REASONABLE ACCOMMODATION OF EMPLOYEES' PARENTING AND CARER RESPONSIBILITIES: A HUMAN RIGHTS PERSPECTIVE

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Positive duties, including a duty to accommodate, are rare in Australian anti-discrimination law. In 2008, the Victorian Parliament enacted a duty on employers to accommodate employees' parenting or carer responsibilities. This unique duty requires employers to seriously consider how they can accommodate such responsibilities when they determine work arrangements. So far, however, these provisions have been interpreted as requiring all employees to be treated the same, regardless of their circumstances. This article argues that interpretation of the provisions should be guided by the Charter of Human Rights and Responsibilities Act 2006 *(Vic). A human rights-focused interpretation would give more weight to the interests of employees with parenting or carer responsibilities and would support the legislative purpose of promoting their full and equal participation in the workforce. This would also assist the cultural change needed to challenge gendered stereotypes regarding the respective roles of men and women in relation to employment and carer work.*

I INTRODUCTION

In 2008, the Victorian Parliament enacted laws requiring employers to accommodate employees' parenting or carer responsibilities in determining their work arrangements.[1] These provisions are distinctive in that they impose an obligation on employers to accommodate the parenting and carer responsibilities of employees, and not merely to avoid discriminatory action. The duty they impose is therefore positive and proactive, rather than merely negative and reactive. This represents a significant development in the rights of employees in Victoria with parenting or carer responsibilities.

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1 See *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) s 8 ('*EO Amendment Act*'), inserting *Equal Opportunity Act 1995* (Vic) s 14A. The provision is now contained in the *Equal Opportunity Act 2010* (Vic) s 19 ('*EOA*').

Prior to the enactment of s 19 of the *Equal Opportunity Act 2010* (Vic) (the '*EOAV* provisions'), employees seeking to have their parenting or carer responsibilities accommodated could utilise various provisions in anti-discrimination laws, such as prohibitions on sex-based discrimination in the form of direct or indirect discrimination. These provisions have, however, proved largely ineffective. On the one hand, many common work arrangements — such as inflexible start and finish times, and the requirement to work full-time — are likely to disproportionately disadvantage employees with parenting or carer responsibilities. They may therefore be the basis for a claim of indirect discrimination. However, indirect discrimination requires that the condition or requirement be 'not reasonable', and courts have interpreted this as requiring that all employees be treated the same, which ignores the situation of employees with parenting or carer responsibilities.[2]

The *EOAV* provisions are unique and potentially transformative in that they impose a duty on employers in Victoria to accommodate the parenting and carer responsibilities of their employees. The provisions seek to promote the full inclusion and participation of employees with such responsibilities in the economic and other benefits of employment. However, in the small number of reported decisions in which the *EOAV* provisions have been relied on, the provisions have been interpreted in an extremely restrictive manner, denying their transformative potential.

In 2006, the Victorian Parliament enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'). The *Charter* protects and promotes the right to equality,[3] which has been interpreted as meaning *substantive* equality (equality of outcome) and not merely *formal* equality (same treatment of all people, regardless of their circumstances).[4] This article argues that the *Charter* requires that the *EOAV* provisions should be interpreted through a human rights lens. A *Charter*-based approach to interpreting the provisions would give more weight to the interests of employees with parenting or carer responsibilities, and would support the legislative purpose of promoting their full and equal participation in the workforce. This would also assist the cultural change needed to challenge gendered stereotypes regarding the respective roles of men and women in relation to employment and carer work.

This article is structured in the following way. Part II sets out the *EOAV* provisions and it highlights their unique features in comparison to previous legislative attempts to accommodate employees' parenting or carer responsibilities through anti-discrimination laws. Part III sets out the relevant provisions of the *Charter*, including the equality provisions and the interpretive duties. Part IV examines two reported decisions in which the *EOAV* provisions have been interpreted restrictively and in which the *Charter* has been largely ignored. Part V sets out a

2 See generally Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 155–59.

3 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8 ('*Charter*').

4 *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 311 [107], 344 [290] ('*Lifestyle Communities*').

human rights-based approach to interpreting the *EOAV* provisions, which would give more weight to promoting equal participation in the workforce by employees with parenting or carer responsibilities.

II REASONABLE ACCOMMODATION OF PARENTING AND CARER RESPONSIBILITIES

This part sets out the *EOAV* provisions and places them in their legislative context. These provisions impose a positive duty on employers, which is unique in Australian anti-discrimination law. This part also highlights the deficiencies in existing legislation, which the *EOAV* provisions sought to overcome. This highlights the transformative potential of the provisions.

A *The* EOAV *Provisions*

The *EOAV* provisions were enacted by the Victorian Parliament in 2008.[5] Section 19 of the *Equal Opportunity Act 2010* (Vic) ('*EOA*')[6] currently provides:

> **19 Employer must accommodate employee's responsibilities as parent or carer**
>
> (1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.
>
> …
>
> (2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that an employee has as a parent or carer, all relevant facts and circumstances must be considered, including —
>
> (a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and
>
> (b) the nature of the employee's role; and
>
> (c) the nature of the arrangements required to accommodate those responsibilities; and
>
> (d) the financial circumstances of the employer; and
>
> (e) the size and nature of the workplace and the employer's business; and
>
> (f) the effect on the workplace and the employer's business of accommodating those responsibilities, including —
>
> (i) the financial impact of doing so;
>
> (ii) the number of persons who would benefit from or be disadvantaged by doing so;
>
> (iii) the impact on efficiency and productivity and, if applicable, on customer service doing so; and

5 *EO Amendment Act* (n 1) s 8.

6 This Act re-enacted s 14A of the *Equal Opportunity Act 1995* (Vic). This insertion commenced on 1 September 2008: ibid s 2.

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the employee of not making such accommodation.

Section 7 of the *EOA* was also amended in 2008 to provide that '[d]iscrimination means — (a) direct or indirect discrimination on the basis of an attribute; (b) or a contravention of … s 19'. Therefore, the *EOAV* provisions '[operate] separately from [prohibitions on] direct or indirect discrimination'.[7]

Generally, Australian anti-discrimination laws prohibit two forms of discrimination — direct and indirect.[8] In the employment context, *direct* discrimination occurs where an employer treats a person less favourably than they would have treated someone who does not have the protected characteristic (for example, a woman).[9] *Indirect* discrimination, on the other hand, involves the imposition of a term, condition or requirement which, although neutral on its face, disproportionately disadvantages persons with a protected characteristic (such as women as a group).[10] Work arrangements[11] — the subject matter of the *EOAV* provisions — are more likely to constitute indirect than direct discrimination. This is because such arrangements are more likely to constitute a term, condition or requirement that disproportionately disadvantages employees with parenting or carer responsibilities, rather than treating a particular person less favourably.[12] However, indirect discrimination is only unlawful if it is 'not reasonable'.[13] Further, as highlighted below, courts have typically been reluctant to find work arrangements to be not reasonable — no matter how unaccommodating they are for employees with parenting or carer responsibilities.[14] The *EOAV* provisions

7 Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 3. See also Anna Chapman, 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (2012) 33(1) *Adelaide Law Review* 39, 52 ('Reasonable Accommodation').

8 For a general overview of anti-discrimination law in Australia, see Rees, Rice and Allen (n 2).

9 Ibid 92.

10 Ibid 135–6. In the United States, the terms 'disparate treatment' and 'disparate impact' are used in place of direct and indirect discrimination: Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 34 [14]. In Canada, the Supreme Court has rejected the distinction between direct and indirect discrimination, instead adopting a 'unified' approach to all types of discrimination. A unified approach more readily addresses systemic discrimination, such as barriers to full and equal participation in employment: *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3, 18 [39], 24 [50] (McLachlin J). For a comparison between Australia and Canada regarding positive duties, see Belinda Smith and Dominique Allen, 'Whose Fault Is It: Asking the Right Question to Address Discrimination' (2012) 37(1) *Alternative Law Journal* 31.

11 '[W]ork arrangements' means 'arrangements applying to the employee or the workplace': *EOA* (n 1) s 4 (definition of 'work arrangements' para (b)).

12 As highlighted in Part II(C) of this article, work arrangements that disadvantage people with parenting or carer responsibilities may constitute sex discrimination against women.

13 Rees, Rice and Allen (n 2) 155.

14 See n 12.

therefore offer significant potential in requiring employers to accommodate these responsibilities.

B *Positive Duties in Anti-Discrimination Law*

In Australia, anti-discrimination laws generally impose *negative* duties only.[15] In other words, such laws generally prohibit certain forms of conduct, which are defined as either direct or indirect discrimination. Duties of accommodation, however, are a type of *positive* duty, as they require the duty holder to take certain action to comply with the duty.[16] The *EOAV* provisions are a type of positive duty, as they require employers to accommodate employees' parenting and carer responsibilities, for example by 'reviewing their practices and environment and proactively making changes to reduce barriers'.[17] This duty is triggered by an employee's *request* for accommodation.[18]

Explicit duties to accommodate are rare in Australian anti-discrimination law.[19] In 2009, the *Disability Discrimination Act 1992* (Cth) ('*DDA*') was amended to include a requirement to provide 'reasonable adjustments' in the definition of direct[20] and indirect discrimination.[21] However, unlike the *EOAV* provisions, the *DDA* provisions are not an independent or freestanding ground of discrimination.[22]

By way of comparison, the *Canadian Human Rights Act* 1985 includes a duty to accommodate which applies to *all* grounds of discrimination.[23] Further, the duty to accommodate is regarded by anti-discrimination scholars such as Beth Gaze and Belinda Smith as being more likely than prohibitions on direct and indirect

15 Gaze and Smith (n 10) 284.

16 Ibid 284–5. Positive duties are more common in United Kingdom anti-discrimination laws: at 266–8.

17 Ibid 285.

18 Chapman, 'Reasonable Accommodation' (n 7) 53, citing *Richold v Victoria* [2010] VCAT 433, [38], [40] (Deputy President Macnamara) ('*Richold*'). On the other hand, other duties under anti-discrimination law are triggered by a finding of fault. Up to this point, an employer has no duty to take any action: Smith and Allen (n 10) ch 7.

19 A duty to accommodate is implicit in prohibitions on indirect discrimination, which require duty holders to review terms, conditions or requirements that disproportionately disadvantage people with a protected characteristic. Also, vicarious liability in anti-discrimination laws provides that an employer is liable for discriminatory acts done by an employee in the course of their employment unless the employer has taken 'all reasonable steps to prevent' the conduct: Gaze and Smith (n 10) 128, 284. These provisions impose a type of positive duty on employers.

20 *Disability Discrimination Act 1992* (Cth) s 5(2) ('*DDA*').

21 Ibid s 6(2). See also *EOA* (n 1) ss 20, 33, 40, 45 (reasonable adjustments must be made for people with a disability in relation to employment, education, and provision of services).

22 The prohibition on direct discrimination in the DDA has been interpreted by the High Court as requiring formal equality only: *Purvis v New South Wales* (2003) 217 CLR 92, 101 [12] (Gleeson CJ), 158 [213], 162 [229] (Gummow, Hayne and Heydon JJ) ('*Purvis*'). That is, it is not discrimination to treat a person with a disability the same as a person without the disability but who has similar behavioural manifestations of the disability.

23 *Canadian Human Rights Act*, RSC 1985, c H-6, s 15 ('*Canadian Human Rights Act*').

discrimination to reduce barriers to equal participation in society.[24] This is because such duties place the obligation to change disadvantageous conditions or requirements (such as work arrangements) on the employer, rather than the employee.

Gaze and Smith argue that duties to accommodate are based on capacity-building, rather than fault-finding.[25] Prohibitions on direct and indirect discrimination have been interpreted as requiring a finding of fault or wrongdoing against the person who is required to redress the discrimination.[26] This is most obvious, for example, in the finding that one person has treated another person less favourably, based on a protected characteristic. However, the duty to accommodate is based not on finding fault, but on the duty-holder having the *capacity* to redress the discriminatory condition or requirement.[27] In the employment setting, for example, work arrangements are determined by the employer and are therefore within the employer's capacity to change.[28]

Therefore, a duty to accommodate is more likely to effectively remove barriers to equal participation, such as work arrangements which exclude or limit the participation of employees with parenting or carer responsibilities.[29] Whereas prohibitions on direct discrimination are based on notions of *formal* equality (that is, the importance of treating all people the same), a duty to accommodate requires duty-holders (such as employers) to take into account the diversity of an employee's circumstances and their corresponding needs.[30] The duty to accommodate does not seek to provide special treatment or favouritism for some employees, but to ensure that every person is treated equally according to their circumstances. Therefore, such duties seek to provide a degree of *substantive* equality (or equality of outcome) by removing discriminatory barriers to a person's full participation in significant areas of life, such as work.[31]

24 Gaze and Smith (n 10) 128, 284.

25 Ibid 266, citing Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60(1) *American Journal of Comparative Law* 265. See also Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12(4) *Maastricht Journal of European and Comparative Law* 369.

26 Belinda Smith, 'It's About Time: For a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131 ('It's About Time'). See also Smith and Allen (n 10) 35.

27 Smith, 'It's About Time' (n 26) 132, 137.

28 In the United Kingdom ('UK'), positive duties are imposed on public authorities and not on other duty-holders: *Equality Act 2010* UK) s 149(1). The *EOAV* provisions, on the other hand, obliges all employers to reasonably accommodate an employee's parenting and carer responsibilities: *EOA* (n 1) s 19. However, imposing this duty on all employers is justified, as employers generally determine work arrangements and are therefore able to change them.

29 Gaze and Smith (n 10) 284–5.

30 Smith and Allen (n 10) 34.

31 Gaze and Smith (n 10) 125–8.

Imposing a duty to accommodate can operate to challenge norms or implicit standards on which work arrangements are commonly based.[32] Under established legal principles, an employee is bound to comply with the terms and conditions of employment, and generally those terms can be varied only with the agreement of both parties.[33] Requests for accommodation of an employee's parenting or carer responsibilities can take many forms. However, they commonly involve adjusting the hours or days of work (such as requesting a temporary transition to part-time work), changing the location of work (such as requesting to work partly at home), or changes to starting or finishing times (for example, to collect children from school). Refusal by an employer to accommodate such requests may be based on legitimate financial or organisational reasons. However, 'standard' work arrangements — such as full-time work or working 9am to 5pm each day — may conflict with an employee's parenting or carer responsibilities. Therefore, refusing to accommodate these responsibilities may constitute discrimination against such employees.[34] Further, refusal to accommodate implicitly supports persistent stereotypes and assumptions concerning the role of men and women in relation to employment and caring work.[35]

The positive duty imposed by the *EOAV* provisions is qualified however in two significant ways. First, the duty is qualified by the concept of reasonableness. An employer's refusal to accommodate an employee's parenting or carer responsibilities is discriminatory only if it is unreasonable in all the relevant facts and circumstances. This is a lower standard than the standard in Canada, for example, where the duty to accommodate is limited only by 'undue hardship' to the duty-holder.[36]

Second, the *EOAV* provisions are ultimately enforced by employees whose requests for accommodation have been refused by their employers. The provisions, similar to most anti-discrimination laws in Australia, are enforced through an individual complaint-based system.[37] In other words, complainants must use their own time and resources to pursue the complaint, and this can be a significant

32 Ibid 128.

33 Carolyn Sappideen, Paul M O'Grady and Joellen Riley, *Macken's Law of Employment* (Lawbook, 8th ed, 2016).

34 As outlined in Part III of this article, refusal may also breach an employee's human rights under the Charter.

35 Gaze and Smith (n 10) 127; Smith 'It's About Time' (n 26) 11, citing Human Rights and Equal Opportunity Commission, *It's About Time: Women, Men, Work and Family* (Final Paper, 2007) 90 ('*HREOC Report*'). As scholars such as Smith note, according to these norms, the role of men is to be the breadwinner and the role of women is to be the homemaker and carer: Smith 'It's About Time' (n 26) 122, 125–6. Therefore, work arrangements are often based on the norm of the (male) employee who is 'unencumbered' by parenting or carer responsibilities: at 118, 122. These norms and stereotypes are examined further in Part V of this article.

36 *Canadian Human Rights Act* (n 23) s 15(2). In addition, in the employment context, the employer must show that the requirement is a 'bona fide occupational requirement': at s 15(1)(a).

37 Gaze and Smith (n 10) ch 7.

deterrent to enforcing the provision.[38] Therefore, although the *EOAV* provisions impose a positive duty, considerable barriers to enforcement exist.

C *The Deficiencies of Existing Legislative Protections*

Apart from the *EOAV* provisions, employees seeking accommodation of their parenting or carer responsibilities can utilise other anti-discrimination laws. In particular, employees have utilised prohibitions on *indirect* discrimination. However, as this section will demonstrate, existing legislative protections have proved deficient, either due to their narrow drafting or their restrictive interpretation by courts.

In 1992, the *Sex Discrimination Act 1984* (Cth) ('*SDA*') was amended to prohibit *direct* discrimination on the grounds of family responsibilities.[39] The limited scope of the *SDA* provisions[40] is in contrast with the broad scope of the international instrument on which the provisions are based — the International Labour Organisation's *Workers with Family Responsibilities Convention*.[41] The Convention requires member-states to 'create effective equality of opportunity' for workers with family responsibilities and to 'make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities'.[42]

State and territory anti-discrimination legislation prohibits various forms of discrimination, including indirect discrimination, on the grounds of parenting or

38 Ibid 294.

39 *Sex Discrimination Act 1984* (Cth) s 7A ('*SDA*'). Initially, this prohibition applied only to *dismissal* from employment. However, in 2011 it was amended to apply to all aspects of employment: *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) sch 1. The *SDA* also prohibits direct and indirect discrimination on the grounds of sex: *SDA* (n 39) s 14. The prohibition on indirect sex discrimination has been used by women to challenge work arrangements, such as an employer's refusal to allow part-time work on return from maternity leave: see *Howe v Qantas Airways Ltd* (2004) 188 FLR 1. In *Mayer v ANSTO* [2003] FMCA 209, Driver FM stated, 'I need no evidence that women per se are disadvantaged by a requirement that they work full-time': at [70]. Therefore, the only issue in such claims is whether the requirement is 'not reasonable'.

40 '[L]imiting family responsibilities discrimination to direct discrimination "fails to address"' the more common situation of work arrangements and practices that indirectly exclude employees from full participation in employment: Rees, Rice and Allen (n 2) 495 [9.3.11] (emphasis added), quoting *HREOC Report* (n 35) 58, quoting Belinda Smith, Submission No 106 to Human Rights Equal Opportunity Commission, *Striking the Balance: Women, Men, Work and Family* (2007).

41 *Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983) ('*Workers with Family Responsibilities Convention*'). The Convention was ratified by Australia on 30 March 1990. See Explanatory Memorandum, Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 (Cth) [6]–[8].

42 *Workers with Family Responsibilities Convention* (n 41) art 3(1).

carer responsibilities.[43] As mentioned above, work arrangements that disproportionately disadvantage people who share a protected characteristic are more likely to constitute indirect discrimination than direct discrimination. However, indirect discrimination depends on the term, condition or requirement being 'not reasonable'.[44] This requirement was interpreted extremely narrowly by the Victorian Court of Appeal in *Victoria v Schou [No 2]* ('*Schou*').[45]

In *Schou*, a female court transcriber requested to temporarily work at home two days per week to care for a young child who was sick. The request was refused, and she challenged the decision as indirect discrimination on the grounds of her status as a parent and carer.[46] Ultimately the complaint was dismissed by the Victorian Court of Appeal.[47] The Court's decision focused on the *reasonableness* of the employer's requirement that Schou attend the workplace every day, and not work from home. The Court determined that this requirement was not unreasonable, and therefore there was no need to consider any alternative arrangement requested by the worker.[48] The Court emphasised that attendance at work each day was a term of Schou's contract of employment, and the Court was reluctant to interfere with these terms.[49] Scholars such as Beth Gaze have criticised the Court's approach to interpreting the relevant provisions, describing it as 'narrow and technical'.[50] Gaze argues that the Court upheld managerial prerogatives regarding work arrangements, rather than promoting the purpose of anti-discrimination law, which is to eliminate discrimination in all its forms.[51]

The Court's decision in *Schou* impacted on the interpretation of provisions in other states and territories concerning indirect discrimination on the grounds of parenting or carer responsibilities. This was because the decision was based on the 'reasonableness' aspect, which is part of the indirect discrimination provisions in other jurisdictions. Therefore, the *Schou* decision rendered prohibitions on indirect discrimination largely ineffective for employees seeking accommodation of their parenting or carer responsibilities. The Victorian Parliament enacted the *EOAV*

43 *Anti-Discrimination Act 1977* (NSW) s 49T; *Equal Opportunity Act 1984* (SA) s 85T(6); *Equal Opportunity Act 1984* (WA) s 35A; *EOA* (n 1) s 6(i); *Discrimination Act 1991* (ACT) s 7(1)(l); *Anti-Discrimination Act 1991* (Qld) ss 7(d), (o); *Anti-Discrimination Act 1998* (Tas) ss 16(i)–(j); *Anti-Discrimination Act 1992* (NT) s 19(1)(g).

44 Rees, Rice and Allen (n 2) 155 [3.8.40].

45 (2004) 8 VR 120 ('*Schou*').

46 See *Equal Opportunity Act 1995* (Vic) s 9(1)(c).

47 *Schou* (n 45). The complaint was upheld twice by the Victorian Civil and Administrative Tribunal: *Schou v Victoria* [2000] VCAT 62; *Schou v Victoria* [2002] VCAT 375. It was appealed twice by the employer: *Victoria v Schou* (2001) 3 VR 655 ('*Schou [No 1]*'); *Schou* (n 45).

48 *Schou* (n 45) 129–30 [26]–[27] (Philips JA).

49 *Schou [No 1]* (n 47) 663 [30] (Harper J); ibid 128–9 [24] (Phillips JA).

50 Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 333 ('Context and Interpretation'). See also Chapman, 'Reasonable Accommodation' (n 7) 47–8.

51 Gaze, 'Context and Interpretation' (n 50) 330, 345.

provisions specifically to provide a more effective mechanism to require employers to accommodate an employee's responsibilities as a parent or carer.[52]

In 2007, the Human Rights and Equal Opportunity Commission ('HREOC')[53] published a significant report highlighting the need for legal and cultural change concerning work/family responsibilities in Australia.[54] The report highlighted the failure of anti-discrimination laws to bring about change in this area, and the limited choices available for workers with family responsibilities.[55] The report made three recommendations that are relevant for the purposes of this article.

First, the report recommended new Federal legislation enabling employees to request a flexible work arrangement from their employer.[56] This was enacted in the *Fair Work Act 2009* (Cth) ('*FWA*') rather than in anti-discrimination law.[57] These provisions are extremely limited in terms of their enforceability. Although employers are required to respond to the request for flexible work arrangements, they are not required to accommodate the employee's parenting or carer responsibilities. The *FWA* provides no means for enforcing the substantive duty to accommodate.[58]

Second, the report recommended moving the provisions concerning accommodation of parenting or carer responsibilities from the *SDA* to separate legislation.[59] The important purpose of this change is to provide a gender-neutral mechanism for requesting accommodation of such responsibilities.[60] This change highlights that the accommodation of parenting and carer responsibilities is not a 'women's issue', and both men and women should be able to request such accommodation.

Finally, the report highlighted the importance of *cultural* change regarding work/family responsibilities.[61] The report highlighted the persistence of social

52 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, 3468 (Robert Cameron, Minister for Police and Emergency Services).

53 The HREOC is now known as the Australian Human Rights Commission.

54 *HREOC Report* (n 35).

55 Ibid 53–7.

56 Ibid xviii.

57 *Fair Work Act 2009* (Cth) s 65 ('FWA').

58 Smith, 'It's About Time' (n 26) 130.

59 *HREOC Report* (n 35) xvii.

60 As mentioned above, women can use the indirect sex discrimination provisions in the SDA to challenge work arrangements such as the requirement to work full-time. However, this claim is 'not one available to men, simply because, statistically, men are not likely to be disadvantaged by a requirement that is incompatible with carers' responsibility': Rees, Rice and Allen (n 2) 495 [9.3.11]. This entrenches traditional norms regarding the role of men and women in relation to employment and carer work: at 495 [9.3.11], quoting ibid 55.

61 *HREOC Report* (n 35) x.

norms concerning the role of men and women regarding employment and carer work. Therefore, laws are necessary to enable employees to request flexible work arrangements. Ultimately, however, the goal is to change social norms, so that inflexible work arrangements are eliminated, and individuals do not need to request flexibility. Ironically, however, the *FWA* provisions impose no obligation on an employer to provide flexible work arrangements, and no enforcement mechanism is provided. Therefore, the *FWA* provisions are regarded by scholars as largely ineffective.[62]

In summary, prior to the enactment of the *EOAV* provisions, no enforceable obligation to accommodate an employee's parenting or carer responsibilities existed in Australian law. Although the 2007 report by the HREOC highlighted the need for federal legislation on this topic, no federal laws (apart from the *FWA* provisions) exist. The *EOAV* provisions, which currently exist only in Victoria, are therefore potentially very significant. However, this potential significance depends on how the provisions are interpreted and applied by courts and decision-makers. In the next part of the article, the operation of the Victorian *Charter* is examined, particularly in relation to its possible impact on the interpretation of the *EOAV* provisions.

III THE OPERATION OF THE *CHARTER* OF HUMAN RIGHTS

This part outlines the operation of the Victorian *Charter*, particularly regarding the interpretation of the *EOAV* provisions. The first section outlines the operation of the *Charter*, including the equality provisions. The second section outlines the interpretive duties of courts under the *Charter*. Ultimately, this part concludes that the *Charter* requires the *EOAV* provisions to be interpreted in a human rights-compatible manner, which emphasises the protection of the family unit and every person's right to be treated with equal dignity.

A *Relevant Human Rights*

The Victorian *Charter* was enacted in 2006 and came into full operation in 2008.[63] Its purpose is to 'protect and promote human rights',[64] which are listed in pt 2. In the context of the accommodation of an employee's parenting and carer responsibilities, two rights — equality before the law, and protection of the family — are particularly relevant:

> **8 Recognition and equality before the law**
>
> (1) Every person has the right to recognition as a person before the law.

62 Smith, 'It's About Time' (n 26) 131. As outlined in Part V(C) of this article, an enterprise agreement may contain an enforceable term regarding flexible work arrangements.

63 *Charter* (n 3) s 2.

64 Ibid s 1(2). The rights contained in the Charter are based on those found in the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

> (2) Every person has the right to enjoy their human rights without discrimination.
>
> (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
>
> (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.[65]

Section 8 has been interpreted as encompassing notions of substantive equality, rather than merely formal equality. In relation to the equality rights in the *Charter*, as Bell J stated in *Lifestyle Communities*: 'Equality means substantive equality, not just formal equality. Where differentiation is a measure for redressing disadvantage, it is not discrimination because it furthers equality.'[66]

Interpreting s 8 as promoting substantive equality is supported by sub-s (4), which provides that measures taken to assist or advance certain disadvantaged persons or groups 'do not constitute discrimination' and are therefore legitimate and authorised.[67] Protections of equality contained in international instruments have also been interpreted as supporting substantive equality.[68] The right to equality is regarded in international law as a fundamental human right.[69]

The *Charter* also protects the family, home and a person's 'private life':

> **17 Protection of families and children**
>
> (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.[70]

65 *Charter* (n 3) s 8.

66 *Lifestyle Communities* (n 4) 311 [107]. Justice Bell made this statement in relation to EOA (n 1) s 89, which permits the Victorian Civil and Administrative Tribunal ('VCAT') to grant temporary exemptions from the operation of the *EOA*, when the applicant establishes that the relevant activity promotes the purposes of the *EOA*. His Honour held that this section did not constitute discrimination, as it operated to promote the purpose of the *EOA*, which is to achieve substantive equality: at 344 [290].

67 *Charter* (n 3) s 8(4).

68 *Lifestyle Communities* (n 4) 310–46 [105]–[303] (Bell J). His Honour explained that s 8 of the Victorian *Charter* was based on arts 16 and 26 of the *ICCPR*: at 313–14 [117], citing Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9–10. As outlined below, s 32(2) of the *Charter* provides that '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision', including when interpreting the nature and scope of human rights in the *Charter*.

69 Colm O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' [2008] (1) *UCL Human Rights Review* 80, 82. See also Gaze and Smith (n 10) ch 1.

70 *Charter* (n 3) s 17(1).

Relatedly, s 13 of the *Charter* provides that '[a] person has the right — (a) not to have [his or her] privacy, family, home or correspondence unlawfully or arbitrarily interfered with'.[71] This right has been interpreted broadly in certain contexts, as prohibiting interference by the state and by other actors (including, potentially, employers) in a person's private life.[72]

The aspect of s 17 conferring protection on the family unit has not been directly considered by a Victorian court or tribunal.[73] The wording of s 17 is taken from art 23 of the *ICCPR*, which has been interpreted in a broad manner by the United Nations Human Rights Committee.[74] The concept of what is a 'family' differs from country to country, depending on cultural and other factors, and it changes over time. The 'family' includes nuclear families, extended families, kinship relationships, 'unmarried couples and their children [and] single parents and their children'.[75] The obligation to protect the family extends beyond the state to 'society', including social institutions.[76]

B *Interpretive Obligation*

The primary mechanism provided by the *Charter* for protecting and promoting human rights is the interpretive obligation set out in s 32:

> **32 Interpretation**
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.[77]

71 Ibid s 13(a) is based on art 17 of the *ICCPR* (n 64).

72 See Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (8 April 1988) [1].

73 However, several decisions have interpreted s 17(2) of the *Charter*, which requires the best interests of children to be promoted: see, eg, *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441; *Certain Children v Minister for Families and Children* (2016) 51 VR 473.

74 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 (29 July 1994) 29 [2] ('*General Comment No 19*'). See also Human Rights Committee, *General Comment No 28: Article 3 (The Equality of Rights between Men and Women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [27]; *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol I) (27 May 2008) 192 [5].

75 *General Comment No 19*, UN Doc HRI/GEN/1/Rev.1 (n 74) 29 [2].

76 Ibid 29 [3].

77 *Charter* (n 3) ss 32(1)–(2).

Broadly, s 32 requires all legislation to be interpreted compatibly with the human rights listed in the *Charter*, including the right to equality (s 8) and protection of the family (ss 9 and 17). The interpretive obligation in the *Charter* is 'potentially very powerful'.[78] The *Charter* does not require or enable courts to interpret legislation contrary to its purpose.[79] However, where there is more than one interpretation open to a court, the court must choose the interpretation that promotes human rights.[80]

Therefore, it is important to determine the purpose of the *EOAV* provisions. In terms of context, the objectives section of the *EOA* provides as follows:

> **3 Objectives**
>
> The objectives of this Act are—
>
> (a) to eliminate discrimination … to the greatest possible extent;
>
> (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
>
> …
>
> (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
>
> (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
>
> (ii) equal application of a rule to different groups can have unequal results or outcomes;
>
> (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.[81]

The objectives section highlights that the purpose of the *EOA* as a whole is to promote substantive equality, which means equality of outcomes rather than treating all people the same. This is consistent with the way in which the equality rights in the *Charter* have been interpreted. As indicated by s 7, the *EOAV* provisions are a distinct type of discrimination. They impose a legal duty on employers, separate from the prohibitions on direct or indirect discrimination.[82]

78 Gaze and Smith (n 10) 261.

79 *Momcilovic v The Queen* (2011) 245 CLR 1, 45–6 [41] (French CJ) ('*Momcilovic*').

80 Ibid 46–7 [43] (French CJ).

81 *EOA* (n 1) s 3.

82 The *EOAV* provisions could be regarded as a 'special measure' in terms of s 8(4) of the *Charter* (n 3). That is, they are a measure enacted 'for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination'. However, this characterisation is not necessary for the purposes of this article.

Therefore, the *EOAV* provisions require employers to consider an employee's particular circumstances regarding their parenting or carer responsibilities.

In summary, the *Charter* requires the *EOAV* provisions to be interpreted and applied in a way that promotes substantive equality. This requires the provisions to be interpreted in a way which emphasises the importance of employees with parenting or carer responsibilities not being disadvantaged or excluded by work arrangements. This may involve requiring an employer to change work arrangements which constitute a barrier to full and equal participation in employment. Applying a human rights lens to the interpretation of the *EOAV* provisions is likely to lead to decisions that are more favourable to employees with parenting or carer responsibilities. This is because employees can raise two human rights in their favour — equality rights, and protection of the family. Employers, however, have no *Charter* rights on which they can rely.[83]

The next part of the article examines decisions in which the *EOAV* provisions have been interpreted and applied by the Victorian Civil and Administrative Tribunal ('VCAT').

IV VCAT DECISIONS INTERPRETING THE *EOAV* PROVISIONS

Since the *EOAV* provisions were enacted in 2008, only two reported decisions have considered and interpreted the substantive provisions. In both decisions, the person alleging a breach was unsuccessful. More significantly, in both decisions the *EOAV* provisions were interpreted restrictively, and the *Charter* was largely ignored.

A *Challenging Rostering Arrangements*

In *Richold v Victoria* ('*Richold*'),[84] the employee was a female prison officer with two children aged four and six. Her husband worked full-time for the same employer. She worked casual shifts on the weekend when her husband was not working.

The respondent introduced a policy under which casual staff were offered less shifts if they refused earlier shifts. This was introduced in response to concerns (apparently by other staff) that some staff were only working on weekends to obtain penalty rates. The number of shifts offered to the applicant dropped to approximately one quarter, resulting in a significant reduction in her income, and consequent distress. The applicant argued that the new policy disadvantaged her due to her 'responsibilities "as a parent and carer"',[85] and sought to be accommodated on this basis. After her request was denied, she brought proceedings in VCAT alleging the refusal was unreasonable.[86]

83 As mentioned above, employers commonly rely on principles of freedom of contract in resisting accommodation of employees' parenting responsibilities.

84 *Richold* (n 18).

85 Ibid [12] (Deputy President McNamara) (emphasis omitted).

86 Ibid [18].

Deputy President Macnamara dismissed the proceeding based on a finding that the refusal of the applicant's request was not unreasonable.[87] Primarily, this was because the applicant was a casual employee, which offered her 'the fullest possible flexibility'.[88] The Deputy President emphasised a purely formal conception of equality, stating that '[t]he State is necessarily concerned to maintain an equitable allocation of casual work as between casual officers'.[89] This factor is not explicitly listed in s 19(2), although 'the number of persons who would benefit from or be disadvantaged by [accommodating the arrangement]' is listed.[90] This factor may favour accommodation, as many, if not all workers in a workplace may benefit from the accommodation of parenting or carer responsibilities, in terms of improved morale, for example.[91] However, in *Richold*, Deputy President Macnamara focused on how other workers might be affected by the granting of accommodation to one worker, which could be considered as special treatment.[92] However, a broader consideration of the benefits of accommodating parenting responsibilities could lead to an outcome more favourable to all employees.

In *Richold*, Deputy President Macnamara emphasised the principles of 'equity', but with an exclusive focus on equity *as between different casual staff members*.[93] The *EOAV* provisions allow consideration of the 'number of persons who would benefit from or be disadvantaged by [accommodating those responsibilities]'.[94] However, the Deputy President appeared to assume that accommodating the applicant's responsibilities would be *inequitable* for other staff. As mentioned above, the *EOAV* provisions create a new type of prohibited discrimination, which is entirely separate from direct and indirect discrimination (although it contains aspects of both). The focus of the *EOAV* provisions is on equity *as between an employer and an employee*. The section involves no comparator.[95] Rather, the provision seeks to achieve a type of *substantive* equality, which requires employers to consider an employee's circumstances regarding their parenting or carer responsibilities.

87 Ibid [42].

88 Ibid. The tribunal appeared to confuse the distinct concepts of *flexibility* and *accommodation of parenting responsibilities*. Accommodation may involve an employer providing more stability and certainty, rather than greater flexibility per se. In the circumstances of this proceeding, increased flexibility benefited the employer but not the employee. In addition, VCAT's emphasis on flexibility ignored the employee's actual circumstances.

89 Ibid.

90 *EOA* (n 1) s 19(2)(f)(ii).

91 See below Part V.

92 *Richold* (n 18) [49].

93 Ibid [37], [44].

94 *EOA* (n 1) s 19(2)(f)(ii).

95 Comparators are a judicial device used to compare the treatment of a person with a protected characteristic to one without that characteristic. The use of comparators has caused considerable uncertainty in anti-discrimination law. See *Purvis* (n 22) 131–6 [119]–[133] (McHugh and Kirby JJ).

However, in *Richold*, Deputy President Macnamara equated reasonableness with an employer having a 'universal policy across the entire pool of casual officers' rather than 'differential treatment of different officers'.[96] According to the Deputy President, the employee's request for accommodation of her parenting responsibilities amounted to 'preferential treatment', and other staff 'resented it'.[97] Further, the Deputy President added that 'this type of resentment can be corrosive in the workplace'.[98] Therefore, '[a]n employer has a legitimate interest in maintaining a consistent and transparent policy across' all employees.[99]

In *Richold*, Deputy President Macnamara based his decision on a purely formal conception of equality.[100] The Deputy President adopted the position that all employees must be treated the same, regardless of their parenting or carer responsibilities. In doing so, Deputy President Macnamara failed to recognise the distinctive nature and transformative purpose of the *EOAV* provisions, and failed to apply broader notions of substantive equality.[101] Equality scholar Anna Chapman describes the decision as 'gender-regressive' in that it 'undermine[d] … the beneficial intention of the [*EOAV* provisions]', and it ignored the applicant's responsibilities as the primary carer for two young children.[102]

B *Requesting Part-Time Work*

In *Tate v Department of Human Services (Human Rights)* ('*Tate*'),[103] the employee was a child protection officer, and the sole parent of two school-age children. She

96 *Richold* (n 18) [49]. This statement emphasises the importance placed on formal equality, or treating all people the same regardless of their circumstances. Essentially, this approach ignores the employee's actual circumstances.

97 Ibid.

98 Ibid.

99 Ibid.

100 Purdue notes that 'although the applicant [in *Richold*] was not, in reality, able to avail herself of the flexibility to the same extent as other employees (because she cared for her children on weekdays) the tribunal nonetheless deferred to the flexibility inherent in [her] contractual terms': Emma Purdue, 'Scoping Reasonable Adjustments in the Workplace: A Comparative Analysis of an Employer's Obligation to Accommodate a Worker's Disability under Australian and Canadian Laws' (2017) 30(2) *Australian Journal of Labour Law* 185, 197.

101 VCAT referred to factors indicating that accommodating the applicant's request *was* reasonable, but ultimately gave little weight to these factors. For example, the State of Victoria is a 'large employer with substantial resources': *Richold* (n 18) [41] (Deputy President Macnamara); and 'probably the largest employer in the State': at [37]. Therefore, the respondent would be more likely than a small employer to have the resources to accommodate employees with family or carer responsibilities. Further, the State should seek to be a model employer, in terms of compliance with the *EOAV* provisions.

102 Anna Chapman, 'Employing the Law for Women: Gender, Work and Legal Regulation in Australia' in Ramona Vijeyarasa (ed), *International Women's Rights Law and Gender Equality: Making the Law Work for Women* (Routledge, 2021) 72, 80. Chapman notes that the approach adopted by the tribunal in *Richold* 'possibly plac[es] women in a worse position than they were in before the decision'.

103 [2015] VCAT 507 ('*Tate*').

requested to reduce her working days from five to four days per week (effectively, to work part-time). The employer refused this request, citing 'operational capacity', and the 'detrimental impact on other workers' and on clients.[104]

Ultimately, Senior Member Megay found that the employer's refusal to accommodate the applicant's request was 'not unreasonable'.[105] This was due to the unpredictable nature of the role, and concerns regarding the applicant's ability to manage her caseload in a part-time capacity.[106] Therefore, although the employer had allowed other staff to work part-time, this apparent difference in treatment was explained on the basis of their seniority and their demonstrated ability to manage their caseload.[107] This approach runs contrary to Deputy President Macamara's emphasis in *Richold* of the importance of treating all workers equally. Rather in *Tate*, Senior Member Megay recognised the legitimacy and importance of taking an employee's personal circumstances into account, but nevertheless limited its consideration to traditional factors, such as seniority and demonstrated performance, rather than emphasising the applicant's parenting or carer responsibilities.

Notably, the Victorian Equal Opportunity Commission intervened in the proceeding and made submissions regarding the interpretation of the *EOAV* provisions. The Commission submitted that the provisions were different to other prohibitions on discrimination and that unlike direct or indirect discrimination, the provision 'is not dependent upon … unfavourable treatment, or disadvantage'.[108] The Commission argued that the provision 'does, in certain circumstances, oblige an employer to treat an employee with family responsibilities differently (and more favourably) than other employees'.[109] The Commission in other words emphasised the importance of promoting *substantive* equality, by accommodating the particular parenting or carer responsibilities of the applicant.

Although Senior Member Megay found the Commission's submissions 'very helpful', the Senior Member stated that she '[was] not persuaded that in this case, there is a need to go beyond the plain text of the section'.[110] In other words, the Senior Member did not consider that a substantive equality approach would make any difference to the outcome of the proceeding, as the 'plain text' of the section dictated this.

104 Ibid [52]–[53] (Senior Member Megay).

105 Ibid [108].

106 Ibid [52]–[53].

107 Ibid [53].

108 Ibid [54].

109 Ibid [55].

110 Ibid [54], [56]. This statement ignores the open-textured nature of the term 'reasonable', and how its operation may be influenced by unstated norms.

Senior Member Megay stated that the 'required questions' for the Tribunal to consider are:

1. Was there was [sic] a request to accommodate the [employee's] responsibilities as a parent or carer?
2. What are the responsibilities?[111]
3. Was the request refused? and
4. Was the refusal unreasonable?[112]

These questions may provide some guidance to decision-makers regarding the operation of the *EOAV* provisions. However, they do not replace the language of the provisions. In particular, the central requirement in the *EOAV* provisions is for an employer to *accommodate* an employee's responsibilities as a parent or carer, subject only to the requirement of reasonableness. The provisions do not explicitly require an employee to *request* accommodation, or any particular arrangement. However, this requirement is implied by the requirement of a refusal by the employer.[113] In *Richold*, Deputy President Macnamara reasoned that without a request, an employer would be unaware of the 'employee's domestic arrangements'.[114] Also, respecting an employee's autonomy 'would render it inappropriate for an employer to reach a judgment as to what was an appropriate accommodation for a particular employee absent any consideration of the employee's views'.[115]

However, as Chapman notes, the *EOAV* provisions focus on *accommodation* by the employer, rather than *requests* by the employee.[116] Emphasising requests frames the accommodation of parenting responsibilities as a singular, once and for all arrangement. Commonly, however, negotiating such arrangements involves an ongoing discussion, with various proposals and counter-proposals made. The language of *requests* may introduce an undesirable level of formality into such negotiations.[117] Further, emphasising requests necessarily raises issues of how clear and specific an employee needs to be, when raising issues concerning their parenting or carer responsibilities. This is particularly problematic when making a request is considered a threshold requirement, as suggested by Senior Member Megay in *Tate*.[118] Finally, focusing on requests emphasises what an employee is

111 This involves considering the employee's circumstances and the nature of their parenting responsibilities and the arrangements required or requested.

112 *Tate* (n 103) [56].

113 *Richold* (n 18) [38] (Deputy President Macnamara). Determining whether the refusal was reasonable involves considering the impact on the employer's business and on other staff.

114 Ibid.

115 Ibid.

116 Chapman, 'Reasonable Accommodation' (n 7) 55.

117 Ibid 49–50.

118 *Tate* (n 103) [57], [109].

required to do, rather than what an employer is required to do. As mentioned above, the duty to accommodate emphasises that the employer created the work arrangements and is capable of (and responsible for) changing them. Therefore, the emphasis should remain on what, if anything, the employer has done to accommodate the employee's parenting or carer responsibilities.

C *Summary of VCAT Decisions*

A notable feature of the VCAT decisions examined above is the weight given by VCAT to the interests of employers. For example, in *Richold*, Deputy President Macnamara accepted the employer's evidence that the change in roster arrangements was due to concerns raised by casual workers, rather than for the employer's own reasons. Similarly, in *Tate*, Senior Member Megay accepted the employer's evidence regarding the limited resources available to the applicant's manager, and therefore the limited options available to accommodate the applicant's request to work part-time. Considering that the State of Victoria is one of the largest employers in Victoria, this claim seems questionable. It is credible if the VCAT members consider only the resources available within a particular work area, rather than the larger department. In *Richold* and *Tate*, there was a distinct focus away from resourcing issues and more on interpersonal issues, such as the importance of (formal) equity between staff (in *Richold*) and issues concerning the applicant's work performance and competence (in *Tate*).

In summary, the two reported VCAT decisions have interpreted the *EOAV* provisions as requiring the same treatment of all staff, or formal equality, only. Further, the decisions have emphasised the interests of employers over employees seeking accommodation of their parenting responsibilities. Finally, they have given more weight to the evidence and interests of employers rather than employees.

The next section examines whether the Victorian *Charter* requires a different approach to the interpretation of the *EOAV* provisions, and whether a *Charter*-based approach to interpretation is likely to lead to more favourable outcomes for employees with parenting or carer responsibilities.

V A *CHARTER*-BASED INTERPRETATION OF THE *EOAV* PROVISIONS

This part sets out a human rights-based approach to interpreting the *EOAV* provisions. As highlighted in the previous part, VCAT has so far *not* applied a human rights-based approach to interpreting and applying the *EOAV* provisions. This may be for a range of reasons, including that employees or their representatives have not advanced such arguments in VCAT hearings, or a lack of familiarity by VCAT members with *Charter* issues. A human rights-based approach to interpreting the *EOAV* provisions would give more weight to promoting substantive equality and equal participation in the workforce by employees with parenting or carer responsibilities.

A *The Transformative Potential of Charter-Based Interpretation*

As mentioned above, the *Charter* requires all legislation to be interpreted compatibly with the human rights listed in the *Charter*, including the right to equality and protection of the family. The *Charter* does not require or enable courts to interpret legislation contrary to its purpose. However, where there is more than one interpretation open, courts and tribunals must choose the interpretation that promotes human rights.

Adopting a *Charter*-based approach to interpretation may lead to a different interpretation of the *EOAV* provisions, and different outcomes in VCAT proceedings. This is demonstrated by two examples from other areas of law. First, under a provision in residential tenancy legislation, VCAT has the power to order a residential rental provider of residential premises to enter into a residential rental agreement with a person who is occupying the residential premises as their home and who is able to meet the obligations of a tenant.[119] For many years, VCAT was reluctant to exercise this power, as it was strongly influenced by entrenched notions of freedom of contract, and arguments that the applicant was seeking special treatment over others on the public housing waiting list.[120] However, when human rights arguments based on the *Charter* were presented to VCAT, it began making decisions based on human rights considerations, such as the importance of the family unit and the home, rather than prioritising contractual issues.[121] Similarly, when human rights arguments are presented to VCAT concerning accommodation of an employee's parenting or carer responsibilities, VCAT may give greater priority to promoting substantive equality for those with such responsibilities, rather than prioritising notions of 'equity' between staff in a purely formal sense. Likewise, VCAT may give greater priority to the importance of the family, and associated caring responsibilities, rather than prioritising the business interests of the employer. Overall, when it adopts a *Charter*-based approach, VCAT is more likely to find in favour of employees in such proceedings.

In *Slattery v Manningham City Council* ('*Slattery*'),[122] Senior Member Nihill adopted a *Charter*-based approach in discrimination proceedings involving a person with a disability. The Senior Member particularly emphasised the respondent's obligation to consider the circumstances of persons with a disability to whom the council provided services, in order to promote substantive equality.[123] In determining whether the applicant had been unfavourably treated, Senior Member Nihill rejected previous approaches, which emphasised formal

119 *Residential Tenancies Act 1997* (Vic) ss 91S–91T.

120 See Bill Swannie, 'Creation of Tenancy in Public Housing: A Human Rights Perspective' (2014) 4(1) *Victoria University Law and Justice Journal* 77.

121 See, eg, *DS v Aboriginal Housing Victoria* [2013] VCAT 1548, [110]–[114] (Member Warren).

122 [2013] VCAT 1869 ('*Slattery*').

123 Ibid [38]–[39].

equality.[124] Instead, the Senior Member examined whether the applicant had been treated unfavourably by the respondent in terms of his access to council services.[125] This interpretation gave real 'weight and content' to the applicant's equality rights.[126] This decision shows that a *Charter*-based approach to interpretation is particularly appropriate to anti-discrimination proceedings.

In proceedings for disability discrimination, courts have frequently rendered statutory protections redundant by interpreting them as requiring formally equal treatment. For example, courts have treated the manifestations of a person's disability as separate from the disability.[127] In *Slattery*, Senior Member Nihill recognised that Slattery manifested his disability in ways that were difficult for council staff.[128] However, the *Charter* required the Council to not treat Slattery unfavourably based on these behaviours. In other words, Slattery's behaviours were not ignored in determining whether discrimination had occurred, and he was not compared to a person without a disability who behaved in a similar manner.[129] In summary, the decision in *Slattery* demonstrates that a *Charter*-based approach may 'help to challenge the tendency of courts to eschew substantive equality for formal equality in discrimination law'.[130]

Further, a *Charter*-based approach may lead to outcomes that are more favourable to rights-holders, as VCAT may give more weight than previously to the human rights listed in the *Charter*, including equality rights and protection of the family. Similarly, applying the *Charter* to the *EOAV* provisions means that employees with family or carer responsibilities should have appropriate weight and consideration given to those responsibilities — even if those responsibilities do not fit the norm of the unencumbered or ideal worker. As the decision in *Slattery* illustrates, anti-discrimination law has transformative potential, when interpreted through a *Charter* lens.

B *Realising the Transformative Potential of a Charter-Based Approach*

Discrimination law scholars Beth Gaze and Belinda Smith argue that progress towards achieving substantive equality 'requires more than merely non-

124 Ibid [51]. See also Piers Gooding and Rosemary Kayess, 'Human Rights and Disability: An Australian Experience' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Lawbook, 2021) vol 1 191, 206.

125 *Slattery* (n 122) [86]–[119].

126 Ibid 207.

127 See, eg, *Purvis* (n 22) 159 [217]–[218] (Gummow, Hayne and Heydon JJ); *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 254–5 (Bromberg J).

128 *Slattery* (n 122) [70], [97].

129 See also *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). VCAT also considered the obligations of public authorities under the *Charter* (n 3) s 38: ibid [149]–[165].

130 Gooding and Kayess (n 124) 205.

discrimination; it requires adjustments and accommodation of differences'.[131] They argue that duties to accommodate, such as the *EOAV* provisions, require employers to make reasonable accommodation for the personal circumstances of employees with parenting and carer responsibilities.[132] As highlighted above, the *EOAV* provisions operate similarly to the reasonable adjustments required under some disability discrimination laws.[133] Further, the duty to make reasonable adjustments or accommodations is a *positive* duty in that it requires consideration and possible action by the duty-holder. Whereas formal notions of equality require employers to ignore each employee's attributes and circumstances, the duty to accommodate requires employers to take these factors into account.

The *Charter* emphasises that 'human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'.[134] The purposes of the *Charter* therefore align with those of the *EOA*, which seeks to promote substantive equality. Duties to accommodate perform an important role in promoting substantive equality, as they seek to support personal autonomy and human dignity, or a person's equal worth and their ability to make decisions regarding their life.[135] These values are emphasised by the *Charter*[136] and international instruments.[137] Equal access to work is important for economic reasons and for intrinsic, dignitary reasons. Therefore, the *Charter* requires that the values of human dignity and autonomy be given appropriate weight and consideration when VCAT determines whether an employer has *unreasonably* refused to make accommodations.

Duties to accommodate challenge entrenched norms regarding the 'ideal worker',[138] or the 'unencumbered worker'.[139] According to this norm, employees are expected to be available to work full-time, and should be able to easily change their hours of work.[140] This worker, in other words, is free of domestic responsibilities. Scholars highlight that the 'ideal' worker matches the characteristics of the stereotypical male breadwinner.[141]

131 Gaze and Smith (n 10) 125.

132 Ibid 128.

133 See *EOA* (n 1) ss 20, 33, 40, 45. Provisions requiring reasonable accommodation by employers of employees with a disability were inserted in the *EOA* in 2008, at the same time that s 19 was inserted.

134 *Charter* (n 3) Preamble.

135 Belinda Smith, 'What Kind of Equality Can We Expect from the Fair Work Act?' (2011) 35(2) *Melbourne University Law Review* 545, 558 ('What Kind'); Gaze and Smith (n 10) 127.

136 *Charter* (n 3) Preamble.

137 *ICCPR* (n 64) Preamble.

138 Gaze and Smith (n 10) 127–8.

139 Smith, 'What Kind' (n 135) 568.

140 Ibid 549.

141 Ibid 568. Similarly, in the context of disability discrimination, scholars note that 'there is a persistent … norm of "ableism" which idealises able-bodiedness': Rosemary Kayess and Belinda

Similarly, feminist scholars such as Regina Graycar argue that Australian judges commonly place little value on 'domestic' work done by women, in comparison to paid employment.[142] In torts proceedings, for example, judges commonly regard carer work performed by women as 'part of family life' and as a 'labour of love' which should not be compensated in economic terms.[143] These conclusions are based on outdated stereotypes regarding the appropriate role of men and women, and the economic and social value of carer work and domestic work generally.[144]

Rather than challenging the norm of the ideal worker, VCAT has tended to implicitly confirm and reinforce such norms when interpreting the *EOAV* provisions. For example, in *Tate*, Senior Member Megay accepted the employer's evidence that part-time work was not reasonably available to the applicant employee, due to resourcing limitations.[145] However, allowing the applicant to work part-time would ultimately be resource-neutral for the employer. Like many accommodations of parenting responsibilities, the arrangement is likely to be temporary rather than ongoing. The State of Victoria is one of the largest employers in Victoria, and the resourcing considerations would likely be minimal. A *Charter*-informed approach to the *EOAV* provisions may entail, for example, that VCAT takes a more critical approach to such claims by employers. It may for example, require cogent evidence and details concerning resourcing and other reasons given for an employer refusing to accommodate an employee's parenting or carer responsibilities.

Similarly, VCAT has tended to interpret requests for accommodation of an employee's parenting or carer responsibilities as claims for 'special treatment' or favouritism from the employer. Further, such requests are regarded by VCAT at detracting from the rights and interests of *other* employees. In *Tate*, for example, the employer argued that reducing the applicant's workload by one day would impose unreasonably on *other* employees' workload.[146] However, as noted above, this change to work arrangements would ultimately be resource-neutral for the employer and would at most amount to a mere inconvenience for the State of Victoria.

Smith, 'Charters and Disability' in Matthew Groves and Colin Campbell (eds), *Australian Charter of Rights a Decade On* (Federation Press, 2017) 151, 155.

142 Reg Graycar, 'Damaging Stereotypes: The Return of "Hoovering as a Hobby"' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge, 2012) 205, 213.

143 Ibid.

144 See also Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States*, ed CM Campbell and PNP Wiles (Martin Robertson, 1978).

145 *Tate* (n 103) [53].

146 Ibid [52] (Senior Member Megay).

Part of the entrenched norm of the 'unencumbered' worker is the view that having children is a private 'lifestyle choice', and therefore the burden of pregnancy and raising children should be borne completely by those who make this choice (and not by other employees or by the employer).[147] However, this assumes that accommodation of such responsibilities benefits some employees and does not benefit (or perhaps even disadvantages) others.[148] For example, in *Richold*, Deputy President Macnamara emphasised that other prison officers 'resented it' when the employer took Richold's parenting responsibilities into account, as they considered this treatment 'preferential'.[149] Further, the Deputy President added that this type of resentment 'can be corrosive in the workplace'.[150] Therefore, '[a]n employer has a legitimate interest in maintaining a consistent and transparent policy across' all employees.[151]

This assumption can be challenged, in that other employees in the workplace may, in fact, *benefit* from the accommodation of employees' parenting and carer responsibilities, through improved morale in the workplace and improved productivity, for example. The notion that parenting or carer responsibilities are a purely 'private' or personal matter for an individual employee is based on the norm of the ideal worker, who is unencumbered by such responsibilities. Therefore, VCAT should critically examine such evidence and arguments, if presented by an employer. Promoting harmony in the workplace is an important goal. However, VCAT should give little weight to statements by an employer regarding the opinions of other workers in relation to the employer's compliance with its legal obligations.

In a very real sense, *every member of society* benefits from the accommodation of an employee's parenting or carer responsibilities, as everyone either gives or receives such care at some point in their life. Therefore, accommodation should not be regarded as special treatment or favouritism, but rather as a duty owed by employers to society generally. Accommodating parenting or carer responsibilities is different to general notions of work-life balance or allowing time for rest and recreation (which are also important). Raising children, and caring for those in need of care, are socially valuable activities, which should be appropriately recognised and acknowledged. As Smith notes, '[w]omen continue to undertake a disproportionate share of (unpaid) domestic and caring work'.[152] Therefore, realising the transformative potential of the *EOAV* provisions through adopting a *Charter*-based approach to interpretation is important for employees and for society generally.

147 See Gaze and Smith (n 10) 128; K Lee Adams, 'The Problem of Voluntariness: Parents and the Anti-Discrimination Principle' (2003) 8(1) *Deakin Law Review* 91, 94.

148 O'Cinneide notes that formal approaches to equality tend to be highly individualistic and libertarian. Such approaches tend to assume that existing arrangements are fair, and that any interference would be unfair: O'Cinneide (n 69) 95.

149 *Richold* (n 18) [49].

150 Ibid; O'Cinneide (n 69) 95.

151 *Richold* (n 18) [49].

152 Smith, 'What Kind' (n 135) 548.

It is important to note that VCAT is not bound by its own previous decisions. The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*') provides that VCAT must focus on the 'substantial merits of the case in all proceedings',[153] and it is 'not bound by … any practices or procedures applicable to courts of record'.[154] Therefore, the VCAT decisions examined in this article are not binding in other VCAT proceedings, and VCAT members may therefore adopt a more *Charter*-focused interpretation of the *EOAV* provisions.

When the *Charter* was enacted, an emphasis was placed on educating the legal profession regarding its operation. For example, the former President of the Victorian Court of Appeal, Justice Chris Maxwell, actively encouraged practitioners to present 'human rights-based arguments where relevant to the questions before the Court'.[155] His Honour highlighted that 'the development of an Australian jurisprudence drawing on international human rights law is in its early stages, [and] further progress will necessarily involve judges and practitioners working together to develop a common expertise'.[156]

The VCAT decisions interpreting the *EOAV* provisions examined in this article indicate that much more work is needed to educate the legal profession regarding the distinct purpose of these provisions. As the quote by Justice Maxwell indicates, if *Charter*-based arguments are not raised by legal practitioners, then they will not be considered by courts and tribunals in their decisions. Therefore, employees and their representatives should raise *Charter*-based arguments regarding the interpretation the *EOAV* provisions, and over time such arguments may be accepted.

To summarise the main points made in this article, employees and their representatives should emphasise three arguments. First, the purpose of the *EOAV* provisions is to promote substantive equality for employees with parenting or carer responsibilities. Relatedly, the distinction between formal equality (same treatment of people, regardless of their different circumstances) and substantive equality (taking a person's circumstances into account) should be emphasised. Second, a *Charter*-based approach highlights the unique nature of the *EOAV* provisions as imposing positive duties on employers to remove barriers to full and equal participation in employment. Relatedly, the difference between the duty to accommodate, on the one hand, and prohibitions on direct and indirect discrimination, on the other hand, should be emphasised. Third, a *Charter*-based approach emphasises the human rights context in which the *EOAV* provisions

153 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 97 ('VCAT Act').

154 Ibid s 98.

155 Justice Chris Maxwell, 'Human Rights: A View from the Bench' (Speech, Law Institute of Victoria, 26 October 2005) 1 <https://www.supremecourt.vic.gov.au/about-the-court/speeches/human-rights-a-view-from-the-bench>.

156 Ibid 2.

should be interpreted, and particularly the importance of promoting the values of human dignity and autonomy.

The *EOAV* provisions support a *Charter*-based approach, particularly by emphasising that certain facts and circumstances pertaining to the employee 'must be considered'.[157] This includes the 'nature of [the employee's] responsibilities as a parent or carer',[158] and the 'consequences for the employee of not making such accommodation'.[159] A *Charter*-based approach requires VCAT to give appropriate weight and consideration to these factors. Similarly, the Ontario Human Rights Commission highlights the following factors in relation to the duty to accommodate family responsibilities:

1. The nature of the caregiving responsibility, and of the conflict between that responsibility and the organization's rules, requirements, standards, processes or other factors.
2. The systemic barriers faced by caregivers, including intersectional impacts based on disability, age, gender, sexual orientation, race and race-related grounds, and marital status.
3. The availability and adequacy of social supports for caregiving needs.[160]

Emphasising these factors and adopting a *Charter*-based approach to interpreting the *EOAV* provisions can potentially transform the operation of these provisions. However, this transformation depends on employees challenging the claims made by employers, and VCAT giving greater weight to applicants' circumstances and to relevant human rights.

Equality law scholar Colm O'Cinneide highlights that open-textured concepts such as 'equality' have been interpreted by courts in many different ways, including in ways that are extremely narrow and formalistic.[161] In this way, courts have effectively rendered protections of fundamental human rights 'empty vessels'.[162] Further, judicial interpretation of such concepts may lag behind legislative

157 *EOA* (n 1) s 19(2). The Explanatory Memorandum states that employers should '*seriously* consider how they may be able to accommodate their workers' family responsibilities in order to allow them to participate as much as possible in the workplace, and workforce as a whole': Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 2 (emphasis added).

158 *EOA* (n 1) s 19(2)(a).

159 Ibid s 19(2)(h).

160 'The Duty to Accommodate', *Ontario Human Rights Commission* (Web Page) <https://www.ohrc.on.ca/en/policy-and-guidelines-discrimination-because-family-status/vi-duty-accommodate>. See also Victorian Equal Opportunity & Human Rights Commission, *Understanding Your Rights in the Workplace and Victorian Anti-Discrimination Law* (Practice Guidance, April 2019) <https://www.humanrights.vic.gov.au/resources/practice-guidance-understanding-your-rights-in-the-workplace-and-victorian-anti-discrimination-law-apr-2019/>.

161 O'Cinneide (n 69) 83.

162 Ibid.

innovations and social values. These observations accurately describe VCAT's previous interpretation of the *EOAV* provisions. However, a *Charter*-based approach to interpreting open-textured concepts, such as 'reasonable' accommodation, can produce a very different type of analysis. This approach focuses on the barriers to an employee fully participating in employment, and the employer's duty to remove such barriers. Such an approach can realise the transformative potential of the duty to accommodate.

C *Limitations and Alternatives*

This section examines some limitations concerning the *Charter*-based arguments raised in this article, and some possible alternatives for achieving accommodation of an employee's parenting and carer responsibilities.

First, it may be argued that VCAT proceedings are not an ideal forum to seek accommodation of parenting or carer responsibilities. For example, in *Schou*, *Richold* and *Tate*, the employee had resigned and was seeking compensation rather than accommodation. Further, persons making complaints under anti-discrimination laws face a range of barriers and risks, such as the risk of an adverse costs order.[163] In addition, most discrimination complaints are resolved at conciliation rather than at hearing.[164]

Despite these limitations, VCAT decisions such as *Slattery* illustrate that how VCAT decides discrimination and human rights proceedings is important on several levels. In that decision, Senior Member Nihill rejected previous approaches to interpreting disability discrimination laws as being inconsistent with the purposes of anti-discrimination laws and the promotion of substantive equality.[165] VCAT decisions have significant normative weight, and they are an important part of the cultural change emphasised by the 2007 report by the HREOC. VCAT decisions influence conciliation outcomes, which take place in the shadow of the law (as interpreted by VCAT).[166] As enforceable, public documents, VCAT decisions can influence how the *EOAV* provisions are understood by employers and the wider community.

Second, it may be considered that the arguments presented in this article are of little to no relevance to other states and territories. Currently, Victoria is unique in having the *EOAV* provisions and a *Charter*. However, these arguments are likely to have more significance in the future. This is because other states and territories currently have some duties to accommodate in their anti-discrimination laws and are likely to have more in the future. Similarly, only three Australian jurisdictions (Victoria, the Australian Capital Territory and Queensland) currently have a charter of rights. However, other states and territories may adopt charter of rights in the

163 Gaze and Smith (n 10) 289.

164 Ibid 186–7.

165 *Slattery* (n 122) [51].

166 Gaze and Smith (n 10) 200.

future. Further, even where no charter exists, common law principles of statutory interpretation, such as the principle of legality, may be used to produce a similar result.[167] This principle operates similarly to s 32 of the *Charter*, in that it requires statutory provisions to be interpreted compatibly with 'fundamental' rights, when this is consistent with the purpose of the legislation.[168]

Finally, it may be argued that protection for employees regarding family and carer responsibilities is more appropriately achieved by including appropriate terms in the relevant enterprise agreement and enforcing these terms. Enterprise agreements perform an important role in protecting employees' basic terms and conditions of work. Commonly, they include provisions concerning requests for flexible work arrangements,[169] span of hours (start and finish times) and consultation regarding major change to work arrangements (which may include changing hours of work).[170] However, enterprise agreements apply only to employees working for a particular employer. On the other hand, the *EOAV* provisions apply to all employees in Victoria, and they provide a consistent standard. As mentioned above, the *EOAV* provisions are important in a society that values all employees equally, and which values paid employment and carer work equally. Therefore, the manner by which VCAT interprets the *EOAV* provisions is important. Ultimately, it is important that VCAT decisions promote the normative importance of an employer accommodating employees' parenting and carer responsibilities.

VI CONCLUSION

This article has examined the unique provisions enacted by the Victorian Parliament in 2008 which require employers to reasonably accommodate the parenting and carer responsibilities of employees. The transformative potential of these provisions has not yet been realised and has effectively been frustrated by the narrow approach to interpretation adopted by VCAT. The Tribunal has interpreted the provisions as requiring formal equality, or the same treatment of all employees, regardless of an employee's parenting or carer responsibilities.

The Victorian *Charter* requires all legislation to be interpreted in a manner that is compatible with human rights. Specifically, it requires substantive equality

167 *Momcilovic* (n 79) 46–7 [42]–[43] (French CJ).

168 See *Al-Kateb v Godwin* (2004) 219 CLR 562, 643 [241] (Hayne J).

169 Significantly, enterprise agreements may provide a mechanism for enforcing requests for flexible work arrangements. As mentioned above, the *FWA* itself provides no enforcement mechanism.

170 For example, in *Vaihu v Precision Shower Screens and Robes Pty Ltd* [2018] FWC 7596, an employee challenged a variation to his working hours, which (he argued) prevented him from collecting his children from school. He argued that this breached the relevant enterprise agreement in that it was outside the allowed span of hours, and that proper consultation had not occurred. The Fair Work Commission rejected these arguments. Similarly, in *Kellogg Brown & Root Pty Ltd* (2004) EOC 93-354, contractors working on an offshore oil rig challenged a proposed variation of their rostering arrangements from 7 days on/7 days off to 14 days on/14 days off. The claim was upheld at first instance, with the Commission noting the potential conflict between the proposed roster and employee's family responsibilities. On appeal, the Full Bench held that the application before the Commission did not directly involve issues of employee's family responsibilities: *Re Esso Australia Pty Ltd* (2005) 139 IR 34s.

(equality of outcome) to be promoted in the interpretation of anti-discrimination laws. A *Charter*-based approach to interpreting the *EOAV* provisions would give greater weight to the interests of employees with parenting or carer responsibilities and would support the legislative purpose of promoting their full and equal participation in the workforce. This would also assist the cultural change needed to challenge gendered stereotypes regarding the respective roles of men and women in relation to employment and carer work.