



Law Council  
OF AUSTRALIA

---

# Grey Areas – Age Barriers to Work in Commonwealth Laws Discussion Paper

---

**Australian Law Reform Commission**

29 November 2012

# Table of Contents

<b>Acknowledgement .....</b>	<b>3</b>
<b>Introduction.....</b>	<b>4</b>
Responses to Discussion Paper Proposals .....	5
<b>Proposal 2–1 .....</b>	<b>5</b>
<b>Proposal 2–2 .....</b>	<b>5</b>
<b>Proposal 2–3 .....</b>	<b>6</b>
<b>Proposal 2–4 .....</b>	<b>6</b>
<b>Proposal 2–5 .....</b>	<b>6</b>
<b>Proposal 2–6 .....</b>	<b>7</b>
<b>Proposal 2–7 .....</b>	<b>7</b>
<b>Proposal 2–8 .....</b>	<b>8</b>
<b>Proposal 2–9 .....</b>	<b>8</b>
<b>Proposal 2–10 .....</b>	<b>9</b>
<b>Proposal 2–12 .....</b>	<b>9</b>
Responses to Questions raised in Discussion Paper.....	9
<b>Question 2–1 .....</b>	<b>9</b>
<b>Question 2–2 .....</b>	<b>9</b>
<b>Question 2–3 .....</b>	<b>10</b>
<b>Work, Health and Safety and Workers’ Compensation .....</b>	<b>10</b>
Responses to Discussion Paper Proposals .....	10
<b>Proposal 3-1 .....</b>	<b>10</b>
<b>Proposal 3-2 .....</b>	<b>11</b>
<b>Proposal 3-3 .....</b>	<b>11</b>
<b>Proposal 3-4 .....</b>	<b>11</b>
<b>Proposal 3-5 .....</b>	<b>12</b>
<b>Proposal 3–6 .....</b>	<b>12</b>
<b>Proposal 3-7 .....</b>	<b>12</b>
Responses to Questions raised in Discussion Paper.....	13
<b>Question 3-1 .....</b>	<b>13</b>
<b>Question 3–2 .....</b>	<b>13</b>
<b>Question 3–3 .....</b>	<b>14</b>
<b>Insurance.....</b>	<b>14</b>
Responses to Discussion Paper Proposals .....	14
<b>Proposal 4-3 .....</b>	<b>14</b>
<b>Proposal 4–4 .....</b>	<b>14</b>
Responses to Questions raised in Discussion Paper.....	15
<b>Question 4-1 .....</b>	<b>15</b>

<b>Question 4-2</b> .....	15
<b>Question 4-3</b> .....	16
<b>Superannuation</b> .....	<b>16</b>
Responses to Discussion Paper Proposals .....	17
<b>Proposal 8-1</b> .....	17
<b>Proposal 8-2</b> .....	18
<b>Proposal 8-3</b> .....	18
<b>Proposal 8-4</b> .....	18
<b>Proposal 8-5</b> .....	19
<b>Proposal 8-6</b> .....	19
<b>Proposal 8-7</b> .....	20
<b>Additional issue</b> .....	20
Responses to Questions raised in Discussion Paper.....	22
<b>Question 8-1</b> .....	22
<b>Question 8-2</b> .....	22
<b>Question 8-3</b> .....	23
<b>Other Issues</b> .....	<b>24</b>
Aged Care .....	24
<b>Conclusion</b> .....	<b>24</b>
<b>Attachment A: Profile of the Law Council of Australia</b> .....	<b>25</b>

## Acknowledgement

The Law Council acknowledges the assistance of the Law Society of New South Wales (LSNSW); the Law Society of South Australia (LSSA); the Law Institute of Victoria (LIV); the Law Council's Superannuation Committee; the Law Council's Personal Injuries and Compensation Committee; and the Law Council's Judicial Issues Working Group in the preparation of this submission.

## Introduction

1. The Law Council is pleased to provide this submission to the Australian Law Reform Commission (ALRC) in response to its Discussion Paper on Age Barriers to Work in Commonwealth Laws<sup>1</sup> (the Discussion Paper).
2. The Law Council notes that the Discussion Paper follows the Issues Paper on the same topic that was released by the ALRC in May 2012.<sup>2</sup> The Law Council made a submission on the Issues Paper on 27 June 2012.<sup>3</sup>
3. This submission focuses on the following aspects of the Discussion Paper:
  - a. Recruitment and Employment Law;
  - b. Retirement ages for judicial officers;
  - c. Work, Health and Safety and Workers' Compensation;
  - d. Insurance; and
  - e. Superannuation.
4. In relation to these matters, the Law Council generally supports proposals which:
  - (a) Provide for greater flexibility in working arrangements for mature workers with caring responsibilities;
  - (b) Provide for the review of industrial awards regarding flexible working arrangements for mature workers;
  - (c) Recommend the development of guidelines by the Australian Human Rights Commission regarding age based restrictions in licensing and requalification;
  - (d) Recommend a review of compulsory retirement ages for judicial and quasi-judicial appointments;
  - (e) Recommend education and awareness raising initiatives to increase participation in the workforce by mature workers;
  - (f) Facilitate consistency between the *Fair Work Act 2009* (Cth) and anti-discrimination legislation in relation to protections for mature workers;
  - (g) Increase appropriate Workers' Compensation coverage of mature workers and volunteers; and
  - (h) Address issues relating to insurance cover and superannuation for mature workers.
5. Discrimination against employees, or potential employees, on the basis of age is an increasingly common problem in Australia. Indeed, a survey by the Financial

---

<sup>1</sup> Australian Law Reform Commission, *Age Barriers to Work in Commonwealth Laws Discussion Paper*, October 2012, available from [http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_78\\_0.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_78_0.pdf) (Discussion Paper)

<sup>2</sup> Australian Law Reform Commission, *Grey Areas – Age Barriers to Work in Commonwealth Laws Issues Paper*, 1 May 2012, available from [http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_ip\\_41.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_ip_41.pdf)

<sup>3</sup> See Law Council of Australia, Submission to Australian Law Reform Commission, *Grey Areas – Age Barriers to Work in Commonwealth Laws Issues Paper*, 27 June 2012, available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=E5B568B6-1999-B243-6E23-A5A4697AD016&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=E5B568B6-1999-B243-6E23-A5A4697AD016&siteName=lca). (LCA Submission on Issues Paper)

Services Council found that almost a third of older workers claimed to have experienced some form of discrimination at work such as:<sup>4</sup>

- a. being made redundant before others;
  - b. not having the same training/development opportunities as others;
  - c. being subjected to verbal abuse; and
  - d. not having health and physical needs accommodated.
6. As noted by the Law Council in its submission to the ALRC on the Issues Paper, Australia's ageing population means that age discrimination, and the ways in which it can be addressed, are becoming increasingly important issues, particularly in the employment context.
7. The following paragraphs outline the Law Council's views with respect to the proposals and questions outlined in the Discussion Paper on these issues.

## **Responses to Discussion Paper Proposals**

### **Proposal 2-1**

**The Fair Work Ombudsman should undertake a national recruitment industry campaign to educate and assess the compliance of recruitment agencies with workplace laws, specifically with respect to practices affecting mature age job seekers and workers.**

8. One of the Law Council's Constituent Bodies, the Law Institute of Victoria (LIV), has expressed support for this proposal, and suggests that guidance and education programs for recruitment agencies should be included in any recruitment industry campaign to educate and assess the compliance of recruitment agencies with workplace laws. As part of the education campaign, employers could also be encouraged to consider how they recruit for 'graduate positions' as older workers may be indirectly discriminated against by an assumption that such positions are only suitable for younger workers.
9. The LIV suggests that the issue of discriminatory advertising should be included in any education campaign, and that any civil and criminal penalties that flow from such discrimination should also be highlighted.

### **Proposal 2-2**

**In 2013, the Recruitment and Consulting Services Association of Australia and New Zealand is conducting a review of its Code of Conduct. The review should consider ways in which the Code can emphasise:**

---

<sup>4</sup> Financial Services Council, Media Release, 'New research reveals discrimination against older workers,' 30 January 2012, available from [http://www.fsc.org.au/downloads/file/MediaReleaseFile/2012\\_3001\\_olderworkers\\_mediarelease.pdf](http://www.fsc.org.au/downloads/file/MediaReleaseFile/2012_3001_olderworkers_mediarelease.pdf). See also Timothy Macdonald, ABC News, 'Older Workforce faces age discrimination', 30 January 2012, available from <http://www.abc.net.au/news/2012-01-30/men-in-50s-discriminated-against-in-work-place/3800496>. See also Westfield Wright, *Attitudes to Older Workers (Prepared for the Financial Services Council)*, January 2012, available from [http://www.fsc.org.au/downloads/uploaded/2012\\_3001\\_olderworkers\\_report\\_e568.pdf](http://www.fsc.org.au/downloads/uploaded/2012_3001_olderworkers_report_e568.pdf)

- a. the importance of client diversity, including mature age job seekers;
- b. constructive engagement with mature age job seekers; and
- c. obligations under age-related anti-discrimination and industrial relations legislation.

### **Proposal 2–3**

In order to assist recruitment agencies and consultants to engage constructively with, and recruit, mature age job seekers, the Australian Human Resources Institute and the Recruitment and Consulting Services Association of Australia and New Zealand should:

- a. develop and provide regular, consistent and targeted education and training for recruitment consultants; and
- b. develop a range of guidance material.

### **Proposal 2–4**

The Australian Human Resources Institute and the Recruitment and Consulting Services Association of Australia and New Zealand should promote and recognise best practice in the recruitment of mature age workers, for example through their annual workplace awards.

10. The LIV supports education initiatives, codes of conduct and incentive schemes as means of breaking down barriers for mature workers. The LIV notes that the measures outlined in proposals 2-2 to 2-4 of the Discussion Paper could be a useful way to demonstrate the value of employing mature age workers.

### **Proposal 2–5**

The Australian Government should amend s 65 of the *Fair Work Act 2009* (Cth) to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

11. As noted by the Law Council in its submission on the Issues Paper, the LIV considers that section 65 of the *Fair Work Act 2009* (Cth) (the Fair Work Act) 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 or carers of a child under school age (or a child 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.
12. The LIV suggests that this right should be extended to employees with general carer's responsibilities and to mature workers. 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.

13. The LIV notes that section 65 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 Fair Work Act, 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 Fair Work Act.
14. 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 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.
15. Another of the Law Council's Constituent Bodies, the Law Society of New South Wales (LSNSW), also supports an amendment to section 65 of the Fair Work Act to extend the right to request flexible working arrangements to all employees who have carer's responsibilities. The LSNSW agrees with the ALRC's assessment at paragraph 2.64 of the Discussion Paper, that if this right were extended only to mature age workers, this may act as a disincentive to employ these workers.

### **Proposal 2–6**

**The Fair Work Ombudsman should develop a guide to negotiating and implementing flexible working arrangements for mature age workers, in consultation with unions, employer organisations and seniors' organisations.**

16. The Discussion Paper proposes that the guide to be developed by the FWO should include information about circumstances in which employees might seek flexible working arrangements, and provide employers with guidance about how they can accommodate such requests. The Discussion Paper also suggests that the guide should include model flexibility strategies.<sup>5</sup> The LSNSW and the LIV support this proposal.

### **Proposal 2–7**

**From 2014, Fair Work Australia will conduct the first four-yearly review of modern awards. In the course of the review, the inclusion or modification of terms in the awards to encourage workforce participation of mature age workers should be considered.**

17. The LIV supports this proposal and suggests that the review should examine awards for terms regarding flexible working arrangements. The LIV suggests that template policies that encourage flexible working arrangements could be developed to be included in awards.

---

<sup>5</sup> Discussion Paper, p.50

18. The LIV suggests that Fair Work Australia should have a more proactive role in examining inherent discrimination within an award. The LIV also suggests that the Fair Work Act should be amended to enable Fair Work Australia to review discriminatory provisions in employment contracts.

### **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.**

19. The Law Council acknowledges that there are both advantages and disadvantages to increasing the period of notice of termination from one week to four weeks.<sup>6</sup>
20. The LIV has observed that the advantage of an increased notice period is that it reflects the greater difficulty that some mature workers encounter when searching for new employment. The LSNSW has observed that the disadvantage is that such a measure may also act as a disincentive for employers to employ mature workers.<sup>7</sup> The Law Council acknowledges that the ALRC will need to weigh up the advantages and disadvantages of this proposal in making a recommendation regarding this proposal.

### **Proposal 2–9**

**A range of professional associations and industry representative groups are responsible for developing or regulating licensing or re-qualification requirements. The Australian Human Rights Commission should develop principles or guidelines to assist these bodies to review such requirements with a view to removing age-based restrictions in favour of capacity-based requirements.**

21. The Discussion Paper notes that industry and professional bodies are best placed to determine the most appropriate licensing and re-qualification requirements for mature age workers in their industry or profession. It also acknowledges that principles or guidelines to assist these bodies to review such requirements may be beneficial.<sup>8</sup>
22. The Law Council supports the development of these principles or guidelines, but notes that if the AHRC is tasked with developing these, it will be important to ensure that the AHRC is sufficiently funded to adequately carry out this role. Indeed, on a number of occasions the Law Council has noted the importance of ensuring that the AHRC is sufficiently funded to adequately perform its various functions.<sup>9</sup>

---

<sup>6</sup> Op.cit., Discussion Paper, p.54

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., p.59

<sup>9</sup> See for example, Law Council of Australia, Submission to Attorney-General's Department in response to the *Draft Fifth Report on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment*, 19 November 2012, available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=2A5188B3-1999-B243-6EA1-DF73BB56494C&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2A5188B3-1999-B243-6EA1-DF73BB56494C&siteName=lca)



### **Proposal 2–10**

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

23. The Law Council supports the proposal for an inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments. The Law Council would welcome the opportunity to provide further comments on this issue in the context of such an inquiry.

### **Proposal 2–12**

**The Australian Human Rights Commission should coordinate a national education and awareness campaign in support of the workforce participation of mature age persons.**

24. The Law Council supports this proposal, but reiterates the comments it made in response to Proposal 2-9 regarding the need for the AHRC to be adequately funded so that it can carry out such a role effectively.

## **Responses to Questions raised in Discussion Paper**

### **Question 2–1**

**In what ways, other than through changes to the *Fair Work Act 2009* (Cth), should the Australian Government develop or encourage flexible working arrangements for mature age workers?**

25. There are a number of ways, other than through changes to the Fair Work Act, that the Australian Government should develop or encourage flexible working arrangements for mature age workers. For instance, the LSNSW suggests that one way in which the Government could develop or encourage flexible working arrangements for mature age workers, is by implementing these types of arrangements in the Australian Public Service.
26. The LSNSW also suggests that a co-ordinated whole of government approach to education and awareness about flexible working arrangements could be another way in which the Australian Government could develop or encourage these types of working arrangements for mature age workers.
27. The development of template policies that encourage flexible working arrangements could also be developed in this regard, as has been suggested by the LIV in response to proposal 2-7.

### **Question 2–2**

**There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, could this legislation be amended to improve or clarify their interaction in circumstances of age discrimination?**

28. The Law Council notes that the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth) (the Bill), which consolidates Commonwealth anti-discrimination legislation, was released on 20 November 2012. The Bill provides for

greater consistency between the general protections provisions under the Fair Work Act and Commonwealth anti-discrimination legislation and should reduce current areas of overlap. The Bill introduces a shifting burden of proof so that if the applicant establishes a prima facie case of unlawful discrimination in court proceedings, the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action. The Bill also provides that each party bears their own costs in court proceedings except in limited circumstances. The burden of proof and costs provisions in the Bill are similar to those in the Fair Work Act.

### **Question 2–3**

**Should the Australian Government establish a body or reporting framework with respect to mature age workers similar to that of the Equal Opportunity for Women in the Workplace Agency or its reporting framework? If so, how should such a body or framework operate?**

29. The LSNSW suggests that efforts to increase employers' and employees' awareness of rights, obligations and remedies under the law may be a more effective means of changing attitudes towards the employment of mature age workers, rather than establishing an agency similar to the Equal Opportunity for Women in the Workplace Agency.
30. If such an agency is established, the LIV suggests that it should operate to require employers to disclose on a yearly basis the number of mature age employees that they have working for them. Employers with more than 100 people could also be required to report in the same way as such employers are required to report against gender equality indicators to the Equal Opportunity for Women in the Workplace Agency. Such an agency should also have an educational role and provide employers with information as required
31. The LIV also suggests that a reporting mechanism based on that contained in the *Equal Opportunity for Women in the Workplace Amendment Bill 2012*, which requires employers with more than 100 employees to report against gender equality indicators, could be adapted for the purposes of mature age workers.

## Work, Health and Safety and Workers' Compensation

### **Responses to Discussion Paper Proposals**

#### **Proposal 3-1**

**Safe Work Australia and state and territory work health and safety regulators should consider health and safety issues that may affect mature age workers in implementing the Australian Work Health and Safety Strategy 2012–2022.**

32. The Discussion Paper notes that the Australian Work Health and Safety Strategy 2012-2022 (the Strategy) does not explicitly refer to mature age workers, but that it does contain a section titled 'healthy and safe by design' which could be relevant to mature age workers as one of the strategic outcomes under this section involves

designing and managing work and work processes to eliminate or reduce hazards or risks.<sup>10</sup>

33. The LIV agrees that Safe Work Australia and state and territory work health and safety regulators should consider health and safety issues that may affect mature age workers as part of the implementation of the Strategy.

### **Proposal 3-2**

**Safe Work Australia should include work health and safety issues that may affect mature age workers in its research agenda.**

34. The Discussion Paper notes that the ALRC is of the view that Safe Work Australia, as well as other relevant bodies, should undertake additional and targeted research in relation to the work health and safety issues that are faced by mature age workers.<sup>11</sup> The LIV supports proposal 3-2.

### **Proposal 3-3**

**Safe Work Australia and state and territory work health and safety regulators should develop guidance material to assist persons conducting a business or enterprise, workers, and the representatives of each to respond to health and safety issues that may affect mature age workers. Such material should contain information about:**

- a. legislative responsibilities and duties;
- b. best practice work design and processes;
- c. risk assessment; and
- d. health and wellbeing.

35. The Discussion Paper notes that a number of submissions regarding the Issues Paper expressed support for the development and dissemination of guidance material about work health and safety issues that may affect mature age workers.<sup>12</sup> The Discussion Paper suggests that this guidance material should be widely available from a range of sources, and that it should also be developed so as to be relevant to a number of different industries and professions.<sup>13</sup> The LIV supports this proposal.

### **Proposal 3-4**

**Safe Work Australia should recognise best practice approaches in work health and safety with respect to mature age workers in its Safe Work Australia Awards.**

36. As noted in the Discussion Paper, the Safe Work Australia Awards play a valuable role in increasing awareness about work health and safety issues. These awards recognise individuals and organisations which have implemented innovative work health and safety practices and initiatives,<sup>14</sup> and may be a valuable way to increase awareness in relation to the need to address work health and safety issues facing mature workers.

---

<sup>10</sup> Op.cit., Discussion Paper, p.70.

<sup>11</sup> Ibid., p.72.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., p.73.

<sup>14</sup> Ibid.

37. The LIV supports Safe Work Australia recognising best practice approaches in work health and safety with respect to mature age workers in the Safe Work Australia Awards.

### **Proposal 3-5**

**The Australian Government should amend the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*, *Military Rehabilitation and Compensation Act 2004 (Cth)* and the *Seafarers Rehabilitation and Compensation Act 1992 (Cth)* to ensure that retirement provisions are tied to the qualifying age for the Age Pension.**

38. The Law Council's Personal Injuries and Compensation Committee (Personal Injuries Committee) agrees with this proposal. The LIV also supports this proposal.

### **Proposal 3-6**

**The Australian Government should amend the *Seafarers Rehabilitation and Compensation Act 1992 (Cth)* to provide that workers who are injured at any age after two years prior to Age Pension age may receive incapacity payments for up to 104 weeks.**

39. The Personal Injuries Committee agrees with this proposal.

### **Proposal 3-7**

**Safe Work Australia's Strategic Issues Group on Workers' Compensation should consider the definition of 'worker' under Commonwealth, state and territory workers' compensation legislation to ensure consistency of coverage of volunteers.**

40. As previously noted, the Law Council considers that there is an issue with respect to injured volunteers being covered by Workers' Compensation schemes as State and Territory legislation does not provide effective coverage for volunteers. The Law Council considers that it would be appropriate for the Commonwealth to cover volunteers involved in Commonwealth activities, and that it is appropriate that occupational health and safety laws apply to these volunteers in the same manner that they apply to paid employees.<sup>15</sup>
41. As previously noted, one of the Law Council's Constituent Bodies, the Law Society of South Australia (LSSA) considers that the volunteering sector is a potential future 'engine room' for activity, given Australia's ageing population; it considers that there should be no administrative impediments to the enhancement of that sector.
42. The LSSA suggests that volunteers should be encouraged and their contributions recognised. In this regard, the LSSA, along with the LSNSW and LIV, support proposal 3-7.

---

<sup>15</sup> Op.cit., LCA Submission on Issues Paper, p. 24 .

## Responses to Questions raised in Discussion Paper

### Question 3-1

**Should the Australian Government amend the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*, *Military Rehabilitation and Compensation Act 2004 (Cth)* and the *Seafarers Rehabilitation and Compensation Act 1992 (Cth)* to provide that in circumstances where a worker is injured after two years prior to Age Pension age, he or she should receive incapacity payments for a period longer than 104 weeks?**

43. The Personal Injuries Committee does not consider that the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*, *Military Rehabilitation and Compensation Act 2004 (Cth)* and the *Seafarers Rehabilitation and Compensation Act 1992 (Cth)* should be amended to provide that in circumstances where a worker is injured after two years prior to Age Pension age, he or she should receive incapacity payments for a period longer than 104 weeks.
44. As previously noted, the *Compensation (Commonwealth Government Employees) Act 1971 (Cth)*, which preceded the *Safety, Rehabilitation Compensation Act 1988*, provided for incapacity payments to be paid to the worker up until their death. The Personal Injuries Committee considers that such a scheme would be too expensive if it were introduced again.
45. In addition to this, the Personal Injuries Committee suggests that a number of equity issues arise as a result of allowing a person to receive incapacity payments for more than 104 weeks in situations where they have been injured after two years prior to Age Pension age. Central to this is the fact that an injured worker would potentially receive more payment after retirement, compared to someone who had worked throughout the period.

### Question 3-2

**Should the Australian Government introduce a supplementary payment for mature age workers similar to the one provided for under the *Workers' Rehabilitation and Compensation Act 1988 (Tas)*?**

46. The Personal Injuries Committee does not consider that the Government should introduce a supplementary payment for mature age workers similar to the one provided for under the *Workers' Rehabilitation and Compensation Act 1988 (Tas)* (Tasmanian Act).
47. It is noted that section 87 of the Tasmanian Act provides that workers who are over the age of 65 can receive a weekly supplementary payment after their normal incapacity payments have ended, if the worker can prove that they would have continued to work beyond the age of 65 if they had not been injured. The Personal Injuries Committee notes that the main benefit of the Tasmanian legislation is that medical expenses are tied to a person's entitlement to receive incapacity payments. This is not an issue under the Commonwealth Workers' Compensation Acts.
48. The LSNSW also has reservations about the adoption of a supplementary payment for mature age workers. The LSNSW considers that payment of a weekly supplementary payment in these circumstances could operate as a barrier to

employment for mature age workers because employers may anticipate an additional cost.

### **Question 3–3**

**Does the treatment of superannuation payments in the calculation of incapacity payments under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) create a barrier to workforce participation for mature age workers? If so what, if any, changes should be made?**

49. The Personal Injuries Committee considers that the treatment of superannuation payments in the calculation of incapacity payments under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) creates a barrier to workforce participation for mature age workers. This is particularly the case with respect to individuals who want to re-enter the workforce, where superannuation pensions would reduce incapacity payments after the first 45 weeks.
50. The Law Council is of the view that the treatment of superannuation payments in the calculation of incapacity payments also raises an equity issue. It is no more justifiable to include superannuation payments in the calculation of incapacity payments than other sources of income such as rent, a second job or winnings from gambling.
51. Accordingly, the Law Council considers that superannuation payments should not be taken into account at all in the calculation of incapacity payments. It is noted that it is only the Commonwealth compensation Acts that treat superannuation payments in this way.

## Insurance

### **Responses to Discussion Paper Proposals**

#### **Proposal 4-3**

**From 2012, the General Insurance Code of Practice is being reviewed by an independent reviewer. In the course of the review, the ways in which the Code could be amended to encourage insurers to consider the needs and circumstances of mature age persons should be examined.**

52. The LIV has indicated that it would welcome a review of the General Insurance Code of Practice to ascertain ways in which the Code could be amended, given that the Code does not mention offering insurance to mature workers.

#### **Proposal 4–4**

**The Australian Human Rights Commission, in consultation with the Insurance Council of Australia and the Financial Services Council, should develop guidance material about the application of any insurance exemption under the *Age Discrimination Act 2004* (Cth) or consolidated anti-discrimination legislation.**

53. The LIV considers that guidance material regarding the application of any insurance exemption under the *Age Discrimination Act 2004* (Cth), or consolidated anti-

discrimination legislation, should be developed by the AHRC, in consultation with the Insurance Council of Australia and the Financial Services Council.

54. The LIV has made a number of suggestions regarding what should be included in these guidelines, and submits that employers should be required to take all reasonable steps to obtain appropriate insurance to cover all workers, including mature workers, having regard to factors such as:
- a. The size and nature of the employer's workplace and business;
  - b. The effect on the workplace and the employer's business as a result of obtaining the insurance;
  - c. The consequences for the employer as a result of obtaining insurance; and
  - d. The consequences for the employee if adequate insurance cover is not obtained.

## Responses to Questions raised in Discussion Paper

### Question 4-1

**In addition to the General Insurance Code of Practice, are there other industry standards or codes that should be reviewed in order to encourage insurers to consider the needs and circumstances of mature age persons? For example, the Financial Services Council Code of Ethics and Code of Conduct?**

55. The LIV considers that following the High Court decision in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, there is an onus on financial service providers to ensure that mature age persons receive independent legal advice before making high risk financial decisions. The LIV suggests that the requirement to obtain independent legal advice should be incorporated into the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct. However, the LIV notes that the Financial Services Council Code of Ethics and Code of Conduct only apply to members. The LIV considers this to be problematic as it means that financial services providers are not bound to follow the codes if they are not members of the Financial Services Council.

### Question 4-2

**In the course of the consolidation of federal anti-discrimination legislation, the Australian Government is considering the operation of the insurance exemption under the *Age Discrimination Act 2004* (Cth). If the specific exemption is retained, what changes, if any, should be made? For example, should:**

- a. the application of the exemption be limited in some way;
  - b. there be provision for an individual to request and receive the actuarial or statistical data on which the action or decision was based; or
  - c. clarification be provided as to what are 'other relevant factors'?
56. The Law Council notes that a general exemption regarding insurance is included in the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth), which consolidates Commonwealth anti-discrimination legislation.

57. However, the LSNSW considers that insurers ought to be required to apply for a specific exemption or show why an applicant over 65 years should not be covered by an insurance policy. This approach is favoured by the LSNSW rather than the general statutory exemption.
58. The LIV understands that some mature workers have been asked to waive their rights to insurance cover if they want to continue working with certain employers, due to difficulties that the employer has encountered if the employer's existing insurance policy does not apply to workers over a certain age. The LIV suggests that measures should be put in place to make it easier for employers to access insurance policies that cover mature workers.

### **Question 4-3**

**Is the power of the Australian Human Rights Commission under s 54 of the *Age Discrimination Act 2004* (Cth) sufficient, or should there be some other mechanism for requesting or requiring the actuarial or statistical information relied upon by insurers seeking to invoke the insurance exemption?**

59. Section 54(2) of the *Age Discrimination Act 2004* (Cth) provides that:

*The President or the Commission may give the person a notice in writing, as prescribed, requiring the person to disclose to the President or to the Commission, as the case may be, the source of the actuarial or statistical data on which the act of discrimination was based.*

60. The LSNSW considers that this power is sufficient for requesting or requiring the actuarial or statistical information relied upon by insurers seeking to invoke the insurance exemption.
61. The LIV suggests alternatives for requesting or requiring the actuarial or statistical information relied upon by insurers seeking to invoke the general insurance exemption. It suggests that a new provision should be introduced to establish a public register where insurers, who are seeking to impose age limits on their policies, are required to outline the statistical and actuarial data that they rely on to justify the age limits. The LIV also suggests that a register should be established to enable employers to search for alternative insurance providers who provide policies that cover mature age workers.

## Superannuation

62. The Law Council Legal Practice Section's Superannuation Committee (the Superannuation Committee) considers that some age-based rules in relation to superannuation are necessary to allow people to benefit from their superannuation at an appropriate time to fund their living standards. These age-based rules should prevent people from accumulating assets in a tax advantaged environment for purposes other than funding their retirement (or for providing for dependants in the case of an early death).
63. The Superannuation Committee also considers that people have a legitimate expectation that they will at some stage of their lives be in a position to substantially retire from paid employment (acknowledging that many will wish to continue some productive activity either by way of part-time paid employment or volunteer work).



64. To achieve a 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 both to access superannuation, and accumulate superannuation, subject to reasonable restrictions on both access and accumulation.
65. The Superannuation Committee notes that, in relation to superannuation, the Discussion Paper comments that issues such as system stability, system coherence (encompassing system consistency, simplicity and transparency for individuals) and 'fairness' are also relevant.
66. In considering the ALRC's Proposals and Questions in relation to whether superannuation rules are a barrier to 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 has also considered issues of stability, coherence and fairness.

## **Responses to Discussion Paper Proposals**

### **Proposal 8-1**

**Regulation 7.04(1) of the *Superannuation Industry (Supervision) Regulations 1994 (Cth)* restricts superannuation funds from accepting voluntary contributions for members of superannuation funds:**

- a) **aged 75 years and over; and**
- b) **aged 65 years until 75 years, unless they meet a work test, that is, where they are gainfully employed on at least a part-time basis during the financial year.**

**The Australian Government should amend reg. 7.04(1) to remove the restriction on voluntary contributions for members aged 75 years or over, and to extend the work test to these members.**

67. The Superannuation Committee supports this proposal.
68. The Discussion Paper notes that age restrictions on compulsory superannuation guarantee contributions will be removed from 1 July 2013. The Superannuation Committee considers that voluntary contributions should be treated consistently to avoid undue complexity.
69. For equity and consistency, employees should 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.
70. The Superannuation Committee notes that some submissions on the ALRC Issues Paper proposed the abolition of the work test. The Superannuation Committee acknowledges that abolition of the work test would improve system coherence, for the following reasons:

- contribution rules would be the same irrespective of a member's age, thereby improving consistency and simplicity of superannuation rules; and
- given that contribution caps limit a person's capacity to make superannuation contributions at any age, it is arguable that the work test is no longer required as an 'integrity' measure to avoid excessive accumulation in a tax concessional environment.

71. However, the Superannuation Committee notes that removal of the work test could be a disincentive to continued employment.

### **Proposal 8-2**

**Section 290-80 of the *Income Tax Assessment Act 1997 (Cth)* provides that voluntary superannuation contributions made by employers for employees aged under 75 years are tax deductible. The Australian Government should amend s290-80 to enable employers to claim deductions for voluntary contributions made for employees aged 75 years and over.**

72. The Superannuation Committee supports this proposal. With the removal of the age restriction on compulsory 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 for their employees generally, irrespective of an employee's age, and the tax deductibility of the contributions should not depend on the employee's age.

### **Proposal 8-3**

**Section 290-165(2) of the *Income Tax Assessment Act 1997 (Cth)* provides that superannuation contributions made by self-employed, and substantially self-employed, workers aged under 75 years are tax deductible. The Australian Government should amend s290-165(2) to enable these workers to claim deductions for contributions made at age 75 years and over.**

73. The Superannuation Committee supports this proposal. For equity and consistency, self-employed people should be able to make pre- or post-tax contributions on the same basis as contributions for employees, and the tax deductibility of the contributions should not depend on their age.

### **Proposal 8-4**

**Regulation 7.04(1) of the *Superannuation Industry (Supervision) Regulations 1994 (Cth)* restricts superannuation funds from accepting spouse contributions when the spouse is:**

- aged 70 years or over; and**
- aged from 65 years until 70 years, unless he or she meets a work test, that is, being fully employed on at least a part-time basis during the financial year.**

**The Australian government should amend reg. 7.04(1) to enable a member of a superannuation fund to make contributions for a spouse aged 70 years or over, when the spouse meets the work test.**

74. The Superannuation Committee expressed the view, in the submission on the ALRC Issues Paper, that age-based restrictions on the capacity to fund superannuation for a spouse are an appropriate component of superannuation regulation, and that the Committee therefore supports the current rules for funding superannuation for a spouse.
75. The Superannuation Committee acknowledges that aligning the rules for spouse contributions with the rules for other types of contributions could improve system coherence (in relation to consistency, simplicity and transparency).
76. However, on balance, the Superannuation Committee considers that the current rules for spouse contributions are a reasonable restriction on accumulation (although a change to the age limit may be justified).

### **Proposal 8-5**

**Regulation 6.44(2) of the *Superannuation Industry (Supervision) Regulations 1994 (Cth)* provides that an application for spouse contribution splitting is invalid if the member's spouse is aged 65 years or over, or has reached superannuation preservation age and retired. The Australian Government should amend reg 6.44(2) to remove the age restriction from age 65 years when the spouse meets a work test, that is, being gainfully employed on at least a part-time basis during the financial year.**

77. The difference between spouse contributions and contribution splitting is, in effect, that spouse contributions are non-concessional (post-tax) contributions and split contributions are concessional (pre-tax) contributions.
78. The Superannuation Committee understands there may be some concern that concessional (pre-tax) contributions could be more open to tax manipulation than non-concessional (post-tax) contributions. However the Committee's view is that the current contributions caps are a sufficient integrity measure.
79. The Superannuation Committee acknowledges that aligning the rules for contribution splitting with the rules for spouse contributions would improve system coherence (in relation to consistency, simplicity and transparency).
80. Accordingly, the Superannuation Committee would support introducing the same age-based rules, as noted above, for contribution splitting as for spouse contributions.
81. As an alternative, the Superannuation Committee would support a single age limit for contribution splitting (rather than excluding contribution splitting for a spouse who has reached preservation age and 'retired').

### **Proposal 8-6**

**Section 6(1)(e) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003 (Cth)* provides that government co-contributions are payable only for persons aged under 71 years. The Australian Government should repeal this restriction.**

82. The Superannuation Committee is of the view that the considerations in relation to Co-contributions are materially different from the Low Income Earners Government Contribution. This Contribution is to compensate people, whose tax rate is less than 15%, for the tax payable by their superannuation fund on concessional contributions for them. This is an equity measure designed to address the relatively greater tax benefit that high income earners receive from concessional contributions to superannuation.

83. In contrast, the Co-contribution is an additional payment from the Government intended as an incentive for low income earners to contribute more to superannuation. While there are also equity implications, the Superannuation Committee notes that a person aged 71 and over may be entitled to access the age pension; it questions whether funding of the Co-contribution without any age limit might create complexities in term of avoiding a duplication of entitlements.
84. The Superannuation Committee is not in a position to estimate the likely cost of extending the Co-contribution scheme to people over 71, or to assess whether such expenditure is likely to reduce pressures on the age pension; it considers that research on such matters would be required to assess this proposal.

### **Proposal 8-7**

**The ‘Transition to Retirement’ rules were introduced into the *Superannuation Industry (Supervision) Regulations 1994 (Cth)* to encourage continued mature age workforce participation. Research has suggested that the rules may not meet this policy objective in practice. The Australian Government should initiate a review of the Transition to Retirement rules to determine what changes, if any, are required to ensure that the rules meet their policy objective. The review should consider matters including:**

- (a) the use of the rules in practice;**
- (b) whether there is sufficient and widespread access to the scheme;**
- (c) the relationship to the setting of the concessional superannuation contributions cap;**
- (d) eligibility criteria; and**
- (e) comparable international schemes.**

85. The Superannuation Committee supports this proposal.
86. The Superannuation Committee’s view is that, in principle, Transition to Retirement 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 would be disadvantaged in terms of access to superannuation compared to people who elect to retire, and the disincentives to undertake part-time work may be particularly acute.
87. 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. Accordingly the Committee supports further research on this point.

### **Additional issue**

#### **Tax treatment of redundancy payments for people aged 65 and over**

88. The Superannuation Committee would like to raise an additional issue that was not considered in the Committee’s previous submission and appears not to have been raised in other submissions. This issue is not strictly a superannuation issue, but is a related tax issue.

89. Under subsection 83-175(2) of the *Income Tax Assessment Act 1997* (Cth), a 'genuine redundancy payment' must satisfy prescribed conditions, including:
- (a) *the employee is dismissed before the earlier of the following:*
    - (i) *the day he or she turned 65;*
    - (ii) *if the employee's employment would have terminated when he or she reached a particular age or completed a particular period of service – the day he or she would reach the age or completed the period of service (as the case may be.)*
90. Genuine redundancy payments have preferential tax treatment compared to other payments on termination of employment (in particular, they include a tax-free component, based on the person's years of service).<sup>16</sup>
91. An employee who is aged 65 or over cannot receive a 'genuine redundancy payment'. Accordingly if they are made redundant they may pay considerably more tax on their termination payment than a worker who has the same period of service but has not yet attained 65 years of age.
92. Employees generally have very limited control, if any, over the timing of their redundancy, and the exact timing of a redundancy can make a significant difference to a worker's tax position (for example, if the worker is dismissed a few days before they attain the age of 65 they will have the benefit of the tax free threshold, if they are dismissed at age 65 they will not).
93. As an employee now generally cannot be compulsorily retired at a particular age or after a particular period of service, this restriction (paragraph (a)(ii) of subsection 83-175(2)) is now effectively obsolete.
94. The Superannuation Committee does not have a view as to whether the different tax treatment is a disincentive for older workers, who are made redundant, to seek further work. However, in terms of system coherence, fairness and 'messaging', the different treatment of redundancy payments for people aged 65 and over:
- is inequitable in concept and anomalous in operation;
  - is inconsistent with current anti-discrimination legislation which, for most workers, prohibits compulsory retirement on the basis of age; and
  - is clearly based on an assumption that older workers who are made redundant are expected to retire.
95. The Superannuation Committee considers that the age limit on genuine redundancy payments should be abolished.

---

<sup>16</sup> Section 83-170 *Income Tax Assessment Act 1997* (Cth)

## Responses to Questions raised in Discussion Paper

### Question 8-1

**Regulations 7.04(1) and 7.01(3) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) stipulate a work test for members of superannuation funds aged 65 years and over who wish to make voluntary superannuation contributions. Members must be gainfully employed on at least a part-time basis during the financial year, that is, for a minimum of 40 hours over a consecutive 30-day period.**

**What changes, if any, should be made to the work test? For example, should the minimum hours of work be increased and, if so, over what period?**

96. The Superannuation Committee considers that, in principle, the work test should accommodate legitimate working patterns of older Australians. The Superannuation Committee also accepts that, if the test is to be effective as an integrity measure, the requirements need to be sufficiently robust to avoid manipulation.
97. The Superannuation Committee does not have a view on what changes, if any, should be made to the work test. It may be that research on working patterns of older Australians would be useful to inform the discussion on this issue.

### Question 8-2

**The Australian Government has legislated two key changes to the retirement income system: the superannuation preservation age will increase from 55 to 60 years between 2015 and 2025; and the Age Pension age will increase from 65 to 67 years between 2017 and 2023.**

**Should the preservation age be increased beyond 60 years? For example, to:**

- (a) **62 years – maintaining the five year gap between the Age Pension and the preservation age; or**
- (b) **67 years – aligning the preservation age with the Age Pension age?**

98. The Superannuation Committee does not support aligning the preservation age with the Age Pension age.
99. The Committee's view is that the preservation age needs to be lower than the Age Pension age, particularly as the Age Pension age rises, 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.
100. 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 employment. However other policy goals, and the reality of workforce opportunities for older workers, need to be considered.
101. Raising the preservation age to 67:
- would 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;

- may indeed force people who would otherwise have retired before then to continue working, even if they have sufficient superannuation to retire earlier – this may distort employment patterns, does not recognise legitimate retirement expectations, and in the Committee’s view would be inequitable.

102. The Superannuation Committee suggests that any change to the current preservation age scale should be based on research in relation to these matters.

103. As to whether it would be desirable for there to be an increase in the preservation age to 62 years, over time, to maintain the five year gap between Age Pension age and preservation age, the Committee suggests that the appropriate age setting should be informed by research.

### **Question 8-3**

**The age for tax-free access to superannuation benefits is set at 60 years. Should this age setting be increased:**

- (a) to align with any further increase to superannuation preservation age (that is, beyond 60 years); or
- (b) instead of any further increase to the preservation age – for example, to:
  - (i) 62 years – maintaining the five year gap between the Age Pension age and the tax-free superannuation access age;
  - (ii) 65 years – aligning the tax-free superannuation access age with the unrestricted superannuation access age; or
  - (iii) 67 years – aligning the tax-free superannuation access age with the Age Pension age?

104. The Superannuation Committee would support an increase in the unrestricted access age (currently age 65) to align with increases in the Age Pension Age, to assist consistency of ‘message’ in relation to retirement expectations.

105. The Superannuation Committee understands that age 60 is considered from a policy perspective to represent an appropriate ‘normal’ retirement age within the community, and is therefore appropriate both as the standard preservation age and as the age after which it is appropriate that superannuation benefits should be received free of tax. Presumably, the introduction of these rules was also informed by some analysis of the interaction between the taxation treatment of benefit payments, and the age at which the age pension is likely to be accessed by individuals, who would first use up some or all of their superannuation before becoming eligible for the age pension.

106. The Committee acknowledges that decisions on this issue will need to take into account both the expected increase to the revenue if tax concessions are wound back, and the expected cost to the social security system, if people who have accumulated superannuation are forced onto the age pension at an earlier age because taxes have reduced the period over which their retirement is self-funded. The Committee is not in a position to comment on these matters. However, subject

to the results of relevant research and analysis, the Committee's view is that, on balance, aligning the tax-free access age with the preservation age is the preferred approach. For consistency and transparency, the Committee's view is that, where people are entitled to access their benefit on retirement, they should not be penalised (by way of additional tax) for doing so.

## Other Issues

### Aged Care

107. As outlined in the Law Council's submission on the Issues Paper,<sup>17</sup> the LSSA is of the view that the ALRC should consider aged care in its review of Commonwealth laws – particularly in the context of the themes that emerged from the Government's response to the Productivity Commission's report, *Caring for Older Australians*.<sup>18</sup>
108. 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.
109. 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.
110. 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.
111. 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 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

112. The Law Council generally supports the proposals in the Discussion Paper in the areas discussed above, subject to further consideration of some matters which have been outlined in this submission.
113. The Law Council thanks the ALRC for the opportunity to make this submission and looks forward to the ALRC's report regarding this inquiry.

---

<sup>17</sup> Op. cit., Law Council Submission on Issues Paper, p.27.

<sup>18</sup> See Productivity Commission, *Caring for Older Australians*, 8 August 2011, available from <http://www.pc.gov.au/projects/inquiry/aged-care>



## **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 59,000 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.