

Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand¹

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New Zealand prides itself on being a global leader in gender equality, based on being the first country to have allowed women to vote and on having had and currently having women in high public positions, such as the Governor-General, Prime Minister and Chief Justice. New Zealand also frequently scores high on various international gender equality indexes and reports.² In addition, a number indicator suggests that, overall, there is compatibility between work and family life in New Zealand. Female participation in the labour market is one of the highest in the Organisation for Economic Co-operation and Development (OECD).³ Women's employment rates have increased steadily over the years in New Zealand. In 1976, only 40 per cent of mothers were in employment, while, in 2006, it was 66 per cent.⁴ Women's labour force participation in New Zealand currently sits at 62.3 per cent.⁵ Unlike many other OECD countries, New Zealand does not struggle with low fertility rates which, at replacement level,⁶ are "...second to none of the industrialised countries".⁷

Despite those select achievements, women in New Zealand are still underpaid, under-represented in positions of power or economic standing, and over-represented in atypical and precarious employment.⁸ Women's labour force participation is still lower than that of men's with 12 percentage points difference in 2011.⁹ One of the main causes is the fact that women are still responsible for the majority of the unpaid work in the household and, in particular, they remain the main caregiver for children, the elderly and the disabled. While women's participation in paid employment has increased drastically over the past decades, men have not changed their work-to-care ratio enough to fill the gap. Not surprisingly, women appear to be struggling with work-life conflicts¹⁰ more often than men.

¹ This title is inspired by I. Moebius and E. Szyzszack "Of raising pigs and children" (1998) 18 Yearbook of European Law 125-156.

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² World Economic Forum "Global Gender Gap Report 2013" 2013 <www3.weforum.org>.

³ Reports on the rate of women in the NZ labour force varies from 62.5 per cent in the Statistics New Zealand "Household Labour Force Survey" June 2013 <www.stats.govt.nz> to 72 per cent in the World Economic Forum Report, above at 49. See Department of Labour "Labour force participation in New Zealand: Recent trends, future scenarios and the impact on economic growth" 2010 <www.dol.govt.nz>.

⁴ Families Commission "Families and Whanau Status Report 2013" (2013) <www.familiescommission.org.nz> at 63.

⁵ Statistics New Zealand "Survey of Working Life: March 2008 Quarter Hot Off The Press" 11 December 2008 <www.stats.govt.nz>.

⁶ New Zealand women give birth to 2.1 children on average (Families Commission, above n 4, at 58). Counter-intuitively, high fertility rates are found in countries that have high female employment rates.

⁷ Families Commission, above n 4, at 14.

⁸ Ministry of Women's Affairs "Briefing to the Incoming Minister of Women's Affairs" November 2008 <www.mwa.govt.nz>.

⁹ Families Commission, above n 4, at 62.

¹⁰ There are two types of conflicts. When paid work interferes with family life, it can be referred to as work-to-family conflict. By contrast, when family obligations and responsibilities interfere with employment it is referred to as the family-to-work conflict. This article is concerned with questions regarding employment flexibility, which are, therefore, connected with work-to-family conflicts.

As a growing number of women undertake paid employment, and still continue to do most of the unpaid care as part of raising children,¹¹ issues around reconciling work and family life have enjoyed a great increase in scholarly attention recently in New Zealand.¹² The study of work-life balance started from a gender perspective. However, the issue of work-life balance is evolving in New Zealand, where concerns relating to women in the workforce appear to be ebbing. The concept of flexible work has come to the forefront of New Zealand employment law, not merely as a way to solve work-family conflict but as a tool for employers to adapt quickly and more adequately to the globalised market competition.

In the 1980s, the New Zealand labour market underwent change to become “...particularly fluid and flexible”.¹³ In this context, work-life balance, as a subject in legislation, can be traced back to the Equal Opportunities Trust’s first Work and Life awards in 1999. It was, then, added to the Labour Party’s policy mandate in 2002.¹⁴ In 2003, the government, led by the Labour Party, initiated work-life balance projects underpinned by a decontextualisation of the employer/employee relationship and a gradual deconstruction of the traditional public/private dichotomy.¹⁵ Employers and employees were treated as individuals who have to negotiate their own unique relationship on a case-by-case basis, ignoring the social milieu and environment that actively shape the terms of employment choices. This presumption of endless choice continues to prevail in today’s society (and employment law), although the reality of the labour market (in particular for women) presents only a restricted set of options.¹⁶ This, therefore, puts added pressure on mothers or employees with care responsibilities. It means that for employees with caregiving obligations, it can be difficult and challenging to remain or to thrive in the paid labour market. Because of women’s growing responsibilities in the labour force, unpaid care work in the private sphere has also become more difficult to be navigated sufficiently by individuals. The reconciliation of employment and private care work is, therefore, in need of legal intervention and guidance.¹⁷

An adequate regime of reconciliation between work and family life (or work-life balance)¹⁸ must include provisions relating to ‘leave’ and ‘time’ as well as a strategy on care.¹⁹ ‘Time’ provisions in New Zealand are covered by the right to request flexible working arrangements.²⁰ It is complemented by a number of legal provisions designed to help parents balance paid work and

¹¹ Equality and Human Rights Commission “Working Better: Fathers, Family and Work - Contemporary Perspectives” 20 October 2009 <www.equalityhumanrights.com>.

¹² See for instance E. Anne Baradoel, Helen De Cieri and Clarice Santos “A Review of Work—life Research in Australia and New Zealand” (2008) 46(3) *Asia Pacific Journal of Human Resources* 316; Annick Masselot “The Rights and Realities of Balancing Work and Family Life in NZ” in Nicole Busby and Grace James (ed) *Families, Care-Giving and Paid Work* (Edward Elgar, Cheltenham, UK, 2011) 72.

¹³ Masselot, as above, at 72.

¹⁴ At 75.

¹⁵ On the public/private divide, see: Eugenia Caracciolo di Torella and Annick Masselot *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan, New York, 2010).

¹⁶ Ruth McManus “Work-Life Balance: A Case of Technical Disempowerment?” (2009) 16(1) *Social Politics: International Studies in Gender, State and Society* 111 at 125.

¹⁷ Masselot, above n 12.

¹⁸ For a discussion on these concepts see further below at n 35.

¹⁹ See generally Caracciolo di Torella, E. and Masselot, A. (2010), *Reconciling Work and Family Life in EU Law and Policy*. New York: Palgrave Macmillan; Janet Gornick and Marcia Meyers “Institutions that Support Gender Equality in Parenthood and Employment” in Janet Gornick and Marcia Meyers (eds.) *Gender Equality, Transforming Family Divisions of Labor* (Verso, London, 2010) 3.

²⁰ Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000.

family responsibilities, including 'leave' provisions which grant time off to parents to spend time with their children. In New Zealand, the Parental Leave and Employment Protection Act 1987, and the Employment Relations (Breaks, Infant Feeding, and other matters) Amendment Act 2008 enable parents to take time off work following the birth or the adoption of a child. Both 'leave' and 'time' are part of the employment law provisions designed to enable workers to care for their children or other dependants while remaining in paid employment. Finally, the care strategy is a form of social welfare which enables individuals who have care responsibilities to enter and remain in the labour market.²¹ It includes the Working for Families Scheme Package 2004, together with government subsidies for pre-school and out-of-school care.²²

The New Zealand work-life balance projects have developed under unique motivations, not specifically targeted at women's or families' well-being. The stated goal of the projects was not primarily to enhance or improve women's participation in the workforce or to facilitate better coordination of family and work life specifically, but instead the goals of the programme were broad and unspecific. The project aimed to help people "...to participate more often, or more effectively, in activities that are important to them" and to make organisations prioritise their employee's work-life balance by creating "...more productive, sustainable employment relationships and workplaces".²³ The potential to be a great advantage to working women was never a stated goal; instead it became a welcome side-effect of the legislation. Flexibility became the key to attract and retain skilled workers into the New Zealand labour market. It also was seen as a way to contribute to sustainable workplace management in the context of climate change. A general and gender-neutral approach was adopted to guarantee all employees, regardless of their care responsibilities, some form of work-life balance. This non-gendered approach to work-life balance and workplace flexibility is embodied in the Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000. Under Part 6AA, employees with care responsibilities are entitled to make a formal statutory request to their employers to have their work hours altered in a way that will best enable them to reconcile their unpaid care work with their paid employment obligations. The request must be seriously considered by employers in a timely fashion (within three months of the reception of the request). A majority of employees with care responsibilities are women, which means that Part 6AA bears great significance for female employment rights, as it is a provision that arguably enables women to enter and remain in the workforce.

Originally modelled on a similar UK provision,²⁴ which exclusively addressed the need of parents of young and disabled children, the New Zealand 2007 Amendment Act was, however, designed to facilitate the needs of employees with their more general care obligations. This amendment has represented a significant development for the right to care²⁵ and constituted a world premiere in relation to valuing unpaid care work. As such, the New Zealand 2007 Amendment Act is a point of reference for development of similar legislation in the world.

²¹ Jane Lewis "Childcare Policies and the Politics of Choice" (2008) 79(4) Political Quarterly 499.

²² This includes the government funding for up to 20 hours per weeks for children aged 3-5 to attend early childhood education.

²³ Department of Labour "Work-Life Balance in New Zealand: A Snapshot of Employee and Employer Attitudes and Experiences" July 2008 <www.dol.govt.nz>.

²⁴ Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000. See also Jodie Levin-Epstein "How to Exercise Flexible Work: Take Steps with a 'Soft Touch' Law" (2005) Centre for Law and Social Policy - Work Life Balance Brief No 3.; Ariane Hegewisch (2009), "Flexible working policies: a comparative review" (2009) Institute for Women's Policy Research, Equality and Human Rights Commission.

²⁵ See Nicole Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, Oxford, 2011).

In 2012, the 2007 Flexible Working Arrangements Act was reviewed pursuant to section 69AAL of the Employment Relations Act 2000. Following the 2012 review, the government proposed a number of amendments to the 2000 Employment Relations Act,²⁶ including some change to the flexible working arrangements provisions. Under the terms of the proposed amendment, the purpose of the legislation is considerably broadened to the point that the objective of flexible working arrangements arguably moved away significantly from the original intention to facilitate a better reconciliation between family and work commitments. The Employment Relations Amendment Bill 2013 (hereafter the 2013 Bill), currently under consideration by the Transport and Industrial Relations Select Committee, proposes further amendments to Part 6AA.

This paper aims to assess critically the impact of the New Zealand flexible working arrangement law in contributing to achieving reconciliation between work and family life from a gender perspective. In order to consider the impact of the law in a meaningful way, the paper takes a socio-legal approach. In the first part, the paper reviews the law facilitating flexible working arrangements and its recent proposed amendments. Part 2 considers the gender neutrality of legislation relating to work life balance. Against this backdrop, Part 3 provides a critical analysis of the right to request flexible working arrangements. It is argued that the use of gender neutral legislation has implications for the disparate values of production and reproduction in New Zealand. Finally, the gender dimension of the concept of flexibility is explored in Part 4.

1. The key changes of the Employment Relations Amendment Bill 2013

The Employment Relations Amendment (Flexible Working Agreements) Act 2007 introduced the right of employees with caregiving commitments to request flexible working arrangements from their employers under Part 6AA of the Employment Relations Act 2000. As mentioned above, the statute has been under review and a 2013 Bill is proposing a number of amendments to the right to request flexible working arrangements. The main legislative amendment relates to the link between flexible working arrangements and caregiving obligations.

Under the 2013 Bill, the object of Part 6AA is fundamentally changed; therefore, section 69AA(a)²⁷ of the 2007 Act is fully replaced by a new section which aims to extend the statutory right to all employees, not just those with care responsibilities.

The period within which an employer must deal with a request for a variation under section 69AA(b) is reduced from three to one month. Therefore, the time for an employer to consider the request is considerably reduced.

Sections 69AAB and 69AAD of the 2007 Act provided limitations relating to when an employee could make a request for flexible working arrangements. In particular, under Section 69AAB of the 2007 Act, an employee could make a request only once s/he had been employed by the employer for at least six months. In addition, Section 69AAD provided that an employee was "...not entitled to make another request under this Part to his or her employer earlier than 12 months after the date on which the previous request was made". These Sections are being replaced by the 2013 Bill as the limitations imposed by the old Sections 69AAB and

²⁶ The Employment Relations Amendment Bill 2013 is due to be adopted by parliament early 2014.

²⁷ Under the 2007 Act, Section 69AA(a) states that the object of this Part is to provide "...certain employees with a statutory right to request a variation of their working arrangements if they have the care of any person".

69AAD on when an employee can make a request are to be lifted. Under the new section, such a request can be made at any time and as often as needed. This change will enable all employees to request flexible working arrangements right from the beginning of their employment.

Section 69AAC of the 2007 Act sets out relatively complex requirements relating to the request, including that the employee must make his or her request in writing. Section 69AAC(d), in particular, required the employee to explain how, in his or her view, the variations of the contract of employment would enable the employee to provide better care for the person concerned. This Section is repealed under the 2013 Bill because the flexible working arrangement is no longer connected to the need to care. Therefore, such provision is no longer required and the procedure for requesting flexible working arrangements is simplified. In addition, Section 69AAD is repealed under the 2013 Bill as no limitations on the number or timing of requests apply anymore. Employees are, thus, able to make applications for flexible working arrangements at any time during and prior to their employment.

The requesting employees' rights appear, therefore, somewhat strengthened under the 2013 Bill, as a number of the regulatory processes surrounding the requests for flexible working arrangements have been made more employee-friendly. However, at the same time, the amendments made under the 2013 Bill completely obliterate the caregiving focus of the legislation.

The Cabinet Minutes reveal that the amendments to Part 6AA were introduced on the basis of the findings of the legislative review.²⁸ Under the review, flexible working arrangements were understood to enable a better facilitation of work-life balance for all employees in New Zealand, and not just for employees with care responsibilities.²⁹ As a result, the 2013 Bill proposes that Part 6AA is amended by extending eligibility from those employees with care responsibilities to all employees. As such, the 2013 Bill has been introduced as a

...welcome extension, enabling those who engage in (for example) community activities, charitable volunteering, coaching children, or training and competing in weekend sports to seek some flexibility in their working arrangements.³⁰

The 2013 Bill entirely removes any gender or care dimension from Part 6AA, extending the rights to request flexible working arrangements to all employees,³¹ and instead acknowledges the importance of flexible working arrangements to optimise the labour market participation of groups that would otherwise be unable to participate. The purpose of the right to request flexible working arrangements is, therefore, shifted from reconciliation between work and care focus to a strong and overpowering profit optimisation focus. The unintended gender equality component of the original legislation is lost. The removal of the care criteria from the right to request flexible working arrangements also renders invisible the caregiving provided by men and women. Care is no longer valued (not even symbolically) and this entrenches the idea that production and reproduction are disconnected in New Zealand society.

²⁸ Department of Labour "Review of Flexible Working Arrangements in New Zealand Workplaces" 2011 <www.dol.govt.nz>.

²⁹ Office of Minister of Labour, Economic Growth and Infrastructure Committee "Further Decisions on the Employment Relations Amendment Bill" (2012) CAB Min 38/8.

³⁰ Employment Relations Amendment Bill 2013 (105-2) (select committee report).

³¹ New Zealand Government (2013), Employment Relations Amendment Bill 2013 (105-1) (explanatory note).

2. Gender-neutrality in work-life balance legislation – friend or foe?

Unsurprisingly, both the Statute and the 2013 Bill amending the rights to request flexible working arrangements are drafted in gender neutral terms. Indeed, New Zealand work-life balance has uniquely been promoted and treated as a gender-neutral issue by both the Department of Labour and the Get a Life Campaign of the New Zealand Council of Trade Unions. The legislation is moving towards equalising the circumstances of women and men in employment law. The Cabinet Minutes regarding the Bill further reveal that the amendments are seen as a reflection of changes in modern lifestyles and are intended to boost productivity of employees by helping them to better reconcile work with their family life, regardless of gender.³²

Work-life balance is, thus, framed as being not about family and care issues specifically,³³ but as a more general concern for all working New Zealanders. As early as 2003, Honourable M. Wilson made it clear that the government did not see work-life balance as a project targeted at women:

Is it just for families? No. It's about balancing all aspects of life and may have nothing to do with family responsibilities. When work is impacting on life to the extent that it feels there is no flexibility or little choice, then it's an issue, irrespective of age, gender or culture.³⁴

I have argued elsewhere³⁵ that there is a difference between the right to reconcile work and family life (the *need* to spend less time in the workplace in order to take care of one's family) and the right to work-life balance (the *desire* to limit the involvement in paid activities in order to pursue other interests, such as further education, with the overall aim of contributing to individuals' wellbeing). New Zealand has firmly adopted a regime of work-life balance rather than reconciliation between work and family life. The concept is focussed on limiting the conflict between work and life as a whole, including the ability for employees to access leisure activities.

The non-gendered approach to work-life balance by the New Zealand government has been fuelled and supported by survey results which suggest that the issue of balance does not have a gender dimension. In 2008, the New Zealand Department of Labour undertook a work-life balance survey³⁶ which found that, overall, there were no significant gender, age or ethnic differences in the way people rated their current work-life balance. By contrast, a few years earlier in the 2005 survey³⁷, women were found to be more likely than men to report better work-life balance. As a result of the evolution of perception, work-life balance legislation increasingly aims to treat women and men equally, as illustrated by the provisions of the 2007 Act and also the 2013 Bill. This trend can also be exemplified by other legislation with a gender dimension such as the Parental Leave Act 1987 and the Working for Family package 2004.

The Parental Leave and Employment Protection Act 1987

³² Office of Minister of Labour, above n 29.

³³ Masselot, above n 12, at 73.

³⁴ Hon Margaret Wilson "Integrated Work-Life Policy Development Programme" Office of the Minister of Labour, Steering Group for Work-Life Balance Policy Development, 2003.

³⁵ Caracciolo di Torella and Masselot, above n 15.

³⁶ Department of Labour, above n 23.

³⁷ Lindy Fursman "Work-Life Balance in New Zealand" (2006) Department of Labour <www.dol.govt.nz>.

The Parental Leave Act gives parents the right to time off paid employment in order to take care of young children. The right to take parental leave under New Zealand law is open to either parent, male or female. The criteria for eligibility under the Act are, however, quite restrictive,³⁸ especially for women in precarious employment. The Act is worded in gender-neutral terms but is *de facto* addressed to women. Under section 71A the partner of the mother is able to benefit from the allowance under the Act, but the requirements for the partner to be eligible for the payments and time off work have to be fulfilled by the mother. The partner's employment status pre-birth is irrelevant for the purposes of the section; only the mother's employment status pre-birth is considered. The Act, therefore, clearly assumes that it will be the mother who will be providing care for the child.

The pay guaranteed under the legislation is low and inferior to the minimum wage income. This prejudices against the male partner's wage being sacrificed, as it is typically higher than that of the female partner due to the existence of a persistent gender pay gap in New Zealand. Therefore, although the provisions of the Parental Leave Act aim for gender-neutral terms, it does not achieve any gender neutrality, mainly because it fails to adequately address the gender imbalance that circumstantially surrounds its provisions. In addition, the fact that maternity leave payment is lower than the minimum wage infers that production is more valued than reproduction.

This is reinforced by the fact that the costs of the entitlements under the Act are carried by the government and the employee, excluding any direct financial burden on the employer. Production appears to be prioritised and unconnected to reproduction. Employers are assumed not to benefit from reproductive activities. This also entrenches the idea that the parental leave is an "employer-friendly" provision.

Working for Families Scheme

The Working for Families Scheme is a 2004 government initiative to tackle issues around child poverty and to support families financially in accordance with the number of family members and the income of the family. The scheme does this by providing families with children with a minimum income through a governmental allowance. In other words, the scheme offers tax advantages for a broad scope of families.

The scheme is drafted in gender-neutral terms; however, it arguably has strong gender implications. As an unforeseen consequence, the scheme appears to support patriarchal family structures and entrenches individuals into traditional gender roles. Payment under the scheme is based on a minimum income as well as the number of children. In families with two adults, it is likely that one income or one and a half incomes would qualify for the benefits. Two full incomes often result in going above the threshold, disqualifying the family from benefiting from the tax relief. As a result, the mother in the family can either seek employment while outsourcing the care of their own children at a cost, or she can be supported by the government to stay at home and do it herself. This scheme effectively encourages women who live in a partnership out of paid employment, because it is usually women who earn less as a result of the existing gender pay gap.³⁹

³⁸ Employees are eligible for parental leave if they have worked for the same employer for an average of at least 10 hours a week, and at least one hour in every week or 40 hours in every month, in the six or 12 months immediately before the baby's expected due date (or the date the employee has started caring for an adopted child). There are different entitlements available to employees depending on whether they meet the six or 12-month criteria.

³⁹ Masselot, above n 12, at 81.

At the same time, single parents (who are most often mothers) are still required to engage in paid employment in order to benefit from the scheme. The policy, therefore, rewards the two parent family who embrace traditional gender roles by enabling one non-earning partner (usually the woman) to stay at home and look after the children, whilst making a moral judgment about single parents (usually single mothers), who are chastised as being bad mothers and/or citizens who “do nothing”, living on the Domestic Purposes Benefit. Thus, the value of caring for children appears to be higher when it is undertaken by women living as part of a couple, as opposed to single parents.

In addition, despite its apparent gender neutrality, the scheme supports a gendered agenda. The legislation’s terminology stays away from terms such as ‘family life’ and instead makes references to ‘personal’ and ‘leisure’ time. This effectively removes all connotations of traditionalism from the context.⁴⁰ The legislative wording, thus, suggests that a gender issue does not exist, and the neutral wording supports an impression that the legislation supports equality goals. The legislation refers to family as a unit and does not point to fathers or mothers to avoid gender issues. This non-gendered wording fails to acknowledge that women do carry the bulk of the unpaid care work. The legislation addresses male and female employees with equal terms in the abstract, while failing to acknowledge that, in reality, there is no equality as a starting point between the two genders.

Finally, as the intention of the scheme is to keep parents in employment, this means that the scheme does not appear to promote the interests of families, women or children, but rather of employers and the labour market. It is another example of employer friendly work-life related legislation. Thus, work-life balance law in New Zealand does very little to benefit parenthood or care in general. Foremost, the existing legislation appears to accommodate business, employment and labour market needs.

3. Gender “neutrality” of the right to request Flexible Working Arrangements legislation – the importance of the concept of care

In line with the rest of New Zealand legislation on work-life balance, the provisions outlining the rights to request flexible working arrangements are drafted in gender-neutral terms. The eligibility to request flexible working arrangements in the 2007 Act refers to the need to meet care obligations and not to the gender of the caregiver. The idea of providing mechanisms designed to accommodate employees’ dual burden of work and care commitment is, however, highly gendered in reality. Rearing and caring for children are mostly done by women in most countries, including in New Zealand.⁴¹ Nevertheless, there are growing numbers of fathers who do care for their children and sons who do care for their elderly/dependent parents.⁴² In addition, increased divorce rates mean that more fathers are forced to care for their children as well as working in paid employment. Spousal care has been reported, overall, to be more gender neutral than other forms of care.⁴³ The gender neutral dimension of the legislation caters for this growing population as well as arguably allowing for societal evolution of gender norms.

⁴⁰ Maria Stratigaki “The Cooperation of Gender Concepts in EU Policies: The Case of Reconciliation of Work and Family” (2004) 11(1) Social Politics 30 at 49.

⁴¹ World Economic Forum, above n 2.

⁴² Lindy Fursman and Paul Callister “Men’s Participation in Unpaid Care” (2009) Department of Labour <www.dol.govt.nz>.

⁴³ Louise Ackers and others “The Gender Dimension of Geographic Labour Mobility in the European Union.” Report prepared for Directorate C Citizens’ Rights and Constitutional Affairs (European Parliament), January 2009.

The motivation of the legislator for removing the care criteria for eligibility to request flexible working arrangements, in fact, reflects the fundamental distinction which exists in New Zealand between production and reproduction. The processes and values of production (a commercial activity deemed to belong to the public sphere) and reproduction (a private endeavour not valued in the public sphere) are disconnected from one another. This is further illustrated in the fact that employers are not required to contribute to maternity or parental leave pay. Reproduction in New Zealand is partly paid by the State, mainly through the Working for Families Scheme, Parental Leave legislation, subsidised childcare arrangements and the (female) employee. In this context, enlarging the right to request flexible working arrangements to all employees contributes to “pacifying” child-free (or care-free) employees who consider that care-related rights are additional privileges provided mostly to women. There are some (child-free and care-free) individuals who claim that having children is a life choice, comparable to choosing to have a pet or akin to gardening. Indeed, the removal of care from the eligibility criteria for requesting flexible working arrangements in the 2013 Bill has been supported by the 2012 survey, which suggests that the gender dimension of the flexible working arrangements requests is negligible. Overall, only 55.6 per cent of all requests for flexible working arrangements in their current jobs reported by employees related to care responsibilities.⁴⁴ Therefore, while a small majority of requests related to caring, a significant proportion of requests were made for other reasons. In addition, the survey found that overall 73.6 per cent of employers and 75.2 per cent of employees said that the legal right to request flexible working arrangements should be available to all employees.⁴⁵ In addition to this, the Cabinet Minutes reveal that another motivation behind the legislation is to increase the productivity of all workers, rather than just increasing the productivity of employees with care obligations through flexible working arrangements.⁴⁶ Therefore, the increase of the overall productivity of employees, regardless of their gender or family commitments, has become a focal point for the amendments.

Arguably, these views completely fail to recognise the fact that society benefits when parents invest heavily into caring and nurturing their children and helping them to become the next generation of active, responsible and well-adjusted citizens, workers and tax payers. All members of society benefit from the “production” of such individuals. However, such production is carried largely by parents, and especially by mothers who are not compensated for their work. In addition, caregivers can never withhold the fruit of their labour. On that basis, it is arguable that a large portion of society, including employers, is “free-riding” on the unpaid work of some individuals who are mostly women.

Moreover, the neoliberal system encourages and values the individual’s autonomy, which, in turn, is valued above all in society. Care need and care-related obligations are relegated to the private sphere and are provided little or no accounting values. This approach ignores the fact that all human beings are in need of care at least in their infancy and more often these days, later in life with the increasing life expectancy. In addition, no one is ever guaranteed to remain free from accident, illness or general tribulation in life. The autonomous approach also ignores the fact that those who consider themselves “autonomous” (those who have a job and are “productive” from an accounting point of view), in fact, rely heavily on other individuals to provide care work which autonomous individuals need. This very often includes relying on one’s wife or partner; it can also take the form of outsourcing house cleaning, childcare or elderly care

⁴⁴ Department of Labour, above n 28.

⁴⁵ As above.

⁴⁶ Office of Minister of Labour, above n 29.

(increasingly these days also relying on global help).⁴⁷ In turn, this means that often those whom we consider to be the most autonomous in life are, in fact, the most reliant on care work done by other individuals.⁴⁸ This further underscores the fact that there is, in New Zealand, a disconnection between production, which is valued, and reproduction, which is not.

4. The complexity of the flexibility concept

The concept of flexibility is central to the right to request flexible working arrangements. Over the past few decades, many forms of flexible working arrangements have been introduced, sometimes with a view to resolving work-family conflict and enhancing work-life balance.⁴⁹ These include, in particular, part-time work, fixed-term contracts, temporary agency work, work with flexible hours, tele-working and home working, and more recently the “zero-hour work”.⁵⁰ Flexibility is an ambiguous concept which can potentially impact positively but also negatively on work-family conflicts.⁵¹ Indeed, the concept of work flexibility can be interpreted as a tool for employers to adapt quickly to the globalised market competition or as an instrument to enhance the reconciliation between work and family life or contribute to general work-life balance. While a number of researchers have pointed out how flexibility can help to resolve work life conflicts,⁵² others have highlighted that employers can benefit greatly from this concept at the expense of employees.⁵³ On the one hand, when flexibility is used as a tool for employers to enhance business in an increasingly globalised economic competition, it has been argued that it leads to less predictability and discretion, and an increase in irregularity of work hours, which, in turn, leads to lower income and higher insecurity for workers.⁵⁴ Consequently, this leads to increased work-life conflicts for employees. On the other hand, in the context of the increasing female employment rate and the overall evolution of gender norms, certain forms of “family-friendly” flexible arrangements are seen as helping women integrate into the employment market by reducing their work-family conflicts.

These findings are consistent with some New Zealand research which suggests that there are great benefits in making flexible working arrangements available to men and women equally with a view to resolving some work-family conflicts. A survey recently conducted in the context of the Canterbury rebuild suggests that in order to accommodate changing family patterns, where

⁴⁷ Evelyn Nakano Glenn *Forced to Care: Coercion and Caregiving in America* (Harvard University Press, Harvard, 2010); Evelyn Nakano Glenn (2009) “Le travail forcé: citoyenneté, obligation statutaire et assignation des femmes au *care*” in Pascale Molinier, Sandra Laugier and Patricia Paperman (eds.) *Qu'est-ce que le Care? Souci des autres, sensibilité, responsabilité* (Payot et Rivages, Paris, 2011) 113.

⁴⁸ Joan Tronto “Care démocratique et démocratie du care” in Pascale Molinier, Sandra Laugier and Patricia Paperman (eds.) *Qu'est-ce que le Care? Souci des autres, sensibilité, responsabilité* (Payot et Rivages, Paris, 2011) 35.

⁴⁹ Janneke Plantenga and Chantal Remery “Reconciliation of Work and Private Life: A Comparative Review of Thirty European Countries” (September 2005).

⁵⁰ Hugh Collins “The Right to Flexibility” in Joanne Conaghan and Kerry Rittich (eds.) *Labour Law, Work, and Family* (Oxford University Press, Oxford, 2005) 99.

⁵¹ See generally Caracciolo di Torella and Masselot, above n 15.

⁵² Susan Yeandle *Women's Working Lives* (Tavistock, London, 1984); Ivana La Valle and others *Happy Families? A typical Work and its Influence on Family Life* (Policy Press and Joseph Rowntree Foundation, Bristol, 2002); Jill Rubery and Roger Tarling “Britain” in Jill Rubery (ed.) *Women and Recession* (Routledge, London, 1988).

⁵³ Anneke Goodswaard and Matthieu de Nanteuil “Flexibility and Working Conditions: A Qualitative and Comparative Study in Seven EU Member States” (2000) European Foundation for the Improvement of Living and Working Conditions <www.eurofound.europa.eu>.

⁵⁴ Dirk Hofäcker and Stefanie König “Flexibility and Work-life conflict in time of crisis: a gender Perspective” (2013) 33(9) *International Journal of Sociology and Social Policy* 613.

both parents are in paid employment, there needs to be more flexibility of employment for both women and men, and not just for women.⁵⁵ Moreover, flexibility is very high on the New Zealand agenda: 70 per cent of employers report having some or all of their employees working flexibly.⁵⁶ Among current employees, 43 per cent reported that they have made a request for flexible working arrangement (not necessarily based on the statutory rights) to their employer and a large majority of these requests were approved.⁵⁷ Women are more likely to report that their jobs had a lot of flexibility and less likely to say they had no flexibility.⁵⁸ However, given that a majority of women are in part-time employment and precarious work, it raises the fundamental question of the understanding and the meaning of the concept of flexibility.

The concept of flexibility is not merely a tool that can alternatively benefit employers or employees, but is also a concept that impacts differently on men's and women's ability to solve work-life conflicts. In the context of the European Union, the work of Hofäcker and König is particularly useful to shed light on the gender impact of the concept of flexibility, which arguably impacts on men and women similarly and also differently.⁵⁹

The number of working hours does impact on employees' work-life balance. When flexibility is concerned with the *volume of work*, too many hours of work leave little time for family life and, therefore, long working hours conflict directly with the ability to resolve work-family conflicts.⁶⁰ A number of studies have demonstrated, in particular, that working overtime impacts negatively on individuals' perception of their work-life balance.⁶¹ The negative impact of overtime is more important when imposed by the employer⁶² than when it results from personal choice.⁶³ In the New Zealand context, this has been well documented by Fursman.⁶⁴ Moreover, Fursman and Zodgekar have argued that flexible working arrangements could mean that work encroached on family time, particularly where employees work from home.⁶⁵ Additionally, working flexibly can lead to feelings of guilt and induce people who are highly committed to their employment to do extra hours voluntarily. Employees working flexibly are likely to miss family events and feel guilty when taking time off to look after sick children, as if they let down their employer or colleagues. Those employees are likely to work harder than they otherwise would have to compensate for the perception that they are creating difficulties for their employers or colleagues. This is influenced by both the culture of workplaces and the broader cultural message

⁵⁵ Ministry of Women's Affairs "Building Back Better - Utilising Women's Labour in the Canterbury Rebuild" (2013) <www.mwa.govt.nz>.

⁵⁶ Department of Labour, above n 28.

⁵⁷ As above.

⁵⁸ Lindy Fursman and Nita Zodgekar "Flexible Work Arrangements: New Zealand Families and Their Experiences with Flexible Work" (2009) 81 Family Matters 25.

⁵⁹ Hofäcker and König, above n 54.

⁶⁰ Jerry Jacobs and Kathleen Gerson *The Time Divide: Work, Family and Gender Inequalities* (Harvard University Press, Cambridge, 2004).

⁶¹ Agnes Parent-Thirion and others "Fifth European Working Conditions Survey – Overview Report" (12 April 2012) European Foundation for the Improvement of Living Standards and Working Conditions <www.eurofound.europa.eu>; Monique Van der Hulst and Sabine Geurts "Associations between overtime and psychological health in high and low reward jobs" (2001) 15(3) Work & Stress 227.

⁶² Philip Tucker and Celia Rutherford "Moderators of the relationship between long work hours and health" (2005) 10(4) Journal of Occupational and Health Psychology 465.

⁶³ Gayle Porter "Work, work ethic and work excess" (2004) 17(5) Journal of Organizational Change and Management 424

⁶⁴ Lindy Fursman "Working Long Hours in New Zealand: A Profile of Long Hours Workers Using Data from the 2006 Census" (March 2008) Department of Labour <www.dol.govt.nz>.

⁶⁵ Fursman and Zodgekar, above n 58, at 51.

of being “a good worker”, where time off is frowned upon.⁶⁶ Such a workplace culture is particularly beneficial to employers.

However, as argued by Hofäcker and König, work-life balance of both men and women appears to be negatively impacted upon by the irregularity and unpredictability of working hours, regardless of the number of working hours.⁶⁷ Thus, the worker’s level of control over the working hours is important in mitigating work-family conflict.⁶⁸ Hofäcker and König further demonstrate that the importance of autonomy on choosing one’s working time is used differently by each gender.

On the one hand, Hofäcker and König convincingly argue that women use this control to achieve better work-life balance. Women tend to do so by requesting to work part-time or to job-share. This is overwhelmingly confirmed in the New Zealand context, where women are more likely than men to have access to arrangements that involve a reduction in hours and income. Women are more likely to report access to part-time work (68 per cent of women and only 44 per cent of men), and job-sharing (48 per cent of women against only 34 per cent of men).⁶⁹ Research by the Ministry of Women’s Affairs reveals that nearly three quarters (72.4 per cent) of part-time employees are women,⁷⁰ while only 42 per cent of full-time employees are women.⁷¹ These findings are backed up by the Families Commission, which found that 32 per cent of New Zealand women who were in paid employment reported that they worked 20 or fewer hours per week, compared with just 2 per cent of men working as little.⁷² The research further revealed that women were more likely to agree with statements that involved putting family needs before personal or work responsibilities.⁷³

On the other hand, Hofäcker and König’s study shows that men use flexible arrangements to increase their work commitments. In particular, men tend to make use of flexi-breaks and work from home. This results in increasing work-family conflicts for men. Here again, New Zealand’s research provides convincing evidence confirming the gender dimension of the concept of flexibility. Men and women differ in what they report as being generally available to them at their workplace in terms of flexibility. Men are considerably more likely to have access to flexible breaks (71 per cent of men against only 64 per cent of women).⁷⁴ Men are also more likely to regularly work from another location, including home (28 per cent of men against only 20 per cent of women).⁷⁵ Consistent with the finding that men are more likely than women to have flexible hours, fathers with a child or children under 14 years living in the household are reported also to be more likely to have flexible hours than mothers with a child under 14 years in the household.⁷⁶

Thus, New Zealand data points toward two trends. On one level, and in accordance with Hofäcker and König’s study, flexibility is not a gender-free concept. Flexibility contributes to

⁶⁶ As above.

⁶⁷ Hofäcker and König, above n 54.

⁶⁸ As above.

⁶⁹ Department of Labour, above n 23.

⁷⁰ Ministry of Women’s Affairs “Mothers’ Labour Force Participation” (December 2009) <www.mwa.govt.nz>.

⁷¹ Department of Labour “Review of Part 6AA: Flexible Working Arrangements” (2011) <www.dol.govt.nz>.

⁷² Families Commission “Give and Take: Families’ Perceptions and Experiences of Flexible Work in New Zealand” (1 September 2008) <www.familiescommission.org.nz>.

⁷³ As above.

⁷⁴ Department of Labour, above n 23.

⁷⁵ As above.

⁷⁶ Department of Labour, above n 71.

societal gender structures. As flexible working arrangements are used differently by men and women, it also reflects traditional gender roles and entrenches gender-segregated labour market structures. On another level, the types of flexible working arrangements which are made available by employers appear to greatly differ depending on whether the employees are male or female.

Conclusion

This article has argued that flexible working arrangements are neither automatically family friendly, nor are they gender neutral. Legislation which relies on gender-neutral terms does not necessarily achieve gender equality, and on the contrary, such legislation can even create or entrench disadvantages relevant to sex as well as remaining blind to the reality of gender roles. At the same time, however, it should be pointed out that gender-neutral legislation does provide opportunities for an evolution of traditional gender roles. There is, therefore, a need to consider the right balance between gender-neutral terms and the reality of gender positions in society. The right to request flexible working arrangements and the 2013 proposed amendments to this provision show that (unpaid) care work, which is not valued from an accounting point of view, is now no more valued from a symbolic standpoint. Although care work disproportionately falls to women, legislation addressing work-life balance does not take into account women's social reality. Gender-neutral legislation dealing with work-life balance and work-care balance does often negatively impact on women disproportionately, if it is not specifically directed at women.⁷⁷ If policy favours gender-neutral terms in legislation as a way to encourage the evolution of gender roles, such legislation could be accompanied by provisions helping men to better share domestic and caring tasks. Promoting gender equality in the workforce is a complicated undertaking as it has to address two feminist concerns of valuing unpaid work while at the same time contributing to a more equal share between men and women.⁷⁸ The provisions amending Part 6AA in the 2013 Bill pretend that gender differences do not exist by treating both men and women as if they carried the care burden equally. Therefore, the proposed legislation does not adequately address either issue and it is likely to worsen women's employment rights in New Zealand.

In addition, *prima facie* gender-neutral concepts such as flexibility are being revealed to have, in fact, a strong gender dimension, which ultimately has the power to shape and entrench gender structures. The emphasis of the concept of flexibility in New Zealand employment law not only reveals that work-life balance is primarily a tool which assists employers to adapt to global competition; it is also a gender-charged concept. The gender dimension of the flexibility concept contributes to the entrenching of traditional gender roles and segregated labour markets. Ultimately, the use of flexibility reinforces the conclusion that in New Zealand, production and reproduction are disconnected. Thus, raising pigs is more valuable and valued than raising children.

⁷⁷ Charlotte O'Brien "Confronting the Care Penalty: The Case for Extending Reasonable Adjustment Rights Along the Disability/care Continuum" (2012) 34(1) Journal of Social Welfare and Family Law 5 at 12 – 13.

⁷⁸ Stratigaki, above n 40, at 38.