

## WHAT DID THE COVID-19 PANDEMIC REVEAL ABOUT WORKPLACE FLEXIBILITY FOR PEOPLE WITH FAMILY AND CARING RESPONSIBILITIES?

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### I INTRODUCTION

Increasingly, employers are embracing the idea of flexible work. In 2019–20, 75.9% of employers reporting to the Workplace Gender Equality Agency (‘WGEA’) had a policy and/or strategy for flexible working.<sup>1</sup> WGEA says that a flexible working arrangement is ‘an agreement between a workplace and an employee to change the standard working arrangement to better accommodate an employee’s commitments out of work ... [and it] usually encompass[es] changes to the hours, pattern and location of work’.<sup>2</sup> In Australia, employees may request flexible working arrangements from their employers informally or, if eligible, formally via the right set out in section 65 of the *Fair Work Act 2009* (Cth) (‘*FW Act*’).<sup>3</sup> One of the strongest arguments for flexible working arrangements is they lead to greater workforce participation by women. The WGEA claims that ‘flexibility is a key driver and enabler of gender equality’<sup>4</sup> and encourages employers to make their workplaces more flexible

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<sup>1</sup> Workplace Gender Equality Agency, ‘Australia’s Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency’s 2019-20 Reporting Data’ (Scorecard, 26 November 2020) 2, 10. The highest proportion of employers with this type of policy and/or strategy were in the Financial and Insurance Services sector. The lowest were in the Agricultural, Forestry and Fishing sector: at 10.

<sup>2</sup> ‘Flexible Work’, *Workplace Gender Equality Agency* (Web Page) <<https://www.wgea.gov.au/flexible-work>> (‘Flexible Work’).

<sup>3</sup> An eligible employee who ‘is the parent, or has responsibility for the care, of a child who is of school age or younger’ may make a formal request: see *Fair Work Act 2009* (Cth) ss 65(1), 65(1A)(a), 65(2) (‘*FW Act*’). See also Part II below.

<sup>4</sup> Workplace Gender Equality Agency, ‘Executive Briefing on Workplace Flexibility’ (Toolkit, 11 March 2019) 3 <[https://www.wgea.gov.au/sites/default/files/documents/FLEXIBILITY\\_TOOLKIT\\_EXECUTIVE-BRIEFING\\_0.pdf](https://www.wgea.gov.au/sites/default/files/documents/FLEXIBILITY_TOOLKIT_EXECUTIVE-BRIEFING_0.pdf)>.

because it will boost the number of female employees.<sup>5</sup> However, access to flexible working arrangements is important to women *and* men who want to balance the competing demands of work and caring.

The COVID-19 pandemic had – and continues to have – a significant impact upon the world of work, for both businesses and workers. As Howe, Healy and Gahan have recently observed, it is foreseeable that the pandemic could produce permanent changes to how work is performed, particularly given workers’ experiences regarding ‘the viability of remote and work-from-home alternatives’.<sup>6</sup> Against this backdrop, this article focuses on the need for flexible working arrangements by workers with family responsibilities during the first phase of the pandemic in 2020. Talk of ‘flexibility’ has abounded in connection with government responses to the COVID-19 pandemic. Governments urged employers and employees to be flexible in response to the changed world of work.<sup>7</sup> Yet what many employees needed to assist them with managing the competing demands of working from home while caring for children was overlooked in the generalised initial response. In addition, dialogue regarding ‘flexibility’ to manage the impacts of the pandemic tended to integrate notions of employer-led flexibility (intended to manage costs and fluctuations in demand such as by varying workers’ rosters and working hours) and employee-led flexibility (intended to enable employees to address conflict between work and non-work responsibilities).<sup>8</sup>

Many workers who had not previously sought flexible working arrangements suddenly needed to do so during the pandemic. The Victorian Equal Opportunity and Human Rights Commission (‘VEOHRC’) found that 29% of men and 44% of women in Victoria used flexible working arrangements to meet increased caring

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<sup>5</sup> ‘Flexible Work’ (n 2). The WGEA takes into account whether or not an employer has mainstreamed flexible working arrangements when awarding its Employer of Choice for Gender Equality: ‘Employer of Choice for Gender Equality’, *Workplace Gender Equality Agency* (Web Page) <<https://www.wgea.gov.au/what-we-do/employer-of-choice-for-gender-equality>>. On the capacity of these awards to raise expectations for greater workplace equality and promote good practice, see Belinda Smith and Monica Hayes, ‘Using Data to Drive Gender Equality’ (2015) 28(3) *Australian Journal of Labour Law* 191.

<sup>6</sup> John Howe, Joshua Healy and Peter Gahan, ‘The Future of Work and Labour Regulation after COVID-19’ (2021) 34(1–2) *Australian Journal of Labour Law* 130, 144.

<sup>7</sup> See, for example, the Prime Minister extolling how important it had been for the labour force to embrace flexibility and noting that flexibility and flexible working arrangements benefitted the economy: Scott Morrison, ‘Press Conference Australian Parliament House, ACT Transcript’ (Press Conference, 16 July 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-23>>.

<sup>8</sup> See, eg, ‘Alternative Work Arrangements’, *Fair Work Ombudsman* (Web Page, 9 December 2021) <<https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/alternative-work-arrangements>>. On the distinction between employer-led (demand-driven) and employee-led (supply-driven) flexibility see, eg, Simon Deakin and Hannah Reed, ‘The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration’ (Working Paper No 162, ESRC Centre for Business Research, University of Cambridge, March 2000).

responsibilities during the pandemic in 2020.<sup>9</sup> As Rosemary Owens has observed, ‘[t]he conflict between work in the home and work in the paid work force is a *gendered* reality’<sup>10</sup> and this has persisted during the pandemic.<sup>11</sup> The Centre for Future Work found that men were more likely than women to obtain flexibility to discharge their caring responsibilities while retaining the same pay.<sup>12</sup> More than a year into the pandemic, it therefore remains crucial to examine what workers with family responsibilities have needed and how employers have responded.

In Part II of this article, we outline the legal framework regarding flexible working arrangements. In Part III, we consider the impact of government-imposed lockdowns on how work was performed in 2020.<sup>13</sup> We report on the results of an online survey we conducted in late 2020 about the needs of people with family responsibilities who were working from home during lockdowns in 2020, and how their employers responded.<sup>14</sup> The majority of survey participants were working in Victoria. In Part IV, we outline implications relevant to how flexible working arrangements might operate in the future.

## II FLEXIBLE WORKING ARRANGEMENTS

Assisting employees to balance work and caring responsibilities is an object of the *FW Act*.<sup>15</sup> As noted above, section 65 gives eligible employees,<sup>16</sup> including parents or carers of children who are school age or younger, the right to request flexible working arrangements.<sup>17</sup> Employers can only refuse a request on reasonable business grounds, although employers’ decisions to refuse requests are not reviewable.<sup>18</sup> For eligible

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<sup>9</sup> Victorian Equal Opportunity and Human Rights Commission, ‘Juggling Caring, Parenting and Work: Lessons for the Post-COVID Workplace’ (Survey Snapshot 4, August 2021) 4 (‘Juggling Caring’).

<sup>10</sup> Rosemary Owens, ‘Women, “Atypical” Work Relationships and the Law’ (1993) 19(2) *Melbourne University Law Review* 399, 428 (emphasis in original).

<sup>11</sup> See, eg, Lyn Craig and Brendan Churchill, ‘Working and Caring at Home: Gender Differences in the Effects of COVID-19 on Paid and Unpaid Labor in Australia’ (2021) 27(1–2) *Feminist Economics* 310.

<sup>12</sup> Dan Nahum, ‘Work and Life in a Pandemic: An Update on Hours of Work and Unpaid Overtime Under COVID-19’ (Research Paper, Centre for Future Work, The Australia Institute, November 2020) 26.

<sup>13</sup> Further lockdowns were imposed in 2021 and were in place at the time of writing. This article predominantly draws upon the data that was available before this which relates to the first wave of lockdowns in 2020.

<sup>14</sup> See Part III, Section B below.

<sup>15</sup> *FW Act 2009* (Cth) s 3(d).

<sup>16</sup> *Ibid* s 65(2).

<sup>17</sup> *Ibid* s 65(1A)(a).

<sup>18</sup> *Ibid* ss 44(2), 739(2). It is beyond the scope of this article to examine the deficiencies in this model. See, eg, Dominique Allen and Adriana Orifici, ‘Home Truths: What Did COVID-19 Reveal About Workplace Flexibility?’ (2021) 34(1–2) *Australian Journal of Labour Law* 77 (‘Home Truths’).

employees, this right is supplemented by entitlements under model terms in modern awards.<sup>19</sup> Equality laws prohibit discrimination based on family responsibilities.<sup>20</sup> Victoria is the sole jurisdiction that promotes flexibility for parents and carers via a duty on employers to reasonably accommodate an employee's parental or caring responsibilities, such as by modifying working arrangements.<sup>21</sup>

Before the pandemic, the right to request flexible working arrangements under section 65 tended to be underutilised by eligible employees.<sup>22</sup> Scholars recognised the equality-enabling potential of section 65 but critiqued its limitations.<sup>23</sup> Many employers offered access to flexible working arrangements that exceeded the legal minimum standard,<sup>24</sup> including via flexible work policies.<sup>25</sup> In addition to formal policies, employers have been found to use informal practices to negotiate flexible working arrangements with workers.<sup>26</sup> For eligible employees, modern awards and enterprise agreements include terms that augment and improve the right under section 65.<sup>27</sup> Equality law also augmented these rights including via protections against discrimination on the basis of family responsibilities,<sup>28</sup> and in some jurisdictions an obligation on employers to reasonably accommodate eligible workers' family

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<sup>19</sup> These terms were introduced via a Model Term inserted via the determination in *Re 4 Yearly Review of Modern Awards – Family Friendly Work Arrangements* (2018) 276 IR 249.

<sup>20</sup> See, eg, *Sex Discrimination Act 1984* (Cth) s 7A.

<sup>21</sup> *Equal Opportunity Act 2010* (Vic) s 19 ('EO Act'). It is unlawful for an employer in the Northern Territory to fail or refuse to accommodate a 'special need' a person has because of parenthood: *Anti-Discrimination Act 1992* (NT) ss 19(1)(g), 24 ('AD Act').

<sup>22</sup> Natalie Skinner, Barbara Pocock and Claire Hutchinson, *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions* (Report, 2015) 69 ('NES Right to Request Provisions Report'). See also Bernadette O'Neill, *General Manager's Report into the Operation of the Provisions of the NES Relating to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave: 2009–2012* (Report, Fair Work Commission, November 2012) 184–5 <<https://www.fwc.gov.au/documents/sites/admingmreporting/nas.pdf>>.

<sup>23</sup> See, eg, Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21(2) *Australian Journal of Labour Law* 116, 122; Belinda Smith, 'What Kind of Equality Can We Expect from the Fair Work Act?' (2011) 35(2) *Melbourne University Law Review* 545, 569–71; Anna Chapman, 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (2012) 33(1) *Adelaide Law Review* 39, 50–1.

<sup>24</sup> Productivity Commission, 'Working from Home' (Research Paper, September 2021) 49.

<sup>25</sup> *Ibid* 50.

<sup>26</sup> See, eg, Skinner, Pocock and Hutchinson, *NES Right to Request Provisions Report* (n 22) 21–2; Rae Cooper and Marian Baird, 'Bringing the "Right to Request" Flexible Working Arrangements to Life: From Policies to Practices' (2015) 37(5) *Employee Relations* 568, 570.

<sup>27</sup> For an explanation of how modern awards and enterprise agreements can supplement the Right to Request, see Allen and Orifici, 'Home Truths' (n 18) 86–8.

<sup>28</sup> See, eg, *EO Act 2010* (Vic) ss 6, 8–9.

responsibilities.<sup>29</sup> Studies have highlighted that a workplace culture that is supportive of flexibility is key to giving employees confidence to make requests.<sup>30</sup>

Flexible working arrangements are touted as a means of increasing workforce participation by women and encouraging more men to assume caring responsibilities.<sup>31</sup> Women are more likely to seek flexible working arrangements than men,<sup>32</sup> but men are more likely to have their requests refused,<sup>33</sup> and are less willing to seek flexibility because they fear it could affect job security.<sup>34</sup> Requests are common amongst women returning to work following maternity leave. The inquiry by the Australian Human Rights Commission ('AHRC') into pregnancy discrimination at work found that 70% of mothers returning to work requested adjustments to working arrangements and 89% of those requests were granted.<sup>35</sup> The Australian Bureau of Statistics ('ABS') reports that 86% of mothers who started work or returned to work following the birth of their child used flexible working arrangements. The most common forms were working part-time (65%), flexible hours (35%) and working from home (26%).<sup>36</sup> Similarly, the AHRC found the most common requests were for part-time work or job sharing (50%), flexible hours (32%) and a change in start or finishing times (16%).<sup>37</sup>

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<sup>29</sup> These jurisdictions are Victoria, Northern Territory and (possibly) New South Wales. In Victoria, this protection applies to employees and 'contract workers': *EO Act 2010* (Vic) ss 19, 22; *AD Act 1992* (NT) ss 19(1)(g), 24; *Anti-Discrimination Act 1977* (NSW) s 49(V).

<sup>30</sup> See, eg, Diane van den Broek and Emma Keating, 'Rights to a Process for the Masses or Select Privileges for the Few? Telework Policy and Labour Market Inequality in Australia' (2011) 32(1) *Policy Studies* 21, 23; Natalie Skinner and Janine Chapman, 'Work-Life Balance and Family Friendly Policies' 2013(4) *Evidence Base* 1, 12; Skinner, Pocock and Hutchinson, *NES Right to Request Provisions Report* (n 22) 23–5; Cooper and Baird (n 26) 579.

<sup>31</sup> For a comprehensive overview of the different forms of flexibility, see Marian Baird and Daniel Dinale, *Preferences for Flexible Working Arrangements: Before, during and after COVID-19: A Report to the Fair Work Commission* (Research Report, November 2020). See also Skinner, Pocock and Hutchinson, *NES Right to Request Provisions Report* (n 22) 6.

<sup>32</sup> 'The State of Flex 2020', *Diversity Council Australia* (Web Page) <<https://www.dca.org.au/topics/flexibility/business-case/state-flex-2020>>.

<sup>33</sup> Victorian Equal Opportunity and Human Rights Commission, 'Rebuilding Flexible Workplaces: Lessons for the Post-COVID Workplace' (Survey Snapshot 1, March 2021) 8 ('Rebuilding Flexible Workplaces').

<sup>34</sup> Victorian Equal Opportunity and Human Rights Commission, 'Supporting Gender Equality Lessons for the Post-COVID Workplace' (Survey Snapshot 2, March 2021) 5 ('Supporting Gender Equality').

<sup>35</sup> Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review* (Report, 25 July 2014) 47 ('Supporting Working Parents').

<sup>36</sup> Australian Bureau of Statistics, *Australian Social Trends, Nov 2013: Pregnancy and Work Transitions* (Catalogue No 4102.0, 20 November 2013).

<sup>37</sup> *Supporting Working Parents* (n 35) 47.

### III THE COVID-19 PANDEMIC – FLEXIBILITY IN ACTION

#### A The Impact of COVID-19 on Working Arrangements

The government-imposed lockdowns during the COVID-19 pandemic had an immediate impact on Australian workplaces. In this section, we consider the impact during the lockdowns that occurred in 2020. Other than workers who performed essential services, such as health professionals and educators, people were directed to work from home during lockdowns.<sup>38</sup> Consequently, both employees and employers had to be flexible in terms of where and how work was conducted.<sup>39</sup> In April–May 2020, Roy Morgan found women were more likely to be working from home than men, and workers aged 35–49 were the most likely age group to be working from home. More than half of all workers in the Finance and Insurance, Public Administration, and Defence sectors were working from home. Working from home was most common in Canberra, Sydney, and Melbourne.<sup>40</sup> The ABS reported that large businesses were twice as likely as small businesses to have workers working from home.<sup>41</sup>

In 2020, government responses to the pandemic included periods where schools, as well as kindergartens and childcare centres, were closed to all except the children of essential services workers.<sup>42</sup> Access to informal care and support structures was also curtailed via government directions to enforce social distancing.<sup>43</sup> Consequently, workers had to assume more caring responsibilities. Twenty-eight percent of respondents to a survey conducted by the Centre for Future Work in 2020 said their family and caring responsibilities had increased due to COVID-19.<sup>44</sup> An Australian Council of Trade Unions (‘ACTU’) survey found 60% of people working from home in 2020 who also had carer responsibilities were spending more time on caring during

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<sup>38</sup> The lockdowns commenced in March 2020 but well into 2021, many workforces had not returned to ‘normal’ due to social distancing and public health requirements, coupled with employee preference to work from home. At the time of writing in 2021, further lockdowns were in place in Victoria and New South Wales. Many workplaces were closed so workers were at home but not working, their incomes supplemented by the federal government’s JobSeeker payment.

<sup>39</sup> On the challenges workers faced in quickly adapting, see Margaret Thornton, ‘Coronavirus and the Colonisation of Private Life’ (2021) 1(1) *Legalities* 44, 50–2.

<sup>40</sup> Roy Morgan, ‘Nearly a Third of Australian Workers Have Been “#WFH”’ (Press Release, 29 June 2020).

<sup>41</sup> Australian Bureau of Statistics, *Business Indicators, Business Impacts of COVID-19* (Catalogue No 5676.0.55.003, 24 September 2020) (‘Business Indicators’).

<sup>42</sup> Most recently see, Department of Health and Human Services (Vic), ‘Coronavirus Update for Victoria’ (Media Release, 22 August 2021) <<https://www.dhhs.vic.gov.au/coronavirus-update-victoria-22-august-2021>>.

<sup>43</sup> The Australian Institute of Family Studies found a significant reduction in the use of approved care and non-parental care before the pandemic to parent-only care during the pandemic: Kelly Hand et al, *Families in Australia Survey: Life during COVID-19* (Report No 1, July 2020) 3.

<sup>44</sup> Nahum (n 12) 23.

the pandemic than before.<sup>45</sup> Women predominantly bore the burden of the increase in care.<sup>46</sup> Although the location of work changed, not all employers adjusted their productivity expectations accordingly.<sup>47</sup> Evans et al found that, in 2020, many parents struggled to meet the competing demands on their time<sup>48</sup> and worked late into the evening to accommodate work and home schooling.<sup>49</sup>

The COVID-19 pandemic was not a typical experience of working from home using new technology, including because many employees had to concurrently care for and home school children.<sup>50</sup> The ABS reported that in September 2020, 1 in 3 households had kept their children home due to COVID-19 in the preceding four weeks.<sup>51</sup> In 2020, the impact was felt most significantly in Victoria, where extended lockdowns occurred. The period the ABS examined was during Victoria's second period of lockdown,<sup>52</sup> during which time 83% of households in Victoria had kept their children at home.<sup>53</sup> Forty-eight percent of Victorian workers surveyed by the VEOHRC in June–July 2020 said they found it hard to manage work and caring for children during the pandemic.<sup>54</sup> Caring responsibilities, which are usually hidden from the workplace, were visible to colleagues and employers because all forms of communication shifted online where children could often be seen. Thornton writes: 'The children were visible reminders to employers and the wider community that a

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<sup>45</sup> Australian Council of Trade Unions, *Working from Home Survey Report* (Report, 13 November 2020) 10.

<sup>46</sup> See, eg, 'Juggling Caring' (n 9) 8; 'Gendered Impact of COVID-19', *Workplace Gender Equality Agency* (Web Page, 11 May 2020) <[https://www.wgea.gov.au/topics/gendered-impact-of-covid-19#\\_edn1](https://www.wgea.gov.au/topics/gendered-impact-of-covid-19#_edn1)>; Rae Cooper and Sarah Mosseri, 'Underutilised, Underpaid, Undervalued: Australian Women and COVID-19 in and after the Crisis', *The Forum Network* (online, 31 July 2020) <<https://www.oecd-forum.org/posts/underutilised-underpaid-undervalued-australian-women-and-covid-19-in-and-after-the-crisis>>.

<sup>47</sup> Respondents to a survey about work and time said employers still expected long hours from people working from home: Lyn Craig, 'Coronavirus, Domestic Labour and Care: Gendered Roles Locked Down' (2020) 56(4) *Journal of Sociology* 684, 689 ('Gendered Roles Locked Down').

<sup>48</sup> Subhadra Evans et al, 'From "It Has Stopped Our Lives" to "Spending More Time Together Has Strengthened Bonds": The Varied Experiences of Australian Families During COVID-19' (2020) 11 *Frontiers in Psychology* 1, 10.

<sup>49</sup> *Ibid* 7. On the negative impacts of trying to balance work and care, see 'Juggling Caring' (n 9) 4.

<sup>50</sup> On the division of labour and care and the experiences of women in the early part of the pandemic, see Craig, 'Gendered Roles Locked Down' (n 47) 687–9. On the experience of Victorian women, see Andrea Carson, Leah Ruppanner and Shaun Ratcliff, *Worsening of Australian Women's Experiences under COVID-19: A Crisis for Victoria's Future* (Report, 29 September 2020). Craig and Churchill found that mothers and fathers working from home spent more time on domestic work and care than before the lockdowns: Lyn Craig and Brendan Churchill, 'Dual-Earner Parent Couples' Work and Care during COVID-19' (2020) 28(S1) *Gender, Work and Organization* 66, 71, 73, 75.

<sup>51</sup> Australian Bureau of Statistics, *Household Impacts of COVID-19 Survey, September 2020* (Catalogue No 4940.0, 13 October 2020) ('Household Impacts').

<sup>52</sup> Between 7 July–28 October 2020.

<sup>53</sup> 'Household Impacts' (n 51).

<sup>54</sup> 'Juggling Caring' (n 9) 3.

substantial proportion of workers have caring obligations; they are not the unencumbered monads that accord with the ideal worker model'.<sup>55</sup>

The ABS reported that to care for their children, 35% of workers changed or reduced their work hours and 20% took leave from work.<sup>56</sup> Offering leave was a common response by employers, whether that was annual leave, carer's leave, 'purchased leave' or 'special' pandemic leave.<sup>57</sup>

The pandemic was a testing ground for flexible working arrangements for employers and employees with family or caring responsibilities.<sup>58</sup> However, very little data was captured in 2020 about what forms of flexibility workers with family responsibilities asked for while working from home and how their employers responded.

## B Survey of Workers with Family Responsibilities

In this context, at the end of 2020, we surveyed workers with family responsibilities, seeking information about the types of flexible working arrangements they sought and obtained during COVID-19, their employer's response, and their employer's general response to its workforce's flexibility needs. Questions focused on whether the forms of flexibility workers with family responsibilities needed accorded with those their employers offered.

The survey was aimed at workers who were responsible for the primary care of a child school aged or younger in 2020 during the COVID-19 pandemic and who were working from home.<sup>59</sup> Sixty-one people responded. Forty-two participants had two to

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<sup>55</sup> Thornton (n 39) 53.

<sup>56</sup> 'Household Impacts' (n 51).

<sup>57</sup> For example, the New South Wales government temporarily amended the *Long Service Leave Act 1955* (NSW) so employees could take shorter periods of leave and not need to give one month's notice provided both parties agreed: *Treasury Legislation Amendment (COVID-19) Act 2020* (NSW) sch 1. Nash and Churchill examined policies instituted by Australia's 41 higher education providers and found they 'over relied' on leave as a solution for workers with caring responsibilities: Meredith Nash and Brendan Churchill, 'Caring during COVID-19: A Gendered Analysis of Australian University Responses to Managing Remote Working and Caring Responsibilities' (2020) 27(5) *Gender, Work and Organization* 833, 842. Williamson, Colley and Hanna-Osborne found the public services typically offered staff access to leave: Sue Williamson, Linda Colley and Sally Hanna-Osborne, 'Will Working from Home Become the "New Normal" in the Public Sector?' (2020) 79(4) *Australian Journal of Public Administration* 601, 603.

<sup>58</sup> Section 65 also applies to other categories of employees, and it was not only workers with family responsibilities who sought flexibility due to the impact of COVID-19. As this group was the focus of our data collection, we have confined our discussion to that group of workers.

<sup>59</sup> The research was approved by the Human Research Ethics Committee at Monash University (Project ID Number: 26999) and received funding from the Centre for Development Economics and Sustainability in the Monash Business School. Seventy-three responses to the survey were received. Twelve respondents were excluded because they did not have children school aged or younger or were not working, leaving 61



four children. Having one child (31%) or two children (55%) was the most common. The children ranged from 3–17 years. Most were aged between 5 and 11. Eighty-three percent had a child who required home schooling and 73% of participants had primary responsibility for home schooling. Of the participants responsible for a child under school age, 91% said these children would attend childcare or kindergarten if not for the pandemic. Women predominantly responded to the survey. Specifically, 52 participants were female and 9 were male. Twenty participants were aged 21–40, 37 were aged 41–50 and 4 were aged 51 or older.

Most participants were engaged in ongoing employment. Thirty participants worked full-time, 29 worked part-time, 1 was casual, and 1 was a contractor. Table 1 shows that most participants were professionals.<sup>60</sup> It is not, therefore, unsurprising that they were able to work from home.<sup>61</sup> The most common industry participants were employed in was Education and Training (40%), followed by Government, Defence and Protective Services (18%). Ninety percent of participants worked for employers with more than 20 employees.

Table 1: Participant's Profession

|                                    |    |
|------------------------------------|----|
| Manager                            | 12 |
| Professional                       | 41 |
| Clerical and Administrative Worker | 7  |
| Technicians and Trades Worker      | 1  |

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participants. The survey was opened initially between 17 November and 10 December 2020 and participants were sought Australia-wide via posts on LinkedIn, Twitter, Facebook and via articles we wrote that appeared in two Monash University external facing publications: see Dominique Allen and Adriana Orifici, 'What Working-From-Home Lessons can be Learned to Protect Fairness and Flexibility?', *Lens* (online, 30 November 2020) <<https://lens.monash.edu/@business-economy/2020/11/30/1381807/what-working-from-home-lessons-can-be-learned-to-protect-fairness-and-flexibility>>; Dominique Allen and Adriana Orifici, 'The Battle to Retain COVID's Flexible Work Arrangements', *Impact* (online, 2 December 2020) <<https://www2.monash.edu/impact/articles/covid-19/the-battle-to-retain-covids-flexible-work-arrangements/>>. Sixty people completed the survey in this timeframe. We reopened the survey between 18 January and 9 March 2021 following the publication of a news article in *Broad Agenda* about the project but this yielded only one participant.

<sup>60</sup> Fifty-seven percent worked in the public sector or for government, 29% worked in the private sector and 13% worked for a non-for-profit organisation.

<sup>61</sup> Ninety-five percent of participants worked from home during the pandemic and 85% still worked from home when completing the survey. Similarly, the Centre for Future Work found white collar workers were most able to complete work from home: Nahum (n 12) 28.

While the survey was open to residents Australia-wide, 70% of participants were from Victoria which, as noted above, experienced longer lockdowns in 2020. This situation, and our location in Victoria, may account for the high response rate from Victorian workers. Given the dominance of Victorian respondents, it is not possible to draw general conclusions from the data but the unique experience of Victorian residents in having to work from home and educate children for longer makes the views of this group valuable.

### *1 Types of Flexibility*

Of the 61 participants, 54% asked their employers for flexible working arrangements to balance caring for and/or homeschooling children and work. Of those 33 participants, 4 made formal requests, 24 did so informally (such as verbally or via email) and 5 made both formal and informal requests. Thirty requests were supported. The 3 participants whose requests were rejected were women and they all made informal requests.

Of those participants who requested flexible working arrangements and had the request approved, 87% said those changes better enabled them to balance their work and caring responsibilities. The most common type of flexibility requested was around hours of work. This is shown in Table 2, noting participants could list more than one form of flexibility. Requests to take various forms of leave were not as common, though seven participants sought to reduce their working hours temporarily to care for children.

Of the 28 participants who did not ask their employer for flexible working arrangements, the most common reasons were that they could balance work and family responsibilities without making any changes (35%) or were already able to work flexibly without needing approval (25%). Only one participant did not seek flexible working arrangements because they did not think their employer would respond favourably. Five participants did not think it was possible to change their jobs to accommodate family responsibilities. The experience of the male participants was different. Seven of the nine male respondents did not ask their employer for flexible working arrangements, and they all chose not to because they could already balance their responsibilities or had flexibility arrangements in place.

Table 2: Types of Flexibility Participants Requested

|                                |    |
|--------------------------------|----|
| Altered Start/Finish Times     | 17 |
| Special Leave                  | 2  |
| Carers Leave                   | 3  |
| Unpaid Leave                   | 2  |
| Long Lunch Break               | 2  |
| Weekend/Evening Work           | 2  |
| Utilising Flex Time            | 1  |
| Reduced Working Hours          | 7  |
| Flexible Working Hours         | 6  |
| Reduced Tasks and Expectations | 1  |

Nineteen participants said their employers initiated workplace-wide flexibilities to deal with the pandemic. Eighty-four percent said they accessed those arrangements and, as a result, were better able to balance work and family responsibilities. Twelve were public sector employers, four were not-for-profit and three were private sector employers. Table 3 shows the types of flexibility offered by those employers noting multiple responses could be submitted.

Table 3: Types of Flexibility Offered by Employers

| Type of Flexibility                  | Number of Employers |
|--------------------------------------|---------------------|
| Access to Annual Leave               | 12                  |
| Access to Personal Leave             | 14                  |
| Special Leave                        | 8                   |
| Unpaid Leave                         | 9                   |
| Condensed Working Hours              | 4                   |
| Changes to the Span of Working Hours | 11                  |
| Temporary Reduction in Hours         | 11                  |
| Other Arrangements                   | 4                   |

Access to leave was the most common form of flexibility. One employer offered a voluntary ‘reduced year’, which the participant described resembling ‘purchased leave’. In terms of the ‘other arrangements’, one participant said their employer let parents be paid as usual but work only 75% of their usual hours. Another participant said their employer reduced its expectations of staff. The final participant said their employer offered everyone access to a flexibility policy.

#### IV PRELIMINARY FINDINGS ABOUT FLEXIBILITY AND WORKERS WITH FAMILY RESPONSIBILITIES

The data this article reports on is from a small group and it is dominated by Victorian residents who, at the time the survey was administered, had experienced extensive periods of lockdowns and school, kindergarten and childcare centre closures, which made them very suitable participants in this research. It is now a matter of history that further lockdowns were imposed in 2021 in Victoria and elsewhere. Future research could consider whether or not the experience of workers with family responsibilities during the 2021 lockdowns was similar to 2020, and if that experience varied by state or territory. Most survey participants worked for the public sector or large organisations.<sup>62</sup> It would be instructive to know more about the experience of workers with family responsibilities working in smaller organisations and how those employers responded to the pandemic.<sup>63</sup> This is particularly important because small businesses employed over 4.7 million Australians in 2020.<sup>64</sup> In addition, managerial attitudes can significantly impact whether employers approve employee requests for flexibility.<sup>65</sup> As Cooper and Baird have shown, organisational policies and strategies, individual managers’ attitudes, personal experience and levels of commitment to flexible work are critical in the process of employees requesting, and ultimately obtaining, flexible work,<sup>66</sup> and these can vary considerably.<sup>67</sup>

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<sup>62</sup> As noted above, large businesses were more likely than small businesses to have employees working from home.

<sup>63</sup> The VEOHRC surveyed Victorian workers with family responsibilities and workers with disabilities during the pandemic. The VEOHRC is gradually releasing its findings and may well have captured this data.

<sup>64</sup> Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts* (Report, December 2020) 5.

<sup>65</sup> See, eg, Public Service Association of New South Wales and Community and Public Sector Union New South Wales, *What Women Want Report 2020* (Report, November 2020)<sub>24</sub> (*‘What Women Want Report 2020’*); Ashlee Borgkvist et al, ‘Critical Considerations of Workplace Flexibility “For All” and Gendered Outcomes: Men Being Flexible about Their Flexibility’ (2021) 28(6) *Gender, Work and Organization* 2076.

<sup>66</sup> Cooper and Baird (n 26) 579.

<sup>67</sup> *Ibid.*

That being said, it is possible to reach some early conclusions about the use of flexible working arrangements in 2020 based on the survey findings. First, almost every employer agreed to alternate arrangements when requested and most survey participants reported a favourable experience when making a request. Twelve participants used the words ‘positive’ or ‘supportive’ to describe their employer’s response.<sup>68</sup> Although we cannot assume employers will respond this way in the future (especially given these requests were made during a highly unusual time), arrangements implemented during COVID-19 might have reduced scepticism or resistance amongst employers towards flexible work.<sup>69</sup>

Second, in terms of the type of flexibility sought by workers with family responsibilities, making requests for flexible hours was most common, whether that involved a change to span of hours, spreading part-time hours over additional days or working at night and/or on the weekend to make up hours. Overall, this suggests participants wanted autonomy to complete their work at a time that fitted in with other responsibilities. This accords with the findings from another study in New South Wales (‘NSW’). When asked about the most important form of flexibility, 80.05% of female members of the Public Service Association NSW nominated flexible work hours. Access to leave when needed was also very important (81.62%).<sup>70</sup> The data collected in our survey suggests workers with family responsibilities did not want to reduce their leave entitlements during this time and wanted to maintain their hours of work while accessing flexibility around how and when they performed work.

Third, the type of flexibility sought by participants differed from the type of workforce-wide flexibilities commonly offered by employers. The emphasis in employer responses to the pandemic on taking accrued leave can be seen as reinforcing the ‘normative’ worker model, which remains prevalent in Australian labour regulation.<sup>71</sup> The normative worker can be described as the ‘unencumbered worker’

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<sup>68</sup> In research commissioned by WGEA during COVID-19, respondents identified positive benefits associated with flexible working arrangements: unpublished WGEA survey data reported by Baird and Dinale (n 31) 18. The VEOHRC found 57% of Victorian workers with caring responsibilities had a positive experience of flexibility during the pandemic: ‘Rebuilding Flexible Workplaces’ (n 33) 5.

<sup>69</sup> Similarly, members of the Public Service Association NSW reported workplaces that were resistant to flexible working arrangements were more accommodating since COVID-19: *What Women Want Report 2020* (n 65) 25.

<sup>70</sup> See, eg, *ibid* 23. WGEA has made similar findings: see unpublished survey data in Baird and Dinale (n 31) 27–8.

<sup>71</sup> See also Jill Murray, ‘Introduction’ (2005) 23(1) *Law in Context* 1, 1–7; Anna Chapman, ‘Work/Family, Australian Labour Law, and the Normative Worker’, in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 79; Rosemary Owens, ‘Taking Leave: Work and Family in Australian Law and Policy’, in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 237; Smith (n 23).

who devotes long hours over the full working week without periods of interruption and uses non-working time for rest or relaxation.<sup>72</sup> Offering employees ‘exceptional’ access to accrued annual and personal leave to gain flexibility during the pandemic meant employers required affected employees to draw down on accrued leave that is intended for rest and relaxation, medical emergencies or convalescence. The structural framework around leave and flexibility remains unaltered when the ‘exceptional’ access is no longer required. On the other hand, preference of participants towards flexibility via changes to hours and patterns of work arguably challenges the dominant paradigm including by requiring employers to rethink the ‘standard working hours’ that can be undertaken by the ‘model worker’.

Finally, as noted above, the pandemic has produced significant challenges for businesses and workers, as well as showing the potential for employers to adapt and accommodate flexible working arrangements under pressure. However, the survey results highlight that some workers did not discuss increased flexibility needs with their employers even during this time when increased work/family conflict was highly visible. As noted, 28 participants with caring responsibilities did not discuss their flexibility requirements with their employers but instead balanced their responsibilities without making changes to work arrangements or worked flexibly without approval. It is likely these participants continued to present as ‘model workers’ and may have worked ‘double shifts’ to do so, particularly where they worked ‘atypically’ without approval.<sup>73</sup> This invites deeper reflection on the impact of law on workers who require flexibility. Among other things, the policy underpinning section 65 of the *FW Act* reinforces the dichotomy between ‘typical’ and ‘atypical’ work arrangements.<sup>74</sup> This legal right conceives of flexible work as an exceptional arrangement that eligible employees can seek out. Employers do not need to encourage flexibility at work under section 65. Instead, they are required to reactively respond to employee requests. This policy framework requires rethinking if the law is to contribute to normalising ‘atypical’ work.

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<sup>72</sup> Murray (n 71) 1–2. There is a large body of literature on the entrenchment of the ‘model worker’ in the regulation of work and its effects: see, eg, Owens, ‘Women, “Atypical” Work Relationships and the Law’ (n 10); Joan Williams, *Unbending Gender: Why Work and Family Conflict and What to Do About It*, (Oxford University Press, 1999) 1–6; Sara Charlesworth, ‘Managing Work and Family in the “Shadow” of Anti-Discrimination Law’ (2005) 23(1) *Law in Context* 88, 92–6.

<sup>73</sup> On simultaneous work see, eg, Lyn Craig, ‘Is There Really a Second Shift, and If So, Who Does It? A Time-Diary Investigation’ (2007) 86 *Feminist Review* 149, 163–5. On the reasons for not formally requesting flexibility see, eg, Natalie Skinner, Abby Cathcart and Barbara Pocock, ‘To Ask or Not to Ask? Investigating Workers’ Flexibility Requests and the Phenomenon of Discontented Non-Requesters’ (2016) 26(2) *Labour and Industry* 103, 109.

<sup>74</sup> On ‘atypical’ work and labour law’s response see also Owens, ‘Women, “Atypical” Work Relationships and the Law’ (n 10).

## V CONCLUSION

Workers with family responsibilities will continue to request flexible working arrangements long after the immediate threat of the COVID-19 pandemic has receded. It is hoped this experience will encourage them to do so. In a survey conducted by the VEOHRC, 40% of workers said the pandemic had made them more confident to ask for flexible working arrangements.<sup>75</sup> Part of this dialogue needs to be around the form of flexibility that suits both the employer and worker. Much has been said about the desire for many workers to continue working from home to some degree after the pandemic ends,<sup>76</sup> and this has led to various employer responses.<sup>77</sup> Yet it should not be assumed that working from home means someone is working flexibly – their arrangements may still be rigid and not accommodating of other responsibilities. Nor is it necessarily desirable to have workers with family responsibilities (predominantly women) absent from the office. The Male Champions of Change group noted that, if women choose this, offices will become places frequented by men and where people with caring responsibilities are not visible. They recommend rotating ‘employees between in-office/onsite and remote working to avoid central workplaces becoming centres of power dominated by men and/or people without caring responsibilities’.<sup>78</sup>

Working conditions during the pandemic have raised awareness of flexible working arrangements and how rapid technological and organisational changes can enable them to be broadly and practically implemented across sectors and industries. Yet these changes have arisen in unique circumstances. It is not certain employers and

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<sup>75</sup> ‘Supporting Gender Equality’ (n 34) 8.

<sup>76</sup> The VEOHRC found 85% of Victorian workers with a disability or family/caring responsibilities wanted flexible working arrangements in the future: *ibid.* In September 2020, the ABS reported 29% of businesses expected employees to work from home once restrictions eased. This was most common for employers in information, media and telecommunications, professional, scientific and technical services and financial and insurance services: ‘Business Indicators’ (n 41). The Centre for Future Work found a third of workers it surveyed wanted to continue to work from home after the pandemic: Nahum (n 12) 30. The ACTU reported 81% of the workers it surveyed wanted to continue working from home to some degree: *Working from Home Survey Report* (n 45) 11. Cf Williamson, Colley and Hanna-Osborne who hypothesise that the public sector’s reluctance towards working from home in the past and early plans to return workers to the office means it is unlikely to embrace it in the future: Williamson, Colley and Hanna-Osborne (n 57) 604. Thornton found workers were ambivalent on this issue: Thornton (n 39) 59. For data on employee future preferences, see also Baird and Dinale (n 31) 24–5.

<sup>77</sup> See Victorian Public Sector Commission, ‘Flexible Work Policy and Resources’ (Policy, 21 April 2021); ‘Telstra Moves to “Location-Agnostic” Working’, *Workplace Express* (online, 31 May 2021) <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&selkey=60125](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=60125)>.

<sup>78</sup> Male Champions of Change, ‘Accelerating Change on Flexible Ways of Working’ (Discussion Paper, 2020) 3.

employees are aware of the law about flexibility more generally. For instance, in its survey, the VEOHRC found many employers did not understand their legal obligations around flexible work.<sup>79</sup> Some years ago, the AHRC also found low awareness amongst employees of the right to request flexible working arrangements.<sup>80</sup> The Fair Work Ombudsman has an opportune moment to promote the right to request in section 65 and relevant obligations under modern awards, as applicable to workers with family responsibilities.

The COVID-19 experience could also be the catalyst for rethinking regulatory responses to flexible working arrangements. The AHRC has previously recommended the positive obligation to accommodate workers with family responsibilities under Victorian law be implemented on a national scale.<sup>81</sup> While there were collaborative discussions during 2020 between industrial parties pursuant to the *Clerks – Private Sector Award 2020* [2021] FWCFB 3653 case towards installing more enduring changes in modern awards to support flexible work, this case was discontinued in June 2021.<sup>82</sup> Yet, rethinking industrial and equality laws that promote flexible working arrangements remains imperative. Extending entitlements to flexible working arrangements to all workers, including parents and carers, is just one way to ‘normalise’ flexible work and challenge the normative paradigm of the ‘ideal worker’ that has been so visibly and fundamentally challenged by the working arrangements of many during the pandemic.

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<sup>79</sup> ‘Rebuilding Flexible Workplaces’ (n 33) 7.

<sup>80</sup> *Supporting Working Parents* (n 35) 121.

<sup>81</sup> In the *Supporting Working Parents* report, the AHRC recommended that the *Sex Discrimination Act 1984* (Cth) include a positive obligation on employers to accommodate workers with family responsibilities and the *FW Act* include a positive obligation to reasonably accommodate a request for flexible working arrangements: *ibid* 12.

<sup>82</sup> See also ‘Clerks – Private Sector Award 2020 – Work from Home Case’, *Fair Work Commission* (Web Page) <<https://www.fwc.gov.au/hearings-decisions/major-cases/previous-major-cases/clerks-private-sector-award-work-home-case>>.