

2. Recruitment and Employment Law

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Summary

2.1 The Australian employment law landscape has undergone significant shifts in recent years, with changes to the nature of work relationships and arrangements as well as the legislative and regulatory framework. In light of demographic changes in Australia and government objectives aimed at prolonging workforce participation, the ability of the employment law framework to respond to the needs of mature age workers and their employers is crucial. Increased labour force participation by mature age workers is key to meeting the policy challenges presented by an ageing population.¹ As stated by the Advisory Panel on the Economic Potential of Senior Australians, the ‘challenge is to re-shape workplaces’ and the employment law

¹ See, eg. Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012); Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission; Australian Government, *Intergenerational Report 2010, Australia to 2050: Future Challenges* (2010).

framework to facilitate the ongoing involvement of mature age persons in the workforce and other productive work.²

2.2 This chapter examines barriers in an employment context to mature age persons participating in the workforce or other productive work. It identifies a number of barriers at various stages of employment and ways in which these may be addressed, including in relation to: entering and re-entering the workforce; maintaining employment; protections surrounding termination of employment; regulation and monitoring; and education and awareness.

2.3 Reform in this area must address complex and interrelated barriers to workforce participation. This requires a combination of legislative and regulatory reform, combined with measures to increase education and awareness and address perceptions and stereotypes surrounding mature age workers. The ALRC makes a number of proposals aimed at: addressing the practices of recruitment agencies; extending the right to request flexible working arrangements; reviewing modern awards; extending periods for notice of termination of employment; reviewing compulsory retirement; and supporting education and awareness raising and the development of guidance material in a range of areas.

Recruitment

2.4 Mature age job seekers face multiple and intersecting difficulties in entering or re-entering the workforce and often utilise either the national employment services system or the services of private recruitment agencies.³ Increasingly, private recruitment agencies are playing a role as ‘intermediaries between job seekers and employers’.⁴ However, stakeholders have expressed a number of concerns about this role. For example, stakeholders have noted perceived discrimination by some recruitment agencies against mature age job seekers. Stakeholders have also highlighted that some recruitment agencies and recruiters appear to have limited understanding of the benefits of employing mature age workers or their obligations under anti-discrimination law.⁵

2.5 Addressing such concerns requires attitudinal and cultural change as well as regulatory change. The ALRC makes a range of proposals which combine the development and provision of ongoing education, training and guidance material for recruitment consultants and recognition of best practice with increased regulation. In the regulatory context, the ALRC proposes that the Fair Work Ombudsman (FWO) conduct a national campaign focused on the recruitment industry, and that industry

2 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 1.

3 The national employment services system is discussed in Ch 5.

4 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, 18; Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010) ch 4. See also ACTU, *Submission 38*.

5 See, eg. Brotherhood of St Laurence, *Submission 54*; Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*; JobWatch, *Submission 25*.

codes of conduct be reviewed with a view to incorporating clauses with respect to client diversity and constructive engagement with mature age job seekers.

Recruitment barriers to mature age participation

2.6 At a general level, unlawful age discrimination in recruitment has been described as ‘rampant, systemic and the area of employment decision-making where managers use age to differentiate between people most extensively’.⁶ More specifically, a number of bodies and key academics have emphasised that recruitment ‘operates as a major barrier for mature age workers seeking employment, and recruitment agencies often perform a gate-keeping function that can exclude mature age workers’.⁷

2.7 This sentiment was echoed in submissions from stakeholders like the South Australian Government, which noted that

in reality, the discrimination on the basis of age is a prominent issue in the recruitment practices of many Australian private recruitment agencies. The recruiters may fail to provide an appropriate level of service to an older worker, or fail to put forward an older applicant to a potential employer.⁸

2.8 The Diversity Council of Australia expressed the view that ‘there is clearly evidence of poor levels of compliance [with anti-discrimination legislation] in the private recruitment sector’.⁹

2.9 The results of a 2012 survey of recruitment professionals conducted by the Australian Human Resources Institute (AHRI) indicate approximately one-third of respondents (35%) believe their organisation is biased to some extent against the employment of mature age workers.¹⁰

2.10 However, as National Seniors acknowledged, it appears to be unclear whether this reluctance to engage mature age workers and discriminatory practices arise as a result of recruiters’ ‘own view of older workers or under instructions (implicit or otherwise) from their clients’,¹¹ or both.

Regulatory framework

2.11 While private recruitment agencies operate under contractual arrangements with individual employers, a number of elements of the regulatory framework are relevant,

6 Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010), 12.

7 T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 208. See also 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.

8 Government of South Australia, *Submission 30*.

9 Diversity Council of Australia, *Submission 40*.

10 Australian Human Resources Institute, *Mature Age Workforce Participation: HR Pulse Survey Report* (2012), 5.

11 National Seniors Australia, *Submission 27*.

including anti-discrimination and industrial relations legislation, industry codes of practice and state and territory licensing regimes.

Legislative framework

2.12 Recruitment agencies are required to comply with all relevant statutory obligations, including in relation to age discrimination under Commonwealth, state and territory anti-discrimination legislation and the *Fair Work Act 2009* (Cth).

2.13 Where recruitment agencies discriminate against mature age job seekers, whether through their own practices or by aiding or permitting an employer to do so—for example by following an employer’s discriminatory requests or practices—such agencies may face potential liability under anti-discrimination law.¹² In addition, the general protections provisions under the *Fair Work Act* extend protection from discrimination on the basis of age to prospective employees.¹³ As a result, recruitment agencies that discriminate against a prospective employee on the basis of their age are in breach of their obligations under both anti-discrimination law and the *Fair Work Act*.

Code of Conduct

2.14 All members of the Recruitment and Consulting Services Association (RCSA) are bound by its Code for Professional Conduct and associated Disciplinary and Dispute Resolution Procedures, which are authorised by the Australian Competition and Consumer Commission. The RCSA Code requires members to

observe a high standard of ethics, probity and professional conduct which requires not simply compliance with the law; but extends to honesty, equity, integrity, social and environmental responsibility in all dealings and holds up to disclosure and to public scrutiny.¹⁴

2.15 Similarly, AHRI members are required to comply with a code of ethics and professional conduct.¹⁵

Licensing regime

2.16 A number of Australian states and territories have licensing regimes in place for employment agents. Requirements vary between jurisdictions and there is no Commonwealth licensing regime.¹⁶

12 *Age Discrimination Act 2004* (Cth) s 56. Also for example, by analogy through the reasoning in *Elliot v Nanda* (2011) 111 FCR 240.

13 *Fair Work Act 2009* (Cth) s 341.

14 Recruitment and Consulting Services Association of Australia and New Zealand, *Code for Professional Conduct*, General Principle 1.

15 Australian Human Resources Institute, *By-Law 1: Code of Ethics and Professional Conduct*.

16 For example, in SA, WA and ACT specific registration legislation requires licensing, however in Queensland there is just a Code of Conduct: *Private Employment Agents (Code of Conduct) Regulation 2005* (Qld); *Employment Agents Registration Act 1993* (SA); *Employment Agents Registration Regulations 2010* (SA); *Employment Agents Act 1976* (WA); *Agents Act 2003* (ACT); *Agents Regulations 2003* (ACT); *Employment Services Code of Conduct* (ACT).

2.17 The Law Council of Australia suggested one regulatory approach could involve requiring ‘the recruitment industry to comply with licensing requirements under a federal licensing regime, similar to other industries that provide services to the public’.¹⁷

2.18 While the ALRC is of the view that greater consistency between jurisdictions in this area would be favourable, proposing a new Commonwealth licensing regime for the recruitment industry is a systemic reform which goes beyond the scope of this Inquiry.

Approach to reform

2.19 A number of stakeholders in this Inquiry have emphasised the difficulty of bringing successful claims of age discrimination, because ‘age discrimination can often be subtle and disguised as conduct taken for other reasons’.¹⁸ This difficulty has been highlighted in the recruitment context. As a result, some stakeholders advocated for greater regulation to tackle particular approaches that may mask discrimination on the basis of age.¹⁹ For example, the South Australian Equal Opportunity Commission suggested the introduction of provisions precluding recruitment agencies from ‘asking for certain information’, for example information about ‘age and history of WorkCover claims’.²⁰

2.20 However, COTA Australia (COTA) submitted that increased regulation of recruitment agencies beyond existing provisions would be difficult,²¹ and a number of stakeholders opposed increased regulation. For example, the Business Council of Australia expressed the view that such regulation ‘unnecessarily duplicates existing legislation’.²² The Australian Industry Group (Ai Group) opposed increased regulation on the basis that the regulatory burden is already ‘substantial’ and that it would not be ‘an effective means of removing barriers to mature age employees entering or re-entering the workforce’, instead favouring consultative and educative approaches.²³

2.21 The key concerns expressed by stakeholders focused on non-compliance and lack of awareness by recruitment agencies and recruiters of existing legislative obligations, rather than the content of the obligations under anti-discrimination law and the *Fair Work Act*.²⁴ For example, JobWatch noted that many ‘recruitment agencies do not know or understand their legal obligations’.²⁵

2.22 The content and operation of anti-discrimination provisions with respect to age will be examined in the course of the process to consolidate Commonwealth anti-

17 Law Council of Australia, *Submission 46*. See also JobWatch, *Submission 25*.

18 See, eg, Victoria Legal Aid, *Submission 34*.

19 ACTU, *Submission 38*.

20 The South Australian Equal Opportunity Commission, *Submission 11*.

21 COTA, *Submission 51*.

22 Business Council of Australia, *Submission 19*.

23 Australian Industry Group, *Submission 37*.

24 See, eg, Law Council of Australia, *Submission 46*; JobWatch, *Submission 25*.

25 JobWatch, *Submission 25*.

discrimination legislation.²⁶ In addition, the ALRC notes the work being undertaken by the Age Discrimination Commissioner, the Hon Susan Ryan AO, who is involved in discussions with the recruitment industry around constructive and supportive approaches to the recruitment of mature age job seekers. Rather than proposing the imposition of additional regulatory requirements under legislation, the ALRC therefore considers that the most appropriate approach to reform involves: education, awareness and training; investigation and auditing of recruitment practices; and additional provisions in industry codes of conduct.

Investigation and auditing of recruitment practices

2.23 The FWO is an independent statutory office created by the *Fair Work Act*.²⁷ The primary aim of the FWO is to promote harmonious, productive and cooperative workplace relations and compliance with the Act, through education, assistance and advice. The FWO also plays a role in monitoring compliance, carrying out investigations and, in some cases, commencing proceedings or representing employees or outworkers in order to promote overall compliance.²⁸ In particular, the FWO can undertake:

- investigations—into industries or workplaces, either in response to a complaint or self-initiated, which involve examination of employment records and documents to determine whether relevant parties have complied with Commonwealth workplace laws; and
- targeted campaigns and audits—where the FWO targets a particular industry, usually involving the employment of vulnerable workers, and in conjunction with industry associations assists employers to ensure compliance with Commonwealth workplace laws.²⁹

2.24 Academic Therese MacDermott has expressed the view that the FWO could usefully play a role in ‘targeted and sustained work on exposing age discrimination in recruitment, and the development of more transparent selection processes’.³⁰ In particular, she suggests that the FWO could play a role in education and the development of guidance material, and that such approaches should be ‘supplemented with other measures, such as investigating and auditing of such practices’.³¹

2.25 A number of stakeholders supported this type of approach. For example, the Law Institute of Victoria suggested—in the context of anti-discrimination legislation—

26 See discussion in Ch 1.

27 *Fair Work Act 2009* (Cth) s 681.

28 *Ibid* s 682(1).

29 Fair Work Ombudsman, *Investigations* <www.fairwork.gov.au/about-us/investigations/pages/default.aspx> at 13 September 2012; Fair Work Ombudsman, *Audits and campaigns* <www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx> at 13 September 2012.

30 T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 209.

31 *Ibid*, 209.

that, ‘in order to ensure compliance with a more regulatory approach ... random audits could be conducted by the Federal Government’.³²

2.26 JobWatch submitted that the FWO should increase its educative role in this area, focusing on the rights and obligations of employers, workers and recruitment agencies under Commonwealth, state and territory anti-discrimination legislation regarding age. It noted that the FWO should be ‘adequately funded to provide free, ongoing community education and training programs’.³³

2.27 The ALRC considers that the FWO is well placed to play a key role in this area. Research undertaken by the Centre for Employment and Labour Relations Law at the University of Melbourne concluded that the FWO has ‘been active and innovative in performing its function of promoting compliance’ with the *Fair Work Act*,³⁴ including through targeted compliance and audit campaigns. The ALRC therefore proposes that the FWO undertake a targeted national campaign in the recruitment industry that includes education, awareness raising, and auditing.³⁵

Proposal 2–1 The Fair Work Ombudsman should undertake a national recruitment industry campaign to educate and assess the compliance of recruitment agencies with workplace laws, specifically with respect to practices affecting mature age job seekers and workers.

Review of the RCSA Code of Conduct

2.28 In 2013, the RCSA is conducting a review of its Code of Conduct. This review provides an opportunity for the RCSA to consider amendments to the Code of Conduct, including addressing barriers to workforce participation faced by mature age job seekers in the context of recruitment.

2.29 A number of key stakeholders suggested that the practices of recruitment agencies and recruiters could be regulated ‘by the implementation of codes of conduct, guidelines, or minimum standards which could provide guidance about how to constructively engage with and employ’ mature age persons.³⁶ The South Australian Government submitted that any such code of conduct should ‘emphasise the principle of respect for client diversity’ and ‘include a clause relating to an appropriate engagement with mature age job seekers’.³⁷

32 Law Council of Australia, *Submission 46*.

33 JobWatch, *Submission 25*.

34 Centre for Employment and Labour Relations Law, *University of Melbourne, Submission to Fair Work Act Review* (17 February 2012), 9.

35 Fair Work Ombudsman, *Audits and campaigns* <www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx> at 13 September 2012.

36 Law Council of Australia, *Submission 46*. See also Diversity Council of Australia, *Submission 40*; Government of South Australia, *Submission 30*; JobWatch, *Submission 25*.

37 Government of South Australia, *Submission 30*.

2.30 In the course of the review of the Code, the ALRC proposes that the RCSA should consider ways in which the Code could: emphasise the importance of client diversity; promote constructive engagement with mature age job seekers; and outline obligations under anti-discrimination and industrial relations legislation with respect to age.

2.31 The Code of Professional Practice developed by the Recruitment and Employment Confederation (REC) of the United Kingdom (UK Code) represents a useful model that potentially could be incorporated into existing industry codes of practice or form the basis of a new code of conduct.³⁸ The UK Code is binding on all corporate members of the REC and their associated companies.³⁹ Principle Four of the UK Code provides:

Principle 4—Respect for diversity

a. Members should adhere to the spirit of all applicable human rights, employment laws and regulations and will treat work seekers, clients and others without prejudice or unjustified discrimination. Members should not act on an instruction from a client that is discriminatory and should, wherever possible, provide guidance to clients in respect of good diversity practice.

b. Members and their staff will treat all work seekers and clients with dignity and respect and aim to provide equity of employment opportunities based on objective business related criteria.

c. Members should establish working practices that safeguard against unlawful or unethical discrimination in the operation of their business.⁴⁰

Proposal 2–2 In 2013, the Recruitment and Consulting Services Association of Australia and New Zealand is conducting a review of its Code of Conduct. The review should consider ways in which the Code can emphasise:

- (a) the importance of client diversity, including mature age job seekers;
- (b) constructive engagement with mature age job seekers; and
- (c) obligations under age-related anti-discrimination and industrial relations legislation.

Education, training and guidance material

2.32 In addition to any national recruitment industry campaign lead by the FWO, there was significant support by stakeholders for education, training and the

38 The Recruitment and Employment Confederation (UK), *REC Code of Practice*.

39 The REC also has a Diversity Charter and a Diversity Pledge: The Recruitment and Employment Confederation (UK), *Diversity Pledge* <www.rec.uk.com/about-recruitment/diversity/diversity-signthepledge> at 13 September 2012.

40 The Recruitment and Employment Confederation (UK), *REC Code of Practice*, Principle 4.

development of guidance material for the recruitment industry.⁴¹ The Ai Group expressed the view that ‘consultative and educative approaches are more likely to achieve a shift in practices by recruiting agencies and their clients’.⁴²

2.33 The Brotherhood of St Laurence submitted that there is a need for a

a targeted campaign focusing on recruitment agencies reminding them of their legal obligations and the discrimination legislation that applies to their business in relation to mature workers. Campaigns combating discrimination against older workers need to be supplemented by targeted training for recruitment agents, HR managers and employers to educate them on the economic and other benefits of a diverse workforce.⁴³

2.34 The Diversity Council of Australia suggested that such education ‘should be developed following industry research undertaken in partnership with recruitment agents and their clients’.⁴⁴

2.35 Comcare pointed to the National Australia Bank (NAB) experience as a model for the practices of private recruitment agencies:

NAB established a process of mandatory training for all recruitment agencies used by NAB. Through their contractual agreement with the recruiting agencies, NAB requires completion of mandatory age stereotype ‘myth busting’ training. This forms part of their MyFuture: a pathway to 2020, an interactive leadership forum that looks at the challenges and opportunities of an ageing workforce, and creates a culture that values experience and maturity.⁴⁵

2.36 Queensland Tourism referred to a pilot study undertaken in 2011, which sought to identify the reasons underlying mature age persons not applying for positions in the hospitality industry. The findings from the study indicated that:

the two main factors that emerged as barriers to mature age employment were perception and awareness. It was identified that age-friendly recruitment practices need to be adopted and promoted in the recruitment process. Education around where to source workers, the wording of job adverts, the interview process and the composition of the interview panel was also critical.⁴⁶

2.37 The *Investing in Experience Toolkit*, a practical guide developed in partnership with the Ai Group and the Consultative Forum on Mature Age Participation includes a chapter on ‘How to Recruit the Best Mature Age Workers’ and an advertising checklist which provides a useful model for guidance material.

2.38 In the ALRC’s view, industry bodies such as AHRI and the RCSA, with support from the Australian Government, Australian Human Rights Commission (AHRC), unions and employer organisations, should develop and provide regular, consistent and

41 Brotherhood of St Laurence, *Submission 54*; Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*; Australian Industry Group, *Submission 37*; Queensland Tourism Industry Council, *Submission 28*; JobWatch, *Submission 25*.

42 Australian Industry Group, *Submission 37*.

43 Brotherhood of St Laurence, *Submission 54*.

44 Diversity Council of Australia, *Submission 40*.

45 Comcare, *Submission 29*.

46 Queensland Tourism Industry Council, *Submission 28*.

targeted ongoing training as well as develop guidance material for recruitment consultants in relation to engaging constructively with, and recruiting, mature age job seekers.

Proposal 2–3 In order to assist recruitment agencies and consultants to engage constructively with, and recruit, mature age job seekers, the Australian Human Resources Institute and the Recruitment and Consulting Services Association of Australia and New Zealand should:

- (a) develop and provide regular, consistent and targeted education and training for recruitment consultants; and
- (b) develop a range of guidance material.

Recognition of best practice

2.39 A number of stakeholders emphasised the importance of best practice approaches in the recruitment of mature age workers.⁴⁷ Formal public recognition of employers, recruitment agencies or consultants who develop initiatives or workplace processes geared towards mature age job seekers and workers is desirable. The potential development of an age-related reporting and recognition framework similar to Equal Opportunity for Women in the Workplace Agency is discussed later in this chapter.

2.40 Both AHRI and RCSA host annual workplace awards. As part of the AHRI Diversity Awards there is an *Age Diversity in the Workplace Award* sponsored by National Seniors Australia.⁴⁸ Internationally, organisations like AARP have awards including the *AARP Best Employers for Workers Over 50 Award–International*, which recognises employers outside the United States with innovative workforce or human resource practices aimed at issues relevant to mature age workers.⁴⁹

2.41 The ALRC proposes that both AHRI and RCSA should recognise excellence in initiatives and programs involving the recruitment of mature age workers, including in such awards.

2.42 The work of mature age-specific recruitment initiatives and agencies are also an important development in supporting workforce participation by mature age persons.⁵⁰

47 COTA, *Submission 51*; Comcare, *Submission 29*.

48 Australian Human Resources Institute, *Age Diversity in the Workplace Award* <www.awards.ahri.com.au/diversity/winner_orgn_age_diversity.php> at 13 September 2012.

49 AARP, *Best Employers for Workers Over 50 Award–International* <<http://aarpinternational.prod.bridgelinesw.net/aarp-international/best-employers---international>> at 14 September 2012.

50 For example, Adage.com; Dome SA; GreyHairAlchemy; Miller’s Fillers; Over 40 Recruitment; and Silver Temp: Department of Education, Employment and Workplace Relations, *Experience+ Private Recruitment Firms* <www.deewr.gov.au> at 13 September 2012.

Proposal 2–4 The Australian Human Resources Institute and the Recruitment and Consulting Services Association of Australia and New Zealand should promote and recognise best practice in the recruitment of mature age workers, for example through their annual workplace awards.

The *Fair Work Act 2009* (Cth)

2.43 The *Fair Work Act* is one of the key Commonwealth statutes governing the employment of mature age workers. It provides for terms and conditions of employment and sets out the rights and responsibilities of employees, employers and employee organisations in relation to that employment.

2.44 The *Fair Work Act* regulates ‘national system’ employers and employees.⁵¹ Employment that is not covered under the national industrial relations system remains regulated by the relevant state industrial relations systems. However, some entitlements under the *Fair Work Act* extend to non-national system employees.⁵² The Act also creates a compliance and enforcement regime and establishes several bodies to administer the Act, including Fair Work Australia (FWA) and the FWO.

2.45 There are a number of aspects of the *Fair Work Act* that present potential opportunities to address legal barriers to participation by mature age workers and in relation to which the ALRC makes proposals. These include:

- the right to request flexible working arrangements;
- modern awards;
- provisions relating to notice of termination of employment; and
- the general protections provisions.

Relevant reviews and research

2.46 In December 2011, the Australian Government announced a review of the *Fair Work Act* (the Fair Work Act Review),⁵³ to examine and report on 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. In August 2012, the Australian Government released the Fair Work Act Review Panel’s Final Report. The Government is currently considering its response. The Fair Work Act Review was the

51 The definitions of ‘national system employee’ and ‘national system employer’ are contained in ss 13 and 14 of the *Fair Work Act 2009* (Cth) and are extended by ss 30C, 30D, 30M and 30N to cover employers in referring states: *Fair Work Act 2009* (Cth) ss 13, 14, 30C, 30D, 30M and 30N.

52 For example, non-national system employees are entitled to unpaid parental leave, notice of termination, payment in lieu or notice and protection from unlawful termination of employment: *Fair Work Act 2009* (Cth) pts 6–3, 6–4.

53 B Shorten (Minister for Employment and Workplace Relations), ‘Fair Work Act Review announced’ (Press Release, 20 December 2011). The Australian Government had committed to reviewing the operation of the legislation two years after its full commencement: Explanatory Memorandum, Fair Work Bill 2008 (Cth).

subject of much controversy and attracted submissions from a wide range of stakeholders. Although the Fair Work Act Review found that the effects of the *Fair Work Act* ‘have been broadly consistent with the objects’ of the Act and that it is ‘operating broadly as intended’, there were 53 recommendations for reform. The key recommendations of relevance to this Inquiry relate to the right to request flexible working arrangements, and a number of changes to the operation of individual flexibility arrangements and the general protections provisions.⁵⁴

2.47 Under the *Fair Work Act*, the General Manager of FWA is required to provide a number of research reports, including on: developments in enterprise agreement making; the use and content of individual flexibility arrangements; and the operation of the National Employment Standards (NES) relating to employee requests for flexible working arrangements.⁵⁵ The reports are due to be submitted to the Minister by 24 November 2012.

Flexible working arrangements

2.48 The Consultative Forum on Mature Age Participation has emphasised that the ‘ability to work part-time or flexible hours has been found to be the most important facilitator, after good health, for older people to work beyond retirement age’.⁵⁶ Examining legislative mechanisms for ensuring access to flexible working arrangements is vital to encouraging mature age workers to enter, re-enter or remain in the workforce. The Advisory Panel on the Economic Potential of Senior Australians commented that mature age persons have ‘diverse requirements for flexibility’:

some want part-time work; some want casual work; and some want to work for blocks of time, take leave and return to work ... Others wish to scale-down and work fewer hours, allowing more time for recreation. Many find it difficult to work full-time, standard hours because of their health, caring responsibilities or other specific circumstances.⁵⁷

2.49 Increasingly, there are a range of government and industry initiatives and reports focused on developing and implementing flexible work arrangements as standard business practice.⁵⁸

2.50 The key legal, as opposed to policy-based, mechanism which currently provides access to flexible working arrangements is the right to request flexible working arrangement provisions under the NES. However, the ALRC is also interested in stakeholder feedback about ways, other than through changes to the *Fair Work Act*,

54 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012) recs 5, 9, 10–13, 47, 49.

55 *Fair Work Act 2009* (Cth) s 653.

56 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, 23.

57 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 15.

58 See, eg. Australian Government, *Investing in Experience Tool Kit* (2012); Diversity Council of Australia, *Get Flexible: Mainstreaming Flexible Work in Australian Business* (2012); National Australia Bank, *My Future*, referred to in Comcare, *Submission 29*.

that the Australian Government should develop or encourage flexible working arrangements for mature age workers.

The right to request flexible working arrangements

2.51 The NES enshrine ten statutory minimum requirements that apply to all ‘national system’ employees. The NES encompass areas such as working hours and arrangements, leave, and termination and redundancy pay. The NES cannot be excluded by an enterprise agreement or modern award.⁵⁹

2.52 The NES were introduced following significant consultation⁶⁰ to provide a ‘safety net which is fair for employers and employees and supports productive workplaces’.⁶¹ The NES replaced the Australian Fair Pay and Conditions Standard (AFPCS)⁶² and many of the entitlements under the AFPCS and then NES arise from a long history of test cases.⁶³ As a result, amendment to the NES would have a wide-ranging impact on the entitlements of mature age workers and involve a significant change to the *Fair Work Act* framework.

2.53 Under the NES, an employee who satisfies the service requirements,⁶⁴ who is a parent or otherwise has responsibility for a child who is under school age, or who is under 18 and has a disability, may request that his or her employer change his or her working arrangements to assist with the care of that child.⁶⁵ Such a request may only be refused on ‘reasonable business grounds’.⁶⁶

2.54 FWA’s 2011 survey in relation to provisions under the NES found that 3.8 % of employers surveyed had considered a request for flexible working arrangement by an employee to care for a child, and that 0.9 % of employees surveyed had made such a request.⁶⁷

Extending the right to request

2.55 The key concern expressed by stakeholders, with respect to the current provision and its effect on mature age workers, is limited eligibility to request flexible working

59 Enterprise agreements and modern awards are instruments which govern the terms and conditions of employment and are discussed below.

60 Prior to the introduction of the NES, the Australian Government published an Exposure Draft, in response to which it received 129 submissions from stakeholders as well as engaging in broader consultations. The proposed NES were subsequently released on 16 June 2008. The *Fair Work Act 2009* (Cth) retains the substance of the Exposure Draft, with some amendments.

61 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 25.

62 Introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which amended the *Workplace Relations Act 1996* (Cth).

63 See, eg, J Murray and R Owens, ‘The Safety Net: Labour Standards in the New Era’ in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 40–42.

64 In order to be eligible to request flexible work arrangements, the employee must have 12 months of continuous service, or for a casual employee, be a long-term casual employee with a reasonable expectation of continuing employment on a regular and systemic basis: *Fair Work Act 2009* (Cth) s 65.

65 Ibid s 65(1), (2). The note to s 65(1) states that examples of changes in working arrangements include changes in hours of work, patterns of work and location of work.

66 Ibid s 65(5).

67 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 96.

arrangements.⁶⁸ While other systemic concerns with the provision have been discussed and addressed in the course of the Fair Work Act Review,⁶⁹ the focus of the ALRC in this Inquiry is concerns about eligibility.

2.56 As outlined above, flexible working arrangements are vital for mature age workers. For example, mature age workers may request such arrangements to adjust working hours to accommodate caring responsibilities, allowing them to prolong workforce participation.

2.57 In many workplaces, both employers and employees work cooperatively to address the needs of employees, including through flexible working arrangements. Under existing arrangements, while employees are able to request flexible working arrangements outside the scope of the NES, they are not entitled to a response or reasons for refusal.⁷⁰

2.58 While in its current formulation the right to request flexible working arrangements is based on parental or child-care related responsibilities, potentially the section could be extended to include other bases upon which an employee could request flexible arrangements.

2.59 Notably, the UK right to request scheme, upon which the Australian provisions were based, has been incrementally extended. It applies to parents and carers of children up to the age of 16 and those with caring responsibilities for a wide range of adults requiring care, including: relatives, spouses, civil partners and other household members.⁷¹

2.60 A number of bodies and reports have recommended the extension of the Australian provision. For example, the Fair Work Act Review Panel recommended that, in order to increase workplace equity and remove current inequities, s 65 should be amended to ‘extend the right to request flexible working arrangements to a wider range of caring and other circumstances’.⁷² The Australian Government is currently consulting on possible expansion of the right to those with caring responsibilities more generally,⁷³ and the House of Representatives Standing Committee on Family, Community, Housing and Youth recommended in 2009 that the right to request be extended to all employees ‘who have recognised care responsibilities, including to

68 Stakeholders also expressed other concerns, echoed in submissions to the Fair Work Act Review, about the current structure and operation of the provision, including its procedural nature, the limited availability of enforcement mechanisms and the grounds for refusal.

69 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 95–99.

70 The Fair Work Act Review Panel recommended that s 65 be amended to require that an employer and employee hold a meeting to discuss the request, unless the employer has agreed to the request: *Ibid*, rec 5.

71 *Employment Rights Act 1996* (UK) ss 80F, 80G; *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* (UK) (SI 2002 No 3236) and *Flexible Working (Procedural Requirements) Regulations 2002* (UK) (SI 2002 No 3207). For discussion of the evolution of the provisions see Centre for Employment and Labour Relations Law, *University of Melbourne, Submission to Fair Work Act Review* (17 February 2012), 5.

72 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), rec 5.

73 See Australian Government, *National Carer Strategy* (2011), 8.

those who are caring for adults with disabilities, mental illness, chronic illness or who are frail aged'.⁷⁴

2.61 The Advisory Panel on the Economic Potential of Senior Australians recommended that the right be extended to persons aged 55 and over.⁷⁵ In February 2012, Adam Bandt MP introduced the Fair Work Amendment (Better Work/Life Balance) Bill 2012, which would, among other things, amend the *Fair Work Act* by extending the right to request to all employees and remove the flexible working arrangements provisions from the NES and create a new part of the Act.⁷⁶

2.62 Despite some support for such an expansion, peak industry bodies such as the Australian Chamber of Commerce and Industry (ACCI) have expressed strong opposition to the extension of the right to request flexible working arrangements provisions.⁷⁷

2.63 In the ALRC's view, amendment of the NES to extend the right to request in this context is an important reform that balances one of the key objects of the *Fair Work Act*, which is to help employees balance their work and family responsibilities by providing flexible working arrangements, with the need to encourage workforce participation by mature age workers. It may also reduce the need for mature age workers to seek casual employment to achieve flexibility, or rely solely on the goodwill of their particular employer to access flexible working arrangements and provide statutory basis for such requests.

2.64 There are a number of possible approaches to extension of the right to request provisions in this context. The first is an extension of the right to request to all employees. However, a proposal of this nature might be seen as beyond the ALRC's Terms of Reference. The second possible approach is an extension of the right to request to mature age workers. The ALRC considers that this narrow extension may contribute to discrimination against mature age workers and further entrench negative stereotypes about this group, for example by acting as a disincentive for employers to engage mature age workers. The third potential approach, in line with the submissions and recommendations outlined above, would be to extend the right to request to all employees who have caring responsibilities.

2.65 In the ALRC's view the third approach is the most appropriate for a number of reasons. Australian Bureau of Statistics (ABS) figures indicate that the likelihood of a person providing care to someone else increases with age and that the majority of

74 House of Representatives Standing Committee on Family, Community, Housing and Youth—Parliament of Australia, *Who Cares...? Report on the inquiry into better support for carers* (2009) rec 40.

75 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 15.

76 The Bill also includes other significant changes, including specifically in relation to carers, unions and the role of Fair Work Australia. The Bill was referred to the House of Representatives Standing Committee on Education and Employment which reported in June 2012 and at the time of writing was before the House of Representatives.

77 Australian Chamber of Commerce and Industry, *Submission to Fair Work Act Review* (2012).

carers in Australia are aged 45 years and over.⁷⁸ As a result, mature age workers would predominantly benefit by an extension of the right to request to employees with caring responsibilities. Such an extension would provide mature age workers with the right to request flexible working arrangements to accommodate their caring responsibilities, and in light of the often gendered nature of caring, such a reform is of particular importance to mature age women. The ALRC therefore proposes that the Australian Government extend the right to request flexible working arrangements to all employees who have caring responsibilities.

2.66 In addition, the ALRC proposes that the FWO develop a guide to requesting, considering and implementing flexible working arrangements, in consultation with unions, employer organisations and seniors organisations. The guide should include information about circumstances in which employees might seek such arrangements and give employers guidance on accommodating requests and include model flexibility strategies.

Proposal 2–5 The Australian Government should amend s 65 of the *Fair Work Act 2009* (Cth) to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

Proposal 2–6 The Fair Work Ombudsman should develop a guide to negotiating and implementing flexible working arrangements for mature age workers, in consultation with unions, employer organisations and seniors organisations.

Question 2–1 In what ways, other than through changes to the *Fair Work Act 2009* (Cth), should the Australian Government develop or encourage flexible working arrangements for mature age workers?

Individual flexibility arrangements

2.67 Section 202 of the *Fair Work Act* requires that every enterprise agreement must include a ‘flexibility term’, allowing the employer and the employee to make a specific ‘individual flexibility arrangement’ (IFA) that would vary the effect of the enterprise agreement to account for the employee’s particular circumstances.⁷⁹ Therefore, under every enterprise agreement a mature age worker is entitled to negotiate an IFA with the employer, for example, to vary work arrangements.

2.68 Similarly, modern awards must include a ‘flexibility term’, allowing the employer and the employee to make a specific IFA to vary the effect of the enterprise

78 Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, Cat No 4430.0* (2003), 10, 49.

79 *Fair Work Act 2009* (Cth) s 202. Further, particular requirements must be met for an IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 203.

agreement to account for the employee's particular circumstances.⁸⁰ Mature age workers are therefore entitled to negotiate IFAs with their employer under modern awards, for example, to vary their work arrangements.

2.69 There is limited data available about the use of IFAs since the introduction of the *Fair Work Act*. The Fair Work Act Review noted that a 2011 survey by FWA indicated that of the employers surveyed,

six percent had used IFAs, although more than a third of these entities had only made one such arrangement. Around 3.5 per cent of employees surveyed had entered into an IFA.⁸¹

2.70 This finding was consistent with observations in submissions to this Inquiry. For example, JobWatch stated that it was 'not aware of any older workers who have negotiated (or attempted to negotiate) IFAs under an enterprise agreement or modern award'.⁸²

2.71 Stakeholder responses to questions about the use of IFAs and, in particular, the reasons for limited use of IFAs, were mixed.⁸³ However, in light of the limited use of IFAs and the systemic nature of any reforms aimed at IFAs, the ALRC does not consider it is appropriate to make any proposals with respect to IFAs. The ALRC notes that the Fair Work Act Review Panel gave the issue of IFAs 'extensive consideration' and made a number of recommendations on their operation under both enterprise agreements and modern awards.⁸⁴

Modern awards

2.72 A modern award is an industrial instrument that regulates the minimum terms and conditions for a particular industry or occupation in addition to the statutory minimum outlined by the NES.⁸⁵ A modern award cannot exclude any provisions of the NES, but can provide additional detail in relation to the operation of an NES entitlement. The *Fair Work Act* prescribes terms which must, must not, or may, be

80 *Fair Work Act 2009* (Cth) s 144. Note particular requirements must be met for the IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 143.

81 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 108.

82 JobWatch, *Submission 25*. See also Australian Industry Group, *Submission 37*.

83 See, eg, JobWatch, *Submission 25*; Government of South Australia, *Submission 30*; Australian Industry Group, *Submission 37*; ACTU, *Submission 38*; Diversity Council of Australia, *Submission 40*; Australian Chamber of Commerce and Industry, *Submission 44*; The Employment Law Centre of WA, *Submission 45*; Law Council of Australia, *Submission 46*.

84 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), [5.3.2], recs 9–13.

85 Beginning in 2008, the Australian Industrial Relations Commission, and then its successor FWA, conducted an award modernisation process which reviewed and rationalised existing awards to create streamlined 'modern awards'. The award modernisation process was completed by the end of 2009, with 122 modern awards commencing operation on 1 January 2010. FWA continues the modernisation process in relation to enterprise instruments and certain former state awards preserved by the national system. See Fair Work Australia, *About Award Modernisation* <<http://www.fwa.gov.au>> at 23 April 2012; A Stewart and P Alderman, 'Awards' in *CCH Australia, Australian Master Fair Work Guide* (2010) 147.

included in a modern award.⁸⁶ Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement⁸⁷ and is not a ‘high income employee’⁸⁸ may be covered by a modern award.⁸⁹ In general, a modern award applies to employees in a particular industry or occupation and is used as the benchmark for assessing enterprise agreements before they are approved by FWA.

2.73 FWA is currently undertaking a review of all modern awards, based on applications to vary modern awards, as part of a range of reviews required under the *Fair Work Act* and associated legislation.⁹⁰ The scope of its current review is limited to considering whether modern awards achieve the modern awards objectives and are operating effectively, without anomalies or technical problems arising from the award modernisation process. The modern award review is unlikely to revisit issues already determined during the award modernisation process unless there are cogent reasons, such as where there has been a significant change in circumstances.⁹¹

2.74 In addition, the *Fair Work Act* provides for review of each modern award every four years.⁹² The first review of this kind will commence in 2014, and FWA has indicated that it will be broader in scope than the 2012 review.⁹³ The reviews are ‘the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.⁹⁴

2.75 ACCI submitted that ‘the Productivity Commission should conduct research or be specifically requested to inquire, into the effects of certain award terms and conditions on mature age workers, including the impact of minimum wages’.⁹⁵ In the ALRC’s view, the legislatively mandated FWA review processes present the appropriate mechanism for FWA to consider issues relating to mature age workers in the context of modern awards. Importantly, in conducting the review, FWA is required to take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of, among other attributes, age.⁹⁶

86 See *Fair Work Act 2009* (Cth) ch 2, pt 2–3, div 3.

87 *Ibid* s 57.

88 *Ibid* s 47(2).

89 The *Fair Work Act 2009* (Cth) draws a distinction between where a modern award *covers* an employee, employer, or organisation (where it is expressed to cover them) and where it *applies* (if it actually imposes obligations or grants entitlements): *Ibid* ss 46–48. There is an obligation to comply with a modern award: *Fair Work Act 2009* (Cth) s 45.

90 See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6. The *Fair Work Act* provides for review of each modern award every four years: *Fair Work Act 2009* (Cth) s 156. There is also a process for varying modern awards outside the four yearly review: *Fair Work Act 2009* (Cth) s 157.

91 *Modern Award Review 2012 [2012] FWAFB 5600* at [89], [99]. For an outline and timetable on the Review, see *Modern Award Review 2012–Timetable [2012] FWA 5721*.

92 *Fair Work Act 2009* (Cth) s 156.

93 *Modern Award Review 2012 [2012] FWAFB 5600* at [99].

94 Explanatory Memorandum, *Fair Work Bill 2008* (Cth), [600].

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

96 *Fair Work Act 2009* (Cth) s 578.

2.76 Stakeholders raised a number of issues that could be considered in the course of the review. For example, an issue raised by the Government of South Australia was the inclusion of Graduated Retirement Provisions, which would

offer a voluntary option for persons who have reached a certain age to access a number of flexible working arrangements that meet their needs. The provisions should provide a range of graduated retirement options that would be most suited to the needs of the industry, the employer and the worker. The graduated retirement provisions should specify an age at which a worker may access these provisions, and this age should reflect the occupational requirements of modern awards for each industry or profession.⁹⁷

2.77 The submission further explained that Graduated Retirement Provisions could assist in workforce planning processes and ‘provide the platform for conversation about how the experienced employee could best contribute to the workplace’.⁹⁸

2.78 The Australian Council of Trade Unions (ACTU) suggested a suite of amendments to modern awards, primarily for the benefit of part-time workers, including:

access to part-time employment options, greater employee control over rosters and greater certainty over hours of work which assisted many older workers to transition to reduced hours of work.⁹⁹

2.79 Finally, ACCI suggested that three hour minimum shift requirements in awards can

impact mature age employees, who wish to work for less than the required minimum shift requirement (ie only want to work as a casual for 1 hour on certain days and not for 3 hours for each shift—the employer must pay for three hours, regardless of the amount of work available and whether the employer only operates at certain hours).¹⁰⁰

2.80 In light of the issues outlined above, the ALRC proposes that in the course of the 2014 FWA review, the inclusion or modification of terms to encourage the participation of mature age workers should be considered. The ALRC considers that s 139(1) of the *Fair Work Act* is sufficiently broad to allow scope for the inclusion of any such additional terms as required.

Proposal 2–7 From 2014, Fair Work Australia will conduct the first four-yearly review of modern awards. In the course of the review, the inclusion or modification of terms in the awards to encourage workforce participation of mature age workers should be considered.

97 Government of South Australia, *Submission 30*.

98 *Ibid.*

99 ACTU, *Submission 38*.

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

Notice of termination of employment

2.81 The NES establish the minimum period of notice, or payment in lieu of notice, that an employer must give an employee to terminate their employment without reasonable cause.¹⁰¹ The amount of notice or payment in lieu of notice is determined according to the employee's period of continuous service with the employer.¹⁰² However, that period is increased by one week for employees over age 45 who have completed at least two years continuous service.¹⁰³

2.82 Evidence suggests that, of those experiencing age discrimination, the largest proportion of that discrimination constitutes having their employment terminated or being made redundant before their younger counterparts.¹⁰⁴ JobWatch identified that mature age workers 'are often the first target when businesses restructure and downsize' and highlighted that in some cases 'redundancy was used as a means of removing the [mature age worker] from their job in order to replace them with younger workers'.¹⁰⁵

2.83 Statistics from the ABS indicate that unemployed mature age persons are more likely to be long-term unemployed than their younger counterparts. For example, in 2010–11, 33% of unemployed people aged 45–64 were long-term unemployed, compared to 22% of the total unemployed.¹⁰⁶ Further, mature age job seekers registered with Job Services Australia aged 55 years and over experience an average duration of unemployment of 73 weeks compared to 37 weeks for job seekers aged 25–44.¹⁰⁷

2.84 The Employment Law Centre of WA (ELCWA) suggested that the 'minimum additional entitlement to notice for older employees be increased to reflect the greater difficulty that an older worker may encounter in finding alternative employment'.¹⁰⁸ ELCWA also proposed 'removing the requirement that a worker over the age of 45 years complete a minimum period of service prior to qualifying for this additional notice entitlement'.¹⁰⁹

2.85 In order to provide incentives for employers to retain mature age workers the ALRC proposes that the minimum additional period of notice for employees over age 45 should be four weeks. However, the ALRC is conscious of concerns that additional rights and entitlements for mature age workers may have unintended consequences by making them less attractive to employers and welcomes stakeholder feedback on this proposal.

101 *Fair Work Act 2009* (Cth) s 117.

102 *Ibid* s 117(3)(a).

103 *Ibid* s 117(3)(b).

104 Westfield Wright Pty, *Attitudes to Older Workers* (2012), 13.

105 JobWatch, *Submission 25*.

106 Australian Bureau of Statistics, *Australian Social Trends, Cat No 4102.0* (2011).

107 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, 27.

108 The Employment Law Centre of WA, *Submission 45*.

109 *Ibid*.

Proposal 2–8 Section 117(3)(b) of the *Fair Work Act 2009* (Cth) provides that if an employee is over 45 years of age and has completed at least two years of continuous service with the employer, then the minimum period of notice for termination is increased by one week. The Australian Government should consider amending this section to increase this period from one week to four weeks.

General protections

2.86 The general protections provisions provide statutory protection for mature age workers seeking to challenge discriminatory treatment. The general nature and operation of the general protections provisions was considered in detail in the course of the Fair Work Act Review.¹¹⁰ In addition, the High Court of Australia provided greater clarity about the operation of the general protections provisions in a recent decision concerning determination of the reason for the relevant conduct in a general protections claim.¹¹¹ Rather than considering the operation of the provisions in any detail, the ALRC's focus in this Inquiry is, therefore, on the interaction between the general protections provisions and anti-discrimination legislation.

Legislative framework

2.87 Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections.¹¹² These general protections, among other things, prohibit an employer from taking 'adverse action' against an employee or prospective employee on the basis of the employee having, exercising or not exercising, or proposing to exercise or not exercise, a 'workplace right', or to prevent the exercise of a 'workplace right'.¹¹³ Measures that may constitute 'adverse action' taken by an employer against an employee include dismissal, injury or discrimination, or, in the case of a prospective employee, refusing to employ or discriminating in the terms or conditions of offer,¹¹⁴ and threatening any of the above.¹¹⁵

110 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), ch 11.

111 *Board of Bendigo Institute of Technical and Further Education v Barclay* [2012] HCA 32. See also discussion in Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 236.

112 *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

113 A 'workplace right' exists where a person: is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument (such as an award or agreement) or an order made by an industrial body; is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or has the capacity under a workplace law to make a complaint or inquiry to a person or body to seek compliance with that workplace law or instrument, or in the case of an employee, in relation to their employment: *Ibid* s 341.

114 *Ibid* s 342(1).

115 An employee cannot make a general protections dismissal application at the same time as an unfair dismissal application: *Ibid* s 725.

2.88 The *Fair Work Act* prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons and outlines a number of grounds of discrimination.¹¹⁶ Age is specifically listed as a protected attribute upon which a mature age worker may be able to pursue a claim of discrimination under the general protections provisions.¹¹⁷

2.89 The general protections provisions provide statutory protection and may, therefore, provide greater security and an incentive for mature age workers to remain in the workforce. However, it is difficult to evaluate the effectiveness of the general protections provisions with respect to mature age job seekers and workers ‘in the absence of information as to the number of matters brought and the outcomes’.¹¹⁸

2.90 While stakeholders identified a range of difficulties with the current general protections provisions,¹¹⁹ many expressed the view that the provisions are ‘sufficiently comprehensive and effective in providing an avenue for mature age workers to pursue if they have been discriminated against on the basis of age’.¹²⁰

Interaction with anti-discrimination legislation

2.91 The introduction of general protections provisions in the *Fair Work Act* provides employees with an additional choice of forum for complaints of discrimination; and that choice ‘can be a complex exercise’.¹²¹ Some commentators and stakeholders have suggested that the general protections provisions may provide a more useful avenue for redress in circumstances of age discrimination in the employment context than state or federal anti-discrimination legislation.¹²²

2.92 The key advantages of these provisions from the perspective of mature age workers seeking to challenge discriminatory treatment include: broad coverage, encompassing recruitment; the reverse onus of proof; that the unlawful or discriminatory reason only needs to be one of the reasons for the adverse action; cost implications; the role of the FWO; and the availability of injunctive relief.¹²³

116 Ibid s 351(1). Similarly, s 772(1)(f), which extends coverage to non-national system employees, prohibits termination of an employee’s employment on the basis of the same discriminatory grounds. However, s 772(1)(f) is more limited than s 351(1) as it only applies to termination of employment, rather than ‘adverse action’ more generally.

117 Ibid ss 351(1), 772(1)(f).

118 Law Council of Australia, *Submission 46*. See also Government of South Australia, *Submission 30*; JobWatch, *Submission 25*.

119 Law Council of Australia, *Submission 46*; Australian Industry Group, *Submission 37*; Victoria Legal Aid, *Submission 34*; JobWatch, *Submission 25*.

120 Government of South Australia, *Submission 30*. See also Victoria Legal Aid, *Submission 34*; JobWatch, *Submission 25*.

121 C Andreas, *Intersections Between ‘General Protections’ Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries*, Working Paper No 47 (2009), Centre for Employment Law and Labour Relations, 11.

122 See, eg, Law Council of Australia, *Submission 46*; Victoria Legal Aid, *Submission 34*. See also T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 199–200.

123 Law Council of Australia, *Submission 46*; The Employment Law Centre of WA, *Submission 45*; Government of South Australia, *Submission 30*; JobWatch, *Submission 25*. See also T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 199–200.

2.93 Legal Aid Victoria submitted that, in addition to providing a ‘more effective avenue for recourse than other anti-discrimination legislation’, the provisions represent ‘a progressive solution to a problematic feature of other Australian anti-discrimination legislation’.¹²⁴

2.94 The value of the general protections provisions is highlighted in the following case study:

Mick is a 63 year old man who lost his job after 20 years of continuous employment. Mick applied for a job as a cleaner. After attending an interview and passing a medical examination he was offered and accepted the job. The company sent Mick the appropriate paperwork, which he completed and returned. The day after he sent in the paperwork the company said that Mick could no longer have the job. Mick was distressed because in the meantime he had turned down other work and he could not work out why he was now being told that he could not have the job. The only thing that had changed was that he had sent the company a copy of his driver’s licence, which revealed his age. Mick suspected that the company had decided not to employ him because he is 63. He asked the company whether this was the case and, if not, why it had decided not to employ him, but the company refused to provide a reason. Under the *Fair Work Act*, Mick could make a general protections application to Fair Work Australia alleging age discrimination in regard to a prospective employee. Once he had established a prima facie case, from which age discrimination could be inferred, if the company was not able to provide a compelling alternative reason for suddenly revoking the job offer, it would be presumed that the reason was age, as alleged by Mick. In the absence of s 361, the company could simply stay silent as to its reason for revoking the offer, and in the absence of direct evidence of age discrimination Mick’s claim would not be successful.¹²⁵

2.95 The Fair Work Act Review Panel acknowledged that ‘there is substantial overlap’ between the discrimination provisions in the *Fair Work Act* and other Commonwealth anti-discrimination laws.¹²⁶ This issue is being considered in the context of the consolidation of Commonwealth anti-discrimination law. In the discussion paper for the consolidation project, the Government asked ‘should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the *Fair Work Act*?’¹²⁷

2.96 The Law Council submitted that the consolidation project ‘provides the opportunity to minimise this duplication and promote clarity and consistency for complainants and respondents seeking to navigate these regimes’.¹²⁸

2.97 The ALRC is interested in the approach taken by the Government to the issue of overlap and duplication with anti-discrimination legislation and will consider the draft consolidated anti-discrimination legislation upon its release. The ALRC is also

124 Victoria Legal Aid, *Submission 34*.

125 Ibid.

126 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 239. See also Law Council of Australia, *Submission 46*.

127 Australian Government Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011).

128 Law Council of Australia, *Submission 46*.

interested in stakeholder comment on what ways, if any, Commonwealth anti-discrimination legislation or the *Fair Work Act* could be amended to improve or clarify their interaction in circumstances of age discrimination.

Question 2–2 There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, could this legislation be amended to improve or clarify their interaction in circumstances of age discrimination?

Compulsory retirement

2.98 While compulsory retirement has been abolished for Commonwealth statutory office holders and other public servants, a number of direct and indirect mandatory retirement practices remain. In addition, while not having a specific compulsory retirement age, a range of other occupations require licensing and re-qualification. Clearly, these practices may create barriers to mature age participation in the workforce.

2.99 As a matter of principle, the ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. The imposition of compulsory retirement fails to account for the capacity of individuals, reinforces stereotypes about the abilities of mature age workers and reduces utilisation of the workforce contribution of mature age workers.¹²⁹ National Seniors emphasised that,

while it may be acceptable to have an age determined review point, it is not appropriate to have age determined cut off points. Licensing and re-qualification should be dependent on capacity, not chronological age. People of the same age often have widely differing physical and mental capacity.¹³⁰

2.100 While recognising that mature age workers should generally decide the time and manner in which they leave the paid workforce, in certain circumstances and instances it may be appropriate for public policy reasons to assess their capacity to remain in their position. For example, the Ai Group emphasised that ‘in some cases these restrictions are necessary and justified on health and safety grounds’.¹³¹

2.101 In order to balance the desire to encourage workforce participation of mature age workers with public policy requirements around health and safety, individual capacity-based assessment rather than the imposition of compulsory retirement is a preferable approach.¹³² As suggested by the Law Institute of Victoria, assessment should occur on the basis of a ‘person’s ability to perform the tasks of their particular

129 Ibid; JobWatch, *Submission 25*. See also World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011), 47.

130 National Seniors Australia, *Submission 27*.

131 Australian Industry Group, *Submission 37*.

132 COTA, *Submission 51*; Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*.

job, regardless of their age'.¹³³ This approach was echoed in submissions by stakeholders such as the ACTU, which 'generally supports an approach to licensing and/or re-qualification which is based on risk factors rather than age',¹³⁴ and the Diversity Council, which stated that 'individuals should only be assessed on whether they can carry out the inherent requirements of the job in question'.¹³⁵

2.102 In the ALRC's view, industry and professional bodies are best placed to determine the most appropriate assessment and safeguards for mature age workers in their industry or profession. However, the provision of principles or guidelines may assist such bodies in reviewing licensing or re-qualification requirements with a view to removing age-based restrictions in favour of capacity-based requirements.

Proposal 2–9 A range of professional associations and industry representative groups are responsible for developing or regulating licensing or re-qualification requirements. The Australian Human Rights Commission should develop principles or guidelines to assist these bodies to review such requirements with a view to removing age-based restrictions in favour of capacity-based requirements.

Independent reviews of compulsory retirement

2.103 As outlined above, as a matter of principle, the ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. However, in certain circumstances and instances it may be appropriate for public policy reasons to assess the capacity of mature age workers to remain in their position. Two key examples of this are judicial and quasi-judicial officers, and Australian Defence Force personnel.

2.104 In order to consider these examples, the ALRC proposes that there should be two independent reviews of existing compulsory retirement—one in relation to judicial and quasi-judicial appointments and the other in relation to the military. This approach is consistent with the one advocated by stakeholders, such as the South Australian Government, which suggested that

it may be more appropriate for those areas that have compulsory retirement ages to be reviewed separately to consider whether the set age limits remain appropriate to the contemporary work practices.¹³⁶

Judicial and quasi-judicial officers

2.105 Under s 72 of the *Australian Constitution*, the maximum age for Justices of the High Court and any court created by Parliament is 70 years.¹³⁷ While the section

133 Law Council of Australia, *Submission 46*.

134 ACTU, *Submission 38*.

135 Diversity Council of Australia, *Submission 40*.

136 Government of South Australia, *Submission 30*.

137 *Australian Constitution* s 72.

provides that Parliament may make a law fixing a lower age, it does not make such provision for a higher age.¹³⁸

2.106 There is jurisdictional inconsistency in the compulsory retirement provisions relating to judicial and quasi-judicial officers, such as Ombudsmen. Under state and territory constitutions and legislation compulsory retirement ages range from age 65 to 72 years of age.¹³⁹

2.107 The Government of South Australia favoured national consistency and observed that, although the compulsory retirement provisions affect a relatively small number of people, they have important symbolic implications with respect to the Australian Government's view of the 'capacity of people to work competently until they are of a certain age'.¹⁴⁰

2.108 Other stakeholders such as National Seniors supported the removal of compulsory retirement ages for judicial officers, consistent with the 'abolition of compulsory retirement ages for Commonwealth statutory office holders and public servants'.¹⁴¹

2.109 There are certain complexities associated with removing compulsory retirement for judicial officers, including Constitutional requirements and public policy reasons for compulsory retirement. There may also be flow on effects with respect to judicial pensions.¹⁴²

2.110 Rather than proposing the removal of compulsory retirement ages, the ALRC proposes that the Australian Government, in cooperation with state and territory governments, should initiate an inquiry to consider removing the compulsory ages of judicial and quasi-judicial appointments or, at a minimum, to achieve national consistency in such ages.

Proposal 2–10 The Australian Government should initiate an inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

138 In 1977 the *Constitution Alteration (Retirement of Judges) Act 1977* (Cth) was proclaimed following a successful referendum. It created a retirement age of 70 for all judges in federal courts.

139 *Federal Magistrates Act 1999* (Cth) ss 9 & sch 1 pt 1 cl 1(4); *Judicial Officers Act 1986* (NSW) ss 44(1), 44(3); *Supreme Court of Queensland Act 1991* (Qld) s 23(1); *District Court of Queensland Act 1967* (Qld) s 14(1); *Magistrates Act 1991* (Qld) s 42(d); *Supreme Court Act 1935* (SA) s 13A(1); *District Court Act 1991* (SA) s 16(1); *Magistrates Act 1983* (SA) s 9(1)(c); *Supreme Court Act 1887* (Tas) s 6A(1); *Magistrates Court Act 1987* (Tas) s 9(4)(a); *Constitution Act 1975* (Vic) s 77(3); *County Court Act 1958* (Vic) ss 8(3), 14(1)(b), 14(1)(c); *Magistrates' Court Act 1989* (Vic) s 12(a); *Judges' Retirement Act 1937* (WA) s 3; *District Court of Western Australia Act 1969* (WA) s 16; *Magistrates Court Act 2004* (WA) s 5 & sch 1 cl 11(1)(a); *Supreme Court Act 1993* (ACT) s 4(3); *Magistrates Court Act 1930* (ACT) s 7D(1); *Supreme Court Act 1979* (NT) s 38; *Magistrates Act 1979* (NT) s 7(1).

140 Government of South Australia, *Submission 30*.

141 National Seniors Australia, *Submission 27*.

142 To be eligible a judge must have served as a judge for not less than 10 years. If the judge has served less, the pension entitlement reduces proportionately and no pension is paid where a judge has served less than 6 years. For Commonwealth judges see *Judges' Pensions Act 1968* (Cth).

Military personnel

2.111 The compulsory retirement age for Australian Defence Force (ADF) personnel is 60 years and 65 years for reservists.¹⁴³ However, there is provision for the Minister or the Chief of the Defence Force to extend the compulsory retirement age for either a specific officer or member or a class of officers or members. In the 12 months up to 30 June 2012, 35 ADF personnel were granted an extension to their compulsory retirement age.¹⁴⁴

2.112 While the current average number of years of service for ADF personnel is nine years,¹⁴⁵ statistics indicate that of the 56,728 ADF personnel, 3,019 were aged 50 years and above and are approaching compulsory retirement age. In August 2012, there were 50 ADF personnel over 60 years of age.¹⁴⁶

2.113 The Alliance of Defence Service Organisations (ADSO) emphasised the operational capability reasons for ensuring that ADF personnel ‘deployed into operations are of an age and physical fitness to meet the rigours of battle in defence of the nation’.¹⁴⁷ ADSO provided two examples:

Firstly, the infantry soldier, wearing body armour and carrying his weapon and a heavy pack, could not cope with the rigours of a fire-fight unless he or she is relatively young, very fit and highly trained; secondly, the pilot, flying a high performance fighter aircraft, capable of pulling 7G and delivering precision weapons in a hostile air environment, could not cope unless he or she is relatively young, very fit and highly trained.¹⁴⁸

2.114 The ADSO submitted that ‘the need for a relatively young ADF is obvious and ADSO is very strongly opposed to any change in compulsory retirement age for the ADF’.¹⁴⁹ However, ADSO did not oppose the current provision for the extension of compulsory retirement age by the Minister or Chief.

2.115 As a matter of principle the ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. The Defence, Science and Technology Organisation (DSTO), in partnership with the University of Wollongong, is currently conducting a Physical Employment Standards (PES) Review Project.¹⁵⁰ In seeking to identify objective criteria for physical standards across the ADF, the ALRC suggests that this, and similar projects, may provide a useful basis upon which to reconsider the compulsory retirement ages.

143 The last increase in the compulsory retirement age occurred in 2007.

144 Department of Defence, *Correspondence*, 3 August 2012.

145 *Ibid.*

146 *Ibid.* Of the 50 ADF personnel over 60 years of age, 59 were men and one was a woman.

147 Alliance of Defence Service Organisations, *Submission 49*.

148 *Ibid.*

149 *Ibid.*

150 The research is being conducted through the Centre of Expertise for the Physical Employment Standards Project, a partnership between the Defence Science and Technology Organisation and University of Wollongong: G Combat (Minister for Defence Personnel, Materiel and Science), ‘Physical Standards for Military Service to be Benchmarked’ (Press Release, 21 August 2009). See also Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force: Phase 2 Report* (2012), 32.

2.116 The ALRC's view is that the most appropriate approach to this issue is to propose that the Australian Government initiate an inquiry to review the compulsory retirement ages for ADF personnel. Proposing a review rather than removal of the compulsory retirement ages recognises the concerns expressed by stakeholders such as the ADSO, and the need for a detailed examination of this issue undertaken in cooperation with the ADF and key defence force and veterans organisations. Any such inquiry should consider a range of possible alternatives, including a capacity-based approach and any unintended consequences arising from a change to compulsory retirement ages with respect to the calculation of death and invalidity benefits paid under military superannuation and benefits schemes.¹⁵¹

Proposal 2–11 The Australian Government should initiate an inquiry to review the compulsory retirement ages for military personnel.

Regulation and monitoring framework

2.117 There are a number of bodies within the employment law framework tasked with regulation and monitoring of obligations and requirements under legislation such as anti-discrimination and industrial relations legislation. A number of stakeholders have suggested that the Equal Opportunity for Women in the Workplace Agency (EOWA) model might provide a useful one upon which to establish a similar body or process of recognition of employer best practice with respect to mature age workers.

Is there an appropriate model?

2.118 EOWA is a statutory authority with a role in administering the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWA Act) and focuses on assisting organisations to achieve equal opportunity for women, including through education.¹⁵² EOWA has an 'Employer of Choice for Women' citation which acknowledges organisations that are recognising and advancing women in their workplace.

2.119 In 2012, the Australian Government introduced amendments to the EOWA Act. Under the Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth), employers with over 100 employees must report annually against 'gender equality indicators' which relate to the gender composition of employees and governing bodies, remuneration, flexible working arrangements and consultation on gender equality issues.¹⁵³

151 Compulsory retirement ages for most ADF personnel were increased in 2007, and this had an unintended effect on the calculation of death and invalidity payments under the Military Superannuation and Benefits Scheme. See Australian Government Actuary, *Military Superannuation and Benefits Scheme and Defence Force Retirement and Death Benefits Scheme (MSBS and DFRDB)* (2008), [2.9].

152 *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

153 See, Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth) for further details of proposed amendments, including renaming EOWA the Workplace Gender Equality Agency. At the time of writing the Bill was before the Senate after a report examining the Bill was released by the Senate Education, Employment and Workplace Relations Committee on 10 May 2012.

2.120 The broader Canadian model may also provide a useful model. The aim of the *Employment Equity Act 1995* SC c 44 (Canada) is to ensure that federally regulated employers provide equal opportunities for employment to four designated groups: women; Aboriginal peoples; persons with disabilities; and members of visible minorities.¹⁵⁴

How would an age-related model work?

2.121 Stakeholders expressed differing views on the appropriateness of introducing an age-related reporting or best practice recognition framework, or a body responsible for monitoring such a framework.

2.122 The Law Council of Australia suggested that the employment of mature age workers ‘could be promoted by providing recruitment agencies and employers with formal public recognition’ and that this could be modelled on the annual awards and employer of choice lists compiled by EOWA.¹⁵⁵

2.123 The ACTU also supported the approach and submitted that

such frameworks assist employers and employees to self-identify internal practices and procedures which may hinder or assist maintaining a diverse workforce, including mature age workers ... The ACTU supports the introduction of the benchmarks and would suggest such a model be adapted as part of any prospective framework for mature age employees.¹⁵⁶

2.124 However, some stakeholders opposed the establishment of a reporting framework requiring employers to report against equality indicators related to age, expressing concerns about the regulatory burden and cost implications.¹⁵⁷ The Ai Group expressed the view that such an approach may also ‘encourage negative stereotypes’ about mature age workers and may ‘shift the focus from developing positive and flexible management practices to the burden of complying with a reporting framework’.¹⁵⁸

2.125 Given such concerns, the ALRC considers that the establishment of a body or process of recognition of employer best practice on the basis of age would need to be less formal and onerous than the EOWA framework. The ALRC also emphasises that the focus of any such framework should be on both formal policies, and on outcomes and experience in practice.

2.126 In light of divergent stakeholder views about the appropriateness of establishing a body or process of recognition of employer best practice similar to EOWA, but on the basis of age, the ALRC is interested in further comment by stakeholders on this issue.

154 *Employment Equity Act 1995* SC c 44 (Canada).

155 Law Council of Australia, *Submission 46*. See also JobWatch, *Submission 25*.

156 ACTU, *Submission 38*.

157 Australian Industry Group, *Submission 37*. See also Diversity Council of Australia, *Submission 40*.

158 Australian Industry Group, *Submission 37*.

Question 2–3 Should the Australian Government establish a body or reporting framework with respect to mature age workers similar to that of the Equal Opportunity for Women in the Workplace Agency or its reporting framework? If so, how should such a body or framework operate?

National education and awareness campaign

2.127 A central theme that has emerged in the course of this Inquiry is the need for increased awareness and effective education and training about barriers to workforce participation for mature age persons, and the benefits of employing mature age workers.¹⁵⁹ Both these elements are fundamental to ensuring that the employment law system is able to respond appropriately to address such barriers.

2.128 A range of bodies and reports have highlighted the prevalence of negative perceptions and stereotypes about mature age workers and age discrimination. For example, the Consultative Forum on Mature Age Participation reported that

Age discrimination in employment of mature age people arises from a combination of social perceptions and economic justifications but is usually justified in terms of productivity, whereby older people are stereotyped for having some assumed behaviours regardless of the individual's actual conditions and characteristics.¹⁶⁰

2.129 The Advisory Panel on the Economic Potential of Senior Australians noted that

negative views about older people can be based on generalisations and stereotypes. Stereotypes tend to group people together, taking away their individuality and diversity.¹⁶¹

2.130 A key report produced by the Productive Ageing Centre and National Seniors outlined the impact of stereotype threats on mature age workers. It stated that

evidence shows that stereotypes relating to mature age workers are consistently negative, and apply across different occupations. These findings suggest that older adults are likely to be susceptible to stereotype threat in the workplace.¹⁶²

2.131 In May 2011, the *Age Discrimination Act 2004* (Cth) was amended to create an office for an Age Discrimination Commissioner within the AHRC. The AHRC has been allocated funding to enable the Commissioner to undertake a project addressing the stereotyping of mature age persons including research, roundtables and community education and awareness activities to promote positive portrayal of mature age

159 See, eg, COTA, *Submission 51*.

160 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, 17.

161 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 45.

162 National Seniors Productive Ageing Centre, *Stereotype Threat and Mature Age Workers* (2011), prepared for National Seniors Australia, 3.

persons.¹⁶³ The position of Age Discrimination Commissioner and this project mean the AHRC is most appropriately placed to lead and coordinate a national education and awareness campaign in support of the workforce participation of mature age persons. This type of approach was recommended by the Advisory Panel on the Economic Potential of Senior Australians.¹⁶⁴

2.132 The ALRC considers that a national campaign should be appropriately resourced, and be based on a coordinated whole-of-government approach involving all key stakeholders and participants in the employment law system, including: employees, employers, unions, employer organisations, government agencies and departments, and seniors organisations. The Age Discrimination Commissioner should coordinate the campaign and bodies such as unions, employer organisations, the FWO and Safe Work Australia should also play a key role. Anti-discrimination bodies should also play a role including through the publication of material such as the Victorian Equal Opportunity and Human Rights Commission's, publication, *Mature-age Workers and the Equal Opportunity Act—Know Your Rights*.¹⁶⁵

2.133 Stakeholders highlighted numerous examples of best practice in attracting, retaining and supporting mature age workers in industries across Australia which could be built upon and developed in the course of the campaign.¹⁶⁶ The Australian Government has also taken a leading role in this area, for example through the Australian Public Service 200 Project which was 'established to tackle barriers to a longer productive life of work in the APS'.¹⁶⁷

2.134 There are a range of initiatives that the ALRC suggests could usefully form part of the national education and awareness campaign, including:

- education and training in workplaces around Australia, including of employees, employers, and their representatives;

163 Australian Government, *Budget Measures 2012–13, Budget Paper No 2* (2012) Part 2 Expense Measures, 'Economic Potential of Senior Australians—countering negative stereotypes and promoting positive media portrayal of older Australians'. In relation to creating positive attitudes see Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 35.

164 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 36: 'The federal Age Discrimination Commissioner develop a community education and awareness campaign that identifies ageism and age discrimination and promotes positive images of ageing'.

165 Victorian Equal Opportunity and Human Rights Commission, 'Mature-age Workers and the Equal Opportunity Act: Know Your Rights' (2012) .

166 Australian Government, *Investing in Experience Tool Kit* (2012); Australian Chamber of Commerce and Industry, *Employ Outside the Box: The Rewards of a Diverse Workforce* (2012); Department of Education, Employment and Workplace Relations, *Corporate Champions* <www.deewr.gov.au/Employment/Programs/ExpPlus/Employers/Pages/CorporateChampions.aspx> at 13 September 2012; APS 200 referred to in Comcare, *Submission 29*.

167 Comcare, *Submission 29*.

- development of guidelines and other resources, such as mature age employment strategies, to complement legislative or workplace entitlements;¹⁶⁸
- establishment of best practice benchmarks;
- posters, newsletters, factsheets, online information and advertisements;
- material relating to redesign of work arrangements and processes; and
- additional research and the development of an evidence base, including case studies.¹⁶⁹

Proposal 2–12 The Australian Human Rights Commission should coordinate a national education and awareness campaign in support of the workforce participation of mature age persons.

168 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 13: ‘The federal government engage peak employer and industry groups to assist individual employers to develop and implement older worker employment strategies, starting with a series of high profile seminars across the country’.

169 See, eg, Comcare, *Submission 29*; JobWatch, *Submission 25*.