

1. Inquiry Overview

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Summary

1.1 This Report comprises the final step by the Australian Law Reform Commission (ALRC) in the Inquiry into Commonwealth legal barriers to older persons participating in the workforce or other productive work. The Inquiry was initiated under Terms of Reference from the then Attorney-General of Australia, the Hon Nicola Roxon MP, issued in March 2012. This chapter provides a snapshot of the background to the Inquiry, its scope and the processes of reform leading to this Report and its 36 recommendations.

Background to the Inquiry

The ageing population—public policy challenges

1.2 Australia’s population is ageing. It is estimated that by 2044–45, almost one in four Australians will be aged 65 years and over; and in every year between 2012–28, ‘the aged share of the Australian population is projected to increase by more than 0.35 percentage points—an increase around 4 times the long-term average’.¹ This also means that the population will comprise fewer people of ‘working age’, with only 2.7

1 Productivity Commission, *Economic Implications of an Ageing Australia* (2005), xiv.

people of working age to support each Australian aged 65 years and over by 2050, in contrast to five in 2010 and 7.5 in 1970.²

1.3 The ageing of the population has implications for a wide range of public policy concerns, including, for example:

- public health;
- aged care;³
- infrastructure;
- city design;
- workplace design; and
- the retirement income system—the Age Pension and superannuation.

1.4 As noted in the *Intergenerational Report 2010*, decisions taken ‘in the near term’ will have an impact on ‘the wellbeing of future generations’.

Productivity-enhancing reforms, particularly through nation building infrastructure and improving the skills base, will grow the economy, improve living standards, and partly offset the fiscal pressures of ageing. With an ageing population, productive growth is the key driver of future growth prospects. Reforms that reduce barriers to participation will also lift growth and reduce future pressures.⁴

1.5 Increasing the labour force participation of older Australians is one response. But there are others. The tensions between ‘work’ and ‘retirement’, ‘work’ and ‘caring’, for example within the context of Australia’s Social Inclusion Agenda, are considered in Chapter 2.

Related activity

1.6 There has been a considerable amount of activity and initiatives directed towards ageing populations—both internationally and within Australia. Since the mid-1990s, numerous international organisations have considered the impact of population ageing on economic productivity, pension system design, and health policy. These include:

- the World Bank;⁵
- the Organisation for Economic Co-operation and Development (OECD);⁶
- the World Health Organization;⁷ and
- the United Nations.⁸

² The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), viii.

³ See, eg, Law Council of Australia, *Submission 96*.

⁴ The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), vii.

⁵ World Bank, *Averting the Old Age Crisis* (1994).

⁶ Organisation for Economic Co-operation and Development, *Maintaining Prosperity in an Ageing Society* (1998); OECD, *Live Longer, Work Longer* (2006). *Live Longer, Work Longer* is a series on ageing and employment policies, including reports on 21 countries.

⁷ World Health Organization, *Active Ageing: A Policy Framework* (2002).

⁸ United Nations, *World Population Ageing: 1950–2050* (2002).

1.7 In the Australian context, the Treasury published intergenerational reports in 2002, 2007, and 2010;⁹ and the Productivity Commission produced the report, *Economic Implications of an Ageing Society*, in 2005.¹⁰ There is also the work listed in the Terms of Reference for this Inquiry, namely that of the Advisory Panel on the Economic Potential of Senior Australians (Advisory Panel);¹¹ and the Consultative Forum on Mature Age Participation (Consultative Forum).¹²

1.8 The Consultative Forum was established in February 2010 to provide ‘evidence-based advice on ways to overcome the barriers to employment participation confronting many mature age people’.¹³ The Forum’s final report was completed in August 2012.¹⁴ The work of the Consultative Forum overlapped with this Inquiry and the issuing of Terms of Reference to the ALRC was one of the Forum’s key recommendations. The Forum’s work will continue through the Advisory Panel on Positive Ageing, to ‘support a strategic approach to maximising the potential of an ageing population’.¹⁵ The membership of the Consultative Forum included the Hon Susan Ryan AO, who was appointed as Australia’s first Age Discrimination Commissioner with the Australian Human Rights Commission on 30 July 2011. Ms Ryan was also appointed as a part-time Commissioner to the ALRC to assist in this Inquiry.

1.9 Significant reviews have also been conducted into specific areas related to this Inquiry. In 2008–09, the Australian Government initiated the Australia’s Future Tax System Review, chaired by Dr Ken Henry AC (the Tax Review); the Super System Review, chaired by Mr Jeremy Cooper; and the Pension Review, chaired by Dr Jeff Harmer AO.¹⁶ The Tax Review examined the retirement income system, including the superannuation system, as a key part of the ‘tax-transfer system’—the combination of Australia’s tax and social security systems.¹⁷ The Super System Review addressed the governance, efficiency, structure and operation of Australia’s superannuation system. The Pension Review examined measures to strengthen the financial security of older

9 The Treasury, *Intergenerational Report 2002–03* (2002); The Treasury, *Intergenerational Report 2007* (2007); The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010).

10 Productivity Commission, *Economic Implications of an Ageing Australia* (2005).

11 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011); Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Enabling Opportunity* (2011); Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011).

12 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation; National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

13 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 1.

14 *Ibid.*

15 *Ibid.*, 7.

16 The Treasury, *Australia’s Future Tax System: Final Report* (2010); Super System Review Panel, *Super System Review* (2010); FaHCSIA, *Pension Review Report* (2009).

17 For a description, see The Treasury, *Australia’s Future Tax System: Architecture of Australia’s Tax and Transfer System* (2008), ‘Executive Summary’.

Australians, carers and people with disability.¹⁸ These reviews made a number of recommendations for reform, which are noted as relevant in this Report.

1.10 In the field of the Commonwealth workers' compensation schemes, the Government announced a review of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) in July 2012 and an issues paper was released in September.¹⁹ At the time of writing, the final report of the review had not been made public.

1.11 With respect to employment law, in August 2012 the Australian Government released the final report of the review of the *Fair Work Act 2009* (Cth). In October 2012, the Government announced it would implement the first tranche of recommendations arising from the review and on 1 January 2013 the provisions of the *Fair Work Amendment Act 2012* (Cth) took effect.²⁰ In March 2013, the Fair Work Amendment Bill 2013 (Cth) was introduced into Parliament.²¹

1.12 The project to consolidate existing Commonwealth anti-discrimination laws into a single Act was also relevant to this Inquiry as the *Age Discrimination Act 2004* (Cth) is one of the pieces of legislation being examined.²² This project forms a key component of Australia's Human Rights Framework.²³ In November 2012 an exposure draft Human Rights and Anti-Discrimination Bill 2012 was released and was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. The Committee's Report was released on 21 February 2013. In March 2013, the Government announced that, aside from amendments to the *Sex Discrimination Act 1984* (Cth) in relation to sexual orientation, gender identity and intersex status, the consolidation process involved a number of issues requiring 'deeper consideration' and that the Attorney-General's Department will 'continue working on this project'.²⁴

1.13 A further initiative that may be relevant in the mature age context is Disability Care Australia (formerly the National Disability Insurance Scheme)—a response to the Productivity Commission's inquiry into a National Disability Long-term Care and Support Scheme.²⁵ The scheme is to provide funding and support to eligible Australians with disability. The National Disability Insurance Scheme Bill 2013 was passed by Parliament on 21 March 2013.

18 FaHCSIA, *Pension Review Report* (2009).

19 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

20 *Fair Work Amendment Act 2012* (Cth); B Shorten (Minister for Employment and Workplace Relations), 'Government implements first tranche response to Fair Work Act Review' (Press Release, 15 October 2012).

21 Fair Work Amendment Bill 2013 (Cth).

22 Some of the key issues being considered in the course of the consolidation project that are relevant in the context of this Inquiry include: the definition of discrimination; the protection of voluntary workers; and exemptions.

23 Australian Government Attorney-General's Department, *Australia's Human Rights Framework* (2010).

24 The Hon Mark Dreyfus QC MP (Attorney-General) and the Senator the Hon Penny Wong (Minister for Finance and Deregulation), 'New Anti-Discrimination Laws to Cover Sexual Orientation, Gender Identity and Intersex Status' (Media Release, 20 March 2013).

25 Productivity Commission, *Disability Care and Support* (2011).

1.14 Beginning in July 2013, Disability Care Australia will be launched at a number of sites around Australia.²⁶ To become a participant in the launch a person must be under the age of 65 on the date the access request is made.²⁷ Given that the details of the scheme and its potential impact on older workers with disability have yet to be worked out at the time of writing, it is not considered in this Report. However, issues with respect to disability-related social security payments as well as insurance more broadly are discussed—in Chapters 5 and 6 respectively.

Defining the scope of the Inquiry

Terms of Reference

1.15 The Terms of Reference²⁸ direct the ALRC to consider Commonwealth legislation and related legal frameworks that either directly, or indirectly, impose limitations or barriers that could discourage older persons from participating, or continuing to participate, in the workforce or other productive work. The laws to be considered include:

- superannuation law;
- family assistance, child support and social security law;
- employment law;
- insurance law;
- compensation laws; and
- any other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004* (Cth).

1.16 Defining the scope of the Inquiry required consideration of the meaning of a number of terms: ‘limitations or barriers’; ‘older persons’; ‘other productive work’; and ‘legal frameworks’.

1.17 The ALRC also had to determine the extent of barriers, if any, in the areas identified for consideration in the Terms of Reference. Some topics clearly sat outside; and in others that were considered, the ALRC concluded that no recommendations were to be made. These are noted below.

26 Council of Australian Governments, *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch* <www.coag.gov.au/node/485> at 21 March 2013.

27 National Disability Insurance Scheme Bill 2013 (Cth) cl 22. The Bill passed both houses of parliament on 21 March 2013. The Senate Community Affairs Legislation Committee released its report on the Bill on 13 March 2013. The Committee recommended that the Government, through the Council of Australian Governments, ‘identify mechanisms by which to provide adequate specialised disability support for people 65 and over who have disabilities not resulting from the natural process of ageing’.

28 The full Terms of Reference are set out at the front of this Report.

Terminology

Barriers

1.18 The Terms of Reference refer to the ‘obstacles’ to workforce participation by older persons and the desirability of ‘removing limitations on, or disincentives to’ such participation. The ALRC is then asked to identify ‘barriers’ in Commonwealth laws and legal frameworks to participation, or continuing active participation, in the workforce or other productive work. ‘Barriers’ to continuing active workforce participation may include specific limitations, such as age limits. Barriers in a broad sense may also include other things, such as disincentives to remain in the workforce and even incentives to leave.

1.19 How wide, then, is the notion of ‘barriers’ for the purposes of this Inquiry? The Terms of Reference required first, the identification of barriers in Commonwealth legislation and legal frameworks and, secondly, determining what, if any, changes to law and legal frameworks were necessary to remove them. The ALRC took a wide approach to the idea of ‘obstacles’ or ‘barriers’. In determining what changes should be made, the ALRC developed a set of framing principles—set out in Chapter 2. They provided the lens for the consideration of what, if any, reform recommendations were to be made in response.

1.20 The Consultative Forum’s final report included a summary of 14 key barriers to workforce participation.²⁹ They provide an instructive analysis in the wider context of the ageing population and a useful backdrop to the consideration of barriers in laws and legal frameworks considered in this Inquiry:

- *Discrimination in employment on the basis of age.* Can manifest itself both directly and indirectly in the recruitment and retention of staff. Often, age discrimination interacts with other barriers.
- *Care-giving responsibilities.* Significantly impacts the ability to secure and retain employment—in particular for those with disrupted careers due to child care and other responsibilities.
- *Flexibility of employment arrangements.* Is an important factor enabling mature age people to extend their working lives or to increase the employment participation of older Australians who face other barriers.
- *Issues around private recruitment firm practices.* The increasing role of private recruitment agencies in job search has opened avenues for age-based discrimination to be experienced at the recruitment stage.
- *Job search assistance.* Mature age job seekers can have trouble finding employment because of outdated job search skills, and [this] may discourage them from seeking employment.

29 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

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- *Leisure time trade-off.* Efforts to increase employment participation of mature age Australians are challenged by a tendency for many to retire early to pursue leisure activities.
 - *Mental health barriers.* Evidence has demonstrated the connections between mental illness and early retirement, job loss, unemployment, or difficulties re-entering employment.
 - *Mismatch of job skills and experience with industry demands.* Changes in the economy in recent decades, including a decline in manufacturing, means that some mature age people have skills less suited to the modern economy.
 - *Physical illness, injury and disabilities.* Have a major impact on early retirement, job loss, unemployment, and can create difficulties re-entering employment.
 - *Re-entry issues barriers of the Very Long-Term Unemployed (of 24 months or more in duration).* Many mature age job seekers have experienced significant difficulties in re-entering the workforce because of structural changes in the economy, among other reasons.
 - *Re-training and up-skilling barriers.* The ability of mature age people lacking prior qualifications to find employment is reliant upon the availability of appropriate training opportunities, as well as their aspirations to upgrade their skills.
 - *Superannuation.* Individual superannuation decisions, as well as government policies, can significantly impact retirement timing decisions.
 - *Tax transfer system.* In Australia there is evidence that the tax transfer system is complex and may act as a disincentive for mature age people to work.
 - *Workplace barriers.* Improving the quality of workplaces with physically demanding occupations and inappropriate conditions can attract and retain mature age people in the workforce.³⁰

1.21 The characterisation of ‘barriers’ in this list is a wide one. Some of these barriers are about law and legal frameworks; some are broader. Some are about incentives to leave work; some about disincentives to stay in the paid workforce. Some are personal—specific to an individual; some are structural—affecting whole groups.³¹ For example, experiencing mental and physical illness may be a barrier to workforce participation at an individual level, and so may having care-giving responsibilities. In relation to such matters the focus of the ALRC in this Report is on enhancing a person’s capacity to participate in the workforce where laws and legal frameworks can play a role—for example, in the number of hours a person may work while in receipt of Disability Support Pension or Carer Payment.

30 Ibid, 1–6.

31 Ibid, 10.

1.22 The Consultative Forum’s list includes as a barrier that the timing of retirement may be an individual matter of choice—a ‘leisure time trade-off’. The Forum also notes that decisions to leave the paid workforce may also be significantly affected by superannuation settings. Both are listed as ‘barriers’. However in considering whether to make a recommendation in relation to superannuation settings in this Report, the ALRC’s framing principles for this Inquiry, set out in Chapter 2, became dominant considerations. In this context the principles of self-agency, independence and participation were critical.

1.23 Some stakeholders expressed objections to the ALRC’s approach to the breadth of the ‘barriers’, suggesting, for example, that adding a right or entitlement for older workers was not about removing ‘barriers’.³² The ALRC considers that an approach that enhances the position of older workers by recommending, in some instances, the expansion of an entitlement, is appropriate where to do so addresses an obstacle affecting workforce participation. For example, flexible employment arrangements may enable mature age people to extend their working lives or to increase their employment participation.³³ The ALRC considers that facilitating such flexibility removes a barrier by enhancing the capacity of older persons to maintain workforce attachment.

Older persons

1.24 The Terms of Reference define ‘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).³⁴ This is a very wide group, with varying capacities and needs stretching over several decades—raising particular challenges for the development of policy responses.

1.25 The Advisory Panel noted that there is no agreed definition of ‘seniors’ or ‘older Australians’, and that ‘the effects of ageing vary from person to person in terms of their capability’.³⁵ The Australian Institute of Health and Welfare refers to older Australians as being 65 years and over;³⁶ and older Indigenous people as being 50 years and

32 Australian Chamber of Commerce and Industry, *Submission 85* and Australian Chamber of Commerce and Industry, *Submission 44*. See also Australian Industry Group, *Submission 97*; Business Council of Australia, *Submission 93*.

33 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 18.

34 The Queensland Industry Tourism Council expressed concern about the use of the term ‘older persons’ and suggested replacing it with ‘mature age worker’, ‘given that the ABS definition for “older persons” is often an arbitrary classification that differs between each of their publications’: Queensland Tourism Industry Council, *Submission 67*. Given that the Terms of Reference for this Inquiry are headed specifically with the term ‘older persons’, the ALRC considers it appropriate to use this term throughout the Report.

35 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011), 4.

36 Australian Institute of Health and Welfare, *Australia’s Health 2012* (2012) <www.aihw.gov.au> at 21 March 2013, 9.

over.³⁷ The Population Division of the Department of Economic and Social Affairs of the United Nations refers to older persons as 60 years and over.³⁸ Its 2002 report on *World Population Ageing* divided its consideration of older persons into three cohorts: 60 years and over; 65 years and over; and 80 years and over.³⁹

1.26 Stakeholders in this Inquiry noted the difficulty of characterising persons as ‘older’ from the age of 45 years.⁴⁰ The Brotherhood of St Laurence, for example, described the term ‘older people’ as a ‘slippery concept’ and pointed to the problem of cohort differences:

Even setting aside individual characteristics, there tend to be considerable differences between the interests and needs of cohorts aged 50–65 and those aged 65–80 or 80–100.⁴¹

1.27 In developing the recommendations in this Report, the ALRC has taken into account that public policy responses require consideration of ‘older persons’ as comprising many varied cohorts, with varying needs. As the Advisory Panel commented: ‘People do not suddenly become old at a set age. Rather all people age and are ageing’.⁴²

Other productive work

1.28 The Terms of Reference recognise that ‘work’ is a wider concept than work in the labour market as paid work. ‘Work’ includes ‘other productive work’, which includes volunteer work and caring. The Terms of Reference also note the obstacles faced by older persons participating actively in the workforce. 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. This may particularly be the case with unpaid care work. The Consultative Forum identified ‘care-giving responsibilities’ in its list of barriers to employment participation, because it ‘significantly impacts the ability to secure and retain employment—in particular for those with disrupted careers due to child care and other responsibilities’.⁴³

1.29 To resolve this tension, the ALRC focused on how to enhance the capacity to combine paid work and caring—recognising the value of that care but also looking to enabling paid workforce participation. This is considered further in Chapter 2. As a

37 Australian Institute of Health and Welfare, *Older Aboriginal and Torres Strait Islander People Cat No IHW 44* (2011), 1.

38 United Nations, *World Population Ageing: 1950–2050* (2002).

39 Ibid.

40 Eg, L Masters, *Submission 36*: ‘What is it that makes 45 the magic number?’.

41 Brotherhood of St Laurence, *Submission 54*. Quoting: H Kimberley and B Simons, *The Brotherhood’s Social Barometer: Living the Second Fifty Years* (2009). Another stakeholder queried how the definition of ‘old age’ at age 45 years applied to women: ‘the term has always been based on the notion that men determine ... what age is old, and what age is young. Women also have determinants of “old age” that differ to those that men hold true’: L Masters, *Submission 36*.

42 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011), 4.

43 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

matter of terminology, where the expression ‘workforce participation’ is used in this Report, it refers to participation in the paid workforce, unless otherwise stated.

1.30 The tension between ‘work’, as income generating, and ‘other productive work’ in activities such as caring and volunteering, is considerable. It is a key part of the wider context of ageing and the challenges of developing policy responses. As noted in the *Intergenerational Report 2010*:

Policy responses need to reflect a sound understanding of the complex nature of mature age participation. Retirees make a valuable contribution to the economy and living standards through activities such as volunteering or carer activities.⁴⁴

1.31 The Consultative Forum recommended that the Government should ask the Productivity Commission to examine the broad thematic issues around caring, beyond employment and beyond mature age carers.⁴⁵

Legal frameworks

1.32 The Terms of Reference direct the ALRC to consider ‘all relevant Commonwealth legislation and related legal frameworks’. The Business Council of Australia criticised what it described as an ‘unusually broad view of legislation and legal frameworks’.⁴⁶ The ALRC considers that the reference to ‘legal frameworks’ means that the ALRC is directed to consider not only legislative instruments, but also policy and practice guides, codes of conduct, education and training about legal rights and responsibilities and other related matters.

Coverage of particular issues

Migration

1.33 In the Issues Paper for this Inquiry, the ALRC asked a number of questions relating to migration,⁴⁷ as the Terms of Reference directed the ALRC to consider ‘other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004*’, which includes the *Migration Act 1958* (Cth).⁴⁸ The ALRC looked at issues concerning skilled migration visas and age limits imposed—for example, the 50 year age limit for entry as a skilled migrant under the General Skilled Migration (GSM) program.⁴⁹ A number of stakeholders supported either an increase in the age

44 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), xiv.

45 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 1.

46 Business Council of Australia, *Submission 93*.

47 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Questions 53–55.

48 *Migration Act 1958* (Cth) s 43.

49 The requirement that a person be under 50 years of age is expressed as a criterion for making a valid application. See, eg, *Migration Regulations 1994* (Cth) sch 1 item 1135(3)(b) in relation to a Skilled (Independent) subclass 175 visa. For applications made prior to 1 July 2011, the age limit was 45 years. Similarly, one criterion for applying for employer-sponsored visas is that the applicant is under 50 years of age: see, eg, *Migration Regulations 1994* (Cth) sch 2, subclass 186—Employer Nomination Scheme, cl 186.221 (Temporary Residence Transition Scheme), cl 186.231 (Direct Entry Scheme).

limitations for the GSM and employer-sponsored visas to 55 years,⁵⁰ or the removal of the age limitations altogether.⁵¹

1.34 During the next stage of the Inquiry, the ALRC concluded that the failure by an applicant to obtain a skilled visa, whether as a result of being barred from making an application or being unsuccessful, was not primarily a limitation or barrier to their participation in the workforce—the focus of the Terms of Reference—but rather a barrier to entry to Australia for the purposes of work. In light of this, the ALRC signalled that proposals for reform in this area would be beyond the scope of this Inquiry.⁵² The ALRC suggested that, given the views expressed in this Inquiry, it may be appropriate for the Department of Immigration and Citizenship (DIAC) to consider the role of age as a criterion in the skilled migration program.⁵³

1.35 DIAC supported this approach,⁵⁴ submitting that

Australia's skilled migration program is carefully managed so as to yield the maximum benefit for the Australian community serving a range of economic, social and demographic objectives.

Demographic research indicates that, in the near future, our ageing population will also begin to act as a constraint on the supply of younger skilled workers. The department's planned migration program will help address skills shortages. It will also offset the major decline in the size of Australia's working age population, which would otherwise begin to affect the Australian community in a few years time, as the majority of 'baby boomer' generation moves into retirement.⁵⁵

1.36 DIAC also drew attention to the series of reforms of the skilled migration program that commenced on 1 July 2012—including a review of the points test used to assess skilled migrants.⁵⁶

50 Australian Chamber of Commerce and Industry, *Submission 44*; Government of South Australia, *Submission 30*.

51 National Seniors Australia, *Submission 27*. The Brotherhood of St Laurence submitted that age restrictions create 'risks of losing the global competition for older workers, losing potential knowledge and skills': Brotherhood of St Laurence, *Submission 54*. An article by Professor Simon Briggs and others referred to the fact the Issues Paper had raised the issue of older workers in Australia's migration program and supported the idea of valuing older workers, both within Australia and through immigration within 'globalised economies' to 'capitalise upon this resource': S Biggs, M Fredvang, Irja Haapala, 'Not in Australia: Migration, Work and Age Discrimination' (2012) *Australasian Journal on Ageing* 1, 3.

52 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), ch 9. The ACTU, for example, argued that 'the Commonwealth Government's priority should be on training and assisting Australian workers, including older workers, to find employment before looking to fill the gaps through migration': ACTU, *Submission 38*.

53 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), [9.18].

54 Department of Immigration and Citizenship, *Submission 79*. The ALRC concluded not to make a recommendation. This is not the same thing as a recommendation that 'no changes be made to the age limits under Australia's skilled migration framework'.

55 *Ibid.*

56 *Ibid.*

Family assistance and child support

1.37 The Terms of Reference referred to legal barriers to work for mature age persons in the areas of child support and family assistance.⁵⁷ These laws may be relevant to mature age persons, in particular when they raise grandchildren.⁵⁸ Specific barriers to work for mature age persons within these laws have not been identified.⁵⁹ Consequently, the ALRC makes no recommendation to reform child support or family assistance laws.

Tax

1.38 In the Discussion Paper, the ALRC noted that personal income tax laws may affect workforce participation, including for mature age cohorts.⁶⁰ The Issues Paper discussed several aspects of the income tax system in relation to mature age workforce participation, including:

- effective marginal tax rates;
- the complexity of the tax transfer system;
- tax exemptions for social security payments; and
- tax offsets.⁶¹

1.39 Responses from key stakeholders were summarised in the Discussion Paper,⁶² largely focusing on systemic reforms to the tax system. For example, the Australian Council of Trade Unions (ACTU) stated that, having regard to the Inquiry's framing principles of system coherence and stability, it would not support 'significant structural change to one payment ... in the absence of change to other forms of income support payments'.⁶³ Further submissions reiterated the concerns identified in the Discussion Paper.⁶⁴

1.40 While several aspects of the income tax system that may be relevant to mature age workforce participation were traversed in the Discussion Paper, the ALRC

57 Relevant statutes include: *A New Tax System (Family Assistance) Act 1999* (Cth); *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth); *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth). The policy guides are: FaHCSIA, *Family Assistance Guide* (2013) <www.fahcsia.gov.au/guides_acts/> at 21 March 2013 and Child Support Agency, *The Guide—CSA's Online Guide to the Administration of the New Child Support Scheme* (2013) <www.guide.csa.gov.au/> at 21 March 2013.

58 The Inquiry did not consider barriers to work in child support and family assistance laws that affect mature age parents.

59 For consideration of these laws as they may affect mature age persons, see: Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), 147–150.

60 Ibid, Ch 7.

61 Ibid, 25–28.

62 Submissions dealing with these issues included: COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Chamber of Commerce and Industry, *Submission 44*; ACTU, *Submission 38*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*; Superannuated Commonwealth Officers' Association, *Submission 14*.

63 ACTU, *Submission 38*.

64 For example, National Seniors Australia, *Submission 92*; Brotherhood of St Laurence, *Submission 86*.

concluded that addressing them required consideration of systemic reforms to the tax system—a task beyond the scope of this Inquiry. Further, such a project was completed in 2009, when the Tax Review recommended comprehensive reforms to the tax transfer system with a particular focus on ensuring appropriate incentives for workforce participation.⁶⁵

1.41 Following the release of the Discussion Paper, three stakeholders raised the issue of the tax treatment of redundancy payments.⁶⁶ Preferential tax treatment is accorded to a ‘genuine redundancy payment’, a component of which is based on the person’s years of service.⁶⁷ There are two limitations on what amounts to a ‘genuine redundancy payment’: namely, if the dismissal occurs after the employee’s 65th birthday, or ‘if the employee’s employment would have terminated when he or she reached a particular age or completed a particular period of service—the day he or she would reach the age or completed the period of service (as the case may be)’.⁶⁸ In such cases, an employee may pay ‘considerably more tax on their termination payment than a worker who has the same period of service but has not yet attained 65 years of age’.⁶⁹

1.42 The Superannuation Committee of the Law Council of Australia (Superannuation Committee) submitted that, ‘as an employee now generally cannot be compulsorily retired at a particular age or after a particular period of service, this restriction ... is now effectively obsolete’.⁷⁰

1.43 While reaching a certain age is clearly a relevant criterion to the determination of whether a payment is a ‘genuine redundancy payment’, the ALRC considers that this does not sit within the Terms of Reference as a ‘barrier’ to workforce participation. As the Superannuation Committee commented, ‘employees generally have very limited control, if any, over the timing of their redundancy’, hence it did not have a view ‘as to whether the different tax treatment is a disincentive for older workers, who are made redundant, to seek further work’.⁷¹

Re-skilling

1.44 The Consultative Forum identified the difficulty that mature age people may face if the employment they are seeking requires certain qualifications, or they need to update or upgrade their skills—described as ‘re-training and up-skilling barriers’.⁷² The Advisory Panel also noted that workers, or those seeking work ‘may need to look for re-skilling opportunities’:

The Australian economy has transformed significantly in recent decades. We have seen a decline in manufacturing jobs and an increase in occupations in the services

65 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 1, vii, Terms of Reference.

66 J Constable, *Submission 98*; Law Council of Australia, *Submission 96*; C Lanyon, *Submission 61*.

67 *Income Tax Assessment Act 1997* (Cth) s 83-170.

68 *Ibid* s 83-175(2)(a).

69 Law Council of Australia, *Submission 96*.

70 *Ibid*.

71 *Ibid*.

72 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 1–6.

and information technology sectors. Some older Australians have skills that were well-suited to jobs of the past but may not be as relevant to the jobs of today.⁷³

1.45 The third report of the Advisory Panel, *Turning Grey into Gold*, included four recommendations under the label, ‘Lifelong learning’, helping individuals to ‘remain active participants in a changing society and a changing economy’:

Lifelong learning contributes to an innovative and adaptable workforce, creative and strong communities, and more satisfying personal lives.⁷⁴

1.46 The report suggested that to support people who want to remain in the workforce but want to take a different career direction—to pursue ‘encore careers’—educational settings ‘need to be flexible’. Having options in relation to vocational study at any age is ‘important in maintaining workforce participation’.⁷⁵ The Advisory Panel therefore recommended that:

The federal government, in conjunction with employer and employee peak bodies, examine mechanisms that support older workers to take up skilling and educational opportunities, including:

- investigating the concept of ‘educational leave’
- reviewing the availability of financial assistance and concessional tax arrangements to assist individuals to undertake vocational study in order to re-skill or change careers.⁷⁶

1.47 The *Intergenerational Report 2010* identified the need to support mature age participation through practical measures such as retraining and re-skilling programs.⁷⁷ The development of the *Investing in Experience Tool Kit* is an example of such a government response.⁷⁸ Additionally, since 1 January 2013, \$35 million from the National Workforce Development Fund is available to businesses to provide training to new and existing workers aged 50 years and over.⁷⁹

1.48 Concerns were repeated throughout this Inquiry about such matters as: the need for programs to assist carers to re-enter the paid workforce or obtain or regain skills;⁸⁰ and the difficulties faced by immigrants in having their qualifications and experiences recognised.⁸¹

1.49 The ALRC recognises the importance of retraining and re-skilling as issues affecting continued workforce participation. As seen in the work of the Advisory Panel, however, ‘lifelong learning’ is an issue that not only concerns workforce participation, but also contributes to community and personal wellbeing. To the extent

73 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011), 12.

74 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 29.

75 *Ibid.*, 33.

76 *Ibid.*

77 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), xxiii–xxiv.

78 Australian Government, *Investing in Experience Tool Kit* (2012).

79 DEEWR, DHS and FaHCSIA, *Submission 101*.

80 National Welfare Rights Network (NWRN), *Submission 99*.

81 Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*.

that education touches on workforce participation, it is included in various ways in the text and recommendations in this Report.

The law reform process

Building an evidence base

1.50 Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base. A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.⁸² Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.⁸³

1.51 The process for each law reform project may differ according to the scope of the inquiry, the range of key stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference—and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC’s website.⁸⁴

Community consultation

1.52 A multi-pronged strategy of seeking community comments was used. Two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry. After an initial period of research and consultation, an Issues Paper was released on 1 May 2012, *Grey Areas: Age Barriers to Work in Commonwealth Laws* (ALRC IP 41, 2012). The Issues Paper set out the proposed framing principles for the Inquiry and raised a range of questions in relation to barriers to mature age workforce participation in each of the areas of law under review. On 2 October 2012, the ALRC released the Discussion Paper, *Grey Areas: Age Barriers to Work in Commonwealth Laws* (ALRC DP 78, 2012), accompanied by a Discussion Paper Summary, putting forward 36 proposals and 15 questions to assist the ALRC to develop its recommendations for reform.

1.53 Two national rounds of stakeholder consultation meetings, forums and roundtables were also conducted following the release of each of the consultation documents. In addition, the ALRC developed consultation strategies for engaging with Indigenous peoples, those from culturally and linguistically diverse backgrounds,

82 B Opeskin, ‘Measuring Success’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.

83 *Australian Law Reform Commission Act 1996* (Cth) s 38.

84 <www.alrc.gov.au/law-reform-process> at 21 March 2013.

people with disability and people who identify themselves as lesbian, gay, transgender or intersex.

1.54 The Terms of Reference for this Inquiry directed the ALRC to ‘identify and consult with relevant stakeholders including relevant Government departments and agencies, the Australian Human Rights Commission, the Consultative Forum on Mature Age Participation, and key non-government stakeholders and peak employer and employee bodies’. The individuals, Departments, agencies and the many bodies consulted in the Inquiry are included at the end of this Report.

1.55 The ALRC received 101 submissions, a full list of which is included at the end of this Report. Submissions were received from a wide range of people and agencies, including: bodies representing older Australians; individuals; academics; lawyers; unions; employer organisations; employment agencies; community legal centres; law societies and representative groups; state and federal government agencies; and peak bodies in the fields of recruitment, superannuation and insurance.

1.56 The ALRC acknowledges the contribution of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions. This can have a significant impact in organisations with limited resources. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

Appointed experts

1.57 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of Advisory Committees, panels, roundtables and the appointment by the Attorney-General of part-time Commissioners. The Advisory Committee for this Inquiry had eight members, listed at the end of this Report. Two meetings were held in Sydney on 9 August and 6 December 2012; the first to consider draft proposals and the second, draft recommendations for reform.

1.58 In this Inquiry the ALRC was able to call upon the expertise and experience of two part-time Commissioners: the Hon Justice Berna Collier of the Federal Court, a standing part-time Commissioner of the ALRC; and the Hon Susan Ryan AO, Age Discrimination Commissioner, who was appointed specifically to assist the ALRC in this Inquiry. The ALRC was also assisted by a number of people as expert readers who commented on particular aspects of the Discussion Paper and Report. They are included in the list of participants in this Inquiry.

1.59 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, Panel or Roundtable and the enlisting of expert readers are invaluable aspects of ALRC inquiries—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the considerable contribution made by the Advisory Committee and the expert readers in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

Implementation

1.60 Once tabled in the Australian Parliament, this Report becomes a public document.⁸⁵ ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2011–2012 records that 59% of ALRC reports are substantially implemented and 30% are partially implemented, representing an overall implementation rate of 89%.⁸⁶

Report structure

1.61 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—including the framing principles for reform.

1.62 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 the plan.

1.63 This is followed by five chapters focusing upon the specific areas identified in the Terms of Reference.

1.64 **Recruitment and Employment** is covered in Chapter 4. This chapter examines barriers in an employment context to mature age persons participating in the paid workforce or other productive work. It identifies barriers in relation to both finding and keeping a job and recommends ways these barriers may be addressed, including legislative and regulatory reform and measures to increase education and awareness. The ALRC makes a number of recommendations aimed at: addressing the practices of recruitment agencies; extending the right to request flexible working arrangements; periods for notice of termination of employment; modern awards; reviewing compulsory retirement; and supporting education and awareness raising and the development of guidance material in a range of areas. The ALRC also recommends that the Fair Work Ombudsman consider issues relating to mature age workers in conducting national campaigns and audits.

1.65 **Work Health and Safety and Workers' Compensation** is the subject of Chapter 5. This chapter makes a range of recommendations with respect to work health and safety and workers' compensation. With respect to work health and safety, the ALRC recommends that Safe Work Australia, in implementing the Australian Work Health and Safety Strategy 2012–2022 and in its other activities and research, should consider and recognise health and safety issues that may affect mature age workers.

85 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

86 Australian Law Reform Commission, *Annual Report 2011–2012* (ALRC Report 119), 30 and see Appendix F.

Safe Work Australia should also review guidance material and promote recognition of best practice approaches to work health and safety involving mature age workers.

1.66 With respect to workers' compensation, the ALRC recommends amendments to Commonwealth workers' compensation legislation to align retirement provisions with the qualifying age for the Age Pension and to extend incapacity payment periods. The inconsistent coverage of volunteers under workers' compensation is also identified and the ALRC recommends that Safe Work Australia consider this issue. Finally, the ALRC recommends that the superannuation offset provisions under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) be repealed.

1.67 **Insurance** is covered in Chapter 6. This chapter examines some of the key concerns with respect to mature age workers and insurance that emerged during the Inquiry, including: the availability of, and information about, insurance products for mature age persons and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing occurs.

1.68 To facilitate the provision of clear and simple information about available insurance products for mature age persons, the ALRC recommends that the Insurance Reform Advisory Group consider options for the development of a central information source. The ALRC recommends a two-fold approach to addressing concerns about actuarial and statistical data. First, the ALRC recommends that the Australian Government and insurers negotiate an agreement requiring the publication of data upon which insurance offerings based on age are made. Secondly, the ALRC recommends review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to age. A related recommendation is the development of guidance material about the application of any insurance exception under Commonwealth legislation. Finally, the ALRC recommends that the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct be amended. The codes should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

1.69 **Social Security** is covered in Chapter 7. It considers aspects of the social security system that act as barriers to work for mature age persons. The ALRC recommends an evaluation of the methods for communicating information about social security payments and entitlements to mature age persons, and that staff of employment services providers be provided with training tools to improve the quality of job search assistance provided to mature age persons.

1.70 The ALRC also makes recommendations about specific income support payments. The ALRC recommends that the review process for Disability Support Pension be clarified. It also recommends that a more flexible interpretation to combining care with work, education, training or voluntary work be taken when assessing qualification for Carer Payment. Finally, the ALRC proposes that the Work Bonus amount for the Age Pension and Veterans' Age Service Pension be indexed.

1.71 **Superannuation** is the focus of Chapter 8. This chapter considers whether the age-based rules regarding the accumulation of, and access to, superannuation impose

limitations or barriers that could discourage mature age workforce participation. The ALRC has not found specific evidence that the age limits on contributions create barriers to workforce participation, and has made no recommendations regarding the removal of the age limits. However, concerns have been raised about the work test imposed on people over 65 if they wish to contribute to superannuation. It is not clear that the work test is meeting its policy objective and the ALRC has recommended that the Government review the test.

1.72 There is evidence that age-based rules regarding withdrawals from superannuation accounts have a significant impact on mature age workforce participation. Access to superannuation funds makes retirement possible, or at least more attractive, and increasing access ages is likely to increase older people's workforce participation rates. Access to superannuation may amount to an incentive to leave the workforce. Delaying access to superannuation may therefore delay retirement and compel workforce participation. As such an outcome would conflict with the framing principles for this Inquiry, particularly independence and self-agency, the ALRC has not made any recommendations for changes to access rules.

1.73 The relationship between access to superannuation and older people's workforce participation is of significant public interest. For this reason, this chapter reviews the issue and reports on the submissions received on this topic. In particular, the arguments made both for and against changing access rules are examined. Arguments for increasing access ages are concerned with improving the adequacy and sustainability of the superannuation system. They are also concerned with the economic benefits that would accrue if mature age workforce participation increased. If a recommendation to increase access ages is to be made, this should occur after an inquiry that fully considers all of these issues.

Stop press—release of SRC Act Review Report

1.74 On 30 March 2013, as this Report was going to press, the Australian Government released the final Report of the *Safety, Rehabilitation and Compensation Act 1988 (Cth) Review*.⁸⁷

1.75 The ALRC's work in this Inquiry is referred to throughout the SRC Act Review Report and the Review made a number of recommendations of relevance to this Report. In particular, SRC Act Review Recommendation 7.16 is similar to ALRC Recommendation 5-5 and is in line with the ALRC's suggested approach in Recommendation 5-8. In addition, SRC Act Review Recommendation 7.5 mirrors ALRC Recommendation 5-9.

⁸⁷ P Hanks QC, *Safety, Rehabilitation and Compensation Act 1988 (Cth) Review: Report* (2013) prepared for Department of Education, Employment and Workplace Relations.

