Scale) was applied. Second, Grace's income was calculated by assuming an 8% return on her inheritance (she was unemployed at the time of trial). Third, the costs between Wendy and Grace were apportioned by applying the formula under the *Child Support (Assessment) Act.* Thus, the court held that Grace was to bear approximately two-thirds of the cost of child raising. However, when the promise was made (which had to be prior to insemination under promissory estoppel's constraints), and indeed for most of the relationship in which the children were raised, Grace was either engaged in low-paying employment or was on unemployment benefits. Thus, when Wendy relied on Grace's financial support in having the children, Wendy was surely relying on the support of a *low income earner* — not on the support of a woman who many years later would inherit $500,000 (and have her contribution apportioned by a statute which did not apply to her). It is clearly a fiction to say that Grace represented, or that Wendy relied on, a promise to support the children at the top end of the Lee Scale until adulthood.

Final orders and costs have not yet been determined, so it is not known whether an appeal will proceed. If it does, the two issues discussed above, the timing of the point of promise and the scope of the promise, may well be weak spots, which could allow the Court of Appeal to overturn the case on purely technical grounds and ignore the policy import of the decision.

Recognition of lesbian families?

Despite the fact that the decision in W v G does go some way towards recognising lesbian families, it does so in what is effectively a legal and social vacuum. The decision applied a case about building supermarkets to raising children without acknowledging the wider legal context in which the parties were and are operating. Grace was required by equity to stand by her promise to be a parent, to the tune of $150,000, without being recognised as a parent in any other area of law. If Grace had died or been injured, the children would have had no right to compensation or to her estate if there was no will (although they could have applied under the *Family Provision Act 1982* (NSW), as it is broader than all other States, except the revised ACT version). If Wendy had died or been injured, Grace would have had no right of guardianship.[4] Although Grace could have approached the Family Court of Australia seeking custody or access to the children,[5] the extent to which the court would recognise her claim is questionable. Non-biological parents are generally referred to as a 'stranger' and biological parenthood has been regarded as a 'significant factor' by the court in assessing which proposal advanced the welfare of the child.[6] Moreover, in child custody cases involving lesbian mothers and their male ex-partners, the court has continued to issue judgments which are at best disrespectful and at worst pathologising of (biological) lesbian mothers, as recently as last year.[7] Thus, the technical right in equity of a lesbian co-mother to approach the court may indeed do very little in fact to provide equality between lesbian and heterosexual families.

Conclusion

When the broader context of the failure of the law to recognise lesbian partnerships and parenthood is acknowledged, it is hard to see the *W v G* case as an unequivocal improvement in the legal position of lesbian families. Effectively, we have the right to sue each other and thereby save the state money on child support, but not much else. Of course, this is not the fault of the court in *W v G*. Like most litigation, issues are privatised and individualised and the Court could only do justice with the specific issues put to it. The case does, however, serve to highlight how iniquitous this area will be until legislation begins to fill in some of the gaps.

Jenni Millbank teaches law at the University of Sydney.

References

1. See *Child Support (Assessment) Act 1989* (Cth) ss.3, 5, 29.
2. See 'An Implied Promise to Parent: Lesbian Families, Litigation and W v G', (1996) 10 *Australian Journal of Family Law* 112.
3. *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Promissory estoppel as a 'sword', a way of actively enforcing what would otherwise not be a legal obligation, stems from this case.
4. See Lesbian and Gay Legal Rights Service, *The Bride Wore Pink*, 2nd edn, Gay and Lesbian Rights Lobby, Sydney, 1994.
5. The *Family Law Act 1975* (Cth) s.65C(c) provides that 'any other person concerned with the care, welfare or development of the child' can apply for a parenting order (which encompasses residence or contact, formerly known as custody and access). The Act also states that a parenting order may be made in favour of a person who is not a parent: s.64C. This is a vast improvement on many other jurisdictions where lesbian co-parents do not even have standing to approach the court, see, for example, the American cases: *Curiale v Reagan*, 222 Cal App 3d 1597 (3d Dist 1990); *Nancy S v Michele G* 228 Cal App 3d 831 (1st Dist 1991): *Alison D v Virginia M*, 572 NE 2d 27 (Ct App 1991).
6. See, for example, *Drew v Drew*; *Lovett (interveners)* (1993) 16 Fam LR 536, limited by *Hodak and Hodak and Newman* (1993) 17 Fam LR 1.
7. See, for example, the demeaning eight step test applied to a lesbian mother in *L and L* (1983) FLC 91-353, including questions such as, 'Whether a homosexual parent would show the same love and responsibility as a heterosexual parent'. A recent case involving a gay father adopted this approach: *Doyle* (1992) 15 Fam LR 274. The Family Court has taken such steps as banning mothers from living with a female lover: the most recent of which was *G and G* (1988) FLC 91-939 (interim order, lasting one year). In *A and J* (1995) 19 Fam LR 260, the trial judge expressed the view that 'it was inappropriate for children to observe overt displays of affection between persons in a committed and continuing homosexual relationship'. The court granted the custody to the husband despite the evenly balanced claims of the parents, on the grounds that it was of overriding importance that the child have a 'balancing' male influence to counter the effects of the mother's lesbian relationship. This was upheld on appeal by the Full Family Court.

MATERNITY RIGHTS

The baby or the job?

CAROLINE ALCORSO discusses the experience of Working Women's Centres.

Working Women's Centres are community-based, government-funded information resource centres for working and unemployed women.

Although there is considerable interstate variation, all centres provide information, advice and support on employment issues, including:

- unfair dismissal
- discrimination
- pay and employment conditions
- maternity rights and entitlements
- health and safety
  workplace bargaining and
- vocational support.

The NSW Working Women's Centre, in Parramatta, NSW, is one of the four *new* centres across Australia. In late 1994, coalitions of women's organisations, trade unions and (in

Queensland) the State Government received funding from the Federal Department of Industrial Relations to establish industrial relations information services for women in NSW, Tasmania, Northern Territory and Queensland. These centres now form a network with the Adelaide WWC, which has a long and quite different history, emerging out of the labour movement in the mid 1970s.

The centres represent a new type of community service. In part they can be seen as a response to the void in the private sector workforce caused by the declining presence of trade unions and other bodies that represent workers' interests. In this respect, they can be seen as part of a new species of comunity-based industrial service, similar to, for example, JobWatch in Victoria. WWCs are also a response to the distinct needs of *women* workers in male-dominated and sexist workplaces and labour markets, and grew out of women's protests at the decentralisation of industrial relations and the adverse impact this would have on women workers.

Maternity rights — the experience of NSW

In the first 18 months of our full operation, queries and complaints on maternity entitlements and rights have averaged around 10% of all client calls — some 150 from January 1995-August 1996. Even when we add in those sex discrimination and employment termination cases where maternity issues are involved, this is well behind the number pertaining to the less gender-specific issues such as unfair dismissal, remuneration, employment conditions and workers' compensation.

Typically, women inquiring about maternity issues seek information and support on being denied their leave entitlements or on being refused their old (or another suitable) job on return to work. In some cases, once armed with information, callers are able to negotiate an acceptable outcome with their employers, with or without our direct assistance.

However, there seems to be a distinct syndrome whereby employers try to retain the temporary replacement worker, and downgrade or harass the return-to-work mother. Often the replacement worker has been taken on for a lower wage; perhaps also the employer perceives a new mother as potentially unreliable.

Being dismissed following pregnancy also remains depressingly common, ironically, in two recent cases even amongst women employed as private nannies! One wonders about the social chaos that would result if, on falling pregnant again, mothers were suddenly regarded as unable to care for their existing children.

The scale of these issues amongst the many problems facing our clientele may not, on first glance, seem dramatic. Comparing frequencies is, however, fraught with problems, as women are far more likely to seek information and pursue action over a traumatic event like being sexually harassed than they are over denial of their maternity leave.

Limited rights

Maternity rights themselves, while important, provide relatively little protection. When one examines the typical complaint to the WWC from pregnant women and new mothers, one is struck by the thinness of the maternity rights enjoyed by Australian women. The best most women can expect is leave without pay, and for the 30% of women who are employed on a casual basis, and a further proportion who have not been with that particular employer for 12 months, not even unpaid leave is available. This very thinness militates against a large number of complaints, and against consciousness about rights.

For this reason, the WWC often proposes to women that they seek conditions above the minimum, especially where their particular minimum is nothing. We have also looked with interest at some of our recent cases which do test the limits of the law, especially with regard to casual workers. We have found that the most vulnerable women occupy precisely those employment types that in turn are likely to deny them access to maternity leave and other rights.

The problems of a 'regular casual'

In one such case, a Vietnam born immigrant woman who worked as a process worker in a large multinational food company had been retained as a full-time 'regular casual' for nearly four years. During this time she had not taken any leave, as she earned a low wage and had pressing financial needs.

Immigrant women appeared more likely to be retained as casuals at this factory; for example, Anh had a Vietnamese friend who had worked there six years as a 'casual'.

Although it had been explained to her that she was not entitled to maternity leave, she had been reassured that she could just call the company when she was ready to return to work and go back to her old job. However, a few weeks after the baby was born, Anh received notice of her termination benefit from the superannuation company.

Alarmed, Anh called her supervisor and said that she wanted to return to work. Her supervisor procrastinated, and eventually said there was no job for her. When Anh, very upset, pressed people at the company, explaining that she needed the money desperately, she was banned from the worksite for being disruptive.

An out of court settlement of some three months pay was reached after Anh made application to the Australian Industrial Relations Commission for unfair dismissal. However, an anti-discrimination claim also made by her at the time was rejected by the NSW Anti-Discrimination Board on the basis that workplace conflict, as much as discrimination, could have been the cause of her problems, and that the company had not shown discrimination in the past — for example, permanent women workers had not been dismissed after they had had babies. (The 'conflict' referred to was a sharp exchange between Anh and her supervisor in the late stage of pregnancy when she sought a different production line job where she could sit down instead of standing.)

What this case highlights is that the lack of entitlements for casual workers (and approximately half of all casual workers are estimated to be 'regular casuals') ensures that the already precarious position of these workers is made more precarious and unsafe, both while they are at work and following childbirth. What justification can there be for their exclusion from this most appropriate entitlement when in NSW casual workers *are* entitled to long service leave?

The experience of the WWCs confirms that significant numbers of women continue to have difficulty in obtaining their maternity entitlements, and are especially vulnerable to dismissal when they are pregnant, or have had a child. It also shows that an increasing number of women (that is, long-term casuals) fall through a very patchy legislative net, and have few rights or legal protection at all. While enforcing awareness of and compliance with existing laws is clearly

important, extending and strengthening the employment rights of women workers in the area of maternity must be a priority for the labour movement and all governments.

See below for contact information, including Free Call numbers, for all the Centres. Contact the Centre in your State to find out more about, or to assist with, its work.

Caroline Alcorso is Director of the New South Wales Working Women's Centre.

WWC CONTACT DETAILS

NSW
tel (02) 9689 2233
free call 1800 062 166

QUEENSLAND
tel (07) 3224 6115
free call 1800 621 458

ADELAIDE
tel (08) 8267 4000
free call 1800 652 697

TASMANIA
tel (002) 34 7007
free call 1800 644 589

NORTHERN TERRITORY
tel (08) 8981 0655
free call 1800 817 056

Failing to deliver

CAMILLA PALMER examines the impact of European law on maternity rights in Britain.

Good maternity rights, high quality childcare and a flexible working environment which enables women to combine work with family responsibilities are the key to women's equal participation in the labour market. The UK has failed on all scores. The prediction that by the next century 20% of women will choose to remain childless, in order to pursue a career, is a damning indictment. Despite the increasing number of women entering and staying in the labour market, there is still a glass ceiling, which few women break through, and full-time women employees receive only 72% of men's gross weekly earnings.

Maternity leave and pay

Prior to 1994 women who had worked for their employer for less than two years were not entitled to maternity leave. The evidence shows that many were simply dismissed. The European 'Pregnant Workers Directive' forced a reluctant UK Government to introduce 14 weeks maternity leave for all women, whether permanent or temporary employees, irrespective of the number of hours they work or how long they have worked for the employer.[1] In addition, women who have worked for their employer for two years are entitled to 'extended maternity absence' — that is, they can return to work up to 29 weeks after the birth of a baby.[2]

The reality is that many women cannot afford to take the longer period. Statutory maternity pay (SMP), which is payable to employees earning more than $122 a week, is payable for 18 weeks @ 90% of pay for the first six weeks and a flat rate of $109 a week for the following 12 weeks. (This is paid by the employer, but 90% is refunded by the Government.) Thus, women who are only entitled to 14 weeks leave must return to work and will lose four weeks SMP. This is just one of the anomalies in the system. Another is the different treatment of women during their 14-week maternity *leave* period and the extended maternity *absence*.

During maternity leave women are entitled to the benefit of the terms and conditions of their contract *except* for 'remuneration'. Remuneration is the woman's basic pay. All other benefits, such as mortgage subsidy, insurance, employer pension contributions, and holiday leave continue to be received or accrue during the 14 weeks.

What happens at the end of the 14 weeks, during the extended 'maternity absence' period? The Employment Appeal Tribunal (EAT) clearly does not know. Two EAT decisions say that the contract continues, but are not clear about whether the *terms and conditions* of the contract continue.[3] The third decision suggests that the contract comes to an end — unless and until the woman exercises her right to return to work.[4]

Dismissal and discrimination

It is now *automatically unfair* to dismiss a woman for any reason connected with her pregnancy, childbirth or maternity leave. The employer has no defence.[5] This protection was introduced in 1994 at the same time as Carole Webb was arguing before the European Court of Justice (ECJ) that it was *discrimination* to dismiss her because she was pregnant.[6]

It took eight years for Carole Webb to win her case. All the British courts were against her. The ECJ, to which the case was referred by the House of Lords, held that it *was* unlawful to treat a woman less favourably because she was pregnant. It was not necessary to compare her to a man in a similar situation (the sick man comparator). Nor was it possible to argue that the discrimination was *not* because the woman was pregnant but because of the *consequences* of her pregnancy — that is, she was not available to work.

Webb established that any less favourable treatment of a woman because she is pregnant, has had a baby or has taken maternity leave is unlawful discrimination. This would include a failure to recruit, promote or train a woman, denial of any benefit or dismissal. A discrimination claim should always be brought (as well as an unfair dismissal claim) because, unlike unfair dismissal, compensation can be awarded for injury to feelings and there is no limit to the amount of compensation.

Other maternity rights

All employees are entitled to *paid* time off for ante-natal care, which includes relaxation classes. In addition, pregnant women, new and breastfeeding mothers are entitled to protection from health and safety risks. Employers must carry out an assessment of the risks and where there is a risk, the employer must either alter the working conditions to remove the risk, give the woman available suitable alternative work, or if there is no such work, suspend her on full pay.

A 'right' to return to work part time or as a job share?

Many women want to return to work part-time. Refusal to allow a woman to work part-time may be indirect discrimination. Indirect discrimination is where there is a 'requirement' or 'condition' (for example, to work full-time), which a considerably smaller proportion of women than men can comply with (90% of part-timers are women), which the employer cannot justify and which is to the woman's disadvantage because she cannot comply with it. Women with children find it harder to work full-time and it is not enough to say they *could* do so by employing a childminder.

The main issue is whether the requirement to work full-time is necessary. Employers often argue it is administratively difficult to have part-timers, or they are inconvenient