

## 4. Recruitment and Employment

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### Summary

4.1 The Australian employment landscape has undergone significant shifts in recent years, with changes to the nature of the labour market, work relationships and arrangements as well as the legislative and regulatory framework. Sustaining and increasing workforce participation by mature age workers is critical to meeting the policy challenges presented by an ageing population.<sup>1</sup> The challenge is therefore to ‘re-shape workplaces’ and the employment law framework to facilitate the ongoing involvement of mature age persons in the paid workforce and other productive work.<sup>2</sup>

4.2 This chapter examines barriers in an employment context to mature age persons participating in the paid workforce or other productive work. It identifies barriers at various stages of employment and ways in which these may be addressed, including in

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

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

relation to: entering and re-entering the workforce; maintaining employment; protections surrounding termination of employment; regulation and monitoring; and education and awareness.

4.3 Reform in this area must address complex and interrelated barriers to workforce participation. This requires a combination of legislative and regulatory reform, as well as measures to increase education and awareness and address perceptions and stereotypes surrounding mature age workers. In this chapter the ALRC makes a number of recommendations aimed at: addressing the practices of recruitment agencies; extending the right to request flexible working arrangements; periods for notice of termination of employment; modern awards; reviewing compulsory retirement; and supporting education and awareness raising and the development of guidance material in a range of areas. The ALRC also recommends that the Fair Work Ombudsman (FWO) consider issues relating to mature age workers in conducting national campaigns and audits.

## Recruitment

4.4 Mature age job seekers face multiple and intersecting difficulties in entering or re-entering the paid workforce.<sup>3</sup> Once unemployed, mature age job seekers experience longer periods of unemployment<sup>4</sup> and are more likely to become discouraged job seekers than their younger counterparts.<sup>5</sup> Recruitment agencies can play an important role in facilitating the employment of mature age workers. However, recruitment practices and personnel may also operate as a barrier to mature age workforce participation, as ‘recruitment agencies often perform a gate-keeping function that can exclude mature age workers’.<sup>6</sup>

4.5 There are a range of both government funded and private ‘intermediaries between job seekers and employers’.<sup>7</sup> The focus of this section is on private recruitment agencies and the role such agencies play in the recruitment of mature age job seekers.<sup>8</sup>

4.6 The key concerns that emerged in course of this Inquiry were:

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3 In many cases these difficulties are exacerbated for Indigenous mature age job seekers as well as job seekers from culturally and linguistically diverse backgrounds and those with disability: See, eg, Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*; Australian Federation of Disability Organisations, *Submission 78*.

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

5 Australian Bureau of Statistics, *Persons Not in the Labour Force, Australia, Sep 2011, Cat No 6220.0* (2012).

6 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.

7 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 18; Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010), Ch 4. See also ACTU, *Submission 38*.

8 The role played by Australian Government employment service is discussed in Chapter 7.

- perceived discrimination against mature age job seekers by some recruiters and recruitment agencies;
- limited understanding of obligations under anti-discrimination law among some recruiters;<sup>9</sup> and
- lack of awareness by some recruiters of the benefits of employing mature age job seekers, or of ways to engage appropriately and constructively with mature age job seekers.

4.7 To address such concerns, the ALRC makes a number of recommendations that focus on recruitment agencies and consultants. These involve the development and provision of ongoing education, training and guidance material, as well as the recognition of best practice in the recruitment of mature age job seekers. In addition, the ALRC recommends increased regulation, specifically by way of amendment to industry codes of conduct.

### Regulatory framework

4.8 While private recruitment agencies operate under contractual arrangements with individual employers, a number of regulatory frameworks are relevant, including anti-discrimination and industrial relations legislation, industry codes of practice and state and territory licensing regimes.

4.9 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). Where recruitment agencies discriminate against mature age job seekers, 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—they may face potential liability under anti-discrimination law.<sup>10</sup> In addition, the general protections provisions under the *Fair Work Act* extend protection from discrimination on the basis of age to prospective employees.<sup>11</sup> As a result, recruitment agencies that discriminate against a prospective employee on the basis of age are in breach of their obligations under both anti-discrimination law and the *Fair Work Act*.

4.10 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.<sup>12</sup> Stakeholders such as Jobwatch and the Law

9 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*.

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

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

12 For example, in South Australia, Western Australia and the ACT, specific registration legislation requires licensing: *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). However, in Queensland there is a Code of Conduct: *Private Employment Agents (Code of Conduct) Regulation 2005* (Qld).

Council of Australia suggested that 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’.<sup>13</sup> While the ALRC is of the view that greater consistency across jurisdictions in this area would be favourable, proposing a new Commonwealth licensing regime for the recruitment industry is a systemic reform that is wider than the scope of this Inquiry. However, some elements of such a regime suggested by stakeholders, including regular training and education about statutory obligations, addressing negative stereotypes, and outlining the benefits of employing mature age workers, are incorporated into the recommendations the ALRC makes below.

### **Review and amendment of codes of conduct**

4.11 There are two key recruitment industry codes of conduct. The ALRC considers that reviews of both codes provide opportunities for considering amendment to promote better engagement with mature age job seekers.

4.12 All members of the Recruitment and Consulting Services Association (RCSA)—recruitment agencies and agency personnel—are bound by its Code for Professional Conduct (RCSA Code) and associated Disciplinary and Dispute Resolution Procedures.<sup>14</sup>

4.13 The RCSA Code contains both general principles and a number of specific principles, including respect for laws, and 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.<sup>15</sup>

4.14 Australian Human Resources Institute (AHRI) members—in-house human resources practitioners—are also required to comply with a Code of Ethics and Professional Conduct (AHRI Code).<sup>16</sup> The AHRI Code outlines a number of specific principles, including lawfulness and justice, and provides that

AHRI members will foster equal opportunity and non-discrimination and seek to establish and maintain fair, reasonable and equitable standards of treatment of individuals by their employer and by all employees in the organisation, through their own behaviour and through the policies and practices of their employer.<sup>17</sup>

4.15 In 2013, the RCSA is conducting a review of its Code. The ALRC’s proposal that the review consider ways in which the RCSA Code could emphasise client

<sup>13</sup> Law Council of Australia, *Submission 46*. See also JobWatch, *Submission 25*.

<sup>14</sup> The RCSA Code is a non-prescribed voluntary industry code of conduct. The Australian Competition and Consumer Commission provides guidance to industry associations developing such codes but has no formal enforcement role. For prescribed industry codes and ACCC enforcement powers see *Competition and Consumer Act 2010* (Cth) pt IVB.

<sup>15</sup> Recruitment and Consulting Services Association of Australia and New Zealand, *Code for Professional Conduct*, General Principle 1.

<sup>16</sup> Australian Human Resources Institute, *By-Law 1: Code of Ethics and Professional Conduct*.

<sup>17</sup> *Ibid.*

diversity, constructive engagement with mature age job seekers and age-related anti-discrimination and industrial relations legislative obligations,<sup>18</sup> was supported by a number of key stakeholders.<sup>19</sup> For example, the South Australian Government supported including the ‘principle of respect of client diversity and other minimum standards of professional and ethical conduct that discourage age discrimination practices across the recruitment industry’ in the RCSA Code.<sup>20</sup> Adage suggested that

every opportunity should be taken to leverage this review to campaign for mature age workers and making this audience a feature of the review—even a review is a marketing opportunity.<sup>21</sup>

4.16 The Code of Professional Practice developed by the Recruitment and Employment Confederation (REC) of the United Kingdom (UK Code) represents a useful model.<sup>22</sup> The UK Code is binding on all corporate members of the REC and their associated companies.<sup>23</sup> 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.<sup>24</sup>

4.17 The RCSA stated that it was committed to actively considering ‘ways in which the Code may further emphasise diversity, engagement with mature aged workers and responsibilities within its upcoming review’.<sup>25</sup> In addition, AHRI submitted that ‘there could be some value for AHRI to undertake an equivalent code-of-conduct review or a survey on the matter with our members, and we will look at the matter’.<sup>26</sup>

18 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–2.

19 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*; ACTU, *Submission 88*; Australian Human Resources Institute, *Submission 87*; Brotherhood of St Laurence, *Submission 86*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; Diversity Council of Australia, *Submission 71*.

20 Government of South Australia, *Submission 95*.

21 Adage, *Submission 69*.

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

23 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](http://www.rec.uk.com/about-recruitment/diversity/diversity-signthepledge)> at 21 March 2013.

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

25 Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

26 Australian Human Resources Institute, *Submission 87*.

4.18 Conducting a review of industry codes of conduct would provide a useful opportunity to consider amendments, including to address barriers to workforce participation faced by mature age job seekers in the context of recruitment. In the ALRC's view, the most useful additions to such codes relate to diversity, engagement with mature age job seekers and legislative obligations. Such reviews also provide a timely opportunity to consider intersectional discrimination and difficulties faced by Indigenous mature age job seekers as well as those from culturally and linguistically diverse communities and job seekers with disability.

**Recommendation 4-1** 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 could 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.

**Recommendation 4-2** The Australian Human Resources Institute should review its Code of Ethics and Professional Conduct to consider ways in which the Code could 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**

4.19 The ALRC recommends that industry bodies such as AHRI and the RCSA provide recruitment consultants with ongoing training and guidance material about engaging constructively with and recruiting mature age job seekers. The training should be regular, consistent and targeted. This work should be conducted with support from the Australian Government, Australian Human Rights Commission (AHRC), unions, industry bodies and community organisations.

4.20 The results of a 2012 survey of recruitment professionals conducted by AHRI indicated approximately one-third of respondents (35%) believed their organisation was biased to some extent against employing mature age workers.<sup>27</sup> The survey also found that 56% of respondents considered negative perceptions of mature age people influenced employment decisions to some extent in their organisation or were unsure

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<sup>27</sup> Australian Human Resources Institute, *Mature Age Workforce Participation: HR Pulse Survey Report* (2012), 5.

whether employment decisions were influenced by such perceptions.<sup>28</sup> This was echoed in submissions to this Inquiry. For example, the South Australian Government, expressed the view that ‘discrimination on the basis of age is a prominent issue in the recruitment practices of many Australian private recruitment agencies’.<sup>29</sup>

4.21 In addition, JobWatch noted that many ‘recruitment agencies do not know or understand their legal obligations’,<sup>30</sup> and 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’.<sup>31</sup> AHRI conceded that ‘some organisations could be more conscious of their legal obligations in the area of workplace age discrimination’.<sup>32</sup>

4.22 However, it appears that discriminatory practices and reluctance to engage mature age workers may arise as a result of recruiters’ ‘own view of older workers [as well as] under instructions (implicit or otherwise) from their clients’.<sup>33</sup> The ALRC makes a number of recommendations with respect to employers later in this chapter.

4.23 Addressing discriminatory treatment of mature age workers primarily requires broad attitudinal and cultural change. Many of the measures necessary to facilitate such change require multifaceted solutions, and some go beyond the scope of a law reform project like this Inquiry. For example, several key reports and a number of stakeholders have emphasised the need to provide labour market information, re-training and skills development, career guidance and other job-readiness assistance to mature age job seekers.<sup>34</sup>

4.24 The ALRC suggests that the development and provision of education, training and guidance material for the recruitment industry about mature age job seekers may go some way to addressing these issues. This approach was supported by stakeholders.<sup>35</sup> It is designed to increase the awareness of those in recruitment of the

28 Australian Human Resources Institute, *Submission 87*.

29 Government of South Australia, *Submission 30*. See also Brotherhood of St Laurence, *Submission 54*; Diversity Council of Australia, *Submission 40*; WA Equal Opportunity Commission, *Submission 23*.

30 JobWatch, *Submission 25*. See also ACTU, *Submission 38*.

31 Diversity Council of Australia, *Submission 40*. See also Law Council of Australia, *Submission 46*.

32 Australian Human Resources Institute, *Submission 87*.

33 National Seniors Australia, *Submission 27*.

34 See, eg, National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation; Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011); The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010).

35 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*; ACTU, *Submission 88*; Australian Human Resources Institute, *Submission 87*; Brotherhood of St Laurence, *Submission 86*; Diversity Council of Australia, *Submission 71*; South Australian Equal Opportunity Commission, *Submission 70*; Adage, *Submission 69*; Queensland Tourism Industry Council, *Submission 67*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*; 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*.

benefits of mature age workers, the difficulties mature age job seekers may face, as well as recruiter obligations and can build on existing developments in this area.

4.25 Stakeholders outlined a range of existing initiatives that could be extended or adapted in implementing this recommendation. For example, the RCSA submitted that it has coordinated a number of education and training programs focusing on diversity, including working with mature age workers, and in 2013 will be rolling out a Participation Forum with the aim of engaging Government, recruiters, employers and candidates to increase workforce participation.<sup>36</sup>

4.26 AHRI noted it has

developed a workshop program on ‘Unconscious Bias’ that is marketed to organisations and individual practitioners and which takes up issues related to bias in recruitment, retention and promotion practices with respect to various sub-groups in the community such as those that relate to employment and ethnicity, religion, gender, disability, sexual preference and age.<sup>37</sup>

4.27 AHRI has also conducted workshops including ‘Older Workers and Younger Managers’ and runs an annual National Diversity and Inclusion Conference. In addition, the *Investing in Experience Toolkit*, a practical guide developed in partnership with the Australian Industry Group (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 that provides a useful model for guidance material.<sup>38</sup>

4.28 Both AHRI and the RCSA indicated they would be ‘open to developing other relevant intellectual property that could be used for training purposes in mature age employment’.<sup>39</sup> The RCSA indicated it proposes a ‘survey of members to gather information about workplace practices of members in working with mature aged candidates’.<sup>40</sup> In addition, the RCSA and AHRI Codes are supported by resource and education programs and the organisations have a Memorandum of Understanding in place that provides the basis for close cooperation between the two, including coordinated education and training programs.<sup>41</sup> This provides a solid basis for the development and provision of the recommended education, training and guidance material.

4.29 However, AHRI cautioned that

people often do not see this as a compliance area of HR practice despite the prevalence of anti-discrimination laws, and so getting engagement that amounts to course enrolments can be difficult.<sup>42</sup>

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36 Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

37 Australian Human Resources Institute, *Submission 87*.

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

39 Australian Human Resources Institute, *Submission 87*.

40 Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

41 *Ibid.*

42 Australian Human Resources Institute, *Submission 87*.

4.30 Adage emphasised that, in light of the high turnover of recruitment consultants, regular and consistent training is important, and that

we need to be careful we don't feed into negative stereotypes of mature workers through dissemination of bulky, formal and outdated communications. The messaging and communication methods need to appeal to these individuals we are trying to influence.<sup>43</sup>

4.31 In addition, the Federation of Ethnic Communities' Councils of Australia (FECCA) emphasised the barriers faced by particular groups of mature age workers, including for example those from culturally and linguistically diverse communities.<sup>44</sup> In the course of developing education, training and guidance material, ways these could appropriately address the barriers faced by Indigenous people, mature age job seekers from culturally and linguistically diverse backgrounds and those with disability should be considered.

**Recommendation 4-3** 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

to assist recruitment agencies and consultants to engage constructively with, and recruit, mature age job seekers.

### Recognition of best practice

4.32 A number of stakeholders have emphasised the importance of best practice approaches in the recruitment of mature age workers.<sup>45</sup> The ALRC recommends that both AHRI and the RCSA should recognise excellence in initiatives and programs involving the recruitment of mature age workers, including in workplace awards.

4.33 Recognition of best practice is particularly important in light of evidence suggesting that some 'recruiters may fail to provide an appropriate level of service' to mature age job seekers.<sup>46</sup> A 2012 survey of mature age job seekers conducted by

43 Adage, *Submission 69*.

44 See, eg. Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*.

45 Law Council of Australia, *Submission 96*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*; South Australian Equal Opportunity Commission, *Submission 70*; Adage, *Submission 69*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*; and importantly Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*. See also: COTA, *Submission 51*; Comcare, *Submission 29*.

46 Government of South Australia, *Submission 30*.

Adage found that 88% of respondents were ‘dissatisfied with the level of response received from recruiters’.<sup>47</sup>

4.34 The work of mature age-specific recruitment initiatives and agencies are an important development in supporting workforce participation by mature age persons.<sup>48</sup> In addition, formal public recognition of employers, recruitment agencies or consultants who develop initiatives or workplace processes geared towards mature age job seekers and workers is important in engendering cultural and practical change.

4.35 Both AHRI and the 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.<sup>49</sup> The RCSA submitted that it will

actively consider the inclusion of a Workforce Participation Award within the awards program to provide public recognition of best practice from the recruitment industry in supporting workforce participation and diversity within the workforce, including mature aged workers.<sup>50</sup>

4.36 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.<sup>51</sup>

**Recommendation 4–4** 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)

4.37 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. The *Fair Work Act* regulates ‘national system’ employers and employees.<sup>52</sup> Employment that is not covered under the national industrial relations system remains regulated by the relevant state

47 Adage, ‘Mature Jobseekers Not Happy With Recruiters, Employers’ (Press Release, 13 November 2012).

48 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 21 March 2013.

49 Australian Human Resources Institute, *Age Diversity in the Workplace Award* <www.awards.ahri.com.au/diversity/age\_diversity.php> at 21 March 2013.

50 Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

51 AARP, *Best Employers for Workers Over 50 Award—International* <http://aarpinternational.prod.bridgelinesw.net/aarp-international/best-employers---international> at 21 March 2013.

52 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.

industrial relations systems. However, some entitlements under the *Fair Work Act* extend to non-national system employees.<sup>53</sup> The Act also creates a compliance and enforcement regime and establishes several bodies to administer the Act, including the Fair Work Commission (FWC)—previously Fair Work Australia—and the FWO.

4.38 As outlined in Chapter 1, in August 2012 the Australian Government released the final Report of the Fair Work Act Review.<sup>54</sup> On 1 January 2013, the provisions of the *Fair Work Amendment Act 2012* (Cth) implementing some of the Review's recommendations took effect.<sup>55</sup> In March 2013, the Fair Work Amendment Bill 2013 (Cth) was introduced into Parliament.<sup>56</sup>

4.39 The ALRC makes recommendations about a number of aspects of the *Fair Work Act* to address legal barriers to workforce participation by mature age workers, including:

- the National Employment Standards (NES), in particular the right to request flexible working arrangements and provisions relating to notice of termination of employment;
- modern awards; and
- the general protections provisions.

### **Flexible working arrangements**

4.40 There are a number of grounds upon which the right to request flexible work arrangements under the *Fair Work Act* could be extended. However, the Terms of Reference for this Inquiry require the ALRC to focus on barriers to work for mature age persons. There are two possible grounds upon which an extension is likely to provide most assistance to mature age workers: extending the right to all mature age workers on the basis of their age; or to all employees who have caring responsibilities, a high proportion of whom are mature aged.<sup>57</sup> The ALRC prefers the latter approach

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

54 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012). The Australian Government had committed to reviewing the operation of the Act two years after its commencement: Explanatory Memorandum, Fair Work Bill 2008 (Cth).

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

56 Fair Work Amendment Bill 2013 (Cth). Following introduction the Bill was referred to the Senate Standing Committees on Education Employment and Workplace Relations which is due to report in May 2013 and the House of Representatives Standing Committee on Education and Employment. For Australian Government announcements about relevant amendments, see, eg: B Shorten (Minister for Employment and Workplace Relations), 'Gillard Government to Further Enhance Fair Work Act' (Press Release, 8 March 2013); B Shorten (Minister for Employment and Workplace Relations), 'Expanding the Right to Request Flexible Work Arrangements to Help Modern Australian Families' (Press Release, 11 February 2013).

57 In light of the often gendered nature of caring, such a reform is of particular importance to mature age women: see, eg, Chapter 2.

and recommends that s 65 of the *Fair Work Act* be amended to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

### ***The importance of flexibility***

4.41 The Consultative Forum on Mature Age Participation 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’.<sup>58</sup> Flexible working arrangements may allow mature age workers to prolong workforce participation, maintain workforce attachment and facilitate the participation of those whose caring responsibilities affect their ability to participate in the paid workforce. This is particularly important for mature age workers: Australian Bureau of Statistics (ABS) figures indicate that the likelihood of a person providing care to a person with disability or an elderly person increases with age and that the majority of carers in Australia are aged 45 years and over.<sup>59</sup> In addition, the Diversity Council of Australia submitted that findings from its ‘Grey Matters’ survey highlighted that

A considerable number of mature-age employees reported having current caring responsibilities. Some 13% reported current caring roles for elderly family members, 13% for children and grandchildren, 9% for a family member with health issues and 7% for a family member with a disability.<sup>60</sup>

4.42 The Advisory Panel on the Economic Potential of Senior Australians emphasised 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.<sup>61</sup>

4.43 As a result, examining a range of legislative and other mechanisms for ensuring access to flexible working arrangements is central to enabling mature age workers to enter, re-enter or remain in the paid workforce.<sup>62</sup>

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58 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.

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

60 Diversity Council of Australia, *Submission 40*.

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

62 A number of stakeholders made submissions with respect to the structure and operation of individual flexibility arrangements (IFAs). However, as outlined in the Discussion Paper, given the limited use of IFAs by mature age workers and the systemic nature of any reforms aimed at IFAs, the ALRC does not consider it is appropriate to make any recommendations about IFAs: Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), [2.67]–[2.71].

***The right to request flexible working arrangements***

4.44 Under the NES,<sup>63</sup> an employee who is a parent or otherwise has responsibility for a child under school age, or under 18 and has a disability, may request a change in working arrangements to assist with the care of that child.<sup>64</sup> To be eligible to request flexible work arrangements, the employee must satisfy certain service requirements.<sup>65</sup> Such a request may only be refused by an employer on ‘reasonable business grounds’.<sup>66</sup>

4.45 The ALRC’s proposal to extend the right to request flexible working arrangements to all employees who have caring responsibilities received support from a number of key stakeholders.<sup>67</sup> A number of bodies and reports have recommended the extension of the provision along these lines. For example, 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 those who are caring for adults with disabilities, mental illness, chronic illness or who are frail aged’.<sup>68</sup> 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’.<sup>69</sup> In addition, in 2013 the AHRC’s Report, *Investing in Care*, recommended extending the right to ‘include parents of children of all ages and to encompass all forms of family and carer responsibilities such as disability and elder care’.<sup>70</sup>

63 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 and cannot be excluded by an enterprise agreement or modern award, discussed below. The NES were introduced following significant consultation to provide a ‘safety net which is fair for employers and employees and supports productive workplaces’: Explanatory Memorandum, Fair Work Bill 2008 (Cth), 25. The NES replaced the Australian Fair Pay and Conditions Standard (AFPCS) and many of the entitlements under the AFPCS and then NES arise from a long history of test cases: 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.

64 *Fair Work Act 2009* (Cth) 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.

65 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: *Ibid* s 65.

66 *Ibid* s 65(5).

67 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–5. See, eg, National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Carers Australia, *Submission 81*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*; Queensland Tourism Industry Council, *Submission 67*; Suncorp Group, *Submission 66*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*; The Employment Law Centre of WA, *Submission 57*.

68 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.

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

70 Australian Human Rights Commission, *Investing in Care: Recognising and Valuing Those Who Care*, Research Report, Volume 1 (2013), 38.

4.46 Similarly, 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. It also applies to those with caring responsibilities for a wide range of adults including: relatives, spouses, civil partners and other household members.<sup>71</sup>

4.47 Some stakeholders and reports have suggested a wider approach—including extending the right to request on the basis of age—or more broadly.<sup>72</sup> For example, Women in Social and Economic Research (WiSER) suggested that there are a range of reasons aside from caring why mature age persons may require flexible working arrangements, including for example:

poor health, injuries and other life circumstances can make it difficult for older people to work full-time, standard hours. The RTR is important to all older workers and not only those with informal caring roles.<sup>73</sup>

4.48 The Advisory Panel on the Economic Potential of Senior Australians recommended that the right be extended to persons aged 55 and over.<sup>74</sup> In 2012, the Fair Work Amendment (Better Work/Life Balance) Bill 2012 was introduced that would, among other things, amend the *Fair Work Act* by extending the right to request to all employees. It would also remove the flexible working arrangements provisions from the NES and create a new part of the Act.<sup>75</sup> In addition, in March 2013, the Fair Work Amendment Bill 2013 (Cth) was introduced to amend the *Fair Work Act*. The proposed amendments include extending the right to request to a range of workers, including those with caring responsibilities and employees aged 55 years and over.<sup>76</sup>

4.49 However, peak industry bodies such as the Australian Chamber of Commerce and Industry (ACCI) and the Ai Group have expressed strong opposition to the extension of the right to request flexible working arrangements provisions on the basis of either caring responsibilities or mature age.<sup>77</sup> For example, the Ai Group emphasised that:

in practice, many mature age workers request and are granted flexible work arrangements without using the right to request provisions. This is the result of open dialogue between employees and their employers about achieving meaningful

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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 See, eg, Women in Social & Economic Research (WiSER), *Submission 72*.

73 Ibid.

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

75 The Bill also includes other significant changes, including 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. At the time of writing the Bill was before the House of Representatives.

76 Fair Work Amendment Bill 2013 (Cth) pt 3.

77 Australian Industry Group, *Submission 97*; Australian Chamber of Commerce and Industry, *Submission 85*; Chamber of Commerce and Industry of Western Australia, *Submission 76*.

flexibility in the workplace. This, in our view, is a more effective means of promoting working arrangements that balance the needs of mature age employees with the operational requirements of their employers.<sup>78</sup>

4.50 Stakeholders also expressed concerns about possible stigmatisation of mature age workers if the right to request were extended to mature age workers on the basis of age alone.<sup>79</sup>

***On what basis should the right to request be extended?***

4.51 Amendment to the NES would involve a significant change to the *Fair Work Act* framework. However, in the ALRC's view, amendment of the NES to extend the right to request is an important reform to enable the workforce participation of mature age persons.

4.52 The ALRC considers extending the right to request to all employees with caring responsibilities is the preferable approach to reform in this area. Given that the largest proportion of carers are mature age people, extension of the right to request to employees with caring responsibilities would predominantly benefit mature age workers. Extension on this basis would provide mature age workers with the right to request flexible working arrangements to accommodate their caring responsibilities and address a key barrier to ongoing workforce participation. Such reform balances one of the key objects underlying the right to request—to help employees balance their work and family responsibilities by providing flexible working arrangements—with the need to enable the workforce participation of mature age workers.<sup>80</sup> 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. It would also provide a statutory basis for such requests. Extension of the right to request on this basis, rather than on the basis of age alone, is also consistent with an incremental purposive extension of the right to request.

**Recommendation 4–5** Section 65 of the *Fair Work Act 2009* (Cth) should be amended to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

***Complementary approaches***

4.53 In addition to recommending extension of the right to request provisions, the ALRC suggests a range of other complementary approaches to encourage the uptake of flexible working arrangements by mature age workers.

78 Australian Industry Group, *Submission 97*.

79 See, eg, Brotherhood of St Laurence, *Submission 54*; COTA Victoria, *Consultation*, by telephone, 30 May 2012.

80 *Fair Work Act 2009* (Cth) s 3.

4.54 The Australian Work and Life Index 2012 indicated that 20.6% of Australian employees had made a request for a change to working arrangements in the past 12 months, although the proportion that relied upon the formal right to request provision is unclear.<sup>81</sup> The survey indicated that a majority of Australian employees were unaware of the existence of the right to request provisions,<sup>82</sup> and that there has been no significant change in request-making following enactment of the right to request provisions.<sup>83</sup>

4.55 Further, FECCA emphasised that provisions such as the right to request may be unfamiliar concepts for mature age people from culturally and linguistically diverse backgrounds. As a result, ‘they may not have the confidence to assert their rights, even if they are aware of them, for a range of inter-linked reasons such as unfamiliarity, distrust of institutions and a lack of confidence’.<sup>84</sup>

4.56 The ALRC recommends that, as part of the National Mature Age Workforce Participation Plan discussed in Chapter 3, attention be paid to ensuring that the legislative right to request is complemented by initiatives designed to encourage

worker and management knowledge of the new right, a commitment to genuinely enact the right ... worker confidence that they will not be directly or indirectly punished or stigmatised for asking, management’s perception that agreeing to requests is worthwhile and that unreasonable refusal will have negative consequences for them.<sup>85</sup>

4.57 There are a range of useful government and industry initiatives and reports focused on promoting flexible work arrangements as standard business practice that could contribute to achieving these changes.<sup>86</sup> For example, the Diversity Council of Australia outlined a range of strategies to ‘mainstream flexible work in the Australian labour market’, including changing language, building flexibility into business strategy, engaging at a management level as well as developing broader community awareness.<sup>87</sup> In their joint submission, DEEWR, DHS and FaHCSIA highlighted the role that teleworking initiatives and the Centre for Workplace Leadership may play in this area.<sup>88</sup>

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81 N Skinner, C Hutchinson and B Pocock, *Australian Work and Life Index 2012 The Big Squeeze: Work, Home and Care in 2012* (2012), 62.

82 *Ibid.*, 61.

83 *Ibid.*, 63.

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

85 N Skinner, C Hutchinson and B Pocock, *Australian Work and Life Index 2012 The Big Squeeze: Work, Home and Care in 2012* (2012), 60.

86 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*; AHRC *Investing in Care Toolkit* (2013); Department of Education, Employment and Workplace Relations, *Corporate Champions* <[www.deewr.gov.au/experience-corporate-champions](http://www.deewr.gov.au/experience-corporate-champions)> at 21 March 2013.

87 Diversity Council of Australia, *Submission 71*.

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

4.58 In addition, the ALRC's proposal that the FWO should develop a guide to negotiating and implementing flexible working arrangements for mature age workers,<sup>89</sup> received support from a range of stakeholders.<sup>90</sup>

4.59 The FWO has developed a fact sheet about the right to request as well as a Best Practice Guide on the use of individual flexibility arrangements. The ALRC recommends that the FWO, in consultation with unions, employer organisations and seniors organisations, amend the fact sheet and associated material to include information for mature age workers. A Best Practice Guide on the right to request could expand the information provided in the fact sheet and should: include case studies involving mature age workers; outline circumstances in which employees might seek flexible work arrangements; provide employers with guidance on considering and accommodating requests; and include model flexibility strategies. The material should be accessible for all members of the community—including Indigenous people, members of culturally and linguistically diverse communities and people with disability.

**Recommendation 4–6** The Fair Work Ombudsman (FWO) has developed material relevant to negotiating and implementing flexible working arrangements. The FWO should amend such material to include information for mature age workers, in consultation with unions, employer organisations and seniors organisations.

#### *Other concerns*

4.60 Many stakeholders expressed concerns, echoed in submissions to the Fair Work Act Review, about the current structure and operation of the right to request provision, including in relation to eligibility, its procedural nature, the limited availability of enforcement mechanisms and the grounds for refusal. For example, Carers Australia expressed particular concern about the provision failing to 'reflect the diversity of caring situations' and the service requirements which 'effectively remove the capacity for carers seeking to enter or re-enter the workforce to request flexible working arrangements'.<sup>91</sup>

4.61 The Law Institute of Victoria submitted that there should be a right of review for unsuccessful requests for flexible working arrangements and that the FWC should also

89 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–6.

90 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Carers Australia, *Submission 81*; Australian Federation of Disability Organisations, *Submission 78*; Queensland Tourism Industry Council, *Submission 67*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*.

91 Carers Australia, *Submission 81*.

have the power to make binding orders where a request for flexible working arrangements has been denied for reasons which do not amount to reasonable business grounds.<sup>92</sup>

4.62 The Australian Council of Trade Unions (ACTU) expressed the view that simply extending the scope of the right to request flexible work arrangements without amending the legislation to include real, enforceable procedural rights, does not address the fact the provision, in practice, is nothing more than a right to ask for something.<sup>93</sup>

4.63 Stakeholder concerns about the nature and awareness of the existing provision are significant and the Fair Work Act Review Panel made a number of recommendations for reform in this area.<sup>94</sup> The Fair Work Amendment Bill 2013 (Cth) provides a non-exhaustive list of what might constitute ‘reasonable business grounds’,<sup>95</sup> but does not appear otherwise to address these concerns. While recommending systemic reform of the provision goes beyond the scope of this Inquiry, the ALRC suggests that the Australian Government examine these concerns in developing any further proposed amendments to the *Fair Work Act*.

### Notice of termination of employment

4.64 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.<sup>96</sup> The amount of notice or payment in lieu of notice is determined according to the employee’s period of continuous service with the employer.<sup>97</sup> However, that period is increased by one week for employees over age 45 who have completed at least two years continuous service.<sup>98</sup> The ALRC recommends that the Australian Government consider amending s 117(3)(b) to increase this period.

4.65 The origins of the provision lie in the 1984 *Termination, Change and Redundancy Case* of the former Australian Conciliation and Arbitration Commission.<sup>99</sup> In deciding that employees over 45 years of age should be entitled to an additional week’s notice of termination after satisfying service requirements, the Commission noted that:

Extended notice based on age is also supported by the evidence before us which indicates that persons in higher age groups often find it more difficult to obtain and adapt to comparable work elsewhere.<sup>100</sup>

92 Law Council of Australia, *Submission 96*.

93 ACTU, *Submission 88*.

94 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 95–99, rec 5.

95 Fair Work Amendment Bill 2013 (Cth).

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

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

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

99 *Termination, Change and Redundancy Case* (1984) 1 IR 34.

100 *Ibid*.

4.66 Mature age people continue to remain unemployed for longer than their younger counterparts. In May 2012, the average duration of unemployment for people aged aged 45 and over was 62 weeks, compared to 34 weeks for job seekers aged 25–44.<sup>101</sup>

4.67 Evidence also 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.<sup>102</sup> 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’.<sup>103</sup>

4.68 Extending the minimum period of notice of termination may provide incentives for employers to retain mature age workers, given the additional costs potentially associated with terminating a mature age worker’s employment. Where the employment is terminated, the longer notice period would also provide the worker with additional time or remuneration to facilitate the job search process.

4.69 Stakeholder responses to extending the notice period were mixed.<sup>104</sup> For example, the Employment Law Centre of Western Australia submitted that ‘an increase in the minimum period of notice would reflect the greater difficulty that older employees may encounter in finding alternative employment’.<sup>105</sup> However, stakeholders such as ACCI and the Ai Group opposed any extension on the basis that the provision of additional notice for employees over 45 years is a ‘long-standing workplace standard’,<sup>106</sup> the ‘lack of evidence to justify it and [that] the unintended consequences would outweigh any perceived benefit’.<sup>107</sup>

4.70 The Australian Government has introduced two sets of legislative responses to the Fair Work Act Review. While the Fair Work Act Review determined that the notice of termination provisions ‘appear to be operating as intended’,<sup>108</sup> the ALRC suggests that the Australian Government should consider whether these provisions could be

101 DEEWR, DHS and FaHCSIA, *Submission 101*, 47.

102 Westfield Wright Pty, *Attitudes to Older Workers* (2012), prepared for the Financial Services Council, 13. Research also suggests mature age workers are targeted in times of economic downturn: see, eg, M Bittman, M Flick and J Rice, *The Recruitment of Older Australian Workers: A Survey of Employers in a High Growth Industry*, Social Policy Research Centre Report 6/01 (2001), 12.

103 JobWatch, *Submission 25*.

104 In the Discussion Paper, the ALRC proposed that the Australian Government consider amending s 117(3)(b) of the *Fair Work Act* to provide 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 four weeks, rather than one week: Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–8.

105 The Employment Law Centre of WA, *Submission 57*. Other stakeholders in support included ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Women in Social & Economic Research (WiSER), *Submission 72*; R Christiansen, *Submission 58*.

106 Australian Industry Group, *Submission 97*.

107 Australian Chamber of Commerce and Industry, *Submission 85*. Caution recommended by Diversity Council of Australia, *Submission 71*.

108 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 104.

amended to encourage retention of mature age employees. The ALRC therefore recommends that in the course of considering amendments to the *Fair Work Act*, the Australian Government should consider amending the provision to increase the minimum notice period for employees over 45 years of age.

**Recommendation 4–7** 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. In the course of amending the *Fair Work Act 2009* (Cth), the Australian Government should consider increasing this period.

### Modern awards

4.71 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.<sup>109</sup> The ALRC considers that the inclusion or modification of terms in modern awards, which may assist in addressing barriers to workforce participation for mature age workers, should be considered in the course of the 2014 review of modern awards.

#### *How do modern awards operate?*

4.72 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 included in a modern award.<sup>110</sup> Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement<sup>111</sup> and is not a ‘high income employee’<sup>112</sup> may be covered by a modern award.<sup>113</sup> However, ‘only 15.2% of the Australian workforce has their pay and conditions set by awards, while approximately 80% derive their pay and conditions from collective and individual agreements’.<sup>114</sup> 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 the FWC.

109 Beginning in 2008, the Australian Industrial Relations Commission, and then its successor Fair Work Australia (now Fair Work Commission) 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. The Fair Work Commission continues the modernisation process including by conducting a review of modern awards as well as in relation to enterprise instruments and termination of instruments. See, eg, Fair Work Commission, *About Award Modernisation* <[www.fwc.gov.au](http://www.fwc.gov.au)> at 21 March 2013.

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

111 *Ibid* s 57.

112 *Ibid* s 47(2).

113 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.

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

**Reviews of modern awards**

4.73 In 2012–2013, the FWC is undertaking a review of all modern awards, based on applications to vary modern awards.<sup>115</sup> The scope of the 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.<sup>116</sup> The current review is scheduled to conclude in May 2013.<sup>117</sup>

4.74 In addition, the *Fair Work Act* provides for review of each modern award every four years.<sup>118</sup> The first review of this kind will commence in 2014, and the FWC has indicated that it will be broader in scope than the 2012–2013 review.<sup>119</sup> The reviews are ‘the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.<sup>120</sup>

4.75 The ALRC proposed that, in the course of the 2014 review, the inclusion or modification of terms in the awards to encourage workforce participation of mature age workers should be considered.<sup>121</sup> The proposal received support from many stakeholders.<sup>122</sup>

4.76 However, in its joint submission, DEEWR, DHS and FaHCSIA suggested that ‘encouraging mature worker participation might be more effectively pursued through other initiatives’.<sup>123</sup> The Chamber of Commerce and Industry of Western Australia (CCIWA) opposed the proposal. It submitted that such terms are ‘not an appropriate matter for inclusion in awards and in-turn should not be considered during the four-yearly award review process’, as modern awards

set minimum terms and conditions of employment (as opposed to statements of aspiration). CCI[WA] submit that terms that relate to encouraging mature age workers participation in the workforce cannot be appropriately categorised as a term or condition of employment; and if such terms are included, they will increase the already onerous regulatory burden on employers.<sup>124</sup>

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115 See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6. The *Fair Work Act 2009* (Cth) 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.

116 The modern award review is unlikely to revisit issues already determined during the award modernisation process unless there are cogent reasons to do so, such as where there has been a significant change in circumstances: *Modern Award Review 2012 [2012] FWAFB 5600* at [89], [99].

117 For an outline and timetable on the Review, see *Modern Award Review 2012–Timetable [2012] FWA 5721*.

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

119 *Modern Award Review 2012 [2012] FWAFB 5600*, [99].

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

121 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–7.

122 Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*; DOME Association, *Submission 62*; JobWatch, *Submission 60*.

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

124 Chamber of Commerce and Industry of Western Australia, *Submission 76*.

4.77 While it may be a matter for parties to make applications for variation in the course of the review,<sup>125</sup> the ALRC considers that the legislatively-mandated FWC review process presents the appropriate mechanism for the FWC to consider issues relating to mature age workers in the context of modern awards.

***What should be considered in the 2014 review?***

4.78 The ALRC considers that s 139(1) of the *Fair Work Act*—which outlines the terms that may be included in modern awards—is sufficiently broad to allow scope for the inclusion of any such additional terms as required. However, terms that are discriminatory must not be included in modern awards, an issue that will need to be considered by the FWC.<sup>126</sup>

4.79 In exercising its functions, the FWC 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.<sup>127</sup>

4.80 In addition, stakeholders raised a number of issues that could be considered in the review. For example, the Government of South Australia raised 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.<sup>128</sup>

4.81 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’.<sup>129</sup>

4.82 The 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.<sup>130</sup>

4.83 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

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125 See, eg, Australian Industry Group, *Submission 97*.

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

127 *Ibid* s 578.

128 Government of South Australia, *Submission 30*.

129 *Ibid*.

130 ACTU, *Submission 38*. See also ACTU, *Submission 88*.

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).<sup>131</sup>

4.84 In light of the issues outlined above, the ALRC recommends that, in the course of the 2014 FWC review, the inclusion or modification of terms to remove barriers to workforce participation by mature age workers should be considered.

**Recommendation 4–8** From 2014, the Fair Work Commission will conduct the first four-yearly review of modern awards. The review should consider the inclusion or modification of terms to encourage workforce participation of mature age workers.

### Interaction between the *Fair Work Act* and anti-discrimination legislation

4.85 There is substantial overlap between the general protections provisions under the *Fair Work Act* and anti-discrimination legislation at a Commonwealth, state and territory level.<sup>132</sup> The ALRC recommends that the AHRC and the FWC should develop guidance to clarify how these interact and outline potential avenues for redress under this legislation for mature age workers.

4.86 A number of stakeholders suggested that ‘Commonwealth anti-discrimination laws should cover the field in discrimination legislation’.<sup>133</sup> However, as explained in the joint submission from DEEWR, DHS and FaHCSIA,

among the reasons the Government included anti-discrimination provisions in the Act’s general protections was to address situations where breaches of both workplace relations laws and anti-discrimination obligations occurred. This allows most employment-related matters to be dealt with simultaneously, rather than the affected parties participating in multiple claims in multiple jurisdictions.<sup>134</sup>

4.87 Other stakeholders, such as Victoria Legal Aid, noted that:

due to the complexity of Australian anti-discrimination law and the various options for legal redress that are available, it is common for clients to make a complaint under legislation that is not the most appropriate to the subject matter of their complaint.<sup>135</sup>

4.88 Victoria Legal Aid suggested that one improvement aimed at addressing this issue would involve updating and simplifying information available on the National Anti-Discrimination Information Gateway to

assist people, particularly those who do not have legal representation, to understand and evaluate the available options. For example, an aggregated comparative table setting out the protected attributes, requirements and limitations and the available

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

132 For general protections see *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

133 Diversity Council of Australia, *Submission 71*; Suncorp Group, *Submission 66*.

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

135 Victoria Legal Aid, *Submission 83*.

remedies under the respective statutes would assist potential complainants to make this assessment.<sup>136</sup>

4.89 The ALRC considers that the AHRC and the FWC should work cooperatively, including with the Australian Council of Human Rights Agencies,<sup>137</sup> to develop guidance which clarifies the interaction of the general protections provisions under the *Fair Work Act* and Commonwealth, state and territory anti-discrimination legislation. The guidance should also outline the potential avenues for redress for mature age workers.

**Recommendation 4-9** The Australian Human Rights Commission and the Fair Work Commission, in consultation with the Australian Council of Human Rights Agencies, should develop guidance to:

- (a) clarify the interaction of the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth, state and territory anti-discrimination legislation; and
- (b) outline potential avenues for redress under this legislation for mature age workers.

## Compulsory retirement

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

4.91 The ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. This position was strongly supported by stakeholders throughout the Inquiry.<sup>138</sup> The imposition of compulsory retirement fails to account for the differing capacities of individuals at older ages, reinforces stereotypes about the abilities of mature age workers and reduces utilisation of the workforce contribution of mature age workers.<sup>139</sup> National Seniors emphasised that,

136 Ibid.

137 The Australian Council of Human Rights Agencies is comprised of Australia's national human rights institution, the AHRC, and human rights bodies at the state and territory level.

138 See, eg, Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Women in Social & Economic Research (WiSER), *Submission 72*; Suncorp Group, *Submission 66*; JobWatch, *Submission 60*; Government of South Australia, *Submission 30*.

139 Law Council of Australia, *Submission 46*; JobWatch, *Submission 25*. See also World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011), 47.

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.<sup>140</sup>

4.92 It may be necessary in some circumstances to assess a person's capacity to remain in their position. For example, the Ai Group emphasised that in some cases age-based restrictions 'are necessary and justified on health and safety grounds'.<sup>141</sup> However, individual capacity-based assessments can account for health and safety concerns, and are preferable to imposing a compulsory retirement age.<sup>142</sup> 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 job, regardless of their age',<sup>143</sup> an approach echoed in submissions by other stakeholders.<sup>144</sup>

4.93 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, such bodies may benefit from guidance. The ALRC proposed that the AHRC 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'.<sup>145</sup>

4.94 Stakeholders also emphasised the need for industry and professional bodies to recognise and account for potential barriers faced by mature age workers in renewing their professional qualifications. For example, the ACTU submitted that

re-qualification schemes often require workers to attend professional development training before their license can be renewed. In some industries, due to limited resources there may not be sufficient training opportunities for all staff. Older workers may therefore be denied access to career and professional development training in favour of younger workers, which can negatively affect their re-qualification.<sup>146</sup>

4.95 The ACTU suggested that, 'if an older worker can demonstrate that they have attempted to attend refresher training but have been denied the opportunity, they should not be restricted from re-registering on this basis' alone.<sup>147</sup>

4.96 The ALRC considers that the provision of national principles or guidelines may assist industry and professional bodies in reviewing licensing or re-qualification requirements with a view to removing age-based restrictions in favour of capacity-based requirements. Such principles and guidelines may also assist to address issues

140 National Seniors Australia, *Submission 27*.

141 Australian Industry Group, *Submission 37*. See also JobWatch, *Submission 60*.

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

143 Law Council of Australia, *Submission 46*.

144 See, eg Suncorp Group, *Submission 66*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*.

145 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–9.

146 ACTU, *Submission 88*. See also Australian Active Doctors Association Incorporated, *Submission 35* in relation to senior doctors.

147 ACTU, *Submission 88*.

such as those raised with respect to access to training opportunities and should be developed in cooperation with industry and professional bodies.

**Recommendation 4–10** Professional associations and industry representative groups are often responsible for developing or regulating licensing or re-qualification requirements. The Australian Human Rights Commission should facilitate the development of 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.

### Judicial and quasi-judicial officers

4.97 The ALRC recommends that the Australian Government should initiate an independent inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

4.98 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.<sup>148</sup> While the section provides that Parliament may make a law fixing a lower age, it does not make such provision for a higher age.<sup>149</sup>

4.99 There is jurisdictional inconsistency in the compulsory retirement provisions relating to other 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.<sup>150</sup> Inconsistency also arises as a result of provisions for the appointment of acting judges and magistrates in some jurisdictions beyond these ages.<sup>151</sup>

4.100 While such 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'.<sup>152</sup>

148 *Australian Constitution* s 72.

149 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.

150 *Federal Magistrates Act 1999* (Cth) s 9, sch 1 pt 1 cl 1(4); *Judicial Officers Act 1986* (NSW) s 44(1), (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), (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).

151 For example, in NSW acting judges and magistrates can be appointed for 12 months up to either age 75 or 77: *Supreme Court Act 1970* (NSW) s 37; *District Court Act 1973* (NSW) s 18; *Land and Environment Court Act 1979* (NSW) s 11; *Local Court Act 2007* (NSW) s 16.

152 Government of South Australia, *Submission 30*.

4.101 In the Discussion Paper, the ALRC proposed that the Australian Government should initiate an inquiry to consider removing the compulsory ages of judicial and quasi-judicial appointments.<sup>153</sup> Key stakeholders, including the Law Council, expressed support for such a review.<sup>154</sup>

4.102 The ALRC prefers this approach to recommending immediate removal of compulsory retirement ages as suggested by some stakeholders,<sup>155</sup> particularly in light of the complexities associated with removing compulsory retirement for judicial officers such as Constitutional requirements and public policy reasons for compulsory retirement. There may also be flow-on effects with respect to judicial pensions.<sup>156</sup>

4.103 The ALRC suggests that the inquiry should be conducted in cooperation with state and territory governments and consider current inconsistencies and alternatives to compulsory retirement ages. At a minimum the inquiry should consider national consistency in the compulsory retirement ages of judicial and quasi-judicial appointments.

**Recommendation 4–11** The Australian Government should initiate an independent inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

### Military personnel

4.104 The ALRC recommends that the Australian Government initiate an independent inquiry to review the compulsory retirement ages for Australian Defence Force (ADF) personnel.

4.105 The compulsory retirement age for ADF personnel is 60 years and 65 years for reservists. 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 to 30 June 2012, 35 ADF personnel were granted an extension to their compulsory retirement age.<sup>157</sup>

4.106 While the current average number of years of service for ADF personnel is nine years,<sup>158</sup> 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.<sup>159</sup>

153 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–10.

154 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; JobWatch, *Submission 60*.

155 See, eg. National Seniors Australia, *Submission 27*.

156 See *Judges' Pensions Act 1968* (Cth).

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

158 *Ibid.*

159 *Ibid.* Of the 50 ADF personnel over 60 years of age, 49 were men and one was a woman.

4.107 The ALRC favours individual capacity-based assessments and proposed that the Australian government should initiate an inquiry to review the compulsory retirement ages for military personnel.<sup>160</sup>

4.108 While a number of stakeholders supported this approach,<sup>161</sup> some stakeholders expressed concerns. For example, 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’.<sup>162</sup> 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.<sup>163</sup>

4.109 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’.<sup>164</sup> However, ADSO did not oppose the current provision for the extension of compulsory retirement age by the Minister or Chief.

4.110 The Government of South Australia expressed concern that ‘mature military personnel in occupations associated with increased physical discomfort or physical demands may be further disadvantaged by increases to mandatory retirement ages’.<sup>165</sup> The ALRC is of the view that a shift to a capacity rather than age-based compulsory retirement regime is unlikely to disadvantage military personnel in this way. Rather, it would provide military personnel who wish to remain in the ADF beyond age 60 (or 65 for reservists) an opportunity, but no compulsion, to do so, thereby removing a barrier to work for mature age military personnel.

4.111 The Defence, Science and Technology Organisation, in partnership with the University of Wollongong, is currently completing a Physical Employment Standards Review Project.<sup>166</sup> The Department of Defence ‘plans to implement the new employment standards that focus on removing barriers for women across all three

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160 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–11.

161 See, eg, ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; JobWatch, *Submission 60*.

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

163 *Ibid.*

164 *Ibid.*

165 Government of South Australia, *Submission 95*.

166 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: Defence Science and Technology Organisation, Physical Employment Standards, <<http://www.dsto.defence.gov.au/research/6962/>> at 21 March 2013; G Combet (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.

Services in the first phase of its five year plan'.<sup>167</sup> The focus of the new standards is on removing barriers for women in the ADF. However, as this projects seeks to identify objective criteria for physical standards across the ADF, the ALRC suggests that this, and similar projects,<sup>168</sup> may provide a useful basis upon which to reconsider the compulsory retirement ages.

4.112 The ALRC therefore recommends that the Australian Government initiate an independent inquiry to review the compulsory retirement ages for ADF personnel. Recommending such a review recognises the concerns expressed by stakeholders 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. It should also consider 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.<sup>169</sup>

**Recommendation 4–12** The Australian Government should initiate an independent inquiry to review the compulsory retirement ages for military personnel.

## Regulation and monitoring framework

4.113 There are a number of bodies within the employment law framework that have responsibility for regulation and monitoring of obligations and requirements under legislation such as anti-discrimination and industrial relations legislation. In this section the ALRC examines the role of the FWO and recommends that in conducting national campaigns and audits the FWO should consider issues relating to mature age workers. The ALRC also considers the potential role of a new reporting framework or body, like that of Workplace Gender Equality Agency, with respect to age.

### A role for the FWO

4.114 The ALRC recommends that the FWO build into its national campaigns and audits, consideration of employment practices that affect mature age workers and job seekers.

<sup>167</sup> W Snowdon (Minister for Defence Science and Personnel), 'New Physical Standards Open Paths for Women in Defence' (Press Release, 27 November 2012).

<sup>168</sup> For example, arising from the research projects and studies presented at the First Australian Conference on Physiological and Physical Employment Standards: N Taylor and D Billing (eds), 'Physiological and Physical Employment Standards I' (Paper presented at Proceedings from the First Australian Conference on Physiological and Physical Employment Standards, Canberra, 27–28 November 2012).

<sup>169</sup> Compulsory retirement ages for most ADF personnel were increased in 2007. 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].

4.115 The ALRC considers that the FWO is well placed to play a key role in this area. The FWO is an independent statutory office created by the *Fair Work Act*.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup>

4.116 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*,<sup>173</sup> including through targeted compliance and audit campaigns. In addition, in October 2012, the FWO launched its first age discrimination prosecution.<sup>174</sup>

4.117 In the Discussion Paper, the ALRC proposed that the FWO ‘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’.<sup>175</sup>

4.118 A number of stakeholders supported the proposal.<sup>176</sup> However, the FWO submitted that it

conducts four national campaigns per year. In order to ensure that these campaigns provide the most benefit for the community, the FWO prepares a four year, evidence based, targeted campaign strategy focusing on high risk industries.<sup>177</sup>

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

171 *Ibid* s 682(1).

172 Fair Work Ombudsman, *Investigations* <<http://www.fairwork.gov.au/complaints/the-complaints-process/pages/investigations.aspx>> at 21 March 2013; Fair Work Ombudsman, *Audits and Campaigns* <[www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx](http://www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx)> at 21 March 2013.

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

174 FWO, ‘Court Action Over Restaurant’s Response to Employee’s Request for Long Service Leave’ (Press Release, 9 October 2012).

175 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–1.

176 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*; DOME Association, *Submission 62*.

4.119 While the recruitment industry was not identified as a high risk industry and is currently not included in the four year plan, the FWO indicated that it will ‘consider opportunities to address recruitment practices during targeted campaigns in priority industries’.<sup>178</sup> The FWO suggested that it could ‘address non-compliant recruitment practices affecting mature age job seekers and workers in the course of compliance and education activities’.<sup>179</sup>

4.120 The FWO can play a role in examining and addressing employment practices that affect mature age job seekers and workers across a range of industries. The ALRC recommends that in conducting its campaigns and audits, the FWO should consider issues relating to mature age workers and job seekers.

**Recommendation 4–13** In conducting national campaigns and audits to ensure compliance with Commonwealth workplace laws, the Fair Work Ombudsman should ensure issues relating to mature age workers and job seekers are considered.

### New reporting framework or body

4.121 In the Discussion Paper, the ALRC asked whether the Australian Government should 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, now the Workplace Gender Equality Agency (WGE Agency), or its reporting framework.<sup>180</sup>

4.122 The WGE Agency is a statutory authority with a role in administering the *Workplace Gender Equality Act 2012* (Cth) (WGE Act). It focuses on promoting gender equality, including through education, supporting employers to remove barriers to the full and equal participation of women and through fostering workplace consultation.<sup>181</sup>

4.123 Under the WGE Act, 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, consultation on gender equality issues and sex-based harassment and discrimination.<sup>182</sup> In addition, from the 2014–15 reporting period, evidence-based minimum standards will apply. The agency also has an ‘Employer of Choice for Women’ citation which

177 Fair Work Ombudsman, *Submission 100*.

178 Ibid.

179 Ibid.

180 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Question 2–3.

181 *Workplace Gender Equality Act 2012* (Cth).

182 Ibid. See also Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No 1) which establishes the specific reporting matters for the reporting period 1 April 2013 to 31 March 2014.

acknowledges organisations that are recognising and advancing women in their workplace.<sup>183</sup>

4.124 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. For example, the ACTU expressed its support for the establishment of an age-related body or framework suggesting that it would be likely to

encourage employers to monitor and analyse the employment patterns of older workers, any impact existing workplace policies, procedures and practices may have on older workers and the effectiveness of programs used to eliminate discrimination and promote equal employment opportunity for older workers.<sup>184</sup>

4.125 Similarly, Adage expressed the view that such a body or framework would ‘incentivise organisations to change behaviour in a productive and positive way’.<sup>185</sup>

4.126 Other stakeholders preferred a broader approach. They highlighted the Canadian model outlined in the Discussion Paper, the aim of which 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.<sup>186</sup> Stakeholders suggested that the existing WGE Agency framework be expanded to include age and a range of other attributes, such as in Canada.<sup>187</sup>

4.127 However, some stakeholders opposed the establishment of a new body or framework, expressing concerns about the regulatory burden and cost implications of this approach.<sup>188</sup> 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’.<sup>189</sup>

4.128 An alternative approach was recommended in a 2000 report by the House of Representatives Standing Committee on Education, Employment and Workplace Relations:

The inclusion of the age profile of employees in the annual reports of all listed companies would draw attention to firms which do not have a normal diversity of age groups in their workforce. This should prompt employers to consider whether their recruitment practices, perhaps inadvertently, involve some form of age discrimination. The Committee is aware that age discrimination might occur unintentionally or sub-consciously. The availability of such profiles would also make possible greater

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183 At the time of writing, the Employer of Choice for Women citation criteria were under review and were expected to be announced in September 2013.

184 ACTU, *Submission 88*.

185 Adage, *Submission 69*. See also Australian Federation of Disability Organisations, *Submission 78*.

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

187 DOME Association, *Submission 62*.

188 Australian Industry Group, *Submission 37*. See also Suncorp Group, *Submission 66*; Diversity Council of Australia, *Submission 40*.

189 Australian Industry Group, *Submission 37*.

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scrutiny by shareholders and other interested parties, providing an added spur for employers to give proper consideration to employing mature-age job seekers.<sup>190</sup>

4.129 Following the introduction of the new framework under the WGE Act, it is necessary to allow time for monitoring and evaluation of its operation. However, following such monitoring and evaluation, the ALRC suggests that the Australian Government should consider extending the framework to include age (and potentially a range of other attributes). This approach would ensure adequate consideration of the operation of the existing framework, limit compliance costs and avoid duplication.

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190 House of Representatives Standing Committee on Education, Employment and Workplace Relations, *Age Counts: An Inquiry into Issues Specific to Mature-Age Workers* (2000), 4.17.

