

## The Gender Implications of New Zealand's Gender-Neutral Law and Policies on Flexible Working Arrangements

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New Zealand prides itself on being leading in gender equality as the first country to have allowed women to vote and because New Zealand has had and currently has women in high public positions such as the Governor-General, Prime Minister or Chief Justice. New Zealand also frequently scores high on various international gender equality indexes and reports (eg: World Economic Forum 2013). In addition, a number indicator suggests overall that 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) (Department of Labour 2010b; World Economic Forum 2013).<sup>1</sup> Unlike many other OECD countries New Zealand does not struggle with low fertility rates, which, at replacement level,<sup>2</sup> are “second to none of the industrialised countries” (Families Commission 2013, 14).

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 (Ministry of Women's Affairs 2008). Women labour force participation is still lower than that of men's with the 12 percentage points in 2011 (Families Commission 2013, 62). One of the main hold up remains in the fact that women are still responsible for the majority of the unpaid work in the household and in particular they remain the main care giver for children, the elderly and the disabled. While women's participation in paid employment has increased drastically over the past decade, men have not changed their work to care ratio enough to fill the gap.

As a growing number of women undertake both paid employment and still continue to do most of the unpaid care as part of raising children (Equality and Human Rights Commission 2009), it is not surprising that issues around reconciling work and family life have enjoyed a great

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<sup>1</sup> Reports on the rate of women in the NZ labour force varies from 62.5% in the Household Labour Force Survey (June 2013) to 72% in the World Economic Forum Report (2013) at p. 49.

<sup>2</sup> New Zealand women give birth to 2.1 children on average (Families Commission 2013, 58). Counter-intuitively, high fertility rates are found in countries that have high female employment rates.

increase in scholarly attention recently (Bardoel, De Cieri, and Santos 2008; Masselot 2011). However, these issues are evolving and are decreasingly concerned with women in the workforce.

In the 1980s the New Zealand labour market underwent change to become “particularly fluid and flexible” (Masselot 2011, 72). 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 (Masselot 2011, 75). In 2003, the government lead 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 (Caracciolo di Torella and Masselot 2010). 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 (McManus 2009, 125). This therefore puts added pressure on mothers or employees with care responsibilities. It means that for employees with care giving obligations, it can be difficult and challenging to remain or to thrive in the paid labour market. It also means that the private sphere of care is not sufficiently navigable by individuals anymore and is therefore in need of legal intervention and guidance (Masselot 2011).

An adequate regime of reconciliation between work and family life<sup>3</sup> must include ‘leave’ and ‘time’ provisions as well as a care strategy (Caracciolo di Torella and Masselot 2010; Gornick and Meyers 2010). ‘Time’ provisions in New Zealand are covered by the right to request flexible working arrangements. It is complemented by a number of legal provisions designed to help parent balance paid work and family responsibilities. ‘Leave’ provisions 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)

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<sup>3</sup> I have argued elsewhere 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 for instance, with the overall aim of contributing to individuals’ well being) (Caracciolo di Torella and Masselot 2010).

Amendment Act 2008 enable parents to 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 enable individual who have care responsibilities to enter and remain in the labour market (Lewis 2008). It includes the Working for Families Scheme Package 2004 together with the government subsidies for pre-school and out-of school care.<sup>4</sup>

The New Zealand work-life balance projects have developed under **unique motivation**, not specifically targeted at women or families' well-being. The stated goal of the project was not to enhance or improve women 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 that organisations prioritise their employee's work-life balance in light of creating "more productive, sustainable employment relationships and workplaces"(New Zealand Department of Labour). The fact that the act had the potential to be a great advantage to working women was never a stated goal, but it became a welcome side-effect of the legislation. The more 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 into the Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000. Under Part 6AA employees with caring responsibilities are entitled to make a formal statutory request to their employers in order 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 caring 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.

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<sup>4</sup> This includes the government funding for up to 20 hours per weeks for children aged 3-5 to attend early childhood education.

Originally modelled on a similar UK provision, which exclusively addressed the need of parents of young and disabled children, the New Zealand 2007 amendment Act was, however, extended significantly to facilitate the need of employee with more general care obligation. This has represented a significant development for the right to care 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.

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

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. In order to consider the impact of the law in a meaningful way, the paper takes a socio-legal approach. In first part the paper reviews the law facilitating flexible working arrangement and its recent proposed amendments. Part 2 considers the **XXX**

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

For the purposes of the 2013 Bill section 69AA(a) is fully replaced by a new section as the object of Part 6AA is changed. The new section 69AA(a) aims to extend the act's applicability to extend the statutory right to all employees, not just those with caring responsibilities.

The period within which an employer must deal with a request for a variation under section 69AA(b) is reduced from 3 to 1 month. Therefore the time for an employer to consider the request is considerably reduced.

Section 69AAB is replaced with a new section as the limitations imposed by the old section 69AAB 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 sets out the requirements relating to the request. Section 69AAC(d) is repealed, which requires an employee who requests a variation of his or her working arrangements to explain how the variation will enable the employee to better care for the person whom he or she is to care for. The condition that the variation must be to enable the employee to care for another person is to be removed, so section is no longer required.

Section 69AAD is repealed, as no limitations on the number or timing of requests is meant to apply anymore. Employees are thus able to make applications for FWAs at any time during and prior to their employment.

The requesting employees' rights are therefore somewhat strengthened, as a number of the regulatory processes surrounding the requests for FWAs have been made more employee friendly, but on the other hand the amendments take completely abolish and women or carer focus of the legislation.

The cabinet minutes reveal that the amendments of Part 6AA in the bill were introduced based on the findings of the legislative review were interpreted to mean that FWAs have to enable a better facilitation of work-life balance for all employees in NZ, and not just for employees with care responsibilities (Office of Minister of Labour 4). Therefore the bill proposes that Part 6AA is amended by extending eligibility from those employees with caring responsibilities to all employees. As such the 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 (*Employment Relations Amendment Bill 2013, Commentary*)." The bill entirely removes any gender/care dimension from Part 6AA and instead acknowledges the importance of flexible working arrangements to optimise the labour market participation of groups that

would otherwise be unable to participate by extending the rights to request FWAs to all employees (*Employment Relations Amendment Bill 2013*, explanatory note). The purpose of FWAs 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.

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

In 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 by the New Zealand Council of Trade Unions. It is thus framed as an issue that is not about family and care issues specifically (Masselot 2011, 73), but a more general concern of every working New Zealander. As early as 2003, Honourable M. Wilson made it clear that the government did not see work-life balance projects as projects 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" (Wilson). Rather than about the reconciliation of work and care work or work and family life it is focused on a reconciliation of an employee's work and leisure life.

The non-gendered approach to work-life balance by the government has been fuelled and supported by survey results, which seemingly suggest that the issue of work-life balance does not have a gender dimension. In 2008 the New Zealand Department of Labour undertook a work-life balance survey (New Zealand Department of Labour), which found that overall there were no significant gender, age or ethnic differences in the way people rated their current work-life balance. Only a few years earlier in the 2005 survey, unlike the 2008 results, women were even found to more likely report better work-life balance than men. Therefore work-life balance legislation increasingly aims to treat women and men equally. This development in New Zealand legislation in general is not only evidenced by the act and the bill, but also by other legislation with a women's rights dimension.

*The Parental Leave and Employment Protection Act 1987*

The Parental Leave Act gives parents the right to take parental leave in order to take care of small children. The criteria under the provision are however quite restrictive, especially for women in precarious employment. The act is worded in gender neutral terms, but is *de facto* addressed at women. Under section 71A the male partner is able to receive the allowance under the act, but the requirements for the male partner to be eligible for the payments and time off work have to be fulfilled by the woman. The father'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 that will be doing the care giving for the child.

The pay under the legislation is inferior to a minimum wage income, which also prejudices against the male partner wage being sacrificed, as it is typically higher than that of the woman partner. Although the provisions under the Parental Leave Act therefore aim for gender neutral terms, it does not achieve any gender neutrality, mainly because it fails to address the gender imbalance that circumstantially surrounds its provisions adequately.

Additionally the costs of the entitlements under the act are carried by the government solely and there is no burden on the employer. Production appears to be privileged and unconnected to reproduction. Employers are assumed not to benefit from reproduction activities and it reinforces the idea that parental leave is "employer friendly" provision.

#### *Employment Relations (Breaks, Infant Feeding, and other matters) Amendment Act 2008*

The provisions relating to breast feeding mothers are set out in part 6C of the act. Section 69Y provides that employees can request their employers to provide breaks and reasonable facilities for breast-feeding mothers at work. However, the section is limited by the operational environment and resources of the employer and there is no obligation on employers to pay during the break taken for the purposes of breast feeding. The stated goal of the legislation is to provide infant well-being and gender equality, however due to its strong employer focus the legislation falls short of meeting the UNCEAFDW 2003 standards.

### *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 an allowance provided by the government. In a broader sense the scheme offers tax advantages for a broad scope of families.

The scheme is drafted in gender neutral terms yet it has very strong gender implications. Arguably as an unforeseen consequence, the scheme supports patriarchal traditional family structures and entrenches individuals into gender roles. It effectively encourages women who live in partnership, out of paid employment because it is usually women who earn less as a result of the existing gender pay gap (Masselot 2011, 81). Women can either seek employment and outsource the care of their own children at a cost, or they can be supported by government to stay at home and do it themselves. 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 the single mother), 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 gender neutrality on the face of it, the scheme supports very 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 (Stratigaki 2004, 49). The legislation refers to family as a unit and does not refer 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.

Finally, as the incentive of the scheme is to keep parents in employment. This means that the scheme does not appear to promote the interest of families, women or children, but rather

employers and the labour market. It is another example of employer friendly work-life related legislation. Thus, work-life balance law in New Zealand has very little to give for parenthood or care in general. Foremost, the existing legislation appears to accommodate business, employment and labour market needs.

### **3. Gender neutrality of FWA legislation**

Flexible Working Arrangement provisions are also drafted in gender neutral terms. The eligibility refers to care obligations and not to gender, even if the care is mainly done by women. The idea of providing mechanisms designed to accommodate employees' dual burden of work and care commitment is however highly gendered in reality. The provisions allows for societal evolution. There are growing numbers of fathers who do take care of their children and sons who do care for their elderly parents. The gender neutral dimension of the legislation caters for this growing population. Research suggests that there are great benefits in making FWAs available to men and women equally. A survey recently conducted in the context of the Canterbury rebuilt suggests that in order to accommodate changing family patterns, where both parents are in paid employment, there needs to be more flexibility of employment for both women and men and not just for women (Ministry of Women's Affairs 2013).

The removal of the criteria of care to access FWA under the 2013 bill, means that not only the gender dimension of the legislation is obliterated but also that the care provided by men will become invisible.

However, the removal of care from the eligibility criteria for requesting FWA in the 2013 is supported by the 2012 survey on the FWA provisions. The 2012 survey suggests that the gender dimension of the FWA requests is negligible. Overall, only 55.6 percent of all requests for FWAs reported by employees in their current jobs related to caring responsibilities (Department of Labour 2011). 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 percent of employers and 75.2 percent of employees said that the legal right to request FWAs should be available to all employees (Department of Labour 2011).

**This is an issue of gender stereotyping:** Yet men and women differed in what they reported as being generally available to them at their workplace in terms of flexibility. Men were considerably more likely to have access to flexible breaks (71 percent of men and only 64 percent of women). Men were also more likely to regularly work from another location (28 percent of men and only 20 percent of women) (New Zealand Department of Labour). Consistent with the finding that men were more likely than women to have flexible hours, fathers with a child or children under 14 years living in the household were also more likely than mothers with a child under 14 years in the household to have flexible hours (Department of Labour, *Review of Part 6AA: Flexible Working Arrangements*). Therefore the type of FWAs that would be of great assistance for mothers with care responsibilities are more commonly taken up by men.

Women on the other hand were more likely to have access to arrangements that involved a reduction in hours and income. Women were more likely to report access to part time work (68 percent of women and only 44 percent of men), and job sharing (48 percent of women and only 34 percent of men) (New Zealand Department of Labour). Research by the Ministry of Women Affairs revealed that nearly three quarters (72.4 percent) of part time employees are women (Ministry of Women's Affairs, *Mothers' Labour Force Participation*), while only 42% of full-time employees are women (Department of Labour, *Review of Part 6AA: Flexible Working Arrangements*). This finding is backed up by 2008 Families Commission research, which found that 32 percent of New Zealand women who were in paid employment reported that they worked 20 or fewer hours per week, compared with just 2 percent of men working as little. The research also revealed that women were more likely to agree with statements that involved putting family needs before personal or work responsibilities (Families Commission, *Give and Take: Families' Perceptions and Experiences of Flexible Work in New Zealand*). Therefore the type of flexible work that is available to men and women greatly differs and therefore clearly has a gender dimension.

Internal flexibility, as defined by Peter Auer (Auer) is the most useful work place flexibility for employees with care responsibilities, but currently much more likely to be available to men, who carry a much smaller share of the care burden than women. At the same time external flexibility, which is instead linked to implications for job insecurity, pay rates and working

conditions, appears to be significantly more available for women. This shows that the FWA legislation also has the effect of driving women into precarious employment and traditional roles, while the benefactors of the provisions are more likely to be male.

Gender neutral legislation thus inevitably creates disadvantages relevant to sex, and does not achieve gender equality by any means. Adversely, it has been argued that increasing the flexible employment of women in particular is synonymous with gender equity (Stratigaki 49). Care duties disproportionately fall to women so that a gender neutral legislation to deal with work-life balance and work-care balance will always indirectly discriminate against women, if it is not specifically directed at women (O'Brien 12–13). Promoting gender equality in the workforce is already a complicated undertaking as it has to address two feminist concerns of valuing unpaid work and to share it more equally between both men and women (Stratigaki 38). The provisions amending Part 6AA in the bill pretends that gender differences do not exist by treating both men and women as if they equally carried the care burden. Therefore the bill does not adequately address either issue and would thus worsen women's employment rights in New Zealand.

#### **4. Is the legislation being utilised appropriately?**

Under the existing legislation FWAs have already been requested to a large extent for reasons other than care responsibilities (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). Because the legislation has lost its character of being about work and care reconciliation early on, it has therefore been utilised in order to achieve better work-life balance of employees, and consequently more productive employees. However, despite the presence of legislation providing eligible employees with a right to request flexible work arrangements for caring responsibilities, a majority of employee-reported requests that were accepted by employers took place without recourse to the formal process provided for under Part 6AA of Employment Relations Act (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). Therefore the legislation arguably has not been utilised to its full potential.

In order for the FWA legislation to be implemented, employers have to make FWAs available to their staff. There was a slight increase in the general availability of flexible work made available to all or some staff as reported by employers subsequently to the introduction of Part 6AA in 2007. However, in a number of areas there was a decrease in the proportion of organisations offering these arrangements to all staff, with an increase in those offering them to only some staff (New Zealand Department of Labour). Therefore despite close two two-thirds of all employers in the review stating that they would like FWAs to be available to both men and women, not many have actually made this an option to their staff in addition to the existing legislation.

There has also been a change in terms of the type of FWA that is available to employees. The indicative comparison between the Department of Labour employee surveys of 2005 and 2008 suggests a decrease in the availability of occasional flexibility in start and finish times and regular flexibility in start and finish times, which are crucially important flexibility terms for carers. A decrease was further shown in shift flexibility and buying additional leave in exchange for reduced pay, which are also mechanisms, which help carers reconcile their care and work obligations effectively.

The comparison further suggests an increase in the availability of occasionally and regularly working from another location and flexibility in choosing when to work your hours. While these FWAs can be helpful to carers, they also show significant benefits to employers. A 2013 study found a highly significant 13 percent increase in performance from home-working of which 9 percent was from working more minutes of their shift period (fewer breaks and sick days) and 4 percent from higher performance per minute. No negative spill overs onto workers who stayed in the office were found. Home workers also reported substantially higher work satisfaction and psychological attitude scores, and their job attrition rates fell by over 50 percent (Blooma et al.). Therefore arguably employers have benefitted from the types of FWAs that are being made available to employees, which again underlines the employer focussed and employer friendly nature of this legislation, in opposition to it not creating many benefits for carers.

Employees in New Zealand also perceived disadvantages of FWAs, which further support the impression, that the reconciliation of work and family life or even the reconciliation of work and

leisure life, is not the core purpose of the legislation, but that it is rather focussed on profit maximisation. Some employees felt that working according to an FWA could be more complicated than simply working standard hours and missing some aspects of family life. They also felt that an FWA could mean that work encroached on family time, particularly where participants were working from home (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 51). Additionally there were findings that FWAs can invoke feelings of guilt and lead people who are highly committed to their employment to do extra hours voluntarily. Survey participants who had an FWA felt that they were likely to miss family events, to feel guilty when taking time off, or as if they let down their employer or colleagues, and to feel guilty when calling in sick when they had to look after sick children. Those employee participants with FWAs thus feel guilty because of the FWA and therefore ending up working even harder than they otherwise would have. This is influenced by both culture of workplaces and also the boarder cultural message of being "a good worker", where time off is frowned upon (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 51). Such workplace culture is particularly beneficial to employers.

The FWA legislation creates an individual right, which is difficult to enforce. In order for it to be successful there would have to be an appropriate monitoring process. As the bill also proposes considerable changes to the legislation involving collective actions and collective bargaining, as well as altering employees' and employers' rights during strikes, it is a bill that has the potential to noticeably weaken the role of Unions in employment disputes. It is therefore not likely, that trade unions will be able to undertake the monitoring of employers to a level that would be appropriate.

Moreover, Amanda Reilly raises some fundamental concerns with the legislation. While acknowledging that the legislation may be helpful to some employees she had doubts as to its general effectiveness, because the complaints are to be driven by an individual, who by the nature of the complaint will be pressed for time. Further there is no significant penalty on employers who are in breach of the act, as the maximum penalty is very small at only \$2000, and there is no possibility of naming and shaming employers who do not take requests seriously (Reilly 165). Many employees might consider that it is not enough of an incentive to

challenge their employment and colleague relationships. Therefore it is questionable, how much of a right the legislation actually gives employees, as there are very little mechanisms of enforcing any such rights. Therefore, while the bill aims to make applications for FWAs and the admissibility requirements easier, that does not change the fact that it is an individual right to be enforced by relatively powerless employees.

Under section 69AAH and AAI of the act the employee has the right to take the employer for mediation or to the Employment Relations Authority. However, there are not many cases in regards to the negotiation of FWAs before the Authority. This can mean that the provisions are working perfectly and that there are no disputes between employers and employees on the basis of FWA negotiations, or that FWAs are always granted in accordance with the employee's wishes and employees never suffer any grievances. Or it can mean that the employees are simply not informed about their rights of appeal against their employer's decisions and that they fear the repercussions such an appeal could have on their career and their working atmosphere. Looking at the uptake of FWAs, it appears that the latter might apply in reality.

## **5. What is the uptake of FWAs ?**

The legislation granting a right to request FWAs has already been in force since 2008. Therefore in light of the recent bill it is crucial to look at how FWAs have been treated by employers and employees to date. Most people that were surveyed as part of a 2009 survey were able to have at least some form of FWA, for example some workplace flexibility such as taking time off for special events (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 45). 70 percent of employers report having some or all of their employees working flexibly (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). Among current employees, 43 percent reported that they have made a request for FWAs to their employer and almost all of these requests were approved (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). Although women generally have less access to FWAs under the act, women were more likely to report that their jobs had a lot of flexibility and less likely to say they had no flexibility (Fursman and Zodgekar, "Flexible Work Arrangements: New Zealand Families and Their Experiences with Flexible Work" 27). Therefore a majority of employees

appear to already have flexibility in their workplace, which is unrelated to the statutory FWAs and there appear to be flexible terms available for women. However, given that a majority of women are in part time employment and precarious work, it is not surprising that women report that they are under the impression that their employment is flexible unrelated to any statutory right to request a FWA.

Out of those women, who said that they had flexibility in their employment, 78 percent had varied start or finish times in order to pick up family members, and 65 percent used that arrangement regularly (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 45). This is an area that appears to be working relatively well as other surveys also depict flexible start and finish times as the most common form of FWA. 77 percent of participants with an existing FWA stated that they could move lunch breaks for family commitments and that they could have time off during school holidays. Although it was not specified whether time off during school holidays was due to scheduling of annual leave entitlements. Out of all participants 69 percent could work longer hours and take time off later and 71 percent could change hours for sports. Therefore there is uptake of a number of different FWAs, which aid the reconciliation between work and family life. However, arrangements, which go beyond flexitime, are not common. Therefore any arrangements that employees are able to negotiate, might be negotiated as part of their contract, without the help of a particular statutory right reinforcing rights they already possess as part of their employment contract negotiation.

This impression is strengthened by a 2011 survey conducted with women in public sector employment, which found that the uptake of flexible working is predominantly confined to flexitime, as opposed to job-sharing or working from home (Donnelly, Proctor-Thomson, and Plimmer 193). Working from home was the FWA which had the lowest uptake with only 36 percent using it regularly (Fursman and Zodgekar, "Flexible Work Arrangements: New Zealand Families and Their Experiences with Flexible Work" 27). A survey by statistics New Zealand showed that only 41 percent of all employees had flexible start and finish times in their main job. Thus, although it is the most common form of FWA, its overall uptake is still relatively low. The survey also found that male employees were more likely to have flexible hours (43 percent) than female employees (39 percent) (Statistics New Zealand), which further suggests that there

already is a gender imbalance in the uptake of FWAs, considering that so far they have been available only to carers, and women in New Zealand carry the bulk of the care burden. It also shows that employees under the 2007 legislation are already in a position where they can make FWAs available to all employees and not just to carers, should they wish to, and that there is a significant uptake of FWAs by male employees.

A more general finding was that FWAs have to suit both the employee and the employer well. There was not one arrangement that helped all families, but only individual solutions. The most popular form of FWA was taking time off for special occasions, flexible start finish times and working from home (Fursman and Zodgekar, "Flexible Work Arrangements: New Zealand Families and Their Experiences with Flexible Work"). And while a large majority of employers already make flexitime agreements available to their employees, 30 percent of employers reported that they did not have any employees working flexibly. Larger employers were much more likely to have none or only a small proportion of staff working flexibly, while small firms were much more likely to have all staff working flexibly (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). This is surprising, given that larger firms with larger numbers of employees should be in a better position to offer FWAs generally. Therefore there does appear to be some reluctance, especially of large employers, to offer FWAs to their employees. Thus, there is a need for statutory intervention to strengthen employees' rights to FWAs in larger companies.

## **6. What are the barriers to the uptake of FWAs ?**

Although there is some uptake of FWAs, there are many barriers, which prevent employees from accessing changes in their working patterns. Research by the Families Commission found that barriers to accessing flexible working arrangements included the unavailability of FWAs in particular workplaces, a perception of unsupportive workplace cultures, including the attitudes of immediate managers or employers, and the views of colleagues and co-workers, concerns that using flexible work would hamper career progression and involve a reduction in income, and a perception that flexibility was only available to highly valued employees in particular occupations or industries (Families Commission, *Give and Take: Families' Perceptions and Experiences of Flexible Work in New Zealand*). Similarly a Public Service Association survey

found that the main barriers for women were related to the nature and the structure of the work. The main preventing factors were workloads and time pressures (53.6 percent), not wanting to burden work colleagues (35.5 percent) and anxiety about future employment/job security (18.8 percent). While workloads, time pressures and job natures are always going to pose challenges on the workings of FWAs, many of the burdens that employees experience are unnecessary, as they are mainly caused by employer attitudes and workplace culture.

Although not every job will be perfectly flexible and the sheer nature of some positions will prevent employees from taking up flexible arrangements, there is still a lot of room for improvement. Research has found that employees showed an almost apathetic attitude as to what is possible in their line of work in terms of FWAs (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 48). But it was also found that most participants try and fit their work around their care responsibilities, with care being the higher priority. Although in the quantitative study significantly more women than men who showed that attitude, especially women in lower the income employment and self employed women (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 48). The women in a recent survey in the context of the Canterbury Rebuilt clearly wanted permanent positions but fewer hours, in order to also fulfil their existing care responsibilities (Ministry of Women's Affairs, *Building Back Better - Utilising Women's Labour in the Canterbury Rebuilt*). Yet women were more likely than men to rate their workplace as being supportive (New Zealand Department of Labour). Therefore women do not have a strong sense of entitlement to FWAs and appear to think that by requiring an alteration in work hours they are causing a great inconvenience. As a result women are complacent with their employment terms and easily satisfied with small flexibility concessions made by employers.

Women are in return perceived by employers as flexible employees in terms of being employed mostly in part time and precarious work, and women employees tend to make their employment choices to a degree according to the perceived flexibility of the job. These attitudes result in under-employment and under-utilisation of women employees (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 48). The Rebuilt survey revealed that 78 percent of unemployed women were looking

for part time work only, as the main barrier for unemployed women to get into the work force are family responsibilities, especially childcare (Ministry of Women's Affairs, *Building Back Better - Utilising Women's Labour in the Canterbury Rebuilt*). And 12 percent of employed women said that a barrier to their employment was that they had to fit work around family and childcare responsibilities (Ministry of Women's Affairs, *Building Back Better - Utilising Women's Labour in the Canterbury Rebuilt*). At the same time, only 9% of unemployed women stated that their partner's income was sufficient (Ministry of Women's Affairs, *Building Back Better - Utilising Women's Labour in the Canterbury Rebuilt*). Therefore in order to support their family financially women are forced to do both the unpaid care work and take up financial employment. Women who are not granted FWA arrangement by their employers often have to draw on alternative options (such as part time work or drawing upon their sick leave and holiday pay) in order to achieve reconciliation between care and working responsibilities.

Care responsibilities can thus lead to exclusion, resulting in carers working in low-grade jobs, which often underutilize the skills that the carer actually has to offer the labour market. At the same time lower paid, part time and precarious employment are not necessarily easy to reconcile with family obligations (O'Brien 24). Some employees perceived that FWAs would reduce hours, and thought that only valued employees would be granted flexible work arrangements and that the nature of their work would make it impossible. Therefore women are not convinced of what they have to offer the labour market is worthy of any kind of special treatment. Higher skilled work, which is skills appropriate and more easily flexible in terms, is therefore regarded as unachievable from many women at the outset. At least without making major compromises to family life.

The real issue behind the barriers to FWAs is not the unavailability of flexible work, as there is considerable uptake especially from men, but rather (gendered) workplace cultures and attitudes of immediate managers or employers, as well as the views of colleagues and co-workers (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 47). The barriers are centred on negative employer attitudes, both perceived and actual. The grounds for refusal of a FWA request by employers under the section 69AAF of the 2007 amendment Act (and that section is not subject to revision under the 2013 bill) are very broad. The fact that such priority is given to what is framed as

employer needs in the legislation, creates the strong suggestion that requests for FWAs are “inconvenient concessions” by employers (O’Brien 16). Employees who lack job security and employees who are very diligent in the discharge of their work duties are therefore less likely to make a request for an FWA, as they fear the negative impact of such request.

For FWAs to be considered “quality” there is to be no adverse effects on income, career progression, availability of scheduled leave or access to desirable employment, while creating benefits for both employers and employees (Fursman and Zodgekar, “Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families” 44). Despite this fact FWA requests are perceived to have a negative impact on career progression and are believed to have negative financial consequences.<sup>5</sup> For one in ten of the women surveyed it was the culture of their organization or management rejection that barred them access to FWAs (Fursman and Zodgekar, “Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families” 46). In addition, more than a quarter of survey participants were nervous about asking employers about flexible work. The perceived views of colleagues had a significant influence over whether workers would access flexible work, weighing up the risks of sacrificing career progression, income, or their reputation as committed workers (Families Commission, *Give and Take: Families’ Perceptions and Experiences of Flexible Work in New Zealand*). In order to overcome the barriers that women experience upon entering the work force and negotiating effective FWAs, not only does there have to be an increased willingness by employers to concede to FWAs, but there more importantly has to be a change in work culture and overall environment, in order to make carers feel like valued employees, who can afford to request a FWA.

The 2013 bill addresses only the procedural barriers of FWAs by making it procedurally easier to apply for them. The impact of job tenure duration on access to flexible work plays a big role under the current act. The bill would remedy this by abolishing the six month employment criteria. Job tenure data, however, shows that a majority of employed people (78 percent) have been in their main job for one year or more. Significantly, women were more likely than men to have a job tenure duration of less than six months (Statistics New Zealand). Having the tenure

period removed would therefore likely benefit women to access FWAs. However, in terms of workplace culture and the general attitudes expressed by employees and employers in the surveys, it appears that employees who have been in employment for a longer period of time are much more likely to qualify for a FWA. This culture is not likely to change simply by removing the tenure period. Especially given that many other aspects of the bill will make the provisions of the act more “employers friendly”. Therefore, although employees can make a request for an FWA immediately upon starting employment, they are still more likely to be granted to long term employees, which put women at a disadvantage as they are much more likely than men to be in precarious employment.

The National Advisory Council for the Employment of Women supports the current provision, arguing that the interests of employers should be considered in a way that they are not asked to change an employee’s terms and conditions of work too soon after agreeing to an employment contract. The council were of the view that a six-month requirement is reasonable, given that most new employees will have looked initially for a job that meets their flexibility needs (Heathrose Research Ltd). By removing the tenure period of Part 6AA will confer nothing but a right to negotiate the terms of one’s employment contract. This right already exists, even without the legislation.

## **7. What is the visibility and awareness of the legislation?**

One of the biggest problems around the uptake of FWAs is the lack of awareness of the legislation in general. In order for legislation that creates an individual right to be effectively utilised at all, it has to be well known by the people that it applies to. Duncan Webb’ statement: “If it is practically impossible for a person to determine what their rights and obligations according to the law are, then those rights may as well not exist,” (D. Webb 73) appears to apply to Part 6AA of the act, as recent research has shown.

Businesses used a range of ways to advise their employees of FWAs. Half of the businesses which offered flexible work advised their employees verbally about their availability. Only about a third of employers included it in their employees’ employment agreement. Large organisations with more than 100 staff were more likely than smaller organisations to use a

notice board, their intranet or their Human Resources department to inform their employees of this particular right. Organisations with fewer than five employees were much more likely to only inform staff verbally. However, almost half of the businesses surveyed reported that staff only learned about FWAs when and if they specifically asked about them. There appears to be a lot of room for improvement in terms of how employers inform their employees of FWA rights. The fact that they do not often feature as part of employment contracts in general suggests that a relatively low relevance and importance is given to them in general by employers.

The survey found that only 40 percent of participating employees were generally aware of the provisions, while 59.3 percent of the women surveyed were unfamiliar with the legislation. In terms of usage, only 7.3 percent had made a formal request for flexible working under Part 6AA in the previous 12 months (Donnelly, Proctor-Thomson, and Plimmer 194). However employees in the government, administration and defence sectors were found to be a lot more likely to be aware of the legislation, than employees from other sectors (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). Additionally, in 2012 only 15 percent of private sector, but 41 percent of state sector jobs are taken by women. It is thus a sector with a high women employment rate, where women are represented comparatively well in numbers. Therefore the fact that only half of the women were aware of the legislation and only a very small number had actually made a request is indicative of extremely poor awareness of the legislation overall.

A survey undertaken by the Department of Labour supports this impression. The survey of employees had a low response rate and the survey of employers had poor coverage of some industries and hence could not be representative of all employers in New Zealand. However, it indicated that the level of awareness of flexible work legislation is very low. Only 27.5 percent of employers and 19.8 percent of employees were aware of the legislation. Larger businesses with more employees were significantly more likely to be aware of the existence of the legislation than smaller businesses and employees on incomes over \$40,000 were more likely to be aware than employees on lower incomes. Awareness of the legislation differed also significantly by industry (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). Therefore the overall awareness of the legislation can be assumed to be alarmingly low.

To remedy this shortcoming the National Advisory Council on the Employment of Women strongly recommends a targeted campaign to raise awareness of the 'right to request' legislation and its implications among employers and employees alike. Groups that should be given significant attention in an awareness-raising campaign include small to medium enterprises and female employees (Heathrose Research Ltd). This Public Service Association study however showed that 64 percent of employers, particularly employers in large organisations, are generally aware of the act, which is significantly higher than employee awareness. Further work is needed to raise awareness levels and since employers are more likely to be aware of the act, there should arguably be a burden on employers to ensure that their employees are appropriately informed.

#### **8. Who needs FWAs ?**

FWAs have been proven to be useful to better accommodate the reconciliation between work and family as well as work and leisure life, therefore achieving a better work-life balance overall. Thus FWAs are argued by the promoter of the 2013 Bill to be useful to all employees, regardless of their gender. Yet the legislation surrounding parental leave but also FWAs is most commonly referred to as having a greater impact on women workers, because FWAs can have great benefits for women who have disproportionately more care responsibilities.

There has also been indications that FWAs can be valuable for families and the organisation of unpaid and paid work in general. Couples states that FWAs are important in the struggle to meet care requirements within the family in addition to formal and informal care provision (Families Commission, *Families and Whanau Status Report 2013* 63). A 2008 Department of Labour survey indicated that 40 percent of New Zealanders have some or a lot of difficulty getting the work-life balance they want and 46 percent experience some degree of work-life conflict (New Zealand Department of Labour). However the survey also indicated that the overall satisfaction with work-life balance has improved slightly since the last survey was done in 2005. Nevertheless FWAs are therefore valuable to both genders, which supports the extension of FWA right to not just carers. However, because of the unequal labour market conditions, in which women are at a disadvantage, FWAs would be more purposeful if they

construe a special privilege for employees with caring responsibilities (most of which are women).

Women employment rates have increased steadily over the years in New Zealand. In 1976 only 40 percent of mothers were in employment, while in 2006 it was 66 percent (Families Commission, *Families and Whanau Status Report 2013* 63). Woman labour force participation is comparably high in New Zealand with 62.3 percent (Statistics New Zealand). At the same time fathers' employment rates had been relatively consistent at around 90 percent (Families Commission, *Families and Whanau Status Report 2013* 63). Women also have a narrower range of occupations than men and the gender pay gap still sits at around 13 percent (Parker et al. 222). Simultaneously 46 percent of women earned under \$410 a week compared to only 34 percent of men. This meant that the majority of women were positioned in the bottom two income quintiles in 2012 (Ministry of Women's Affairs). These numbers suggest that there is a great imbalance in what is possible to achieve in the labour market depending on gender. In order to assist women to enter into stable and reliable employment, it has to be possible to combine childcare and paid work efficiently, which FWAs can help facilitate.

Childcare obligations have a great impact on women's availability for paid work. Mother participation in the workforce increases with the age of the youngest child. In 2009 half of mothers with a youngest child aged 0-2 years were employed, while 84 percent of mothers with a child aged 14 years and over had employment (Families Commission, *Families and Whanau Status Report 2013* 63). Therefore especially women with small children need extra support in order to enter the workforce. Almost a third of women in the Rebuilt survey, who were unemployed, stated that childcare responsibilities prevented them from job training (Ministry of Women's Affairs, *Building Back Better - Utilising Women's Labour in the Canterbury Rebuilt*). A 2009 survey revealed that 70 percent of people, who were not in paid work, stated that they would be more likely to enter into employment, if they had access to FWAs. A majority of these potential employees were women (Fursman and Zodgekar, "Making It Work: The Impacts Of Flexible Working Arrangements On New Zealand Families" 50). In the Rebuilt Survey an almost unanimous 49 percent of employed and 50 percent of unemployed women claimed that flexibility in the workplace was important to them. This suggests that FWAs are

particularly valuable to women with care responsibilities who are currently not working but would like to move to paid work.

Employees and potential employees, who are not able to access FWAs, nevertheless believe that their work-life balance would benefit from them. Among those who could not use different flexible work arrangements because they were unavailable, women were more likely than men to want to use part-time work, job sharing, sabbaticals, and significantly more women than men desired unpaid leave, or a career break. In addition, women who do use FWAs like job sharing and part-time work are more likely to have a better work-life balance (New Zealand Department of Labour). In the Rebuilt survey half of the women surveyed said that the top factor that would make them consider a job in the rebuilt was a flexible working environment and flexible working hours. Therefore women also more than men desire access to certain FWAs, which suggests that they are valued as an important privilege more strongly by women.

Despite the labour market being difficult to access for women, they are encouraged to take up employment. In recent years females have been increasingly regarded as key employees to remedy skill shortages in NZ (Massetot 84). Caring responsibilities and facilitating participation in the labour market have been a focus of policies relating to flexible work, both in New Zealand and other countries. The most common forms of flexibility relate to part-time working and a reduction of working hours following the birth of a child (Heathrose Research Ltd). These types of FWAs ultimately also leave women with less earnings and support female poverty.

In order for women to truly benefit from FWAs there needs to be improved utilization of flexible working provisions (Parker et al. 232). There would further have to be a greater scope of the type of FWAs available for women. To argue that work-life balance or work-care balance existed just because someone was working part time or in a job sharing arrangement, risks suggesting that care is incompatible with full-time work (O'Brien 13). Therefore in order to make care compatible with full time work, FWAs have to be implemented creatively for women.

The main beneficiaries of FWAs have so far been care workers. However there are also other reasons beyond caring responsibilities, which demand flexible work. The population is aging

(Families Commission, *Families and Whanau Status Report 2013* 52) and the share of the working age population aged 65 and over is growing. Some of those workers may want to stay in the workforce longer if they could change their working hours (Department of Labour, *Review of Part 6AA: Flexible Working Arrangements*). The 2006 Disability Survey found that 75% of people with disabilities would benefit from flexible working arrangements rather than special equipment, modifications and support (Equal Employment Opportunities Trust, *Disability and Employment – Review of Literature and Research*). Therefore other groups would also benefit from FWAs, and a widening of the group of employees who can access them is reasonable. However, the proposed widening by the bill is taking matters too far.

FWAs are not just harder to access by women as a collective, but there are other employment and societal groups which experience difficulty in accessing the arrangements. Work-life balance is closely associated with white-collar work and employees, who are particularly valued by their employers for their skills. FWAs are further easy to negotiate for professionals and experts who are on a high salary and therefore in a better bargaining position. On the other hand the type of employer who needs the policies the most – those with considerably less power in the market, are less likely to be able to negotiate flexible work in order to achieve work-life balance. This is a problem that women in low income and precarious employment suffer from in particular. The availability of flexibility is directly linked with people's rating of their work-life balance (New Zealand Department of Labour). The accessibility to FWAs therefore has to be improved. The widening of the right to request to all employees however, is disadvantaging women, who are overall in a weaker position and would therefore benefit the most from a special provisions to access FWAs (Parker et al. 229).

### **9. Who benefits the most from FWAs currently?**

The current act and the 2013 bill have a strong employer focus, making the legislation very “employer friendly”. There is ample suggestion that flexible work will result in more productivity, employee loyalty and reduced staff turnover. A 2006 review by the Equal Employment Opportunities Trust found that there is a body of research that supports a positive relationship between work-life balance and productivity. In studies that do not support the positive relationship, the confounding factor is usually workplace culture or management, or a

general lack of implementation of work-life policies (Equal Employment Opportunities Trust, *Work-life Balance, Employee Engagement and Discretionary Effort: a Review of the Evidence*). The bill changes it to be not about individuals with care responsibilities anymore it now is rather about employers increasing the productivity of all of their workers, regardless of their personal circumstances and regardless of what their unpaid work obligations may be.

The act is already essentially employer friendly and about compounding employer burdens. The grounds of refusal under section 69AAF give employers ample opportunity to turn down requests. The bill proposes to strengthen the employee's position in making a request for a FWA by abandoning the tenure period of six months. However, given that employers can refuse requests under widely defined reasonable grounds, prescribing a length of tenure seems redundant. Therefore the removal of the tenure period also does not make it easier for women or any employee to request and be granted FWAs, nor does it make it harder for employers to reject FWA applications.

The legislative approach and implementation has not created the impression that any pressure on employers' attitudes towards the availability of their employees is intended. In a 2009 study employers expressed a general willingness to accommodate their employees' childcare needs. However the extent to which they could be flexible was influenced by factors such as local labour market dynamics and the flow and type of work in question (Moss 72). The interviews with employers showed that some workplaces (such as production line) are limited to the amount of flexibility that can be offered, while in some industries mothers were seen as key employees, who were being accommodated well by their employers in terms of flexibility (Moss 73). This shows how much the implementation of the FWA legislation has been centred around the interests of employers and not on the interests of mothers and families. The study recommends that employers should be continuously encouraged and assisted (through Department of Labour work-life balance initiatives) to offer flexibility to their parent and caregiver employees (Moss 73). Help around the implementation would thus be directed at employers, rather than strengthening mothers' and caregivers' awareness of their rights.

Among employers who have some or all of their staff working flexibly, 76 percent reported they incurred no costs. Of those employers who said they incurred some costs associated with

FWAs, a majority said that these costs were reasonable (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). Nevertheless, among employers who had FWAs of some form in their workplace 87 percent said that they have a positive impact (Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces*). It has also been claimed that the 2007 amendment was not more than the enactment of the status quo at the time, as it strengthened managerial discretion but did not necessarily give more rights to employees (Donnelly, Proctor-Thomson, and Plimmer 187). Therefore employers enjoy the benefit of FWAs, but do not appear to suffer any kind of detriment or even compromise as a result of them.

Although both section 69AA(b) and section 69AAE of the act are to undergo a tightening under the bill, employer rights would still remain paramount under the act. The grounds of refusal effectively strengthen all interests of employers. Employees are only able to appeal decisions on procedural matters and are not in any way able to appeal against the substance of a decision made. Whether a request for a FWA is reasonable or not is a matter only for the employer to decide. Section 69AAF gives ample statutory opportunity and whether or not a FWA will be granted lies entirely in the employer's discretion. Yet employees have very little grounds for enforcement and the penalty of a maximum of \$2000 under the act is so little, that a challenge is often not worth it. Therefore there is no appropriate balance between employer and employee rights under the act, which weakens the right that the act creates even further.

The opening up of the eligibility criteria will likely to worsen the position of women in employment, especially when employed by small employers. Once a small employer has granted a FWA to one employee, it can become impossible for another employee to be granted the same or even another FWA in the same workplace. In light of the new amendment, which opens up the right to request for any employee and not just the ones with caring responsibilities, it is imaginable that a small employer who has granted a FWA to an employee for purely recreational reasons might have to refuse the request made by a parent with child care responsibilities. Limiting the right to alter work terms for carers to achieve a better balance between carers and non-carers on the employment market and therefore it can be considered an equalising development between the sexes. The widening of the eligibility criteria

disproportionately benefits male employees without caring responsibilities. This in effects diminishes the value of care work which is valued under the Act at present.

A New Zealand Institute of Economic Research report to the Ministry of Women's Affairs suggests that government driven regulatory settings and policy like the option of requesting FWAs is helping to get more skilled women in the workforce and it is helping women to enter higher skilled workplaces (Hensen and Yeabsley). Ultimately however, in light of the recent amendments to the Act, the beneficiaries of the amendments are disproportionately men, who have had their rights to renegotiate their employment contracts statutorily reinforced. There is great disregard for the fact that men in fact already possessed those rights prior to the legislation, as men are in a much better position than women to alter their employment terms.

#### **10. Who will be disadvantaged by the extension of eligibility for FWAs?**

The motivation behind applying for an FWA is likely to change when FWAs are no longer exclusively available for employees with caring responsibilities. The focus of the act has shifted from creating a fairer balance between paid and unpaid work towards achieving a 'good' work-life balance for employees. Those goals are significantly different. While achieving work/life balance is very much a choice and privilege only, the reconciliation between paid and unpaid work does not involve any choices. Women (in majority), who are struggling with their competing workloads of unpaid care work and paid employment, could and absolutely should greatly benefit from FWAs. As the availability of those who decide to renegotiate their employment terms to free up more time to say spend time on the golf course, the availability of FWAs for employees with unpaid care obligations will decrease (significantly).

Moreover, the extension of the FWA eligibility criteria arguably ignores the poor. Under the current legislation it is hard for employees in low income employment to access FWAs. It was found to be more common for employees working in 'highly skilled' occupations to have flexible hours than those working in other types of occupations. Employees with no or low qualifications were a lot less likely to have flexible hours compared with other employees (Department of Labour, *The Demand for and Expected Supply of Phased Retirements – Evidence from the Survey of Working Life*). Yet the longest working hours are found among the lowest

income working people with income distribution skewing downwards among those working over 60 hours a week (Fursman). They would thus benefit much more from a FWA legislation that is primarily concerned with the reconciliation of care and work.

Given that it is often more difficult for women keep stable employment because of their care commitment, women in low income groups are likely to be most detrimentally affected by the shift of focus from work-family to work-life balance in the legislation. Furthermore there is a risk that the bill will advance the development of a 2 speed society. Women, who are in higher paid employment or families with a higher income, are more likely to be able to outsource a share of their caring responsibility. This outsourcing frees up those women to participate in the labour market more effectively. The participation in turn advances these women's income. At the other end of the scale, women with a poorer background, who are part of low income families or even single mothers, do not have a choice but to combine care and (often precarious) employment. They are increasingly also employed in segregated poorly paid care industry. FWAs could greatly assist both groups of women to reconcile their own work and care responsibilities better, the higher income mothers would not have to outsource care as much, and the lower income women would not have to resort to low-pay precarious and unstable employment.

A recent decision by the Employment Relations Authority illustrates how women with care obligations are unable to successfully stay in employment, which requires higher skills, continuous training and therefore provides better income. In *Leslie v Commissioner of Police* (ERA, 01/12/08) a police woman had a flexible working agreement with her employer, under which she worked four days instead of five. After her second period of parental leave however, her employer wanted to bind her to her original five day working agreement, which she unsuccessfully disputed.

Mrs Leslie had never made a formal request under Part 6AA, but the reasoning by her employer, which was held to be valid for a refusal in this case, would likely also have been held valid under section 69AAF of Part 6AA. Some of the reasons were that Leslie would not be able to stay current and up to date with her work if she continued on part time hours and that she needed to take up more work due to restructuring. In this case, if Leslie had been in no need for

more training due to her parental leave absences she would have likely been able to negotiate the FWA that she was looking for, as the crucial point before the authority was that she required additional training and would not be able to train and get her work done if she only worked four days.

### **11. The implication of social welfare reforms on FWA**

The legal change regarding FWA takes place in the wider context of social welfare reforms designed to reduce benefit availabilities. The social welfare provisions in New Zealand have become stricter in recent years and the government financial support for families, mothers and children is decreasing and less easily accessible. This development creates a strong link of the social welfare reform with the implications of the act and the bill. The benefit system is undergoing reform that creates a stronger work focus in the “belief that most people can and will work” (Ministry of Social Development). Therefore all welfare provisions are redesigned to encourage people who are recipients of any financial assistance to re-enter the workforce. Beneficiaries with children under the age of five will be expected to look for part time work, and full time work when the child turns 14. If the beneficiary then has a subsequent child, the work obligations begin once that child reached the age of one. There is some support available for individuals in that situation, but only in so far as it enables a prompt return to the work force. If no efforts are being made by the beneficiary to get work, harsh financial sanctions will apply. The work requirements for women will be the same as those for men in similar circumstances (Office of Minister for Social Development). Given women’s overall chances in the workforce compared with that of men in terms of finding stable employment this strategy imposes equal implications on unequal parties, which results in great inequality.

Full time education or work obligations can be imposed on young mothers even earlier, as a young beneficiary who is a primary caregiver of a child under the age of 12 months, will have such an obligation when the child turns only six months old (Social Security Act 1964, s 170(4)). For younger mothers the consequential sanctions will apply even sooner in the event of non fulfilment (M. Webb). This is gender discriminatory as youth parents are more likely to be single females and therefore female youth parents are going to be under scrutiny significantly longer than their male counterparts.

The reforms do not take into account the care obligations and responsibilities of mothers on a benefit and focus on their economic potential only. The statement of the Ministry of Social Development regarding the reforms illustrates this: *“We know that sole parents on benefit are a group with significant work potential, and that they and their children are currently at greater risk of poor social outcomes when compared with other families (Office of Minister for Social Development).* The scheme is thus not focussed on aiding families or young mothers with their care responsibilities and facilitating some reconciliation of work and care. The choice for women who are not in the fortunate situation to have a partner with a sufficient income to enable them to stay at home and care for their small children is entirely removed. Not only does this have grave implications on the quality of any childcare, particularly where the person lacks the financial ability to afford childcare through the facilities that are currently available, but it also presupposes that the state facilities will be able to provide care for those children, whose mothers the social welfare system has pulled out of their care responsibilities and into the workforce. Ultimately it entirely fails to recognise parenting as work. The fact that FWAs under the bill will be construed in a way that they also do not offer an aid mechanism to those mothers means, that mothers in such a position are left with little support or opportunity to fulfil either paid or unpaid roles effectively.

Women on benefits are “activated” back into the workforce, based on the assumption that alternative childcare is available. The New Zealand Council of Trade Unions states that access to Early Childhood Education worsened with the budget cuts in 2009 and quality services are only provided in higher socio-economic areas. Additionally there is a shortage of services being provided for children under the age of two, and the cost of such services have risen. Therefore the fact that care as well as the FWAs provisions only focuses on the labour market, rather than family care solutions, is contradictory to the current care situation in New Zealand.

The changes to the act as proposed by the 2013 bill, especially when read in light with other acts and reform processes addressing the rights of women in the workplace, effectively creates a care penalty for women in New Zealand. O’Brien argues that the care penalty as imposed on women by the current legislative framework stands in clear conflict to existing social and anti-discrimination policy principles. She predicts that this conflict will become more obvious and

grave as the care crisis heightens. She argues that it is discriminatory to penalise a great number of people, who have no choice in regards to their caring responsibilities, and that unless the state is in a willing position to assume a great portion of the care burden, then the roles of carers and therefore women in the labour market have to become more sustainable (O'Brien 12). O'Brien goes as far as claiming that care is an "independent vector of disadvantage", which interacts with other grounds of discrimination, and that even on current grounds of discrimination the care penalty already has sufficient traction to be regarded as discriminatory (O'Brien 15). Commenting on similar provisions regarding flexible work in the UK, O'Brien states that the right to request is at best a "muted" right, because an unreasonable refusal by an employer is not regarded to be unlawful discrimination. On the one hand women are forcibly "activated" back into the workforce. On the other hand rights facilitating work-family reconciliations such as FWA are being removed from effective access to individuals who provide most of the unpaid care work. The result is an increase pressure on women to negotiate the double burden of work and family obligations. The reforms targeted at the social welfare system, but also by relation the changes made to the act by the bill, are arguably in breach of areas covered by section 19 including but not limited to discrimination on the basis of sex, marital status, disability, age, employment status and family status (New Zealand Bill of Rights Act 1993 s 21).<sup>6</sup>

## **Conclusion**

Overall indicators regarding gender equality in New Zealand have been good within the OECD countries but here is a lot of room for improvement, and the latest legislative developments are likely to be step backwards. The submission to the Select Committee, which is currently considering the bill, are mainly concerned with the other, even more radical changes that the Bill proposes. The Parliamentary debates concerning the bill are also mainly focussed more on the changes to collective bargaining, meal and rest breaks, changes to the 30 day rule and the proposed changes to the duty of good faith, with the changes to Part 6AA not being at the centre of the discussion by any means. In light of those more drastic and more obviously

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<sup>6</sup> In New Zealand the right to be free from discrimination is protected by s 19 of the New Zealand Bill of Rights Act 1990. Section 19(1) connects the freedom from discrimination with the grounds of discrimination contained within section 21 of the Human Rights Act 1993.

contestable changes, the changes to the flexible work arrangements appear somewhat innocent and much less important. They are in the shadow of the other proposed amendments and vastly underestimated in the impact they will inevitably have, particularly on women in the workplace.

FWA legislation was originally initiated with great intentions to reconcile care and employment obligations. However, the proposed amendments are due to change the nature of FWA from work-family balance towards being purely about work-life balance. The entire process of FWAs under the act is merely facilitative and is not designed to change the workplace environment. It does not guarantee any actual changes to workplace realities (Masselot 80). Opening the right to request FWAs to more than just care-givers means that unpaid care is not valued. Such amendments would make the FWA legislation a token, as any employee has the right to renegotiate their contract. Thus the changes to the FWA render it to have little effect outside of the effects of contract law.

Existing legislation does not sufficiently take into account that women predominantly bear the burden of having to combine both their family and work responsibilities. The legislative reform process is accompanied by the assumption that child rising is not productive work and therefore parenting as a societal task is grossly undervalued. Women are therefore only considered only for their economic potential in the labour market and not accredited appropriately for their reproductive work.

Stratigaki argues that in the EU the reconciliation of work and family life was initially successful, but then turned into a policy focused primarily on increasing women's capacity to work and their employability in flexible working arrangements, leaving considerations of gender equality and the gender division of labour within families out of consideration (Stratigaki 50). In New Zealand the legislation appears to have taken a similar pathway. Initial surveys stated that the flexible working scheme was going well and was supporting women to some extent, but the most recent survey assessing the women in the Canterbury Rebuilt was focused purely on using FWAs in order to increase women's capacity to work.

In regards to the EU policies on flexible work Stratigaki further argues that any gender equality objectives that carries the shaping of the policies initially were taken over by employment policy goals focused on the flexibility of the labour market (Stratigaki 51). This process has arguably started to happen in New Zealand as well. The language of the legislation has changed to complete gender detachment and the object of the flexible working provisions now appears to mainly be focused around workplace flexibility and the reconciliation of flexible work and employer expectations. What started as legislation to facilitate gender equality has become not more than a tool for the labour market and employers to increase their business efficiency.

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