

Submission to the Australian Law Reform Commission Inquiry into Commonwealth Legal Barriers to Older Persons Participating in the Workforce or other Productive Work

by

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Introduction

The Australian Law Reform Commission (ALRC) review of Commonwealth legal barriers to older persons participating in the workforce or other productive work is an important and valuable initiative. It is consistent with the broad policy intention to increase the retention of older workers. It reflects arguments made elsewhere (for example, in the 2010 Intergenerational Report) that removing the barriers to the participation of older persons is a key part of the policy response to population ageing. Removing the barriers to the employment of older women is particularly important because, compared to men and younger women, women aged 45+ are currently much less likely to be in paid work. They are a demographic group that will grow at a very fast rate in coming years. According to the OECD (2006), the scope for increasing retention in the workforce is highest for this group. However, most research on older workers to date has featured an “intense focus on elderly white men, to the virtual exclusion of most other groups.” (Currie and Madrian 1999) As a consequence relatively little is known about the work and retirement patterns of women in their later years. (Hank 2004: 190)

This submission addresses two of the proposals set out in the *Grey Areas* discussion paper:

- Proposal 2-5: Amend s65 of the *Fair Work Act 2009* (Cth) to extend the right to request flexible working arrangements to all employees who have caring responsibilities; and
- Proposal 2-8: Section 117(3)(b) of the *Fair Work Act 2009* (Cth) provides that if an employee is over 45 years of age and has completed at least two years of continuous service with the employer, then the minimum period of notice for termination is increased by one week. The Australian Government should consider amending this section to increase this period from one week to four weeks.

The submission draws on the evidence currently being assembled by an Australian Research Council Discovery Project¹ on the factors affecting older women’s retention in paid work.

Proposal 2-5

This proposal relates to the current limitation on the Right to Request (RTR) flexible working arrangements to employees who have caring responsibilities for children. The Commission is supporting a claim made elsewhere to extend the RTR to all employees ‘who have recognised care responsibilities, including to those who are caring for adults with disabilities, mental illness, chronic illness or who are frail aged’. Such an extension would bring Australian law into line with the UK legislation on which it was originally based. As argued in the discussion

¹ ARC DP111012728 “Missing Workers: Retaining Mature Age Women Workers to Ensure Future Labour Security”

paper, by allowing older workers to adjust their working hours to accommodate caring responsibilities, such an extension would allow them to prolong workforce participation. The extension will promote gender equity, given “the often gendered nature of caring.” (ALRC 2012 2.56)

The proposal is a positive suggestion. However, for a number of reasons, we advocate extending the right of request flexible working arrangements to *all* older workers and buttressing the initiative with other measures to support older workers with informal care roles.

First, the current proposal only addresses one (and perhaps a relatively minor) reason why inflexible working arrangements comprise a barrier to older worker’s participation in paid work. As the Commission itself notes (ALRC 2012: 2.48), older people have ‘diverse requirements for flexibility.’ In addition to caring responsibilities, poor health, injuries and other life circumstances can make it difficult for older people to work full-time, standard hours. The RTR is important to all older workers and not only those with informal caring roles.

Second, the proposal will only assist older people in informal caring roles who are currently employed. The Commission partly justifies its approach to RTR with data on the large amount of informal care undertaken by older women but it appears to neglect the fact that many of the women who undertake unpaid care work are not employed. Changes in employment law cannot address the employment barriers faced by these women.

Third, changes in employment law alone (even if they do deliver greater flexibility in working arrangements) are, at best, a partial response to the impacts of informal care roles on employment. To fully address these impacts, measures that build the institutional supports for informal carers are required. These supports must take account of the needs of employed and non-employed informal carers. They are likely to include the provision of affordable high quality residential, day and respite care for the frail aged and adults and children with disabilities. This will necessitate higher levels of government funding to ensure improved wages and conditions for aged and disability support workers.

Fourth, evidence that workers are not negotiating Individual Flexibility Arrangements (IFAs) indicates the difficulties and risks involved for workers who want to alter their working conditions by negotiation. A related proposal by the Commission for the development of a guide to negotiating and implementing flexible working arrangements for mature age workers might help address this problem. However, it is likely that many workers will continue to respond to changes in their caring roles, health or other circumstances by moving to another, often casual job. As a consequence, the costs involved with informal caring roles will continue to be particularly high and include employment insecurity and income variability. In this context, the ACTU’s recommendations of enforcing greater employee control over rosters and greater certainty over hours of work are important alternatives to consider.

Fifth, the RTR will not be available to casual workers. This is a critical omission

with consequences for gender equity given the high rate of casual employment among women.

Proposal 2-8

This proposal has merit because it responds to evidence on the relatively high costs of employment termination for older workers (due to the barriers they experience in finding work once unemployed) and evidence of age discrimination (specifically, of older workers being targeted for job termination). However, it does not go far enough in building protections against age discrimination.

The Commission primarily considered the issue of direct discrimination (such as where a person's age affected an employer's recruitment or retention decision). It appears to have sided with the apparently majority view of the 'stakeholders' that the current general protections are 'sufficiently comprehensive and effective in providing an avenue for mature age workers to pursue if they have been discriminated against on the basis of age'. The ALRC (2012, para 2.92) asserts the advantages of these provisions include: "broad coverage, encompassing recruitment; the reverse onus of proof; that the unlawful or discriminatory reason only needs to be one of the reasons for the adverse action; cost implications; the role of the FWO; and the availability of injunctive relief."

The issue of indirect discrimination – for example, where an employer is unprepared make 'reasonable adjustments' to the work environment to accommodate a worker's different physical capacity – has not been given sufficient consideration. *Some* workers experience declines in their physical capability as they get older. Thus, their situation can become similar to that of disabled workers, in that their employment opportunities can depend on whether adjustments are made to their work environment or not. Current legislation does not allow older workers to request "reasonable adjustments" to their work arrangements unless they are physically disabled.

The Commission's discussion of a related issue highlights the need to consider legislative changes to protect older workers against both direct and indirect discrimination. Specifically, one of the Commission's proposals (Proposal 2-9) is for professional associations and industry representative groups to replace any age-based restrictions on licensing and re-qualification with capacity-based requirements. This would help address direct age discrimination. However, if the capacity-based requirements are not realistic given the nature of the task involved (or how the task could be reasonably re-designed to take account of different levels of physical capacity) then older workers may still be at risk of discrimination. Provisions in the Employment and Disability Act could guide the design of new measures to protect older workers from indirect age discrimination.

Evidence from our Research on Older Women Workers in Aged Care

The remainder of this submission adds in some early findings from our ARC project that have a bearing on the issues raised in the Grey Areas discussion paper. As part of our study, we have surveyed women aged 45+ on the factors that are affecting their willingness to stay in their aged care jobs. To date, we have also conducted 30 interviews with older women in aged care jobs. In each set of data we have evidence on factors such as informal care roles, 'flexible' working conditions, age discrimination and physical capability.

The aged care workforce is highly feminized and has a median age of close to 50. In our first wave survey, conducted in November 2011 (3945 responses, representing a response rate of 41 per cent), the majority of women were aged in their 50s and close to a quarter were in their 60s. The women worked in a variety of roles, including as registered and enrolled nurses, personal care workers and community care workers. Across the group, 43.4 per cent reported that they had thought about leaving aged care in the previous 12 months. 12.4 per cent reported having these thoughts at least once a month; 5.9 per cent thought about leaving aged care at least once a week; and 1.8 per cent thought about leaving aged care every day. Age does not appear to be the key driver for these thoughts – as the incidence of thoughts about leaving is actually highest in the group of women aged under 55 years.

Informal care roles and the flexibility of work arrangements

The informal care roles of the women in our survey are relatively high. 34.2 per cent reported that they spent at least 7 hours each week caring for a child or disabled or ill family member or partner. Supporting the ALRC's arguments about the importance of addressing the impact of informal care roles on older worker's retention in paid work, we also find that these roles are correlated to thoughts about leaving aged care, with the incidence of thoughts about leaving higher (47.2 per cent) in the group of women with 7+ hours of informal care than in the group with lower informal care roles (42.9 per cent). However, only 3.4 per cent of the women who reported thoughts about leaving their jobs identified a need to care for a family member or friend as the main reason for their intention to leave.

These patterns in the survey data could reflect the way in which the women we surveyed have been able to structure their paid work roles in aged care around their informal care work. That is, the aged care sector may have a relatively large proportion of women with informal care roles *and* it may feature low impacts from these roles because working arrangements in the sector allow women to accommodate their informal care roles. However, it is important to note that aged care is characterized by low wages and high rates of casualization. Thus, it is possible that some women are 'paying a price' for the ability to achieve their informal care roles by working in the sector.

The interview data supports such a conclusion as several women said that they found working in aged care was conducive to managing informal care roles

because it allowed part-time work and a variety of shift arrangements. For example, a registered nurse working in a residential aged care facility in Melbourne commented that some women like aged care *“because maybe they’ve got a couple of shifts a week, and they know what they are so they can organise other people to help out at home.”*

However, it is important to recognize that, thus far, our data only relates to women who are employed. It does not contain information on women who are not in paid work and, as a result, it does not disclose the full impacts of informal care roles on employment retention even within the aged care sector.

This gap is partly filled by other research conducted for the project (Austen & Ong forthcoming). Utilizing longitudinal data from the Housing, Income and Labour Dynamics (HILDA) Survey, we examined how the chances of employment retention by mature age women altered when their informal care roles increased. We found negative impacts on employment retention that were largest for women working in full-time permanent jobs, indicating that these types of jobs currently are not sufficiently flexible to accommodate changing unpaid care roles. The findings add support to the ALRC’s proposals to extend RTRs to all workers with care responsibilities.

The HILDA data also shows low employment rates for women with high informal care roles. That is, a large number of women with high informal care roles are not in paid work. As noted previously, the Commission’s proposals do not address the employment barriers faced by these women. Our evidence indicates the importance of measures to support the employment chances of women who have informal care roles. As noted earlier, appropriate measures are likely to include the provision of affordable, high quality residential, day and respite care for aged and disabled individuals.

Age Discrimination

It might seem ironic that our study of the aged care sector uncovers evidence of age discrimination. Our interview data indicates that discrimination affects the ability of some women to continue to work in the sector, and has limited some women’s employment chances. For example, a 63 year old enrolled nurse working in a residential aged care facility wanted to continue working after she turned 65 but thought that her employer discouraged people from working after retirement age because their salaries were higher than younger workers. She commented that *“... the government wants you to keep in, but I sometimes think the people in aged care want to get us older people out...”* and noted that the pay rates for *“a fresh EN just coming in, in their first year”* were considerably lower than the rate of pay she and her peers were on.

An Executive Care Coordinator (previously a Director of Nursing) at a residential aged care facility disclosed that the management of the not-for-profit organisation where she worked was averse to continuing to employ older workers. She was 65 years old, had several tertiary nursing qualifications, and

had worked in aged care for 35 years. Her sense was that management associated older workers with greater illness and injury risk:

“...we have a number of aging RN’s on staff. And ...the management would say, look it’s time they left, move them out, because you’ve got degeneration of muscles and skin and you have problems, they get sick and all those things, but ...the older staff rarely have days off sick, they aren’t the ones taking compensation, they aren’t.

The difficulties older women experience in finding work was highlighted by a 63 year old woman that we interviewed. She had 24 years’ experience in residential aged care and wanted to move to community care where the physical demands were not as great. She thought that with her experience she could easily get another job and so she resigned from her job. However, after she had a break from paid work she discovered that she was unable to get a job in community care. She expressed that she believed this was due to her age and employers’ concern about Work Cover (a worker’s compensation scheme).

Another interviewee highlighted how aged discrimination in recruitment decisions add to the impacts of informal care roles. She was 68 years old, looking after a disabled husband and living on the aged pension. She had worked for mining companies for 15 years and had been Executive Assistant to a CEO. She had left work to look after a sick husband and when she went to re-enter the workforce at 58 years of age she could not get a job in her previous type of work. She moved to working in community care where she was working two shifts each weekend to supplement her age pension.

As noted earlier, the ALRC is proposing that age-based restrictions on licensing and requalification be replaced by capacity-based requirements. This is intended to reduce age discrimination. However, our interviews identified an instance where capacity-based requirements, that were perceived to be in excess of the capacity needed to do the job well, acted to prevent an older worker’s employment. This could be interpreted as indirect age discrimination. The woman had applied for a position as a home support worker. She had passed a medical examination but not “the physical side of it” and been forwarded to a physiotherapist who put her through some exercises that she felt “were quite ridiculous” for her age and which did not reflect the physical demands of the job.

... I had to squat down to the floor, not hanging on. And then – could you do this? Squat down to the floor and then stand up again without holding on. I said, “I think I need to hold on.” He said, “Well, go and try it. Go on. I’ll catch you if you fall.” This is the doctor. So the physio asked me to do it and the doctor asked me to do it. Okay. So I got down to the floor but getting up is a bit like an ungainly elephant. And the only way I could balance myself, because I can’t keep my back straight anymore. I mean when you’re young you can do it. So I had my hands out like that to balance me. And I got back up. So I did it. But I wondered, some of the tests they had – there was another one with pegs all down and you weren’t allowed to – you had to stand like that and when you got down to the bottom you had to reach and

you weren't allowed to bend your knees. You had to keep your legs straight the whole time and put the pegs in right down there.

Our data also highlight how older worker's employment chances (and their health and well-being at work) can depend on the willingness of organisations to alter the design of the work environment to reflect the physical capabilities of their workers. Aged care work can involve high physical demands associated with the need to move clients or residents and the need to spend long hours on your feet. Many women in the sector also experience the effects of previous workplace injuries (most notably a 'bad back'). It therefore not surprising that our survey data show that the physical demands of aged care work rates is a key reason why many older workers in the sector are intending to leave. However, our interview data shows that the ability to request changes in hours, shift patterns and work roles, as well as improvements in the design of work practices, training and equipment would promote the chances of older aged care workers being retained in employment.

One of our respondents expressed that "*physically and mentally*" she was "*getting tired... tired of the pace and the everyday routine that you go through, I just want to be able to do other things...*" Another identified a need to alter her shift pattern. She expressed that she was "*finding the carer shifts more difficult and it is, it's more difficult. I mean I'm a fit, healthy person but it is, it's beginning to be mentally wearing and tiring.*"

Some older workers want to change to a less physically demanding work role in order to extend their working life. One woman who had moved from aged to disability care expressed that she could now "*keep going for a lot longer.*"

Organisations can also make adjustments to the design of tasks and/or introduce equipment that will reduce the physical demands of the work. One of the women we interviewed compared her own workplace with another where additional staff was hired to lessen the physical demand associated with lifting clients.

we have no help but in the government they have the wardsmen and the nurses doesn't have to do the lifting, even if you're putting them in the lifters it's very hard because they don't have muscles to stand properly or arms collapsing or whatever, it doesn't matter how do you try, it's sort of hard and I actually sustained an injury on my shoulder.

Another woman that we interviewed highlighted how 'equipment' design, such as ensuring the labels describing medicines were sufficiently large to be able to be read, also influenced the physical demands of the job.

Q: Right okay so can you tell me about some of the aspects of your work that get easier or harder to deal with compared to when you were younger?

A: Oh god just vision, just seeing the ampoules (laughing) [don't know] who designed them but they're shocking, you know the little morphine amps and the, seeing the dates on them and-

Q: It's all small type, really small.

A: They need to really do something about that seeing as we're an aging group, you know (laughing), so things like that.

Conclusion

The ALRC has made a number of good proposals to reduce the barriers to older worker's employment. These include extending the eligibility to the right to request flexible working arrangements to older workers with caring roles and enhancing the protections for older workers from job termination. However, a number of additional initiatives are warranted. These include further extensions of the RTR so that *all* older worker can seek flexible working arrangements to accommodate the variety of their needs and circumstances; improvements in the affordability and quality of day, respite and residential care for the frail elderly and disabled people so that the barriers that informal care roles pose to older worker's employment are lessened; and strengthening of age discrimination legislation to ensure that older workers can request 'reasonable adjustments' to their work environments to accommodate their changing physical capability.

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