



**Government of
South Australia**

**SUBMISSION TO THE AUSTRALIAN LAW REFORM
COMMISSION ON THE ISSUES PAPER:**

'GREY AREAS – AGE BARRIERS TO WORK IN COMMONWEALTH LAWS'

June 2012

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SOUTH AUSTRALIA'S AGEING WORKFORCE – A SNAPSHOT

The South Australian Government welcomes this opportunity to make a submission to the Australian Law Reform Commission in response to the Issues Paper titled *Grey Areas – Age Barriers to Work in Commonwealth Laws*.

In the 1950s and 1960s, South Australia's population was younger than the rest of the nation. Today, South Australia has one of the oldest populations in the nation (equal oldest to Tasmania). This has been influenced by the fact that people are living longer, decreasing fertility rates and negative internal migration¹. The ageing of our population will continue as life expectancy continues to increase, and fertility rates fall.

As at 30 June 2010, 15.6% of South Australia's population was over 65 years of age. It is projected that by 2025 almost 21% of the South Australian population will be over 65 and by 2056, over 27% will be over 65. This is higher than the projected national average which is expected to be approximately 25% by 2056. As shown in Figure 1 (below) it is projected that in 2025, there will be less people under the age of 15 than over the age of 65.

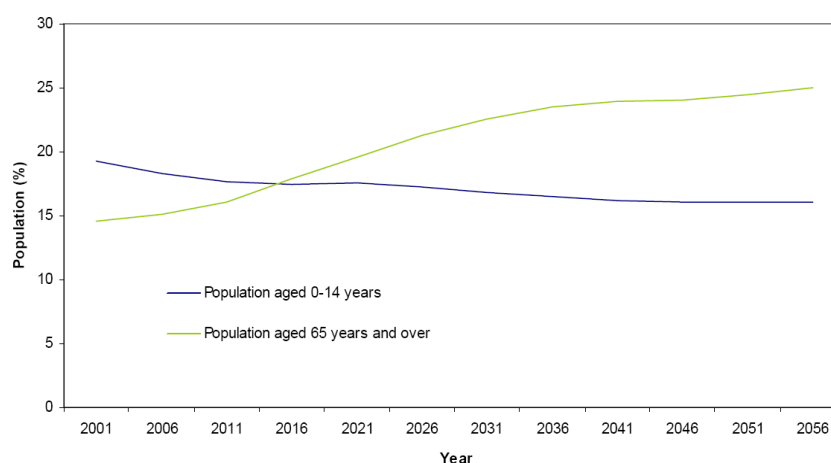


Figure 1: South Australia: Projections of proportions of children and older population, 1998 to 2056
(Source: ABS, Australian Social Trends, 2009)

The Australian Bureau of Statistics defines 'mature age worker' or an 'older person' as anyone over the age of 45 years. ABS figures show that over the past two decades from June 1990 to June 2010, the number of older people Australia wide increased by 170.6%, compared with a total population growth of 30.9% over the same period. This has impacts for growth in the working age population, which is expected to slow as the baby boomers leave the workforce, and lower fertility rates mean less young people are entering the workforce. South Australia's current growth rate in the working population is lower than the national average – South Australia has 1.1% growth compared to national growth of 1.6%.

Research undertaken in 2008 showed that between 2007-08 and 2017-18, growth in the South Australian economy is expected to create 133,000 new jobs². With this expansion, South Australia will experience a demand for labour that it cannot meet with its current labour force participation rate.

¹ Australian Social Trends, March 2009, Australian Bureau of Statistics, Cat. no. 4102.0

² Keating, Michael, 2008, *Review of Skills and Workforce Development in South Australia: The Challenge for the Next Decade*, p.30

The five industries with the highest number of employed people aged 55 and over in South Australia are agriculture, pre-school and school education, professional scientific and technical services; other store based retailing; and public administration (Figure 3). This represents the industries in which the greatest numbers of people are likely to need to be replaced due to retirement over the next ten years in South Australia. The fact that many white collar industries have an ‘older’ age profile may in part reflect that there are high rates of early exits from ‘manual’ occupations, such as tradespersons and labourers.³

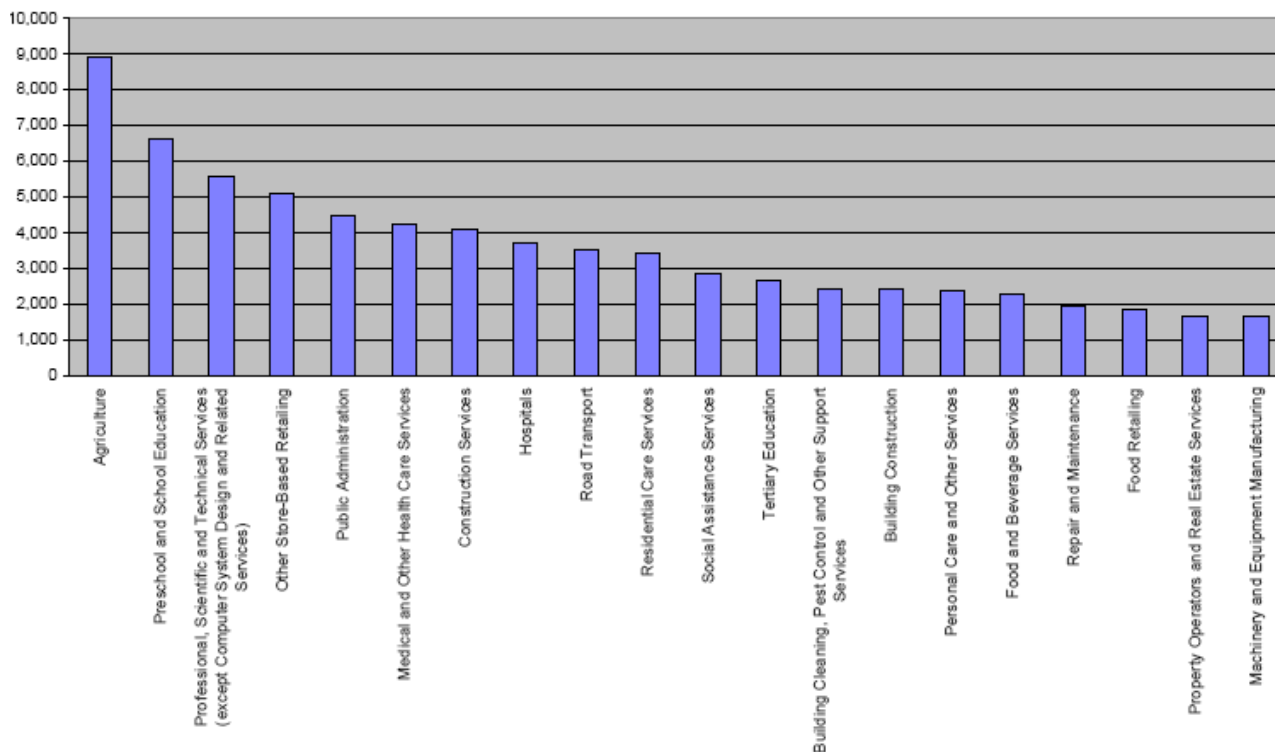


Figure 2: Top 20 ‘oldest’ industries, South Australia, by number (Source: 2006 Census)

Research has shown that South Australia could address the labour shortage gap by better engaging the approximately 250,000 under employed, unemployed and those not in the labour force who want to work⁴.

Better engagement of older workers will be critical to addressing this skills gap. South Australia has recognised the importance of this issue by including in its Strategic Plan Target 48 Ageing Workforce Participation: Increase the proportion of older South Australians who are engaged in the workforce by 10% by 2020.

In view of this, the Government of South Australia is trialling a project which aims to address the underutilisation and discrimination experienced by mature age workers in South Australia. The project, named “Age Matters,” is a cross-government collaboration which has conducted focus groups with employees and small to medium enterprise employers to provide qualitative information regarding engaging and retaining older workers.

³ Barnett, K, Spoehr, J, & Parnis, E, 2008, *Exploring the Impact of an Ageing Workforce on the South Australian Workers’ Compensation Scheme: Chapter 2 Ageing and the South Australian workforce*, the Australian Institute for Social Research, p. 19

⁴ Keating 2008, p32

The project has highlighted the need to change society's attitudes toward older workers. Sadly, society's attitudes and assumptions about the participation of older workers in the workforce are lagging behind that of academics and Government policy makers.

Adoption of policies at a national level coupled with the development of incentives at a business level will assist in promoting a significant cultural shift over time to break down the barriers to mature age workforce participation.

With the assistance and support from both the Commonwealth and State Governments, workplaces that take the time to consider what the requirements of tomorrow's workforce will be and invest time in workforce planning will benefit by being work ready to meet growth demand and retirement demand over the next twenty years. By adopting a range of practices, policies and processes, such as flexible work arrangements; graduated retirement provisions; re-thinking the utilisation of mature talent; career deceleration and other strategies, the nation's workplaces can be prepared to meet the future challenges of changing demographics in an increasingly competitive global market.

WOMEN AND THE AGEING WORKFORCE

The labour force participation of women in South Australia has changed significantly over the past few decades. In particular, the participation rate for women aged 55-64 has more than doubled over this period. As Figure 3 shows, population gains have been most noticeable in the 45 years and over age group, and particularly those in the group aged 55 to 59.

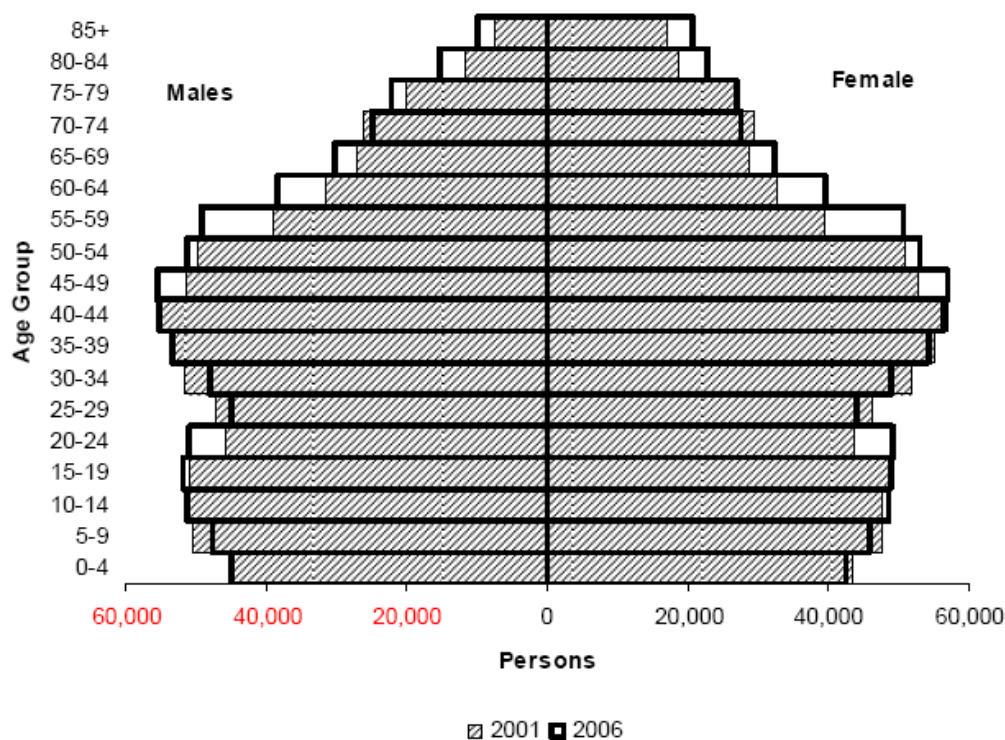


Figure 3: South Australia Age and Sex Distribution of Population 2001 and 2006 (Source: Hugo 2008⁵)

As female labour force participation is increasing, and especially within older age groups, workplaces need to adapt their practices to accommodate older women in a workplace.

As noted by the Australian Human Rights Commission⁶, older women face double discrimination based on both their gender and age. They face particular stereotyping that they will significantly break their employment due to family responsibilities and that they will not possess the skills required for the position when compared to male applicants. These stereotypes and assumptions prevent older women from being selected for jobs or from being considered for training and promotional opportunities.

Women also often underestimate how long they will live, leaving them vulnerable to their money running out in advanced old age.

To address these issues workforce participation by pensioners over Age Pension age should be better supported while a stronger participation focus is needed for those of working age.

⁵ Hugo, G, 2008, Information provided to the Australian Institute for Social Research, from ABS and other analyses, The National Centre for Social Applications of Geographic Information Systems, The University of Adelaide

⁶ Australian Human Rights Commission, *Accumulating Poverty? Women's experiences of inequality over the lifecycle, an issues paper examining the gender gap in retirement savings*, 2009.

FRAMING PRINCIPLES

Question 1

The ALRC has identified as framing principles: participation; independence; self-agency; system stability; system coherence; and fairness. Are there other key principles that should inform the ALRC's deliberations?

The South Australian Government supports the key principles which will inform the ALRC's deliberations, but also believes a framing principle should be one of 'Choice'. While this is partially contained within the concept of 'independence', it is worthy of inclusion on its own merits. Older people should have choices about how much they work, if they want to work at all, or whether they involve themselves in 'service to the community' through volunteering.

Whilst we need to break through the barriers that may prevent mature age workforce participation, working after reaching mature age may not be a viable option for some older Australians. This is particularly the case for older people in physically demanding occupations. An older person in such an occupation may experience physical discomfort or health concerns, which do not qualify them for a disability pension and, with proposed changes to restrict access to Superannuation, that individual would have no financial choice other than to keep working. Suggested changes to the existing support systems (such as raising the Superannuation preservation age) could have the inadvertent consequence of severely limiting individuals' choices about how they spend their later years. On this basis, the South Australian Government contends that deliberations should also be informed by how suggested changes will impact upon individuals' choices.

AGE PENSION

Question 2

As there is a five year difference in qualifying age for a Service Pension under the Veterans' Entitlement Act 1986 (Cth), should it be increased incrementally in the same manner as for the Age Pension?

Provided that the evidence based research supports the fact that veterans age prematurely, the South Australian Government does not consider it justifiable that the retirement age be increased incrementally for this category of older workers. The entitlement should remain at 60 years, and any incremental increase should not exceed 63 years of age to account for the impact of the years of service on these older workers.

Question 3

In what ways, if any, should the means test for the Age Pension be changed to remove barriers to mature age participation in the workforce or other productive work?

The South Australian Government submits that to remove the disincentive to work as suggested in paragraph 46 of the issues paper is not workable as it defines mature aged workers as those over the age of 45 years.

The means test for the Age Pension discourages people from working or providing for themselves in old age. The means test threshold should be increased before a reduction to the pension is activated to encourage people to undertake part-time work. There is no incentive to participate in the workforce if individuals cannot earn money beyond their planned for income from their investments or otherwise.

To truly remove this barrier, income earned should only be exempt from means testing for the Age Pension for those who have reached Age Pension entitlement age. Currently, most workers reach this entitlement age at 65 years, which will incrementally rise to 67 years. To encourage older workers to remain in work, income earned after they have reached Age Pension entitlement age should be exempt from means testing.

Question 4

In what ways, if any, should the Pension Bonus Scheme be changed to remove barriers to mature age participation in the workforce?

In line with the Commonwealth review of the federal anti-discrimination Acts, including the *Age Discrimination Act 2004* (Cth), the South Australian Government supports the removal of the cut off point for accrual of bonus periods once a person reaches the age of 75 years. If an individual is capable of continuing to meet the work requirements of the Pension Bonus Scheme, they should not be arbitrarily disadvantaged by their age.

Question 5

How effective has the Work Bonus been in removing barriers to work for mature age persons? In what ways, if any, could it be improved?

The South Australian Government is unaware of any data that would indicate the effectiveness or otherwise of the work bonus to removing barriers to work for mature age persons. In theory, the Work Bonus would appear to support removal of barriers and encourage older people to remain in the workforce for longer. It could be improved by extending the scheme to those who are self employed.

SUPERANNUATION

Question 10

What changes, if any, should be made to the Superannuation Guarantee scheme, to remove barriers to work for mature age persons?

The main change that is required to the Superannuation Guarantee scheme is the removal of the maximum age (currently 70 years of age) at which an employer no longer need make Superannuation payments for an employee.

In addition, the superannuation tax benefits and the administration of the system generally requires greater support for those people mainly women or those with a disability who spend considerable time out of the workforce or choose to work part-time to manage family obligations or health.

Salary sacrifice arrangements for employees should also be reviewed to make them more attractive to encourage people to save. The amendments that commence on 1 July 2013 to increase the minimum super contribution rate to 12% and removing the age limit could increase the participation of mature age workers in the workforce. However, the tax impact will also need to be offset. It is noted that from 1 July 2013 employers are able to claim income tax deductions for superannuation guarantee contribution for persons aged 75 and over however this will not apply to self employed individuals. Given the large number of small businesses and family businesses in South Australia, which must also be reflected in other parts of the country, this limitation on self-employed appears inequitable and could serve to discourage small business.

Question 11

The Superannuation Industry (Supervision) Regulations 1994 (Cth) prescribe age-based restrictions on voluntary contributions. Members cannot:

- (a) make voluntary contributions from age 65 until age 75 unless they meet a work test; or*
- (b) make voluntary contributions from age 75.*

What effect do these restrictions have on mature age participation in the workforce? What changes, if any, should be made to these regulations to remove barriers to work for mature age persons?

While the voluntary employee contributions and the impact of these on the workforce is not clear owing to a lack of specific research in this area, there needs to be a general culture of encouraging people to put money into their Superannuation funds.

The South Australian Government submits that both of these barriers should be removed. Research has shown that access to various forms of flexible working arrangements, including extended breaks from work followed by a return to work, make staying in the workforce more attractive to older workers. The provision of a work test will, in theory, act as a disincentive for older workers to remain working when they are effectively penalised for not meeting strict standards. The ability to make voluntary contributions at all ages, irrespective of work patterns, should be guaranteed. Voluntary contributions should also be available to workers from age 75. To deny workers this right not only acts as a disincentive and goes against government policy to support people to stay in work longer and be self funded in retirement, it also arguably constitutes discrimination on the basis of age.

Question 12

The Superannuation Industry (Supervision) Regulations 1994 (Cth) prescribe age-based restrictions in relation to members splitting contributions with a spouse and making contributions to a spouse's fund.

Members cannot:

- (a) split contributions for a spouse aged 65 and over;*
- (b) split contributions for a retired spouse of preservation age and over;*
- (c) make spouse contributions for a spouse aged 70 and over; or*
- (d) make contributions for a spouse aged 65 but under 70 unless the spouse meets a work test.*

What effect do these restrictions have on mature age participation in the workforce? What changes, if any, should be made to these regulations to remove barriers to work for mature age persons?

Research has shown that women often have much less Superannuation than men. The level of Superannuation and other retirement savings for women is dependent on their attachment to the paid workforce and lifetime earnings. Women's workforce participation is shaped by a number of factors over their lifetime that affect their earnings, including caring for children and other family members, and impacts of domestic and family violence and divorce or separation. For this reason women are more likely to experience financial insecurity and poverty in older age and in retirement.

The gender pay gap and women's lower earnings in general also have a significant impact on their retirement savings. As a consequence women will continue to be heavily reliant upon the Age Pension and other benefits from the Government rather than their own Superannuation funds.

Some women may have no Superannuation at all were it not for contributions made on their behalf by their spouse. Aside from acting as a disincentive for mature age participation in the workforce, restricting contributions which can be made for a spouse aged 65 and over could have an adversely discriminatory effect on women. A person who is working and able to make Superannuation contributions should not be restricted in splitting or making contributions for their spouse based on the age of their spouse. These barriers, and arguably sexually discriminatory measures, should be removed.

Question 13

In what ways, if any, does the age restriction on government co-contributions in the Superannuation (Government Co-contribution for Low Income Earners) Act 2003 (Cth) create barriers to work for mature age persons?

What changes should be made to the Act to remove such barriers?

The South Australian Government supports the removal of the age restriction on Government Co-contribution for low income earners. Commonwealth Government policy is to encourage people to remain in work as long as they are able to, and if a person is still working at and past the age of 71 years, they should not receive less benefit from Superannuation schemes than other low income earners. In theory, this age restriction does act as a barrier to mature age work participation, and it should be removed. It also constitutes discrimination on the basis of age.

Question 14

What effect, if any, does the increased concessional contributions cap for persons aged 50 years and over have on mature age participation in the workforce?

The concessional contributions cap for persons aged over 50 years is important if continued confidence in contributing to Superannuation and not being excessively taxed on these savings is to continue. In the current economic climate it acts as a small incentive for people to save through Superannuation.

Arguably the cap should be raised to allow older people to take advantage of favourable tax arrangements in Superannuation.

Question 16

The age settings for access to superannuation benefits are:

(a) 55 years increasing to 60 years for 'preservation age'—when persons may access superannuation if retired; and

(b) 65 years for unrestricted access to superannuation.

The Australia's Future Tax System Review recommended that the preservation age be raised to 67 years. In what ways, if any, do existing age settings provide incentives for retirement for mature age persons, rather than continued workforce participation? What changes should be made to address these incentives?

The South Australian Government recommends current preservation ages be maintained.

In reviewing discussions currently held with workers nearing retirement and their decision-making processes, the existing age setting of access to superannuation at 55 does not necessarily provide an incentive for retirement. While the tax system review recommends that the preservation age be raised to 67 years, it would be preferable to provide encouragement to continue people in the workforce through other tax incentives, such that they can switch to part-time work through transition to retirement arrangements rather than lifting the preservation age to 67. While there is evidence that general life expectancy has increased over time, there is little evidence to suggest these additional years are ones of good health. In fact, there is evidence to the contrary which supports the position that approximately 80% of mature aged workers retire through injury or ill health – that is, those individuals have little choice other than to retire as to continue to participate in the workforce would place unacceptable demands on their physical and/or mental health.

The taxation rules need to be viewed in the context of many types of work that have the likelihood of injury because of manual labour and high levels of manual handling. This has been further supported through SafeWork SA consultations with the construction industry, which indicate employees in that industry are considered 'mature aged' at the age of 40 years due to the physical demands of the job. To continually raise the preservation age in effect removes individual choice about whether workers continue to work or not. As has been previously stated, the South Australian Government supports the inclusion of 'choice' as a framing principle in this review.

To support the government's policy of encouraging mature workers to stay in employment as long as possible, further incentives through the Transition to Retirement (TTR) rules should be considered. Better incentives under TTR rules for individuals who are in good health, and wish to continue to participate in work, would facilitate choice while still supporting government policy. The South Australian Government is strongly opposed to the removal of individual choice about work participation, which would effectively be imposed by systematic increases to the Superannuation preservation age.

EMPLOYMENT

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?

The South Australian Government recognises that private recruitment agencies play an instrumental role in assisting older workers in entering and re-entering the workforce by acting as the middle agent between the job seeker and the employer. As private recruitment agencies are responsible for matching the job seeker's attributes and skills to a particular job, the age of the applicant should only come into consideration where the recruitment agency feels that lack of certain physical characteristics or skills of the applicant will limit their capacity to do the job.

It is vital for the recruitment agencies to be able to break through the stereotypes that exist for older workers, and to be able to recommend an older worker to an employer where there is a skills match. However, in reality, the discrimination on the basis of age is a prominent issue⁷ in the recruitment practices of many Australian private recruitment agencies. The recruiters may fail to provide an appropriate level of service to an older worker, or fail to put forward an older applicant to a potential employer.

The South Australian Government submits that the regulation of private recruitment agencies by way of a Code of Conduct will have the potential to improve the recruitment practices of private recruitment agencies. A Code of Conduct would create a set of minimum standards of professional and ethical conduct for the recruitment agencies to adhere to.

The proposed Code of Conduct should emphasise the principle of respect for client diversity. It may also include a clause relating to an appropriate engagement with mature age jobseekers in order to highlight the age discrimination practices that are being discouraged in the recruitment industry.

The Code of Professional Practice developed by the Recruitment and Employment Confederation⁸ (REC) of United Kingdom (UK) represents a useful model that could be adapted to suit the Australian recruitment market. REC is a professional body dedicated to representing the interests of the recruitment industry in the UK. The REC Code of Professional Practice (the Code) is a comprehensive instrument with extensive coverage of the principles of ethical and professional conduct that REC members are required to comply with.

In particular, the Code discusses the principle of respect for diversity. The Code emphasises that work seekers, clients and others should be treated without prejudice or unjustified discrimination. The Code states that the members of REC 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. The Code stipulates that the members and their staff should treat all work seekers and clients with dignity and respect and aim to provide equity of employment opportunities based on objective business related criteria. The Code also requires the members to establish working practices that

⁷ Australian Human Rights Commission, 2010, Age Discrimination – Exposing the Hidden barrier for mature Age Workers, p. 12

⁸ REC Code of Professional Practice, accessed online at <http://www.rec.uk.com/about-recruitment/standards/rec-codepractice> on 21 May 2012

safeguard against unlawful or unethical discrimination in the operation of their business. Lastly, the Code encourages members to sign a Diversity Pledge to commit members to promote diversity and to challenge discriminatory practices in their workplaces.

The South Australian Government proposes a Code of Conduct similar to that of the REC is adopted or developed as a minimum standard for the Australian recruitment industry to adhere to. A similar principle of respect for diversity as discussed above should be incorporated into the proposed Code of Conduct. The diversity principle may also be expanded further to include a specific standard of conduct in relation to the mature age job seekers.

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?

Flexibility in working arrangements is important for all workers to manage a balance between work, family and community. In particular, providing flexible working arrangements has significant benefits for older workers, as it has been shown to be a significant factor in encouraging older workers to enter, re-enter or remain in the workforce.

Employers who participated in recent roundtables organised by SafeWork SA to examine quality part-time work provided feedback that the National Employment Standard provisions have assisted in facilitating increased access to flexible working arrangements.

However, the right to request such arrangements is currently provided only to some parents under the National Employment Standards (NES). As part of its submission to the Australian Government's *Fair Work Act 2009* (FW Act) Review made in February 2012, the South Australian Government submitted that the right to request flexible working arrangements should be available to a much broader range of workers. This would eliminate potential conflict between employee groups, lead to greater work life balance for all workers, and increase productivity.

The South Australian Government also noted in its submission to the FW Act Review the intention of the Australian Government to potentially expand the right to request flexible work arrangements to employees caring for older Australians and those caring for a person with a serious long term illness or disability (a recommendation of the National Carer Strategy⁹).

The South Australian Government supports this proposal, as the lack of structural support for employees with caring responsibilities such as flexible work arrangements creates an additional barrier to men and women's participation in the paid workforce. A significant proportion of the working carers are mature age workers, with women in particular tending to have greater caring responsibilities than men. Women are often forced to take on paid work that does not fully match their skills and experience in order to secure flexible working arrangements and juggle their caring commitments. In addition, there is currently tension between the policy priorities of retaining carers in the workforce with the desire by governments and the community for increased home care. This dual expectation can place additional stress on working carers.

⁹ National Carer Strategy, launched on 3 August 2011

The South Australian Government considers an introduction of Graduated Retirement Provisions as part of the National Employment Standards an appropriate measure to provide older workers with greater working flexibility without creating a basis for potential age discrimination.

The Graduated Retirement Provisions as part of National Employment Standards 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. A graduated retirement plan could include any or all of the following:

- A gradual reduction in the number of hours and/or working days worked by the employee. This could include an option of job-sharing if the workload cannot be done on a part time basis.
- Changing the position of the employee to make it less stressful or labour intensive. In some cases it may involve moving the employee upon their request to a position with less responsibility.
- The worker may retire as a member of staff but remain working as a consultant, or choose to take on a training or a mentoring role.
- The worker may prefer to continue to work full time with an option of additional purchased leave entitlements and other flexible working arrangements, such as an option of taking larger blocks of unpaid leave.

Question 36

In practice, do mature age employees negotiate individual flexibility arrangements made under section 202 of the Fair Work Act 2009 (Cth)? Are such arrangements a useful and appropriate flexibility mechanism for mature age employees?

The South Australian Government submits that individual flexibility arrangements available to mature age employees under Section 202 of the FW Act should not undermine the fundamental workplace relations principles of the national workplace relations system. The South Australian Government considers that it is important that the recent lobbying by employer groups for greater flexibility at the workplace does not open the door to the return of individual statutory agreements.

The proposed changes to the National Employment Standards discussed in Question 35 of this submission reflect the position taken by the South Australian Government in relation to the most appropriate arrangements by way of which older workers may achieve flexibility in their working arrangements.

Question 37

In practice, how effective are the general protections provisions under the Fair Work Act 2009 (Cth) where a mature age employee, or prospective employee, has been discriminated against on the basis of his age?

At this point in time it is difficult to evaluate the effectiveness of the practical application of the relevant general protections provision of the *Fair Work Act 2009* (FW Act) specifically as they relate to older workers. This is due to a lack of definitive case law relevant to Section 351 of the Act where discrimination on the basis of age had been alleged to have occurred.

Despite the lack of examples of the practical application of the provisions, the South Australian Government considers the current general protections provisions under Chapter 3 Part 3-1 of the FW Act to be sufficiently comprehensive and effective in providing an avenue for mature age workers to pursue if they have been discriminated against on the basis of age.

There are a number of reasons why the general protections provisions are considered to be effective by this Government:

- Age discrimination claims brought under the general protections provisions of the FW Act may cover a variety of situations. They are not only restricted to unlawful termination of employment, but may also include incidents that occur during work, such as promotion, demotion, transfers or terms and conditions of employment, as well as discrimination at the job application stage.
- The FW Act provisions place the onus of proof on the employer, where the employer is required to show that the employee's age was not a reason for the way he or she was treated in the workplace.
- Age does not have to be the only or the main reason for the mature age worker's discrimination.
- Injunctive relief is available to the mature age worker in anticipation of the resolution of a matter.
- The Fair Work Ombudsman can investigate and act on a matter of age discrimination.
- The parties have the option of deciding whether Fair Work Australia can arbitrate a dispute.
- The penalties prescribed by the FW Act for the breach of the general protection provisions provide an incentive for the employers to resolve complaints at the conciliation stage.
- It is more affordable to pursue a claim under the FW Act than under equal opportunity legislation, particularly if the employee is represented by a union.

The South Australian Government submits that further education on the availability of the general protections provisions may be more beneficial in raising awareness of these avenues to pursue by the mature age workers in remedying workplace discrimination on the basis of age.

Question 38

How does the operation of the modern award system affect mature age employees and in what ways, if any, can modern awards be utilised or amended to account for the needs of mature age employees?

The South Australian Government submits that if the inclusion of Graduated Retirement Provisions as part of the National Employment Standards cannot be achieved in the short term, the inclusion of such provisions into modern awards may be an appropriate avenue to address the mature age workers' needs for flexible working arrangements.

The graduated retirement provisions as part of modern awards 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.

Question 39

A number of compulsory retirement ages and licensing or re-qualification requirements exist in particular industries and professions. In what ways, if any, do these create barriers to mature age participation in the workforce or other productive work? If they do create barriers, should they be changed or are they appropriate?

It is the position of the South Australian Government that the retirement practices that are currently compulsory under certain pieces of Commonwealth legislation may create certain barriers to mature age participation in the workforce. However, this Government recommends that it may be more appropriate for those areas that have compulsory retirement ages to be reviewed separately to consider whether the set age limits remain appropriate to the contemporary work practices.

This Government also notes that a number of legislative provisions that provide for compulsory retirement practices create discrepancies in age limitations. One example of such provisions is the legislation that deals with the appointment of members of the judiciary or quasi-judiciary, such as ombudsmen, judges and magistrates. Nationally, some legislation specifies an age limitation to their tenure as 65 and others as 70 years of age. For example, in Queensland and in South Australia, magistrates must retire at 65. However, federally and in Victoria the retirement age of magistrates is 70.

The South Australian Government considers that the compulsory retirement provisions should achieve national consistency. Although these legislative provisions only affect a small number of employees, they may have important implications in symbolically representing the capacity of people to work competently until they are of a certain age.

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 South Australian Government submits that it is appropriate for the Australian Work Health and Safety Strategy 2012-2022 to take into account occupational health and safety issues of particular relevance to mature age workers, particularly in the context of the projected demographical statistics identified in the introduction to this submission.

The themes of the strategy are:

- focusing on work health and safety prevention;
- engaging target groups and industries to ensure advice and support is relevant to enable them to effectively respond to hazards;
- engineering hazards out through good design;
- influencing the supply chain inside and outside Australia;
- prioritising key work health and safety hazards and focusing national attention
- creating opportunities for innovation in work health and safety, particularly within the regulatory framework;
- enhancing the culture of safety leadership (promoting highly reliable organisations);
- emphasising the importance of safety culture;
- enhancing the capability of workers to return to work following accident or illness;
- influencing or assisting academia to undertake research—focusing on intervention effectiveness; and
- developing a shared communication strategy to promote the principles of the new strategy.

It is appropriate that all of these themes are developed with the diversity of Australia's workforce in mind, including mature age workers.

Question 41

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

It is not the intention of the work health and safety (WHS) legislation to place mature age workers into a separate category of employees with separate WHS risks or issues different to all other employees. It is the South Australian Government's position that employing older workers does not create additional WHS burdens to the employer. Each risk must be assessed regardless as to whether it is a risk to a younger worker or to an older worker. Therefore, it is unnecessary to create a Code of Practice on mature age workers and WHS issues.

That said, certain industries employing older workers with particular hazards in place may benefit from guidance material specific to those industry sectors. However, this may be addressed by way of more informal guidance such as information sheets, hazard alerts or bulletins, and by integrating these issues into general training of OHS Representatives and committees in the same way as other specific rules are currently dealt with.

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 issues paper at paragraph 257 states that 'the WHS Act **expands** (emphasis added) the class of persons to whom a duty is owed to 'workers', rather than employees. Workers include employees, subcontractors, outworkers, apprentices, students and **volunteers** (emphasis added)'. The paper then asks for comment on the effect of recent OHS changes on mature age volunteers.

The Australian Law Reform Commission should note that in South Australia most volunteers have been covered by OHS laws for many years. Therefore the WHS laws are not expanding coverage in the South Australian context.

The *Occupational Health, Safety and Welfare Act 1986* (SA) (the OHSW Act) at section 4(3) provides that:

*'For the purposes of this Act, where a person, in connection with a trade or business carried on by the employer, performs work for an employer **gratuitously** (emphasis added), the person will be taken to be employed by the employer'.*

The combined effects of clauses 5(7) and 5(8) of the *Work Health and Safety Bill* (SA) (the WHS Bill) is that a volunteer association will only be a person conducting a business or undertaking where the association already employs a person to carry out work for it.

The relevant duties imposed under the WHS Bill owed by PCBUs or by workers (which include volunteers), are generally the same as the current South Australian OHSW Act (i.e. the duties in clauses 19 to 29 of the WHS Bill are the equivalent of sections 19 to 25 of the OHSW Act).

Volunteers have been within the scope of South Australian OHS laws for over 20 years and there is no evidence to suggest that this has led to a decrease in volunteering by mature age volunteers.

Within the broader context, South Australia submits that it is appropriate that unpaid workers should be given the same safety protections as paid workers.

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 implementation of Graduated Retirement Provisions as discussed in Question 35 and Question 38 of this submission should be introduced to ensure that employers are provided with the direction and framework in which to respond to the needs of mature age workers. Such provisions will serve as a standard to which all employers will be required to adhere to, by providing the employers with clear objectives, strategies and responsibilities.

Graduated Retirement Provisions enacted as part of the National Employment Standards or modern awards will also assist in the forward planning processes for both the employer and the mature age worker. They will provide an opportunity for employers to be able to discuss an employee's retirement or continuation in the workplace intentions in a non-threatening or work limiting fashion. This would also avoid employers making assumptions in the process of their workforce planning, and provide the platform for conversation about how the experienced employee could best contribute to the workplace.

Question 44

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

The following are some of the examples of employment management best practices that attract or retain mature age employees:

- Provision of phased or graduated retirement plans;
- re-entry after retirement – an opportunity for the retired employee to reconsider retirement and return to employment within a specified timeframe (window of cooling down time before retirement is final);
- Provision of flexible workplace arrangements or job sharing;
- Ability to take extended Leave of Absence;
- Ability to perform work seasonally – for example, work only during the busiest times of the year;
- Provision of quality work environment with a culture that does not discriminate on the basis of age and uses age-neutral language;
- Treating older workers with the same level of respect as other workers – providing same levels of opportunities and long term projects or goals;
- Changing the position of the older worker through consultation to accommodate the worker's capacity as they age to make it less stressful or labour intensive;
- Placing older workers in mentoring, training or coaching roles;

- Utilisation of the Baby Boomers generation as the cultural change leaders;
- Education of older workers in relation to their options as they reach retirement age to consider alternatives other than retirement;
- Provision of career development, training and programs for older workers to maintain or expand their skills and to make them market ready;
- Development of online tools targeting mature age employees to consider alternative opportunities and career paths;
- Adopting and changing the shape of the workforce to accommodate older workers; and
- Provision of other incentives and business drivers for mature age workers to remain in the workforce.

Question 45

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

It is important to incorporate a number of strategies in order to raise awareness and provide education and training to remove barriers to mature age participation. These strategies should work collectively to increase the profile of the issues facing the ageing Australian workforce, and to educate both the employer groups and the workers on the alternatives that are becoming available to the workers as they near the retirement age.

Some of the ways of raising awareness and providing education and training to remove barriers to mature age participants in the workforce are listed below:

- designing education and awareness programs tailored to the employer groups and recruitment agencies;
- focusing on an induction program in an organisation, and ensuring that the older worker is engaged in an ongoing learning pathway or development program upon their commencement with the agency;
- setting up workshops and training sessions for the public;
- delivering media campaigns;
- leading discussion forums;
- providing publications and other resources to the public and employer and employee groups;
- developing online tools and interactive websites;
- setting up a phone support service for employers and mature age workers;
- providing career counselling and advice services tailored to older workers entering or re-entering the workforce; and
- commissioning further research.

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?

No other changes have been identified at this time.

WORKERS' COMPENSATION AND INSURANCE

The following commentary in relation to the workers compensation related matters has been provided by the WorkCover Corporation of South Australia.

Question 47

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

WorkCover SA is unable to comment on the general Government insurance for volunteers. However, Section 103A of *Workers Rehabilitation and Compensation Act 1986* (the Act) allows classes of volunteers to be deemed as employees of the Crown and thus covered by the Act for work related injuries.

At this time, only volunteer fire fighters with the South Australian Country Fire Service have been prescribed under this section of the Act. It is understood that there is currently consideration at Cabinet level of extending coverage to the South Australian State Emergency Service and volunteer members of the South Australian Volunteer Marine Rescue Associations.

If an overarching Commonwealth law is enacted to provide coverage for all volunteers, this would remove the discrepancies between states and territories, and as a result remove some barriers to volunteering. However, management of claims may still be required at a state level, which in turn may result in a duplication of the service and regulation.

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?

WorkCover SA submits that ideally, consistent provisions should be in place for every jurisdiction – state, territory or Commonwealth. As such, it may be best to leave this matter for the relevant Safe Work Australia Temporary Advisory group which is currently considering retirement age provisions across Australia.

In South Australia, injured workers are entitled to workers compensation regardless of their age. If they are within two years of, or above retirement age, access to income maintenance is limited to a maximum of two years. Injured workers remain entitled to medical and rehabilitation services and lump sum payments for non-economic loss regardless of age, with no limits outside of those applying to all other workers.

Retirement age is currently defined as either 65 years of age or the standard in the worker's industry. This has been identified as an issue in light of the Federal Government's phased increase of retirement age.

In April 2012, a member of the Greens Party, Ms Tammy Franks, Member of the Legislative Council, introduced the *Workers Rehabilitation and Compensation (Retirement Age) Amendment Bill 2012* (the Bill) in the South Australian Parliament. This Bill seeks to increase the retirement age within the Act to reflect future changes to the federal pension age. The federal pension age will be gradually increased from 65 to 67 years of age, starting in 2017 and taking full effect in 2023. This Bill is yet to be debated in Parliament.

WorkCover SA considers that any retirement age restrictions on workers compensation should be aligned across Australia with the Commonwealth pension age to ensure there are no gaps in coverage. This will have significant cost impacts for workers compensation authorities. It may also be considered appropriate to retain some limits on payment of income maintenance if gaps between workers compensation coverage and the aged pension are removed. Workers will have access to the pension and their superannuation, and the limit will recognise that it becomes more difficult with age to know when the worker may have chosen to retire anyway, or if separate health issues have begun to have a greater proportional impact on their recovery or working prospects.

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?

None have been identified at this time.

MIGRATION

Question 53

A skilled migration visa under the Migration Regulations 1994 (Cth) may only be obtained if the applicant is under 50 years of age. Should the age limit be increased?

Given the increase in age for eligibility for the Age Pension to age 67, it would appear logical to increase the age limit under the skilled migration visa. At age 50, a worker has theoretically seventeen years left in their working life before they reach retirement. As it is part of government policy to utilise the skilled migration visa program to fill skills shortages, to restrict the age to fifty years and younger means the Australian economy is missing out on a significant portion of skilled, working age migrants. It is recommended that this age limit be lifted in line with New Zealand's current age limit of 55 years, and to review this age limit with a view to incrementally increasing this limit in line with future trends.

Question 54

In order to obtain a range of visas under the General Skilled Migration category, applicants must obtain a pass mark in a 'points test' where points are allocated according to age, with no points for those aged 45 and over.

Should this be amended, and if so, how?

This age restriction should also be amended so that it is in line with international regimes, such as Canada. The South Australian Government recognises the need to balance the benefits of allowing skilled migrants into the country versus the potential cost they may add to the economy as they age. As age limits for accessing both the Age Pension and Superannuation increase, however, so too should age limits under skilled migration programs increase to reflect current realities and expectations of the working age population. It is suggested that points should be awarded up to and including the age of 54, in line with both Canada and New Zealand.

Question 55

An applicant over 50 years of age may not apply for a permanent employer-sponsored visa under the Migration Regulations 1994 (Cth) from 1 July 2012 unless they are an 'exempt person'.

(a) Should the age limit be increased?

(b) What considerations should be taken into account in determining whether a person should be eligible for an age exemption?

It is recommended that age restrictions in this category be raised to persons 55 years and under, in line with recommendations regarding other categories of skilled migrant visas. It is also recommended that, when considering whether a person should be eligible for an age exemption, actual industry need should be taken into account. Where there is a skill shortage in a particular industry, this should also have some bearing on exemptions to age restrictions when an individual applies for an employer-sponsored visa. This will have the effect of supporting government policy on meeting skills shortages from skilled migration.