
Grey Areas – Age Barriers to Work in Commonwealth Laws

Australian Law Reform Commission

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- Law Institute of Victoria;
- Law Society of New South Wales;
- Immigration Lawyers' Association of Australasia (a focus group of the Law Council's International Law Section);
- Law Council Legal Practice Section's Personal Injuries and Compensation Committee;
- Law Council's Legal Practice Section's Superannuation Committee; and
- Law Council Federal Litigation Section's Commonwealth Compensation & Employment Law Committee.

Introduction

1. The Law Council is pleased to provide the following submission on the Australian Law Reform Commission's (ALRC) Issues Paper titled, 'Grey Areas – Age Barriers to Work in Commonwealth Laws' (the Issues Paper).
2. It is noted that the purpose of the Issues Paper is to identify Commonwealth laws and legal frameworks that contain or create barriers to the participation of older people in the workforce or in other productive work, and to identify any changes that could be made to relevant Commonwealth legislation and legal frameworks to remove these barriers.
3. There are a number of Commonwealth laws and legal frameworks that the ALRC has identified as being of interest in this regard. These include those relating to:
 - income tax;
 - superannuation;
 - social security;
 - family assistance;
 - child support;
 - employment;
 - workers' compensation;
 - insurance;
 - migration; and
 - discrimination.
4. It is noted that the ALRC Issues Paper outlines a series of questions in relation to each of these issues.
5. This submission will focus on the following areas:
 - Superannuation;
 - Employment;
 - Workers' Compensation;
 - Migration; and
 - Other miscellaneous issues such as informal caring.
6. The submission will firstly address the issue of 'superannuation'.

Superannuation

7. The Issues Paper summarises the age-based rules applying to superannuation in the following terms:

"There are a number of age-based rules in superannuation law, providing when members can access their superannuation, and restricting the accumulation for older persons when they reach certain ages. The former group of rules may constitute a 'pull' to early retirement if age-settings are too low. The latter group of rules, by contrast, has the potential to 'push' older persons from employment due to the messages conveyed about retirement expectations. Some age restrictions may be necessary to ensure that tax concessions are

targeted to best support the accumulation of superannuation over the course of a working life.”¹

8. The Law Council Legal Practice Section’s Superannuation Committee (the Superannuation Committee) agrees with this analysis but notes that the age-based rules that provide when members can access their superannuation, and restrict the accumulation of superannuation for older persons, also recognise that superannuation is a form of private savings representing foregone consumption and is intended to be used by the persons who accumulated it (or by their dependants in the case of early death).
9. The Superannuation Committee is of the view that the concessional tax treatment that is applied recognises the benefit to the entire community of encouraging people to save for their retirement, thus reducing the burden on the taxpayer-funded pension system. If the age-settings are too high there is an increased risk that superannuation will benefit persons other than those who have accumulated it, and will operate more as a concessional tax means whereby wealth is passed to younger generations. That would be inconsistent with the Government’s policy objectives.
10. Accordingly, the Superannuation Committee believes that some age-based rules are necessary to allow people to benefit from their superannuation at an appropriate time to fund their living standards, while preventing them from accumulating assets in a tax advantaged environment for purposes other than funding their retirement (or providing for dependants in the case of early death).
11. The Superannuation Committee also believes that people have a legitimate expectation that they will at some stage in their lives be in a position to substantially retire from paid employment (although, as the Issues Paper notes, many will wish to continue some productive activity either by way of part-time paid employment or volunteer work).
12. To achieve the policy goal of avoiding disincentives to workforce participation, the Superannuation Committee is of the view that age-based rules need to include provision for older workers to both access superannuation and accumulate superannuation subject to reasonable restrictions on both access and accumulation. As set out below, however, the Superannuation Committee considers that some adjustments to these rules might be made so as to better support the relevant policy objectives.
13. In considering the ALRC’s questions in relation to whether superannuation rules are a barrier to workforce participation by older persons, the Superannuation Committee has considered whether the particular rules disadvantage older persons who continue to work compared to persons of the same age who do not work. The Superannuation Committee’s responses to the superannuation questions outlined in the Issues Paper are outlined in the paragraphs that follow.

Question 10.

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

¹ Australian Law Reform Commission, Issues Paper, *Grey Areas – Age Barriers to Work in Commonwealth Laws*, 1 May 2012, para 71, p.30. Available from <http://www.alrc.gov.au/publications/grey-areas-age-barriers-work-commonwealth-laws-ip-41>.

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14. The Superannuation Committee is of the view that the removal of the maximum age limit for superannuation guarantee contributions is an equity issue. It is difficult to identify a sound policy reason for employers to have different obligations for remuneration of employees based solely on their age.
 15. The Superannuation Committee considers that the age limit constitutes a form of discrimination against older workers based solely on their age, and is likely to result in at least some cases of older workers receiving less remuneration overall than younger workers doing the same job.
 16. The Superannuation Committee therefore supports the removal of the maximum age limit on equity grounds.

Question 11.

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

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

17. As set out above, the Superannuation Committee's view is that age-based restrictions on accumulation of superannuation are an appropriate component of superannuation regulation. A work test is an appropriate basis for framing the restrictions.
18. The Superannuation Committee supports the Tax Review recommendation that restrictions on persons aged 75 and over making contributions should be removed, but that a work test should continue to apply for persons aged 65 and over.²
19. The rationale is that once the age restrictions on superannuation guarantee contributions are removed, voluntary contributions need to be treated consistently. This is to avoid undue complexity in managing contribution obligations for employers and for superannuation funds.
20. The Superannuation Committee notes that the superannuation guarantee requires an employer to contribute 9% of an employee's ordinary time earnings, up to the maximum contribution base for a particular quarter. Some employers may contribute a greater amount – for example, the contribution may be 9% of an employee's total ordinary time earnings, or the employer may contribute at a higher rate than 9%, under an employment contract, salary sacrifice arrangement or a collective agreement.

² The Treasury, *Australia's Future Tax System – Final Report*, 2010, Recommendation 20. Available from http://www.taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/papers/Final_Report_Part_1/chapter_12.htm

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21. With the removal of the age restriction on superannuation guarantee contributions, employers will continue to be required to pay such contributions irrespective of an employee's age. They should therefore be able to continue to make the same level of contributions generally, irrespective of an employee's age.
 22. For equity and consistency, employees should also continue to be able to make voluntary post-tax contributions and self-employed people should be able to make pre- or post-tax contributions, on the same basis.
 23. The Superannuation Committee does not have a view as to whether the current restrictions on voluntary contributions are a barrier to work or that the changes the Superannuation Committee supports will necessarily provide an incentive to increased workforce participation. However, the Superannuation Committee considers that the work test is a reasonable restriction and that removal of the work test could be a disincentive to continued employment.
 24. If the unrestricted access age is raised in line with rises in the age pension age, the Superannuation Committee would support an equivalent rise in the age at which the work test applies to voluntary contributions. This would assist consistency of "message" in relation to retirement expectations.

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:

- (i) split contributions for a spouse aged 65 and over;
- (ii) split contributions for a retired spouse of preservation age and over;
- (iii) make spouse contributions for a spouse aged 70 and over; or
- (iv) 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?

25. The Superannuation Committee considers that age-based restrictions on the capacity to fund superannuation for a spouse are an appropriate component of superannuation regulation, and that the current restrictions strike an appropriate balance with the policy goal of providing the opportunity for couples to fund superannuation for a non-working spouse or under-funded spouse.
26. The Superannuation Committee therefore supports the current rules for funding superannuation for a spouse.

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?

27. The Superannuation Committee considers that cessation of Government co-contributions at a specified age is an appropriate restriction on accumulation.

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?

28. The Superannuation Committee notes the recent Budget announcement that the previously announced higher concessional contributions cap for persons aged 50 and over with superannuation balances of less than \$500,000 is to be deferred for two years.³
29. The stated policy intention for the increased concessional contributions cap for persons over age 50 years was to permit “catch up” contributions for persons who have been unable to accumulate sufficient superannuation at younger ages, for a variety of reasons.
30. The Superannuation Committee is of the view that the higher caps are an equity issue. A flat cap for all age groups has the potential to significantly advantage people who have maintained constant full-time employment over their lifetime, compared to people with broken working patterns or periods of part-time employment. The Superannuation Committee notes that women, in particular, are likely to fall into these latter groups (as highlighted in paragraph 74 of the Issues Paper).
31. The Superannuation Committee therefore supports higher concessional caps for persons over 50 years of age on equity grounds.

Question 15.

What effect, if any, does the ‘bring forward rule’ (in relation to the non-concessional contributions cap) have on mature age participation in the workforce? What changes should be made to this rule to address barriers to such participation?

32. The Superannuation Committee considers that the “bring forward” rule, with the requirement to satisfy the work test for persons over the age of 65, may not strike an appropriate balance between the stated policy intention of permitting “catch up” contributions and the need for restrictions on accumulation of superannuation at older ages. This is because a person aged 65 still has a lengthy life expectancy, and the imposition of barriers to the building of retirement savings at this relatively early stage may in turn constitute a barrier to the achievement of the Government’s policy objectives.
33. The Superannuation Committee notes that many persons aged 65 and over may be in a position, for the first time in their lives, to contribute substantial lump sums into

³ See Press Release by Minister for Financial Services and Superannuation, the Hon. Bill Shorten MP, 8 May 2012. Available from <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/024.htm&pageID=003&min=brs&Year=&DocType=>

superannuation. For example, they may be able to sell assets or perhaps the family home (in order to downsize), and thus be able to boost their retirement savings. Preventing the use of the 'bring forward' rule for these people may represent a missed opportunity in terms of the Government's goal of having individuals secure their own retirement incomes.

34. The Superannuation Committee supports the continued application of the work test, on the grounds that this is a reasonable restriction on accumulation. However, if the unrestricted access age is raised in line with rises in the age pension age, the Superannuation Committee would support an equivalent rise in the age at which the work test applies in respect of the "bring forward" rule. This would assist consistency of "message" in relation to retirement expectations.

Question 16.

The age settings for access to superannuation benefits are:

- (i) 55 years increasing to 60 years for 'preservation age' — when persons may access superannuation if retired; and**
- (ii) 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?

35. The ALRC Issues Paper indicates the ALRC is interested in comments on the following issue:

*"The preservation age rules may encourage people to leave the workforce as soon as they can access their superannuation – although this may be ameliorated by the transition to retirement rules ... Preservation age settings that are too low may also constitute a disincentive to mature age workplace participation due to the message it sends about retirement expectations."*⁴

36. The current superannuation access rules are a mix of:
- unrestricted access at age pension age; and
 - unrestricted access on retirement, at an earlier "preservation age", with limited access under transition to retirement rules [TTR rules].
37. The Superannuation Committee does not support the Tax Review's recommendation for convergence of the preservation age to the pension age.
38. The Superannuation Committee's view is that the preservation age needs to be lower than the age pension age, particularly as the age pension age increases, to allow access to superannuation for people who wish to retire before age pension age and have valid reasons for doing so, or who are effectively forced into early retirement through an inability to find employment.
39. Obviously, raising the age at which people can access income derived from sources other than paid employment would create a significant incentive to continue in paid

⁴ Op cit., ALRC Issues Paper, para 123, p.40.

employment. However, the Superannuation Committee notes that other policy goals, and the reality of workforce opportunities for older workers, need to be considered.

40. The Superannuation Committee considers that raising the preservation age to 67:
- will not increase workforce participation for older people who are receiving disability support pensions or other forms of social security due to an inability to find suitable employment – they will simply continue to receive social security until their superannuation becomes available; and
 - may force people who would otherwise have retired before then to continue working, even if they have sufficient superannuation to retire earlier – this does not recognise legitimate retirement expectations, and in the Superannuation Committee’s view is inequitable.
41. The Superannuation Committee is of the view that any change to the current preservation age scale should be based on research in relation to these matters. However, raising the unrestricted access age, in line with rises in the age pension age, may be appropriate and would assist consistency of “message” in relation to retirement expectations.

Question 17.

In practice, how do the ‘transition to retirement’ rules encourage continued mature age participation in the workforce? What changes, if any, should be made to these rules to encourage continued workforce participation?

42. The Superannuation Committee is of the view that, in principle, TTR rules are a necessary component of any policy to encourage workforce participation by older people. In the absence of these rules, people who elect to continue to work after their preservation age are potentially disadvantaged compared to people who elect to retire, and the disincentives to undertake part-time work may be particularly acute.
43. However, the Superannuation Committee is unable to comment on how effectively these rules have in fact operated to allow people to transition to retirement in the intended manner. This is a matter that would require further research.

Question 18.

In practice, do persons of preservation age have sufficient access to the ‘transition to retirement’ rules? If not, what measures could improve such access?

44. The ALRC Issues Paper indicates the ALRC is interested in comments on the following issue:

“Access to the TTR rules may be restricted, because not all superannuation funds offer the income stream products that enable members to use this option. In these circumstances, members may need to change superannuation funds if they wish to use the TTR rules. The ALRC is interested in hearing whether this is a barrier to the TTR option – and, consequently, continued workforce participation.”⁵

⁵ Ibid., para 132, p.41.

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45. Under current “portability” rules, a superannuation trustee is generally obliged to transfer or rollover all or part of a member’s benefit to another superannuation fund within 30 days of receiving a request from the member in a form that complies with prescribed requirements.⁶
46. The Superannuation Committee’s view is that, in principle, the portability requirements offer sufficient access to TTR pensions as most people are in a position to transfer their relevant superannuation entitlements to a fund that offers the product. The Superannuation Committee suggests that broader availability of financial advice would assist awareness of people’s rights in this regard.⁷
47. The Superannuation Committee is not aware of any particular efforts made by the Government to publicise the availability of TTR pensions, and expects that more people would take advantage of this option if it was more widely understood. The Superannuation Committee notes that the information on the Australian Taxation Office (ATO) website is somewhat discouraging. The opening paragraphs contain the following:
- “With the new rules, you can withdraw some or all of your super over into a retirement income stream. Then you can top up your reduced income by drawing on your super.*
- However, you must be aware of the impact this can have on you and your circumstances. Some parts of this measure are complex to understand, set up and maintain. We recommend you see a financial adviser, accountant or your tax agent to help you decide if this option is right for you.”⁸*
48. The Superannuation Committee is unable to comment on the operation of the rules in practice.

Question 19.

What changes, if any, should be made to the taxation of superannuation benefits to remove barriers to work for mature age persons?

49. The current position is that benefits received after the age of 60 are tax free, and benefits received before the age of 60 are subject to tax on the amount that exceeds the “low rate cap.”
50. The Superannuation Committee’s view is that the current taxation treatment is not a barrier to work (by providing an incentive to retire) as there is no disadvantage to people who elect to continue to work, provided the rules permitting TTR benefits and continued accumulation of superannuation while in the workforce are retained.

Question 20.

What other changes, if any, should be made to superannuation laws, including tax laws, to remove barriers to mature age participation in the workforce?

51. The Superannuation Committee considers that the tax treatment of contributions by self employed persons over the age of 75 is an equity issue, once the removal of the

⁶ Regulations 6.33 – 6.35, *Superannuation Industry (Supervision) Regulations 1994*. Some limitations apply, for example, the portability requirements do not apply to defined benefits.

⁷ While this is an aim of the “Future of Financial Advice” reforms, we expect that an analysis of the likelihood of the FOFA reforms achieving this aim is outside the scope of this Review.

⁸ <http://www.ato.gov.au/super/content.aspx?doc=/content/74219.htm>

maximum age for superannuation guarantee is implemented. The Superannuation Committee therefore supports the equivalent tax treatment of contributions by self employed persons on equity grounds.

52. The Superannuation Committee does not consider that the different tax treatment necessarily disadvantages workers over the age of 75 who work compared to those who do not, or that the changes the Superannuation Committee supports will necessarily provide an incentive to increased workforce participation.
53. The Superannuation Committee notes that some Commonwealth public sector defined benefit schemes have a structure including 'cliff' vesting. This means that employees who remain until a specified age receive significantly greater benefits than those who might retire or resign before that age.
54. Other defined benefit schemes operate such that, from a specified age, the employee will not accrue any greater benefit even if they continue working (except perhaps to reflect a higher final salary). These are complex issues. While there is clearly a significant element of age-based discrimination at work, and implications in terms of incentives and disincentives to workforce participation, changes to the design of defined benefits are difficult to make, particularly as they inevitably involve cost implications for employers and any other funding entities.
55. The Superannuation Committee notes that there are many superannuation rules under which the attainment of particular ages will trigger certain tax implications, or will make contributions or other opportunities either available or cease to be available. In the case of preservation age, the individual's date of birth is also relevant. In some situations, the attainment of a precise age is important (for example, on reaching the date on which an individual attains their preservation age, they can commence a TTR). In other situations, the relevant tests effectively apply to the individual's age at the beginning of a financial year (for example, the bring-forward rule applies to an individual who was under the age of 65 at any time during the year).⁹ These age-based rules incorporate a significant degree of complexity within the superannuation system.
56. The Superannuation Committee's experience is that these rules are not well understood by the community in general, and that many advisers are also uncertain of the rules. Failure to understand and to apply the rules correctly can lead to adverse tax consequences for the superannuation fund members concerned. In some situations, these consequences can be financially devastating as demonstrated in the case study below.

Case study (based on an actual fact situation):

A taxpayer sold his house and wished to contribute some of the proceeds into superannuation, being aware of the tax advantages this would provide and the opportunity it presented to maximise his retirement income. He consulted with staff at a retail fund, and was advised to contribute \$450,000 into that fund, in 5 separate payments of \$50,000 each. The taxpayer had turned 65 in the previous financial year. He was informed that he would need to satisfy the 'work test' in order to make these contributions, but he was not advised that his age prevented him from using the 'bring forward' rule and that consequently the amount of \$300,000 would be subject to excess contributions tax.

⁹ Section 292-85(3)(b), *Income Tax Assessment Act 1997*

The taxpayer was not aware from his general knowledge that any age-based restriction applied in respect of the contribution of amounts into superannuation by way of non-concessional contributions. He subsequently received an excess contributions tax assessment from the Australian Taxation Office for the amount of \$139,500. For this taxpayer, an effort to act responsibly and in accordance with Government policy, by increasing his personal retirement savings within the superannuation system, has resulted in a financially crippling blow. It seems reasonable to expect that the ultimate result of the imposition of this tax will be that the taxpayer will be forced to rely on the taxpayer-funded age pension from an earlier age than would otherwise be the case.

57. Understandably, individuals who find themselves in this type of situation are bewildered and distressed, and view the imposition of such taxes as unfair penalties which have been assessed against them by reason of a combination of their age and a failure to understand a complex system of rules.
58. The Superannuation Committee notes that some of the age-based rules seem counter-intuitive to the community in general, and this further increases the likelihood that individuals will at some point be 'tripped' by such a rule. For example, the taxpayer in the case study above was aged 65. At that point, he would have been expecting to need to provide for his financial requirements over a lengthy period (according to the Australian Bureau of Statistics, an Australian man at age 65 has a life expectancy in the vicinity of 18 years). The fact that there might be a limitation on contributions to superannuation for a person of his age (compared to other individuals) did not occur to the individual described in the case study, and doubtless does not occur to many other Australians.
59. The Superannuation Committee queries whether, in the absence of simplification, more work could be done to explain the age-based rules to the community. At present, the Australian Tax Office (ATO) does provide a range of information on its website, some of which is written in simple language and would be readily understandable to most. However, it is not certain how many individuals would access the ATO website looking for information of this type (and one would first need to be aware that there was a question to be asked before going in search of information in any event).
60. The Superannuation Committee does not have the expertise to suggest how such information might best be imparted, and is of course conscious that any form of 'marketing campaign' has a cost. Nonetheless, the Superannuation Committee is aware that the Government has the capacity to write to community members when they attain a particular age (for example, in connection with breast screening and bowel cancer screening campaigns, and in connection with electoral enrolment). The ATO also has that capacity.
61. The Superannuation Committee is also aware of information campaigns conducted by the ATO and by the Government more generally, which involve utilising a range of delivery and distribution methods. For example, the forthcoming campaign aimed at encouraging people to search for their lost superannuation.¹⁰

¹⁰ See for example, Government's recent announcements in relation to its Super Seeker initiative. Available from <http://mfss.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/031.htm&pageID=003&min=brs&Year=&DocType=0>

Employment

62. Australia's ageing population means that age discrimination, and the ways in which it can be addressed, are becoming increasingly important issues in Australia. Indeed, in its 2010 report on *Age Discrimination – Exposing the Hidden Barrier for Mature Age Workers*,¹¹ the Australian Human Rights Commission (AHRC) described unlawful age discrimination as “one of the foremost barriers”¹² to workplace participation by older Australians.
63. The Law Council notes that one of the issues that the ALRC has been asked to take into consideration when conducting this inquiry, is the work that the Attorney-General's Department is currently undertaking with respect to consolidating Commonwealth anti-discrimination legislation into a single Act (the Consolidation Project).
64. The Law Council has previously expressed its support for the Consolidation Project as a key initiative within Australia's Human Rights Framework.¹³ The consolidation process also offers the benefit of improving protections for intersectional discrimination in employment: for example, where a person might be discriminated against on the basis of age and disability.
65. The Law Council has provided the Attorney-General's Department with a number of submissions on the Consolidation Project,¹⁴ particularly in relation to the promotion of equality and the need for adequate legal protection against discrimination in line with Australia's international human rights obligations.
66. The Law Council acknowledges that the Consolidation Project is ongoing and that accordingly, the ALRC will consider issues of age discrimination under the *Age Discrimination Act 2004* in further detail following the release of the draft consolidated Act. As well as the issue of discrimination in employment, there are other issues which may provide barriers to the participation of older people in work such as:
- a) The practices and administration of private recruiters; and
 - b) Relevant provisions of the *Fair Work Act 2009* (Cth) (the FWA).
67. This submission will address the following questions with respect to employment:
- a) Questions 34 to 39; and
 - b) Questions 44 to 46.

¹¹ Australian Human Rights Commission, *Age Discrimination – Exposing the Hidden Barrier for Mature Age Workers*, 2010. Available from <http://www.hreoc.gov.au/pdf/age/hiddenbarrier2010.pdf>.

¹² *Ibid.*, p.iii.

¹³ See

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx>

¹⁴ See Law Council of Australia submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion paper – Supplementary Submission*, 26 April 2012. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F20E96C4-F2B2-6170-CE0D-2EC8B77C860A&siteName=lca; Law Council of Australia submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=3CB5B91F-FAD1-A141-6739-7B95833015D0&siteName=lca.

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?

68. There are a number of ways that the practices of private recruitment agencies can be regulated to remove barriers to mature age employees entering or re-entering the workforce. For instance, one of the Law Council's constituent bodies, the Law Institute of Victoria (LIV), suggests that such practices could be regulated by the implementation of codes of conduct, guidelines, or minimum standards which could provide guidance about how to constructively engage with and employ older people.
69. The LIV notes that a reporting framework similar to that proposed in the *Equal Opportunity for Women in the Workplace Amendment Bill 2012*, requiring employers to report against equality indicators related to age may be useful in this regard.¹⁵ A code of ethics and professional conduct, similar to that used by the Australian Human Resources Institute and for the Recruitment and Consulting Services Association may be another model that could be adopted.¹⁶
70. Alternatively, the LIV suggests that a more regulatory approach could be implemented that would require the recruitment industry to comply with licensing requirements under a federal licensing regime, similar to other industries that provide services to the public.¹⁷ A possible requirement under such an arrangement could be mandatory, regular education and training in relation to the recruitment industry's legal obligations regarding age discrimination in the interview and application processes. Indeed, although recruitment agencies are already required to comply with statutory obligations under anti-discrimination laws, which provide that it is unlawful to discriminate against older workers both through their own practices or by following discriminatory employer requests, many employers (particularly smaller businesses) appear to be unaware of their legal obligations.
71. In order to ensure compliance with a more regulatory approach, the LIV suggests that random audits could be conducted by the Federal Government. In addition to this, the LIV considers that employment of older employees could be promoted by providing recruitment agencies and employers with formal public recognition. The LIV suggests that this recognition could be modelled on the annual awards and 'employer of choice' lists compiled by the Equal Opportunity for Women in the Workplace Agency (EOWWA).
72. It is noted that from 1 July 2012, the Federal Government will be implementing the 'Jobs Bonus' scheme. This scheme provides an incentive payment of \$1,000 to employers who employ workers aged 50 years and over for at least three months.¹⁸ The LIV suggests that this scheme could be broadened to provide employers with a new payment for each year they continue to employ the older worker.

¹⁵ See Item 44, *Equal Opportunity for Women in the Workplace Amendment Bill 2012*. Available from http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4765_first-reps/toc_pdf/1225b01.pdf;fileType=application%2Fpdf.

¹⁶ See http://www.ahri.com.au/MMSDocuments/membership/resources/governance/by-inlaw1_codeof%20ethics_professionalconduct.pdf; http://www.rcsa.com.au/documents/RCSA%20Code/Code%20Reference%20Documents/Code_for_Professional_Conduct.pdf

¹⁷ For example, financial services licensees must hold an Australian Financial Services License.

¹⁸ See for example <http://www.abc.net.au/news/2012-04-18/government-announces-older-worker-plan/3957374>

Question 35.

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

73. The LIV considers that section 65 of the FWA should be amended to include age as a basis upon which an employee may request flexible working arrangements under the National Employment Standards. At present, section 65 only allows certain employees who are the parents of or have responsibility for the care of a child under school age (or under 18 with a disability), to request a change to their working arrangements. The employer must respond within 21 days and may refuse the request only on reasonable business grounds.
74. The LIV suggests that this right should be extended so that similar obligations apply to older workers as well as employees with caring responsibilities more generally. The LIV considers that extending the operation of section 65 in this way would enable older employees to request flexible working arrangements in the years leading up to their retirement. This may be of particular assistance to older workers who do not want to stop working, but need to make some changes to their working arrangements, such as reducing their working hours or converting to part-time or casual employment.
75. The LIV notes the limitations of section 65: specifically, the fact that this section merely provides a right to request flexible work arrangements, to receive a written response and that the employer may refuse the request on reasonable business grounds. In addition, the Fair Work Ombudsman (FWO) may not formally investigate an alleged contravention of section 65 of the FWA, except possibly where an employer has not provided a written response within 21 days. This means that even if a contravention letter or compliance notice is issued, the FWO may not be able to escalate the matter further where an employer does not respond or take steps to comply with the FWA.
76. The LIV also notes that section 44(2) excludes a contravention of s 65(5) relating to a refusal of a request for a change in working arrangements from the civil remedy provisions under Part 4-1 of the FWA. Accordingly, the LIV considers that section 65(5) should be included in the civil remedy provisions.
77. Alternatively, the LIV suggests that where a request for flexible working arrangements is rejected by an employer, there should at least be a right to have the decision made under section 65 reviewed by Fair Work Australia. The LIV considers that Fair Work Australia should also 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.
78. Another of the Law Council's constituent bodies, the Law Society of NSW (LSNSW), suggests that the issue of whether section 65 of the FWA should be amended to include age as a basis upon which an employee may request flexible working arrangements is a policy issue and that any decisions made on such requests should involve consideration of the age of the employee, the basis for the application, and details of the proposed arrangements, including duration.

Question 36.

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

79. The LIV considers that individual flexibility arrangements (IFA) are a useful flexibility mechanism as they allow employers and individual employees to make arrangements which vary the effect of the modern award or enterprise agreement, to meet both parties' needs so long as the employee is better off overall.
80. Notwithstanding this, the LIV notes that vulnerable, older employees may not be in a position to negotiate an IFA or may be hesitant to attempt to do so for fear of the consequences. This mechanism may be enhanced by collective negotiation or the provision of support for older workers in this regard.

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 age?

81. The Law Council does not receive feedback directly from mature age employees or prospective employees. However, the Law Council has had the opportunity to consult with its constituent bodies in relation to the protections against discrimination on the basis of age in the *Age Discrimination Act 2004* (Cth) and the FWA in the context of the Consolidation Project. It is from this perspective that the Law Council offers the comments below on the relevant FWA provisions and how they interact with Commonwealth anti-discrimination legislation.
82. Part 3-1 of the FWA contains a series of safeguards for workplace rights known as general protections provisions. These provisions seek to protect employees from adverse action and other inappropriate behaviour related to workplace rights¹⁹ and industrial activities.²⁰ They also provide protection from workplace discrimination.²¹
83. Under the FWA, a person must not take 'adverse action' against another person because the other person has a workplace right, has exercised a workplace right, or proposes to exercise such a right.²²
84. 'Adverse action' is broadly defined, and includes action against prospective employees in addition to actual employees.²³ The Law Council acknowledges that some work arrangements will involve persons working as independent contractors, but for the purposes of this submission, the Law Council is restricting its comments to employees. 'Adverse action' also encompasses a range of behaviours and includes taking certain prescribed actions as well as threatening or organising such action.²⁴

¹⁹ Division 3, *Fair Work Act 2009*

²⁰ Division 4, *Fair Work Act 2009*

²¹ S.351, *Fair Work Act 2009*

²² S.340, *Fair Work Act 2009*

²³ S.342, *Fair Work Act 2009*

²⁴ S.342(2), *Fair Work Act 2009*

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85. Actions that are considered 'adverse' include dismissal; injuring the employee in the course of their employment; altering the position of the employee to the detriment of the employee; and discriminating against an employee/prospective employee on the basis of a series of protected attributes.
86. The protected attributes are outlined in section 351 of the FWA. This section prohibits an employer from discriminating against an employee, or prospective employee on the basis of their race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.²⁵
87. Age is specifically mentioned as a protected attribute in this regard, and employers who discriminate against their employees or prospective employees on the basis of this characteristic may be found to breach the general protections provisions of the FWA.²⁶ The LSNSW notes that age is also included as one of the reasons for which an employer must not terminate an employee's employment under section 772(1)(f) of the FWA.
88. The Law Council supports the diverse range of protected attributes in section 351. Indeed, in its supplementary submission on the Discussion Paper, the Law Council recommended that the consolidated Act should include the same attributes as those protected in section 351 of the FWA.²⁷
89. Notwithstanding the general protection against discrimination outlined above, there are a number of circumstances outlined in the FWA where discrimination will not amount to adverse action. For example, an employer will not be found to have discriminated against their employee or prospective employee if the action was taken because of the inherent requirements of the particular position concerned,²⁸ or if the action was taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.²⁹
90. An employer will also not be found to have discriminated against their employee or prospective employee where the action taken is not unlawful under any anti-discrimination law in force in the jurisdiction where the action was taken.³⁰ Thus, where action is authorised by or is not considered unlawful under relevant anti-discrimination law, either by virtue of an exception or exemption applying, then that action is not unlawful under the adverse action provisions of the FWA.³¹
91. The Law Council highlighted the problematic nature of this aspect of the FWA's operation in its submission on the Discussion Paper.³² In particular, the Law Council noted the very real prospect of section 351 being applied inconsistently throughout Australia because of the different anti-discrimination laws currently operating in each jurisdiction, and the subsequent confusion that this is likely to cause both

²⁵ S.351, *Fair Work Act 2009*

²⁶ S.772(1)(f), *Fair Work Act 2009*

²⁷ Op cit., Law Council of Australia Supplementary Submission, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper – Supplementary Submission*, p.33.

²⁸ S.351(2), *Fair Work Act 2009*

²⁹ S.351(2)(c), *Fair Work Act 2009*

³⁰ S.351(2)(a), *Fair Work Act 2009*

³¹ Op cit., Law Council of Australia Submission, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, p.81.

³² Ibid.

complainants and respondents.³³ The LSNSW has raised similar concerns, noting in particular that because the scope of the general protection remedies is confined to those actions which are unlawful in the place where the action is taken, a person would need to consider the applicable State anti-discrimination law and also Commonwealth law, which could be a complex preliminary question.

92. The LSNSW notes that it is difficult to assess the effectiveness of the general protections provisions in addressing discrimination in relation to mature age employees or prospective employees, in the absence of information as to the number of matters brought and the outcomes. The LSNSW notes that age discrimination is experienced by people of all ages, and therefore, information pertaining to those employees over 45 years of age would need to be identified separately from other claims of age discrimination. At present, this information is not available from public sources.
93. The adverse action provisions of the FWA combined with other laws affecting employment, offer a complex range of options for persons experiencing discrimination in the workplace. There is also significant overlap with other anti-discrimination legislation and the jurisdiction of courts and tribunals that can deal with the same conduct. The Consolidation Project provides the opportunity to minimise this duplication and promote clarity and consistency for complainants and respondents seeking to navigate these regimes.
94. There are other elements of the general protections regime under the FWA that arguably make it a more effective avenue for redress in circumstances of age discrimination in the employment context than State or Commonwealth anti-discrimination legislation. This is particularly the case with respect to the shifting burden of proof and the cost implications of actions under the FWA.

Burden of proof under the general protection provisions of the Fair Work Act

95. Under the existing Commonwealth anti-discrimination laws, the burden of proving that the respondent treated the complainant less favourably because of their protected attribute falls entirely on the complainant.
96. In contrast to this, under the adverse action provisions of the FWA, once a complainant alleges that a person took action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.³⁴
97. The FWA shifts the burden of proof from the complainant to the respondent and as a result, provides a greater balance between the interests of complainants and respondents compared to the approach currently adopted in Commonwealth anti-discrimination legislation. Indeed, a shifting onus provision like that used in the FWA requires duty holders to provide evidence as to why they took the particular action that has been challenged, so that the court can make an assessment of whether it was on an unlawful basis.³⁵

³³ Ibid.

³⁴ S.361, *Fair Work Act 2009*

³⁵ Discrimination Law Experts Group, *Submission in response to Discussion Paper on Consolidation of Commonwealth Anti-Discrimination Laws*, 13 December 2011, p.12. Cited in Law Council of Australia, supplementary submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper – Supplementary Submission*, 26 April 2012, p.13. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=F20E96C4-F2B2-6170-CE0D-2EC8B77C860A&siteName=lca.

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98. It has been suggested by some commentators that the shifting onus under the FWA makes it an attractive jurisdiction for applicants in discrimination cases to bring an action.³⁶

Costs under the general protection provisions of the Fair Work Act

99. The other element of the general protections regime that may make action under the FWA a more effective means of addressing age discrimination in employment relates to the cost of bringing an action.
100. Under Commonwealth anti-discrimination laws, “costs tend to follow the event.”³⁷ This means that subject to the court’s overriding discretion, the successful party in an action will be able to recover their costs from their opponent. It also means that whichever party is unsuccessful may be ordered to pay the winning party’s costs as well as their own. The Law Council is of the view that the prospect of a costs burden in the event of a failure by a complainant to prove a claim may act as a deterrent for potential complainants from seeking relief under Commonwealth anti-discrimination legislation.
101. The advantage of commencing an age discrimination action under the ‘general protections’ provisions in the FWA is that general protections matters usually involve parties only being ordered to pay the other party’s costs in circumstances where proceedings are vexatious or have been instigated without reasonable cause.³⁸ This costs provision means that more employees are likely to use the FWA provisions.

Other reasons for the effectiveness of the general protection provisions of the Fair Work Act

102. In addition to the advantages outlined above, the LIV considers that there are a number of other reasons why the general protections provisions under the Fair Work Act 2009 (Cth) are effective in situations where a mature age employee, or prospective employee, has been discriminated against on the basis of age. These include the fact that the unlawful/discriminatory reason only needs to be part of the reason for the adverse action (as opposed to, for example, the substantial reason); and the fact that the FWO can investigate and take action on discrimination matters under the general protections provisions.
103. Notwithstanding the reasons above, the LIV also considers that there are a number of aspects to the general protections provisions under the FWA that detract from their effectiveness. These include the fact that the general protections provisions may not extend to indirect discrimination.

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?

³⁶ Andrades, C. (2009). *Working Paper 47: Intersections between General Protections under the Fair Work Act 2009 (Cth) and anti-discrimination law – Questions, quirks and quandaries*, Centre for Employment and Labour Relations Law, University of Melbourne. Available from http://celrl.law.unimelb.edu.au/files/Andrades_Working_Paper_No._47.pdf.

³⁷ S.570, *Fair Work Act 2009*

³⁸ Op cit., Andrades, C. (2009). *Working Paper 47: Intersections between General Protections under the Fair Work Act 2009 (Cth) and anti-discrimination law – Questions, quirks and quandaries*, p.12.

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104. The LIV notes that modern awards must include a 'flexibility term', enabling an employer and the employee to make an IFA to vary the effect of the enterprise agreement to accommodate the employee's circumstances. Thus, older workers who are covered by modern awards may negotiate IFAs with their employers, for example, to vary their work arrangements to accommodate their circumstances.
105. However, as noted above, older workers may not always be in a position to individually negotiate such arrangements and 'flexibility terms' could be enhanced by collective negotiations or other support mechanisms for older workers in this regard.

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?

106. There are a number of ways in which compulsory retirement ages and re-licensing or re-qualification requirements create barriers to mature age participation in the workforce. For instance, the LIV considers these requirements can create a negative stereotype of older employees being incompetent or incapable of undertaking paid employment.
107. Accordingly, the LIV considers that such requirements should be removed so that it is the individual employee's choice as to whether and when they retire, so long as they can still undertake the genuine and reasonable job requirements.
108. The LIV notes that adequate safeguards exist within re-licensing or re-qualification requirements as well as standard testing, to discern whether employees are able to perform the inherent requirements of their jobs. This enables any potential occupational health and safety issues to be identified and addressed at an early stage. The LIV suggests that re-qualification requirements and assessments should be limited to a person's ability to perform the tasks of their particular job, regardless of their age.

Question 44.

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

109. Examples of employment management best practice aimed at attracting or retaining mature age employees are diverse, but can include providing flexible workplaces, as well as effective recruitment and management practices.
110. The LIV suggests that employers could facilitate a flexible workplace by:
- a) allowing employees to work flexible hours;
 - b) providing employees with opportunities for part-time employment;
 - c) implementing job-sharing arrangements;
 - d) permitting older employees to work from home; and

e) providing flexible leave options.

111. Another way that employers could attract or retain mature age employees is through effective recruitment and management practices. The LIV notes that this can be facilitated in a number of ways, including:

- a) Allowing mature age employees to return to the workplace after they have retired;
- b) Providing alternative, interesting and exciting job opportunities for older workers;
- c) Designing age-friendly job advertisements and making these accessible to older people;
- d) Employing age-friendly job selection processes and staff;
- e) Carrying out an induction process for older employees when they commence employment;
- f) Encouraging older employees to maintain and develop their skills, knowledge, qualifications and training;
- g) Valuing older workers and letting them know that their skills and experience are appreciated; and
- h) Ensuring the workplace complies with occupational health and safety standards by providing suitable equipment and taking the physical and mental needs of older workers into consideration.

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?

112. The LIV has identified a number of ways for raising awareness and providing education and training to remove barriers to mature age participation in the workforce and other productive work.

113. For instance, the LIV suggests that Federal and State Governments throughout Australia could launch a joint media campaign promoting the benefits of older workers and the obligations of employers and employees under discrimination laws. The LIV suggests that this campaign could also inform older workers about the rights and remedies that are available to them under relevant legislation if they feel they have been discriminated against on the basis of age.

114. In addition to this, the LIV suggests that there should be a requirement for all directors and employees of recruitment agencies (and employers) to attend ongoing education and training programs, specifically targeting age discrimination in the pre-employment context.

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115. The LIV also notes that the FWO and State and Territory equal opportunity agencies could increase their educational role to assist employers, recruitment agencies and employees to understand their rights and obligations under Federal and State anti-discrimination legislation, particularly in relation to age discrimination. The LIV considers that these agencies and community legal centres should be adequately funded to provide free, on-going community and education training programs.
116. Finally, the LIV suggests that additional educational material should be developed to educate employees and employers about their rights and responsibilities in relation to mature workers. The LIV suggests that resources based on the Australian Chamber of Commerce and Industry's *'Employ Outside the Box'*³⁹ may be useful in this regard.

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?

117. The LIV has identified a number of other changes that should be made to the employment law framework to remove barriers to mature age participation in the workforce or other productive work. These include changes based on the *Equal Opportunity Act 2010* (Vic) (the EO Act).
118. Sections 17 and 19 of the EO Act require employers to "accommodate" the parental or carer needs of their employees (including people to whom employment has been offered).
119. Similarly, section 20 of the EO Act requires employers to make "reasonable adjustments" for employees (including people to whom employment has been offered) with a disability.
120. These provisions of the EO Act express positive obligations on employers in contrast to the prohibition on discriminatory conduct under the *Age Discrimination Act 2004* (Cth) and the LIV suggests that such provisions be considered as model provisions in the consolidation of anti-discrimination laws.
121. In addition to this, the LIV considers that section 65 of the FWA could be extended to mirror section 20 of the EO Act, so that employers are required to make reasonable adjustments for persons who are offered employment, or employees with a disability. This protection could also be extended to older employees generally, who may require adjustments to be made in order to perform the genuine job requirements.

Workers' compensation and insurance

122. As the Issues Paper notes, age restrictions on workers' compensation payments can mean that in certain circumstances, workers aged over 65 are unable to access compensation in the event of a workplace accident. This inability to access compensation may act as a disincentive for mature age workers to remain in the

³⁹See <http://acci.asn.au/getattachment/1d9163c5-f634-4126-9e90-ae73d810f1bc/Employ-Outside-the-Box.aspx>

workforce. This issue is of particular interest to the Law Council Legal Practice Section's Personal Injuries and Compensation Committee, and the Law Council Federal Litigation Section's Commonwealth Compensation and Employment Law Committee (the Law Council Committees).

123. The Issues Paper also notes that volunteers are not eligible for workers' compensation at a Commonwealth level. This issue is of particular interest to the Law Council Committees and one of the Law Council's constituent bodies, the Law Society of South Australia (LSSA).
124. This submission addresses questions 47 and 49 in relation to these issues.

Question 47.

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

125. In relation to workers' compensation coverage for volunteers, the Law Council Committees note that there is an issue with respect to injured volunteers being covered by such schemes, given State and Territory legislation does not really provide coverage for volunteers. In any event, the Law Council Committees note that it is unlikely that not-for-profit organisations would be able to sustain the type of premiums involved if volunteers were to be covered under workers' compensation legislation.
126. The Law Council Committees note that they are not able to comment upon the likely cost of the Commonwealth adopting a volunteers' compensation scheme without an actuarial analysis as to its costs. Notwithstanding this, the Law Council Committees consider that it would be appropriate for the Commonwealth to cover volunteers involved in Commonwealth activities: for example, volunteering at National institutions such as the Australian War Memorial.
127. The Law Council Committees consider that it is appropriate that occupational health and safety laws apply to volunteers in the same manner that they apply to paid employees. The Law Council Committees do not believe that this equitable requirement should be a disincentive to recruiting mature age volunteers and note that in practice, it does not appear that it is.
128. One of the Law Council's constituent bodies, the LSSA, notes that the volunteering sector is a potential future 'engine room' for activity given Australia's ageing population, and considers that there should be no administrative impediments to the enhancement of that sector. The LSSA does not believe that an organisation which engages volunteers should have to consider the extent to which a particular volunteer may fall within the protection of State or Territory laws to compensate for the absence of Commonwealth coverage.

Question 49.

What 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?

129. The Law Council Committees note that the Commonwealth legislation currently provides incapacity payments up to the age of 65 or, in the case of an employee

who has reached the age of 63 years, a maximum of two years of incapacity payments.⁴⁰

130. The forerunner to the *Safety, Rehabilitation Compensation Act 1988*, the *Compensation (Commonwealth Government Employees) Act 1971*, provided for incapacity payments until the death of the worker. However, given that the current Commonwealth workers' compensation scheme is a "long tail" compensation scheme, the Law Council Committees consider it unlikely that a return to such a provision would be affordable.
131. The Law Council Committees note that there is also some inequity in the cessation of compensation at age 65 when pension and other entitlements are increasing to a retirement age of 67 years. The Law Council Committees consider that a more balanced approach would be to amend section 23 of the *Safety, Rehabilitation Compensation Act 1988*⁴¹ (the SRC Act) to provide incapacity payments up to the age of 67 years; or if an employee is contracted to work to an age over 67 years to that age; or for 104 weeks after the date of accident, whichever occurs later.
132. The Law Council Committees are of the view that a further disincentive in the Commonwealth scheme is the treatment of superannuation payments in the calculation of incapacity payments. This is because the Commonwealth schemes are the only workers' compensation schemes in Australia to deduct monies received by way of superannuation pension or, based on a formula, a lump sum "received" by the injured worker from incapacity entitlements.
133. Whilst this may have reflected the entitlements under the previous Commonwealth Superannuation Scheme,⁴² the Law Council Committees note that it does not reflect the plethora of superannuation entitlements that may be received by employees under the SRC Act. In this regard, it provides both a disincentive for those injured prior to the age of 65 to roll over these entitlements for retirement, and for those receiving superannuation, to re-enter the workforce. The Law Council Committees do not believe that either of these outcomes are desirable from a policy perspective.
134. The Law Council Committees are of the view that the relevant provisions should be repealed in their entirety on the basis that superannuation entitlements ought not to have any effect on compensation benefits. The Law Council Committees suggest that at the very least, there needs to be an incentive placed on injured workers to roll over rather than use lump sum superannuation entitlements prior to retirement, and for existing superannuation entitlements not to be considered a factor at all if they existed prior to any accident.
135. Finally, the Law Council Committees note that there are a wide range of approaches to incapacity entitlements under State and Territory workers compensation ranging from no entitlements over 65 (South Australia), to ongoing entitlements up to a capped amount with no age barrier (Western Australia).
136. The Law Council Committees consider that it would be appropriate for the Commonwealth to take a "leadership" role in attempting to standardise entitlements across the State, Territory and Commonwealth jurisdictions.

⁴⁰ See for example section 23 of the *Safety, Rehabilitation Compensation Act 1988*.

⁴¹ The equivalent provisions at section 121 of the *Military Rehabilitation Compensation Act 2004* and section 38 of the *Seafarers Rehabilitation and Compensation Act 1992* should also be amended.

⁴² See <http://www.finance.gov.au/superannuation/arrangements-for-australian-government-employees/css.html>

Migration

137. The Commonwealth Government controls who is allowed to enter and remain in Australia under the provisions contained in the *Migration Act 1958* (the Migration Act) and *Migration Regulations 1994* (the Migration Regulations). The Act also provides the Minister for Immigration and Citizenship with the power to grant visas to non-citizens to enable them to remain in Australia on a permanent or temporary basis.⁴³
138. As noted by the Issues Paper, there may be a conflict between the policy objectives of the migration system, which include regulating the persons who can enter Australia and the policy objective of using the skills of older workers. This conflict is of particular interest to the Immigration Lawyers' Association of Australasia (ILAA), a focus group of the Law Council's International Law Section.
139. This submission will address question 53 in this context.

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?

140. As noted by the ILAA, Australia's Migration program essentially consists of four categories. These include the:
- Skill Stream;
 - Business Skill Stream;
 - Family Migration;
 - Refugee/Humanitarian Program.
141. The ILAA notes that Australia's Migration Program has increasingly focused on the Skill Stream outcomes to meet the population and skills needs of Australia. Indeed, Australia's declining workforce participation and an ageing workforce has seen the Government use the Skill Stream to focus on selecting younger skilled migrants to fill the void created by these trends.
142. The ILAA notes that the General Skilled Migration Program⁴⁴ and the Employer Nomination Scheme⁴⁵ advantage younger migrants on the basis that younger migrants are better able to contribute to the Australian community over time relative to the costs to be incurred by the Australian community in the areas of health care and aged pensions as they get older.
143. The ILAA notes that although the 1 July 2012 overhaul of the Employer Nomination Scheme will increase the age requirement for applicants to be less than 50 years old (as opposed to 45 years old as it is now),⁴⁶ the focus of the visa system is to adopt a

⁴³ S.29, *Migration Act 1958* (Cth)

⁴⁴ See <http://www.immi.gov.au/skilled/general-skilled-migration/>

⁴⁵ See <http://www.immi.gov.au/skilled/skilled-workers/ens/>

⁴⁶ See <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-186/>

range of criteria relevant to the aims of the visa subclass, taking into consideration the significant number of applications that the Department of Immigration and Citizenship receives.

144. In this regard, and as noted by the ILAA, Australia's Migration Program is inherently discriminatory in the sense that it seeks to discriminate on the basis of a range of criteria including on the basis of age.
145. The ILAA considers that it is a matter of policy for the government to determine the extent to which age should be a factor in the visa selection process, but notes that it is difficult to argue that the barriers to entry based on age should be removed all together, given the valid public policy function that they serve.

Other issues

Informal caring

146. The Issues Paper acknowledges the important economic and social contribution of 'informal caring' to Australian society,⁴⁷ but notes that this is not an issue that the ALRC will be considering as part of this inquiry.⁴⁸
147. However, the LSSA considers that the ALRC should reflect on the broader policy implications of informal caring from both a social and economic perspective, and the extent to which informal carers should be recognised and supported in the role they play.

Aged Care

148. Another issue that the LSSA suggests the ALRC should consider in its review of Commonwealth laws is aged care – particularly in the context of the themes that emerged from the Government's response to the Productivity Commission's report, *Caring for Older Australians*.⁴⁹ Encouraging workforce participation by older workers for a longer period of time could contribute to a policy objective of greater private contributions to the cost of aged care.
149. The LSSA suggests that the ALRC could consider the social and economic desirability of care provided in the home, and the increasing need to develop a 'user pays' framework in its analysis of Commonwealth laws and legal frameworks.
150. In relation to the latter issue, the LSSA suggests that the ALRC could consider whether a higher level of care within a 'user-pays' framework might be able to be facilitated by allowing more people, albeit in receipt of in-home support, to remain in active work and participate via technology.
151. The LSSA is cognisant of the increasing cost of aged care as a percentage of Gross Domestic Product (GDP), and accordingly, notes that revenue measures (and the implementation of Commonwealth laws) will require careful consideration.
152. The LSSA considers that revenue concessions may encourage people to remain in the workforce for a longer period of time and consequently improve the capacity of

⁴⁷ Op cit., ALRC Issues Paper, p.17

⁴⁸ Ibid., p.16

⁴⁹ See <http://www.pc.gov.au/projects/inquiry/aged-care>

individuals to meet the Commonwealth objective of greater private contributions to the cost of aged care. The LSSA cites the example of making workplace commuting costs tax deductible for workers over the age of 65 as one type of revenue concession that the ALRC could consider in this regard.

Conclusion

153. The Law Council thanks the ALRC for providing it with the opportunity to comment on the Issues Paper and for the extension of time in which to do so.
154. The Law Council is of the view that there are a number of improvements that could be made to Commonwealth laws and legal frameworks to remove barriers to the participation of older people in the workforce or other productive work, and has focussed its submission on the barriers that exist in the areas of Superannuation; Employment; Workers' Compensation; and Migration law.
155. The Law Council hopes that this submission is of assistance to the ALRC and looks forward to providing further comments on the ALRC's Discussion Paper on this important issue once it is released later this year.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.