Executive Summary

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Why this Inquiry?
This Inquiry by the Australian Law Reform Commission (ALRC) arose out of concerns about the implications of an ageing population and the recognition that expanding the workforce participation of older Australians may go some way to meeting such concerns. Much energy and activity—nationally and internationally—has been directed towards encouraging mature age people to remain in, or re-enter, paid work. The Treasury published intergenerational reports in 2002, 2007, and 2010; and the Productivity Commission produced Economic Implications of an Ageing Society (2005). There is also the work of the Advisory Panel on the Economic Potential of Senior Australians (Advisory Panel)¹ and the Consultative Forum on Mature Age Participation.² This Inquiry also contributes to finding answers.

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Access All Ages—Older Workers and Commonwealth Laws

Breaking down the barriers

How do you break down the barriers to workforce participation faced by mature age people? What are the barriers that stand in the way? What can law and legal frameworks do about it? These were the key challenges for the ALRC in this Inquiry.

Law reform can remove barriers to mature age workforce participation by removing specific age limits and by making discrimination on the basis of age unlawful. But law can only go so far. Achieving cultural change was singled out by stakeholders in the Inquiry as crucial for reform. It is the ‘real game changer’. Law reform has its part in contributing to cultural change and can lead it in some respects.

What the ALRC contributes in this Inquiry is a range of 36 targeted recommendations that capture some of the momentum for reform, complementing other work in the broader area of policy development affecting mature age people. The ALRC also gives voice to wider concerns where those have been highlighted throughout the Inquiry.

Developing the law reform response

Defining the brief

The ALRC’s work is defined by Terms of Reference from the Commonwealth Attorney-General. They provide the constraint within which any law reform project undertaken by the ALRC must operate, in addition to the direction given under the ALRC’s constituting legislation, the Australian Law Reform Commission Act 1996 (Cth). In this Inquiry the focus was on ‘limitations or barriers’ to participation in ‘the workforce or other productive work’. The ALRC was asked to identify ‘what, if any, changes could be made to relevant Commonwealth legislation and legal frameworks to remove such barriers’. A number of issues arose in defining the brief.

First, the ALRC took a wide approach to the idea of ‘limitations or barriers’. And in responding to the question of what changes could be made to remove them, the ALRC developed a set of framing principles that provided the lens for the consideration of any reform recommendations.

Secondly, the Terms of Reference defined ‘older persons’ as anyone over the age of 45 years, which is consistent with the definition of ‘mature age worker’ used by the Australian Bureau of Statistics (ABS). The age cohort therefore comprised a very wide group, with varying capacities and needs stretching over several decades—raising particular challenges for the development of policy responses in this Inquiry.

Thirdly, the Terms of Reference recognised that ‘work’ is a wider concept than work in the labour market as paid work, through its inclusion of ‘other productive work’, which includes volunteer work and caring. There is a tension, however, between the concepts of ‘work’ and ‘other productive work’, where other productive work may itself act as a barrier to paid work—particularly with respect to unpaid care work. To resolve this tension, the ALRC focused on developing reform recommendations to enhance the
capacity to combine paid work and caring—recognising the value of that care but also looking to enable workforce attachment and participation.

Fourthly, having to consider ‘legal frameworks’ in addition to laws meant that the Inquiry concerned more than just specific legislative provisions. It required consideration of things such as policy and practice guides, codes of conduct, education and training about legal rights and responsibilities, and other related matters.

**Report structure**

This Report is divided into eight chapters. The first two chapters introduce the Inquiry, describe the reform process and set out relevant conceptual and contextual issues. Chapter 3 concerns the keystone recommendation of a National Mature Age Workforce Participation Plan, to provide a coordinated policy response to addressing barriers to the participation of mature age persons in the Australian labour market. The ALRC suggests that the Advisory Panel on Positive Ageing, or a similar body, lead the development of this plan.

This is followed by five chapters focusing upon the specific areas identified in the Terms of Reference, as follows:

- Recruitment and Employment—Chapter 4
- Work Health Safety and Workers’ Compensation—Chapter 5
- Insurance—Chapter 6
- Social Security—Chapter 7
- Superannuation—Chapter 8

**Framing principles**

The Recommendations for reform were developed in the light of six interlinking principles: participation, independence, self-agency, system stability, system coherence, and fairness:

- **Participation**—all Australians should feel valued and have the opportunity to participate fully in the life of our society. This reflects the Australian Government’s ‘Social Inclusion Agenda’.  

- **Independence**—older persons should have the ability to make choices about the form of participation they wish to make, including the capacity to determine when and at what pace withdrawal from paid employment takes place. It also involves the ability to make genuine choices between participation in paid work, unpaid work, or some combination of both.

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• **Self-agency**—an individual should have the right to make decisions about matters affecting him or her. The principle of self-agency is one that underpins the idea of ‘independence’ and of ‘participation’. Like the principle of independence, self-agency also encompasses choice and the importance of being treated with dignity and respect, as reflected in the National Statement on Social Inclusion.  

• **System stability**—laws and systems that are complex should remain stable and predictable. This is particularly relevant in areas such as superannuation. The Super System Review Panel emphasised that, because superannuation is a large and complex system, with ‘an increasingly important social and macroeconomic dimension’, rule changes ‘should be made sparingly and in a way that engenders member confidence’. Other related principles are ‘coherence’ and ‘fairness’, which may be seen as aspects of a stable system, but also go further. They concern how the system operates in terms of impact on those affected and more broadly within the Australian community.

• **System coherence**—systems should be consistent, simple and transparent for individuals. This was a priority identified by the review of Australia’s tax system, chaired by Dr Ken Henry AC, in its review of the retirement income system. Complexity may cause disengagement in paid work. Lack of accessible information is another aspect of system coherence and an element of complexity, leading to poor understanding of rules and entitlements.

• **Fairness**—national resources should be distributed fairly and responsibility should be balanced between individuals and government. Fairness can be a consequence of coherence, consistency and the stability of the relevant systems involved. A further aspect is fairness between generations—that is, ‘intergenerational equity’. Issues important to intergenerational equity include the management of public debt and the funding of pension schemes. Fairness also encompasses ensuring basic rights and freedoms are enjoyed by older persons, and that there exists equality of opportunity in participation in paid and other productive work.

These reform principles guided the development of the targeted set of recommendations addressing the Terms of Reference in this Report.

**The recommendations**

**Net effect**

The Terms of Reference required the ALRC to review a number of distinct and discrete areas of law, to identify potential barriers to mature age persons’ workforce...

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6 Australian Government and Social Inclusion Unit, *A Stronger, Fairer Australia—National Statement on Social Inclusion*.


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participation, and to recommend law reform solutions. As finding the answers to enabling workforce participation by older Australians requires a broader focus than just on law, the ALRC considers that a major coordinating initiative is needed in the form of a National Mature Age Workforce Participation Plan. This is the first and keystone recommendation in this Report.9 Taken together, the other recommendations will amount to specific strategies in the implementation of the National Plan. Their net effect will be to provide

- a coordinated policy response to enabling mature age workforce participation;
- consistency across Commonwealth laws and between Commonwealth and state and territory laws to support mature age workforce participation;
- a reduction in age discrimination;
- a greater awareness of mature age workers’ rights and entitlements;
- support for maintaining attachment to the workforce for mature age persons; and
- work environments, practices and processes that are appropriate for mature age workers.

Achieving a coordinated policy response

In addition to the recommendation for a National Plan, other recommendations throughout the Report also reflect the theme of achieving a coordinated policy response to mature age workforce participation, with the aim that:

- the social security and superannuation systems do not discourage or prevent workforce participation;10
- policy responses are guided by relevant reviews, which have considered issues affecting mature age workers;11 and
- certain agencies or bodies will work together to facilitate the development of coordinated policy responses.12

Improving consistency of laws

Some of the recommendations aim to improve consistency across Commonwealth laws and between Commonwealth and state and territory laws to support mature age workforce participation. These recommendations concern:

- Commonwealth workers’ compensation laws;13
- the retirement age of judicial and quasi-judicial appointments;14 and

9 Recommendation 3–1.
10 Recommendations 7–3, 7–4, 7–5, 8–1, 8–3.
11 Recommendations 4–3, 4–4, 4–10, 4–12.
12 Recommendations 4–5, 4–6, 4–11, 4–12, 5–1, 5–3, 5–4, 6–4.
13 Recommendation 5–5.
the insurance exceptions in Commonwealth, state and territory anti-discrimination legislation.\textsuperscript{15}

**Removing age discrimination**

A number of recommendations are directed towards removing age discrimination in legislation and practice. In some cases, the ALRC recommends amendments; in some, reviews. For example, reviews are recommended for:

- compulsory retirement ages of judicial and quasi-judicial appointments, and military personnel;\textsuperscript{16}
- licensing or re-qualification requirements, with the Australian Human Rights Commission facilitating the development of guidelines to assist;\textsuperscript{17} and
- the insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.\textsuperscript{18}

Amendments are recommended in specific areas:

- to ensure access to incapacity payments under Commonwealth workers’ compensation schemes;\textsuperscript{19}
- to provide that government co-contributions of superannuation for low-income earners do not cease at age 71 years;\textsuperscript{20} and
- to ensure the amount of compensation payable to an employee under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) is not reduced by reference to superannuation.\textsuperscript{21}

Age discrimination is also addressed through recommendations directed towards promoting awareness of the rights and entitlements of mature age workers.

**Promoting awareness of rights and entitlements**

Recommendations throughout this Report reflect the importance of promoting awareness of mature age workers’ rights and entitlements: by recruiters, by job services providers, by employers, and by mature age workers. Mature age workers also need information that supports their ability to make choices in employment. They need to know what rights and entitlements they have to make such choices.

\textsuperscript{15} Recommendation 6–4.
\textsuperscript{16} Recommendations 4–13, 4–14.
\textsuperscript{17} Recommendation 4–11.
\textsuperscript{18} Recommendation 6–4.
\textsuperscript{19} Recommendations 5–5, 5–7.
\textsuperscript{20} Recommendation 8–2.
\textsuperscript{21} Recommendation 5–9.
Promoting awareness of the rights and entitlements of mature age workers is therefore crucial and is seen in recommendations in this Report about:

- codes of conduct;\(^{22}\)
- national campaigns and audits;\(^ {23}\)
- training;\(^ {24}\)
- information provision;\(^ {25}\)
- guidance material;\(^ {26}\) and
- recognition of best practice.\(^ {27}\)

**Maintaining workforce attachment**

A number of recommendations in this Report seek to enable mature age people to remain attached to the workforce. Maintaining workforce attachment is supported through recommendations to ensure:

- insurance coverage is available and appropriate for continued participation in work or other productive work;\(^ {28}\)
- there are no gaps under the Commonwealth workers’ compensation schemes in entitlement, and that incapacity payment periods are extended, to ensure injured mature age workers remain connected to rehabilitation and return to work support services;\(^ {29}\) and
- mature age workers are provided with longer periods of notice for termination of employment.\(^ {30}\)

Recommendations are also directed towards improving employment services for unemployed mature age people. Recruiters are key gatekeepers in the employment process. Ensuring that they are aware of their obligations and appreciate the value of mature age workers is essential.\(^ {31}\) Similarly, mature age job seekers need to be supported by Job Services Australia staff who understand their needs.\(^ {32}\)

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22 Recommendations 4–3, 4–4, 6–6.
23 Recommendations 4–2.
24 Recommendation 4–5, 7–2.
25 Recommendation 4–8, 6–1, 7–1.
26 Recommendations 4–5, 4–8, 4–11, 5–3, 6–5, 7–3, 7–4.
27 Recommendations 4–6, 5–4.
28 Recommendations 6–1, 6–2, 6–3.
31 Recommendations 4–3, 4–4, 4–5.
32 Recommendation 7–2.
Other recommendations seek to remove disincentives to work that may be associated with receipt of income support payments, including the Age Pension and Disability Support Pension.33

Two recommendations in this Report are directed towards enabling carers to retain an attachment to the paid workforce. These recommendations:

• recognise the compatibility of paid work and caring responsibilities;34 and
• support the flexibility in work that enables choices to be made in relation to caring.35

**Improving work environments, practices and processes**

Ensuring that work environments, practices and processes are safe and conducive to worker health and wellbeing is central to facilitating the ongoing participation of mature age workers in paid employment and other productive work. Recommendations in this Report are therefore directed towards ensuring that health and safety issues affecting mature age workers are:

• considered in implementing the Australian Work Health and Safety Strategy 2012–2022;36
• included in Safe Work Australia’s research and evaluation strategy and work plans;37 and
• acknowledged through recognition of best practice.38

**Summary**

The approach to law reform in this Report includes a mix of strategies, directed, for example, at legislation, codes of practice, guidelines, education and training. Although the Report is presented to the Attorney-General, some of its recommendations are directed to other government agencies and bodies, professional associations and institutions, for action or consideration.

The Terms of Reference did not give unlimited licence to consider matters that were wider than ones anchored in the idea of workforce participation. Many throughout this Inquiry spoke about broader issues—and the ALRC gives voice to such concerns throughout this Report—but the Recommendations are kept within the brief as defined by the Terms of Reference. By drawing attention to wider concerns, however, this Report can provide a catalyst to further work as well as complement initiatives already in train. All such activity will have a place within the framework set by a National Mature Age Workforce Participation Plan.

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33  Recommendations 7–3, 7–5.
34  Recommendation 7–4.
36  Recommendation 5–1.
37  Recommendation 5–2.
38  Recommendations 4–6, 5–4.