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COMCARE'S SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION'S ISSUES PAPER: GREY AREAS—AGE BARRIERS TO WORK IN COMMONWEALTH LAWS

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

BY COMCARE
15 JUNE 2012

THE COMCARE SCHEME

The Comcare scheme is a national, integrated work health and safety, rehabilitation and compensation system. Comcare partners with workers, their employers and unions to keep workers healthy and safe, and reduce the incidence and costs of workplace injury and disease.

Comcare is established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and has a number of powers and functions that ensure injured workers have access to compensation and can return to work quickly and safely.

Comcare administers the Commonwealth workers' compensation scheme for all workers employed by Australian Public Service (APS) agencies, the ACT Government and for workers of organisations which self-insure under the scheme. There are currently 30 licensed self-insurers, with most being significant employers in sectors such as banking, construction, transport and telecommunications.

From 1 January 2012, the *Work Health and Safety Act 2011* (WHS Act) established Comcare as the single regulator for work health and safety in the federal jurisdiction.

COMCARE'S SUBMISSION

The APS workforce is ageing faster than the broader labour force. There are currently four generations of people at work—with older people choosing to work only if conditions are right. Integrated strategies are required to remove barriers, and encourage workforce participation, of mature aged people who want to contribute to the workforce.

The purpose of Comcare's submission is to clarify some of the issues posed in the Australian Law Reform Commission's issues paper, *Grey Areas – Age Barriers to Work in Commonwealth Laws* (ALRC's issues paper) and to provide comment, where applicable, to work health and safety (WHS) and workers' compensation issues relevant to the Comcare scheme.

It is important to note, that when referring to legislative change, Comcare does not have policy responsibility for federal WHS and workers' compensation laws. This is the role of the Department of Education, Employment and Workplace Relations (DEEWR).

Correcting the record

Comcare notes that paragraph 265 in the ALRC's issues paper is factually incorrect. Under the SRC Act, if an employee suffers an injury before reaching 63 years of age, compensation is not payable for the injury after age 65. If an employee suffers an injury after 63 years of age, compensation is payable for 24 months after date of injury, which may extend beyond age 65.

QUESTION 34:

In what ways if any, can the practices of private recruitment agencies be regulated to remove barriers to mature age employees entering or re-entering the workforce?

Comcare believes that the practices of private recruitment agencies should model the National Australia Bank (NAB) experience. NAB established a process of mandatory training for all recruitment agencies used by NAB. Through their contractual agreement with the recruiting agencies, NAB requires completion of mandatory age stereotype 'myth busting' training. This forms part of their MyFuture: a pathway to 2020, an interactive leadership forum that looks at the challenges and opportunities of an ageing workforce, and creates a culture that values experience and maturity.

QUESTION 35:

Should section 65 of the Fair Work Act 2009 (Cth) be amended to include age as a basis upon which an employee may request flexible working arrangements?

Comcare agrees with this suggestion and believes there is a need to incorporate high-quality flexible work as part of workforce planning and retention strategies.

Comcare was instrumental in leading an Australian Public Service 200 Project (APS200 Project) between August 2011 and May 2012, which was established to tackle barriers to a longer productive life of work in the APS. The APS200 Project developed a framework of action to mitigate critical workforce human capital risks, improve engagement and participation, and lift productivity. The framework was organised into four key elements:

- > workforce planning and development—to better understand our workforce and turn demographic risk into opportunity
- > front-line confidence—to build age management skills and confidence of front line managers
- > health and wellbeing—to link up fragmented work health programs across the APS
- > work design—to use opportunities and incentives to improve recruitment, retention, and return of older workers to the APS.

The framework was approved by the Secretaries Board in May 2012 with support for integration of a range of actions into APS work practices.

Workshops conducted through the APS200 Project indicated overwhelmingly that older workers preferred, and required, flexibility in their work which may include less working hours, 'chunks' of work throughout the year, and other options for being accountable for their work whilst being able to have more time for caring responsibilities and being better able to transition to retirement.

With the creation of the Create MyFuture pilot program, which involved the participation of 700 NAB employees, NAB improved their workplace flexibility by offering options such as job sharing, working from home, implementing a 'reConnect Program' for employees on leave to assist them to successfully return to work and established a governance body to track its diversity progress.

Another example is the Department of Human Services survey of mature age workers conducted in late 2011. The respondents (1,953) indicated that the availability of part-time hours and the ability to take extended breaks were the highest ranked priority of factors encouraging them to remain in the workplace.

QUESTION 40:

In what ways, if any, can strategic plans developed under the Australian Work Health and Safety Strategy 2012-2022 take account of occupational health and safety issues of particular relevance to mature age workers?

The final draft *Australian Work Health and Safety Strategy 2012-2022* (the Australian Strategy) was approved by Safe Work Australia Members at their meeting on 6 June 2012. The Australian Strategy is scheduled to be considered by the Select Council on Workplace Relations in July 2012, with its launch scheduled for later in the year. The Australian Strategy does not specifically mention mature age workers—however, the elements of work design (listed under the Action Area *Healthy and Safe by Design*) will be particularly relevant to all workers across the life course of their employment.

Research and guidance on increasing mature age participation in the workforce is available from a range of European countries, as well as Australian agencies such as the Australian Public Service Commission. Governments, employers and employees will need to recognise the different needs and priorities of an intergenerational workforce when developing their strategic Work Health and Safety Plans.

QUESTION 41:

Where is it best to include information about occupational health and safety issues relevant to mature age workers?

At a national level Comcare supports important work of Safe Work Australia in brokering industry benchmarks on work ability and ageing to guide national or industry directed strategies and interventions. Employers also need to better understand their workforce and use information on workforce demographics, the nature of work and standardised measures of work ability. Information about ageing worker issues and work health and safety at the enterprise level will enable employers to partner with their workers to mitigate any performance and capability risks and achieve health and productivity gains. Information and resources for middle managers will support better matching skills and abilities with work requirements.

Issues associated with older workers' employability are not wholly age-related, and in fact, there may be greater similarities with other measures of disadvantage. In the National Centre for Vocational Education Research's (NCVER) *Older Workers: research readings*, Dr Stephen Billett from Griffith University advises there are three major at-risk groups of older workers:

1. those in occupations that are age-intolerant
2. those with lower levels of educational achievement and whose engagement in low-status work with narrow pathways leaves them vulnerable
3. those with workplace circumstances, health or dispositions that constrain their capacity for learning during their working life.

Workers normally learn best through their work, and older workers learn best through everyday work activities. Therefore the requirement on organisations is to adopt an appropriate learning culture, work design and support.

QUESTION 42:

In what ways, if any, do occupational health and safety duties and responsibilities act as a barrier to volunteering for mature age persons?

The new work health and safety (WHS) laws are not a barrier to encouraging volunteers and potential volunteers from undertaking volunteer work.

Following the implementation of new WHS laws in January this year, the media has reported a series of inaccurate and alarmist claims made regarding volunteers. Safe Work Australia has undertaken to set the record straight on volunteers. The new WHS laws will not apply to every volunteering activity or organisation. They apply if a volunteer organisation employs staff as well as volunteers to carry out work for the organisation.

The WHS Act aims to protect the health and safety of all workers. The WHS Act does not discriminate based on age, as all workers are afforded the same protections. The main health and safety duty under the WHS Act is owed by a 'person conducting a business or undertaking' (PCBU). The duty is to ensure, so far as is reasonably practicable, the health and safety of workers engaged in work for the business or undertaking. This means that mature age workers will receive the highest level of protection wherever they perform their work consistent with the protections provided to all workers.

There are some volunteer organisations which the work health and safety laws explicitly exclude. These groups of volunteers are 'volunteer associations' who work together for one or more community purpose where none of the volunteers (jointly or alone) employs any person to carry out work for the association. As a 'volunteer association' does not conduct a business or undertaking it does not owe duties to its volunteers under the WHS Act.

Volunteers are protected under the WHS Act where they carry out work for a PCBU, and as such are required to take reasonable care for their own health and safety and that of others, and to cooperate with the PCBU. Like any other duty holders who do not comply with their duties under the WHS Act, workers, including volunteer workers, can be prosecuted. However, this should not be seen as a barrier to volunteering for mature age workers. The obligations are the same for any person, including a member of the public, who visits a workplace and is required to take reasonable care for their own health and safety.

Officers of a business or undertaking have a separate duty under the WHS Act to be proactive and continuously ensure that the business or undertaking complies with relevant duties and obligations. An officer of a business or undertaking is a senior executive who makes, or participates in making, decisions that affect a substantial part of the business. A volunteer officer may be a member of a committee, a director, a company secretary or a CEO of a not for profit organisation that is conducting an undertaking. Volunteer officers are required to take reasonable steps that will support a health and safety culture, accountability, the allocation of resources for health and safety and the development of appropriate health and safety policies at the organisation. Volunteer officers have a duty to exercise due diligence under the WHS Act. A volunteer officer is expected to comply with that duty; however they cannot be prosecuted for failing to comply with that duty. This immunity from prosecution was put in place to reduce any barriers to voluntary participation at an officer level. A volunteer officer can however, be prosecuted in their capacity as a 'worker' if they fail to meet their duties as a volunteer 'worker'.

QUESTION 43:

What measures involving regulation and monitoring if any, should be introduced to ensure:

- (a) Employers are responsive to the needs of mature age employees; and**
- (b) Mature age employees are actively involved in developing and implementing such measures**

The WHS Act does not differentiate between young and mature workers, but a PCBU has a duty to consult with workers on matters affecting their health and safety. Evidence shows that mature workers are likely to be susceptible to musculoskeletal injuries and other body stressing activities. As a WHS regulator, Comcare delivers a range of campaigns which target known or emerging risks and respond accordingly. With an ageing workforce, Comcare will work with PCBUs to target known risks to mitigate and focus on prevention.

In developing these programmes, workers can be involved in co-designing the programmes. Comcare also sees potential opportunities, such as the publication of a chapter focused on mature age workers in the APS State of the Service Report/ Census Survey, and periodic 'pulse surveys' along the lines of the DHS Mature Age Worker Survey (Nov 2011).

Self-management in optimising health wellbeing and career planning as well as balancing work and non-work demands are important career competencies for active ageing. Workforce skills such as described in the Australian Blueprint for Career Development should be promoted for workers and their managers to support a longer working life and improve work ability of ageing workers.

QUESTION 44:

What are some examples of employment management best practice aimed at attracting or retaining mature age employees?

Comcare views the following examples as employment best practice aimed at attracting and retaining mature age employees currently available in the workforce:

- > NAB *MyFuture* program.
- > VicRoads positive age-management and wellbeing practices aligned with the *Experience Employment Charter* (developed by DEEWR) including Transition to Retirement workshops and investment in improving management of a multigenerational workforce.
- > Investment in professional development and training—a commonly reported concern of older workers is a lack (or perceived lack) of employers to invest in their professional development and training (as compared to younger workers who felt they were encouraged by their supervisor to build new skills) *APSC Human Capital Research Note 31-11 Work attitude in an ageing workforce*.
- > DEEWR's *Experience+ Pilot Program* was established to raise broader corporate organisational awareness to participation of older workers by addressing issues relating to the ageing workforce across several organisations in Ballarat through interactive workshops followed by individual general advice sessions. They reported that having a mix of private/public sector agencies was beneficial to both sectors.
- > METEOR (Matching Employees and Training to Employers for Ongoing Recruitment and Retention) funded by DEEWR: e.g. Manufacturing Mentors, and Grey Matters (DEEWR/Victorian Department of Innovation, Industry and Regional Development) identified a ranged of holistic factors incorporating health, work-life balance issues, social support and family care giving.
- > Self-management is a leading care principle and targeted tailored careers guidance is necessary (NCVER p.23).
- > The Bureau of Meteorology's (Bureau) workforce is made up a high percentage of workers aged 50 years and over. The Bureau has low voluntary turnover rates when compared with other Australian Public Service agencies, an indicator of professional fulfilment and high returns-on-investment for learning and development activities.

QUESTION 45:

What are the most effective ways of raising awareness and providing education and training to remove barriers to mature age participation in the workforce and other productive work?

Individuals need to plan for their own future. The decision to retire, needs to be based on informed judgements about financial security (and sufficiency of retirement savings), health and lifestyle choices.

Findings from the NAB *MyFuture* program included leadership commitment and leading by example. The focus here was on helping managers and their workers through two separate but connected workshops. The first workshop focussed on the skills, knowledge and confidence that employees need to extend their careers and plan for their future, while the other, was an interactive leadership forum for managers to better understand and support their mature age team members plan for the future.

Comcare also sees the following examples of effective ways of raising awareness and providing education and training to remove barriers to mature age participants in the workforce include:

- > generating case studies at individual and also at organisation level to raise awareness of the issues
- > establish a benchmark(s) for best or better practice
- > collaborative approach with a mix of public and private sector to learn from each sector
- > involvement of key stakeholders including; workers, managers and leaders, HR experts, unions, super funds, industry bodies.

QUESTION 46:

What other changes, if any, should be made to the employment law framework to remove barriers to mature age participation in the workforce or other productive work?

Comcare supports the Business Council of Australia findings in their paper *50+ Age Can Work* notes that older workers may:

- > be discouraged from ongoing job search
- > may be discriminated against
- > are often vulnerable to downsizing and restructuring, resulting in decisions to exit the workforce that are not voluntary and earlier than intended.

There is a critical need to challenge the entrenched life-cycle mindset that sees a one-way path from full-time education to full-time work to full-time retirement. Lifelong learning, phased retirement and the capacity for individuals to engage, and reengage, in the work force at different levels of intensity is needed.

QUESTION 47:

Should volunteers be eligible for workers' compensation at a Commonwealth level or is current state and territory coverage sufficient?

The ALRC's issues paper at page 76 states that volunteers in state and territory jurisdictions are eligible for workers' compensation, either because they are deemed to be employees under the relevant legislation or the legislation specifically provides compensation for certain categories of volunteers. The paper suggests that this is not the case for volunteers at a Commonwealth level. This is incorrect.

The SRC Act allows for the coverage of volunteers, as declared by the Minister, under section 5(6) of the SRC Act, by Notice of Declaration. Section 5(6) states:

- (a) that persons specified in the notice, being persons who engage in activities or perform acts:
 - (i) At the request or direction, for the benefit, or under a requirement made by or under the law, of the Commonwealth; or
 - (ii) At the request or direction, for the benefit, of a Commonwealth authority or licensed corporation ; shall, for the purposes of this Act, be taken to be employed by the Commonwealth, or by that authority or corporation, as the case may be; and
 - (b) that the employment of the person shall, for those purposes, be taken to be constituted by the performance by the person of such acts as are specified in the notice;
- and such a declaration shall have effect accordingly.

There are a number of declarations made under the SRC Act covering volunteers. Examples include; persons who, under the control or direction of a Commonwealth officer, take part, without receiving any remuneration (excluding payment of expenses incurred), in search and rescue activities or training exercises carried out by the Department of Infrastructure and Transport or the Civil Aviation Safety Authority, and persons who, under the control or direction of a Commonwealth officer, render services, without receiving remuneration (excluding payment of expenses incurred), in an institution or for a service conducted by the Department of Veterans' Affairs. These declarations are available on the Comcare website at www.comcare.gov.au/laws__and__regulations/src_act,_regulations__and__directions/src_act_notices.

The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) does not have coverage for volunteers.

QUESTION 48:

In what ways, if any, should retirement provisions in Commonwealth workers' compensation legislation be amended? For example, are any of the following approaches appropriate?

- (a) Removing all age based restrictions;**
- (b) Removing all age based restrictions, but imposing benefit period or amount restrictions; or**
- (c) Increasing the age at which compensation is no longer payable to age 67, except in certain circumstances?**

The retirement provisions in the SRC Act are that income replacement benefits (known as 'incapacity payments') for a worker who is injured before age 63 cease when the worker reaches age 65. As the ALRC's issues paper notes, the original rationale for this provision was that once an injured worker had access to other forms of income support, specifically the age pension, income support being received under the workers' compensation system should cease. This was stated in the then Minister's second reading speech as "this Government does not consider it appropriate that employees should continue to receive workers' compensation benefits after the normal retirement age."

The introduction of section 23(1A) in 1999 extended coverage so that a worker who is injured at any age after 63 may receive incapacity payments for up to 104 weeks. This extends the original coverage under the 1988 SRC Act to allow compensation to continue beyond age 65 and to provide coverage for incapacity payments for workers who remain in the workforce beyond age 65.

The Government will increase the pension age from 65 years to 65.5 years on 1 July 2017. This will continue to rise incrementally every six months for six years, until it reaches 67 years by 1 July 2023. Comcare considers option (c) as an appropriate option for the Government to ensure that injured workers covered under the SRC Act do not face a gap between the current age limit of 65 years and the new pension age of 67 years. Other benefits under the SRC Act will remain unchanged. This includes access to medical treatment, attendant care, household service and permanent impairment lump sum, which continue for the life of the compensation claim.

Comcare considers option (c) is an appropriate option for the Government to ensure that injured workers covered under the SRC Act do not face a gap between the current age limit of 65 years and the new pension age as it progressively increases to 67 years. Specifically, option (c) would provide that the current age limit of 65 in Section 23(1) is amended to align with the injured worker's pension age and that the age 63 provision in Section 23(1A) is amended to be two years younger than the worker's pension age. This is consistent with the original policy intent. Comcare notes that this option would increase Comcare's outstanding claims liabilities under the SRC Act, which will reduce Comcare's reported funding ratio and require premium increases to fund the additional liability.

Other benefits under the SRC Act will remain unchanged. This includes access to medical treatment, attendant care, household service and permanent impairment lump sum, which continue for the life of the compensation claim.

Comcare considers that options (a) and (b), represent significant changes to the SRC Act. If the Government were to implement option (a) to remove all age based restrictions, this would appear to be outside the generally accepted norms of workers' compensation schemes in Australia. As incapacity payments are the biggest drivers of claim costs, scenarios such as paying incapacity until a person died as they 'never intended to retire at x age and planned on continuing work' could pose substantial scheme sustainability issues. While option (b) (removing all age based restrictions, but limiting the benefit period) imposes risks for significant costs shifting to social security benefits and changes the scheme from a long tail to short tail claims model.

Option (b) (removing all age based restrictions, but limiting the benefit period as, for example, in Western Australia) would represent a significant reduction in the entitlements under the SRC Act for workers with a long-term reduction in their capacity to earn. This imposes risks for significant cost shifting to social security benefits and changes the scheme from a long tail to short tail claims model.

Comcare acknowledges that any of the options could be implemented, but notes that each option has a financial impact that requires the costs to be assessed. These costs will be passed on to employers to pay.

QUESTION 49:

What other changes, if any, should be made to the Commonwealth workers' compensation scheme to remove barriers to mature age participation in the workforce or other productive work?

As explained at Question 48, the SRC Act provides the same workers' compensation coverage for all workers regardless of their age, with an extended entitlement for mature age workers (i.e. any age over 63) which allows incapacity payments to continue beyond age 65 for up to 104 weeks.