



Re-imagining decent work for home care workers in Australia

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Abstract

The progress in Australia towards the full industrial recognition of home care work as ‘work’ has stalled. This paper draws on ILO *Convention 189 on Decent Work for Domestic Workers 2011* to argue for a re-imagining of decent minimum standards for home care workers in Australia. While to date Australia has not ratified ILO 189, home care workers, who are employed to work in the homes of the aged or with people with disabilities, fall within the scope of this Convention. Drawing on the scholarship and activism that has emerged around ILO 189 we argue that with the slow but steady shift to more fragmented, individualised and informal employment relationships in home care services re-imagining employment protections for home care workers in Australia is crucial. Recasting minimum labour standards for work described as both ‘work like all other and work like no other work’ could well provide a basis for a more substantial re-imagining of Australian employment regulation for all workers.

Key Words: Decent work, home care, minimum labour standards, ILO Domestic Workers Convention

Introduction

The impetus for this paper is the adoption by the tri-partite International Labour Organization (ILO) conference in 2011 of ILO Convention 189 and Recommendation 201 on Decent Work for Domestic Workers. In the context of what is what appears to be an increasing informalisation of home care work in Australia, we argue that

Australia should look to ILO 189 and scholarship generated around its adoption and implementation in re-imagining what decent minimum standards for home care workers in Australia might look like.¹

Most interest in the potential of ILO 189 has centred on countries where domestic workers are subject to very serious human rights and labour rights violations, or have been significantly or formally excluded from employment protection. This includes developed countries where a significant proportion of care is provided by privately and often informally employed migrant workers (Bettio, Simonazzi & Villa 2006). This paper however, focuses on the use of ILO 189 to respond to the historic and institutionalised precarity characterising home care work in the context of what is a comparatively extensive employment regulatory regime.

Home care work in the formal Australian labour market is not usually conceived of as ‘domestic work’. In the framing of ILO 189, however, the definition of ‘domestic’ work was designed specifically to encompass personal care services, household cleaning and child/elder caretaking (Fish 2017: 115). Moreover, the definition of domestic worker in ILO 189 includes workers who perform work in or for a household within an employment relationship (Article 1). Home care workers in Australia, such as those who are employed to provide both personal care and household assistance in the homes of the aged or with people with disabilities, are thus encompassed in the scope of this Convention. Moreover, given the purpose of ILO Conventions is to set agreed international minimum labour standards, we argue that ILO 189 provides scope to include and consider home care workers in a diverse range of national contexts, including in developed countries such as Australia.

While in 2011 Australia supported the adoption of ILO 189 (ILC 2011), to date the Australian government has not expressed any intention to ratify this Convention. Nevertheless Australia provides a useful case study for considering how ILO 189 might be used as a decent work ‘benchmark’ to assess existing conditions of work for home care workers. This is important because while minimum labour standards in such countries might be seen to provide more robust regulatory protection for home care workers than in many developing nations, glaring gaps remain in the standards and protections for these workers (Hayes 2016; Charlesworth forthcoming). Indeed what is striking, even in countries such as Australia and the Netherlands which have had historically better minimum employment standards (particularly in terms of wages and working time) for home care work than other developed countries such as the United States and the United Kingdom, is a slow but steady shift to more fragmented, individualised and informal employment relationships in care services funded by national governments (Bekker 2015; Kraamwinkel 2016; Macdonald & Charlesworth 2016). The marketisation and privatisation of home care services, underpinned by either explicit or implicit cost containment policies, place particular pressures not only on workers but also on the mainly female clients to whom they provide services through the erosion of both job quality and care quality (Hayes 2016).

So it is timely we believe to reflect on what decent work for home care workers in Australia might look like drawing on both ILO 189 and the scholarship and activism that has emerged around it. In this paper we address two related questions: firstly, how can ILO 189 be used to contribute towards re-imagining employment protections for home care workers in Australia? Secondly, what key principles should underpin and inform these protections?

In the following section we outline the key framings on which our analysis draws, namely the informalisation of home care work and the role of the standard employment relationship; the decent work agenda emerging from ILO and the recognition of domestic work as ‘work’; and the work of McCann and Murray on a proposed Model Working Time Law for Domestic Work (2010, 2014). The next section outlines relevant features of the current regulatory framework for home care work in Australia, including both shifts in policy and funding arrangements, and the current protections provided under the *Fair Work Act 2009* (FW Act) by the *Social Community Home Care and Disability Services Industry Award 2010* (SCHCDS Award).² The subsequent section sets out the background to the adoption of ILO 189 and assesses how minimum labour standards for home care workers in the SCHCDS Award measure up against key aspects of this Convention. We also consider how the principles underpinning the design of the Model Working Time Law can work in conjunction with the Convention to provide a way forward for rethinking decent work for home care workers.

Key Framings

Informalisation and the Standard Employment Relationship

Home care work is distinctive in that it trespasses not only the boundaries between the informal and formal economies but also those boundaries between market work and family work, and between public and private spaces (Fudge 2012: 3). To understand how employment conditions for home care work are created, it is important to move beyond what is often presented as a static categorisation of work as formal or informal or as a regulated/unregulated division in the scope of employment law. The process of formalisation/informalisation is most usefully understood as a dynamic process with shifts both away from and towards formalisation along a continuum (Fudge 2012;

Freedland & Kountouris 2012). In the case of home care, formalisation can be seen as the process that facilitates the regulatory recognition of home care work as ‘work’ (le Bihan 2012). In most developed economies where public funding is provided for long-term care, the conditions of work for home care workers have become more formalised over time, with many regulatory exclusions addressed. Nevertheless this regulatory recognition of home care work as ‘work’ remains incomplete and vulnerable to labour market changes with the rapid shift to the marketisation and privatisation of care services.

The ILO (2013) identify a range of factors in which a deviation from the Standard Employment Relationship (SER) contributes to informality, many of which intersect with domestic work, including workers who are disguised, ambiguous, precarious or vulnerable own-account workers, special cases and workers in triangular relationships (ILO 2013). Precarity and informality are shaped by employment status, such being self-employed or an employee, the form of employment (temporary or permanent, part-time or full-time) as well as by social context and social location (Noack & Vosko 2012). In particular in home care work, overwhelmingly undertaken by women including migrant women on part-time or casual contracts, precarity is underpinned by the gendered (de)valuation of paid care work more generally (eg Folbre 2008; Palmer & Eveline 2012) and amplified by being work that occurs outside institutional settings in private homes (Lily 2008; Hayes 2016).

While some have argued that a reliance on the SER to protect vulnerable workers is inherently problematic (see Vosko 2011) because ‘those in working relations that deviate sharply from the SER [such as domestic workers] are the least likely to benefit’ (McCann 2014: 510), McCann and Murray (2014) suggest a rethinking and reconfiguration of the role of the SER in contemporary employment regulation is

crucial, particularly in relation to domestic work. They suggest that working time regulation should play a constitutive role in binding together varieties of non-standard forms of work into ‘coherent and protective working relationships (2014: 322).

Decent work and domestic work as work

Conceptual debates concerning the role of the standard employment relationship for redressing the precarity of domestic work was central in scholarship that formed the basis of advocacy for both the adoption and subsequent ratification of ILO 189 (McCann & Murray 2010, 2014; Blackett 2011). Manuela Tomei, then Chief of the ILO’s Conditions of Work and Employment Programme, summarised the animating force behind the adoption of ILO 189 thus: ‘Decent work for domestic workers means recognizing that they are real workers, that is, like other workers with labour rights’ (McCann and Murray 2010: v). Thus the formal recognition of domestic work as ‘work’ in ILO 189 provides a mechanism as Blackett points out, to hold up assumptions about domestic work ‘to the light of labour law principles’, making the skill level required by this work more visible not only to industrial institutions and funding bodies but also to the workers themselves (2011: 14).

The ILO estimated that prior to the Convention, ninety per cent of domestic workers worldwide, the vast majority of whom are women, were not protected or only partly protected by national labour laws (ILO 2013). Advocates for ILO 189 argued that the failure to fully recognise domestic work as work creates a number of problems including low levels of legal regulation of this work, underpinned by the characterisation of domestic work as ‘non-work’. This has resulted in gendered conditions of work ranging from precarious to egregious breaches of labour standards (ILO 2013) in which migrant workers are particularly vulnerable (ILO 2017).

The Model Working Time Law

Prior to the adoption of ILO 189 in 2011, the ILO commissioned a study by McCann and Murray to develop a resource for the design of regulatory measures on working time in recognition that working time is a crucial aspect traditionally excluded from any labour regulation of domestic work (2010). This resource, a proposed Model Working Time Law, aims to model minimum working time standards for domestic workers (McCann and Murray 2010; 2014). Rather than ‘shoehorn’ domestic work into existing labour standards, the sophisticated analysis underpinning the development of the Model Law recognises the specific nature of domestic work as ‘work like all other and work like no other’ (ILO 2010). The Model Law is based on a concept of ‘framed flexibility’. It combines key elements of conventional working time laws in ‘framing standards’, which place constraints on working time through a framework of limits on working hours, unsocial hours and rest periods, together with ‘flexibility standards’ that promote both employer and worker-orientated forms of flexibility (McCann and Murray 2010: 25-26). The provisions and the principles that underpin the Model Working Time Law provide a useful benchmark to highlight the deficits in current Australian protections for home care workers and a basis for a re-imagining of better regulatory protections for home care work. In this paper we draw on ILO 189 and the principles and provisions of the Model Working Time Law to rethink decent work for home care workers in Australia.

Home care work in Australia - trends and employment protections

In Australia there has been a slow but significant shift from residential aged care services to home-based services (ACFA 2016). While the precise number of home

care workers in Australia is unclear, a 2016 national aged care survey estimated there were 72,495 direct home care employees of whom almost ninety percent are female (Mavromaras et al 2017: 74). However another 10,000 home care workers are indirectly employed by aged care agencies, including through labour hire with the proportion of these workers growing due to considerable structural change in the aged care sector (Mavromaras et al 2017: 128, 69).

The growth in the importance of home care work, as in other OECD countries is due to a number of factors including population ageing, shifts away from institutional care to community-based care and to the implementation of individualised funding models such as in Australia via ‘personal budgets’ in disability as part of the National Disability Insurance Scheme (NDIS) and via ‘consumer directed care’ (CDC) in aged care. In aged and disability care the shift away from residential to home based care is an explicit federal government policy objective predicated on parallel yet competing objectives of providing ‘consumer choice’, and cost-effective service delivery (Macdonald & Charlesworth 2016).

Today there are growing numbers of the frail aged and people with disabilities receiving care services in their home provided by workers who are employed in an increasingly diverse and non-standard array of working relationships, including labour hire, casual, part-time work and self employment such as via online web platforms. In both disability and aged care the rapid shift to individualised funding has led to calls from employers for even more flexible working time arrangements than exist under existing employment regulation, which provides a relatively modest base for decent work conditions discussed further below.

Australia’s regulatory framework for home care workers

So where do we stand in Australia with decent work for home care workers?

Currently, the overwhelming majority of home care workers are engaged in the formal economy, which has a protective effect relative to conditions in many emerging economies. However many home care workers are located in what in the Australian context might be called ‘poor quality’ work. Importantly, the conditions of work for home care workers are not simply an aberration but underpinned and facilitated by a regulatory framework under the FW Act, which provides only protection for those designated as employees, rather than for all workers.

While the FW Act does not define what constitutes an ‘employee’, over time case law has built up that distinguishes employees from other workers, such as independent contractors, by focusing on factors such as the nature and extent of control an employer has over the worker’s activities (Johnstone & Stewart 2016: 68). However an employer’s misclassification of an employee as a contractor to avoid the legal protections of the FW Act needs to be identified as such and enforced, ultimately through the courts. Such action is well beyond the capacity of most home care workers, who are unlikely to be union members. Further home care workers, who may be employed by a number of separate employers, are still dependent on these employers in the way that a truly independent contractor may not be (see McCann & Murray 2010: 6).

To understand the current regulatory protections for home care workers, it is useful to understand just how far along the formalisation continuum that home care work has come. In the Australian context, the regulatory inclusion of home care workers occurred in differing ways. Historically many home care workers were employed directly by state and or local governments and eventually gained protections through the relevant industry awards that provided the minimum wages and employment

conditions for those sectors (Charlesworth 2012). However it was only in 1991 that home care workers in the non-profit sector gained coverage by an industry award and access to the minimum wage and other employment conditions (Briggs et al, 2007). Different levels of skills used in home care work, particularly in relation to personal care, began to be ‘unpacked’ and were recognised in award skill classifications. In many states, particularly in government employment, conditions for home care workers improved and included the payment of travel time between clients (Charlesworth 2012).

The regulatory recognition of home care work has not, however, been a steady story of progress. The ‘award modernisation’ process introduced in 2009/2010 under the FW Act saw more than 23 state and federal awards aggregated into the *Social Community Home Care and Disability Services* (SCHCDS) Award. Some of the improvements won in several individual predecessor awards, such as payment for travel time between clients, were lost in this process (Charlesworth 2012). Indeed in Australia, as elsewhere, we are now seeing what is arguably a re-informalisation of employment of home care workers with further contracting out by governments and non-profit providers, a shift to consumer choice in funding arrangements and the growth of uber-like platforms that link clients and workers, encouraging ‘self-employment’ that sits outside the protection of labour law (Macdonald & Charlesworth 2016).

Approximately one third of directly employed home care workers in aged care are employed on a casual basis, while most of the remainder are on part-time contracts (Mavromaras et al 2017). In disability, the rate of casualisation of disability support workers is estimated to be around 41% with the remainder also mainly on part-time contracts (NDS 2017). Today, many home care workers, both casual and ‘permanent’

part-time, have fragmented daily working hours. This fragmentation is facilitated by the SCHCDS Award, which provides only a one-hour minimum engagement for casual home care workers and for split shift arrangements and the cancellation of visits for part-time workers, who are not entitled to any minimum engagement (Charlesworth & Heron 2012). As a result workers may experience multiple short shifts with periods of non-pay and no paid breaks over long days (Cortis, Macdonald, Davidson & Bentham 2017). Together, casual status and low minimum 'guaranteed' hours for part-timers can leave some home care workers essentially underemployed yet unavailable to top up income through additional jobs.

Home care work is the lowest classification in the SCHCDS award with other classifications such as social and community services employees subject to relatively better conditions. Casual status means no access to a range of entitlements, such as paid leave, under the FW Act's National Employment Standards and under the terms of the SCHCDS award to poorer working time minima than other home care workers such as paid premia for unsocial hours (Charlesworth & Heron 2012). Further, much of the work intrinsic to home care work is not accounted for or remunerated under the SCHCDS Award. This work includes travel between clients, administration, monitoring and reporting on client well-being, relationship management, and dealing with complex client care needs. The treatment of travel time between clients as non-work time arguably constitutes an 'unacceptable form of work' (see Fudge & McCann 2015) for Australian home care workers. It is also an anomaly compared to New Zealand and the UK, which have poorer employment protections, but now provide that travel time between clients is paid working time (Davison and Trevett 2017; UK Government 2017).

The ongoing first Modern Award Review by the Fair Work Commission, which began in 2014, is a contested space where workers and unions are seeking improved conditions for workers, while home care employers in disability and aged care have called for yet more flexibility in home care workers' conditions.³ This push has focused on making part-time work more flexible through mechanisms such as the averaging of hours, reducing the minimum engagement casual disability support workers (currently two hours) to one hour (in line with home care workers) and increasing the spread of hours for broken shifts. In a welcome move, in a draft consent determination as part of the Modern Award Review it appears likely that the payment of travel time is to be included in the SCHCDS Award, although this appears to have been won as a concession for increased worker flexibility.⁴

ILO 189: Lessons for Employment Protection for Home Care Workers

For most of the last two decades, the ILO has been focused on its 'decent work agenda'.⁵ In 2011 building on that agenda and after the sustained activism of women's groups, domestic workers NGOs, unions and internal support within the ILO, the tripartite ILO conference (made national employer bodies, unions and governments) adopted ILO C189 by a vote of 396 to 16). The impetus for ILO 189 arose from historical and international patterns of partial or complete exclusion of domestic work from national employment regulation which Albin and Mantouvalou (2012) describe as 'legislative precariousness'. The adoption of the Convention was widely supported by employer groups and national governments including by the Australian government. The Australian focus however was more on its impact in the Asia Pacific region where the concern was 'undervalued and poorly regulated domestic work' (ILC 2011: 5). Indeed there is little evidence that the Convention was

seen by the Australian government to apply to Australia, much less to home care workers.

ILO 189 covers households, agencies and other employers of domestic workers and provides a number of important standards. These include protection from abuse and harassment, provision of a written contract, equal treatment with other workers, minimum wage coverage, equivalent social security protection, and some oversight of private employment agencies, access to legal remedies and to enforcement of labour standards in the home. Importantly ILO 189 recognises that many domestic workers are migrants, focusing specifically on migrant workers' rights and on their access to practical legal remedies. This is highly relevant in the Australian context. The presence of migrant workers in frontline care work is important and growing, including those on temporary visas, who are particularly vulnerable to the risk of poor quality work (Howe, Charlesworth & Brennan 2017).

To date there have been twenty-four ratifications of ILO 189 including by several developed countries including Belgium, Finland, Germany, Ireland, Switzerland and Italy. There are a number of reasons why other developed countries have considered ratification and rejected it. The UK government abstained from voting for the adoption of ILO 189 on the grounds that it was not appropriate or practical to extend regulation to cover private households employing domestic workers with its representative stating 'It would be difficult, for instance to hold elderly individuals, who employ carers to the same standards as large companies' (Albin & Mantouvalou 2011: 14). The Netherlands also has rejected ratification on the basis that it has historically perceived domestic work as 'pocket money' for housewives, with such work framed as non-work in labour regulation (Kraamwinkel 2016).

How does Australian home care work measure up?

Here we compare the current protections for Australian home care workers against firstly several key standards set out in ILO 189 and secondly against the core principles and more detailed minima of the proposed Modern Working Time Law (McCann & Murray 2010).

McCann points out that the ‘exhortation’ in Article 6 of ILO 189 that domestic workers should enjoy ‘fair terms of employment as well as decent working conditions ‘goes much further than previous ILO conventions dealing with nonstandard work’ (2012: 189). Together with Article 10 this aspiration provides an important basis of re-imagining decent work for home care workers in the Australian context. Article 10 provides that ratifying member states take ‘measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work.’ ILO 189 thus provides a basis for the equal treatment of home care workers with other workers and confronts directly the view that such work is somehow too difficult to subject to the working time minima that applies to other work (see McCann 2012: 186-187) .

Importantly ILO 189 makes no distinctions between ‘worker’ and ‘employee’ and there is arguably a presumption of an employment relationship where domestic workers are employed, including by households. In this respect ILO 189 offers a higher standard that exists in Australia where, as outlined above, employment regulation still limits protections to those who are designated as employees. Even for employees, under both the NES and the SCHCDS Award casuals have poorer conditions relative to permanent or ongoing employees, others covered by the SCHCDS Award and indeed by Awards in more male-dominated sectors. This

reflects the low value that this work has been accorded historically and industrially (Briggs et al 2007).

Article 7 provides that workers need to be appropriately informed of their employment terms and conditions, preferably in a written contract. Provision for a written contract and written agreement to changes in hours for permanent workers were only inserted into the SCHCDS Award in 2013, after a union claim in the 2012 Interim Modern Award Review. Nevertheless, the provision for such written agreements is likely to become an issue of increasing contestation by employers with the growth of non-standard employment.

ILO 189 Article 3.3 sets out the right to freedom of association and the right to collective bargaining. One of the key drivers to the adoption of ILO 189, as well as a consequence of it, has included the galvanisation of the union movement to engage more effectively with domestic workers who, due to their invisibility in the domestic sphere have historically not been organised at significant levels (ITUC 2013; Solidar 2012). However, in Australia while home care workers have the right to join a union and a formal right to collective bargaining, union coverage remains poor outside state or local government employment, which limits collective bargaining, as does a low awareness among unions of the mobilisation potential of ILO 189 to gain better conditions for home care workers.

Articles 13 and 17 provide the right to a safe and healthy working environment workplace as well as labour inspection, enforcement and penalties. While all Australian home care workers are covered by occupational health and safety laws, the Fair Work Ombudsman only enforces FW Act protections, such as in awards, for employees. To date there are no specific measures for labour inspection in the private homes in which home carers work, although to date we note that the FWO has taken

action against one home care employer for sham contracting, that is employing workers as independent contractors rather than employees (FWO 2016). Nevertheless there is clearly little capacity to enforce workplace laws in private homes under individualised arrangements with the unclear employment status of workers employed directly by the householder, as is possible under the NDIS. Historically there has been a strong reluctance for the state to regulate in the private sphere and as noted above, this was the primary reason for the UK not supporting the adoption of ILO 189.

Finally, article 16 provides for effective access to courts, tribunals or other dispute resolution mechanisms available to other workers. This ILO 189 provision, perhaps more than others highlights the issue of limited substantive access of many Australian home care workers to the protection of the national employment system - a system which as noted above provides legal protection only to employees, not all workers - and within the class of employees, more limited protections to those designated as casuals and specifically under the SCHCDS Award, to part-timers.

Work like all other work and work like no other work

Lobbying for ILO 189 used the slogan that domestic work is both ‘work like all other work and work like no other work’ (ILO 2010). This is a useful way to briefly consider key principles underpinning ILO 189 that the proposed Model Working Time Law draws out.

The principle of universality embodied in the phrase ‘work like all other’ is consistent with a human rights approach as embodied in ILO Conventions generally (Albin and Mantouvalou 2012). It assumes that domestic workers, including home care workers, should have access to the same protections that exist for other workers in the national context, no matter who their employer (McCann and Murray 2010: 14). Thus ILO 189

provides a basis for the legal recognition of the value of home care work, which has been historically treated as ‘not quite’ work. In ILO Conventions, universality is framed within the context of national labour regulation, which in Australia and elsewhere makes distinctions in the levels of employment protection on the basis of both the form and status of employment. Nonetheless ILO 189 clearly advocates that domestic work, such as home care work, is incorporated into national employment regulation at a level provides protection equal to that of other workers – irrespective of employment form or status (ILO 2013).

The subject of regulation principle is based on an expansive understanding of what McCann and Murray call the ‘statutory image of the protected worker’ (2010: 16). This principle means that the design of working time regulation needs to take account of the most vulnerable workers. An important test of the inclusiveness of working time regulation in the Australian context would be the extent to which the most vulnerable workers are protected, including home care workers. Inherent in the principle of universality is the dissolution of any distinctions between groups of people. Such ‘inclusivity’ is a crucial underpinning of comprehensive minimum standards (Vosko 2010: 120). This principle is clearly undermined in the poorer safety net protections offered home care employees under the SCHCDS award, particularly those who work on a part-time and casual basis (Charlesworth & Heron 2012).

An important principle implicit in ILO 189 and made explicit in the proposed Model Working Time Law is the legal recognition of the value of care work (McCann & Murray 2010: 13). As outlined above, while home care work is formally recognised in labour regulation in Australia, its value as ‘work’ has not been fully recognised. There is an ongoing reluctance to extend the same protections as exist for professional care occupations, such as nursing, to this work, despite some similar fluctuations in demand.

Yet, as McCann and Murray argue the need for temporal flexibilities such as emergency care and the difficulties in providing fixed working hours, such as experienced in home care work, have been addressed in the medical and nursing professions (2010: 13). Even within frontline care work, there exists a hierarchy that provides poorer protections to those who provide such care in the home, than in institutional settings (Lily 2008).

The phrase ‘work like no other work’ encapsulates both the distinctive nature of home care work in responding to the changing needs and demands of clients as well as the historical and gendered construction of work in the home as work with limited work value. Importantly ILO 189 provides the basis to explicitly recognise the nature of home care work – that it is work unlike much other work in its location in the private sphere and in its profoundly gendered dimensions.

A core component of the McCann and Murray conceptualisation of working time is the way in which the organisation of work hours interferes with non-work time. They consider unpaid time where the worker is essentially on-call or standby as ‘time out of life’ (2010: 29-30). This occurs in the form of ‘porous’ boundaries between work and non-work in which workers are expected to be on call for work, yet are unpaid and unable to devote time to their own lives including other employment or caring responsibilities (McCann and Murray 2014: 325). In her study of home support services in Quebec, Boivin (2016) argues that this ‘time porosity’ occurs as a consequence of the way in which this work is organised, creating a requirement for workers to be constantly available without industrial compensation or protection. This is especially acute for live-in workers but also relevant in the Australian context to home care workers who may work multiple, interrupted shifts with periods of unpaid time over a long day.

The need for regulated flexibility and ‘working time capability’ underpins the Model Working Time Law. These concepts, first elaborated by Lee and McCann (2006), lead to a focus on how best to support the capacity of individual workers to influence their working hours, without derogating from basic minima in the framing standards such as the regulation of weekly and daily hours, overtime and unsocial hours. The principle of regulated flexibility and working time capability recognises that working time regulation for home care work, notwithstanding its non-standard dimensions, needs to provide some basic protections and benefits of standard working time regulation, particularly around the duration and predictability of working time arrangements and therefore time for family, personal and community life (McCann and Murray 2010: 15). This erects an important conceptual demarcation between the caring work many women do ‘for free’ in their private lives and the paid caring work they might undertake, a demarcation that is often blurred (Armstrong et al. 2008). Working time regulation thus needs to provide the minimum standards necessary to enable workers to exercise a certain degree of genuine choice over their working time arrangements (Lee and McCann 2006: 78-79) and ought to be extended to home care workers, notwithstanding the need for some client/ agency orientated-flexibility in their work.

The Model Law is ‘not proposed as a universal model that can be applied without modification in all legal regimes’ — it recognises that there are specific national policy contexts in which better working time regulation for domestic workers might be implemented (McCann and Murray 2010: 25, 17). Nevertheless the concept of framed flexibility that lies at its basis suggests both that there are profound deficits in current Australian working time regulation of home care workers and that there is also a way forward towards decent work. While some of the minimum framing standards

set out in the text of the Model Law (McCann & Murray 2010: 44-49) are exceeded under the SCHCDS award, such as maximum weekly hours and rest breaks, several are not. For example, a written agreement of working time arrangements under the Model Time Law which would apply to all workers, including the right to paid annual and sick leave, only applies to permanent employees under the SCHCDS Award and the NES. Further, Clause 8.1 of the Model Law stipulates that all hours worked beyond normal hours, including the normal hours of part-time workers, shall be deemed to be overtime hours and compensated as such. Under the SCHCDS Award part-timers who work beyond their guaranteed minimum weekly hours are required to full time hours (38 hours per week) and over to attract overtime pay. Any 'flexed up' time over the guaranteed minimum hours is paid for at ordinary time rates (Charlesworth & Heron 2012).

The Model Law expressly forbids the employment of workers on 'as and when required' (casual basis) (CL 10.4) and also provides what could be described as a two hour minimum engagement for all workers (Clause 10.2). Under the SCHCDS Award casual home care workers are only entitled to one hour's minimum engagement, while under the Award those designated as casual disability support workers are current entitled to a two hour minimum engagement. However, as noted above, minimum working hours per shift are not specified for part-time employees, whatever their role.

Compared to the Flexibility Standards set out under the Model Law (McCann & Murray 2010: 50-54), the SCHCDS Award also falls short. These standards place a limit on what is termed as on-call and provide a framework for adjusting working time both employer- and worker-initiated that applies to all workers. The Model Law also provides a far more robust template for negotiating changes to working time than the request for flexible working arrangements standard under the NES. This standard

covers only employees who have been employed for at least 12 months, and if casual, only those who have been in regular and systematic employment, and is unable to be enforced (see Pocock & Charlesworth 2017).

Using ILO 189 towards decent work for home care workers in Australia

Australia was a founding member of the ILO and has remained actively engaged with the ILO since 1919. To date, **58** ILO Conventions have been ratified by Australia, of which **41** are currently in force, with the ILO Part-time Work Convention 1992 one of the last to be ratified in 2011 under the then Labor government. While historically Australia has only ratified those Conventions with which it deemed itself to be compliant, the ratification in 1990 of ILO 156 on Workers with Family Responsibilities 1981 was used to drive significant legislative and policy change far beyond the terms of the Convention, including for example, increased government spending on childcare as well as provisions prohibiting discrimination on the ground of family or carer responsibilities not only in anti-discrimination regulation, but also in industrial relations regulation (Charlesworth & Elder 2012). These changes and the ripple effects they generated were driven by significant government activity at the time of ratification, as well as growing union and community pressure since that time, to enable workers better balance work and family responsibilities. We note that Australia's obligations under ILO 156 is also invoked in the current ACTU case before the Fair Work Commission seeking more secure work and family arrangements for workers.⁶

Unratified conventions have also on occasion been used as an important reference point for policy initiatives. For example, ILO 183, the Maternity Protection

Convention 2000 was used to partly shape the Paid Parental Leave (PPL) scheme introduced in 2011 (Stewart et al 2016: at 4.44). It was also used as a relevant international benchmark by unions, the Australian Human Rights Commission and advocacy groups lobbying for a national parental leave scheme, with this standard invoked more recently by the Workplace Gender Equality Agency to argue against proposed legislative change to limit PPL for women in receipt of employer-provided parental leave (WGEA 2016: 7).

What might Australia learn from international activity around ILO 189?

The potential of ILO 189 as a way of mobilising to improve the working conditions of home care workers is visible in other developed nations, both in ratifying and non-ratifying countries. Italy ratified ILO 189 in 2013 and the ratification process was underpinned by a strong union alliance that has characterised many national movements towards ILO 189 (EFFAT 2015). Global and national mobilisation of workers through coalition of unions, incorporation of migrant domestic workers into unions, and other forms of non-union collective mobilisation such as that in the UK (Jiang and Korczynski 2016) has been a cornerstone of ILO 189 (Carls 2012). As a consequence of effective union action, subsequent to Italy's ratification of ILO 189 a new collective bargaining agreement emerged that covers many domestic workers (though not homecare workers). In the Italian case as in some other countries such as France and Germany (Carls 2012), collective agreements play a central role remedying some of the inequities inherent in labour law toward care/domestic work although coverage is imperfect and enforcement of conditions remains problematic. Interestingly, in these three countries, there is collective bargaining between union and associations representing private households (EFFAT 2015).

Ireland which has also ratified ILO 189 has developed key policies for domestic workers including labour inspections in private homes, a code of practice for the sector by Labour Relations Commission with social partners, and new measures to protect domestic workers in embassies (Workplace Relations 2016). Recognition of the private home as a workplace is a crucial step in moving domestic workers under the umbrella of general labour law and toward the construction of domestic work as work. Nonetheless, labour inspection in private homes remains a sticking point for non-ratifying countries such as the UK as well as ratifying countries.

Even in some non-ratifying countries, there has been progress towards improved labour standards for domestic workers as a consequence of the mobilisation of domestic workers and unions for adoption of the Convention. In the US a Domestic Workers' Bill of Rights has been adopted in seven states: New York, Hawaii, California, Massachusetts, Oregon, Connecticut and Illinois (NDWA 2017) giving domestic workers some essential rights and protections. In the Netherlands, which has refused to ratify the Convention, union groups lobbied successfully to have publically funded social care recognised as 'work' - so that such work is now covered by labour regulation (Kraamwinkel 2016). Other domestic work in the Netherlands, however, remains excluded from labour law as it is perceived as 'non-work'.

Action to date in Australia

There are some clear limitations to the use of ILO 189 in achieving decent work for home care workers in Australia through more robust labour standards. Despite supporting its adoption in 2011, the Australian government has been silent on its intentions to ratify or not. Such ratification is highly unlikely under a Coalition government in any event; nor is ratification of ILO 189 part of the Labor Party's policy platform. Nevertheless, there has been some action by unions and civil society

to encourage ratification of ILO 189. For example, by the Salvation Army, which has focused on sex slavery of migrant women and migrant women used as live-in housekeepers, including for foreign diplomats. This activism was supported in 2012 at a union rally led by both the Australian Council of Trade Unions (ACTU) and United Voice (IDWFED 2012). ILO 189 is one of a number of ILO conventions that the ACTU's International Policy has called on the Australian government to ratify. However ILO 189 ratification has not become a key union campaign as in other countries nor has any connection made between the larger group of domestic workers and those who provided publically funded aged and disability care in private homes. This appears to be due to a lack of union recognition that formal home care work in a developed country context falls within the definition of domestic work in ILO 189. Indeed there is has been an historical disconnect between union mobilisation around the rights of those who fall clearly outside Australia's employment regulation, such as domestic workers in foreign embassies, with mobilisation around the rights of workers who are at least partly covered by the protections of such regulation.

Conclusion

We have argued that ILO 189 provides a starting point to think about what sorts of principles and provisions might underpin the legal regulation of home care work in the Australian context. Our consideration of the potential role of this Convention occurs in a rapidly changing context in which the employment conditions of many home care workers are arguably shifting backwards along the informalisation/formalisation continuum, though marketisation and privatisation, more distanced from a protective employment regime that remains constructed around the SER.

Under current Australian regulation, home care workers face a number of challenges in accessing decent work. Firstly the low standards set by the Award point to the constitutive role of Australian labour law (Freedland & Kountouris 2012) in producing poor conditions of work for home care workers. Earlier awards as well as the current SCHCDS Award arguably have not fully recognised the nature of home care work as work, leaving many aspects of the work hidden and skills unrecognised (Charlesworth & Heron 2012). Secondly within that regulation, the limited access many home care workers have to robust labour protection by virtue of their employment status – self-employed, casual or part-time, creates additional gaps in protection in what is already a porous safety net. The current shift to marketisation, to consumer-directed care in aged care and to personal budgets in disability support has intensified both the precarity of home care work and of the workers who perform it. A rethinking of current employment regulation for home care workers is thus timely.

Our argument in this paper has been that ILO 189 could offer some guidance, especially via the Model Working Time Law, to start that project. ILO 189 also has potential to be used by unions and the labour movement more generally to build a stronger foundation for decent work and access to substantive legal protection.

Realising this potential would require a broader recognition in Australia, including by unions that that homecare work falls within the scope of ILO 189. The intent of this paper is to contribute to growing this awareness, including by learning from efforts of international unions, such as the NFAW in the Netherlands, to mobilise around ILO 189. There is both historical precedent for a relationship between international conventions and Australian labour law, as well as some good practice being implemented internationally in developed countries as highlighted above, which point

the way forward for recognising home care work as work with regard to full access to national employment regulatory systems and enforcement.

There does however, still remain a strong tendency, contrary to international law, to embed exclusions within regulation that is specific to home care work. A significant point of demarcation is between home care workers employed by the household and other home care workers who work in the home but are employed by external organisations. In many contexts, such as the Netherlands, where the householder is the employer and the work is not publically funded, home care work is expressly excluded from broad national employment regulation. Similarly, the Irish Code of Practice fails to recognise the coverage of home care funded by governments and organised through employers as falling under ILO 189, and thus ignore the poor conditions characterising work for these workers while addressing those conditions for those considered to be domestic workers (MRCI 2015).

Nonetheless, these international examples indicate that ILO 189 can be used to create critical pressure points for improving the lot of domestic workers – including home care workers. Such examples include recognition of the private home as a workplace for the purposes of employment regulation and relevant enforcement mechanisms, and the role of unions in strategically engaging with a group of highly mobile and isolated workers, who have been historically invisible to labour law and institutions of labour protection. As with past and current Australian union and civil society action drawing on ILO 156 and ILO 183, international conventions such as ILO 189 provide an expression of a relevant international standard and thus a basis for mobilisation.

There are of course clear limits to ILO 189. Even if Australia did ratify a number of clear problems beyond those that typify international regulation would still remain.

There is no mention for example in ILO 189 of work value beyond a right to the

applicable minimum wage, no recognition of the very different sets of skills that may be involved in different forms of home care work nor of rights to advancement and recognition of acquired skills. However as with the Australian experience of ILO 156, once ratified, it may be possible to use ILO 189 as a basis to address these concerns. Taking on the regulatory challenges of decent work regulation that provides protections for home care work that is both ‘work like all other and work like no other work’ could well provide a basis for a more substantial re-imagining of Australian employment regulation for all workers within the context of increasingly fragmented forms of employment. In that respect we concur with McCann who argues that

...across the developed and developing worlds, the project of domestic work regulation is also the single most significant contemporary attempt to engage with the regulatory demands of profoundly casualised and informal working relations.’ (2014: 511).

Notes

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¹ This paper draws on a broader cross-national project examining regulatory strategies to improve the quality of jobs held by frontline care workers (ARC FT120100346 *Prospects for quality work and gender equality in frontline care work*).

² In this paper we use the generic term ‘home care worker’ to include all those workers who provide long-term care to both aged care and clients with a disability in private homes. However we note that currently under the SCHCDS Award these two groups of workers are separately and respectively classified as ‘home care employee’ and as ‘social and community services employee’.

³ Australian Business Industrial & the NSW Business Chamber, Social, Community, Home Care and Disability Services Industry Award. Casual Employment and Part-Time Employment, Fair Work Commission: 4 Yearly Review of Modern Awards, 30 November 2015

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014196-197-sub-abi-301115.pdf>

⁴ *Draft Consent Determination*, 4 Yearly Review of Modern Awards [AM2014/285], Social, Community, home Care and Disability Services Industry Award 2010. Fair Work Commission, Australia.

⁵ Decent work is defined as ‘opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.’ (ILO, <http://www.ilo.org/global/topics/decent-work/lang-en/index.htm>).

⁶ See <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20152-sub-witness-statements-actu-090517.pdf>