



Response to:

**Discussion Paper on National  
Employment Standards**

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## Introduction

Multiple Sclerosis Australia welcomes the opportunity to respond to the Discussion Paper: **National Employment Standards Exposure Draft**.

The Discussion Paper signals a new era in employment policy, and the overall intentions and approach are to be strongly commended.

The emphasis on developing minimum standards and a focus on flexibility for both employees and employers has the potential to provide many benefits to Australia, including a much needed framework to ensure that people with chronic illnesses and disabilities, and the families caring for them, are able to participate in the workforce as much as possible while balancing the complex interplay of: disability/illness – family – community – family caregiving – work.

The minimum standards in relation to requests for flexible work arrangements, parental leave, and personal/carer's leave all incorporate vital, but incremental, advancements in relation to modernising employment standards. In the wake of the previous government's Workchoices legislation, it is exciting and refreshing to see more progressive and constructive policies being developed.

However, while the proposed National Employment Standards (NES) do represent an important step forward, an incremental approach is unlikely to deliver the real flexibility required to meet the rapidly changing needs of the nation in relation to employment and economic issues generated by the nexus of: (a) the ageing of the population; (b) increasing levels of disability and chronic illness; (c) increasing dependency ratio; (d) increased workforce participation of women; (e) low levels of unemployment; (e) reduction in the availability of family caregivers into the future; and (f) deeply entrenched employment practices and cultures that continue to disadvantage and to discourage people with disabilities and chronic illnesses (and the family members who care for them) from maximising their participation in paid work.

While the proposed NES may have been capable of delivering a fair, flexible and productive workplace relations system in the past, it is not sufficient to meet our needs today or into the future.

To meet this goal the NES will need revisions in relation to three of the proposed standards:

- (a) requests for flexible working arrangements
- (b) parental leave and related entitlements
- (c) personal/carer's leave and compassionate leave

One of the key issues in these revisions is the need to include particular provisions in relation to the need for increased flexibility for people with chronic illnesses/disabilities and their carers.

Also, caring needs and arrangements within families cover the inevitably broad spectrum of human experience. Some will need a small amount of flexibility over a long period of time, others will need episodic flexibility where they need a few days or a few weeks several times a year, and a small number will need large

chunks of time such as 3-4 months or 12-24 months of unpaid leave to deal with particularly demanding caring situations that have a clear endpoint such as death or residential care.

We are proposing changes to more adequately ensure that NES is able to cater for the broad spectrum of issues that constantly confront employers and employees in relation to employees with disabilities/chronic illnesses, and employees caring for family members with disabilities/chronic illnesses.

While many people with disabilities and chronic illnesses are able to exercise considerable independence with minimal assistance from family or paid carers, some are not. Approximately 20% of the Australian population report having a disability, with approximately 6.4% of the population reporting a severe core activity limitation (ABS 2004).

In some situations caring for someone with a chronic illness or disability requires the same intensity and time commitment as looking after a child under school age. Approximately 13% of people living in households are carers, and approximately 20% of these are primary carers: 55% of primary carers report providing 20 or more hours of care each week. In relation to those of working age, there is a gradual increase over time with 9% of 18-24 year olds reported as carers gradually increasing to 22% of 55-64 year olds. (ABS 2004)

People with disabilities and carers have significantly lower incomes and less workforce participation than the Australian average (ABS 2004). More flexibility in workplaces would increase these participation rates, and provide employers with access to additional skills and labour.

### **Requests for Flexible Working Arrangements for Family Caregivers**

The Government's commitment to flexibility and helping families to balance work/family responsibilities is commendable and very welcome. The recognition of the need for employment flexibility if there is a young child at home is a clear acknowledgement of the importance of family responsibilities and the difficulties most families face when trying to balance the need to provide care to a family member and commitments to employers.

In this proposed standard there appears to be a fair and equitable balance struck between the needs of employers and the needs of employees and their families in relation to caring for children under school age.

However, the commitment outlined in the first paragraph of this standard to 'effective measures that will help all working families balance their work and family responsibilities' and 'helping business to manage their workforce to encourage greater workforce participation' (para 58) cannot be delivered through these measures which only focus on parents of very young children.

While subsequent standards in relation to **Parental Leave** and **Personal/Carer's Leave** go some ways towards filling the gaps, as a whole they fall short of what is required.

The proposed **Request for Flexible Working Arrangements** appears to be premised on the notion that caring for a family member with a chronic illness or disability somehow less worthy or less important than caring for a young child, as there is no provision for these carers.

The objective of the entitlement to **Requests for Flexible Working Arrangements** requires modification to be inclusive of people with disabilities and chronic illnesses, as well as their family caregivers. The current focus on carers of young children under school age must be expanded, and the following example is a reworking of paragraph 59, with suggested changes underlined:

‘The Government recognises that working families can find it difficult to balance work and family responsibilities when one family member requires ongoing care, such as when a child is not old enough to attend school; or a family member has a significant disability or chronic illness. Indeed, some families find themselves trying to care for several family members with such needs, with phrases such ‘the sandwich generation’ being used to describe situations in which parents caring for young children also find themselves caring for their frail older parents. It is for this reason that the proposed NES will include a right for certain employees to request flexible work arrangements from their employer while they provide these high levels of daily care. An employer can only refuse a request on reasonable business grounds.’

Similarly, the ‘outline of entitlement’ described in paragraphs 62 must be amended to:

‘The proposed flexible working arrangements NES applies if the employee:

- Is a parent of a child under school age and/or has a family member with a serious disability or chronic illness
- Has responsibility for the care of that child and/or family member with a serious disability or chronic illness.’

Other paragraphs relating to the outline of the entitlement should stand (paragraphs 63-67). Likewise, the section defining flexible work arrangements (paragraphs 67 and 68) covers the issues well.

Definitions of terms need to be expanded beyond describing ‘school age’, ‘responsibility for care of a child’ and ‘reasonable business grounds’ (paragraphs 69-72) to include what constitutes a ‘significant disability or chronic illness’, and ‘responsibility for caring for a family member with a significant disability or chronic illness’. Definitions are not proposed here as this will require consultation and involvement with a range of stakeholders which is beyond the scope of this response. Importantly, these definitions will need to focus on the amount and type of care required in relation to ‘significance’ of the disability/chronic illness, as often the type and amount of care required is the product of a complex set of circumstances.

There will inevitably be some concerns about the open-ended nature of the need to support carers of family members with disabilities and chronic illnesses, as these are often not as finite and clear cut as a child reaching school age. In many instances the need for care will be ongoing and relatively modest, and can be met with the type of arrangements already proposed for parents of very young children. As per the intent of this standard, these arrangements will need to be workable for employers and can be refused based on 'reasonable business grounds'.

There will also be some situations in which there is a need for more intensive care for short episodes of several days or weeks, and these can be met through the proposed **Personal/Carer's Leave** standard, with some modifications (see below). And some employees will need longer term arrangements similar to those outlined in the standard for **Parental Leave and Related Entitlements** (see below). With modification, these three standards (including the **Request for Flexible Working Arrangements**) have the capacity to meet the needs of employees involved in providing care to family members, and bridge the gap between employers' need for productivity and skilled staff and employees' need for flexibility to balance the needs of work and family.

However, none of these standards outlines the flexible working arrangements needed by people with disabilities and chronic illnesses, and this is addressed below.

### **Requests for Flexible Working Arrangements for Employees with Disabilities and Chronic Illnesses**

If they are to be effective, flexible working arrangements need to go beyond negotiating flexible work hours for family caregivers as outlined in the proposed standard for **Requests Flexible Working Arrangements**, and address the need for flexible working arrangements for people with disabilities and chronic illnesses.

People with chronic illnesses and disabilities need the capacity to **Request Flexible Working Arrangements**. Without this, employers are unlikely to be able to encourage greater workforce participation by a rapidly growing segment of the Australian population that often includes highly experienced and highly skilled workers.

In addition to the capacity to request flexible hours, people with chronic illnesses and disabilities also need flexible arrangements in relation to actual job content, workplace modifications, assistance at work, assistance to get ready for work prior to a shift, as well as assistance with transportation to and from work when required.

It is important that the NES are integrated with other policy initiatives such as the Disability Employment Network, Chronic Disease Management initiatives, and Carer policies.

Significantly, employers need access to advice, information and assistance in relation to negotiating and providing flexible work arrangements for people with

chronic illnesses and disabilities. The development and implementation of a national program of Workplace Flexibility Advisors is one way of achieving this.

There are two options for addressing the flexible workplace needs of employers and employees in relation to employees with disabilities and/or chronic illnesses: create an additional standard or modify existing standards to incorporate the following elements.

Objective of entitlement:

'The Government recognises that employees and job seekers with disabilities and chronic illnesses can find it difficult to secure the necessary flexibility and support to retain or gain employment. It is for this reason that the proposed NES will include a right for certain employees and job seekers to request flexible work arrangements and supports from an employer. An employer can only refuse a request on reasonable business grounds.

A variety of Government programs, now and into the future, will continue to provide both employers and employees with the resources necessary to make essential workplace modifications and to provide advice, assistance and information. More support for employers will be needed to achieve this than has been provided in the past.'

Outline of entitlement:

'The proposed flexible working arrangements NES applies if the employee has a significant disability or chronic illness which requires modifications to working hours, the actual job content, workplace modifications, or assistance at work. The employer may refuse the request on reasonable business grounds.'

Paul works as a security van driver and discloses to his employer that he has MS – and his fatigue levels are becoming problematic due to heat intolerance during summer. He is finding completing the route on his shift more difficult on hot days. Paul thinks he may have to quit his job. His boss doesn't want Paul to resign but doesn't know where to start in finding a solution before any decision to resign is made.

He calls the Workplace Flexibility Advisor hotline and puts his dilemma to them. They inform him about his options, and some HR advice about how to approach redesigning Paul's duties and dealing with his co-workers. A referral is given to a DEN provider who works with the MS Society, Paul and his boss to re-route Paul's run to minimise time out of the vehicle in the hottest part of the day. A cooling vest and a car fridge is prescribed for Paul through the Workplace Modifications scheme to regulate his temperature. The adjustments enable Paul to continue working by better managing his disease symptoms.

## Parental Leave and Related Entitlements

The recognition of the desire of many families wanting to have parental leave for the first two years of a child's life, and the establishment of an entitlement to enable this is to be commended. The outline of the structure of the entitlement also appears to be a fair and balanced approach to the needs of families and employers in this regard.

To address the range of needs for households that are caring for people with a significant chronic illness or disability which, on occasion for some families will require extensive and intensive periods of care giving, similar arrangements need to be made to meet these needs. This would ensure that employers are able to retain skilled and experienced employees, and that those employees have the flexibility required to meet their family obligations. It is a far too common experience for family members to give up working or significantly reduce their work commitments because this flexibility is not currently widely available.

To address this need for flexibility, the standard should be renamed to **'Family Leave and Related Entitlements'**.

The Objectives for this standard should be re-written to include caring for a family member with a significant disability or chronic illness. For example, paragraphs 76 and 77 should read:

'The Government recognises that many families want to have a parent care for a child during the first two years of the child's life, and that in many families there is also a need for family members to be able to provide a similar degree of care for other family members with significant disabilities or chronic illnesses. The Government also believes that maintaining the links between parents and/or family caregivers and the workforce will ensure strong workforce participation of parents to the benefits of business and the overall economic prosperity of Australia.

This is why the Government is enhancing family leave entitlements to provide each parent of a new child with a separate entitlement to up to 12 months' unpaid family leave, and a similar entitlement for a maximum of two family members caring for another family member. This means for example [this Objective then needs to continue with its example of parents of a new child, and add a similar example for the same entitlement for family members caring for a family member with a disability - two people x 12 months or one person x 24 months].'

Similar modifications need to be made throughout the Outline of the Entitlement. For example, paragraphs 78 and 79 should read:

'The proposed family leave NES provides each parent of a new child, or two family caregivers of someone with a significant disability or chronic illness, with an entitlement to be absent from work for separate periods of up to 12 months of unpaid family leave. Unpaid family leave must be taken in association with: (a) the birth of a child to an employee or their spouse; or (b) the adoption of a child below school age; or (c) the need for

an intensive period of caregiving to an employee's family member with a significant disability or chronic illness.

A parent or family member who takes 12 months' family leave may request additional leave from their employer of up to 12 months. The employer may refuse the request on reasonable business grounds.'

Changes need to be made in line with the inclusion of family leave for employees caring for a family member with a significant disability or chronic illness throughout the remainder of this standard. Also, as noted previously, work will need to be undertaken to define key elements of this standard such as what constitutes a significant disability or chronic illness, and what constitutes the need for intensive family care giving which might require such leave.

Care will need to be taken to ensure that arrangements are workable for employers, while at the same time as enabling employees to meet their family responsibilities.

### **Personal/Carers' Leave and Compassionate Leave**

Overall the objective and outline of the entitlement for this standard have been well done, with a well constructed objective and a clear outline of the entitlement. In particular the capacity to accrue personal/carer's leave over multiple years of employment helps to provide additional flexibility that many employees currently miss out on.

However, to ensure that employers are able to retain staff and employees have access to the flexibility required if they are caring for a family member with a significant disability or chronic illness there is a need to expand this entitlement slightly so that it adequately bridges the gaps between the **Request for Working Arrangements** and **Family Leave**.

It is propose that the 10 days of personal/carer's leave for each year of service be expanded to include an additional 5-10 days of personal/carer's leave each year that cannot be accumulated.

The difficulty with the 10 days of personal/carer's leave is that if it is considered appropriate for someone without family caregiving responsibilities to have access to 10 paid days of sick/personal leave, this standard provides little or no additional flexibility for people who have the additional responsibilities of family caregiving.

Similarly, for some employees with a significant chronic illness or disability there may be a need for a little more time off.

While on the surface this appears to be excessive and not achievable for most employers, there is evidence that this can be easily achieved if employers adopt a policy of pooled personal/carer's leave (see example below).

Helen works for a large bank as a team leader. Her husband is diagnosed with Cancer, and she needs to take leave to attend appointments and treatment. She takes carers leave and annual leave but gets to a point where she needs to take extended leave over six months to become her husband's primary carer.

As Helen cannot afford to take unpaid leave for six months, and the Bank wants to retain her as a valued employee, an arrangement is made that Helen will be paid for her leave out of the corporate sick leave pool (from the total unused leave for the company) so she can concentrate on her caring role and then return to work. Helen's colleagues are supportive of the arrangement because they want Helen to return to work as well as manage her family crisis.

It is proposed that small businesses provide an additional 5 days of paid leave for employees (a) employees with a significant disability or chronic illness, and (b) employees with family caregiving responsibilities in relation to a family member with a significant disability, and that larger employers (with more capacity for pooling) provide an additional 10 days for those who qualify. This additional leave should be:

- accessible to people with a significant chronic illness/disability or an employee caring for a family member with a significant disability or chronic illness
- subject to demonstrating the need for such leave through appropriate documentation such as that already required (doctors certificate or statutory declaration) regarding the employees disability/chronic illness or that of the family member they are caring for
- based on employer agreement, and can be refused on reasonable business grounds.

To further enhance flexibility in relation to unpaid carer's leave (paragraphs 170 and 171) it is proposed that this be slightly expanded from 2 days to 3 days per occasion for both employees and casual employees. It is suggested that wording be changed to: 'up to three days of unpaid carers' leave per occasion'. Expanding these episodes of unpaid carer's leave from 2 to 3 days will enable families where both parents work to be able to cover 5 or 6 days of a week with sufficient care when a young child or adult child, or spouse parent requires some short term intensive caregiving.

If the need for an employee to take occasional unpaid carers leave become more frequent as the needs of the person being cared for increases, the employee and employer will require support and guidance about how to manage the situation. This may be beyond the scope of the NES, however one of the elements of the new framework for fairness and flexibility in employment will be relied upon to manage this kind of transitions.

## References

ABS 2004, *Disability, Ageing and Carers, Australia: Summary of Findings 2003*, ABS Catalogue Number 4430.0.