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To cite this article: Megan Pearson (2023): Asking the carer question: caring and working during Covid-19, King's Law Journal, DOI: [10.1080/09615768.2023.2236379](https://doi.org/10.1080/09615768.2023.2236379)

To link to this article: <https://doi.org/10.1080/09615768.2023.2236379>



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Published online: 02 Aug 2023.



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# Asking the carer question: caring and working during Covid-19

Megan Pearson\*

## 1. Introduction

In a celebrated article, Katharine Bartlett argued for a feminist legal method of 'asking the woman question', 'designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups'.<sup>1</sup> This method includes asking whether women have been left out of consideration in a decision or policy, how might this be corrected and what difference it would make if they were considered. In doing so, this method highlights the presumptions made by law (or in other institutional practice or decision making) and asks whose point of view these presumptions reflect. It does not assume that all women will speak with a single voice, but instead opens a space for women to raise their own experiences.

This method can be extended to other groups whose voices have not traditionally been dominant. Carers and those in care-giving relationships are one such group. Numerous feminist writers have argued that care and caregiving relationships have been, and continue to be, sidelined and seen as a private or family matter rather than a matter of fundamental public importance.<sup>2</sup> This is part of a broader tendency within liberal theory to

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1 Katharine Bartlett, 'Feminist Legal Methods' (1990) 829 Harv Law Review, 836

2 See among many others eg Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 Stanford Law Review 1; Susan Moller Okin, *Justice, Gender and the Family* (Basic Books, 1991); Carol Pateman, 'The Patriarchal Welfare State' (1988) 2 The Welfare State Reader 134; Raia Prokhovnik, 'Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness' (1998) 60 Feminist Rev. 84; Robin West, 'Rights, Capabilities and the Good Society' (2001) 69 Fordham L Rev 1901.

perceive the imagined liberal person as autonomous and independent.<sup>3</sup> In reality though, as Martha Fineman has identified in her work, vulnerability and therefore the requirement of care, far from being an unusual state, is fundamental to the human condition.<sup>4</sup> Everyone requires care at some point(s) in their lives and everyone is interdependent on others. This need for care is not only inescapable. Care giving relationships, of whatever kind, are usually of central importance to people's lives. Herring has therefore argued that law's relationship to care should go beyond mere accommodation so that care giving and care relationships should be celebrated, rather than begrudged.<sup>5</sup>

While care and caregiving relationships are valuable and rewarding, they are also demanding. In many situations, care cannot be given by one person without it placing an entirely intolerable burden on them. Furthermore, despite its importance, the demands of care are not spread equally, but are, among other disparities, gendered, meaning that this work has been and continues to be disproportionately done by women. This leads to the 'second shift':<sup>6</sup> care work done by women on top of their paid work, placing an additional burden on them and having an impact on the type of work and working pattern 'chosen' and on career progression. In the term given by Eva Kittay, carers require 'doulia'. She derives this concept from the Greek word for service and now used in the word 'doula': someone who provides assistance during and after childbirth to enable the mother to care for her child.<sup>7</sup> In a similar way to the supportive role given by a doula during this limited period, Kittay argues that doulia requires support for the caregiver over the full course of the care relationship to enable her<sup>8</sup> to give good and responsive care without overly burdensome demands being placed on her. Kittay therefore defines doulia as 'the public responsibility to provide support for the caregiver so that the caregiver can give care without depleting herself

<sup>3</sup> 'The imagined autonomous liberal subject is constantly at the peak of physical power and independence, its powers and capacities never deteriorating, its body never ageing'. Ellen Gordon-Bouvier, 'Vulnerable bodies and invisible work: The Covid-19 pandemic and social reproduction' (2021) 21 *International Journal of Discrimination and the Law* 212

<sup>4</sup> See Martha Fineman and Anna Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, (Ashgate Press 2013); Martha Fineman and Jonathan Fineman, *Vulnerability and the Legal Organization of Work* (Routledge 2017); Martha Fineman, 'Vulnerability and Social Justice' (2019) 53 *Valparaiso Law Review*; Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133. Fineman's work has been developed and applied to different contexts by many others, including to labour law. See eg Gemma Mitchell, 'A Right to Care: Putting Care Ethics at the Heart of UK Reconciliation Legislation' (2020) 49 *ILJ* 199; Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar 2016), 'The Potential and Limitations of the Vulnerability Approach to Labour Law' in Daniel Bedford and J. Herring (eds) *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge 2020).

<sup>5</sup> Jonathan Herring, 'Ethics of Care and Disability Rights: Complementary or Contradictory?' in Loraine Gelsthorpe and others, *Spaces of Care* (Hart Publishing 2020)

<sup>6</sup> Arlie Hochschild & Anne Machung, *The Second Shift: Working Families and the Revolution at Home* (Viking Penguin 1989)

<sup>7</sup> Eva Kittay, *Love's Labor: Essays on Women, Equality and Dependency* (Routledge 2019, 2nd ed); Eva Kittay and Ellen Feder (eds) *The Subject of Care: Feminist Perspectives on Dependency* (Rowman & Littlefields 2002).

<sup>8</sup> As does Kittay, I use 'her' here not because such care should be provided by women, but because it disproportionately is.

and her resources'.<sup>9</sup> It is not about taking over the care from the caregiver or interfering in the care relationship, but supporting the carer 'to fulfil responsibilities to the dependent without exploiting [her] labor and concern' and enabling both parties in the care relationship to 'thrive'.<sup>10</sup> Doulia therefore requires as a matter of fairness a social duty not to exploit carers even when they are willing to provide care under unfair conditions, thus avoiding what Taylor-Gooby calls 'compulsory altruism'.<sup>11</sup> This duty includes support through social institutions, such as access to high quality and importantly not itself exploitative paid care, a recognition of the importance of care when in paid work, such as through paid maternity leave. and financial support to those providing care. In addition to these practical requirements, it also requires that social institutions foster an 'attitude of caring and a respect for care'.<sup>12</sup> In summary, doulia means that 'the larger society has an obligation to attend to the well-being of the caregiver'.<sup>13</sup>

Within the work/care reconciliation context, this may require short or long term changes to work patterns, including periods of leave. At least for the most intensive forms of care, in order to access paid work it is also likely that some care for dependents must be done by paid or unpaid others. In turn, paid care, partly because of its labour intensive and therefore expensive nature despite the low pay often given to those performing it, may be impossible to access without subsidy. Nevertheless, carers are under recognised and protected by labour law and practice. Many argue the labour market assumes an 'ideal worker' norm of a worker who is unencumbered by any other commitments,<sup>14</sup> despite the fact that about 26% of the UK population currently have caregiving roles and far more will have this role at some point in their working lives.<sup>15</sup> While, as detailed below, there are work life balance rights in UK law, these are limited and only marginally challenge this norm. Notably, caring status is not a protected characteristic in the Equality Act 2010. This is despite the impact motherhood has on women's earnings, which demonstrates there is evidence of substantial and long lasting economic and other disadvantage associated with caring.<sup>16</sup>

It is sometimes argued that taking on a caring role, particularly when this relates to children, is a choice and protected characteristics should only apply to innate characteristics.<sup>17</sup> This can be contested for a number of reasons. Firstly, care is a choice

<sup>9</sup> Eva Kittay, 'Love's Labor Revisited' (2002) 17 *Hypatia* 237, 242

<sup>10</sup> Kittay (n7) above, 116

<sup>11</sup> P Taylor Gooby, 'Welfare State Regimes and Welfare Citizenship' (1991) *Journal of European Social Policy* 93, cited by Kittay (n 7) above

<sup>12</sup> Kittay (n7 above) 117

<sup>13</sup> *Ibid* 140

<sup>14</sup> See for discussion, Heejung Chung, *The Flexibility Paradox* (Bristol University Press 2022) Ch 8

<sup>15</sup> Office for National Statistics, 'Population Estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2019' <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2019> accessed 2 March 2023

<sup>16</sup> Monica Costa Dias and others, 'Wage Progression and the Gender Wage Gap: the Causal Impact of Hours of Work' (IFS 2018)

<sup>17</sup> Such an argument was made by the Labour government when this change was proposed. See Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 *Equal Rights Review* 11

only in a limited sense. Once a care relationship is formed, it is usually only broken in exceptional circumstances. (Of course, there may be less need for care, because a recipient requires less care over time or because more of the care is done by a paid carer, but that does not end the relationship). Secondly, other things that are, or can be, perceived as a 'choice' are covered by the Equality Act such as pregnancy or religion, partly because of the importance of the choice to the individual. Finally, and most significantly, care and care giving relationships are simply fundamental to the nature of being human and require protection.<sup>18</sup>

A similar method to that proposed by Bartlett of asking the carer question should therefore be used to uncover the assumptions made by policy makers about the circumstances in which care will be provided and the support, or doulia, required. Importantly, this does not suggest there will only be one answer. In the same way as if the woman question was asked, not all carers, like not all women, will answer in the same way, especially given the very different forms care may take. Asking the question though requires decision makers to identify whether the interests of carers have been considered in the making of law and policy. It asks question such as who is doing care and for whom? What support for the carer is available, including financial support and support for time off from caring for paid work, rest or leisure? Is there access to expert care or advice on care where required? In short, this article asks what it would have meant to ask the carer question during the Covid-19 crisis, and to take it seriously, so that carers were not unduly burdened by their care relationships.

In this article I will focus on the carer question, particularly those caring for children, as it relates to work/care reconciliation rights during a two year period of the pandemic from the first lockdown in March 2020 until March 2022, when most Covid restrictions ended. This is in one sense a piece of legal history relating to an unprecedented and, hopefully, unlikely to be repeated situation. However, that does not mean it is irrelevant. Firstly, it is important to recognise the burdens on carers during this period both in its own right and because it may have continuing effects on carers' rates of employment, career progression and mental health, which may only now be becoming apparent. Secondly, the crisis simultaneously highlighted the importance of care, while paradoxically reducing pre-existing support such as the provision of childcare or education settings or access to informal care. By considering whether the voices of carers were heard or disregarded during this crisis and whether the fundamental nature of care to the human condition was recognised, we can see the value policymakers place more widely on care and caregivers.

The core of my argument is that to have avoided inequitable burdens in the context of work/care reconciliation during pandemic restrictions, either the network of existing rights had to be generous enough to be used effectively during this period, or new rights or other support had to be introduced. As will be demonstrated though, pre-existing rights were limited and not fit for purpose even before the pandemic. Pandemic specific

<sup>18</sup> Robin West, 'The Right to Care' in Eva Feder Kittay and Ellen Feder (eds) n 7 above.

rights took a long time to be implemented, mostly gave incidental support to carers and were very limited. This lack of consideration by policymakers to carers and the failure to ask the carer question raises clearly the marginalisation and lack of attention given to carers within employment law and elsewhere. Finally, looking forward, I consider whether the Covid pandemic is likely to have any lasting impact on how the demands of work and care are reconciled and whether the carer question might be given greater attention by policymakers in the future.

Before going on to detail specific work/care reconciliation rights it is important to note that 'care' and 'carers' are amorphous terms. In a wide sense, care can involve any form of social reproduction.<sup>19</sup> This though is too broad for our purposes of recognising the specific value of care as it relates to caregiving relationships. I therefore adopt Kittay's example of what she called dependency work.<sup>20</sup> Following Martin, she defines such care as 'labour that, when well done, involves the three Cs: care, the tending of others in response to their vulnerability; connection, building intimacy and trust or sustaining ties between intimates; and concern, giving expression to the ties of affection that sustain the connection'.<sup>21</sup> It therefore includes child care, although it is not restricted to any particular type of care relationship.

## 2. Limited doulia: work/care reconciliation rights before Covid

While there is protection against sex<sup>22</sup> and pregnancy/maternity discrimination,<sup>23</sup> under the Equality Act 2010, there is no overarching right to care and caring or parent status is not a protected characteristic in its own right. An attempt to include caring status as a protected characteristic was rejected by the Labour government while the Equality Act 2010 was going through Parliament, on the basis that work/life balance issues were better dealt with through specific policies.<sup>24</sup> Such policies have been introduced by successive governments most notably over the last twenty years. However, this law consists of several piecemeal, limited, rights, introduced at different times and for different purposes. Overwhelmingly, they only give rights to parents of under 18s (and a limited number of others taking on a parenting role, such as partners of parents), and not other carers, despite an ageing population and a lack of capacity within the public and private sector to provide paid care for those

<sup>19</sup> See eg Tronto's definition as a 'species activity that includes everything we do to maintain, continue and repair our world so that we can live in it as well as possible': Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993) 103

<sup>20</sup> See also Doryen Bubeck, 'Justice and the Labor of Care', in Kittay and Feder n. 7 above

<sup>21</sup> Kittay n.7 above, 31

<sup>22</sup> Equality Act 2010 s.11.

<sup>23</sup> Equality Act 2010 s.17 and s. 18. Maternity discrimination prohibits treating a woman unfavourably because she has been on maternity leave, rather than generally because she has a child.

<sup>24</sup> Hepple, n 12 above

who require it because of age or disability.<sup>25</sup> Other caring relationships are therefore mostly not even recognised in this context. Once introduced, these rights have sometimes been extended but there has not been a comprehensive consideration of how workers can best combine work and care and the legal framework required to support them. Furthermore, the government does not routinely collect data on use of these rights and so it is difficult to know how often or how they are used. Given these rights take different forms, for the purposes of our discussion, I will divide them into equality based rights, flexible working rights and short term or situation specific rights.

## 2.1. Equality based rights

The purpose of the rights given by the Equality Act 2010 was to target inequality and exclusion from the workforce rather than specifically to enable employees to combine work with care. Nevertheless, they have been used to challenge policies such as requiring full time rather than part time work (eg *Shaw v CCL Ltd*)<sup>26</sup> or requiring changing rather than fixed shift patterns (eg *Edwards v London Underground No 2*).<sup>27</sup> The Equality Act 2010 may provide limited protection in two main ways, in addition to the time limited protection given against pregnancy and maternity discrimination. The first is through the prohibition of indirect sex discrimination, which has been particularly relevant to child care claims.<sup>28</sup> Sex discrimination claims relating to other forms of care, such as care for elderly relatives or disabled adult children, which is also gendered, have not yet been fully accepted, but there is no reason in principle why they should not be.<sup>29</sup>

The law does not start from the starting point that care is fundamental to the human condition and therefore needs to be supported. Rather as caring status or parent status in itself is not recognised as a protected characteristic, the claim has to be framed as sex discrimination in that women are more likely to have child or other care responsibilities and therefore working patterns such as changing shift patterns or atypical hours are likely to disadvantage women as a group. Practically this is true.<sup>30</sup> However, a requirement to frame it in this way identifies child care as a

<sup>25</sup> Skills for Care, 'The State of the Adult Social Care Sector and Workforce in England' 2021 <https://www.skillsforcare.org.uk/adult-social-care-workforce-data/Workforce-intelligence/publications/national-information/The-state-of-the-adult-social-care-sector-and-workforce-in-England.aspx> accessed 2 March 2023

<sup>26</sup> [2008] IRLR 284

<sup>27</sup> [1998] IRLR 364

<sup>28</sup> see eg *Shackletons Garden Centre Ltd v Lowe* UKEAT/0161/10

<sup>29</sup> *Follows v Nationwide Building Society* ET 2201937/2018

<sup>30</sup> 85% of single parent families are single mother families: Office for National Statistics, 'Families and Households in the UK: 2021' <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2021> accessed 2 March 2023. Even when they have a partner, women take on more childcare responsibilities (see eg, Pierre Walthery and Heejung

problem only for women who have to define themselves as part of a group which is particularly disadvantaged, rather than a claim that recognises that caring is a central, beneficial and inescapable part of the human condition. Sex equality based rights therefore exclude men with caring roles from protection as they cannot rely on indirect sex discrimination rights to for example, adjust their working patterns, although they could claim direct sex discrimination if women were permitted greater working flexibility than men. Even here, it is lawful to pay women more for maternity leave than men for shared parental leave.<sup>31</sup> While this can be justified on the basis it encourages better paid maternity leave, which encourages women to stay in the work force, it again reinforces that it is the norm for women to combine caring with paid work and for men's work to be unaffected.

Equality rights can also be used to make a claim of direct associative disability discrimination on the basis of the disability of the person cared for.<sup>32</sup> This is only of use in limited situations. Most obviously it requires that the other person has a disability, rather than simply requiring care, for example because of their young age. It is also a comparative right and not a right to fair treatment. It therefore only applies when a person is treated less favourably because of the disability. In the claim made in *Coleman*, for example, her argument was that she had not been given arrangements other employees whose children were not disabled had been given. If none of the employees had been given such arrangements she would not have had a free standing right to these.

There would, however, appear to be no reason why a claim of indirect associative discrimination could not be brought. This has been considered by an Employment Tribunal in *Follows v Nationwide Building Society*,<sup>33</sup> following the CJEU's decision in *CHEZ Razpredelenie Bulgaria*<sup>34</sup> which suggested that such a claim was possible. Follows was a carer for her elderly disabled mother. For many years she had worked for two days in the office and three at home. Following a decision to wind down the role she was doing, her employer required that those remaining would have to work full time in the office. It was held that this put those like Follows who were carers for

Chung, 'Sharing of Childcare and Well-Being Outcomes: An Empirical Analysis' 2021, [https://kar.kent.ac.uk/85872/1/Sharing\\_of\\_childcare\\_and\\_well-being\\_outcomes\\_\\_an\\_empirical\\_analysis\\_\\_1\\_.pdf](https://kar.kent.ac.uk/85872/1/Sharing_of_childcare_and_well-being_outcomes__an_empirical_analysis__1_.pdf) (accessed 2 March 2023) Women are also much more likely to change their working hours by working part time once they have a child, even if they are the higher earning partner: Institute for Fiscal Studies, 'The Careers and Time Use of Mothers and Fathers' (IFS 2021). One in four female workers aged between 50–69 and one in eight male workers is a carer: Office for National Statistics, 'Living Longer: Caring in Later Working Life' 2019 <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglongerhowourpopulationischangingandwhyitmatters/2019-03-15#who-is-providing-unpaid-care> accessed 2 March 2023.

<sup>31</sup> *Ali v Capita Customer Management Ltd; The Chief Constable of Leicestershire Police v Hextall* [2019] EWCA Civ 900

<sup>32</sup> Case C-303/06 *Coleman v Attridge Law* [2008] IRLR 722

<sup>33</sup> ET 2201937/2018

<sup>34</sup> Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*. The decision in *CHEZ* was on quite different facts, but it still raised this as a possibility



people with a disability at a disadvantage and this was not justified by the reasons Nationwide had put forward such as requiring supervision and training for more junior employees. However, this decision is not binding and it was held in the later Employment Tribunal case *H v Lambie and Lambie*<sup>35</sup> that *CHEZ* was not sufficient authority for the existence of such a cause of action.

This issue has not yet been considered by any higher English tribunals or courts. It is noticeable that there is a lack of case law on this issue, although the fact pattern of a policy, criterion or practice being applied, such as refusing homeworking or reducing or changing working hours which puts carers of disabled people at a disadvantage must not be particularly rare, especially given an aging population. This suggests these rights are underused to achieve real change, perhaps because of their complexity. Overall therefore, sex and disability equality based rights can be of use, but are problematic in their focus on gender roles or have limited scope.

## 2.2. Flexible working rights

Partly due to recognition of the limitations of a discrimination model in protecting the needs of carers, since 2002, there have been specific, but very limited, rights directly addressing the problem of finding an ongoing balance between work and caring commitments. The first of these rights was a right to request flexible working.<sup>36</sup> Originally this right was only available to those with a child under 6 or a disabled child under 18. This was changed to those with a child under 18 and some carers of adults in 2007<sup>37</sup> and finally the link between caring and requesting flexible work was severed completely in 2014.<sup>38</sup> This was criticised by Mitchell for weakening the rights available to carers<sup>39</sup> but it has value in the mainstreaming of flexible work and recognising work life balance as a benefit to all. It is noticeable that this is not a right to flexible work itself, but only a right to *request* it from an employer. The request must be handled in a reasonable manner but can be rejected for one of seven business reasons.<sup>40</sup> It is only available to employees or agency workers, rather than the broader ‘worker’ category and the employee must have been employed for 26 weeks before a request can be made. Only one request can be made per year.<sup>41</sup>

<sup>35</sup> ET 4122594/2018 and 4103066/2019

<sup>36</sup> Employment Act 2002 s 47

<sup>37</sup> Work and Families Act 2006 s.12

<sup>38</sup> Children and Families Act 2014 s 131

<sup>39</sup> n. 4 above

<sup>40</sup> Under Employment Rights Act s 80G(1)(b) these are: (i) the burden of additional costs, (ii) detrimental effect on ability to meet customer demand, (iii) inability to re-organise work among existing staff, (iv) inability to recruit additional staff, (v) detrimental impact on quality, (vi) detrimental impact on performance, (vii) insufficiency of work during the periods the employee proposes to work, (viii) planned structural changes.

<sup>41</sup> Employment Rights Act 1996 s.80F and Flexible Working Regulations 2014

At best, the flexible working regulations give a format for discussions and require an employer to consider the request.<sup>42</sup> With an unwilling employer it can amount to a purely tick box approach, although employment tribunals do have some reviewing power over the decision making process in that they can assess whether the rejection was based on incorrect facts and whether it was handled in a reasonable manner.<sup>43</sup> However, they cannot directly consider the reasonableness of the decision to refuse and the possible reasons for refusal are very broad.<sup>44</sup> Whilst those who make formal flexible working requests are likely to have them agreed: only 9% of flexible working requests are refused, this is not a good mechanism to measure success.<sup>45</sup> Unless there is a working culture which is friendly to such requests, it is unlikely that a person will subject themselves to the possible stigma that may result from even requesting it.<sup>46</sup>

### 2.3. Short term rights

In addition to these rights which may affect the whole of a working relationship, parental leave can allow a parent to take a short term break from work to for example cover school holidays.<sup>47</sup> A parent can take unpaid leave up to 18 weeks for each child, with a maximum of 4 weeks per year per child. There is no right to take leave for any other caring relationship. It cannot be refused by an employer but only delayed by up to 6 months and this must be for a 'significant reason'. It must be taken in week blocks unless the child is disabled. It is only available to employees with 1 year's continuous employment and the employee must give the employer 21 days' notice. It cannot therefore be used in emergency situations. It has had very little take up possibly because it is unpaid, inflexible (apart from for parents of children with disabilities) and little known.<sup>48</sup>

### 2.4. Situation specific rights

There are also various rights available after a qualifying event: maternity, paternity and shared parental leave after the birth of a child, emergency leave for a dependant for a reasonable time in an emergency and parental bereavement leave following the death

<sup>42</sup> See Emily Rose, 'Workplace Temporalities: A Time-Based Critique of the Flexible Working Provisions' (2017) 46 ILJ 245

<sup>43</sup> See *Commotion Ltd v Ruddy* [2006] ICR 290

<sup>44</sup> See eg *Singh v NHS Care Pennine Foundation Trust* UKEAT/0027/16/DA

<sup>45</sup> Department for Business, Energy & Industrial Strategy, 'Making Flexible Working the Default' Sept 2021, 18

<sup>46</sup> See further on flexibility stigma, Heejung Chung, 'Gender, Flexibility Stigma and the Perceived Negative Consequences of Flexible Working in the UK' (2020) Social Indicators Research 521

<sup>47</sup> Maternity and Parental Leave etc. Regulations 1999, reg 14

<sup>48</sup> Sarah Tipping and others, *The Fourth Work-Life Balance Employee Survey* (Department for Business, Innovation and Skills 2012) 6

of a child. These rights all require employee status and are either unpaid or low paid. Most also require qualifying periods of employment.

The right with the broadest scope to support carers in combining work with care is emergency leave. Nevertheless, although there are no definite limits on its use, it is only available for emergencies (not, for example, for a planned medical appointment) and only for limited time periods. *Qua v John Ford Morrison*<sup>49</sup> held there was a need to consider the individual circumstances of the employee but it was suggested that ‘in the vast majority of cases, no more than a few hours or, at most, one or possibly two days would be regarded as reasonable’. A similar view was expressed in *Cortest Ltd v O’Toole*<sup>50</sup> where it was held that one month or longer would rarely if ever be included. This would therefore appear to allow employees to take time off to try and find other arrangements, but not to provide the care themselves, apart from in the very short term. It is also unpaid, and therefore not attractive to employees.

Eligibility is also a problem. Around 10% of employees have changed their job or begun working in the last six months.<sup>51</sup> It is also likely that some who have appropriate flexible working arrangements do not seek better remunerated or more enjoyable work because they would not be given them in their new employment.<sup>52</sup> Many also are in paid work which does not fall into the ‘employee’ category and are therefore not eligible for these rights, or at least, are informed by their employer they are not.<sup>53</sup>

Overall, as has been argued for many years,<sup>54</sup> current work/care reconciliation rights do not provide sufficient support to allow carers to combine work and care. They are piecemeal, not well known, difficult to enforce, and often unpaid. There is flexibility stigma in using them, particularly among male employees.<sup>55</sup> Even before

49 [2003] ICR 482

50 EAT/0470/07

51 n 45 above, 15

52 Global Institute of Women’s Leadership et al, ‘Working Parents, Flexibility and Job Quality’ (2021) <https://www.kcl.ac.uk/giwl/assets/working-parents-flexibility-and-job-quality-what-are-the-trade-offs.pdf> Last accessed 2 March 2023.

53 There have been several successful cases holding that people have ‘worker’ status, even where this has been strongly opposed by the employer. See eg *Uber v Aslan* [2021] UKSC 5 and *Pimlico Plumbers v Smith* [2018] UKSC 29. Employee status has not yet been the focus of challenges, but it is likely that many may be able to argue this as well. Despite this it is unrealistic for the vast majority of workers to challenge the putative status given to them by their employer.

54 See eg Eugenia Caracciolo di Torella, *Caring Responsibilities in European Law and Policy* (Routledge, 2020); Grace James, ‘The Work and Families Act 2006: Legislation to Improve Choice and Flexibility’ (2006) 35 *ILJ* 272; Grace James and Nicole Busby (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, 2011), ‘Regulating Work/Care Relationships in a Time of Austerity: A Legal Perspective’ in Suzan Lewis and others (eds), *Work-Life Balance in Times of Recession, Austerity and Beyond* (Routledge, 2017); Michelle Weldon-Johns ‘From Modern Workplaces to Modern Families – Re-Envisioning the Work–Family Conflict’ (2015) 37 *Journal of Social Welfare and Family* 395.

55 Rose Cook and others, ‘Fathers’ Perceptions of the Availability of Flexible Working Arrangements: Evidence from the UK’ (2021) 35 *Employment and Society* 1014; Gayle Kaufman, ‘Barriers to Equality: why British fathers do not use parental leave’ (2018) 21 *Community, Work and Family* 310; Michelle Weldon-Johns ‘EU Work Family policies Revisited: Finally Challenging Caring Roles’ (2021) 12 *ELLJ* 301

the pandemic then, the situation showed only very limited 'doulia' for carers. By asking the carer question we can see that their limited scope and coverage means that it may be necessary to leave or change employment in order to provide care, and even where appropriate leave rights exist, some caring situations (eg after birth or in times of illness) can cause significant financial pressure. It is difficult to challenge inflexibly structured employment and even where possible, workers may not feel able to use these rights because they fear stigma from deviating from the unencumbered worker norm.

This underlying lack of doulia turned into a crisis during the pandemic when in addition access to childcare and informal care was much reduced. As workers had to change the way they worked, such as providing care and working simultaneously or changing or reducing the hours worked during the periods of childcare/school closure, or requiring periods off work to look after a child who was ill or self-isolating, these rights failed to match the needs of carers. This is important not only in its own right for those who experienced it, but also because it shows the lack of attention given to the needs of carers within the work context and demonstrated that the carer question was not asked.

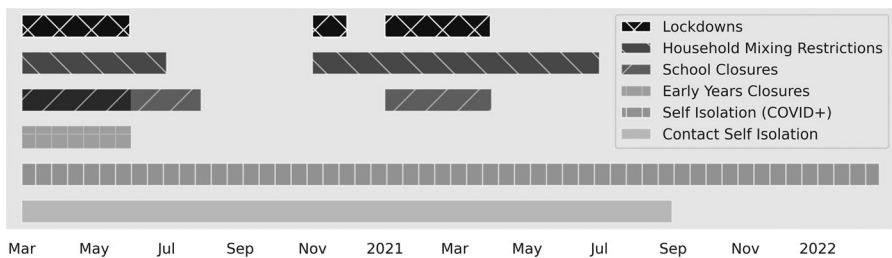
### 3. Doulia during Covid?: March 2020-March 2022

Given that the devolved governments took different approaches to covid restrictions, this article will only describe the situation in England, although there were similar wide-spread closures of schools and child care facilities across many jurisdictions. Whilst the public health emergency caused by Covid-19 required immediate and far reaching action, it appeared to be assumed throughout not only that carers would be able to take on the extra care, a difficult but not unreasonable request given the public health needs and the direct risk to those working in these settings, but also that carers could combine this with their paid work or negotiate appropriate arrangements with their employers and do this without additional financial support. This failure to act created an inequitable, and in some cases unbearable, burden.

In considering whether or not there was sufficient doulia during this two year period we need to distinguish between inherent and contingent vulnerability. Inherent vulnerability means that people and those they care for are inevitably at risk of illness and therefore sometimes require care, or at least be unable to work or attend education or childcare settings. Contingent vulnerability refers to the vulnerability caused by the social and economic response to such inherent vulnerability. Time off work for illness or to care for others may for example create financial difficulties because sick leave or carers leave is low paid or unpaid or may even risk continued employment. It may also cause stress or anxiety because requests for time off work are not treated sympathetically by employers or because of difficulties in managing workload if time is taken off. As I will demonstrate, inherent vulnerability to Covid-19 led to unneeded contingent

vulnerability. As normal forms of support, such as access to childcare or education settings or informal care provided by relatives were drastically reduced, there was a need for other forms of doulia to take its place to prevent unfair burdens being placed on carers. Overwhelmingly, doulia either was not provided or was only provided at a very late stage. This burden was also inequitable in other ways, particularly on those who were low paid or in insecure work and for single parents and for children with disabilities. Asking the carer question would have revealed this.

### 3.1. Timeline of Covid restrictions



### 3.2. Other key dates

- Introduction of furlough scheme – April 2020
- Support bubbles introduced for single adult households – June 2020
- Introduction of flexible furlough – July 2020
- Childcare bubbles introduced – October 2020
- Support bubbles extended for households with a baby under 1 or a child under 5 with a disability that required constant care – December 2020

As can be seen in the timeline above, between 20th March to 1st June 2020 all schools, nurseries and other childcare providers largely closed in order to halt the spread of Covid-19, keeping open only for key workers and ‘vulnerable’ children. Even some of the children theoretically eligible to attend could not in practice be accommodated and school wrap around care was mostly unavailable, meaning that the hours their child would normally be cared for by others were reduced. From 1st June 2020, early years provision and children in Reception, Year 1 and Year 6 were permitted to open but the practicalities of doing so while complying with the smaller ‘bubble’ system guidelines designed to ensure child and staff safety,<sup>56</sup> in practice meant that many providers

<sup>56</sup> Department for Education, ‘Actions for Education and Childcare Settings to Prepare for Wider Opening From 1 June 2020’ <https://www.gov.uk/government/publications/actions-for-educational-and->

did not re-open to even these ages or could only provide part time care. Schools, but not early years settings, closed again from January to 8th March 2021. Even when schools were open to all, the requirement to self isolate if in contact with someone who had tested positive for Covid (until August 2021 for doubly vaccinated people or those under 18) or until February 2022 for those who had tested positive or were awaiting test results still reduced access to schools and child care. In one week alone in June 2021, 172,000 school children were self-isolating.<sup>57</sup> This did not include the closure of child care facilities/schools owing to lack of staff due to self isolation.

For those caring for adults, even during the strictest restrictions, paid carers could continue to work and the provision of care and assistance to vulnerable people or to provide emergency assistance was permitted,<sup>58</sup> but access to sources of support such as day centres closed from March-June 2020.<sup>59</sup> Given the health risks, some of those particularly vulnerable to Covid-19 tried to reduce non household contacts, including paid carers, and relied more on family members, increasing the demands on them.

Informal childcare, which is extensively used,<sup>60</sup> was inevitably caught by the restrictions on household mixing. Several months passed until some of the restrictions were lessened to permit this. Support bubbles for single adult households were introduced in June 2020.<sup>61</sup> Until this point, single parents, who are predominantly women and more likely to be on low incomes, had been particularly disadvantaged by the extra burden of care required. Support bubbles were extended to all households where there was a baby under 1 on the 2nd December 2020 or where there was a child under 5 with a disability that required constant care. Childcare bubbles, open to anyone with a child under 14, were permitted from October 2020 when restrictions on household mixing were reintroduced at the beginning of the Tier system of restrictions, whereby restrictions varied according to location, and during the second and third lockdowns.

Between March -June 2020 there were therefore little legally permitted forms of doulia. Childcare bubbles were not introduced for 8 months after the beginning of the pandemic. Existing work life balance rights were of little use. As we have seen, emergency leave and parental leave is unpaid. Parental leave also requires notice, unless this was waived by an employer, so could not be relied on when a child was self isolating or if schools or childcare settings were closed at short notice. A dismissal for lack of suitable childcare because of a need to attend work in person could therefore be entirely lawful

[childcare-settings-to-prepare-for-wider-opening-from-1-june-2020/actions-for-education-and-childcare-settings-to-prepare-for-wider-opening-from-1-june-2020](https://www.theguardian.com/education/2021/jun/22/quarter-of-a-million-children-in-england-missed-school-last-week-due-to-covid) Last accessed 2 March 2023.

<sup>57</sup> The Guardian, 'Quarter of a Million Children in England Missed School Last Week Due to Covid' 22 June 2021 <https://www.theguardian.com/education/2021/jun/22/quarter-of-a-million-children-in-england-missed-school-last-week-due-to-covid>

<sup>58</sup> (Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 s. 6(2)(d)

<sup>59</sup> Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 s.7

<sup>60</sup> Grandparents spend average of 8 h a week looking after grandchildren: Ann Buchanan and Anna Rotkirch 'Twenty-first Century Grandparents: Global Perspectives on Changing Roles and Consequences' (2018) 13 *Contemporary Social Science* 131.

<sup>61</sup> Introduced 13<sup>th</sup> June 2020 by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 s. 7A.

and would not necessarily breach unfair dismissal or indirect sex discrimination rights.<sup>62</sup> Even if a worker did not fall between these gaps in protection, rights may be difficult to enforce in practice.<sup>63</sup>

Some carers could use the furlough scheme, introduced in April 2020. Whilst furlough was introduced as a job protection measure rather than to support those who could not work because of a lack of childcare, an employee could be placed on furlough for any reason. The scheme was amended from 1 July 2020 with the introduction of 'flexible furlough' so it was possible to use furlough to reduce working hours/days, rather than stopping work completely. However, furlough could only be the solution to child care issues for a small number of employees. Most importantly, the decision to place employees on furlough was entirely within the employer's discretion. Secondly it was only available for non-publicly funded employees and it was only paid at 80% of salary, even for those on the minimum wage, although an employer could top it up to full pay if it wanted to. The scope of the scheme included so called limb b) workers,<sup>64</sup> as long as they were paid through PAYE, and thus included some precarious workers in addition to employees. Whilst those on casual contracts could therefore be included, a much cheaper and entirely lawful alternative for employees without fixed entitlement to hours was for an employer simply not to offer them work.<sup>65</sup> This led to a significant lack of protection for some of the most vulnerable and precarious workers. For example, in Herman's study a lack of demand for care staff in care homes due to the deaths of residents did not lead to furlough even though the staff would have been entitled to it. Instead bank staff, who made up a considerable section of the work force, were simply not offered shifts.<sup>66</sup>

It was not until 28 Sept 2020<sup>67</sup> that any direct financial support was introduced to ameliorate some of the financial impact required by obligations to self isolate, and it was not until 22nd March 2021, a full year after the beginning of the first lockdown, that this included where a person could not work because they had to care for a child who had to self isolate. This clearly demonstrates that the carer question was not asked or taken seriously at the time. Support amounted to a one off taxable payment of £500 which is roughly equivalent to minimum wage for over 25s on a 35 h week. Even then, the

<sup>62</sup> See eg *Batty v Woof Inn Ltd* where a dismissal following a need to attend the workplace and a lack of childcare caused by school closures did not amount to indirect sex discrimination because of the employer's legitimate need to keep their business open. ET 1805316/2020

<sup>63</sup> See for general challenges of bringing cases to employment tribunals, Nicole Busby and Morag McDermont, 'Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal,' (2020) 49 ILJ 159

<sup>64</sup> Employment Rights Act 1996 s.230(1)(3)(b)

<sup>65</sup> Even though 80% of the employee's salary was paid by the government, furlough was not cost free for employers. They had to pay employer's national insurance contributions and employees continued to accrue leave entitlements.

<sup>66</sup> Eva Herman and others, 'A Case of Employers Never Letting a Good Crisis Go to Waste? An Investigation of How Work Becomes Even More Precarious for Hourly Paid Workers under Covid' (2021) *Industrial Relations Journal* 1

<sup>67</sup> And only from 10 Dec 2021 if notified through the COVID-19 app

eligibility criteria were restrictive. There was only an automatic entitlement if the person was working outside the home and on certain benefits. It could also be awarded on a discretionary basis if a person was on a low income and self isolating would cause financial hardship. This financial support therefore could best be described as grudging. Being required to have time off work to care for children or others who required care and were self isolating or ill could have a devastating financial effect,<sup>68</sup> particularly for workers who could not work from home and for younger workers and women as they are likely to be lower paid.<sup>69</sup> Many therefore had the choice of complying with the law and public health guidelines on testing and self isolation or significantly reducing their income.

Despite very rapid, and expensive, law-making in other areas, working carers' rights were not reconsidered during the pandemic. Individual employers may have had their own policies such as paid carer's leave (although this was usually for only an extra few days, rather than for long periods of time), flexible or reduced working, but there were no additional statutory rights focused on carers. There was not even 'soft law' guidance to employers that such policies should be considered by employers, at a time when the government had issued non legally binding guidance on many other aspects of the pandemic. This is in contrast to the expensive and wide ranging business/job support schemes introduced, such as furlough (at a cost of £70 billion),<sup>70</sup> which may incidentally have benefitted some carers but did not have this purpose; the SEISS scheme for self employed people (cost of £28 billion)<sup>71</sup> and support for particular business sectors (not those working in such sectors), particularly leisure and hospitality. Such schemes included Business Grants (cost of almost £27 billion)<sup>72</sup> for business required to close or otherwise affected by during covid, the Eat Out to Help Out scheme (cost of £849 million)<sup>73</sup> and the reduction in VAT for hospitality businesses between July 2020 and March 2022 and waiver in business rates for hospitality, retail and nursery

<sup>68</sup> Even if the carer was also self isolating, Statutory Sick Pay is paid at the extremely low rate of a maximum of £99.35 per week. As a result of Covid it was available from day 1 of self isolation, rather than having to wait until day 3 of illness but the rate of pay was not increased.

<sup>69</sup> There were about 1.5 million low paid men and 2.3 million low paid women at the time: Office for National Statistics, 'Employee Earnings in the UK: 2021' <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2021> Women are also more likely to be in insecure employment, be involuntarily part time, temporary employment and on zero-hours contracts: Women's Budget Group, 'Spring Budget 2022 Pre Budget Briefings: Women and Employment 2022.

<sup>70</sup> <https://www.statista.com/statistics/1122100/uk-cost-of-furlough-scheme/>

<sup>71</sup> House of Commons Library, 'Coronavirus: Self Employment Income Support Scheme' (5 Jan 2023) <https://commonslibrary.parliament.uk/research-briefings/cbp-8879/#:~:text=With%20the%20closure%20of%20the,2021%2C%2016%20December%202021> (Last Accessed 19 May 2023)

<sup>72</sup> BEIS, 'COVID-19 Business Grants Schemes: Insights' (10 May 2023) <https://www.gov.uk/government/publications/coronavirus-grant-funding-local-authority-payments-to-small-and-medium-businesses/covid-19-business-grants-schemes-insights-august-2022> (Last Accessed 19 May 2023)

<sup>73</sup> House of Commons Library 'Eat out to Help Out Scheme' (22 Dec 2020) <https://commonslibrary.parliament.uk/research-briefings/cbp-8978/> (Last Accessed 19 May 2023)



sectors in 2020/21.<sup>74</sup> By contrast, the only change in policy targeted at workers directly was the £20 a week uplift to Universal Credit, which only covered some of the workforce affected.

This lack of policy directed at carers, and in turn those cared for, in itself demonstrates a lack of *doulia* to carers, but furthermore the burden was not spread equally. Unsurprisingly, given the gendered nature of care, the closure of schools and childcare to most had a disproportionate impact on women. Numerous studies show that women did more care work than men during both the first and second lockdowns. Xue and McMunn's study showed that men were doing 9.55 h of housework and 11.61 h of childcare/homeschooling per week during the first lockdown whilst women were doing 14.87 h and 22.47 respectively.<sup>75</sup> More women than men had consequently reduced or adapted their work patterns due to this increased burden.<sup>76</sup> Adams-Prassl et al too found during the first lockdown that even for jobs done from home and controlling for factors such as number of children and type of job, women were doing an average of an hour a day more childcare/homeschooling than men.<sup>77</sup> The way the work was done also differed. Women were more likely to be interrupted by child care responsibilities and to be working in shared space.<sup>78</sup>

Trying to combine the demands of childcare, homeschooling and paid work led to increased levels of stress for women. In Herten-Crabb and Wenham's interviews with women during the first lockdown many women commented on the traditional gender roles the pandemic had forced onto them, their dissatisfaction with this and the burden they found the increased workload.<sup>79</sup> In Daly and Robinson's study of the second school closure period, increased housework hours and childcare/homeschooling hours were associated with higher levels of psychological distress among women only.<sup>80</sup> No significant association was found among men. Lone mothers had

<sup>74</sup> HM Revenue and Customs 'VAT: reduced rate for hospitality, holiday accommodation and attractions' <https://www.gov.uk/guidance/vat-reduced-rate-for-hospitality-holiday-accommodation-and-attractions#:~:text=5%25%20from%2015%20July%202020,2021%20to%2031%20March%202022> (Last Accessed 19 May 2023)

<sup>75</sup> Baowen Xue and Anne McMunn, 'Gender Differences in Unpaid Care Work and Psychological Distress in the UK Covid-19 Lockdown' (2021) 16 *PLoS ONE*

<sup>76</sup> During the first lockdown, 16.8% of women had reduced employment hours due to childcare/homeschooling compared to 11.6% of men and 29.5% of men adapted work patterns due to childcare/homeschooling compared to 36.7 of women: Claudia Hupkau and Barbara Petrongolo, 'Work, Care and Gender during the COVID-19 Crisis' (2020) 41 *Fiscal Studies* 623

<sup>77</sup> Abi Adams Prassl and others, 'Inequality in the Impact of the Coronavirus Shock: Evidence from Real Time Surveys' (2020) 189 *Journal of Public Economics*.

<sup>78</sup> Heejung Chung and others, 'Working From Home During the COVID-19 Lockdown: Changing Preferences and the Future of Work' (University of Kent, 2020) <https://www.birmingham.ac.uk/Documents/college-social-sciences/business/research/wirc/epp-working-from-home-COVID-19-lockdown.pdf> Last Accessed 2 March 2023

<sup>79</sup> Asha Herten Crabb and Clare Wenham, "'I Was Facilitating Everybody Else's Life. And Mine Had Just Ground to a Halt": The COVID-19 Pandemic and its Impact on Women in the United Kingdom' (2022) 29 *Social Politics: International Studies in Gender, State & Society* 1213

<sup>80</sup> Michael Daly and Eric Robinson, 'Psychological distress associated with the second COVID-19 wave: prospective evidence from the UK Household Longitudinal Study' (2022) *J Affect Disord* 274

particularly high levels of psychological distress, especially those with school aged children. Oreffice and Quintana-Domeque similarly found that women's average anxiety score was 25% higher than men.<sup>81</sup>

The situation was particularly difficult for carers of children with disabilities who required specialised care. Whilst most could legally attend school or childcare as they would be classed as 'vulnerable' children, some parents felt they could not send their child because of the health risks involved, or their school could not accommodate them because of lack of staff or the risks to staff caused by their medical or social needs. Many children with complex health needs lost access to essential health services such as physiotherapy and/or speech and language therapy.<sup>82</sup> The Disabled Children's Partnership's report, which was based on the views of over 4,000 families, found parents reported:

Increased caring load, both for themselves and for their disabled children's siblings. Parents feel exhausted, stressed, anxious and abandoned by society. In many cases, the support families previously received has now stopped. Many families are seeing declines in both mental and physical health.<sup>83</sup>

It has become a cliché to say that the pandemic was unprecedented. It required co-ordinated attention on a huge number of issues. However, the slow and minimal financial and other support to carers demonstrates there was a clear failure to ask the carer question, and because of this failure, to provide sufficient doulia to carers. My argument here is not that closing schools or childcare and restricting non household contacts was wrong, but that the problems this raised were given insufficient attention and there was little support given to those who assumed the extra burden of this care. To frame these issues as an inevitability of the pandemic fails to recognise the choices that were made about the way this burden was shared and the circumstances in which care, necessary and fundamental to the human condition, was performed. In particular, once the pre-existing every-day support of care was removed, the limited and complex nature of work/care reconciliation rights became obvious but was not addressed and there was very little additional financial support.

As Catriona Mackenzie puts it, 'social and political structures [should be] responsive to and seek to mitigate the effect of inherent vulnerabilities, ensuring that their burdens do not fall disproportionality on the disadvantaged'.<sup>84</sup> This did not happen in numerous ways during the pandemic, including in the context of work and care. The practical burden of childcare, and probably other forms of care work too, fell

<sup>81</sup> Sonia Oreffice and Climent Quintana- Domeque, 'Gender inequality in COVID-19 times: evidence from UK Prolific Participants' (2021) 87 *Journal of Demographic Economics* 261

<sup>82</sup> Disabled Children's Partnership, 'Left in Lockdown: Parent Carers' Experiences of Lockdown' (Disabled Children's Partnership, 2021) <https://disabledchildrenspartnership.org.uk/wp-content/uploads/2020/06/LeftInLockdown-Parent-carers'-experiences-of-lockdown-June-2020.pdf> Last accessed 2 March 2023.

<sup>83</sup> *Ibid.*, 1

<sup>84</sup> Catriona Mackenzie, 'The importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie and others, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013) 39

disproportionately on women, particularly those without a partner and/or whose children had disabilities. The economic burden mostly affected those on low incomes, whose work could not be done at home and/or who worked in atypical work such as zero hour contracts. This demonstrates Mackenzie's argument that 'many kinds of vulnerability are primarily the result not of unavoidable biological processes but of interpersonal and social relationships or economic, legal and political structures'.<sup>85</sup> These contingent vulnerabilities can and should have been ameliorated.

#### 4. Asking the carer question post pandemic

The pandemic made evident and also exacerbated several existing problems – that care is provided disproportionately by women, thus having a disproportionate impact on their work, that financial support for leave from work when extra care is required is minimal, and that financial support for childcare or other paid care is limited. Whilst it therefore highlighted the lack of support for carers, it also provided an ideal opportunity to revisit this support. Nevertheless, there has not been a clear move towards legal reform, although some employers have acted independently to change the way they organise work and to give greater contractual rights to their employees.

These changes are particularly noticeable in the acceptability and prevalence of flexible working, especially working from home. Home working can better allow carers to combine work with care by for example eliminating commuting times or allowing less intensive forms of care to be performed simultaneously with work. At the beginning of the first lockdown, 47% of the workforce was working wholly from home.<sup>86</sup> This had decreased to 20% working wholly from home by June 2020,<sup>87</sup> although it is still higher than pre-pandemic.<sup>88</sup> 38% of workers said they had worked from home at some point in the last week in May 2022 and there is a rising number who are working primarily from home.<sup>89</sup>

Somewhat belatedly and in a rather convoluted way as a result of the various changes in government in 2022, changes to the right to request flexible working are

<sup>85</sup> *Ibid*, 38

<sup>86</sup> Office for National Statistics, 'Coronavirus and homeworking in the UK: April 2020' <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/coronavirusandhomeworkingintheuk/april2020> Last accessed 2 March 2023

<sup>87</sup> Office for National Statistics 'Homeworking in the UK Labour Market' May 2021 <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/homeworkingintheuklabourmarket> Last accessed 2 March 2023

<sup>88</sup> Office for National Statistics, 'Homeworking and Spending during the Coronavirus (COVID-19) pandemic, Great Britain: April 2020 to January 2022' <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/homeworkingandspendingduringthecoronaviruscovid19pandemicgreatbritain/april2020tojanuary2022> Last accessed 2 March 2023

<sup>89</sup> Office for National Statistics, 'Is Hybrid Working Here to Stay?' <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/ishybridworkingheretostay/2022-05-23> last accessed 2 March 2023

likely to be introduced shortly to support these changes to working patterns. The Employment Relations (Flexible Working) Bill, a Private Members' Bill now supported by the government,<sup>90</sup> will widen the eligibility criteria to make a statutory request for flexible working, reduce the time for an employer to respond and increase flexibility over requests. However, it will not change the substance of the right: it will still only be a right to request rather than a substantive right to flexible working.

Furthermore, flexibility alone cannot be the answer to inherent vulnerability and cannot by itself provide doulia to carers. This is particularly true if flexible working is gendered. If it is predominantly requested by women, this does not change the flexibility stigma and the 'femininity stigma'<sup>91</sup> of flexible working, including remote working. It may conversely increase the inequality of the care burden as women who work flexibly may take on more care from their male partners who continue to work outside the home on their employer's standard working patterns.<sup>92</sup> Whilst the pandemic has led to increased care being done by fathers, although still at a lower rate than mothers,<sup>93</sup> it is unclear whether this trend will continue.

There is an important Private Members Bill, the Carer's Leave Bill, again now supported by the government, which will for the first time give carers beyond the parent/child relationship specific leave rights, albeit unpaid and for a maximum of 5 days per year. However, it does not seem likely that there will be broader changes to work life balance rights. Notably, there are no proposals to increase or introduce pay for short term or situation specific work life balance rights even though this is essential for them to be effective. In any case, marginal tweaks to work life balance rights are not by themselves enough to recognise the value of care. A fundamental shift in attitude is required, which recognises the fundamental value of care even when it may conflict with work requirements and practices. Proposed reforms have not started from the point of view of inherent vulnerability. If we accept the starting point of vulnerability theory that being human and therefore requiring care is inevitable, that care and care relationships are valuable to individuals and to society, but can be burdensome, then the need for action becomes clearer. Recognition of this from legal policy makers is still negligible.

Adding care as a protected characteristic to the Equality Act, as proposed by Busby among others,<sup>94</sup> may help to do this. She argues this should include a positive duty of

<sup>90</sup> Department for Business, Energy and Industrial Strategy, 'Millions of Britons to be able to request flexible working on day one of employment' 5 Dec 2022 <https://www.gov.uk/government/news/millions-of-britons-to-be-able-to-request-flexible-working-on-day-one-of-employment> last accessed 2 March 2023

<sup>91</sup> Heejung Chung 'Gender, Flexibility Stigma and the Perceived Negative Consequences of Flexible Working in the UK' (2020) 151 *Social Indicators Research* 521

<sup>92</sup> Chung n 8 above

<sup>93</sup> Alice Margaria, 'Fathers, Childcare and COVID-19' (2021) 29 *Feminist Legal Studies* 133

<sup>94</sup> Nicole Busby, 'Carers and the Equality Act 2010: Protected Characteristics and Identity' (2012) 11 *Contemporary Issues in Law* 71. See also 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, 2011).

reasonable adjustment, as well as protection against direct and indirect discrimination. Mitchell similarly has argued for adding carer as a protected characteristic, including a duty of reasonable adjustment and challenging the standard worker model through an overarching right to care.<sup>95</sup> As well as being of practical significance in allowing people to better combine work with care, this would be an important symbolic gesture of recognition: recognising carers as deserving of protection and care as important in its own right, not merely because it happens to intersect with other protected characteristics. At minimum, even if this would not lead to the fundamental change in attitude required, adding carer as a protected characteristic to the Equality Act 2010 would mean discrimination claims based on conflicts between work and care do not have to be framed as sex discrimination claims. While it recognises the reality of care work, these claims require women to frame themselves as default carers. Adding carer as a protected characteristic would allow men to frame themselves as equally responsible for care, including in a bizarrely radical claim given its mundanity, of their own children. It would also widen the recognition of caring relationships, not just childcare.

Sufficient *doulia* for carers will take different forms depending on their different needs but at minimum taking seriously the carer question is needed to identify the interests of carers and to take these needs into account in policy making. Whilst a right to *doulia* requires changes to work life balance rights and to equality law rights, this needs to have the aim of promoting ‘fundamental change’ rather than ‘incremental legislative modifications’.<sup>96</sup> Specific changes to work life balance rights require include removing or altering eligibility requirements particularly around continuity of work or work status, raising the pay of leave entitlements such as those subsequent to the birth of a child and introducing a right to paid parental leave.<sup>97</sup> There also needs to be a cultural change which recognises the importance of care so these rights can be used without stigma and the burden of care is more equitably spread between men and women. Financial and practical support for care, particularly for the most labour intensive forms of care is also required.

## 5. Conclusion

As Martha McCluskey has argued, neoliberal policymakers assume that family care-takers will act as ‘shock absorbers’.<sup>98</sup> The shocks caused by Covid reverberated in every aspect of life, including care. The government moved swiftly to protect the

<sup>95</sup> Mitchell n. 4 above

<sup>96</sup> Ibid, 230

<sup>97</sup> See also Busby’s argument that eligibility requirements to existing rights such as parental leave and flexible working should be amended to include non employees, and parental leave provisions should be paid and available more flexibly. Nicole Busby, ‘Carers and the Equality Act 2010: protected characteristics and identity’ (2011) 11 *Contemporary Issues in Law* 71

<sup>98</sup> Martha T McCluskey, ‘Subsidized Lives and the Ideology of Efficiency’ (2000) 8 *Am U J Gender Soc Pol’y* & L 115

economic interests of many businesses, and through them their workers, most notably through the furlough scheme, which is estimated cost £70 billion.<sup>99</sup> However, its response to Covid failed to ask the carer question and only provided late and minimal protection to carers. The pandemic has therefore highlighted how partial pre-existing work/life care rights are. Alongside this, there are significant issues caused by lack of knowledge of the rights by both employees and employers, stigma in using them and a complete lacuna when it comes to their enforcement. In addition, there is a fragmented labour market where many are not eligible for all employment rights, or at least believe that they are not eligible.

Outside the labour law context, there is poor financial and practical support for care. Subsidies for paid care are patchy and often minimal. This places disproportionate burdens on carers, particularly when it comes to combining care with paid work. Asking the carer question, and identifying the disadvantages that come with carer's status would at minimum identify the issues with the current law, and have the potential to recognise the fundamental nature of care as highlighted by vulnerability theory. Adding caring status to the Equality Act 2010 would be one way to improve the current legal framework, although this still rests on an individualised enforcement mechanism. Beyond this, there needs to be more flexibility and more financial support to make use of rights such as parental leave. Otherwise, the shocks will continue to fall predominantly on women, particularly those on low incomes with inflexible work.

Kittay and Feder asked, 'How can we deal justly with the demands of dependencies that constitute inevitable facts of human existence, so that we avoid domination and subordination with respect to care and dependency?'.<sup>100</sup> We are not currently justly dealing with these demands in the legal framework for balancing work and care.

#### Disclosure statement

No potential conflict of interest was reported by the author(s).

<sup>99</sup> House of Commons Library, 'Coronavirus Job Retention Scheme: Statistics', 23 December 2021 <https://commonslibrary.parliament.uk/research-briefings/cbp-9152/> accessed 2 March 2023

<sup>100</sup> Kittay and Feder above n 7, 3