



**Human Rights and Equal
Opportunity Commission**
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Submission of the

**HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION (HREOC)**

to the

**AUSTRALIAN GOVERNMENT DEPARTMENT OF
EDUCATION, EMPLOYMENT AND WORKPLACE
RELATIONS**

**ON THE DISCUSSION PAPER, NATIONAL
EMPLOYMENT STANDARDS EXPOSURE DRAFT
(2008)**

Human Rights and Equal Opportunity Commission

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Introduction

1. The Human Rights and Equal Opportunity Commission (HREOC) makes this submission to the Australian Government Department of Education, Employment and Workplace Relations in response to the Australian Government's invitation to make comment on the National Employment Standards Exposure Draft Discussion Paper.
2. HREOC is Australia's national human rights institution.¹
3. HREOC's submission draws on recent work undertaken by HREOC in relation to paid maternity, paternity and parental leave, carer's leave and the right to request flexible work arrangements in the workplace, particularly the findings and recommendations contained in: *It's About Time: Women, Men, Work and Family Final Paper 2007 (It's About Time 2007)*,² *WORKability II: Solutions – People with Disability in the Open Workplace*,³ HREOC's submission to the Work and Family Test Case and other research.
4. In addition, HREOC's submission draws upon its previous recommendations regarding enactment of Commonwealth legislation which removes discrimination against same-sex couples and their children in areas such as leave and other related entitlements, set out in *Same Sex: Same Entitlements*, the report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (2007 *Same-Sex: Same Entitlements Report*).⁴

¹ HREOC is established by the *Human Rights and Equal Opportunity Commission Act 1986* ("HREOC Act"). Sections 11 and 31 of the HREOC Act set out HREOC's functions relating to human rights and equal opportunity in employment respectively. HREOC also has functions under the Commonwealth *Sex Discrimination Act 1984*, *Racial Discrimination Act 1975*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*.

² Available at http://www.humanrights.gov.au/sex_discrimination/its_about_time/index.html.

³ Available at http://www.humanrights.gov.au/disability_rights/employment_inquiry/index.htm.

⁴ Available at http://www.humanrights.gov.au/human_rights/samesex/report/index.html.

Summary

5. HREOC supports the intention of the Australian Government to legislate a set of National Employment Standards (NES) to cover key minimum workplace entitlements for all Australian employees.
6. HREOC welcomes the Australian Government's commitment to encourage greater workforce participation, especially amongst groups that have historically experienced barriers to participation in the paid workforce including parents, carers, employees with disability and Indigenous Australians.
7. HREOC is pleased to see that the right to request flexible working arrangements is being considered by the Government as a core workplace entitlement.
8. However, the proposed NES do not go as far as previous recommendations put forward by HREOC in relation to parental leave and carer's rights and responsibilities in employment and the right to request Flexible Working Arrangements, particularly for employees with a disability.
9. HREOC supports the enactment of legislation dealing with a right to request Flexible working arrangements and urges the Government to consider broadening this right by not limiting this right to parents of children under school age only and making it available to:
 - employees with all forms of family and caring responsibilities; and
 - employees with disability who may need flexibility as part of reasonable accommodation in the workplace.
10. Giving the above employees the legal right to request Flexible working arrangements is a fundamental step in enabling people with diverse needs and responsibilities to participate in the workforce, importantly providing an opportunity to maximise productivity and encouraging more employees to remain in the workforce. Such an approach will foster economic and social benefits for the nation.

11. Extending the right to request Flexible working arrangements to employees with disability would also support the aims of the Governments National Mental Health and Disability Employment Strategy.
12. HREOC makes thirteen recommendations in relation to issues raised in the NES Exposure Draft Discussion Paper:

Recommendations

13. HREOC's recommendations are as follows:
 1. **Recommendation One: That the definition of the term 'employee with a responsibility for the care of a child' under the Flexible Working Arrangements NES remain inclusive of same-sex couples with children, and therefore not be restricted to those with 'legal' responsibility for a child.**
 2. **Recommendation Two: That the proposed right to request Flexible Working Arrangements NES apply to all forms of family and caring responsibilities and to employees with a disability.**
 3. **Recommendation Three: That the proposed right to request Flexible Working Arrangements NES explicitly set out a list of non-exhaustive factors to be taken into consideration by the employer when considering each request and determining what constitutes 'reasonable business grounds'.**
 4. **Recommendation Four: That the right to request Flexible Working Arrangements NES contain a dispute settlement mechanism allowing an employee to refer unresolved disputes around the Flexible Working Arrangements NES to Fair Work Australia or some other form of conciliatory body for procedural review.**
 5. **Recommendation Five: That the introduction of the right to request Flexible Working Arrangements NES be accompanied by a comprehensive education campaign to assist in alleviating employer**

concerns and to inform men and women of all ages about this new right. This should include development of practical ‘guidelines’ setting out respective rights and responsibilities under the NES and education of employers on what constitutes ‘reasonable business grounds’ for refusing a request for specific working arrangements under the NES. This education campaign should also have a specific small business focus.

6. **Recommendation Six:** That the Government consider future expansion of the Flexible Working Arrangements NES to include the introduction of a minimum period of notice for any intended changes to rostering arrangements. This should also be accompanied by a legislated right to refuse such employer requests where the employee has reasonable grounds for refusal.
7. **Recommendation Seven:** That the definition of ‘de facto spouse’ under the Parental Leave (and related entitlements) NES be replaced with a new definition of ‘de facto partner’ that is inclusive of same-sex couples as outlined in the 2007 *Same-Sex: Same-Entitlements Report*.
8. **Recommendation Eight:** That the Productivity Commission consider the need to amend the Parental Leave (and related entitlements) NES as part of its inquiry into Improved Support for Parents with Newborn Children.
9. **Recommendation Nine:** That the Parental Leave (and related entitlements) NES explicitly set out a non-exhaustive list of factors to consider when determining ‘reasonable business grounds’ in relation to the additional parental leave entitlement under the NES.
10. **Recommendation Ten:** That the Parental Leave (and related entitlements) NES contain a dispute settlement mechanism allowing an employee to refer unresolved disputes around the request for additional Parental Leave under the NES to Fair Work Australia or some other form of conciliatory body for procedural review.

11. **Recommendation Eleven:** That the definition of ‘de facto spouse’ under the Personal/Carers’ and Compassionate Leave NES be replaced with a new definition of ‘de facto partner’ that is inclusive of same-sex couples as outlined in the 2007 *Same-Sex: Same Entitlements* Report.
12. **Recommendation Twelve:** That the definition of ‘child’ under the Personal/Carers’ and Compassionate Leave NES be amended to recognise the children of a birth mother, birth father, lesbian co-mother or gay co-father, as outlined in the *Same-Sex: Same Entitlements* Report 2007.
13. **Recommendation Thirteen:** That the Personal/Carer’s and Compassionate Leave NES be increased and expanded in line with Recommendation 15 of HREOC’s *It’s About Time Final Paper 2007* by providing employees with 12 months continuous service with access to 20 days paid personal/carer’s per annum with 10 days to be non-accumulative. HREOC further recommends that the Government expand the NES to include 12 months unpaid Carer’s leave to be made available to employees who need to attend to the care of a seriously or terminally ill dependent. This additional unpaid leave should be job protected and available to employees who have 12 months continuous service.

HREOC's recommendation – Right to request Flexible Working Arrangements NES

Discussion Paper question 6. Should the proposed Flexible Working Arrangements NES include additional provisions to define the term 'employee with responsibility for the care of a child? If so, what additional rules should be included?

14. HREOC believes that there is a need to extend the proposed Flexible Working Arrangements NES to men and women of *all ages* and to encompass all *forms of family and carer responsibilities*⁵ such as disability and elder care⁶.
15. HREOC also believes that there is a need to extend the Flexible Working Arrangements NES to employees with a disability.

Extending the right to request flexible working arrangements to employees with all forms of caring responsibilities

16. HREOC welcomes the proposal to include, as part of the NES, a right to request flexible working arrangements. HREOC considers that its inclusion represents a

⁵ In this submission the terms "balancing paid work and care", "family and carer responsibilities" and "family/carer responsibilities" (as an abbreviation) will be used to encompass the full range of unpaid/informal care responsibilities that families and workers undertake across the life course. It is clear from HREOC's consultations with the public that "family responsibilities" are often assumed to refer exclusively to the care of children. Similarly, the term "carer responsibilities" is often understood as referring only to the care of older people or people with disability. For clarity, HREOC has opted to use both terms together in this paper. Where the paper refers to particular types of family/care work in the text it will be specified as such (e.g. as "parenting" or "caring for people with disability"). The term "carer" is used to refer to a person providing unpaid care to an older family member or someone with an illness or disability. The term "carer" would need to be defined.

⁶ The term 'elder care' is used in this submission to refer to unpaid informal care of older people requiring care. The term 'aged care' is used to refer to paid formal care of older people requiring care.

long overdue step in legislating to balance paid work and “family and carer responsibilities” in the Australian workplace relations system.

17. HREOC believes that flexible working arrangements applying to those who have ‘responsibility for the care of a child under school age’ should apply equally to people in same-sex relationships. HREOC supports the current definition under the proposed Flexible Working Arrangements NES as inclusive of same-sex couples with children. However, HREOC would be concerned if this term were altered to require ‘legal’ responsibility for the care of a child. The *Same-Sex: Same Entitlements* Report outlines a number of difficulties faced by same sex couples seeking legal recognition as parents.⁷ Thus, **HREOC recommends** that the definition should not be more specifically defined. [**Recommendation no. 1**].
18. In limiting the Flexible Working Arrangements NES to employees who are either parents of children under school age or who have responsibility for the care of a child under school age, the NES fails to take account of Australia’s changing demographic and the fact that a significant proportion of the working population have family and carer responsibilities that are not confined to the care of young school children. In this regard, the recent *Report of the Carer Payment (child) Review Taskforce* (the Taskforce) notes that, for carers of children with a disability, the role is unremitting in nature and does not decrease as the child gets older. Carers of children with disability or severe medical conditions remain permanently “on call” even when the child becomes school aged and attends an educational facility. As one submission to the Taskforce explained (in relation to their carer responsibilities for a child with a disability),

[y]ou are constantly on duty 24 hours a day, seven days a week. This role will continue until the child dies, or if I predecease my daughter. Most intensive parenting duties decline as the child grows and matures [but] this is not the case for a child with a severe disability. I will have to be on call 24/7 until the day I die.⁸

⁷ HREOC, *Same-Sex: Same Entitlements*, 2007, Chapter 5: Recognising Children.

⁸ In March 2007, the Carer Payment (child) review Taskforce was established to examine eligibility criteria for child Carer Payments and to consider the effectiveness of the payment in providing a safety net

19. As the Taskforce Report notes, “the ability of carers to provide care is an integral component of the broader care system. Their contribution is central to sustaining the current system of community-based, person-centred care”.⁹ Despite the important role played by carers in society, the evidence available to the Taskforce established that carers experience particular challenges including severely reduced employment opportunities. Many carers who provided submissions to the Taskforce expressed a desire to enter or re-enter the paid workforce when care requirements would allow. However, they reported numerous additional barriers to workforce participation.
20. Current research into Australia’s demography shows that Australia’s population is ageing rapidly.¹⁰ At the same time, older people are a significant source of informal care for older spouses, relatives (including adult children), or household members with disability or poor health. There is a strong public policy emphasis on encouraging older workers to remain in the paid workforce but this requires provision of flexible working arrangements to meet caring needs as they arise, such as flexibility around start and finishing times, occasional change of working hours and occasional working from home.
21. The need to make provision for flexible working arrangements for carers was addressed in Recommendation 4 of the Taskforce Report. The Report recommended that the government support participation in the workforce by carers of children with a severe disability by examining ways to assist employers to develop consistent and flexible policies and practices for carers. HREOC supports this recommendation but, as noted previously, HREOC is of the view that the right to request flexible working arrangements should be extended to defined carer responsibilities.

for children with a profound disability or severe medical condition, The Report of the Carer Payment (child) Review Taskforce *Carer Payment (child): A New Approach* is available on the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) website at www.fahcsia.gov.au/carers.

⁹ *Carer Payment (child): A New Approach*, at 3

¹⁰ The proportion of all persons aged 45-64 years in employment has risen from 61.5% in October 1996 to 69.5 percent in October 2006

22. HREOC considered this issue in its *It's About Time 2007*. HREOC recommended the establishment of a *Family Responsibilities and Carers' Rights Act* which would apply to men and women workers of all ages and would encompass all forms of carer responsibilities. The Act would include a right for workers with family and carer responsibilities to request flexible work arrangements with a corresponding duty on employers to reasonably consider these requests.¹¹
23. During the public consultations for the *It's About Time 2007*, HREOC received support for its proposal for a *Family Responsibilities and Carers' Rights Act* and, in particular, support for legislation which was broad in scope and not limited to accommodating family responsibilities involving young children. The Disability Council of NSW made a submission recommending that the proposed right to request be extended to include disability-related flexibility needs, based upon the model in the United Kingdom. The United Kingdom's 'right to request' model is set out in section 80 of the *Employment Rights Act 1996* (UK) and essentially encapsulates all forms of carer responsibilities. It provides a right to request flexible working conditions to:
- parents with children under the age of six;
 - parents of disabled children under eighteen; and
 - since April 2007, carers of adults.

Extending the right to request flexible working arrangements to employees with disability

24. The kind of flexibility which assists workers with family care responsibilities is often the same as, or very similar to, the kind of flexibility which may be

¹¹ For further discussion of HREOC's recommendations regarding establishment of a *Family Responsibilities and Carers' Rights Act*, see HREOC, *It's About Time- Women, men work and Family Final Paper* (2007), chapter 4 'Striking the Balance in the Workplace' available at http://www.humanrights.gov.au/sex_discrimination/its_about_time/index.html

required by people with disability in the workplace. This is also a theme which has been highlighted in HREOC's National Inquiry into Employment and Disability (the Inquiry).

25. In December 2005, HREOC produced *WORKability II: Solutions - People with Disability in the Open Workplace (WORKability II)*, the final report the Inquiry. The Report built upon HREOC's interim report – *WORKability I: Barriers*, which found that, while people with disability represent 16.6% of Australia's working age population (15-64 years of age),¹² they are less likely to be employed than people without disability and they will earn less if they do get a job.
26. People with disability have a comparatively lower labour force participation rate (53.2% compared to 80.1%) and a higher unemployment rate (8.6% compared to 5%) than those without a disability.¹³
27. In terms of gender disaggregated data, women with disability are less likely to be in the workforce than men with disability.¹⁴ For men with disability, the decrease in full time employment accounts for most of the decrease in labour force participation. For women, disability has negative affects on both full time and part-time employment.¹⁵
28. People with disability have a right to work on an equal basis with others. This right is stated clearly in the *UN Convention on the Rights of Persons with Disabilities* which the Australian Government signed on the day it opened for signature.¹⁶

¹² Australian Bureau of Statistics, *Disability, Ageing and Carers Australia*, Catalogue Number 4430.0, 2003.

¹³ Issues Paper 1: Employment and disability: The Statistics. Available at http://www.humanrights.gov.au/disability_rights/employment_inquiry/papers/issues1.htm

¹⁴ See HREOC (2005) Issues paper 1. Employment and Disability – the Statistics. Available at http://www.humanrights.gov.au/disability_rights/employment_inquiry/papers/issues1.htm

¹⁵ Wilkins R (2004). The effects of disability on labour force status in Australia. *The Australian Economic Review*, 37 (4), 359-382.

¹⁶ See Article 27, Work and employment.

29. HREOC's Final Report, *WORKability II*, made a series of recommendations on how to address barriers to participation and to ensure equality of opportunity for people with disability. Central to these recommendations was the need for flexibility in the workplace.
30. There is a range of situations in which flexibility is desirable for an employee with disability. For instance, people with certain disabilities may not be in a position to work at particular times of the day (for example due to the effects of medication or pain levels) or due to personal care or transport arrangements. Other people with disability may require reduced working hours, or the option to work from home.
31. The opportunity to work from home due to a 'flaring' in a particular condition or illness, may also be needed on an *ad hoc* basis for unpredictable recurrences (much in the same way that parents may face caring needs on an unpredictable basis).
32. Flexibility may also be required to allow people with disabilities to attend medical appointments.
33. A significant number of submissions to the Inquiry suggested that flexible working conditions are a key to a successful employment experience and retention, and consequently career advancement, for people with disability.
34. HREOC notes, in relation to the above, that extending the Flexible Working Arrangements NES to employees with a disability would not involve the establishment of any *additional requirements* or duties upon an employer in relation to the treatment of an employee with a disability that do not presently exist under the *Disability Discrimination Act 1992 (Cth) (DDA)*. The *DDA* already imposes a prohibition on an employer discriminating against a person in employment on the basis of that person's disability. The *DDA* requires that an employer make reasonable accommodation of an employee with disability, to the extent that would not involve unjustifiable hardship. Enshrining the right to request flexible working arrangements in the NES will serve to highlight this important aspect by articulating it as a right of employees to ask for flexibility as part of the 'reasonable accommodation' of their disability.

35. The Government has also recently identified, as a key priority, the need for a workforce which promotes the inclusion of people with disability and mental illness as set out in its recent announcement of a *National Mental Health and Disability Employment Strategy*.
36. That Strategy will identify national solutions to address the barriers faced by people with disability and mental illness. As stated above, it is HREOC's view that increased flexibility in the workplace will be a component of the necessary suite of solutions.
37. HREOC believes the *National Employment Standards* and *National Mental Health and Disability Employment Strategy* must complement one another.
38. **HREOC recommends** that the proposed Flexible Working Arrangements NES apply to all forms of family and caring responsibilities as well as to employees with a disability [**Recommendation no. 2**].

Definition of 'reasonable business grounds'

Discussion Paper question 7. Should the proposed Flexible Working Arrangements NES expressly define what constitutes reasonable business grounds? If so, how can this be best achieved? What additional rules, if any, should be included in the NES?

39. Question 7 of the Discussion Paper to the NES Exposure Draft asks whether the Flexible Working Arrangements NES should expressly define what constitutes reasonable business grounds.
40. HREOC is of the view that the proposed Flexible Working Arrangements NES should give employees a legislated right to have their request for flexibility reasonably considered by employers but not impose obligations on an employer who is unable to meet a request due to genuine operational reasons.

41. An employer should be required to clearly demonstrate that they have properly investigated the employee's request and only refuse the request if they have 'reasonable business grounds' for doing so.
42. HREOC believes that the NES should provide employers with guidance on what constitutes 'reasonable business grounds' for refusing to accommodate an employee's request for flexible working arrangements.
43. It is recognised that there is no "one-size fits all" approach to workplace flexibility and that reasonableness in each case will depend upon the size and nature of the employer's business or undertaking and the individual circumstances. Therefore, HREOC considers that the flexible work arrangements NES should set out a non-exhaustive list of factors to be taken into account when determining what constitutes 'reasonable business grounds' for refusal.
44. HREOC recommends an approach similar to that employed by the United Kingdom legislation dealing with right to request and the Victorian right to request model which forms part of recent amendments to the *Equal Opportunity Act 1995* (Vic).
45. As previously noted in this submission, the United Kingdom's right to request flexible working provisions are set out in section 80 of the *Employment Rights Act 1996* (UK) and the procedures for employers and employees to follow regarding right to request applications are set out in the *Flexible Working (Procedural Requirements) Regulations 2002*.
46. Under the United Kingdom model, an application can only be refused where the employer has a clear business reason for doing so. Clear business grounds are set out in the legislation as one or more of the following: the burden of additional costs; detrimental effect on ability to meet customer demand; inability to reorganise work among existing staff; inability to recruit additional staff; detrimental impact on quality; detrimental impact on performance; insufficiency of work during periods the employee proposes to work; and planned structural changes.

47. In the domestic context, under new laws amending the *Equal Opportunity Act 1995 (Vic)* (EOAV), Victorian employers may not “unreasonably refuse” any request by a new or existing employee to make changes to their or the business’s work patterns so that they can meet their obligations as a parent or carer. An employer cannot “unreasonably refuse” to accommodate the parental or carer responsibilities of a person offered employment or an employee or a contract worker.
48. The Victorian legislation explicitly sets out a non-exhaustive list of factors to be considered when determining whether a refusal to accommodate family responsibilities is unreasonable. These factors are set out below for convenience:
- the person’s circumstances, including the nature of their responsibilities as a parent or carer; and
 - the nature of the role that is on offer; and
 - the nature of the arrangements required to accommodate those responsibilities; and
 - the financial circumstances of the employer; and
 - the size and the nature of the workplace and the employer’s business; and
 - the effect on the workplace and the employer’s business of accommodating those responsibilities, including-
 - the financial impact of doing so;
 - the number of persons who would benefit from or be disadvantaged by doing so;
 - the impact on efficiency and productivity and, if applicable, on customer service of doing so, and
 - the consequences for the employer of making such accommodation; and

- the consequences for the person of not making such accommodation.
49. From the public consultations and submissions HREOC received for its *It's About Time 2007*, the National Inquiry into Employment and Disability and other research, it is generally accepted that the flexibility needs of carers and people with disability are often quite sporadic and vary between individuals. For these reasons, it is important that consideration be given to the *individual* or *personal* circumstances of the person making the request for flexible working arrangements and that these individual circumstances form part of the non-exhaustive list of factors relevant in determining 'reasonable business grounds' under the Flexible Working Arrangements NES.
50. The list of considerations in the Victorian model has received support amongst researchers and academics¹⁷ as this model requires consideration of not only the consequences for the employer of accommodating the employees' request, but also the consequence for the employee of *not* accommodating their request.
51. HREOC considers that the factors set out in the Victorian model under the EOAV provide a best practice model for the NES.
52. **HREOC recommends** that the Flexible Working Arrangements NES explicitly set out a list of factors to be taken into consideration when determining 'reasonable business grounds' under the Flexible Working Arrangements NES. The factors should be non-exhaustive, including a general provision that enables consideration of "any other factors relevant in determining reasonable business grounds". [**Recommendation no. 3**].

¹⁷ See Charlesworth S & Campbell I, *Right to Request Regulation: A Panacea for Work/Family Imbalance?*(2007).

Discussion Paper question 8. Are there any other matters that need to be taken into consideration when finalising the Flexible Working Arrangements NES?

Provision of a dispute settlement mechanism

53. HREOC considers that it is essential that the Flexible Working Arrangements NES contain some form of dispute settlement mechanism or conciliatory procedure to deal with situations where an employer appears to be unreasonably refusing an employee's request for flexible working arrangements. Under the proposed Flexible Working Arrangements NES, an employee must set out in writing the details of any flexible arrangement sought and the reasons for such. The employer, in turn, must give the employee a written response to their request within 21 days. Whilst the employer can only refuse the request on 'reasonable business grounds', which the employer must set out in writing, the proposed NES makes no provision for third party involvement in settling disputes around whether an employer has reasonable business grounds for refusal.
54. The Discussion Paper to the Exposure Draft makes reference to the United Kingdom experience and notes (at paragraph 61) that
- the United Kingdom experience has demonstrated that simply encouraging employers and employees to discuss options for flexible arrangements has been very successful in promoting arrangements that work for both employers and employees.
55. The success of the United Kingdom's model of right to request legislation is predicated on the existence of a procedural review mechanism as well as large investment provided by the United Kingdom government prior to and during implementation of the right to request legislation (see paragraphs 74-75 inclusive of the submission for further discussion of the United Kingdom's public education campaign).

Dispute settlement mechanism – HREOC’s model

56. Recommendation 6 of HREOC’s *It’s About Time 2007* recommended the establishment of a *Family Responsibilities and Carers’ Rights Act* which would include a right for workers with family and carer responsibilities to request flexible working arrangements with a corresponding duty on employers to reasonably consider these requests. HREOC’s proposed legislative right, requiring employers to reasonably consider requests made by men and women with family and carer’s responsibilities, would mean that employers must be able to demonstrate that they have properly investigated whether such a request could be accommodated and reached a decision fairly on the merits. A refusal to ***reasonably consider*** a request for flexible working arrangements could then be the subject of a complaint to some form of conciliatory body.
57. HREOC’s proposed right to request framework would not impose obligations on an employer who was unable to meet a request due to genuine operational considerations. Under HREOC’s proposal, the review mechanism would not be tantamount to a review on the merits, i.e. the conciliation procedure would not extend to questioning an employers’ ultimate business decision. Rather, HREOC’s model would involve a review of whether an employer has followed due process and considered all relevant factors available to them when responding to an employee’s request for flexible working arrangements. The review mechanism ***would not*** supplant an employers’ business judgement.
58. HREOC considers that its right to request model would provide men with much improved access to flexible work arrangements to assist them in balancing their paid work and care responsibilities.
59. Improving men’s access to, and use of, flexible work arrangements would have an important and significant influence on equality between men and women both within the workplace and within the home and would serve to reverse long standing stereotypes that caring responsibilities are ‘women’s work’. As was noted in the *It’s About Time 2007*, HREOC is of the view that this legislative

change would be an important and necessary step toward creating the expectation that “caring for children, the aged and infirm, for friends and relatives in times of need, is the responsibility of men and women equally”.¹⁸

60. There is potential to use the right to request legislation as a vehicle for systematic change. However, HREOC is of the view that the broader social benefits associated with creation of the Flexible Working Arrangements NES will be reduced if there is no dispute settlement mechanism whereby employees can seek to have their requests reasonably considered by employers.
61. **HREOC recommends** that the Flexible Working Arrangements NES contain a dispute settlement mechanism allowing an employee to refer unresolved disputes around the Flexible Working Arrangements NES to Fair Work Australia or some other form of conciliatory body for procedural review **[Recommendation no. 4]**.
62. In a situation where a request for flexibility is in dispute and unable to be resolved at the workplace level, there are a number of options for the next step which could be considered in consultation with employers, employees, unions and other stakeholders during the development of the NES. However, HREOC is of the view that its right to request model strikes an appropriate balance between the legitimate business considerations of employers and the need for greater support for those employees with family and carer responsibilities.
63. A scheme along these lines already operates very successfully in the UK with more than 80 per cent of requests for flexibility being granted and employers expressing a high degree of satisfaction with the scheme.¹⁹

¹⁸ Australian Capital Territory Human Rights Office, Northern Territory Anti-Discrimination Commission, Anti-Discrimination Commission Queensland, Equal Opportunity Commission Western Australia, and Equal Opportunity Commission of South Australia, Submission 117, p 21.

¹⁹ Department of Trade and Industry *Results of the second flexible working employee survey* Employment Relations Research Series No 39, April 2005, p 9 available at <http://www.berr.gov.uk/files/file11441.pdf>

The United Kingdom right to request model (procedural review only)

64. The United Kingdom right to request legislation places a duty on employers to consider an employees' request for flexibility seriously. The initial onus is on the employee to prepare a carefully thought-out application well in advance of when they would like the desired working pattern to take effect. The employer then follows a regulated procedure to help ensure a request is considered seriously. Importantly, the procedure seeks to facilitate discussion and enables both parties to gain a clear understanding of each other's thinking.
65. Employers have a statutory duty to consider employee requests seriously and according to a set procedure. They are only able to refuse requests where they have a **clear business reason**. The 'clear business reason' approach accords with the HREOC recommendation that an employer must be able to demonstrate that they have properly investigated the request and only refuse on the basis of genuine operational considerations.
66. Under the United Kingdom legislation, there are clear application procedures which must be complied with and, importantly, complaints about an employer's refusal to reasonably consider a request are only considered on procedural grounds, not on the merits.
67. The UK model involves active consultation between employer and employee. Once an employee makes a request for flexible working arrangements, the employer must hold the meeting to consider the request within 28 days and must write to the employee informing them of their decision within 14 days of the meeting.
68. Where a new working pattern has been refused and an employee feels that their request has not been considered, they have 14 days to appeal in writing after the date of notification of their employer's decision. If an appeal is made, the employer must arrange an appeal meeting. The employer must inform the

employee of the appeal outcome in writing within 14 days of the meeting. An unresolved application can be dealt with through the employer's grievance procedure, third party involvement e.g. a union representative or through making a complaint to an Employment Tribunal.²⁰

69. It is important to note that, under the UK legislation, an employee can make a complaint to the Tribunal where the employer has failed to follow procedure properly or where the decision by the employer to reject an application was based on incorrect facts. However, an employee has no right to make a complaint where they simply disagree with the business grounds and the Tribunal binding arbitration has no power to question the employer's business reason.
70. An Employment Tribunal binding arbitration which finds in favour of the employee is able to order the employer to reconsider an application by following the procedure correctly and/or pay an award to the employee. The maximum level of compensation is eight weeks' pay.²¹

Extensive Government funded public education

71. The right to request legislation in the United Kingdom has been widely welcomed. A number of post implementation surveys have shown that, whilst

²⁰ Alternatively, complaints can also be made through the Acas arbitration scheme, a quicker and less formal alternative to an Employment Tribunal hearing. In the Australian context, in a situation where a request for flexibility is in dispute and unable to be resolved at the workplace level, there are a number of options for the next step which could be considered in consultation with employers, employees, unions and other stakeholders during the development of the legislation. It may be that such disputes are referred for conciliation by HREOC, prior to a formal complaint being lodged. Alternatively such disputes could be referred for mediation by the AIRC or some other alternative tribunal type body, yet to be established. If a request is unable to be agreed following conciliation, individuals could make a complaint of discrimination in employment on the grounds of family or carer responsibilities.

²¹ The weeks' pay is limited to the maximum provided under s 227 of the *Employment Rights Act 1996*, a maximum which is reviewed annually.

take up by people with family and caring responsibilities has been high, there have been minimal adverse effects on business.²²

72. The Department of Trade and Industry's (DTI) second employee survey, which was carried out two years after the changes occurred, showed that fourteen per cent of British employees reported that they had requested a change to their working arrangements in the last two years. Nineteen per cent of female employees requested flexible working in the two years to January 2005, compared with 10 per cent of male employees.²³ Almost one-quarter (22 per cent) of employees with dependent children under the age of six have requested to work flexibly.
73. Take up of the right to request has remained relatively stable with the most recent information showing that 17 per cent of employees had made a request to change how they regularly worked for a sustained period over the last two years.²⁴ Eighty-one per cent of employee requests were fully or partly accepted by employers, with the refusal rate significantly lower than before the new right to request flexible working was introduced.²⁵ Over four-fifths of employees who had requested to change their working pattern said they were satisfied or very satisfied with their working arrangements.²⁶ By 2006, this had increased to 87 per cent of employees.²⁷

²² Chartered Institute of Personnel and Development, 2003; Working Families, 2004; Chartered Institute of Personnel and Development *Flexible Working: Impact and Implementation An Employer Survey* February 2005.

²³ Department of Trade and Industry *Results of the second flexible working employee survey* Employment Relations Research Series No 39, April 2005, p 12.

²⁴ Hülya Hooker, Fiona Neathey, Jo Casebourne and Miranda Munro *The Third Work-Life Balance Employee Survey* Employment Relations Research Series No. 58 Department Of Trade and Industry Institute For Employment Studies March 2007 Executive Summary p 8.

²⁵ Department of Trade and Industry *Results of the second flexible working employee survey* Employment Relations Research Series No 39, April 2005.

²⁶ Department of Trade and Industry *Results of the second flexible working employee survey* Employment Relations Research Series No 39, April 2005.

²⁷ Hülya Hooker, Fiona Neathey, Jo Casebourne and Miranda Munro *The Third Work-Life Balance Employee Survey* Employment Relations Research Series No. 58 Department Of Trade and Industry Institute For Employment Studies March 2007 Executive Summary p 2.

74. The success and high degree of satisfaction with the United Kingdom scheme among both employers and employees has been attributed largely to extensive, inclusive and widespread consultation carried out both before the scheme was introduced and following its introduction.
75. In the United Kingdom, the DTI undertook substantial employer consultation and case study analysis on the potential effects of its right to request legislation prior to enacting the law. This included case study analysis to examine the implementation of the provision of flexible working arrangements by employers over a variety of industries. The case studies indicated positive outcomes for each of the businesses in their respective industries and further DTI studies showed that, while there were some concerns about staff shortages, almost three quarters of employers reported that work-life balance policies (including flexible working) had a positive impact upon employee relations (71 per cent), employee commitment and motivation (69 per cent) and labour turnover (54 per cent). Nearly half stated that the policies had a positive effect upon recruitment (47 per cent), absenteeism (48 per cent) and productivity (49 per cent).²⁸
76. Employers in the United Kingdom have demonstrated a willingness to go beyond the current scope of the law and to accommodate requests. Since the Act took effect, the number of refused requests has declined by around a half. Recent evidence shows just eight per cent of requests are now being turned down.²⁹
77. The law has also contributed to a greater level of community understanding about the need for workplace flexibility. In a 2004 survey, 65 per cent of managers believed that it was up to individual employees to balance their work which represented a significant decline since 1998, when 84 per cent of managers took this view.³⁰ A further recent survey in the UK found that small as well as larger

²⁸ Woodland et al *The second work-life balance study* Results from employer survey – Executive Summary Employment Relations Research Series No 22 London DTI 2003, pp 10-11.

²⁹ DTI *Work and Families: Choice and Flexibility* A Consultation Document February 2005, p 69.

³⁰ Barbara Kersley, Carmen Alpin, John Forth, Alex Bryson, Helen Bewley, Gill Dix, and Sarah Oxenbridge *Inside the Workplace First Findings from the 2004 Workplace Employment Relations Survey (WERS 2004)* UK Economic and Social Research Council/Advisory, Conciliation and Arbitration Service/Policy Studies Institute July 2005 p32

businesses perceived the benefits of flexible working. The majority of small employers providing some form of flexible working arrangements – either formally under the legislation or informally - felt there had been real benefits to their workplace. These identified benefits included ‘a happier workforce’, positive impacts on employee retention and a perception that flexible working arrangements had led to increased employee commitment and cooperation which, in turn, had contributed to the smooth running of the business.³¹ More than half of the requests for flexibility made to small business were met, either in full or part.³²

78. A survey carried out for the UK Government 12 months into the operation of the new right to request legislation found that, although substantial advertising meant awareness of the changes was high among both employers and employees, there was an ongoing need for more awareness-raising and training for both parents and employers. Fathers, in particular, needed help and support in pursuing their rights under the legislation and some employers needed a clearer understanding of compliance with the legislation and the business reasons for refusal of requests. The survey also found that there should be more training for managers in how to manage requests and flexible workers³³.
79. HREOC consulted widely with the business community on its right to request proposal during the preparation of the *It's About Time 2007*.³⁴ Employer consultations commented on the need for any right to request legislation to be accompanied by some set of supporting guidelines.³⁵ There was also discussion

³¹ Lynette Harris and Carley Foster ‘*Small, flexible and family friendly*’ – *work practices in service sector businesses* Employment Relations Research Series No.47 DTI October 2005 p 31

³² Lynette Harris and Carley Foster ‘*Small, flexible and family friendly*’ – *work practices in service sector businesses* Employment Relations Research Series No.47 DTI October 2005 p 30

³³ Christine Campon on behalf of Working Families *Right to Request Flexible Working* Review of impact in first year of legislation Report for the UK Department of Trade and Industry London, March 2004.

³⁴ For further discussion see generally, Chapter 3 ‘*Legal Protection for Workers with Family and Carer Responsibilities*’ in the HREOC, *It's About Time- Women, men work and Family Final Paper* (2007).

³⁵ Employer Consultation, Adelaide, 12 July 2006; Employer Consultation, Hobart, 10 August 2005; Employer Consultation, Melbourne, 12 July 2005.

of a proper implementation strategy to alleviate small business concerns about their capacity to meet obligations under the right to request legislation.

80. The United Kingdom experience highlights the importance of supporting such new legislation with an extensive media and education campaign targeting both men and women which informs employees about the new opportunities and increases employers support for the scheme.
81. **HREOC recommends** that the introduction of the Flexible Working Arrangements NES be accompanied by a comprehensive education campaign to both assist in alleviating employer concerns and to inform men and women of all ages about this new right. This should include development of practical ‘guidelines’ setting out respective rights and responsibilities under the NES and educating employers on what constitutes ‘reasonable business grounds’ for refusing a request for specific working arrangements under the NES. This education campaign should also have a specific small business focus [**Recommendation no. 5**].

Other necessary protections: flexibility around working hours and rostering arrangements

82. Research in the United Kingdom has found that while the "right to request" legislation has been both popular and successful for many employees with caring responsibilities for young children, the legislation has had little or no impact on the extent of long hours working.³⁶ The long hours culture may be one of the reasons why men find it harder both to request flexible working and to have their requests accepted by employers. Variable and unsocial hours present particular problems under the right to request flexible work.
83. The UK research has received support in Australian academic and research circles with calls for the right to request framework to be accompanied by regulation of weekly and daily hours, overtime and unsocial hours as well as regulation that

³⁶ Colette Fagan, Ariane Hegewisch and Jane Pillinger *Out of time: Why Britain needs a new approach to working-time flexibility* Trades Union Congress 2006. See 3.4, 4.7 and 4.8 for further discussion of the "right to request" flexible work.

protects employees from unilateral or arbitrary change in working time, schedules and rostering or locations of work that are family hostile and a ‘right to refuse’ certain arrangements such as overtime and long hours.³⁷ Such regulation provides the minimum necessary to “enable employees to exercise a certain degree of choice over their working time arrangements”.

84. In relation to variable hours, evening and weekend work, there are obvious difficulties for parents and other carers when both partners or a sole care has irregular hours. Likewise, HREOC has heard many stories of the impact that arbitrary changes to rostering arrangements without adequate notice have on employees with a disability.
85. The Department of Innovation Industry and Regional Development in Victoria (2007) undertook a study of the impact of the WorkChoices legislation on 30 Victorian Workers in minimum wage sectors in relation to changes to rostering arrangements. The subsequent report by Dr Sara Charleswoth and Fiona Macdonald³⁸ highlighted the ways in which hours of work could be increased or decreased without negotiation and how rostering arrangements could be changed without notice, even for permanent workers.
86. For employees with a disability, such arbitrary changes to rostering arrangements can pose significant problems in obtaining medication, attendant care and transport arrangements, amongst other things. Many employees with disability are unable to comply with such requests where little or no notice has been given by the employer. Further, the Victorian research suggests that many employees would have little if any opportunity to discuss this with their employer. An inability to comply could similarly arise for many parents and employees with carer obligations.
87. **HREOC recommends** that the Government consider future expansion of the Flexible Working Arrangements NES to include an introduction of a minimum

³⁷ See Charlesworth S & Campbell I, *Right to Request Regulation: A Panacea for Work/Family Imbalance?*(2007).

³⁸ Charlesworth, S & Macdonald F, *Going too far: Workchoices and the Experience of 30 Victorian Workers in Minimum Wage Sectors* (2007).

period of notice for any intended changes to rostering arrangements. This should also be accompanied by a legislated right to refuse such employer requests where the employee has reasonable grounds for refusal [**Recommendation no. 6**].

HREOC's recommendations - Parental leave (and related entitlements) NES

Discussion Paper Question 14. Are there any other matters that need to be taken into account when finalising the proposed parental leave NES?

General Issues: Paid Maternity, Paternity and Parental leave

88. Under the proposed Parental Leave (and related entitlements) NES, each parent is entitled to separate periods (up to 12 months) unpaid parental leave. If it is the preference of the family that the leave is take by one parent, the parent is entitled to request an additional period of parental leave (of up to 12 months). The employer may refuse the request on reasonable business grounds.
89. HREOC notes that under the parental leave NES an employee is entitled to parental leave where the leave is associated with the 'birth of a child to the employee or the employee's spouse'. 'Spouse' is defined to include a former spouse, de facto spouse and a former de facto spouse. However, as de facto spouse is defined under the NES as 'a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to', a lesbian co-mother, and both members of a gay couple, are not guaranteed parental leave under the NES. Only a birth mother in a same-sex couple will be guaranteed parental leave. It is also important that parental leave be available to adoptive parents.

90. HREOC acknowledges that the Exposure Draft states that the ‘proposed parental leave NES does not deal with entitlements for same-sex couples. This issue is to be addressed as part of a whole of government response in accordance with the Government’s election commitments’ (paragraph 122).
91. While HREOC appreciates the Government’s intention to amend discriminatory laws simultaneously, HREOC is concerned that the newly introduced NES, including parental leave provisions will continue to detrimentally impact upon same-sex couples until the election commitment is fulfilled. HREOC is concerned that the proposed NES will enact new discrimination against same-sex couples, when the Government has stated its commitment to addressing discrimination in other federal laws that already exist. A simple amendment to the definition of ‘de facto spouse’ as outlined in *Same-Sex: Same-Entitlements* (2007), would remove this proposed discrimination.
92. **HREOC recommends** that the definition of ‘de facto spouse’ under the Parental Leave (and related entitlements) NES be replaced with a new definition of ‘de facto partner’ that is inclusive of same-sex couples, as outlined in the 2007 *Same-Sex: Same-Entitlements* Report³⁹ [**Recommendation No 7**].
93. HREOC notes that the Exposure Draft to the proposed NES deals with an entitlement to *unpaid* parental leave and further, that the Productivity Commission is currently inquiring into the economic, productivity and social costs of providing paid maternity, paternity and parental leave through its Inquiry into Improved Support for Parents with Newborn Children. HREOC will be making further and more detailed submission to the Productivity Commission Inquiry in relation to *paid* maternity, paternity and parental leave. However, HREOC considers that the provision of paid maternity leave is a priority for Australian women and has previously made recommendations (Recommendations 13 and 14) in relation to paid maternity, paternity and parental leave contained in the *It’s About Time 2007* and HREOC’S ‘*A Time to Value: Proposal for a National Paid Maternity Leave Scheme*’ (2002).

³⁹ HREOC, *Same-Sex: Same-Entitlements*, 2007, Chapter 18.

94. HREOC supports the Productivity Commission Inquiry process. However, it is concerned that the parental leave NES be brought into line with proposals for paid maternity, paternity and parental leave arising out of the Inquiry.
95. **HREOC recommends** that the Productivity Commission consider the need to amend the Parental Leave (and related entitlements) NES as part of its Inquiry into Improved Support for Parents with Newborn Children. [**Recommendation no. 8**].

Refusal on reasonable business grounds

Discussion Paper Question 12. In what situations should examples of reasonable business grounds be included in the proposed parental leave NES?

Discussion Paper Question 13: What type of examples could be included in the NES in order to address any issues arising from these situations?

96. The proposed NES entitlement to request additional parental leave does not define the term ‘reasonable business grounds’. HREOC recognises that the Government does not wish to inadvertently limit, by legislation, the grounds upon which an employer may reasonably refuse to implement the requested work arrangements. As HREOC noted earlier in this submission in relation to the Flexible Working Arrangements NES, there is no “one size fits all” approach when determining ‘reasonableness’. Further, HREOC does not intend that the legislation supplant an employers’ business judgement.
97. From the evidence gathered through research, consultations, focus groups and public submissions contained HREOC’s *It’s About Time 2007*, HREOC considers that there is a clear need to provide practical guidance to employers in implementing the NES. Whilst Fair Work Australia will provide general information and assistance to employers as to what may constitute ‘reasonable business grounds’, HREOC considers that the legislation should also provide guidance.

98. **HREOC recommends** that the Parental Leave (and related entitlements) NES explicitly set out a non-exhaustive list of factors to consider when determining ‘reasonable business grounds’ in relation to the additional parental leave entitlement under the NES [**Recommendation no. 9**].
99. The decision whether to grant an additional period of up to 12 months parental leave will naturally pose significant issues for both the individual making the request and the employer who is accommodating the request.
100. HREOC recommends that the Government consider adopting a broad approach to the concept of ‘reasonable business grounds’. As a model of ‘best practice’, HREOC believes that the Government should look to the model contained in the Victorian family responsibilities legislation which forms part of recent amendments to the *Equal Opportunity Act 1995* (Vic) (as previously outlined in paragraphs 47-48 inclusive) .
101. HREOC also recommends that the Government look to the 2005 Australian Industrial Relations Commission (AIRC) Family Provisions Test Case decision regarding the right to request an additional 12 months parental leave for further guidance on the type of examples of ‘reasonable business grounds’ that could be included in the proposed parental leave NES. By way of general guidance, the AIRC test case decision pointed to such grounds as encompassing: cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

Provision of a dispute settlement mechanism

102. Notwithstanding HREOC’s recommendations regarding paid leave, HREOC welcomes the Federal Government’s commitment to provide an entitlement to additional unpaid parental leave. However, for the same reasons as were set out in this submission in relation to the Flexible Working Arrangements NES, HREOC is of the view that the Parental Leave (and related entitlements) NES should contain some form of dispute settlement mechanism or conciliatory

procedure to deal with situations where an employer appears to be unreasonably refusing an employee's request for an additional period of unpaid parental leave.

103. In situations where a request for additional leave is in dispute and unable to be resolved at the workplace level, there are a number of options for the next step which could be considered in consultation with employers, employees, unions and other stakeholders during the development of the NES.
104. As noted previously in relation to the Flexible Working Arrangements NES, HREOC's proposal does not amount to a review on the merits but rather, HREOC's proposal would involve procedural review to provide employees with a formal recognised right to have their requested work arrangements *reasonably considered* by their employer.
105. **HREOC recommends** that the Parental Leave (and related entitlements) NES contain a dispute settlement mechanism allowing an employee to refer unresolved disputes around the request for additional Parental Leave under the NES to Fair Work Australia or some other form of conciliatory body for procedural review [**Recommendation no. 10**].

HREOC's submissions - Personal/Carers and Compassionate Leave NES

Question

28. What other matters should be taken into consideration when finalising the proposed personal/carer's and compassionate leave NES?

Additional Non- accumulative Personal/carer's leave and introduction of a 12 months unpaid carer's leave NES

106. Under the proposed Personal/Carer's and Compassionate Leave NES, employees (other than casual employees) are entitled to 10 days of paid personal/carer's leave for each year of service, two days of paid compassionate leave per

occasion and two days of unpaid carer's leave 'per occasion' for genuine caring purposes or family emergencies if paid carer's leave is exhausted. Casual employees in turn, are entitled to two days of unpaid compassionate leave 'per occasion' and two days of unpaid carer's leave 'per occasion'.

107. HREOC notes that, under the proposed Personal/Carer's and Compassionate Leave NES, personal or carer's leave may be taken to 'provide care or support to a member of the employee's immediate family, or a member of the employee's household'.
108. HREOC is concerned that the definition of 'immediate family' may discriminate against same-sex families. An employee in a same-sex couple is only guaranteed leave to care for a partner if he or she is living with that partner. An employee in an opposite-sex couple has an automatic right to take leave to care for his or her partner. A gay or lesbian employee is not guaranteed leave to care for his or her partner's immediate family. Where a child is not a member of the 'employee's household', a gay or lesbian co-parent will not be entitled to carer's or compassionate leave to care for that child. Amendments to the definitions of 'de facto spouse' and 'child' would remove this discrimination.
109. **HREOC recommends** that the definition of 'de facto spouse' under the Personal/Carers' and Compassionate Leave NES be replaced with a new definition of 'de facto partner' which is inclusive of same-sex couples as outlined in the *Same-Sex: Same Entitlements Report 2007* [**Recommendation no. 11**]
110. **HREOC recommends** that the definition of 'child' under the Personal/Carers' and Compassionate Leave NES be amended to recognise the children of a birth mother, birth father, lesbian co-mother or gay co-father, as outlined in the *Same-Sex: Same Entitlements Report 2007*⁴⁰ [**Recommendation no. 12**]

⁴⁰ HREOC, *Same-Sex: Same-Entitlements*, Report of the National Inquiry into Discrimination against People in Same-Sex Relationships: financial and Work-Related Entitlements and Benefits, 2007, Chapter 18.

111. The submissions and consultations that took place during HREOC's *It's About Time Project* highlighted the need for greater support to assist carers in balancing work and carer responsibilities whilst remaining in the paid workforce.
112. According to a 2003 survey by the Australian Bureau of Statistics (ABS), there are an estimated 2.6 million carers who currently provide some form of assistance to those who need help because of disability or age.⁴¹ However, the demand for care is expected to increase dramatically as Australia's population ages.
113. The National Centre for Social and Economic Modelling in 2004 estimated that by 2031 the number of people needing care will be over one million while the number of available carers will be under 400,000.⁴²
114. The projected increase in the demands for care has significant implications for younger, working age groups, particularly women, who will potentially fall into the 'sandwich generation', with caring responsibilities for both children (including children with disability or severe medical conditions) and older parents or relatives. Likewise, older workers will increasingly be called upon to undertake unpaid care work, which for many will overlap with their longer working lives.
115. With projected care needs set to increase in line with this demographic change, government policy will be important in better aligning the supply of carers and the demand for care services.
116. HREOC considers that greater and expanded carer's leave provisions are a necessary expansion of legal rights and that the ability to take extra unpaid carer's leave is an important workplace flexibility for those whose need to provide care is more sporadic and less predictable. For these reasons, discussed

⁴¹ Australian Bureau of Statistics 2004, *Disability, Ageing and Carers: Summary of Findings*, cat. No. 4430.o.

⁴² National Centre for Social and Economic Modelling 2004, *Who's going to care? Informal care and an ageing population*.

in more detail below, HREOC supports its previous recommendation in the *It's About Time 2007* regarding Personal/Carer's leave.

117. Taking on a caring role has many social and financial consequences for carers. The Australian Institute of Health and Welfare (AIHW) in its report *Carers in Australia*⁴³ found that, whilst some carers find the role rewarding and satisfying, many carers experience financial hardship and reduced employment and education prospects as a result.
118. Whilst many carers report positive benefits from participating in employment, ABS statistics show that 'primary carers have a lower labour force participation rate (39 per cent) than people who were not carers (68 per cent).'⁴⁴
119. The ABS analysed the labour force trends of primary carers in 2005 and found that for primary carers not in the labour force, around 90, 500 had been in the labour force *prior to* commencing the caring role and around half of those had left work to commence or increase caring.⁴⁵
120. When the ABS undertook earlier research asking primary carers who were unemployed or not in the labour force whether they would like to be employed while caring, an overwhelming majority (51 per cent) of primary carers of children with a severe or profound disability reported that they would like to work.⁴⁶
121. Even for carers who are in paid employment, the caring role impacts significantly on workforce participation in terms of reduced standard hours and additional leave.⁴⁷ For example, many people with primary caring responsibilities for older people or people with disability are unable to participate in paid work because of

⁴³ Australian Institute of Health and Welfare 2004, *Carers in Australia*.

⁴⁴ Australian Bureau of Statistics 2004, *Disability, Ageing and Carers: Summary of Findings*, cat. No. 4430.0.

⁴⁵ Australian Bureau of Statistics 2005, *Australian Social Trends 2005*, cat. no. 4102.0.

⁴⁶ FaCSIA analysis of 2003 Survey of Disability, Ageing and Carers Confidentialised Unit Record File cited in *Carer Payment (child): A New Approach*, Report of the Carer Payment (child) Review Taskforce, Chapter 4.

⁴⁷ Australian Bureau of Statistics 2005, *Australian Social Trends 2005*, cat.no. 4102.0.

difficulty in arranging working hours, a loss of skills from being out of the workforce and a lack of alternative care arrangements. For many carers, participation in paid work may not be an option while for others part time work may be the only feasible option.

122. There is a strong case for government based support to assist carers who chose to remain, enter or re-enter the workforce.
123. HREOC notes that the recent report of the TaskForce on Care Costs⁴⁸ found that federal anti-discrimination legislation may not provide sufficient protection for employees with caring responsibilities. The Report points to recent initiatives in the UK providing employees with a legislated 'right to request' and employers with a duty not to 'unreasonably refuse' such a request, as best practice models for Australia. Further, Recommendation 4 of the Report of the Carer Payment (child) Review Taskforce recommends that the government examine ways to assist employers to provide employment opportunities for carers including flexible working arrangements and access to carers' leave.
124. It is recognised that carers make a significant economic contribution in providing informal care. In 2005, Access Economics researched the economic value of informal care for people with a disability or chronic illness and the frail aged and noted that this unpaid care would cost \$30.5 billion to replace if it was no longer provided informally⁴⁹.
125. In order to support this care, and cognizant of the cost to employers of a large scale exit from an ever-diminishing supply of workers, greater and expanded carer's leave provisions are a necessary expansion of legal rights. Job protection acknowledges both in practical terms and symbolically the importance of unpaid care to the community as a whole, including business and government.
126. Submissions and consultations during HREOC's *It's About Time Project* noted that the needs of people with carer responsibilities for older people and people

⁴⁸ Taskforce on Care Costs 2007, the *Hidden Face of Care: Combining work and caring responsibilities for the aged and people with a disability*.

⁴⁹ Access Economics Pty Ltd 2005, *The Economic Value of Informal Care*.

with disability differ from those with children, pointing to a need for greater recognition of this by employers.

127. In addition to general family-friendly provisions such as reduced working hours, flex time or working from home, elder carers or carers of people with a disability may need access to additional leave, including an ability to take extra leave when paid leave runs out. Such measures would encourage acceptance of these carer responsibilities within the workforce so that employees do not feel pressured to resign.⁵⁰
128. It is also important that employers and employees share a common understanding that, while preferences for combining paid work and care may vary, as will an employers' ability to meet them, caring itself is not a "choice". Very few individuals have no caring or other unpaid responsibilities across their working lives, whether this is a responsibility for raising children, caring for older relatives or caring for family members with an illness or disability. Paid and unpaid caring work is interdependent and, as one submission pointed out, during HREOC's *It's About Time Project*, those who do not have care responsibilities depend on the care of others.
129. In response to the question posed by the Exposure Draft to the NES (at paragraph 201), in which the Government seeks views on whether the proposed personal/carer's leave NES strikes an appropriate balance, it is HREOC's view that there is clearly widespread support for an expansion of legal rights for employees with caring responsibilities beyond those currently contained in the proposed NES.
130. An increase in the Personal/Carer's Leave Standard is a necessary support for employees with increasing caring responsibilities. Further, a mirroring of the 12 month unpaid Parental Leave Standard should be considered to address other forms of care that workers provide to other family members or partners throughout the life cycle.

⁵⁰ See HREOC *Striking the Balance* discussion paper pp 72-74 for a discussion of workforce participation in an ageing society. See also Organisation for Economic Co-operation and Development *Live Longer, Work Longer* Ageing and Employment Policies OECD Publishing, 2006.

131. In light of the ageing of the population and the ageing workforce, HREOC recommends that the Australian Government consider introducing a new entitlement to meet the emerging need for care in Australia.
132. **HREOC recommends** that the Personal/Carer's and Compassionate Leave NES be increased and expanded in line with Recommendation 15 of HREOC's *It's About Time 2007* by providing employees with 12 months continuous service with access to 20 days paid personal/carer's per annum with 10 days to be non-accumulative. HREOC further recommends that the Government consider expanding the NES to include 12 months unpaid Carer's leave to be made available to employees who need to attend to the care of a seriously or terminally ill dependent. This additional unpaid leave should be job protected and available to employees who have 12 months continuous service **[Recommendation no. 13]**.
133. The introduction of a *non-accumulative* personal/ carer's leave entitlement ensures greater support for those employees who need it, without greatly increasing costs to business. It also ensures that employees with family/carer responsibilities are less likely to end up with no leave entitlements for personal illness, which is currently often the case.
134. Parents of young children in particular often complain that currently a single bout of illness (particularly common childhood illness such as chicken pox) can completely deplete their personal/carer's leave entitlement leaving them with only the option of taking unpaid leave for either any period of personal illness or other family care needs. The increase in this entitlement should also be considered in light of proposals to shift the costs of other existing entitlements such as paid maternity leave, away from individual employers.
135. Finally, making provision for an additional 12 month unpaid carer's leave NES will ensure employees have access to longer term leave to care for family members with a disability during a period of sickness or during a terminal illness. The provision of job protection for a 12 month period is a key element of supporting this care and of ensuring that carers do not suffer long term disadvantage as a result of their caring role.