Germany was reunified in 1990, two very different working societies had been formed: West Germany, a typical 'bread-winner' country<sup>95</sup>, and East Germany, with its Soviet influence and a strong dual earner model.<sup>96</sup>

#### 1 *East Germany*

The East German state ('GDR') made the dual earner model possible by providing comprehensive childcare and assuming most of the costs of raising children.<sup>97</sup>

<sup>91</sup>*Mutterschutzgesetz 1878* (DE) [trans: *Maternity Protection Act*].

<sup>92</sup>Albeit a relatively high maximum of 65 hours per week: *Arbeiterschutzgesetz 1891* (DE) [trans: *Protection of Workers Act*].

<sup>93</sup>The administration of health and social services is decentralised, through *Krankenkassen* [trans: *Health Insurance Agencies*], but minimum entitlements are set by the federal government.

<sup>94</sup>*Reichsversicherungsordnung 1911* (DE) [trans: *National Insurance Act*].

<sup>95</sup>Trudie Knijn and Ilona Ostner, *The 'meaning' of children in Dutch and German family policy* (2008) 7.

<sup>96</sup>Ilona Ostner and Christoph Schmitt (eds), *Family Policies in the Context of Family Change: The Nordic Countries in Comparative Perspective* (2008) 175.

<sup>97</sup>By 1989, 80% of the costs of children were covered by the state: *Ibid* 176.

Despite it being taboo for post-Nazi German governments to influence fertility, the GDR Government recognised the need to address falling fertility rates in the 1960s.<sup>98</sup> A number of measures were introduced including subsidies for the costs of children, one year paid maternity leave,<sup>99</sup> and childcare facilities for children as young as 20 weeks.<sup>100</sup>

These benefits were provided regardless of the person's gender or marital status,<sup>101</sup> resulting in significantly more substantive equality between genders, marital statuses and parental statuses than West Germany. The GDR had the highest workforce participation rate of women in the world.<sup>102</sup> However, despite freeing women from spousal dependence, the GDR did not achieve complete gender equality, as women were still expected to fill the primary carer role in addition to their impressive workforce participation. In addition to this, women were on average paid less, as many accepted jobs below their qualification to facilitate responsibilities at home.<sup>103</sup>

## 2 *West Germany*

In accordance with the West German constitution's requirement that the government eliminate gender inequality,<sup>104</sup> the *Equality Act 1957*<sup>105</sup> removed a series of outdated laws that formally entrenched gender inequality. But these changes did not magically supply the Federal Republic of Germany with substantive equality.

The conservative rhetoric of 'choice' combined with existing gender roles and inequalities to keep the pro-'breadwinner' policy active in West Germany up until reunification. Mothers were given easy access to part-time working hours and parental leave was secured in 1952 with an amendment to the *Mutterschutzgesetz* ('Maternity Protection Act'). By 1962 mothers had access to 14 weeks compulsory paid leave, and in 1979 an additional

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<sup>98</sup>Ostner, above n 96, 181.

<sup>99</sup>Initially only for a second and third child.

<sup>100</sup>Ostner, above n 96, 181.

<sup>101</sup>Ibid 176.

<sup>102</sup>Kristen Lee, Duane Alwin and Paula Tufis, 'Beliefs about Women's Labour in the Reunified Germany, 1991—2004' (2007) 23 *European Sociological Review* 487, 490.

<sup>103</sup>Ibid 490.

<sup>104</sup>*Grundgesetz* Art 3(2). [trans: *The Constitution*]

<sup>105</sup>*Gleichberechtigungsgesetz 1957* (DE).

four months could be taken.<sup>106</sup> But in 1986 the West German government introduced a new payment<sup>107</sup> designed to keep mothers at home for the first year.<sup>108</sup> Unpaid parental leave entitlements were expanded throughout the late 1980s, reaching 18 months in 1990.

Shortly before reunification, only 55% of women in West Germany were working for pay.<sup>109</sup> Of the two approaches on either side of The Wall, the West German system resembled Australia's historical work-family policies more closely.

### 3 *Reunification*

Generally, it has been the West German traditions and mindset that shaped the approach taken by the German government since unification. Directly following reunification, the government under Chancellor Kohl dismantled GDR social services such as childcare, replacing them with extensive cash benefits. Through this, many women lost their jobs and those that did not, lost their entitlement to social services.<sup>110</sup> The costs of children were only partially covered by the state and women were encouraged through the tax system to stay at home, keeping the female workforce participation and the fertility rate low.

But this has been changing in recent years. In addition to the social and family oriented policies of the European Union,<sup>111</sup> the federal *Red-Green* coalition<sup>112</sup> from 1998 to 2005 dramatically changed the nature of Germany's social policy. The Red-Green Coalition introduced a Scandinavian approach to parental support early in their term,<sup>113</sup> which rejects the 'male bread-winner' model, promoting instead shared child-raising responsibilities

<sup>106</sup>Monika Merz, *Women's Hours of Market Work in Germany: The Role of Parental Leave* (2004) 10.

<sup>107</sup>*Bundeserziehungsgeldgesetz* (National Parental Allowance Act) 1986.

<sup>108</sup>Merz, above n 106, 11; Although part-time work up to 15 hours was allowed.

<sup>109</sup>Lee, above n 102, 490.

<sup>110</sup>*Ibid* 487.

<sup>111</sup>*Directive 1992/85/EEC* (Pregnant Workers Directive); *Directive 1996/34/EC* (Parental Leave Directive); *Directive 2000/78/EC*, *Directive 2006/54/EC*, *Directive 2000/34/EC* amending *Directive 93/104/EC* (Working Time Directive)

<sup>112</sup>Coalition of the *Social Democratic Party* ('*Sozialdemokratische Partei Deutschlands*' or *SPD*) and *The Greens* ('*Die Grünen*'). This is theoretically comparable to a coalition between the *Socialist Left* faction of the *Australian Labor Party* and the *Australian Greens*.

<sup>113</sup>*Elternzeitgesetz 2000* (DE) [trans: *Parental Leave Act*].

and increased female workforce participation. This attempt was not overwhelmingly successful; only 1% of men were taking parental leave. Five years later the new government re-implemented and enhanced the Scandinavian approach, with the current *National Parental Leave and Allowance Act*.<sup>114</sup>

This time 12.6% of the people receiving Parental Allowance were men,<sup>115</sup> a positive change, but still only a small number. It is also interesting to note that around half of the women would not have received any payment under a non-universal system: Only half of the women who received Parental Allowance were employed.<sup>116</sup>

## B *Current State*

### 1 *Parental Leave Entitlements*

The currently legislation was introduced in 2006 and applied to babies born from 1 January 2007.<sup>117</sup> It offered a fundamentally different conception to that discussed in Australia: parental leave and money are completely separated. Parental leave is called *Elternzeit* and any pay ('Parental Allowance') is called *Elterngeld*. It is a universal payment, applying to all parents living in Germany, including unemployed parents, and foreigners with settlement and work permits.<sup>118</sup> As was already available, all parents have access to three years unpaid parental leave, with the right to return to the same position. The two parents can receive a total of 14 months Parental Allowance and no individual parent can receive it for longer than 12 months.<sup>119</sup> The two month gap between the individual and couple maximum is specifically designed to encourage fathers to take at least 2 months leave.

Parental Allowance is calculated at 67% of previous year's income,<sup>120</sup> with a minimum of 300 EUR and a maximum of 1800 EUR per month, gradu-

<sup>114</sup>*Bundeselternzeit- und Elterngeldgesetz 2006* (DE).

<sup>115</sup>87 379 from 719 621: Statistisches Bundesamt Deutschland, *Statistik zum Elterngeld 2007* (2008).

<sup>116</sup>52.5% of women compared to 77% men: Ibid.

<sup>117</sup>*Bundeselternzeit- und Elterngeldgesetz 2006* (DE), [trans: *National Parental Leave and Parental Allowance Act*].

<sup>118</sup>Ibid §1(7).

<sup>119</sup>Ibid §4(2).

<sup>120</sup>Ibid §2(1).

ally scaling to 100% for salaries under 1000 EUR.<sup>121</sup> To promote workforce attachment and reduce dependence on the state, a parent can work up to 30 hours whilst receiving Parental Allowance<sup>122</sup> In addition to parental allowance, 154 EUR/month child allowance (*Kindergeld*) is also paid to parents of children under 18.<sup>123</sup>

## 2 *Child care*

Childcare services for German parents are not what they were under the socialist state in East Germany. Crèche and Kindergarten places are expensive, limited and under-utilised; there are enough places for only one in five children under three. Unlike the GDR Kindergartens, which were synchronised with working times, today's Kindergartens finish at lunch-time. The government is looking at completely subsidising Kindergarten fees in the near future.

## C *Criticism*

The most obvious issue is that *Elterngeld* is very economically regressive; the government pays wealthier parents more than poorer parents. This is a perfect example of a conflict in addressing the two different inequalities: The subordination of women using gender roles versus the disproportionate hardship suffered by poorer families when they have children. A regressive system is used, so that the wealthier husbands will be tempted to take leave, but this means that poorer families actually receive less than wealthier families, limiting the amount that they government would be able to provide. To a lesser extent, this can also be seen as economically regressive in a gender equality context. Men, who typically earn more than women, will receive more money from the government. That's exactly what has been seen. Since the introduction of Parental Allowance in 2007, 58% of women received a low payment<sup>124</sup> while only 30% of men received a low payment.<sup>125</sup>

<sup>121</sup>*Bundeselternzeit- und Elterngeldgesetz 2006* (DE) §2(2).

<sup>122</sup>*Ibid* §1(6).

<sup>123</sup>*Einkommensteuergesetz 2002* (DE), [trans: *Income Tax Act*] §§32, 62; *Bundeskindergeldgesetz 1995* (DE), [trans: *National Child Allowance Act*].

<sup>124</sup>500 EUR or less per month.

<sup>125</sup>363 650 out of 632 242 women compared to 26 026 out of 87 379 men: Statistisches Bundesamt Deutschland, above n 115, 10.



Another criticism is that 300 EUR per month is not enough to live on, which is relevant for temporarily unemployed women, or women who had previously been dependent on a partner or family. They might find it particularly difficult to find a suitable job during this time, and would be unable to support themselves with this amount.

At the other end of the spectrum, high-salary earners do not need a 1 800 EUR welfare payment from the government, which could be spent elsewhere. These entitlements seem to be directed mainly at middle-class earners, with less consideration for non-standard family arrangements.

A final criticism questions the emphasis on parental childcare over external childcare. If men continue to avoid taking parental leave, then equality cannot be achieved because women still carry the burden of childcare. An approach that incorporates universal access to childcare from a young age is then more likely to promote gender equality. Of course, an alternative to this would be to increase the incentive or introduce compulsory paternity leave, but this alternative poses a range of political difficulties.

## V CONCLUSION

To achieve the desired outcome of substantive gender equality, I would contend that the following is necessary:

- Workforce participation and wages of men and women need to be equal
- Time spent on unpaid responsibilities must be equal between genders
- Financial dependence on partners and continuous employment needs to be eliminated

Any policy relating to parenting must also consider the wellbeing of the parents and children. As a bare minimum, all mothers must receive at least 14 weeks full paid maternity leave, regardless of their employment status and have the opportunity to breastfeed their child during the first 6 months. In addition, all parents must be able to provide care for sick children on full pay.

In terms of workforce participation, the overwhelming success of the GDR's childcare system is a clear example of an efficient, and substantively equal working environment, with almost eliminated financial dependence on partners. Achieving equal wages requires men to spend equal time on unpaid responsibilities, a complementary Scandinavian parental leave system like that in Germany might help increase the number of men taking leave. A further helpful incentive would be to allow part-time work to continue with parental allowance, and to ensure that quality jobs are available with part-time hours. Care should be taken to ensure that the base amount is sufficient, and that the government is not feeding other existing inequalities.

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