SECURING UPWARD CAREER MOBILITY FOR PROFESSIONAL WOMEN WITH CAREGIVING RESPONSIBILITIES? A CRITIQUE OF THE UK'S RIGHT TO REQUEST FLEXIBLE WORKING.

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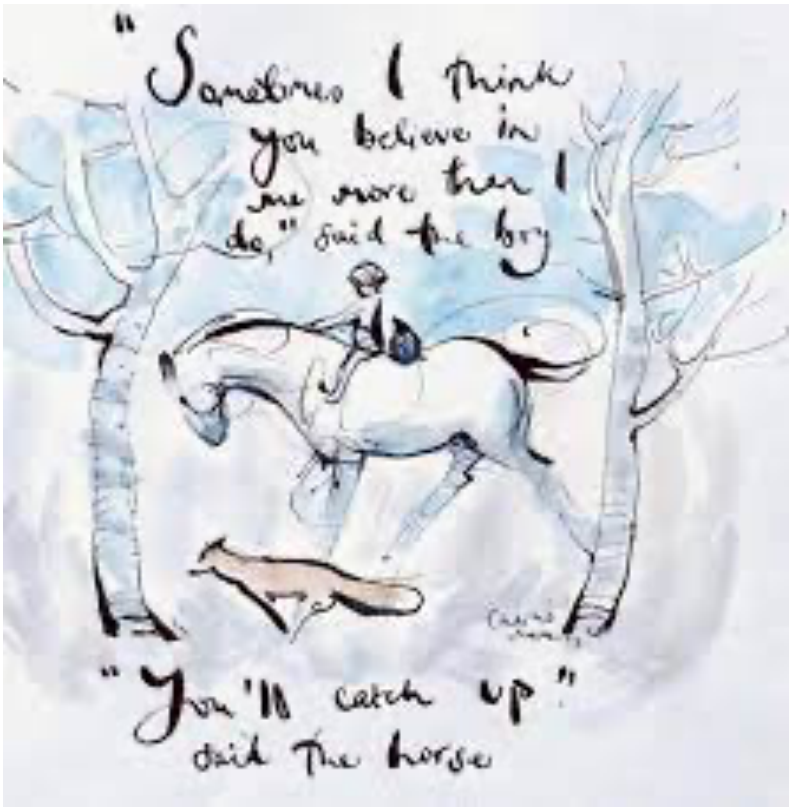

Figure 1 The Boy, the Mole, the Fox and the Horse by Charlie Mackesy.

To my dad…I am catching up. Wish you were here to see it. Always in my heart.

ABSTRACT

This thesis is an investigation into the role the law can play in addressing gender imbalance in the higher echelons of the employment sphere. The purpose of my doctrinal research is to contribute to a debate on the stymied headway in professional female career progression. By utilising Fineman's vulnerability theory to critique the RTR provision in conjunction with Acker's inequality regime to dissect the employment landscape women compete on, an original angle is developed which enhances our understanding of gender inequality in the workplace.

In 2014, The Children and Families Act 2014 extended the right to request (RTR) to allow all employees to apply for flexible working structures; this extension of the legislation had, as is argued in this thesis, the potential to challenge normative unencumbered working structures, but it has not been successful in achieving this goal. The thesis investigates the reasons for the RTR's limited transformative impact with reference to specifically professional female caregiver's career progression. This analysis is conducted by scrutinising the content and operation of the provisions contained within the RTR as well as the workplaces upon which it is imposed. The RTR is critiqued from the perspective of its inability to challenge gender inequality and the unencumbered norm as well as address the needs of caregivers. Against this backdrop, an investigation of the employment landscape female caregivers compete within, provides useful insights into their stymied career progression. Instead of a set of discernible obstacles, there are inherent inequalities imbedded in workplace structures, processes and practices which perpetuate, instead of challenge, the already imbalanced employment gender slate. Bearing in mind the operation of this unequal employment landscape, an 'ideal' RTR is proposed - one with the core aim of supporting the career progression of professional female caregivers. In addition, by examining similar flexible working legislative regimes in Australia, New Zealand and the Netherlands, areas of potential legislative reform within the UK's RTR are identified and examined. Having highlighted the shortcomings of family-friendly laws, and the RTR specifically, to advance female career progression of professional women with caregiving responsibilities, an investigation into how alternative measures such as positive action could potentially fill the gaps in addressing the various axes of workplace inequalities, is conducted.

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CHAPTER 1 – INTRODUCTION

1.1 Introduction

This thesis explores the scope, operation and potential impact of the right to request flexible working legislation[1] ('RTR') as a means of aiding the career advancement of professional women with caregiving responsibilities. I argue that the extension of the RTR to all employees had the potential to achieve this goal but has not been successful. The reason for the law's limited impact in this regard is, first and foremost, situated in the way the problem it is trying to solve is demarcated; instead of a set of well-defined obstacles to be overcome, the workplace is permeated with taken-for-granted structures and policies which are designed to sustain the status quo. Generally, the porous regulatory framework within which the RTR is situated inhibits transformation, but more specifically the design and operation of the RTR does not provide an effective legislative framework to facilitate female career progression. This thesis provides a critique of the RTR's use as a tool to address the unequal gendered employment landscape within which female professional employees with caregiving responsibilities are attempting to compete. It investigates and identifies amendments to the law, as well as other statutory mechanisms, which are more likely to accelerate the career progression of this group of women.

The chapter is divided into four sections. Firstly, some of the terminology used throughout the thesis is identified and explained to allow for uniformity in the application of terms. Then, the historical, employment and legislative contexts within which my research is situated are provided. This includes an overview of the relevant historical background context with reference to the development of female employment trends, a snapshot of the current state of affairs for the female professional workforce, and finally, a summary of the framework of family-friendly regulatory measures within which the RTR operates. In the latter part of the chapter, the methodology and scope of the thesis are outlined, supplemented by a chapter outline which demarcates the roadmap for the rest of this thesis.

1.2 Terminology

[1] The Children and Families Act 2014.

In order to avoid repetition and allow for uniform understanding of important notions, this section provides definitions of the following key concepts: flexibility; the unencumbered worker and professional women with caregiving responsibilities.

1.2.1 Flexibility

The kind of flexibility envisioned by the RTR legislation allows mainly for a change in hours, times and working locations.[2] Examples of these types of flexible working structures include part-time working, staggered working hours, compressed working weeks, term-time only working, annualised hours schemes and home working. Flexible working arrangements in the context of this thesis refer to structured working conditions that are not in line with a more traditional 8am – 5pm day's work in an office setting. However, this does not include shift work or other irregular working structures, such as zero-hour contracts. Although the argument presented in this thesis is that the flexibility awarded to employees is often employer-centred, there is an element of choice in the flexible working structures of employees under the RTR legislation; this is not usually the case for shift workers for example.

1.2.2 The unencumbered

Berns described the unencumbered citizen as follows:

> The unencumbered citizen is able to access the 'infrastructure' required to participate fully and as an equal in the public sphere. Thus, the unencumbered citizen has a wife, or behaves as if she does. …If she has a family, she relies upon others for care work and all of the other services that facilitate single-minded concentration upon the tasks at hand.[3]

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[2] Employment Act 2002 (EA 2002), s 80F (1) (a)(i)-(iv).

[3] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (1st edn, London Routledge 2002) 43. Conaghan describes the workplace as a place historically designed for a worker 'who is (or was) biographically and empirically male: the full time, long term, generally unionised worker with no domestic responsibilities beyond that of financial provision.' Joanne Conaghan, 'Feminism and Labour Law: Contesting the Terrain' in Anne

This citizen, therefore, is not necessarily a man but could be any employee who is able to perform economic labour in an unfettered manner due to the fact that they do not 'sustain caring relationships which affect [their] capacity for earnings and [their] (paid) working hours'.[4] The extent to which an employee is free to work in this manner could therefore be influenced by their access to full-time childcare (e.g., nanny) or their own relationship status, usually excluding single parents in its operation. The expectation that mothers are still the primary caregivers, and are therefore not able to adhere to the unencumbered standard, amplifies the complexity of this construction; this perception often prevails regardless of whether the female employee has children, or intends to have children at any point in the future.[5] So, whether women choose to prioritise family commitments over work or not, the assumption that they will do so is made regardless.[6] The reverse belief, that men *are* able to operate without regard to any responsibilities outside the employment sphere, also adds to the 'multi-tiered hierarchy'[7] which generally benefits all male employees due to their high level of perceived 'unencumberdness'.[8] Berns calls for employment measures which allow both parents to participate in economic and caring labour which necessitates a rethink of the notion that 'the ideal worker is an economic parent and not a social parent'.[9] The normative perceptions around

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Morris and Thérèse O'Donnell, *Feminist Perspectives on Employment Law* (Routledge 1999) 26.

[4] London School of Economics, Knowledge Exchange, 'Confronting Gender Inequality: Findings from the LSA Commission on Gender' (Gender Institute, 2016) 39.

[5] '…the stigma of 'motherhood' affects all women...' Judy Wajcman, *Managing Like a Man: Women and Men in Corporate Management* (Polity Press 1998) 40. The normative narratives in which 'womanhood and motherhood are considered to be synonymous' are explored by Donath. See Orna Donath, 'Regretting Motherhood: A Sociopolitical Analysis' (2015) 40 Signs Journal of Women in Culture and Society 343, 343. '…the mere potential of the maternal body for reproduction is sufficient to stall career advancement.' See Caroline Gatrell, Cary I Cooper and Ellen Ernst Kossek, 'Maternal bodies as taboo at work: new perspectives on the marginalizing of senior-level women in organizations' (2017) 31 Academy of Management Perspectives 239, 248.

[6] Mark Evans, Meredith Edwards, Bill Burmester and Deborah May, '"Not yet 50/50" – Barriers to the Progress of Senior Women in the Australian Public Service' (2014) 73 Australian Journal of Public Administration 501.

[7] Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge-Cavendish 2009) 18.

[8] Although they might reap the rewards in the workplace for operating in an unfettered manner, the unsociable hours associated with this type of work do impact negatively on their ability to interact with their spouses and children in a meaningful way; Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 3).

[9] ibid 195.

the nurturing capabilities of mothers reinforce their role as 'social parents', whilst 'social fatherhood', which entails 'caring for children as opposed to caring about them', is incongruous with the unencumbered norm.[10]

The level of 'unencumberdness' can vary between different parameters; at a minimum the worker is usually able to perform full-time hours without interruption from outside responsibilities, whilst the most ideal worker is available for unlimited overtime hours in addition to their contracted full-time hours. The RTR legislation allows some employees to opt out of the 'best/ideal' system of working, but the extent to which employees are unencumbered, or able to appear unencumbered in the workplace, impacts on the way they are perceived by employers. Berns bases the foundations of disadvantage on the persistence of the unencumbered norm, as well as the breadwinner homemaker bargain which encompasses the sexual contract.[11]

It is, however, important to distinguish between the concepts of the unencumbered norm and the ideal worker. Whilst 'work is organized on the model of the unencumbered (white) man' and all employees are measured against this standard, this norm does not necessarily constitute the ideal worker.[12] The ideal worker norm is, however, a fluid construction which could mean submissive employees willingly working for a low wage in one context,[13] or 'rational, strong leaders who prioritizes work as evidenced by long hours and visibility' in another.[14] The premise of this thesis is based on the extent to which the workplace is organised around the

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[10] ibid 196. See also Smart on the 'care for' and 'care about' discourses in child custody scenarios, Carol Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 Journal of Law and Society 485.

[11] Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 3) 198.

[12] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (2006) 20 Gender and Society 441, 450.

[13] Leslie Salzinger, *Genders in Production: Making Workers in Mexico's Global Factories* (University of California Press 2003).

[14] Krista M Brumley, 'The Gender Ideal Worker Narrative: Professional Women's and Men's Work Experiences in the New Economy at a Mexican Company' (2014) 28 Gender & Society 799, 817. See also Williams who describes the ideal worker as someone 'who works full time (and often overtime) and who can move if the job "requires it"'; Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press 2001) 5.

employee with limited responsibilities in the domestic arena; references to the ideal worker in the context of this thesis therefore imply the unencumbered *professional* worker.

The prevalence of the unencumbered norm is evident in various elements of the workplace. Sometimes its prominence is disguised, and non-conformation labelled as something else; 'lack of ambition', 'not a good fit' and 'lifestyle choices'[15] are a few that come to mind. A deconstruction of this unencumbered worker model, which is done throughout this thesis, makes questions of inclusion and exclusion more visible, which is particularly prevalent among women who usually operate on the periphery of this norm.

1.2.3 Professional worker with caregiving responsibilities

This thesis is particularly concerned with the career progression of a specific group: 'professional' women with caregiving responsibilities. The terms professional and senior women are used interchangeably, and the classification employed by the Office for National Statistics is utilised to define this category of women. Within the Standard Occupational Classification Hierarchy Major Groups 1, Managers, Directors and Senior Officials and 2, Professional Occupations, are included in the scope of 'professional women' for the purpose of this thesis.[16] This 'professional' group has been selected for three reasons. The first relates to the focus on the gender composition leadership numbers of FTSE companies prevalent in the Lord Davies and other subsequent government-led reports.[17] Work/life measures, such as working flexibly, are often referenced in these documents as a mechanism to improve female

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[15] Catherine Hakim, 'Competing Family Models, Competing Social Policies' 2003 (64) Family Matters 51, 59. See also a critique of Hakim's arguments in Jay Ginn, Sara Arber, Julia Brannen, Angela Dale, Shirley Dex, Peter Elias, Peter Moss, Jan Pahl, Ceridwen Roberts and Jill Rubery, 'Feminist Fallacies: A Reply to Hakim on Women's Employment' (1996) 47 The British Journal of Sociology 167.

[16] https://onsdigital.github.io/dp-classification-tools/standard-occupational-classification/ONS_SOC_hierarchy_view.html accessed 2 April 2021.

[17] Davies Review, 'Women on Boards' (February 2011). Women on Boards Davies Review, 'Improving the Gender Balance on British Boards: Five Year Summary' (October 2015). Hampton-Alexander Review, 'FTSE Women Leaders: Improving Gender Balance in FTSE Leadership' (November 2016). Hampton-Alexander Review, 'FTSE Women Leaders: Improving Gender Balance in FTSE Leadership' (November 2017). Hampton-Alexander Review, 'FTSE Women Leaders: Improving Gender Balance in FTSE Leadership' (November 2018). Hampton-Alexander Review, 'FTSE Women Leaders: Improving gender balance – 5 year summary report' (February 2021).

representation in the higher echelons of organisations. The effectiveness of these measures to genuinely affect change, specifically in the professional realm, is therefore important to explore. The second reason for narrowing the scope of this thesis to *professional* women relates to the manner in which unequal organisational practices impact differently upon the various sectors/levels of the employment realm.[18] The unequal employment landscape, explored in Chapter 4, focusses specifically on the manner in which certain organisational structures and processes disproportionately impact on the career progression of senior women, a theme explored throughout this thesis. The third reason relates to the importance of the unencumbered norm to the analysis conducted here. As indicated in the discussion above, the 'ideal worker', for the purpose of this thesis, is an employee who can operate as if they have no responsibilities outside of the workplace. In the higher spheres of employment, commitment is often attributed to this ubiquitous always available employee and awarded disproportionately. The prominence and impact of the unencumbered ideal, which usually excludes caregiving in its operation, is therefore particularly relevant for the *professional* female workforce who are less likely to adhere to this norm due to their caregiving roles.

Furthermore, this work is specifically concerned with women with *caregiving* responsibilities as it is this factor that often inhibits their ability to conform to the 'desired' unencumbered norm which leads to career penalties. Care work includes 'domestic/private and unpaid work that involves taking care of others – usually family members – including children, older people in need of care and those who are disabled or sick'.[19] Caracciolo di Torella and Masselot provide a comprehensive notion of the caring relationship by focussing on the caregivers as well as the people for whom they care. It is specifically the notions of 'constant and on-going responsibilities' and 'absence of choice' in their construction of the caring relationship which is useful for the analysis conducted in this investigation.[20] Women are still more likely to care

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[18] This is in addition to the intersectionality of issues faced by different minority groups in the workplace as 'social outcomes such as gendered inequalities are produced by multiple intersecting forces'. London School of Economics, Knowledge Exchange, 'Confronting Gender Inequality: Findings from the LSA Commission on Gender' (n 4) 4.

[19] Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (Hart Publishing 2020) 4-5. For a more detailed definition of 'caring' and 'carer' see Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020).

[20] Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 19) 143.

for their children, perform unpaid domestic work and provide care for the elderly, all activities which limit their ability to perform economic labour and consequently diminish their recognition in terms of remuneration and advancement.[21] This thesis specifically explores the impact of the RTR in addressing the issues faced by this group of women in the employment sphere.

1.3 Contexts

Having outlined key terms, the next section provides the historical, employment and legislative backgrounds within which my research is situated. In order to understand women's place in paid employment today, it is necessary to consider firstly the historical development of their involvement in caring labour and consequent limitations on economic labour (historical context). The second part of the discussion focusses on the current state of the employment market with specific reference to the representation of gender and caregiving roles within it (current employment context). Finally, the extent to which the law is mobilised to facilitate economic and caring labour through family friendly legislation is explored (legislative context). These contexts provide useful backdrop settings for the critique conducted in this thesis of a piece of legislation (the RTR) and its impact on women's employment trajectories today.

1.3.1 Historical context

Although 'women always engaged in the labor market' in some form or another,[22] the employment structures which emerged after the Industrial Revolution traditionally confined women to working in the private sphere, raising children and conducting domestic duties,

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[21] Rosemary Crompton and Clare Lyonette, 'Who does the housework? The Division of Labour within the House' in Alison Park, John Curtice, Katarina Thomson, Miranda Phillips, Mark Johnson and Elizabeth Clery (eds), *British Social Attitudes: The 24th Report* (Sage 2008). See also the discussion on the unequal division of labour in Section 4.2.2 of Chapter 4.

[22] Jane Lewis, 'The Decline of the Male Breadwinner Model: Implications for Work and Care' (2001) 8 Social Politics: International Studies in Gender, State & Society 152, 153.
152. See also Land's historic analysis of women's involvement in wage labour in the factory and agricultural context; Hilary Land, 'The Family Wage' (1980) 6 Feminist Review 55.

whilst men operated mainly in the public domain, earning a living.[23] It is, however, important to note that women's work inside the household was not always regarded as economically insignificant. In the 19th century, 'housewives' were regarded as productive participants for census purposes. This changed gradually to incorporate housewives in a separate category at first, then they were moved to an 'unoccupied' classification, thereafter they were regarded as 'dependents', and eventually they were excluded completely from the census inventory.[24] This abolition of the recognition of unpaid labour (performed predominantly by women) was financially advantageous to those who were fighting the cause for a family wage to allow for the male breadwinner to support his 'unproductive' wife and children.[25] The traditional labour contract, built on a man earning a wage in the public arena and his spouse providing care for the children and elderly in the private, formed the basis of the male breadwinner model; 'female dependence was inscribed in the model'.[26] This justified higher remuneration for male employees, confined women to the home and devalued caring labour as a result.[27] The extent to which 'policy makers treated [the male breadwinner model] as an "ought"' set the tone for policy assumptions which permeated post-war legislative interventions.[28] The underpinnings of this model, and the policies sustaining it, were situated in a gendered construction of the

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[23] See discussion by James and Busby on the evolution of women's working structures through the Industrial Revolution and Wartime era. Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (n 19) 30-32.

[24] Because men were carrying the burden of providing for the family they were able to get rid of any unpaid household responsibilities and consequently such labour was devalued and female orientated. Nancy Folbre, *Who pays for the kids? Gender and the Structures of Constraint* (Routledge 1994) 95.

[25] ibid.

[26] Jane Lewis, 'The Decline of the Male Breadwinner Model: Implications for Work and Care' (n 22) 153. See Creighton on the manner in which the gendered division of labour contributed to women's 'economic and social dependence'. Colin Creighton, 'The rise and decline of the "male breadwinner family" in Britain' 1999 (23) Cambridge Journal of Economics 519, 520.

[27] Heidi Gottfried, Gender, *Work, and Economy: Unpacking the Global Economy* (Polity Press, 2013). See also Angela Y Davis, 'Women and Capitalism: Dialects of Oppression and Liberation' in Joy James and T Denean Sharpley-Whiting (eds), *The Black Feminist Reader* (Blackwell Publishers, 2000).

[28] Jane Lewis, 'The Decline of the Male Breadwinner Model: Implications for Work and Care' (n 22) 153. See also Creighton for a discussion of the market-led and policy measures which pressured employers to pay a living wage to support the breadwinner model; Colin Creighton, 'The rise and decline of the "male breadwinner family" in Britain' (n 26).

masculine provider and the use of time, a reinforcement of the normative nuclear family structure and the sustainment of a 'hierarchy of labour market entitlements'.[29]

The composition of the employment market and the prevalence of the male breadwinner model have, however, shifted considerably in the latter part of the 20th century. In 1971 only 53% of women aged 16-64 were employed, as opposed to 72.5% in 2019.[30] Various factors can be attributed to this significant increase in women's employment rates, including the rise of the service sector industry which traditionally attracted more female employees, lower fertility rates, improved ability to control childbearing and women attaining higher education levels with the consequence of desiring to sustain their own employment trajectories.[31] Additionally, the inability of families to survive on one income has played a part in women's increased entrance into the employment market.[32] Furthermore, a contributing factor to the demise of the male breadwinner model in the UK is the significant changes which have occurred in family structures.[33] An increase in divorce rates,[34] single parent households[35] and 'more fluidity in

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[29] Colin Creighton, 'The rise and decline of the "male breadwinner family" in Britain' (n 26) 525.

[30] Office of National Statistics, Female employment rate (aged 16 to 64, seasonally adjusted) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/timeseries/lf25/lms accessed 1 April 2021.

[31] Dianne Perrons, 'Managing work-life tensions in the neo-liberal UK' in Berit Brandth, Sigtona Halrynjo and Elin Kvande (eds), *Work-Family Dynamics: Competing Logic of Regulation, Economy and Morals* (Routledge 2017).

[32] This can be attributed to the increase in 'families with mortgages, rising house prices and growing economic demands on parents as child-rearing has become increasingly commercialised and material expectations laid on parents have enlarged'. Anne Harrop and Peter Moss, 'Trends in Parental Employment' (1995) 9 Work, Employment & Society 421, 438. See also Julia Brannen, 'Mother and Fathers in the Workplace: The United Kingdom' in Linda Haas, Philip O Hwang and Graeme Russell, *Organizational change & gender equity: International Perspectives on Fathers and Mothers at the Workplace* (Sage Publications 2000).

[33] Jane Lewis, 'The Decline of the Male Breadwinner Model: Implications for Work and Care' (n 22).

[34] 20% of marriages entered into in 1968 were ended by its 15th anniversary as opposed to 32% in 1998 for the same 15-year period. https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2013 accessed 2 April 2021.

[35] The number of single working parents who are predominantly women has risen from 47% in 1996 to 66% in 2014. Giselle Cory and Alfie Stirling, 'Who's Breadwinning in Europe? A Comparative Analysis of Maternal Breadwinning in Great Britain and Germany' (Institute for Public Policy Research October 2015).

intimate relationships' are factors which have impacted heavily on this shift.[36] Social and employment policies which are generally based on the assumptions of a male breadwinner, or even a dual earner model, but which do not account for the 'separation of marriage and parenthood', consequently do not serve the needs of many female caregivers.[37] This is specifically pertinent for women who are more likely to take up the responsibility of single parenthood when a relationship breaks down.[38] Their reduced capacity to perform paid work and limitations on how they structure economic and care commitments means that standard employment policies generally provide limited relief to this group.[39]

Within the female labour force, it is important to acknowledge the significant changes which have occurred in relation to women with caregiving responsibilities' participation, which is the cohort at whom this thesis is aimed. From a social point of view, it has generally become more acceptable for mothers to work (albeit only on a part-time basis),[40] and employers have been steered towards supporting caregivers in performing care and paid work which assisted the transition of some women into the paid public domain.[41] Since 1996 the percentage of mothers (married or cohabiting) in work has increased from 67% to 75.1% (in June 2019),[42] with mothers with young children (under four) showing an even steeper upward trend.[43] In terms of

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[36] Jane Lewis, 'The Decline of the Male Breadwinner Model: Implications for Work and Care' (n 22) 153.
[37] ibid 155.
[38] Giselle Cory and Alfie Stirling, 'Who's Breadwinning in Europe? A Comparative Analysis of Maternal Breadwinning in Great Britain and Germany' (n 35).
[39] Jill Rubery, 'Regulating for Gender Equality: A Policy Framework to Support the Universal Caregiver Vision' (2015) 22 Social Politics 513.
[40] Kathleen Kiernan, 'Men and women at work and at home' in Roger Jowell, Lindsay Brook, Gillian Prior and Bridget Taylor (eds), *British Social Attitudes the 9th report* (Dartmouth Publishing Company 1992).
[41] Anne Harrop and Peter Moss, 'Trends in Parental Employment' (n 32).
[42]Office of National Statistics, 'Full Report – Women in the labour market' (Annual Survey of Hours and Earnings, 25 September 2013) https://webarchive.nationalarchives.gov.uk/20160108012507/http://www.ons.gov.uk/ons/dcp171776_328352.pdf accessed 2 April 2021. This number has declined since the onset of Coronavirus which has disproportionately impacted female employment (71.8% in Oct- Dec 2020) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/timeseries/lf25/lms accessed 12 March 2021.
[43] 47% in 1996 to 65% in 2014. Ghazala Azmat, 'Gender Gaps in the UK Labour Market: Jobs Pay and family policies' (Centre of Economic Performance, LSE 2015) https://cep.lse.ac.uk/pubs/download/ea027.pdf accessed 5 April 2021.

caring for older or disabled friends or family, the number of carers has increased by over 620,000 since 2001, with women comprising 73% of the people receiving Carer's Allowance for caring for more than 35 hours per week.[44] The increase in women's labour force participation has created new challenges for combining paid employment and family responsibilities.[45] It has been argued that the effective implementation of policies designed to reconcile work and family life could address gender equality, support the economy, increase fertility, boost pension schemes and improve the general welfare of women and children.[46] For these reasons, amongst others, family-friendly measures were an important issue on the Labour Government's legislative agenda from 1997 as they aimed to achieve 'a society where to be a good parent and a good employee are not in conflict'.[47] An overview of these policies is provided later in this chapter as part of the legislative context within which the RTR is situated.

The increased female labour force participation, as well as the varying nature of family structures, have 'disrupted the former equilibrium' around the breadwinner model and family wage underpinning it and led to its demise. However, the benefits the model offer are still evident where men are rewarded for performing economic labour without regard to responsibilities outside of that realm.[48] Additionally, the models proposed to replace the male breadwinner structure provide their own challenges.[49] Incorporating women into the labour market based on the masculine standard of work reinforces the notion of the unencumbered worker and disregards caregiving in the public arena. On the other hand, providing financial compensation to caregivers (who are predominantly women) for the caring labour they provide

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[44] Carers UK, Policy Briefing (May 2014) https://www.carersuk.org/for-professionals/policy/policy-library/facts-about-carers-2014 accessed 5 April 2021.

[45] Willem Adema and Peter Whiteford, 'Babies and Bosses: Reconciling Work and Family Life: A Synthesis of Findings for OECD Countries' (Organisation for Economic Co-operation and Development, November 2007). See also, Fineman's approach to dealing with the 'demands of the employment market conflicted with the needs of the family'; Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133.

[46] Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

[47] Department of Trade and Industry, 'Work and Parents: Competitiveness and Choice. A Green Paper' (December 2000).

[48] Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 3) 193.

[49] See a critique of the dual earner-carer model as an alternative in Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 19).

in the home[50] does not address the gendered nature of the work they do. The male breadwinner model 'retains a continuing, if weakened, hold' on the way economic and caring labour is structured and its decline 'is still an unfinished project.'[51] Although the 'imprint' of this standard remains visible in the persistent gendered division of labour and the way the workplace is organised,[52] the assumptions upon which this model was built – i.e., male earner, female dependent carer and 'stable families' – are not foundations of today's society.[53] For the purpose of this thesis the extent to which the 'traditional male breadwinner metamorphosed almost seamlessly into the unencumbered worker'[54] is an important narrative to explore.

1.3.2 Employment context

This thesis focusses specifically on caregiving women's career attainment in the higher spheres of the employment terrain. This necessitates a look into the current composition of the employment market, broken down in terms of: female representation; the extent of their caregiving responsibilities and the level of their attainment. This context offers a useful backdrop for discussions surrounding the impact of caregiving on women's career trajectories which is relevant to my research. It also provides a glimpse into the disparity at the top which accentuates the manner in which inequalities continue to shape and perpetuate opportunities, status and power, a central theme which weaves through the whole thesis.

In the last quarter of 2019, 15.61 million women aged 16 and over were in employment in the UK (of which around 40% were working part-time).[55] Women were predominantly represented

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[50] Nancy Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22 Political Theory 591.
[51] Colin Creighton, 'The rise and decline of the "male breadwinner family" in Britain' (n 26) 528. See also Folbre on the impact of policy on women and children where allowing intervention is 'just enough to generate a non-patriarchal system of social reproduction' but insufficient to serve the needs of dependents; Nancy Folbre, *Who pays for the kids? Gender and the Structures of Constraint* (n 24) 248.
[52] London School of Economics Knowledge Exchange, *Confronting Gender Inequality: Findings from the LSA Commission on Gender* (n 4) 18.
[53] Jane Lewis, 'The Decline of the Male Breadwinner Model: Implications for Work and Care' (n 22) 153.
[54] Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 3) 167.
[55] House of Commons Library, 'Women and the economy' (Briefing Paper 4 March 2020).

as employees, only 11% were self-employed.[56] Although women are better represented in high-skilled professional occupations than men (22% compared to 20%), their representation is higher in areas such as nursing, teaching and other educational professions or occupations, whilst men dominate in areas such as management, directorship and senior positions (14% of men compared to 8% of women).[57] The percentage of women providing informal care, which means it is not as part of paid employment, has been fairly consistent since 2008 at 60%. The impact of caregiving responsibilities on employment rates and hours appears to differ for men and women. Statistical discrimination resulting in reduced wages for caregivers disproportionately impacts female carers,[58] and women are more likely than men to not work as a result of the demands of caregiving[59]. The 'gradual, drip-drip effect' of caregiving 'weakens carers' longer-term employment prospects and ultimately their labour market attachment'; this has a stronger bearing on female caregivers due to the gendered nature of caregiving.[60] The onset of the Coronavirus pandemic has further impacted women's opportunities in the employment realm due to the disproportionate increase in their share of household and caring labour.[61]

Women are also increasingly outnumbering and outperforming men in higher education in the UK; 57% of higher education students were female in 2018/19, this has been a consistent trend since 2016/17.[62] Female students were also more likely to gain a first or upper second class grade compared to their male counterparts and also outnumbered male students in gaining masters qualifications (62% were female in 2018/19).[63] Women's greater attainment levels in higher education, however, do not translate to correspondingly higher starting salaries. For the

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[56] ibid.
[57] ibid.
[58] Alex Heitmueller and Kirst Inglis, 'The earnings of informal carers: Wage differentials and opportunity costs' (2007) 26 Journal of Health Economics 821.
[59] Fiona Carmichael and Susan Charles, 'The opportunity costs of informal care: does gender matter?' (2003) 22 Journal of Health Economics 781.
[60] Fiona Carmichael, Claire Hulme, Sally Sheppard & Gemma Connell, 'Work-life imbalance: Informal care and paid employment in the UK' (2008) 14 Feminist Economics 3, 26.
[61] Institute of Fiscal Studies, 'How are mothers and fathers balancing work and family under lockdown?' (27 May 2020) https://www.ifs.org.uk/publications/14860 accessed 10 March 2021.
[62] https://www.hesa.ac.uk/news/16-01-2020/sb255-higher-education-student-statistics/numbers accessed 5 April 2021.
[63] https://www.hesa.ac.uk/news/16-01-2020/sb255-higher-education-student-statistics/numbers accessed 5 April 2021.

academic year 2017/18, men were better represented in the higher earning brackets (from £27 000 p/a), with the difference most significant in the £39 000+ p/a range where males outnumbered females 14% to 8%.[64] The average gender wage difference is, however, not significant upon entry into the labour market and neither is the initial growth trajectory.[65] The difference in compensation levels for men and women only start showing particular divergence after the birth of a first child when a 'gradual but continual rise in the wage gap' begin to manifest.[66] The career trajectories in terms of wage progression and occupational attainment are steeper for men than they are for women.[67] Whilst female wage growth plateaus after childbirth, male levels of occupational attainment are higher than those of females over their life course.[68]

In addition to the discrepancies in pay and career trajectories between men and women, female employees remain substantially underrepresented in the higher spheres of various employment areas. They constitute 36.2% of board members on FTSE 100 companies;[69] female CEOs in the same cohort of companies remain stubbornly consistent at six in 2017, 2018 and 2019.[70] Indeed, five out of 23 cabinet ministers,[71] 28% of professorships at UK universities,[72] and one out of 12 supreme court justices[73] are women. This is despite various attempts to improve women's representation in certain sectors including, for example, parliament permitting

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[64] https://www.hesa.ac.uk/news/18-06-2020/sb257-higher-education-graduate-outcomes-statistics/salary accessed 5 April 2021.
[65] Institute for Fiscal Studies, 'Wage progression and the gender wage gap: the casual impact of hours of work' (5 Feb 2018) https://www.ifs.org.uk/publications/10358 accessed 5 April 2021.
[66] ibid.
[67] Laura Jones, 'Women's Progression in the Workplace' (Government Equalities Office, Global Institute for Women's Leadership: Kings College London, October 2019).
[68] ibid.
[69] Hampton-Alexander Review, 'FTSE Women Leaders: Improving gender balance – 5 year summary report' (February 2021).
[70] Currently the number of FTSE 100 female CEO's stand at 8 in the UK, which include an appointment on 21 January 2021; Hampton-Alexander Review, 'FTSE Women Leaders: Improving gender balance – 5 year summary report' (February 2021).
[71] https://www.gov.uk/government/ministers accessed 2 April 2021.
[72] https://www.hesa.ac.uk/news/19-01-2021/sb259-higher-education-staff-statistics accessed 2 April 2021.
[73] https://www.supremecourt.uk/about/biographies-of-the-justices.html accessed 30 March 2021.

registered political parties to use all-women shortlists for elections in the UK (until 2030),[74] and efforts being made to improve women's presence in the fields of science, technology, engineering and mathematics (STEM) where they have been traditionally underrepresented.[75] Additionally, an inquiry into board positions launched by the Equality and Human Rights Commission,[76] as well as other government-led target setting initiatives[77] are attempts to address the gender inequality in the employment sphere.

The promotion of gender equality as a social goal on a global scale is not only the 'right thing to do to honour the world's commitments to human rights', but it is also the 'smart thing' to do as female employment holds various advantages, including increased national competitiveness, economic growth and better living standards for children.[78] For the purpose of this thesis, dealing with the senior female workforce, the advantages of more equal gender representation in the higher echelons of the employment sphere are worth considering. Apart from tapping into a large talent pool which is particularly significant in light of women's increased educational attainment, the 'process of social cloning, whereby those in a position of power champion those like them' can be countered to some extent with more equal gender representation in higher positions.[79] In terms of the commercial benefits, 'a real relationship between diversity and performance' is becoming more evident which cannot be ignored by companies attempting to gain a competitive advantage.[80]

1.3.3 Legislative context: family friendly laws

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[74] Equality Act 2010, s 104 & 105.
[75] House of Commons, Business, Innovation and Skills Committee, 'Women in the Workplace. First report of the session 2013-2104' (June 2013).
[76] Equality and Human Rights Commission, 'Appointment to Boards and Equality Law' (July 2014).
[77] See footnote 17 for a list of Government-led reports.
[78] UN Secretary General's High-Level Panel on Women's Economic Empowerment, 'Leave no one behind: A call to action for gender equality and women's economic empowerment' (2016) https://www.empowerwomen.org/-/media/files/un%20women/empowerwomen/resources/hlp%20briefs/unhlp%20full%20report.pdf?la=en&vs=2916 accessed 5 April 2021.
[79] Laura Jones, 'Women's Progression in the Workplace' (n 67).
[80] The rationale for this correlation is situated in an 'improved access to talent, enhanced decision making and depth of consumer insight and strengthened employee engagement and license to operate.' McKinsey & Company, 'Delivering through Diversity' (January 2018) 5.

Having dealt with the historical background and current employment market trends relating to female employees, this section reviews the family-friendly legislative context within which the RTR is situated. As the term indicates, *family*-friendly *workplace* measures imply the collision of two traditionally very separate spheres (albeit since the industrial revolution),[81] the family and the workplace. Lewis and Campbell distinguish between 'work/family balance' and 'work/life balance'; due to the inherent gendered nature of caring, the former focusses predominantly on mothers' ability to combine paid and care work, whilst the latter enables all employees to control their leisure and work commitments.[82] Using the term 'balance' in this context is problematic as 'it assumes that if somebody manages to combine earning and caring responsibilities, a balance is reached', without taking into account the conflicting demands and consequent compromises the caregiver has to endure in order to reconcile their duties in both arenas.[83] Furthermore, the idea that work is juxtaposed with life and family within the modern labour law context can be explained using the public/private dichotomy which is a prominent feature in legal feminist studies. Work performed in the public domain is paid for and regulated whilst domestic and caring responsibilities are not remunerated and left up to individuals to deal with. As recently as 1995, the UK's Minister of Competition and Consumer Affairs regarded the art of balancing work and family life 'best decided by parents, not Brussels or Westminster'.[84] This kind of rhetoric, based on a very clear divide between the operation of the public and private spheres, became problematic as caregivers entered the workplace in increasing numbers whilst the notion of the unencumbered worker norm remained intact.

Successive administrations did, however, recognise the importance of increasing women's labour force participation as a means of addressing various goals.[85] Socially, the emphasis was

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[81] Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (n 19).
[82] Jane Lewis and Mary Campbell, 'UK Work/Family Balance Policies and Gender Equality, 1997-2005' (2007) 14 Social Politics: International Studies in Gender, State & Society 4, 5.
[83] Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (n 46) 4.
[84] HC Deb 13 December 1995, vol 268, col 942. See also, in this context, Fineman's use of the vulnerability theory as part of the 'decision-making ethics' when reviewing the 'parameters of state responsibility'; Martha Albertson Fineman, 'Vulnerability and Social Justice' (2019) 53 Valparaiso University Law Review 341, 367.
[85] See Collins' review on European legislation aimed at increasing female labour force participation rather than gender equal outcomes. Hugh Collins, 'The Right to Flexibility' in

on the impact of the aging society, pension and workforce demographics, boosting fertility rates, addressing children living in poverty and the well-being of young children in general.[86] On an economic level, broadening the tax-paying population and growth through the expansion of the workforce was a central policy theme.[87] The implementation of policies to facilitate female carers' role in the public and private arenas therefore served a dual purpose. Firstly, as women in work were central to the achievement of these social and economic policy outcomes but remained primarily responsible for unpaid caregiving (with limited appetite to facilitate men's contribution), it was necessary to formally recognise the lived reality of their dual role as caregivers and employees. Secondly, as a result of such recognition, the policies were designed to build a bridge between the public (work) and private (family) domains in order to facilitate the caregiving workforce to operate in both.[88] The willingness of the legislature to regulate the private sphere as part of their family-friendly commitment was, however, based on the prioritisation of certain policy outcomes and emphasised the role of law-making in drawing the line between the separate spheres.[89]

Masselot and Di Torella distinguish between family-friendly policies designed to facilitate 'leave', 'care' and 'time' and propose that these elements have to be developed simultaneously and with all type of carers (not just mothers) in mind in order to support all aspects of reconciliation.[90] In the UK context, maternity, paternity and parental leave fall within the 'leave' realm, whilst the facilitation of childcare through the provision of funding, tax credits and vouchers can be situated within the 'care' element. The RTR flexible working was intended to address the 'time' *and* 'care' aspects of the reconciliation agenda as it was originally

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Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, And Family: Critical and Comparative Perspectives* (Oxford university Press 2005).

[86] Jane Lewis and Mary Campbell, 'UK Work/Family Balance Policies and Gender Equality, 1997-2005' (n 82).

[87] ibid.

[88] The package of employment laws is part of a 'transformation in the legal construction of the employment relation; every bit of allowance under these laws chips away at the employer's powerful position of power.' Hugh Collins, 'The Right to Flexibility' (n 85) 124.

[89] For examples see Katherine O'Donovan, *Sexual divisions in law* (Weidenfeld & Nicolson 1985) and Nicole Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998). See also the discussion on the 'Regulation of working hours' in Section 1.3.3.3 of this chapter.

[90] Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (n 46) 24.

designed to facilitate economic and caring labour.[91] Today the RTR permits all employees to request alternative working structures which situates it outside a strict *family*-friendly accommodation narrative. However, where the terms family-friendly policies/legislation are used in this thesis, the focus is mainly on the types of initiatives that allow for caregiving alongside paid labour. The ability of the RTR to go beyond this scope, as a mechanism to normalise alternative working structures facilitated by it, is fundamental to the reasoning in this thesis and is explored throughout.

This section provides an overview of the other legislative measures directed at enabling elements of 'leave' and 'care' in the UK context, these include: maternity leave; shared parental leave; parental leave; childcare allowances; regulation of working hours and part-time workers; the Equality Act and elderly care. This does not profess to be an all-encompassing analysis of the family-friendly legislative reforms in this area, but rather it aims to provide a broad-brush introduction to the context of the policies which could possibly bolster the operation of the RTR legislation and the limitations of them to do so. The critique is specifically focussed on the extent to which the constellation of family-friendly measures operates in different ways to alleviate, but more often to reinforce, the persistence of the unencumbered norm whilst also further cementing the gendered nature of caregiving.

1.3.3.1 Maternity, Paternity and Shared Parental Leave Provisions

The UK's maternity leave provisions allow mothers to take 52 weeks' maternity leave.[92] Paternity Leave was introduced for the first time in 2003, allowing fathers (and adoptive fathers) two week's leave.[93] In 2010 an additional 26 weeks' paternity leave was introduced if

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[91] Family friendly legislation or policies are often referenced in the UK's constellation of legislative measures allowing mostly parents to combine economic and caring responsibilities; the examples generally include 'flexible working, enhanced parental leave, and additional childcare provision.' See Government Equalities Office, 'What works to reduce your gender pay gap: Family friendly polices action note' (1 March 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783088/WAGE-action-note1.pdf accessed 5 April 2021.

[92] The Maternity and Parental Leave etc. Regulations 1999, SI 1999/3312, as amended by The Maternity and Parental Leave (Amendment) Regulations 2002, SI 2002/2789, reg 8.

[93] The Paternity and Adoption Leave Regulations 2002, SI 2002/2788.

the mother has returned to work and the child was born on or after 3 April 2011.[94] Since 5 April 2015, a system of Shared Parental Leave (SPL) has been enacted whereby fathers can share the parental leave with mothers for a total duration of 52 weeks (and 39 weeks of paid leave).[95] For a father to qualify for such shared parental leave and pay, the mother has to end her maternal leave and pay. The major symbolic difference between maternity/paternity leave and the SPL system is that the former is gender specific whereas the latter operates on a supposed gender-neutral basis.

There are various elements of the current operation of the legislation which contribute to the improbability of even a supposed gender-neutral system like SPL to reverse the prevailing assumptions regarding pregnancy and maternity 'as a continuum'[96] which generally serves the unencumbered well. The elements of maternity and SPL to be scrutinised in this regard relate to the level of legally mandated maternity and SPL pay, as well as the non-restrictive elements of the shared part of SPL. It has been argued that these two aspects of any parental leave entitlement are instrumental in fostering shared parenting in households.[97] This is relevant to my research question for two reasons; the possibility that fathers could become more prominent in the caregiving context may impact on their perceived unencumbered status whilst simultaneously contradicting the corresponding expectation that only women will take longer career breaks for caring purposes. Another advantage of both parents taking time out of the paid employment is the general preparedness of workplaces to deal with prolonged absences.[98]

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[94] The Additional Paternity Leave Regulations 2010, SI 2010/1055, reg 5.
[95] The Shared Parental Leave Regulations 2014, SI 2014/3050.
[96] Sandra Fredman, 'Reversing roles: bringing men into the frame' (2014) 10 International Journal of Law in Context 442, 449.
[97] Mitchell argues that a system which grants fathers (or the partner of the mother) a day one non-transferable entitlement linked to his/her real earnings could foster such a change. Gemma Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (2015) 44 Industrial Law Journal 123. See also European Commission, 'Proposal for a Directive of the European Parliament and of the Council, on work-life balance for parents and carers repealing Council Directive 2010/18/EU' (2017/0085 COD) 7. The limited utilisation by fathers is attributed to 'a lack of payment during leave in many Member states and the rule allowing parents to transfer most of their entitlement to the other parent.' https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0253 accessed 12 April 2021.
[98] For example, in public sector workplaces in the Nordic countries certain areas, which have been dominated by female employees, have streamlined processes due to parental leave absences and have 'routines in arranging substitutes and reorganising tasks' already in place. See Jahanna Lammi-Taskula, 'Nordic men on parental leave: can the welfare state change

Currently, Statutory Maternity Pay (SMP) allows mothers to receive 90% of their average weekly earnings for the first six weeks of maternity leave, plus an additional £151.97 per week or 90% of average weekly earnings (whichever is lower) for the next 33 weeks.[99] Statutory Shared Parental Leave Pay is based on the same levels as the latter (£151.97 per week or 90% of average weekly earnings, whichever is lower), but is only allowed between the mother and father for 37 weeks;[100] two weeks after childbirth maternity leave is compulsory (four weeks if the mother works in a factory). The low levels of pay[101] provided to mothers and fathers during maternity and SPL is an important element of the legislation to consider for two reasons. 'Benefits are important for the family economy, but they also symbolise the importance of care work as it is evaluated by the state.'[102] Firstly, the monetary value attributed to care-giving is indicative of the recognition of such services as a 'social function'; the fact that mothers' contributions to this 'social function' are disproportionately high and the remuneration very low means that they 'support the state' in the provision of these essential services, to a large extent.[103] Secondly, the low level of compensation attached to these leave entitlements impacts on parents' decision-making regarding how work and caring responsibilities should be distributed. Whilst the original system of separate maternity and paternity rights openly promoted the notion that the father should be the secondary caregiver,[104] the structure of SPL, on the surface at least, suggests otherwise. The legislation allows parents to share the caring

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gender relations?' in Anne Lise Ellingsæter and Arnlaug Leira (eds), *Politicising Parenthood in Scandinavia: Gender relations in welfare state* (Polity Press 2006) 90.

[99] Social Security Contributions and Benefits Act 1992, s 166.

[100] The Shared Parental Leave Regulations 2014, SI 2014/3050.

[101] The current amount for Shared Parental Leave is £151.97 per week which is well below the minimum wage at £356.40 per week for someone over 25 working a 40-hour week and the average weekly wage which amounted to £586 in April 2020. https://www.gov.uk/national-minimum-wage-rates and https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2020 accessed 6 April 2021.

[102] Jahanna Lammi-Taskula, 'Nordic men on parental leave: can the welfare state change gender relations?' (n 98) 82.

[103] Grace James, 'Mother and fathers as parents and workers: family-friendly employment policies in an era of shifting identities' (2009) 31 Journal of Social Welfare and Family Law 271, 278.

[104] Section 4(1) of The Paternity and Adoption Leave Regulations 2002, SI 2002/2788, allowed employees to take time off work for the purpose of looking after a child or 'supporting the child's mother'. See also Grace James, 'All That Glitters Is Not Gold: Labour's Latest Family-Friendly Offerings' (2003) 3 Web Journal of Current Legal Issues.

responsibilities during the first year after childbirth and provide equivalent compensation for the majority of the time. It is, however, important to acknowledge that, whilst the first six weeks of Maternity Leave is income related, there is *no* element of SPL which corresponds to actual earnings for the father (or the mother's partner). This is a symbolic recognition that a mother's caring labour is worth more than a father's, but on a practical level it further diminishes the likelihood of the SPL legislation addressing the gendered nature of caregiving between spouses. Whether a caring allowance is regarded as 'compensation for income foregone rather than as a wage for caring' is a contested topic in the realm of family friendly policies.[105] It is, however, not a straightforward binary; whilst an increased wage for caring could point to an acknowledgement of the value of caring, it could also reinforce gender roles if linked to motherhood duties.

The second area of the parental leave entitlement which has transformative potential concerns the *shared* element of SPL legislation. Here the discussion focuses on the impact of particularly the SPL provisions which were specifically implemented to address the 'gender imbalance in terms of attachment to, and position in, the labour market' and were highlighted by the Government in its impact assessment on this issue.[106] The policy has only been in place for six years and the initial numbers on uptake are probably not realistic,[107] although comparative

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[105] Jane Lewis, 'Gender and Welfare Regime: Further Thoughts' (1997) 4 Social Politics: International Studies in Gender, State & Society 160, 171.

[106] Department for Business Innovation & Skills, 'Modern Workplaces: Shared parental leave and pay administration consultation – impact assessment' (February 2013) 2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/110692/13-651-modern-workplaces-shared-parental-leave-and-pay-impact-assessment2.pdf accessed 5 April 2021.

[107] A year after the Shared Parental Leave Regulations was implemented, research showed that only 1% of all men in the study chose to use the opportunity to take time off after the birth of their children. The financial impact on the family's budget, women's reluctance to share the leave and a lack of knowledge of the process were reasons presented for the low take up by fathers. See Women's Business Council & My Family Care, 'Shared Parental Leave: Where are we now?' (April 2016) https://www.myfamilycare.co.uk/resources/white-papers/shared-parental-leave-where-are-we-now/
accessed 7 April 2021. The accuracy of the 1% figure has been questioned due to the fact that the researchers did not distinguish between men eligible for Shared Parental Leave and those not. See Holly Birkett and Sarah Forbes, 'Shared Parental leave: Why is take-up so low and what can be done?' University Birmingham Business School (September 2018) https://www.birmingham.ac.uk/Documents/research/Public-Affairs/Shared-Parental-Leave-Why-is-take-up-so-low-and-what-can-be-done-WIRC.pdf accessed 7 April 2021.

research covering 38 countries conducted on leave policies in general does indicate that fathers only utilise a small proportion of family leave (where parents have a choice regarding who should take it), but they are more likely to take such leave if it is 'paid at or near income replacement level'.[108] The notion that a father needs wage replacement (or at least something close to it) in order to justify providing caring labour further accentuates the devaluation of a mother's care provision. When a mother provides it, very low compensation (if any) would suffice, when it is outsourced the level of compensation is marginally higher, and when a father is involved, it must be worth his while. As indicated, the low remuneration attached to SPL diminishes its effectiveness in inciting cultural change; this is further weakened by the fact that no part of the SPL is restricted to fathers exclusively. It has been shown that fathers are more likely to reduce their working hours after taking parental leave for more than two months without the mother/partner being home during that period.[109] This could impact extensively on the prevalence of the unencumbered norm using continuous careers and long hours as a shorthand for commitment worthy of rewards in the workplace. Although SPL has been welcomed as 'it symbolically takes a step towards equalising parents' caring role',[110] it does not seem likely that, in its current format, this goal is achievable.[111] This is unfortunate as this kind of legislative measure, which is aimed at eradicating the gendered nature of care, could potentially facilitate women's career mobility by reducing the 'gender penalty' faced by

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[108] Moss P, '11th International Review of Leave Policies and Related Research 2015' (International Network on Leave and Research and Institute of Education University of London, June 2015) 45 https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/2015_full_review3_final_8july.pdf accessed 7 April 2021. See also Morgan and Zippel for an evaluation of fathers' involvement in care as part of progressive leave policy structures; Kimberly Morgan and Kathrin Zippel, 'Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe' (2003)10 Social Politics 49.

[109] Mareike Bünning, 'What happens after the "Daddy Months"? Fathers' involvement in Paid Work, Childcare, and Housework after Taking Parental Leave in Germany' (2015) 31 European Sociological Review 738.

[110] Gemma Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (n 97) 132.

[111] The construction of the law 'pokes a finger at the ideology of the sexual division of labour.' Hugh Collins, 'The Right to Flexibility' (n 85) 113. Horton touches on how the 'gender-neutral rights on offer fail to redress the imbalance.' Rachel Horton, 'Care-giving and reasonable adjustment in the UK' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar Publishing 2011) 139.

women with caregiving responsibilities.[112] Increasing men's participation in care, through the implementation of effective parental leave policies, would also go a long way towards challenging the notion that 'women are better at childcare while men are indispensable at the workplace.'[113]

1.3.3.2 Parental Leave

Currently, parents who have been employed by the same employer for a period of one year[114] are also entitled to 18 weeks' unpaid parental leave[115] (with a maximum of four weeks per year)[116] for each child and adoptive child up to the child's 18th birthday.[117] It is important to note, however, that this leave is not limited to caring for new-born babies (where the mother's role as nurturer is biologically necessitated), but it allows for the care of children through various stages of their development. This kind of provision highlights the distinction between the responsibilities for childbearing, which is intrinsically a female prerogative, and child rearing, which could be performed by either parent. Although these provisions are gender neutral and give each parent an individual entitlement to leave, there are two factors which specifically impact fathers' willingness to utilise such leave provisions: the rate of compensation and flexibility.[118] Currently parental leave is not compensated for at all and allows for very little flexibility. An employee is required to give 21 days' notice to an employer in order to utilise this leave entitlement,[119] but even then an employer may choose to postpone the leave period if the 'business would be unduly disrupted' by the employee taking leave at a particular time.[120] Furthermore, an employee has to take the leave in blocks of one week[121] and

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[112] Gemma Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (n 97) 123.
[113] Linda Haas and Tine Rostgaard, 'Fathers' rights to paid parental leave in the Nordic countries: consequences for the gendered divisions of leave' (2011) 14 Community, Work and Family 177, 192.
[114] The Maternity and Paternal Leave etc. Regulations 1999, SI 1999/3312, reg 13.
[115] The Parental Leave (EU Directive) Regulations 2013, SI 2013/283, reg 3.
[116] The Maternity and Parental Leave (Amendment) Regulations 2014, SI 2014/3221, reg 5.
[117] ibid reg 4.
[118] Jane Lewis and Mary Campbell, 'UK Work/Family Balance Policies and Gender Equality, 1997-2005' (n 82).
[119] The Maternity and Paternal Leave etc. Regulations 1999, SI 1999/3312, sch 2, s 3(b).
[120] ibid s 6 (b).
[121] Ibid s 7.

may not take more than four weeks during any particular year.[122] The inflexible nature of these provisions, along with the fact that it is unpaid, are factors inhibiting the potential for such leave measures to influence fathers' attitude towards caring and address the gendered nature of caregiving in traditional workplaces and in families.[123]

1.3.3.3 Regulation of working hours/part-time workers

Within this discussion, there are two avenues to explore: the regulation of working hours and the treatment of employees in part-time working structures. Whilst the former is aimed at limiting the working hours of employees, the latter purports to provide protection to part-time employees. Both are relevant in the context of this thesis due to the potential impact of these statutory provisions in limiting the prevalence of the unencumbered norm and potentially normalising alternative working structures.

Men's long working hours, unequal division of labour in the household and non-recognition of the cost of reproductive labour have been established as some of the main contributors to gender inequality in the workplace.[124] Of these three factors, only one, men's long working hours, is truly situated within the public arena, which traditionally is 'more justifiably accessible' in terms of regulation.[125] Since 1998, the UK workforce has been regulated by a set of rules prescribing the allowed maximum of 48 weekly hours to be worked by employees as well as minimum rest and annual leave entitlements.[126] The UK did, however, utilise Article

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[122] ibid s 8.

[123] The way the leave was devised and can be utilised indicates that it was 'designed for employer convenience, rendering it very cumbersome and often impractical for parents'. Sue Himmelweit, 'The Right to Request Flexible Working: A "Very British" Approach to Gender (In)Equality?' (2007) 33 Australian Bulletin of Labour 246, 249.

[124] See Joanne Conaghan, 'Feminism and Labour Law: Contesting the Terrain' (n 3); Eugenia Caracciolo Di Torella, 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers' (2007) 36 Industrial Law Journal 318 and Jane Lewis and Mary Campbell, 'UK Work/Family Balance Policies and Gender Equality, 1997-2005' (n 82).

[125] Okin divides the public and private spheres on the basis of how readily intervention is permitted. Compared to the public sphere, 'special justification' is required for regulation of the private arena. Susan Moller Okin, 'Gender, the Public, and the Private' in Anne Phillips, *Feminism and Politics* (2nd edn, Oxford University Press 2009) 117.

[126] The Working Time Regulations 1998, SI 1998/1833 implemented the EU Working Time Directive (2003/88/EC). It is also important to note that, due to the outcome of the referendum on 23 June 2016, the UK is not part of the European Union any longer. The Prime Minister

18(1)(b) of the EU Working Time Directive (2003/88/EC), allowing employees the opportunity to opt-out, which meant that employers could disregard the 48-hour restriction. This resulted in a 'diluted' version of the intended EU Directives and consequently had little impact on reducing the long working hours of male workers.[127] The Government therefore elected not to regulate a section of the public sphere based on the notion that employees should be able to make independent decisions on how they would like to construct their time at work and at home.[128] In this instance, elements of the private sphere, e.g., the family and their home life, were offered as justification for not interfering with the working hours of employees in the public sphere.[129] This is a good example of how the divide between the private and public spheres is redrawn by the Government in order to achieve other policy objectives i.e. long working hours which support the 'flexibility that businesses need.'[130] It also signals the priorities of a Government who refuses to legislate the long-hours working culture preferred by the unencumbered, but which instead focuses on '"sound bite" employment legislation' in order to appear family-friendly without disrupting the status quo.[131]

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triggered article 50 on the 29th of March, 2017 which began the two-year countdown to the UK's departure from the EU. After the withdrawal agreement was finally ratified, the UK left the EU on 31 January, 2020; this began the transition period for negotiation of the future relationship which itself ended on 31 December, 2020. The exact relationship the UK will have with the EU is unclear at this point, but the Court of Justice of the European Union and EU laws will almost certainly not shape UK policies and legislation in the same manner going forward. This could have implications for the landscape of family friendly policies in the UK.

[127] Catherine Barnard, Simon Deakin and Richard Hobbs, 'Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK' (2003) 32 Industrial Law Journal 223, 252.

[128] Department of Trade and Industry, 'Working Time - Widening the Debate. A preliminary consultation on long hours working in the UK and the application and operation of the working time opt out' (June 2004) http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file11782.pdf accessed 5 April 2021.

[129] 'For parents, one may decide temporarily to work longer to maintain the family income when the other decides to withdraw from the labour market or work reduced hours in order to spend time caring for their children.' Department of Trade and Industry, 'Working Time - Widening the Debate. A preliminary consultation on long hours working in the UK and the application and operation of the working time opt out' (June 2004) 15.

[130] ibid 29. See also Pencavel's argument regarding the limitation of working hours; instead of 'damaging restraints on management' it could enhance productivity and the social wellbeing of employees. John Pencavel, 'The Productivity of Working Hours' (Stanford University and IZA, April 2014) 26.

[131] Lucy Anderson, 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working "Rights" for Parents' (2003) 32 Industrial Law Journal 37, 41.

In addition to the regulation of working hours, it is also necessary to review the UK's legislative response to the part-time work force as part of the family friendly statutory framework discussion. In the UK, caregiving female workers are disproportionately represented in this cohort of employees;[132] the legislative protection offered to them is therefore critiqued briefly in this section.

As part of the New Labour Government's inclusion to the Social Chapter,[133] the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTR 2000) was enacted with effect from 1 July 2000.[134] The PTR 2000 defines part-time workers[135] in relation to full-time workers[136] and prohibits the less favourable treatment of a part-time worker in relation to the 'terms of his contract'[137] and 'being subjected to any other detriment by any act, or deliberate failure to act, of his employer'.[138] This will be established by considering the treatment of a 'comparable full-time worker'.[139] The comparator and the part-time worker must be 'employed by the same employer under the same type of contract'[140] and be 'engaged in the same or broadly similar work'.[141] Whereas the protection afforded by the PTR 2000 is particularly essential for employees in precarious jobs,[142] there are elements of the legislation

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[132] Janneke Plantenga and Chantal Remery, 'Flexible working time arrangements and gender equality: A comparative review of 30 European countries' (n1).
[133] The UK Government's initial objection to the inclusion of the Social Chapter (dealing with policies covering workplace conditions, equal pay and part-time workers' employment conditions) into the body of the treaty of Maastricht led to an agreement by the remaining member states to incorporate it into a separate Protocol to the Treaty. Since the UK opted out of this Protocol, the proposals on part-time work regulations could progress which led to the 1997 Part-time Agreement and Directive. When the New Labour Government came to power in May 1997, they cancelled the opt-out and signed up to the Social Chapter which was then extended to the UK by another Directive (Council Directive 98/23/EC of 7 April 1998).
[134] It was passed under The Employment Relations Act 1999.
[135] PTR 2000, reg 2(2).
[136] ibid reg 2(1).
[137] ibid reg 5(1)(a).
[138] ibid reg 5(1)(b).
[139] ibid reg 5(1).
[140] ibid reg 2(4)(a)(i).
[141] ibid reg 2(4)(a)(ii).
[142] See McColgan's critique of the operation of the PTR 2000 in relation to 'low-skilled workers' and jobs 'characterised by low pay.' Aileen McColgan, 'Missing the point? The part-time workers (prevention of less favourable treatment) Regulations 2000 (SI 2000, No.1551)' 2000 (29) Industrial Law Journal 260, 265.

which had the potential to address the needs of professional caregiving employees, the cohort which this thesis is directed at. These relate to the scope of the protection afforded under the PTR 2000 as well as its (in)ability to address the issues of access to part-time work and the transfer between full- and part-time work. Due to the strict requirements for a 'comparator', many part-time workers in the UK will not be able to seek protection under the PRT 2000.[143] Furthermore, due to the 'high level of gendered occupational segregation' generally prevalent in part-time employment, professional female caregivers will consequently not derive additional protection from this legislation.[144] Apart from the limitations in terms of the scope of the protection under the PTR 2000, the law does not regulate access to part-time work or transition between full- and part-time work which are important considerations for the female caregiving cohort.[145] Although the 'increase access to part-time work' was part of the aims of the RTR 2000,[146] there is no provision dealing with prospective employees attempting to access part-time employment. This inhibits the law's potential to address workplace barriers often faced by mothers returning from maternity leave needing reduced hour contracts due to caregiving responsibilities. Additionally, the PTR 2000 does not regulate the situation where employees are dismissed for wishing to transfer between part- and full-time employment.[147] This is particularly prevalent for caregiving employees who might need flexibility between full- and part-time working structures due to the changing nature of their responsibilities outside the workplace.[148] It has been argued that the Government's unwillingness to implement

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[143] Conaghan attributes this to the 'ungenerous interpretation of the EU directive' upon which the law was based. See Joanne Conaghan, 'Women, Work, Family: A British Revolution?' in Joanne Conaghan, Richard M Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (first published 2002, Oxford University Press) 64. See also the Government's Regulatory Impact Assessment (which was part of the consultation process) where it was stated that only 1 million of the estimated 6 million part-time employees in the UK will indeed have a comparable full-time employee. Department of Trade and Industry, 'Part-Time Work Public Consultation' (January 2000).

[144] Nicole Busby, 'The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000: righting a wrong or out of proportion?' (2001) Journal of Business Law 344, 353.

[145] See Section 4.3.2.1 of Chapter 4 for a discussion on the importance of access to and transitioning between flexible working structures for female caregivers as part of Acker's analysis of inequality regimes in the workplace context.

[146] Department of Trade and Industry, 'Fairness at Work' (May 1998) par 5.5.

[147] Aileen McColgan, 'Missing the point? The part-time workers (prevention of less favourable treatment) Regulations 200 (SI 2000, No.1551)' (n142).

[148] See Section 5.3.3. of Chapter 5 on a discussion of the permanent nature of a change under the RTR which inhibits caregiving responsibilities in a similar manner.

the EU's directive in a substantive manner has resulted in regulations which will have very limited transformative results;[149] as indicated in this section, this definitely rings true for female caregiving employees who will find limited recourse in the provisions currently contained in the PTR 2000.

1.3.3.4 The Equality Act 2010

The Equality Act 2010 is an important piece of legislation in the employment law context. As indicted later in this thesis, it prohibits workplace discrimination on certain grounds,[150] deals with sexual harassment in the workplace[151] and regulates the use of positive action in specific employment scenarios.[152] In addition to these provisions it also prohibits indirect discrimination on certain grounds. This is important in the context of this thesis as it is a legal tool that could potentially address issues of accessing flexible working structures and/or avoiding/overcoming some of the negative consequences associated with flexible working. This section will briefly touch on the operation of indirect discrimination in the context of my research with specific reference to these issues.

Section 19 of the Equality Act 2010 defines indirect discrimination as an act based on a 'provision, criterion or practice' which discriminates based on a protected characteristic.[153] It will be regarded as discriminatory if it applies to everyone, it disadvantages persons sharing the protected characteristic (compared to those who do not) and the organisation cannot prove that it used 'proportionate means' to a achieve a 'legitimate aim'.[154] Indirect discrimination will also occur where a policy, if applied, would detriment someone with a protected characteristic; the example in the explanatory notes refer to a person being dissuaded from

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[149] Claire Kilpatrick and Mark Freedland, 'The United Kingdom: how is EU governance transformative?' in Silvana Sciarra, Paul Davies and Mark Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union* (Cambridge University Press, 2004).
[150] See discussion on workplace discrimination in Section 4.2.3 of Chapter 4.
[151] See discussion on sexual harassment in the workplace in Section 4.2.3 of Chapter 4.
[152] See discussion on positive action in Section 6.2.1 of Chapter 6.
[153] The protected characteristics for the purpose of indirect discrimination are: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. Equality Act 2010, Section 19 (1)&(3).
[154] Equality Act 2010, Section 19 (2).

applying for or taking up a job due to a potential disadvantage experienced if a policy is applied.[155] This speaks to the issue of accessing flexible working structures in the workplace as indirect discrimination against a female carer could potentially be proved where an organisation has a policy not to appoint employees on a flexible basis and there is no justification for such policy.[156] In addition to the potential value of an indirect discrimination claim for accessing flexible working structure, it is also worth considering how the protection of the Equality Act 2010 can be utilised to avoid the negative consequences of flexible working for the female caregiving workforce. Due to the 'persistent nature between gender and care' any policy or practice 'which disadvantage those who have a care-giving role' and cannot be justified by the employer, could potentially amount to indirect discrimination.[157] In Chapter 4 of this thesis various such exclusionary practices are discussed as part of the unequal employment landscape women are attempting to compete on; these include the persistent link between working hours and perceived commitment,[158] wage setting practices based on facetime, instead of output[159] and the disproportionate rewards associated with visibility and continuous career.[160]

This protection against indirect discrimination in this context is a 'result of the coincidence between gender and caring'[161] and could potentially be useful for the cohort of employees this thesis is directed at in securing flexible working positions and protecting them against the negative consequences associated with it. Although the indirect sex discrimination route might benefit women marginally, this will only be of value to individuals who fall within the protected characteristic groups and are able and willing to pursue lengthy litigation.[162] This 'identity approach to equality' based on individual responsibility to address discrimination

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[155] Explanatory Notes to Equality Act 2010, Part 2, Section 19 (79).
[156] Rachel Horton, 'Care-giving and reasonable adjustment in the UK' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (n 111).
[157] ibid 141.
[158] See Section 4.3.1.2 of Chapter 4.
[159] See Section 4.3.3.1 of Chapter 4.
[160] See Section 4.3.3.2 of Chapter 4.
[161] Rachel Horton, 'Care-giving and reasonable adjustment in the UK' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (n 111) 142.
[162] See Section 3.5 of Chapter 3 for Fineman's critique of ant-discrimination legislation in the context of the RTR legislation.

creates the illusion that the workplace is fair and equal and that 'discrimination is the discoverable and correctable exception'.[163] Additionally, utilising this route might reinforce the gendered nature of caregiving as indirect discrimination only addresses the 'barriers to participation and consequent disadvantage' in relation to the *female* caring workforce.[164] The bigger systematic problems, which deals with the unwillingness of employers to rethink the systems and policies they have designed for the unencumbered worker and the 'structural and institutional causes of inequality'[165] built into workplace practices do not necessarily get challenged by utilising the indirect discrimination legislative tool. Furthermore, the premise of this thesis is the normalisation of flexible working structures for *all* employees; a legislative route like indirect discrimination, generally only available to the female caregiving cohort which also does not address persistent workplace inequalities, will therefore not be explored in extensive detail in my research.

1.3.3.5 Childcare

Within the employment context, governments generally deal with the provision of childcare and the interests of children in two distinct ways. Firstly, parents are enabled through various legislative measures, such as maternity leave, shared parental leave and flexible working to combine their responsibilities in the public domain with their duties in the domestic arena. Recognising the interests of children as part of the Government's attempt to implement and promote family-friendly policies is significant.[166] It emphasises the necessity of addressing the way in which economic labour is performed in order to serve the welfare of children in the home.[167] The importance of caring labour is therefore acknowledged in this context, but only

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[163] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 254. See also Fineman's detailed critique of the limitations of anti-discrimination laws in Section 4.3.2 of Chapter 4.
[164] Rachel Horton, 'Care-giving and reasonable adjustments in the UK' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (n 111) 142.
[165] Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (n 19) 43.
[166] See Department of Trade and Industry, 'Work and Parents: Competitiveness and Choice. A Green Paper' (n 47); par 2.8 which links a mother's employment to lower poverty conditions for children.
[167] Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 7).

to the benefit of parents who also operate in the workplace and can therefore utilise the family-friendly provisions.[168]

Another way in which the Government addresses the provisions of childcare is by subsidising childcare costs in various forms. Whereas family-friendly measures facilitate employees to care in the private sphere, childcare subsidies shift the same role to a separate setting within the public domain e.g., nursery, childminder, preschool. Therefore, when an element of the private sphere is brought into the public domain, the providers of care are compensated by the Government for their services (albeit at a low rate), whereas caring services within the domestic sphere are not valued to the same extent. Currently the Government provides assistance with childcare costs in various ways. If both parents are working and earning at least the National Minimum or Living Wage for 16 hours a week (and no parent earns more than £100,000 per year), the government will pay £2 for every £8 the parents pay through an online system; this amounts to £2,000 per year and can be used to pay costs incurred through the use of approved childcare providers for children up to the age of 11.[169] This can be utilised in conjunction with the 30 hours free childcare allowance available for three- and four-year-olds (and in some limited cases to children under two) in England.[170] The latter consists of 15 hours free allowance available to all parents with children aged three and four prior to the children starting formal education; it is available for 38 weeks of the year provided the child is in the care of an approved childcare provider.[171] Some parents might also be entitled to an additional 15 hours

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[168] Joanne Conaghan, 'Women, Work, and Family: a British Revolution?' in Joanne Conaghan, Richard Michael Fischl and Karl Klare, *Labour law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford Universi*f*ty Press 2004).

[169] In England and Scotland this can be used to pay for childcare provided by a relative if they are a registered childminder and care is provided outside the home. In Northern Ireland help with childcare costs is only available where the relative is part of a childcare approval scheme, care is provided outside the home and the provider care for at least one other child not related. In Wales, help is available for relatives registered as childminders caring outside the home.

[170] In Scotland, childcare help is available to parents of two-year-olds receiving qualifying benefits, whilst all three- and four-year olds are entitled to 600 hours of childcare per year. Wales allows for 30 hours a week for those aged three, while four-year-olds may receive 48 weeks a year, but the entitlement is means tested. In Ireland three- and four-year-olds are awarded a funded pre-school education place on either a full-time (22.5 hours per week) or a part-time basis (12.5 hours per week).

[171] Education Act 2011, s 1.

per week (for 38 weeks a year)[172] provided both parents earn at least the Minimum or Living Wage and no parent earns more than £100,000 per year.

The UK's current framework to fund childcare must be scrutinised in light of its ability to address the persistence of the unencumbered norm. Unencumbered workers generally have no childcare responsibilities or are able to outsource such obligations almost entirely. The current childcare provisions funded by the Government do not, however, facilitate an employee to work in an unfettered manner. Fifteen hours a week in term time amounts to three hours a day for only 38 weeks of the year; this limited provision terminates as soon as the child enters formal education. The additional 15 hours are not universally available and many childcare providers have opted out of this system due to the shortfall in the Government's funding. When children then enter formal education a new set of challenges arises for parents dealing with holidays, before and after school care, as well as adjusting to homework demands, after school activities and emotional support through the various junctures of primary and secondary school phases. Against the backdrop of excessively long hours prevalent in the UK, the current construction of childcare provision usually only allows one parent the option to work without regard to childcare responsibilities.[173] The other parent's 'unencumberdness' is often inhibited by the availability of affordable and quality childcare. Due to the persistent gendered nature of care, it is predominantly women who pay the price for the lack of such childcare.[174]

The scattered childcare options funded by the Government often predict the possible working patterns available to one parent; the haphazard nature of the childcare provisions may stimulate the use of part-time work as it is compatible with what is offered by the Government in terms of childcare. Although higher earners can, and do, usually top up the funded childcare allowances by purchasing additional hours through the same childcare setting, this would still only amount to a 9am – 5pm commitment to availability (since childcare providers generally

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[172] Childcare Act 2016, s 1.
[173] '…public childcare redistributes childcare from mothers to the state, leaving fathers out of the equation.' Mareike Bünning and Matthias Pollman-Schult, 'Family policies and fathers' working hours: cross-national differences in the paternal labour supply' (2016) 30 Work, employment and society 256, 270.
[174] Grace James, 'Mother and fathers as parents and workers: family-friendly employment policies in an era of shifting identities' (n 103).

operate between 8am and 6pm), and very few options to adhere to sudden overtime demands.[175] Consequently, neither scenario, i.e., either working part-time and only utilising Government funded childcare or working full-time by financing additional childcare, allows both parents to adhere to the 'desired' unencumbered workplace norms. It is therefore not helpful to view childcare in isolation, as is often done, as a major obstacle to predominantly female caregivers' return to paid employment. This not only reinforces the notion that *mothers* should be the primary carers of children but also assumes that lowering the obstacle (by increasing the state-funded child-care allowance) would ensure a more equal playing field for male and female employees. This is evident from the Government's reasoning behind the much anticipated additional 15 hours childcare provision; it 'should help boost employment rates by enabling more parents, especially women, to return to work'.[176] The incentive to lure mothers into the employment sphere is therefore clear; allowing caregivers the opportunities to thrive (and not only survive) in the employment sphere is, however, yet again absent from the rhetoric.

1.3.3.6 Elderly care

This thesis deals with the career progression of women with caregiving responsibilities and this includes care for those outside the reproductive realm. Women are more likely to provide unpaid care (20% compared to 13% of men), consider its provision to have a negative impact on their work (9% compared to 5% of men) and to work part-time as a result of such provision.[177] Additionally 68% of the sandwich carers (i.e., those who have caregiving responsibilities for children and the elderly) in the UK are women.[178] In the Labour Government's attempt to facilitate a family-friendly regulatory regime, 'eldercare was an

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[175] The disparity between 'full-time' childcare (30 hours) and 'full-time' employment (40 hours) in the EU context is highlighted in Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 19) 71.

[176] HL Deb 16 June 2015, vol 762, col 1082 https://publications.parliament.uk/pa/ld201516/ldhansrd/text/150616-0001.htm#15061659000409 accessed 5 April 2021.

[177] Carers UK, 'Juggling work and unpaid care: A growing issue' (2019) https://www.carersuk.org/for-professionals/policy/policy-library/juggling-work-and-unpaid-care accessed 5 April 2021.

[178] https://www.ageuk.org.uk/our-impact/campaigning/care-in-crisis/breaking-point-report/ accessed 6 April 2021.

afterthought' which was added 'quite late in the evolution of this body of rights'.[179] Section 57A of the Employment Rights Act 1996 allows employees time off to provide intermittent care for a spouse, child, parent or someone living in the same household. The leave is not compensated for and seems to envision scenarios where care is already in place but interrupted,[180] where care is to be provided by someone else[181] or where care is temporarily required;[182] not in scenarios where the employee is in fact the carer. The timeframe for which the leave is intended to cover, and which is described as 'reasonable' time off, also 'reflects the tight boundaries' within which it was intended.[183] The RTR legislation does, however, provide a more extensive solution to the workplace dilemmas of employees to alter their work arrangements around their elderly caregiving obligations. Again, adult carers were not part of the initial group of employees included within the remit of the legislation, but they were added as part of the extension to the right in 2006.[184] The limitations of this piece of legislation to address the challenges faced specifically by employees caring for the elderly is discussed in more detail in Chapter 3 as part of the detailed critique of the RTR legislation.

1.4 Methodology

> Consistent with feminist scholarship more broadly, feminist legal methodology is more clearly unified by a common objective – revealing and challenging the role of law in exacerbating women's inequality – than specific methods per se.[185]

In conducting the research underpinning this thesis, the role of a specific piece of employment law legislation, the RTR, is investigated in order to highlight its role in 'exacerbating women's

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[179] Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (n 19) 140.
[180] Employment Rights Act 1996, s 57A (1)(d) 'unexpected disruption or termination of arrangements of the care'.
[181] ibid s 57A (1)(b) 'to make arrangements for the provision of care for a dependent'.
[182] ibid s 57A 1(a) 'provide assistance on an occasion when a dependent fall ill, gives birth or is injured', 1(c) 'death of a dependent' and 1(e) deals with unexpected accidents involving children in childcare settings.
[183] Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (n 19) 141.
[184] Work and Families Act 2006.
[185] Catherine O'Rourke, 'Feminist Legal Method and the Study of Institutions' (2014) 10 Politics and Gender 691, 691.

inequality' on the one hand,[186] whilst exploring its transformative potential within a framework of measures on the other. This involves a doctrinal review of the legal infrastructure under investigation with reference to sources such as policy documentation, Hansard reports and caselaw; this black-letter legal review allows for an analysis which exposes 'the motives and meanings of legal phenomena from within'[187] through the revision of policy considerations in the context of its historical development. In this realm of utilising black-letter law review as a methodology angle, I also review and analyse the flexible working provisions in the following three jurisdictions: New Zealand, Australia and the Netherlands.[188] The reason for selecting these three countries is situated in the type of legislative flexible working regime within which they operate. Similar to the UK, these countries have a stand-alone right to request system which implies that it is not connected to, or reliant on, other temporary parental leave provisions. However, I do not employ traditional 'comparative legal methods' where the 'differences and similarities between legal institutions and systems' are studied,[189] rather I apply a lessons-learnt analysis in the context of one particular legislative mechanism implemented in these countries as well as in the UK. The 'shared human problems' identified specifically in relation to female professional employees' career progression necessitates a review of these laws in other jurisdictions 'for inspiration at least, if not for direct borrowing' in an attempt to improve the UK's legislative response.[190] Studying 'positive law' in isolation, however, only paints part of the picture; other 'master trends and dominant features of the social landscape' have to be scrutinised in order to highlight inherent inefficiencies and the law's limits in dealing with them.[191] The contours of the employment landscape provide the necessary context in this regard and allow for a socio-legal analysis into the manifestation of

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[186] ibid.
[187] Reza Banakar, 'Reflections on the Methodological Issues of the Sociology of Law' (2000) 27 Journal of Law and Society 273, 274.
[188] My research does, therefore, fall within the narrow definition of 'comparative legal scholarship' in that I will be implementing a methodology 'that examines the laws (however defined) of more than one jurisdiction'. Stephen A Smith, 'Comparative Legal Scholarship as Ordinary Legal Scholarship' (2010) 5 Journal of Comparative Law 331, 336.
[189] Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 240.
[190] Esin Örücü, 'Law as Transposition' (2002) 51 The International and Comparative Law Quarterly 205, 221-222.
[191] Positive law is described by Selznick as an 'intricate tapestry whose main strands are legislation, judicial decisions, and administrative regulations.' Philip Selznick, '"Law in Context" Revisited' (2003) 30 Journal of Law and Society 177, 178.

gender and institutional structures conducive to reproducing inequality in this arena. Acker's inequality regimes form the basis of the critique of the current operation of the employment realm; conducting this review allows for a different lens to be cast over women's stymied career progression and it also highlights the ways in which laws could be made more responsive in this regard. Additionally, utilising Finenan's vulnerability theory, by assessing the 'parameters of state responsibility' relating to employees' universal vulnerability, a unique perspective of the role the RTR can play as a resilience enhancing mechanism becomes evident.[192] The original contribution of the thesis lies in the utilisation of the different angles, organisational and legal, to highlight the unequal landscape in which women are operating, as well as the shortcomings of existing legal frameworks to address the issues effectively. The approach followed in this thesis gauges the extent to which the RTR (specifically) and the family-friendly framework (more broadly) diminish the prevalence of the unencumbered as the 'preferred norm' and/or enhance individuals' resilience in relation to their 'universal' vulnerability.[193]

1.5 Scope

The scope of this thesis is limited to employees as this is the group of people towards whom the RTR is directed. The employment status of 'employee' requires that the person performing the work has an employment contract and this relationship necessitates regular work to be provided by the employer which has to be conducted by the employee personally.[194] The RTR specifically omits agency workers,[195] but other groups also excluded from the operation of the legislation include contractors, freelancers and self-employed workers. Whereas these workers have a level of control over their working hours/structures, employees are generally dependent on the flexibility allowed by employers. The RTR provides a legislative platform for the provision of this flexibility to employees which is ubiquitous to the purpose of the discussion in this thesis. Within this group of employees, I focus specifically on the professional female cohort with caregiving responsibilities. In some instances, the impact on all women employees might be discussed due to the nature of the statistical discrimination towards them as a group, regardless of the existence of their caregiving responsibilities. Similarly, in certain scenarios,

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[192] Martha Albertson Fineman, 'Vulnerability and Social Justice' (n 84) 367.
[193] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (n 45) 146.
[194] https://www.acas.org.uk/checking-your-employment-rights accessed 5 May 2021.
[195] EA 2002, s 80F (8)(a)(ii).

the challenges faced by all caregiving employees are highlighted, regardless of their gender, due to the limitations their caring labour places on their ability to progress professionally. It is, however, the cumulative effect of being a caregiving female employee within the higher sphere of employment which is predominantly the focus of the analysis conducted in my research. The manner in which Acker's inequality regimes manifest in the professional workplace, combined with the supposed lack of visible vulnerability of unencumbered workers, allows for an original contribution to be made in relation to this group specifically.

In addition to the group of employees with whom this thesis is concerned, it is important to highlight its scope in terms of legislative reforms. The thesis does not aim to develop alternative approaches with regards to the recognition of caregiving, promotion of paternal involvement in caregiving or prescription of state intervention in terms of social benefits. The main focus of this thesis is to investigate one piece of legislation in terms of its ability to foster career progression for professional women. The strengths and limitations of this law are highlighted by looking at the problem to be solved, i.e., women's stymied career progression. By critiquing the RTR with this problem in mind, potential areas of reform are highlighted and explored. A look at other jurisdictions with similar laws to the RTR provides useful examples of alternative legislative provisions in the context of regulating flexible working. The limitations within the operation of the RTR, even considering the suggested amendments, necessitates a look at stronger legislative options, such as quotas, to address the problem.

Finally, during the process of writing this thesis, the Coronavirus pandemic hit the world and changed the way we live, work and interact for a prolonged period of time. Although it has not been possible to integrate extensive research findings relating to the impact of the pandemic into the scope of my work, I have attempted to incorporate available data where relevant. It is particularly the prevalence of homeworking, resulting from strict lockdown measures, and contributing to the normalisation of this flexible working structure, which is relevant for the purpose of my research. In the final chapter, the extent to which flexible working could be utilised to solve problems, other than the combination and economic and caring labour, is explored with specific reference to the utilsisation of homeworking during the pandemic. Having delineated the scope of my research, the next section contains a chapter outline which shows the progress of the argument presented in my thesis.

1.6 Chapter outline

In this current chapter, I outlined my research question, key terms, important historical, employment and legislative contexts, as well as the methodology and scope of my research. An overview of the development of women's labour market participation historically, as well as an analysis of the current constellation of family-friendly laws within which the RTR is situated, provided an important backdrop for an evaluation of the evolution of women's career progression routes and their options in combining productive and reproductive labour.

Chapter 2 explores the theoretical underpinnings upon which the critique and analysis in this thesis are based. This chapter identifies and explores, firstly, the main feminist theories/concepts which have traditionally been utilised to critique and challenge employment law regulations, as well as the assumptions on which these frameworks are built. The 'women question' is addressed with reference to feminist theories relating to the ethics of care principle, sameness/difference/dominance dichotomies and the genuine choice narrative. Then the theoretical framework, drawn upon throughout this thesis, is outlined; it employs Acker's inequality regimes and Fineman's vulnerability theory. Using these two theories in tandem is critical to the original contribution of my research as it allows for elements of Acker's organisational perspective to be woven into an analysis of black letter law through an application of Fineman's vulnerability theory. This socio-legal analysis provides alternative lenses through which to view the problem, i.e., professional women's career progression in light of a specific legislative solution, i.e., the RTR.

Chapter 3 provides an outline of the development of the RTR as a legislative mechanism, the rhetoric of its policy aims and the provisions it contains; this analysis accentuates the limitations and strengths of the RTR as a transformative tool in the context of professional female career progression. The piecemeal inclusion of different categories of employees, gendered policy notions underpinning the legislation from the outset and strong inclination to accommodate employer demands lead to a legislative mechanism which facilitates flexible working, but which also inhibits employees' genuine choices and career progression options. It is specifically the law's inability to challenge gender inequality and normative working practices whilst disregarding the needs of caregivers which are highlighted in this chapter in relation to the female caregiving workforce. Fineman's vulnerability theory provides a useful framework to critique the law; situating her 'vulnerable legal subject' at the heart of the

analysis[196] allows for an alternative lens to be cast over female caregivers' choices in the workplace.[197] The analysis highlights the necessity of resilience enhancing mechanisms for all employees and a way in which caregiving can be recognised in the design and operation of the law. As a result, a strong argument is fostered in favour of the current universal application of the law to dismantle the unencumbered norm; other recommendations include the addition of a right to appeal, less open-ended rejection options and procedural amendments to facilitate and recognise caregiving.

Chapter 4 provides an overview of the 'problem' professional women face in the workplace when attempting to progress. Rather than situating this in the traditional 'barrier' narrative, a more nuanced analysis allows for an exploration of the multi-faceted elements of the organisational structure which are stacked against those with responsibilities outside of it 'where every layer reveals yet another to be explored and examined'.[198] As this chapter deals with the elements of the *organisational* infrastructure which impedes the professional female career development, the theory which is applied originates from Acker's inequality regimes. The extent to which the employment landscape generates unequal results for those not operating in an unencumbered manner is emphasised with reference to the way in which employees are recruited, work is organised and salaries are determined.[199] Practices which appear gender neutral on the surface often produce incongruent results for those who deviate from the norm. In this context, the accommodation of the RTR for alternative working patterns 'inadvertently reify standard work patterns by implicitly affirming full-time, continuous paid work as the norm.'[200] Whilst employers can shift the blame to clients, industry demands or competitive business models, the incentive to rethink the persistence of the unencumbered norm, and consequently envision the normalisation of flexible working structures, is very limited.

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[196] Martha Fineman, 'Vulnerability and Inevitable Inequality' (n 45).
[197] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self- Sufficiency' (2000) 8 American University Journal of Gender, Social Policy & the Law 13, 21.
[198] D Kolb, J Flethcer, D Meyerson and D Merrill-Sands and R Ely, 'Making Change: A framework for promoting Gender equity if Organizations' (1998) Briefing note No 1 Centre for Gender in Organizations, CGO Insights 1, 3.
[199] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 12).
[200] Shelley J Correll, Erin L Kelly, Lindsey Timble O'Connor and Joan C Williams, 'Redesigning, Redefining Work' (2014) 41 Work and Occupations 3, 9.

Chapter 5 explores other ways to improve the effectiveness and strength of the RTR as a mechanism to facilitate upward career progression. In this context, similar legislative regimes in Australia, New Zealand and the Netherlands are explored from a lesson learnt perspective. Based on this review, an 'ideal' RTR is constructed for purposes of the UK context. This includes procedural elements to strengthen the flexibility afforded by the RTR in order to facilitate caregiving, as well as other amendments which could enhance the bargaining position of applicants. The main elements of the 'ideal' RTR are, however, a universal RTR and a right to appeal. Regarding the former, theoretical and practical arguments are presented for allowing all employees to utilise the RTR. Fineman's call to the 'responsive state' to address the 'universal vulnerability' of all individuals proves particularly useful in this analysis.[201] A right to appeal, which has been in place since the enactment of the Dutch flexible working regulatory entitlement, provides a useful example of the transformative potential of the law. The advantages of the ability to question the substantive reasons for an employer's rejection of a flexible working request is situated in the manner in which such a prerogative could shift the traditional vectors of power between the employer and employee.

The inability of the RTR to facilitate female career progression, as highlighted in Chapters 4 and 5, necessitates a review of alternative, possibly stronger, legislative regimes. Chapter 6 therefore explores regulatory possibilities outside the remit of the family-friendly legislative framework which could potentially address the stymied career progression of professional women. In this context, the UK's current response in terms of positive action is investigated in relation to the Norwegian quota regime; a general critique of such legislative interventions as a mechanism to affect drastic change is provided in this penultimate chapter. The discussion highlights the design, operation and limitations of the UK's current positive action regulatory framework and then investigates in more detail quotas as a tool to enhance change. The Norwegian example for quota implementation is utilised from a lessons-learnt perspective; some unintended consequences yielded from that social experiment proved useful in the UK context. The chapter concludes by reviewing the arguments generally raised against quotas as a method to jolt institutional transformation. By applying Acker's inequality regimes, it

[201] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (n 163) 275.

becomes clear that employment scripts that presuppose merit-based systems are imbedded in the unequal employment landscape contoured in favour of the unencumbered norm.

Chapter Six provides conclusive comments regarding the usefulness of the RTR as a transformative tool in the UK context, as well as recommendations in light of the findings of this thesis.

CHAPTER 2 - THEORETICAL FRAMEWORK

2.1 Introduction

This thesis investigates the impact of the RTR with specific reference to its ability to facilitate the career progression of female professional caregivers; this requires an analysis of a piece of employment law legislation through a gender-sensitive lens. In order to determine the most appropriate theoretical prism(s) for a critique of the legislative mechanism under discussion, i.e., the RTR legislation, an exploration of a variety of feminist theoretical angles is necessary, these include: the extent to which women should or should not be treated differently in law; the manner in which caregiving/household labour is recognised in law and the choices caregivers have when performing their dual duties in and outside of the public arena. The first part of this chapter explores feminist theories which address these concepts in relation to the RTR legislation. After highlighting the relevant aspects of these doctrines, Fineman and Acker's theories are investigated in the latter part of the chapter with the aim of utilising them throughout this thesis as lenses through which to frame the discussion and critique the law. It is a combination of Acker's inequality regimes, which are used to critique the organisational setting, and Fineman's vulnerability theory, which is used as a barometer of the state's responsiveness towards employees' universal vulnerability status that provide an original angle to the problem for female employees and the potential solution situated in the RTR.

2.2 Theoretical Framework

2.2.1 Feminist critique

This thesis is concerned with the potential impact of a piece of employment law on women's career progression; the 'women question' is therefore strongly imbedded in the premise of the analysis conducted throughout.[1] This requires, firstly, an acknowledgment of the multitude of issues faced by different women in society based on their diverse backgrounds, socio-economic status, race and culture. To avoid 'gender essentialism', feminist theory should be employed to

[1] The 'woman question' is aimed at highlighting the 'gender implications of rules and practices which might otherwise appear to be neutral or objective'; Katherine T Bartlett, 'Feminist Legal Methods' (1989) 103 Harvard Law Review 829, 837.

not only question the operation of the law, but also to challenge the way in which the law 'privilege[s] the abstract and unitary voice'.[2] Secondly, utilising feminist theory to address the 'women question' inevitably incites ambivalent reactions; whilst a recognition of the 'women's point of view' provides a useful avenue for critical exploration, this acknowledgement also 'risks perpetuating attitudes at odds with feminist commitments'.[3] This paradox within feminist theory often results in contrasting views on how legislative interventions should be demarcated to ensure a more gender egalitarian operation of the law. The discussion in the following section is not intended to provide an all-encompassing review of feminist theories, but rather it focuses on three areas which are relevant to the issues critiqued in this thesis under the auspices of the sameness/difference/dominance dichotomies, the ethics of care and the choice narrative.

2.2.1.1 Sameness/difference/dominance

The sameness and difference dogmas are particularly important in gender studies as their application underpins how policies, aimed at regulating employment for instance, will be formulated and implemented. If the sameness principle is followed, women will be treated the same as men ('like should be treated alike') and the general goal will be to achieve formal equality for all. First wave feminism had at its core the advancement of equal treatment of women based on their equal worth and capabilities compared to men;[4] these feminists 'explored the discrimination within law and contributed to the movement towards equality'.[5] The legislative and constitutional instruments which were challenged to achieve this goal excluded women in their operation. It was therefore necessary to eliminate these restrictions to allow women to become equal citizens and promote formal equality. Formal equality is based on the notion that legislation and policies which differentiate between men and women based on

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[2] Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' in Hilaire Barnett (ed), *Sourcebook on Feminist Jurisprudence* (Cavendish Publishing Limited 1997) 250.
[3] Deborah L Rhode, 'The "woman's point of view"' in Hilaire Barnett (ed), *Sourcebook on Feminist Jurisprudence* (n 2) 244.
[4] A distinction can be drawn between 'the right to equal treatment' which allows for the same resources and opportunities to be awarded to everyone as opposed to 'the right to treatment as an equal' which deals with the same level of 'respect and concern' when the allocation of services and opportunities are considered. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 227.
[5] Carol Smart, 'Feminism and the power of law' in Hilaire Barnett (ed), *Sourcebook on Feminist Jurisprudence* (n 2) 83.

sexual differences should be eradicated to allow for 'individual competition in the societal marketplace' between genders.[6] It is argued by proponents of this 'liberal model of sexual equality' that very few inherent differences exist between men and women and, where certain genetic differences do occur, a 'cross sex analogue' can be utilised to ensure equal treatment.[7] This can be explained with reference to the American case *Geduldig v Aiello,* wherein the plaintiff drew an analogy between pregnancy, a condition which could only affect women and 'prostatectomies, circumcision, hemophilia and gout',[8] which are illnesses primarily linked to men, in order to substantiate a sex discrimination argument. Here the plaintiff wanted to avoid requesting special treatment for women based on pregnancy with the view to promote formal equality. The justification for the sameness theory is that the existence of a separate set of rules for men and women perpetuates existing stereotypes, enforces an outdated system by facilitating women's double shift and diminishes the opportunity to redefine the concept of an ideal worker.[9]

On the other hand, the difference theory envisages that men and women are inherently different and should therefore be treated differently in order to achieve substantive equality. Or, as Fredman explains, 'in some contexts, legal inequalities might be necessary to correct factual inequalities.'[10] The 'difference' theory stands in contrast with the notion of the liberal feminists 'sameness' model and requires an analysis of the 'feminist standpoint' based on the real experiences of women.[11] The principles valued and the thought processes implemented by

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[6] Linda J Krieger and Patricia N Cooney, 'The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality' (1983) 13 Golden Gate University Law Review 513, 537.
[7] ibid 538.
[8] 417 US 484 (1974), 501.
[9] Wendy W Williams, 'Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate' (1984-1985) 13 New York University Review of Law and Social Change 325.
[10] She goes further to construct substantive equality as a 'multidimensional concept' with four interdependent goals, these are the 'redistributive', 'recognition', 'participatory' and 'transformative' dimensions. Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review 273, 279 & 282.
[11] Sandra Harding, *'The Science Question in Feminism'* (Cornell University Press 1986) 26. '…the main weakness of formal equality lies in its failure to consider the circumstances which make individuals different.' Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020) 105.

women as a suppressed group should be considered in the effort to explain and understand society, the workplace and social relationships between the sexes. Carol Gilligan, an educational psychologist, provides strong justification for this theory by emphasising the different voices men and women use when faced with moral decisions. She distinguishes a clear 'ethic of care' approach on the female side versus a 'logic of justice approach' favoured by men.[12] She links the 'ethic of justice' to the notion of equality which requires the same treatment for everyone, whilst the 'ethics of care' approach of justice is associated with sentiments of 'nonviolence'.[13] Although Gilligan's work has been implemented by various feminist scholars in advancing the 'difference' argument,[14] the 'dilemma of difference', provides genuine predicaments in the employment setting.[15] Whether 'special benefits' afforded to women strengthens the stereotype 'in violation of commitments to equality', or accommodates differences 'in fulfilment of the vision of equality' is the crux of the issue of difference leading to 'diverse labels and inconsistent treatment in the legal system'.[16]

Catherine MacKinnon turns both the sameness[17] and difference[18] theories on their respective heads and proposes a notion whereby sex is not connected to difference and equality, not to sameness. She provides a systematic critique of the Aristotelian principle that 'like should be treated alike' by evaluating the implications of categorising people in relation to their similarities or differences to each other. On the one hand, she argues, insisting that people who have disparate standing in society should become like people who have never been affected by inequality, in order to receive similar treatment, disallows many the equality they so desperately need. On the other hand, equating difference to 'unequal' poses serious questions about the standard against which everyone is measured. In the context of gender discourse

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[12] Carol Gilligan, *In a Different Voice* (Harvard University Press 1998).
[13] ibid 174.
[14] See Christine A Littleton, 'Reconstructing Sexual Equality' (1987) 75 California Law Review 1279 and Leslie Bender, 'From gender difference to feminist solidarity: using Carol Gilligan and an ethic of care in law' (1990-1991) 15 Vermont Law Review 1.
[15] Martha Minnow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990) 21.
[16] ibid.
[17] MacKinnon equates 'sameness' to an 'illusory equality'; Catherine A MacKinnon, *Women's Lives, Men's Laws* (The Belknap Press of Harvard University Press 2005) 50.
[18] MacKinnon refers to it as the 'special protection rule legally, the double standard philosophically'; Catherine Mackinnon, 'Difference and Dominance: On Sex Discrimination' in Hilaire Barnett (ed), *Sourcebook on Feminist Jurisprudence* (n 2) 212.

specifically, MacKinnon emphasises the anomaly of the gender equality goal where the sexes are different but 'first-class equality is predicated on sameness'.[19] By focusing on difference, a comfortable vacuum is created where no changes to the social order can be achieved due to the fact that the difference is constant, it cannot be altered and consequently it is not regarded as a result of inequality or of the reproduction of inequality. In order to address the realities faced by women, she contends, there should be a shift from constructing sex as a difference to identifying the inequality and hierarchy of treatment in every scenario.[20] The construction of women's identities through their subordination should be tackled first, she argued, before any gender related theory can address the inequalities faced.[21]

Situating the RTR within one of these theories is, however, not a straightforward exercise. The focus on 'mothers' in the policy documents preceding the initial implementation of the RTR[22] contrasted with the gender neutral, albeit caregiving framework, within which the law was situated from the outset, distorts this analysis. The RTR never differentiated on gender grounds between employees as it was always available to certain categories of male *and* female carers and could, therefore, be regarded as treating men and women the same. However, the fact that it was necessary to create this type of legislative entitlement is indicative of the normative strength of full-time office-based working structures. An employee who therefore applies for flexible working is expressing his/her need to deviate from the standard employee norm by highlighting how their differences (usually in the form of caring responsibilities) justify differential treatment.[23] As women are more likely to apply for flexible working and their requests are more likely to be approved,[24] their deviation from the norm in the employment

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[19] Catherine A MacKinnon, *Women's Lives, Men's Laws* (n 17) 50.
[20] ibid.
[21] ibid.
[22] See Section 3.4.1 of Chapter 3 for a discussion on the focus on mothers in the initial stages of the development of the RTR.
[23] James explored this as 'a process of layering' in the context of maternity and parental leave where mothers and parents, in certain scenarios, are 'different' or 'different enough' to justify 'special legal accommodation'. Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge-Cavendish 2009) 62.
[24] Department for Business Innovation & Skills, 'The Fourth Work-Life Balance Employer Survey (2013)' (December 2014). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398557/bis-14-1027-fourth-work-life-balance-employer-survey-2013.pdf 8 April 2021.

sphere highlights their differences and defeats the 'sameness' doctrine of the wording used in the legislation.

The sameness/difference/dominance theories advocate for different aims in gender equality; formal, substantive and offering liberation from dominance, notions of equality underpin each of the respective theories. Although the RTR has always been framed in gender neutral terms, its operation in the caregiving sphere has allowed for gendered outcomes, thus it does not slot easily into one of the recognised feminist theories. Elements of the dominance theory do, however, inform the assessment of the employment landscape which is reported in Chapter 4; this manifests specifically in the critique of the unencumbered norm which is introduced in Chapter 1 and which weaves its way throughout the thesis. The premise of the dominance theory, which opposes 'treating the *status quo* as "the standard"' and questions the 'arrangements under male supremacy',[25] shows parallels with the analysis conducted into the persistence of the unencumbered norm as the standard against which employees are measured. Where 'man has become the measure of all things', the sameness standard requires that 'women are measured according to our correspondence with man', whilst the difference theory advocates for a measure in terms of women's 'lack of correspondence' to men.[26] A critique of these double binds, encompassed by the dominance theory, provides useful avenues for critical exploration of the unencumbered employee standard which contributes to the unequal employment landscape inhibiting female career progression.

2.2.1.2 Ethics of Care

Gilligan initially identified a clear 'ethic of care' notion on the female side versus a 'logic of justice approach' favoured by men as a basis for different decision-making processes preferred by boys and girls, respectively.[27] Whilst Gilligan's work has been instrumental in formulating

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[25] Catherine Mackinnon, 'Difference and Dominance: On Sex Discrimination' in Hilaire Barnett (ed), *Sourcebook on Feminist Jurisprudence* (n 2) 219.
[26] ibid 213.
[27] Carol Gilligan, *In a Different Voice* (n 12). Although Gilligan was responsible for mainstreaming the notion of care ethics, the roots of this doctrine can be traced back further. Gilligan's work critiqued Lawrence Kohlberg's finding regarding the supposed superior moral reasoning abilities of boys versus girls. See Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages* (Harper & Row 1984).

the 'difference' argument,[28] it has been criticised for reinforcing a gendered stereotype which assigns caring attributes to females. Liberal feminists have been attempting to eradicate this notion. Certainly, in the context of employment law, labelling care as a feminine attribute leaves very limited scope for fathers in the caregiving framework, and consequently also limits the redistribution of labour in the domestic sphere.[29] Without endorsing the notion that all women do inherently portray these characteristics, it remains possible to utilise the ethics of care approach to critique any policy response aimed at facilitating work and care labour.[30] A recognition of care ethics in the context of employment law could potentially counter the undervaluation of those who perform caring labour[31] and benefit not only those receiving care, but also facilitate 'a better distribution of care responsibilities between individuals and communities'.[32] On the other hand, a 'lack of effective legal acknowledgement' of the significance of caregiving often means that 'its cost lie where they fall', which further exaggerates the 'economic gender inequality' experienced by female caregivers who perform the majority of care work.[33]

The implementation of the RTR in its original format was indeed an important symbolic step to bring forward elements of caregiving into the public employment terrain. Initially, in order to trigger the entitlement of the RTR, employees had to prove their eligibility as a parent carer; for instance, prior to 2007 parents had to provide evidence of the age of the children for whom they were responsible and how they were related to them. Post 2007, employees could also qualify by explaining their carer status (for adults) within the remit of the law. Since the enactment of the Children and Families Act 2014, all employees are entitled to request flexible working, so technically there is no need to justify an application based on personal

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[28] See Christine A Littleton, 'Reconstructuring Sexual Equality' and Leslie Bender, 'From gender difference to feminist solidarity: using Carol Gilligan and an ethic of care in law' (n 14).
[29] Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 23).
[30] Utilising the 'the lens of ethic of care' to construe and analyse a right-based approach for care has been advocated in the EU context. Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 11) 132.
[31] Jonathan Herring, 'Caring' (2007) 89 Law & Justice - The Christian Law Review 89
[32] Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (2016) 45 Industrial Law Journal 477, 497.
[33] Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 11) foreword.

circumstances. This is an example of where the invisible private lives of employees (predominantly women) were made public to allow them to combine work and home responsibilities more efficiently, but the subsequent 'deregulation' of the parent/carer requirement has pushed the caring elements back into the private arena. The element of the private sphere which used to be brought into the workplace in an application for flexible working has, therefore, been extinguished by the extension of the RTR to all employees; this has various ideological implications. Firstly, it adds to the perception that care work performed in private does not carry any value in the conventional sense and 'entrenches the idea that production and reproduction are disconnected'.[34] Secondly, it ignores the fact that women remain predominantly responsible for unpaid care work and would therefore be disproportionally affected by the relinquishment of the care element from the legislation. One way of recognising the ethics of care in the design of the RTR would be to allow caregivers preference in the operation of the legislation where there are competing demands between them and other employees for alternative working structures.[35] This thesis, however, proposes a universal operation of the RTR legislation in order to normalise flexible working structures and avoid the marginalisation of flexible workers. This does not, however, mean that the ethics of care should, at least symbolically, be silenced in the rhetoric of the RTR legislation. In Chapter 3, the legislative provisions contained in the RTR are critiqued and its inflexible operation is highlighted as an inhibiting factor, specifically from the viewpoint of caregivers; thus, this discussion emphasises the extent to which the ethics of care can be recognised in the operation of the law through amendments to its procedural elements to the benefit of caregivers.

In the context of this thesis, the importance of the ethics of care approach to justice also deserves mention in two other areas: the construction of the unencumbered norm and the recognition of universal vulnerability. When the foundations of the unencumbered norm are considered, the invisibility of the ethics of care in the occupational setting is illuminated. Employees who are able to operate as if economic labour 'is the[ir] only, or at least the[ir]

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[34] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2014) 39 New Zealand Journal of Employment Relations 59, 63.

[35] Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (n 32).

primary, responsibility',[36] generally rely on someone else to perform household labour.[37] The unencumbered norm is built on the assumption that the majority of the responsibilities in the private arena are taken care of by a partner or are outsourced; the notion of caregiving is, therefore, completely obliterated from this norm which impacts disproportionately on the female workforce due to their amplified involvement in caregiving. The dissonance between this normative component of caregiving and the expectation that economic labour should be performed without hindrance, means that the unencumbered norm is often invoked in the workplace as an exclusionary mechanism to the detriment of female employees. Therefore, women not only facilitate men's unencumbered status through the performance of the bulk of the domestic labour,[38] they are also penalised for their inability to work unfettered themselves,[39] *and* they pay a price for attempting to operate in both spheres.[40] A recognition of the ethics of care within the employment setting has the potential to 'radically transform institutions and legal rights and the values that underpin them';[41] a legislative mechanism such as the RTR has the potential to achieve these goals, but its current design and implementation mask, rather than expose, the deleterious impact of the unencumbered norm.

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[36] Erin Kelly, Samantha K Ammons, Kelly Chermack and Phyllis Moen, 'Gendered Challenge, Gendered Response: Confronting the Ideal worker Norm in a White-Collar Organization' (2010) 24 Gender and Society 281, 283.

[37] 'This worker has no care-giving responsibilities, or relies upon others to facilitate his/her unencumbered status'. Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 23) 18.

[38] Women also facilitate their male counterparts' unencumbered status in the *employment* setting. Their clustering in lower skilled jobs due to vertical job segregation means that they often supply 'the raw material of essential "back-up" services for "service-class" occupations; for example, as clerks, typists, secretaries and punchgirls'. Rosemary Crompton, 'Women and the "service class" in Rosemary Crompton and Michael Mann (eds) *Gender and Stratification* (Cambridge Polity Press 1986) 124. See also the discussion regarding the 'edifice of women's nearly invisible support' in Erin Kelly, Samantha K Ammons, Kelly Chermack, and Phyllis Moen, 'Gendered Challenge, Gendered Response: Confronting the Ideal worker Norm in a White-Collar Organization' (n 36) 294.

[39] Women's facilitation of men's unencumbered status often leads to a scenario where 'they are unable to sell their labour at the same rate as men' due to their caregiving commitments. Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (Policy Press 1998) 8.

[40] This includes increased sickness related time off work, fragmented leisure time and higher stress levels due to their double shift. Espen Bratberg, Sven-Åge Dahl and Alf Erling Risa, '"The Double Burden" Do Combinations of Career and Family Obligations Increase Sickness Absence among Women?' (2002) 18 European Sociological Review 233.

[41] Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (n 32) 495.

The ethics of care notion is also a significant factor when considering Fineman's vulnerability theory, discussed later in this chapter and utilised throughout this thesis. Although Fineman's approach casts a wider net than what is generally contained within, for instance, Herring's application of the ethics of care to the legal system, there are intersecting points between Herring and Fineman's approaches which are useful for the purpose of this thesis.[42] Herring's delineation of care ethics is situated within individuals' 'ignorant, vulnerable, interdependent' status 'whose strength and reality is not in [their] autonomy, but [their] relationships with others.'[43] This resonates with Fineman's approach which recognises the universal vulnerability of individuals who are 'anchored at each end of their lives by dependency and the absence of capacity'.[44] Whilst Herring critiques institutions that are designed to 'disguise our vulnerability',[45] Fineman theorises around methods which enhance individuals' resilience in the face of their vulnerability.[46] She situates vulnerability, as opposed to liberal autonomy, at the center of her analysis, whilst Herring utilises 'relational autonomy' to counter the notion of the unencumbered and to incorporate the ethics of care into law.[47] Although this resonates with the approach followed in this thesis, the vulnerability theory, rather than the ethics of care, is utilised as a construction to critique the law's engagement with elements of caregiving throughout the discussions conducted herein. There are various reasons for choosing the vulnerability theory, as opposed to the ethics of care, as a conceptual lens in my research. Firstly, focusing on the vulnerability of all employees, rather than on the inclination of some towards caregiving, can avoid the 'biologically essential' label often attributed to notions of caregiving.[48] This is important in the context of this thesis which advocates for the normalisation of alternative working patterns to allow all employees the option to combine activities in- and outside the workplace and, potentially, also to enhance the incorporation of

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[42] Herring defines the 'Ethics of Care' as 'an approach based on relationship, mutuality and interconnection;' Jonathan Herring, 'Caring' (n 31) 102.
[43] Jonathan Herring, *Caring and the Law* (Hart Publishing 2013) 46.
[44] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' in Martha Albertson Fineman (ed), *Transcending the Boundaries of law: Generations of Feminism and Legal Theory* (Routledge 2010) 168.
[45] Jonathan Herring, *Caring and the Law* (n 43) 50.
[46] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251.
[47] Jonathan Herring, *Caring and the Law* (n 43) 73.
[48] Jonathan Herring, *Caring and the Law* (n 43) 69.

men into the caregiving framework.[49] Additionally, focusing on a 'wide range of differing and interdependent abilities over a lifetime', which is proposed by the vulnerability theory,[50] as opposed to only the caregiving aspect of the human experience, offers new avenues for a critical exploration of the current construction of the work/life/care paradigm.

2.2.1.3 Choice narrative

In the context of feminist theories and the concept of gender equality, the notion of the choice narrative often surfaces. A gender equality concept based on the genuine choices people have in relation to performing caring and economic labour has been at the forefront of policy design and government initiatives,[51] and it seems to provide a palatable alternative to substantive and formal equality as a policy goal. Genuine choice, however, encompasses more than a 'simple expression of preferences' and, although the utopian society facilitating this appears to be an unrealistic goal, it seems to provide a 'desirable policy direction' towards achievement of gender equality.[52] For the purpose of this thesis, dealing as it does with women's career progression, the nexus between choice and gender equality is important to consider. Providing genuine choices to employees on how to structure their work and care commitments is, in principle, a worthy notion, but the extent to which this is compatible with gender equal outcomes, is questionable.

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[49] '[L]inking care to women in such an essential way limits individuals' ability to change and challenge the organisation and structures of society' Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 11) 38.

[50] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 44) 168.

[51] A Consultation document published in 2011 has many such references: providing jobs on a flexible basis will assist 'families to balance their caring and working commitments, increasing choice' and 'protecting fairness in order to give choice in how employment and caring is balanced.' HM Government, 'Consultation on Modern Workplaces' (May 2011) 34 & 17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31549/11-699-consultation-modern-workplaces.pdf accessed 12 April 2021. See also the European Commission's use of the choice narrative in constructing their proposal for a gender-neutral flexible working right. European Commission, 'Proposal for a Directive of the European Parliament and of the Council, on work-life balance for parents and carers and repealing Council Directive 2010/18/EU' (2017/0085 COD) 2. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0253 accessed 12 April 2021.

[52] Jane Lewis and Mary Campbell, 'UK Work/Family Balance Policies and Gender Equality, 1997-2005' (2007) 14 Social Politics: International Studies in Gender, State & Society 4, 8.

The gender equal/choice paradox, which often permeates family-friendly policy debate, is illuminated by the Norwegian "daddy quota" system. The initial policy considerations for introducing this leave, earmarked for fathers, were situated in strengthening the bond between fathers and their babies whilst simultaneously addressing the unequal division of household labour; the allowance necessitated a four-week block to be taken by fathers during the first year of the child's life.[53] The choice element of who should care was therefore removed, to some extent, from the Norwegian parental leave scheme by situating it in a gender neutral realm and forcing fathers to care in order to avoid losing the entitlement. Since 2007, however, the scope and operation of the legislation have been amended to allow for flexible leave to be taken over a three-year period; the underlying policy aim of this amendment was situated in facilitating a combination of work and care and increased 'freedom of choice for families'.[54] Although the flexibility of the daddy quota enticed more fathers to take it up, the option of part-time leave only 'partially dismantle[d] the gendered division of care responsibility' and added to 'a weakening of the effects of earmarking fathers' leave'.[55] This was due to the fact that the legislative entitlement institutionalised the opportunity to work and care simultaneously which 'discursively defines fathers as people who cannot be separated from work'.[56] By facilitating 'choice' through the daddy quota, fathers could continue to use 'work as their point of departure' in the Norwegian context.[57] The notion that gender equality can, therefore, be situated in providing genuine choices to all employees in how they want to shape their different responsibilities becomes distorted in societies where caregiving and breadwinning are still strongly gendered notions. Fathers' inclinations to optimise their choices, in terms of engagement and participation in economic and caring labour, inhibits the leftover 'choices' available to mothers in providing care which is 'crucial for perpetuation of the species through the nurturing of infants and beyond…'.[58] When the choice narrative was reinstated in the

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[53] Berit Brandt and Elin Kvande, 'Norway: the making of the father's quota' in Sheila Kamerman and Peter Moss (eds), *The politics of parental leave policies: Children, parenting, gender and the labour market* (Policy Press 2009).
[54] ibid 196.
[55] Berit Brandth and Elin Kvande, 'Fathers and flexible parental leave' (2016) 30 Work, employment and society 275, 286 & 284.
[56] ibid 287.
[57] ibid 282.
[58] Nicola Busby*, A Right to Care?: Unpaid Work in European Employment Law* (Oxford University Press 2011) 48. See also Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) and Jane Lewis, 'Employment and care: The policy problem, gender equality and the issue of choice' (2006) 8

Norwegian legislation, a predictable relapse to gendered care-work patterns occurred. The UK's RTR legislation has always been situated very strongly in a choice narrative;[59] the natural fall-back means men's ability to work in an unencumbered manner while women combine work and care continue to be the obvious 'choice' in many households in the UK despite the introduction of the RTR.

As is evident from this discussion, the notions of choice and genuine choice in the realm of feminist rhetoric are much more nuanced that some theorists are willing to admit.[60] Although there might be some scope in how individuals choose to care, e.g., through outsourcing or giving it preference over paid commitments, for many there is no choice as to whether they want to care or not.[61] The choices made by individuals are both informed and inhibited by societal expectations and normative structures and they are constrained by 'ideology, history and tradition'.[62] In the context of this thesis, it is important to highlight the instances where the choice narrative is employed to 'avoid general responsibility for the inequality and justify the maintenance of the status quo.'[63] For instance, employing the 'choice talisman' when analysing a woman's decision to give up economic labour during certain phases of reproduction to justify her limited career investment, ignores not only the indispensable nature of caregiving labour ('essential rather than contingent'), but also constructs the choice as a preference and the impact

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Journal of Comparative Policy Analysis: Research and Practice 103. See also the Secretary of State's evidence regarding the Gender Pay Gap giving families a choice in how to structure their shared parental leave, as opposed to the notion of 'compulsion'. House of Commons Women and Equalities Committee, 'Gender Pay Gap: Second Report of Session 2015-16' (22 March 2016) 47 https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/584/584.pdf accessed 12 April 2021.

[59] See footenote 51.

[60] Catherine Hakim, 'Competing Family Models, Competing Social Policies' 2003 (64) Family Matters 51. See also Deech arguing in favour of limited state intervention in the private sphere as the decision to withdraw from the workplace is a 'free choice to opt for the home rather than the office.' Ruth Deech, 'What's a woman worth?' [2009] Family Law 1140, 1142.

[61] Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 11).

[62] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self- Sufficiency' (2000) 8 American University Journal of Gender, Social Policy & the Law 13, 22.

[63] ibid 21.

of such 'voluntary' decision on workplace attainment as immaterial.[64] Although 'genuine choice' as a gender equality construction provides a valid starting point for feminist critique in the context of family-friendly law, the limitations thereof must be acknowledged in order to ensure a transparent analysis of the transformative potential of the law in this context. Throughout this thesis, the usefulness and restrictions of the choice narrative are highlighted as a parameter of gender equal outcomes.

2.3 Theoretical underpinnings: inequality regimes and vulnerability

The theoretical constructs that are utilised in my work are situated in the analysis of the operation of the law when imposed on organisational structures. From an organisational perspective, Acker's inequality regimes are utilised to excavate the fundamental foundations of the workplace and, from a legal perspective, the vulnerability theory, as demarcated by Fineman, is engaged as a conceptual tool to critique the institutional framework designed to facilitate economic and caring labour in the UK. The application of this specific theoretical construct is at the heart of the original contribution of this thesis. The flaws in a piece of employment law which aim to solve the problem of female career progression are illuminated by shedding light on the issue from two different angles. Firstly, by using the lens of vulnerability, the operation of the law is critiqued as a change enhancing mechanism, and secondly, the organisation on which the law is imposed is assessed through application of Acker's inequality regimes. These theories are generally used separately, depending on the specific angle of the discussion. There is, however, a link between Acker's inequality regime and Fineman's vulnerability theory which is situated within the individual at the core of their respective theories. Acker uses the 'image of the unencumbered worker' to accentuate the manner in which work is organised around an individual with limited caregiving responsibilities;[65] meanwhile, Fineman focusses on the 'independent and autonomous individual' in her exploration of society's unresponsiveness to caregiving.[66] This intersecting element of these two theories links neatly with the discussion of the unencumbered norm,

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[64] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (1st edn, London Routledge 2002) 18.
[65] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (2006) 20 Gender and Society 441, 448.
[66] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self- Sufficiency' (n 62) 21.

provided in Chapter 1; the prevalence of this norm in the workplace is a central theme explored throughout the thesis and is further illuminated in the following discussion of Acker and Fineman's theories.

2.3.1 The inequality regimes lens

Joan Acker's work provides a useful theoretical framework to review elements of organisational practices which reproduce inequalities relating to gender, race and class in the workplace. The 'complex interweaving of analytically separated processes' underscores the intersectional approach often advanced in feminist theories to highlight the impact of multiple oppressions in the workplace.[67] Particularly important for the purpose of this thesis, which deals with a specific group of female employees, is Acker's 'gendered substructure' which 'points to the often-invisible processes in the ordinary lives of organizations in which gendered assumptions about women and men, femininity and masculinity, are embedded and reproduced, and gender inequalities perpetuated'.[68] Acker's work is utilised in this thesis from various angles. Firstly, her exploration of inequality in the organisational setting is instrumental in the analysis conducted in Chapter 4 where the problems for women in the workplace are explored with reference to the unequal employment landscape, as opposed to certain surmountable barriers. Acker's inequality regimes also provide useful analytical tools later in the thesis when the effectiveness of the RTR and other legislative regimes to address the problem are critiqued. Finally, Acker's insights into the female employee's contamination of 'essentially gender-neutral structures'[69] adds another layer to the critique of the unencumbered norm narrative – a strong premise throughout this thesis.

Acker situates the concept of 'inequality' in the organisational realm and describes it as:

> [S]ystematic disparities between groups of organizational participants in control over organizational goals and outcomes, work processes and decisions, in opportunities to

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[67] Joan Acker, 'Gendered organizations and intersectionality: problems and possibilities' 2012 (31) Equality, Diversity and Inclusion: An International Journal 214, 219.
[68] ibid 215.
[69] Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' (1990) 4 Gender and Society 139, 142.

> enter and advance in particular job areas, in security of positions and levels of pay, in intrinsic pleasures of the work, and in respect of freedom from harassment.[70]

She further explores the operation of inequalities in the workplace by reviewing the bases of inequality (race/ethnicity, class, gender), processes that produce inequality (regimes), the visibility and legitimacy of inequality, as well as the mechanism of control and compliance relating to inequalities.[71] This thesis focusses predominantly on the gender element of inequality and the processes are discussed in more detail in the next section under the auspices of Acker's inequality regimes. An exploration of the visibility, legitimacy and control aspects of Acker's inequality analysis is, however, also useful as it advances the understanding of how workplace practices and rules reproduce the status quo to the detriment of female employees. The awareness of inequality in the organisational setting is a perquisite for addressing its existence. Where organisational processes are then disguised under a gender-neutral veneer, the invisibility of inequalities is enhanced, which complicates their eradication.[72] The extent to which inequalities are regarded as part of the norm also contributes to its legitimacy and makes questioning it more challenging. Where a 'particular ordering of advantage' is regarded as 'natural or desirable', or even inevitable, in the organisational setting, it strengthens the validity of the particular inequality and the status quo by which it is sustained.[73] The final aspect of Acker's inequality breakdown deals with the extent to which elements of control and compliance contribute to the disparity in organisational processes. These include control mechanisms 'built into bureaucratic texts' which impact on how hierarchical authority will dictate decision-making and interactions in the workplace.[74] From a gendered perspective, this can vary between harassment, which is a direct form of coercion, to 'internalized forms of control', where female employees adapt their management style to comply with dominant workplace expectations.[75] The visibility, legitimacy and control aspects of Acker's inequality regimes are highlighted throughout this thesis in order to expose the taken for granted

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[70] Joan Acker, 'Theorizing Gender, Race, and Class in Organizations' in Emma Jeanes, David Knights and Patricia Yancey Martin (eds) *Handbook of Gender, Work and Organization* (Wiley-Blackwell 2011) 70.
[71] ibid.
[72] Joan Acker, *Class Questions: Feminist Answer* (Rowman & Littlefield Publisher 2006).
[73] ibid 120.
[74] ibid 122.
[75] ibid 123.

'commonsense understanding of the way things are' in organisational and legislative structures.[76]

Within this systematic imbalanced workplace, Acker pays specific attention to certain 'interrelated practices, processes, actions, and meanings' in operation which allow for preservation and intensification of 'class, gender, and racial inequalities' within organisations.[77] These 'inequality regimes' are organised into five categories: 'organizing the general requirements of work'; 'recruitment and hiring'; 'wage setting and supervisory practices'; 'organizing class hierarchies' and 'informal interaction while "doing the work"'.[78] This thesis focusses specifically on the first three inequality regimes. The first, dealing with how work is organised, is especially pertinent in the analysis conducted in this thesis as it accentuates the prevalence of the unencumbered norm in organisational practices. Acker critiques the apparent gender-neutral elements of 'jobs and hierarchies' by investigating the employee performing the work.[79] The person is described as a 'disembodied worker who exists only for the work' and who 'cannot have other imperatives of existence that impinge upon the job.'[80] Responsibilities outside the workplace cannot be included in the job description and an increased number of such obligations would make the worker unfit for the job. This highlights the gendered elements of a job as 'male worker[s] whose life centers on his full-time, life-long job' are more likely to fit this abstract job, whilst 'women's identification with childbearing and domestic life' excludes them from this construction.[81] Acker's 'image of the unencumbered

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[76] ibid 119.
[77] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 65) 448 & 443.
[78] ibid 448 – 451.
[79] Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' (n 69) 149. In Acker's later work on inequality regimes she extends her critique of the gendered organization by adding 'class and race' to the discussion. See Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 65) 443.
[80] Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' (n 69) 149
[81] ibid 149 & 152. See also Carole Pateman's analysis of the disembodied worker in liberal theory; Carole Pateman, 'Introduction: The theoretical subversiveness of feminism' in Carole Pateman and Elizabeth Grosz (eds), *Feminist challenges: Social and Political Theory* (Routledge 2014) 8.

worker'[82] show strong parallels with Berns' 'unencumbered citizen', discussed in Chapter 1;[83] the extent to which this norm impacts on organisational practices and dictates legislative interventions is a narrative to be explored throughout this thesis.

The other two inequality regimes, utilised in this thesis, deal with the manner in which employees are appointed/promoted and their remuneration assessed.[84] The evaluation of 'competence', based on the judgment of the decision maker, often leads to appointments that replicate the demography of the organisational structures.[85] The same value judgment also impacts on decisions regarding promotion where the "old boy's network" effect allows some employees' careers to be fast-tracked, while others are overlooked and excluded. A particular element of organisational processes which further differentiate on the basis of gender, race and class, deal with the manner in which salaries are calculated and employees supervised. Whilst the discretionary element of wage setting allows for discrepancies in the salaries of male and female employees in the professional sphere, the way in which managers allocate duties further bolsters the excising patterns of inequality.[86] The analysis in Chapter 4 critiques the employment landscape from the perspective of these intrinsic unequal aspects, as opposed to the traditional barriers customarily attributed to women's lack of career progression. This allows for an alternative angle when reviewing the effectiveness of the RTR legislation's capacity to act as a change agent in the pursuit of more egalitarian employment outcomes.

2.3.2 The vulnerability lens

For the purpose of this thesis, Fineman's Vulnerability Theory is explored with reference to the subject underpinning it, the responsive state's role in mitigating vulnerability and the

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[82] This is discussed in Section 4.3.1 of Chapter 4 under the 'organizing the general requirements of work' inequality regime as one of the elements which perpetuate the gender unequal workplace. See Joan Acker: 'Inequality Regimes: Gender, Class and Race in Organizations' (n 65) 448.

[83] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 64) 43.

[84] The inequality regimes are 'recruitment and hiring' and 'wage setting and supervisory practices'. Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 65) 449 – 451.

[85] ibid 450.

[86] ibid.

equality dogma advanced by Fineman's approach. These aspects are discussed separately in the following section, and utilised throughout the thesis, to highlight the shortcomings of the RTR as a mechanism to effectively address employees' universal vulnerability.

Fineman uses the vulnerable subject as a narrative to address inequalities in society and institutions. 'Vulnerable' in this sense refers to a 'universal, inevitable, enduring aspect of the human condition'; the vulnerability of human beings can be curtailed to some extent, but there is no way of eradicating its existence altogether, she argues.[87] Such vulnerability does not deal with concepts generally associated with the term, such as 'victimhood', 'deprivation', 'dependency' or 'pathology', but rather focuses on 'our embodied humanity' which is vulnerable to natural disasters and illness or injury (misfortune and catastrophe).[88] The subject for which laws are designed, according to Fineman, is an 'autonomous and independent being' who 'govern[s] his own life, while at the same time asserts his freedom from responding to the needs of others who should equally be independent and self-sufficient'.[89] Fineman's use of the masculine pronoun is intentional as the 'political subject [on which] our current institutional imagination' is built, allows only for a 'limited notion of the human experience'; this generally encompasses the masculine norm.[90] Elements of this political and legal subject in the arena of law-making can be transferred to the employment sphere; an area that is irreconcilable with outside responsibilities because it 'assume[s] that workers are those independent and autonomous individuals who are free to work long and regimented hours.'[91] Furthermore, this subject can operate within the breadwinner realm as 'they assume personal responsibility for themselves and for their dependants.'[92] Consequently, individuals are either regarded as '"full"

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[87] 'Of course, society cannot eradicate vulnerability, but it can mediate, compensate, and lessen vulnerability through programs, institutions, and structures.' Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 44) 166 & 167.
[88] ibid 166.
[89] Martha Albertson Fineman, 'Vulnerability and Social Justice' (2019) 53 Valparaiso University Law Review 341, 355.
[90] In the American context, Fineman also includes 'white, property-owning or tax-paying, certain age and/or religion, and free framer of the U.S Constitution.' Martha Albertson Fineman, 'Vulnerability and Social Justice' (n 89) footnote 355.
[91] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self- Sufficiency' (n 62) 21.
[92] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 44) 167.

legal subjects' or 'given a modified legal subjectivity' based on the extent of their deviation from this norm.[93]

The second element of Fineman's theory that is useful for the analysis conducted in this thesis, relates to the role the state can play in building vulnerable individuals' resilience.[94] Fineman's reference to vulnerability has a relational element as well as a physical manifestation. Whilst our physical vulnerability is more evident as children/the elderly, 'the ability to mitigate, compensate, or manage vulnerability will vary according to the quality and quantity of resources that individuals possess or can command'.[95] It is the mitigation of this vulnerability that allows for legislative avenues of reform. Whilst vulnerability cannot be escaped, providing individuals with means to mitigate their vulnerable status through resilience is imperative. Resilience is, however, not a natural human attribute, rather it is 'produced within and through institutions and relationships that confer privilege and power' which are 'partially defined and reinforced by law.'[96] Whilst Fineman theorises around dependency, she avoids centralising her hypothesis on it due to its 'episodic' and 'sporadic' nature; although universal, 'dependency and the absence of capacity' are more likely to occur at the beginning and end stages of life, whilst vulnerability recognises that there is an 'ever-present possibility that our needs and circumstances will change'[97] due to the possibility of an 'accidental mishap, natural disaster, institutional failure, or serious illness'.[98] Structures to increase resilience in the workplace can be situated in the family-friendly legislative regime as these measures provide 'coping mechanisms' for employees confronted with elements of their vulnerability which manifest in the workplace setting.[99] The extent to which the responsive state 'exercise[s] its authority to

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[93] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133, 148.
[94] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 44).
[95] Martha Albertson Fineman, 'Introducing Vulnerability' in Martha Albertson Fineman and Jonathan W Fineman (eds), *Vulnerability and the Legal Organization of Work* (Routledge 2018) 5.
[96] ibid 6.
[97] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 12 & footnote 25.
[98] Martha Albertson Fineman, 'Grappling with equality: One feminist journey' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (n 44) 52.
[99] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (n 46) 270.

ensure that access and opportunities exist' for individuals' to increase their resilience[100] forms an important part of the analysis conducted in relation to the RTR legislation throughout this thesis. Fineman does, however, steer clear of 'setting forth a cluster of individual rights to entitlements', rather she proposes a 'set of decision-making ethics' situated in the vulnerability of all human beings.[101]

Finally, Fineman's critique of the notion of gender equality is very useful in the context of this thesis which is aimed at utilising a piece of employment law to advance gender equal outcomes. Fineman develops an equality suitable for the family which considers the circumstances and obligations within which members of the family operate. Women's subordination 'in a world that values economic success and discounts domestic labour' endorses their difference and enhances the formal equality conundrum.[102] She proposes to use gender as a 'door through which [to] enter the discussion of equality' rather than as the core of her analysis. She promotes a stance on equality that transcends the boundaries of certain groups and spaces and advocates for equality as a 'universal resource, a radical guarantee that is a benefit for all'.[103] It is important however, within this narrative, to vest equality strongly within the universal concepts of human vulnerability and dependency, rather than autonomy which is 'a product of social policy not a naturally occurring characteristic of the human condition'.[104] Fineman does not dispute the principle 'that laws should be applied equally to those who are determined to be similarly situated', but argues for a rethink of the 'characteristics of the legal subject that are universalized'.[105] Elements of human vulnerability should be built into the concept of the legal subject to allow for a 'counter-discourse' on the current configuration of work, family and life, she argues.[106] A reconstruction of the subject at the heart of equality discourse offers a useful analytical framework throughout this thesis for two reasons. Firstly, it fills the gaps where conventional notions of equality fall short of providing a coherent lens for an analysis of

[100] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (n 46) 261.
[101] Martha Albertson Fineman, 'Vulnerability and Social Justice' (n 89) 367.
[102] Martha Albertson Fineman, 'Grappling with equality: One feminist journey' (n 98) 53.
[103] ibid 60.
[104] ibid 61.
[105] Martha Fineman, 'Vulnerability and Inevitable Inequality' (n 93) 148.
[106] ibid 149.

family-friendly laws generally and the RTR specifically.[107] Secondly, it provides a sharpened vocabulary for arguing in favour of the universal operation of the RTR throughout this thesis.[108]

2.4 Conclusion

This chapter firstly outlined the feminist theories which are relevant to the premise at the core of this thesis, i.e., exploring female caregivers' ability to advance in the occupational setting. The extent to which female employees should be treated the same/different from their male counterparts in order to address inherent workplace inequalities, the recognition of caregiving elements in the public domain and the manner in which 'choice' plays a part in decision-making processes are important elements of the 'women question' being addressed in this chapter from a theoretical viewpoint. The most important theories utilised throughout this thesis are, however, situated in Acker's inequality regimes and Fineman's notion of vulnerability. In the next chapter, a critique of the RTR is conducted utilising Fineman's vulnerability theory to gauge the UK Government's responsiveness towards employees' vulnerability. In Chapter 4, the employment landscape upon which female caregivers attempt to compete is dissected specifically via the 'gender' base of inequality, three of Acker's inequality regimes and visibility and legitimacy of inequality in the workplace setting. Based on the limitations of the RTR in light of the unequal employment landscape, Chapter 5 constructs an 'ideal' RTR law using elements of the Dutch, Australian and New Zealand flexible working regimes which are more likely to bolster female employees' resilience in the face of inherent workplace inequalities. In Chapter 6, solutions outside of the family-friendly legislative framework are explored to address some of Acker's inequality regimes and increase the state's responsiveness towards vulnerable employees.

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[107] See discussion above regarding the limitations within the sameness/difference/dominance dogmas in relation to critiquing family-friendly legislation.

[108] See Chapters 3 and 4 for arguments presented on these elements of the 'ideal' RTR legislation.

CHAPTER 3 - THE RIGHT TO REQUEST LEGISLATION: A CRITIQUE

3.1 Introduction

Chapter 1 provided an overview of the family-friendly legislative framework within which the RTR is situated, as well as the historical and employment backdrop against which female professional employees operate. Chapter 2 outlined the relevant feminist theories generally employed to critique family-friendly legislation; it introduced Fineman's vulnerability theory and Acker's inequality regimes as theoretical constructs to be employed throughout my research. The thesis is predominantly focussed on the RTR legislation, specifically on its ability to facilitate career progression for professional caregiving women which necessitates the detailed critique of the RTR legislation conducted in this chapter.

The challenges faced by employees attempting to operate in the public arena whilst performing duties outside of it, could potentially be addressed by a variety of different legislative[1] and organisational measures. These initiatives are generally directed at solving problems for caregivers in either the domestic arena or the workplace; leave provisions and childcare allowances are directed at the former, whilst anti-discrimination laws and the regulation of working hours are intended to regulate the latter. The RTR legislation, however, recognises the overlap between the expectations of the workplace and the demands outside it by allowing diminished or varied working hours in order to free up time for caregiving and other responsibilities, thus it is an important tool in the arsenal of caregiving employees. Although the RTR has the potential to challenge normative behaviours regarding the work/life/care interface, its impact in this context has been disappointing. The usefulness of the RTR as a mechanism to affect change in this regard is investigated in this chapter. This analysis is necessary in the context of this thesis as it addresses an important part of the research question which deals with the potential of the RTR to enhance professional women's career progression. In order to answer this question, the chapter provides a breakdown of the legislative development of the RTR since 2002, as well as the provisions contained within it. This is followed by a detailed critique of the law based on its (in)ability to address gender disparities,

[1] See Section 1.3.3 of Chapter 1 for a discussion of the UK's constellation of family-friendly employment law measures.

dismantle normative workplace operations and facilitate caregiving in the employment arena. The final section focuses on useful elements of the RTR which are worth keeping due to their ability to normalise flexible working.

3.2 Development of the RTR

Since 2002 the RTR has developed from a piece of legislation allowing certain categories of employees to apply for flexible working into a universal law allowing all employees to request flexible working.[2] The historical overview of the development of the RTR, conducted in the next section, is relevant in the context of this thesis for a number of reasons. This thesis deals primarily with the potential of the RTR as a mechanism to advance women's career progression; an overview of how this piece of legislation came about and has been developed over the last 20 years is therefore necessary to contextualise the critique fundamental to the whole thesis. Furthermore, as part of this analysis, the policy considerations and rhetoric which underpin the enactment and expansion of the RTR are highlighted. This provides useful background context when the law is critiqued in the latter part of this chapter.

3.2.1 The preamble to the RTR

After they came to power in 1997, the New Labour Government's employment law reforms reflected a definite change in direction and pace from their predecessors in the landscape of family-friendly workplace initiatives. The work-life balance campaign launched in March 2000 by the then Prime Minister, Tony Blair, focused on a voluntary approach 'in persuading increasing numbers of employers to introduce policies that benefit their business and give their employees a better balance between their work and home lives'.[3] The Green Paper ('Work And Parents Green Paper'), published in December of the same year, suggested a shift from such a completely voluntary system to a regime whereby certain employment rights were entrenched in legislation.[4] The three options which were considered by the Government in order to address

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[2] See Section 3.3 below for a discussion of the specific qualifying requirements.
[3] Department of Education and Employment, 'Work Life Balance Changing Patterns in a Changing World' (March 2000) 31 https://dera.ioe.ac.uk/8789/7/52_1_Redacted.pdf accessed 15 April 2021.
[4] Department of Trade and Industry, 'Work and Parents: Competitiveness and Choice. A Green Paper' (December 2000).

the issue of flexible working for parents were: a reduction in working hours where mothers decide to return to work before the end of the maternity leave period; an extension of the right to work reduced hours for fathers until the end of the maternity leave period (exempting the smallest employers) and the introduction of a right to reduced hours for parents at the end of the maternity leave period.[5] During the consultation process, certain organisations (e.g., those promoting the interests of women, families and employees) were in favour of a purely rights-based approach. They proposed that the right to request flexible working should be extended to all parents (not just mothers) in order to remove gender segregation[6] and avoid stigma and the adverse impact on careers and promotion when working flexibly.[7] In contrast, the Institute of Directors (which represents business leaders in the UK) suggested that employees' preferences should be considered on a purely voluntary basis, and that employers will utilise flexible working structures 'if a business case can be made (but not a social one…)',[8] whilst the Confederation of British Industry's stance was that flexible practices should be 'encouraged not regulated'.[9]

These polarised responses received in relation to the Work and Parents Green Paper led to an amended regulatory approach, and consequently the Labour Party announced in May 2001, during the General Election campaign, that the Government would provide a right to request flexible working to all parents with young children.[10] The Work and Parents Taskforce was appointed on 28 June 2001 to create a 'light-touch legislative approach to giving parents of young children a right to make a request to work flexible hours and to have this request

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[5] ibid paras 4.16, 4.18 & 4.20.
[6] Women's Budget Group, 'Government Green Paper, Work and Parents: Competitiveness and Choice - Women's Budget Group Response' (2001) https://wbg.org.uk/wp-content/uploads/2016/03/Work-and-Parents.pdf accessed 17 April 2021.
[7] Joseph Rowntree Foundation, 'Response to Green Paper, Work and Parents: Competitiveness and Choice' (March 2001) https://www.jrf.org.uk/report/response-green-paper-work-and-parents-competitiveness-and-choice accessed 12 April 2021.
[8] Ruth Lea, '"The Work-Life Balance"…and all that: The re-regulation of the labour market'(Institute of Directors Policy Paper, April 2001) 11.
[9] Mark Hall, 'Green paper on parental leave receives mixed reception' (Eurofound 27 January 2001) http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions/green-paper-on-parental-leave-receives-mixed-reception accessed 15 April 2021.
[10] George Jones, 'Right to ask for flexible working hours welcomed' *The Telegraph* (31 May 2001) http://www.telegraph.co.uk/news/uknews/1332336/Right-to-ask-for-flexible-work-hours-welcomed.html accessed 15 April 2021.

considered seriously by the employer.'[11] The recommendations of the Work And Parents Taskforce focused on prudent mechanisms to introduce the right to request flexible working to allow employers and employees to gradually become familiar and comfortable with the process.[12] The fact that offering the right to request to parents of young children exclusively could possibly create resentment within the workplace was considered by the Work and Parents Taskforce, but based on employers' unwillingness to extend the right to others and the priority given by Government to working parents, the Work and Parents Taskforce suggested that the option should be extended to others by employers who voluntarily chose to do so. Furthermore, the interests of small businesses were considered at every step of the way, but instead of excluding them from the remit of the legislation the spirit of the suggested legislative recommendations prescribed a straight-forward process based on existing best practice with the objective of making it easy, for small businesses specifically, to implement.

The Government responded to the Work and Parents Taskforce's report in November 2001[13] and confirmed their willingness to legislate the majority of the recommendations promptly. The Taskforce was praised by the Government for finding a prudent concession between the interests of the various groups whom the legislation might affect. On the one hand, there were employee and parenting groups who were campaigning in favour of an objective justification test to be applied to the evidence of business reasons presented by an employer when rejecting an employee's request to work flexibly. On the other hand, employer's groups preferred a much less stringent test which focused on the procedural element of the request for flexible working applications only. In this chapter, I discuss the limitations of the provisions which made it into the relevant legislation and show that the 'cautious compromise which goes with the grain of good practice'[14] actually weighed heavily in favour of the latter group as it allowed for a very limited right to appeal, should an application be rejected by the employer, to be implemented. Furthermore, it has been argued that what had been enacted was a 'toothless right for a narrowly

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[11] HC Deb 28 June 2001, vol 370, col 149W.
[12] Work and Parents Taskforce, 'About Time: Flexible Working, Work and Parent Taskforce' (November 2001).
[13] Department of Trade and Industry, 'Government Response to the Recommendation from the Work and Parents Taskforce' (November 2001) http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/er/wptresponse.pdf accessed 15 April 2021.
[14] ibid 2.

defined group' due to heavy consideration of the interests and concerns of employer groups and an attempt to gain employer acceptance of the general flexible working initiative by limiting the entitlement to parents with young children only.[15] It is also important to note that the aforementioned two documents contain no specific reference to the objective of promoting gender equality in the employment sphere. The focus was on increasing workplace participation of parents (mainly mothers), encouraging dialogue between employers and employees regarding flexible working options and transforming the cultural perceptions regarding flexible working by emphasising the benefits and creating awareness of the options available. The critique which addresses the limitations of the RTR, elaborated on later in this chapter, is not, however, directed at the absence of the gender equality policy goal in the Government's submissions as such, but rather at the possible unanticipated outcome of gender *in*equality associated with these measures.[16]

The right to request flexible working was implemented in 2002 and by 2005 it was clear that awareness amongst employees had increased. The results of the Second Flexible Working Employee Survey which surveyed 3,222 employees in January 2005 (with a response rate of 62%), showed that women, parents and older employees were generally better informed about the option to request flexible working; almost 25% of employees who were regarded as a 'qualifying employee' under the law, brought an application in the preceding two years, 81% of requests were granted (fully or partially) and complete approval of an employee's request was more probable where the employee had dependent children, was a woman and worked fewer than 40 hours a week.[17]

3.2.2 The next step: including carers

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[15] Claire Kilpatrick and Mark Freedland, 'The United Kingdom: how is EU governance transformative?' in Silvana Sciarra, Paul Davies and Mark Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union: A Comparative Analysis* (Cambridge University Press 2004) 342. Anderson referred to it as 'sound-bite legislation.' Lucy Anderson, 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working "Rights" for Parents' (2003) 32 Industrial Law Journal 37, 41.

[16] See discussion below in Section 3.4.1.

[17] Heather Holt and Heidi Grainger, 'Results of the Second Flexible Working Employee Survey' (Office of National Statistics, July 2005).

In December 2004, the Government published a document[18] setting out its strategy to deal with childcare and the needs of working parents specifically for the following 10 years. Although the document focused on the need to provide affordable flexible childcare in the UK, one of the measures supported by the Government to ensure sufficient support to parents was the option of flexible working arrangements to enable them to balance work and family life with specific focus on the needs of parents with older children. Consequently, the Government committed, in its pre-budget report, to consult with employers on extending the RTR to parents of older children.

Following the above-mentioned consultation, the Government set out various proposals in a response document (Government Response 2005)[19] to ensure improved childcare provision, amended working patterns that allowed 'especially mothers' and other carers to advance in the workplace and provide families with a real choice on how they want to adjust to work and family commitments.[20] The impact of the RTR was discussed in the Government Response 2005 and, although it was admitted that the right had stimulated discussions between employers and employees, concerns were raised about the availability of flexible working arrangements for those in more senior positions and in workplaces where shift work is prevalent. Although this acknowledgement of the shortcoming of the RTR flexible working was expressed in gender neutral terms e.g., 'senior jobs' and 'managerial employees',[21] it is significant in the context of this thesis as it highlights the struggles faced by employees in combining work and care responsibilities when they are situated higher up in the employer's hierarchical structures, which is the focus group of this thesis. Due to the gendered nature of caregiving, the scarcity of flexible working options in senior positions would be felt more noticeably by women in the workforce. The Government's suggestions to promote flexible working in these areas were to provide more detailed guidance documents and raise awareness of the option to use a trial

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[18] HM Treasury, 'Choice for Parents, the Best Start for Children: A Ten Year Strategy for Childcare' (December 2004) https://dera.ioe.ac.uk/5274/2/02_12_04__pbr04childcare_480-1.pdf accessed 15 April 2021.
[19] Department of Trade and Industry, 'Work and Families: Choice and Flexibility. Government Response to Public Consultation' (October 2005) https://webarchive.nationalarchives.gov.uk/20060213223940/http://www.dti.gov.uk/er/workandfamilies.htm accessed 15 April 2021.
[20] ibid 2.
[21] ibid 37.

period.[22] This is a very generic, simplistic resolution to the plea of senior employees, and shift workers, on how to address the lack of flexible working options in their arenas. It also goes against the notion that the legislation envisioned fostering a culture change regarding the availability of flexible working as no attempt was made to engage the law fully to address the disconnect between flexible working and senior roles in this instance.

Once the input of various stakeholders was considered, the final recommendation was to extend the RTR to carers of adults only as a stronger case was made for the needs of this group of employees as opposed to parents of older children. Factors which impacted the Government's decision to prioritise carers when extending the RTR to a wider audience include the point that employers were already more accommodating of the work-life challenges faced by parents (as opposed to carers), very few employers made provision for the care of the elderly and the Government-subsidised childcare scheme was a lot more extensive than carer allowances were.[23] Focusing on one closely defined group, it was argued, would allow employers to deal with applications from a limited number of employees at a time and avoid a surge of requests coming in after the legislation had been passed.

The change was implemented by the Work and Families Act 2006, and the corresponding regulations[24] enacted thereunder allowed an employee responsible for the care of a person 18 or over to apply for a contract variation provided that the person to be cared for was married to, in civil partnership with, or the partner of the employee, a relative of the employee or living at the same address as the employee.[25]

3.2.3 Moving forward: all parents

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[22] The EA 2002 does not make any provision for a trial period, but it could be argued that refusal on the part of the employer to agree to a trial period might support an employee's submission that the request was not handled in a 'reasonable manner' as required by s 132(2)(a) of the Children and Families Act 2014.

[23] Department of Trade and Industry, 'Work and Families: Choice and Flexibility. Government Response to Public Consultation' (n 19).

[24] The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006, SI 2006/3314.

[25] Work and Families Act 2006 s 12(b)(ii) and reg 5(3B) of the The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006, SI 2006/3314.

Within nine months of the extension of the RTR to carers, the Government made a commitment to review the possibility of providing the RTR to all parents (regardless of the age of their children) in order to assist double parent working households to combine work and care responsibilities.[26] Imelda Walsh (Human Resources Director at Sainsbury's) was asked by the Secretary of State to consider how the RTR flexible working should be extended to parents of older children. In her report, Walsh touched on the fact that flexible working is perceived as being of importance mainly to women.[27] The reason for this perception, according to her, was that women were more likely to work part-time (the most common form of flexible working) because they generally earnt less than men. This reduction of hours by women would then have a diminished effect on the overall household income compared to where the higher earner had to reduce his/her hours. Walsh countered this argument by highlighting the fact that in 29% of households in the UK women were in fact the higher earners. There is, however, no reference in this section to the fact that the primary reason why women are working part-time is to care for children or dependant family members. Walsh's final recommendation was that the RTR should be extended to all parents of children 16 years and younger to allow parents to support their children during the different stages of schooling.

The Government accepted Walsh's recommendation completely[28] and also considered measures to deregulate the RTR by simplifying the process for businesses and reducing the administrative tasks involved when dealing with a request. The only change that was made to the legislation though, which came into force on 6 April 2009, was the extension of the RTR to parents with children under the age of 17, or 18 for disabled children.[29]

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[26] HC Deb 6 November 2007, vol 467, col 27.
[27] Imelda Walsh, 'Flexible working. A review of how to extend the right to request flexible working to parents of older children' (Department for Business Enterprise & Regulatory Reform, May 2008). https://webarchive.nationalarchives.gov.uk/20090609082429/http://www.berr.gov.uk/files/file46092.pdf accessed 14 April 2021.
[28] Department of Business Enterprise & Regulatory Reform. 'Consultation on implementing the recommendations of Imelda Walsh's independent review. Amending and Extending the Right to Request Flexible Working to Parents of Older Children' (August 2008) https://webarchive.nationalarchives.gov.uk/20090609030026/http://www.berr.gov.uk/files/file47434.pdf accessed 14 April 2021.
[29] The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009, SI 2009/595 amending reg 3A of The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236.

3.2.4 The final extension: RTR for all employees

In May 2010 the Labour Party was voted out of power and a coalition government was formed between the Conservative Party and the Liberal Democrats. In the manifesto of the Coalition Government a section was dedicated to 'Equalities' wherein it committed to address (among other things) equal pay, discrimination in the workplace, gender equality on boards and the extension of the RTR to all employees.[30] The Department for Business Innovations and Skills conducted an impact assessment to establish the potential effect that different policy alternatives would have on the workforce in monetary and non-monetary terms.[31] The main options evaluated were to extend the RTR to all employees, or to create a two-tier system whereby a non-statutory voluntary code provided guidelines to employers on how to extend flexible working (whilst still prioritising the requests of parents and carers). The latter approach was rejected for various reasons, strong arguments against it included: the fact that a non-legislative 'good practice' method would inhibit employer-employee discussions regarding flexible working options and that an employee would have no recourse to an appeal in the event their request was not considered seriously. This gave the impression that the legislator had a broader right to recourse in mind than the one contained in existing legislation which only provided for an appeal on procedural grounds. Nothing of this nature was, however, incorporated into the final amendment to the legislation which extended the RTR to all employees.

The main policy outcomes sought by the extension of the RTR were outlined as follows:[32]

- to increase the availability and uptake of flexible working to enable individuals to manage their work alongside other commitments and to help employers realise the benefits flexible working can have on their business;

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[30] HM Government, 'The Coalition: our programme for government' (May 2010) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf accessed 14 April 2021.
[31] HM Government, 'Consultation on Modern Workplaces. Modern Workplaces Consultation - Government Response on Flexible Working: Impact Assessment' (November 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/82794/12-1270-modern-workplaces-response-flexible-working-impact.pdf accessed 15 April 2021.
[32] ibid 8.

- to provide all employees with the same access to flexible working as are available to parents and carers, whilst ensuring that businesses have the flexibility to refuse requests on business grounds;
- to remove the cultural expectation that flexible working only has benefits for parents and carers, encouraging wider take-up and demand; and
- to improve the functioning of the labour market through a more diverse provision of working patterns.

It is particularly the third policy aim, 'to remove the cultural expectation' that flexible working only holds benefits for parents and carers, which is explored in more detail later in this chapter where the argument is formulated in favour of a universal RTR to normalise alternative working practices.

3.3 Outline of the RTR

A right to request flexible working was introduced in the UK for the first time through the enactment of the Employment Act 2002 (EA 2002) which received Royal Assent on 8 July 2002. The EA 2002 amended the Employment Rights Act 1996 (ERA 1996) by the insertion of Section 47[33] which provided a statutory right to request a change in contract terms and conditions to all parents with children under the age of six or 18 (where the child is disabled).[34] The EA 2002 stipulates that a change requested by a qualifying employee must relate to required hours or times, working from the office or home or additional aspects as specified by regulations.[35] An employee was regarded as eligible to apply if he/she had been working for the same employer for 26 weeks,[36] was related to the relevant child (mother, father, adopter, guardian, foster parent or the spouse/partner of any of these),[37] or was responsible for the upbringing of the child[38] and was not an agency worker.[39] When making an application, the employee had to consider the potential impact the change might have on the employer and how

[33] This amended the ERA 1996 by inserting Part 8A after Part 8.
[34] EA 2002, s 80F(3).
[35] ibid s 80F(1)(a)(i)-(iv).
[36] The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236, reg 3(1)(a).
[37] ibid reg 3(b)(i)-(ii).
[38] ibid reg 3(c).
[39] EA 2002, s 80F(8)(a)(ii).

such outcomes might be addressed.[40] It only allowed for one application within any 12 month period whilst with the same employer.[41]

An employer could refuse an application if one or more of the following grounds applied: burden of additional costs, detrimental effect on ability to meet customer demand, inability to re-organise work among staff, inability to recruit additional staff and detrimental impact on quality or performance, insufficiency of work during the periods the employee proposes to work or planned structural changes.[42] An employee could lodge a complaint with an employment tribunal if the employer failed to comply with certain procedural requirements[43] or rejected an application based on incorrect information.[44] Where such a complaint was found to be valid the tribunal could order the application to be reconsidered by the employer[45] or award compensation to the relevant employee based on certain limits.[46] The EA 2002 further amended the ERA 1996 by providing protection to employees from suffering detriment in employment based on any application, or proposed application, to request flexible working, or complaints made to an employment tribunal regarding their application.[47] Furthermore, a dismissal based on such application, proposed application, or proceedings shall, it stipulated, be regarded as unfair.[48]

Since then, the scope of the law was extended to include carers in 2006,[49] all parents in 2009,[50] and finally, from 30 June 2014, all employees. The final extension was enacted by the Children and Families Act 2014 (CFA 2014) through the removal of Section 80F (1)(b) of the ERA 1996

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[40] ibid s 80F(2)(c).
[41] ibid s 80F(4).
[42] ibid s 80G(1)(b)(i)-(viii).
[43] ibid s 80H(1)(a).
[44] ibid s 80H (1)(b).
[45] ibid s 80I (1)(a).
[46] ibid s 80I (1)(b) – (3).
[47] ibid s 47E(1)(a)-(d). In the Northern Ireland context, this is regulated by Section 70E of The Employment Rights (Northern Ireland) Order 1996; no employee may 'be subjected to any detriment' based on a flexible working application.
[48] EA 2002, s 104C (a)-(d).
[49] Work and Families Act 2006 and The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006, SI 2006/3314.
[50] The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009, SI 2009/595 amending Regulation 3A of The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236.

which dealt with the condition of being a carer in order to qualify for the legislative entitlement to request flexible working.[51] Consequently, an application to request flexible working only has to contain the relevant information of the change required and proposed effective date thereof,[52] as well as the possible impact such change might have on the employer and ways to deal with any such impact.[53] An obligation was also imposed on the employer to notify the employee of the outcome of their decision within three months of the application being made, or a longer period if agreed between the parties.[54] The grounds for refusal were unchanged,[55] but the employer now had a duty to consider an employee's request in a reasonable manner,[56] and the Secretary of State regulations (which governed the employer's duty to consider the request previously) were repealed. Furthermore, the statutory process to be followed when considering a request was repealed by the CFA 2014, this should allow employers to review requests based on the HR processes they have in place already.[57] An additional ground for a complaint to the employment tribunal (where an employee was not provided with sufficient notification of the employer's decision) was also incorporated by the CFA 2014,[58] but it still only deals with a procedural element of the application (and not its substantive fairness).

The following table sets out the RTR as it stands today:

Eligibility	All workers with employee status, agency workers excluded.
Type of flexible working allowed	Hours required to work, times required to work, location of work.
Information required on application	That it is a flexible working request. Change required and date change should come into effect. What effect change will have on employer and how the change should be dealt with.
Review of request	Reasonable manner within 3 months. Rejection is allowed based on the following grounds: burden of additional costs, detrimental effect on ability to meet customer demand, inability to re-organise work among staff, inability to recruit additional staff and detrimental impact on quality or performance, insufficiency of work during the periods the employee proposes to work or planned structural changes.
Right to Appeal	Procedural only. Employer did not deal with the application in a reasonable manner. Employer did not respond within the 3-month period.
Changes allowed	Only permanent changes to employment contract allowed.
Frequency of requests allowed	Every 12 months.
Length of service required	26 weeks.

[51] CFA 2014, s 131(1).
[52] EA 2002, s 80F(2)(b).
[53] ibid s 80F(2)(c).
[54] CFA 2014, s 132(3)(1B).
[55] See footnote 42.
[56] CFA 2014, s 132(2)(a).
[57] Explanatory Notes to CFA 2014, part 9.
[58] CFA 2014, s 133(2)(c).

3.4 Critique of the RTR

Having outlined the development of the RTR and the provisions contained within it, the following section provides a detailed critique of the RTR from the perspective of my research question dealing with professional women's career progression. This critique highlights the limitations within the RTR to facilitate career progression by reviewing the policy aims which have always underpinned it, as well as the provisions contained within it. The discussion focuses specifically on the following three flaws within the RTR: its failure to challenge gender inequality; its inclination to sustain normative working practices and its disregard for the needs of caregivers operating in the employment sphere.

3.4.1 Failure to challenge gender inequality

This section explores the extent to which the RTR challenges gender inequality in the workplace. The analysis is conducted by reviewing the goals and rhetoric underpinning the RTR development and providing a critique of the notion of equality in the context of this type of legislation in general. This is important for the purpose of this thesis as the employment outcomes for women, who are still predominantly the main caregivers, are detrimentally impacted by the use of flexible working facilitated by the RTR. The policy goal of gender equality was, however, never at the forefront of the implementation of the RTR legislation. It was only when the right was finally extended to all employees in 2014 when the policy rhetoric changed in this regard; the promotion of 'work-life balance' instead of 'family-friendly policies' was a clear indication of this shift. [59] For the first time since the RTR came into force the direct impact of flexible working on gender equality was considered in policy documentation and an acknowledgment that women would be disproportionately affected by the associated detrimental impact on their career prospects. In this section, I show how the absence of any gender equality rhetoric from the outset, and the proverbial nod to it in later policy documents, was just that - rhetoric. Even where a shift started to occur towards recognising the link between flexible working and gender inequality, the methods suggested to support this notion did not carry any weight in terms of bringing about real change.

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[59] HM Government 'Consultations on Modern Workplaces, Modern Workplaces Consultation - Government Response on Flexible Working: Impact Assessment' (n 31) 25 & 26.

Although the RTR never implicitly made any differentiation in its application between men and women, from the outset the Government's policy stance focused heavily on increasing women's, and especially mothers', workplace participation through facilitation of their roles inside and outside of the home. In the Work and Parents Green Paper published on 7 December 2000, the Government considered 'working parents and the people they work for' by exploring various practical measures to support employees who have caring responsibilities.[60] Whilst the objectives of the Green Paper are formulated in gender neutral terms, Chapter 4, entitled 'Supporting *parents* in the workplace', is predominantly focused on *mothers'* ability to combine employment and caring responsibilities. The following references in this section of the Green Paper emphasise this theme:

> 'In the UK, the majority of women believe a career and children can be combined…'
>
> 'When choosing whether to return to work women want to know that they will be able to balance home and work.'
>
> 'Flexible working arrangements, particularly home working and term-time work, are a further key factor in facilitating a mother's return to paid employment.'
>
> 'Thirty-three percent of mothers who do not work cite the lack of suitable childcare as the reason.'[61]

These statements, when supposedly assessing *parents'* abilities to perform paid work and care simultaneously, strongly reinforce the notions that women are predominantly responsible for childcare, that domestic and care work are not valued and that fathers are not concerned about childcare arrangements or motivated by flexible working as a means to facilitate economic and caring labour. The transformative potential of these policies can be immense but could also reinforce existing inequalities if the accommodations are directed at mothers as the marginalisation of such beneficiaries are usually soon to follow such action. The emphasis which was placed on mothers' roles in this context is problematic from a gender equality point of view as it strengthened the link between motherhood and caregiving, thus limiting the 'space' female carers have within which to consider their career mobility; a core question this thesis aims to address.

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[60] Department of Trade and Industry, 'Work and Parents: Competitiveness and Choice. A Green Paper' (n 4) para 1.2.
[61] ibid paras 4.3, 4.4, 4.8, 4.33.

The policy aims which the RTR sought to achieve from the outset did not, therefore, include universal caregiving, rather they focussed on the role of mothers almost exclusively. Although the RTR which flowed from the suggestions considered in this Green Paper was eventually formulated in gender neutral terms (in that it provided the right to *all* parents with children under 6), the focus on *mothers*' interests in childcare, employment and on balancing the two in the policy discussions leading up to regulation of flexible working, is indicative of the Government's stance on where the ultimate responsibility for domestic tasks and childcare should rest. This kind of rhetoric probably resonates with what is also still regarded as socially acceptable, but does not take into account the role the law can play in 'shaping perceptions of these values'.[62] Whilst the bluntness of law as a transformative tool is well documented,[63] the impact of legislative reform would be even less effective where the legislature endorses existing cultural norms, instead of challenging them.[64] The initial policy goals connected to the implementation of the RTR legislation is evidence of just that; an attempt to help mothers enter and operate in the employment terrain without addressing the prevalence of the unencumbered norm, or of fathers' lack of involvement in the caregiving framework. This reinforces the notion that caregiving is, and should be, a female undertaking and also promotes the current gendered care-giving structure which is regarded as a 'precondition of inequality in the workplace and more generally society.'[65] The role of fathers as carers has become increasingly important and is instrumental in combatting the current unequal division of household labour and improving women's progression in the workplace.[66] Not recognising fathers' caregiving role in the rhetoric of this legislation, however, neutralised the gender-neutral wording of the legislation as it was never intended, nor designed, to operate as a universal right to facilitate flexible working for all parents. The gendered rhetoric and gender-neutral language culminated in a piece of law facilitating caregiving by some employees, whilst reinforcing the unequal

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[62] Katherine O'Donovan, *Sexual divisions in law* (Weidenfeld & Nicolson 1985) 19.
[63] Carol Smart, *Feminism and The Power of Law* (Routledge 1989).
[64] Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998).
[65] Eugenia Caracciolo Di Torella. 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers' (2007) 36 Industrial Law Journal 318, 328.
[66] See Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' 2016 (45) Industrial Law Journal 477; Eugenia Caracciolo Di Torella. 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers' (n 65); Nicole Busby, 'Unpaid care-giving and paid work within a rights framework: towards reconciliation?' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar Publishing 2011).

operation of the employment landscape in favour of the unencumbered worker. The law might have been able to effect change in this regard if the underlying gendered policy rhetoric was its only downfall; the fact that the rhetoric was supported and strengthened by legislative provisions, insulating the unequal norms, completely diminished the ability of the RTR as a statutory mechanism to dismantle normative gendered patterns. It became a tool which allowed caregivers to survive in the employment sphere, but not to thrive.

The first time gender equality goals became evident in the development of the RTR was in a manifesto issued by the Coalition Government in 2010 wherein a section was dedicated to 'Equalities'.[67] The flexible working section of the subsequent consultation document promoted the possibility of flexible working supporting various other Government policies, such as the gender pay gap and shared parenting.[68] In the context of flexible working and women's career progression, these issues are crucial elements for addressing gender inequality in the workplace. The part-time pay penalty is a contributing factor to the persistent gender pay gap; addressing the detrimental impact of part-time work on career prospects through policy intervention could potentially avert flexible working from amplifying an already unequal element of workplace remuneration.[69] Additionally, shared parenting is an element of the private sphere which has thus far been left unregulated to the detriment of female carers.[70] Highlighting these issues suggested, therefore, that the proposed legislation might have been aimed at supporting a more egalitarian relationship between men and women inside and outside the formal employment sector, an issue previous administrations have not explicitly explored or attempted before.

Regarding shared parenting, the idea was to normalise flexible working to allow men to utilise the option in order to increase their involvement in childcare responsibilities without the risk of harming their career prospects. The fact that *men's* career prospects are considered here is

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[67] HM Government, 'The Coalition: our programme for government' (n 30) 18.
[68] HM Government, 'Consultation on Modern Workplaces' (May 2011) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31549/11-699-consultation-modern-workplaces.pdf accessed 18 April 2021.
[69] See Acker's inequality regime on 'wage setting and supervisory practices' in Section 4.3.3 of Chapter 4.
[70] Shared parental leave regulations were only implemented in 2015. See section 1.3.3.1 of Chapter 1 for a discussion on SPL provisions within the wider framework of family-friendly legislation in the UK.

significant[71] because the link between flexible working and upward career progression in the workplace have not featured in policy documents at all up to this point; the main focus had always been on allowing parents to combine their work and home responsibilities, predominantly with the aim to increase the female workforce. It was acknowledged that the RTR in its traditional format (available only to carers), 'may inadvertently have reinforced' the 'misconception that the non-traditional working practices are only useful or justified for parents and carers, and for women in particular'.[72] The extension to all employees, it was argued, would address this misunderstanding by 'making flexible working a mainstream practice for men'.[73] Apart from the extension of the right, no significant measures were however identified (or eventually implemented) to promote the ideal of shared parenting through the normalisation of flexible working.

The gender pay gap consideration was addressed as follows:

> Gender pay gap: increasing the number and quality of jobs that are available on a flexible basis helps families to balance their caring and working commitments, increasing choice. Opening up the right to request flexible working to all employees also challenges the perception that flexible working is only for mothers.[74]

This shows a very frivolous connection with the issue of the gender income difference prevalent in the workplace and is in line with the spirit of the rest of the consultation document which shows no genuine commitment to the promotion of gender equality through the extension of the RTR. The positive rhetoric displayed in these most recent policy documents hinted at a commitment by Government to address the limitations of the RTR as a means of facilitating women's career mobility. Unfortunately, it was only that - positive rhetoric. As evident from the discussion in the previous section, the only change which was implemented as a result of this consultation was to extend the RTR to all employees. In the light of the fact that 90% of employers interviewed in the Fourth Work-Life Balance Employers Survey[75]

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[71] HM Government, 'Consultation on Modern Workplaces' (n 68) 34.
[72] ibid 35.
[73] ibid 34.
[74] ibid 34.
[75] Department for Business Innovation & Skills, 'The Fourth Work-Life Balance Employer Survey (2013)' (December 2014).

indicated that they provided the RTR to all employees (even before they were legislatively obliged to do so), it is difficult to imagine how the mere act of formally providing all employees with the option to apply for flexible working, without strengthening the right in any other way, could foster the cultural change required to address issues such as the gender pay gap and shared parenting in the flexible working realm.

In the context of legislative measures aimed at addressing gender equality, it is, however, important to investigate the actual impact of gender equality rhetoric in producing gender equal results in the employment law realm. Masselot conducted an analysis of New Zealand's flexible working legislation which, since 2013, has been drafted in a gender-neutral manner. She distinguishes the provisions implemented in NZ from other countries (like the UK) based on the wider policy considerations which the NZ legislation has advanced. Whereas the UK initially used flexible working in the context of work-family reconciliations and to address the untapped female labour force (and later, as indicated here, to advance gender equality), similar measures introduced in NZ were framed in a work-life context supporting 'areas such as migration and environmental protection' from the outset.[76] Masselot argues that although such gender neutral legislative provisions have the symbolic potential to shift perceptions, they provide no guarantee of achieving gender equality. Instead, because of the employer's construction of flexible working options between the sexes, the idea that men and women use flexible working options for different reasons, along with the gendered inclination of 'flexibility', these gender-neutral provisions might reinforce gender stereotypes rather than alleviate them.[77] Although this thesis argues in favour of a universal RTR to normalise alternative working practices, whereas Masselot contends that a RTR which gives preference to caregivers will, at least symbolically, recognise the value of care in the public arena, her analysis of gender equality in this context provides a useful platform to explore the UK's policy response.[78] She argues that the gender neutral wording of the NZ legislation 'supports an impression' of egalitarian outcomes whilst disregarding the fact that there is 'no equality as a

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[76] Annick Masselot, 'The right and realities of balancing work and family in New Zealand' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar Publishing 2011) 72.
[77] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2014) 39 New Zealand Journal of Employment Relations 59.
[78] ibid.

starting point between the two genders'.[79] This resonates with Fineman's notion of equality which questions the 'distorted and inappropriate equality of position' upon which legislative reform is often founded.[80] Instead of assuming a position of 'presumed equals'[81] and situating legislative reform in one of the traditional equality dogmas, Fineman proposes that the attributes associated with the legal subject theorised in the gender equality narrative should be reassessed to include elements of universal vulnerability.[82] Evaluating the RTR's policy rhetoric based on Fineman's more nuanced notion of equality, allows for an alternative perspective to emerge in terms of the role the law can play in shaping policy outcomes which are more tolerant of a variety of employees' realities. Assuming that all workers are inherently vulnerable and constructing the RTR as a resilience enhancing tool, shifts the focus from the individual's inability to perform economic labour without hindrances to the role the organisation can play in supplementing the 'deficit in resources' which has resulted from 'institutional and societal failing' over many decades.[83] The potential within the RTR to became a more effective resilience building mechanism is explored in more detail in Chapter 5 where a comprehensive ideal flexible working legislative regime is constructed with the career progression of the female caregiving cohort in mind.

3.4.2 Imbedded in sustaining the normative construction of the workplace

This section explores the limitations within the RTR legislation as a mechanism to confront the normative construction of workplace operations. The failure of the law to do this is highlighted by reviewing the piecemeal development of the RTR, as well as the absence of a right to appeal. This contributes to answer my research question because it emphasises the extent to which the RTR legislation has further insulated the unencumbered norm from scrutiny, instead of challenging its operation.

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[79] ibid 66.
[80] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133,148.
[81] Martha Albertson Fineman, 'Grappling with equality: One feminist journey' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge 2011) 60.
[82] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (n 80).
[83] ibid 147.

The RTR has incrementally increased the eligibility requirement over the last 19 years. The right was initially available to employees with children under six, but was extended to all carers, then all parents, and finally to all employees in 2014. This development is relevant for the question relating to the unencumbered worker as it exemplifies the extent to which the purpose of the RTR legislation was imbedded in sustaining the normative construction of workplace operations. The fact that different types of caregivers were gradually allowed to apply for flexible working speaks to a workplace which has a finite amount of flexible working options available and could, therefore, only permit those who genuinely needed it to work flexibly. The extension of the RTR did not, however, necessarily expand the capacity for flexible working structures in the workplace. Since there is no need to mention caregiving responsibilities in an application for flexible working, the question arose of how employers could go about assessing and prioritising applications should competing requests be received. In the Government's response to the flexible working consultation document (Response Document),[84] this issue of prioritisation was discussed in relation to the extension of the right to all employees. The ultimate conclusion arrived at in the Response Document was that no further measures were required in this regard as the flexible working and discrimination legislation already in place assisted employers to prioritise requests based on their own commercial requirements and the employee's individual situation. The mention of discrimination provisions and personal circumstances in this context (as well as the example provided in the Response Document)[85] gave a strong impression of an intention to give preference to women's requests for flexible working. This is in line with common practices which employers implemented prior to the extension of the right to all employees.[86] Although employers are not required 'to make value judgments about the most deserving request', it is clear from the ACAS guidelines that competing requests might impact the number of successful

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[84] HM Government, 'Modern Workplaces Consultation – Government Response on Flexible Working' (November 2012) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82793/12-1269-modern-workplaces-response-flexible-working.pdf accessed 18 April 2021.

[85] ibid 17. "For example refusing a request for flexible working from a mother with a disabled child may be disability discrimination, as the mother needs flexible working in order to continue to work", which reinforces the perception that women are still the primary caregivers and their flexible working requests should be prioritised.

[86] Men's requests only represented 25% of all requests and their requests were more likely to be turned down. See Department for Business Innovation & Skills, 'The Fourth Work-Life Balance Employer Survey (n 75).

applications.[87] One of the solutions possible in such a scenario is to encourage existing flexible workers to change their working structures, 'thereby creating capacity for granting new requests to work flexibly',[88] which again speaks to a workplace with limited capacity for flexible working. Although the removal of the care element from the legislation was, therefore, a symbolic gesture towards normalising flexible working, the necessity of prioritising requests still speaks to a workplace with a predetermined capacity for flexibility which should be reserved for caregivers, whilst the unencumbered norm remains safely intact.

Whilst the scope of the legislation has increased incrementally to allow for more employees to gradually apply for flexible working, the capacity of the workplace on which it was imposed to accommodate flexibility, remained limited. From the outset, the intention of the legislator was that flexible working should be utilised to facilitate caregiving; this fortified the ideology of the unencumbered norm and flexible working was implemented *steadily* as an option, not a right, to ensure that the foundations of the unencumbered norm remain intact whilst appearing family-friendly. Ensuring that employers are shielded from a surge of applications,[89] feel comfortable with the implementation of the law and are able to seamlessly perform business functions within the constructs of the law[90] are reasons the legislator offered for phasing the RTR into the organisational realm in a piecemeal fashion. This kind of rhetoric contributes to the legitimacy of the inequality imbedded in working practices highlighted by Acker.[91] If '[e]conomic success may be best achieved through a hierarchical ordering of responsibilities and division of labour',[92] any disruption of this principle, such as the RTR legislation, requires strong justification and cautious implementation. This is exactly how the RTR was introduced and developed, and it minimised any impact on tackling the legitimacy of unencumbered working practices in the employment sphere.

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[87] ACAS, 'The right to request flexible working: an ACAS guide (including guidance on handling requests in a reasonable manner to work flexibly) (June 2014) 15 https://www.employmentlawwatch.com/wp-content/uploads/sites/7/2014/07/The-right-to-request-flexible-working-the-Acas-gui.pdf accessed 18 April 2021.
[88] ibid 16.
[89] Department of Trade and Industry, 'Work and Families: Choice and Flexibility. Government Response to Public Consultation' (n 19).
[90] Work and Parents Taskforce, 'About Time: Flexible Working, Work and Parent Taskforce' (n 12).
[91] Joan Acker, *Class Questions: Feminist Answer* (Rowman & Littlefield Publisher 2006).
[92] ibid 121.

In addition to the manner in which the RTR was implemented, the weak right afforded under it, limited its transformative potential to challenge the current construction of the employment terrain. Where an eligible employee makes an application, an employer could refuse based on a variety of grounds;[93] there is no opportunity for an employee to query the substantive fairness of an employer's decision, or request that an evaluation of the grounds for refusal should be conducted. With the arsenal of all-encompassing business reasons available to employers when considering the applications of employees, the potential for 'merely paying lip-service to such requests' becomes very plausible.[94] The employer can either reject a request by fairly comfortably slotting it into one of the options in law, or partially accept a request by suggesting a different working schedule to a particular employee, based again on any of the grounds of refusal. The fact that this limited appeal right was not addressed when the right was extended to all employees in 2014 diminished the symbolic significance of the extension as a means of shifting perceptions about who works flexibly and why; some of the advantages gained by the universal RTR were consequently obscured by the retention of a weak entitlement with no right to appeal.

The current operation of the RTR does not allow it to become a mechanism whereby Acker's 'organising the general requirement of work' inequality regime[95] can be addressed. Instead of challenging the normative edifice of the workplace, it allows the 'fundamental construction of the working day and work obligations' imbedded in Acker's inequality regime to persist.[96] Providing a wide range of rejection options to the employer, with no right to appeal for the employee, allows the organisation to configure roles and responsibilities within their preferred existing organisational working structures, which might result in very different working structures than those genuinely required by employees. The law, therefore, becomes a mechanism whereby the employer can sustain its preferred normative working structures and the inequalities flowing from it, instead of a tool for the employee to challenge standard

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[93] EA 2002, s 80G (1)(b)(i)-(viii). See footnote 42.
[94] Grace James, 'Mother and fathers as parents and workers: family-friendly employment policies in an era of shifting identities' (2009) 31 Journal of Social Welfare and Family Law 271, 278.
[95] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (2006) 20 Gender and Society 441, 448.
[96] ibid.

employment roles and expectations. In this context, it also becomes less important who is entitled to request flexible working structures as, whatever is on offer, would be more dependent on what the employer is willing to sustain than being part of a group whose privileges are enshrined in legislation.[97] Additionally, flexible working is increasingly implemented as a tool to address employer needs, e.g., operational requirements, avoidance of expensive office space, or, in a time of an epidemic for example, to allow for continuity. Although this might hold benefits for employees, the focus is yet again on what the employer can gain from an operational/business point of view, as opposed to how the RTR can facilitate the employee's genuine work/life/care needs regardless of the disruption this might cause to normative working practices. The sudden shift which occurred in homeworking during the recent Covid-19 pandemic is a very good example of how a specific flexible working structure (working from home), which was unheard of in certain industries before the pandemic, became commonplace in a matter of weeks because it was necessitated by a serious business need for continuity. Inroads were made into the acceptability of homeworking, which would have been unprecedented as part of a RTR application just a few months before, because it served the operational functions of the employers.

Providing a universal (fairly weak) RTR to all employees within an organisation, one which is mobilised to reproduce the status quo, creates a tension which is generally addressed by negotiating a trade-off with the employees utilising the legislative entitlement whilst rewarding those who do not. The bigger systematic problem, which deals with the unwillingness of employers to rethink the systems and practices they have designed for the unencumbered worker, will not be addressed by providing the employer with a 'right to reject' which is of equal strength to the employee's 'right to request'. In Chapter 5, the transformative potential of a strong right to appeal is discussed with reference to its effectiveness as part of a legislative flexible working regime in other jurisdictions; the potential impact on organisational structures becomes evident in this analysis.

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[97] Noelle Donnelly, Sarah B Proctor-Thomson and Geoff Plimmer, 'The Role of "Voice" in Matters of "Choice": Flexible Work Outcomes for Women in the New Zealand Public Services' (2012) 54 Journal of Industrial Relations 182. See also Erin L Kelly and Alexandra Kalev, 'Managing flexible work arrangements in US organizations: formalized discretion or "a right to ask"' (2006) 4 Socio-Economic Review 379.

3.4.3 Disregards the needs of caregivers

The extent to which the current universal operation of the RTR could potentially deleteriously impact on caregivers' options in the employment sphere is an important aspect to consider in the context of this thesis dealing specifically with female carers. The caregiving load still predominantly falls on women and the availability of a mechanism to combine working and caring labour is, therefore, particularly vital to them. The distinction between achieving a 'work-life balance', which indicates a 'desire' to spend less times at work in order to pursue other interest or hobbies, and reconciling work commitments with caring labour based on a genuine 'need' is important to acknowledge here.[98] Whilst an element of choice is present when employees construct their work and leisure activities, carers have a very 'limited, if not, non-existent' choice in whether they want to provide care or not.[99] With the extension of the RTR to all employees, carers had to, in principle, start competing with employees 'desiring' instead of 'needing' flexibility in the workplace. This change in the legislation is symbolically significant in light of the Government's attempt to remove the 'labelling from the legislation' through the extension of the RTR to all employees.[100] By situating the legislation within a work-*life* narrative instead of the work-*family* context, the notion of normalising flexible working was sought through the removal of the care element. Whilst this might appear transformative, we have to be wary of 'the reproduction of old oppressions in new guises' when evaluating so-called progressive labour law legislative measures.[101] The universal application of the current legislation can been regarded as a 'blessing' because it encourages, at least on the surface, flexible working for all employees,[102] and it could potentially (marginally) simplify the process as clarification of caring responsibilities is no longer required as part of the application process.[103] However, the 'curse' element of the extension highlights the value that

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[98] Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave MacMillan 2010) 4.
[99] ibid 4.
[100] HM Government 'Consultation on Modern Workplaces. Modern Workplaces Consultation - Government Response on Flexible Working: Impact Assessment' (n 31) 55.
[101] Joanne Conaghan, 'Women, Work, and Family: a British Revolution?' in Joanne Conaghan, Richard Michael Fischl and Karl Klare, *Labour law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2004) 70.
[102] Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (n 66).
[103] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (n 77). For the avoidance of

the RTR added to carers' options to operate in the employment arena which has now been diluted as employers are no longer obliged to give preference to the flexible working requests of carers above other employees.[104] Although the latter argument carries weight in terms of the flexible working options available to *carers* within a universal right to request realm, it also diminishes the potential of the legislation to defy the unencumbered worker norm within the unequal employment landscape.[105]

A universal RTR is necessary to avoid the marginalisation of flexible workers; there is, however, no reason why the needs of caregivers should be disregarded by the operation of the legislation. This is specifically pertinent in relation to the procedural elements of the RTR. Where an eligible employee applies for flexible working, the employer has three months to allow or reject such a request,[106] unless a longer period is agreed with the employee.[107] This timeframe within which an employer is permitted to review an application disqualifies the RTR as a method to facilitate any immediate responsibilities outside of the workplace. This is specifically prevalent for employees providing care to the elderly. Whilst the trajectory of a child's physical needs is generally fairly predictable in terms of the type and length of care required, i.e., physical nurturing during the earlier years and more emotional support later, the same is not true for elderly relatives.[108] The care needed by this group can vary from one day to the next with little warning of a change in circumstances; a three-month waiting period without any assurances with regards to the working structure which might be approved can potentially cause great uncertainty and emotional distress to carers and the elderly for whom they care. Also, the likelihood that the care need might suddenly become obsolete has to be considered; as the flexible working hours/structure would constitute a permanent variation to

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resentment see Colette Fagan, Ariane Hegewisch and Jane Pillinger, 'Out of Time: Why Britain needs a new approach to working-time flexibility' (Trades Union Congress, London 2006) https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:5b153&datastreamId=FULL-TEXT.PDF accessed 16 April 2021.

[104] Grace James, 'Family-Friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (n 66).

[105] See discussion in Section 5.3.1.3 of Chapter 5 refuting the perceived competition between carers and non-carers for workplace flexibility.

[106] CFA 2014, s 132(3)(1B)(a).

[107] CFA 2014, s 132(3)(1B)(b).

[108] Grace James and Emma Spruce, 'Workers with elderly dependants: employment law's response to the latest caregiving conundrum' (2015) 35 Legal Studies 463.

the employee's employment contract another application would only be considered after the expiration of 12 months.[109]

The fact that an application can only be made once in the scope of a one-year period[110] is another procedural element of the RTR which inhibits its potential to facilitate caregiving. In the initial policy documentation, the UK government alluded to the fact that the permanent nature of a request to work flexibly and the limitation of one application per year is supposed to deter employees from (ab)using the system.[111] Back then the extension of the RTR to include carers for adults was contemplated and the issue arose as to whether the level of care should be defined in the legislation to ensure uniformity in the application of the law. The government's response referenced the permanent nature of a change in the employment contract of an employee as a reason why employees will not abuse the system and only utilise it for a 'substantial and regular level of care.'[112] The tone of the policy document is indicative of encouraging a flexible working system which appears transformative, but which is inherently designed to be prohibitive.

There is one element of the current construction of the RTR which could potentially facilitate caregivers' RTR applications; this relates to the reasons employers must provide for rejecting a request. Anderson asserts that these written justifications could be utilised by employees when exploring other avenues of protecting their rights e.g., sex, disability, sexual orientation discrimination.[113] It is usually however only women who can employ this option, by supplementing an appeal to an employment tribunal on a failed flexible working request, with a claim of indirect sex discrimination. Various limitations within the RTR e.g., cap on damages to be awarded, no recourse to query the employer's substantive reasoning, exclusion based on non-employee status do not operate within the indirect discrimination realm and therefore provide women specifically with a stronger remedy under an indirect discrimination claim.[114]

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[109] EA 2002, s 80F(4).
[110] ibid.
[111] Department of Trade and Industry, 'Work and Families Act 2006. Draft Flexible Working Regulations: Summary of Responses and Government Response to the 2006 Consultation' (November 2006).
[112] ibid 8.
[113] Lucy Anderson, 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working "Rights" for Parents' (n 15).
[114] See Section 1.3.3.4 of Chapter 1 on a discussion of indirect discrimination.

Their limited right to appeal under the RTR is therefore potentially bolstered by the Equity Act 2010, but this will almost certainly undermine the impact of the extension of the RTR in terms of addressing the gendered nature of caregiving and normalising flexible working. It is highly unlikely that a male carer will have the liberty of an indirect discrimination claim tallying to their right to appeal when their application to work flexibly is rejected. This is because the law requires a disadvantage relating to the gender of the applicant in this instance, rather than their role as carers.[115] The work practices and policies of the employers of male caregiving applicants will therefore not be scrutinised by an employment tribunal to establish if the business reason provided is justified or if a rescheduling of the workplace could potentially address the applicant's caregiving needs. This procedural element of the RTR might therefor bolster female caregivers' requests to some extent but does not challenge the workplace practices the unencumbered norm is built on.

The fact that the RTR, in its current format, does not allow for genuine flexibility in the workplace which can be utilised at short notice, and for intermittent periods, is indicative of the policymakers' lack of regard for the ethics of care in drafting these measures. The RTR legislation had the potential to reconfigure the 'systems and public spaces' which have so far 'failed to respond to the changing realities of modern life' into something more amenable to all employees working within it.[116] Unfortunately, due to the inflexible operation of the legislation in practice, and the reluctance to put the 'vulnerable legal subject' at the core of it, the measures lean more favourably towards the interests of employers, rather than the employees whose interests it was supposed to serve. Although this thesis argues in favour of the universal operation of the RTR to normalise alternative working structures, there is no reason why the construction of the legislation should not be flexible enough to accommodate the specific needs of caregivers whilst allowing all employees the option to request their desired flexibility; an improvement of the procedural elements could be 'more inclusive of those whose

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[115] Rachel Horton, 'Care-giving and reasonable adjustments in the UK' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar 2011)

[116] Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (n 66) 502. See also Horton's discussion on the limitations of the RTR to facilitate caregiving; Rachel Horton, 'Care-giving and reasonable adjustment in the UK' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (n 115).

family or other uncounted labor is not valued in a formal equality regime.'[117] Allowing for a more flexible operation of the RTR could allow a shift from constructing the right 'within a traditional normative framework that values personal autonomy and free choice', to an acknowledgment of the 'independence of individuals' and 'human diversity'.[118] The procedural elements which could potentially meet the needs of a wider variety of employees more effectively are discussed in Chapter 5 from a lessons-learnt perspective which reviews similar provisions in the statutory regimes of other jurisdictions.

3.5 Useful elements of the RTR

In this chapter the historical development of the RTR, as well as the provisions contained within it, have been reviewed from the viewpoint of the law's (in)ability to affect change for professional caregiving female employees. The main elements of the RTR legislation which were critiqued are the absence of a right to appeal and the inflexible operation of the legislation's procedural requirements. Whilst the former inhibits the law's potential to challenge normative working structures, the latter disregards the needs of caregivers in the employment sphere. It is, however, necessary to highlight an important element of the current operation of the law which is useful and therefore worth keeping, i.e., the universal application of the RTR. As argued throughout this chapter, a universal RTR has the potential to normalise alternative working practices which could enhance the career progression of female caregiving professionals. The aim should be to move flexible working structures from the 'organizational fringes to the organizational mainstream',[119] and to incorporate it into employment contracts as a standard provision instead of a separate issue to be negotiated on an ad-hoc basis.[120] This could potentially make less visible those who use alternative working structures and limit the

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[117] Martha Albertson Fineman, 'Grappling with equality: One feminist journey' (n 81) 52.
[118] Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020) 137.
[119] Ellen Ernst Kossek, 'Implementing organizational work-life interventions: toward a triple bottom line' (2016) 19 Community, Work & Family 242, 247. See also Ellen Ernst Kossek, Suzan Lewis and Leslie B Hammer, 'Work-life initiatives and organizational change: Overcoming mixed messages to move from the margin to the mainstream' (2010) 63 Human Relations 3.
[120] Kossek et al. argue that it could be incorporated into 'organizational function such as compensation, career and performance management, and organizational development.' Ellen Kossek, Suzan Lewis and Leslie Hammer, 'Work-life initiatives and organizational change: Overcoming mixed messages to move from the margin to the mainstream' (n 119) 9.

backlash and negative career penalties associated with it. Fineman's analysis of the anti-discrimination legislation in the American context provides useful language for a critique in this regard; by only protecting the equality of certain categories of employees, she argues, the inevitable 'pitting one protected group against another' causes 'politics of resentment and backlash' on the part of others.[121] Fineman's concept of vulnerability is 'detached from specific subgroups', focussing rather on 'the very meaning of what it means to be human.'[122] Applying this to the RTR legislation, which allows for elements of vulnerability to be accommodated in the public sphere, the focus should be on the inherent vulnerability of all employees, rather than certain subgroups who are in more obviously detectable vulnerable situations, e.g., caregivers. The danger of 'labeling some individuals and herding them into "populations" defined as differently or particularly vulnerable' is that they might be ostracised for displaying certain traits which should be regarded as a 'fundamental reality of the human condition'.[123] This often occurs in the context of flexible workers who are marginalised and penalised for their vulnerability at work by displaying commitment to caregiving duties outside of the workplace. In this context the RTR can become a mechanism whereby organisations could 'cushion the concrete manifestations and implications of vulnerability'[124] in the workplace setting by enhancing employees' '"resilience" in the face of vulnerability'.[125]

The justification for a universal RTR is situated predominantly in its ability to normalise alternative working structures; including all workers in the scope of the law could avoid the 'us' and 'them' narratives so often directed at the users and non-users of family-friendly legislation. The 'ideal' RTR to enhance professional women's career progression applies universally to all employees due to its ability to challenge current norms; this discussion is

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[121] See also discussion in Section 1.3.3.4 of Chapter 1 on Fineman's identity approach to equality in the context of indirect discrimination. Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 253&254.
[122] Ellen Kossek, Suzan Lewis and Leslie Hammer, 'Work-life initiatives and organizational change: Overcoming mixed messages to move from the margin to the mainstream' (n 119) 266.
[123] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (n 80) 147 &133. See also James' analyses of the ethics of care in which 'mutual care is essential' and crucial to the existence of human life that it should be regarded as the responsibility of all citizens (not just women) to carry its burdens. Grace James, 'Family-friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (n 66) 495.
[124] Martha Albertson Fineman, 'Grappling with equality: One feminist journey' (n 81) 58.
[125] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 13.

further developed in Chapter 5 in relation to the operation of similar legislative regimes in other jurisdictions.

3.6 Conclusion

The RTR has developed in a piecemeal fashion based on a variety of sometimes contradictory policy goals and political agendas. The manner in which the RTR actually reproduces, instead of challenges, the unencumbered norm has been considered in this chapter. Although the extension of the RTR was meant to change perceptions around flexible working, its design allowed for it to 'be manipulated, weakened, and even avoided by employers seeking to evade regulation and responsibility'.[126] The extent to which the RTR could be circumvented is situated mainly in the absence of a right to appeal; other elements, such as the inflexible and gendered operation thereof, also inhibit its usefulness to address the genuine needs of employees. The current universal operation of the RTR is, however, important for various reasons, including: the normalisation of alternative working structures; avoidance of the marginalisation of flexible workers and recognition of the vulnerability of all employees in the employment sphere. From the perspective of professional female caregiving employees, this could potentially sustain a more equal employment landscape which could foster career progression. It has been argued that such a universal right to request, symbolically at least, does not recognise the value of care in the private arena as it 'renders invisible the caregiving provided by men and women.'[127] The argument presented herein is that the recognition of caregiving in the RTR development had a strong gendered narrative; instead of focusing on who 'ought to' care, the policy aims focussed heavily on the normative female caregiving structure. The symbolic advantages associated with recognising the ethics of care in the public arena through a RTR giving preference to caregivers' requests was, therefore, offset by the reinforcement of the female caregiving role and the marginalisation of those using flexible working structures to perform it.

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[126] Martha Albertson Fineman, 'Introducing Vulnerability' in Martha Albertson Fineman and Jonathan W Fineman (eds), *Vulnerability and the Legal Organization of Work* (Routledge 2018) 3.

[127] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (n 77) 63.

Although the RTR has addressed some of the challenges faced by caregivers, it has become evident that, in its current format, the right which focuses on an individual employee's limited option to deviate from traditional unencumbered working structures does not provide a useful mechanism for challenging the fundamental construction of this norm. Whilst an initiative like the RTR appears progressive on the surface, applying it to workplaces which are built on assumptions contrary to the vulnerable narrative inevitably reinforces the persistence of the norms it is supposed to eradicate. The legislative and institutional conditions which foster sustained change in the foundations of the workplace are explored in this thesis with specific refence to the role of the RTR. Whilst this chapter has highlighted the limitations of the current construction of the RTR with reference to its historic implementation and current scope, the next chapter dissects the organisational landscape upon which the RTR was imposed from the viewpoint of professional female caregivers. This investigation shines some light on the reasons why a supposedly transformative legislative mechanism like the RTR has limited impact on female career progression routes. Chapter 5 then draws on flexible working regimes in other jurisdictions in an attempt to identify ways in which the UKs regulatory response could be improved given the limitations identified herein.

CHAPTER 4 - THE UNEQUAL EMPLOYMENT LANDSCAPE

4.1 Introduction

Chapter 2 provided the theoretical framework on which this thesis is based. It highlighted the feminist theories generally employed when considering the potential effects of legislative interventions on workplace inequality, it also identified Fineman's vulnerability theory and Acker's inequality regimes as appropriate theoretical lenses to be used in the analysis conducted herein. In Chapter 3 a critique of the RTR was conducted by reviewing its policy considerations and implementation in light of its ability to disrupt normative working patterns, address gender inequality and support caregiving provision. The analysis in Chapter 3 highlighted two important issues that need further exploration. The first concerns the limitations within the RTR to address female professional employees' career progression. The second issue is the manner in which the problem the RTR aims to solve is demarcated. Whilst the content question is addressed in Chapter 5, this chapter explores two approaches that have been used to explain female disadvantage in the workplace. The first, known as the 'barrier narrative', assumes that the workplace is inherently fair, with the exception of a few specific barriers faced by women who also have caregiving responsibilities in the private sphere. The second, based on Acker's inequality regimes, illuminates the inherent unequal elements of the employment landscape which results in a more realistic representation of how the solution offered by the legislature, in the form of the RTR, should be constructed.

The barrier narrative is problematic for various reasons. This approach usually entails identifying specific barriers faced by employees with caregiving responsibilities whilst situating the solutions to surmounting the hurdles within the framework of family-friendly legislative measures and workplace initiatives.[1] The assumption that removing or lowering certain obstacles to women's career paths will automatically allow them to compete on a level playing field is flawed as it creates a false sense of the possibility of equal workplace outcomes.

[1] Examples include providing a right to request which could be 'facilitating a mother's return to paid employment' and increasing early years childcare entitlements to 'boost employment rates by enabling more parents, especially women, to return to work'. Department of Trade and Industry, 'Work and Parents: Competitiveness and Choice. A Green Paper' (December 2000) para 4.8 and HL Deb 16 June 2015, vol 762, col 1082.

The legislation and initiatives directed at addressing these obstacles generally only empower a small group of women to conform to the demands of the gendered workplace, but they are very limited in challenging the foundations thereof. Additionally, these solutions are often directed at either 'fixing' women to compete more successfully in the workplace, *or* facilitating their increased workplace participation to allow them to edge closer to the unencumbered worker ideal. Despite these shortcomings, it is the barrier narrative that has traditionally been used by legislatures and policymakers to explain women's stymied career progression and that have informed the design of legislative responses; policy documentation is inundated with references to these workplace barriers, as highlighted in Chapter 3.[2] Although such barriers are genuine concerns for female employees, the simplistic way in which legislative solutions are constructed to address these as resolvable problems results in patchwork solutions with limited impact.

The main objective of this chapter is to introduce an alternative to the barrier narrative to identify and address the genuine inhibiting factors in professional women's career progression. This projects a new lens on the black letter law review of a piece of legislation supposedly designed to address gender imbalance in the workplace. This angle provides useful and unique insights into the limited effectiveness of legislative interventions in the realm of family-friendly legislation and female career progression in the employment terrain. In doing so, this chapter makes an important contribution to an existing literature that has hitherto only considered the effect of the RTR from a highly restrictive and simplistic perspective.

The chapter starts with a brief breakdown of traditional workplace obstacles under the rubric of the barrier narrative. A synopsis of the actual and perceived hurdles in women's career attainment is critical for the purpose of evaluating the effectiveness of the RTR and other measures (Chapter 6) aimed at inciting change in this regard. The latter part of the chapter then discusses the alternative "inequality regimes" perspective in order to sketch the areas of overlap and tension between what is generally regarded as women's workplace issues and what is proposed herein. This perspective is utilised as an alternative lens to investigate why professional caregiving women's career progression is limited and makes specific reference to the strengths and weaknesses of the RTR to facilitate such advancement.

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[2] See the discussion on the development of the RTR in Section 3.2 of Chapter 3.

4.2 The Barrier Narrative

Career obstacles or barriers are generally regarded as elements of the employment environment which interfere with an employee's attempt to progress in the workplace. These barriers may be experienced and perceived differently by employees from different age groups, ethnicities and genders, they are non-exhaustive and complex and operate cumulatively, which amounts to what has been termed 'the labyrinth';[3] a very apt description of female caregiver's employment journey.[4] The barrier narrative encompasses a variety of concomitant perspectives on the limiting aspects of women's routes to the pinnacle of organisational structures. These obstacles can be viewed from the organisational point of view by conducting an analysis of common employer practices which have a disincentive effect on women's advancement.[5] Additionally, structural barriers, such as the limited availability of quality childcare which matches standard expected working hours, can inhibit the progression of caregivers. And finally, cultural barriers relating to expectations of how a female employee and caregiver should conduct herself in the workplace and in the domestic terrain create difficulties for those attempting to operate effectively in both arenas against the expected discourse.

These barriers are often addressed by policymakers and employers through the provision of legislative measures and workplace initiatives to remove the obstacle or alleviate the impact of the hurdle. The problem with this approach is that these measures often lead to the 'structural reproduction (rather than transformation) of traditional organization structure and practice.'[6] In a study which investigated the career progression of women and BME lawyers, five out of the six career strategies commonly utilised by these groups to navigate upward mobility

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[3] Alice H Eagley and Linda L Carli, *Through the Labyrinth: The Truth about how women become leaders* (Harvard Business School Press 2007).

[4] See Swanson et al. for a career barrier inventory measured on 13 scales; Jane L Swanson, Kimberley K Daniels and David M Tokar, 'Assessing Perception of Career-Related Barriers: The Career Barriers Inventory' (1996) 4 Journal of Career Assessment 219.

[5] Employers play a very important role in this process as they 'are both the gatekeepers to employment and the overall architects of employment arrangements.' See Jill Rubery, 'Regulating for Gender Equality: A Policy Framework to Support the Universal Caregiver Vision' (2015) 22 Social Politics 513, 519.

[6] Jennifer Tomlinson, Daniel Muzio, Hilary Sommerlad, Lisa Webley, and Liz Duff, 'Structure, agency and career strategies of white women and black and minority ethnic individuals in the legal profession' (2013) 66 Human Relations 245, 246.

reproduced, rather than challenged, the status quo.[7] This study highlighted the power of professional norms and firm socialisation processes to shape individuals to 'fit the mould' as they sought promotion up a prescribed hierarchy. This is particularly significant for this thesis as female caregivers attempting to advance up the organisational ladder have limited scope to apply conformist strategies, this leads to a scenario where 'old opportunity structures, and the inequalities that go with them' persist, regardless of attempts to alleviate traditional barriers.[8]

This section explores the following three traditional obstacles: the alleged limitations of feminine personality traits; the unequal division of household labour and the prominence of workplace discrimination.[9] This analysis is aimed at highlighting the obvious difficulties for female caregivers in their pursuit of career progression in light of the potential solution offered by a legislative mechanism like the RTR.

4.2.1 Feminine managerial skills

The first traditional barrier to be explored is situated in the notion that women supposedly operate differently in the employment sphere (compared to their male counterparts), which diminishes their chances of equivalent career trajectories. Organisational briefs addressing the dearth of women in the executive pipeline and senior positions often include a section on women's intrinsic shortcomings in their ability to deal with the pressure at the top. These include raising 'women's awareness of the limitations they impose on themselves',[10] having 'a 'discomfort with self-promotion' and 'sometimes over-share[ing] the problems and challenges

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[7] These strategies are assimilation, compromise, playing the game, reforming the system, location/relocation and prospective withdrawal of which only 'reforming the system' had the potential to challenge the status quo. Jennifer Tomlinson, Daniel Muzio, Hilary Sommerlad, Lisa Webley, and Liz Duff, 'Structure, agency and career strategies of white women and black and minority ethnic individuals in the legal profession' (n 6) 246.

[8] ibid 265.

[9] A report on the Gender Pay Gap mentions both 'direct discrimination' and 'women's disproportionate responsibility for unpaid caring' as 'structural factors' attributing to the Gender Pay Gap. House of Commons Women and Equalities Committee, 'Gender Pay Gap, Second Report of Session 2015-16' (March 2016) 18. https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/584/584.pdf accessed 15 April 2021.

[10] McKinsey & Company, 'Women Matter: Gender diversity, a corporate performance driver' (2007) 21 https://www.raeng.org.uk/publications/other/women-matter-oct-2007 accessed 15 April 2021.

they face'.[11] Women are then perceived as "not cut from the same cloth" as their male counterparts and, therefore, not suitable for the competitive masculine work environment; 'fear of failure, low self-esteem, role conflict, fear of success' are supposed 'internal' characteristics associated with women's lack of progress in this context.[12] Popular literature is permeated with self-help tools on how female employees should deal with supposed intrinsic characteristics which are holding them back from progressing in the workplace. Sandberg's book provides ample solutions to women who 'face a battle from within' to deal with the imposter syndrome, the negative relation between success and likeability and putting themselves forward (or taking a seat at the table).[13]

The focus is generally on how 'women can change themselves',[14] rather than on the societal setting within which they attempt to navigate career trajectories and caring responsibilities. Sandberg's 'lean in' dogma has been associated with neoliberal feminism which recognises persistent workplace inequalities, but which rises above the institutional obstacles by 'crafting a felicitous work-family balance based on a cost-benefit calculus'.[15] Similar solutions are also found in government policy recommendations when the issue of the lack of female representation in the workplace is considered; this is usually discussed as part of a proposed mentoring scheme to boost female applicants' confidence levels in order to get them 'Board ready'.[16]

The dissonance between the perception of women's abilities and the picture of what a leader in the workplace should look like forms the basis of the negative discernment of women in

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[11] Chartered Management Institute, 'Women in management: tackling the talent pipeline' (November 2013) 8 https://www.wearethecity.com/wp-content/uploads/2014/05/4943-Talent-Pipeline-White-Paper-PRINT.pdf accessed 15 April 2021.
[12] Virginia E O'Leary, 'Some Attitudinal Barriers to Occupational Aspirations in Women' (1974) 81 Psychological Bulletin 809, 809.
[13] Sheryl Sandberg, *Lean In: Women, Work and the will to lead* (Ebury Publishing 2013) 28
[14] ibid 11.
[15] Catherine Rottenberg, 'The Rise of Neoliberal Feminism' (2014) 28 Cultural Studies 418, 420.
[16] House of Commons, Business, Innovation and Skills Committee, 'Women in the Workplace. First report of the session 2013-2104' (June 2013) 44 https://publications.parliament.uk/pa/cm201314/cmselect/cmbis/342/342iii.pdf accessed 15 April 2021.

senior employment positions.[17] Qualities generally associated with women, including 'warmth and selflessness', do not link strongly with personalities in higher positions in the hierarchical structures of a company, whilst more masculine traits, such as 'assertiveness and instrumentality', do.[18] Compared to the successful male manager, women might appear less competitive, confident and vocal. Since these attributes have been associated with successful career trajectories for so long, a deviation portrayed more often by female employees is constructed as an inhibiting factor in women's pursuit of professional attainment. Additionally, the extent to which the reproductive capabilities of women's bodies manifest in the workplace 'blur the boundaries between home and work' and impact on the assumptions regarding their 'capacity for rationally processing information'.[19] Gatrell el al. summaries it very aptly as follows:

> Inevitably, if senior-level women are first labelled "taboo" and evaluated on the basis of unsubstantiated perceptions about maternal bodies as social pollutants (rather than performance) and second assumed to be intellectually compromised, women will continue to remain underrepresented in prestigious business arenas.[20]

Additionally, women's attempts to operate in a masculine manner generally required in the higher echelons of employment are 'filtered through complex reference systems',[21] which leads to a double bind where competence and likeability are rarely both attributed to female professionals. Where women attempt to blend in by 'de-emphasiz[ing] their sexual difference'[22] they are criticised for not being authentic enough, and where they purport to be themselves (which could be perceived as different), they are penalised for not adhering to the required professional standard.[23] Furthermore, focusing on mechanisms certain top-paying

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[17] Alice H Eagly and Linda L Carli, 'The female leadership advantage: An evaluation of the evidence' (2003) 14 The Leadership Quarterly 807.
[18] ibid 818.
[19] Caroline Gatrell, Cary I Cooper and Ellen Ernst Kossek, 'Maternal bodies as taboo at work: new perspectives on the marginalizing of senior-level women in organizations' (2017) 31 Academy of Management Perspectives 239, 241 & 246.
[20] ibid 249.
[21] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (1st edn, London Routledge 2002) 42.
[22] Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (Polity Press 1998) 130.
[23] C Grey, 'On being a professional in a "Big Six" firm' (1998) 23 Accounting, Organizations and Society 569.

females have used to negotiate their upward progress might provide useful 'how to climb the masculine ladder' tips to others in a similar position, but it does nothing to confront the cultural assumptions underlying the notion of that ladder. The 'gendered coping strategies' which are then often implemented in line with the advice from 'female moguls espousing individual strategies to counter structural disadvantages in text such as Sheryl Sandberg's *Lean In*'[24] reinforces, rather than challenges, the unequal employment landscape. Furthermore, the notion that success in the workplace can only be attained by women who are able to 'emulate "benchmark men"' rationalises and perpetuates the status quo in organisational practices.[25]

Constructing the female way of working as a hurdle in the stymied career progression of women is problematic for various reasons. The solutions are often situated in 'fixing' women in order to ensure a management style which is more 'acceptable' in the higher echelons of the employment realm; this requires the adoption of a 'genderless persona' which closely portrays the 'life choices associated with middle class white males'.[26] Wajcman argues that women who *do* succeed in the current setting display very similar attributes to their male counterparts working equally long hours.[27] Whilst accommodating women's differences by providing maternity entitlement and flexible working structures facilitates workforce participation, the 'sameness' at the top is still indicative of an unencumbered workforce which remains unscathed. What is, however, very 'different' is how the majority of those with caretaking responsibilities navigate their career aspirations. The fact that many women accept that their uptake of family-friendly workplace accommodations would be detrimental to their career development is a way in which they 'take responsibility for repairing the embarrassment caused by their difference'.[28] Constructing characteristics and working structures generally associated

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[24] Sheryl Sandberg, *Lean In: Women, Work and the will to lead* (n 13). See also London School of Economics, Knowledge Exchange, 'Confronting Gender Inequality: Findings from the LSA Commission on Gender' (Gender Institute, 2016).
[25] Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45 Osgoode Hall Law Journal 773, 809.
[26] Berns uses the example of female academics in this context who are generally expected (by students and management) to perform a pastoral role. A '"genderless" persona' would reject this notion and 'focus single-mindedly upon career goals'. Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 21) 42.
[27] See Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (n 22).
[28] ibid 124. See also Lewis who explores women's lesser sense of entitlement to career progression where work/family accommodations are made for them. Suzan Lewis, '"Family

with female employees as mere hurdles in career progression routes which can be overcome by training courses/flexible working fuels, rather than challenges, the persistence of the unencumbered worker norm and does not provide female caregivers with genuine prospects to thrive in the employment terrain.

4.2.2 Unequal division of household labour

Women's inability to match the economic labour performed by their male counterparts is often attributed to their heavier workload in the domestic arena. The unequal division of household duties is, therefore, constructed as a barrier to women's career progression. The parent who works long hours usually has limited capacity to perform duties at home; this creates 'an organizational logic in the home that undermines attempts to renegotiate the domestic division of time'.[29] In the UK, fathers generally work longer hours than their childless counterparts and some of the longest hours of all men in Europe.[30] The persistent culture of long working hours prevalent in the UK is problematic in the context of the unequal division of labour in the private sphere due to its impact on employees with caregiving responsibilities. The equation of long hours and presentism to committed ambitious employees works against those who are trying to progress in the workplace but also have time constraints associated with reproductive labour.[31]

Friendly" Employment Policies: A Route to Changing Organizational Culture of Playing About at the Margins?' (1997) 4 Gender, Work and Organization 13.

[29] Colette Fagan, 'The Temporal Reorganization of Employment and the Household Rhythm of Work Schedules' (2001) 44 The American Behavioral Scientist 1199, 1209.

[30] Between 17 EU countries, UK fathers had the second highest average weekly hours recorded in 2013, only surpassed by Greece. Matthew Aldrich, Sara Connolly, Margaret O'Brien, Svetlana Speight, and Robert Wilshart, 'Parental Working in Europe: Working Hours' (Modern Fatherhood 2016) http://www.modernfatherhood.org/wp-content/uploads/2016/03/Parental-Working-in-Europe-Working-Hours-final_formatv3.pdf accessed 15 April 2021.

[31] Colette Fagan, 'Working-time preferences and work-life balance in the EU: some policy considerations for enhancing the quality of life' (Eurofound 2003) https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0342en.pdf accessed 15 April 2021. See also Bertrand et al.'s findings on the impact of career interruptions and decreasing hours associated with childcare responsibilities leading to significant lower salaries for female MBA's (from the Booth School of Business of the University in Chicago), compared to their male counterparts. Marianne Bertrand, Claudia Goldin and Lawrence F Katz, 'Dynamics of the Gender Gap for Young Professionals in the

The working patterns of fathers (full time and overtime),[32] the disparity in power and income between men and women in households, the rise of the lone mother family structure and the fact that domestic and care work are socially regarded as a female responsibility,[33] are all factors which contribute to the burden of the 'double shift', one which still falls predominantly on women in most households.[34] Some argue that the impact of this 'double shift' is overestimated as studies (using data from 1994 to 2005) show that men and women's total working hours (paid and unpaid) are now almost equal over the course of their lives.[35] The type, intensity and proportion of work done by men and women, respectively, should however be considered and analysed before its bearing on gender equality is completely disregarded. Although men's contributions to household tasks in recent years have increased, they generally perform ad-hoc duties, whereas women are still mainly responsible for the day-to-day management of the house[36] and are more likely to be the first to receive a call from the childcare

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Financial and Corporate Sectors' (2010) 2 American Economic Journal: Applied Economics 228.

[32] Peter Moss and Julia Brannen, *Managing Mothers: Dual Earner Households After Maternity Leave* (Unwin Hyman 1991).

[33] Afshin Zilanawala, 'Women's Time Poverty and Family Structure: Differences by Parenthood and Employment' (2016) 37 Journal of Family Issues 369. Also referred to as 'specific time bound roles'; Diane Perrons, 'Managing work-life tensions in the neo-liberal UK' in Berit Brandth, Sigtona Halrynjo and Elin Kvande (eds), *Work-Family Dynamics: Competing Logic of Regulation, Economy and Morals* (Routledge 2017) 47.

[34] Based on studies conducted from 1960 to 1970, women worked a month a year in hours more than men when combining their responsibilities inside and outside the home. Arlie Hochschild, *The Second Shift: Working Families and the Revolution at Home* (Penguin Books 2012). See also Wajcman's conclusion that no obvious trade-off exists between professional's women's economic and domestic labour. Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (n 22).

[35] 'The total work time for women and men was 467 and 486 minutes respectively in the year just after partnership, peaking at 562 and 562 minutes respectively in the year just after childbirth'. Jacqueline Scott, Rosemary Crompton and Clare Lyonette (eds), *Gender Inequalities in the 21st Century : New Barriers and Continuing Constraints* (Edward Elgar 2010) 160.

[36] Suzanne M Bianchi, Melissa A Milkie, Liana C Sayer and John P Robinson, 'Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor' (2000) 79 Social Forces 191. See also the difference in quality of leisure time highlighted in Michael Bittman and Judy Wajcman, 'The Rush Hour: The Character of Leisure Time and Gender Equity' (2000) 79 Social Forces 165.

setting when there is childcare related issue.[37] Even where some of the household and caring duties are outsourced, women are predominantly responsible for coordinating such additional resources.[38] The time and energy associated with performing these duties predominantly limit women's abilities to perform economic labour in an unfettered manner and, consequently, their routes to the higher echelons of the employment arena.

The obstacle of the unequal division of labour impacts negatively on the career progress of those more inclined to carry a heavier load in the private arena. Of the three traditional hurdles, discussed in this section, this one manifests mainly in the private sphere, making it more inaccessible in terms of legislative reform due to the 'permeable membrane' separating the public and private domains.[39] Furthermore, this 'obstacle' is probably the one most constrained by ideological undercurrents; women's unique reproductive role highlights their 'difference' which manifests most clearly in the private arena. Equating this difference to 'necessarily subordinate' in a society that does not recognise the value of caring labour[40] leads to a scenario where the unequal division of labour obstacle is often constructed as a result of legitimate choices made by 'good' mothers; as Fineman so aptly puts it, '[w]hen individuals act according to these scripts, consistent with prevailing ideology and institutional arrangements, we say they have chosen their path from the available options'.[41] The fact that these choices 'occur within the constraints of social conditions', which inhibits the options available to caregivers from a 'practical and symbolic' point of view, is, however, ignored in the choice narrative often used to 'avoid general responsibility for the inequality and [to] justify the maintenance of the status

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[37] Working Families and Bright Horizons, 'Modern Families Index' (2016) https://www.workingfamilies.org.uk/wp-content/uploads/2016/02/Modern-Families-Index-2016.pdf accessed 15 April 2021.
[38] Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (n 22).
[39] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 21) 201.
[40] Martha Albertson Fineman, 'Grappling with equality: One feminist journey' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge 2011) 53.
[41] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self- Sufficiency' (2000) 8 American University Journal of Gender, Social Policy & the Law 13, 21. Caregivers should have the option to 'make genuine choices' without being 'penalised for prioritising care'. Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020) 153.

quo'.[42] Although the RTR is a useful mechanism to facilitate the performance of activities in both realms, it is not effective as a stand-alone measure to address the gendered discrepancies in caregiving responsibilities,[43] or the prevalence of the 'choice talisman',[44] in rationalising caregivers decision-making. The government's general inclination 'to exploit women's care commitments as a means of marginalising their paid work and reducing employer's cost' often leads to the reinforcement of the gendered nature of caregiving and the reaffirmation of the unencumbered norm.[45] This thesis regards the unequal elements of the employment landscape feeding into this asymmetrical division of labour, rather than the unequal division of labour, as a limiting factor in professional women's career progression. This different angle allows for multi-faceted solutions to emerge which are more likely to challenge, rather than entrench, existing gendered paradigms.

4.2.3 Discriminatory workplace practices/structures

According to the Equality Act 2010, pregnancy and maternity are protected characteristics[46] which means treating women differently than others on these grounds could amount to direct discrimination.[47] Under the protected characteristic of "sex", treating a woman less favourably due to the fact that she is breastfeeding, is regarded as direct discrimination.[48] Women can also automatically claim unfair dismissal in the event of losing their jobs due to leave taken related to pregnancy, childbirth or maternity.[49] The prevalence of maternity related discrimination is a particularly persistent limiting factor in female employees' career progression; this impacts on women as a group exclusively due to their reproductive capacity. Although discrimination in this regard is prohibited by legislation, the effectiveness of these laws has been questioned due to the existing level of such discrimination in the workplace, women's inability/reluctance to

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[42] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self- Sufficiency' (n 41) 22 & 21.
[43] K Lee Adams, 'A Right to Request Flexible Working: What can the UK teach us' in Martha Albertson Fineman and Jonathan W Fineman (eds), *Vulnerability and the Legal Organization of Work* (Routledge 2018).
[44] See Berns' analysis in Section 2.2.1.3 of Chapter 2 of the 'choice talisman'.
[45] Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (Hart Publishing 2020) 48.
[46] Equality Act 2010, s 4.
[47] ibid s 13(1).
[48] ibid s 13(6)(3)(a).
[49] ERA 1996, s 99(3)(a).

engage with the legal mechanisms in place when confronted with pregnancy related discrimination and the low percentage of women who successfully hold their employers accountable for unfavourable treatment on this basis.[50] Although women are, therefore, formally protected from discrimination based on certain protected characteristics,[51] the way in which the workplace allows, and disguises, certain elements of sexual differentiation is in itself a barrier to women's upward mobility.

What is not addressed in anti-discrimination laws, however, is the manner in which statistical discrimination impacts on women's career progression options. In this type of discrimination, 'economic actors attempt to access some characteristic of individuals based on limited information'; this occurs when an interviewer evaluates 'the expected productivity' of an applicant he/she might potentially appoint.[52] The manner in which 'stereotyping based on group membership' impacts negatively on women's workplace attainment is worth considering, however.[53] The 'stigma of motherhood affects all women', regardless of whether they are married, have children or intend to have children.[54] They are therefore regarded as performing their work alongside domestic responsibilities and their inclination to request flexible working conditions, regardless if they ever do so, 'can enter into the perceptions of the predominantly male decision-makers in a negative way'.[55] When certain women then do become pregnant and leave the labour market, they are penalised for taking time out of paid employment through limited career advancement and less/fewer prominent clients/projects upon their return.[56] The gendered division of household labour, which usually sets in after the birth of the first child, is then accentuated by the fact that 'the woman subsequently accumulates

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[50] Grace James, 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' (2007) 15 Feminist Legal Studies 167.
[51] Equality Act 2010, s 4.
[52] Jonathan Guryan and Kerwin Kofi Charles, 'Taste-based or Statistical Discrimination: The Economics of Discrimination Returns to its Roots' (2013) The Economic Journal F417, F418.
[53] ibid F418.
[54] Judy Wajcman, *Managing Like a Man: Women and Men in Corporate Management* (n 22) 40.
[55] London School of Economics, Knowledge Exchange, 'Confronting Gender Inequality: Findings from the LSA Commission on Gender' (n 24) 12. See also Wajcman; 'employers' perceptions of employees' domestic circumstances affect recruitment and promotion practices.' Judy Wajcman, *Managing Like a Man: Women and Men in Corporate Management* (n 22) 40.
[56] Douglas M McCracken, 'Winning the Talent War for Women: Sometimes It Takes a Revolution' (2000) 78 Harvard Business Review 159.

human capital at a slower rate', which further cements her speciality in household and caring labour.[57]

Another form of discrimination which affects women disproportionately in the workplace is sexual harassment.[58] The Equality Act 2010 defines sexual harassment as 'unwanted conduct related to a relevant protected characteristic' which violates someone's dignity or creates an environment which is 'intimidating, hostile, degrading, humiliating, or offensive'.[59] The platform for this type of discriminatory behaviour gained publicity in 2017 after the prominent American figure, Harvey Weinstein, was exposed by widespread sexual-abuse allegations. The 'me-too' movement, which commenced in 2006 to help especially black women and girls deal with sexual violence, was rekindled by the Weinstein scandal when various prominent women started speaking out about sexual violence and harassment.[60] Additionally, in the UK context, the 'Everyday Sexism Project' started to shine a light on women's accounts of sexism in various settings and has grown to record everyday stories in 25 countries to combat the usual 'just the way things are' mantra.[61] Although the sharing of stories and acknowledgement of others' experiences are contributing to a wider awareness of the problem, the extent and impact of sexual harassment in the workplace particularly is far-reaching. The severity of the issue is, however, difficult to assess as victims of sexual harassment are reluctant to make formal complaints or take action against perpetrators.[62] The reasons for this hesitancy relate to

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[57] Man Yee Kan, Oriel Sullivan and Jonathan Gershuny, 'Gender Convergence in Domestic Work: Discerning the Effects of Interactional and Institutional Barriers from Large-scale Data' (2011) 45 Sociology 234, 248.

[58] In relation to sexual harassment a report published by the Eurofound indicated that women are three times as likely to be subjected to sexual harassment than men. Agnès Parent-Thirion, Greet Vermeylen, Gijs van Houten, Maija Lyly-Yrjänäinen, Isabella Biletta, Jorge Cabrita, with the assistance of Isabelle Niedhammer, '5th European Working Conditions Survey' (Eurofound 2012) https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1182en.pdf accessed 18 April 2021.

[59] Section 26 (1).

[60] https://metoomvmt.org/about/ accessed 15 April 2021.

[61] https://everydaysexism.com/about accessed on 18 April 2021.

[62] In a recent survey, 67% of employees/students acknowledged that they did not report the incidence of sexual harassment. BBC Radio 5 Live, 'Sexual harassment in the workplace survey' (October 2017). https://comresglobal.com/polls/bbc-radio-5live-sexual-harassment-in-the-workplace-survey/ accessed 19 April 2021. See also TUC reporting that 4 in 5 women not reporting an incidence of sexual harassment to their employer. Trade Union Congress, 'Still just a bit of banter? Sexual harassment in the workplace in 2016' (August 2016).

hopelessness on the part of employees in light of the vastness of the problem, fear of negative career/relationship implications, embarrassment and lack of trust in the system/being believed.[63] The impact of sexual harassment on career attainment can be potentially devastating and often plays an important part in 'shaping early career trajectories'.[64] The opportunity to thrive in the workplace is limited by a toxic atmosphere which can often lead to sudden changes in workers' progression routes; employees may be forced into less well-paid jobs where they perceive the environment to be less hostile.[65]

Whilst discrimination laws might be a deterrent to potentially nonchalant employers, or where they provide certain groups of individuals the option to seek justice based on a specific set of circumstances, Fineman focusses on the limitations of such legislation to address inherent systematic inequalities in society.[66] Instead of requiring individuals to fit into certain categories of protected groups in order to gain the protection of discrimination laws, the organisational processes allowing differentiating outcomes should be addressed, she argues.[67] This allows for a shift from the blameworthy individual employee who, for instance, does not utilise the anti-discrimination employment laws at his/her disposal, to the unequal workplace which favours, and disproportionately advantages, employees who operate in an unencumbered manner. Reviewing the workplace setting based on the extent to which it recognises vulnerability, however, allows for a 'more thorough and penetrating equality mandate' to emerge.[68] In the context of this thesis, regarding workplace discrimination as a hurdle in the career progression routes of female employees, and then situating the solution to overcome this obstacle within the remedies available under the Equality Act, not only disregards the law's limitations to

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[63] ibid.
[64] Heather McLaughlin, Christoper Uggen and Amy Blackstone, 'The Economic and career effects of sexual harassment on working women.' 2017 (31) Gender & Society 333, 352.
[65] ibid.
[66] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge 2010). See also other examples of cases falling through the discrimination legislation net, e.g., indirect discrimination against women returning from maternity leave being awarded 'knowledge management' type work. Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (n 25) 809.
[67] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 66).
[68] ibid 173.

address institutional inequalities, but also shifts the focus and blame from these inequalities to the employee who does not utilise the law which is at his/her disposal. The anti-discrimination route, as a stand-alone solution, does not, therefore, provide female caregiving employees with a concrete mechanism through which to navigate their professional career progression.[69] The next section explores the foundations of the employment landscape which need to be excavated further in order to provide useful solutions to the career impediments placed on professional women.

4.3 The unequal employment landscape

This thesis is specifically concerned with the potential of the RTR as a mechanism to facilitate the combination of caregiving and economic labour whilst sustaining career progression for female professional employees. In order to evaluate the effectiveness of the RTR to achieve this goal, it is necessary to investigate the problem the RTR is attempting to solve. In addition to the barriers which have traditionally been regarded as limiting factors for female caregivers, this section explores the inequalities entrenched in the employment landscape which disproportionately impacts on women and inhibits the operation of the RTR, in its current format, as a tool to level the playing field. The way in which these inequalities operate and manifest in the workplace has a cumulative effect; where there are no separate surmountable hurdles anymore, but a structure of '[p]rivileges and disadvantages accumulate[d] across systems' which 'are more devastating or more beneficial than the weight of each separate part'.[70]

The remainder of this chapter is devoted to the dissection of the inhibiting contours of the employment terrain through a gendered lens; the purpose of this analysis is to highlight the discriminatory norms associated with economic and caring labour which prevent the development of alternative work/life/care paradigms to the detriment of professional female caregivers. Joan Acker, in her research on inequality regimes, provides a helpful lens for

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[69] There is 'no big stick' to prevent discrimination against those with caregiving responsibilities. Amanda Reilly, 'Equality and family responsibilities: a critical evaluation of New Zealand law' (2012) 37 New Zealand Journal of Employment Relations 161, 166. See Section 1.3.3.4 of Chapter 1 on a similar discussion in the context of indirect discrimination.
[70] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 15.

conducting this critique.[71] She reviewed the workplace holistically by investigating the impact of various factors, such as race, gender and class on the level and intensity of inequality experienced by employees.[72] This intersectional approach to a review of the unequal workplace is a useful way to expose the hidden inequalities which are legitimised on the basis of socially constructed hierarchies.[73] Acker identified five different organisational structures which produce inequalities in the workplace setting; the next section focusses on the following three: 'organizing the general requirements of work'; 'recruitment and hiring practices' and 'wage setting and supervisory practices'.[74] A detailed analysis of these inequality regimes is conducted with reference the extent to which: (i) it impacts on professional female caregiving employees and (ii) the RTR can alleviate this impact. The second part of the discussion highlights the manner in which organisational practices and legislative provisions (specifically the RTR) allow the status quo to be sustained; whilst some constructions operate as a stick to penalise those who deviate from the norm, others are used as a carrot to sustain the current state of affairs.[75]

4.3.1 Organizing the general requirements of work

This inequality regime deals with the manner in which the workplace, work obligations and employer expectations are constructed based on the availability and dedication of an employee with no obligations outside of the employment sphere. This inequality regime is important for the analysis conducted in this thesis for various reasons. Firstly, it manifests heavily in the

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[71] Other similar doctrines that expose hidden inequalities in the employment terrain are Roth's 'gender schemas', Sandberg's 'intertwining gender inequalities' and recognition by Wajcman of informal barriers. See Louise Marie Roth, 'Leveling the Playing Field: Negotiating Opportunities and Recognition in Gendered Jobs' (2009) 2 Negotiation and Conflict Management Research 17; Paula Koskinen Sandberg, 'Intertwining Gender Inequalities and Gender-neutral Legitimacy in Job Evaluation and Performance-related Pay' (2017) 24 Gender, Work and Organization 156 and Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (n 22) 80.

[72] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (2006) 20 Gender and Society 441.

[73] ibid.

[74] ibid 448.

[75] Fineman adds her voice to this narrative by investigating the extent to which the organisation's processes 'can almost invisibly produce or exacerbate existing inequality.' Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 70) 21.

notion of the unencumbered norm (defined in Chapter 1), which is a construction used throughout to critique the workplace, as well as the measures implemented to address its unequal operation. Secondly, the tacit precondition of the way work is organised is constant availability, this is inherently antipathetic to what is allowed under the RTR and consequently distorts its potential impact. And finally, the manner in which the organisation of work disguises the vulnerability of employees illuminates the impact of this inequality regime in the context of female caregivers. This section explores these elements separately with reference to the operation of the RTR and the extent to which this inequality regime reinforces the already imbalanced workplace and disproportionally impacts professional caregiving female employees.

4.3.1.1 The Unencumbered

Acker's first inequality regime is based on the 'expectations that incorporate the image of the unencumbered worker.'[76] This worker is able to operate successfully within the 'fundamental construction of the working day and of work obligations'.[77] The gendered nature of the workplace in this context is embedded in the way the working day, as well as work obligations, are demarcated. Regarding the former, Acker referred to the notion of an eight-hour day, complete attention during working hours and a timely start.[78] Additionally, the type of work obligations a worker is obliged to perform further reinforces the notion that employees should pay undivided attention to employment tasks for long periods of time. At first glance, these requirements seem to include the basic attributes one would expect any employee to demonstrate, but upon further scrutiny the gendered undertones of these implicit workplace norms and expectations become evident. The notion that the work day consists of a set number of hours performed by a worker who is constantly available is based on the construction of the male breadwinner model; in this scenario the employee performing duties in the public arena has a partner at home performing caring and household labour based on a clear division of labour between the spouses.

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[76] Joan Acker: 'Inequality Regimes: Gender, Class and Race in Organizations' (n 72) 448.
[77] ibid 448.
[78] ibid.

Although the male breadwinner/women homemaker bargain has evolved considerably over the last 50 years, the demands of the workplace have stubbornly persisted. In reality, the fact that a right to request flexible working had to be created in the first place signifies very definite 'assumptions about the allocation of labour in the productive and reproductive spheres'.[79] Employees applying for flexible working are indicating a need (or desire) to be treated differently than the standard employee; the justification for this 'special legal accommodation' is usually situated in their caregiving responsibilities outside of the employment sphere.[80] The utilisation of flexible working structures, therefore, makes caring labour performed in the private sphere more visible in the public arena. Female employees' inclination to noticeably require family-related accommodation in the workplace[81] draws attention to their caregiving duties; this might occur through the utilisation of their RTR entitlement, being the first port of call when an issue arises at school/nursery or requesting additional ad-hoc time off to attend to dependents' doctor's appointments or school productions, for example. Women, who are more likely to operate as the main caregivers, might also feel more entitled to utilise alternative working structures by 'confirming a dispositional preference',[82] but since this is viewed as another benefit bestowed upon them by their generous employer, they generally accept the consequent career progression penalty associated with such structures as a given.[83] The ability to operate in an unencumbered manner is linked to stronger career commitment which, in turn, shapes the allocation of rewards in the employment setting; this is another subtle way in which the contours of the employment landscape occlude the development of more diverse working

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[79] Joanne Conaghan, 'Women, Work, Family: A British Revolution?' in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2004) 56.

[80] Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge-Cavendish 2009) 62.

[81] Women are more inclined to utilise flexible working structures for caregiving purposes. Working Families and Bright Horizons, 'The Modern Families Index 2017' (2017) https://www.workingfamilies.org.uk/publications/2017-modern-families-index-full-report/ accessed 15 April 2021.

[82] Scott Coltrane, Elizabeth C Miller, Tracy DeHaan and Lauren Stewart, 'Fathers and the Flexibility Stigma' (2013) 69 Journal of Social Issues 279, 283.

[83] Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (n 22). The 'motherhood pay penalty' has been defined as 'the long-term shortfall in earnings for women who withdrew from the labor market for periods of time to take care of their children at home.' Anne H Gauthier and Alzbeta Bartova, 'The Impact of Leave Policies on Employment, Fertility, Gender Equality, and Health' in Kristen M Shockley, Winny Shen and Ryan C Johnson (eds), *The Cambridge Handbook of the Global Family Interface* (Cambridge university Press 2018) footnote 122.

structures in favour of the employee able to operate visibly in line with the unencumbered work trajectory.

4.3.1.2 Flexibility and predictability

An important element of the way in which work is organised deals with the unpredictability of workplace demands; being available at short notice and unsociable hours is built into the notion of the unencumbered. Although the RTR allows for *flexibility* in terms of working hours/times/location, it is usually also *predictability* that specifically caregivers need in terms of work commitment due to their fixed (and sometimes unpredictable) caregiving commitments. For caregivers to adhere to these commitments, they need predictable schedules and sometimes appear inflexible in terms of adhering to unpredictable work demands. A variation from non-standard working structures, to accommodate caregiving responsibilities, would normally require at least the approval of a supervisor or manager, which itself entails either special permission or a restructuring of the employee's working conditions or hours. The former could be undertaken informally, whereas the latter usually triggers a flexible working request. The RTR makes provision for such a formal arrangement between the employer and employee which allows certainty and predictability to the caregiver in terms of the hours available to perform duties in the domestic sphere. Men in senior positions in the workplace are more likely to use informal arrangements in order to gain more control over their working time,[84] whilst the latter option, a restructure of conditions and/or hours, is vital and inevitable for caregivers who need a structured agreement which fits in with their outside caring arrangements (nannies, nursery hours, etc.). This leads to a scenario where '…women do so contractually, men do it unofficially'.[85] The RTR therefore becomes a mechanism whereby women can formally gain predictable workplace structures in order to provide caregiving,

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[84] This control usually allows for 'family emergencies or on-off family events' but has no impact on the number of hours they work. Ariane Hegewisch, 'Flexible working policies: a comparative review' (Equality and Human Rights Commission 2009) 25 https://www.equalityhumanrights.com/sites/default/files/research-report-16-flexible-working-policies-comparative-review.pdf accessed 17 April 2021.

[85] Alexa Bailey and Carol Rosati, 'The Balancing Act: A Study of how to balance the talent pipeline in business, 2013' (Inspire & Harvey Nash 2013) 10 https://assets.website-files.com/5b890e25ddb98b71ea7698fc/5bb773aa0d43be2d6a25e334_Inspire-TheBalancingAct_LR.pdf accessed 18 April 2021.

whilst men can still conform to the required norm; this further strengthens the 'organization of work' inequality regime to the detriment of caregivers.

The fact that caregivers need predictability in terms of working hours/time/place not only impacts their perceived commitment (and associated rewards) in the workplace context, but also has further negative implications in the context of what happens outside of the office and office hours. At a certain level of seniority, 'succession planning' involves a vetting process through all networks considering employees' movements up the occupational ladder, as well as their prominence in the organisation.[86] The strength of the 'old boy's network', described as 'a group of men with a shared background, who have worked with each other over many years and meet socially at conferences and in local pubs' becomes important in this context.[87] There are many subtle layers to these networks, but an important element of the operation of such a group is usually socialising, which often occurs outside office hours and at short notice. The social capital gained through this kind of socialisation often increases participants' desirability for certain contracts, and consequently their professional progression in the organisation.[88] The ability of employees with intransigent responsibilities outside the employment sphere to participate in these networks is usually restricted and this impacts on their prospects of securing similar opportunities to progress to the apex of the organisational hierarchy. This also increases the workplace input expected from women to gain and maintain the same level of clientele, whereas the favoured men are automatically 'pulled into rainmaking situations'.[89] Female caregivers' limited facetime availability at these 'out-of-hours' gatherings not only impacts their promotional prospects, but also limits their exposure to networking events where prospective employers might be scouting for new talent. This is another way in which the

[86] Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (n 22) 94.
[87] ibid 95.
[88] Judith K Pringle, Candice Harris, Katherine Ravenswood, Lynne Giddings, Irene Ryan and Sabina Jaeger, 'Women's Career Progression in Law Firms: Views from the Top, Views from Below' (2017) 24 Gender, Work and Organization 435.
[89] Deborah Kolb and Kathleen McGinn, 'Beyond Gender and Negotiation to Gendered Negotiations' (2009) 2 Negotiation and Conflict Management Research 1, 9. See also the impact of 'exclusionary networks' in Louise Marie Roth, 'Leveling the Playing Field: Negotiating Opportunities and Recognition in Gendered Jobs' (n 71) 20.

unencumbered is advantaged, not only by visibility in the office, but also due to their ability to adhere to out-of-hours socialising demands.[90]

4.3.1.3 Disguises vulnerability

Another element of the 'organization of work' inequality regime which is worth considering is the notion that the unencumbered usually appear 'unhampered by other responsibilities'[91]. The extent to which this worker's vulnerability manifests in the public arena is therefore inhibited by his/her ability to shift/outsource their private sphere duties to a partner/paid carer/childminder. Whilst mothers utilise work-family policies to increase their engagement in caring and domestic labour, fathers' abilities to work in an unencumbered manner are often enhanced by their partners' input in caring and domestic labour.[92] Although Fineman theorises around the 'universal vulnerability' of individuals,[93] the extent to which employees are able to conform to the unencumbered norm during different life stages, often based on their lack of responsibilities outside of the employment realm, does diminish their perceived vulnerability in the eyes of employers rewarding facetime and time commitment disproportionately. In the employment setting this leads to a scenario where certain cohorts of employees are sheltered 'from the harshest implications of our shared vulnerability' at the expense of others.[94] This chapter highlights many ways in which organisational practices soften the blow, particularly for the unencumbered worker, by disproportionally rewarding their efforts whilst penalising those who exhibit vulnerability at work by displaying a visible commitment to caregiving.

4.3.2 Recruitment and hiring practices

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[90] 'The patterns of social bonding in high-status jobs remain distinctly masculine.' Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press 2001) 68.
[91] Joan Acker, 'Theorizing Gender, Race, and Class in Organizations' in Emma L Jeanes, David Knights and Patricia Yancey Martin (eds) *Handbook of Gender, Work and Organization* (John Wiley & Sons Ltd 2011) 67.
[92] Sunny L Munn and Tomika W Greer, 'Beyond the "Ideal Worker": Including Men in Work-Family Discussions' in Maura J Mills (ed) *Gender and the Work-Family Experience: An Intersection of Two Domains* (Springer 2015).
[93] Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133, 146.
[94] Martha Albertson Fineman, 'Grappling with equality: One feminist journey' (n 40) 58.

The manner in which employers make decisions about how they recruit workers and on which terms they appoint them are important aspects to consider in the pursuit to expose the unequal operation of the employment landscape. Acker highlights the impact of '[h]iring through social networks' i.e., the 'old boy (white) network', rather than implementing 'gender- and race-neutral criteria of competence' in recruitment processes.[95] The extent to which concepts such as 'competence' and 'merit' are constructed based on the characteristic of decisionmakers already in power is explored in more detail in Chapter 6 where alternative interventions, like quotas and affirmative actions, are considered. Meanwhile, this section focuses on the manner in which gendered organisational recruitment practices negatively impact the career advancement of female professional employees with specific reference to the role the RTR play in this process. For the purpose of this analysis, the recruitment process is divided into a search element, whereby a list of candidates is put together who might be suitable for the post and a selection element (interview and appointment) which involves choosing one of the candidates for the job.

4.3.2.1 The search element of the recruitment process

The way in which companies go about recruiting for senior positions reflects something about the gendered culture they are trying to sustain. By using personal networks, board members often recruit more of their own, whilst excluding candidates from under-represented groups. Whether this is ascribed to 'chance homophily' or 'choice homophily', where the latter is indicative of a concerted effort to identify with people who show analogous characteristics, the impact on female caregivers amounts to exclusion as men still dominate these decision-making positions.[96] Before the search process even commences, the job descriptions which are used to recruit for these positions exemplify the gendered nature of the workplace by excluding certain cohorts of applicants. When requirements for a certain position contain elements of background and 'fit', the likelihood of people with decision-making powers appointing employees 'in their own image' increases due to the subjective assessment of these criteria. The Equality and Human Right's Commission made several suggestions in a document published in 2016,

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[95] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 72) 450.
[96] Marieke van den Brink and Yvonne Benschop, 'Gender in Academic Networking: The Role of Gatekeepers in Professional Recruitment' (2014) 51 Journal of Management Studies 460, 464.

regarding the diversity of FTSE 350 boards. In terms of recruiting board members, they dealt specifically with the role descriptions used when advertising these positions.[97] One of their recommendations was that companies should be wary of 'undefined, poorly defined or subjective criteria' when outlining the criteria suitable applicants should possess.[98] Examples of role descriptions that would not necessarily pass this test are terms such as 'chemistry' and 'fit' as there might be very little prospective employees could do to increase their employability in this regard. Additionally, stipulating as a requirement that the applicant should have FTSE board experience could also potentially exclude certain demographics, like women, who are under-represented in this group; an alternative and preferable description would refer to the objective skills and experience necessary to perform the job.[99] In some instances it was found that replacing 'experience-based criteria' with 'skill-based criteria of commercial acumen and team leadership' resulted in a fairer assessment of employees' competence levels and a more gender equal outcome.[100] This could also potentially avoid the scenario where prospective employees are screened on the basis of conventional notions of 'power, similarity, and familiarity' already prevalent within a specific profession.[101] The example given by Malleson relates to the appointment of white male judges from traditionally elite chambers; in this scenario the judicial job description reflected the 'career paths, skills, interests, life choices, experiences, and culture' of this group which consequently reproduces the homogenous composition of the judiciary.[102] These examples highlight how the method of compiling a document containing the required, preferred and desired elements of a specific vacancy excludes certain demographics, whilst insulating the selection process from any obvious discriminatory elements. Where 'employers clothe a discriminatory job description in a gender-neutral veneer' it might be difficult to identity the elements thereof which impact negatively

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[97] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (April 2016) https://www.equalityhumanrights.com/sites/default/files/ehrc_inquiry_ftd_ftse350_updated_22-4-16.pdf accessed 16 April 2021.
[98] ibid 57.
[99] ibid.
[100] Hampton-Alexander Review, 'FTSE Women Leaders: Improving Gender Balance in FTSE Leadership' (November 2016) 16.
[101] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126, 140.
[102] ibid 140. See also Murray's analysis of the merit principle in this context; Rainbow Murray, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (2014) 108 American Political Science Review 520.

on women specifically.[103] This points to Acker's invisibility of inequality which sustains the validity of certain workplace practices; in this example the supposed gender-neutral requirements contained in job descriptions legitimises the inequality in recruitment practices, which makes it even harder to challenge or change.[104]

In terms of the potential impact the RTR might have in this regard, it is important to acknowledge that the current operation of the law does not allow for a day-one right.[105] Under the current construction of the RTR, an employee must be able to show 26 weeks of continuous service with the same employer in order to bring an application to change his/her working hours/structure. This means that jobs do not have to be advertised in a flexible manner, which in itself excludes large cohorts from applying. One of the key recommendations in a report into the gender pay gap conducted by the House of Commons Women and Equalities Select Committee in 2016, was that '[a]ll jobs should be available to work flexibly unless an employer can demonstrate an immediate and continuing business case against doing so'.[106] The recommendation would effectively repeal the 26 weeks requirement and is in line with a proposal made in 2009 by the Equality and Human Rights Commission.[107] The implications of such an amendment to the legislation would be far-reaching as it will impact the fundamental construction of the RTR i.e., a *right to* flexible working as opposed to a *right to request* flexible working. It is therefore not surprising that the Government pushed back on this recommendation; the reason for this rejection related to the necessary balance to be struck between employees' needs to combine their responsibilities inside and outside of the workplace on the one hand, and employers' desire to schedule work structures on the other.[108] In terms of

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[103] Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (n 90) 104.
[104] Joan Acker, *Class Questions: Feminist Answer* (Rowman & Littlefield Publisher 2006). See also Joan Acker, 'From glass ceiling to inequality regimes' (2009) 51 Sociologie du Travail 199.
[105] See Section 5.3.3.1 of Chapter 5 for an analysis of New Zealand's day one RTR.
[106] House of Commons Women and Equalities Committee, 'Gender Pay Gap, Second Report of Session 2015-16' (n 9) 40.
[107] Equality and Human Rights Commission, 'Working Better: Meeting the changing needs of families, workers and employers in the 21st century' (March 2009) https://webarchive.nationalarchives.gov.uk/20141013170704/http:/www.equalityhumanrights.com/sites/default/files/documents/working_better_final_pdf_250309.pdf accessed 18 April 2021.
[108] House of Commons Women and Equalities Committee, 'Gender Pay Gap, Second Report of Session 2015-16' (n 9).

facilitating and enhancing female carers' employment opportunities, the 26-week requirement is problematic for various reasons. Firstly, it only provides the option to employees already in employment and does not legislate the advertisement of jobs on a flexible basis from the outset. Research conducted by the Joseph Rowntree Foundation, in relation to part-time work specifically, indicates that companies generally use part-time work as a 'retention tool' for existing employees with 48% of staff in part-time roles having transitioned from full-time positions with the same employer.[109] This is in line with the notion that women who are already performing a job are more likely to be judged on their actual abilities, whereas female applicants are up against possible sex and, in some cases, age discrimination. Additionally, the negative impact of gender stereotyping in the workplace is diminished where employers get to know their workers 'more as individuals than as representatives of their sex'.[110] The 26 week requirement is, in essence, another way of limiting the impact of the RTR legislation as a mechanism to perpetrate real change in the way work is constructed in favour of those who can, at least for a certain period, work in a traditional manner before acquiring the option to possibly vary their working hours.

4.3.2.2 The selection element of the recruitment process

After a list of candidates has been composed, it is necessary to consider the interview process in order to expose its discriminatory nature. Various interview techniques have proven to ensure a fairer, more transparent, process whereby candidates' skills and experience are evaluated as opposed to their ability to fit in with the existing culture of the board 'clan'.[111] These include panel-type instead of one-to-one interviews, asking the same scripted questions to all interviewees, and steering clear of questions relating to factors which are not relevant to

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[109] Joseph Rowntree Foundation, 'Building s sustainable quality part-time recruitment market: What can encourage employers to generate quality part-time jobs?' (March 2012) 17 https://www.jrf.org.uk/report/building-sustainable-quality-part-time-recruitment-market accessed 19 April 2021.

[110] Gary N Powell, Women and Men in Management (2nd edn, Sage Publications 1993) 174.

[111] 'I don't think women fit comfortably into the board environment.' One of the explanations provided by a group of FTSE 350 Chairs and CEOs on the stymied representation of women in senior positions in the UK. Department for Business, Energy & Industrial Strategy, 'Revealed: The worst explanations for not applying women to FTSE company boards' (May 2018). https://www.gov.uk/government/news/revealed-the-worst-explanations-for-not-appointing-women-to-ftse-company-boards> accessed 19 April 2021.

the skill set required and which could invite judgment based on stereotypes into the equation.[112] In a YouGov poll conducted in 2018, more than 33% of senior decision-makers deemed it appropriate to enquire about women's intention to have children and 59% expected a woman to disclose whether she was pregnant during the recruitment stage.[113] The masculine dominant nature of the workplace further manifests during this recruitment process with questions such as '[do you] play golf',[114] or 'how would you go about balancing this job with the childcare responsibilities you have outside the workplace?'[115] Although the second of these questions appears accommodating, it actually reinforces the prejudicial assumptions which connect women and childcare responsibilities when directed at a female interviewee. If, however, it is assumed that all workers have responsibility to care for someone in the private sphere, the balancing act will be regarded as a given built into any job, rather than something the prospective employee will have to manage individually and justify in an interview scenario, or wait until after 26 weeks of employment to make a RTR application.

The element of the workplace inhibiting women's career progression discussed in this section relates to the manner in which candidates for senior positions are recruited and interviewed. The already homogenous nature of FTSE 350 boards leads to appointments which fortify their composition, rather than challenging it, whilst companies with more female board members are generally more inclined to promote women along the pipeline than those with all male boards.[116] Whilst, in theory, the historic exclusion of women from certain sectors and levels of employment have been eradicated and traditional discriminatory barriers removed, the inclination to replicate the employee already performing the job is often reflected in established

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[112] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (n 97).
[113] Equality and Human Rights Commission, 'Employers in the dark ages over recruitment of pregnant women and new mothers' (February 2018) https://www.equalityhumanrights.com/en/our-work/news/employers-dark-ages-over-recruitment-pregnant-women-and-new-mothers accessed 19 April 2021.
[114] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (n 97) 81.
[115] A study conducted in 2017 indicated that 39% of young mothers had been asked about their ability to combine their paid and unpaid work in an interview situation. Young Women's Trust, 'What matter to young mums?' (March 2017) https://www.youngwomenstrust.org/wp-content/uploads/2020/12/What-matters-to-young-mums-report.pdf accessed 19 April 2021
[116] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (n 97).

recruitment practices.[117] This shapes the employment landscape and impacts negatively on caregivers' ability to compete for professional positions and the influence they assert when negotiating their starting compensation packages.

4.3.3 Wage setting and supervisory practices

Acker's third inequality regime to be explored relates to the operation of organisational processes regarding wage setting and supervisory practices; the extent to which 'assumptions about skill, responsibility and a fair wage' perpetuate already unequal remuneration systems is investigated in more detail in this section. By reviewing the elements of employee input and behaviour which are generally rewarded by management, the inhibiting elements of the landscape becomes more evident from a caregiver's perspective.

Currently the workplace attributes significant value and reward to visibility and continuous careers. Visibility manifests in various different forms, from actually being present (signified by the jacket on the chair) to making yourself heard in the office (vocal visibility);[118] the latter is often evaluated differently depending on the gender of the employee. The next section deals with the various ways in which the wage setting inequality regime manifests in the workplace to the detriment of caregivers. Firstly, the impact of discretionary decisionmakers' influence in determining salaries in the higher echelons of the employment sphere is investigated. Then, the disproportionate rewards associated with visibility and continuous careers are highlighted with specific reference to the role the RTR plays in strengthening/alleviating the current unequal construction of the employment landscape.

4.3.3.1 Discretionary wage-setting

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[117] Mark Evans, Meredith Edwards, Bill Burmester and Deborah May, '"Not yet 50/50" – Barriers to the Progress of Senior Women in the Australian Public Service' (2014) 73 Australian Journal of Public Administration 501.

[118] Boris Groysberg and Katherine Connolly, 'Great Leaders Who Make the Mix Work' (2013) 91 Harvard Business Review 68. Promotion of 'ever-present, fast, individual and mouthy' employees is discussed in Gill Coleman and Ann Rippin, 'Putting Feminist Theory to Work: Collaboration as a Means towards Organizational Change' (2000) 7 Organization 573, 579.

Wage setting involves the 'division of surplus between workers and management'[119] and generally involves some sort of evaluation system, whether formal or informal, which attributes monetary recognition to various workplace elements such as skill, performance management, client service and industry knowledge. The way in which these rewards manifest usually relate to salary increases and bonus structures within the discretion of the management of the organisation. The unequal operation of reward schemes becomes particularly evident in 'prestigious settings' where, despite assumed abstract performance indicators, the reward mechanisms often allow for 'highly subjective, opaque, and adversarial' elements to influence the decisionmakers decisions.[120] The immense power of decision-makers in setting bonuses for employees at their discretion leads to biased assessments and increases the gender pay gap significantly at this level; these performance related payments which 'constitute the main difference between basic pay and total earnings' often carry heavy 'discretionary rather than contractual' components.[121] A gender gap of 80% was found in a study conducted by the Equality and Human Rights Commission in the case of performance related pay.[122] Gendered elements contributing to this discrepancy include men's increased assertiveness to negotiate/demand higher remuneration, as well as the decisionmakers 'derogatory attitudes' towards female employees.[123]

The inclination to follow a 'mini-me' approach, highlighted in the recruitment process discussed earlier in this chapter, also manifests in reward structures;[124] what shapes the expectations of desirable candidates worthy of extensive remunerative rewards is often based

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[119] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 72) 450.
[120] Aparna Joshi, Jooyeon Son and Hyuntak Roh, 'When can women close the gap? A meta-analytic test of sex differences in performance and rewards' (2015) 58 Academy of Management Journal 1516, 1533.
[121] Equality and Human Rights Commission, Financial Services Inquiry: Sex discrimination and gender pay gap report of the Equality and Human Rights Commission' (September 2009) 33 & 40 https://www.equalityhumanrights.com/sites/default/files/financial_services_inquiry_report_0.pdf accessed 22 April 2021.
[122] ibid.
[123] ibid 41.
[124] One of the recommendations in the Grant Thornton report for gender diversity is to 'reduce mini-me recruitment and promotion'. Grant Thornton, 'Women in business: beyond policy to progress' (March 2018) 21 https://www.grantthornton.global/globalassets/1.-member-firms/global/insights/women-in-business/grant-thornton-women-in-business-2018-report.pdf accessed 22 April 2021.

on the profiles of existing employees in senior positions.[125] Furthermore, the fact that 'time, productivity and commitment are socially constructed' notions, are, however, rarely considered in the context of promotional rewards.[126] The issue for caregiving women attempting to reach the higher echelons of the organisational structure are, therefore, often not necessarily situated within the level of their professional input, but rather in the discretionary reward system operating to their detriment.[127] Wages reflect the worth of an employee based on the (often unencumbered) manager's discretion which allows for a level of subjectivity in assessment which cannot be ignored in an analysis of the landscape in which women are competing.[128]

4.3.3.2 Disproportionate rewards

For the purpose of analysing the role of the RTR in the context of this inequality regime of 'wage setting', it is useful to explore the following two workplace attributes which are rewarded disproportionately in favour of the employee able to operate in line with the unencumbered work trajectory: visibility and continuous careers.

(i) Visibility

The culture of presentism and long working hours prevalent in the UK retains the gendered norms which exclude workers with responsibilities outside of the workplace.[129]

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[125] Rainbow Murray, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (n 102).
[126] Suzan Lewis, '"Family Friendly" Employment Policies: A Route to Changing Organizational Culture of Playing About at the Margins?' (n 28) 16.
[127] Aparna Joshi, Jooyeon Son and Hyuntak Roh, 'When can women close the gap? A meta-analytic test of sex differences in performance and rewards' (n 120).
[128] Joan Acker, 'The Gender Regime of Swedish Banks' (1994) 10 Scandinavian Journal of Management 117. '… the system of bonus rewards is consciously chosen even though it is known that discretion leads to bias.' London School of Economics, Knowledge Exchange, 'Confronting Gender Inequality: Findings from the LSA Commission on Gender' (n 24) 19.
[129] The prevalence and disproportionate rewards associated with workers conforming to the unencumbered norm, can also be explained by the signaling theory, whereby 'managers use employees' observable behaviors to make inferences about characteristics that are harder to observe, including organizational commitment'. Any signaling towards responsibilities outside of the workplace, which often manifests in flexible working structures, supposedly inhibits employees' commitment to economic labour. Lisa M Leslie, Colleen Flaherty Manchester, Tae-Youn Park and Si Ahn Mehng, 'Flexible Work Practices: A Source of Career Premiums or Penalties' (2012) 55 Academy of Management Journal 1407, 1409.

‘“Workaholism”, whether by assignment or personal decision, is regarded as a virtue and a sign of commitment and excellence.’[130] Employees who spend less hours at work, and are consequently less visible, are penalised for seemingly being only partly committed to their jobs.[131] Facetime, in the form of ‘hours in the physical workplace and visible busyness’, is regarded as worthy of reward.[132] Whereas dedication is measured by ‘putting in the hours’,[133] the ‘lack of bodily presence militates against flexible working’.[134] This is evident from the detrimental effects of, for instance, part-time work on the remuneration[135] and advancement opportunities of such workers.[136] The awards associated with presentism are further exemplified by the impact of the client discourse when evaluating employees’ performance. In a study conducted in 1996 within two of the formerly ‘Big 5’ professional services firms, the parameters used for appraising trainee accountants were permeated with client-serving

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[130] Cynthia Fuchs Epstein, ‘Border Crossings: The Constraints of Time Norms in Transgressions of Gender and Professional Roles’ in Cynthia Fuchs Epstein and Arne L Kalleberg (eds), *Fighting for Time: Shifting Boundaries of Work and Social Life* (Russel Sage Foundation 2004) 323.

[131] Where commitment is regarded as ‘finite and non-expandable’ an employee’s responsibilities outside of work ‘inevitably reduces their level of commitment at work’. Suzan Lewis, ‘“Family Friendly” Employment Policies: A Route to Changing Organizational Culture of Playing About at the Margins?’ (n 28) 16.

[132] Shelley J Correll, Erin L Kelly, Lindsey Trimble O’Connor and Joan C Williams, ‘Redesigning, Redefining Work’ (2014) 41 Work and Occupations 3, 4.

[133] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 21) 195.

[134] Margaret Thornton and Joanne Bagust, ‘The Gender Trap: Flexible Work in Corporate Legal Practice’ (n 25) 791.

[135] Frances McGinnity and Patricia McManus,‘Paying the price for reconciling work and family life: Comparing the wage penalty for women’s part-time work in Britain, Germany and the United States’ (2007) 9 Journal of Comparative Policy Analysis: Research and Practice 115. See also Alan Manning and Barbara Petrongolo, ‘The Part-Time Pay Penalty’ (Centre of Economic Performance March 2005) and Colette Fagan and Jacqueline O’Reilly, ‘Conceptualising part-time work: The value of an integrated comparative perspective’ in Jacqueline O’Reilly and Colette Fagan (eds), *Part-Time Prospects: An International Comparison of Part-Time Work in Europe, North America and the Pacific Rim* (Routlegde 1998).

[136] Elena Bardasi and Janet C Gornick, ‘Working for Less? Women’s part-time wage penalties across countries’ (2008) 14 Feminist Economics 37. See also the occupational demotion associated with the shift between full and part time work in Alan Manning and Barbara Petrongolo ‘The Part-Time Pay Penalty for Women in Britain’ 2008 (118) The Economic Journal 526. Gaze refers to the ‘“choice” of part-time work’ as a ‘survival mechanism’ for female employees in the Australian context. Beth Gaze, ‘Quality Part-time Work: Can Law Provide a Framework?’ (2005) 15 Labour and Industry: A Journal of the Social and Economic Relations of Work 89, 89.

elements.[137] Whilst subject and industry knowledge were assessed, client care carried a great deal of weight measured by employees' long hours which 'makes visible a commitment to getting the job done'.[138] Equating visible commitment to superior working performance through higher monetary awards is a mechanism by which the unencumbered norm shapes the employment landscape whilst implicating the 'archetypical "client"'.[139]

Another element of visibility relates to mobility; this refers to the location at which employees perform their duties, the flexibility of employees to travel regularly for work purposes, or to relocate as and when work needs so demand. Being 'geographically mobile' is often an essential element of career progression in the professional realm.[140] Women are more likely to relocate for the sake of their partner's careers[141] and, being 'less mobile' to explore 'cosmopolitan careers' for themselves, this could inhibit their career mobility significantly.[142] Women's stronger attachment to domestic labour also limits their options to commute to workplaces which are further away, or to travel for work-related purposes.[143] There is evidence that the gender pay gap and the gender commuting gap have the same negative trajectory for women after the birth of their first child; looking for work closer to home gives mothers fewer options from which to choose and often results in a mismatch with their skillset and less

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[137] See examples in Fiona Anderson-Gough, Christopher Grey and Keith Robson, 'In the name of the client: The service ethic in two professional services firms' (2000) 53 Human Relations 1151, 1158.
[138] ibid 1160.
[139] Martin Kornberger, Chris Carter and Anne Ross-Smith, 'Changing gender domination in a Big Four accounting firm: Flexibility, performance and client service in practice' (2010) 35 Accounting, Organizations and Society 775, 785. See also the next section on how the 'culprit client' is blamed for inflexible workplaces in an attempt to sustain and reward the status quo employee.
[140] Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (n 22) 147.
[141] William T Bielby and Denise Bielby, 'I Will Follow Him: Family Ties, Gender-Role Beliefs, and Reluctance to Relocate for a Better Job' (1992) 97 American Journal of Sociology 1241.
[142] Colleen Chesterman, Anne Ross-Smith and Margaret Peters, '"Not doable jobs!" Exploring senior women's attitudes to academic leadership roles' (2005) 28 Women's Studies International Forum 163, 167.
[143] Susan Hanson and Geraldine Pratt, 'Reconceptualizing the Links between Home and Work in Urban Geography' (1998) 64 Economic Geography 299.

competitive remuneration packages.[144] The sudden normalisation of especially homeworking during the Coronavirus pandemic has the potential to curb the negative impact of the gender commuting gap and allow more women to cast the search net wider for better paid jobs which are also better suited to their level of professional attainment.[145] The future of remote working post-Covid, however, remains uncertain, but the hope is that a new 'normal' may emerge which allow women the option to provide caregiving without sacrificing their careers, whilst at the same time increasing fathers' involvement in the caregiving framework.[146]

The disproportionate rewards associated with visibility and mobility in the workplace works directly against those working in a flexible manner, whether they work part-time or from home, their lack of 'visible commitment' impacts negatively on their perceived commitment. The RTR might, therefore and in principle, allow all employees to apply for flexible working; however, the flexible working 'allowed' under the law detrimentally impacts the recipient's remuneration rewards which does not situate the current RTR legislative regime in the realm of assisting career progression.

(ii) Continuous careers

Another element of the workplace which attracts disproportionate rewards is that of continuous employment. This works against those who take career breaks; for women this is generally due to childbearing and other caring commitments. Despite attempts to level the periods of time out of employment for mothers and fathers through parental leave legislation, the very low parental leave compensation rate discourages longer career breaks, especially for fathers who often remain the greater earner.[147] The impact of career breaks is bundled into the unexplained

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[144] Robert Joyce and Agnes Norris Keiller, 'The "gender commuting gap" widens considerably in the first decade after childbirth' (Institute of Fiscal Studies, 7 Nov 2018) https://www.ifs.org.uk/publications/13673 accessed 20 April 2021.

[145] Heejung Chung, Hyojin Seo, Sarah Forbes and Holly Birkett, 'Working from home during the Covid-19 lockdown: Changing preferences and the future of work' (University of Birmingham & University of Kent, 2020) https://www.birmingham.ac.uk/Documents/college-social-sciences/business/research/wirc/epp-working-from-home-COVID-19-lockdown.pdf accessed 20 April 2021.

[146] 73% of fathers indicated that they would utilise flexible working in future to spend more time with their children post-Covid. Ibid 6.

[147] See Section 1.3.3.1 of Chapter 1 on parental leave legislative provisions as well as a critique of the UK's shared parental leave provisions.

element of the most recent Gender Pay Gap statistics, along with family structures, education and possibly 'discriminatory behavior'.[148] This does acknowledge, albeit indirectly, that a deviation from the standard continuous career path has damaging financial implications for employees. A further deleterious impact of rewarding career continuity disproportionately is that women might be judged more harshly on their immediate output and performance, whereas men, who generally have the liberty to work continuously throughout their life course, are evaluated based on their potential contributions and growth in the workplace.[149] The importance of career continuity can also impact decision-makers' willingness to assign important clients to female employees;[150] this is often done with very little regard for genuine client expectations, or whether/when the specific female employee might actually take a career break. This not only limits women's chances to work on significant client accounts, but might also lead to 'scattered assignments', which reflects poorly on their CV's going forward.[151] The fact that women are often not able to follow the 'conventional career path of non-stop, vertically upward progression' results in labels like 'inconsistent and unpredictable' being attributed to them; these negative connotations do not essentially pertain to their actual skillset or experience, but rather their inability to construct an unfettered linear career track.[152] The idea that experience in the workplace carries more worth as part of a continuous career is yet another taken-for-granted parameter of the employment landscape which impacts adversely on those not able to conform to such a norm.[153]

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[148] '[N]on-continuous employment' is one of the factors attributed to women's negative career trajectory and consequently reflected in the gender pay gap. House of Commons Women and Equalities Committee, 'Gender Pay Gap, Second Report of Session 2015-16' (n 9) 12. See also Tom Evans, 'Understanding the gender pay gap in the UK' (Office of National Statistic 2018). https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/understandingthegenderpaygapintheuk/2018-01-17#modelling-the-factors-that-affect-pay> accessed 20 April 2021.

[149] Douglas M McCracken, 'Winning the Talent War for Women: Sometimes It Takes a Revolution' (n 56).

[150] ibid. See also Judith K Pringle, Candice Harris, Katherine Ravenswood, Lynne Giddings, Irene Ryan and Sabina Jaeger 'Women's Career Progression in Law Firms: Views from the Top, Views from Below' (n 88).

[151] Deborah Kolb and Kathleen McGinn, 'Beyond Gender and Negotiation to Gendered Negotiations' (n 89) 6.

[152] Mary Shapiro, Cynthia Ingols, Stacy Blake-Beard, Regina O'Neill, 'Canaries in the Mine Shaft: Women Signaling a New Career Model' (2009) 32 People & Strategy 52, 56.

[153] See also the impact of an 'relatively uninterrupted career path' on the career trajectories of female lecturers in Australia. Sandra Berns, *Women Going Backwards: Law and change in a family unfriendly society* (n 21) 42.

In the context of the role the RTR can play (if any) in challenging the rewards associated with career continuity, it is worth noting that employees can only request flexible working (under the RTR) after completing a period of 26-weeks with any one employer. Female caregivers are not only more inclined to leave the employment sphere for reasons related to reproduction, but they are also more likely to require flexible working when they return to work in order to combine caring and economic labour. Consequently, they are heavily penalised for their absence from the workplace as is evident from the gender pay gap analysis relating to career breaks,[154] and then penalised further when they want to return on flexible terms to a different employer as they would only be entitled to request flexible working from their existing employer. Professional female caregivers are impacted by this requirement in different ways. Firstly, they are less likely to seek alternative employment if their current working structure allows for their desired flexibility; the uncertainty regarding alternative working options after transitioning to a different employer might discourage them from exploring other options, especially if the legislative entitlement does not allow for immediate flexibility requests. This could negatively impact their wage gradient as remuneration attached to inter-firm promotions are generally more substantive than within the same organisation.[155] A requirement for jobs to be advertised with inherent flexibility routes, or a day-one right to request flexibility, might address these inhibiting elements of the employment landscape to some extent. In the next chapter, these options are discussed from a lesson learnt perspective which looks at other jurisdictions where similar measures have been trialled.

By incentivising presenteeism and continuous careers disproportionately and using exclusionary rewarding systems, employers are active participants in shaping a culture of anywhere-anytime availability and a workforce of homogenous employees. The manifestation of these practices is, however, often disguised behind human resource manuals which dictate supposed gender-neutral organisational processes, employee evaluation guidelines and remuneration brackets. This forms an integral part of the gendered employment landscape

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[154] See footnote 148.
[155] Hugh Cassidy, Jed DeVaro and Antti Kauhanen, 'Promotion signalling, gender, and turnover: New Theory and evidence' (2016) 126 Journal of Economic Behavior & Organization 140.

which entrenches employees with limited facetime capability into lower professional hierarchies, or prevents them from entering the higher echelons from the outset.

4.4 Sustaining the unequal employment landscape

The first part of this chapter focused on the inequalities within the workplace which act as a stick, penalising employees for not adhering to sometimes disguised normative workplace demands. In this section, the RTR and the organisational setting are scrutinised with the aim to highlight the incentives which sustain and justify the norm in the professional realm. By investigating the forces which allow this standard to prevail in organisational practices, the potential areas for gender transformation which relate to the operation of the RTR become visible. In this context, I explore the manner in which the RTR deals with deviations from the norm, the extent to which the client narrative is used to justify the norm, and finally, I touch on organisational (dis)incentives to challenge the norm.

4.4.1 An 'option' to opt-out

The RTR legislation has attempted to allow employees to combine economic and caring labour by providing them with an option to apply for alternative working structures. The basic construction of flexible working is, however, born out of the availability of the unencumbered worker as opposed to the limitations of the encumbered worker. A flexible working request, therefore, signals an opt-out from the 'preferred' norm; an investigation into how this deviation is dealt with and perceived in the workplace can shed some light on why the RTR provides limited relief in challenging the norm, but rather contributes to sustaining it. This discussion focuses firstly on the limitations of the law in providing viable and genuine options to employees to opt out, and secondly on the impact of a 'successful' opt-out on female career progression routes. Both the limitations and impact of the RTR highlighted here contribute to sustaining the unequal employment landscape to the detriment of those unable to adapt to its gendered contours.

4.4.1.1 The limitations within the opt-out

The limitations to challenges of normative working structures within the RTR were highlighted in Chapter 3 with reference to the weak entitlement afforded under the right; this is situated

within the rejection options available to the employer as well as the absence of a right to appeal. Reviewing these elements of the law with reference to how it (dis)allows deviations from the unencumbered norm shines a light on how the RTR sustains the unequal landscape, instead of challenging it.

The RTR legislation had the potential to strengthen the negotiation position of the worker not able to adhere to the favoured norm by providing a legislative justification to do so. The comprehensive rejection grounds built into the law, however, give the employer immense powers to decide which employees could work flexibly and how this flexibility should be constructed. The RTR then becomes a mechanism whereby an employee's options are limited in a practical and symbolic manner by the employer's unbridled legislative prerogative to reject, or partially accept, applications without consequences. The weak entitlement to adjust working hours/schedules/location afforded to all employees under the RTR legislation therefore becomes a powerful instrument in the arsenal of the employer to decide who should be allowed to diverge from the unencumbered norm and so also suffer the negative employment consequences associated with such deviation. Jonathan Fineman applied the vulnerability theory to rethink the unequal power allocation between employer and employees specifically in regard to America's 'at-will' termination provisions. The employer's prerogative to dictate employment contract terms based on the current construction of the employment relationship leads to a scenario where any deviation is viewed as 'generous or gratuitous concessions to employees'.[156] A similar narrative can be identified in the provision of flexible working structures in accordance with the RTR. As alternative working structures constitute deviation from the 'preferred' norm, an employee who has their application approved often displays their gratitude for the privilege bestowed upon them by the generous employer; this could manifest in an intensified workload, amplified loyalty or acceptance of career penalties relating to compensation, promotion or training opportunities. Although the word 'right' appears in the heading of the legislation, the reality is that the entitlement is constructed oftentimes as 'favours that have to be negotiated and/or reciprocated'.[157]

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[156] Jonathan Fineman, 'The vulnerable subject at work: a new perspective on the employment at-will debate' (2013) 43 Southwestern Law Review 275, 314.
[157] Suzan Lewis and Janet Smithson, 'Sense of entitlement to support for the reconciliation of employment and family life' (2001) 54 Human Relations 1455, 1457.

Against this backdrop, there are a few issues to explore in the context of the employer's ability to dictate terms with reference to women with caregiving responsibilities. Firstly, where gender equality is based on the notion of providing men and women with genuine choices[158] on how to construct their work/life/care responsibilities, the choices caregiving employees have when applying for flexible working are influenced by various factors. One such factor may be the likelihood of the request being approved as an employee would normally not raise a request if he/she is not fairly confident that it would be approved.[159] Thus, from the outset their options are limited to what the employer has approved in the past, or to what might work best around employer and client expectations. Where such a request is then rejected, without any recourse to a review of the employer's reasons, the already potentially inhibited choices of the employee are squashed with no legislative recourse to a further discussion on the merits of the application. Where the request is, however, partially agreed and then adapted in line with working practices preferred by the employer, the genuine choice of the employee has been reduced to such an extent that the compromise 'agreed' might not contain any 'genuine' element anymore. The element of 'choice' also fades away where mothers utilise part-time working structures as their 'dominant coping strategy[s]' since they are not able to find quality childcare, are single mothers, or their partners give priority to work obligations and, therefore, cannot share the caring load.[160] Part-time work, and the negative consequences associated with it, therefore becomes the fall-back position, which is not a clear choice, but is a way of returning to the workforce in some form. Additionally, exercising the 'choice' to work flexibly is only the beginning of the process, the employee then becomes responsible 'to deal with the consequences of those flexible working choices',[161] an issue highlighted in the next section where the impact of the opt-out is discussed.

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[158] See Section 2.2.1.3 of Chapter 2 for a discussion on the choice narrative in feminist theory.
[159] Ariane Hegewisch, 'Employers and the European Flexible Working Rights: When the Floodgates Were Opened.' (Work Life Law: UC Hastings College of Law, 2005). See also research in the Australian context where employees start off with 'an informal approach which was perceived to be lower risk'. Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (2016) 26 Labour & Industry: a journal of the social and economic relations of work 103, 111.
[160] Jelle Visser, 'The first part-time economy in the world: a model to be followed? (2002) 12 Journal of European Social Policy 23, 34.
[161] Noelle Donnelly, Sarah Be Proctor-Thomson, and Geoff Plimmer, 'The Role of "Voice" in Matters of "Choice": Flexible Work outcomes for Women in the New Zealand Public Services' (2012) 54 Journal of Industrial Relations 182, 197.

4.4.1.2 The impact of the opt-out

Where a flexible working request is approved, whether in line with the actual needs of the applicant or not, the manner in which flexible workers are perceived in the employment sphere inhibits the impact of the RTR to challenge the prevalence of the unencumbered 'preferred' norm. This is evident in the detrimental impact of flexible working on career progression, but also in the language used to describe especially part-time workers which creates and sustains a certain sub-standard culture. References such as 'part', 'reduced' and '0.5' when describing certain workers implies a 'whole', 'full' or '100%' standard which represents the norm; therefore this narrative immediately denotes part-time employees to inferior or underperforming workers even before the quality of their work has been considered.[162] Any commitment which is not completely devoted to the employer is regarded as second-rate and not worthy of the same recognition as the 'undivided commitment' expected in the dominant working culture. Additionally, the 'statistical discrimination' against employees using flexible working structures becomes problematic in this context; employers might oversee an employee for promotion who is working flexibly based on the employer's negative perception of such workers in general, regardless of the specific employee's actual performance and output.[163] Furthermore, it has been shown that men and fathers in male dominated workplaces are more likely to hold feelings of flexibility stigma against women.[164] This is problematic for two reasons. Firstly, the fact that workers who deviate from the norm are perceived in a negative light by fellow male employees, who are possibly being rewarded for avoiding their own caregiving responsibilities, reinforces the gendered divisions of economic and domestic

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[162] Jenny Chalmers, Iain Campbell and Sara Charlesworth, 'Part-time Work and Caring Responsibilities in Australia: Towards an Assessment of Job Quality' (2005) 15 Labour & Industry: a journal of the social and economic relations of work 41.

[163] Jennifer Glass, 'Blessing or Curse? Work-Family Policies and Mother's Wage Growth Over Time' (2004) 31 Work and Occupations 367, 372.

[164] Heejung Chung, 'Work Autonomy Flexibility and Work-Life Balance: Final Report' (WAF Project & University of Kent, May 2017). 'Employers and coworkers are known to resent practical disturbances to everyday workplace routines – for example, if mothers seek to access flexible work schedules.' Caroline Gatrell, Cary I Cooper, and Ellen Ernst Kossek, 'Maternal bodies as taboo at work: new perspectives on the marginalizing of senior-level women in organizations' (n 19) 242.

labour.[165] In this context, entertaining 'autonomous' employees' negative assessment of their colleagues with caregiving responsibilities ignores the extent to which autonomy is 'a product of social policy not a naturally occurring characteristic of the human condition'.[166] Whilst vulnerability is universal, autonomy is afforded to some individuals who then operate unfettered at the expense of the 'vulnerable'. Secondly, since men still dominate senior positions in the workplace and consequently have decision-making powers, these flexibility stigmas could directly impact upward career possibilities for women with caregiving responsibilities. The fact that these 'decision-makers [are] guided by their own biography' means that their perception of how the job should be done is based on their own experience and this usually excludes alternative working patterns.[167] This is especially pertinent where the 'gatekeepers of change' are from a generation of men who were encouraged to perform the breadwinner role with limited regard to caregiving responsibilities.[168]

The option to request flexible working, as well as the absence of a right to appeal under the RTR legislation, accompanied by the financial and social/symbolic penalties faced when opting for this route, are some of the many ways in which the gendered workplace reinforces the unencumbered worker standard. Providing an option to work flexibly, without addressing these underlying issues, is therefore unlikely to challenge this norm and the culture sustaining it. If, however, employment contracts were structured based on the assumption that all employees have responsibility to care for someone outside of the workplace,[169] the starting point for all jobs will be different and a deviation or opt-out would be superfluous. The current operation of the legislation, as well as the marginalisation of flexible workers, does, however, currently

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[165] '…often those whom we consider to be the most autonomous in life are, in fact, the most reliant on care work done by other individuals.' Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2014) 39 New Zealand Journal of Employment Relations 59, 68. See also Elson for the extent to which organisations depend on the 'reproductive economy' for the provision of their workforce and sale of their products. Diane Elson, 'Micro, Meso, Macro: Gender and Economic Analysis in the Context of Policy Reform' in Isabelle Bakker (ed) *The Strategic Silence: Gender and Economic Policy* (Zed Books Ltd 1994) 42.

[166] Martha Albertson Fineman, 'Grappling with equality: One Feminist Journey' (n 40) 61.

[167] Ariane Hegewisch, 'Flexible working policies: a comparative review' (n 84) 25.

[168] Keith Cunningham, 'Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family' (2001) 53 Stanford Law Review 967, 1008.

[169] Nicole Busby, 'Unpaid care-giving and paid work within a rights framework: towards reconciliation?' in Nicole Busby and Grace James (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar Publishing 2011).

sustain the unequal employment landscape to the detriment of caregivers who are more likely to need the 'opt-out' facilitated by the RTR legislation.

4.4.2 The culprit client

Employers use various techniques to justify the unencumbered norm; one of them is to situate the requirement for constant availability within industry requirements as opposed to employer preferences. In this section, the discussion highlights ways in which an employee's desire for flexibility is trumped by supposed 'forces' outside of the employer's control; this might manifest in the refusal of a flexible working request due to reasons related to client expectations. Due to the remoteness of these justifications, employees have very limited success when attempting to open a dialogue in this regard and have to accept these elements of the working environment as a given by conforming or, alternatively, by opting out. By framing the necessity for ever-present employees within the context of the needs of clients, an employer can often justify refusal of a flexible working request. For example, where an employee attempts to deviate from the unencumbered worker norm by applying for flexible working, one of the reasons, according to legislation, an employer can offer for rejecting such an application relates to the manner in which the requested alternative working structure might impact on the business' ability to meet customer demands.[170] Since the legislation does not allow for a review of the reason provided by the employer, it is quite an easy-out to use when rejecting a request; there is no way to verify what these customer demands are and whether the employee's working structure would, in actual fact, have a detrimental impact. Furthermore, placing the obligation to meet customer demands on the individual employee implies a level of responsibility and commitment which is more likely to be met by workers who can put work (and their clients) first with limited regard to duties outside of the workplace. The way in which these employers present the 'client as sovereign' to justify demands placed on employees' commitment masks the role of the senior management team in shaping this long hours landscape for reasons relating to commercial gain and competitiveness.[171] This includes the manner in which price

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[170] EA 2002, s 80G (1)(b)(ii).

[171] Fiona Anderson-Gough, Christopher Grey and Keith Robson, 'In the name of the client: The service ethic in two professional services firms' (n 137) 1156. Client expectations have also been blamed for controversial ethnicity as well as gender choices in a professional accounting firm. See C Grey, 'On being a professional in a "Big Six" firm' (n 23).

structures are designed, budgets are compiled and competitiveness consequently constructed, each of which are significant factors to consider when reviewing the client discourse as justification for non-flexible working structures.[172] Additionally, it is doubtful that the 'meeting customer demands' justification for rejecting a flexible working request actually involves a process whereby the expectations of clients are identified and measured;[173] more probable is the likelihood that it is based on what management regard as the 'archetypical client'.[174] Like many other workplace notions, the basis for a concept such as '"good client service"' is taken for granted as an unavoidable fixity rather than a 'socially constructed, negotiated' standard which is used as a justification for sustaining the status quo.[175]

Another way in which employers often justify the need for ever-present employees is based on the notion of 'professionalism' linked to the 'client narrative'.[176] The idea of 'professionalism', which is a prerequisite in higher-level employment structures is, in itself, a concept which is fabricated within the masculine employment narrative. This usually entails specific skill levels and, in certain instances, an accreditation with a professional body; in addition to these measurable requirements there are also elements of behaviour and composure which are more subjective in nature.[177] This encompasses dress code and physical attributes, as well as

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[172] See Cooney for the gendered impact of the billable hours model in American law firms. Leslie L Cooney, 'Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law' (2010) 47 San Diego Law Review 421.

[173] Clients are more concerned with '"good, timely service, the rest of it is academic"'. Keith Cunningham, 'Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family' (n 168) 986. Clients' concerns relate to '"cost and overall result"', '"capability and knowledge"', '"upfront with turnaround times"' and the implementation of 'communication protocols. Victorian Women Lawyers, 'A 360° Review: Flexible Work Practices. Confronting myths and realities in the legal profession' (November 2005) 23 & 24 https://www.vwl.asn.au/downloads/VWL%20360DegreeReport.pdf accessed 30 April 2021.

[174] Martin Kornberger, Chris Carter, and Anne Ross-Smith, 'Changing gender dominations in a Big Four accounting firm: Flexibility, performance and client service in practice' (n 139) 785.

[175] ibid 786.

[176] Valérie Fournier, 'The appeal to "professionalism" as a disciplinary mechanism' (2001) 47 The Sociological Review 281. See also the juxtaposition between 'professional and mothering aspects' in Kathryn Haynes, '(Re)figuring accounting and maternal bodies: The gendered embodiment of accounting professionals' (2008) 33 Accounting, Organizations and Society 328, 331.

[177] Kathryn Haynes, '(Re)figuring accounting and maternal bodies: The gendered embodiment of accounting professional' (n 176).

character traits such as aggressiveness and dedication.[178] Where, for instance, employees work within a budget and timeframe set by senior management, the idea is that 'professional' employees will choose to work additional hours in order to meet deadlines; all done in the name of serving the client efficiently. 'The allusion to personal choice seemingly appeals to the perception of autonomy and/or trust that professionals desire within their work.'[179] The line between 'choice' and 'subservience' in this scenario is very thin and yet again limits the options available to employees with caregiving responsibilities; the 'choice' between being a 'professional' by adhering to the overtime hours required by the employer (via the client) and the alternative, which must inevitably involve 'unprofessionalism', present very unpalatable options for employees with limited freedom to fabricate additional working hours. Those with responsibilities outside the employment realm are less likely to 'indulge the "choice" to work overtime'; this 'unintended cumulative result of the small decisions to finish a project, help a teammate' allows some to appear more committed than others.[180] Situating women's working structures within the choice narrative 'permits firm management to argue with a straight face that those women who "chose" not to be ideal should not reasonably expect the same pay and the same promotion rate as others who were available full time, all the time'.[181]

The client discourse in this context provides a platform for successful progressive careers on the one hand, but overshadows ideas of autonomy, public service, family life and social activities outside of the workplace on the other.[182] It is not hard to spot the conundrum here for anyone with caring responsibilities; their limited ability to adhere to the client's demands in a professional manner will undoubtedly impact on the material and symbolic rewards they can expect in the employment setting. The client discourse has therefore diminished the progress made in terms of unconventional working structures; flexible working is a feasible option

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[178] C Grey, 'On being a professional in a 'Big Six' firm' (n 23).
[179] Fiona Anderson-Gough, Christopher Grey and Keith Robson, 'In the name of the client: The service ethic in two professional services firms' (n 137) 1168.
[180] Patricia van Echtelt, Arie Glebbeek, Suzan Lewis and Siegwart Lindenberg, 'Post-Fordist Work: A Man's World? Gender and Working Overtime in the Netherlands' (2009) 23 Gender and Society 188, 196 & 197.
[181] Peggy D Dwyer and Robin W Roberts, 'The contemporary gender agenda of the US public accounting profession: embracing feminism or maintaining empire' (2004) 15 Critical Perspectives on Accounting 159, 171 footnote 7.
[182] Fiona Anderson-Gough, Christopher Grey and Keith Robson, 'In the name of the client: The service ethic in two professional services firms' (n 137).

unless you have the abstract universal client demanding otherwise. The focus then shifts from the seemingly blameless employer who would like to offer flexible working structures (whether in the name of gender equality or business efficiency or both), to the contemptuous client who hinders the development of transformative organisational values and practices.

By refusing flexible working patterns on the basis of client expectations, or framing the long hours, full-time, client-serving culture within the 'professionalism' discourse, the inflexible workplace hurdle can really only be overcome by avoiding any client related job. If, however, the contours of the employment landscape are considered, a rethink of organisations' billing structures[183] and client contracts could deliver more substantive results. For instance, two accounting firms in New Zealand who integrated flexible working into their business models spent time to 'educate the client to be less demanding in terms of work turnaround'.[184] These elements of the workplace are, however, often invisible, complicated and very hard to ascertain as they are regarded as confidential and not relevant to employees' employment contracts. The fact that these arrangements are traditionally designed on the basis of the availability of the unencumbered worker forms an intrinsic part of the contours of the gendered employment landscape which has to be considered in an analysis of professional caregivers' career progression. What is required is to shift the focus from the 'professional' employees meeting challenging client demands to the role of the industry and employer in managing the client discourse more effectively.

4.4.3 (Dis)incentives to rethink the unencumbered worker norm

The assumptions upon which the unencumbered worker standard is built are often taken for granted because it is so deeply ingrained in the employment landscape. Challenging the

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[183] Hourly billing structures 'reward you for working longer, not smarter.' See James Surowiecki, 'The Cult of Overwork' *The New Yorker* (27 January 2014) https://www.newyorker.com/magazine/2014/01/27/the-cult-of-overwork accessed 20 April 2021.

[184] Ministry of Women's Affairs, 'Workplace Flexibility in the Accounting Sector: Case Study Research' (June 2010) 11. https://women.govt.nz/sites/public_files/workplace-flexibility-in-the-accounting-sector.pdf accessed 20 April 2021. See also Young's analysis of the value of 'employee responsiveness' which inhibits the use of flexible working. Zoe Young, *Women's Work: How mothers Manage Flexible Working in Careers and Family Life* (Policy Press 2018) 23.

configuration of this norm requires an acknowledgement of its gendered nature, but also a willingness to transform its construction and prevalence.[185] The resistance to address these fundamental workplace values can often be attributed to real (or perceived) advantages associated with sustaining the status quo; whilst the current employment landscape penalises those deviating from the unencumbered norm, the 'carrot' to sustain this norm for certain employees must be investigated in the attempt to diminish its desirability. As Acker so aptly puts it, 'gender equity of necessity redistributes power and rewards'.[186] Recognising and addressing areas of the workplace which hold impetus for landscape changes will almost certainly disrupt the current alignment of 'power and rewards' in the employment sphere; this exercise will not, therefore, necessarily appeal to those who benefit considerably from the current state of affairs. The obstacle then becomes those who resist transformation 'that will inevitably undermine their own hegemony'.[187] The beneficiaries of the current system might find a rethink of the foundations of it undesirable; this includes not only the employees able to conform to the expectations of the unencumbered norm and reap the rewards, but also 'other societal institutions that benefit from carework' and are therefore 'free to evade responsibility to accommodate or compensate caretakers in any way'.[188] The next section highlights instances where the organisation is incentivised by different circumstances to promote or deviate from the unencumbered norm based on the advantages it holds for it.

4.4.3.1 Benefitting from sustaining the status quo

Currently those opting for flexible working arrangements often intensify their workload or accept the penalties associated with non-conventional working structures as a 'ritual which repairs the offense caused' by their deviation from the expected norm.[189] Employees display

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[185] Beth Gaze, 'Quality Part-time Work: Can Law Provide a Framework?' (n 136).
[186] Joan Acker, 'Gendered Contradictions in Organizational Equity Projects' (2000) 7 Organization 625, 628.
[187] Judy Wajcman, *Managing Like a Man: Women and Men in Corporate Management* (n 22) 163.
[188] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 70) 9 footnote 24.
[189] Silvia Gherardi, 'The Gender We Think, The Gender We Do in Our Everyday Organizational Lives' (1994) 47 Human Relations 591, 605. See also Clare Kelliher and Deidre Anderson, 'Doing more with less? Flexible working practices and the intensification of work' (2010) 63 Human Relations 83.

their gratitude for flexible working arrangements by increasing their time and effort input above their contracted hours without demanding additional compensation in order to make up for the fact that they are supposedly disrupting the workplace dynamics.[190] Limited influence over 'workloads, work distribution and working additional hours' means that those working flexibly often perform their jobs to the same capacity as before they opted to amend their working structures.[191] Consequently, employers often still enjoy access to skilled employees whilst reducing their labour overhead cost (in the case of part-time workers) and maintaining the return on training invested in these employees.[192] The employer therefore gets more for its money, but the employee loses out due to his or her non-conformation to the unencumbered worker norm, despite their attempts to sustain it. In this scenario there is very little incentive for the employer to rethink the way the workplace is structured in favour of the unencumbered worker. Additionally, the 'general condition of competition' between organisations often manifests in the employability of people the employer can exploit for their own benefit.[193]

The unquestioned belief that working longer hours is the solution to almost every workplace problem leads to the unencumbered norm being awarded and encouraged without a review of the necessity for additional hours in the specific situation;[194] this is reinforced by assumptions such as 'more time necessarily leads to greater productivity', 'time is an unlimited resource',

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[190] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (n 165). See also the reference to a 'quasi-moral' obligation to reciprocate on the part of employees working flexibly in Steve Fleetwood, 'Why work – life balance now?' 2007 (18) International Journal of Human Resource Management 387, 397.

[191] Noelle Donnelly, Sarah Be Proctor-Thomson, and Geoff Plimmer, 'The Role of "Voice" in Matters of "Choice": Flexible Work outcomes for Women in the New Zealand Public Services' (n 161) 198.

[192] Jill Rubery, 'How Gendering the Varieties of Capitalism Requires a Wider Lens' (2009) 16 Social Politics: International Studies in Gender, State & Society 192.

[193] Yvonne Due Billing, 'Are Women in Management Victims of the Phantom of the Male norm?' (2011) 18 Gender, Work and Organization 298, 301.

[194] Lotte Bailyn, Joyce Fletcher and Deborah Kolb, 'Unexpected Connections: Considering Employees' Personal Lives Can Revitalize Your Business' (1997) 38 Sloan Management Review 11. A study conducted in New Zealand by the Ministry of Women's' Affairs in 2010 in 12 accounting firms indicated that employees were more productive during a period within which there was a cap on their weekly working hours (45 hours per week); more accurate work was detected with fewer corrections made. Ministry of Women's Affairs, 'Workplace Flexibility in the Accounting Sector: Case Study Research' (n 184). See also John Pencavel, 'The Productivity of Working Hours' (Stanford University and IZA, April 2014).

'the most committed workers are those who work the longest hours' and 'individual competition and heroics are the best way to get the most out of people'.[195] Additionally, for knowledge workers particularly, time spent at work is a more straightforward yardstick for measuring productivity, rather than output, which perpetuates the culture of working overtime. As long as these values dictate the way efforts are evaluated and awarded, those who can work this way can distinguish themselves based on their ability to operate in an unfettered manner in the workplace and avoid an assessment of their actual input/effectiveness quotient. Sustaining the status quo in this manner holds significant advantages for certain groups of employees (as well as employers) which will inevitably impact on the trajectory and speed of change in this area. Regardless of what the problem in any given workplace is, as long as the answer is automatically situated within increasing working hours, those able to become part of the solution would reap the 'rewards for individual heroics' without an investigation into what created the problem/crisis from the outset.[196]

Additionally, those defined by their commitment, success and attainment in the workplace might 'find multiple ways to resist relinquishing privileges',[197] regardless of whether or not the change might hold benefits for them as well. If missing important moments in your children's lives has enabled you to climbed the corporate ladder rapidly, you might be 'tremendously invested in defending the logic' that has gotten you thus far.[198] In order to set the levers of transformational change in motion, not only do the disproportionate rewards associated with

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[195] Lotte Bailyn, Joyce Fletcher and Deborah Kolb, 'Unexpected Connections: Considering Employees' Personal Lives Can Revitalize Your Business' (n 194) 19.
[196] Leslie A Perlow, 'The Time Famine: Toward a Sociology of Work Time' (1999) 44 Administrative Science Quarterly 57, 77.
[197] Susan Milner, Sophie Pochic, Alexandra Scheele and Sue Williamson, 'Challenging gender pay gaps: Organizational and regulatory strategies' (2019) 26 Gender, Work and Organization 593, 594.
[198] Shelley J Correll, Erin L Kelly, Lindsey Trimble O'Connor and Joan C Williams, 'Redesigning, Redefining Work' (n 132) 12. See also Jonathan Lazear, *The Man who Mistook His Job for a Life: A Chronic Overachiever Finds the Way Home* (Crown Publishers 2001). See also resistance in senior men's contribution to an extensive workplace initiative increasing genuine flexibility in Erin L Kelly, Samantha K Ammons, Kelly Chermack and Phyllis Moen, 'Gendered Challenge, Gendered Response: Confronting the Ideal Worker Norm in a White-Collar Organization' (2010) 24 Gender and Society 281. See also the extent to which men's evaluation of subordinates is based on their own progression by prioritising economic labour in JR Kofodimos, *Beyond Work-Family Programs: Confronting and Resolving the Underlying Causes of Work-Personal Life Conflict* (Center for Creative Leadership 1995).

constant availability have to be scrutinised, consideration also needs to be given to the way in which employees' identities are situated within their unencumbered status.[199] Although fathers' primary identities as breadwinners are shifting as the culture sustaining the notion evolves and the demand for parental caring labour increases,[200] many men might still be reluctant to relinquish the 'power and status' generally bestowed upon them due to their 'economic, social, political and cultural "normality"'.[201] In order to expose the real 'barriers' professional female caregivers face when attempting to compete in the workplace, the interests of individuals and organisations 'consistently profit[ing] from the status quo' have to be illuminated.[202] As long as these underlying structures incentivise the unencumbered disproportionately, its persistence will be encouraged and the inequalities it sustains, fueled.

4.4.3.2 Benefitting from challenging the status quo

Although this chapter deals mainly with circumstances where the organisation allows the unencumbered norm to prevail as an exclusionary mechanism to the detriment of female caregivers, the onset of the Coronavirus pandemic, at the beginning of 2020, highlighted how a disruption of the status quo will be permitted, and can be hastened, where it is within the *employer's* interest to do so. The speed with which new realities were forged can be attributed to the unexpectedness of the Covid-19 spread, but also due to the fact that alternative working structures allowed for business continuity amidst the interruption of normal working structures/places. The focus therefore shifted rather swiftly from flexible working solving the problem of mothers' attempting to combine responsibilities, to everyone needing alternative structures to sustain some economic activity over a prolonged period. Where flexible working is usually regarded as a 'coping mechanism' to counter the vulnerability of specifically

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[199] Workplaces are regarded as the main area for men to form their masculine dominant identities which impacts on women's experiences in the same setting. See Patricia Yancey Martin, '"Mobilizing Masculinities": Women's Experience of Men at work' 2001 (8) Organization 587.

[200] Ashlee Borgvist, Vivienne Moore, Jaklin Eliott and Shona Crabb, '"I might be a bit of a front runner": An analysis of men's uptake of flexible work arrangements and masculine identity'" (2018) 25 Gender Work and Organization 703.

[201] Valerie Bryson, "Time, care and gender inequalities' in Anne Coote and Jane Franklin (eds) in *Time on our side: Why we all need a shorter working week* (New Economics Foundation 2013) 55 & 63.

[202] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (n 21) 205.

caregivers in the employment sphere,[203] one form of flexible working, homeworking, became a resilience enhancing mechanism when the vulnerability of the whole population was exposed.[204] The virus not only exposed the universal vulnerability of all employees, but also highlighted how deep-rooted organisational practices can be altered rapidly where employer needs necessitate such action. Whereas 57.3% of managers regarded physical presence in the office as a perquisite for career advancement before lockdown, only 37.5% share that view since.[205] The change in perceptions and stigmas regarding flexible working was mainly brought on by a period of enforced homeworking due to the impact of lockdown on employees' mobility, but it did highlight the transformative possibilities within the flexible working realm when the incentive is situated in employer demands, rather than employee needs.

4.5 Conclusion

The traditional barriers preventing female caregivers' from maintaining a similar career trajectory to that of their male counterparts have historically been addressed through the implementation of various legislative measures and organisational initiatives. The "add-women-and-stir" approach used to incorporate caregivers into the professional realm led to a 'haphazard, infrastructure of support'[206] which superficially dealt with the obvious barriers in combining economic and caring labour, but this approach did very little to address the fundamental aspects of the workplace which are grounded in the unencumbered male norm. This has forced women to either conform to the norm by surrendering to the 'dominant discourse' in order to advance professionally, settle for substandard assignments and accept the

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[203] Martha Alberston Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 270.
[204] This is obviously not a solution for every sector of the employment sphere but can almost certainly be applied to knowledge workers in the professional realm.
[205] The data was collected between July and August 2020 and included 742 responses from senior, middle and line managers. Sarah Forbes, Holly Birkett, Lowri Evans, Heejung Chung and Julie Whiteman, 'Managing employees during the Covid-19 pandemic: Flexible working and the future of work' (University of Birmingham and University of Kent, 2020) https://www.birmingham.ac.uk/Documents/college-social-sciences/business/research/responsible-business/managerial-experiences-during-covid19-2020-accessible.pdf accessed 20 April 2021.
[206] Ariane Hegewisch and Janet C Gornick, 'The impact of work-family policies on women's employment: a review of research from OECD countries' 2011 (14) Community, Work & Family 119, 120.

associated diminished rewards, or withdraw from the employment sphere altogether.[207] None of these scenarios promote genuine choices for female employees or gender equality as a social goal.

This chapter evaluated the inhibitive elements of the workplace through a gender sensitive lens in order to highlight the disparity for female caregivers. The analysis explains, to some extent, why the increase in senior female representation in the workplace has been so very slow despite various policy implementations by the UK Government to address it.[208] These measures, like flexible working options, anti-discrimination laws and parental leave entitlements, are generally directed at removing barriers women face when combining their care and work responsibilities. Dealing with these challenges in a simplistic barrier/legislative solution manner might give a nod to gender progressive attempts, but will generally leave the panoply of 'taken-for-granted' parameters within which people perform economic and caring labour unscathed. Dissecting the current constructions of the workplace is an important exercise for the purpose of this thesis. It turns the current understanding of the way things work upside down and allows us to question what is really set in stone and what is temporarily attached, but removable, in the context of the current employment landscape from a legal perspective. Without this kind of analysis, the transformative possibilities seem limited and the current state of affairs an as-good-as-it-gets given. However, a preparedness to subject existing structures to critical scrutiny reveals an array of areas where the possible and acceptable can be challenged. The next chapter investigates the RTR as a legislative mechanism to address the work/care conundrums of female professional employees; utilising the findings of this chapter it becomes possible to distinguish between laws and organisational practices with genuine transformative potential and those which are progressive only in name.

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[207] Saija Katila and Susan Meriläinen, 'Metamorphoses: From "Nice Girls" to "Nice Bitches: Resisting Patriarchal Articulations of Professional Identity' 2002 (9) Gender, Work and Organization 336, 339. See also Hirschman's 'voice' narrative to illustrate non-conforming in Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).

[208] See analysis of statistical inequality in the professional sphere in Section 1.3.2 of Chapter 1.

CHAPTER 5 - LESSONS LEARNT FROM ELSEWHERE

5.1 Introduction

The problems associated with women's career progression, identified in Chapter 4, are complex and extensive. The manner in which the workplace disproportionately rewards the unencumbered worker, tips the scale towards men who are generally more able to conform to this norm. Using long hours and constant availability as a shorthand for dedicated reward-worthy employees impacts negatively on the career progression of those with caregiving responsibilities.[1] The extent to which one piece of legislation, in this case the RTR, is able to address this multitude of cultural, organisational and structural barriers is always going to be limited. Nevertheless, the UK's RTR is a useful and important tool in the facilitation of alternative working patterns. Although limited in its operation to address certain unequal elements of the employment landscape, it has produced some positive results; a lessened 'fear of retaliation or cultural inertia' has been attributed to having an entitlement in law to ask for alternative working schedules.[2] It also provides employees with a little bit more 'elbow power' when negotiating flexible working structures[3] and potentially addressing the gender pay gap, albeit only for certain types of flexible working schedules.[4]

Although the RTR has limitations in its ability to address women's career progression, as indicated in Chapter 3, it is available to female caregivers today and this thesis is specifically concerned with its potential as a change-enhancing tool. In light of this, this chapter looks at

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[1] Whilst women's increased involvement in paid work has diminished the gender working hours gap, the disproportionate clustering of women in part-time and other alternative working structures, continue to produce 'gender inequality in terms of income and responsibility'. Janneke Plantenga and Chantal Remery, 'Flexible working time arrangements and gender equality: A comparative review of 30 European countries' (European Commission, November 2009) 24 https://op.europa.eu/en/publication-detail/-/publication/13a65488-9cd7-46f5-b9f4-d60e3dd09592/language-en accessed 22 April 2021.

[2] Robert C Bird and Liz Brown, 'The United Kingdom Right to Request as a Model for Flexible Work in the European Union' 2018 (55) American Business Law Journal 1,9.

[3] A Hegewisch 'Individual Working Time Rights in Germany and the UK: How a Little Law Can Go a Long Way' in A Hegewisch (ed) *Working Time for Working Families: Europe and the United States* (Friedrich Ebert Foundation 2005) 119.

[4] Tanja Van der Lippe, Leonie Van Breeschoten, & M Van Hek, 'Organizational work–life policies and the gender wage gap in European Workplaces' (2019) 46 Work and Occupations 111.

other jurisdictions in order to investigate ways in which the RTR could be improved as a mechanism to alleviate at least some of the unequal elements of the employment landscape identified in Chapter 4 by addressing the legislative shortcomings highlighted in Chapter 3. The impact of the UK's RTR does not, however, exist in a vacuum and, akin to any '[w]ell-intended and potentially beneficial reforms', it is always 'introduced in existing reality'.[5] Its effectiveness is dependent on the welfare regime[6] and normative behaviours that exist in the relevant society upon which it has been imposed. Although the 'existing reality' is different for every country, those countries which currently form part of the European Union may show some strands of similarity because of the compelling nature of certain EU directives. Due to the impact of Brexit, the trajectory and speed of the implementation of family-friendly initiatives might be very different in the UK going forward. Although the EU's directives on family-friendly laws are not analysed in detail as part of the discussion in this chapter, a review of their latest family-friendly directive[7] is conducted to highlight the intricacies associated with EU directive minimum standards in the context of employment law legislation, whilst also providing a useful platform for exploring the extension of the RTR to *all* employees under the UK's latest legislative amendment.

This chapter explores the RTR regimes in Australia, New Zealand and the Netherlands. These three countries provide useful platforms for comparison as they all have a permanent and independent right to request system (comparative to the UK), which are not linked to temporary

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[5] Patricia van Echtelt, Arie Glebbeek, Suzan Lewis and Siegwart Lindenberg, 'Post-Fordist Work: A Man's World? Gender and Working Overtime in the Netherlands' (2009) 23 Gender and Society 188, 209.

[6] Esping-Andersen's three-way classification, which is markedly 'not linearly distributed, but clustered by regime-types' provides for the following clusters: 'liberal', 'corporatist' and 'social democratic'. 'Liberal' regimes, such as the US, Canada and Australia, are generally associated with modest state intervention and 'traditional, liberal work-ethic norms', whereas the 'corporatist' states have a stronger inclination to uphold traditional family values and allow for more generous social rights and benefits (Austria, France, Germany and Italy fall into this category). The 'social-democratic' regime-type countries (Scandinavian countries) endorse social democracy as a core value with greater emphasis on alleviating the 'social-service burden' on citizens. Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 2012) 48, 49 & 51.

[7] European Commission, 'Proposal for a Directive of the European Parliament and of the Council, on work-life balance for parents and carers repealing Council Directive 2010/18/EU' (2017/0085 COD) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0253 accessed 21 April 2021.

parental leave provisions. An analysis of the specific provisions within the laws of these three countries brings to the surface various aspects not currently incorporated into the UK's RTR legislation; the usefulness of these legislative frameworks is reviewed in the UK context with regards to their ability to effectively challenge the way work is organised and to enhance employee resilience. The extent to which a piece of legislation, like the RTR, could potentially address the vulnerability of employees is incorporated into Fineman's construction of the responsive state; she argues in favour of a vulnerability analysis to be used when 'legislators and legislation are judged' in order to 'articulate a more self-conscious and aware egalitarian political culture'.[8] Instead of relying exclusively on anti-discrimination measures to redress inequalities, the responsive state could potentially address all individuals' 'shared vulnerability' with resilience enhancing mechanisms; these are described as 'resources in the form of advantages or coping mechanisms that cushion' the impact of vulnerability in the public sphere.[9] The RTR is one of the mechanisms which could potentially enhance the resilience of employees by mitigating the bearing of vulnerability on their ability to earn a living in the employment arena; the design and operation of policy instruments like the RTR 'provide a useful gauge of how far a state is willing to challenge institutional and structural norms'.[10] A deconstruction of flexible working statutory frameworks in other jurisdictions, conducted in this chapter, highlights the extent to which other legislatures are prepared to challenge traditional work/care/life paradigms through flexible working policy intervention which provides a useful avenue to critically explore the scope of the UK's flexible working statutory response.

This chapter is divided into two parts. The first section outlines the flexible working measures legislated in Australia, NZ and the Netherlands in order to consider which aspects might feasibly bolster the UK's statutory framework; this involves an analysis of the differences and similarities between the policy aims, as well as the relevant legislative provisions in these three jurisdictions compared to the UK. Based on this lesson-learnt perspective, in the latter part of

[8] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 275.
[9] ibid 270.
[10] Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (Hart Publishing 2020) 12.

the chapter an 'ideal' RTR is constructed with reference to improving caregiving female employees' career progression.

5.2 Right to request legislation in other countries

This chapter investigates how the RTR measures currently operating in the UK compare to approaches taken in other jurisdictions. The problem with cherry-picking the best bits of legislative provisions implemented elsewhere in order to create a blueprint policy package to address all gender-based employment predicaments, is that these measures might have limited transferable potential due to budget constraints, political agendas and various socio-economic differences between countries. Whilst 'it is difficult to isolate an effect of a reform from other processes in society, such as economic cycles and demographic processes',[11] the idea of this analysis is not to draw direct parallels between flexible working legislation and women's career progression, but rather to investigate the likelihood of specific legislative measures to impact employers' and employees' perceptions of what is possible and acceptable in the realm of working hours, structures and resultant rewards. An improvement to the existing legislative framework, not just to facilitate female caregivers' workplace participation but to allow them to thrive in the employment milieu, is at the heart of this investigation.

The RTR legislation in the following countries are investigated in this section: Australia, NZ and the Netherlands. These countries are chosen as they have a right to request legislation which is not associated with an event such as childbearing, nor is it linked to parental leave provisions. These countries also fall within a similar liberal welfare state regime and are regarded as advanced 'capitalist countries'.[12] The next section provides an outline of the policy aims which were prevalent during the implementation of the various RTR regimes in NZ, Australia and the Netherlands, with specific reference to the UK's policy stance in this regard. Whilst strong similarities are identified between the underlying policy considerations in Australia, NZ and the UK, the Netherlands seems to provide a useful alternative angle which

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[11] Ann-Zofie Duvander and Mats Johansson, 'Does Fathers' Care Spill Over? Evaluating Reforms in the Swedish Parental Leave Program' (2019) 25 Feminist Economics 67, 68.
[12] Mark Considine, 'Contract Regimes and Reflexive Governance: Comparing Employment Service Reforms in the United Kingdom, The Netherlands, New Zealand and Australia' (2000) 78 Public Administration 613, 616.

manifests in a significantly different flexible working statutory regime. A brief outline is then provided of the relevant provisions contained in the laws of these three countries, highlighting the parallels and differences with the UK; eligibility, appeal options and procedural elements are specifically compared in this analysis.

5.2.1 Policy aims

Before examining the specific provisions which are contained in the RTR laws of these countries, it is necessary to touch on some of the policy considerations underpinning the development of the legislative regimes in order to draw parallels with the UK's system. Strong similarities have been identified between the aims of the RTR regimes of the UK, Australia and NZ; various concurrent themes manifest in the initial policy documentation, as well as in subsequent reviews of the operation of the different laws. From the outset, all three countries emphasised the importance of improving discussion between employers and employees as a policy aim of the legislation; a narrative also endorsed by the promotion of a 'soft' approach in all three countries. This type of narrative gave the impression of a legislative regime aimed at encouraging dialogue without imposing strict measures on employers. The initial policy aim of the Australian Fair Work Act, in terms of flexible working practices, was to 'promote discussion between employers and employees about the issue of flexible working arrangements'.[13] This aim has been instrumental in the 'soft' legislative approach adopted by Australia.[14] In the NZ context, the legislation was supposed to 'foster dialogue and better relationships in the workplace' and was regarded as '"signalling" legislation' to organisations and workers as to what Parliament regards as acceptable work arrangements.[15] Such signalling

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[13] The Parliament of the Commonwealth of Australia House of Representatives, 'Fair Work Bill 2008: Explanatory Memorandum' (2008) 258 https://www.legislation.gov.au/Details/C2008B00262/Explanatory%20Memorandum/Text accessed 22 April 2021.

[14] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (2016) 26 Labour &Industry: a journal of the social and economic relations of work 103, 104.

[15] Ministry of Business, innovation and Employment, 'Employment Relations Amendment Bill 2013: Departmental Report for the Transport and Industrial Relations Committee' (October 2013) 39-40 https://www.parliament.nz/resource/en-NZ/50SCTIR_ADV_00DBHOH_BILL12107_1_A364873/2b5c7e80b51ec8331603ecfd77f5129fd4c8a87c accessed on 22 April 2021. See also Reilly's reference to the NZ right to request as a 'soft law educative mechanism[s]' with specific reference to its lack of a right to

has continued to be highlighted, even with the most recent extension of the right to request in 2015 to all employees and other more radical amendments.[16] The UK's initial policy documentation referenced the aim of enhancing 'dialogue between employers and employees' in the early stages of the discussion on the RTR legislation,[17] and the term 'light-touch legislative approach' was used in the development stages of the legislation.[18]

Part of the justification for the UK's 'light-touch' entitlement was situated in the fact that accommodation was required to be made for smaller employers who did not have specialist HR personnel to deal with requests, or the ability to re-allocate work easily.[19] The initial policy documentation, setting the tone for the suggestions regarding the UK's proposed RTR legislation back in 2001, was permeated with references to the interests of small employers; they go so far as to 'recommend a straightforward and light-touch approach that is specifically tailored to meet the needs of small businesses'.[20] This resulted in a very employer-centred piece of legislation whereby *all* employers benefitted from a strong right to deny employees' requests. The Dutch legislature used a different approach to alleviate the possible heavy burden a strong right to request might have on smaller employers; they excluded the very small employers (those with fewer than 10 employees) from the remit of the flexible working legislation completely.[21] Furthermore, the initial aims of the Dutch law were situated in the utilisation of predominantly part-time working structures to limit involuntary unemployment and improve the possibility to combine caring labour with other responsibilities.[22] The purpose

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appeal. Amanda Reilly, 'Equality and family responsibilities: a critical evaluation of New Zealand law' (2012) 37 New Zealand Journal of Employment Relations 161, 166.

[16] Employment Relations Amendment Act 2014 (NZ)

[17] Department of Trade and Industry 'Government Response to the Recommendation from the Work and Parents Taskforce' (November 2001) 11 http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/er/wptresponse.pdf accessed 22 April 2021.

[18] HC Deb 28 June 2001, vol 370, col 149W.

[19] Work and Parents Taskforce, 'About Time: Flexible Working, Work and Parent Taskforce' (November 2001) iv.

[20] ibid viii.

[21] Wet Flexibel Werken 2016 (The Netherlands), art 2(16).

[22] Tweede Kamer der Staten-Generaal, 'Regels inzake het recht op aanpassing van de arbeidsuur (Wet aanpassing arbeidsuur)' (26358, Vergaderjaar 1998-1999) https://zoek.officielebekendmakingen.nl/kst-26358-3.html accessed 22 April 2021.

of the law was described as a 'stok achter de deur',[23] which directly translates to 'stick behind the door',[24] and gave the impression that the law would be used 'as an extra measure to threaten with'. The language used in the policy documents is indicative of a stronger legislative response which was supposed to forge alternative pathways, rather than only enhance conversations about it, which was the case in the other three countries.

Another differentiating factor between the policy considerations of the UK and NZ on the one hand and the Netherlands on the other, stems from the manner in which they evaluated and reacted to normative realities as part of the legislation design. The government consultations conducted prior to the UK's RTR extension to a larger cohort in 2008 downplayed the impact of an amendment based on the large cohort of employees regarded as 'deadweight requests'; since these employees had the option to work flexibly, without having their entitlement enshrined in law, they were not regarded as additional applicants for the purpose of gauging the impact of widening the law's eligibility criteria.[25] Similarly, it has been argued that 'rolling out a more formal process over an existing but informal process', as was done in the NZ scenario when the right was extended to all employees, did not have to be 'hugely disruptive'.[26] The impact of the NZ reforms was, therefore, deemed limited due to the fact that the majority of flexible working requests were made 'without direct recourse to the legislation'.[27] In both countries, the same argument which was used to justify the extension of the law to wider categories of employees was presented to downplay the impact of a proposed legislative

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[23] Parlemetaire Monitor, 'Brief minister met het kabinetsstandpunt over de evaluatie van de Wet aanpassing arbeidsuur – Evaluatie Wet aanpassing arbeidsuur' (April 2004) https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vi3am6nvtss6 accessed 22 April 2021.

[24] https://www.learndutch.org/lessons/250-dutch-proverbs-lesson-19/ accessed on 22 April 2021.

[25] Department of Business Enterprise & Regulatory Reform. 'Consultation on implementing the recommendations of Imelda Walsh's independent review. Amending and Extending the Right to Request Flexible Working to Parents of Older Children' (August 2008) 27 https://webarchive.nationalarchives.gov.uk/20090609030026/http://www.berr.gov.uk/files/file47434.pdf accessed 14 April 2021.

[26] Carol Brown and Peter Dallimore, 'Flexible Work Design: A Strategic Imperative in New Zealand Business' (Diversitas, July 2015) 13 https://diversitas.cdn.prismic.io/diversitas%2F9e5c724d-c6db-4e04-b595-9a99c5666661_flexibility-research-july-2015.pdf accessed 21 April 2021.

[27] Ministry of Business, Innovation and Employment, 'Employment Relations Amendment Bill 2013: Departmental Report for the Transport and Industrial Relations Committee' (n 15) 37.

amendment, i.e., extending the RTR to all employees would have limited impact on employers as the majority of them offer it anyway.

It is, however, worth acknowledging how the same reality was utilised differently by the Dutch legislature in implementing its law in this regard. When the Adjustment of Working Hours Act was introduced in 2000 in The Netherlands, the prevalence of especially part-time working was already very high.[28] Part of the policy considerations with the implementation of the Dutch legislative framework was situated in creating a system which gives certainty and establishes the norm by supporting what happens in practice.[29] Instead of limiting the impact of the legislation because employers already provide a level of flexibility informally, the Dutch legislature utilised the legislation as a reflection of the normative.[30] This was especially pertinent in relation to part-time working structures, already an acceptable form of working when the law was enacted. [31] The legislation did, however, go further by providing a right to request, strengthened by a right to appeal, in relation to other forms of flexible working structures as well.[32] Although mention was made (in the submissions preceding the enactment of the law) of informal agreements negotiated outside the remit of the law, this provided an impetus to create a statutory mechanism within which negotiations can thrive, instead of limiting the law's strength because of it.[33] In all four of these countries, the strength of the

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[28] Jelle Visser, Ton Wilthagen, Ronald Beltzer and Esther Koot-van der Putte, 'The Netherlands: from atypicality to typicality' in Silvana Sciarra, Paul Davies and Mark Freedland (eds) *Employment Policy and the Regulations of Part-time Work in the European Union: A Comparative Analysis* (Cambridge University Press 2004).

[29] Tweede Kamer der Staten-Generaal, 'Voorstel van wet van de leden Van Gent en van Hijum tot wyjziging van de Wet aanpassing arbeidsuur ten einde flexibel werklen te bevorderen', (32889, Vergaderjaar 2010-2011).

[30] See also Den Dulk et al. on the interaction between organisational polices and legislative regimes. In a reinforcing scenario, the presence of national policies is imperative to effect workplace change as government initiations are indicative of the cultural attitudes to be sustained. Alternatively, organisational policies could become imperative substitutes where government initiatives are lacking. Laura Den Dulk, Sandra Groeneveld, Ariane Ollier-Malaterre and Monique Valcour, 'National context in work-life research: A multi-level cross-national analysis of the adoption of workplace work-life arrangements in Europe' (2013) 31 European Management journal 478.

[31] The Netherlands has been described as 'the only part-time economy in the world'. Richard B Freeman, 'War of the models: Which labour market institutions for the 21st century?' (1998) 5 Labour Economics 1, 2.

[32] See section 5.2.2.3 on the different types of flexible working allowed under Dutch law.

[33] Parlemetaire Monitor, 'Brief minister met het kabinetsstandpunt over de evaluatie van de Wet aanpassing arbeidsuur – Evaluatie Wet aanpassing arbeidsuur' (n 23).

resulting provisions which made it into their respective right to request laws are reflective of the legislative aims which were envisioned by it from the outset. In the next section a concise overview of the flexible working legislative laws in each of the countries is provided, as well as a short summary at the end to highlight parallels and differences with the UK's RTR.

5.2.2 Legislation

5.2.2.1 Australia

In Australia, one of the ten National Employment Standards prescribing the minimum entitlements for employees, set out in the Fair Work Act, deals with flexible working. This allows the following groups of employees to request flexible working structures: employees with caring responsibilities; parents or guardians of children at school; workers with disabilities; employees 55 years or older and employees dealing with family violence or looking after someone experiencing family violence.[34] Only employees who have worked for their employer for a minimum of 12 months are eligible to apply,[35] and the employer can reject the request on reasonable business grounds.[36] An employer has 21 days to consider an application and must provide a reason should this result in a refusal.[37] According to the Fair Work Ombudsman, a request does not have to be approved or rejected in full; a discussion between the employer and employee is encouraged to reach a suitable agreement for both.[38] Section 146 of the Fair Works Act sets out procedures for settling disputes, but specifically excludes 'a dispute about whether an employer had reasonable business grounds' in relation to a flexible working request,[39] unless dispute resolution is covered in a employment or enterprise agreement between the parties.[40]

5.2.2.2 New Zealand

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[34] Fair Work Act 2009 (Australia), s 65(1A).
[35] ibid s 65(2)(a).
[36] ibid s 65(2)(5A)(a)-(e).
[37] ibids 65(4).
[38] Fair Work Ombudsman, 'Requests for flexible working arrangements' (Australian Government) https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/requests-for-flexible-working-arrangements accessed 21 April 2021
[39] Fair Work Act 2009 (Australia), s 146.
[40] Fair Work Ombudsman, 'Requests for flexible working arrangements' (n 38).

New Zealand's right to request flexible working was first introduced in 2007 under the Employment Relations (Flexible Working Arrangements) Amendment Act 2007. Initially, the legislation allowed all employees with caregiving responsibilities[41] who had been working for their employer for six months,[42] to apply for an amendment to their 'working arrangements' which could relate to a change in working hours or days/place of work.[43] Since March 2015, all employees have the right to request alternative working structures.[44] The Employment Relations Amendment Act 2014 allows for an application to be made at any time, which technically provides a day one right to all employees.[45] There is no limitation to the number of applications an employee can make,[46] and an employee may request a permanent or temporary change to working structures.[47] The period within which the employer has to deal with the request has been decreased from three months to one month[48] since the amendment came into force in 2015. The employer may refuse a request based on a list of business reasons.[49] An employee only has recourse to a review by the Labour Inspector and possible further mediation if non-compliance with the time within which the employer must respond to a request occurred.[50]

5.2.2.3 The Netherlands

Since 2000, all employees in the Netherlands have a right to request flexible working; originally this flexibility only allowed for an increase or decrease in their working hours,[51] but since 2016 other types of flexible working structures have been included (see discussion

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[41] Employment Relations (Flexible Working Arrangements) Amendment Act 2007 (NZ), s 69AAB(2)(a) amending the Employment Relations Act 2000 (NZ) by the insertion of Part 6AA.
[42] ibid s 69AAB(2)(b).
[43] ibid s 69AAA.
[44] Employment Relations Amendment Act 2014 (NZ), s 22.
[45] ibid s 24.
[46] ibid s 26.
[47] Employment Relations (Flexible Working Arrangements) Amendment Act 2007 (NZ), s 69AAC(b).
[48] Employment Relations Amendment Act 2014 (NZ), s 69AAE(1).
[49] Employment Relations (Flexible Working Arrangements) Amendment Act 2007 (NZ), s 69AAF (2).
[50] ibid s 69AAH.
[51] Wet Aanpassing Arbeidsuur 2000 (The Netherlands), art 2(1).

below). Initially the law required an employee to work for the company for one year before making a request,[52] but since 2016 this period has been decreased to 26 weeks.[53] An employee must make a request at least two months before the desired changes in working structures can commence,[54] they can make one request per year[55] and the right is only available to employees working in companies with more than 10 employees.[56] If the employer has not responded to the request one month after the application, the suggested working arrangements are implemented automatically; in the case of an application dealing with unforeseen circumstances the employer is obliged to respond within five working days.[57]

The Dutch legislation distinguishes between three types of flexible working requests, which cover applications: to amend working hours (reduce/increase hours); to change work location or to amend working time (structure of working hours).[58] The law stipulates different thresholds for rejection of these different types of requests. In the case of a request based on the location of work, the employer's obligation is limited to a consultation with the employee regarding the request and a discussion if the request is rejected.[59] In the case of a request relating to working hours or times, the benchmark for rejecting a request is considerably higher. The employer *has* to grant the request unless compelling business reasons exist. The word used in the Dutch legislation for the type of reason which may justify a rejection is 'zwaarwegende'; this translates to English as 'serious'.[60] The legislation goes further to explain which reasons would be regarded as 'serious' for the different type of applications; in the case of a reduction of working hours, these situations are limited to problems associated with the reallocation of the extra hours, as well as safety or timetabling issues arising from the reduced working hour structures.[61] In the case of a request to increase hours, the 'serious' business reasons include problems of a financial/organisational manner, where the increase in hours may lead to a lack of sufficient work for the employee or an inability to provide space or budget for the increased

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[52] ibid.
[53] Wet Flexibel Werken 2016 (The Netherlands), art 2(1).
[54] ibid art 2(3).
[55] ibid art 2(3).
[56] ibid art 2(16).
[57] ibid art 2(12).
[58] ibid art 2(3)(a)-(c).
[59] ibid art 2(6).
[60] https://dictionary.cambridge.org/translate/ accessed on 22 April 2021.
[61] Wet Flexibel Werken 2016 (The Netherlands), art 2(9).

hours.[62] Finally, a request to change the structure of working hours, may only be rejected where the change will lead to issues regarding safety in the workplace, timetabling problems or having financial/organisational implications.[63] By constructing these different tiers, the Dutch legislature has created a hierarchy of rejection levels for different flexible working requests. At the bottom, and the easiest to reject from the employer's perspective, is a request to work in a different location, the next level is a request to increase work hours or to work on a different schedule and the highest threshold is associated with reduced working hours. Additionally, the Dutch RTR encompasses a right to appeal in case of a rejection of a request.[64]

5.2.2.4 Comparison of legislative provisions

The following table provides an overview of the corresponding and differing elements within the RTR legislation of the UK, the Netherlands, Australia and NZ.

	United Kingdom	**New Zealand**	**Australia**	**The Netherlands**
Legislation	Children and Families Act	Employment Relations Act	Fair Work Act	Wet Flexible Werken
Eligibility	All, except agency workers	All employees	Certain categories (includes long term casual employees)	All employees (working for a company with more than 10 employees)
Review of Request	Reasonable manner, rejection based on certain grounds	Rejection based on specified grounds	Reasonable business grounds	Serious business reasons
Right to Appeal	Procedural only	Procedural (employer did not comply with response time)	Procedural only	Yes, on substantive grounds
Flexible Operation	Only permanent changes	Permanent or temporary change	Not mentioned	Not mentioned
Frequency of requests allowed	Every 12 months	No limit	Not mentioned	Once a year
Length of service	26 weeks	Day one right	12 months	26 weeks
Employer response time	Three months	One month	21 days	One month
Flexible structures allowed	Hours, times and location of work	Hours, days and place of work	Change of working arrangements including hours, patterns and location	Amend working hours (reduce/increase hours), working location or working time (structure of working hours)

[62] ibid art 2(10).
[63] ibid art 2(11).
[64] ibid art 2(13).

As is evident from the above discussion, there are clear parallels to be drawn between the different legislative regimes. All four schemes provide employees with a right to request alternative working structures and the employer some discretion to allow/deny it. The Netherlands offers the strongest legislative entitlement in that the reasons for rejection are more restrictive than the other countries and it is also the only country which enacted a right to appeal on substantive grounds. Whilst NZ is the only country which provides a day one right to all employees with no limit to the number of applications to be submitted in any given period, Australia is the only one of the four which does not provide a universal right to request.

5.3 A potential 'ideal' right to request

Having briefly outlined the relevant legislative frameworks in Australia, NZ and the Netherlands, this section aims to dissect some of the provisions with reference to their usefulness in the UK context and to professional women's career progression. The aim is to create a RTR regime which does more than just 'play around at the margins of work, enabling some employees with family commitments to adapt to, but not challenge traditional work structures'.[65] If the RTR is going to be used as a mechanism to challenge the workplace status quo, it should be constructed as a device to address the 'organizing the general requirements of work' inequality regime[66] whilst enhancing employees' resilience in the face of their universal vulnerability. The assumptions of the unencumbered autonomous employee should be replaced with the notions of vulnerability which can be countered with resilience enhancing mechanisms in the workplace setting. Any repercussions this shift might have on normative behaviours in the domestic sphere is, of course, beneficial, but the argument presented in this thesis is that the facilitation of caregiving should be an added bonus of the RTR, not its main aim.[67] The RTR should be directed at the normalisation of alternative working practices in

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[65] Suzan Lewis, '"Family Friendly" Employment Policies: A Route to Changing Organizational Culture of Playing About at the Margins?' (1997) 4 Gender, Work and Organization 13, 21.

[66] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (2006) 20 Gender and Society 441, 448.

[67] As indicated in Chapter 3, improvements to the procedural elements of the RTR could facilitate caregiving by allowing for increased flexibility. Although a universal RTR would not be part of the 'tailored measures' aimed at caregivers specifically, it could be constructed in a way which supports carers' unpredictable and sudden caring responsibilities. See a discussion of the manner in which caregiving rights should be designed in Eugenia Caracciolo di Torella

order to break down the workplace assumptions designed to favour the unencumbered at the expense of those who operate outside of the norm. Based on the analysis of flexible working frameworks in other jurisdictions, conducted in the previous section, an 'ideal' RTR law is constructed in the latter part of this chapter which could potentially incite organisational change through the implementation of a piece of employment law. The following aspects are covered as part of this discussion: the universal application of the legislation; a stronger entitlement in law; improved procedural provisions and a right to appeal.

5.3.1 Universal application

The UK's RTR legislation did not always operate in a universal manner, rather it was introduced in a piecemeal fashion which allowed for a limited category of employees to apply for flexible working back in 2002 to cover all employees today.[68] The relevance and impact of this gradual piecemeal development of the RTR is discussed in Chapter 3; the focus in this section is on the theoretical, policy and practical arguments for and against a universal right to request regime. From a theoretical angle, Fineman's vulnerability approach is utilised, whilst the policy rhetoric relating to a universal RTR in other jurisdictions is explored. The pragmatic implications of 'diluting' an entitlement in law to work flexibly is investigated with reference to the utilisation of flexible working structures in practice. This analysis aims to justify the argument in favour of a universal RTR in order to normalise alterative working structures, remove the negative association with flexible working and challenge the unencumbered worker as the ideal norm, which is a strong premise of this thesis.

5.3.1.1 Theoretical arguments

In the context of theorising vulnerability with reference to the operation of the RTR, Adams argued that a right exclusively available to caregivers recognise the 'distinct need stemming from universal human vulnerability' whilst allowing for carers to perform dual responsibilities

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and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020).

[68] See discussion in Section 3.2 of Chapter 3 regarding the development of the RTR.

and challenging the 'institution of the ideal worker'.[69] The argument presented herein is, however, that a universal RTR can indeed facilitate caregiving *and* dislodge obstinate organisational norms. Whilst Adams argues for a RTR available to caregivers in order to diminish their vulnerability, this thesis takes the stance that it is the 'inequality of resilience' entrenched in institutions, policies and law which has to be addressed.[70] Providing *all* individuals with mechanisms to build their 'resilience in the face of their vulnerabilities' is useful for two reasons; it exposes elements of the 'preferred' unencumbered worker and highlights the sameness of employees, in terms of their vulnerability, despite caregiving responsibilities. The different type of dependencies, highlighted by Fineman, provides further impetus for a universal RTR. Whilst 'inevitable dependency' is unavoidable and sporadic, derivative dependency (based on those looking after others) is 'not universally experienced', rather it is 'assigned to social institutions like the family, which are structured through history, ideology and culture'.[71] By restricting the RTR to caregivers only, the derivative dependency culture of predominantly women is once again reinforced. Whilst the workplace might 'reveal our vulnerability in ways that are hard to ignore',[72] it is Fineman's contention that no person is 'more or less vulnerable, or as differently or uniquely vulnerable'.[73] She argues for a responsive state which 'acts with equal regard for the shared vulnerability of all its legal subjects';[74] in this context a RTR operating universally can be constructed as a resilience building mechanism based on the assumption of the shared vulnerability of all employees. This construction can be extended to challenge the notion of the unencumbered worker who is generally able to disguise any manifestations of vulnerability in the workplace. This theoretical basis for the universal

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[69] K Lee Adams, 'A Right to Request Flexible Working: What can the UK teach us' in Martha Albertson Fineman and Jonathan W Fineman (eds), *Vulnerability and the Legal Organization of Work* (Routledge 2018) 338.
[70] Martha Albertson Fineman, 'Introducing Vulnerability' in Martha Albertson Fineman and Jonathan W Fineman (eds), *Vulnerability and the Legal Organization of Work* (Routledge 2018) 9.
[71] Martha Albertson Fineman, 'Vulnerability and Social Justice' (2019) 53 Valparaiso University Law Review 341, 361.
[72] Martha Albertson Fineman, 'Fineman on Vulnerability and Law' (New Legal Realism Project, November 2015) https://newlegalrealism.org/2015/11/30/fineman-on-vulnerability-and-law/ accessed on 22 April 2021.
[73] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133, 142.
[74] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 23.

RTR provides a useful avenue for the next section to explore the practical implications of extending the right to all employees.

Another theoretical argument in favour of a RTR which is only available to caregivers is situated within the realm of valuing caregiving in the public arena; by moving to a universal RTR, it is contended, unpaid care work is not 'valued from a symbolic standpoint'.[75] By giving preference to the flexible working requests of caregivers, there is an acknowledgement of the responsibilities to be conducted outside of the workplace and an inclination towards allowing caregiving employees to perform economic and caring labour simultaneously. Consequently, the removal of the care element from the operation of the RTR has been blamed for demoting the value of care in the public arena and treating it 'as a lifestyle choice akin to gardening or golf playing'.[76] This leads to another argument often raised in favour of prioritising caregivers' requests, i.e., to avoid competition between those *needing* flexibility in order to provide care and those *desiring* it in order to play golf/do gardening.[77] The premise of this thesis is that the advantages of a universal right to request for professional women's career progression outweighs these concerns, especially when, upon further scrutiny, it transpires that the impact is often only symbolic in nature. Furthermore, the symbolic optics of limiting flexible working to caregiving is worth considering; if it is only caregivers who are allowed to request flexible working (under legislation), the notion that all others are supposed to work without hindrances is further reinforced. The idea that caregivers and others compete for flexible working structures is based on the idea that the workplace only has a limited amount of flexibility on offer; a concept deeply ingrained in organisational structure and culture. A right to appeal, discussed later in this chapter, could be utilised to challenge this notion to some extent.

5.3.1.2 Policy arguments

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[75] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2014) 39 New Zealand Journal of Employment Relations 59, 71.
[76] Amanda Reilly and Annick Masselot, 'Women in the Workforce: Still Unequal after all these Years?' in Gordon Anderson (ed), *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press 2018) 165.
[77] Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave MacMillan 2010).

Unlike the fragmented development of the UK and NZ RTR legislation, the Dutch RTR has always been available to all employees. Although the enhancement of performing economic and caring labour was at the forefront of the implementation of the Dutch legislation from the outset, an acknowledgment in the policy documentation of the importance of combining work with other *private activities*, which could differ depending on the employee's life phase, indicated that the legislation was intended to address more than just a caregiving issue.[78] The notion that such a RTR could normalise and contribute to a climate of part-time working in organisations, as well as support those employees who might find it difficult to request such working structures due to a full-time work culture or the negative career consequences normally associated with part-time working, was considered in the policy documentation.[79] This is in line with the premise of this thesis; a universal RTR enhances the potential of the law to normalise flexible working structures. Although this was definitely part of the policy aims within the legislation of the UK[80] when the right was extended to all employees, it has not had the desired impact due to the weak legislative right afforded by the UK's RTR.

In the debate regarding a universal RTR vs a right restricted to caregivers, the European Union's recent work-life directive provides an interesting perspective to consider; they proposed further measures to be introduced by member states with the purpose of 'addressing women's under-representation in employment and support their career progression through improved conditions to reconcile their working and private duties'.[81] The premise of the suggested intervention is based on women's disproportionate participation in part-time work and their contribution to caregiving duties, as well as the gender pay and pension gaps which are largely attributed to insufficient measures for dealing with work-life balance; these include '[u]nbalanced design of leave between genders, insufficient incentives for men to take leave to

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[78] Tweede Kamer der Staten-Generaal, 'Regels inzake het recht op aanpassing van de arbeidsuur (Wet aanpassing arbeidsuur)' (n 22).
[79] Parlemetaire Monitor, 'Brief minister met het kabinetsstandpunt over de evaluatie van de Wet aanpassing arbeidsuur – Evaluatie Wet aanpassing arbeidsuur' (n 23).
[80] HM Government 'Consultation on Modern Workplaces. Modern Workplaces Consultation – Government Response on Flexible Working: Impact Assessment' (November 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/82794/12-1270-modern-workplaces-response-flexible-working-impact.pdf accessed 22 April 2021.
[81] European Commission, 'Proposal for a Directive of the European Parliament and of the Council, on work-life balance for parents and carers repealing Council Directive 2010/18/EU' (n 7).

care for children and/or dependent relatives, limited possibilities to make use of flexible working arrangements, insufficient formal care services and economic disincentives'.[82] According to the European Commission, a gender neutral right to request flexible working available to all carers and parents with children under the age of 12 will provide those employees with 'greater choice in how to organise work and caring responsibilities'.[83] As with all European Directives, the proposal constitutes a minimum standard to be followed by member states. The UK's RTR legislation already meets this minimum threshold technically, but the current eligibility provision is more comprehensive within a strict interpretation of the law as it provides *all* employees the option to request flexible working. This could, however, amount to a dilution of the RTR legislation as parents and carers now have to compete with others for workplace flexibility.[84] The question arises whether the European Commission will allow countries, such the Netherlands, to continue providing a universal RTR to all employees, or alternatively demand a more limited scope to ensure that caregivers are being favoured in the operation of the legislation.[85]

5.3.1.3 Practical implications

From a practical point of view, it is important to review the likelihood of caregivers missing out on much needed flexible working practices in a regime where all employees are entitled to make such a request. In the context of this discussion there are a few elements to consider. Firstly, how does the competition between caregivers and others manifest in the workplace and

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[82] ibid.
[83] ibid.
[84] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (n 75). See also, in the American context, K Lee Adams, 'A Right to Request Flexible Working: What can the UK teach us' (n 69) 317.
[85] After the UK left the European Union formally on the 31st of January 2020, a 'non-regression' arrangement was included in relation to employment law in the agreement on how the relationship between the EU and the UK will operate. Although the UK will not be bound by EU directives going forward, in the employment law arena it was agreed that 'labour and social levels of protection' will not be diminished. Official Journal of the European Union, 'Trade and cooperation agreement between the European Union and the European atomic energy community, on the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part' (31 December 2020) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN#page=202 accessed 21 April 2021.

how does this impact on caregivers' options? Additionally, what are the *advantages* for caregivers and others utilising flexible working structures in tandem?

The gendered operation of flexible working has been researched extensively. A recurring finding is that men are more likely to utilise schedule control to increase their work hours and intensify their efforts, whilst women use flexibility to adhere to caring duties outside the workplace.[86] Apart from the different reasons for using flexibility, it is also important to consider the type and way in which men and women use flexibility differently. In a recent study conducted by Working Families UK, fathers were more likely to utilise remote working options (60% compared to 42%), whereas mothers were more inclined to work reduced hours (20% as opposed to 4%).[87] Although the percentage of men working flexibly for childcare reasons were not that much lower than women (70% v 81% of women), fathers were more likely to have 'bent the truth' about the impact of childcare commitments on their working capabilities.[88] Being more vocal and honest about childcare commitments is necessary for those who have fixed schedules to adhere to outside of work, whereas fathers, who show a desire to spend more leisure time with their children, could employ other techniques to achieve this flexibility. Whilst being 'transparent about their difficulties' to combine work and care responsibilities could lead to penalties due to non-compliance with the unencumbered norm, some employees use other techniques to portray the image of an ever-available worker whilst carving some time out for domestic and caring involvement. These strategies include 'passing' as ideal workers

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[86] Heejung Chung and Tanja van der Lippe, 'Flexible Working, Work-Life Balance and Gender Equality: Introduction' (2020) 151 Social Indicators Research 365. See also Yvonne Lott and Heejung Chung, 'Gender Discrepancies in the Outcomes of Schedule Control on Overtime Hours and Income in Germany' (2016) 32 European Sociological Review 752. In the context of the UK and NZ, women are more likely to opt for flexible working structures which affect the number of hours they work, whereas men are more likely to request flexibility that has no bearing on their income See Heathrose Research Limited, 'Flexible Work Arrangements Literature Review: Report to the National Advisory Council on the Employment of Women (NACEW)' (2010) https://women.govt.nz/sites/public_files/flexible-working-literature-review%20(1).pdf accessed 22 April 2021.

[87] Working Families and Bright Horizons, 'The Modern Families Index 2017' (2017) https://www.workingfamilies.org.uk/publications/2017-modern-families-index-full-report/ accessed 22 April 2021. See also the impact of Covid-19 on flexible working preferences; 64% of fathers compared to 59% of mothers indicated that they want to reduce their working hours in order to spend more time with their children in the future. Heejung Chung, Hyojin Seo, Sarah Forbes and Holly Birkett, 'Working from home during the Covid-10 lockdown: Changing preferences and the future of work' (University of Birmingham & University of Kent, 2020)

[88] Working Families and Bright Horizons, 'The Modern Families Index 2017' (n 87).

by manipulating their client base to be more local, or by forming close relationships with co-workers in order to help each other out.[89] These 'unobtrusive, under-the radar' techniques to appear committed without actually working or traveling the long hours for work in the manner usually required for these jobs, allowed fathers to enjoy the financial and other benefits of their high profile jobs, without completely compromising on time spent with their families.[90]

Whilst this gendered operation of flexible working might reinforce 'biases employers and co-workers' foster towards female employees working flexibly,[91] it also diminishes the actual competition between carers and non-carers for the limited flexibility the workplace has to offer. Caregivers need formal fixed arrangements due to the impermeable nature of their commitments outside the workplace, whereas those who work flexibly to pursue hobbies and other interests are often more able to comply with sudden changes to workplace demands due to the non-urgency of their commitments in the private sphere. They also have an ability to intensify their work output 'to reciprocate for the gift of control' due to their non-involvement in fixed caring commitments.[92] Whilst caregivers, therefore, stand out for disrupting the status quo, other flexible workers might be able to blend in more easily. Furthermore, mothers are generally responsible for the day-to-day running of the household, whilst fathers are more likely to act in a supporting capacity performing 'irregular, time flexible and passive tasks'.[93] Employers' knowledge and normative expectations of this division of household labour and tasks might also lead to an increased belief in fathers' abilities to juggle work and care. The idea that caregivers have to compete with other employees for the limited flexibility available in each organisation therefore becomes less attainable as their reasons for using flexibility are

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[89] Erin Reid, 'Why Some Men Pretend to Work 80-Hour Weeks' (2015) Harvard Business Review 2, 2.
[90] ibid 4.
[91] Heejung Chung and Tanja van der Lippe, 'Flexible Working, Work-Life Balance and Gender Equality: Introduction' (n 86) 376.
[92] Heejung Chung, '"Women's work penalty" in access to flexible working arrangements across Europe' (2019) 25 European Journal of Industrial Relations 23, 25.
[93] Christin L Munsch, 'Flexible Work, Flexible Penalties: The Effect of Gender, Childcare and Type of Request on the Flexibility Bias' (2016) 94 Social Forces 1567, 1585. See also ONS analysis indicating that women perform on average 26 hours of unpaid work compared to the 16 hours done by men, with men's unpaid labor only exceeding women's in the area of providing transport (driving themselves and others and commuting to work). Office of National Statistics, 'Women shoulder the responsibility of "unpaid work"' (November 2016) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womenshouldertheresponsibilityofunpaidwork/2016-11-10 accessed 22 April 2021.

very different and even where fathers do utilise it for caregiving purposes they are portrayed very differently by employers. Whilst this might reinforce a stereotype the universal RTR is attempting to eradicate, the gendered manifestation of flexible working does weaken the argument that a RTR available to all employees limits the availability of flexible working structures for caregiving employees.

In addition to the fact that flexible working is utilised in a gendered manner which diminishes competition between the different groups of employees, there is further benefit to a universal RTR which is situated in permitting a broader scope of employees to utilise flexible working structures. Since the working practices of carers and non-carers might vary, this could enhance the flexibility available in the workplace by 'scaffolding' these working structures to complement each other.[94] For example, the working structures desired by the aging working population might be able to supplement the structures needed by those in different life phases, e.g., parents with young children and students in employment. The universal application of the RTR could potentially provide a framework for normalising different patterns on the one hand, but also allow a wider range of flexible working structures to complement each other in an attempt to meet organisational needs and customer demands, on the other.[95]

5.3.1.4 Conclusive arguments in favour of universal application

This section reviews arguments for and against the universal operation of the RTR for the purpose of constructing an 'ideal' legislative entitlement to address the career progression of professional women. As indicated, the universal application of the law does not necessarily diminish the availability of options to assist caregivers in combining their responsibilities; it does, however, improve the law's ability to address deep rooted workplace assumptions. Although employers claim to only have limited scope for flexibility in organisations, the way caregivers and non-caregivers use and 'need' flexibility is generally very different and therefore they do not impact each other greatly.

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[94] Managers in the public sector in New Zealand often reported to 'scaffolding formal FWAs with more informal approaches.' Noelle Donnelly, Jane Parker, Julie Douglas, Katherine Ravenswood and Ruth Weatherall, 'The Role of Middle Managers in Progressing Gender Equity in the Public Service (Victoria University of Wellington, September 2018) 25.
[95] See section 7.2 of Chapter 7 for recommendations in scaffolding flexible working practices.

One of the UK Government's policy goals with the extension of the RTR was 'to remove the cultural expectation that flexible working only has benefits for parents and carers'.[96] In the NZ context, the extension was directed at avoiding a situation where the legislation allowed certain roles to be 'ring fence[d]' for flexibility, whilst ruling out others.[97] A number of scholars have, in the past, argued in favour of a universal right to flexible working in order to achieve certain results. These include challenging the current construction of the unencumbered/encumbered worker,[98] reducing the work intensification which can be associated with flexible working,[99] lowering the potential for resentment from those excluded,[100] allowing for a 'diffusion' of work-life benefits[101] and reducing the marginalisation of female carers who work flexibly.[102] This thesis is specifically concerned with the career progression of professional women. In terms of the barriers to be broken down for this group of employees, the RTR has the potential to address the 'organizing the general requirements of work' inequality regime identified by Acker.[103] This inherent element of the workplace assumes that work will be performed in a certain manner based on the 'fundamental construction of the working day and of working obligations'.[104] A flexible working regime available to all employees and large-scale uptake of

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[96] HM Government 'Consultation on Modern Workplaces. Modern Workplaces Consultation – Government Response on Flexible Working: Impact Assessment' (n 80) 8.
[97] Carol Brown and Peter Dallimore, 'Flexible Work Design: A Strategic Imperative in New Zealand Business' (n 26) 7. See also Ministry of Women's Affairs, 'Realising the opportunity: Addressing New Zealand's Leadership pipeline by attracting and retaining talented women' (September 2013) https://women.govt.nz/sites/public_files/Realising%20the%20opportunity.pdf accessed 22 April 2021.
[98] Grace James, 'Mothers and fathers as parents and workers: family-friendly employment policies in an era of shifting identities' (2009) 31 Journal of Social Welfare and Family Law 271.
[99] Clare Kelliher and Deidre Anderson, 'Doing more with less? Flexible working practices and the intensification of work' (2010) 63 Human Relations 83.
[100] Colette Fagan, Ariane Hegewisch and Jane Pillinger, 'Out of time: Why Britain needs a new approach to working-time flexibility' Trades Union Congress (Trades Union Congress, London 2006) https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:5b153&datastreamId=FULL-TEXT.PDF accessed 16 April 2021.
[101] Susana Pasamer, 'Availability and use of work-life benefits: what's in between' (2015) 44 Personnel Review 949, 962.
[102] Janet Smithson and Elizabeth H Stokoe, 'Discourses of Work-Life Balance: Negotiating "Genderblind" Terms in Organizations' (2005) 12 Gender, Work and Organizations 147.
[103] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 66) 448.
[104] ibid 448.

flexible working structures are, however, imperative to challenge this deep-rooted workplace norm.[105] The universal application of the law is already part of the UK's legislative regime, but it has not come close to achieving this goal. The reason for this limited impact is discussed in the next section with reference to the weak entitlement afforded by the RTR and the absence of a right to appeal.

5.3.2 Stronger entitlement in law

5.3.2.1 Limited refusal/rejection options

As indicated in Chapter 3, the fact that the RTR provides a wide range of rejection options[106] sustains the normative construction of the workplace by giving the employer wide discretion in terms of which applications and consequently which working structures, should be accommodated in the organisation. In terms of Acker's 'organizing the general requirement of work' inequality regime,[107] the wide scope of options afforded to employers when faced with a flexible working request allows them to dictate the manner in which flexible working is allowed to disturb the way work is done and expectations constructed. In terms of the operation of inequality in the workplace, the RTR has the potential to challenge the invisibility of bias in normative working practices, but simultaneously provides organisations with the power to control the narrative.[108] This section explores ways in which this element of the RTR can be amended by drawing on other countries experiences with similar systems.

The 'soft' legislative approach which was taken by the UK, Australia and NZ becomes more evident when reviewing the arsenal of reasons afforded to employers confronted with an employee's request for flexible working structures. The wording of the NZ and the UK legislations are almost identical in their descriptions of the grounds on which an employer can

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[105] Excluding groups of employees from its operation, however, would inevitably result in a situation where not enough people utilise it 'to have any balancing effect.' John A Durkalski, 'Fixing Economic Flexibilization: A Role for Flexible Work Laws in the Workplace Policy Agenda' (2009) 30 Berkeley Journal of Employment & Labor Law 381, 396.
[106] EA 2002, s 80G (1)(b)(i)-(viii).
[107] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 66) 448.
[108] See discussion on visibility, legitimacy and control of inequalities in Section 2.3.1 of Chapter 2. Joan Acker, *Class Questions: Feminist Answer* (Rowman & Littlefield Publisher 2006).

reject an application. Although the Australian law is worded slightly differently, the following reasons for rejecting requests are contained in all three laws: the employer's inability to rearrange work between staff or appoint new staff to perform additional duties; the negative impact on efficiency, quality and customer service and the burden of the additional cost associated with a flexible working request.[109] These provisions offer extensive scope for employers to reject employees' requests by slotting them into one of these open-ended options; the rejection possibilities are 'broad enough to encompass most reasons for employer resistance'.[110] However, the substantive elements of the employer's decision-making process, containing subtle informal line manager considerations, remain invisible and shielded from scrutiny.

The Dutch law does, however, provide a higher onus for rejecting requests. As explained earlier, the Dutch RTR stipulates different thresholds depending on the type of flexible working request. On all levels though, the business reasons for rejecting a request must be 'serious' or 'compelling' which already indicates a stronger narrative than that of the UK.[111] The Dutch legislation then clarifies what 'serious' reasons would entail in the context of the different types of applications. Here, some of the reasons available under the UK's legislation emerge as well e.g., the inability of the employer to allocate additional hours or create additional work. Other reasons relate to matters of safety, timetable issues and availability of office space. Interestingly, serious problems, e.g., due to financial consideration for the business or in terms of the staff budget, are not viable justification for rejecting a request to work fewer hours, but could be raised by employers if the employee requests increased or different hours in the Dutch context.[112] The acceptability of part-time working in the Netherlands is, therefore, further reinforced by this high threshold set in legislation which limits employers' ability to reject specifically this type of alternative working practice by utilising financial justifications. This contrasts heavily with the legislation of the UK, NZ and Australia which provides 'burden of

[109] Fair Work Act 2009 (Australia), s 65(5A), Employment Relations Amendment Act 2014 (NZ), s 69AAF (2) and EA 2002, s 80G (1)(b)(i)-(viii).
[110] K Lee Adams, 'A Right to Request Flexible Working: What can the UK teach us' (n 69) 320.
[111] Wet Flexibel Werken 2016 (The Netherlands), art 2(9)-(11).
[112] ibid.

additional cost' as an easy-out in all circumstances.[113] The wording of the Dutch regime offers much less room for discretion to be exercised by managers in the application of the law and consequently creates a more certain, resilient framework within which employees can utilise their right to request to obtain their desired flexible working structures. In the context of Acker's inequality regimes, the employer's ability to dictate the permitted flexible working structures by utilising the law's rejection options under the RTR can be construed as a control mechanism which perpetuates the unequal operation of the employment terrain to the detriment of employees in need of alternative working structures.[114]

5.3.2.2 Right to a process v right to request

The UK's *right* to request flexible working legislation gives the impression that it provides an entitlement in law which becomes part of a bundle of employment rights constituting the minimum entitlement any worker is permitted to access. As indicated in Chapter 3, the current operation of the RTR legislation does not fall within this category of employment *rights* as there is no guarantee that an employee's application will be successful and no recourse to a higher authority if it is not.[115] The inability of the RTR as a 'rights'-based mechanism to facilitate genuine flexibility and to challenge normative organisational structures becomes evident when viewed in the context of a country like America, well known for its non-interventionist approach in relation to family accommodation in the workplace setting[116] and where no such legislative entitlement to request alternative working structures exists. Although the UK Government did intervene in the employment realm by enacting legislation in this

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[113] Section 80G(1)(b)(i) of the EA 2002 and section 69AAF (2)(g) of the Employment Relations (Flexible Working Arrangements) Amendment Act 2007 (NZ). The wording in the Australian legislation differs slightly and reads as follows: 'that the new working arrangements requested by the employee would be too costly for the employer'. Fair Work Act 2009 (Australia), s 65(5A)(a).

[114] Joan Acker, *Class Questions: Feminist Answer* (n 108).

[115] See Collins for an analysis of the elements which could provide an employee with a 'strengthened hand' when negotiating alternative working structures. Hugh Collins, 'The Right to Flexibility' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press 2005) 116.

[116] 'De-regulation, short-termism and low investment are common phrases used to describe the US market.' See Jennifer Tomlinson, 'Employment regulation, welfare and gender regimes: a comparative analysis of women's working-time patterns and work-life balance in the UK and the US' (2007) 18 Human Resources Management 401, 407.

regard, the manner in which the law manifests show parallels with the American system. In the US, flexible working arrangements are generally awarded based on 'formalized discretion', encapsulated in official policies which 'explicitly protect manager's discretion to grant or deny requests' for such alternative working structures.[117] Although these policies are often formally drafted and distributed between employees, the 'anti-entitlement message' is generally crystal clear in their operation.[118] Whereas no 'latitude or discretion' is allowed in the provision of legislated mandated *family leave* entitlement, the opposite is generally true for flexible working requests in the American context where no legislative right exist.[119] The limitations of HR policies, even the formal ones, are highlighted as not containing a confirmation of workers' rights and a lack of accountability to 'some outside authority'.[120] In the case of rejection of flexible working requests, the reference to 'job requirements and business needs' becomes highly prevalent.[121]

Various analogies can be drawn between the way in which America's non-statutory flexible working system operates and elements enshrined in the formal systems of the UK, Australian and NZ laws. Whilst these countries, in theory, have a RTR flexible working, a very low threshold for refusal is set which shows parallels with the reasons used by American employers; 'detrimental effect on ability to meet customer demand' and 'inability to re-organise work among existing staff' are just two examples available to employers in the UK and NZ, with similar provisions in Australian law.[122] Furthermore, in all three countries there is no right to appeal, which is comparable to the lack of access to any 'outside authority' in the US context. The extent to which discretion determines successful outcomes is also evident in the Australian

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[117] Erin L Kelly and Alexandra Kalev, 'Managing flexible work arrangements in US organizations: formalized discretion or "a right to ask"' (2006) 4 Socio-Economic Review 379, 382.
[118] ibid 398.
[119] ibid 399.
[120] ibid 406.
[121] ibid 401.
[122] Section 80G(1)(b)(ii)&(iii) of the EA 2002 and section 69AAF (2)(a)&(h) of the Employment Relations (Flexible Working Arrangements) Amendment Act 2007 (NZ). The wording in the Australian legislation differs slightly and reads as follows: 'that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employees' and 'that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.' Fair Work Act 2009 (Australia), s 65(5A)(c)&(e).

context where 'flexibility advances and retreats with changing managers'.[123] In NZ, the RTR has been described as a '"manager dependent"' flexible working regime, instead of one which is 'systematic, organisationally endorsed'.[124] The only differentiating factor, in terms of flexible working allowances, between the US and these countries is that the latter provide a right to a certain set process under legislation. In the NZ setting this has been aptly described as 'a right to a process for a fair and timely consideration of a request, rather than a right to flexibility';[125] this can be directly linked to the operation of the UK's RTR as well.

The extensive level of discretion permitted to employers under the RTR can be contrasted with the Dutch system. Although manager discretion does still play a part in the consideration of a request under the Dutch law, this is curbed by the strong wording used in the letter of the law for the rejection of requests and the possibility that any rejection can be scrutinised by a court. In the Dutch system the *law* enables employees to construct their work/life responsibilities in a certain way, whereas the UK's RTR empowers specific *supervisors* in the workplace to become 'powerful barriers and enablers of flexibility'.[126] This situates the Dutch RTR in a stronger 'right to flexibility' realm, whereas the UK allows for a strong 'right to a process' where the flexibility granted is based on manager discretion. The uncertainty in how this discretion may be exercised is part of the arbitrary operation of the RTR, which further diminishes the possibility that the legislation would effect change. To avoid employees being 'caught between formal arrangements and unwilling supervisors' the discretionary element of the RTR has to be addressed;[127] this can be done by enacting more rigid rejection options as displayed in the wording of the Dutch legislation.

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[123] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (n 14) 114
[124] Carol Brown and Peter Dallimore, 'Flexible Work Design: A Strategic Imperative in New Zealand Business' (n 26) 5.
[125] Amanda Reily and Annick Masselot, 'Precarious Work and Work-Family Reconciliation: A Critical Evaluation of New Zealand's Regulatory Framework' in Sarah de Groof (ed) *Work-Life Balance in the Modern Workplace: Interdisciplinary Perspectives from Work-Family Research, Law and Policy* (Kluwer Law International B.V. 2017) 294.
[126] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (n 14) 114.
[127] Wike M Been, Tanja van der Lippe, Laura den Dulk, Maria Das Dores, Horta Guerreiro, Aleksandra Kanjuo Mrcela and Charlotte Niemistö, 'European top managers' support for work-life arrangements' (2017) 65 Social Science Research 60, 71.

The US is not one of the countries used in the comparative analysis in this chapter due to the fact that it does not provide employees with *any* sort of legislative entitlement to work flexibly. However, the weak entitlement provided for in the UK, Australia and NZ legislation then becomes comparable to a system like the US where no RTR exists from the outset; the discretionary allowance of flexible working conditions is a privilege afforded to a few chosen ones unrelated to the prerogative in law.[128] In all of these countries, manager discretion becomes the key indicator of a successful flexible working application, which speaks to the dearth of legislative force associated with the RTR. Although the option to work flexibly being enshrined in law could potentially 'influence management decisions and cultural expectations about the employment relationship',[129] this shift is almost as unlikely to be achieved in the context of the UK's weak right to request as the US's lack of any entitlement.

5.3.2.3 Employer-centred right

The final element of the UK's weak RTR is the fact that it is not employee-centred,[130] this further cements the 'organisation of work' in its current format and possibly discourages potential applicants. From the outset, the wording of the UK law requires employees to show, as part of their application, how the requested change in working structure will impact on the employer and how this should be handled.[131] The NZ legislation goes even further and requires an employee to foresee the changes needed to be made by the employer if the request is

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[128] Whereas both the UK and the US fall into the 'liberal state' cluster of the welfare state typology, the UK show signs of 'dualism between state and market' due to the uneven distribution of state grants and support, whilst the US is categorised as an 'archetypical' liberal welfare state regime. Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (n 6) 49 & 50. Tomlinson indicated how different approaches towards a work-life balance implemented in these two countries have similar results when viewed from a gender sensitive perspective. Jennifer Tomlinson, 'Employment regulation, welfare and gender regimes: a comparative analysis of women's working-time patterns and work-life balance in the UK and the US' (n 116) 412.

[129] Erin L Kelly and Alexandra Kalev, 'Managing flexible work arrangements in US organizations: formalized discretion or '"a right to ask"' (n 117) 380.

[130] It has been described as a 'right to request rather than a right to obtain flexibility' which is 'designed to suit the needs of business rather than the needs of workers.' Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 67) 149.

[131] EA 2002, s 80F (2)(c).

approved.[132] This is indicative of an employer centred right and is again not dissimilar to the American context where employees have to indicate that the alternative working structure holds 'any benefit other than for their own convenience'.[133] The fact that the onus is on the employee to argue their case for flexible working structures and that this is based on how they can diminish the impact on the employer's business, is problematic for various reasons. Not only might it deter employees from making an application due to their uncertainty on how to answer this question, but it also seems rather unfair to put an obligation on an employee to envisage how his/her desired working structure could be accommodated in an organisation designed to resist it. The underlying premise here is that flexible working disrupts the status quo; the employee is therefore required, in terms of this provision, to explain how this interference can be minimised. In this context, the employees *not* applying for flexible working become as important as the ones who do apply (successfully or not). Their reasons for not applying might be situated in the fact that they genuinely do not require alternative working structures, but might also be because they cannot foresee how 'the effect [of their flexible working structures] will be dealt with' by the employer, as stipulated in legislation. [134] This is significant for the normalisation of flexible working structures as the law would only be an effective change mechanism when it starts to infiltrate sectors and departments which are generally less prone to utilising flexible working schedules.[135]

An Australian study revealed 'discontented non-requesters', i.e., those employees who are not necessarily happy with their working structures but who had not made a request for flexibility, amounted to 23% of the employees who participated.[136] Employees in 'more flexibility-hostile climates', it was held, were not empowered by the introduction of the legislation to ask for their desired flexibility.[137] In the submissions made by the ACCI to the Australian Fair Work

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[132] Employment Relations Act 2000 (NZ), s 69AAC (e).
[133] Erin L Kelly and Alexandra Kalev, 'Managing flexible work arrangements in US organizations: formalized discretion or '"a right to ask"' (n 117) 404.
[134] EA 2002, s 80F (2)(c).
[135] In the Australian context, successful applicants for flexible working have been described as representing 'the low-hanging flexibility fruit', which implies that they are clustered in workplaces and cultures which are more responsive to flexibility from the outset. Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' 2011 (53) Journal of Industrial Relations 65, 79.
[136] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (n 14) 115.
[137] ibid 115.

Commission reviewing the right to request legislation in 2018, the issue of the 'discontented non-requestor' was addressed. According to this report, the decision by these employees not to apply for flexible working is not due to the inherent shortcomings of the legislation, but rather based on 'an employee's rational assessment of whether their preferences can be accommodated within the scope of their current role'.[138] The employees who do not request flexible working 'self-regulate[d]' themselves not to ask for an 'impractical (or impossible) accommodation' of their responsibilities outside of the workplace.[139] Whereas the ACCI gave the impression that these employees should be applauded for their 'rational' decision-making, this is exactly the reason why the legislation in Australia (and the RTR in the UK) will not transform the workplace. As long as employees 'self-regulate', in terms of not asking for flexible working provisions which might rock the proverbial employment boat and they are rewarded for being 'rational' about flexible working possibilities, the RTR legislation's capacity to effect change will always be limited and its usage strained.

The current application process facilitated by the RTR is not designed to encourage employees to challenge normative prevailing working structures, but potentially inhibits the use of the regulatory framework to obtain desired flexibility. The extent to which applicants do not apply for flexible working due to uncertainty on how the organisation should deal with their disruption of standard organisational practices then becomes an important determinant in the assessment of the success of the RTR as a mechanism to challenge the status quo.

5.3.3 Alternative procedural improvements

As indicated in Chapter 2, instead of viewing caregiving as a manifestation of vulnerability in the employment arena, Fineman argues for an approach which enhances resilience through state intervention by creating opportunities through which individuals can realise their potential and limit their vulnerability.[140] One of the 'coping mechanisms' provided by organisations to achieve this goal relates to opportunities to enhance human capital and participation in

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[138] Australian Chamber of Commerce and Industry, 'Family Friendly Working Hours Submissions in Response' (October 2017) 64 https://www.australianchamber.com.au/wp-content/uploads/2018/01/am2015_2_-_family_friendly_work_arrangments_-_submissions_of_the_austral.pdf accessed 20 April 2021.
[139] ibid 64.
[140] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (n 8).

economic labour.[141] Whilst the RTR is such a mechanism through which all employees' resilience can be strengthened, recognising the ethics of care in the design and operation of this law also holds value in terms of the worth attributed to caregiving, as well as carers, in the domestic sphere. Within the procedural elements of the legislation specifically, there is scope to recognise caregiving from more than simply a symbolic perspective; it can be acknowledged and facilitated practically though the operation of the law.

Whilst this thesis argues in favour of a universal RTR in order to challenge the fundamental operation of the workplace, there is no reason why the fluctuating needs of caregivers should be ignored in the design of the procedural elements of the legislation. The following procedural elements, identified in the laws of other countries, are discussed in this section with the view of enhancing the effectiveness of the UK's RTR as a mechanism to recognise caregiving in the employment sphere and to critique the procedural (in)efficiency of the UK's RTR with specific reference to professional women's career progression: a day one right; the number of requests allowed per year and the timeframe within which employers are compelled to respond.

5.3.3.1 Day one right

The day one right, available in NZ since 2015, appears on the surface to be a radical addition to NZ's legislative regime.[142] This provision suggests that a discussion regarding flexible working options might occur as early as the recruitment and interview stage. According to a policy document, published in 2013, part of the justification for this amendment was to motivate employers to structure jobs 'flexibly at the recruitment phase'.[143] It is, however, not clear from reading the legislation how this will work in practice. The legislation states clearly

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[141] Fineman categorises this under '[h]uman assets' to counter individual vulnerability. Martha Albertson Fineman, 'Introducing Vulnerability' (n 70) 7.

[142] See section 4.3.2.1 of Chapter 4 for a discussion of the UK Government's reluctance to implement a similar provision in the context of the UK's RTR legislation. House of Commons Women and Equalities Committee, 'Gender Pay Gap, Second Report of Session 2015-16' (March 2016) 18 https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/584/584.pdf accessed 15 April 2021).

[143] Ministry of Business, Innovation and Employment, 'Employment Relations Amendment Bill 2013: Departmental Report for the Transport and Industrial Relations Committee' (n 15) 38.

that 'an *employee* may make a request at any time'.[144] (This contrasts with the UK's RTR, for instance, which requires a 26-week period to expire before an employee can request alternative working structure under the law.)[145] An 'employee' is, however, defined as 'any person of any age employed by an employer to do any work for hire or rewards under a contract of service'.[146] An application can, therefore, only be made by someone who already has 'employee' status, which excludes applicants from its operation. The guidance notes do not provide further clarity on this issue. There is no specific explanation of how the day one right would work in practice, apart from suggesting that employers should make known their 'openness to flexible working options' in job advertisements.[147] Whilst flexible working options might, therefore, be discussed during the negotiation process with the knowledge that an employee will acquire and might utilise, this right as soon as he/she is appointed, a strict reading of the legislation implies that an employee can submit an application to work flexibly from their first day on the job and not before.

Unfortunately, very little mention is made of this rather radical legislative amendment in the policy documents or subsequent 'toolkits' issued by the NZ Government. To date, there has also been limited studies conducted in the NZ employment market to assess the impact of this specific legislative measure in terms of utilisation and operation. One explanation for the silence in this regard is that organisations in NZ are generally very flexible in any event and it is this that impedes the necessity for an entitlement enshrined in law, regardless of how generous it might be. A study conducted in 2010 in NZ to assess women's experiences of flexible working in the public sector (under the previous right to request legislation), indicated that awareness of the law and uptake of the flexible working structures was particularly low.[148] This was especially surprising for two reasons: the study was conducted in the public sector

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[144] Employment Relations Act 2000 (NZ), s 69AAC (e).
[145] The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 SI 2002/3236, reg 3(1)(a).
[146] Employment Relations Act 2000 (NZ), s 6 (a).
[147] Diversitas, 'Flexible Work Toolkit: How your business can get and keep great staff' https://www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/dd1c4f7c5c/flexible-work-toolkit.pdf accessed on 28 April 2021.
[148] Two years after the legislation was passed, only 7.3% of the respondents in a study conducted indicated that they made a request under the legislative regime, whilst 59.3% were not familiar with the legislation. Noelle Donnelly, Sarah B Proctor-Thomson and Geoff Plimmer, 'The Role of "Voice" in Matters of "Choice": Flexible Work outcomes for Women in the New Zealand Public Services' (2012) 54 Journal of industrial Relations 182,188.

where knowledge of employment law allowances is generally good and the type of workers who were interviewed were professional, full time employees who usually have the best chance of accessing alternative working structures. Despite these numbers, respondents indicated that flexible working practices were often available to them; this can be explained by the fact that the NZ employment market provides various flexible working options outside of the legislative regime 'within collective employment agreements (CEAs), HR policies and through informal negotiations with managers'.[149] In this context it is worth noting that the availability of flexible scheduling options in the workplace, regardless of uptake, can lead to increased job satisfaction and loyalty to the employer;[150] the day-one right might, therefore, contribute to the positive sense of entitlement for employees, but it still does not necessarily address the genuine needs of female caregivers who attempt to enter the employment market and who possibly need a day-one option to do so.

In a survey launched at the end of 2016 (after the changes to the Employment Relations Act came into force), 828 women's views on matters such as career progression, work/life balance, organisational barriers and career aspirations were summarised. Although the section entitled 'What can be done? Organisational-level initiatives' is permeated with recommendations regarding the necessity for flexible working structures, 'none of the women referenced specific legislative provisions that employees can trigger' to seek alternative working structures from their employer.[151] The authors of the report attributed this to a lack of awareness raising by employers, but there is a good argument that the Employment Relations Act is an ineffective tool to facilitate the desired flexibility for the women in this study (of which 85.4% identified as Professional or Managers).[152] The lenience towards flexible working structures in the NZ employment market, coupled with the limited scope of the law to facilitate genuine desired flexibility, might explain why the day one entitlement, implemented in 2015, has not been more

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[149] ibid 188.
[150] T Alexandra Beauregard and Lesley C Henry, 'Making the Link between Work-Life Balance Practices and Organisational Performance' (2009) 19 Human Research Management Review 9.
[151] Jane Parker, Nazim Taskin, Janet Sayers, Jeff Kennedy and Jane Halteh, 'Women's Career and Aspirations Survey (MPOWER for Convergence Partners, February 2017) 44-45 https://www.massey.ac.nz/massey/fms/Colleges/College%20of%20Business/mpower/forthcoming%20events/Final%20Report.pdf?7F956E3F72FE1EB5E8B07E8D0F8D31DE accessed 27 April 2021.
[152] ibid.

contentious. The current construction of NZ's day one right does not seem to accommodate pre-employment scenarios or provide clear guidance on how it will operate as a day one entitlement, which limits its usefulness from a lesson-learnt perspective. A shift might have occurred in this regard due to the impact of the Covid pandemic on attitudes towards and usage of, alternative working structures; employer surveys conducted indicate that jobs are more likely to be advertised in the future as suitable for homeworking, this could potentially open up higher echelons of the employment sphere which have not traditionally been prone to flexible working structures.[153] The organisational impetus to change is laudable, but from a regulatory viewpoint a clearer scope is required in terms of compelling employers to advertise positions and recruit staff in a flexible manner in order to accommodate caregiving applicants.

5.3.3.2 Number of requests allowed per year

Under the UK's RTR, an employee can only ask for a change in working structures once in a 12-month period and if the request is approved the variation constitutes a permanent change to an employment contract. This is also the case in the Netherlands, whilst the Australian law is silent on this aspect. NZ however, since 2015, allows for permanent *and* temporary changes to the employment contract of an employee[154] and places no limit on the number of requests allowed in any given period.[155] During the consultation period, employer groups raised concerns about the fact that there was no limitation on the number of times an employee could request a variation of working structures. This was addressed by the Transport and Industrial Relations Committee with reference to the duty of good faith encompassed in the legislation; submitting multiple requests, they held, knowing that the employer's business requirements have not changed, would be breaching this duty.[156] Whilst this generous provision seemingly provides an employee with the option to change working structures at whim, the fact that it is situated within a right to request regime (like the UK's), which provides an even stronger right

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[153] Sarah Forbes, Holly Birkett, Lowri Evans, Heejung Chung and Julie Whiteman, 'Managing employees during the Covid-19 pandemic: Flexible working and the future of work' (University of Birmingham and University of Kent, 2020).
[154] Employment Relations Amendment Act 2014 (NZ), s 69AAC(b).
[155] ibid s 26.
[156] Sections 60 and 60(A) of the Employment Relations Act 2000 (NZ) set out the good faith behavior required when negotiating an 'individual employment agreement'. Ministry of Business, Innovation and Employment, 'Employment Relations Amendment Bill 2013: Departmental Report for the Transport and Industrial Relations Committee' (n 15) 37.

to reject to employers, means that it is once again just a symbolic nod towards providing flexible working structures in line with genuine employee needs.

An alternative to allowing unlimited RTR applications in any given period is to permit temporary employment contract changes under the legislation. The NZ legislation requires employees, as part of their application, to state what kind of change they may require, i.e., 'permanent or for a period of time'.[157] The EU's most recent family-friendly proposal also indicated that a trial period might be mandated in the relevant directive; it states that employees should be able to return to their original working structures when a change in their 'underlying circumstances' necessitates it and that they should also have a *right* to return to their original arrangement at the end of the agreed period.[158] The possibility that employees can comfortably move between different working structures would serve 'the evolving nature of the caring needs as well as the level of dependency involved in the caring relationship'.[159] The implied suggestion in this section of the directive is that a trial period would be permitted for flexible working structures and that more flexibility might be built into the legislative provisions to allow for frequent changes to the agreed working structures. This is more extensive than what is currently allowed by the UK's RTR legislation and would have required an amendment to the UK's RTR provisions prior to Brexit. What is not clear, however, is how prescriptive the proposed legislative measures will be in this regard. If it allows employers unrestricted discretion to approve or reject employees' requests to return to their original working structures, it will once again not add any teeth to the current employer-based flexible working legislative regime.

A temporary change to hours/working structure could allow employees to attend to responsibilities outside the workplace on a short-term basis with the knowledge that they will be able to resume normal duties after a set period of time; this type of agreement can be used for the benefit of both the employer and employee to test the alternative working structures.

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[157] Employment Relations (Flexible Working Arrangements) Amendment Act 2007 (NZ), s 69AAC(b).
[158] European Commission, 'Proposal for a Directive of the European Parliament and of the Council, on work-life balance for parents and carers repealing Council Directive 2010/18/EU' (n 7).
[159] Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (n 67) 150.

The benefits of a trial period are especially prevalent when the working structure has not been used before; challenging the status quo might be easier when both parties have the option of a trial period to assess how and if, it will work in practice.[160] The fact that a successful RTR application in the UK context always results in a permanent change also has other implications. This is especially prevalent in a workplace that claims to have a limited amount of flexibility on offer. It could lead to a scenario where the 'flexible working possibilities become "clogged up" by people who no longer qualify' for it.[161] Although this will only technically be the case in a country that reserves flexible working structures for certain categories of employees (like Australia), it could also impact the options available to caregivers who need different flexibility depending on the life phase/age of the person for whom they care. Furthermore, the scaffolding of the requests of caregivers and non-caregivers could be thwarted by the permanent nature of flexible working structures. This might also lead to the under-utilisation of employees' skills, e.g., when they are ready to resume their original workload, but are time-barred by the legislation to request to do so. A right which allows for working hours/structures to be adapted in line with ever-changing caregiving responsibilities could allow employees an option to maintain their optimal desired capacity in the workplace without compromising on their time spent providing caregiving outside of it, which is specifically prevalent in the case of professional caregiving employees.

5.3.3.3 Timeframe to respond

The Australian law demands the shortest turn-around time of 21 days for employers to respond to a flexible working request, whilst the UK has the longest, at three months. The role of caregiving was indeed considered in the most recent amendment to the NZ legislation; decreasing the period within which the employer has to respond from three months to one,[162] based on the fact 'that caring situations or emergencies can arise suddenly with arrangements

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[160] Wike M Been, Tanja van der Lippe, Laura den Dulk, Maria Das Dores, Horta Guerreiro, Aleksandra Kanjuo Mrela and Charlotte Niemistö, 'European top managers' support for work-life arrangements' (n 127) 71. See also footnote 185 below for a Dutch case where a six-month trial period was ordered to test the feasibility of an employee's requested flexible working structure.

[161] Richard Croucher and Clare Kelliher, 'The Right to Request Flexible Working in Britain: the Law and Organisational Realities' (2005) 21 International Journal of Comparative Labour Law and Industrial Relations 503, 508.

[162] Employment Relations Amendment Act 2014 (NZ), s 69AAE(1).

needing to be made at short notice'.[163] This is indeed a highly valid consideration which is even more pertinent for caregivers of the elderly, compared to those who care for children, due to the possibility that the care required for older family members is less predictable and could very suddenly become necessary or absolute.[164] The UK's three month period lags behind each of the other countries and is a limiting factor in facilitating different types of caregiving. The Dutch law provides two interesting examples in this regard. Firstly, in the case of an application dealing with unforeseen circumstances the employer is obliged to respond within five working days.[165] This option could potentially be considered in the UK's RTR context by linking the reason for the request to a specific (possibly shorter) turn-around time; in this way urgent caregiving elements might be recognised and accommodated by the law. Secondly, in the Dutch context, an employee would automatically be awarded the working structure requested if the employer does not respond within the one month allocated period.[166] This can be contrasted with the UK where non-compliance with the required time period (three months) gives the employee a right to appeal to an employment tribunal based on procedural inefficiencies,[167] in which case the remedies available are a reconsideration of the employee's request[168] or an award for compensation.[169] The lengthy period an employee has to wait for a request to be considered (three months), coupled with the remedies available in the case of non-adherence to the timeline, do not leave any scope for urgent/sudden caregiving commitments which might arise. This inhibits the UK's legislation as a mechanism to facilitate genuine caregiving needs, but, ironically, it might be less of a deterrent to employees who do not need flexibility, but who simply desire it for non-caregiving reasons. These employees might have more time to plan their out-of-work-commitments which are then not frustrated by a long delay in the employer's response to their request. Whilst a universal RTR might allow for their

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[163] Ministry of Business, Innovation and Employment, 'Employment Relations Amendment Bill 2013: Departmental Report for the Transport and Industrial Relations Committee' (n 15) 38.
[164] Grace James and Emma Spruce, 'Workers with elderly dependants: employment law's response to the latest caregiving conundrum' (2015) 35 Legal Studies 463.
[165] Wet Flexibel Werken 2016 (The Netherlands), art 2(12).
[166] Ibid.
[167] EA 2002, s 80H (1)(a).
[168] ibid s 80I (1)(a).
[169] ibid.

working structures to be scaffolded with those of caregivers, there is no reason why the procedural elements within the legislation should work directly against caregivers.[170]

The procedural elements currently contained in the UK's RTR legislation inhibit its potential to serve the needs of caregivers specifically. This group might need more malleable options between full-time/part-time/work-from-home structures which are not currently facilitated by the inflexible operation of the RTR. The law's inability to facilitate prompt transitioning between different working structures could lead to caregivers being 'stuck' in 'part-time' work whilst they are ready and able to take on more hours and responsibilities and this could inhibit their career progression. The permanent nature of any change might also dissuade certain workers from the pursuit of flexible working routes from the outset,[171] and this could limit the potential of the law to infiltrate obstinate higher echelons of the employment sphere where flexible working is regarded as less acceptable.

5.3.4 Right to appeal

Of the four countries investigated in the chapter, the right to appeal the substantive reasons for rejection of a flexible working request is currently only available in the Netherlands. The right to appeal was, however, considered by the other three countries, but has never been included. The first part of this section provides a review and critique of the arguments presented in the other countries for not implementing this right to recourse. Then, three Dutch court cases are investigated to highlight the transformative possibilities of a right to appeal with reference to the operation of the Dutch right to request. Finally, conclusive arguments are presented in favour of a right to appeal in the context of the current construction of the UK's RTR.

5.3.4.1 Arguments for/against a right to appeal

[170] Noelle Donnelly, Jane Parker, Julie Douglas, Katherine Ravenswood and Ruth Weatherall, 'The Role of Middle Managers in Progressing Gender Equity in the Public Service' (n 94).
[171] K Lee Adams, 'A Right to Request Flexible Working: What can the UK teach us' (n 69).

In 2018, the Fair Work Commission in Australia conducted their four-yearly review of the Fair Work Act 2009 in terms of Section 156 of the same act.[172] Submissions from various interest groups were considered by the Commission in their review of the flexible working elements of the legislation; the absence of a right to appeal was one of the issues considered. Whilst the ACTU argued in favour of a right to appeal, the ACCI suggested that the amendment would force an employer to accept the flexible working terms requested by an employee which, according to them, is an attempt to 'cross the "Rubicon"', fundamentally altering the paradigm under which an employer operates a business'.[173] Although the argument which is made herein, which is in favour of a right to appeal, is that it would achieve exactly that, to 'alter the paradigm' which the employer's business in based on, the ACCI seemed to confuse a right to flexible working with a right to appeal in their submissions. Although a right to appeal is supposed to enhance the strength of the right to request flexible working, it still does not provide an outright employment right to employees to work in a flexible manner under all circumstances. The discussion of submissions to NZ's Ministry of Business, Innovation and Employment in 2103, dealing with the most recent amendments to the NZ RTR legislation, also covered the matter of the absence of a mechanism 'to legally challenge a decision'.[174] Here, the Ministry's response reflects a better understanding of the issue, but a reference to, and analogy with, the UK's RTR was made which emphasises the purpose of both laws to provide 'a right to a specified process for a fair and timely consideration of a request'.[175] This emphasis on the purpose of the law in NZ (and the UK), embodies the crux of the problem; the RTR has always been framed as a procedural tool to facilitate requests, rather than a mechanism whereby the foundations of the employment landscape can be challenged.[176]

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[172] Fair Work Commission, 'Decision Fair Work Act 2009 s.156 – 4 yearly review of modern awards Family Friendly Working Arrangements' (September 2018) https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb5753.htm accessed 22 April 2021.

[173] Australian Chamber of Commerce and Industry, 'Family Friendly Working Hours Submissions in Response' (n 138) 3.

[174] Ministry of Business, Innovation and Employment, 'Employment Relations Amendment Bill 2013: Departmental Report for the Transport and Industrial Relations Committee' (n15) 39.

[175] ibid 39.

[176] See discussion above in section 5.3.2.2 on the right to a process as opposed a right to a request afforded under the RTR.

The importance of a recourse to a higher judiciary power is encompassed in this quote from Australia's Victorian State Government:

> To be effective, a right must be capable of vindication in a manner appropriate to its nature, otherwise it is not a right at all but a guideline. A safety net of comprehensive, fair and relevant employment conditions is after all a public statement of what constitutes socially acceptable minima in a democratic society that respects human dignity. A minimum is nothing if an employer may depart from it when inconvenient.[177]

This provides a very apt description of the RTR legislation where it operates without a right to appeal; a set of guidelines on how an employer should deal with the administrative elements of a flexible working request, but an easy-out where the request presents only marginal uncomfortable prospects for the employer's business.

Apart from the role a right to appeal can play in challenging an employer's rejection of a request, it could also potentially incentivise 'employers to change their behaviours'.[178] Firstly, it might limit the extent to which 'individual managers make arbitrary and inconsistent decisions'[179] when reviewing flexible working requests. Although the ACCI strongly refuted the assertion that an employer can 'determine, at its own whim and arbitrarily' who is afforded flexibility in the workplace, their counter arguments are yet again situated in the strong *procedural* elements afforded by the right.[180] Whilst the laws in Australia, NZ and the UK indeed provide a strong right to a certain process in relation to flexible working applications, the lack of a substantive review mechanism, does technically, 'provide a carte blanche to employers to dispose of flexible working requests'.[181]

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[177] Victorian Government 'Victorian Government Submission to the Commonwealth of Australia National Employment Standards – Commonwealth Exposure Draft and Discussion Paper' 9.
[178] Amanda Reilly, 'Equality and family responsibilities: a critical evaluation of New Zealand law' (n 15) 166.
[179] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (n 14) 117.
[180] Australian Chamber of Commerce and Industry, 'Family Friendly Working Hours Submissions in Response' (n 138) 25.
[181] ibid 26.

Additionally, the knowledge that an employee could challenge a decision and ultimately expose the employer's business structures and reluctance to accommodate alternative working patterns in a public forum, like an Employment Tribunal, might urge employers to consider more carefully, from the outset, flexible working requests in order to find feasible solutions. This could also 'publically identif[y]' employers who are resistant to allowing flexible working, as well as 'raise awareness of the need to avoid such practices among other employers'.[182] At this point it is worth highlighting again the breadth of the reasons for rejecting a request which is permitted in terms of the UK's RTR legislation. These reasons generally provide the employer with an infallible defence in rejecting requests with minimal regard to any consequences. There is, however, no way for an employee to actually investigate or question these reasons for a rejection. Knowledge regarding the 'burden of additional costs' or the 'detrimental effect on ability to meet customer demand' could easily be raised by the employer as justification for rejecting a request, with no further explanations provided into the specifics of the concerns relating to these aspects. If, however, a right to appeal existed, the employer would be compelled to provide more substance in their rejections, either to the employee or later to an employment tribunal. This could lead to a situation where the employer's intricate, confidential, financial statements and client contracts might have to be exposed to public scrutiny for the purpose of the appeal hearing; this in itself might encourage employers to engage with employees requests more constructively from the outset.

5.3.4.2 The Dutch Courts

Due to the fact that the Dutch legislation allows employees to appeal the substantive reasons given by employers when rejecting a flexible working request, it is possible to gain some insight from court judgments in terms of how the right to appeal manifests in the Netherlands. The wording of the Dutch legislation, as well as the way in which it has been construed by the courts, 'leaves so little room for refusal of a request to work part-time' which has also resulted in a consistent application of the law by employers.[183] It is, however, important to acknowledge

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[182] Reilly identified these advantages in the context of discrimination, but they could also be used regarding an appeal against a rejection of a flexible working request. Amanda Reilly, 'Equality and family responsibilities: a critical evaluation of New Zealand law' (n 15) 164.
[183] Jelle Visser, Ton Wilthagen, Ronald Beltzer and Esther Koot-van der Putte, 'The Netherlands: from atypicality to typicality' (n 27) 212.

here that part-time flexible working was normalised in the Netherlands before the law was enacted; therefore, the extent to which the right to appeal challenged normative structures, in terms of part-time working specifically, is not necessarily a good indication of the transformative potential of the right to appeal. In this sense, the working patterns of women in the Netherlands were paving the way for others to question and change longstanding employer practices and '[s]trengthening the hand of men in negotiating shorter hours with their line managers'.[184] Although the use of legislation in this manner, as a reflection of the normative, sends out a strong signal of what is acceptable and should be possible, there are two additional reasons why the operation of the right to appeal in the Dutch context can be used as an example of this legislative provision's potential to challenge other normative workplace practices. Firstly, two of the examples discussed in this section involved instances where the employee's request did not involve a reduction of hours, but rather a change of working structure/increase in hours. Secondly, the information considered by the courts in all the examples exposed and contested elements of taken-for-granted employer practices; this is a crucial part of challenging normative mindsets and working structures to be achieved by the implementation of a right to appeal. The Dutch right to appeal, therefore, extended beyond allowing normative part-time working structures; this becomes evident upon reviewing the facts and judgements decided under this law since it came into force. This section explores the role a right to appeal can play in bolstering the operation of the RTR legislation with reference to the practical manifestation of such a right in the three Dutch court cases.

Eiseres v Kloosterboer Ijmuiden[185]

In a case decided in 2008, the court overturned the employer's decision to refuse an employee's request to reduce her working hours from 40 to 32 over a four-day week; it is specifically the willingness of the court to explore the rationale behind the employer's reason for refusal which provides useful material for analysis. The employer's business required that there should always be one qualified person in the office to deal with official international customs documentation; allowing the applicant to work four days a week would mean that there would be no qualified staff member in the office should the other office employee be absent due to

[184] ibid 205
[185] Rechtbank Haarlem 394053 \ VV EXPL 08-180 (2008)

either illness or holiday. The applicant's solution to this problem was that she would be able to work in such a case because she could ask one of her five willing family members to look after her baby should the need arise; however, the employer did not provide any reasons why such a solution would not be feasible, or why the applicant could not be trusted to do just that. The court decided in favour of the employee in this instance and held that the practical implications of such an arrangement had to be tried; a six-month trial period of this working structure was ordered to test its feasibility. Specific mention was made of the fact that a four-day work week has become commonplace in the Netherlands in the interests of childcare.

This judgement firstly diminishes, to a large extent, the scope and strength of employers' justifications for rejections based on industry requirements. Secondly, it highlights the importance of a right to appeal on merit regarding flexible working matters in order to shift perceptions. The fact that elements of the private sphere were introduced into the workplace setting is also significant; the employee's contention in this scenario was that she had responsibilities outside the employment sphere, but also support. Although the acknowledgement of especially women's caregiving responsibilities is often the foundation of allowing flexible working in the public domain, other elements of the private arena might have to be considered in order to counter the impact of caregiving roles on career prospects. In this scenario it was the employee's *support* outside the workplace which was crucial to the court's decision; an element of the private sphere was put forward and ignored by the employer but acknowledged by the court.

In the context of the UK's universal RTR legislation, there is technically no need to reference caring responsibilities when submitting a flexible working request. Although the argument throughout this thesis is that a universal right would allow a more dramatic change to the employment landscape, it is worth considering the extent to which elements of the private arena, if considered by an employer, could allow for a shift in workplace perceptions and solutions, as highlighted by this case. Although making caregiving elements visible in an application to work flexibly (as was required before the right was extended to all employees) has advantages in terms of breaking down the divide between the public and the private spheres, this could also be achieved in other ways. Firstly, the employer's knowledge that an employee might challenge the rejection of a flexible working request in a court or tribunal setting might encourage the decision-maker to consider all aspects of the application, including the employee's caregiving situation and support, more carefully before turning down the request.

Additionally, where the application is still rejected the employee then has the option to appeal the decision and present the facts to a tribunal where these elements of the private sphere could be brought forward to justify the worker's ability to successfully perform economic and caring labour in tandem. Earlier in this chapter a critique was made of the provision in the RTR that requires employees to justify their request by explaining what impact it would have on the employer's business and how this effect should be dealt with.[186] This highlights how the RTR operates as a mechanism to protect the interests of employers, rather than to address the needs of employees. The information which was presented by the employee in this case, which dealt with the support she has in the private sphere, could be seen as the antipathy of the information required by the law in terms of how the flexible working structures would impact on the business and how this should be dealt with in the public arena. Requiring an employee to provide the latter, without considering the former, speaks to the weakness of the law as a mechanism to genuinely address caregiving responsibilities; a right to appeal might, however, shift the dialogue between employer and employee regarding the extent of the worker's responsibilities in and outside of the employment setting, even before recourse to a higher authority is utilised.

Eiseres v Prive Kliniek Rosendael B.V. [187]

As shown in another case, the court is even willing to interpret the legislation liberally where an employer has not requested a reduction or increase in hours, but rather wants to spread their existing working hours over four days instead of three. The employer's rejection in this case was based on the human resources policy which required eight-hour working days for all employees; a deviation from this policy in this specific scenario would set a precedent which would allow other employees to request alternative working structures, the employer argued. The court, however, engaged concepts like 'good employership' and 'weighing up of the interest of employees and employers' in order to highlight the unreasonableness of the employer's conduct in this case. A similar scenario in the UK context would not, however, have reached the courts as there is no option for employees to question the substance of an employer's rejection of a flexible working request; similar human resources policies are

[186] EA 2002, s 80F (2)(c)
[187] Rechtbank Arnhem 502745 - VV EXPL 07-20088 (2007)

therefore never scrutinised nor questioned, and neither are the underlying prevailing norms and cultures on which these policies are built. The argument that a precedent will be set by allowing one employee's flexible working request is based on the notion that only a limited amount of flexibility is available in any given workplace and by allowing one request the floodgates will open and business will be disrupted. In this case the court reviewed the employer's argument and provided another angle on the issue of setting a precedent regarding flexible working applications. The court held that the employer should evaluate each application on its own merit, not out of fear that all further applications would therefore have to be approved as well. The court did acknowledge, however, that in subsequent cases the compelling business reasons to reject applications might become stronger and easier to prove. This kind of scrutiny of employer concerns, often associated with flexible working, highlights the added value of providing the employee with recourse upon rejection of his/her application. It also signifies how the law can be utilised to challenge the existing structure and culture of the workplace to allow for an alternative sharpened viewpoint on historic normative behaviours.

This is also a useful example by which to explore the combined impact of two of the elements of the 'ideal' RTR legislation proposed in this chapter, namely a universal right to request and a right to appeal. Due to the successful appeal in this case, the employer might be 'forced' to allow a flexible working structure without regard to the possibility of subsequent requests which could lead to a situation where someone who desires flexibility for leisure activities is allowed to work flexibly, whilst a subsequent applicant's request, based on caregiving purposes, is denied due to the first applicant's request depleting the flexibility the workplace has to offer. This is clearly part of the critique against a universal right to request; if the workplace's limited flexibility is used by non-caregivers, it diminishes the options of caregivers. This predicament can be addressed in various ways. Firstly, as argued earlier in this chapter, the type of flexibility (and its impact) on the workplace is often very different for caregivers and non-caregivers, this limits the actual competition between these two groups for the limited flexibility the workplace has to offer. Secondly, with the rejection of the second applicant/caregiver's request, the right to appeal will once again allow for an examination of the employer's reason for the rejection which would inevitably lead to an investigation of the workplace setting resistant to flexible structures.

Verzoekster v Dirinco B.V.[188]

In another, more recent, case the employer's decision to refuse a request for a 32-hour week, while showing a willingness to allow a 24-hour week, was also rejected by the court; part of the employer's argument was based on the fact that the latter could be moulded into a job share structure. The employer's preparedness to accept the 24-hour week frustrated its rationale that the type of industry involved requires fulltime working structures, the court found. The fact that the employee was already working the reduced 32-hour week for a period of time prior to the application, without significant problems, was also considered by the court. This kind of reasoning stands in stark contrast with the rationale followed by the UK courts when confronted with flexible working scenarios. In a 2015 case an Employment Tribunal accepted the employer's rationale for rejecting a flexible working request. The employer in this case contended that the employee's request to work from home after 6pm daily would be 'detrimental to our business in that, at best, it would cause us minor but more than minimal inconvenience'.[189] Although a rejection of a working from home request in the Netherlands is easier than a rejection of a request to reduce/change hours, the reasoning used by the employer here would not have come close to satisfying the compelling business reasons threshold set in Dutch law. This highlights the weak entitlement afforded by the UK's RTR legislation compared to the much stronger right prevalent in the Netherlands. Evident in these examples is the willingness on the side of the judiciary to interpret the legislation in a manner which gives effect to a more rigorous entitlement to the requested flexible working structures; it strengthens employees' positions in the workplace to negotiate for their desired working structures on a more equal footing.

5.3.4.3 A final word on the right to appeal

The way the Dutch legislation has normalised flexible working is situated in the fact that it is constructed in a rights-based, instead of a privilege-based, discourse. This has impacted on

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[188] Rechtbank Oost-Brabant 5279983 (2016)
[189] ICAEW, 'Case law: Court clarifies when employers may reject requests to work flexibly' (December 2016) https://www.icaew.com/en/archive/library/subject-gateways/law/legal-alert/2016-12/case-law-court-clarifies-when-employers-may-reject-requests-to-work-flexibly accessed 22 April 2021.

employees' abilities to confront the status quo by making requests with candour and certainty regarding the outcome in line with their genuine work/care needs. Employers, on the other hand, have been forced to genuinely engage with employees and seriously rethink the way they structure work due to the possibility of their rejection being scrutinised in court. In terms of Acker's analysis, the Dutch RTR challenges the invisibility *and* legitimacy of inequalities in the realm of working structures. In the examples given above, the courts were forced to lift the veil on workplace practices and employer justifications which are normally regarded 'as a commonsense understanding of the way things are'; the appeal process makes visible some of these taken-for-granted practices which in turn challenges supposedly gender-neutral assumptions about workplace norms.[190] The law, therefore, becomes a method through which the legitimacy of the 'particular ordering of advantage' which is regarded as 'natural or desirable'[191] can be exposed and challenged. This can be juxtaposed with the UK's RTR which contributes to the legitimacy of inequalities by limiting the employee's negotiating power in structuring his/her desired working structure and precluding a process whereby the employee can question the employer's rejection of such a request.

The structure and operation of the Dutch legislation has not only allowed scope for challenging the status quo, but has also connected the genuine desire of employees to manage economic and care work within the purpose of the legislation in a constructive manner.[192] This then moves the focus of the law from a very employer centred mechanism, which yet again allows organisations to operate as the 'overall architects of employment arrangements',[193] to an instrument which 'can improve the choices on offer'[194] for employees. The extent to which the RTR can challenge Acker's 'organizing the general requirements of work' inequality regime and the unencumbered worker at the centre of it,[195] becomes more attainable when

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[190] Joan Acker, *Class Questions: Feminist Answer* (n 108) 119.
[191] ibid 120.
[192] See Den Dulk's analysis of the Netherlands signalling government support which cultivates organisational support. Laura Den Dulk, 'Work-Family Arrangements in Organisations: An International Comparison' in Tanja van der Lippe and Liset van Dijk (eds), *Women's Employment in a Comparative Perspective* (Walter de Gruyter 2001).
[193] Jill Rubery, 'Regulating for Gender Equality: A Policy Framework to Support the Universal Caregiver Vision' (2015) 22 Social Politics 513, 519.
[194] Grace James, 'Mothers and fathers as parents and workers: family-friendly employment policies in an era of shifting identities' (n 98) 278.
[195] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 66) 448.

accompanied by a right to appeal. Instead of viewing flexible working as a contamination of 'essentially gender-neutral structures',[196] a right to appeal allows for the gender disparity built into these structures to be exposed, questioned and transformed.

This thesis argues in favour of a strong RTR entitlement in law to be available to all employees which could potentially challenge normative practices and normalise alternative working structures. The most important element of the 'ideal' RTR is, however, situated in the right to appeal. As indicated in this section, the right to appeal in the Netherlands has manifested in scenarios where employers' rejection decisions have been scrutinised by an outside authority. This has allowed for an investigation into employers' reluctance to facilitate genuine workplace flexibility and an exposure of their resistance to contemplate working structures outside of the norm. By allowing the status quo to be questioned by employees' diverse flexible working requests, the potential of the RTR as a change-inducing mechanism is enhanced. It can do more than facilitate predictable working structures; it can challenge institutional imagination relating to flexible working to incorporate a variety of alternate working structures serving the needs of caregivers and the wishes of non-caregivers. The desired end result, a normalisation of non-traditional working structures, would benefit female caregivers attempting to provide care whilst pursuing a meaningful and rewarding career.

5.4 Conclusion

In this chapter provisions within the RTR laws of NZ, Australia and the Netherlands were investigated in order to explore policies which have attempted (and sometimes managed) to challenge the normative beliefs of how the workplace operates in order to envision imaginable solutions within the context of UK law. Although the transferability of some of these suggested policies are probably a step too far in the current UK political climate, the wisdom of hindsight provides useful insights into how different countries use legislation to affect change, normalise behaviour and address social perceptions.

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[196] Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' (1990) 4 Gender and Society 139, 142.

The RTR legislation has the ability to do so much more than facilitate limited caregiving for some employees in the public arena. It could be utilised to challenge 'systems where bias is mobilized unconsciously through dominant organizational norms and values'.[197] The remit of the legislation could be extended to be more than a vehicle for flexible working; it could be an instrument to effect change at the most fundamental level of the organisation. Based on the analysis conducted herein, the 'ideal' RTR should contain the following elements in order to operate as an effective legal mechanism for change: universal application; a stronger entitlement in law and flexibility in terms of the type of changes allowed (permanent/temporary). The universal application of the RTR is aimed at normalising alternative working structures. The fact that it also symbolically disregards caregiving[198] is countered by the suggested provisions to enhance procedural flexibility which will be more effective in serving the genuine needs of caregivers. Although these elements could improve the effectiveness of the legislation to some extent, they would only have the desired impact if accompanied by a right to appeal which allows employees to challenge the employer's substantive reasons for refusing a request. Without such a right to review, the law will operate as a 'powerful illusionary and distracting function which fosters the impression that new roads to flexibility have been created'.[199] Drawing on the Dutch flexible working legislation however, it becomes possible to envisage scenarios where the law *can* actually be utilised to incite organisational change. Situating flexible working in a rights-based discourse, rather than a privilege-based one, as is the case in the UK, and allowing for robust appeal opportunities could, potentially, allow for a similar shift to occur in the UK employment sphere.

The way in which interrupted careers and flexible hours have been normalised in the Netherlands addresses more than just the issue of caring for small children; it can also be utilised to implement gradual retirement routes and allow employees to care for the elderly, whilst staying connected to the labour market. These issues are becoming prominent policy concerns in the current climate with increased life expectancy and the elderly caregiving crisis

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[197] Mark Evans, Meredtich Edwards, Bill Burmester and Deborah May, '"Not yet 50/50" – Barriers to the Progress of Senior Women in the Australian Public Service' (2014) 73 Australian Journal of Public Administration 501, 502.
[198] Annick Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (n 75).
[199] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (n 14) 117.

the UK (and other countries) are currently facing. The Netherland's flexible working regime has successfully challenged and changed the assumptions on which the world of work is built; this should be viewed as a step in the right direction to shift the workplace parameters for everyone and allow new realities to emerge.

CHAPTER 6 – ALTERNATIVE LEGISLATIVE ROUTES

6.1 Introduction

This thesis has so far: highlighted the disparity in female representation in professional realms and provided justifications for addressing the issue (Chapter 1); outlined the relevant theories upon which the analysis herein is based (Chapter 2); demarcated and critiqued the RTR as a transformative legislative regime (Chapter 3); explored the reasons for women's stymied career progression (Chapter 4) and investigated improvements to the RTR by looking at similar legislative regimes in other jurisdictions (Chapter 5). This chapter reviews measures outside the remit of family-friendly laws which could potentially enhance female representation at a senior level. The measures to be investigated range from soft law voluntary initiatives to stronger regulatory regimes, including positive action and quota implementation; these kinds of interventions are often enacted to 'create more equal, democratic societies' whilst utilising existing human capital.[1] The reason for this analysis is to shed some light on the bigger picture in the context of what is imaginable within the remit of the law. Due to the intersectionality of issues faced by women in the workplace, the law's capacity to effect change is often inhibited by its one-dimensional 'compartmentalised' approach.[2] By casting the net wider, in terms of regulatory solutions to professional women's stalled career progression, the trajectory and speed of change in the employment sphere might be hastened.

This chapter is divided into three sections. Firstly, the UK's[3] current legislative framework is discussed with a focus on permitted positive action under the auspice of the Equality Act. Secondly, the UK's wider approach to self-regulation is explored, relating specifically to reporting requirements, good practice codes and target setting. Finally, the scope for alternative routes within the employment law statutory framework is investigated, with reference to quotas

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[1] Cathrine Seierstad and Tore Opsahl, 'For the few not the many? The effects of affirmative action on presence, prominence, and social capital of women directors in Norway' (2011) 27 Scandinavian Journal of Management 44, 45.

[2] Beth Gaze, 'Quality Part-time Work: Can Law Provide a Framework?' (2005) 15 Labour & Industry: A Journal of the social and economic relations of work 89, 94.

[3] The provisions apply to Great Britain (England, Scotland and Wales) with some differences in Northern Ireland which is governed by the Northern Ireland, Sex Discrimination (NI) Order 1976 and will be indicated in footnotes.

in the Norwegian context specifically, as well as arguments raised against quota setting more generally. Having reviewed the RTR, as well as possible amendments, it has become evident that there are considerable limitations in the ability of the law to address professional women's career progression, specifically given the unequal contours of the employment landscape highlighted in Chapter 4. This chapter focusses on the extent to which alternative measures could potentially fill the gaps in addressing the various axes of workplace inequalities.

6.2 The UK's framework

6.2.1 Positive Action: The Equality Act 2010

Positive action has been described as 'a range of legislative, administrative and policy measures' which are designed 'to overcome past disadvantage and to accelerate progress towards equality of particular groups' and 'is a necessary element within the right to equality'.[4] McCrudden has attempted to construct 'a rubric of what positive action might include' within the following actions: 'eradicating discrimination'; 'factually neutral but purposefully inclusionary polices'; 'outreach programmes'; 'preferential treatment in employment' and 'redefining merit'.[5] Whilst the three former of these fall within the remit of positive action, the two latter would be slotted into the 'more controversial category of positive discrimination'.[6] The Equality Act 2010, which incorporated various equality and discrimination elements into one single piece of legislation,[7] includes three provisions dealing with positive action, Sections 104,[8] 158 and 159. In the context of this thesis, only Sections 158 and 159 are examined in

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[4] Equal Rights Trust, 'Declaration of Principles on Equality' (2008) 5 https://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf accessed 28 April 2021.

[5] Chirstopher McCrudden, 'Rethinking positive action' (1986) 15 Industrial Law Journal 219, 223-225.

[6] Chantal M Davies and Muriel Robison, 'Bridging the gap: An exploration of the use and impact of positive action in the United Kingdom' (2016) 16 International Journal of Discrimination and the Law 83, 86.

[7] Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 The Equal Rights Review 11.

[8] Section 104 deals with the composition of shortlists of political parties for the purpose of various elections (which include parliamentary elections, elections to the European and Scottish parliaments, elections to the National Assembly of Wales and local government elections). This permits political parties to rectify the misrepresentation of certain categories of people in the electorate by adjusting the selection process. Although a shortlist of only

detail due to their direct applicability to professional women's career progression. Where these provisions fall within McCrudden's paradigm, and where relevant to the focus of this thesis, they are explored further in the next section under a separate discussion.

Apart from the theoretical basis for classifying positive action, Van Den Brink provides a useful framework for reviewing the perceptions towards positive action with the view of utilising the 'tacit and internalized discourses around these programs' to evaluate its effectiveness.[9] The first discourse focuses on the need for special programmes to utilise the employment potential situated in the female labour force, provide role models for other women in the pipeline and capitalise on the feminine skillset female employees bring to the table ('the necessity discourse').[10] The second deals with 'the quality discourse', where the conceivable compromise on meritocracy could inhibit the success of the programme. Finally, 'the stigmatization discourse' highlights the negative connotations associated with female employees who might benefit from such programmes.[11] These discourses are applied to the relevant legislative provisions, discussed below, in order to access how they 'constitute, sustain or challenge unequal gender relations'.[12]

6.2.1.1 Section 158

Section 158 provides that where an employer believes that certain employees with protected characteristics[13] 'suffer a disadvantage', 'have needs that are different' or have 'disproportionately low' representation in a certain activity, the employer is not prohibited from taking 'proportionate' action to 'overcome or minimise that disadvantage', '[meet] those needs' or 'enabl[e] or encourag[e]' employees to 'participate in that activity'.[14] Examples of

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people with a certain protected characteristic is not allowed (s104 (6)), the exception is the protected characteristic of sex which means that single sex shortlists are permissible (s 104(7)).

[9] Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (2014) 30 Scandinavian Journal of Management 163, 166.

[10] ibid 167.

[11] ibid 169.

[12] ibid 165.

[13] The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Equality Act 2010, s 4.

[14] Equality Act 2010, s 158.

permitted actions in this regard include: career fairs directed at women and girls to encourage STEM career choices; apprenticeship opportunities targeted at women in the construction arena; reserved places on training courses and increased mentoring/shadowing opportunities for certain employees.[15] In terms of McCrudden's typology, Section 158 would most likely fall into the category of 'outreach programmes', which are aimed at 'bringing employment opportunities to the attention' of unrepresented groups and providing them with training to 'better equip them for competing' in the application process.[16] Although being part of a certain group is a precondition to qualify for these programmes, the 'relevance of group membership ceases' when appointment and promotion decisions are made.[17] This situates the actions permitted under Section 158 within the 'lower level of positive action' which is aimed at 'equality of opportunity, rather than outcome'.[18] This slots neatly into the liberal approach towards equality and is generally more palatable in the UK context due to its recognition of capitalist values and individual rights.[19] In addition to the non-invasive nature of these measures, it is also worth noting that there is no obligation on employers to implement any measures permitted by this legislative provision which could be part of the reason why the law has limited transformative potential in this regard.[20]

As indicated, Section 158 is a less controversial method to advance positive action in the organisation as it falls well outside the realm of reverse discrimination or affirmative action. The extent to which the 'quality discourse', generally associated with the implementation of positive action measures specifically,[21] would impact Section 158 outreach programmes is, therefore, limited. It is, however, worthwhile to investigate the 'stigmatisation discourse' in

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[15] Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice: Employment Statutory Code of Practice' (2011) Chapter 12 https://www.equalityhumanrights.com/sites/default/files/employercode.pdf accessed 28 April 2021.
[16] Chirstopher McCrudden, 'Rethinking positive action' (n 5) 224.
[17] ibid 224.
[18] Chantal M Davies and Muriel Robison, 'Bridging the gap: An exploration of the use and impact of positive action in the United Kingdom' (n 6) 91. See also pages 91 and 92 for examples of Section 158 initiatives within the UK context.
[19] Simonetta Manfredi, 'Increasing Gender Diversity in Senior Roles in HE: Who is Afraid of Positive Action?' (2017) 7Administrative Sciences 1.
[20] Chantal M Davies and Muriel Robison, 'Bridging the gap: An exploration of the use and impact of positive action in the United Kingdom' (n 6).
[21] Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (n 9).

this context as the notion that these programmes are necessary to help 'women who are deficient' can deter and stigmatise female participation.[22] Van Den Brink and Stobbe replace the 'getting help dilemma' with the 'support paradox' in order to allow for a 'critical reflection on the dominant discourse of meritocracy'.[23] This exposes the 'in-built patriarchal support systems', from which men gain in the workplace,[24] to counter any stigma surrounding the support women, and other minority groups, might receive through Section 158-type programmes. The manner in which the workplace inherently 'supports' male employees is discussed in detail in Chapter 4 under the rubric of Acker's inequality regimes; the influence of the 'old boy's network' in succession planning,[25] the extent to which men are 'pulled into the rainmaking situations'[26] and the impact of the "mini-me" approach in structuring reward systems[27] are just three examples which highlight the structural support from which men often benefit in the workplace. The "support paradox" is a useful narrative to employ in the context of this thesis as it negates the notion of 'fixing' women, which requires the female workforce to 'adapt and improve' in order to compete with their male counterparts.[28] Exposing the taken-for-granted, and often concealed, support men receive in the workplace allows for support programmes aimed at women to be regarded as '"getting even" instead of "getting help"'.[29] Additionally, 'fixing' women often implies equipping them with skills and resources to operate

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[22] ibid 170.
[23] Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (n 9) 172.
[24] Barbara Bagilhole and Jackie Goode, 'The Contradiction of the Myth of Individual Merit, and the Reality of a Patriarchal Support System in Academic Careers: A Feminist Investigation' (2001) 8 The European Journal of Women's Studies 161, 161.
[25] See Judy Wajcman, *Managing like a Man: Women and Men in Corporate Management* (Polity Press 1998) 94.
[26] Deborah Kolb and Kathleen McGinn, 'Beyond Gender and Negotiation to Gendered Negotiations' (2009) 2 Negotiation and Conflict Management Research 1, 9. See also the impact of 'exclusionary networks' in Louise Marie Roth, 'Leveling the Playing Field: Negotiating Opportunities and Recognition in Gendered Jobs' (2009) 2 Negotiation and Conflict Management Research 17, 20.
[27] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126.
[28] Katherine Dashper, 'Challenging the gendered rhetoric of success? The limitations of women-only mentoring for tackling gender inequality in the workplace' (2018) 26 Gender, Work & Organization 541, 544. See also the discussion in Section 4.2.1 of Chapter 4 on the traditional barrier of the feminine managerial skills in the context of women's stymied career progression.
[29] Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (n 9) 172.

in the preferred unencumbered manner in the upper echelons of the employment sphere.[30] As indicated in Chapter 4, this might allow a certain cohort of women to proceed up the organisational ranks, but it does not challenge the unequal employment terrain which allows and sustains the inequality regimes in favour of certain employees.

The programmes and measures permitted under Section 158 have limited potential for a direct impact on the gender dissonance in the professional realm, but they could be utilised effectively to address some of the structural disadvantages experienced by under-represented groups in the employment sphere. By situating these initiatives in a support narrative, which offsets inherent systematic assistance provided to male employees, the danger of stigmatising the beneficiaries of these programmes can be diminished. Furthermore, the 'support' permitted under Section 158 can also be viewed as a resilience enhancing mechanism under Fineman's theory; in this instance the outreach programmes allowed by the law would be regarded as 'resources in the form of advantages and coping mechanisms that cushion' vulnerable individuals exposure to misfortune.[31] The responsive state, in this context, has an obligation to provide resources in order to counter individual's vulnerability; the action permitted under Section 158 falls under Fineman's 'human resources' rubric which allows individuals to perform economic labour and earn a living[32] and consequently counter historic 'undue privilege or institutional advantage' by enhancing the resilience of individuals in the employment realm.[33]

6.2.1.2 Section 159

Section 159 allows for positive action in the recruitment and promotion areas of employment. Where an employer 'reasonably thinks' that people who share a protected characteristic 'suffer a disadvantage connected to the characteristic', or that 'participation in an activity by persons who share a protected characteristic is disproportionately low', the employer could treat the person 'more favourably in connection with recruitment and promotion' to allow the person to 'overcome or minimise that disadvantage' or 'participate in that activity'. The following

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[30] Katherine Dashper, 'Challenging the gendered rhetoric of success? The limitations of women-only mentoring for tackling gender inequality in the workplace' (n 28).
[31] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 270.
[32] ibid.
[33] ibid 274.

preconditions apply: the person who is gaining an advantage has to be 'as qualified' as another who does not have the protected characteristic; the employer should have no promotion or recruitment policy in place which favours the person who share the protected characteristic and 'proportionate means' have to be used to achieve the relevant goals. It is worth mentioning that the law requires the employer only to 'reasonably think' that disadvantage and under-representation have occurred in order to justify the positive action implemented.[34] The use of the words 'can demonstrate', instead of 'reasonably thinks', was discussed in the House of Lords debate on the Equality Bill, but rejected due to the fact that a 'higher threshold based on undisputable statistical evidence' would discourage employers from implementing the positive measures at their disposal.[35] Consequently, although 'some indication or evidence' will be required, there is no need to present 'sophisticated statistical data or research' to justify the implementation of the permitted legislative provisions.[36] Despite this attempt to lower the bar in terms of evidence required to trigger the operation of the legislation, the application of this provision has been 'relatively muted' in the UK.[37] The reasons might be attributed to the voluntary nature of the legislation, or to the fear of retaliation from the affected candidates, especially in the light of the time, effort and money generally required to initiate these types of positive action campaigns.[38] The wording and operation of Section 159 also casts doubt on where this type of positive action provision falls within McCrudden's framework, identified above.[39] A strict reading of the law suggests that it might fall within the 'preferential treatment' category as it allows a personal characteristic to be considered in decision-making to favour

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[34] Equality Act 2010.
[35] HL Deb 9 February 2010, vol 717, cols 690-693.
[36] Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice: Employment Statutory Code of Practice' (n 15) 163. Examples include reviewing their workforce against national/local data or 'making enquiries of other comparable employers'. Qualitative evidence would also be permissible, for instance, 'consultation with workers and trade unions'.
[37] Nick Johns, Sara MacBride-Stewart, Martin Powell and Alison Green, 'When is positive action not positive action? Exploring the conceptual meaning and implications of the tie-break criterion in the UK Equality Act 2010' (2014) 33 Equality, Diversity and Inclusion: An International Journal 97, 98.
[38] Equality and Diversity Forum and EDF Research Network, 'Beyond 2015. Shaping the future of equality human rights and social justice: A collection of essays from the Equality and Diversity Forum and EDF Research Network' (June 2015) https://www.equallyours.org.uk/wp-content/uploads/2015/04/EDFJ3259_Beyond_2015_publication_22.07.15_WEB.pdf accessed 28 April 2021.
[39] Christopher McCrudden, 'Rethinking positive action' (n 5).

certain employees/applicants. However, the discussion below highlights the limitations of this legislative provision to operate as positive discrimination by 'crossing the rubicon between '"outreach" and preferential treatment'.[40]

Section 159, referred to as the tie-break provision, is a useful legislative measure to consider in the context of this thesis as it permits women (as a protected group where they are under-represented in certain areas) to be favoured for promotion and recruitment purposes, provided certain criteria are met. The potential of this provision, in terms of women's career progression, is explored from three angles: the negative discourses with which it is associated; the extent to which it currently permits transformative promotion and appointment practices and finally, identification of a more effective way to achieve this goal.

In terms of the perception around positive action, Van Der Brink's 'necessity' and 'quality' discourses are probably most prevalent in a scenario envisioned by the tiebreak provision where preference is given to female applicants or employees.[41] By increasing the number of women in the workplace, organisations draw from a larger talent pool, create a more collaborative work culture and 'add benefit' in the employment setting.[42] Whilst the necessity argument might justify the implementation of a tiebreak provision, the antipathy to that argument is usually the merit concern situated in the 'quality discourse'. A more detailed discussion is conducted regarding the notion of merit in the context of quotas later in this chapter; for the purpose of evaluating the operation of section 159 it is necessary, however, to review the impact of merit, specifically in relation to the wording 'as qualified as', which triggers the tiebreak benchmark.[43] The distinction between 'equally qualified' and 'as qualified as' was considered in parliamentary debates and the former rejected to avoid a scenario where a decision was made 'solely about the equality of qualifications per se'.[44] Other factors, such as 'experience, aptitude, physical ability, or performance during an interview or assessment', as well as 'ability and suitability' had to be considered, according to the legislature, to assess if the candidates

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[40] Chantal M Davies and Muriel Robison, 'Bridging the gap: An exploration of the use and impact of positive action in the United Kingdom' (n 6) 92.
[41] Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (n 9) 167.
[42] ibid.
[43] Equality Act 2010, s159(4)(a).
[44] HL Deb 9 February 2010, vol 717, cols 658-659.

were of equal merit.[45] Whilst it is sensible to widen the scope in terms of how employees/applicants are evaluated in relation to each other, the mention of 'suitability' in this context invites elements of subjectivity into the decision-making process which could be detrimental to women. This speaks specifically to Acker's 'recruitment and hiring' inequality regime (discussed in Chapter 4);[46] where 'background and fit' is considered in the assessment of employees/applicants, the current demographic of the organisation usually dictates the decision-making process which impacts negatively on under-represented groups. Therefore, before the tiebreak provision is triggered, there are complicated assessments to be conducted in terms of candidates' merit, which often contain subjective elements.[47] Furthermore, the notion of merit has to be considered in light of the supposed autonomous individual assessed under the tiebreak provision. A meritorious system rewards such individual's achievement, effort and talent in the workplace setting whilst any 'remedial action to disadvantaged groups' are regarded as the antipathy of 'the policy of restraint and nonintervention that autonomy demands'.[48] The role of the state, or organisations, to enhance the resilience of all employees includes an obligation to pierce the autonomous veil and address 'systemic and historic inequalities lurking in the status quo.'[49] This fits into the realm of Section 159 appointments which permits employers to give preference to applicants based on a characteristic unrelated to competence, after the threshold of competence has been met. The next section reviews the extent to which the tiebreak provision challenges the normative notion of merit in its operation in order to become a transformative tool in the realm of career progression.

The extent to which merit and positive action is imbedded in the tie-break provision is investigated by Johns et al. in order to situate it within either 'positive action (despite the Equality Act 2010 stating this), positive discrimination or a redefinition of merit'.[50] Generally,

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[45] ibid.
[46] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (2006) 20 Gender and Society 441, 449.
[47] See Manfredi's suggestion about utilising equal pay legislation assessments in a Section 159 scenario to evaluate 'as qualified as'. Simonetta Manfredi, 'Increasing Gender Diversity in Senior Roles in HE: Who is Afraid of Positive Action?' (n 19) 8.
[48] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (n 31) 259.
[49] ibid 260.
[50] Nick Johns, Sara MacBride-Stewart, Martin Powell and Alison Green, 'When is positive action not positive action? Exploring the conceptual meaning and implications of the tie-break criterion in the UK Equality Act 2010' (n 37) 108.

the tiebreak provision would be regarded as less daunting if its 'intersection with merit' diminishes its impact as a mechanism for positive action.[51] The idea of the tiebreak provision is that candidates who are considered should be of equal merit; therefore 'merit has to be satisfied before the identity of each candidate is formally entered into the decision-making process'.[52] Therefore, this is not positive action, rather it is an attempt to recognise identity as part of the selection process and the definition of what merit entails; the tipping point at which identity is acknowledged, though, is very late in the process of deciding which candidates are suitable for the job after formal criteria have been met.[53] What is achieved by the tiebreak provision, however, is to reward persons from a protected characteristic group, to some extent in very specific and limited circumstances, without activating the radical elements of positive action.[54] In terms of female career progression, therefore, the provision has limited value. It is contained in the 'positive action' section of the legislation,[55] which usually attracts the negative stigma of special dispensations towards certain groups and merit concession, but arguably does very little to address unequal representation, or the reconstruction of the normative notion of merit by which it is fostered. By extending the remit of what merit in the workplace entails to incorporate identity elements, usually salient in the formal definition of meritocracy, a provision like the tiebreak could potentially be utilised to transform normative criteria associated with suitable candidates.

Noon suggests another method which could have more impact than the tiebreak provision's attempt 'to choose between equally matched candidates'.[56] The 'threshold selection' allows employers to recruit candidates using a two-step process; firstly, a threshold is established in terms of the minimum requirements applicants have to meet to be considered. Once this level has been achieved, another set of criteria is introduced to discern between the suitable candidates; 'it is suggested that achieving a diverse workforce is the primary post-threshold criterion'.[57] Unlike a quota system, this does not 'impose a demographic composition on the

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[51] ibid 100.
[52] ibid 107.
[53] ibid.
[54] ibid.
[55] Chapter 2 of Part 11 is entitled 'Positive Action', Equality Act 2010.
[56] Mike Noon, 'Simply the Best? The case for using "threshold selection" in hiring decisions' (2012) 22 Human Resource Management Journal 76, 76.
[57] ibid 77.

organisation', but rather aligns the recruitment and selection process with diversity, inclusion or social responsibility organisational goals.[58] This type of selection criteria has many advantages; from a gender point of view, though, it is specifically the 'necessity' and 'quality' discourses which are useful here.[59] The necessity of a diverse workforce is built into objective standards in the second phase of the selection process; this ensures 'a greater degree of formalisation through its transparency' and minimises discrimination claims. However, the quality/merit argument is addressed from various angles; the initial threshold ensures only suitably qualified candidates are considered, whilst the second step 'could reduce some of the informal and self-serving practices among selectors'.[60] This 'helps to resolve the persistent tension between suitability and acceptability criteria that pervades existing selection processes'.[61] Furthermore, in the threshold scenario, the candidate from the disadvantaged group does not compete with the 'highest achiever (a movable target as it depends on the other candidates)', but rather with the minimum requirement for a specific job, which is a more exact, static yardstick.[62] Although, from an organisation's point of view, it is probably justifiable to appoint the candidate who surpasses the job description requirements by the 'greatest margin', if elements of diversity are built into the 'necessity discourse' the threshold method could provide a useful alternative recruitment method.[63]

This threshold style selection process also speaks to Acker's inequality regime, relating to 'recruitment and hiring practices', which is a foundational element of the unequal workplace discussed in Chapter 4. As long as appointments are made based on a valuation of 'competence'[64] and left exclusively to the subjective judgement of individuals, the existing composition of the workforce will be replicated instead of challenged. In terms of the threshold selection method, employers might be compelled to reconsider their job descriptions in terms

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[58] ibid 77.
[59] Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (n 9) 167.
[60] Mike Noon, 'Simply the Best? The case for using "threshold selection" in hiring decisions' (n 56) 85.
[61] ibid 85.
[62] Mike Noon, 'The shackled runner: time to rethink positive discrimination? (2010) 24 Work, Employment and Society 728, 732.
[63] ibid. See also Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (n 9) 167.
[64] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 46) 450.

of the minimum requirements, as well as the assumptions underpinning them; this could allow biased acceptability judgements to be 'substituted with more extensive suitability criteria'[65] and inhibit the 'political machinations of the decision makers' to some extent.[66] When applied in this manner, the Section 159 permitted measures can be used to 're-assess merit and re-address the gender balance in senior leadership roles'.[67] This is also in line with Fineman's plea for a responsive state which can enhance individuals' resilience through the provision of opportunities, instead of bracketing off vulnerability and ignoring the consequences thereof for employees attempting to operate successfully in the employment sphere.[68]

6.2.2 Other measures

In addition to the legislative allowances in terms of positive action, the UK has generally opted for a voluntary approach in terms of increasing female representation in the higher echelons of the employment sphere. The initial report, conducted by Lord Davies, which investigated the scarcity of women on UK boards back in 2011, focused heavily on voluntary measures to address the problem. These included recommendations for FTSE 350 companies to set targets to increase female representation, disclosure obligations on quoted companies regarding the gender composition in senior positions and a voluntary Code of Conduct to which executive recruitment firms would adhere.[69] As a result of this report (and subsequent Government reviews),[70] certain measures were implemented which have evolved over the last ten years into more substantive mechanisms for addressing, to some extent, the scarcity of senior female representation, as well as the gender pay gap. These are grouped under the following headings and critiqued separately in the next section: reporting; good practice codes and target-setting.

6.2.2.1 Reporting

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[65] Mike Noon, 'Simply the Best? The case for using "threshold selection" in hiring decisions' (n 56) 81.
[66] ibid 83.
[67] Simonetta Manfredi, 'Increasing Gender Diversity in Senior Roles in HE: Who is Afraid of Positive Action?' (n 19) 2.
[68] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (n 31).
[69] Davies Review, 'Women on Boards' (February 2011) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf accessed 22 April 2021.
[70] See footnote 17 in Chapter 1 for a list of the reports.

In response to the 2017 Hampton Alexander review,[71] the UK Corporate Governance Code was amended in 2018 to include an obligation on companies to publish a copy of their policy on diversity, as well as measurable strategic objectives along with progress on reaching these goals.[72] This was in addition to existing provisions which required information regarding recruitment processes for board positions to be published. Furthermore, a new provision was included which required board effectiveness to be reviewed based on diversity, with gender being one of the parameters in this regard.[73] The code is still only 'a guide to a number of key components of effective board practice'[74] and has no compulsory enforcement mechanisms. Furthermore, the effectiveness of the 'comply or explain method' commonly associated with the Corporate Governance Code has led to compliance in terms of the 'letter' of the law, instead of the 'spirit' thereof, with 'explanation[s] which [are] totally uninformative'.[75] The absence of sanctions, a 'subjective interpretation' of what 'compliance entails' and a very limited involvement of shareholders scrutinising companies' compliance, resulted in a fairly weak instrument to affect change in this area.[76]

Stricter adherence is required, however, with regards to the publication provisions under the Companies Act implemented in 2013. Hereunder, all quoted companies[77] have to prepare a yearly strategic report wherein, amongst other information, details should be contained of the number of staff of each sex who are employees, senior managers and directors of the company.[78] Not compiling such a report is regarded as an offence which is punishable with a

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[71] Hampton-Alexander Review, 'FTSE Women Leaders: Improving Gender Balance in FTSE Leadership' (November 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658126/Hampton_Alexander_Review_report_FINAL_8.11.17.pdf accessed 21 April 2021.
[72] Financial Reporting Council, 'UK Corporate Governance Code' (April 2016), B.2.4.
[73] Supporting principle B.6 of the UK Corporate Governance Code.
[74] Financial Reporting Council, 'UK Corporate Governance Code' (n 72) 1.
[75] Sridhar Arcot, Valentina Bruno and Antoine Faure-Grimaud, 'Corporate governance in the UK: Is the comply or explain approach working?' (2010) 30 International Review of Law and Economics 193, 200.
[76] ibid 200.
[77] Section 385(2) of the Companies Act 2006 defines 'quoted companies'.
[78] Companies Act 2006, s 414C (8)(c)(i)-(iii). In the Northern Ireland context, employers with more than 11 employees have to review the religious composition of their workforce every three years to establish if they provide 'fair participation in employment'; where certain

fine.[79] A further requirement, implemented by the Financial Conduct Authority, was added in 2016 in compliance with an EU directive.[80] Under this provision, companies trading on the EU regulated market are mandated to describe their diversity policy covering age, gender, educational and professional background, as well as the aims, implementation mode and results of the policy.[81] Where no such policy is issued, the company must provide an explanation within its governance statement.[82] Whilst these measures are welcomed, there are limitations in terms of the type of companies covered, as well as the information requested; the level of reporting required is especially limited in terms of bringing 'scrutiny to the talent pipeline' and career progression in the mid-tiers of organisations.[83] The lack of enforcement sanctions associated with these reporting provisions resulted, yet again, in very blunt tools for addressing gender imparity in economic decision-making positions.

The same trend also manifests in the publication requirements of the Gender Pay Gap which has been in place since April 2017.[84] This law requires all companies with more than 250 employees to publish and report on specific gender pay gap figures on a yearly basis. Although there is no enforcement mechanism contained within the legislation, the explanatory notes state that failure to comply would be regarded as an 'unlawful act' within the meaning of the Equality Act 2006.[85] This gives the Equality and Human Rights Commission powers to act against non-complying employers. Their guidance notes set out a range of methods to encourage initial compliance, including promoting awareness, providing education and

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communities are not fairly represented the employer has to consider and implement 'affirmative action' measures which would be 'reasonable and appropriate'. Article 55 of The Fair Employment and Treatment (NI) Order 1998.

[79] Companies Act 2006, s 414A (5) & (6).

[80] European Commission, 'Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertaking and groups' (2014/95/EU).

[81] DTR 7.2.8 A(1) Corporate Governance Statements, FCA Handbook.

[82] DTR 7.2.8 A(2) Corporate Governance Statements, FCA Handbook.

[83] HM Treasury and Virgin Money, 'Empowering productivity: Harnessing the Talents of Women in Financial Services' (March 2016) 26 https://uk.virginmoney.com/virgin/assets/pdf/Virgin-Money-Empowering-Productivity-Report.pdf accessed 20 April 2021.

[84] The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172.

[85] Section 34. See also the Explanatory Note of The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172.

monitoring with further enforcement options under their statutory powers.[86] Efforts have also been made to deal with employers who report unrealistic or erroneous gender pay gap results, whilst a name and shame technique has been implemented to deal with failure of reporting. Although the non-compliance with publication provisions is therefore dealt with, there are no consequences for companies who have significant discrepancies in their pay for male and female employees, or who show no sign of improvement year on year.

The dominance of the gender pay gap is highly significant in the context of considering women's career progression. As indicated in Chapter 4, the inequality regime dealing with salary determination is one of the elements which impacts the unequal gendered landscape. Disproportionate bonus allocation,[87] career breaks[88] and part-time work schedules are factors widening the pay gap in many cases, which disproportionately impacts women, who are more likely to operate as caregivers. The publication of the gender pay gap is, therefore, only the first step in addressing the issue; if this information is not utilised effectively to address the problem it is attempting to solve, these publication requirements would amount to a mere 'culmination of a tick box exercise'.[89] Where employers are not mandated to put measures in place in response to the numbers published, the underlying elements of the workplace allowing

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[86] Equality Act 2006. These include EA Investigations (s 20), Unlawful Act Notices (s 21), Action Plans (s 22), Agreements (s 23), Orders (s 24) and Public Sector Duty Assessments and Compliance Notices (ss 31&32).

[87] London School of Economics Knowledge Exchange, 'Confronting Gender Inequality: Findings from the LSA Commission on Gender' (Gender Institute, 2016). https://www.lse.ac.uk/gender/assets/documents/research/gender-inequality-and-power-commission/Confronting-Gender-Inequality-blue.pdf accessed 29 April 2021. See also, Alice H Eagly and Linda L Carli, 'The female leadership advantage: An evaluation of the evidence' (2003) 14 Leadership Quarterly 807.

[88] The impact of career breaks is bundled into the unexplained element of the Gender Pay Gap statistics. Tom Evans, 'Understanding the gender pay gap in the UK' (Office of National Statistic 2018) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/understandingthegenderpaygapintheuk/2018-01-17#modelling-the-factors-that-affect-pay> accessed 28 April 2021. 'Non-continuous employment' is one of the factors attributed to women's negative career trajectory and consequently reflected in the gender pay gap. See House of Commons Women and Equalities Committee, 'Gender Pay Gap: Second Report of Session 2015-16' (March 2016) 12 https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/584/584.pdf accessed 29 April 2021.

[89] House of Commons Women and Equalities Committee, 'Gender Pay Gap: Second Report of Session 2015-16' (n 88) 76.

these discrepancies to persist will prevail. Using the name and shame technique could potentially accomplish what the law cannot,[90] but might also have unintended consequences in terms of the direction of the negative pay gap. Between the first and second mandatory reporting periods, four in 10 private companies have shown an *increase* in their gender pay gap.[91] This could possibly be attributed to the name and shame factor as women left those companies who performed particularly badly, which would further have amplified the gender pay gaps in those organisations.[92]

A more recent legislative amendment requires quoted companies[93] with more than 250 employees[94] to report in more detail on their executive pay ratios.[95] This compels relevant companies to include in their annual director's remuneration report data to reflect the compensation package of the CEO in relation to the median (and 25th and 75th percentile) full time equivalent employees.[96] This should be accompanied by a narrative report explaining the method used to calculate pay ratios, reasons for executives' pay ratios as well as reasons for year to year changes. Although this reporting is aimed more specifically at addressing pay disparities between executive and other employees, rather than gender pay inequalities, there is an element of the narrative reporting which could be beneficial for the purpose of female career progression. As part of the obligatory report, companies are required to include a summary of the discretion 'exercised in the award of directors' remuneration.'[97] This component of the reporting requirements could potentially shed some light on subjective considerations which favour the unencumbered in the workplace and address, to some extent, the discretionary element of salary determination, discussed in Chapter 4 as part of Acker's 'wage setting and supervisory practices' inequality regime, which shapes the unequal employment landscape. Decisionmakers' inclination to incentivise employees

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[90] Joan Acker, 'Joan Acker's review of the contributing papers, edited by Susan Sayce' (2012) 31 Equality, Diversity and Inclusion 208.
[91] Eleanor Lawrie and Clara Gulbourg, 'Gender pay gap grows at hundreds of big firms' *BBC* (20 February 2019) https://www.bbc.co.uk/news/business-47252848 accessed 29 April 2021.
[92] Dan Worth, 'Why the gender pay gap is widening' *University of Kent News Centre* (20 February 2019) https://www.kent.ac.uk/news/society/21225/expert-comment-why-the-gender-pay-gap-is-widening accessed 29 April 2021.
[93] As defined in Companies Act 2006, s 385 (2).
[94] The Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860, r 11A (2).
[95] These regulations apply to England, Scotland, Wales and by agreement, Northern Ireland.
[96] The Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860, r 19(c).
[97] ibid r 16(aa).

disproportionately through bonus rewards, although they know that 'discretion leads to bias', in the higher echelons of the employment sphere further amplifies the disparity in workplace attainment.[98] Although the executive reporting requirement is yet again not supplemented with any strong legislative enforcement mechanisms,[99] the narrative supplementing the ratio data might illuminate useful discretionary elements of the bonus decision-making process which has gone unchallenged up until now.

6.2.2.2 Good Practice Codes

As indicated earlier, the initial Davies report also recommended that search firms compiled a code of conduct to enhance 'transparency around selection criteria' in board appointments.[100] This resulted in a 'Voluntary Code of Conduct for Executive Search Firms' to which recruitment agencies could enlist.[101] Whereas only a commitment to adhere to the code is required from search firms who join the initiative, special accreditation has been given to search firms performing exceptionally well under a quantitative output measure of at least four female appointments (in the preceding year) to FTSE 350 companies.[102] Although these kind of accolades could potentially enhance the search firms' inclination towards genuinely promoting more diversity in the candidates they put forward and quantitative measurement of promoting gender diversity is commendable, the qualitative criteria is once again indicative of a mere tick-box exercise, e.g., '[v]isibly signaling their commitment to supporting gender diversity clearly on their websites, in marketing literature and in discussions with clients and candidates'.[103]

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[98] London School of Economics Knowledge Exchange, 'Confronting Gender Inequality: Findings from the LSA Commission on Gender' (n 87) 19.
[99] Non-compliance constitutes an offence which is punishable with a fine. The Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860, r 27(9) & r 426B(8).
[100] Davies Review, 'Women on Boards' 17 (n 69).
[101] Department for Business, Energy & Industrial Strategy, 'Guidance: The Standard voluntary code of conduct for executive search firms' (March 2021) https://www.gov.uk/government/publications/standard-voluntary-code-of-conduct-executive-search-firms/the-standard-voluntary-code-of-conduct-for-executive-search-firms accessed 29 April 2021.
[102] Department for Business, Energy & Industrial Strategy, 'Guidance. Enhanced voluntary code of conduct for executive search firms: Hampton-Alexander Review' (March 2021) https://www.gov.uk/government/publications/enchanced-code-of-conduct-for-executive-search-firms-accreditation-process/enhanced-voluntary-code-of-conduct-for-executive-search-firms-hampton-alexander-review accessed on 29 April 2021.
[103] ibid.

These kinds of requirements, which are generally easy to adhere to by making changes which appear, on the surface, to portray a commitment towards diversity enhancing recruitment, have very limited impact on the deep-rooted unequal contours of the employment landscape.

There are, however, elements within the code which speak directly to Acker's inequality regime of 'recruitment and hiring' and could potentially inhibit decision makers distorted judgement of 'competence'.[104] For instance, in the 'supporting candidate selection' segment, the code requires search firms to 'provide weight to intrinsic competencies and capabilities' rather than 'overvaluing certain kinds of experience'.[105] Additionally, 'broadening the candidate pool' is recommended by compiling job descriptions in a manner which would include employees beyond 'conventional corporate careers'.[106] In principle, these kinds of practices could potentially yield results in terms of the type of potential candidates put forward by search firms to employers, but there is no indication that this code has any impact beyond allowing a few recruitment companies on a preferred list by demonstrating their tick-box-like commitment to the cause. As indicated in Chapter 4, there are various elements of the recruitment and hiring processes which are persistently entrenched in the workplace, operating against those who deviate from the unencumbered norm. Practices relating to the sourcing of candidates,[107] compiling job descriptions,[108] interviewing techniques[109] and starting salaries/titles[110] are constantly reproducing the same kind of applicants for board positions. The initiatives suggested by the Davies commission and implemented by search firms are, in principle, noble ideals which could potentially change the way candidates are sourced,

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[104] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 46) 449-450
[105] Department for Business, Energy & Industrial Strategy, 'Guidance: The Standard voluntary code of conduct for executive search firms' (March 2021) (n 101).
[106] ibid.
[107] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (April 2016) https://www.equalityhumanrights.com/sites/default/files/ehrc_inquiry_ftd_ftse350_updated_22-4-16.pdf accessed 21 April 2021.
[108] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (n 27).
[109] Young Women's Trust, 'What matter to young mums?' (March 2017) https://www.youngwomenstrust.org/wp-content/uploads/2020/12/What-matters-to-young-mums-report.pdf accessed 19 April 2021.
[110] Ted Turnasella, 'The Salary Trap' (1999) 31 Compensation and Benefits Review 27. See also the impact of women's knowledge of, and access to, information regarding relative compensation packages on starting salaries in Deborah Kolb and Kathleen McGinn, 'Beyond Gender and Negotiation to Gendered Negotiations' (n 26).

interviewed and appointed. The lack of enforcement and measurement of these initiatives, as well as the voluntary nature thereof, do, however, allow organisations as well as recruitment agencies, to self-regulate without any need to genuinely scrutinise the way they have traditionally recruited board members.

6.2.2.3 Targets

In addition to the quasi-legislative measures mentioned above, the premise of the Lord Davies report and its successor the Hampton-Alexander review,[111] was to set measurable targets in order to specifically enhance the number of female members on FTSE 100 and 350 company boards. The last report by Lord Davies on the state of UK boards' compositions focused strongly on the success of voluntary measures, such as targets, in order to avoid a quota system at all costs.[112] The arguments made against quotas, in favour of a voluntary approach, related to the unsustainability of quota measures, as well as concerns regarding the impact of quotas on 'the longer term interests of women and businesses'.[113] It was argued that targets, on the other hand, produce data which allows for dialogue and, consequently, action.[114] The target set in the initial Davies report was 25% female representation on FTSE 250 boards. At the time of publication of the follow up report (October 2015), the figure stood at 26.1%. The next target was set at 33% representation over a five-year period. In the most recent report, conducted by the Hampton-Alexander steering committee, the FTSE 100 had reached the target (36.2%) as of January 2021, as had the FTSE 250 (33.2%).[115]

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[111] See footnote 17 in Chapter 1 for a list of the reports.
[112] See also the Scottish Government's 'Partnership for Change' initiative which set a voluntary target for 50% gender parity on boards by 2020. Scotland Government, '50/50 By 2020: Working for diversity in the boardroom' (February 2015) https://onescotland.org/equality-themes/5050-by-2020/ accessed 29 April 2021.
[113] Davies Review, 'Improving the Gender Balance on British Board: Five Year Summary' (October 2015) 10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482059/BIS-15-585-women-on-boards-davies-review-5-year-summary-october-2015.pdf accessed 21 April 2021.
[114] ibid.
[115] Hampton-Alexander Review, 'FTSE Women Leaders: Improving gender balance – 5 year summary report' (February 2021) https://ftsewomenleaders.com/wp-content/uploads/2021/02/HA-REPORT-2021_FINAL.pdf accessed 21 April 2021.

It is clear that the UK's approach to improving gender diversity on boards is strongly situated in the setting of targets realm.[116] The advantage of this approach includes a more customised solution to the problem with an emphasis on 'different pipeline challenges and talent management processes', rather than a focus merely on the end result.[117] As opposed to quotas, which are often perceived as being forced upon businesses, targets are more likely to be regarded as 'business-driven and business-owned', which improves the chances of various role-players to take the challenge onboard.[118] On the other hand, without any enforcement mechanisms, the impact of targets could be fragmented and 'progress is fragile' with 'intense championing and public scrutiny' needed for success.[119] It could, however, be argued that there is an element of sanctions associated with targets: the threat of quotas. The strong desire to avoid the implementation of quotas could, therefore, in itself be seen as an enforcement mechanism for measures such as targets, which then situates targets somewhere between 'compulsion' and 'voluntary' measures. [120] Since quotas are a route the UK would like to avoid at all costs, they seem to have made good progress in the target-setting arena. Additionally, in terms of addressing the unequal employment landscape, the underlying assumptions associated with targets and quotas, respectively, are also worth considering. Whilst quotas are directed at changing the numbers to ensure a critical mass which would consequently change the culture,

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[116] See, however, the Scottish context where a target of 50% female representation is contained in legislation specifically related to non-executive members of public boards. Gender Representation on Public Boards (Scotland) Act 2018, s 1(1).

[117] Ruth Sealy, Elena Doldor and Susan Vinnicombe, 'The Female FTSE Board Report 2016. Women on Boards: Taking Stock of Where We Are' (Cranfield University School of Management) 45 https://ore.exeter.ac.uk/repository/bitstream/handle/10871/24389/Female%20FTSE%20Report%20July%202016.PDF?sequence=1&isAllowed=y accessed 29 April 2021. See also Hampton-Alexander Review, 'FTSE Women Leaders: Improving gender balance in FTSE Leadership' (November 2019) https://ftsewomenleaders.com/wp-content/uploads/2019/11/HA-Review-Report-2019.pdf accessed 21 April 2021 and HM Treasury and Virgin Money, Empowering productivity: Harnessing the Talents of Women in Financial Services' (n 83).

[118] ibid 45.

[119] ibid 45.

[120] European Parliament, 'Directorate-General for Internal Policies: Policy Department Citizen's Rights and Constitutional Affairs. Gender Quotas in Management Boards' (2012) 8 https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462429/IPOL-FEMM_NT(2012)462429_EN.pdf accessed 21 April 2021.

targets seem to address the issue from the bottom up by changing 'behaviors and organizational processes' in order to impact the numbers.[121]

The mechanism which has been identified to ensure the success of targets in the context of female board representation is situated in clear goals accompanied by a stern willingness to address the problem.[122] Where 'publicly visible sector targets' are set, this provides a gauge in terms of performance and necessary intervention needed.[123] One of the downsides of target setting, however, is situated in the extent to which it can be viewed as a ceiling for progression and consequently 'limit the ambition' of those employers who already reached the relevant target.[124] What is necessary, therefore, are goals that are 'stretching but realistic', underpinned by structural change in the organisation and clear performance indicators on how to achieve these goals.[125]

6.3 Another alternative: quotas

The UK's approach to achieving a more balanced slate on boards has so far been based on a voluntary action campaign whereby organisations are tasked with the responsibility to improve their numbers through internal measures. This methodology can be juxtaposed with a system of setting quotas which has been described as a 'fixed percentage or number imposed by the State to ensure representation of women, time bound and with sanctions'.[126] Although UK businesses currently operate without the direct threat of quotas, the possibility that quotas might be enforced has been the driving force behind the urgency with which certain voluntary measures have been implemented; in a sense the 'threat of legislation to compel' becomes the

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[121] Ruth Sealy, Elena Doldor and Susan Vinnicombe, 'The Female FTSE Board Report 2016. Women on Boards: Taking Stock of Where We Are' (n 117) 45.
[122] ibid.
[123] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (n 107) 49.
[124] ibid 49.
[125] Ruth Sealy, Elena Doldor and Susan Vinnicombe, 'The Female FTSE Board Report 2016. Women on Boards: Taking Stock of Where We Are' (n 117) 47. See also the analysis on the necessity of 'aspirational target' setting in Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (n 107).
[126] Ruth Sealy, Elena Doldor and Susan Vinnicombe, 'The Female FTSE Board Report 2016. Women on Boards: Taking Stock of Where We Are' (n 117) 45.

impetus behind the success of 'voluntary' instruments.[127] It is surely not a coincidence that the first report by Lord Davies was preceded by the European Union making threats to implement quotas to address 'the lack of progress in this area'.[128] The then vice-president of the European Commission (Justice, Fundamental Rights and Citizenship), Viviane Reding, warned that she would deploy her 'regulatory creativity' to address the slow progress in female numbers in economic decision-making if other measures fail.[129] Even a Conservative prime minister, David Cameron, back in 2012, indicated that 'strong measures will not be taboo any more' if change did not occur at an acceptable speed.[130] Therefore, the warning that quotas might be implemented became the stimulus for change. In the last Lord Davies report published, one FTSE Chairmen went so far as to suggest that businesses should stand in unity against quotas and against Europe, who was trying to impose them, which certainly reflects the resistant position against quotas in the UK context.[131]

The effectiveness of legal instruments, such as quotas, compared to voluntary regimes, is well researched.[132] The arguments for (and against) quotas usually allow for various avenues of reasoning to be explored, such as the extent to which quotas actually improve the numbers in the higher echelons of the workplace and the impact of quota appointments on company

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[127] European Parliament, 'Directorate-General for Internal policies: Policy Department Citizen's Rights and Constitutional Affairs. Gender Quotas in Management Boards' (n 120) 8.
[128] European Commission, 'Giving Europe a female touch: European Commission adopts new strategy on gender equality' (Brussels, September 2010) https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1149 accessed 21 April 2021.
[129] European Commission, 'EU Justice Commissioner Reding challenges business leaders to increase women's presence on corporate boards with "Women on the Board Pledge for Europe"' (Brussels, March 2011) https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_124 accessed 29 April 2021. Although a legislative proposal aiming to set a 40% target was tabled by Reding, this has not yet become law. See her Foreword in Cathrine Seierstad, Patricia Gabaldon and Heike Mesni-Klarbach (eds), *Gender Diversity in the Boardroom. Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017).
[130] Charles Arthur, 'EU Plans Tough Quotas to Put Women in the Boardroom' *The Guardian* (4 March 2012) https://www.theguardian.com/business/2012/mar/04/women-europe-plans-boardroom-quotas accessed 28 April 2021.
[131] Davies Review, 'Improving the Gender Balance on British Boards: Five Year Summary' (n 113).
[132] See analysis in Ruth Sealy, Elena Doldor and Susan Vinnicombe, 'The Female FTSE Board Report 2016. Women on Boards: Taking Stock of Where We Are' (n 117) 45. See also Hampton-Alexander Review, 'FTSE Women Leaders: Improving gender balance in FTSE Leadership' (n 117) 38.

performance. In the next section, these issues are investigated with reference to the Norway quota example implemented in 2003, which can be utilised from a historic lesson learnt perspective. Regardless of the actual, or perceived, bearing that quotas might have on board numbers and performance, the fact that it is often used as a highly stigmatised antonym to the concept of 'merit' requires a more nuanced scrutiny of the perceptions and attitudes surrounding quotas, particularly in the UK context. The final section explores arguments generally raised against quota implementation with reference to the unequal employment landscape and women's career progression within it. A more in-depth evaluation of this type of controversial regulatory intervention allows for a clearer picture to emerge regarding its usefulness as a transformative tool in the context of this thesis.

6.3.1 The Norwegian experiment

Norway's quota regulation provides a useful platform for exploring the effectiveness of this kind of legislative regime as the deadline date for implementing the target percentage has now passed. Norwegian companies were warned that impending regulatory measures would only be initiated if private sector firms could not successfully reach the target set (40%) by July 2005 using their own preferred voluntary measures.[133] Non-compliance with this deadline by over 80% of the relevant companies led to the implementation of legislation providing for a two-year period within which the target (40%) must have been met to avoid sanctions; this was mandated on 9 December 2005 and applied to all public limited liability companies.[134] Companies registered after 1 January 2006 had to adhere to this ruling from the onset, whereas existing companies had to comply by 1 January 2008.[135] Sanctions included liquidation of companies by court order in the case of non-compliance.[136] The Norwegian government's

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[133] The original legislation had a 'self-destruct clause' which meant that the initial quota target would have been withdrawn if it was met by the deadline. Knut Nygaard, 'Discussion Paper. Forced board changes: Evidence from Norway' (Norwegian School of Economics and Business Administration, March 2011) 6 https://core.ac.uk/download/pdf/6400402.pdf accessed 28 April 2021. See also Lisa Warth, 'Discussion Paper Series: Gender Equality and the Corporate Sector' (United Nations Economic Commission for Europe, December 2009) https://unece.org/DAM/oes/disc_papers/ECE_DP_2009-4.pdf accessed 21 April 2021.

[134] Norwegian Public Limited Liability Companies Act 1997 (Norway).

[135] Mingzhu Wang and Elsabeth Kelan, 'The Gender Quota and Female Leadership: Effects of the Norwegian Gender Quota on Board Chairs and CEOs'' (2013) 117 Journal of Business Ethics 449.

[136] Lisa Warth, 'Discussion Paper Series: Gender Equality and the Corporate Sector' (n 133).

implementation of the quota system was situated in the notions of justice and utility.[137] Whereas the sharing of influence in the higher echelons of employment was presented as indicative of a more egalitarian society, the utility argument required that all human capital had to be utilised to enhance corporate efficiency.[138] Women's level of educational attainment, which could broaden the talent pool for organisations, as well as the unique skillset they bring to the table were considered within this rhetoric.[139]

Although the 40% target was reached by the relevant companies in Norway, it is also important to highlight a few intricacies regarding the way in which this was achieved. In a study conducted in 2011, based on 384 public limited companies affected by the gender quota, it became evident that after the enforcement period of the law no further progress was made in terms of the numerical representation of women on boards, which is indicative of a culture of complying with the law, but not enhanced gender responsive mindsets.[140] Whilst the numbers of board representation by women in general has met the 40% target, the composition of boards led by women increased only marginally (3.4% to 4.3%), which limits the equality of influence gained through the quota mandated system.[141] Finally, the numerical goal which was achieved might have painted a slightly distorted picture of the impact of the gender quota law; the high demand for skilled women, in some instances, was met by selecting the same women for various directorship positions[142] and was dubbed the '"Golden Skirt" phenomenon'.[143]

Apart from the quantitative evaluation of quotas on the number of women on boards, it is also worth considering how increased female representation affects the efficiency of such boards. The bearing of more gender equal board representation on firm performance, however, is not conclusive; this might be due to multiplicity of functions performed by boards which are impacted in varied degrees by women's ratios.[144] Furthermore, data is often inaccurate or

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[137] Cathrine Seierstad and Tore Opsahl, 'For the few not the many? The Effects of affirmative action on presence, prominence, and social capital of women directors in Norway' (n1).
[138] ibid.
[139] ibid.
[140] ibid.
[141] ibid.
[142] ibid. One woman held as much as 8 directorship positions in August 2009.
[143] ibid 52.
[144] Sabina Nielsen and Morten Huse, 'The Contribution of Women on Boards of Directors: Going beyond the Surface' (2010) 18 Corporate Governance: An International Review 136.

incomparable with uncertainty about the type of firms included.[145] Nevertheless, in the Norwegian context, an increased presence of female board members has shown to positively influence boards' strategic tasks; their willingness to incorporate various role-players' ideas and viewpoints 'enhance board oversight of firm strategy'.[146] On the other hand, value decline and the imposition of 'substantial costs on shareholders' have been associated with the Norwegian government's quota intervention.[147] Furthermore, the impact on organisational processes, particularly HR, seems to indicate that firms mandated to make gender quota appointments experienced an increase in 'relative labour costs' due to fewer redundancies made, which impacted negatively on companies' short term returns.[148] This could be attributed to women's 'greater concern for workers', 'vulnerability to unemployment risk' or their 'consideration of labor hoarding as a more profitable long-run strategy'.[149] These, and other, gendered outcomes of quotas on management styles and corporate decision-making, however, might be mitigated when an increased number of female board members change the 'equilibrium behavior of women and the men serving with them'.[150]

As is evident from the Norwegian experiment, the implication of hard quota laws to ensure gender equality on boards is by no means straight forward, with varied policy lessons learnt from its design and implementation. Instead of using a short, sudden two-year period to comply, a longer step-phased implementation, as well as a cap on the number of board positions per individual, might have avoided the amalgamation of influence with a few female

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See also Bøhren and Staubo on the varying impact of the gender balance law on board decisions. Øyvind Bøhren and Siv Staubo, 'Does mandatory gender balance work? Changing organizational form to avoid board upheaval' (2014) 28 Journal of Corporate Finance 152.

[145] Heike Mensi-Klarbach, Cathrine Seierstad, and Patricia Gabaldon, 'Setting the Scene: Women on Boards: The Multiple Approaches Beyond Quotas' in Cathrine Seierstad, Patricia Gabaldon and Heike Mesni-Klarbach (eds), *Gender Diversity in the Boardroom. Volume 2: Multiple Approaches Beyond Quotas* (Palgrave Macmillan 2017).

[146] Sabina Nielsen and Morten Huse, 'The Contribution of Women on Boards of Directors: Going beyond the Surface' (n 144) 143.

[147] Kenneth R Ahern and Amy K Dittmar, 'The Changing of the Boards: The impact on Firm Valuation of Mandated Female Board Representation' (2012) 127 The Quarterly Journal of Economics 137, 168.

[148] David A Matsa and Amalia R Miller, 'A Female Style in Corporate Leadership? Evidence from Quotas' (2013) 5 American Economic Journal: Applied Economics 136, 138.

[149] ibid 138.

[150] ibid 166.

directors;[151] certainly, presenting seemingly increased gender ratios in board positions by counting the same women twice did not accurately reflect the quota mandated process. Although the implementation of the quota system had a positive impact on the female board numbers at the outset, the curve flattened once enforcement mechanisms were relaxed. The sanctions associated with the reform have been severe enough to ensure compliance, even though a number of companies most likely to be effected by the reform changed their incorporation status to avoid the harsh liquidation penalty associated with non-compliance; this opt-out alternative diluted the effectiveness of the enforcement mechanisms to some extent.[152] Different firm characteristics impacted the likelihood of companies to exit the regulatory quota regime; most firms who changed their corporation status had a small number of female directors.[153] These firms weighed up the 'cost of forced gender balance' and 'suboptimal boards' against parting with the most optimal organisational structure.[154] Although there was no evident compromise on the education level of employees after the quota law was implemented,[155] the new appointees had less board level experience and were on average eight years younger than their male counterparts.[156] However, this impact of quotas can be mitigated by implementing them 'on the recruitment pipelines' to increase the supply side of qualified women available for board level appointments.[157]

6.3.2 Quotas in general

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[151] Cathrine Seierstad and Tore Opsahl, 'For the few not the many? The Effects of affirmative action on presence, prominence, and social capital of women directors in Norway' (n 1).
[152] Øyvind Bøhren and Siv Staubo, 'Does mandatory gender balance work? Changing organizational form to avoid board upheaval' (n 144). See also Kenneth R Ahern and Amy K Dittmar, 'The Changing of the Boards: The impact on Firm Valuation of Mandated Female Board Representation' (n 147).
[153] Øyvind Bøhren and Siv Staubo, 'Does mandatory gender balance work? Changing organizational form to avoid board upheaval' (n 144).
[154] ibid 152.
[155] Women appointed as a result of the reform had higher attainment levels compared to women who were appointed before the reform. Aaogoth Storvik, 'Women on Boards – Experience from the Norwegian Quota Reform' (Institute for Social Research Oslo, 2011) https://core.ac.uk/download/pdf/6662323.pdf accessed 29 April 2021.
[156] Øyvind Bøhren and Siv Staubo, 'Does mandatory gender balance work? Changing organizational form to avoid board upheaval' (n 144).
[157] Grant Thornton, 'Women in business: beyond policy to progress' (March 2018) 13 https://www.grantthornton.global/globalassets/1.-member-firms/global/insights/women-in-business/grant-thornton-women-in-business-2018-report.pdf accessed 28 April 2021.

Whilst Norway's 'experiment in board engineering'[158] provides a practical platform for exploring the effectiveness of this kind of legislative regime, it is also useful to consider the appetite for quotas in the UK context, which is largely situated in deep-rooted mindsets against such interventions. This allows some of the assumptions surrounding a quota-like system to be exposed, particularly in the context of the unequal landscape on which female employees are constantly operating. In terms of the inequality regimes highlighted in Chapter 4, it is specifically 'recruitment and hiring' systems which come under scrutiny when this type of gender balance law is reviewed; Acker attributes subjective elements within recruitment decision-making processes to the sustained inequality in the workplace.[159] The condemnation of measures such as quotas/positive discrimination or other forms of positive action, however, is often situated within the supposed gender/race neutral meritocracy of organisations' recruitment and hiring systems. In this section, the concept of merit is explored with reference to the value attributed to it in the UK employment arena, the inherent flaws in its operation and application and an alternative angle to the panacea of meritorious appointments and promotions.

6.3.2.1 Merit in the UK context

Within the UK context, the inclination towards formal equality and preoccupation with the principle of meritocracy is often situated in normative practices and beliefs that appointing 'the best man for the job'[160] is always in the best interest of corporate governance. Government supported initiatives, like the latest Hampton-Alexander report, praised stakeholders for their commitment to find, develop and appoint female appointees 'on a purely meritocratic basis'.[161] The notion that merit-based appointments are not jeopardised in the pursuit of achieving a balanced slate is publicised as part of the success story of the voluntary measures implemented in the UK to improve numbers. The concept of meritocracy is directly juxtaposed to setting

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[158] Richard Milne, 'Enlightened Norway gender paradox at the top of business' *Financial Times* (20 September 2018) https://www.ft.com/content/6f6bc5a2-7b70-11e8-af48-190d103e32a4 accessed 28 April 2021.
[159] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 46).
[160] Lord Lloyd of Berwick, 'Examination of Witnesses (Questions 204-219)' (Select Committee on Constitutional Affairs Minutes of Evidence, 27 November 2003).
[161] Hampton-Alexander Review, 'FTSE Women Leaders: Improving gender balance in FTSE Leadership' (n 117) 41.

any targets (let alone quotas)[162] and, by the same token, used as a trump card to justify board appointments in a particular way. In a report compiled by the Equality and Human Rights Commission in 2016 on the fairness and diversity of FTSE 350 board apportionments, the word 'merit' was used 30 times; every time in the context of ensuring the fairest appointment criteria or the appointment of the most deserving candidate.[163] This kind of rhetoric strongly points to Van den Brink's quality discourse, which focuses on 'objectivity, measurement and neutrality' in the context of the evaluation and promotion of employees to support merit-based decision-making processes.[164] However, the extent to which this discourse conceals the pervasiveness of the 'masculine model' of the 'ideal' unencumbered worker,[165] and other irregularities in the employment setting, is explored in the rest of this section.

6.3.2.2 Inherent flaws in the merit principle

In Chapter 4, the inhibiting elements of the workplace for professional women is discussed under Acker's 'recruitment and hiring' inequality regime with specific reference to various elements of the recruitment process, including the gendered elements of 'merit-based' job descriptions. However, it is worth exploring further what is *not* included in the notion of merit, as opposed to what is, e.g., objective gender/race neutral job requirements. Whilst compiling minimum requirements for a job description and appointing board members on visibly stronger CV's are generally defendable as merit-based corporate decisions, the 'less systematic and less transparent' principles involved in these decision-making processes are harder to detect and easier to ignore. The fact that these appointments are often made on 'the strength of being in

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[162] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (n 107). See also Tienari et al. discussing the 'juxtaposition between quotas and competence' in Janne Tienari, Charlotte Holgersson, Susan Meriläinen and Pia Höök, 'Gender, Management and Market Discourse: The Case of Gender Quotas in the Swedish and Finnish Media' (2009) 16 Gender, Work and Organization 501, 513.

[163] Equality and Human Rights Commission, 'An inquiry into fairness, transparency and diversity in FTSE 350 board appointments' (n 107).

[164] Marieke Van den Brink and Lineke Stobbe, 'The support paradox: Overcoming dilemmas in gender equality programs' (n 9) 169.

[165] ibid 171.

the right male networks',[166] '(male-dominated) precedents',[167] 'privilege and insider knowledge'[168] or having a '"hunch" about someone',[169] which inherently, but less visibly, distorts the meritocracy of the process, is however often overlooked. In this sense, merit is used to 'mask stereotypes and assumptions about certain groups'[170] whether this is based on a biased assessment of inherent ability of the applicant or personal choice of the decision maker.[171] The notion that merit in the workplace is situated in what existing employees have achieved as a result of 'superior abilities, dedication, and performance' slots comfortably into the prevalence of the unencumbered norm.[172] If 'those whose responsibility it is to make judgments of merit'[173] achieved their positions by operating in an unfettered manner, this will shape their notion of the ideal most meritorious applicant.[174] Successful women who manage to navigate this path are often used as examples of a commendable system, allowing those with the necessary qualities to succeed to do so.[175] Apart from the inherent inequalities built into this path, discussed in Chapter 4, elements of 'favouritism, cronyism, nepotism and the like'[176] disproportionately advantage certain subsets of employees and distorts the true meritocracy which supposedly prevails above all. The fairness of the system, therefore, becomes disputable and the justification for measures, such a quota system, to address it, more palatable.

6.3.2.3 Alternative angle to the merit principle

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[166] Alexa Bailey and Carol Rosati, 'The Balancing Act: A Study of how to balance the talent pipeline in business, 2013' (Inspire 2013) 11 https://assets.website-files.com/5b890e25ddb98b71ea7698fc/5bb773aa0d43be2d6a25e334_Inspire-TheBalancingAct_LR.pdf accessed 21 April 2021.
[167] Rainbow Murray, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (2014) 108 The American Political Science Review 520, 526.
[168] ibid 527.
[169] Mike Noon, 'The shackled runner: time to rethink positive discrimination? 2010 (n 62) 731.
[170] Nick Johns, Sara MacBride-Stewart, Martin Powell and Alison Green, 'When is positive action not positive action? Exploring the conceptual meaning and implications of the tie-break criterion in the UK Equality Act 2010' (n 37) 107.
[171] Mike Noon, 'The shackled runner: time to rethink positive discrimination? 2010 (n 62).
[172] Joan Acker, 'Gendered Contradictions in Organizational Equity Projects' (2000) 7 Organization 625, 630.
[173] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (1st edn, London Routledge 2002) 65.
[174] See Section 4.4.3 of Chapter 4 on the impetus to challenge the unencumbered norm in the employment context.
[175] Rainbow Murray, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (n 167).
[176] Mike Noon, 'The shackled runner: time to rethink positive discrimination? 2010 (n 62) 734.

Instead of viewing quotas as an antipathy to the merit principle, it might be worth exploring areas where quotas can enhance the conventional notion of merit in the workplace. Whilst quotas are often perceived as inhibiting an organisation's ability to make independent decisions on who to employ[177] or how to optimally construct its boards,[178] it could also force them to rethink the normative assumptions the ideal employee and board constructions are built on and potentially allow for an understanding of equality based on a redefinition of the subject at its heart. Replacing the 'white, male, property-owning or tax-paying, of a certain age and/or religion and free' measure with a 'more inclusive and realistic legal subject'[179] reframes the problem to be addressed by equality discourses through legislative interventions.[180] Stripping away the elements of job descriptions and interviewer bias, which allows heterogeneity to persist, could allow a fairer meritocracy within which a wider range of skillsets, personalities and values can thrive. The final objective of a quota system then becomes imbedded in more than just a numbers game; it becomes a mechanism whereby the 'forces that maintain the dominance of a mediocre male elite' is weakened.[181]

A good example of how quotas can potentially strengthen, rather than dilute, the notion of merit can be found in an analysis of the homogenous judiciary currently operating in England. Instead of justifying appointments in this arena based on meritocracy, merit and diversity could be

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[177] Nick Johns, Sara MacBride-Stewart, Martin Powell and Alison Green, 'When is positive action not positive action? Exploring the conceptual meaning and implications of the tie-break criterion in the UK Equality Act 2010' (n 37).
[178] Øyvind Bøhren and Siv Staubo 'Does mandatory gender balance work? Changing organizational form to avoid board upheaval' (n 144).
[179] Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133, 148 & 149.
[180] Fineman's emphasis on the vulnerable, instead of the autonomous, legal subject provides a 'more thorough and penetrating equality analyses'. Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 18.
[181] Timothy Besley, Olle Folke, Torsten Persson, and Johanna Rickne, 'Gender Quotas and the Crisis of the Mediocre Man: Theory and Evidence from Sweden' (2017) 107 American Economic Review 2204, 2240. Other advantages of quotas could be to 'suppress demand-side resistance to women candidates' and to 'boost supply by fostering a more welcoming, inclusive environment' and to create a 'more pleasant and productive legislative culture for both sexes'. Rainbow Murray, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (n 167) 522 & 529.

framed as 'complementary values'.[182] Currently, only one of 11 justices (fewer than 10%) of the UK's Supreme Court,[183] 26% of Court of Appeal,[184] and 27% of High Court judges are women.[185] This composition raises questions about how a panel of judges so far removed from the demographics of the country's population can perform its judiciary functions effectively;[186] should the diversity element of the judiciary not be a perquisite for the merit argument from the outset? Secondly, a reconsideration of the definition of merit is necessary in order to ensure the creation of a job description which is based on the genuine attributes required, instead of what is already evident from the available talent pool.[187] How merit is defined, and what constitutes suitability for the job, is very often decided based on unwritten requirements moulded by the existing members of the judiciary, this in itself begs the question of objectivity in this regard. The merit argument, therefore, becomes the stance taken by both the friends and foes of quotas; for the former a system can only operate meritocratically if diversity is built into the equation, whereas the latter consider merit and diversity quotas as mutually exclusive and conflicting principles.[188]

Although quotas are an extreme and controversial method used to address the disparity in representation in the workplace, the purpose of this section has been to illuminate arguments to counter the most fundamental critique often raised against it: merit. From the perspective of professional females' career progression, a review of the subjective and objective elements contained in a merit assessment is necessary; objectively, the 'qualifications, skills, work

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[182] Lady Hale, 'Kutton Menon Memorial Lecture: Equality in the Judiciary' (February 2013) 9 https://www.supremecourt.uk/docs/speech-130221.pdf accessed 29 April 2021.
[183] https://www.supremecourt.uk/about/biographies-of-the-justices.html accessed 30 March 2021.
[184] https://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/coa-biogs/ accessed 30 March 2021.
[185] Ministry of Justice, 'Diversity of the judiciary: Legal professions, new appointments and current post-holders 2020 statistics ' (September 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf accessed 30 March 2021.
[186] Similar arguments can be made regarding the BAME compositions of the judiciary.
[187] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (n 27). See also Lizzie Barmes and Kate Malleson, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity' (2011) 74 The Modern Law Review 245.
[188] Reyna et al. explored these dichotomies in the context of affirmative action, but it is also applicable to quotas. Christine Reyna, Amanda Tucker, William Korfmacher and PJ Henry, 'Searching for Common Ground between Supporters and Opponents of Affirmative Action' (2005) 26 Political Psychology 667.

experience' of candidates might be comparable, whilst the subjective evaluation of these criteria allows for elements of 'bias in favour of men'.[189] Although numerical equality might, therefore, be the ultimate end goal of quota systems, the auxiliary benefits imbedded in such programmes could be equally valuable for female career progression. This includes improved processes which compel decisionmakers to push 'the boundaries of their rationality to engage with alternative career paths and meaning of success', as well as questioning the notion of the 'best-fit' based on the applicant 'who presents more similarities with the existing groups and current organisational culture'.[190] The implementation of quota systems then becomes a mechanism whereby elements of Acker's 'recruitment and hiring' inequality regime can be illuminated and addressed alongside the improvement of female representation in the higher echelons of the employment sphere.

6.4 Conclusion

This thesis' main focus is the extent to which flexible working legislation can promote professional caregiver's career development. The limitations of the RTR to address the obstinate inequality in workplace structures and cultures, highlighted in previous chapters, necessitated a review of other measures which could enhance workplace progression for professional caregivers. This chapter investigated legislative measures which have been implemented by the UK Government under the Equality Act 2010, as well as soft-law approaches which are aimed at monitoring and improving gender representation specifically in the upper spheres of employment. Although some of these measures are mandatory, the narrative is generally one of 'comply-and-explain', with limited sanctions in cases of non-compliance. In this sense, the initiatives are in line with the UK's voluntary target-driven approach to solve gender imbalances which are dubbed 'more politically palatable'.[191] The UK has, however, seen some progress under this 'umbrella of a voluntary approach'; this can be attributed to the threat of quotas, the collaboration of various stakeholders and instrumental work by different equality regulators.[192] Whilst these measures have shown some numerical

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[189] Simonetta Manfredi, 'Increasing Gender Diversity in Senior Roles in HE: Who is Afraid of Positive Action?' (n 19) 7.
[190] ibid 8.
[191] Mike Noon, 'The shackled runner: time to rethink positive discrimination? 2010 (n 62) 731.
[192] Heike Mensi-Klarbach, Cathrine Seierstad and Patricia Gabaldon, 'Setting the Scene: Women on Boards: The Multiple Approaches Beyond Quotas' (n 145).

success in improving the disparity in employment, other more vigorous interventions could potentially 'permeate organisations more rapidly and extensively'.[193] In this context, an overview of Norway's quota law provided a useful platform for exploring the various business, ethical and social justifications for implementing such a strong regulatory regime. Although the data from Norway in terms of numbers is promising, the evidence around the impact of quotas on business performance is not conclusive and valuable lessons can be learnt from the design and operation of the Norwegian quota legislation, specifically, and the social experiment, generally. The UK's appetite for such severe state intervention in the realm of board representation is limited, however,[194] and the impact of leaving the European Union on the gender agenda, uncertain. Even so, this chapter has highlighted the 'revolutionary potential' of a quota-like system to 'override a gendered construction of merit', which could go a long way towards addressing some biased elements of the unequal employment landscape.[195]

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[193] Mike Noon, 'The shackled runner: time to rethink positive discrimination? 2010 (n 62) 737
[194] The UK has 'less appetite for interventionist solutions.' See Heike Mensi-Klarbach, Cathrine Seierstad and Patricia Gabaldon, 'Setting the Scene: Women on Boards: The Multiple Approaches Beyond Quotas' (n 145) 17.
[195] Simonetta Manfredi, 'Increasing Gender Diversity in Senior Roles in HE: Who is Afraid of Positive Action?' (n 19) 8&9.

CHAPTER 7 – CONCLUSION

7.1 Introduction

The main focus of this thesis concerns the potential of the RTR legislation to address the career progression of professional female employees. The analysis advances understanding of the development, implementation and operation of the RTR, and also contributes to the existing literature by situating a piece of employment law within organisational and gender theories. The exposure of the gendered, unequal employment landscape within which women must compete, along with a review of the measures specifically designed to equip them for this undertaking, provides unique insights into the reasons for their stymied headway as they attempt to advance in the professional realm. The original contribution of this thesis is situated in rethinking the problem which family-friendly legislation aims to solve. Instead of a set of well-defined barriers blocking career progression, the argument presented in Chapter 4 is that the complex and compounding obstacles employees face in their pursuit to career progression, are situated within disguised built-in workplace assumptions which create an unequal employment landscape. These inequalities are entrenched in workplace processes and structures, they reinforce the prevalence of the unencumbered worker norm and disproportionately impact those less able to conform to such an ideal. This core argument is pertinent to this thesis, relating to women with caregiving responsibilities who, as a group, due to the cumulative effect of historic, societal and organisational norms, generally cannot adhere to the unencumbered standard and suffer detrimental consequences as a result.

Although the RTR legislation should, in principle, allow for the facilitation of economic and caring labour in tandem, it has been a 'weak' legislative tool in the arsenal of employees' employment rights from the outset,[1] and the fact that the '[w]orkplace culture trumps policy or regulation' led to the teeth of this piece of legislation remaining fairly blunt.[2] Dissecting the black-letter law, its underlying rhetoric and operation (as reported in Chapter 3) reveals areas of tension between one of the law's aims (normalisation of flexible working practices) and its

[1] See Section 5.2.1 of Chapter 5 for the policy aims associated with this development.
[2] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (2016) 26 Labour &Industry: a journal of the social and economic relations of work 103, 116.

gendered bearing in practice, specifically in relation to the unequal employment landscape on which it was imposed, as explored in Chapter 4. In Chapter 5, following a discussion of RTR legislation in other jurisdictions, recommendations were made regarding amendments to enhance the law's potential as a mechanism for promoting change in this field. In addition to exploring avenues to strengthen the design and operation of the RTR, Chapter 6 touched on other soft-law and regulatory measures which could potentially assist in advancing women's careers. This final chapter focusses on the implications of the thesis findings for policy and practice in the UK context. The discussion is divided into three sections. Firstly, alternative ways to normalise flexible working are explored in order to broaden the scope of the RTR legislation as a policy tool. Secondly, improvements in the organisational realm are investigated and areas requiring further research are highlighted. Finally, legislative amendments which could bolster the operation of the RTR framework are demarcated.

7.2 Alternative avenues to explore in the flexible working realm

Originally, the main purpose of the RTR legislation was to address the difficulties caused for those who combine unpaid caregiving with paid work. Initially, the policy aims of the legislation were directed mainly at mothers, later, gender equality goals were advanced.[3] Whilst it is crucial to facilitate this interaction of work and home, especially in the context of this thesis, dealing with senior women's ability to move successfully between the private and public spheres, the potential scope of a piece of legislation like the RTR is so much wider than that. Shifting the RTR out of the realm of solving women's caregiving problems, into an arena which addresses a range of different issues for a variety of people, could be beneficial in terms of 'removing the cultural expectation that flexible working only has benefits' for certain employees, which was one of the goals of extending the RTR to all employees back in 2014.[4] Another advantage of this paradigm shift is the fact that applications from other groups of employees (who, for instance, want to work flexibly for retirement purposes, or to participate in recreational, political or charitable causes) could potentially benefit the cause of carers. The

[3] See Section 3.2. of Chapter 3 for the development of RTR legislation.
[4] HM Government 'Consultations on Modern Workplaces, Modern Workplaces Consultation - Government Response on Flexible Working: Impact Assessment' (November 2012) 8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/82794/12-1270-modern-workplaces-response-flexible-working-impact.pdf accessed 4 May 2021.

working structures required by this group, *choosing* flexible working instead of *needing* it, might 'increase the chances of finding a workable solution for the team' from an employer's point of view.[5] The scaffolding of different types of working structures is, consequently, another outcome which could be achieved in this context.[6] This notion could even be extended to 'matching' between service providers and clients where similar working structures exist between the employees from both organisations; this could allow for an open dialogue regarding flexible working practices which is often avoided in order to impress clients with an ever-present availability.[7] This requires a wider scope, not only regarding the type of employee who can utilise flexible working, but also concerning the types of issues which could potentially be addressed through the utilisation of flexible working structures. This type of analysis speaks directly to Fineman's vulnerability theory in that it allows for 'an integrated approach to society, not one of either separate spheres or competing generations'.[8] This thesis argues strongly in favour of a universal RTR in order to recognise universal vulnerability and advance the normalisation of flexible working structures for everyone;[9] this goal can be furthered by broadening the scope of alternative working structures beyond combining responsibilities in- and outside of the workplace. This section highlights some of the ways in which flexible working could proliferate into other areas of societal structures and which could potentially challenge persistent institutional barriers and cultural expectations in the workplace from a different angle; the aim is to highlight other problems which could be solved by the implementation of flexible working initiatives and so to contribute to its normalisation.

7.2.1 Epidemics

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[5] CIPD, 'Flexible Working: Impact and Implementation. An Employer Survey' (February 2005) 13.

[6] Managers in the public sector in New Zealand often reported to 'scaffolding formal FWAs with more informal approaches.' Noelle Donnelly, Jane Parker, Julie Douglas, Katherine Ravenswood and Ruth Weatherall, 'The Role of Middle Managers in Progressing Gender Equity in the Public Service (Victoria University of Wellington, September 2018) 25.

[7] Victorian Women Lawyers, 'A 360° Review: Flexible Work Practices. Confronting myths and realities in the legal profession' (November 2005) 6 https://www.vwl.asn.au/downloads/VWL%20360DegreeReport.pdf accessed 4 May 2021.

[8] Martha Albertson Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 Elder Law Journal 71, 110.

[9] Ellen Ernst Kossek, Suzan Lewis and Leslie B Hammer, 'Work-life initiatives and organizational change: Overcoming mixed messages to move from the margin to the mainstream' (2010) 63 Human Relations 3.

In 2020, the UK experienced a pandemic on a large scale when the COVID-19 virus began its spread around the world. The majority of workplaces were shut down completely in an attempt to curb the spread of the virus and emergency legislation hastily passed through Parliament placed restrictions on the movement of people; among those restrictions the law provided that people should only travel to work where it was not possible to work 'from the place where they are living'.[10] The location of work is specified under the RTR legislation as one of the flexible working options to be requested under law; where 'the change relates to where, as between his home and a place of business of his employer, he is required to work'.[11] The outbreak, which at the time of writing continues to disrupt life globally, has led to a near shutdown of normal activity. However, remote working has allowed employees in many industries to stay economically active. Although this is generally only the prerogative of knowledge workers, a forced shift has occurred in other industries as well. Many news analysts have been reporting from their home offices, whilst even Parliament has put working from home measures in place. The Members of the House of Lords were informed regarding steps to allow them to connect virtually,[12] whilst electronic voting systems[13] and working from home options were implemented[14] to ensure continuity in decision-making and governance.

Although these are unprecedented times, the rapid move to alternative working structures in an arena that has long favoured physical presence, in an unencumbered manner, above all else, is worth considering. Interestingly, it was only in January 2019 when a pilot proxy voting system was implemented in the House of Commons to accommodate parents who had a baby or adopted a child; in June 2020 this scheme was extended to permit Members who were unable to attend in person for 'medical or public health reasons related to the [coronavirus] pandemic'

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[10] The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, r 6(2)(f).
[11] ERA 1996, s 80F (1)(a)(iii).
[12] https://www.parliament.uk/business/news/2020/april1/changes-to-house-of-lords-sittings-following-easter-recess/ accessed 4 May 2021.
[13] https://www.parliament.uk/business/commons/the-speaker/speakers-commission-on-digital-democracy/electronic-voting/ accessed 4 May 2021.
[14] https://www.parliament.uk/business/news/2020/june/select-committees-to-continue-remote-working-beyond-the-summer-/ accessed 4 May 2021.

to vote by proxy.[15] The extent to which 'the arrangement for proxy voting during the pandemic initially piggy-backed on the pilot scheme' is a good example of how the vulnerability of supposed unfettered employees became comparable to that of parents in the wake of a pandemic. The way in which this pandemic has exposed the vulnerability of all people provides an emotive, but useful, avenue down which to explore the current configuration of employment law structures. This speaks clearly to Fineman's reference to universal human vulnerability with an 'ever-present possibility that our needs and circumstances will change'[16] due to the possibility of an 'accidental mishap, natural disaster, institutional failure, or serious illness'.[17] The COVID 19 virus has illuminated the manifestations of society's universal vulnerability and flexible working has rapidly become a resilience enhancing mechanism in cases unimaginable only months ago; even the Prime Minister resorted to remote connection with his colleagues during his time in isolation. The lessons learnt from this pandemic will be vast from scientific/medical viewpoints, while, for the purpose of this thesis, it has highlighted the way in which flexible working structures could respond to the vulnerability of employees in general; but, it has also allowed a rethink on how traditionally intransigent employment sectors could potentially operate in a more flexible manner.[18] The inconceivable, regarding alternative working structures, has swiftly become a reality for many unencumbered workers and the hope is that society can capitalise on these gains going forward.[19]

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[15] House of Commons Library, 'Proxy voting in divisions in the House' (Briefing Paper November 2020) 8. https://commonslibrary.parliament.uk/research-briefings/cbp-8359/ accessed 4 May 2021.

[16] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 12.

[17] Martha Albertson Fineman, 'Grappling with equality: One Feminist Journey' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge 2011) 52.

[18] Another way in which flexible working can be utilised as this scenario unfolds, relates to the return of furloughed/dismissed workers on a flexible basis. Various soft law policies, generally directed at caregivers, could also help older workers as well as people returning after time off due to illness/redundancies. See Jill Rubery, 'Regulating for Gender Equality: A Policy Framework to Support the Universal Caregiver Vision' 2015 (22) Social Politics 513.

[19] There are, unfortunately, many other areas where the virus has caused long-term damage to women's position in society and the workplace. An increase in unpaid labour, less support for part-time/short-term flexible workers and heightened work-life conflict are a few examples highlighted by a report conducted in September 2020. The Global Institute for Women's Leadership and King's College London, 'Future-focus: How can workplaces evolve for parents/career in a post-Covid world?' (September 2020) https://www.kcl.ac.uk/giwl/assets/future-focus.pdf accessed 4 May 2021.

The Covid pandemic has disproportionately impacted the female workforce in various ways; they are more likely to lose their jobs, or give them up and are more likely to be furloughed since lockdown commenced;[20] they are also more likely to take unpaid leave to provide care/schooling for children, which has further diminished their economic activity.[21] Whilst Covid's 'regressive effect on gender equality' is notable and troublesome,[22] the 'normalcy and employment security', which were facilitated by homeworking in a time of crisis,[23] has allowed new perspectives to emerge in the spectrum of alternative working which could be beneficial for the professional female cohort. The forced normalisation of flexible working, through the operation of the Government's lockdown measures, could potentially be another 'watershed moment for women's emancipation' as disaster is used as 'an opportunity for change'.[24]

7.2.2 Environmental gains

At the core of this thesis is an argument in favour of a universal RTR with the aim of normalising flexible working. The premise of the argument is situated in the removal of flexible

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[20] However, 68% of mothers' requests to be furloughed have been rejected. Trade Union Congress, 'Working mums: Paying the price' (January 2021) https://www.tuc.org.uk/workingparents accessed 4 May 2021.

[21] House of Commons Library, 'Coronavirus: Impact on the labour market' (Briefing Paper February 2021) https://commonslibrary.parliament.uk/research-briefings/cbp-8898/ accessed 4 May 2021. See also Strategy &, 'Women in Work 2021: The impact of COVID-19 on women in work' (March 2021) https://www.pwc.co.uk/economic-services/WIWI/women-in-work-2021-executive-summary.pdf accessed 4 May 2021.

[22] Any Madgavkar, Mekala Krishnan, Olivia White, Deepa Mahajan and Xavier Azcue, 'Covid-19 and gender equality: Countering the regressive effects' (McKinsey Global Institute, July 2020) https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects accessed 4 May 2021.

[23] Nicola Green, David Tappin and Tim Bentley, 'Exploring the Teleworking Experiences of Organisations in a Post-Disaster Environment' (2017) 1 New Zealand Journal of Human Resources Management 1, 10.

[24] Wenham and Morgan referred to it to as a 'watershed moment' similar to World War I which could lead to another 'opportunity for greater gender equality in the workplace'. This is due to the recognition of household and caring labour during the pandemic as well as the morphing of the spheres as the workplace physically invaded the domestic realm. Clare Wenham, Julia Smit and Rosemary Morgan, 'Covid-19 is an opportunity for gender equality within the workplace and at home: Could covid-19 help unravel gender norms?' (2020) 369 British Medical Journal (Online) https://www.bmj.com/content/bmj/369/bmj.m1546.full.pdf accessed 4 May 2021.

working from the gendered caregiving narrative to avoid the marginalisation generally associated with combining economic and caring labour. Another way in which the evolution of normative flexible working patterns can possibly be enhanced is by situating them within an environmental account, where a global dilemma is at stake, in order to widen the scope of issues addressed through flexible working patterns. The necessary levers for change are already in motion from an employee and employer perspective. Specifically, in relation to the younger workforce, the impact of commuting on the environment is becoming particularly important; this cohort of workers appear to be more 'environmentally conscious' and expect businesses to display their commitment to sound environmental goals as well.[25] Additionally, providing flexible working options for employees can contribute to 'reducing a company's overall corporate carbon footprint, which is an increasingly recognised objective for many organisations'.[26] The 'improvements to air quality stemming from lower CO^2 emissions' provides compelling reasons to reconsider the way work has traditionally been constructed based on permanent office/face-time.[27] The advantages of 'green teleworking' do not only relate to a decrease in air pollution due to fewer car and train journeys being taken, but also to savings in office space and resources. [28] Situating working from home within the measures available to address environmental concerns, in addition to work/life conflicts, could allow for a different layer of justification to emerge in relation to remote or homeworking structures. This shift could also positively alter the negotiation position of employees attempting to gain flexible working structures as the reason is situated within a goal more obviously beneficial to

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[25] O2 business, 'The flexible future of work: Employee connectivity research report' (May 2020) 3 https://static-www.o2.co.uk/sites/default/files/2020-09/The%20flexible%20future%20of%20work%20report.pdf accessed 4 May 2021.

[26] Regus, 'The Flex Economy: How decentralised workspaces are breathing new life into city centres' (Suburban Economic Survey 2019) 9 https://assets.regus.com/images/nwp/the-flex-economy-report.pdf accessed 4 May 2021.

[27] ibid 11. Kossek et al. also argued in favour of normalising teleworking which 'can reduce auto pollution and shorten commutes.' See Ellen Ernst Kossek, Suzan Lewis and Leslie B Hammer, 'Work-life initiatives and organizational change: Overcoming mixed messages to move from the margin to the mainstream' (n 9) 8.

[28] 'Green teleworking' is defined as '[w]ork undertaken away from the conventional office location using computer and telecommunications technologies involving green considerations of the environment, transport, location, office space and resource use.' Iheanyi Chuku Egbuta, Brychan Thomas, Marilia Angove, Lynne Gornall and Christopher Miller, 'A conceptual model of the contribution of Teleworking towards a Green Computing Environment' (Emerging themes in Business Conference, Newport Business School UK, 2013) 5.

the organisational ethos.[29] Capitalising on the sentiments of environmentally conscious workers, as well as organisations, could enhance the normalisation of flexible working without utilising the gendered caregiving angle which often marginalises the employees in need of such alternative working structures.

7.2.3 Retiring workforce

Historically, the focus of family friendly legislative measures has been directed at combining childcare and economic labour. This situated flexible working structures in the realm of the accommodation of the female child-bearing workforce which reinforces women's role as caregivers, whilst the retiring workforce[30] has been largely omitted from the work/life/care paradigms. The advantages of incorporating this group into the conversation are plentiful and explored briefly in this section.

The first benefit of including the retiring workforce in the discussion on family-friendly measures is situated in the Government's own admission to utilise flexible working to 'avoid the cliff-edge of sudden retirement'.[31] One of the nine essential design elements of the new social contract for retirement[32] is 'lifelong learning, longer working lives and flexible retirement' in 'phased retirement'; this allows for an extended working life and retirement based on the employee's willingness and ability to perform economic labour.[33] This type of

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[29] Although the fruits of caregiving hold definite benefits for the entire society, its value is often obscured because the 'collective good is privately produced'. Patricia van Echtelt, Arie Glebbeek, Suzan Lewis and Siegwart Lindenberg, 'Post-Fordist Work: A Man's World? Gender and Working Overtime in the Netherlands' (2009) 23 Gender and Society 188, 208.

[30] Although a 'default retirement age', which implied forced retirement at 65, has been demolished, the state pension age for men and women is currently 66, with plans to increase it further in the future. See Pensions Act 2011.

[31] CIPD, 'Flexible working in the UK' (June 2019) 2 https://www.cipd.co.uk/Images/flexible-working_tcm18-58746.pdf accessed 4 May 2021.

[32] This is based on the increased life expectancy of individuals, decline in government funded retirement assistance and general social and economic developments which necessitates a rethink of existing retirement systems which should be 'flexible and adaptable, but sustainable and resilient to ever-changing times'. AEGON, 'The New Social Contract: Empowering individuals in the transitioning world. Aegon Retirement Readiness Survey 2019 (2019) 4 https://www.aegon.com/contentassets/bac770e70deb4ea382fd8c6a8e66918b/global-report-2005192.pdf accessed 4 May 2021.

[33] ibid 5.

retirement could be facilitated by the existing operation of the RTR which currently allows *all* employees to apply for flexible working structures. The Government acknowledged the role of the RTR legislation in facilitating older peoples' 'Fuller Working Lives', along with the removal of the default retirement age and a review and reform of the state pension age and system.[34]

On a more pragmatic level, it is worth considering how flexible working could potentially accommodate the longer life expectancy of people and the current strain on pension funds, whilst also providing creative job-sharing solutions. The latter is specifically prevalent within the argument presented in Chapter 5 which deals with the practical implications of 'diluting' the RTR by allowing all employees the option to apply, instead of limiting it to caregivers. Although parents of young children often have similar needs in terms of constructing their working hours (in line with nursery/school opening and closing times), there are other groups who could use flexible working structures with very different capabilities and availabilities. These include employees utilising flexible working for non-caregiving purposes, parents with older children or those caring for an elderly/disabled relative,[35] and older employees hoping to gradually ease into retirement. Utilising flexible working options, in different forms, to address the individualised challenges employees face when attempting to combine their responsibilities could shift the parameters within which employees construct their options. The scaffolding of flexible working requests from employees at different stages of their career/life could allow for more creative alternative working solutions;[36] e.g., allowing a job share between a retiring employee who wants to phase out their involvement in economic labour gradually with a parent who might be prepared to progressively increase their hours as childcare duties become less parent intensive. On a more theoretical level, utilising flexible working for a variety of demographics could potentially accelerate its mainstreaming; this would also fall within the scope of the universal operation of the RTR to enhance various life and care scenarios. If flexible working was considered holistically to address work-life conflicts for all employees

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[34] Department for Work & Pension, 'Fuller Working Lives: A Partnership Approach' (February 2017) https://www.gov.uk/government/publications/fuller-working-lives-a-partnership-approach accessed 4 May 2021.
[35] Grace James and Emma Spruce, 'Workers with elderly dependants: employment law's response to the latest caregiving conundrum' (2015) 35 Legal Studies 463.
[36] Noelle Donnelly, Jane Parker, Julie Douglas, Katherine Ravenswood and Ruth Weatherall, 'The Role of Middle Managers in Progressing Gender Equity in the Public Service (n 6).

throughout their career stages, and not only as a way of providing a part-time-mummy track for women returning from maternity leave, it might actually speed up the trajectory of normalising alternative working structures.

7.3 Alternative organisational measures to consider

Although this thesis is mainly focused on legislative measures which could improve professional women's career progression, it became clear throughout the discussion that there are various limitations to the operation of the RTR to successfully challenge workplace cultures which sustain the status quo. In addition to these structural shortcomings, the law does not deal with the consequences of a flexible working request, this includes bearing the responsibility and paying an occupational price for utilising alternative working structures. Whilst the RTR legislation provides a process whereby requests for alternative working structures can be made, considered and communicated, there are no measures in place to regulate what happens after a request has been approved and the employee begins to perform duties in line with the amended working structure. As soon as a RTR application is approved, 'the responsibility to facilitate and manage the arrangement is shifted' from the employer onto the individual employee to 'deal with the consequences of those flexible working choices'.[37] There is no guarantee that a general restructuring of workload allocation would occur to ensure that the relevant employee's assignments will be reduced proportionately (if they decided to opt for less hours), or that other employees will not become responsible for the overspill workload. Consequently, employees often intensify their work input in thankfulness for the flexible structures afforded to them without any corresponding remunerative rewards.[38] Apart from the penalties (reduced remuneration and stalled career advancement) generally associated with flexible working,[39]

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[37] Noelle Donnelly, Sarah B Proctor-Thomson and Geoff Plimmer, 'The Role of "Voice" in Matters of "Choice": Flexible Work outcomes for Women in the New Zealand Public Services' (2012) 54 Journal of Industrial Relations 182, 196 & 197.

[38] Silvia Gherardi, 'The Gender We Think, The Gender We Do in Our Everyday Organizational Lives' (1994) 47 Human Relations 591. See also Clare Kelliher and Deidre Anderson, 'Doing more with less? Flexible working practices and the intensification of work' (2010) 63 Human Relations 83. See also Chung's 'gift exchange' notion, where flexible workers 'expand greater effort, and increase their motivation and commitment' in thankfulness for the flexible working structures granted to them. Heejung Chung, 'Work Autonomy, Flexibility and Work-Life Balance: Final Report' (WAF Project & University of Kent, May 2017) 9.

[39] See detailed discussion in Section 4.3.3. of Chapter 4 under the inequality regimes 'Wage setting and supervisory practices'.

there is also a strong flexibility stigma associated with flexible workers due to their supposed inclination to be less productive, thereby making more work for others.[40]

These outcomes, which manifest after a request to work flexibly has been approved, fall completely outside the operation of the law; the remit of the legislation, 'whether available to a few or many', is therefore of less significance when employees are constrained from, and penalised by, organisational cultures when using it.[41] The RTR legislation, and the flexible working it facilitates, has been constructed throughout this thesis as a resilience enhancing mechanism to counter the vulnerability of individuals. Fineman defines this resilience as something that allows individuals 'to respond to life – to not only survive, but thrive within the circumstances in which we find ourselves'.[42] For the RTR to genuinely enhance employees' resilience in the workplace, and allow them to thrive, it is important to address the impact of flexible working. This is a crucial element of its normalisation; it avoids the marginalisation generally associated with flexible working because it allows for a system that goes beyond access to flexible working structures to one which permits successful capitalisation thereof. Potentially, this could be done by the same legislation which facilitates flexible working (i.e., the RTR); the operation of such a legislative regime might be complicated to enforce and does not fall within the remit of this thesis.[43] The protection against indirect discrimination under the Equality Act 2010 provides some relief to female caregivers against the negative consequences of flexible working, but also reinforces their role as caregivers which a premise

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[40] Heejung Chung, 'Gender, Flexibility Stigma and the Perceived Negative Consequences of Flexible Working in the UK' (2020) 151 Social Indicators Research 521.

[41] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (n 2) 116. Durkalski makes the same argument. See John A Durkalski, 'Fixing Economic Flexibilization: A Role for Flexible Work Laws in the Workplace Policy Agenda' (2009) 30 Berkeley Journal of Employment & Labor Law 381.

[42] Martha Albertson Fineman, 'Introducing Vulnerability' in Martha Albertson Fineman and Jonathan W Fineman (eds), *Vulnerability and the Legal Organization of Work* (Routledge 2018) 6.

[43] 'Greater definition of not just the rights, but also the responsibilities, under the legislation would ensure that the burden of implementation is shared by both workers and organizations.' Noelle Donnelly, Sarah B Proctor-Thomson and Geoff Plimmer, 'The Role of "Voice" in Matters of "Choice": Flexible Work outcomes for Women in the New Zealand Public Services' (n 37) 197.

this thesis is trying to avoid.[44] Another alternative, however, would be to address the impact of flexible working from an organisational angle since this is the arena where actual decisions are made regarding the recognition of employees' efforts in monetary terms.[45] Consequently, it is worth considering which organisational safeguarding measures will allow employers to 'remain vigilant' regarding the career penalties associated with alternative working structures.[46] My research is, however, focussed on the inequalities entrenched in organisational processes, rather than the extent to which organisational change management occurs. The section therefore highlights three elements within organisational arrangements where further research is necessary to explore how transformation might yield beneficial results for female professional employees.

7.3.1 Work allocation

In Chapter 4, the unequal employment landscape was highlighted as the main reason women are not reaching the same occupational heights as their male counterparts. The 'general requirements of work' inequality regime,[47] which is deeply embedded in the unencumbered norm, permeates throughout organisations and is implemented as an exclusionary mechanism in relation to those who cannot conform. In the context of tackling the negative impact of flexible working, it is important to address the workload allocation of the flexible worker, as well as other employees, to avoid resentment. This could be achieved through a reduction in workload where the employee has chosen to work part-time in proportion to the amended reduced working structure, or by a reassessment of duties/timelines/deadlines in line with the employees' alternative working arrangement. What is required is 'organisational adjustment of governance structure, coordination and control mechanisms, and relationship and reward

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[44] See Section 1.3.3.4 of Chapter 1 on a discussion of the protection against indirect discrimination in this context.
[45] Tanja Van der Lippe, Leonie Van Breeschoten & Magriet Van Hek, 'Organizational work–life policies and the gender wage gap in European Workplaces' (2019) 46 Work and Occupations 111.
[46] Lisa M Leslie, Colleen Flaherty Manchester, Tae-Youn Park and Si Ahn Mehng, 'Flexible Work Practices: A Source of Career Premiums or Penalties' (2012) 55 Academy of Management Journal 1407, 1423.
[47] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (2006) 20 Gender and Society 441, 448.

systems' in line with the new approved working structure.[48] For example, where an employee was granted a schedule to homework twice a week, it might be useful if a clear restriction be implemented for face-to-face meetings on those days. Or, where an employee has their request for a contracted work week approved (e.g., 38 hours in 4 days), their workload allocation should be amended in line with longer daily hours and restrictions on the non-working day. This is, however, only one side of the coin; the other is the workload of other workers who do not work in a flexible manner, but who are impacted by the reduced/alternative working structures of their colleagues. It is also crucial to address 'the resourcing of gaps created by staff movement to flexible positions'[49] to deal with the resentment experienced by non-flexible workers due to the fact that they often pick up the overflow work.

7.3.2 Rewards

Closely linked to the need to rethink work allocation, is the impact of the 'wage setting and supervisory practices' inequality regime[50] which manifests in disproportionate rewards for unencumbered efforts. The RTR provides a legislative avenue around this norm, which is often utilised by mothers, as main caregivers who generally need certainty in terms of their working hours, to accommodate caregiving responsibilities. Because the disproportionate rewards associated with the unencumbered worker remain impenetrable, flexible workers often embark on two different journeys. Some intensify their workload beyond what is required, and for what they are remunerated, in an attempt to demonstrate commitment and presence and to reap the rewards associated with face-time and constant availability. Others opt out of the race by sticking to their contracted hours, in this way they indicate their preparedness not to make any headway up the organisational ladder because they have 'chosen' a healthier work/life balance,

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[48] Nicola Green, David Tappin and Tim Bentley, 'Exploring the Teleworking Experiences of Organisations in a Post-Disaster Environment' (n 23) 12. See also Skinner et al. advocating for the adjustment of targets in line with the working structure of an employee. Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (n 2).

[49] Noelle Donnelly, Jane Parker, Julie Douglas, Katherine Ravenswood and Ruth Weatherall, 'The Role of Middle Managers in Progressing Gender Equity in the Public Service' (n 6) 26. See also Ministry of Women's Affairs, 'Realising the opportunity: Addressing New Zealand's Leadership pipeline by attracting and retaining talented women' (September 2013) https://women.govt.nz/sites/public_files/Realising%20the%20opportunity.pdf accessed 4 May 2021.

[50] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 47) 450.

and they attempt to avoid resentment from co-workers who would potentially pick up their extra workload. The fact that these options 'funnel decisions into prescribed channels and often operate in a practical and symbolic manner to limit options' distorts the genuine choice narrative which is at the heart of the gender equality discourse.[51] It also allows organisations to apportion blame for stalled career progression to caregivers based on their choices, instead of acknowledging the organisation's role in constructing choices in a manner which sustains the status quo.[52]

Additionally, rethinking the way work is rewarded could also disarm some of the negative implications of flexible working. By shifting remuneration systems to focus on competence/output (what is produced), instead of commitment (what can be observed),[53] the workplace inequalities sustaining the status quo can be challenged, to some extent. The disproportionate rewards associated with unencumbered workers can further be curbed by restructuring the creditable skillset of recognition, remuneration and promotion. Regarding a supervisors' ability to manage their own and their subordinates' work/life balance as a competency to be evaluated for promotion purposes could be a way of sending a signal of what is valued by the organisation. This might incentivise, instead of deter, managers to lead the way in working flexibly and to approve and encourage flexible working by their employees. Rewarding skills such as 'the ability to work independently, manage time effectively and communicate virtually' could signal a diversion from the traditional 'work-is-primary notion of management'[54] and distort the inequalities which currently sustain the unequal employment landscape. In addition to rewarding competencies associated with a healthier work-life balance, it might be worth considering penalising the alternative. Sending a signal that long, unsociable hours will not be condoned by structuring a reward system to inhibit, rather than encourage it,

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[51] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self- Sufficiency' (2000) 8 American University Journal of Gender, Social Policy & the Law 13, 22.
[52] ibid.
[53] 'One key aspect of flexible working is being open to thinking about jobs in terms of outcomes, rather that time spent in the workplace.' House of Commons Women and Equalities Committee, 'Gender Pay Gap: Second Report of Session 2015-16 (March 2016) 23 https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/584/584.pdf accessed 4 May 2021. See also Ellen Ernst Kossek, 'Implementing organizational work-life interventions: toward a triple bottom line' (2016) 19 Community, Work & Family 242.
[54] Mary Shapiro, Cynthia Ingols, Stacy Blake-Beard and R O'Neill 'Canaries in the Mine Shaft: Women Signaling a New Career Model' (2009) 32 People & Strategy 52, 58.

might be a step in the right direction. At the Sony Corporation, an employee's promotion was delayed until he showed an inclination to work in a more balanced manner; '[m]anagement was concerned that rewarding his long hours would send the wrong message about what it takes to succeed at Sony'.[55] Adjusting the reward systems and recognition of time commitment for non-flexible workers can go a long way towards normalising flexible working and dismantling the career-suicide label with which it is often associated. This will, however, require a clear paradigm shift in terms of how work is organised, face-time perceived and commitment defined and rewarded in the employment arena.

7.3.3 Temporary flexible options

In Chapter 5, the ideal RTR is constructed and, as part of the suggested procedural improvements, it is proposed that employees should be allowed to change their working structures more regularly. Currently, the UK's RTR only allows for one request per calendar year with no option to trial alternative working structures or change working patterns temporarily to accommodate short term caregiving demands.[56] Although the administrative burden of multiple requests on employers might be a step too far in terms of legislative reform, organisations could bolster their flexible working provision above and beyond their duty under law by offering more malleable working patterns. This could be done by allowing 'additional short-term flexibility' in the case where an employee's circumstances necessitate a certain change which can be accommodated by amending their working hours for a set period of time.[57] Additionally, permitting reduced hours on a temporary basis would open up employment sectors which are traditionally resistant to part-time working and contribute to the attitudinal changes necessary to transform these workplaces. The integration of full and part-time work in the employment sector is an important factor in countering the occupational segregation generally associated with these alternative working structures,[58] whilst also providing a

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[55] Cynthia A Thompson, 'Barriers to the implementation and usage of work-life policies' in Steven AY Poelmans and Paula Caligiuri (eds), *Harmonizing Work, Family, and Personal Life: From Policy to Practice* (Cambridge University Press 2009) 214.
[56] EA 2002, s80F(4).
[57] See an example in Clare Lyonette, 'Part-time work, work-life balance and gender equality' (2015) 37 Journal of Social Welfare and Family Law 321, 328.
[58] Elena Bardasi and Janet C Gornick, 'Working for less? Women's part-time wage penalties across countries' 2008 (14) Feminist Economics 37.

'flexible mechanism that can be moulded to the particular set of circumstances' of caregivers.[59] Allowing employees to move more freely between part- and full-time work, whilst providing equal compensation and work benefits between both working structures, could significantly increase the status and worth of reduced hour working conditions.[60] Although the RTR, in its current format, has limited potential to address employee's genuine and ever-changing workplace needs, the organisation has the ability to strengthen the legislative entitlement by providing adaptable working options to serve the needs of caregivers more efficiently.

7.4 Alternative legislative measures to consider

This thesis is ultimately a piece of research into the ability of the law to address employee work/life/care dilemmas; the ultimate aim is to enhance the career progression of professional female caregivers. As indicated in Chapter 1, work/life measures are often viewed as 'popular but inadequate "band-aid" solutions',[61] and the RTR is no exception to this. It is, however, a mechanism at our disposal today which demanded an enquiry into how it can be better utilised to the benefit of female caregivers, a demand met in this thesis. In addition to the recommended amendments to the RTR, this section explores another statutory avenue which might strengthen the operation of the law dealing with the publication of flexible working data.

7.4.1 Publication of data

In Chapter 6, the publication obligations of certain cohorts of companies were discussed as one of the legislative measures implemented to address the gender pay gap and enhance transparency in relation to the gender composition of senior management in organisations. The limitations of these measures to bring about transformation were highlighted in terms of the lack of punitive elements associated with them. This section, however, briefly explores

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[59] Grace James and Emma Spruce, 'Workers with elderly dependants: employment law's response to the latest caregiving conundrum' (n 35) 474.
[60] Janet C Gornick and Alexandra Heron, 'The Regulation of working time as work-family reconciliation policy: Comparing Europe, Japan, and the United States' (2006) 8 Journal of Comparative Policy Analysis 149.
[61] Cynthia A Thompson, 'Barriers to the implementation and usage of work-life policies' in Steven AY Poelmans and Paula Caligiuri (eds), *Harmonizing Work, Family, and Personal Life: From Policy to Practice* (n 55) 218.

alternative publication obligations which could potentially be more conducive to disrupting endemic workplace cultures. The premise of these suggested measures is that flexible working as a governance structure, as well as its impact on employees' career trajectories, should be viewed as a measurable commodity. This kind of approach could appeal to the competitive side of corporations to win the 'gender war',[62] whilst tapping into the unexplored female talent pool, as well as exposing organisations who regard flexible working as a tick box exercise. The kind of information required for publication would include numbers on the flexible workforce, as well as the numbers of applications made for flexible working. In terms of the former, the required information would include the number of flexible workers in the organisation, as well as the type of flexible working at different organisational levels based on gender composition, and finally, the promotion routes of flexible workers compared to their counterparts who do not utilise any flexible structures. Flexible working application data should include an outline of the number of flexible working applications made by employees, the number approved (with specific reference to percentages approved based on the original request) and the number of rejections based on the gender of the applicant. This kind of information, in conjunction with data published under the Gender Pay Gap legislation,[63] could possibly allow potential applicants a genuine glimpse into the flexible career routes and corresponding promotion opportunities in large corporations, many who claim to be at the forefront of innovative working practices by publicly advertising their family/life-friendly flexible approaches.[64]

7.4.2 Right to request amendments

The final recommendation of this thesis relates to the provisions contained in the RTR. Based on the critique of the design and operation of the RTR, conducted in Chapter 3, the limitations within the UK's legislative response become evident. The 'ideal' RTR regime, discussed in

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[62] 'Businesses may finally have just become too embarrassed and ashamed not to improve gender diversity.' Grant Thornton, 'Women in business: beyond policy to progress' (March 2018) 7 https://www.grantthornton.co.ke/globalassets/1.-member-firms/kenya/insights/pdf/grant-thornton-women-in-business-2018-report-edited-web.pdf accessed 4 May 2021.

[63] The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172

[64] The Agile Future Forum include 22 major UK employers leading the way in transforming cultural mindsets towards flexible working. The Agile Future Form, 'Understanding the economic benefits of workplace agility' (June 2013) 3 https://www.agilefutureforum.co.uk/purpose-objectives/ accessed 4 May 2021.

Chapter 5, contains the following elements: universal application; stronger entitlement in law; more streamlined procedural elements and a right to appeal. Whilst the UK's RTR already operates in a universal manner, the other elements of an ideal flexible working system necessitate changes to the current operation of the law. Providing a stronger entitlement in law requires an amendment to the current construction of the RTR in terms of the reasons available to employers when rejecting a request. Currently, the avenues for rejecting a request cast a wide net over a range of possible options which gives the employer extensive powers to dictate an employee's flexible working structure. The RTR then becomes a mechanism for facilitation of a right to a certain process, as opposed to a right to flexible working. A rethink of the available reasons for rejecting a request might go some way to strengthening the hand of an employee to negotiate their ideal working structure. This suggested amendment links to another element of the 'ideal' RTR regime; the right to appeal. Currently, it is very easy for an employer to reject a request *and* the employee has no recourse to question the substantive reason of that rejection. Therefore, the manner in which employers can reinforce normative working structures through the acceptance (or not) of RTR applications is not challenged at any stage of the process. As indicated in the lessons learnt from the Netherlands (seen in Chapter 5), a right to appeal could enhance the operation of the RTR as a mechanism to challenge the unequal employment landscape. The final element to be addressed in terms of the wording of the law relates to the procedural aspects of the legislation. As argued throughout this thesis, a universal RTR has more transformative potential in terms of assisting senior women's career progression through the normalisation of flexible working. This does not mean, however, that the operation of the RTR should exclude caregivers in its operation. This can be specifically addressed by amending the law to ease the application process to allow for more flexible elements within it. Shortening the timeframe for employers to approve/reject a decision and allowing for more than one application a year, or a day-one right to request flexible working schedules, can enhance the law's ability to assist caregivers to combine their economic and caring labour more efficiently. These structural changes to the RTR could enhance the law as a mechanism to recognise the vulnerability of all employees within the framework of family-friendly legislation, which is helpful for the cohort of women at whom this thesis is directed.

7.5 Conclusion

This thesis explored the potential of a piece of legislation, the RTR flexible working, to facilitate female career progression. It became clear in the analysis conducted herein that the

RTR has definitely 'set the stage for a negotiation process'[65] and provided parameters within which managers are legally required to consider requests. The fragility of the gains made through the implementation of the RTR is, however, highlighted throughout; this became especially pertinent when considered in the context of the strong social, attitudinal and cultural operation of the workplace on which the RTR was imposed, viewed through the lens of Acker's inequality regimes.[66] Where 'new norms are constantly being inscribed on the social script' that is designed to sustain the status quo, the pace and degree of change is always going to be stymied.[67] On the one hand, some amendments to the current construction of the RTR flexible working provisions can strengthen its ability to break down the gendered wall of resistance associated with flexible working and upward career mobility. On the other hand, the intricate ways in which inequalities are reinforced in the employment sphere revealed the limitations of the current discursive structures of the law to offer avenues of reform.[68] An exploration of the constellation of family-friendly laws, within which the RTR is situated, as well as other legislative regimes, such as quotas and publication obligations, were conducted to explore the remit of the statutory realm to address the stymied career advancement of female employees. The notion that the prevalence of the unencumbered worker could be inhibited by the recognition of the universal vulnerability of all individuals through the implementation of policies and workplace practices, provided an alternative lens to be cast over traditional and normative career/care/life paradigms.[69] These constructions could hold benefits for female career progression routes into the higher echelons of organisations. The hope is, however, that the pockets of transformation emerging may be the canaries lowered down the mine tunnels to establish safe oxygen levels, 'signaling to organizations that the conventional career model' is not fit for a 21st century workforce.[70]

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[65] Hugh Collins, 'The Right to Flexibility' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, And Family: Critical and Comparative Perspectives* (Oxford University Press 2005) 119.
[66] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 47).
[67] Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45 Osgoode Hall Law Journal 773, 811.
[68] Joan Acker, 'Inequality Regimes: Gender, Class and Race in Organizations' (n 47).
[69] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' in Martha Albertson Fineman (ed), *Transcending the Boundaries of law: Generations of Feminism and Legal Theory* (Taylor and Francis Group 2010) 161, 166
[70] Mary Shapiro, Cynthia Ingols, Stacy Blake-Beard and R O'Neill 'Canaries in the Mine Shaft: Women Signaling a New Career Model' (n 54) 53.

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