

# FLEXIBLE WORK PRACTICES AND PRIVATE LAW FIRM CULTURE: A COMPLEX QUAGMIRE FOR AUSTRALIAN WOMEN LAWYERS

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*In this article, we examine gender and the work culture in Australian private law firms. Our primary focus is the extent to which flexible work practices remain a quagmire for female lawyers. We consider the systemic barriers affecting women lawyers, including hidden attitudes, the persistence of a gendered division of labour in the private sphere, the ongoing gender pay gap in Australia, and the ways in which the law firm ethos of long working hours disadvantages women. We then present some practical steps to remedy this situation, including accommodating working mothers' time constraints, mentoring and networking, and training for managers and support staff. It is proposed that more needs to be done to encourage employers to implement these methods with confidence that flexible work arrangements can provide benefit to the firm as a whole, as well as individual employees. To achieve this, we put forward a reform of the framework in order to implement these practical steps. We also discuss some ways to possibly effect attitudinal change in law firm culture and conclude with some observations about the future of legal practice in this context. Finally, further involvement of the Law Council of Australia is proposed, to impose conditions on the practising certificates of lawyers in supervisory roles to assist them in complying with the framework. This would also ensure that flexible work arrangements are accessible to both employers and employees, which in turn will assist in dissolving the systematic discrimination that female lawyers face in private law firms.*

## I INTRODUCTION

This article examines work culture in private law firms in Australia and discusses the extent to which flexible work practices remain a quagmire for female lawyers. This is despite more than 30 years of legal protection for women provided by the *Sex Discrimination Act 1984* (Cth) and various affirmative action-type laws commencing in 1986 with the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).<sup>1</sup> There continues to be a division of labour between men and women

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in the public/private spheres and a gender pay gap. This is mirrored in law firms. These are both perpetuated by and translate into few women at the top, persistence of male-defined work practices and an organisational resistance to the incorporation and celebration of flexible work practices. Indeed, work-life balance issues for lawyers working in private practice have a 'gender hue' attached, because the 'life' component 'tends to be associated with the feminised role of caring for others, particularly children'.<sup>2</sup>

In 2012, the Law Society of New South Wales, which is the largest law society in Australia, reported that 66 per cent of solicitors working less than full-time hours were female.<sup>3</sup> Statistics on the experience of female lawyers in Victoria showed the majority of women who made requests for flexible work practices asked for two main types: 72.5 per cent requested flexible hours and 45.6 per cent requested to work from home.<sup>4</sup> Indeed, as women have more responsibilities associated with the private sphere, compared to their male counterparts, this means women will continue to be more likely to work less than full-time hours, contributing to the gender pay gap and further hindering their opportunities in climbing to the upper echelons of law firms. This highlights the need for flexible work arrangements to be accessible in order to enhance opportunities for female lawyers.

The difficulties women lawyers may experience in accessing and working flexible work arrangements were highlighted in the prominent discrimination case of *Hickie v Hunt and Hunt*.<sup>5</sup> In that case, Hunt and Hunt, the law firm where Hickie worked, was found to have engaged in unlawful indirect sex discrimination by not maintaining Hickie's work while she was on maternity leave and in deciding not to renew her partnership after she returned as a part-time staff member. In awarding damages of \$95 000, Sex Discrimination Commissioner Evatt made some significant recommendations:

There is a need for clearly defined maternity leave and part time work policies ... Basic maternity leave policies should allow work practices to be developed which enable a partner, associate or employee to maintain their professional career and practice during and after maternity leave, with

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<sup>1</sup> Sally Moyle and Marissa Sandler, 'Effective Law Effecting Change: *The Sex Discrimination Act* and Women in the Legal Profession' (2003) 83 *Australian Law Reform Commission Reform Journal* 10. Please note this Act was originally titled the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth), but was renamed following an independent review in 1998–99.

<sup>2</sup> Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45 *Osgoode Hall Law Journal* 773, 778.

<sup>3</sup> The Law Society of New South Wales, *Flexible Working: A More Flexible, More Diverse Profession At All Levels* (November 2012) <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/671890.pdf>>.

<sup>4</sup> Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Changing the Rules: The Experiences of Female Lawyers in Victoria* (December 2012) 4 <[http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Changing\\_the\\_Rules\\_Web.pdf\\_Final\\_1.pdf](http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Changing_the_Rules_Web.pdf_Final_1.pdf)>.

<sup>5</sup> *Hickie v Hunt and Hunt* [1998] HREOCA 8.

the full support of the firm. Such policies should also ensure that an employee's or partner's practice and support staff is adequately managed in their absence.<sup>6</sup>

Women's lawyers' associations have also identified the problems facing full-time workers and full-time mothers, advocating for workplaces that have flexible working arrangements.<sup>7</sup> Indeed, the need to provide such flexible work arrangements is one of the most pressing innovation changes facing Australian law firms today.<sup>8</sup>

However, law firms remain gender stratified. Even though there has been some 'genuine intent in major law firms to begin to redress the gender imbalance at the higher echelons within, the policies and procedures being implemented in Australian corporate law firms to improve the status of women lawyers are not working'.<sup>9</sup> Successful flexible work practices may help in retaining female employees by allowing them time and space to move up the ladder.<sup>10</sup> If not truly accepted though, these flexible arrangements can be linked to the high attrition rate of women leaving the law.<sup>11</sup> And, as we discuss below, this contributes to fewer women rising to the higher echelons, a gender pay gap and the persistence of a masculinised sub-culture.<sup>12</sup>

Indeed, there would appear to be a variety of nexuses between the low numbers of female partners, high rate of female attrition and lack of flexibility in the profession. Because men continue to 'hold the reins' at the top of these firms, a masculine management style, form of communication and ethos prevail. Women are still represented as 'other', juxtaposed against the 'normative benchmark, paradigmatic incarnation of legality — invariably a white, heterosexual, able-bodied, politically-conservative, middle-class' benchmark man.<sup>13</sup> Being 'other' for female lawyers, particularly working mothers, is 'systematically factored into the structuring of contemporary legal practice, and has also lodged deep within the recesses of the legal psyche'.<sup>14</sup>

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<sup>6</sup> Ibid [4.6.6].

<sup>7</sup> Joanne Bagust, 'Keeping Gender on the Agenda: Theorising the Systemic Barriers to Women Lawyers in Corporate Legal Practice' (2012) 21 *Griffith Law Review* 137.

<sup>8</sup> Natalie Zirngast, et al, 'Women Barristers — Justice in Limbo' (2013) 1 *Australian Journal of Gender and Law* <<https://genderandlaw.murdoch.edu.au/index.php/sisterinlaw/article/view/42/80>>; Kate Ashmor, 'Let's Get Flexible' *Lawyers Weekly* (26 October 2012) <<http://www.lawyersweekly.com.au/opinion/let-s-get-flexible>>; Australian Law Reform Commission, *Equality Before the Law: Justice for Women, Part 1*, Report No 69 (1994); Chief Justice Marilyn Warren, 'Speech on the Occasion of the Tenth Anniversary of the Victorian Women Lawyers' (Speech delivered at the Supreme Court of Victoria, 24 August 2006); Justice Diana Bryant, 'Creating Justice' (Keynote Address to Australian Women Lawyers Second National Conference, 13 June 2008); Kate Eastman, 'Sex Discrimination in the Legal Profession' (2004) 27 *University of New South Wales Law Journal* 866.

<sup>9</sup> Bagust, above n 7, 137.

<sup>10</sup> Diversity Council Australia, 'Paid Parental Leave and Flexible Working Paying Dividends for Employers' (Media Release, 19 June 2012) <<http://www.dca.org.au/News/Media-Releases/Paid-parental-leave-and-flexible-working-paying-dividends-for-employers/267>>.

<sup>11</sup> Leanne Mezrani, 'Discrimination Fuelling Female Exodus', *Lawyers Weekly* (online), 5 December 2012 <http://www.lawyersweekly.com.au/news/11148-Discrimination-causing-female-exodus>. See also Annie Woodger, 'The Costs of Turnover in Law Firms' (1998) 72 *The Law Institute Journal* 34.

<sup>12</sup> Justin Whealing, 'Working from Home Key to Keeping Women in Office' *Lawyers Weekly* (16 August 2013) <<http://www.lawyersweekly.com.au/news/working-from-home-key-to-keeping-women-in-office>>.

<sup>13</sup> Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 2.

<sup>14</sup> Ibid 8.

In this paper, we look at these and other variables which holistically constitute the barriers to successful implementation of flexible work practices in the legal profession. We propose practical methods and reforms in how the legislative framework is interpreted and applied in the hope of overcoming these barriers. By looking through the cultural and different feminism lenses, it can be seen that the failure to implement flexible work practices in private law firms severely limits the opportunities for women to contribute to private practice, and this not only acts as a disservice to women, but law firms and clients also miss out on the skills and diverse approaches women have to offer the legal field.<sup>15</sup>

There are a number of building blocks that underpin private law firms which inhibit the opportunities of female lawyers, primarily due to their responsibilities in the private sphere and the ingrained masculinised culture in private practice. A number of paths are proposed — some practical/micro-level and some radical/macro-level — that could lead to a shift in the gender identity of the organisational sub-culture, and make part-time work and other family-friendly work arrangements more normalised. This would enable women to more readily reach a level playing field in private law firms alongside their male counterparts.

## II SYSTEMIC GENDER BARRIERS

Systemic barriers remain ‘deeply embedded in the mindsets and attitudes of those organising the legal workplace, and over time they have proven to intractably defy redress’.<sup>16</sup> Law is built upon tradition, and is conservative and resistant to change. Similarly, law firm culture is characterised by an ‘innate conservatism’ and ‘resistance to change’ that comes from a predisposition to practising law in a certain way because ‘that’s the way it has always been done’.<sup>17</sup> According to the Victorian Equal Opportunity and Human Rights Commission (‘VEOHRC’): ‘This is about society’s attitudes too, not just law firms. But law firms are still way behind the rest of society; some are positively Dickensian and male chauvinist in their attitudes to [flexible working arrangements].’<sup>18</sup> Both the masculinisation of legal practice and the lack of uptake of flexible work arrangements are perpetuated by the persistence of male control. Although women have been outnumbering men as law graduates in Australia since the 1990s,<sup>19</sup> the number of these women reaching the upper echelons of private law firms still remains low.<sup>20</sup> According to 2013 figures, 23 per cent of partners in large law firms are female. Perhaps surprisingly, the figures are even lower in smaller firms, with women only accounting for 18 per cent of partners in mid-tier firms

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<sup>15</sup> Anja Louis, ‘Equality, Difference and All That Jazz: The Infamous Debate and a Spanish Take on It’ (2001) 10 *Griffith Law Review* 211; Margaret Thornton, ‘Unspeakable Subjects: Feminist Essays in Legal and Social Theory by Nicole Lacey’ (1998) 20 *Adelaide Law Review* 365; Margaret Davies, ‘Unity and Diversity in Feminist Legal Theory’ (2007) *Philosophy Compass* 655; Ben Golder, ‘Rethinking the Subject of Postmodern Feminist Legal Theory: Towards a Feminist Foucaultian Jurisprudence’ (2004) 8 *Southern Cross University Law Review* 73.

<sup>16</sup> Bagust, above n 7, 143.

<sup>17</sup> Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (LexisNexis Butterworths, 2001) 213.

<sup>18</sup> VEOHRC, above n 4, 42.

<sup>19</sup> Alexander Ward, ‘President’s Column: Why We Must Retain Female Lawyers’ [2011] (July) *Australian Law Management Journal* 1–2.

<sup>20</sup> Alex Boxsell, ‘Moves to Boost Women’ *Australian Financial Review* (9 December 2011)

[http://www.afr.com/p/national/legal\\_affairs/moves\\_to\\_boost\\_women\\_AHqmrUp6c7IFQTD6NJejHJ](http://www.afr.com/p/national/legal_affairs/moves_to_boost_women_AHqmrUp6c7IFQTD6NJejHJ).

and 17 per cent in small firms.<sup>21</sup> An annual partnership survey revealed that males are more than four times more likely than females to be appointed to partnership;<sup>22</sup> out of a total of 142 partnership appointments reported, only 23 (18 per cent) of those were female. Global figures show women only comprise of 29 per cent partners in law firms.<sup>23</sup> Freehills, one of the largest commercial law firms in Australia, recruits roughly 60 per cent female lawyers into their graduate intake, and yet only 16 per cent go on to become partners.<sup>24</sup> This suggests that women are more likely to remain employees, while men take over at partnership level.

One reason for this may be that availing oneself of flexible work practices has a negative effect on career trajectory, with the quality and type of work declining.<sup>25</sup> As one female lawyer noted

When a colleague informed her female manager she was engaged, she was told not to consider having children for a minimum of five years. It was implied that a decision to have children sooner would affect her ability to get good work and a promotion.<sup>26</sup>

In addition, the lack of women in senior positions is contributed to by a disproportionately higher attrition rate than men. The Law Council of Australia's 2014 study summarised it this way: 'the pressure, stress and poor work-life balance were unenjoyable, unsustainable and incompatible with other priorities.'<sup>27</sup>

There is a complex feedback system here, with the lack of family-friendly work practices in turn contributing to the drop-out rate and fewer women in senior positions. The key time seems to be when women return to work following pregnancy and are faced with a lack of support for part-time work or a lack of any options for flexible work.<sup>28</sup> Some female respondents reported that their employer's attitude varied from 'outright hostility to lack of support, while others felt devalued by work allocation that did not meet their capacity and experience'.<sup>29</sup> They may also be faced with the fear of being stuck with a lesser quality of work, especially if they have adopted some form of flexible working arrangement.<sup>30</sup> According to the VEOHRC: 'the attrition of women lawyers is seen to reflect the poor practices of law firms, especially long hours, poor record with flexibility, discrimination in career progression as well as the broader gender culture of the profession.'<sup>31</sup> All

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<sup>21</sup> Brigid Gorman, "'Woeful' Percentage of Female Legal Leaders" *Lawyers Weekly* (12 September 2013) <<http://www.lawyersweekly.com.au/news/woeful-percentage-of-female-legal-leaders>>.

<sup>22</sup> 'Women still struggling to make partner' *Lawyers Weekly* (online), 30 June 2010 <<http://www.lawyersweekly.com.au/news/women-still-struggling-to-make-partner>>.

<sup>23</sup> Amruta Slee, 'Profound Cultural Shift Needed on Diversity' (2013) 51 *Law Society Journal* 14.

<sup>24</sup> 'Still Bridging the Gender Gap' *Lawyers Weekly* (2 November 2007), <<http://www.lawyersweekly.com.au/news/still-bridging-the-gender-gap>>.

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

<sup>26</sup> VEOHRC, above n 4, 26.

<sup>27</sup> Law Council of Australia, *National Attrition and Re-Engagement Study (NARS) Report* (Report 2014), 57.

<sup>28</sup> 'Women Leading with the Law' *Lawyers Weekly* (10 March 2011) <<http://www.lawyersweekly.com.au/news/women-leading-with-the-law>>.

<sup>29</sup> 'The Year in Review: Alone in a Crowd' *Lawyers Weekly* (7 January 2013) <<http://www.lawyersweekly.com.au/features/alone-in-a-crowd>>.

<sup>30</sup> VEOHRC, above n 4; Belinda Smith and Joellen Riley, 'Family-Friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395; Beth Gaze, 'Working Part Time: Reflections on 'Practicing' the Work – Family Juggling Act' (2001) 1 *Queensland University of Technology Law and Justice Journal* 199.

<sup>31</sup> VEOHRC, above n 4, 45.

of this in turn perpetuates the status quo of male dominance and values, as well as a male identity and working ethos. Therefore, as discussed next, the legal system continues to ‘speak to men while it alienates and excludes women’.<sup>32</sup>

#### A (Hidden) Attitudes

There is also a perception of the ‘ideal lawyer’ being ‘the unencumbered worker [a]s the worker who you know will go far’, which assumes *he* is able to ‘slough off relational ties in order to devote himself unconditionally to work’.<sup>33</sup> This stereotype is embedded so deeply into the ideal of ‘the perfect lawyer’ that unconscious biases remain a key cultural barrier for diversity and the integration of women working flexibly in the legal profession.<sup>34</sup> One of the female lawyers that Joanne Bagust spoke to noted: ‘We’ve still got a couple of partners who I would say are not fully comfortable with working mothers, as extraordinary as that might seem in this day and age.’<sup>35</sup> Indeed, in one study where female Senior Counsels were interviewed, one commented ‘I’m female and that takes you out of the mainstream at silk level straight away’, with another stating ‘[gender differences] are obvious’.<sup>36</sup> This is especially true for those who opt to work part-time and reduced hours.<sup>37</sup> Bagust has suggested that unwritten assumptions include that ‘women lawyers who have family commitments cannot work hard at their jobs’ and that ‘family commitments take up time that should be dedicated to the firm’.<sup>38</sup>

Flexible work practices, part-time work and job-sharing are all seen as subordinate positions and the domain of women.<sup>39</sup> Liz Broderick, while Sex Discrimination Commissioner, has likewise observed that ‘Flexible work arrangements [have also been] seen as a bit of a poor relation to what real work is all about.’<sup>40</sup> As discussed further below, the issue concerns hours and a focus on time instead of on outcomes ‘that will always be an impediment to the way we redesign legal jobs.’<sup>41</sup>

Negative attitudes towards working mothers have been identified as a barrier to both career progression and ongoing employment within firms.<sup>42</sup> And yet, as discussed next, the gendered

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<sup>32</sup> Louis, above n 15, 230.

<sup>33</sup> VEOHRC, above n 4, 42.

<sup>34</sup> Stephanie Quine, ‘Unmasking Unconscious Bias’ *Lawyers Weekly* (1 February 2013), <<http://www.lawyersweekly.com.au/news/unmasking-unconscious-bias>>; Smith and Riley, above n 30, 395; Gaze, above n 30, 199.

<sup>35</sup> Bagust, above n 7, 141.

<sup>36</sup> Angela Ragusa and Philip Groves, ‘Gendered Meritocracy? Women Senior Counsels in Australia’s Legal Profession’ (2012) 1 *Australian Journal of Gender and Law* 1, 9; Robin Sax (ed), *Reaching the Bar: Stories of Women at All Stages of Their Law Careers* (Kaplan, 2009) 141; Justice Susan Kenny, ‘Women’s Law Collective: Experiences of Women in the Courtroom’ (2003) 32 *Federal Judicial Scholarship* 13; Jocelyn A Scutt, ‘Restricted Vision — Women, Witches and Wickedness in the Courtroom’ (2001) 6 *Deakin Law Review* 40.

<sup>37</sup> Anne Susskind, ‘Billable Hours at Odds with Flexible Work Practices’ (2008) 46 *Law Society Journal* 20.

<sup>38</sup> Bagust, above n 7, 153.

<sup>39</sup> Thornton and Bagust, above n 2.

<sup>40</sup> Broderick quoted in Susskind, above n 37, 20.

<sup>41</sup> *Ibid.*

<sup>42</sup> VEOHRC, above n 4.

division of labour in the domestic sphere means that women are still held responsible for the majority of the unpaid domestic duties and men for the paid work to support the family.<sup>43</sup>

### B *Public/Private Roles*

In Australia, the traditional model of the man as ‘breadwinner’ and the woman as ‘primary carer’ continues to exist despite the much more significant involvement of women in the workforce.<sup>44</sup> When a child is born and one parent needs to take time off, it is usually the lower-paid partner who does so, for financial reasons. As discussed further below, Australia continues to have a marked gender pay gap, and it is, therefore, more commonly the woman who is the lower-paid partner. Thus, over a decade ago, an Australian Bureau of Statistics survey found that of employees with a child aged less than six years and who took a break when their youngest child was born, only 6 per cent of men took longer than six weeks, compared to around 93 per cent of women.<sup>45</sup> It would seem that little has changed in the intervening period: a more recent report revealed that after the birth of a child, the duration of partners’ leave was relatively short. Of the partners who took leave from their job for the birth of the child, 70 per cent had returned to work within two weeks.<sup>46</sup>

Compounding this issue, law has a sub-culture defined by male personality traits: adversarial instead of mediating, rational as opposed to emotive, and detached instead of personal.<sup>47</sup> Women are already disadvantaged; pregnancy and motherhood highlight femininity.<sup>48</sup> The ‘master narratives’ of law tend to portray women according to a few outmoded stereotypes associated with the body, sexuality, subordination in marriage, and the supposed vacuity of the female mind.<sup>49</sup>

### C *Gender Pay Gap*

As long as women make less money than men, the domestic division of labour just described is perpetuated, along with a failure to take up flexible practices. Given that women are already earning less, there might be resistance to going part-time, as that would result in a further drop in salary.<sup>50</sup> Furthermore, gender pay inequity does persist at all levels of the legal profession, despite the principle of equal pay being established in Australia over 40 years ago. As Fiona McLeod and Leonie Kennedy have argued:

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<sup>43</sup> Patricia Easteal, ‘Setting the Stage: The “Iceberg” Jigsaw Puzzle’ in Patricia Easteal (ed), *Women and the Law in Australia* (2010) 1, 20.

<sup>44</sup> Human Rights and Equal Opportunity Commission (‘HREOC’), *Striking the Balance: Women, Men, Work and Family*, Discussion Paper No 16 (2005).

<sup>45</sup> Australian Bureau of Statistics (‘ABS’) ‘Career Experience’ (Cat No 6254.0, ABS, 2002).

<sup>46</sup> Australian Bureau of Statistics (‘ABS’) ‘Pregnancy and Work Transitions’ (4102.0 Australian Social Trends, ABS, 2013).

<sup>47</sup> Easteal, above n 17.

<sup>48</sup> Thornton, above n 13.

<sup>49</sup> Thornton, above n 13, 28-29.

<sup>50</sup> ‘Lawyers Weekly Top 5 Tips’, *Lawyers Weekly* (1 January 2005)

<<http://www.lawyersweekly.com.au/news/lawyers-weekly-top-5-tips-keeping-women-in-the-law>>.

It remains the fact that women lawyers continue to earn less than men in practice, that the disparity emerges at a very junior level and continues to senior levels, and that women are more likely to be engaged in part-time and casual work, all of which contribute significantly to a gap in retirement savings and promotional opportunities.<sup>51</sup>

Even before career breaks occur for female lawyers, a gender pay gap among law graduates exists, with the starting salary of male law graduates reportedly around \$4300 higher than that of female law graduates.<sup>52</sup> The Australian Women Lawyers were unsurprisingly critical of this, noting in a press release:

Paying a male graduate lawyer a starting salary higher than a female graduate lawyer in the same office is sexist and blatantly discriminatory. There is no reason why a male and female graduate lawyer within the same office should be paid different starting salaries. Each lacks experience in practising as an Australian lawyer, and each must yet learn invaluable skills in their trainee year, including client interviewing, time management, marketing and networking.<sup>53</sup>

Kate Ashmor, President of Australia Women's Lawyers, revealed that she wondered whether the continual pay gap amongst male and female lawyers is 'largely due to unconscious biases within many law firms, and the fact that on average only around 20% of partners (the ultimate salary decision makers) are female.'<sup>54</sup> Leanne Mezrani has likewise observed that 'with few women at the top, it's difficult to influence change'.<sup>55</sup>

Other contributors to the existing gender pay disparity in the legal profession might include 'discrimination, the undervaluation of women's work, pay-setting methods, occupational and industrial segregation, lack of investment in women through training and development and career breaks (including returning to work from maternity leave)'.<sup>56</sup> In this context, it should be noted that the longer someone is away on maternity leave, the larger the drop in earnings.

#### D *Ethos of Long Hours*

Lawyers work longer hours as a 'result of cultural, structural and economic influences within the legal profession' leading to the 'embedding of systemic disadvantage for women in the profession'.<sup>57</sup> In this context, Catherine McMahon and Barbara Pocock have observed:

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<sup>51</sup> Fiona McLeod and Leonie Kennedy, 'Women in Practice' in Patricia Eastal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010), 350, 354.

<sup>52</sup> Leanne Mezrani, 'It Pays to Be a Male Law Grad', *Lawyers Weekly* (online), 29 January 2013 <<http://www.lawyersweekly.com.au/news/it-pays-to-be-a-male-law-grad>>.

<sup>53</sup> Australian Women Lawyers, 'Law Firms Challenged To End Discrimination In Graduate Starting Salaries' (Media Release, 4 January 2013) <[http://www.australianwomenlawyers.com.au/uploads/publications/AWL\\_Media\\_Release\\_4\\_January\\_2013.pdf](http://www.australianwomenlawyers.com.au/uploads/publications/AWL_Media_Release_4_January_2013.pdf)>.

<sup>54</sup> *Ibid.*

<sup>55</sup> Mezrani, above n 52.

<sup>56</sup> VEOHRC, above n 4, 5.

<sup>57</sup> *Ibid* 43.



Law firms traditionally operate in ways that can limit the potential for flexibility in employment, which includes performance and remuneration models, based on inputs rather than outputs, high service delivery expectations to clients and support services required for legal staff.<sup>58</sup>

Billable hours do limit a firm's ability to use flexible work practices.<sup>59</sup> Commitment to the firm is measured by 'by their visibility that is how many hours they were seen to put in, creating a culture that valued "presenteeism"'.<sup>60</sup> Elizabeth Broderick has argued that

[t]he business model as currently constructed isn't one that is conducive to [a balanced life for] women, and increasingly for men. [In] most law firms there is a one principle model of success and that is the transactional model that's the 24/7.<sup>61</sup>

Therefore, billable hours may be a real issue for lawyers with carer responsibilities.<sup>62</sup> Quality is often overlooked for quantity due to the billable system and 'even the most brilliant work, if performed by part-time workers in smaller snatches, counts for little unless the "hard yards" can be seen to be performed by the number of billable hours recorded on the slate'.<sup>63</sup>

The emphasis in private practice on billable hours and revenue is exemplified by the case of *Law Society of New South Wales v Foreman*.<sup>64</sup> In this case, the New South Wales Court of Appeal struck a legal practitioner off the roll of practising solicitors for deceiving other practitioners and the court. The impugned conduct related to Foreman forging a law firm time sheet that was to be submitted as evidence to the Family Court in a costs recovery action against a client.<sup>65</sup> The purpose of this was to recover from the client the firm's high fees, which were in excess of \$500 000, and this would not have not been possible were it not for the forged time sheet. Further investigation into this case revealed that the firm's commercial orientation and focus on revenue was heavily ingrained into the organisational culture of the firm.<sup>66</sup> Kirby J highlighted that a significant proportion of the costs sought were attributed to the cost policies and billing procedures that were enforced by the firm, and to some extent not within the control of the firm's legal practitioners.

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<sup>58</sup> Catherine McMahon and Barbara Pocock, *Doing Things Differently: Case Studies of Work-Life Innovation in Six Australian Workplaces* (University of South Australia, 2011)

<<http://w3.unisa.edu.au/hawkeinstitute/cwl/documents/case-studies.pdf>>; See also Rosemary Hunter and Helen McKelvie, 'Gender and Legal Practice' (1999) 24 *Alternative Law Journal* 57.

<sup>59</sup> Susskind, above n 37.

<sup>60</sup> VEOHRC, above n 4, 5.

<sup>61</sup> 'Firms Fight for Women in Talent War' *Lawyers Weekly* (16 March 2008)

<<http://www.lawyersweekly.com.au/news/firms-fight-for-women-in-talent-war>>.

<sup>62</sup> VEOHRC, above n 4.

<sup>63</sup> Bagust, above n 7, 153.

<sup>64</sup> *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408.

<sup>65</sup> Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 27 *University of Queensland Law Journal* 347.

<sup>66</sup> See also Margaret Thornton, 'Hypercompetitiveness of a Balanced Life? Gendered Discourses in the Globalisation of Australian Law Firms' (2014) 17(2) *Legal Ethics* 153.

This case highlights that, in some circumstances, it could be appropriate for law firms to be held accountable for their policies on billing.<sup>67</sup> The natural conclusion follows that firms should be held responsible for perpetuating this kind of commercially orientated culture. Further, scope for reform exists here for recognising that billable hours can serve to disadvantage not only clients, but also lawyers, and that benefits can ensue if quality, as opposed to quantity, is billed.<sup>68</sup>

However, some areas of practice find implementing flexible work arrangements easier than others. Longer hours are expected in ‘areas where there are “high intensity transactions” though this may not be “a consistent approach across the whole firm”’.<sup>69</sup> Personal injury firms might find it easier to implement flexible work practices than other types of law firms, due to the control over the business process; there are certain work aspects that do require urgency, but they do not require ‘all-nighters’.<sup>70</sup>

### III RECONSTRUCTING THE SUBCULTURE

Clearly, flexible practices are available in theory; however, more than one quarter of respondents in a 2009 study claimed that their organisations were not implementing flexibility at all.<sup>71</sup> In November 2012, the Australian Institute of Management Queensland and Northern Territory produced a white paper, entitled *Managing in a Flexible Work Environment*,<sup>72</sup> which revealed a list of the types of flexible work used in Australia, including working part-time, compressed hours, non-traditional hours, from home or alternative worksite. It also listed contract work or consulting, casual work, job-sharing arrangements. Finally, it highlighted leave alterations from flexibility, for example, extending leave periods, purchasing leave and, most importantly, the tailoring of approaches to the use of leave — by allowing staff to use half days of annual leave and a phased return from parental leave.

Each lawyer’s situation should be looked at individually, because every flexible worker has different requirements, and in order for the arrangements to work they must be suitable to the individual and the firm.<sup>73</sup> It is also particularly important to offer career-planning options.<sup>74</sup> An example is one firm where half of the management is female, which has lawyers seconded to clients on fixed term projects, allowing for more flexible work practices.<sup>75</sup>

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<sup>67</sup> Ibid. See further David Edwards, ‘Wounding the Bull: Costs in a Disciplinary Context = Charging “Excessive Costs in Connection with the Practice of Law” and Other Issues’, Legal Services Commission (18 March 2009) <[http://www.lsc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/106196/wounding-the-bull.pdf](http://www.lsc.qld.gov.au/__data/assets/pdf_file/0005/106196/wounding-the-bull.pdf)>.

<sup>68</sup> Maryam Omari and Megan Paull, “‘Shut Up and Bill’: Workplace Bullying Challenges for the Legal Profession” (2014) 20 *International Journal for the Legal Profession* 141.

<sup>69</sup> Justin Whealing, ‘It Starts with You’ *Lawyers Weekly* (4 April 2013) <<http://www.lawyersweekly.com.au/news/it-starts-with-you>>.

<sup>70</sup> Ibid.

<sup>71</sup> Stephanie Gall, ‘Achieving Workplace Flexibility Is Not Such a Stretch’ (2011) *Australasian Law Management Journal* 5, 6.

<sup>72</sup> Lucy Burgmann, *Managing in a Flexible Work Environment: Paper* (Australian Institute of Management Queensland and Northern Territory, 2012).

<sup>73</sup> Gall, above n 71, 5-8.

<sup>74</sup> VEOHRC, above n 34.

<sup>75</sup> Diversity Council of Australia, above n 10. Leanne Mezrani, ‘New MD Tips the Balance’, *Lawyers Weekly* (online), 4 July 2013 <<http://www.lawyersweekly.com.au/news/new-md-tips-the-balance>>.

A *Framework for Implementing Practical Steps*

From 1 July 2009, the majority of Australian workplaces have been governed by the system created under the *Fair Work Act 2009* (Cth) ('FWA'). Any request for flexible working arrangements falls under the National Employment Standards ('NES'), and in the context of female lawyers, should be considered in conjunction with the *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates*.<sup>76</sup> From 1 January 2010, the NES applied to all employees covered by the national workplace relations system. A contravention of the NES can result in penalties of up to \$10 200 for an individual and \$51 000 for a corporation. The NES gives certain employees the right to request flexible working arrangements, and an employer may only refuse such a request if there are 'reasonable business grounds' for doing so.<sup>77</sup>

Under section 65 of the *FWA*, employees are eligible to request flexible working arrangements if they:

- are a parent, or have responsibility for the care, of a child, who is of school age or younger;
- are a carer (within the meaning of the *Carer Recognition Act 2010* (Cth));
- have a disability;
- are 55 or older;
- are experiencing violence from a member of their family; or
- provide care or support to a member of their immediate family or household, who requires care or support because they are experiencing violence from their family.

Prima facie, the breadth of these categories should enable the majority of working mothers to access flexible work arrangements, but it is possible that the threshold of reasonable business grounds is the component which prevents female lawyers from being allowed a flexible work arrangement. This threshold is entirely discretionary, which means that if an employer decides that the proposed flexible work arrangement is not suitable for the firm, they are able to refuse that request and still be acting within the scope of the Act.

Accordingly, in order for change to happen, education may be the key to alter the way employers approach requests to flexible work arrangements. This would help them shift to viewing such requests as a way to further benefit not only the firm as a whole, but also clients. To this end, employers must have practical steps available to them that ensure they are able to implement flexible work practices with confidence, which in turn will assist in mitigating the disadvantages that female lawyers face. Some practical steps are proposed, which are explained in further detail below.

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<sup>76</sup> Law Council of Australia, 'Model Equal Opportunity Briefing Policy for Female Barristers and Advocates' (November 2009).

<sup>77</sup> Fair Work Ombudsman, *Introduction to the National Employment Standards* (2014)

<<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/minimum-workplace-entitlements/requests-for-flexible-working-arrangements#refusing-a-request>>.

B *Reconstructing the Subculture: Practical Steps*

**Figure 1: Practical Steps for Reconstructing Law Firm Subculture**

<b>Employee</b>	<b>Employer</b>	<b>Outcomes and advantages</b>
Locating other available child care	Organising child care through the firm, assisting in locating other available child care	Same hours can be worked over different time frames if adequate child care is available
Purchasing leave	Providing purchased leave, including carer's leave	No financial loss to the firm
Bidding for work based on quality, rather than quantity	Implementing value-based billing, virtual working, telecommuting	Quality of work would increase  Advantages to client base and morale of employees <sup>78</sup>
Bidding for more flexible hours arrangements, or discussing this with union representatives	Allowing flexible hours (eg. start at 7am finish at 3pm)	Same billable hours achieved in a different format  Being seen and gaining a reputation as a progressive and supportive workplace  Attracting more employees by being seen as an appealing workplace
Working from home	Providing facilities for staff to work from home	Urgent meetings can be held at short notice and allow for alternative working hour arrangements  Costs for home facilities could be partially offset from salary or in a salary sacrificing arrangement so little to no financial loss experienced by firm  Ability for staff with family commitments to be available more hours of the day  More client access to legal practitioners outside of normal working hours

The above are just a few ideas of how organisational structure only needs to be altered slightly in order to obtain a substantial benefit to employees, clients and the firm as a whole. If the above working practices become more common in private firms, there may be more scope for more women to reach senior positions in firms, as they will be able to provide high quality work and

<sup>78</sup> FMRC Pty Ltd, *Driving Profitable Practice* (Workshop, 2007) <<http://www.fmrc.com.au/seminars-workshops/driving-profitable-practice/>>.

still maintain family commitments. Having flexible working arrangements is a legal requirement under the *FWA*, so implementing these practical steps makes that legal requirement an accessible reality for employees.

C *Allowing for Working Mothers' Time Constraints*

It is important to further examine the benefits of implementing these practical steps. Providing childcare for lawyers with carer responsibilities is beneficial in relation to any urgent meetings or unexpected work that arises and may allow more options for flexible working arrangements.<sup>79</sup> Also, meetings can be timetabled for more childcare-friendly periods.<sup>80</sup> According to the Victorian Women Lawyers, this type of organisational support can improve the satisfaction levels of employees who use flexible work practices.<sup>81</sup>

An alternative to time-billing could assist in reducing barriers to flexible work. One model is value-based billing, with John Chisholm noting:

value pricing meaning law firms agree on the price with their clients for the work they are going to do commensurate with the value they create for their client and they price the work before they do the work. The value is determined by the client.<sup>82</sup>

Accordingly, one Melbourne-based law firm that uses value-based billing has been working on phasing out billable hours and has attracted a number of sophisticated clients solely because they have heard about the firm's alternative pricing.<sup>83</sup>

Until the billable model is changed, time will always be the most crucial money-maker to a law firm.<sup>84</sup> Firms are more profitable when they have more people working long-chargeable hours. In

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<sup>79</sup> See for example Sarah Rey, 'Family Friendly Work Practices' (1997) 71 *The Law Institute Journal* 20; Cathy Sherry, 'Parenting the Legal Profession' (1999) 73(1) *The Law Institute Journal* 58. Note that even more challenging issues can arise for legal practices in regional, remote or rural areas. See Caroline Hart, 'Sustainable Regional Legal Practice: The Importance of Alliances and the Use of Innovative Information Technology by Legal Practices in Regional, Rural and Remote Queensland' (2011) 16 *Deakin Law Review* 225.

<sup>80</sup> Whealing, above n 12; HR editor, 'Staff Retention — Becoming an Employer of Choice' (2000) 74 *The Law Institute Journal* 42.

<sup>81</sup> Victorian Women Lawyers, *A 360-Degree View: Flexible Work Practices — Confronting Myths and Realities in the Legal Profession* (Victorian Law Foundation, 11 November 2005) <[http://www.wgea.gov.au/sites/default/files/Vic\\_Women\\_Lawyers\\_360\\_Degree\\_Report.pdf](http://www.wgea.gov.au/sites/default/files/Vic_Women_Lawyers_360_Degree_Report.pdf)>.

<sup>82</sup> John Chisholm, *There is an Alternative to Time Based Billing!* (5 August 2009) <<http://chisconsult.com/there-is-an-alternative-to-time-based-billing/>>.

<sup>83</sup> Stephanie Quine 'A Lawyers Weekly Poll Has Found That Almost Half Of Voters Believe Billable Hours Are Harmful To The Legal Profession' (8 November 2012) <<http://www.lawyersweekly.com.au/news/11008-poll-reveals-cost-of-billable-hours-is-too-high>>.

<sup>84</sup> See Gordon Salier, 'The Costs of Legal Services' (2004) 27 *University of New South Wales Law Journal* 220; John Chisholm, 'Practising Law in Australia in 2010' (2004) 9(2) *Deakin Law Review* 301; Ray Benson, 'Tracking & Billing — Keeping Up with the Times' (2000) 74 *The Law Institute Journal (Victoria)* 57; Andrew Podger, 'Legal Implications of Values-Based Management — Observations on *Hot Holdings Pty Ltd v Creasy*' (2003) 39 *Australian Institute of Administrative Law Forum* 32.

lieu, then, of part-time positions, virtual working and telecommuting,<sup>85</sup> may mean that it is more practical for women to work remotely.<sup>86</sup> In order to be able to work from home, law firms must ensure remote access to the office systems<sup>87</sup> and technical support.<sup>88</sup>

#### D *Mentoring and Networking*

Heather Moore and Kate Potter suggest that women should seek out ‘mentors, sponsors and champions.’<sup>89</sup> It has also been suggested that law firms should consider implementing mentoring schemes to help integrate work and family commitments.<sup>90</sup> This is most important when women reach a ‘cross-roads in their career and personal lives’.<sup>91</sup> Some firms have already begun implementing mentoring programs, however this needs to become far more widespread.<sup>92</sup> Female lawyers report isolation and an inability to network due to carer responsibilities.<sup>93</sup> This could hinder career advancement. Mentoring could assist in countering these challenges.

The importance of having a mentor or role model is clear as one interviewee in the Law Council of Australia NARS report discussed:

Women need champions and they need role models to make the way of managing life as a women, as a mother, as a partner, as a daughter, all the rest of it, to make it normal to be able to say to the court I’m leaving, I need to pick up my kids, can we resume tomorrow.<sup>94</sup>

One initiative — ‘parenting partners’ — involves partners with children assisting pregnant employees in developing flexible working arrangements.<sup>95</sup> This is not only a method of practical support, but also a means of supporting women with children to succeed in ascension to partnership. Sharing information and contacts can be very important. For example, the Women Legal 2013 Roundtable: Retaining and Advancing Women in the Legal Profession provided an opportunity for women lawyers to both network and share the flexible practices that appear to be working.<sup>96</sup>

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<sup>85</sup> ‘Women Lawyers Tap Flaws in Glass Ceiling’ *Lawyers Weekly* (23 January 2004) <<http://www.lawyersweekly.com.au/news/women-lawyers-tap-flaws-in-glass-ceiling>>.

<sup>86</sup> Leanne Mezrani, ‘Tech-Savvy Lawyers Turned off Timesheets’ *Lawyers Weekly* (23 October 2012) <<http://www.lawyersweekly.com.au/news/tech-savvy-lawyers-turned-off-timesheets>>.

<sup>87</sup> VEOHRC, above n 4, 28.

<sup>88</sup> Burgmann, above n 72, 30.

<sup>89</sup> Heather Moore and Kate Potter, *Advancement of Women in the Profession: Report and Recommendations* (2011) 22.

<sup>90</sup> Justice Marilyn Warren, ‘Women in my Life: Leadership Across the Generations’ (Speech delivered at the Victorian Women’s Trust, 15 November 2004).

<sup>91</sup> Stuart Westgarth, ‘Support and Flexibility at Core of Retaining Women in Practice’ (2011) 29 *Law Society Journal* 70, 70–71.

<sup>92</sup> See John Teerds, ‘A Year for all Lawyers’ (2013) 33 *Proctor* 18.

<sup>93</sup> Law Council of Australia, above n 27.

<sup>94</sup> *Ibid* 26.

<sup>95</sup> ‘New Partner Role Keeps Women at Work’ *Lawyers Weekly* (17 November 2006) <<http://www.lawyersweekly.com.au/news/1332-new-partner-role-keeps-women-at-work>>.

<sup>96</sup> Brigid Gorman, ‘Narrow Focus Restricting Flexibility’ *Lawyers Weekly* (22 November 2012) <<http://www.lawyersweekly.com.au/news/narrow-focus-restricting-flexibility>>.

E *Training Managers and Support Teams*

A 2006 Victorian study revealed that: ‘only 44% of lawyers using flexible work practices agree that it is possible to work flexibly and have a career in their organisation, and 67% of lawyers using flexible work practices are dissatisfied with the negative impact that working flexibly has on their career prospects.’<sup>97</sup> Part of the problem may be that some workers and managers are unaware of what types of flexible work practices actually exist.<sup>98</sup> Accordingly, law firms must prioritise helping supervisors learn to manage flexibility by providing partners and managers with the necessary practical management skills,<sup>99</sup> as well as developing a strategic ability to see the long term benefits of using flexible work practices.<sup>100</sup> This is essential, since supervisors act as ‘gatekeepers to the flexible workers’ career development (eg, via the allocation of work), career progression and integration into a practice group’.<sup>101</sup>

We also acknowledge that firms must ensure that support staff and colleagues are educated about the challenges of working flexible hours:

Support and co-workers should actively communicate with lawyers using flexible work practices and partners/managers (e.g. about structure, process and protocols for managing workloads), and cultivate an understanding attitude.<sup>102</sup>

There are steps being made in this direction. For instance, the Victorian Women Lawyers and Diversity Partners in 2010 developed a ‘Do You Manage?’ workshop, which offers practical tools, such as a ‘Flexible Work Proposal/Business Case’ and an ‘Individual Flexible Work Plan’, for partners to use so that they can assess the feasibility and usefulness of implementing flexible work practices in their firms. In 2012, the VEOHRC reported that there are law firms in Australia that are actively committed to gender equality.<sup>103</sup> For example, one firm developed a position for a ‘flexibility manager’, a human resources professional who facilitates discussions between partners and those returning to work to flexibly come to an arrangement that suits them both.<sup>104</sup> It is clear that these kinds of innovative approaches could benefit female legal practitioners across the board.

F *Reconstructing the (Sub) Culture: Practical Steps Leading to Attitudinal Change*

The radical feminist perspective seeks to overturn the way patriarchal society is structured.<sup>105</sup> As such, practical steps are seen as positive but inadequate in order to effectuate the sort of change in culture required to ensure gender equality (see Figure 2).

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<sup>97</sup> Victorian Women Lawyers, above n 81, 7.

<sup>98</sup> Gorman, above n 96.

<sup>99</sup> VEOHRC, above n 4.

<sup>100</sup> Burgmann, above n 72.

<sup>101</sup> Victorian Women Lawyers, above n 81, 17; See also Melinda Brown, ‘Workplace Change Needed to Retain Women’ (2000) 74 *The Law Institute Journal* 26.

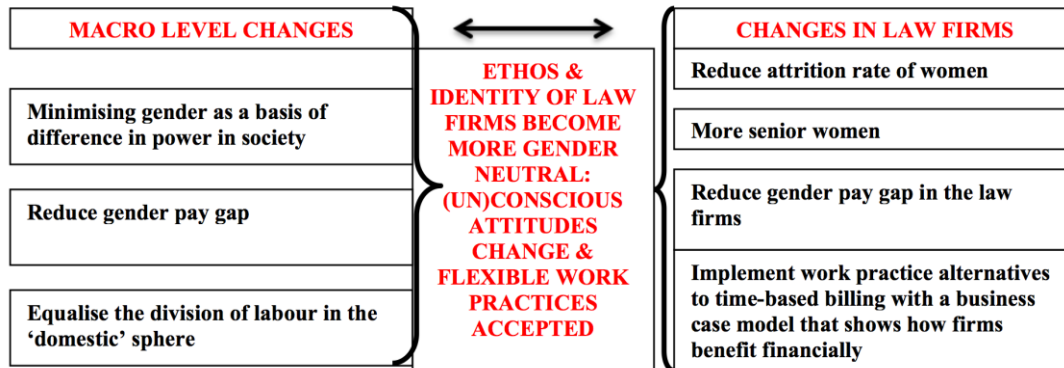
<sup>102</sup> Victorian Women Lawyers, above n 81, 34.

<sup>103</sup> VEOHRC, above n 4.

<sup>104</sup> Gorman, above n 96.

<sup>105</sup> Golder, above n 15; Thornton, above n 13; Jenny Morgan, ‘Feminist Theory as Legal Theory’ (1988) 16 *Melbourne University Law Review* 743.

Figure 2: Holistic Model for Reducing Gender Discrimination in Law Firms



Instead, a fundamental attitudinal change is a necessary first step in implementing cultural change within the legal profession.<sup>106</sup> As we have seen, a core component of that masculine identity is an emphasis upon lawyers' prioritising of work above other areas of life, as measured by hours spent in the workplace. The 2014 national study suggests that the problems related to career progression, retention and attrition flow from 'systemic issues including organisational culture, lack of leadership and strategy, unconscious bias, an entrenched business model, and limited transparency and accountability.'<sup>107</sup>

How best, then, to change attitudes about lawyers working part-time or remotely? One answer might be to work within the current economic rationalist ethos: the operational bottom line is maximising profit. Therefore, employers need to be shown that having staff working in a variety of flexible ways can benefit the firm financially.<sup>108</sup> Potential business benefits include enhanced organisational performance,<sup>109</sup> employee commitment and engagement, staff loyalty, lowering recruitment costs, and enhanced reputation,<sup>110</sup> as well as improved staff morale and lower absenteeism.<sup>111</sup> In this way, attitudinal change could correlate with employers' seeing 'flexibility in the workplace as an opportunity rather than a problem to be dealt with'.<sup>112</sup>

The VEOHRC has declared that:

<sup>106</sup> Bagust, above n 7, 138, 156, 160; Neil Tucker, "'C' is for Creative Cultural Change' (1997) 71 *The Law Institute Journal* 32.

<sup>107</sup> Law Council of Australia, above n 27, 86.

<sup>108</sup> Julian Thompson and Edward Truch, 'The Flex Factor: Realising the Value of Flexible Working' (Research Report, Action and Research Centre, July 2013).

<sup>109</sup> Workplace Gender Equality Agency, *The Business Case for Gender Equality* (March 2013) <[http://www.wgea.gov.au/sites/default/files/business\\_case\\_web.pdf](http://www.wgea.gov.au/sites/default/files/business_case_web.pdf)>.

<sup>110</sup> Bagust above n 7, 138.

<sup>111</sup> Diversity Council Australia, 'Paid Parental Leave and Flexible Working Paying Dividends for Employers' (Media Release, 19 June 2012) <<http://www.dca.org.au/News/Media-Releases/Paid-parental-leave-and-flexible-working-paying-dividends-for-employers/267>>.

<sup>112</sup> Gall, above n 71, 8.



real change will only come when managing partners stop obsessing about short term financial results and start introducing effective flexible work options and other initiatives to help women stay in work through different stages of their lives and continue to succeed... Short term it may cost money, but long term, in terms of talent maximisation, retention, cost of turnover, loss of knowledge, loss of connection with clients... [the business benefits will make up for that short term cost].<sup>113</sup>

A part of that business case could be acknowledging that clients prioritise costs, quality and outcome over their lawyer's employment arrangement.<sup>114</sup> Two new government agencies have been assigned with supporting businesses to achieve diversity and encouraging flexible work practices: the Diversity Council Australia (formerly the Council for Equal Opportunity in Employment) and the Workplace Gender Equality Agency (formerly the Equal Opportunity for Women in the Workplace Agency). These agencies were tasked with increasing the scrutiny that employers face in regards to gender equity, and to provide advice to business on how to implement such changes.<sup>115</sup> However, it is not clear whether such scrutiny is applied to law firms, particularly as to how diversity can be achieved in practice, so it is imperative that the benefits of a diverse workforce are emphasised to the legal community in order to facilitate change.

Once attitudes start to shift, the adaptation and implementation of flexible work practices can begin. This could not only facilitate the use of flexible work practices, but a fundamental change in the mindset of all practitioners, which may also be helpful to overcome gender inequity in the profession as a whole.<sup>116</sup> A metamorphosis of the mindset of the sub-culture is also critical in the successful implementation of any new work practices.<sup>117</sup> To this end, the Law Society of New South Wales has suggested that '[i]mplementing flexibility requires cultural change, and leadership is a fundamental component in that change process'.<sup>118</sup>

Without the commitment and strong support of a firm's leaders, the capability of achieving any sustainable change is difficult, if not impossible.<sup>119</sup> Therefore, in order for flexibility to become 'embedded in a culture, partners/leaders must articulate and promote the value of flexibility to the firm'.<sup>120</sup> Partners and managers need to identify and change their own attitudinal barriers, and to take steps to create a supportive workplace for women.<sup>121</sup> Redefining the traditional lawyer and the meaning of success is the beginning to making an effective cultural change in law firms.<sup>122</sup>

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<sup>113</sup> VEOHRC, above n 4, 27.

<sup>114</sup> Victorian Women Lawyers, above n 81.

<sup>115</sup> Ibid; Law Council of Australia, above n 27; see further Commonwealth, *Australian Government Response To The House Of Representatives Standing Committee On Employment And Workplace Relations Report – Making It Fair – Pay Equity And Associated Issues Related To Increasing Female Participation In The Workforce* (May 2013).

<sup>116</sup> Warren, above n 90, 18–21.

<sup>117</sup> Ragusa and Groves, above n 36, 1.

<sup>118</sup> Law Society of New South Wales, *The Case For Flexibility: Delivering Best Practice In Integrating Work And Life In The Legal Profession – A Guide To Implementing A Flexible Workplace* (17 February 2005), 11.

<sup>119</sup> Gorman, above n 96.

<sup>120</sup> Ibid.

<sup>121</sup> Burgman, above n 72, 2, 9.

<sup>122</sup> Gorman above n 96; Kenny, above n 36, 13.

From a holistic perspective, it makes sense that increasing the percentage of female leaders might effect some change in the gender identity of law firms' sub-culture. As an example, one Queensland firm with strong female leadership and supportive flexible work practices has a 170-person workforce, of whom 83 per cent are female, with women also accounting for 50 per cent of the management team. The high number of female staff 'has come about because of the work [they] do and the way [they] structure [their] business'.<sup>123</sup> Reportedly, a large proportion of women return to this firm after maternity leave because of the flexible work arrangements available. This example illustrates the complex relationship between attrition, promotion and alternative styles of work practices. In fact, it is theorised that more women would stay in the profession if they were offered the ability to work flexibly.<sup>124</sup> Accordingly, the attrition rate would decline and more women would climb the ladder to leadership positions, which might in turn result in greater retention of women lawyers, as they see more female role models in senior positions.

Holistically, there is another variable that needs to be remedied. The existing gender pay gap supports the status quo, with the lesser-paid spouse/parent taking on more childcare responsibilities; as they are already paid less, and by taking career breaks to have kids their income is impeded further, this may mitigate their motivation to return to the workforce. Some employers have already recognised the business benefits of pay equity and have started to implement approaches that are considered innovative, including the payment of superannuation and ensuring eligibility for salary reviews while staff are on unpaid parental leave.<sup>125</sup> However, more is required, to ensure that pay disparities are minimised and women lawyers' salaries and professional engagement do not languish as a result of time spent on parenting duties.

#### IV REFORM: INTERPRETATION AND APPLICATION OF THE LEGISLATIVE FRAMEWORK

It can be seen that promoting the above practical steps to law firms may make supervisors more willing to implement and have confidence in implementing flexible work arrangements that will provide an overall benefit to law firms on both the macro and micro level. However, as the *FWA* provides discretionary power to supervisors, it can also be seen that the responsibility for implementing these steps falls directly on employers, or on individual women to challenge systematic bias. In light of the landmark case of *Hickie*, discussed above, the fact that this responsibility often falls on individual women has been highlighted by feminist commentators as an issue.<sup>126</sup>

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<sup>123</sup> Brigid Gorman, 'Women Tip Balance at Queensland Firm', *Lawyers Weekly* (online), 14 June 2013 <<http://www.lawyersweekly.com.au/news/women-tip-balance-at-queensland-firm>>.

<sup>124</sup> Whealing, above n 12.

<sup>125</sup> VEOHRC, above n 4.

<sup>126</sup> Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 261; Denise Reaume, 'Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination' (2001) 2 *Theoretical Inquiries in Law* 349; Alice Tay, 'Human Rights and Human Wrongs' (1999) 21 *Adelaide Law Review* 4; Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699. See also *Brown v Maurice Blackburn Cashman* [2013] VSCA 122.

Because methods for implementing flexible work arrangements have already been available for some time, it appears that more needs to be done to show law firms that implementing flexible work practices will not operate to the detriment of the workplace. As the discretionary power in the *FWA* needs to remain flexible to an extent, it is unlikely that recommending legislative reforms in this area will result in mitigating the disadvantage female lawyers can experience through the reluctance of firms to implement flexible work practices. However, in order to address the issue in relation to law firms specifically, reform can be explored in the way the various codes of conduct in each Australian jurisdiction are interpreted and applied.<sup>127</sup>

A *Regulation on Legal Practice Certificates and Codes of Conduct*

The incorporation of legal practices, multidisciplinary partnerships and the ability for admitted practitioners to practise law are given legitimacy by the *Legal Profession Acts* in each jurisdiction.<sup>128</sup> This legislation also imposes conditions on lawyers' practising certificates. For example, section 46(1) of the *Legal Profession Act 2006* (ACT) provides that a local practising certificate is subject to any conditions imposed by the relevant council, and any statutory conditions imposed under that Act or any other Act. This means that the Law Council in each jurisdiction is able to impose conditions on lawyers' practising certificates.

Law Councils could therefore impose any or all of the following conditions on the practising certificates of legal practitioners who are in any supervisory role:

- to undertake mandatory training about flexible work practices as part of their continuing legal education training program. This could involve some or all of the practical steps discussed above and could be done in the context of specific areas of law or additional modules, to avoid firms missing out on training in their specialised areas; and
- to raise the standard of when a request for flexible work arrangements can be refused on 'reasonable business grounds'.

Both measures would enable education about flexible work practices to filter through all law firms. The first dot point would also ensure that all lawyers in managerial positions have at least a minimal understanding of the methods available to implement flexible work practices and that these do not have to come at a cost to the firm when implemented efficiently. The latter suggestion expands on the existing legislative requirement. It is clear that such an expansion is necessary where the discretionary power available under the current provisions appears insufficient to compel employers to implement flexible work practices.

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<sup>127</sup> *Legal Profession Act 2004* (NSW) s 711; *Legal Profession Act 2007* (Qld); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2008* (WA); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT); *Professional Conduct and Practice Rules 1995* (NSW); *Legal Profession (Solicitors) Rules 2007* (Qld); *Rules of Professional Conduct and Practice* (SA); *Professional Conduct and Practice Rules 2005* (Vic); *Legal Profession (Solicitors) Rules* (ACT); *Rules of Professional Conduct and Practice* (NT).

<sup>128</sup> *Ibid.* See, eg, *Legal Profession Act 2006* (ACT) s 115.

B *Raising the Standard of 'Reasonable Business Ground' for Refusing Flexible Work Proposals*

To raise the standard of when 'reasonable business grounds' might justify a refusal of a proposal of flexible work arrangements, first, more steps could be established that require employers to rule out why particular methods are not reasonably justifiable for a particular employee. Those reasons could be presented to employees under common law procedural fairness principles, to provide them with an opportunity to comment on those views and present alternatives. While this kind of negotiation is encouraged by the Fair Work Ombudsman, there is no legislative requirement for managers to engage in this kind of conversation. Incorporating such steps into the requirements for legal practitioners under their practising certificates would ensure that these steps are undertaken. This, in turn, would open up more opportunities for female lawyers to have their proposals for flexible work arrangements approved, by encouraging open dialogue between the parties and showing the number of methods of flexible work arrangements that could be of benefit to all involved.

Second, where such steps are not undertaken or the employee is dissatisfied with an employer's response or approach to the flexible work arrangement proposal, the employee could take the issue to the Law Council. The counter-argument may exist that an employee already has protections from their union and also under the *FWA*, as well as each jurisdiction's *Discrimination Act* and/or *Equal Opportunity Act*. It may seem, therefore, that there is no need to duplicate the complaint process by giving the Law Council additional responsibilities. However, the intervention of the Law Council, and the potential involvement of a representative from the Law Council, could be viewed as a preliminary and informal step in resolving the issue, akin to alternative dispute resolution. This may be more appealing to both the employee and employer as it would provide an opportunity to resolve the issue at a lower cost and informally, as opposed to the employee initiating litigation. This also provides accessibility to a resolution to those employees who do not wish to pursue litigation. The case of *Brown v Maurice Blackburn Cashman*<sup>129</sup> emphasises the extent to which the responsibility to amend an alleged wrongdoing in the workplace falls on individual women, and it follows that preventative strategies could be of significant benefit to the field, and would be preferable to waiting for timely and costly litigation to potentially resolve disputes, or leaving disputes unresolved.

Further, the Law Councils are more likely to understand the business, including the constraints on implementing flexible work practices, to take an interest in reforming the sector holistically, and to ensure that the flexible work arrangements implemented across the board are equal. This approach is clearly preferable to waiting for employees, who feel they have been discriminated against, to pursue litigation, which is time-consuming and expensive. Where those plaintiffs are successful, they may be personally remedied, but this does not result in the sector being reformed holistically. Therefore, the option to involve the Law Councils in such disputes allows for an alternative to time-consuming and costly litigation, and provides scope for the wholesale reform of the sector in relation to the availability of flexible work practices. For the reasons discussed earlier in this article, this would mitigate the disadvantages that female lawyers face.

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<sup>129</sup> *Brown v Maurice Blackburn Cashman* [2013] VSCA 122; See further Joanne Bagust, 'The Culture of Bullying in Australian Corporate Law Firms' (2014) 17 *Legal Ethics* 177.

However, we note one caveat in relation to this proposed pathway. We know that women lawyers are reluctant to ‘rock the boat’ by making formal complaints or initiating grievance procedures. It is both ironic and sad that those working with the law are inhibited when it comes to accessing legal remedies for themselves, due to concerns about the implications for their career progression and workplace experience.<sup>130</sup> This is one more reason why the ‘big picture’ needs to be addressed with attitudinal and practical changes throughout the occupational culture.

## V CONCLUSION

Within a Western liberalist perspective, the law continues to be embedded in a core of rationality and objectivity. Private law practice sub-culture is the same; like the discipline as a whole, it has traditionally been and remains defined by traits at the masculine end of a gender personality continuum. Women, for so long assigned to the private domain of hearth and home, are not as readily identified as having those attributes and can easily be labelled as outsiders or ‘others’. This is even more the case for pregnant women or those who are mothers, and therefore, the embodiment of femaleness.

As we have seen, the sub-culture is characterised by practices, such as billable hours and myths about what it means to be a ‘good’ lawyer, which are a bad ‘fit’ for working mothers. Indeed, the societal gendered division of labour that is correlated with a persistent pay gap remains relevant to the legal profession and poses particular difficulties for women who become parents and want to take up more family-friendly work patterns, such as working part-time or from home. The resistance to change may reflect at least in part an on-going discrimination that translates into a smaller proportion of women either staying in the occupation or rising to positions of potential influence. The billable hours framework and masculinised mythology contribute to the attrition and lack of promotion of women lawyers; reciprocally, the lack of acceptance of flexible work practices is at least partially the result of there being fewer women at the top of the pyramid.

There is, however, the promise of change. The organisational gender identity of law firms can be transformed in the ways we describe above through implementing practical measures, revolutionising the way the framework is interpreted and applied, and implementing more macro-level steps that would increase retention and the proportion of women as leaders. These would create the necessary female critical mass at senior levels, and encourage employers to engage with flexible work arrangements with a view that this will benefit the firm as a whole, and have a positive impact on organisational processes and practices. In turn, as flexible work practices become more entrenched and normative, the gender identity of legal practice sub-cultures will become more gender neutral, and hopefully facilitate the ultimate goal of gender equality.

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<sup>130</sup> VEOHRC, above n 4, 35.