

IN VITAL NEED OF REFORM: PROVIDING CERTAINTY FOR WORKING WOMEN UNDERGOING IVF TREATMENT

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Currently, leave for IVF treatment is not a legitimate use of personal leave under the Fair Work Act 2009 (Cth), as women undergoing treatment are neither 'ill' nor 'injured'. As a result, there is significant uncertainty regarding the use of personal leave by women undergoing IVF. Drawing on stakeholder interviews and broader societal contexts, this article evaluates which legal framework most appropriately assists women seeking IVF treatment. Two areas of law are considered. First, this article argues that anti-discrimination frameworks, whilst applicable, are unconvincing. Second, looking to employment law, this article advocates amending the National Employment Standards to introduce paid leave provisions for women receiving IVF treatment. Modern awards and enterprise agreements are also discussed. This article concludes by identifying options for further exploration in order to ensure that the unconditional right for women to have children is not only recognised, but fulfilled.

I INTRODUCTION

Since its introduction in 1980, In Vitro Fertilisation ('IVF') has become central to Australia's reproductive landscape. It provides a last resort for women otherwise unable to conceive 'naturally'. The broader IVF experience, and its effects on women, is already considerable. IVF often elicits additional uncertainty, disruption and hardship for a significant number of working women. Adding to these difficulties, leave for IVF treatment is not a legitimate use of personal leave under the *Fair Work Act 2009* (Cth) ('*FW Act*'), as women undergoing treatment are neither 'ill' nor 'injured'.¹ As a result, there is significant uncertainty regarding the use of personal leave by women undergoing IVF. Whilst the difficulties of IVF treatment and pregnancy are well-known, the impact of IVF on women in the workplace is not.

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1 See below nn 107–14 and accompanying text.

Drawing on stakeholder interviews and broader societal contexts – regarding gender equality in the workplace, fertility trends, and broadening notions of ‘family’ – this article acknowledges Australia’s overarching human rights obligations to then evaluate which legal framework most appropriately assists women seeking IVF treatment. Two areas of law are considered. First, this article argues that anti-discrimination frameworks, whilst applicable, are unconvincing. Second, looking to employment law, this article advocates amending the National Employment Standards (‘NES’) to introduce paid leave provisions for women receiving IVF treatment. Modern awards and enterprise agreements are also discussed. This article concludes by identifying options for further exploration in order to ensure that the unconditional right for women to have children is not only recognised, but fulfilled.

Regarding this article’s research methodology, ethics approval was obtained from Monash University’s Human Research Ethics Committee to undertake qualitative empirical research. Five interviews were conducted with six established professionals from the legal and medical professions, and union members across the private and public sectors. Interviewees were selected using the author’s personal contacts, workplace websites, or snowball sampling. Their responses are presented in a de-identified summary form to maintain their anonymity.

II ANALYSIS OF IVF

Using the surrounding legislative and regulatory framework, and growing use of IVF as a platform, the following Part evaluates women’s IVF-related experiences in two parts.² First, an analysis of women’s IVF experiences – as they relate to the IVF process, its costs, and success rates – highlights its demanding nature. Second, the physical and psychological effects of IVF treatment demonstrate the difficulties that most women experience. Consequently, the uncertain and disruptive nature of IVF can be characterised as a ‘harm’ requiring resolution.

A IVF’s Legislative and Regulatory Framework

Before delving deeper, it is necessary to understand the legislative and regulatory framework surrounding IVF.³ In Victoria, assisted reproductive treatment (‘ART’), which includes IVF, is defined as ‘medical treatment or a procedure that procures, or attempts to procure, pregnancy in a woman by means

2 A feminist critique of IVF exceeds the scope of this article, however: see, eg, R Alta Charo, ‘The Interaction between Family Planning Policies and the Introduction of New Reproductive Technologies’ in Kerry Petersen (ed), *Intersections: Women on Law, Medicine and Technology* (Ashgate, 1997) 73. Alta Charo notes that ‘IVF was a technique born of physical control over procreation’, which resembles ‘another example of putting all risk and responsibility for reproductive failure on women’: at 81.

3 Note, the following analysis provides a jurisdictional focus on Victorian legislation. For other state legislative frameworks, see Victorian Assisted Reproductive Treatment Authority, *Legislation and Guideline Overview* <<https://www.varta.org.au/regulation/legislation-and-guideline-overview>>.

other than sexual intercourse or artificial insemination'.⁴ IVF specifically involves fertilising a woman's ovum outside of her body,⁵ using an individual or couple's own or donated gametes.⁶ Initially developed to cure blocked fallopian tubes, IVF is now used for diagnosed, undiagnosed, and social infertility.⁷

The federal and Victorian legislative and regulatory regime surrounding IVF centres on the *Assisted Reproductive Treatment Act 2008* (Vic) ('*ART Act*').⁸ The *ART Act* imposes various eligibility requirements on those seeking treatment.⁹ For instance, women and their partners are required to give consent,¹⁰ engage in counselling,¹¹ and undergo criminal and child protection order checks.¹² They also cannot be excluded by the *ART Act*'s presumptions against treatment.¹³ The *ART Act* also establishes the Victorian Assisted Reproductive Treatment Authority ('*VARTA*').¹⁴ As Victoria's regulatory body, *VARTA* provides 'independent information and support for individuals, couples and health professionals' on fertility-related issues.¹⁵ In addition, there are accreditation guidelines mandated by the Fertility Society of Australia's Reproductive

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- 4 *Assisted Reproductive Treatment Act 2008* (Vic) s 3 (definition of 'assisted reproductive treatment').
- 5 Katie Harris et al, 'Assisted Reproductive Technology in Australia and New Zealand 2014' (Surveillance Report, National Perinatal Epidemiology and Statistics Unit, University of New South Wales, September 2016) vi; Peter Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (LexisNexis Butterworths, 1997) 578.
- 6 Alexandra Harland et al, *Family Law Principles* (Thomson Reuters, 2nd ed, 2015) 221.
- 7 Alta Charo, above n 2, 80. Medical reasons include, for example, endometriosis, uterine fibroids, fallopian tube damage, and unexplained or 'undiagnosed' infertility: Monash IVF, *IVF – In Vitro Fertilisation* (2017) <<https://monashivf.com/fertility-treatments/fertility-treatments/ivf-in-vitro-fertilisation/>>. 'Social infertility' refers to queer and single women unable to conceive 'naturally' due to the absence of a male partner.
- 8 See generally Victoria, *Parliamentary Debates*, Legislative Assembly, 10 September 2008, 3441–2 (Rob Hulls, Attorney-General). The relevant Acts include: *Family Law Act 1975* (Cth); *Prohibition of Human Cloning for Reproduction Act 2002* (Cth); *Research Involving Human Embryos Act 2002* (Cth) ('*RIHE Act*'); *Births, Deaths and Marriages Registration Act 1996* (Vic); *Status of Children Act 1974* (Vic). The latter two Commonwealth Acts are replicated at the Victorian level: *Prohibition of Human Cloning for Reproduction Act 2008* (Vic); *Research Involving Human Embryos Act 2008* (Vic). For a more sophisticated insight into regulatory frameworks revolving around reproduction and emerging reproductive technologies see, eg, Isabel Karpin, 'Regulating Reproduction' in Anne-Maree Farrell et al (eds), *Health Law: Frameworks and Context* (Cambridge University Press, 2017) 162; Isabel Karpin, 'Regulating Emerging Reproductive Technologies' in Anne-Maree Farrell et al (eds), *Health Law: Frameworks and Context* (Cambridge University Press, 2017) 180.
- 9 *ART Act* ss 10(1)(b)(i), (2)(a)(i)–(iii); Victorian Assisted Reproductive Treatment Authority, *Are You Eligible to Have Treatment?* <<https://www.varta.org.au/information-support/assisted-reproductive-treatment-art/are-you-eligible-have-treatment>>.
- 10 *ART Act* ss 10(1)(a), 11.
- 11 *ART Act* s 13.
- 12 *ART Act* ss 12, 14(1)(a). For an analysis of the inequities that may arise from this requirement, see Kara Thompson and Rosalind McDougall, 'Restricting Access to ART on the Basis of Criminal Record: An Ethical Analysis of a State-Enforced "Presumption against Treatment" with Regard to Assisted Reproductive Technologies' (2015) 12 *Journal of Bioethical Inquiry* 511.
- 13 *ART Act* ss 10(2)(b), 14.
- 14 *ART Act* s 1(e), pt 10.
- 15 Victorian Assisted Reproductive Treatment Authority, 'Annual Report' (2016) <<https://www.varta.org.au/sites/varta/files/public/VARTA%202016%20Annual%20Report.pdf>> i; Victorian Assisted Reproductive Treatment Authority, *About VARTA* <<https://www.varta.org.au/about-varta>>.

Technology Committee, which require compliance with the National Health and Medical Research Council's ethical guidelines.¹⁶ The following discussion builds upon the legislative framework which recognises IVF and its role within society.

B The Increasing Use of IVF in Victoria and Australia

The use of IVF has dramatically increased since Australia's first 'IVF baby' was born in 1980.¹⁷ In 2014, 14 238 babies were conceived using ART in Australia.¹⁸ There were also 67 707 treatment cycles, representing a 2.4 per cent increase from 2013.¹⁹ In Victoria, the number of IVF patients increased by 7.1 per cent from 2015 to 2016,²⁰ in which 12 115 patients underwent 22 274 treatment cycles.²¹ The number of treatment cycles also rose, increasing by 8.2 per cent from 2014–15 to 2015–16.²² In practical terms, four per cent of babies are conceived using ART.²³ Alternatively, approximately one child in every classroom is an 'IVF baby'.²⁴ These figures demonstrate that an increasingly significant proportion of Australian children are conceived using IVF. The recent growth of Australia's IVF market is likely to add momentum to this trend.²⁵ This development will undoubtedly impact workplaces. In the words of a key stakeholder:

[IVF] was once really unique and ... unusual, but it is increasingly becoming the norm in a lot of workplaces where more than one person would have experienced some sort of [ART] or be going through it. In that sense, workplaces need to get with the times and adapt to the workforce, and if the workforce needs [IVF] then they need to be able to provide [for it].²⁶

Consequently, Australia already was, but is increasingly becoming more, dependent on IVF.

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- 16 *RIHE Act* s 8 (definition of 'accredited ART centre'), divs 3–4; Victorian Assisted Reproductive Treatment Authority, *Legislation and Guideline Overview*, above n 3; National Health and Medical Research Council, 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research' (Guide, Australian Government, 2017); Fertility Society of Australia, *RTAC* <<https://www.fertilitysociety.com.au/rtac/>>.
- 17 Victorian Assisted Reproductive Treatment Authority, 'Possible Health Effects of IVF' (Brochure, April 2016) <<https://www.varta.org.au/resources/publications/possible-health-effects-ivf/>> 1.
- 18 Harris et al, above n 5, 4; Cathy O'Leary, 'Growing Population of IVF Babies', *The West Australian* (online), 8 September 2016 <<http://health.thewest.com.au/news/3147/growing-population-of-ivf-babies>>.
- 19 Harris et al, above n 5, vi.
- 20 Victorian Assisted Reproductive Treatment Authority, 'Annual Report', above n 15, 19.
- 21 *Ibid.*
- 22 *Ibid.*
- 23 Victorian Assisted Reproductive Treatment Authority, 'Possible Health Effects of IVF', above n 17, 1.
- 24 Monash IVF, *IVF – In Vitro Fertilisation*, above n 7; Interview with Anonymous (Melbourne, 29 June 2017).
- 25 See 'Half-a-Billion-Dollar Baby: IVF Provider Aims for Growth', *ABC News* (online), 16 June 2013 <<http://www.abc.net.au/news/2013-06-16/ivf-provider-aims-for-growth/4755370>>: Australian healthcare company, Virtus Health, was the world's first publicly listed IVF company. At the time of its initial public offering, its Chief Executive Officer, Sue Channon, forecasted a four to five per cent growth for the company.
- 26 Interview with Anonymous (Melbourne, 29 June 2017).

C Women's IVF Experiences

1 Process

Women's IVF experiences can be analysed in three parts. First, the IVF treatment process elicits uncertainty, disruption, and hardship, creating an additional burden for a significant number of women. Before beginning a cycle, women are required to attend a fertility specialist appointment, a new patient appointment, an information session with a nurse, a patient liaison administrator appointment, and counselling.²⁷ Women often adopt a 'holistic' approach, using additional treatments or therapies such as acupuncture.²⁸ Already daunting, IVF becomes more invasive once the physical elements of treatment commence. For example, ovary stimulation requires injections, transvaginal ultrasounds, and probing.²⁹ The egg collection procedure is particularly invasive, using 'the latest ultrasound technology to guide a needle into each ovary' whilst a woman is under a general anaesthetic.³⁰ The actual experience is not as dignified as that described: '[they] are basically punching holes in the upper part of your vagina to get to your ovals'.³¹ The less painful stages of treatment are also uncomfortable. For instance, during embryo transfer,

[a] catheter is inserted into your uterus and then the embryologist brings in your embryos and places them into the catheter and the specialist guides it up to the uterus. It [is] pain free but very uncomfortable as your legs are in the air, all dignity lost, and a duck billed apparatus exactly like when you have a pap smear is placed in.³²

The logistical aspects of IVF treatment are underscored by unpredictability. Although each individual clinic has its own protocols, they all require women to attend appointments intermittently but frequently. At the same time, each woman responds to IVF treatment differently. As summarised by two stakeholders:

It is very dependent and very individual. [Women] will only know a few days before when they are going to [receive treatment]. They have to come in for scans regularly to know when the right time is to [undergo] egg pick-up ... [and] ... [have] blood tests. There is a lot involved before they actually get the eggs. ... [It] depends on their individual cycle.³³

27 Melbourne IVF, *IVF Treatment* (2018) <<https://www.mivf.com.au/fertility-treatment/ivf-treatment>>.

28 Gavin Sacks, 'Current Study: Can Acupuncture Support IVF Treatment?' on *Melbourne IVF Blog* (19 June 2014) <<https://blog.ivf.com.au/current-study-can-acupuncture-support-ivf-treatment>>. For further information regarding the use of complementary medicines during IVF, see, eg, A Nandi et al, 'Acupuncture in IVF: A Review of Current Literature' (2014) 34 *Journal of Obstetrics & Gynaecology* 555.

29 Monash IVF, *IVF Process* (2017) <<https://monashivf.com/fertility-treatments/fertility-treatments/ivf-process/>>; Melbourne IVF, *IVF Treatment*, above n 27.

30 Monash IVF, *IVF Process*, above n 29.

31 Interview with Anonymous (Melbourne, 27 June 2017).

32 Samantha Delmege, 'Infertility Sucks' on *Monash IVF Blog* (2017) <<https://monashivf.com/infertility-sucks/>>.

33 Interview with Anonymous (Melbourne, 18 July 2017); Access Australia, 'How to Choose an IVF Clinic and Understand Success Rates: Questions to Ask When Choosing an IVF Clinic' (Fact Sheet, May 2015) <<http://access.org.au/wp-content/uploads/2016/12/20-How-to-choose-an-IVF-clinic-and-understand-success-rates.pdf>>; Caloah, 'How Much Time-Off Work Did You Need to Take? Ie IUI, IVF, ICSI Etc' on Faithy, *Essential Baby* (25 March 2011)

It makes it very difficult because [women] need to access time off from work to ... access the services. It is not something they can do in their own time. IVF clinics do not run from 6pm to 5am in the morning. With every other medical situation in the world, whether they go to a dentist or to an eye surgeon, they can seek time off.³⁴

Thus, the physical hardship and uncertainty of the IVF process, as distinct but in addition to 'natural' pregnancy experiences, highlights the difficulties frequently experienced by women undergoing treatment.

2 Costs

IVF is expensive.³⁵ The preliminary expenses include medical tests, medication, counselling, and information sessions.³⁶ Once treatment begins, women must pay for specialist and nursing consultations, additional counselling, ultrasound scans, blood tests, laboratory services, semen preparation, egg collection, embryo transfer, treatment medication, and pregnancy tests.³⁷ IVF clinics also offer additional services with similarly substantial costs.³⁸ For these reasons, at the time of writing, the anticipated out-of-pocket cost of the first cycle of IVF treatment at Monash or Melbourne IVF, two of Victoria's leading IVF clinics, is between \$4461–\$4659.³⁹ Subsequent cycles cost between \$3895–\$4103.⁴⁰ Financial supports, including Medicare and private health insurance, are available.⁴¹ However, these supports are limited. For instance, the Medicare Safety Net is currently capped at \$2030 and excludes various procedures.⁴² The financial commitment required is significant given women undergo on average 1.9 cycles of treatment.⁴³

<<http://www.essentialbaby.com.au/forums/index.php?/topic/881070-how-much-time-off-work-did-you-need-to-take/>>.

34 Interview with Anonymous (Melbourne, 21 July 2017).

35 For an analysis comparing the costs of IVF in Australia with other developed countries, see Georgina Chambers et al, 'The Economic Impact of Assisted Reproductive Technology: A Review of Selected Developed Countries' (2009) 91 *Fertility and Sterility* 2281.

36 Victorian Assisted Reproductive Treatment Authority, 'Costs of IVF' (Brochure, June 2013) <<https://www.varta.org.au/resources/brochure/costs-ivf>> 2; Melbourne IVF, *Melbourne IVF Costs* (1 August 2017) <<https://www.mivf.com.au/ivf-fees/ivf-costs>>.

37 Victorian Assisted Reproductive Treatment Authority, 'Costs of IVF', above n 36, 3.

38 Ibid. These services include pre-treatment counselling, pre-treatment tests, intracytoplasmic sperm injection, extended embryo culture to blastocyst stage, excess embryo freezing, ongoing embryo storage, day surgery or hospital costs, anaesthetist and bed fees, specialist consultation fees, and early pregnancy care.

39 Monash IVF, *IVF Costs Victoria* (1 October 2017) <<https://monashivf.com/ivf-cost-vic/>>; Melbourne IVF, *Melbourne IVF Costs*, above n 36.

40 Monash IVF, *IVF Costs Victoria*, above n 39; Melbourne IVF, *Melbourne IVF Costs*, above n 36.

41 Monash IVF, *IVF Costs Victoria*, above n 39.

42 Ibid; Victorian Assisted Reproductive Treatment Authority, 'Costs of IVF', above n 36, 4; Melbourne IVF, *Medicare Rebate* (2018) <<https://www.mivf.com.au/ivf-fees/ivf-and-medicare>>; Access Australia, *Why Are Some Parts of Infertility Treatment Covered by Medicare and Not Others?* (2018)

<<http://access.org.au/?p=1425>>; Access Australia, *How Many Times Will Medicare Contribute to the Cost of My Treatment?* (2018) <<http://access.org.au/?p=1428>>; Access Australia, *What is the Medicare Safety Net?* (2018) <<http://access.org.au/?p=1430>>.

43 Harris et al, above n 5, vi.

3 Success Rates

IVF success rates are low. The process contains multiple opportunities for failure: ‘a woman might not respond to the fertility drugs, eggs may not be recovered, and embryos may not develop or implant. Even if the embryo does implant, ... there is still a risk of miscarriage’.⁴⁴ Other variables include a woman’s genetics and fertility history, the quality of the eggs and sperm collected, and the treatment team’s competence.⁴⁵ Accordingly, even at Australia’s leading clinics, IVF success rates are low. For example, Monash IVF’s clinical pregnancy success rate per transfer in 2015, measured in terms of live births, declined from 40 per cent for women aged under 30 to 10 per cent for those aged 40 and over.⁴⁶ The declining success rate, relative to age, highlights that whilst ‘IVF may largely overcome infertility in younger women, ... it does not reverse the age-dependent decline in fertility’.⁴⁷ Such statistics are particularly concerning if women now seek IVF treatment later in life.⁴⁸ Moreover, the Australian Competition and Consumer Commission’s concern that ‘some IVF clinics in Australia have made misleading claims about their treatment success rates on their websites’ creates an even more disheartening reality.⁴⁹ Furthermore, even if IVF treatment is successful, IVF-conceived babies have higher risks of birth defects.⁵⁰ Additionally, women using IVF treatment are more likely to develop blood clots, high blood pressure and diabetes, or experience bleeding during pregnancy.⁵¹ Thus, whether in terms of process, costs, or likelihood of success, women’s IVF experiences are undeniably difficult.

D The Effects of IVF on Women

1 Physical Effects

The effects of IVF on women can be evaluated in two parts. Physically, the effects of IVF are intense. For example, the hormones used to regulate women’s menstrual cycles have significant side effects. Clomiphene, the most commonly used fertility drug, can induce ‘nausea, hot flushes, gastrointestinal upset, bloating, headache, dizziness, visual disturbances, mood swings and thickening

44 Victorian Assisted Reproductive Treatment Authority, ‘Understanding IVF Success Rates’ (Brochure, April 2016) <<https://www.varta.org.au/resources/brochure/understanding-ivf-success-rates>> 1; Interview with Anonymous (Melbourne, 21 July 2017).

45 Victorian Assisted Reproductive Treatment Authority, ‘Understanding IVF Success Rates’, above n 44, 3; Monash IVF, *Success Rates (VIC)* (2017) <<https://monashivf.com/ivf-success-rates/>>.

46 Monash IVF, *Success Rates (VIC)*, above n 45. These rates are largely the same across Australia: Harris et al, above n 5, vii.

47 Beth Malizia, Michele Hacker and Alan Penzias, ‘Cumulative Live-Birth Rates after In Vitro Fertilization’ (2009) 360 *The New England Journal of Medicine* 236, 236.

48 Harris et al, above n 5, vi.

49 Victorian Assisted Reproductive Treatment Authority, ‘ACCC Finds IVF Clinics Providing Misleading Information on Success Rates’ (Media Release, November 2016) <<https://www.varta.org.au/resources/news/accc-finds-ivf-clinics-providing-misleading-information-success-rates>>.

50 Victorian Assisted Reproductive Treatment Authority, ‘Possible Health Effects of IVF’, above n 17, 3.

51 Ibid.

of cervical mucus'.⁵² Further, the general anaesthetic used during egg collection can leave women feeling 'beaten around from the process', requiring 'anything from a day to a couple of days off afterwards'.⁵³ In some instances, women develop ovarian hyper-stimulation syndrome ('OHSS'). Although only one per cent of women undergoing IVF experience OHSS,⁵⁴

[in] very severe cases they can be in hospital for as long as several weeks, having litres of fluid drained ... Even if they are not hospitalised, they can feel very unwell and very uncomfortable. They will need time off from work and not be able to function. ... It can be very debilitating, very painful, ... very uncomfortable and very frightening. Some women can get post-operative infections that may require them to either have time off, go back to a doctor, [or receive] antibiotic treatment. In very rare or severe cases, [women] go back to hospital.⁵⁵

2 Psychological Effects

Psychologically, IVF commonly negatively impacts women prior to, during, and after their treatment. Before commencing treatment, IVF may trigger or exacerbate previous trauma, noting that '[there] have been years probably of discussions, ... [exploring] ... options or trying for a baby. Perhaps there [have] been miscarriages. It usually comes with a history of some kind of baggage'.⁵⁶ Moreover, IVF may affect pre-existing mental health conditions.⁵⁷ Furthermore, the unpredictability of IVF can create 'anticipatory anxiety' leading up to treatment.⁵⁸ During treatment, '[women] often experience symptoms of depression and anxiety ... particularly when waiting for results after embryo transfer [or] when treatment fails'.⁵⁹

Although the range of emotional responses to IVF is diverse,⁶⁰ two experiences are common. First, women's lives and careers are 'put on hold' as a result of prioritising 'appointments, having [blood tests], injecting hormones, waiting, ... [becoming] pregnant in early stages, [being] told bad news or ... [starting] another cycle'.⁶¹ These experiences become increasingly intense for 'women ... [who] are in the process for years'.⁶² Second, given the low success

52 Access Australia, 'Drugs and Infertility Treatment' (Fact Sheet, June 2015) <<http://access.org.au/wp-content/uploads/2010/01/9-drugs.pdf>> 2.

53 Interview with Anonymous (Melbourne, 21 July 2017).

54 Victorian Assisted Reproductive Treatment Authority, 'Possible Health Effects of IVF', above n 17, 2.

55 Interview with Anonymous (Melbourne, 21 July 2017).

56 Interview with Anonymous (Melbourne, 29 June 2017).

57 Interview with Anonymous (Melbourne, 21 July 2017).

58 Ibid.

59 Victorian Assisted Reproductive Treatment Authority, 'Possible Health Effects of IVF', above n 17, 1.

60 Access Australia, 'Normal Emotional Responses to Infertility and Coping Strategies' (Fact Sheet, September 2010) <<http://www.access.org.au/wp-content/uploads/2010/01/23-normal-emotional-coping.pdf>> 1.

61 Delmege, above n 32.

62 Interview with Anonymous (Melbourne, 18 July 2017); Access Australia, 'Normal Emotional Responses to Infertility and Coping Strategies', above n 60, 2; Delmege, above n 32.

rates, almost all women undergoing IVF experience grief at some point.⁶³ These experiences are particularly complex:

It is very much a disenfranchised grief because there is no deceased person [women] can formally mourn.

Often over a period of time we see patients who have multiple treatment cycles; there is an accumulative effect of ... disenfranchised grief. We see in our practice that it will often manifest in what appears to be depressive symptoms but when you look at what they have been through, it can be experiences of trauma and unresolved grief ... [Also] if they are starting to run out of options – they have done three, four cycles, even more – they then ... become quite despairing.⁶⁴

Thus, IVF constitutes a ‘major life crisis’,⁶⁵ likened to an emotional roller-coaster which commonly invites both angst and elation.⁶⁶

III THE EFFECTS OF IVF ON WORKING WOMEN

The above experiences and effects do not exist in isolation, but rather, impact every facet of women’s lives – including their work. It is important to acknowledge that although the hardship that women endure during IVF is familiar, their IVF experiences as they relate specifically to the workplace are not. The absence of academic discussion and practical guidance regarding this issue is particularly problematic considering that women’s workplace productivity and ability to conceive are used by society to measure their meaningful contribution to the community. Drawing on discussions with key stakeholders, this Part evaluates how IVF, as distinct from other pregnancy-related contexts, specifically affects working women.⁶⁷

A How IVF Treatment Affects Women in the Workplace

The effects of IVF treatment on working women are complex. For example, the cost of IVF often pressures women into working full-time during treatment.⁶⁸ However, the sporadic and unpredictable nature of IVF-related appointments can disrupt work routine, creating ‘enormous pressure’, as women otherwise risk losing their income if they cannot obtain paid leave.⁶⁹ Moreover, the physical

63 Access Australia, ‘Pregnancy Loss’ (Fact Sheet, November 2010) <<http://www.access.org.au/wp-content/uploads/2010/01/25-pregnancy-loss.pdf>> 1–3; Sheryl de Lacey, ‘Death in the Clinic: Women’s Perceptions and Experiences of Discarding Supernumerary IVF Embryos’ (2017) 39 *Sociology of Health & Illness* 397, 400; Shu-Hsin Lee et al, ‘Grief Responses and Coping Strategies among Infertile Women after Failed In Vitro Fertilization Treatment’ (2010) 24 *Scandinavian Journal of Caring Sciences* 507.

64 Interview with Anonymous (Melbourne, 21 July 2017).

65 Access Australia, ‘How to Choose an IVF Clinic’, above n 33, 3.

66 For a first-hand account of the emotional journey IVF entails, see Delmege, above n 32.

67 For an insight into how discrimination towards pregnant women affects their workforce participation, health, family and the broader economy, see, eg, Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review’ (Report, 2014) <<http://www.humanrights.gov.au/our-work/sex-discrimination/publications/supporting-working-parents-pregnancy-and-return-work>> (‘*Supporting Working Parents Report*’).

68 Interview with Anonymous (Melbourne, 18 July 2017).

69 Interview with Anonymous (Melbourne, 21 July 2017); Victorian Assisted Reproductive Treatment Authority, *Emotional, Physical and Practical Considerations of ART*

challenges IVF presents fit within ‘a broader context of ... difficulties that employers ... contribute to by not accommodating reproduction’.⁷⁰ Additionally, women’s commitment to their workplace may conflict with their experiences of grief, creating a ‘build-up where [women] are not stopping and they end up falling over’.⁷¹ Consequently, some women ‘find that they cannot concentrate [or] function ... in their workplace’.⁷² Put simply, ‘[there] are so many hopes and dreams invested in [IVF] ... It is very distracting. It consumes your life. All of that is potentially going to impact work’.⁷³

B Incompatibility with Workplace Practice

The requirements of IVF are also largely incompatible with workplace practice. Women are commonly expected to inform their employers and peers if they need to take IVF-related leave from work.⁷⁴ Whilst reasonable, such expectations are problematic. Acknowledging the unpredictability of IVF-related appointments, expectations that women give advance warnings of their IVF commitments are impractical. Privacy and confidentiality concerns are also relevant: ‘[women] do not want the pressure of people in the workplace knowing that they are doing IVF and asking “are you pregnant yet? What is happening?”’.⁷⁵ Understandably, some women feel anxious navigating such discussions.⁷⁶ Further, drawing a logical connection between IVF and pregnancy, ‘there is a big expectation [that women] are about to go on maternity leave’.⁷⁷ As a result, ‘that stigma can last for a long time before [women] actually get to pregnancy’.⁷⁸

Additionally, IVF treatment may mistakenly undermine women’s commitment to their workplace:

[It] is really problematic because it potentially looks like [women] are not fulfilling [their] work properly or that [they] are being evasive or up to something.⁷⁹

The stigma that people feel is that they are perceived as not being reliable. That they are taking a lot of time. That potentially they are creating a burden on other team members. Again, that they will be seen unfavourably by their employer and not as committed to their role or organisation.⁸⁰

<<https://www.varta.org.au/information-support/assisted-reproductive-treatment-art/emotional-physical-and-practical>>.

70 Interview with Anonymous (Melbourne, 27 June 2017).

71 Interview with Anonymous (Melbourne, 18 July 2017).

72 Interview with Anonymous (Melbourne, 21 July 2017).

73 Interview with Anonymous (Melbourne, 29 June 2017).

74 Victorian Assisted Reproductive Treatment Authority, *Emotional, Physical and Practical Considerations of ART*, above n 69.

75 Interview with Anonymous (Melbourne, 18 July 2017).

76 Interview with Anonymous (Melbourne, 21 July 2017).

77 Interview with Anonymous (Melbourne, 18 July 2017).

78 Ibid.

79 Interview with Anonymous (Melbourne, 29 June 2017).

80 Interview with Anonymous (Melbourne, 21 July 2017).

For these reasons, women are often perceived as shirking their commitment to the ‘greater cause’, prioritising themselves before their workplace.⁸¹ As a result, women undergoing IVF can feel ‘very guilty that they cannot take time off work ... because they do not fit [the] criteria. [This] is often reinforced by feedback by their colleagues and people around them, [including] managers’.⁸² These misconceptions frequently follow women throughout their IVF treatment into pregnancy.⁸³ In response, many women experience additional stress by striving to ensure that their IVF treatment does not conflict with their employment, often working harder and longer to redeem their absence and fatigue.⁸⁴

C Resulting Vulnerability in the Workplace

1 Employer–Employee Power Imbalance

The impact of IVF commonly exacerbates women’s vulnerability at work. Two ideas are particularly relevant. First, women are susceptible to the inherent power imbalance between themselves and their employers. Recalling a woman’s request to use her personal leave for IVF, an interviewee recollected:

Their experience was that they felt ... [that] they were going cap in hand to the [human resources] department. They had to explain what they [were] doing. They felt uncomfortable about that. That ambiguity of whether it [was] in fact grounds for personal leave or not was ... apparent in the exchange, to the point where the employee felt [that] they had no leg to stand on ... and that they were always begging favours. The power in the relationship around that – when the woman had made her decision to have one last cycle ... [whilst] having to deal with the work politics ... made it really difficult.⁸⁵

Thus, women may ‘feel beholden to the employer. They are unlikely to feel [that] they are coming from a rights-based place [when requesting] leave’.⁸⁶ These concerns are valid. By virtue of deciding whether women can use their personal leave, the status quo confers power upon employers to ultimately determine whether a woman’s IVF treatment is permissible, inappropriately implicating employers in women’s personal lives.⁸⁷

2 Fear of Discrimination

A second consideration concerns the ‘[high degree] of pregnancy-related discrimination that still occurs in workplaces’.⁸⁸ More precisely, a woman’s IVF

81 Ibid.

82 Ibid.

83 Margaret Thornton, ‘Women and Discrimination Law’ in Patricia Eastal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 131, 142; Barbara Masser, Kirsten Glass and Michelle Nesic, ‘“We Like You, but We Don’t Want You”: The Impact of Pregnancy in the Workplace’ (2007) 57 *Sex Roles* 703.

84 Interview with Anonymous (Melbourne, 21 July 2017).

85 Interview with Anonymous (Melbourne, 27 June 2017).

86 Ibid.

87 Interview with Anonymous (Melbourne, 29 June 2017).

88 Interview with Anonymous (Melbourne, 27 June 2017). See above n 67 and accompanying text. An analysis of why sex discrimination occurs is outside the scope of this article: see, eg, Cecilia Ridgeway and Paula England, ‘Sociological Approaches to Sex Discrimination in Employment’ in Faye J Crosby,

treatment accentuates her vulnerability by inadvertently revealing her intention to become pregnant.⁸⁹ This susceptibility is amplified for women who undergo more than one treatment cycle.⁹⁰ Specific concerns include being overlooked for promotion, treated unfavourably, or denied access to the same opportunities they might have otherwise obtained.⁹¹ These concerns are ‘often ... reinforced by feedback from patients ... that their employers [have asked] “What? You are taking more time off again?” or “[you] are going to be late again today?”’.⁹² Alarmingly,

[one] patient had a certificate of attendance for why they were late to work that day. ... [Their] employer drove to the clinic and confronted the patient and said ‘I went to where you said you were. Why didn’t you tell me you are doing IVF?’ That person was devastated ... It was an enormous invasion of privacy, and [they] felt that they had to justify it, that they did not have a valid reason [for why] they [were] not physically sick.⁹³

This experience, whilst extreme, is not unique. Women have been asked to reconsider their position or resign, or worse, threatened with disciplinary action.⁹⁴ IVF-related absences have also been noted during performance management reviews.⁹⁵ Accordingly, IVF treatment undermines job security in an already insecure global economy. Summarising the scope of the issue, one stakeholder stated:

Whether it is real or perceived, [job security] is an anxiety for [women]. They [do not] want to be seen as taking too much leave. Especially nowadays, people are ... anxious about their jobs. [Women undergoing IVF] do not want to bring attention to [themselves] or [be] seen not pulling [their] weight. They will drag themselves off to work even if they are not feeling great ... They do not want to be seen to not be coping.⁹⁶

The hardship that working women routinely encounter as a result of IVF treatment is largely incompatible with them reaching their potential in the workplace.

Margaret S Stockdale and S Ann Ropp (eds), *Sex Discrimination in the Workplace: Multidisciplinary Perspectives* (Wiley-Blackwell, 2007) 192.

89 Interview with Anonymous (Melbourne, 27 June 2017); Interview with Anonymous (Melbourne, 18 July 2017): ‘The main concern, that we hear here, is that once they tell their employer that they are doing IVF, it is very obvious that they are trying to get pregnant and then that obviously puts them in a different league’.

90 Interview with Anonymous (Melbourne, 27 June 2017).

91 Interview with Anonymous (Melbourne, 18 July 2017); Interview with Anonymous (Melbourne, 21 July 2017). For a first-hand account of these concerns, see, eg, Kookies, ‘IVF Info for Employers?’ on Leez, *Essential Baby* (20 January 2010) <<http://www.essentialbaby.com.au/forums/index.php?/topic/758360-ivf-info-for-employers/>>.

92 Interview with Anonymous (Melbourne, 21 July 2017).

93 Ibid.

94 Frizzle, ‘IVF Info for Employers?’ on Leez, *Essential Baby* (19 January 2010) <<http://www.essentialbaby.com.au/forums/index.php?/topic/758360-ivf-info-for-employers/>>; electra68, ‘My Rights at Work Doing IVF in Qld’ on ~jojo~, *Essential Baby* (21 November 2008) <<http://www.essentialbaby.com.au/forums/index.php?/topic/614266-my-rights-at-work-doing-ivf-in-qld/>>.

95 Interview with Anonymous (Melbourne, 21 July 2017).

96 Interview with Anonymous (Melbourne, 18 July 2017).

D But Not All Employers!

Avoiding convenient characterisations, it is important to recognise that not all employers are inhospitable to women's IVF-related commitments. Looking at gender-based discrimination more broadly, employers are often proactive and willing to address concerns.⁹⁷ This is also apparent in IVF-related contexts: '[by] and large, employers are pretty good'.⁹⁸ However, the fact that a woman's ability to use her personal leave is dependent upon her relationship with her employer, is problematic.⁹⁹ It allows employers to favour individual employees.¹⁰⁰ Further, it does not stop employers from renegeing on their initial acquiescence.¹⁰¹ The argument that 'not all employers are bad' overlooks the reality that almost all women undergoing IVF encounter workplace-related anxiety due to the resulting uncertainty and absence of adequate protections. Regardless of whether some employers are accommodating or not, a consistent solution is needed.

IV PROBLEM: AN ISSUE OF UNCERTAINTY

In search of a solution which maintains the relationship between women and their employers, women often use their paid personal leave entitlements to access IVF. Formerly referred to as 'sick leave',¹⁰² the entitlement presents a viable option for women to seek IVF treatment whilst ensuring that they fulfil their obligations as employees. At first glance, this appears permissible – the definition of personal leave under the NES allows for employees to take up to 10 days of paid personal leave in two situations. Most commonly, if they are unfit for work due to personal illness or injury.¹⁰³ Alternatively, if an individual's immediate family or household member requires care or support because of a personal illness or injury or an unexpected emergency.¹⁰⁴ However, the use of personal leave by women undergoing IVF whilst they are neither 'ill' nor 'injured' has led to practical and theoretical uncertainty.¹⁰⁵ Consequently, both

97 *Supporting Working Parents Report*, above n 67, 8.

98 Interview with Anonymous (Melbourne, 18 July 2017).

99 *Ibid*; Interview with Anonymous (Melbourne, 21 July 2017); Interview with Anonymous (Melbourne, 27 June 2017).

100 Interview with Anonymous (Melbourne, 29 June 2017).

101 *Ibid*.

102 Carolyn Sappideen, Paul O'Grady and Joellen Riley, *Macken's Law of Employment* (Thomson Reuters, 8th ed, 2016) 497. For a contextual background and insight into the evolution of personal leave, see, eg, Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 371–7; Andrew Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 6th ed, 2016) 490–2.

103 *FW Act* ss 96–7. Sections 107(1)–(2) also impose various notice and evidence requirements, including the need to 'give notice to the employer as soon as practicable' using 'evidence that would satisfy a reasonable person'.

104 *FW Act* ss 96–7; Stewart et al, above n 102, 491. Note, the other types of leave available under div 7 of pt 2-2 of the *FW Act* include unpaid carer's and compassionate leave, although these are not available for women undergoing IVF treatment: ss 102, 104.

105 *Supporting Working Parents Report*, above n 67, 162. The author first became aware of this issue after speaking with a senior employment lawyer based in Melbourne: Email from Anonymous to Thomas Hvala, 28 February 2017. In their words: 'We are getting questions from clients about this. Technically it

employees and employers are unsure as to how to proceed.¹⁰⁶ The following Part evaluates this uncertainty and its implications.

A Causes of Uncertainty

This uncertainty stems from three concerns. First, women undergoing IVF are not actually sick, nor is IVF covered as a reason for sick leave.¹⁰⁷ Consequently, requests to use personal leave for IVF have been met with responses from employers stating that women ‘[cannot] take sick pay if [it is] a planned day, [as] sick days are only allowed to be taken if [they] are sick’.¹⁰⁸ The presentation of a valid medical certificate does not necessarily provide assistance.¹⁰⁹ Second, even if women are unwell during IVF, the specific elements of IVF constituting an ‘illness’ or ‘injury’ are limited. For instance, whilst the more substantive procedures requiring anaesthetic may result in ‘illness’, the initial stages of IVF which involve screening appointments and blood tests may not.¹¹⁰ Thus, personal leave does not cover the entire IVF process.¹¹¹ Third, workplace policies and approaches to elective surgery are inadequate. Put simply, IVF is not a choice.¹¹² Rather, it is a last resort for women who ‘have usually exhausted every other option available to them’.¹¹³ Despite this, some employers continue to analogise IVF treatment to elective surgery in order to refuse leave.¹¹⁴ Evidently, there is an absence of an

is not a legitimate use of personal leave (you are not ill or injured) so this makes for some tricky conversations in the workplace’.

- 106 These concerns were confirmed by interviewees: Interview with Anonymous (Melbourne, 27 June 2017); Interview with Anonymous (Melbourne, 29 June 2017); Interview with Anonymous (Melbourne, 17 July 2017); Interview with Anonymous (Melbourne, 18 July 2017); Interview with Anonymous (Melbourne, 21 July 2017). For a practical insight into how this affects women in the workplace, see, eg, ‘How Much Time-Off Work Did You Need to Take? Ie IUI, IVF, ICSI Etc’ on Faithy, *Essential Baby* (24 March 2011) <<http://www.essentialbaby.com.au/forums/index.php?/topic/881070-how-much-time-off-work-did-you-need-to-take/>>; ‘IVF Info for Employers?’ on Leez, *Essential Baby* (19 January 2010) <<http://www.essentialbaby.com.au/forums/index.php?/topic/758360-ivf-info-for-employers/>>; ‘IVF – Time-Off Work’ on Baznleah, *Essential Baby* (9 March 2008) <<http://www.essentialbaby.com.au/forums/index.php?/topic/510063-ivf-time-off-work/>>; ‘IVF – What Did You Tell Your Work? ... Without Telling Them It’s IVF’ on Shopalot33, *Essential Baby* (4 April 2012) <<http://www.essentialbaby.com.au/forums/index.php?/topic/971074-ivf-what-did-you-tell-your-work/>>; ‘Leave and IVF’ on Jane, *Bellybelly* (28 August 2006) <<https://www.bellybelly.com.au/forums/long-term-ttc-39/leave-ivf-19515/>>; ‘My Rights at Work Doing IVF in Qld’ on ~jojo~, *Essential Baby* (18 November 2008) <<http://www.essentialbaby.com.au/forums/index.php?/topic/614266-my-rights-at-work-doing-ivf-in-qld/>>; ‘Sick Pay for IVF???’ on Flickyd, *BabyCenter* (19 October 2013) <<https://www.babycenter.com.au/thread/481963/sick-pay-for-ivf/>>.
- 107 Interview with Anonymous (Melbourne, 27 June 2017); Interview with Anonymous (Melbourne, 18 July 2017). Note, the *FW Act* does not define ‘illness’ or ‘injury’: ss 12, 96–7.
- 108 Debbi82, ‘Sick Pay for IVF??’, above n 106.
- 109 See above n 93.
- 110 Interview with Anonymous (Melbourne, 27 June 2017); Interview with Anonymous (Melbourne, 17 July 2017); Interview with Anonymous (Melbourne, 21 July 2017).
- 111 Interview with Anonymous (Melbourne, 27 June 2017).
- 112 Interview with Anonymous (Melbourne, 17 July 2017).
- 113 Interview with Anonymous (Melbourne, 21 July 2017).
- 114 See, eg, Flickyd, ‘Sick Pay for IVF??’, above n 106.

overarching regulatory framework regarding the use of personal leave by women undergoing IVF, or employees more generally.

B Exacerbating Factors

The resulting uncertainty is exacerbated by various factors. For instance, both women and employers are largely confused about and unaware of the demands of IVF.¹¹⁵ Many women attempting to become pregnant often feel unable to discuss their concerns with their employers.¹¹⁶ On the other hand, multiple employers have reported that the deeply personal, sensitive and confidential nature of IVF is difficult to discuss, particularly in instances of miscarriage.¹¹⁷ Apprehension regarding accessing personal leave becomes increasingly difficult and confusing for women who have sought ongoing treatment or experienced trauma.¹¹⁸ Genuine attempts to clarify the available options by both women and their employers are largely redundant, as the lack of accessible or authoritative resources regarding this issue creates further doubt. For instance, searches for information using online search engines return blog posts rather than authoritative websites. This is partly because the Australian government's most authoritative sources, such as the Fair Work Ombudsman ('FWO'), provide no assistance.¹¹⁹ This is particularly problematic considering that internet resources and government agencies are the two most commonly consulted resources used by mothers to clarify their pregnancy- and work-related entitlements.¹²⁰ In the few instances in which authoritative resources discuss IVF-related leave, the information is difficult to find or contains minimal clarification.¹²¹ A possible reason for this is that, although IVF relates to pregnancy, it is conceptually and practically distinct, as women undergoing IVF are not pregnant.¹²²

115 *Supporting Working Parents Report*, above n 67, 115.

116 *Ibid.*

117 *Ibid* 115, 139.

118 Interview with Anonymous (Melbourne, 27 June 2017).

119 See Fair Work Ombudsman, <<https://fairwork.gov.au>>.

120 *Supporting Working Parents Report*, above n 67, 61.

121 See, eg, Australian Human Rights Commission, 'Supporting Working Parents: A Guide for Employees' (Guide, 1 July 2015) <https://supportingworkingparents.humanrights.gov.au/sites/default/files/2015_Supporting-Working-Parents-Employee-Guide.pdf> 10. The guide makes one reference to IVF, in which it confirms that any discriminatory treatment towards women undergoing fertility treatment is prohibited by the *Sex Discrimination Act 1984* (Cth) ('*SD Act*'). It also states that '[where] fertility treatment impacts on [an individual's] health ... [they] may be entitled to access personal ... leave under the [*FW Act*] on the basis of [their] personal illness'.

122 See, eg, Susan Halliday, 'Pregnancy Discrimination – A Growing Concern' (Speech delivered at the IIR Diversity and EEO Conference, 22 March 1999). The Sex Discrimination Commissioner's speech, similar to those made since, stated that '[pregnant] employees who become ill during pregnancy are entitled to at least the same sick leave entitlements as other employees'. However, if read as is, it is unclear whether references to women who are 'ill during pregnancy' includes women undergoing IVF. For a similarly ambiguous use of 'prenatal treatment' and 'prenatal medical appointments' see Victorian Equal Opportunity and Human Rights Commission, 'Pregnancy and Work: Know Your Rights and Obligations' (Guide, June 2017) <https://www.humanrightscmission.vic.gov.au/home/our-resources-and-publications/know-your-rights-brochures/item/download/8870_0cfff4fe9070d55f9b54f5133dfeff28> 21 ('*Pregnancy and Work Guide*'); Australian Human Rights Commission, 'Working Parents: A Quick Guide to Your Rights' (Guide, 1 July 2015)

C Practical Implications

The practical consequences of this uncertainty are four-fold. First, even if the use of personal leave for IVF is legitimate, requests to use it are routinely denied.¹²³ Second, even if not explicitly denied, the ambiguity leaves the status quo open to challenge:

Our view internally is that you are not sick when you ... are doing IVF. That, in fact, seeking personal leave is not really an appropriate thing to do. We would not be encouraging people to be confident about applying for personal leave to use [it] for IVF, because we think if it were challenged it could be an issue.¹²⁴

Third, even if women are permitted to use their personal leave, they risk returning to work without a safety net if no remaining leave is available.¹²⁵ Thus, upon returning to work, women are required to take unpaid or annual leave to care for themselves, their sick children or to fulfil other family responsibilities.¹²⁶ Consequently, the likely exhaustion of personal leave discourages individuals from using the provisions appropriately, as many individuals pre-emptively reserve leave in case they miscarry or undergo additional cycles.¹²⁷

Fourth, the current uncertainty encourages dishonesty, sometimes forcing women to deceive their employers in order to use their leave.¹²⁸ Regrettably, the FWO has previously encouraged women to deceive their employers whilst using their personal leave for IVF-related appointments.¹²⁹ Alternatively, women may respond with hostility, telling employers that their treatment is ‘none of their business’.¹³⁰ Regardless, rather than being transparent, women are required to be evasive or risk looking ‘dodgy’.¹³¹ Without attributing blame to women for using the only means available to secure paid leave, such approaches are at odds with notions of integrity and most likely violate codes of conduct found in most, if not all, workplaces. As a logical extension, the current context creates a false dichotomy in which women are required to choose between job security or welcoming a baby into the world whilst fighting to keep their job. At worst,

<<https://supportingworkingparents.humanrights.gov.au/sites/default/files/quick-guide-employees.pdf>> 1
(‘Working Parents Quick Guide’).

123 *Supporting Working Parents Report*, above n 67, 88; Kate Brian, ‘Trying Times’ *The Guardian* (online), 3 June 2006 <<https://www.theguardian.com/money/2006/jun/03/careers.work7>>.

124 Interview with Anonymous (Melbourne, 27 June 2017).

125 *Ibid*; Interview with Anonymous (Melbourne, 17 July 2017).

126 Interview with Anonymous (Melbourne, 17 July 2017); Jane, ‘Leave and IVF’, above n 106.

127 Interview with Anonymous (Melbourne, 21 July 2017); Interview with Anonymous (Melbourne, 18 July 2017); *Supporting Working Parents Report*, above n 67, 88; Jennifer Renda, Jennifer Baxter and Michael Alexander, ‘Exploring the Work-Family Policies Mothers Say Would Help after the Birth of a Child’ (2009) 12 *Australian Journal of Labour Economics* 65, 67.

128 Interview with Anonymous (Melbourne, 29 June 2017).

129 Flickyd, ‘Sick Pay for IVF???’ , above n 106.

130 Interview with Anonymous (Melbourne, 18 July 2017).

131 Interview with Anonymous (Melbourne, 29 June 2017).

women may leave work to ensure that they can access IVF without disruption.¹³² Alternatively, they may choose not to have children.¹³³

V THE BROADER SOCIAL CONTEXT: INCREASING THE NEED FOR REFORM

The current uncertainty regarding IVF and the legitimate use of personal leave demands clarification. However, although prioritising and supporting women's reproductive rights is a historical issue, it sits within a rapidly changing contemporary context that requires an analysis which looks to the future. The following section builds upon three key contexts – gender inequality in the workplace, changing trends regarding women's fertility and society's perception of 'family'. Persuasive individually, but even more so when combined, these contexts make it unequivocally clear that the Australian government must not only acknowledge this issue, but proactively address it before it becomes more problematic.

A Gender Inequality in the Workplace

1 *The Good*

At first glance, Australia's progress regarding the inclusion of women in the workplace, including women with dependent children, is impressive.¹³⁴ Participation of women in the paid workforce has doubled in the last century.¹³⁵ In early 2017, women comprised 46.4 per cent of all employees in Australia, participating at 59.1 per cent.¹³⁶ The increased participation of women in the workplace has strong legislative backing. For example, the *Workplace Gender*

132 Interview with Anonymous (Melbourne, 18 July 2017).

133 See, eg, Australian Human Rights Commission, 'Pregnant and Productive: It's a Right Not a Privilege to Work while Pregnant' (Inquiry Report, 1999) <<https://www.humanrights.gov.au/publications/pregnant-and-productive-its-right-not-privilege-work-while-pregnant-1999>> ('*Pregnant and Productive Report*'); Australia's first national inquiry into pregnancy and potential pregnancy discrimination at work, now almost 20 years old, highlighted that an 'inability to obtain paid maternity leave [is a] significant [factor] contributing to Australian women and their partners deciding not to have children or to limit the size of their families': at 13–18.

134 Marian Baird, 'Women and Work in Australia: A Theoretical and Historical Overview' in Peter A Murray, Robin Kramar and Peter McGraw (eds), *Women at Work: Research, Policy and Practice* (Tilde University Press, 2011) 1, 4.

135 Anne-Marie Mooney Cotter, *Pregnant Pause: An International Legal Analysis of Maternity Discrimination* (Ashgate, 2010) 79. See also *ibid*; Juliet Andrews and Juliet Bourke, 'Trends in Women's Participation in the Australian Workforce 1900–2010' in Peter Murray, Robin Kramar and Peter McGraw (eds), *Women at Work: Research, Policy and Practice* (Tilde University Press, 2011) 23, 33; Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge-Cavendish, 2009) 2–3; Christie Breakspear, *From Juggling to Managing? The Evolution of Work and Family Policies in Three Australian Organisations* (Industrial Relations Research Centre, University of New South Wales, 1998) 1.

136 Australian Bureau of Statistics, *Labour Force* (January 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0/>>; Workplace Gender Equality Agency, 'Gender Workplace Statistics at a Glance' (Statistics Report, February 2017) <<https://www.wgea.gov.au/sites/default/files/Stats%20at%20a%20Glance%20FEB2017.pdf>> 1.

Equality Act 2012 (Cth) (*‘WGE Act’*) constitutes the third major revision of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth).¹³⁷ The *WGE Act’s* objectives include, for example, promoting and improving gender equality by encouraging employers to remove barriers to women’s participation in the workforce.¹³⁸ Crucially, it requires employers to produce and disclose internal data on its six ‘Gender Equality Indicators’.¹³⁹ This publicly available information creates a market, encouraging better performance.¹⁴⁰ It also requires private sector employers with 100 or more staff to report to the Workplace Gender Equality Agency each year.¹⁴¹ Such improvements are to be celebrated.

2 *The Bad*

However, Australia’s inclusion of women in the workplace remains substandard.¹⁴² The ‘ideal’ worker is still imagined by most employers to be male, with no caring responsibilities, fully available to work.¹⁴³ Such notions are reflected by Australia’s gender gap.¹⁴⁴ For instance, although women graduate from university at higher rates than men, they are under-represented in the labour market.¹⁴⁵ Moreover, Australia’s full-time gender pay gap sits at 15.3 per cent, in which women earn on average \$251 per week less than men.¹⁴⁶ The difference is influenced by various factors, including discrimination, the disproportionate allocation of unpaid care and domestic labour, and poor workplace flexibility.¹⁴⁷ These inequalities become particularly pertinent in pregnancy contexts, in which pregnancy is a ‘workplace issue that starts well before conception’.¹⁴⁸ Employers

137 Carolyn Sutherland, ‘Reframing the Regulation of Equal Employment Opportunity: The *Workplace Gender Equality Act 2012* (Cth)’ (2013) 26 *Australian Journal of Labour Law* 102, 102. For more information regarding the impact of the *WGE Act*, see Tony Cardillo, ‘New Obligations on Employers by the *Workplace Gender Equality Act*’ (2013) 65 *Keeping Good Companies* 236; Terri MacDonald, ‘The New *Workplace Gender Equality Act*: A Step in the Right Direction’ (2013) 21 *Agenda* 26.

138 *WGE Act* ss 2A(a)–(b).

139 *WGE Act* ss 3 (definition of ‘gender equality indicators’), 13. The *WGE Act’s* Gender Equality Indicators include, for example, a gender composition of the workforce and relevant governing bodies, equal remuneration between women and men, and the availability and utility of employment terms, conditions and practices relating to flexible work arrangements and family-related responsibilities.

140 Sappideen, O’Grady and Riley, above n 102, 621.

141 *WGE Act* ss 3 (definition of ‘relevant employer’), 8A, 10, 13. The Agency’s functions involve advising and assisting employers in promoting gender equality in the workplace, developing benchmarks in relation to gender equality indicators, issuing guidelines and reviewing compliance standards: at ss 10(1)(a)–(c).

142 Mooney Cotter, above n 135, 364.

143 *Supporting Working Parents Report*, above n 67, 23.

144 See, eg, Peter McGraw, ‘Gender Pay Equity Issues in Australia: Patterns and Causes’ in Peter Murray, Robin Kramar and Peter McGraw (eds), *Women at Work: Research, Policy and Practice* (Tilde University Press, 2011) 54.

145 *Supporting Working Parents Report*, above n 67, 28.

146 Workplace Gender Equality Agency (Cth), ‘Australia’s Gender Pay Gap Statistics’ (Statistical Analysis, August 2017) <<https://www.wgea.gov.au/sites/default/files/gender-pay-gap-statistics.pdf>> 1.

147 *Ibid* 2; Australian Human Rights Commission, ‘A Conversation in Gender Equality’ (Report, March 2017) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/conversation-gender-equality-2017>> 12 (*‘Conversation in Gender Equality Report’*).

148 Mooney Cotter, above n 135, 240.

are, despite genuine interest,¹⁴⁹ ‘reluctant to accommodate either pregnant or ... post-partum [women]’.¹⁵⁰

The barriers to achieving gender equality in the workplace for pregnant women remain complex. They include, for example, the prevalence of ‘precarious’ or ‘atypical’ work in female-dominated industries,¹⁵¹ the public/private divide,¹⁵² traditional gender roles,¹⁵³ and outdated social norms regarding women, pregnancy, and masculinity.¹⁵⁴ These barriers become greater when issues of disability, sexuality, class, race, and marital status are also considered.¹⁵⁵ Recognising this context is important to providing a solution to the absence of leave provisions for women undergoing IVF. Namely, if society already largely recognises the social utility in remedying gender inequality, any potential solution which improves women’s access to medical and financial support during IVF, as it concerns the workplace, should be welcomed.

B Fertility-Related Considerations

Childbirth trends in Australia underscore the need for a solution. Australian women are having children later in life. For instance, 43 per cent of first-time mothers are aged 30 or over, almost double the rate in 1991.¹⁵⁶ Moreover, the proportion of mothers aged 35 and over increased from 20 to 22 per cent from 2004 to 2014.¹⁵⁷ Women are also accessing IVF at an older age.¹⁵⁸ Whilst various interconnected factors may explain this trend, a primary consideration is that

149 *Conversation in Gender Equality Report*, above n 147, 31.

150 Thornton, above n 83, 142.

151 *Conversation in Gender Equality Report*, above n 147, 6. See also Rosemary Hunter, ‘The Legal Production of Precarious Work’ in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing, 2006) 283; Rosemary J Owens, ‘Women, “Atypical” Work Relationships and the Law’ (1993) 19 *Melbourne University Law Review* 399.

152 James, above n 135, 1, 13. See also Patricia Easteal, ‘Setting the Stage: The “Iceberg” Jigsaw Puzzle’ in Patricia Easteal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 1; Joyce K Fletcher, ‘Relational Practice: A Feminist Reconstruction of Work’ in Andrea Barnes (ed), *The Handbook of Women, Psychology, and the Law* (John Wiley & Sons, 2005) 79.

153 Paula McDonald, Kerriann Dear and Sandra Backstrom, ‘Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress’ (2008) 39 *Industrial Relations Journal* 229, 230, 244–5; *Supporting Working Parents Report*, above n 67, 112.

154 See Deborah Rhode and Joan Williams, ‘Legal Perspectives on Employment Discrimination’ in Faye J Crosby, Margaret S Stockdale and S Ann Ropp (eds), *Sex Discrimination in the Workplace: Multidisciplinary Perspectives* (Wiley-Blackwell, 2007) 235; Ann McGinley, ‘Work, Caregiving, and Masculinities’ (2011) 34 *Seattle University Law Review* 703.

155 This article focuses on the ‘typical’ experiences of women as a collective whole. As a result, an analysis which incorporates third wave feminist perspectives is outside its scope. For an intersectional analysis, see *Conversation in Gender Equality Report*, above n 147, 5; Sharyn L Roach Anleu, ‘Reproductive Autonomy and Reproductive Technology: Gender, Deviance and Infertility’ in Kerry Peterson (ed), *Intersections: Women on Law, Medicine and Technology* (Ashgate, 1997) 99.

156 Michael Flynn, ‘Going Solo – Contemplating Single Motherhood?’ on *Melbourne IVF Blog* (7 August 2014) <<https://blog.ivf.com.au/going-solo-contemplating-single-motherhood/>>.

157 Australian Institute of Health and Welfare (Cth), ‘Australia’s Mothers and Babies in 2014 – In Brief’ (Brief, 2014) <<https://www.aihw.gov.au/reports/mothers-babies/australias-mothers-babies-2014-in-brief/>> 2.

158 Leita Flen, ‘15 Years of IVF Patients – How Have Women Changed?’ on *Melbourne IVF Blog* (24 April 2014) <<https://blog.ivf.com.au/15-years-ivf-patients-how-have-women-changed/>>; Harris et al, above n 5, vi.

women are establishing themselves in the workforce in order to achieve financial security before having children.¹⁵⁹

Improvements in IVF-related technology support this development. For instance, ‘egg freezing’, the process in which women freeze their embryos for the purpose of undertaking IVF at an older age, is becoming increasingly common.¹⁶⁰ Recourse to this technology, as a means of enhancing employee productivity and retention, has been encouraged by leading international employers.¹⁶¹ However, women’s fertility decreases with age.¹⁶² Consequently, the ‘shift towards delaying motherhood can have an effect on fertility’.¹⁶³ Although there are various causes of infertility,¹⁶⁴ which affect women of all ages,¹⁶⁵ as well as men,¹⁶⁶ this predicament is concerning. If women increasingly delay childbirth, they will also increasingly need to rely on IVF in order to conceive.

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- 159 Department of Health and Aging (Cth), ‘National Women’s Health Policy’ (Policy, 2010) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/national-womens-health-policy>> 60; Roach Anleu, above n 155, 120; Interview with Anonymous (Melbourne, 17 July 2017).
- 160 Harris et al, above n 5, vi. An insight into egg freezing, its function and related technological advancements is outside the scope of this article: see generally Victorian Assisted Reproductive Treatment Authority, *Fertility Preservation* <<https://www.varta.org.au/information-support/fertility-and-infertility/fertility-preservation>>; Victorian Assisted Reproductive Treatment Authority, *Social Egg Freezing* <<https://www.varta.org.au/information-support/fertility-and-infertility/fertility-preservation/social-egg-freezing>>; Manuela Toledo, ‘Australian Women Are Increasingly Turning to Egg Freezing to Protect Their Fertility’ on *Melbourne IVF Blog* (19 September 2016) <<https://blog.ivf.com.au/australian-women-are-increasingly-turning-egg-freezing>>; Bill Ledger, ‘Egg Freezing – No Insurance Policy, but Is It Better than Doing Nothing?’ on *Melbourne IVF Blog* (1 November 2013) <<https://blog.ivf.com.au/egg-freezing-no-insurance-policy-it-better-doing-nothing>>. For a discussion of the emerging legal and ethical issues surrounding egg freezing, see Karey A Harwood, ‘On the Ethics of Social Egg Freezing and Fertility Preservation for Nonmedical Reasons’ (2015) 5 *Medicolegal and Bioethics* 59; Catherine Waldby, ‘“Banking Time”: Egg Freezing and the Negotiation of Future Fertility’ (2015) 17 *Culture, Health & Sexuality* 470; Seema Mohapatra, ‘Using Egg Freezing to Extend the Biological Clock: Fertility Insurance or False Hope?’ (2014) 8 *Harvard Law & Policy Review* 381.
- 161 Mark Tran, ‘Apple and Facebook Offer to Freeze Eggs for Female Employees’ *The Guardian* (online), 15 October 2014 <<https://www.theguardian.com/technology/2014/oct/15/apple-facebook-offer-freeze-eggs-female-employees>>; Dara Kerr, ‘Egg Freezing, So Hot Right Now’ *CNET* (online), 22 May 2017 <<https://www.cnet.com/au/news/egg-freezing-so-hot-right-now/>>; ‘Facebook and Apple Offer \$20 000 to Freeze Eggs for Female Staff: Reports’ *ABC News* (online), 15 October 2014 <<http://www.abc.net.au/news/2014-10-15/facebook-and-apple-offer-to-freeze-employees-eggs/5815368>>.
- 162 Victorian Assisted Reproductive Treatment Authority, *Suspecting Infertility* <<https://www.varta.org.au/information-support/fertility-and-infertility/suspecting-infertility>>; Melbourne IVF, *Age & Female Fertility* (2018) <<https://www.mivf.com.au/about-fertility/female-reproductive-system/effect-of-age-on-fertility>>; Melbourne IVF, *A Woman’s Fertility & Age* (2018) <<https://www.qfg.com.au/about-fertility/female-reproductive-system/effect-of-age-womens-fertility>>; Flynn, above n 156.
- 163 Department of Health and Aging (Cth), above n 159, 60.
- 164 Victorian Assisted Reproductive Treatment Authority, *Suspecting Infertility*, above n 162; Access Australia, ‘Unexplained Infertility’ (Fact Sheet, March 2014) <<http://www.access.org.au/wp-content/uploads/2010/01/43-unexplained-infertility.pdf>> 1–2; IVF Australia, *About Infertility* (2018) <<https://www.ivf.com.au/about-fertility/infertility-treatment>>.
- 165 Jennifer L Marino et al, ‘Fertility Treatments and the Young Women Who Use Them: An Australian Cohort Study’ (2011) 26 *Human Reproduction* 473, 473.
- 166 Melbourne IVF, *Age & Female Fertility*, above n 162.

Consequently, the demand for IVF will grow.¹⁶⁷ Therefore, with a society that is set to increasingly rely on artificial conception, the Australian government, as well as women's workplaces, must support rather than impede access to IVF.

C The Broadening Perception of 'Family'

Improvements in IVF have contributed to society's widening understanding of 'family'.¹⁶⁸ This development arises from the opportunities created by using donated sperm and ova, which allow non-heterosexual couples to conceive.¹⁶⁹ Golombok highlights that whilst '[assisted] reproductive technologies were initially developed to enable infertile heterosexual couples to have children and create families ... these technologies have increasingly been used for social, rather than medical reasons'.¹⁷⁰ Two social developments are particularly noteworthy. First, 'the use of donor insemination enables lesbian women to become pregnant without ... a male partner'.¹⁷¹ Second, single mother families are becoming increasingly common.¹⁷² As a result, the use of IVF by both stakeholders is increasing.¹⁷³ IVF use by single women and queer women in same-sex relationships has increased from 2 to 22 per cent from 2008 to 2013.¹⁷⁴ As encouraged by IVF clinics,¹⁷⁵ this trend highlights a movement away from traditional approaches to IVF, in which certain groups of women were routinely denied access.¹⁷⁶ Thus, as society moves away from antiquated conceptions of 'family', more single women and same-sex couples will seek IVF treatment in

167 Roach Anleu, above n 155, 120.

168 Belinda Bennett, 'Gamete Donation, Reproductive Technology and the Law' in Kerry Peterson (ed), *Intersections: Women on Law, Medicine and Technology* (Ashgate, 1997) 127, 127.

169 Ibid.

170 Susan Golombok, *Modern Families: Parents and Children in New Family Forms* (Cambridge University Press, 2015) 138.

171 Ibid.

172 Ibid 143; Melbourne IVF, *Options for Single Women* (2018) <<https://www.mivf.com.au/fertility-treatment/options-single-women/>>; Flynn, above n 156. For a discussion regarding single women and their position within broader family law contexts, see, eg, Fiona Kelly, 'Parenting outside the Normative Framework: Australia's Single Mothers by Choice' (2015) 29 *Australian Journal of Family Law* 90.

173 Flen, above n 158.

174 Ibid.

175 Monash IVF, *Fertility for Same Sex Couples* (2017) <<https://monashivf.com/fertility-treatments/donor-surrogacy/same-sex-couples/>>; Victorian Assisted Reproductive Treatment Authority, 'Annual Report', above n 15, 19.

176 Alta Charo, above n 2, 81–2; Roach Anleu, above n 155, 105, 115–16; Bennett, above n 168, 127. For an analysis of the arguments previously, and sometimes currently, used to deny non-heteronormative stakeholders access to IVF, see M M Peterson, 'Assisted Reproductive Technologies and Equity of Access Issues' (2005) 31 *Journal of Medical Ethics* 280; Adiva Sifris, 'Dismantling Discriminatory Barriers: Access to Assisted Reproductive Services for Single Women and Lesbian Couples' (2004) 30 *Monash University Law Review* 229; Tami Dower, 'Redefining Family: Should Lesbians Have Access to Assisted Reproduction?' (2001) 25 *Melbourne University Law Review* 466; Julian Savulescu and David Molloy, 'Collection of Two Articles on the Federal Government's Plans to Amend Anti-Discrimination Laws Allowing States to Refuse Single Women and Gay Couples Access to Assisted Reproductive Technology' (2000) 12 *Australian Medicine: News Magazine of the Australian Medical Association* 14; Anita Stuhmcke, 'Lesbian Access to In Vitro Fertilisation' (1997) 7 *Australasian Gay and Lesbian Law Journal* 15; Christopher Zinn, 'Australia Acts to Restrict IVF Treatment to Heterosexual Couples' (2002) 324 *British Medical Journal* 1054.

order to have children. Collectively, these social developments – concerning gender equality in the workplace, changing fertility-related trends and contemporary notions of ‘family’ – support the need for a solution regarding the use of personal leave for IVF.

VI IN SEARCH OF A SOLUTION

The experiences of women undergoing IVF treatment serve as more than a mere description – they make clear that women undergoing IVF require certainty during an unpredictable period of instability and strain. The absence of effective political leadership or dialogue regarding this issue suggests that the Australian government either does not understand women’s basic healthcare, or worse, does not consider it important. The dearth of primary resources evaluating the hardship working women experience during IVF highlights this notion. The surrounding context exacerbates the urgency required to resolve this matter. Put simply, ‘[we] have to make workplaces keep up with the modern context’.¹⁷⁷ The following analysis has two aspirations. First, it aims to provide the first legal analysis of Australian women and their IVF-related experiences in the workplace. Second, and more importantly, it searches for a solution to ensure women are better supported during their IVF journey.

A Prioritising Legislation

Acknowledging requests for a ‘more concrete or consistent’ solution,¹⁷⁸ a legislative response is necessary.¹⁷⁹ In short, legislative reform provides the strongest symbolic and practical function, whether as a means of achieving gender equality or minimising harm.¹⁸⁰ Building on the guidelines set out in the Commonwealth’s Best Practice Regulation Handbook,¹⁸¹ a legislative solution provides certainty,¹⁸² is responsive to the high risk, impact, and significance of women’s reproductive health,¹⁸³ applies universally,¹⁸⁴ resolves issues of compliance and employers’ ‘flagrant breaches’ of good faith approaches to equitable workplace conduct,¹⁸⁵ and remedies the failure of the FWO to adequately or actively provide clarification.¹⁸⁶ Thus, this article considers which

177 Interview with Anonymous (Melbourne, 29 June 2017).

178 Ibid.

179 This approach was either suggested or supported by interviewees: Interview with Anonymous (Melbourne, 27 June 2017); Interview with Anonymous (Melbourne, 29 June 2017); Interview with Anonymous (Melbourne, 18 July 2017); Interview with Anonymous (Melbourne, 21 July 2017).

180 Mooney Cotter, above n 135, 3.

181 Australian Government, ‘Best Practice Regulation Handbook’ (Handbook, 2007) 67. See also Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 182; Stewart et al, above n 102, 23–44.

182 Australian Government, above n 181, 67.

183 Ibid.

184 Ibid.

185 Ibid.

186 Ibid.

legislative framework provides the most adequate solution. Two options for reform are considered – anti-discrimination law and employment law.¹⁸⁷

B Australia's Human Rights Obligations

A human rights approach provides further context. Australia 'must not only refrain from violating human rights, but must work actively to promote and protect these rights'.¹⁸⁸ Four human rights are particularly relevant. First, as a means of '[ensuring] ... women [can access] appropriate services in connection with pregnancy', Australia has an obligation to promote women's access to IVF-related services.¹⁸⁹ Second, assisting women to have children using IVF recognises the right for women to 'decide freely and responsibly on the number and spacing of their children'.¹⁹⁰ Third, facilitating women's access to IVF recognises the right to enjoy the benefits of scientific progress and its application.¹⁹¹ Without reform, women have access to IVF in principle but not necessarily in practice. Fourth, recognising the prevalence of pregnancy-related discrimination in the workplace, legislative amendments improving access to IVF helps fulfil Australia's obligation to prohibit discrimination.¹⁹²

The human right to non-discrimination is also echoed in Australia's workplace law,¹⁹³ as well as various international labour standards.¹⁹⁴ For example, Australia's Charter of Employment Rights includes a right to work with dignity and freedom from discrimination.¹⁹⁵ Thus, legislative reforms providing for women's IVF-related treatment helps to fulfil Australia's commitment to

187 Albeit noteworthy, approaches to workplace health and safety are outside the scope of this article. Further inquiries may note that, as similar to the negative impact that discrimination has on workers' mental health, employers may be in breach of their workplace health and safety obligations to eliminate risks of psychological injury by failing to facilitate women's access to IVF: *Supporting Working Parents Report*, above n 67, 164–5. Additional resources worth exploring include: Sappideen, O'Grady and Riley, above n 102, 283–318; Stewart et al, above n 102, 536–604; Neil Foster, *Workplace Health and Safety Law in Australia* (LexisNexis Butterworths, 2nd ed, 2016).

188 Mooney Cotter, above n 135, 6.

189 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 12(2) ('CEDAW').

190 Ibid art 16(1)(e).

191 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 27(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 15(1)(b).

192 CEDAW arts 11, 12(1), 16(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26; *Supporting Working Parents Report*, above n 67, 18, 148, 149.

193 Beth Gaze and Anna Chapman, 'Human Right to Non-discrimination as a Legitimate Part of Workplace Law: Towards Substantive Equality at Work in Australia' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 355, 355.

194 See, eg, *Discrimination (Employment and Occupation) Convention (No 111)*, opened for signature 25 June 1958, ILO (entered into force 15 June 1960). For an explanation of the relationship between international labour standards and Australian labour law, see, eg, Stewart et al, above n 102, 78–98; Owens, Riley and Murray, above n 102, 393–406.

195 Australian Institute of Employment Rights, 'Australian Charter of Employment Rights' (Charter, 2007) <<http://www.aierights.com.au/resources/charter/>>; Clare Ozich (ed), *Employment Rights Now: Reflections on the Australian Charter of Employment Rights* (Hardie Grant Books, 2015).

respecting and upholding human rights. This notion is particularly important in light of Australia's election to the United Nations Human Rights Council for 2018–20.¹⁹⁶

This approach has merit over others.¹⁹⁷ Namely, it has 'the effect of motivating social change with a higher moral imperative that is likely to have longer lasting effect'.¹⁹⁸ This is in contrast to alternative approaches which prioritise the role of institutions, made vulnerable by a potential over-reliance on an institution's reputation or authority.¹⁹⁹ Therefore, a rights-based approach provides the greatest tangible protection for working women seeking IVF. Precedent supports this notion. In *Castles v Secretary of the Department of Justice*, the Department of Justice's decision to deny a prisoner's request to continue receiving IVF whilst in prison was overturned.²⁰⁰ Emerton J held that 'IVF treatment [is] both reasonable and necessary for the preservation of the plaintiff's health'.²⁰¹ Although the crux of Emerton J's reasoning was that IVF was considered necessary for the preservation of Castles' reproductive health per section 47(1)(f) of the *Corrections Act 1986* (Vic) ('*Corrections Act*'), the right to humane treatment in detention – found in section 22(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) – informed the Court's analysis.²⁰² As a result, the decision-maker was required to give proper consideration to human rights more broadly, as specifically provided for by the *Corrections Act*. Similar human rights approaches legitimising IVF treatment have also been applied overseas.²⁰³ Facilitating women's access to IVF ensures that Australia not only recognises these rights, but provides a genuine opportunity for women to exercise them.

196 Department of Foreign Affairs and Trade, Australian Government, Australia's Candidacy for the United Nations Human Rights Council 2018–20 <<http://dfat.gov.au/international-relations/international-organisations/Pages/australias-candidacy-for-the-unhrc-2018-2020.aspx>>.

197 Lisa Heap, 'Promoting an Understanding of Labour Rights as Human Rights' in Clare Ozich (ed), *Employment Rights Now: Reflections on the Australian Charter of Employment Rights* (Hardie Grant Books, 2015) 1, 10.

198 Ibid.

199 Ibid.

200 (2010) 28 VR 141.

201 Ibid 143 [9], 173 [125].

202 Ibid 142 [4], 164 [83], 166–70 [93]–[113], 173–7 [125]–[146]; Rachel Ball, *Landmark Supreme Court Decision on Right to Humane Treatment in Detention and Prisoner Access to Healthcare* (13 July 2010) Human Rights Law Centre <<https://www.hrlc.org.au/human-rights-case-summaries/landmark-supreme-court-decision-on-right-to-humane-treatment-in-detention-and-prisoner-access-to-healthcare-13-july-2010?rq=castles>>.

203 See, eg, Fernando Zegers-Hochschild, Bernard M Dickens and Sandra Dughman-Manzur, 'Human Rights to In Vitro Fertilization' (2013) 123 *International Journal of Gynaecology and Obstetrics* 86.

VII SOLUTION ONE – ANTI-DISCRIMINATION FRAMEWORKS

A Options for Reform

1 *Already Prohibited*

The following Part evaluates whether Australian anti-discrimination frameworks may provide a solution for women undergoing IVF.²⁰⁴ Women undergoing IVF may already be protected by Australia’s anti-discrimination legislation and the *FW Act*’s General Protections. These prohibit employees from being disadvantaged or treated less favourably than other employees.²⁰⁵ Put generally, both federal and state and territory laws prohibit direct and indirect discrimination on various grounds that typically affect women – including sex, pregnancy, potential pregnancy, and family responsibilities.²⁰⁶ Consequently, employees undergoing fertility treatment, including IVF, may be covered by the *Sex Discrimination Act 1984* (Cth) (*‘SD Act’*).²⁰⁷ Although there is no case law exploring this specific issue, a broad interpretation of ‘potential pregnancy’ would seemingly protect employees undergoing IVF treatment.²⁰⁸

Women undergoing IVF may be protected from discrimination under the *FW Act*’s General Protections.²⁰⁹ Employers are prohibited from taking ‘adverse

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- 204 A third argument could be that, if a woman’s infertility were diagnosed as a disability, any action or inaction by an employer restricting her access to IVF, or failing to make ‘reasonable adjustments’, could constitute disability discrimination under the *Disability Discrimination Act 1992* (Cth). However, this approach is weak, as not all women accessing IVF are physically infertile. Further, it is theoretically contentious to associate pregnancy with disability, given that the feminist movement has aspired to rectify misconceptions that pregnancy is disabling.
- 205 Whilst both legislative approaches differ ‘in the nature of the obligations imposed on employers and in the enforcement regime available in respect of each’, a comparison of which option provides a superior solution is unnecessary: Carol Andrades, ‘Intersections between “General Protections” under the *Fair Work Act 2009* (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries’ (Working Paper No 47, Centre for Employment and Labour Relations Law, December 2009) 4; Owens, Riley and Murray, above n 102, 617.
- 206 *SD Act* ss 4A–5, 5B, 7, 7A; *Equal Opportunity Act 2010* (Vic) ss 6(d), (i), (l), 7–9, 17–19 (*‘EO Act’*); Mooney Cotter, above n 135, 6; *Supporting Working Parents Report*, above n 67, 150; *Working Parents Quick Guide*, above n 122, 1; *Pregnancy and Work Guide*, above n 122, 2; Sappideen, O’Grady and Riley, above n 102, 622–7. ‘The federal Acts prohibit both direct and indirect discrimination in respect of all protected attributes, other than the attribute of family responsibilities which is currently limited to direct discrimination only. All states and territory Acts similarly use the dichotomous definition of discrimination’: at 623. The nuances of Australia’s anti-discrimination Acts, as they apply state by state, are outside the scope of this article. For convenience, they will be considered synonymously. For more information concerning Australian anti-discrimination laws and their application to pregnancy contexts, see, eg, Australian Human Rights Commission, ‘Sex Discrimination’ (Fact Sheet, November 2014) <<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/sex-discrimination>>; Thornton, above n 83, 131.
- 207 *SD Act* ss 4B–5, 7, 14; Australian Human Rights Commission, above n 121, 10.
- 208 Australian Human Rights Commission, ‘Pregnancy Guidelines’ (Guidelines, 2001) <https://www.humanrights.gov.au/sites/default/files/content/sex_discrimination/publication/pregnancy_guidelines/Pregnancy_guidelines.pdf> 29.
- 209 *FW Act* pt 3–1. The *FW Act* provides a viable alternative, operating concurrently with federal and state anti-discrimination frameworks: ss 26–7; Sappideen, O’Grady and Riley, above n 102, 483. For an explanation of how the General Protections prohibit discrimination differently to the anti-discrimination Acts, see, eg, Anna Chapman, ‘Freedom from Discrimination and Harassment’ in Clare Ozich (ed),

action' against a woman or unlawfully terminating her employment for discriminatory purposes.²¹⁰ Thus, the *FW Act* may apply to prevent discrimination towards employees seeking IVF. However, women may encounter difficulties when relying on these provisions. For instance, the concept of discrimination and the meaning of discriminatory attributes under the *FW Act* are unsettled.²¹¹ Moreover, as is the case for women experiencing family violence, it may be difficult for individuals to establish a causal nexus between instances of discrimination and an attribute covered by the *FW Act*.²¹² Regardless, even if discrimination on the basis of receiving fertility treatment is already prohibited, greater transparency could be given to pre-existing anti-discrimination provisions, clarifying whether women have a right to access IVF.

2 Potential Amendments

Commonwealth, state and territory anti-discrimination legislation could be amended to explicitly prohibit discrimination on the basis of undergoing IVF. For instance, 'use of fertility treatment' could be included in the *SD Act* or *Equal Opportunity Act 2010* (Vic) ('*EO Act*') as a protected attribute. Alternatively, pre-existing protected attributes could be amended to explicitly include access to IVF.²¹³ These options are viable. For example, the Australian Human Rights Commission ('AHRC') has previously recommended amending the *SD Act* to 'include a positive duty on employers to reasonably accommodate the needs of workers who are pregnant and/or have family responsibilities'.²¹⁴ The same could be done for women undergoing IVF treatment. Such suggestions would seamlessly fit in with pre-existing approaches to preventing discrimination. Victoria's *EO Act* already imposes a positive duty on employers to take appropriate steps to prevent discrimination.²¹⁵

Employment Rights Now: Reflections on the Australian Charter of Employment Rights (Hardie Grant Books, 2015) 33. Adverse action claims may protect women seeking IVF treatment in the United States: see, eg, Katie Cushing, 'Facing Reality: The *Pregnancy Discrimination Act* Falls Short for Women Undergoing Infertility Treatment' (2010) 40 *Seton Hall Law Review* 1697; Elizabeth A Pendo, 'The Politics of Infertility: Recognising Coverage Exclusions as Discrimination' (2004) 11 *Connecticut Insurance Law Journal* 293.

210 *FW Act* ss 342, 351, 772. Marilyn Pittard and Richard Naughton, *Australian Labour and Employment Law* (LexisNexis Butterworths, 2015) 440–1, 448; Andrades, above n 205, 7; Sappideen, O'Grady and Riley, above n 102, 503–50.

211 Chapman, above n 209, 38.

212 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Final Report No 117 (2011) <https://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_alrc_117.pdf> 408 ('*Family Violence Legal Frameworks Report*').

213 Amending the definition of 'related medical conditions' to include IVF treatment, as it relates to discrimination, has been discussed in the United States: see, eg, Erin Percy, '*Hall v Nalco Co*: Redefining Female Infertility' (2009) 70 *Louisiana Law Review* 353.

214 *Supporting Working Parents Report*, above n 67, 25.

215 *EO Act* s 15(2); *Pregnancy and Work Guide*, above n 122, 5.

B Limitations

1 Theoretical Obstacles

Regardless of any possibility of clarification or reform, various theoretical and practical obstacles undermine the utility of anti-discrimination law as an adequate legal protection for women discriminated against on the basis of undergoing IVF. Theoretically, the comparability requirement in anti-discrimination law requires claimants to demonstrate that they were treated less favourably than another individual in the same or similar circumstances.²¹⁶ However, drawing on the distinction between IVF and elective surgery, it is unclear who would be a suitable comparator.²¹⁷ Similarly, a ‘reasonableness’ defence allows employers to deny women’s requests to use personal leave for IVF under the guise of a ‘legitimate business goal’.²¹⁸ Additionally, it may be difficult to prove the ‘causative’ elements of an action regarding IVF following an employee’s redundancy or a workplace restructure.²¹⁹

These concerns are emblematic of the broader theoretical difficulties associated with applying anti-discrimination frameworks within employment law contexts. The underlying principles of anti-discrimination and workplace law are incongruous – whereas anti-discrimination law protects vulnerable individuals, employment law is ‘more collectively based and [includes] managing tensions between management and labour’.²²⁰ Whilst the two approaches are not mutually exclusive, ‘employment discrimination has been treated as a human rights matter and not as a legitimate and important matter for workplace law’.²²¹ Although the expansion of anti-discrimination provisions in the *FW Act* have largely enhanced the protection of vulnerable women,²²² the ongoing marginalisation of employment discrimination within workplace law is unlikely to change.²²³ The absence of a clear indication by Parliament that the *FW Act*’s anti-discrimination provisions were intended to combine anti-discrimination and employment law, the reading down of provisions by judges,²²⁴ and society’s persistent misconception of the paradigmatic worker as male, support this notion.²²⁵

2 Practical Obstacles

Bridging the disjuncture between theory and practice, various practical considerations also limit a woman’s capacity to establish a successful anti-discrimination claim. For example, discrimination may not be reported. Despite

216 Thornton, above n 83, 135; Andrades, above n 205, 8.

217 Andrades, above n 205, 8.

218 *SD Act* s 7B; Sappideen, O’Grady and Riley, above n 102, 630; Chapman, above n 209, 36.

219 *Supporting Working Parents Report*, above n 67, 99; James, above n 135, 28.

220 Gaze and Chapman, above n 193, 355; see also Owens, Riley and Murray, above n 102, 20, 441–72.

221 Gaze and Chapman, above n 193, 356; see Sappideen, O’Grady and Riley, above n 102, 617.

222 Sappideen, O’Grady and Riley, above n 102, 649.

223 Gaze and Chapman, above n 193, 356.

224 Chapman, above n 209, 38–9; see also Sappideen, O’Grady and Riley, above n 102, 642–8. As highlighted, ‘the scope of these protections is limited ... by judicial interpretations that limit the *Fair Work Act*’s discrimination provisions to a very narrow understanding of discrimination as only intentional different treatment’: at 648.

225 Gaze and Chapman, above n 193, 356.

the explicit prohibition of pregnancy-related discrimination, 91 per cent of mothers who experience discrimination do not make a formal complaint.²²⁶ Victims of discrimination may be unaware that they are being discriminated against.²²⁷ Alternatively, some women ‘may lack the power and influence to put [IVF-related discrimination] on the agenda either in their workplace or in the political sphere’.²²⁸ For instance, the AHRC has highlighted that women’s voices are often ignored or ‘that [where] women are able to speak out, they are often not taken seriously’.²²⁹ Moreover, a portion of women may experience a ‘sense of [self-blame] or embarrassment’.²³⁰ Similarly, confronting sexist behaviour may damage social and professional relationships.²³¹ Furthermore, fear of retribution or subsequent victimisation by an employer or colleagues are legitimate concerns for many women.²³²

Further, the volume, diversity and resulting complexity of Australia’s anti-discrimination legislation renders it cumbersome and confusing.²³³ The failure of recent attempts to consolidate Australia’s anti-discrimination laws demonstrates this.²³⁴ Additionally, the reality of pursuing justice in a public tribunal or court can be a ‘devastating experience for a complainant, as there may be a protracted hearing, followed by challenges and appeals’.²³⁵ Consequently, the cost of pursuing legal action if a matter is not resolved at conciliation may be a barrier.²³⁶ Also, the demands of IVF restrict a woman’s time, resources, and overall capacity needed to pursue a discrimination matter.²³⁷ The fact that an employer may have more resources than an individual is also discouraging. Thus, the current ‘litigation gap’, in which the prevalence of discrimination far outweighs the extent to which it is reported, will most likely remain.²³⁸ Ultimately, it seems that any improvement to existing anti-discrimination law frameworks is unlikely to induce meaningful change.

226 *Supporting Working Parents Report*, above n 67, 35, 47.

227 Sappideen, O’Grady and Riley, above n 102, 360; Theresa Beiner and Maureen O’Connor, ‘When an Individual Finds Herself to be the Victim of Sex Discrimination’ in Faye J Crosby, Margaret S Stockdale and S Ann Ropp (eds), *Sex Discrimination in the Workplace: Multidisciplinary Perspectives* (Wiley-Blackwell, 2007) 19, 21; *Supporting Working Parents Report*, above n 67, 60; Karen Ruggiero and Donald Taylor, ‘Coping with Discrimination: How Disadvantaged Group Members Perceive the Discrimination that Confronts Them’ (1995) 68 *Journal of Personality and Social Psychology* 826, 826–38; *Pregnant and Productive Report*, above n 133, 23.

228 Sappideen, O’Grady and Riley, above n 102, 360.

229 *Conversation in Gender Equality Report*, above n 147, 22.

230 Beiner and O’Connor, above n 227, 21; James Gruber and Michael Smith, ‘Women’s Responses to Sexual Harassment: A Multivariate Analysis’ (1995) 17 *Basic & Applied Social Psychology* 543, 546.

231 Cheryl Kaiser and Carol Miller, ‘Stop Complaining! The Social Costs of Making Attributions to Discrimination’ (2001) 27 *Personality and Social Psychology Bulletin* 254, 255.

232 *Supporting Working Parents Report*, above n 67, 99, 175.

233 *Pregnancy and Work Guide*, above n 122, 6; Sappideen, O’Grady and Riley, above n 102, 649; *Pregnant and Productive Report*, above n 133.

234 Sappideen, O’Grady and Riley, above n 102, 621.

235 Thornton, above n 83, 149.

236 *Supporting Working Parents Report*, above n 67, 171.

237 *Ibid* 170.

238 James, above n 135, 25.

3 *Additional Considerations*

Various additional considerations further undermine the effectiveness of anti-discrimination law. Primarily, anti-discrimination legislation does not stop discrimination. The Federal Circuit Court recently found that ‘an employer took unlawful adverse action against a pregnant worker’, dismissing her ‘for taking time off to manage morning sickness and other issues’ related to her pregnancy.²³⁹ This scenario is not unique. Despite a surplus of pregnancy-related anti-discrimination legislation, the AHRC has found that one in two mothers still experience workplace discrimination.²⁴⁰ The AHRC and Victorian Equal Opportunity and Human Rights Commission’s most recent reports confirm that discrimination towards pregnant women remains pervasive.²⁴¹ Thus, the prevalence of workplace discrimination suggests that aspirations to refine anti-discrimination frameworks are unrealisable.²⁴² Furthermore, anti-discrimination protections fail to resolve workplace conflict. For example, the majority of women that take some form of action in response to workplace discrimination report that their conflict is not resolved.²⁴³

Additionally, acknowledging the need for certainty, anti-discrimination legislation relies on judicial interpretation.²⁴⁴ Since the proposals above are largely dependent on gradual developments in the law, they ultimately fail to provide the certainty required for women to use their personal leave for IVF with confidence. Moreover, anti-discrimination frameworks are largely redundant if the employment relationship is already severed.²⁴⁵ Last, the nature of anti-discrimination law is proscriptive – it informs employers of what they cannot do. However, a prescriptive approach – which equips women with a tangible rights-based solution clarifying what they can do – is required. Overall, prioritising the perspectives of working women as the central stakeholders in this discussion, another solution must be found.

239 Workplace Express, ‘Sacking after Morning Sickness Unlawful: Court’ (Report, 11 July 2017) 1; *Mahajan v Burgess Rawson & Associates Pty Ltd* [2017] FCCA 1560 (6 July 2017).

240 *Supporting Working Parents Report*, above n 67, 19, 35.

241 Australian Human Rights Commission, ‘2015–16 Complaint Statistics’ (Report, 2016); *Supporting Working Parents Report*, above n 67, 19, 35; *Conversation in Gender Equality Report*, above n 147, 31; Victorian Equal Opportunity and Human Rights Commission, ‘Annual Report 2015/16’ (Annual Report, 2016) <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/annual-reports/item/1480-victorian-equal-opportunity-and-human-rights-commission-annual-report-2015-16-oct-2015>> 18; *Pregnancy and Work Guide*, above n 122, 4.

242 Thornton, above n 83, 134.

243 *Supporting Working Parents Report*, above n 67, 49.

244 Mooney Cotter, above n 135, 363.

245 Barbara Pocock, Sara Charlesworth and Janine Chapman, ‘Work-Family and Work-Life Pressures in Australia: Advancing Gender Equality in “Good Times”?’ (2013) 33 *International Journal of Sociology and Social Policy* 594, 603.

VIII SOLUTION TWO – EMPLOYMENT LAW MECHANISMS

Employment law, whether enacted by federal or state parliaments, underpins all workplace relationships.²⁴⁶ The sources of Australia’s workplace rights and duties include federal and state industrial, general and commercial legislation, as well as modern awards, enterprise agreements, employment contracts, and workplace policies.²⁴⁷ Unions and industrial tribunals are also central to regulating employment relationships. The most operative legislative and regulatory instrument in employment law, from the perspective of both employers and employees, is the *FW Act*. It ‘provides for terms and conditions of employment and sets out the rights and responsibilities of employees, employers and employee organisations in relation to that employment’.²⁴⁸ It has an expansive application, covering those employed by ‘national system employers’, including ‘constitutional corporations’.²⁴⁹ In short, most employees are covered by the *FW Act*.²⁵⁰ Most importantly, it establishes a safety net comprised of the NES, modern awards and enterprise agreements.²⁵¹

The interrelationship between the sources of these rights and duties, and their related enforcement mechanisms, is elaborate.²⁵² Despite this, the following Part identifies two potential solutions. First, the NES may be amended to include paid leave provisions for fertility-related treatment. Second, alternative employment law mechanisms – namely, modern awards and enterprise agreements – may also secure paid leave for women undergoing IVF.

A Why Paid Leave?

Paid leave provisions, as opposed to other protections, are preferable. Most practically, they create the opportunity for women to retain their income. In contrast, anti-discrimination frameworks do not. The costs of IVF accentuate the importance of this distinction. Additionally, acknowledging the gender-based inequality of Australia’s economic structures and policies – whether in society or the workplace – paid leave provisions ensure that women are not economically disadvantaged by undergoing IVF. Second, the ‘prescriptive’ nature of leave entitlements are more ‘tangible’ than other solutions. They allow individuals to recognise and utilise their right with certainty, rather than having to ‘argue and

246 Pittard and Naughton, above n 210, 55.

247 Carolyn Penfold, ‘Women and Labour Law’ in Patricia Eastal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 289, 291; Stewart et al, above n 102, 276.

248 *Family Violence Legal Frameworks Report*, above n 212, 385.

249 *FW Act* ss 13–14, 30C–30D, 30M–30N; *Australian Constitution* s 51(xx); Pittard and Naughton, above n 210, 574.

250 *FW Act* ss 67, 86, 95, 329, 333; *Fair Work Regulations 2009* (Cth) reg 2.13 (*‘FW Regulations’*); Penfold, above n 247, 293, 301. As highlighted, high income earners, casual employees or those not meeting length of service requirements, as well as franchisees and independent contractors, are excluded. Various groupings of public servants are also excluded: *Family Violence Legal Frameworks Report*, above n 212, 387. These stakeholders are outside the scope of analysis of this article.

251 *FW Act* s 3(b); *Family Violence Legal Frameworks Report*, above n 212, 385; Penfold, above n 247, 294.

252 Pittard and Naughton, above n 210, 55; Penfold, above n 247, 291.

fight for [it].²⁵³ Third, acknowledging the deficiencies of anti-discrimination law, paid leave provisions are more precise. Whereas anti-discrimination protections require identifying and navigating complex human behaviour, paid leave provisions are less vague. They are either available, or not. Although independent flexible working arrangements may provide an alternative solution, they are only accessible by parents or those with parental responsibility.²⁵⁴ Current ambiguity regarding the availability of their enforcement mechanisms undermines their utility.²⁵⁵ As a consequence, the relevant inquiry then requires evaluating which employment law mechanism most effectively secures paid IVF leave – the NES, modern awards, or enterprise agreements.²⁵⁶

B Recommendations for Reform

1 National Employment Standards

The *FW Act* provides employees with a safety net of minimum terms and conditions by requiring national system employers to comply with a set of 10 national employment standards.²⁵⁷ The NES act as an absolute safety net, guaranteeing crucial minimum standards which cannot be negotiated or ‘traded away’ by modern awards, enterprise agreements, or employment contracts.²⁵⁸ Consequently, by amending employees’ most substantive and fundamental workplace entitlements, a solution which refines the NES has various advantages. As Penfold has stated,

[given] that 85 [per cent] and more of Australian employees are or will be covered by the [*FW Act*], these provisions set standards for the vast majority of women [who] do not rely on the strength of the industry in which a woman works, or her ability to negotiate individually or collectively.²⁵⁹

If a subsequent modern award, enterprise agreement or employment contract is entered into, the creation of a broad-based minimum standard in the NES provides a higher platform to negotiate from.²⁶⁰ Further, the NES ensure ‘fairness and consistency in access to the entitlements and, ideally, to consistent decision

253 Interview with Anonymous (Melbourne, 29 June 2017).

254 *FW Act* ss 61(2)(b), 65; Fair Work Ombudsman, ‘Fair Work Information Statement’ (Information Statement, July 2017) 1 (‘*Fair Work Information Statement*’); Owens, Riley and Murray, above n 102, 328.

255 Owens, Riley and Murray, above n 102, 328–9; Pocock, Charlesworth and Chapman, above n 245, 602; *contra* Anna Chapman, ‘Is the Right to Request Flexibility under the *Fair Work Act* Enforceable?’ (2013) 26 *Australian Journal of Labour Law* 118, 120. From a practical perspective, women in domestic violence contexts have raised concerns regarding the effectiveness of individual flexibility arrangements, highlighting issues of unequal bargaining power, the assumed level of confidence, knowledge and skill required to negotiate an agreement, and the limited likelihood of women in these scenarios successfully negotiating an agreement: *Family Violence Legal Frameworks Report*, above n 112, 395.

256 Paid leave provisions may also be included via individual employment contracts or workplace policies. However, these options are outside the scope of this article. See generally Stewart et al, above n 102, 276–89; Pittard and Naughton, above n 210, 47.

257 *FW Act* s 3(b), pt 2-2; Pittard and Naughton, above n 210, 562; *Fair Work Information Statement*, above n 254, 1; Sappideen, O’Grady and Riley, above n 102, 483.

258 *FW Act* s 55; Pittard and Naughton, above n 210, 562, 570, 576; Sappideen, O’Grady and Riley, above n 102, 483; Penfold, above n 247, 293.

259 Penfold, above n 247, 295.

260 *Ibid.*

making and employer responses' in all workplaces throughout Australia.²⁶¹ Thus, amending the NES provides the strongest solution to the uncertainty and accentuated vulnerability that working women encounter whilst receiving IVF treatment.

The NES may be refined in two ways. A separate leave provision, allowing women undergoing fertility treatment to take paid leave, could be introduced. Alternatively, the pre-existing personal leave provisions could be clarified or reformed explicitly to include IVF treatment. To facilitate the latter option, the provision would need to be amended to include the elements of IVF treatment which do not constitute personal illness or injury. This proposal has been previously recommended by the AHRC.²⁶² However, this approach creates more problems than it solves. As identified, women undergoing IVF are not sick.²⁶³ Further, particularly in instances when a woman's first IVF treatment cycle is unsuccessful, women may exhaust their leave entitlements.²⁶⁴ From a theoretical perspective, it is also inherently problematic to conflate pregnancy with illness or injury – doing so inadvertently implies pregnancy is a sickness or disease which requires a cure. Thus, whilst incorporating access to IVF within personal leave provisions creates positive effects, even greater are the negative ones. Consequently, the NES should be amended to introduce a separate paid leave provision for women receiving IVF.

2 *Modern Awards and Enterprise Agreements*

An alternative would be to include paid leave provisions for women undergoing IVF in modern awards and enterprise agreements.²⁶⁵ Operating as a hierarchy of protections, modern awards and enterprise agreements improve the statutory safety net of minimum conditions for employees by building on those contained in the NES.²⁶⁶ Awards provide an additional and broader range of terms and conditions for employees on an industry-by-industry basis.²⁶⁷ Providing additional protection, the collective bargaining system created by the *FW Act* permits employers and employees to make binding enterprise agreements in excess of an award.²⁶⁸ Enterprise agreements 'often elevate employees' terms and conditions substantially above those which would otherwise apply, often in areas of particular benefit to women'.²⁶⁹

261 *Family Violence Legal Frameworks Report*, above n 212, 413.

262 *Supporting Working Parents Report*, above n 67, 25, 163.

263 See above nn 107–9.

264 See above nn 125–7.

265 The inclusion of terms in modern awards is governed by the *FW Act* pt 2-3. Specifically, s 139(1)(h) allows for terms regarding 'leave, leave loadings and arrangements for taking leave': Sappideen, O'Grady and Riley, above n 102, 485. Amendments to enterprise agreements must pass the 'better off overall test': *FW Act* s 193.

266 Stewart et al, above n 102, 290; Pittard and Naughton, above n 210, 570; Penfold, above n 247, 297.

267 Sappideen, O'Grady and Riley, above n 102, 484–5, 576; Stewart et al, above n 102, 290; Pittard and Naughton, above n 210, 542, 570. A discussion exploring the development of Australia's modern awards system, including its role and content, is available: at 543–56, 558–70.

268 *FW Act* s 57; Pittard and Naughton, above n 210, 543; Sappideen, O'Grady and Riley, above n 102, 6, 12; Stewart et al, above n 102, 344.

269 Penfold, above n 247, 297.

Modern awards and enterprise agreements share similar benefits and disadvantages. They both provide legislative-based protections that are less constrained than the NES.²⁷⁰ They can also both be adjusted more easily.²⁷¹ However, when compared with the NES, they do not provide women undergoing IVF with the same level of protection. For instance, awards exclude ‘high income’ employees whereas the NES apply universally.²⁷² Further, only 35 per cent of women rely solely on an award.²⁷³ Similarly, enterprise agreements do not apply to a large proportion of the Australian workforce.²⁷⁴ Moreover, it is unclear whether awards or enterprise agreements are automatically incorporated into employment contracts.²⁷⁵ Additionally, ‘most collective agreements are bargained via trade unions, which have traditionally been male-dominated and ... more orientated to push a male agenda’.²⁷⁶ Concerns that bargaining items benefitting vulnerable employees are excluded from mainstream bargaining processes have been flagged in domestic violence leave contexts.²⁷⁷ Modern awards and enterprise agreements offer a piecemeal approach, only capable of improving protections on an award-by-award or agreement-by-agreement basis. Therefore, the NES are preferable.

C Recent Developments – Domestic Violence Leave

1 *Analogy to Domestic Violence*

An acknowledgment of the developments regarding domestic violence leave may either hinder or help this reasoning. Women experiencing domestic violence typically encounter many of the same harms as those undergoing IVF.²⁷⁸ For instance, victims of family violence frequently exhaust their personal leave entitlements when attending to ancillary matters such as court appearances.²⁷⁹ In the same way women often require financial support during IVF, employment

270 Pittard and Naughton, above n 210, 543.

271 Stewart et al, above n 102, 290.

272 *FW Act* ss 47(2), 329, 333; *FW Regulations* reg 2.13; *Fair Work Information Statement*, above n 254, 1; Sappideen, O’Grady and Riley, above n 102, 481; Pittard and Naughton, above n 210, 543.

273 Penfold, above n 247, 296.

274 *Family Violence Legal Frameworks Report*, above n 212, 397.

275 Stewart et al, above n 102, 290–1; Sappideen, O’Grady and Riley, above n 102, 506–12.

276 Penfold, above n 247, 298. This concern was explicitly raised by an interviewee – ‘[t]he reality is that with a large cohort of male organisers who are not necessarily interested in these issues, [an IVF leave clause] is not necessarily getting a run on [the] board’: Interview with Anonymous (Melbourne, 27 June 2017).

277 *Family Violence Legal Frameworks Report*, above n 212, 397. Various factors affect equality bargaining: Marian Baird, Ludo McFerran and Ingrid Wright, ‘An Equality Bargaining Breakthrough: Paid Domestic Violence Leave’ (2014) 56 *Journal of Industrial Relations* 190.

278 See generally *Family Violence Legal Frameworks Report*, above n 212; Australian Law Reform Commission, *Family Violence – A National Legal Response*, Final Report No 114 (2010) <<https://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>>; National Council to Reduce Violence against Women and Their Children, ‘Time for Action’ (Report, March 2009) <http://www.nasav.org.au/National_Plan/The_Plan.pdf>.

279 *Family Violence Legal Frameworks Report*, above n 212, 400; Louise Naughton, ‘A Work in Progress: The Uptake of Family Violence Clauses in Enterprise Agreements in Victoria’ (Report to the Victorian Trades Hall Council, December 2015) 4.

provides a ‘vital pathway for women to leave a violent relationship’.²⁸⁰ Moreover, domestic violence can affect a woman’s health and thus impair her work performance, similarly to the effects of IVF treatment.²⁸¹ Most importantly, in the same way no woman chooses to be infertile, no woman chooses to be in a violent relationship. Consequently, just as an absence of paid domestic violence leave inadvertently disincentivises women from leaving violent relationships, an absence of paid leave provisions in IVF contexts similarly penalises women for having children. Accordingly, both groups of women can experience uncertainty regarding their employment, exacerbated by the inadequacies of current legal and workplace frameworks. This analogy potentially hinders the introduction of IVF-related paid leave provisions in Australia, given the Full Bench of the Fair Work Commission recently rejected the Australia Council of Trade Unions’ application to include a clause in all modern awards allowing 10 days of paid domestic violence leave.²⁸²

2 FWC Full Bench Domestic Violence Leave Decision

(a) Analysis

The Full Bench, whilst acknowledging the importance of workplace responses to domestic violence as a ‘significant community issue’, stated that ‘the provision of paid leave will increase costs to employers and that given the lack of data, the impact on employers of that increase in costs is difficult to assess’.²⁸³ Thus, the application was dismissed – the provisions deemed ‘not necessary’ – albeit with the proviso that future applications may be more successful.²⁸⁴ The decision resembles a lost opportunity to afford women, both in domestic violence contexts and more broadly, the legal protection they deserve.

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- 280 Australian Domestic and Family Violence Clearinghouse, ‘Domestic Violence and the Workplace: Employee, Employer and Union Resources’ (Resource Package, July 2012) <http://www.csu.edu.au/_data/assets/pdf_file/0009/954540/policies_and_procedures.pdf> 7 (‘*Domestic Violence Resource Package*’).
- 281 Ibid 3, 6–7; Ludo McFerran, ‘Gendered Violence & Work: Key Findings – Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey’ (Research Report Summary, Gendered Violence Research Network, October 2011) <https://www.arts.unsw.edu.au/media/FASSFile/Key_Findings_National_Domestic_Violence_and_the_Workplace_Survey_2011.pdf> 2; Ludo McFerran, Natasha Cortis and Tahlia Trijbetz, ‘Domestic and Family Violence Clauses in Your Workplace: Implementation and Good Practice’ (Draft Report, Social Policy Research Centre & Centre for Gender Related Violence Studies, June 2013) <https://www.arts.unsw.edu.au/media/FASSFile/Domestic_and_Family_Violence_Clauses_in_your_Workplace_Implementation_and_good_practice.pdf> 3–7.
- 282 *4 Yearly Review of Modern Awards – Family & Domestic Violence Leave Clause (AM2015/1)* (2017) 267 IR 57, 59 [6] (The Commission) (‘*FWCFB Domestic Violence Leave Decision*’); Elise Paynter, ‘Ch-Ch-Ch-Changes: FWC Announces Casual Conversation Clauses in Modern Awards, and Domestic Violence Leave is Next’ on Maddocks, *Reading Room* (14 July 2017) <<https://www.maddocks.com.au/ch-ch-ch-changes-fwc-announces-casual-conversion-clauses-modern-awards-domestic-violence-leave-next/>>.
- 283 *FWCFB Domestic Violence Leave Decision* (2017) 267 IR 57, 74 [98], 76 [116] (The Commission); Paynter, above n 282.
- 284 *FWCFB Domestic Violence Leave Decision* (2017) 267 IR 57, 59 [6], 74 [104] (The Commission). The Fair Work Commission has since published a background paper to assist parties in preparing submissions in reply: Fair Work Commission, *4 Yearly Review of Modern Awards – Family and Domestic Violence, Background Paper AM2015/1* (15 September 2017) <<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20151-paper-150917.pdf>>.

Accordingly, proposals to introduce paid IVF leave provisions to modern awards, let alone the NES, must proceed with caution.

(b) Consideration

It could be argued that the Full Bench's decision was incorrectly decided. Evidence regarding the economic benefits for both employees and employers exists, indicating that the introduction of paid leave provisions for women experiencing domestic violence would translate to a 0.02 per cent increment to pay rolls.²⁸⁵ The Full Bench's reasoning also, consciously or not, ignored broader economic inequalities between men and women in the workplace and society more generally. Thus, the decision appears to have afforded greater weighting to employers' interests than the health and wellbeing of women. Such approaches are to be condemned.

(c) Distinction

More effectively, an application for IVF-related paid leave could be distinguished from the Full Bench's domestic violence leave decision. This could be achieved by providing an economic rationalisation which demonstrates that the financial benefits of providing paid leave in IVF contexts are greater than alleviating the harms of women encountering domestic violence. For example, research from the United Kingdom demonstrates that the long-term net tax contribution from an IVF-conceived child significantly outweighs the state's costs of providing treatment.²⁸⁶ Whilst this hypothesis does not seamlessly translate into the Australian economy, it demonstrates that IVF can be 'treated as an investment in human capital with future long-term and revenue implications for the state'.²⁸⁷ Therefore, clarifying and thus promoting women's access to IVF helps create otherwise unavailable tax revenue, whereas paid domestic violence leave does not. Regardless, the most practical solution would be to ensure that any proposals regarding paid IVF leave contain sufficiently clear evidence demonstrating that employers, as well as women, are economically better off. Further research is required.

3 Related Developments regarding Enterprise Agreements

Meanwhile, enterprise agreements, whilst imperfect, offer a temporary solution. In domestic violence contexts, enterprise agreements have provided a pragmatic stopgap. Currently, over 1.6 million workers across Australia are covered by enterprise agreements containing paid domestic violence leave

285 Jim Stanford, 'Economic Aspects of Paid Violence Leave Provisions' (Briefing Paper, Centre for Future Work, December 2016) <<http://www.tai.org.au/content/economic-aspects-paid-domestic-violence-leave-provisions>> 3.

286 M Connolly, S Hoorens and W Ledger, 'Money in – Babies out: Assessing the Long-Term Economic Impact of IVF-Conceived Children' (2008) *Journal of Medical Ethics* 653, 653. At the time of writing, the authors highlighted that 'for every £13 000 invested (the average amount required to conceive an IVF child), the return to the state would be £147 000'.

287 Ibid.

clauses.²⁸⁸ Thus, enterprise agreements may present a similar opportunity for women undergoing IVF treatment to access paid leave. The development of this measure is currently in its preliminary stages. In Victoria, two entities have recently incorporated paid leave provisions for women undergoing IVF into their enterprise agreements – the Police Association of Victoria and Alpine Shire Council.²⁸⁹ Negotiations are currently underway with Towong Shire Council and Greater Shepparton City Council.²⁹⁰ These developments are promising. In aspiring to achieve similar outcomes to the implementation of domestic violence leave clauses, a practical solution would be for the FWO to develop a basic guide to negotiating such clauses.²⁹¹

IX OVERALL RATIONALISATION

A Women and Their Partners

A further rationalisation of paid leave provisions, whether contained in the NES, modern awards or enterprise agreements, can be approached with reference to this discussion's key stakeholders. From the perspective of working women, the introduction of paid leave provisions provides a solution to the 'harms' identified above; namely, it provides certainty whilst minimising women's potential vulnerability in the workplace. It also remedies the 'child penalty' that women incur for having families.²⁹² It is also important to acknowledge that women rarely go through the IVF experience alone. As the primary support person, a partner is required to accompany the woman home after the more invasive IVF procedures.²⁹³ They also provide emotional and psychological support – '[having] someone there as a pillar of support is really important'.²⁹⁴ The opportunity to support the woman undergoing IVF is also invaluable for the partner.²⁹⁵ However, the partners of women undergoing IVF often report difficulty attending IVF-related appointments.²⁹⁶ Thus, paid leave provisions which support both women and their partners should be welcomed.

288 McFerran, Cortis and Trijbetz, above n 281, 4; Australian Council of Trade Unions, 'Paid Family and Domestic Leave and Protections Claim' (Fact Sheet, June 2015).

289 *Victoria Police (Police Officers (Excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015 (AG2016/2526)* [2016] FWCA 1745, 94 [147] (Commissioner Lee); *Alpine Shire Council Enterprise Agreement 2016 (AG2016/6811)* [2016] FWCA 8859, 26 [32.2] (Commissioner Lee).

290 Email from Anonymous to Thomas Hvala, 1 August 2017.

291 This has been recommended by the Australian Law Reform Commission in relation to domestic violence leave: *Family Violence Legal Frameworks Report*, above n 212, 37, 386.

292 Mooney Cotter, above n 135, 16.

293 Interview with Anonymous (Melbourne, 21 July 2017).

294 *Ibid.*

295 *Pregnant and Productive Report*, above n 133, 171.

296 Interview with Anonymous (Melbourne, 18 July 2017).

B Employers and the Economy

The protection of employees' rights must be balanced with the needs of Australian businesses and the broader Australian economy.²⁹⁷ The balance is supposedly dichotomous – '[changes] to minimum employment standards can afford a benefit to employees if they are increased, in which case they would impose a cost on business that has to pay for the increased standard'.²⁹⁸ This concern is important. Ultimately, the 'costs' of affording women paid leave entitlements will be largely incurred by businesses. Whilst there is no available IVF-specific data regarding these considerations, it is undeniable that the economic impact on businesses if IVF paid leave provisions were introduced would be significant.

However, if providing certainty in the workplace were to improve women's workplace experiences and productivity, there is longstanding evidence that suggests that the advantages of affording women paid leave during IVF would outweigh its disadvantages. For example, 'employees in workplaces that have access to [well-articulated], comprehensive frameworks for pregnancy ... [feel] a sense of security, reduced anxiety and [are] better placed to plan for their future'.²⁹⁹ Increasing women's workplace participation also 'generates tangible benefits in terms of better efficiency, performance, and innovation; increased access to the female talent pool; and improvements to organisation reputation' as well as 'increasing the retention of women'.³⁰⁰ Confirmed by interviewees, these ideas extend to IVF-related contexts.³⁰¹ More broadly, there is clear evidence that supporting the participation of women in the workforce has substantial benefits to Australia's economy.³⁰² For example, the Grattan Institute has highlighted that if women's workforce participation increased by six per cent, Australia's gross domestic product would grow by \$25 billion.³⁰³ Thus, whilst further inquiries are necessary, the economic advantages for both businesses and Australia are worth exploring.

X CONCLUSION

Providing a platform for further research, this article concludes by noting some practical recommendations worthy of additional consideration. If a paid IVF leave clause were introduced into the NES, it must be universally available, regardless of a woman's sexuality, marital status, or cause of infertility. This approach avoids inadvertently prioritising sexual preferences or types of

297 *FW Act* ss 3(a)–(g).

298 Explanatory Memorandum, Fair Work Bill 2009 (Cth) r 31.

299 *Pregnant and Productive Report*, above n 133, 17.

300 *Supporting Working Parents Report*, above n 67, 30.

301 Interview with Anonymous (Melbourne, 17 July 2017); Interview with Anonymous (Melbourne, 18 July 2017); Interview with Anonymous (Melbourne, 21 July 2017).

302 *Conversation in Gender Equality Report*, above n 147, 26; *Supporting Working Parents Report*, above n 67, 21.

303 John Daley, 'Game-Changers: Economic Reform Priorities for Australia' (Report, Grattan Institute, June 2012) 39; *Supporting Working Parents Report*, above n 67, 29.

infertility over others. Further, IVF leave should cover all IVF-related appointments and treatments to avoid any ambiguity. Moreover, additional research must be conducted to equitably and accurately determine the quantum of leave needed, and its unit of measurement – eg, whether per cycle or financial year. Additionally, consideration must be given to how the verification of entitlement shall be ascertained. Other practical considerations for employers include maintaining confidentiality, organisational process and staff training.³⁰⁴ Most importantly however, recognising that social progress is often cumbersome, is the need for ‘robust, [multifaceted] and integrated policy reform’ which prioritises increasing awareness as much as amending legislation.³⁰⁵ Last, proactive workplaces already amenable to supporting their employees should revise their employment policies.³⁰⁶

Amending the NES to introduce paid leave provisions for working women undergoing IVF is required. No other recommendation, whether in anti-discrimination or employment law contexts, is as persuasive. In one sense, amending the NES would provide women with certainty during an otherwise uncertain process. In another, it would pre-empt broader social developments which, if left unanswered, indicate that the potential implications will only become worse. In any case, heeding the call for immediate certainty, modern awards, enterprise agreements, and workplace policies may provide a practical, albeit less effective, solution. Regardless, additional research is necessary. Ultimately, the introduction of paid leave provisions for IVF treatment is ambitious, but it has to be.

304 Interview with Anonymous (Melbourne, 27 June 2017). These considerations were suggested in domestic violence leave contexts: McFerran, Cortis and Trijibetz, above n 281, 13–15.

305 Pocock, Charlesworth and Chapman, above n 245, 594.

306 Mooney Cotter, above n 135, 363. Such approaches have been effectively used in domestic violence contexts: see *Domestic Violence Resource Package*, above n 280, 10–12. Note, policies should be seen as a temporary solution as they may not form part of a binding employment contract: see, eg, Pittard and Naughton, above n 210, 57; Stewart et al, above n 102, 282–9.