

1. Introduction to the Inquiry

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The Inquiry

The Discussion Paper

1.1 This document commences the second stage in the consultation processes in this Inquiry into Commonwealth legal barriers to older persons participating in the workforce or other productive work. The first stage included the release of the Issues Paper, *Grey Areas—Age Barriers to Work in Commonwealth Laws* (ALRC IP 41), generating 63 submissions.¹ Both the Issues Paper and this Discussion Paper may be downloaded free of charge from the Australian Law Reform Commission (ALRC) website, <www.alrc.gov.au>. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

1.2 In releasing this Discussion Paper the ALRC again calls for submissions to build on the evidence base so far established and to inform the final stage of the deliberations leading up to the final Report, which is to be provided to the Attorney-General by the end of March 2013.

1 The 54 public submissions are available on the ALRC website at: <www.alrc.gov.au/inquiries/age-barriers-work/submissions>.

The ageing population—a public policy challenge

1.3 Australia’s population is ageing. The Productivity Commission described it as ‘the quiet transformation, because it is gradual, but also unremitting and ultimately pervasive’.² It estimated that by 2044–45, almost one in four Australians will be aged 65 years and over; and in every year between 2012–2028, ‘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’.³

1.4 The effect that the ageing of the population may have on ‘economic growth, living standards and the sustainability of government finances’ has been identified as a major public policy concern.⁴ The Productivity Commission described the economic implications of an ageing Australia as ‘far-reaching’:

It will slow Australia’s workforce and economic growth, at the very time that burgeoning demands are placed on Australia’s health and aged care systems. Unless offsetting action is taken, a gap will open between Government revenue and spending that will need to be closed. Every jurisdiction in Australia is affected in different ways, depending on their specific responsibilities and capacity for raising revenue. Population ageing will require new policy approaches at all levels of government.⁵

1.5 The Productivity Commission also found that ageing pressures were accelerating as the baby boomer generation retires and that ageing ‘will reduce economic growth at the same time that it intensifies demands for public services, such as health, aged care and the age pension’:

With present policy settings, age-related spending will exceed the growth of tax revenue. This will open a fiscal gap equal to around 6½ per cent of GDP by 2044–45.⁶

1.6 A December 2011 report prepared for the Consultative Forum on Mature Age Participation, *Ageing and the Barriers to Labour Force Participation in Australia*, stated that the demographic shift in Australia’s population ‘implies a greater role for mature age Australians both economically and in society more generally’.⁷ A report prepared by Deloitte Access Economics for the Australian Human Rights Commission, released on 3 September 2012 (the Deloitte report), estimated the value of mature age participation in economic terms:

An extra 3 percentage points on participation among workers aged 55 and over would result in a \$33 billion boost to GDP—or around 1.6% of national income.

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

3 Ibid, xiv.

4 B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 3.

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

6 Productivity Commission, ‘Long Term Ageing is Today’s Policy Challenge’ (Press Release, 27 October 2005).

7 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, 6.

A 5 percentage point lift in participation among this group would see around \$48 billion in extra GDP—or 2.4% of national income.⁸

1.7 The report concluded that ‘mature age participation can play a key role in tipping the balance between the number of future retirees and the number of workers available to support them’ and that effective policies aimed at promoting increased workforce participation of older Australians ‘are likely to be among the most cost effective tools available to lift national incomes and living standards in coming decades’.⁹

1.8 Australia’s present retirement income system is based on three pillars: a means-tested Age Pension; compulsory saving through employer superannuation contributions (the ‘Superannuation Guarantee’); and voluntary superannuation contributions.¹⁰ If mature age workforce participation is increased, the balance between welfare costs through the Age Pension and related benefits, on the one hand, and superannuation and other retirement savings, on the other, may change:

By remaining in employment longer, older Australians can not only increase their current income, but can also save more to support themselves once they do decide to retire. In turn, improving retirement incomes not only raises living standards for future retirees, but can also assist in reducing welfare costs for future governments.¹¹

1.9 The shifting demographic requires consideration of the policy settings in each area. Asking the ALRC to conduct an inquiry into barriers to workforce participation for mature age persons forms part of the Australian Government’s response to population ageing. The Terms of Reference require consideration of the ‘three pillars’, together with a number of other specific legal areas.

Terms of Reference

1.10 The Terms of Reference¹² 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, including:

- superannuation law;
- family assistance, child support and social security law;
- employment law;

8 Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, i.

9 *Ibid.*, i.

10 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 8.

11 Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, i.

12 The full Terms of Reference are available on the ALRC website.

- insurance law;
- compensation laws; and
- any other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004* (Cth).

Terminology

Older persons

1.11 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). Throughout this Inquiry, stakeholders have questioned the accuracy of characterising persons as ‘older’ from the age of 45 years.¹³ The Brotherhood of St Laurence has also noted that the term is a ‘slippery concept’:

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 80–100.¹⁴

Barriers to work

1.12 The Terms of Reference focus on Commonwealth law and age-based limitations on, or disincentives to, participation in the workforce or other productive work. The ALRC considers that this requires the identification of:

- limitations on participation;
- disincentives to participation (and incentives to leave); and
- incentives to remain in the workforce.

Other productive work

1.13 The Terms of Reference require the ALRC to consider barriers to participation in the workforce ‘or other productive work’. Under this expanded scope, the ALRC is considering participation in volunteer work. In its 2010 General Social Survey, the ABS found that 38% of the adult population (6.4 million people) had undertaken some voluntary work in the previous 12 months and, of these, the group aged 45 to 54 years reported the highest rate of doing so (44%) and 32.5% were aged 55 years and over.¹⁵ As noted by Volunteering Australia, the work undertaken by the nearly 2 million

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

14 Brotherhood of St Laurence, *Submission 54*. Quoting: H Kimberley and B Simons, *The Brotherhood's Social Barometer: living the second fifty years* (2009), Brotherhood of St Laurence, Fitzroy. 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*.

15 Australian Bureau of Statistics, *General Social Survey: Summary Results, Cat No 4159.0* (2010), ‘Community involvement and volunteering’.

volunteers in the plus 55 category ‘represents a significant social and economic contribution to this nation’.¹⁶

1.14 Another type of contribution that may be considered ‘productive work’ is ‘informal care’—unpaid care provided by family members.¹⁷ Such care includes the care of adult children, children with disability, the care of elderly, care of persons with long-term health conditions, the care of spouses and parents, and child care for grandchildren.¹⁸ The provision of informal care is an important economic and social contribution to Australian society, estimated to be worth over \$40 billion annually.¹⁹ Generally, caring is gendered work, in that it is mainly a contribution made by women. As noted by the Premier’s Council for Women South Australia, statistics indicate that ‘a higher proportion of women than men provide care’.²⁰

1.15 Older persons may also provide unpaid care by raising their grandchildren (or other relatives) when the children’s parents cannot do so.²¹ The ABS notes that, in 2009–10, there were 16,000 Australian families in which grandparents were raising children aged 17 years and younger.²² In such circumstances, grandparent care has significant benefits to children, as discussed in Chapter 6.

1.16 In this Inquiry, the ALRC does not examine the legal barriers to older persons providing unpaid care. Such a project is fundamentally different in nature from an examination of the legal barriers to the paid workforce and other formal working arrangements. Consequently, in defining the scope of ‘productive work’ in this Inquiry, the ALRC is focusing on the latter—and examples of more formal working arrangements including volunteering and civic duties.

1.17 Unpaid caring is not only a form of productive work, but also a barrier to participation in the paid workforce. Providing care can have a significant impact on a

16 Volunteering Australia, *Response to Realising the economic potential of senior Australians. Enabling Opportunity* (2011), [2.2].

17 Access Economics, *The Economic Value of Informal Care in 2010—Report for Carers Australia* (2010), i.

18 The ABS data refer to informal caring as informal assistance with core activities which is ongoing or likely to be ongoing for at least 6 months and is provided by friends or family members to people with a disability, long-term health condition or the elderly: Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, Cat No 4430.0* (2003), 10. The Human Rights Commission considers informal care to cover the broader categories stated above: S Ryan, ‘Barriers facing older women’s workforce participation’ (Paper presented at the International Association for Feminist Economics Symposium in Valuing Care Work, Sydney, 5 December 2011).

19 Access Economics, *The Economic Value of Informal Care in 2010—Report for Carers Australia* (2010), i.

20 The Premier’s Council for Women South Australia, *Submission 13*, citing: Australian Bureau of Statistics, *Employment Arrangements, Retirement and Superannuation, Australia, Cat No 6361.0* (2007). The ABS also indicates in this report that the higher proportion of female care-providers applies in all age ranges ‘except the 45–54 year age range, where a similar proportion of men and women provided care’: 10.

21 Such care is generally termed ‘formal care’ when parental responsibility for children has been granted by a court pursuant to state and territory child protection legislation or the *Family Law Act 1975* (Cth), and ‘informal care’ when there are no court orders in place. However, the use of the terms ‘formal care’ and ‘informal care’ may vary, including across legal frameworks.

22 Australian Bureau of Statistics, *Family Characteristics, Australia, Cat No 4442.0* (2009–10).

person's ability to enter and maintain employment. There is evidence that this impact disproportionately affects women.²³ As a barrier to employment, unpaid care may also restrict the accumulation of retirement income savings. As noted in Chapter 8, the feminised nature of unpaid care contributes to the 'gender gap' in superannuation, whereby women have lower superannuation balances than men.²⁴

1.18 Although unpaid care may constitute a barrier to the paid workforce, it is not a legal barrier. Consequently, the ALRC does not address caring as a barrier to work in this Inquiry, as this is outside the Terms of Reference. The Premier's Council for Women South Australia suggested that:

It would be valuable if the ALRC could recommend that informal barriers, such as informal care, should be addressed in some other context. Experiences of older women as carers not only affects their ability to enter the workforce, but also to volunteer, and certainly to undertake civic duties.²⁵

1.19 It is worth noting that, while providing unpaid care may be a barrier to work for older persons, it may at the same time enable the workforce participation of other family members—most notably, when grandparents provide child care for their grandchildren so that the children's parents can work.²⁶ Such care is 'vital in buttressing intergenerational solidarity'.²⁷ It may also reduce the Australian Government's burden in providing sufficient child care services and related family-assistance benefits to facilitate workforce participation by younger cohorts.

Legal frameworks

1.20 The Terms of Reference direct the ALRC to consider 'all relevant Commonwealth legislation and related legal frameworks'. In this context, the idea of 'frameworks' extends beyond law in the form of legislative instruments to include policy and practice guides, codes of conduct, standards, education, information sharing and other related matters.

Retirement

1.21 The concept of 'retirement' is increasingly difficult to define. The Deloitte report refers to the usual division of life cycles into three: 'childhood, working age and retirement'.²⁸ There are difficulties in placing dividing lines between working age and

23 M Bittman, T Hill and C Thomson, 'The impact of caring on informal carers' employment, income and earnings: A longitudinal approach' (2007) 47(2) *Australian Journal of Social Issues* 255; C Lee and H Gramotnev, 'Transitions into and out of caregiving: Health and social characteristics of mid-age Australian women' (2007) 22 *Psychology and Health* 193.

24 See Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality Over the Lifecycle* (2009).

25 The Premier's Council for Women South Australia, *Submission 13*.

26 In relation to child care, the ABS notes that 'around a quarter of all children (26%) were usually cared for by their grandparents': Australian Bureau of Statistics, *Childhood Education and Care, Australia: Summary, Cat No 402.0* (2011).

27 OECD Meeting on Social Policy, *Paying for the Past, Providing for the Future: Intergenerational Solidarity* (2011). It is part of a 'two-way flow' in which older family members care for younger family members and vice versa.

28 Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, 3.

retirement. National Seniors described the ‘emergence of a work-retirement continuum’ as ‘one of the most significant social changes in recent years’:

Increasingly, people no longer work full-time, and then leave the workforce completely, becoming fully retired. For up to 20 years, a person’s level of engagement in the workforce may cycle between periods of no paid work, full-time work and various levels of part-time paid work. Rather than a simple tapering off of work, anecdotal evidence suggests many people work full-time on a seasonal basis (eg tax accountants during the tax season) and then either do not work for extended periods or work part time.²⁹

1.22 The ‘work-retirement continuum’ includes not only a continuum of time in the paid workforce and time out of the paid workforce as people age, but also time out of the paid workforce which cannot be considered as ‘not working’. The recognition of ‘other productive work’ in the Terms of Reference for this Inquiry suggests that the idea of ‘work’ and ‘non-work’ is as blurry as the distinction between ‘work’ and ‘retirement’.

1.23 In addition to the unclear distinctions of work/non-work and work/retirement, the delineation between unemployment and retirement can also be ‘problematic’.³⁰ This is particularly the case in industries or sectors where continuous work is not the norm. For example, the industry superannuation fund, Construction and Building Industry Super (Cbus), noted that in the construction industry, employment is often ‘defined by a discrete project’. This may affect older workers’ opportunities for continued employment:

Employees need to be hired and re-hired many times throughout the economic cycle. In a market where physical ability is a significant factor in recruitment, it is probable that younger workers will be preferred over older workers. In normal labour market conditions where there is some excess supply, older workers will be amongst the last to obtain work.³¹

1.24 A similar experience of work was identified by the Media, Entertainment and Arts Alliance in relation to the workforce it represents:

In the case of performers there is no real notion of retirement. This is due to the nature of the profession including the long periods of unemployment, the inherent value of personal expression that lies at the heart of the profession and the creative requirements for older (and younger) actors in productions. With no obligation to contribute superannuation upon employers these workers are encumbered with additional administrative burdens and costs in organising their own superannuation.³²

1.25 Given the difficulties of defining life cycles in clear terms of ‘work’ and ‘retirement’ and the focus of policy reform in terms on ‘productive ageing’, Simon Biggs advocates an emphasis on producing ‘a stretched life course’:

where each part is expanded rather than one—work—dominating the later years. This stretched-ness would also extend to looking at patterns of work-life balance

29 National Seniors Australia, *Submission 27*.

30 Cbus, *Submission 41*.

31 Ibid.

32 Media Entertainment & Arts Alliance, *Submission 33*.

throughout the life course, especially if these can be brought into line with the changing priorities made available by living longer.³³

1.26 In this Inquiry the ALRC uses the term ‘retirement income system’ in a general sense, given its common usage in this context, but acknowledges the fluid notion of work in terms of ‘work’ as both paid and unpaid across a lifetime. Notwithstanding this fluidity, in the legal areas examined in this Inquiry, there are certain legislative points or ages that—when reached—enable a person to access retirement income and consequently cease paid work. They are the point, or age, at which a person is eligible for the Age Pension; and the points, or ages, at which a person may (conditionally or unconditionally) access superannuation benefits.

Other inquiries

1.27 In conducting the Inquiry, the ALRC is directed to have regard to the work undertaken by:

- the Advisory Panel on the Economic Potential of Senior Australians including its initial, second and final reports;³⁴ and
- the Consultative Forum on Mature Age Participation and any recommendations made in the Forum’s interim report and final reports.³⁵

1.28 In addition, the ALRC is to have regard to:

- the work to be undertaken during 2012 by Safe Work Australia to investigate options to address age discrimination in workers’ compensation legislation; and
- the work being undertaken by the Attorney-General’s Department to consolidate Commonwealth anti-discrimination laws into a single Act.

Consolidation of anti-discrimination laws

1.29 In September 2011, the Australian Government released a discussion paper seeking submissions in relation to the consolidation of Commonwealth anti-discrimination law. The project to consolidate existing Commonwealth anti-discrimination law into a single Act is a key component of Australia’s Human Rights Framework.³⁶ Submissions on the issues raised in the discussion paper closed on 1 February 2012 and a draft bill will be released for further public consultation during 2012. At the time of publication of this Discussion Paper, the bill had not yet become available.

33 S Biggs, *Inclusive Growth and the Challenge of Population Ageing* (2012), prepared for Brotherhood Comment, Research and Policy Centre, Brotherhood of St Laurence, 4.

34 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).

35 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.

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

1.30 The *Age Discrimination Act 2004* (Cth) (ADA) is one of the pieces of legislation being examined as part of the consolidation process. 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.

1.31 By way of example, s 37 of the ADA provides an exemption in relation to age-based discrimination in the terms and conditions on which an annuity, insurance policy or membership of a superannuation scheme is offered or refused, where the discrimination: is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and is reasonable having regard to the matter of the data and other relevant factors; or in a case where no such actuarial or statistic data is available, and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors. The ALRC is interested in whether this exemption will remain under any consolidated Act, or whether the draft consolidated Act will include a general exemptions provision. In light of the above, the ALRC will consider issues of age discrimination under the ADA or any consolidated Act in more detail following the release of the draft legislation.

Age Pension, tax and superannuation reviews

1.32 Significant reviews have been conducted in relation to superannuation, tax and the Age Pension. 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 Systems Review, chaired by Mr Jeremy Cooper; and the Pension Review, chaired by Dr Jeff Harmer AO.³⁷

1.33 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.³⁸ 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 Australians, carers and people with disability. These reviews made a number of recommendations for reform.

Employment and workers’ compensation reviews

1.34 In July 2012, a review of the Commonwealth workers’ compensation scheme, in particular the *Safety, Rehabilitation and Compensation Act 1988* (Cth) was announced. In September 2012, an issues paper was released for consultation as part of the review.³⁹ It is expected that the review panel will report to the Australian Government in February 2013. The ALRC expresses a preliminary view with respect to the

37 The Treasury, *Australia’s Future Tax System: Final Report* (2010); Super Systems Review Panel, *Super System Review* (2010); FaHCSIA, *Australia’s Future Tax System: Pension Review Background Paper* (2008).

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

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

necessary reforms to Commonwealth workers' compensation in this Discussion Paper. However, in making recommendations in the final Report, the ALRC will consider the work of Safe Work Australia and the outcome of this review of the Commonwealth workers' compensation scheme.

1.35 In August 2012, the Australian Government released the final report of the review of the *Fair Work Act 2009* (Cth) which examined the extent to which the legislation is operating as intended and areas where the operation of the legislation could be improved consistent with the objects of the Act. The report included a range of recommendations for reform. The Government is currently considering its response.

Framing principles

1.36 In the context of Australia's ageing population, the Government's overarching objective is to keep people in work, and paying taxes, longer—rather than receiving the Age Pension—and to support people into self-funded retirement. As noted by the Brotherhood of St Laurence, removing barriers to mature age workforce participation will assist in 'ensuring continuing economic growth and will help to ameliorate the financial costs associated with an ageing population'.⁴⁰ While not in itself a framing principle, this sets the background for the Inquiry.

1.37 In defining the new policy settings in the form of specific framing principles for the Inquiry, assistance may be derived from both the international and domestic arenas.⁴¹ The ALRC considers that six interlinking principles are strongly evident: participation; independence; self-agency; system stability; system coherence; and fairness. Stakeholders strongly supported this approach. For example, the Australian Industry Group commented that 'these are valid considerations relating to the contribution of mature aged workers to the workforce and the Australian economy more broadly'.⁴² Similarly, the National Welfare Rights Network stated that the principles provide

a sound platform for the consideration of Commonwealth legislation that may enhance or limit mature age Australians' participation in the workforce or other productive work (paid or unpaid).⁴³

1.38 Some stakeholders also suggested refinement of, or addition to, these framing principles, as discussed below.

40 Brotherhood of St Laurence, *Submission 54*.

41 United Nations, *United Nations Principles for Older Persons—adopted by General Assembly resolution 46/91 of 16 December 1991*; 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).

42 Australian Industry Group, *Submission 37*.

43 National Welfare Rights Network, *Submission 50*.

Participation

1.39 ‘Participation’ reflects the Australian Government’s ‘Social Inclusion Agenda’:

The Australian Government’s vision of a socially inclusive society is one in which all Australians feel valued and have the opportunity to participate fully in the life of our society.⁴⁴

1.40 The principle of ‘participation’ has a number of elements. The Social Inclusion Agenda emphasises the opportunity of all Australians to

Learn by participating in education and training;

Work by participating in employment, in voluntary work and in family and caring;

Engage by connecting with people and using their local community’s resources; and

Have a voice so that they can influence decisions that affect them.⁴⁵

1.41 The ‘Social Inclusion Principles’ emphasise that ‘maximum participation in economic, social and community life is a defining characteristic of an inclusive society’:

Achieving this outcome for all Australians means delivering policies and programs which support people to learn and strengthen their ability to participate actively in the labour market and in their communities.⁴⁶

1.42 The value of workforce participation to disadvantaged older persons was emphasised by the Brotherhood of St Laurence:

work provides income, the capacity to build retirement savings, a sense of purpose and a connection with the community. Participation in paid work can increase both financial and social wellbeing, and so reduce the significant risk that people over 65 have of being socially excluded.⁴⁷

1.43 The Association of Independent Retirees Ltd noted that a person’s workforce participation, and the kinds of choices he or she will make about participation, vary within the wide age range covered by this Inquiry—‘from 45 through 65 into retirement’.

Work to gain income to support an individual and/or family is an imperative between the ages of 45 and retirement; Government support can be an exception. After retirement, participation in paid work becomes one of the options for an individual to participate in the life of society to achieve a fulfilling retirement. The incentive to work is one of a number of competing retirement priorities and is often not the sole imperative driving financial wellbeing. The priority given to work depends on the need to supplement savings, eligibility to access Age Pension support, individual and family interests, and to some extent habit.⁴⁸

44 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 30 August 2012.

45 Ibid.

46 Ibid, ‘Social Inclusion Principles’, 1.

47 Brotherhood of St Laurence, *Submission 54*.

48 Association of Independent Retirees, *Submission 17*.

Independence

1.44 The principle of ‘independence’ is related to the above principle of participation: ‘supporting people to take independent decisions and to negotiate priorities through participation’ is critical to ‘capacity building’.⁴⁹

1.45 Independence also embodies the idea of being able to determine when and at what pace withdrawal from work takes place.⁵⁰ Independence also involves having access to appropriate training to support work participation.

1.46 Two stakeholders suggested that the element of choice should be a specific framing principle of itself.⁵¹ The Government of South Australia commented that,

While this is partially contained within the concept of ‘independence’, it is worthy of inclusion on its own merits. Older people should have choices about how much they work, if they want to work at all, or whether they involve themselves in ‘service to the community’ through volunteering.⁵²

1.47 National Seniors Australia submitted that

Multiple factors will come into play for each person as they make decisions about work and retirement, eg health, income, caring responsibilities, but artificial barriers based on age should not be amongst them. Irrespective of age, each person should feel they can make the choice about whether or not they work.⁵³

1.48 The Government of South Australia also highlighted that continued workforce participation may not be an option for some older persons, and they require other choices to be available. It considered this particularly pertinent to those ‘in physically demanding occupations’, who

may experience physical discomfort or health concerns, which do not qualify them for a disability pension and, with proposed changes to restrict access to Superannuation, that individual would have no financial choice other than to keep working. Suggested changes to the existing support systems (such as raising the Superannuation preservation age) could have the inadvertent consequence of severely limiting individuals’ choices about how they spend their later years. On this basis, the South Australian Government contends that deliberations should also be informed by how suggested changes will impact upon individuals’ choices.⁵⁴

1.49 On a related theme, the Australian Council of Trade Unions (ACTU) stressed that choices for older persons needed to be ‘real choices’—about ‘when, where and how they work’. The ACTU pointed to the prevalence of casual employment as undermining ‘meaningful and satisfying’ participation in employment:

49 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 30 August 2012, 1.

50 United Nations, *United Nations Principles for Older Persons—adopted by General Assembly resolution 46/91 of 16 December 1991*.

51 Government of South Australia, *Submission 30*; National Seniors Australia, *Submission 27*.

52 Government of South Australia, *Submission 30*.

53 National Seniors Australia, *Submission 27*.

54 Government of South Australia, *Submission 30*. Similarly, the Brotherhood of St Laurence emphasised that ‘the opportunity to be employed should not be conflated with the requirement to be employed’: Brotherhood of St Laurence, *Submission 54*.

Not only is casual and ad hoc employment a source of financial and social insecurity, it is also synonymous with weaker rights and entitlements, poorer career development opportunities and lower job satisfaction. The growth of casual employment has been significant over the past few decades, increasing from 15.8% in 1984 to around 27.7% in 2004. In many cases, casual and insecure employment can lead to social exclusion, rather than social inclusion, by denying workers the chance to participate in the workforce in a meaningful way. This is a particular issue for mature aged workers, who may wish to work more flexible hours but should not have to trade their job security for additional flexibility.⁵⁵

1.50 Another way choice can play a role is in terms of older people choosing to contribute to society by volunteering. The ALRC recognises that there is a policy tension within the Terms of Reference between paid work and ‘other productive work’ that is unpaid, though valuable. This tension was demonstrated in the submission by the Returned & Services League of Australia Ltd (RSL). It emphasised the negative effect that encouraging or pushing older people into paid work may have on the capacity of their members to volunteer:

The annual economic and social benefit to Australian society of the work of the tens of thousands of RSL volunteers is enormous. These citizens, some in their 90s, give back to the Australian community far more than they receive—and they do it selflessly and without fanfare. They and the volunteers in the many other charitable and like organisations form that part of the ageing Australian population whose ongoing efforts are an exemplar of giving. Achieving the overarching government objective of keeping people in work and paying taxes longer will inevitably impact on the number of Australians who, after retirement, work long hours as volunteers for no reward for the overall good of the nation. It is not unreasonable to postulate that if Australia’s volunteers ceased to give so generously of their time, expertise and effort, the nation would be very much the poorer not least because of the increase this would pose on the public purse.⁵⁶

1.51 The ALRC considers that choice can be a crucial element here: choice about the time and pace at which to withdraw from paid work, and choice about using the time around paid work—or after withdrawal from paid work—to contribute productively in other ways.

Self-agency

1.52 The principle of ‘self-agency’ was a key principle identified in the ALRC’s Inquiry into family violence and Commonwealth laws. An individual’s right to make decisions about matters affecting him or her should be respected.⁵⁷ The principle of self-agency is one that underpins the idea of ‘independence’ and of ‘participation’, as considered above. Like the principle of independence, self-agency also encompasses choice. The ACTU again emphasised ‘meaningful choice’ for older workers in this context—about when and if to retire, ‘as well as the work that they are asked to

55 ACTU, *Submission 38*.

56 The Returned & Services League of Australia Ltd, *Submission 24*.

57 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2011), Ch 2.

perform prior to retirement’. It noted that workers in insecure employment are often denied such meaningful choice.⁵⁸

1.53 Self-agency also embodies the importance of being treated with dignity and respect, as reflected in the National Statement on Social Inclusion.⁵⁹ In its submission, the National Welfare Rights Network emphasised the importance of the values of ‘the inherent dignity and respect due to each person’.⁶⁰

System stability

1.54 The principle of ‘system stability’ is particularly relevant in areas like superannuation. The Super System Review panel stated that

Superannuation is a large and complex system with an increasingly important social and macroeconomic dimension. It must be regulated and administered coherently and rule changes, including to taxation rules, should be made sparingly and in a way that engenders member confidence.⁶¹

1.55 Concerns about the pace of change in the area of superannuation were also noted in the Tax Review.⁶² Stakeholders in this Inquiry repeated these concerns and noted the consequences of a lack of stability. National Seniors Australia, for example, submitted that if the Government wishes to encourage effective planning for later life, this is

only possible in a predictable and stable environment. Policy volatility can lead to consumer disenchantment and disengagement.⁶³

1.56 National Seniors Australia gave the example of repeated changes to superannuation, which ‘erode community confidence in the superannuation system and encourage more Australians to minimise, rather than maximise, their superannuation savings’—a matter they submitted ‘will ultimately be to the detriment of the whole community’. It quoted one of its members:

I am sick and tired of Governments being able to ‘play’ with superannuation especially for us over 50s or more still for the over 55s as it is so close to our retirement where we need certainty.⁶⁴

1.57 While system stability has particular relevance in the retirement income context, it is also an important principle more generally. As noted by the Australian Chamber of Commerce and Industry (ACCI):

Many Commonwealth programs impinge on planning decisions, particularly where there are marginal differences between the financial benefits of working and not working. This in turn affects continuity of employment and flexibility options. Both

58 ACTU, *Submission 38*. The ACTU also submitted that ‘job security and quality of employment’ be included as an additional framing principle.

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

60 National Welfare Rights Network, *Submission 50*.

61 Super Systems Review Panel, *Super System Review* (2010), pt 1, 4, principle 8.

62 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 1, xxi.

63 National Seniors Australia, *Submission 27*. See also Australian Chamber of Commerce and Industry, *Submission 44*.

64 National Seniors Australia, *Submission 27*.

employers and employees require reasonable stability for productive employment arrangements to endure.⁶⁵

1.58 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

1.59 The Tax Review identified ‘system coherence’ as a priority in its review of the retirement income system, by which was meant system consistency, simplicity and transparency for individuals.⁶⁶ A number of stakeholders expressed concerns about the lack of consistency, simplicity or transparency. For example, one considered the following should be a framing principle in the Inquiry: ‘easy to understand—and less of—paperwork!’⁶⁷

1.60 Complexity, in particular, was identified as a cause of disengagement in paid work. ACCI, for example, stated that the complexity and wide array of laws that may affect an older person’s decision to remain or re-enter the workforce ‘can often tip the balance against a decision to continue working’.⁶⁸

1.61 The Australian Institute of Superannuation Trustees (AIST) also made the connection between complexity and disengagement, arguing that laws and regulations have become ‘so convoluted that it is arguably a significant reason why the general public is “disengaged” with superannuation’.

It is possible that participants are not so much disengaged as utterly confused. The numerous age-based limits within superannuation cause considerable confusion and are difficult to navigate, before consideration of the penalties for breaching them.⁶⁹

1.62 With specific reference to these age-based limits in superannuation laws, AIST submitted that:

The complexity of understanding different amounts relative to different ages and that these can then be applied across financial years makes it a veritable minefield. Any process that looks to simplify the system is, in principle, applauded.⁷⁰

1.63 A further example of complexity, prompting a plea by Olderworkers for ‘a simpler way’, was the fortnightly reporting regime of Centrelink. It noted that ‘[m]any older people want to participate in the workforce, but just find [this regime] an enormous barrier and won’t engage because of it’.⁷¹ Another stakeholder addressed the

65 Australian Chamber of Commerce and Industry, *Submission 44*.

66 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 15–16.

67 W Trinder, *Submission 01*.

68 Australian Chamber of Commerce and Industry, *Submission 44*.

69 Australian Institute of Superannuation Trustees, *Submission 47*. The submission includes an example of member splitting and spouse contributions not being commonly used because of confusion and complexity.

70 *Ibid.*

71 Olderworkers, *Submission 22*.

difficulties posed by various aspects of the social security system, stating: ‘there should be a simpler and easier to understand format’ and the ‘system should be more transparent’ and less complicated.⁷²

1.64 Accessible information is another aspect of system coherence. Its lack was identified as an element of complexity, leading to poor understanding of various rules and entitlements. COTA Australia (COTA) pointed to a number of examples across the various areas of the Inquiry, saying that ‘more effort needs to be put into providing easy to understand, clear and concise information’.⁷³ Where there is a lack of understanding, ‘myths’ may arise, leading people to decide not to undertake paid work for fear of losing certain benefits. AIST provided as an example misunderstanding about the interaction of the Age Pension and the income and assets tests, suggesting that

Perhaps better communication of how the Age Pension interacts with these tests could help encourage people back to work as they may realise that they can earn a certain amount of income before their Age Pension is affected.⁷⁴

Fairness

1.65 ‘Fairness’ can be a consequence of coherence, consistency and the stability of the relevant systems involved. It can also reflect a commitment to a fair distribution of national resources and a balancing of responsibility between individuals and government. The Tax Review panel advocated that the ‘three-pillar architecture’ of Australia’s retirement income system

should be founded on the presumption that the responsibility for providing for retirement is shared between government and individuals.

Governments should provide for minimum and essential needs and facilitate self-provision. Each of these goals should be pursued in an equitable and targeted way.

Individuals should save or insure during their working lives to provide resources in their retirement. Inevitably under this approach, retirement outcomes will differ for different people, depending on the extent to which they can and do make self-provision.⁷⁵

72 R Spencer, *Submission 08*.

73 COTA, *Submission 51*. The comment was made specifically in relation to tax, but reflects observations made throughout the submission. See also National Welfare Rights Network, *Submission 50* in relation to ‘working credit’.

74 Australian Institute of Superannuation Trustees, *Submission 47*.

75 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 1.

1.66 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.⁷⁶ Consistency may be considered an important component of intergenerational equity—persons of working age may accept the tax burden of supporting the retirement incomes of others because they anticipate similar support when they become older. AIST submitted that, while mature age participation is important, ‘any significant changes to age based limits must be weighed against the cost to society in terms of intergenerational equity, loss of confidence in a system that appears to be changing frequently and affordability’.⁷⁷

1.67 Stakeholders suggested other dimensions to fairness. COTA suggested that ‘equity’ be included.⁷⁸ Another stakeholder suggested including ‘adequacy and security of income’.⁷⁹

1.68 In considering fairness, the ALRC has noted the ‘gendered difference in ageing’⁸⁰ and the effects of discrimination. The Older Women’s Network New South Wales Inc (OWN) stated that ‘good policy and legal protection’ require an understanding that ‘ageing is experienced differently according to gender’.

The differences between older men and older women are stark. To paraphrase the Australian Human Rights Commission (Cerise et al, 2009) unlike most men, most women accumulate poverty over their lifetime.⁸¹

1.69 Similarly, the Brotherhood of St Laurence described the compounding factors that place women over age 65—particularly single women—‘at risk of having fewer assets and lower income’. These factors include fewer years of wealth building than men, lower savings in superannuation funds, and less superannuation coverage. It cited research indicating that

the single female Age Pensioner is the most disadvantaged, with three-quarters in the bottom half of the income range. Women in the pre-retirement age group (55–64) also had much smaller superannuation savings—62% have less than \$20,000 in superannuation, with only a few years left to save before retirement.

76 A Gosseries, *Theories of Intergenerational Justice: A Synopsis* <<http://sapiens.revues.org/165>> at 7 September 2012. The intergenerational exchange is, however, broader and flows both ways: ‘Forwards, towards younger generations, are investments in infrastructure, innovation and environmental protection. Backwards, to older generations, are pensions and public and family care for older people’: OECD Meeting on Social Policy, *Paying for the Past, Providing for the Future: Intergenerational Solidarity* (2011). The Deloitte report refers to the ‘intergenerational compact’ that every society makes with itself: Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, 3.

77 Australian Institute of Superannuation Trustees, *Submission 47*.

78 COTA, *Submission 51*. Confidential, *Submission Confidential 08* also advocated ‘equality’ and ‘inclusion’, stating that both these principles ‘should be applied in workplaces but older Australians that decide to continue working often feel they are treated differently in the workplace, almost as if increasing age leads to an inability to learn or progress’.

79 J Willis, *Submission 42*.

80 Older Women’s Network NSW Inc, *Submission 26*.

81 *Ibid.* Citing: Australian Human Rights Commission, *Accumulating Poverty? Women’s Experiences of Inequality Over the Lifecycle* (2009). See also J Willis, *Submission 42*.

It noted that older women particularly ‘have much to gain by continuing to engage in paid work through middle and older age’, where practicable.⁸²

1.70 Two stakeholders raised issues of age and sex discrimination—and its intersection.⁸³ The Diversity Council of Australia drew attention to its 2010 survey, which found that age discrimination was ‘the most commonly reported type of discrimination and that women were more likely than men to feel they had been discriminated against because of their age (15% vs 12%)’. It also cited research indicating that

middle-aged women attempting to enter the paid workforce after raising children are often rejected on the ground of either ‘lack of experience’ or being ‘overqualified’ when in fact age is the actual determining factor. These women also experience pressure to appear young and attractive and the combination of age and gender interact to create a subclass of highly vulnerable workers.⁸⁴

1.71 The Government of South Australia commented that ‘older women face double discrimination based on both their gender and age’, and that ‘stereotypes and assumptions prevent older women from being selected for jobs or from being considered for training and promotional opportunities’.⁸⁵

How to make a submission

1.72 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.73 There is no specified format for submissions, although the questions and proposals provided in this document are intended to provide guidance for respondents. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC’s online submission form. Submissions made using the online submission form are preferred.

1.74 Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

82 Brotherhood of St Laurence, *Submission 54*, citing: S Kelly, *Reform of the Australian Retirement Income System* (2009), prepared for Brotherhood of St Laurence.

83 Diversity Council of Australia, *Submission 40*; Government of South Australia, *Submission 30*. COTA also considered that discrimination should be included as a framing principle: COTA, *Submission 51*.

84 Diversity Council of Australia, *Submission 40*. Referring to: National Seniors Australia Productive Ageing Centre, *The Elephant in the Room: Age Discrimination in Employment* (2011).

85 Government of South Australia, *Submission 30*. Referring to: Australian Human Rights Commission, *Accumulating Poverty? Women’s Experiences of Inequality Over the Lifecycle* (2009). See also The Premier’s Council for Women South Australia, *Submission 13*. OWN suggested that another principle should be added: ‘capacity’—including capacity to continue in employment and to protect oneself from discrimination and adverse treatment: Older Women’s Network NSW Inc, *Submission 26*.

Submissions using the ALRC's online submission form can be made at: www.alrc.gov.au/content/age-barriers-work-discussion-paper. In order to ensure consideration for use in the final Report, submissions addressing the questions and proposals in this Discussion Paper must reach the ALRC by **Friday 23 November 2012**.

