

This Discussion Paper reflects the law as at 19 September 2012.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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ISBN: 978-0-9871777-7-3

Commission Reference: ALRC Discussion Paper 78, 2012

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Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is 23 November 2012.

Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: <www.alrc.gov.au/content/age-barriers-work-discussion-paper>. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, written submissions may be mailed, faxed or emailed to:

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Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents.

Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions. See the ALRC policy on submissions and inquiry material. For more information <www.alrc.gov.au/policies>.

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Terms of Reference

Review into Commonwealth legal barriers to older persons participating in the workforce or other productive work

Having regard to:

- obstacles faced by older persons in actively participating in the workforce
- the desirability of reviewing Commonwealth laws to remove limitations on, or disincentives to, participation in the workforce by older persons, and
- the definition of ‘older persons’ as anyone over the age of 45 years, consistent with the definition of ‘mature age worker’ used by the Australian Bureau of Statistics.

I refer to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- the identification of Commonwealth legislation and legal frameworks that contain or create barriers to older persons participating, or continuing to actively participate, in the workforce or in other productive work (paid or unpaid), and
- the question of what, if any, changes could be made to relevant Commonwealth legislation and legal frameworks to remove such barriers.

Scope of the reference

In undertaking this reference, the ALRC should consider all relevant Commonwealth legislation and related legal frameworks that either directly, or indirectly, impose limitations or barriers that could discourage older persons from participating, or continuing to participate, in the workforce or other productive work, including:

- (a) superannuation law
- (b) family assistance, child support, social security law and relevant government programs
- (c) employment law
- (d) insurance law
- (e) compensation laws, and
- (f) any other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004*.

In conducting this inquiry, the ALRC should also have regard to:

- the work undertaken by the Advisory Panel on the Economic Potential of Senior Australians including its initial, second and final reports
- the work being undertaken by the Consultative Forum on Mature Age Participation and any recommendations made in the Forum's interim report and final reports
- the work to be undertaken during 2012 by Safe Work Australia to investigate options to address age discrimination in workers' compensation legislation, and
- the work being undertaken by the Attorney-General's Department to consolidate Commonwealth anti-discrimination laws into a single Act.

Consultation

In undertaking this reference, the ALRC should identify and consult with relevant stakeholders including relevant Government departments and agencies, the Australian Human Rights Commission, the Consultative Forum on Mature Age Participation, and key non-government stakeholders and peak employer and employee bodies.

Timeframe for reporting

The ALRC will commence this reference no later than 31 March 2012, and will report no later than 31 March 2013.

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Attorney-General

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Proposals and Questions

2. Recruitment and Employment Law

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.

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:

- (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.

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.

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.

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?

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.

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.

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?

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.

Proposal 2–10 The Australian Government should initiate an inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

Proposal 2–11 The Australian Government should initiate an inquiry to review the compulsory retirement ages for military personnel.

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?

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.

3. Work Health and Safety and Workers' Compensation

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.

Proposal 3–2 Safe Work Australia should include work health and safety issues that may affect mature age workers in its research agenda.

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.

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.

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.

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.

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?

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)?

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.

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?

4. Insurance

Proposal 4–1 In April 2011, the Australian Government established an Insurance Reform Advisory Group. The group should examine:

- (a) options for the development of a central information portal or source in order to provide mature age persons with clear and simple information about available insurance products;
- (b) the design and redesign of comprehensive and affordable insurance products tailored to the needs and circumstances of mature age persons;
- (c) mechanisms for reviewing age-based insurance pricing and underwriting across the industry;
- (d) mechanisms for ensuring that the insurance industry utilises relevant and appropriate actuarial and statistical data upon which to make decisions about insurance offerings, based on age; and
- (e) training of insurance distributors in order to facilitate the provision of clear and simple information about available insurance products.

Proposal 4–2 The Insurance Reform Advisory Group should keep a watching brief on developments in the insurance industry in relation to age, both in Australia and overseas, with a view to reviewing Australian insurance practices as the need arises.

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.

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?

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’?

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?

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.

5. Social Security

Proposal 5–1 The Department of Human Services should evaluate the effectiveness of its methods for communicating information to mature age persons about social security. In its evaluation, it should consider the communication of information about:

- (a) eligibility for income support payments;
- (b) participation obligations for activity-tested payments, including information about the circumstances in which exemptions from the activity test may be available;
- (c) how to calculate the effect of taking up paid work on income support payments, for example through online rate calculators; and
- (d) incentives to take up paid work, for example through Working Credit, Work Bonus, the employment income nil rate period and retention of concession cards.

Proposal 5–2 To enhance the capacity of Job Services Australia, Disability Employment Services and Indigenous Employment Program staff to respond to the needs and circumstances of mature age job seekers, the Department of Education, Employment and Workplace Relations should ensure they are provided with information about:

- (a) age discrimination, including what constitutes ageist behaviour;
- (b) the effect that illness, disability and caring responsibilities may have on mature age persons' capacity to work;
- (c) the ways in which barriers to work for mature age persons may be affected by gender, cultural and linguistic diversity, Aboriginal and Torres Strait Islander status, and sexual orientation; and
- (d) Australian government programs targeted at increasing mature age workforce participation.

Question 5–1 In what other ways, if any, could the Australian Government's employment services system be improved to provide better assistance to mature age job seekers?

Question 5–2 The 'withdrawal' or 'taper' rate for an income support payment operates to reduce gradually the rate at which a payment is made as income or assets increase. What effect, if any, would changing the income test withdrawal rate for Newstart Allowance recipients aged 55 years and over have on their incentives for workforce participation?

Question 5–3 In what ways, if any, does the review process for qualification for the Disability Support Pension create barriers to mature age participation in the workforce or other productive work? For example, does the lack of information about how Disability Support Pensioners are selected for review act as a disincentive to work?

Proposal 5–3 The *Guide to Social Security Law* should provide that a temporary cessation of constant care due to participation in employment, voluntary work, education or training that exceeds 25 hours per week:

- (a) does not result in automatic cancellation of Carer Payment; and
- (b) may, in some circumstances, be compatible with the constant care requirement for qualification for Carer Payment.

Proposal 5–4 The *Guide to Social Security Law* should provide examples of situations where participation in employment, voluntary work, education or training that exceeds 25 hours per week may be compatible with the constant care requirement for Carer Payment. These examples should include:

- (a) employment, voluntary work, education or training undertaken at home, for example online, provided it is consistent with the care receiver’s need for frequent personal care or constant supervision; and
- (b) short term increases in excess of 25 hours per week of employment, voluntary work, education or training undertaken outside the home.

Proposal 5–5 The objective of Work Bonus is to provide incentives for recipients of Age Pension and Veterans’ Age Service Pension to continue in employment. To ensure that Work Bonus continues to achieve its objective, the following amounts should be indexed to the Pensioner and Beneficiary Living Cost Index:

- (a) the income concession amount under s 1073AA of the *Social Security Act 1991* (Cth) and s 46AA of the *Veterans’ Entitlements Act 1986* (Cth); and
- (b) the maximum unused concession balance under s 1073AB of the *Social Security Act 1991* (Cth) and s 46AC of the *Veterans’ Entitlements Act 1986* (Cth).

Proposal 5–6 Pensioner Education Supplement is a payment to assist in meeting the costs of study in eligible secondary or tertiary courses. Section 1061PJ of the *Social Security Act 1991* (Cth) should be amended to provide that Age Pension and Veterans’ Age Service Pension are payments attracting Pensioner Education Supplement.

8. Superannuation

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 and over, and to extend the work test to these members.

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?

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 s 290-80 to enable employers to claim deductions for voluntary contributions made for employees aged 75 years and over.

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 s 290-165(2) to enable these workers to claim deductions for contributions made at age 75 years and over.

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:

- (a) aged 70 years or over; and
- (b) aged from 65 years until 70 years, unless he or she meets a work test, that is, being gainfully 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.

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.

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.

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.

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 age and the preservation age; or
- (b) 67 years—aligning the preservation age with the Age Pension age?

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 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?

1. Introduction to the Inquiry

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The Inquiry

The Discussion Paper

1.1 This document commences the second stage in the consultation processes in this Inquiry into Commonwealth legal barriers to older persons participating in the workforce or other productive work. The first stage included the release of the Issues Paper, *Grey Areas—Age Barriers to Work in Commonwealth Laws* (ALRC IP 41), generating 63 submissions.¹ Both the Issues Paper and this Discussion Paper may be downloaded free of charge from the Australian Law Reform Commission (ALRC) website, <www.alrc.gov.au>. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

1.2 In releasing this Discussion Paper the ALRC again calls for submissions to build on the evidence base so far established and to inform the final stage of the deliberations leading up to the final Report, which is to be provided to the Attorney-General by the end of March 2013.

1 The 54 public submissions are available on the ALRC website at: <www.alrc.gov.au/inquiries/age-barriers-work/submissions>.

The ageing population—a public policy challenge

1.3 Australia's population is ageing. The Productivity Commission described it as 'the quiet transformation, because it is gradual, but also unremitting and ultimately pervasive'.² It estimated that by 2044–45, almost one in four Australians will be aged 65 years and over; and in every year between 2012–2028, 'the aged share of the Australian population is projected to increase by more than 0.35 percentage points—an increase around 4 times the long-term average'.³

1.4 The effect that the ageing of the population may have on 'economic growth, living standards and the sustainability of government finances' has been identified as a major public policy concern.⁴ The Productivity Commission described the economic implications of an ageing Australia as 'far-reaching':

It will slow Australia's workforce and economic growth, at the very time that burgeoning demands are placed on Australia's health and aged care systems. Unless offsetting action is taken, a gap will open between Government revenue and spending that will need to be closed. Every jurisdiction in Australia is affected in different ways, depending on their specific responsibilities and capacity for raising revenue. Population ageing will require new policy approaches at all levels of government.⁵

1.5 The Productivity Commission also found that ageing pressures were accelerating as the baby boomer generation retires and that ageing 'will reduce economic growth at the same time that it intensifies demands for public services, such as health, aged care and the age pension':

With present policy settings, age-related spending will exceed the growth of tax revenue. This will open a fiscal gap equal to around 6½ per cent of GDP by 2044–45.⁶

1.6 A December 2011 report prepared for the Consultative Forum on Mature Age Participation, *Ageing and the Barriers to Labour Force Participation in Australia*, stated that the demographic shift in Australia's population 'implies a greater role for mature age Australians both economically and in society more generally'.⁷ A report prepared by Deloitte Access Economics for the Australian Human Rights Commission, released on 3 September 2012 (the Deloitte report), estimated the value of mature age participation in economic terms:

An extra 3 percentage points on participation among workers aged 55 and over would result in a \$33 billion boost to GDP—or around 1.6% of national income.

2 Productivity Commission, *Economic Implications of an Ageing Australia* (2005), xiii.

3 Ibid, xiv.

4 B Headley, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 3.

5 Productivity Commission, *Economic Implications of an Ageing Australia* (2005), xiii.

6 Productivity Commission, 'Long Term Ageing is Today's Policy Challenge' (Press Release, 27 October 2005).

7 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 6.

A 5 percentage point lift in participation among this group would see around \$48 billion in extra GDP—or 2.4% of national income.⁸

1.7 The report concluded that ‘mature age participation can play a key role in tipping the balance between the number of future retirees and the number of workers available to support them’ and that effective policies aimed at promoting increased workforce participation of older Australians ‘are likely to be among the most cost effective tools available to lift national incomes and living standards in coming decades’.⁹

1.8 Australia’s present retirement income system is based on three pillars: a means-tested Age Pension; compulsory saving through employer superannuation contributions (the ‘Superannuation Guarantee’); and voluntary superannuation contributions.¹⁰ If mature age workforce participation is increased, the balance between welfare costs through the Age Pension and related benefits, on the one hand, and superannuation and other retirement savings, on the other, may change:

By remaining in employment longer, older Australians can not only increase their current income, but can also save more to support themselves once they do decide to retire. In turn, improving retirement incomes not only raises living standards for future retirees, but can also assist in reducing welfare costs for future governments.¹¹

1.9 The shifting demographic requires consideration of the policy settings in each area. Asking the ALRC to conduct an inquiry into barriers to workforce participation for mature age persons forms part of the Australian Government’s response to population ageing. The Terms of Reference require consideration of the ‘three pillars’, together with a number of other specific legal areas.

Terms of Reference

1.10 The Terms of Reference¹² direct the ALRC to consider Commonwealth legislation and related legal frameworks that either directly, or indirectly, impose limitations or barriers that could discourage older persons from participating, or continuing to participate, in the workforce or other productive work, including:

- superannuation law;
- family assistance, child support and social security law;
- employment law;

8 Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, i.

9 Ibid, i.

10 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 8.

11 Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, i.

12 The full Terms of Reference are available on the ALRC website.

- insurance law;
- compensation laws; and
- any other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004* (Cth).

Terminology

Older persons

1.11 The Terms of Reference define ‘older persons’ as anyone over the age of 45 years, which is consistent with the definition of ‘mature age worker’ used by the Australian Bureau of Statistics (ABS). Throughout this Inquiry, stakeholders have questioned the accuracy of characterising persons as ‘older’ from the age of 45 years.¹³ The Brotherhood of St Laurence has also noted that the term is a ‘slippery concept’:

Even setting aside individual characteristics, there tend to be considerable differences between the interests and needs of cohorts aged 50–65 and those aged 65–80 or 80–100.¹⁴

Barriers to work

1.12 The Terms of Reference focus on Commonwealth law and age-based limitations on, or disincentives to, participation in the workforce or other productive work. The ALRC considers that this requires the identification of:

- limitations on participation;
- disincentives to participation (and incentives to leave); and
- incentives to remain in the workforce.

Other productive work

1.13 The Terms of Reference require the ALRC to consider barriers to participation in the workforce ‘or other productive work’. Under this expanded scope, the ALRC is considering participation in volunteer work. In its 2010 General Social Survey, the ABS found that 38% of the adult population (6.4 million people) had undertaken some voluntary work in the previous 12 months and, of these, the group aged 45 to 54 years reported the highest rate of doing so (44%) and 32.5% were aged 55 years and over.¹⁵ As noted by Volunteering Australia, the work undertaken by the nearly 2 million

¹³ See, eg, L Masters, *Submission 36*: ‘What is it that makes 45 the magic number?’.

¹⁴ Brotherhood of St Laurence, *Submission 54*. Quoting: H Kimberley and B Simons, *The Brotherhood's Social Barometer: living the second fifty years* (2009), Brotherhood of St Laurence, Fitzroy. Another stakeholder queried how the definition of ‘old age’ at age 45 years applied to women: ‘the term has always been based on the notion that men determine ... what age is old, and what age is young. Women also have determinants of “old age” that differ to those that men hold true’: L Masters, *Submission 36*.

¹⁵ Australian Bureau of Statistics, *General Social Survey: Summary Results, Cat No 4159.0* (2010), ‘Community involvement and volunteering’.

volunteers in the plus 55 category ‘represents a significant social and economic contribution to this nation’.¹⁶

1.14 Another type of contribution that may be considered ‘productive work’ is ‘informal care’—unpaid care provided by family members.¹⁷ Such care includes the care of adult children, children with disability, the care of elderly, care of persons with long-term health conditions, the care of spouses and parents, and child care for grandchildren.¹⁸ The provision of informal care is an important economic and social contribution to Australian society, estimated to be worth over \$40 billion annually.¹⁹ Generally, caring is gendered work, in that it is mainly a contribution made by women. As noted by the Premier’s Council for Women South Australia, statistics indicate that ‘a higher proportion of women than men provide care’.²⁰

1.15 Older persons may also provide unpaid care by raising their grandchildren (or other relatives) when the children’s parents cannot do so.²¹ The ABS notes that, in 2009–10, there were 16,000 Australian families in which grandparents were raising children aged 17 years and younger.²² In such circumstances, grandparent care has significant benefits to children, as discussed in Chapter 6.

1.16 In this Inquiry, the ALRC does not examine the legal barriers to older persons providing unpaid care. Such a project is fundamentally different in nature from an examination of the legal barriers to the paid workforce and other formal working arrangements. Consequently, in defining the scope of ‘productive work’ in this Inquiry, the ALRC is focusing on the latter—and examples of more formal working arrangements including volunteering and civic duties.

1.17 Unpaid caring is not only a form of productive work, but also a barrier to participation in the paid workforce. Providing care can have a significant impact on a

16 Volunteering Australia, *Response to Realising the economic potential of senior Australians. Enabling Opportunity* (2011), [2.2].

17 Access Economics, *The Economic Value of Informal Care in 2010—Report for Carers Australia* (2010), i.

18 The ABS data refer to informal caring as informal assistance with core activities which is ongoing or likely to be ongoing for at least 6 months and is provided by friends or family members to people with a disability, long-term health condition or the elderly: Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, Cat No 4430.0* (2003), 10. The Human Rights Commission considers informal care to cover the broader categories stated above: S Ryan, ‘Barriers facing older women’s workforce participation’ (Paper presented at the International Association for Feminist Economics Symposium in Valuing Care Work, Sydney, 5 December 2011).

19 Access Economics, *The Economic Value of Informal Care in 2010—Report for Carers Australia* (2010), i.

20 The Premier’s Council for Women South Australia, *Submission 13*, citing: Australian Bureau of Statistics, *Employment Arrangements, Retirement and Superannuation, Australia, Cat No 6361.0* (2007). The ABS also indicates in this report that the higher proportion of female care-providers applies in all age ranges ‘except the 45–54 year age range, where a similar proportion of men and women provided care’: 10.

21 Such care is generally termed ‘formal care’ when parental responsibility for children has been granted by a court pursuant to state and territory child protection legislation or the *Family Law Act 1975* (Cth), and ‘informal care’ when there are no court orders in place. However, the use of the terms ‘formal care’ and ‘informal care’ may vary, including across legal frameworks.

22 Australian Bureau of Statistics, *Family Characteristics, Australia, Cat No 4442.0* (2009–10).

person's ability to enter and maintain employment. There is evidence that this impact disproportionately affects women.²³ As a barrier to employment, unpaid care may also restrict the accumulation of retirement income savings. As noted in Chapter 8, the feminised nature of unpaid care contributes to the 'gender gap' in superannuation, whereby women have lower superannuation balances than men.²⁴

1.18 Although unpaid care may constitute a barrier to the paid workforce, it is not a legal barrier. Consequently, the ALRC does not address caring as a barrier to work in this Inquiry, as this is outside the Terms of Reference. The Premier's Council for Women South Australia suggested that:

It would be valuable if the ALRC could recommend that informal barriers, such as informal care, should be addressed in some other context. Experiences of older women as carers not only affects their ability to enter the workforce, but also to volunteer, and certainly to undertake civic duties.²⁵

1.19 It is worth noting that, while providing unpaid care may be a barrier to work for older persons, it may at the same time enable the workforce participation of other family members—most notably, when grandparents provide child care for their grandchildren so that the children's parents can work.²⁶ Such care is 'vital in buttressing intergenerational solidarity'.²⁷ It may also reduce the Australian Government's burden in providing sufficient child care services and related family-assistance benefits to facilitate workforce participation by younger cohorts.

Legal frameworks

1.20 The Terms of Reference direct the ALRC to consider 'all relevant Commonwealth legislation and related legal frameworks'. In this context, the idea of 'frameworks' extends beyond law in the form of legislative instruments to include policy and practice guides, codes of conduct, standards, education, information sharing and other related matters.

Retirement

1.21 The concept of 'retirement' is increasingly difficult to define. The Deloitte report refers to the usual division of life cycles into three: 'childhood, working age and retirement'.²⁸ There are difficulties in placing dividing lines between working age and

23 M Bittman, T Hill and C Thomson, 'The impact of caring on informal carers' employment, income and earnings: A longitudinal approach' (2007) 47(2) *Australian Journal of Social Issues* 255; C Lee and H Gramotnev, 'Transitions into and out of caregiving: Health and social characteristics of mid-age Australian women' (2007) 22 *Psychology and Health* 193.

24 See Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality Over the Lifecycle* (2009).

25 The Premier's Council for Women South Australia, *Submission 13*.

26 In relation to child care, the ABS notes that 'around a quarter of all children (26%) were usually cared for by their grandparents': Australian Bureau of Statistics, *Childhood Education and Care, Australia: Summary, Cat No 402.0* (2011).

27 OECD Meeting on Social Policy, *Paying for the Past, Providing for the Future: Intergenerational Solidarity* (2011). It is part of a 'two-way flow' in which older family members care for younger family members and vice versa.

28 Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, 3.

retirement. National Seniors described the ‘emergence of a work-retirement continuum’ as ‘one of the most significant social changes in recent years’:

Increasingly, people no longer work full-time, and then leave the workforce completely, becoming fully retired. For up to 20 years, a person’s level of engagement in the workforce may cycle between periods of no paid work, full-time work and various levels of part-time paid work. Rather than a simple tapering off of work, anecdotal evidence suggests many people work full-time on a seasonal basis (eg tax accountants during the tax season) and then either do not work for extended periods or work part time.²⁹

1.22 The ‘work-retirement continuum’ includes not only a continuum of time in the paid workforce and time out of the paid workforce as people age, but also time out of the paid workforce which cannot be considered as ‘not working’. The recognition of ‘other productive work’ in the Terms of Reference for this Inquiry suggests that the idea of ‘work’ and ‘non-work’ is as blurry as the distinction between ‘work’ and ‘retirement’.

1.23 In addition to the unclear distinctions of work/non-work and work/retirement, the delineation between unemployment and retirement can also be ‘problematic’.³⁰ This is particularly the case in industries or sectors where continuous work is not the norm. For example, the industry superannuation fund, Construction and Building Industry Super (Cbus), noted that in the construction industry, employment is often ‘defined by a discrete project’. This may affect older workers’ opportunities for continued employment:

Employees need to be hired and re-hired many times throughout the economic cycle. In a market where physical ability is a significant factor in recruitment, it is probable that younger workers will be preferred over older workers. In normal labour market conditions where there is some excess supply, older workers will be amongst the last to obtain work.³¹

1.24 A similar experience of work was identified by the Media, Entertainment and Arts Alliance in relation to the workforce it represents:

In the case of performers there is no real notion of retirement. This is due to the nature of the profession including the long periods of unemployment, the inherent value of personal expression that lies at the heart of the profession and the creative requirements for older (and younger) actors in productions. With no obligation to contribute superannuation upon employers these workers are encumbered with additional administrative burdens and costs in organising their own superannuation.³²

1.25 Given the difficulties of defining life cycles in clear terms of ‘work’ and ‘retirement’ and the focus of policy reform in terms on ‘productive ageing’, Simon Biggs advocates an emphasis on producing ‘a stretched life course’:

where each part is expanded rather than one—work—dominating the later years. This stretched-ness would also extend to looking at patterns of work-life balance

29 National Seniors Australia, *Submission 27*.

30 Cbus, *Submission 41*.

31 Ibid.

32 Media Entertainment & Arts Alliance, *Submission 33*.

throughout the life course, especially if these can be brought into line with the changing priorities made available by living longer.³³

1.26 In this Inquiry the ALRC uses the term ‘retirement income system’ in a general sense, given its common usage in this context, but acknowledges the fluid notion of work in terms of ‘work’ as both paid and unpaid across a lifetime. Notwithstanding this fluidity, in the legal areas examined in this Inquiry, there are certain legislative points or ages that—when reached—enable a person to access retirement income and consequently cease paid work. They are the point, or age, at which a person is eligible for the Age Pension; and the points, or ages, at which a person may (conditionally or unconditionally) access superannuation benefits.

Other inquiries

1.27 In conducting the Inquiry, the ALRC is directed to have regard to the work undertaken by:

- the Advisory Panel on the Economic Potential of Senior Australians including its initial, second and final reports;³⁴ and
- the Consultative Forum on Mature Age Participation and any recommendations made in the Forum’s interim report and final reports.³⁵

1.28 In addition, the ALRC is to have regard to:

- the work to be undertaken during 2012 by Safe Work Australia to investigate options to address age discrimination in workers’ compensation legislation; and
- the work being undertaken by the Attorney-General’s Department to consolidate Commonwealth anti-discrimination laws into a single Act.

Consolidation of anti-discrimination laws

1.29 In September 2011, the Australian Government released a discussion paper seeking submissions in relation to the consolidation of Commonwealth anti-discrimination law. The project to consolidate existing Commonwealth anti-discrimination law into a single Act is a key component of Australia’s Human Rights Framework.³⁶ Submissions on the issues raised in the discussion paper closed on 1 February 2012 and a draft bill will be released for further public consultation during 2012. At the time of publication of this Discussion Paper, the bill had not yet become available.

33 S Biggs, *Inclusive Growth and the Challenge of Population Ageing* (2012), prepared for Brotherhood Comment, Research and Policy Centre, Brotherhood of St Laurence, 4.

34 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011); Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Enabling Opportunity* (2011); Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011).

35 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation.

36 Australian Government Attorney-General’s Department, *Australia’s Human Rights Framework* (2010).

1.30 The *Age Discrimination Act 2004* (Cth) (ADA) is one of the pieces of legislation being examined as part of the consolidation process. Some of the key issues being considered in the course of the consolidation project that are relevant in the context of this Inquiry, include: the definition of discrimination; the protection of voluntary workers; and exemptions.

1.31 By way of example, s 37 of the ADA provides an exemption in relation to age-based discrimination in the terms and conditions on which an annuity, insurance policy or membership of a superannuation scheme is offered or refused, where the discrimination: is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and is reasonable having regard to the matter of the data and other relevant factors; or in a case where no such actuarial or statistic data is available, and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors. The ALRC is interested in whether this exemption will remain under any consolidated Act, or whether the draft consolidated Act will include a general exemptions provision. In light of the above, the ALRC will consider issues of age discrimination under the ADA or any consolidated Act in more detail following the release of the draft legislation.

Age Pension, tax and superannuation reviews

1.32 Significant reviews have been conducted in relation to superannuation, tax and the Age Pension. In 2008–09 the Australian Government initiated the Australia’s Future Tax System Review, chaired by Dr Ken Henry AC (the Tax Review); the Super Systems Review, chaired by Mr Jeremy Cooper; and the Pension Review, chaired by Dr Jeff Harmer AO.³⁷

1.33 The Tax Review examined the retirement income system, including the superannuation system, as a key part of the ‘tax-transfer system’—the combination of Australia’s tax and social security systems.³⁸ The Super System Review addressed the governance, efficiency, structure and operation of Australia’s superannuation system. The Pension Review examined measures to strengthen the financial security of older Australians, carers and people with disability. These reviews made a number of recommendations for reform.

Employment and workers’ compensation reviews

1.34 In July 2012, a review of the Commonwealth workers’ compensation scheme, in particular the *Safety, Rehabilitation and Compensation Act 1988* (Cth) was announced. In September 2012, an issues paper was released for consultation as part of the review.³⁹ It is expected that the review panel will report to the Australian Government in February 2013. The ALRC expresses a preliminary view with respect to the

37 The Treasury, *Australia’s Future Tax System: Final Report* (2010); Super Systems Review Panel, *Super System Review* (2010); FaHCSIA, *Australia’s Future Tax System: Pension Review Background Paper* (2008).

38 For a description, see The Treasury, *Australia’s Future Tax System: Architecture of Australia’s Tax and Transfer System* (2008), ‘Executive Summary’.

39 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

necessary reforms to Commonwealth workers' compensation in this Discussion Paper. However, in making recommendations in the final Report, the ALRC will consider the work of Safe Work Australia and the outcome of this review of the Commonwealth workers' compensation scheme.

1.35 In August 2012, the Australian Government released the final report of the review of the *Fair Work Act 2009* (Cth) which examined the extent to which the legislation is operating as intended and areas where the operation of the legislation could be improved consistent with the objects of the Act. The report included a range of recommendations for reform. The Government is currently considering its response.

Framing principles

1.36 In the context of Australia's ageing population, the Government's overarching objective is to keep people in work, and paying taxes, longer—rather than receiving the Age Pension—and to support people into self-funded retirement. As noted by the Brotherhood of St Laurence, removing barriers to mature age workforce participation will assist in 'ensuring continuing economic growth and will help to ameliorate the financial costs associated with an ageing population'.⁴⁰ While not in itself a framing principle, this sets the background for the Inquiry.

1.37 In defining the new policy settings in the form of specific framing principles for the Inquiry, assistance may be derived from both the international and domestic arenas.⁴¹ The ALRC considers that six interlinking principles are strongly evident: participation; independence; self-agency; system stability; system coherence; and fairness. Stakeholders strongly supported this approach. For example, the Australian Industry Group commented that 'these are valid considerations relating to the contribution of mature aged workers to the workforce and the Australian economy more broadly'.⁴² Similarly, the National Welfare Rights Network stated that the principles provide

a sound platform for the consideration of Commonwealth legislation that may enhance or limit mature age Australians' participation in the workforce or other productive work (paid or unpaid).⁴³

1.38 Some stakeholders also suggested refinement of, or addition to, these framing principles, as discussed below.

⁴⁰ Brotherhood of St Laurence, *Submission 54*.

⁴¹ United Nations, *United Nations Principles for Older Persons—adopted by General Assembly resolution 46/91 of 16 December 1991*; Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Enabling Opportunity* (2011); Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011).

⁴² Australian Industry Group, *Submission 37*.

⁴³ National Welfare Rights Network, *Submission 50*.

Participation

1.39 ‘Participation’ reflects the Australian Government’s ‘Social Inclusion Agenda’:

The Australian Government’s vision of a socially inclusive society is one in which all Australians feel valued and have the opportunity to participate fully in the life of our society.⁴⁴

1.40 The principle of ‘participation’ has a number of elements. The Social Inclusion Agenda emphasises the opportunity of all Australians to

Learn by participating in education and training;

Work by participating in employment, in voluntary work and in family and caring;

Engage by connecting with people and using their local community’s resources; and

Have a voice so that they can influence decisions that affect them.⁴⁵

1.41 The ‘Social Inclusion Principles’ emphasise that ‘maximum participation in economic, social and community life is a defining characteristic of an inclusive society’:

Achieving this outcome for all Australians means delivering policies and programs which support people to learn and strengthen their ability to participate actively in the labour market and in their communities.⁴⁶

1.42 The value of workforce participation to disadvantaged older persons was emphasised by the Brotherhood of St Laurence:

work provides income, the capacity to build retirement savings, a sense of purpose and a connection with the community. Participation in paid work can increase both financial and social wellbeing, and so reduce the significant risk that people over 65 have of being socially excluded.⁴⁷

1.43 The Association of Independent Retirees Ltd noted that a person’s workforce participation, and the kinds of choices he or she will make about participation, vary within the wide age range covered by this Inquiry—‘from 45 through 65 into retirement’.

Work to gain income to support an individual and/or family is an imperative between the ages of 45 and retirement; Government support can be an exception. After retirement, participation in paid work becomes one of the options for an individual to participate in the life of society to achieve a fulfilling retirement. The incentive to work is one of a number of competing retirement priorities and is often not the sole imperative driving financial wellbeing. The priority given to work depends on the need to supplement savings, eligibility to access Age Pension support, individual and family interests, and to some extent habit.⁴⁸

44 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 30 August 2012.

45 Ibid.

46 Ibid, ‘Social Inclusion Principles’, 1.

47 Brotherhood of St Laurence, *Submission 54*.

48 Association of Independent Retirees, *Submission 17*.

Independence

1.44 The principle of ‘independence’ is related to the above principle of participation: ‘supporting people to take independent decisions and to negotiate priorities through participation’ is critical to ‘capacity building’.⁴⁹

1.45 Independence also embodies the idea of being able to determine when and at what pace withdrawal from work takes place.⁵⁰ Independence also involves having access to appropriate training to support work participation.

1.46 Two stakeholders suggested that the element of choice should be a specific framing principle of itself.⁵¹ The Government of South Australia commented that,

While this is partially contained within the concept of ‘independence’, it is worthy of inclusion on its own merits. Older people should have choices about how much they work, if they want to work at all, or whether they involve themselves in ‘service to the community’ through volunteering.⁵²

1.47 National Seniors Australia submitted that

Multiple factors will come into play for each person as they make decisions about work and retirement, eg health, income, caring responsibilities, but artificial barriers based on age should not be amongst them. Irrespective of age, each person should feel they can make the choice about whether or not they work.⁵³

1.48 The Government of South Australia also highlighted that continued workforce participation may not be an option for some older persons, and they require other choices to be available. It considered this particularly pertinent to those ‘in physically demanding occupations’, who

may experience physical discomfort or health concerns, which do not qualify them for a disability pension and, with proposed changes to restrict access to Superannuation, that individual would have no financial choice other than to keep working. Suggested changes to the existing support systems (such as raising the Superannuation preservation age) could have the inadvertent consequence of severely limiting individuals’ choices about how they spend their later years. On this basis, the South Australian Government contends that deliberations should also be informed by how suggested changes will impact upon individuals’ choices.⁵⁴

1.49 On a related theme, the Australian Council of Trade Unions (ACTU) stressed that choices for older persons needed to be ‘real choices’—about ‘when, where and how they work’. The ACTU pointed to the prevalence of casual employment as undermining ‘meaningful and satisfying’ participation in employment:

49 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 30 August 2012, 1.

50 United Nations, *United Nations Principles for Older Persons—adopted by General Assembly resolution 46/91 of 16 December 1991*.

51 Government of South Australia, *Submission 30*; National Seniors Australia, *Submission 27*.

52 Government of South Australia, *Submission 30*.

53 National Seniors Australia, *Submission 27*.

54 Government of South Australia, *Submission 30*. Similarly, the Brotherhood of St Laurence emphasised that ‘the opportunity to be employed should not be conflated with the requirement to be employed’: Brotherhood of St Laurence, *Submission 54*.

Not only is casual and ad hoc employment a source of financial and social insecurity, it is also synonymous with weaker rights and entitlements, poorer career development opportunities and lower job satisfaction. The growth of casual employment has been significant over the past few decades, increasing from 15.8% in 1984 to around 27.7% in 2004. In many cases, casual and insecure employment can lead to social exclusion, rather than social inclusion, by denying workers the chance to participate in the workforce in a meaningful way. This is a particular issue for mature aged workers, who may wish to work more flexible hours but should not have to trade their job security for additional flexibility.⁵⁵

1.50 Another way choice can play a role is in terms of older people choosing to contribute to society by volunteering. The ALRC recognises that there is a policy tension within the Terms of Reference between paid work and ‘other productive work’ that is unpaid, though valuable. This tension was demonstrated in the submission by the Returned & Services League of Australia Ltd (RSL). It emphasised the negative effect that encouraging or pushing older people into paid work may have on the capacity of their members to volunteer:

The annual economic and social benefit to Australian society of the work of the tens of thousands of RSL volunteers is enormous. These citizens, some in their 90s, give back to the Australian community far more than they receive—and they do it selflessly and without fanfare. They and the volunteers in the many other charitable and like organisations form that part of the ageing Australian population whose ongoing efforts are an exemplar of giving. Achieving the overarching government objective of keeping people in work and paying taxes longer will inevitably impact on the number of Australians who, after retirement, work long hours as volunteers for no reward for the overall good of the nation. It is not unreasonable to postulate that if Australia’s volunteers ceased to give so generously of their time, expertise and effort, the nation would be very much the poorer not least because of the increase this would pose on the public purse.⁵⁶

1.51 The ALRC considers that choice can be a crucial element here: choice about the time and pace at which to withdraw from paid work, and choice about using the time around paid work—or after withdrawal from paid work—to contribute productively in other ways.

Self-agency

1.52 The principle of ‘self-agency’ was a key principle identified in the ALRC’s Inquiry into family violence and Commonwealth laws. An individual’s right to make decisions about matters affecting him or her should be respected.⁵⁷ The principle of self-agency is one that underpins the idea of ‘independence’ and of ‘participation’, as considered above. Like the principle of independence, self-agency also encompasses choice. The ACTU again emphasised ‘meaningful choice’ for older workers in this context—about when and if to retire, ‘as well as the work that they are asked to

⁵⁵ ACTU, *Submission 38*.

⁵⁶ The Returned & Services League of Australia Ltd, *Submission 24*.

⁵⁷ Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2011), Ch 2.

perform prior to retirement’. It noted that workers in insecure employment are often denied such meaningful choice.⁵⁸

1.53 Self-agency also embodies the importance of being treated with dignity and respect, as reflected in the National Statement on Social Inclusion.⁵⁹ In its submission, the National Welfare Rights Network emphasised the importance of the values of ‘the inherent dignity and respect due to each person’.⁶⁰

System stability

1.54 The principle of ‘system stability’ is particularly relevant in areas like superannuation. The Super System Review panel stated that

Superannuation is a large and complex system with an increasingly important social and macroeconomic dimension. It must be regulated and administered coherently and rule changes, including to taxation rules, should be made sparingly and in a way that engenders member confidence.⁶¹

1.55 Concerns about the pace of change in the area of superannuation were also noted in the Tax Review.⁶² Stakeholders in this Inquiry repeated these concerns and noted the consequences of a lack of stability. National Seniors Australia, for example, submitted that if the Government wishes to encourage effective planning for later life, this is

only possible in a predictable and stable environment. Policy volatility can lead to consumer disenchantment and disengagement.⁶³

1.56 National Seniors Australia gave the example of repeated changes to superannuation, which ‘erode community confidence in the superannuation system and encourage more Australians to minimise, rather than maximise, their superannuation savings’—a matter they submitted ‘will ultimately be to the detriment of the whole community’. It quoted one of its members:

I am sick and tired of Governments being able to ‘play’ with superannuation especially for us over 50s or more still for the over 55s as it is so close to our retirement where we need certainty.⁶⁴

1.57 While system stability has particular relevance in the retirement income context, it is also an important principle more generally. As noted by the Australian Chamber of Commerce and Industry (ACCI):

Many Commonwealth programs impinge on planning decisions, particularly where there are marginal differences between the financial benefits of working and not working. This in turn affects continuity of employment and flexibility options. Both

58 ACTU, *Submission 38*. The ACTU also submitted that ‘job security and quality of employment’ be included as an additional framing principle.

59 Australian Government and Social Inclusion Unit, *A Stronger, Fairer Australia—National Statement on Social Inclusion*.

60 National Welfare Rights Network, *Submission 50*.

61 Super Systems Review Panel, *Super System Review* (2010), pt 1, 4, principle 8.

62 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 1, xxi.

63 National Seniors Australia, *Submission 27*. See also Australian Chamber of Commerce and Industry, *Submission 44*.

64 National Seniors Australia, *Submission 27*.

employers and employees require reasonable stability for productive employment arrangements to endure.⁶⁵

1.58 Other related principles are ‘coherence’ and ‘fairness’, which may be seen as aspects of a stable system, but also go further. They concern how the system operates in terms of impact on those affected and more broadly within the Australian community.

System coherence

1.59 The Tax Review identified ‘system coherence’ as a priority in its review of the retirement income system, by which was meant system consistency, simplicity and transparency for individuals.⁶⁶ A number of stakeholders expressed concerns about the lack of consistency, simplicity or transparency. For example, one considered the following should be a framing principle in the Inquiry: ‘easy to understand—and less of—paperwork!’⁶⁷

1.60 Complexity, in particular, was identified as a cause of disengagement in paid work. ACCI, for example, stated that the complexity and wide array of laws that may affect an older person’s decision to remain or re-enter the workforce ‘can often tip the balance against a decision to continue working’.⁶⁸

1.61 The Australian Institute of Superannuation Trustees (AIST) also made the connection between complexity and disengagement, arguing that laws and regulations have become ‘so convoluted that it is arguably a significant reason why the general public is “disengaged” with superannuation’.

It is possible that participants are not so much disengaged as utterly confused. The numerous age-based limits within superannuation cause considerable confusion and are difficult to navigate, before consideration of the penalties for breaching them.⁶⁹

1.62 With specific reference to these age-based limits in superannuation laws, AIST submitted that:

The complexity of understanding different amounts relative to different ages and that these can then be applied across financial years makes it a veritable minefield. Any process that looks to simplify the system is, in principle, applauded.⁷⁰

1.63 A further example of complexity, prompting a plea by Olderworkers for ‘a simpler way’, was the fortnightly reporting regime of Centrelink. It noted that ‘[m]any older people want to participate in the workforce, but just find [this regime] an enormous barrier and won’t engage because of it’.⁷¹ Another stakeholder addressed the

⁶⁵ Australian Chamber of Commerce and Industry, *Submission 44*.

⁶⁶ The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 15–16.

⁶⁷ W Trinder, *Submission 01*.

⁶⁸ Australian Chamber of Commerce and Industry, *Submission 44*.

⁶⁹ Australian Institute of Superannuation Trustees, *Submission 47*. The submission includes an example of member splitting and spouse contributions not being commonly used because of confusion and complexity.

⁷⁰ Ibid.

⁷¹ Olderworkers, *Submission 22*.

difficulties posed by various aspects of the social security system, stating: ‘there should be a simpler and easier to understand format’ and the ‘system should be more transparent’ and less complicated.⁷²

1.64 Accessible information is another aspect of system coherence. Its lack was identified as an element of complexity, leading to poor understanding of various rules and entitlements. COTA Australia (COTA) pointed to a number of examples across the various areas of the Inquiry, saying that ‘more effort needs to be put into providing easy to understand, clear and concise information’.⁷³ Where there is a lack of understanding, ‘myths’ may arise, leading people to decide not to undertake paid work for fear of losing certain benefits. AIST provided as an example misunderstanding about the interaction of the Age Pension and the income and assets tests, suggesting that

Perhaps better communication of how the Age Pension interacts with these tests could help encourage people back to work as they may realise that they can earn a certain amount of income before their Age Pension is affected.⁷⁴

Fairness

1.65 ‘Fairness’ can be a consequence of coherence, consistency and the stability of the relevant systems involved. It can also reflect a commitment to a fair distribution of national resources and a balancing of responsibility between individuals and government. The Tax Review panel advocated that the ‘three-pillar architecture’ of Australia’s retirement income system

should be founded on the presumption that the responsibility for providing for retirement is shared between government and individuals.

Governments should provide for minimum and essential needs and facilitate self-provision. Each of these goals should be pursued in an equitable and targeted way.

Individuals should save or insure during their working lives to provide resources in their retirement. Inevitably under this approach, retirement outcomes will differ for different people, depending on the extent to which they can and do make self-provision.⁷⁵

72 R Spencer, *Submission 08*.

73 COTA, *Submission 51*. The comment was made specifically in relation to tax, but reflects observations made throughout the submission. See also National Welfare Rights Network, *Submission 50* in relation to ‘working credit’.

74 Australian Institute of Superannuation Trustees, *Submission 47*.

75 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 1.

1.66 A further aspect is fairness between generations—that is, ‘intergenerational equity’. Issues important to intergenerational equity include the management of public debt and the funding of pension schemes.⁷⁶ Consistency may be considered an important component of intergenerational equity—persons of working age may accept the tax burden of supporting the retirement incomes of others because they anticipate similar support when they become older. AIST submitted that, while mature age participation is important, ‘any significant changes to age based limits must be weighed against the cost to society in terms of intergenerational equity, loss of confidence in a system that appears to be changing frequently and affordability’.⁷⁷

1.67 Stakeholders suggested other dimensions to fairness. COTA suggested that ‘equity’ be included.⁷⁸ Another stakeholder suggested including ‘adequacy and security of income’.⁷⁹

1.68 In considering fairness, the ALRC has noted the ‘gendered difference in ageing’⁸⁰ and the effects of discrimination. The Older Women’s Network New South Wales Inc (OWN) stated that ‘good policy and legal protection’ require an understanding that ‘ageing is experienced differently according to gender’.

The differences between older men and older women are stark. To paraphrase the Australian Human Rights Commission (Cerise et al, 2009) unlike most men, most women accumulate poverty over their lifetime.⁸¹

1.69 Similarly, the Brotherhood of St Laurence described the compounding factors that place women over age 65—particularly single women—‘at risk of having fewer assets and lower income’. These factors include fewer years of wealth building than men, lower savings in superannuation funds, and less superannuation coverage. It cited research indicating that

the single female Age Pensioner is the most disadvantaged, with three-quarters in the bottom half of the income range. Women in the pre-retirement age group (55–64) also had much smaller superannuation savings—62% have less than \$20,000 in superannuation, with only a few years left to save before retirement.

76 A Gosseries, *Theories of Intergenerational Justice: A Synopsis* <<http://sapiens.revues.org/165>> at 7 September 2012. The intergenerational exchange is, however, broader and flows both ways: ‘Forwards, towards younger generations, are investments in infrastructure, innovation and environmental protection. Backwards, to older generations, are pensions and public and family care for older people’: OECD Meeting on Social Policy, *Paying for the Past, Providing for the Future: Intergenerational Solidarity* (2011). The Deloitte report refers to the ‘intergenerational compact’ that every society makes with itself: Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission, 3.

77 Australian Institute of Superannuation Trustees, *Submission 47*.

78 COTA, *Submission 51*. Confidential, *Submission Confidential 08* also advocated ‘equality’ and ‘inclusion’, stating that both these principles ‘should be applied in workplaces but older Australians that decide to continue working often feel they are treated differently in the workplace, almost as if increasing age leads to an inability to learn or progress’.

79 J Willis, *Submission 42*.

80 Older Women’s Network NSW Inc, *Submission 26*.

81 Ibid. Citing: Australian Human Rights Commission, *Accumulating Poverty? Women’s Experiences of Inequality Over the Lifecycle* (2009). See also J Willis, *Submission 42*.

It noted that older women particularly ‘have much to gain by continuing to engage in paid work through middle and older age’, where practicable.⁸²

1.70 Two stakeholders raised issues of age and sex discrimination—and its intersection.⁸³ The Diversity Council of Australia drew attention to its 2010 survey, which found that age discrimination was ‘the most commonly reported type of discrimination and that women were more likely than men to feel they had been discriminated against because of their age (15% vs 12%)’. It also cited research indicating that

middle-aged women attempting to enter the paid workforce after raising children are often rejected on the ground of either ‘lack of experience’ or being ‘overqualified’ when in fact age is the actual determining factor. These women also experience pressure to appear young and attractive and the combination of age and gender interact to create a subclass of highly vulnerable workers.⁸⁴

1.71 The Government of South Australia commented that ‘older women face double discrimination based on both their gender and age’, and that ‘stereotypes and assumptions prevent older women from being selected for jobs or from being considered for training and promotional opportunities’.⁸⁵

How to make a submission

1.72 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.73 There is no specified format for submissions, although the questions and proposals provided in this document are intended to provide guidance for respondents. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC’s online submission form. Submissions made using the online submission form are preferred.

1.74 Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

82 Brotherhood of St Laurence, *Submission 54*, citing: S Kelly, *Reform of the Australian Retirement Income System* (2009), prepared for Brotherhood of St Laurence.

83 Diversity Council of Australia, *Submission 40*; Government of South Australia, *Submission 30*. COTA also considered that discrimination should be included as a framing principle: COTA, *Submission 51*.

84 Diversity Council of Australia, *Submission 40*. Referring to: National Seniors Australia Productive Ageing Centre, *The Elephant in the Room: Age Discrimination in Employment* (2011).

85 Government of South Australia, *Submission 30*. Referring to: Australian Human Rights Commission, *Accumulating Poverty? Women’s Experiences of Inequality Over the Lifecycle* (2009). See also The Premier’s Council for Women South Australia, *Submission 13*. OWN suggested that another principle should be added: ‘capacity’—including capacity to continue in employment and to protect oneself from discrimination and adverse treatment: Older Women’s Network NSW Inc, *Submission 26*.

Submissions using the ALRC's online submission form can be made at: www.alrc.gov.au/content/age-barriers-work-discussion-paper. In order to ensure consideration for use in the final Report, submissions addressing the questions and proposals in this Discussion Paper must reach the ALRC by **Friday 23 November 2012**.

2. Recruitment and Employment Law

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Summary

2.1 The Australian employment law landscape has undergone significant shifts in recent years, with changes to the nature of work relationships and arrangements as well as the legislative and regulatory framework. In light of demographic changes in Australia and government objectives aimed at prolonging workforce participation, the ability of the employment law framework to respond to the needs of mature age workers and their employers is crucial. Increased labour force participation by mature age workers is key to meeting the policy challenges presented by an ageing population.¹ As stated by the Advisory Panel on the Economic Potential of Senior Australians, the ‘challenge is to re-shape workplaces’ and the employment law

¹ See, eg. Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012); Deloitte Access Economics, *Increasing Participation Among Older Workers: The Grey Army Advances* (2012), prepared for the Australian Human Rights Commission; Australian Government, *Intergenerational Report 2010, Australia to 2050: Future Challenges* (2010).

framework to facilitate the ongoing involvement of mature age persons in the workforce and other productive work.²

2.2 This chapter examines barriers in an employment context to mature age persons participating in the workforce or other productive work. It identifies a number of barriers at various stages of employment and ways in which these may be addressed, including in relation to: entering and re-entering the workforce; maintaining employment; protections surrounding termination of employment; regulation and monitoring; and education and awareness.

2.3 Reform in this area must address complex and interrelated barriers to workforce participation. This requires a combination of legislative and regulatory reform, combined with measures to increase education and awareness and address perceptions and stereotypes surrounding mature age workers. The ALRC makes a number of proposals aimed at: addressing the practices of recruitment agencies; extending the right to request flexible working arrangements; reviewing modern awards; extending periods for notice of termination of employment; reviewing compulsory retirement; and supporting education and awareness raising and the development of guidance material in a range of areas.

Recruitment

2.4 Mature age job seekers face multiple and intersecting difficulties in entering or re-entering the workforce and often utilise either the national employment services system or the services of private recruitment agencies.³ Increasingly, private recruitment agencies are playing a role as ‘intermediaries between job seekers and employers’.⁴ However, stakeholders have expressed a number of concerns about this role. For example, stakeholders have noted perceived discrimination by some recruitment agencies against mature age job seekers. Stakeholders have also highlighted that some recruitment agencies and recruiters appear to have limited understanding of the benefits of employing mature age workers or their obligations under anti-discrimination law.⁵

2.5 Addressing such concerns requires attitudinal and cultural change as well as regulatory change. The ALRC makes a range of proposals which combine the development and provision of ongoing education, training and guidance material for recruitment consultants and recognition of best practice with increased regulation. In the regulatory context, the ALRC proposes that the Fair Work Ombudsman (FWO) conduct a national campaign focused on the recruitment industry, and that industry

2 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 1.

3 The national employment services system is discussed in Ch 5.

4 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 18; Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010) ch 4. See also ACTU, *Submission 38*.

5 See, eg, Brotherhood of St Laurence, *Submission 54*; Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*; JobWatch, *Submission 25*.

codes of conduct be reviewed with a view to incorporating clauses with respect to client diversity and constructive engagement with mature age job seekers.

Recruitment barriers to mature age participation

2.6 At a general level, unlawful age discrimination in recruitment has been described as ‘rampant, systemic and the area of employment decision-making where managers use age to differentiate between people most extensively’.⁶ More specifically, a number of bodies and key academics have emphasised that recruitment ‘operates as a major barrier for mature age workers seeking employment, and recruitment agencies often perform a gate-keeping function that can exclude mature age workers’.⁷

2.7 This sentiment was echoed in submissions from stakeholders like the South Australian Government, which noted that

in reality, the discrimination on the basis of age is a prominent issue in the recruitment practices of many Australian private recruitment agencies. The recruiters may fail to provide an appropriate level of service to an older worker, or fail to put forward an older applicant to a potential employer.⁸

2.8 The Diversity Council of Australia expressed the view that ‘there is clearly evidence of poor levels of compliance [with anti-discrimination legislation] in the private recruitment sector’.⁹

2.9 The results of a 2012 survey of recruitment professionals conducted by the Australian Human Resources Institute (AHRI) indicate approximately one-third of respondents (35%) believe their organisation is biased to some extent against the employment of mature age workers.¹⁰

2.10 However, as National Seniors acknowledged, it appears to be unclear whether this reluctance to engage mature age workers and discriminatory practices arise as a result of recruiters’ ‘own view of older workers or under instructions (implicit or otherwise) from their clients’,¹¹ or both.

Regulatory framework

2.11 While private recruitment agencies operate under contractual arrangements with individual employers, a number of elements of the regulatory framework are relevant,

6 Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010), 12.

7 T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 208. See also National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation.

8 Government of South Australia, *Submission 30*.

9 Diversity Council of Australia, *Submission 40*.

10 Australian Human Resources Institute, *Mature Age Workforce Participation: HR Pulse Survey Report* (2012), 5.

11 National Seniors Australia, *Submission 27*.

including anti-discrimination and industrial relations legislation, industry codes of practice and state and territory licensing regimes.

Legislative framework

2.12 Recruitment agencies are required to comply with all relevant statutory obligations, including in relation to age discrimination under Commonwealth, state and territory anti-discrimination legislation and the *Fair Work Act 2009* (Cth).

2.13 Where recruitment agencies discriminate against mature age job seekers, whether through their own practices or by aiding or permitting an employer to do so—for example by following an employer’s discriminatory requests or practices—such agencies may face potential liability under anti-discrimination law.¹² In addition, the general protections provisions under the *Fair Work Act* extend protection from discrimination on the basis of age to prospective employees.¹³ As a result, recruitment agencies that discriminate against a prospective employee on the basis of their age are in breach of their obligations under both anti-discrimination law and the *Fair Work Act*.

Code of Conduct

2.14 All members of the Recruitment and Consulting Services Association (RCSA) are bound by its Code for Professional Conduct and associated Disciplinary and Dispute Resolution Procedures, which are authorised by the Australian Competition and Consumer Commission. The RCSA Code requires members to

observe a high standard of ethics, probity and professional conduct which requires not simply compliance with the law; but extends to honesty, equity, integrity, social and environmental responsibility in all dealings and holds up to disclosure and to public scrutiny.¹⁴

2.15 Similarly, AHRI members are required to comply with a code of ethics and professional conduct.¹⁵

Licensing regime

2.16 A number of Australian states and territories have licensing regimes in place for employment agents. Requirements vary between jurisdictions and there is no Commonwealth licensing regime.¹⁶

12 *Age Discrimination Act 2004* (Cth) s 56. Also for example, by analogy through the reasoning in *Elliot v Nanda* (2011) 111 FCR 240.

13 *Fair Work Act 2009* (Cth) s 341.

14 Recruitment and Consulting Services Association of Australia and New Zealand, *Code for Professional Conduct*, General Principle 1.

15 Australian Human Resources Institute, *By-Law 1: Code of Ethics and Professional Conduct*.

16 For example, in SA, WA and ACT specific registration legislation requires licensing, however in Queensland there is just a Code of Conduct: *Private Employment Agents (Code of Conduct) Regulation 2005* (Qld); *Employment Agents Registration Act 1993* (SA); *Employment Agents Registration Regulations 2010* (SA); *Employment Agents Act 1976* (WA); *Agents Act 2003* (ACT); *Agents Regulations 2003* (ACT); *Employment Services Code of Conduct* (ACT).

2.17 The Law Council of Australia suggested one regulatory approach could involve requiring ‘the recruitment industry to comply with licensing requirements under a federal licensing regime, similar to other industries that provide services to the public’.¹⁷

2.18 While the ALRC is of the view that greater consistency between jurisdictions in this area would be favourable, proposing a new Commonwealth licensing regime for the recruitment industry is a systemic reform which goes beyond the scope of this Inquiry.

Approach to reform

2.19 A number of stakeholders in this Inquiry have emphasised the difficulty of bringing successful claims of age discrimination, because ‘age discrimination can often be subtle and disguised as conduct taken for other reasons’.¹⁸ This difficulty has been highlighted in the recruitment context. As a result, some stakeholders advocated for greater regulation to tackle particular approaches that may mask discrimination on the basis of age.¹⁹ For example, the South Australian Equal Opportunity Commission suggested the introduction of provisions precluding recruitment agencies from ‘asking for certain information’, for example information about ‘age and history of WorkCover claims’.²⁰

2.20 However, COTA Australia (COTA) submitted that increased regulation of recruitment agencies beyond existing provisions would be difficult,²¹ and a number of stakeholders opposed increased regulation. For example, the Business Council of Australia expressed the view that such regulation ‘unnecessarily duplicates existing legislation’.²² The Australian Industry Group (Ai Group) opposed increased regulation on the basis that the regulatory burden is already ‘substantial’ and that it would not be ‘an effective means of removing barriers to mature age employees entering or re-entering the workforce’, instead favouring consultative and educative approaches.²³

2.21 The key concerns expressed by stakeholders focused on non-compliance and lack of awareness by recruitment agencies and recruiters of existing legislative obligations, rather than the content of the obligations under anti-discrimination law and the *Fair Work Act*.²⁴ For example, JobWatch noted that many ‘recruitment agencies do not know or understand their legal obligations’.²⁵

2.22 The content and operation of anti-discrimination provisions with respect to age will be examined in the course of the process to consolidate Commonwealth anti-

17 Law Council of Australia, *Submission 46*. See also JobWatch, *Submission 25*.

18 See, eg, Victoria Legal Aid, *Submission 34*.

19 ACTU, *Submission 38*.

20 The South Australian Equal Opportunity Commission, *Submission 11*.

21 COTA, *Submission 51*.

22 Business Council of Australia, *Submission 19*.

23 Australian Industry Group, *Submission 37*.

24 See, eg, Law Council of Australia, *Submission 46*; JobWatch, *Submission 25*.

25 JobWatch, *Submission 25*.

discrimination legislation.²⁶ In addition, the ALRC notes the work being undertaken by the Age Discrimination Commissioner, the Hon Susan Ryan AO, who is involved in discussions with the recruitment industry around constructive and supportive approaches to the recruitment of mature age job seekers. Rather than proposing the imposition of additional regulatory requirements under legislation, the ALRC therefore considers that the most appropriate approach to reform involves: education, awareness and training; investigation and auditing of recruitment practices; and additional provisions in industry codes of conduct.

Investigation and auditing of recruitment practices

2.23 The FWO is an independent statutory office created by the *Fair Work Act*.²⁷ The primary aim of the FWO is to promote harmonious, productive and cooperative workplace relations and compliance with the Act, through education, assistance and advice. The FWO also plays a role in monitoring compliance, carrying out investigations and, in some cases, commencing proceedings or representing employees or outworkers in order to promote overall compliance.²⁸ In particular, the FWO can undertake:

- investigations—into industries or workplaces, either in response to a complaint or self-initiated, which involve examination of employment records and documents to determine whether relevant parties have complied with Commonwealth workplace laws; and
- targeted campaigns and audits—where the FWO targets a particular industry, usually involving the employment of vulnerable workers, and in conjunction with industry associations assists employers to ensure compliance with Commonwealth workplace laws.²⁹

2.24 Academic Therese MacDermott has expressed the view that the FWO could usefully play a role in ‘targeted and sustained work on exposing age discrimination in recruitment, and the development of more transparent selection processes’.³⁰ In particular, she suggests that the FWO could play a role in education and the development of guidance material, and that such approaches should be ‘supplemented with other measures, such as investigating and auditing of such practices’.³¹

2.25 A number of stakeholders supported this type of approach. For example, the Law Institute of Victoria suggested—in the context of anti-discrimination legislation—

26 See discussion in Ch 1.

27 *Fair Work Act 2009* (Cth) s 681.

28 *Ibid* s 682(1).

29 Fair Work Ombudsman, *Investigations* <www.fairwork.gov.au/about-us/investigations/pages/default.aspx> at 13 September 2012; Fair Work Ombudsman, *Audits and campaigns* <www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx> at 13 September 2012.

30 T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 209.

31 *Ibid*, 209.

that, ‘in order to ensure compliance with a more regulatory approach ... random audits could be conducted by the Federal Government’.³²

2.26 JobWatch submitted that the FWO should increase its educative role in this area, focusing on the rights and obligations of employers, workers and recruitment agencies under Commonwealth, state and territory anti-discrimination legislation regarding age. It noted that the FWO should be ‘adequately funded to provide free, ongoing community education and training programs’.³³

2.27 The ALRC considers that the FWO is well placed to play a key role in this area. Research undertaken by the Centre for Employment and Labour Relations Law at the University of Melbourne concluded that the FWO has ‘been active and innovative in performing its function of promoting compliance’ with the *Fair Work Act*,³⁴ including through targeted compliance and audit campaigns. The ALRC therefore proposes that the FWO undertake a targeted national campaign in the recruitment industry that includes education, awareness raising, and auditing.³⁵

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.

Review of the RCSA Code of Conduct

2.28 In 2013, the RCSA is conducting a review of its Code of Conduct. This review provides an opportunity for the RCSA to consider amendments to the Code of Conduct, including addressing barriers to workforce participation faced by mature age job seekers in the context of recruitment.

2.29 A number of key stakeholders suggested that the practices of recruitment agencies and recruiters 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’ mature age persons.³⁶ The South Australian Government submitted that any such code of conduct should ‘emphasise the principle of respect for client diversity’ and ‘include a clause relating to an appropriate engagement with mature age job seekers’.³⁷

³² Law Council of Australia, *Submission 46*.

³³ JobWatch, *Submission 25*.

³⁴ Centre for Employment and Labour Relations Law, *University of Melbourne, Submission to Fair Work Act Review* (17 February 2012), 9.

³⁵ Fair Work Ombudsman, *Audits and campaigns* <www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx> at 13 September 2012.

³⁶ Law Council of Australia, *Submission 46*. See also Diversity Council of Australia, *Submission 40*; Government of South Australia, *Submission 30*; JobWatch, *Submission 25*.

³⁷ Government of South Australia, *Submission 30*.

2.30 In the course of the review of the Code, the ALRC proposes that the RCSA should consider ways in which the Code could: emphasise the importance of client diversity; promote constructive engagement with mature age job seekers; and outline obligations under anti-discrimination and industrial relations legislation with respect to age.

2.31 The Code of Professional Practice developed by the Recruitment and Employment Confederation (REC) of the United Kingdom (UK Code) represents a useful model that potentially could be incorporated into existing industry codes of practice or form the basis of a new code of conduct.³⁸ The UK Code is binding on all corporate members of the REC and their associated companies.³⁹ Principle Four of the UK Code provides:

Principle 4—Respect for diversity

a. Members should adhere to the spirit of all applicable human rights, employment laws and regulations and will treat work seekers, clients and others without prejudice or unjustified discrimination. Members should not act on an instruction from a client that is discriminatory and should, wherever possible, provide guidance to clients in respect of good diversity practice.

b. Members and their staff will treat all work seekers and clients with dignity and respect and aim to provide equity of employment opportunities based on objective business related criteria.

c. Members should establish working practices that safeguard against unlawful or unethical discrimination in the operation of their business.⁴⁰

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:

- (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.

Education, training and guidance material

2.32 In addition to any national recruitment industry campaign lead by the FWO, there was significant support by stakeholders for education, training and the

³⁸ The Recruitment and Employment Confederation (UK), *REC Code of Practice*.

³⁹ The REC also has a Diversity Charter and a Diversity Pledge: The Recruitment and Employment Confederation (UK), *Diversity Pledge* <www.rec.uk.com/about-recruitment/diversity/diversity-signthepledge> at 13 September 2012.

⁴⁰ The Recruitment and Employment Confederation (UK), *REC Code of Practice*, Principle 4.

development of guidance material for the recruitment industry.⁴¹ The Ai Group expressed the view that ‘consultative and educative approaches are more likely to achieve a shift in practices by recruiting agencies and their clients’.⁴²

2.33 The Brotherhood of St Laurence submitted that there is a need for a

a targeted campaign focusing on recruitment agencies reminding them of their legal obligations and the discrimination legislation that applies to their business in relation to mature workers. Campaigns combating discrimination against older workers need to be supplemented by targeted training for recruitment agents, HR managers and employers to educate them on the economic and other benefits of a diverse workforce.⁴³

2.34 The Diversity Council of Australia suggested that such education ‘should be developed following industry research undertaken in partnership with recruitment agents and their clients’.⁴⁴

2.35 Comcare pointed to the National Australia Bank (NAB) experience as a model for the practices of private recruitment agencies:

NAB established a process of mandatory training for all recruitment agencies used by NAB. Through their contractual agreement with the recruiting agencies, NAB requires completion of mandatory age stereotype ‘myth busting’ training. This forms part of their MyFuture: a pathway to 2020, an interactive leadership forum that looks at the challenges and opportunities of an ageing workforce, and creates a culture that values experience and maturity.⁴⁵

2.36 Queensland Tourism referred to a pilot study undertaken in 2011, which sought to identify the reasons underlying mature age persons not applying for positions in the hospitality industry. The findings from the study indicated that:

the two main factors that emerged as barriers to mature age employment were perception and awareness. It was identified that age-friendly recruitment practices need to be adopted and promoted in the recruitment process. Education around where to source workers, the wording of job adverts, the interview process and the composition of the interview panel was also critical.⁴⁶

2.37 The *Investing in Experience Toolkit*, a practical guide developed in partnership with the Ai Group and the Consultative Forum on Mature Age Participation includes a chapter on ‘How to Recruit the Best Mature Age Workers’ and an advertising checklist which provides a useful model for guidance material.

2.38 In the ALRC’s view, industry bodies such as AHRI and the RCSA, with support from the Australian Government, Australian Human Rights Commission (AHRC), unions and employer organisations, should develop and provide regular, consistent and

41 Brotherhood of St Laurence, *Submission 54*; Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*; Australian Industry Group, *Submission 37*; Queensland Tourism Industry Council, *Submission 28*; JobWatch, *Submission 25*.

42 Australian Industry Group, *Submission 37*.

43 Brotherhood of St Laurence, *Submission 54*.

44 Diversity Council of Australia, *Submission 40*.

45 Comcare, *Submission 29*.

46 Queensland Tourism Industry Council, *Submission 28*.

targeted ongoing training as well as develop guidance material for recruitment consultants in relation to engaging constructively with, and recruiting, mature age job seekers.

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.

Recognition of best practice

2.39 A number of stakeholders emphasised the importance of best practice approaches in the recruitment of mature age workers.⁴⁷ Formal public recognition of employers, recruitment agencies or consultants who develop initiatives or workplace processes geared towards mature age job seekers and workers is desirable. The potential development of an age-related reporting and recognition framework similar to Equal Opportunity for Women in the Workplace Agency is discussed later in this chapter.

2.40 Both AHRI and RCSA host annual workplace awards. As part of the AHRI Diversity Awards there is an *Age Diversity in the Workplace Award* sponsored by National Seniors Australia.⁴⁸ Internationally, organisations like AARP have awards including the *AARP Best Employers for Workers Over 50 Award–International*, which recognises employers outside the United States with innovative workforce or human resource practices aimed at issues relevant to mature age workers.⁴⁹

2.41 The ALRC proposes that both AHRI and RCSA should recognise excellence in initiatives and programs involving the recruitment of mature age workers, including in such awards.

2.42 The work of mature age-specific recruitment initiatives and agencies are also an important development in supporting workforce participation by mature age persons.⁵⁰

⁴⁷ COTA, *Submission 51*; Comcare, *Submission 29*.

⁴⁸ Australian Human Resources Institute, *Age Diversity in the Workplace Award* <www.awards.ahri.com.au/diversity/winner_orgn_age_diversity.php> at 13 September 2012.

⁴⁹ AARP, *Best Employers for Workers Over 50 Award–International* <<http://aarpinternational.prod.bridgelinesw.net/aarp-international/best-employers---international>> at 14 September 2012.

⁵⁰ For example, Adage.com; Dome SA; GreyHairAlchemy; Miller's Fillers; Over 40 Recruitment; and Silver Temp; Department of Education, Employment and Workplace Relations, *Experience+ Private Recruitment Firms* <www.deewr.gov.au> at 13 September 2012.

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.

The *Fair Work Act 2009* (Cth)

2.43 The *Fair Work Act* is one of the key Commonwealth statutes governing the employment of mature age workers. It provides for terms and conditions of employment and sets out the rights and responsibilities of employees, employers and employee organisations in relation to that employment.

2.44 The *Fair Work Act* regulates ‘national system’ employers and employees.⁵¹ Employment that is not covered under the national industrial relations system remains regulated by the relevant state industrial relations systems. However, some entitlements under the *Fair Work Act* extend to non-national system employees.⁵² The Act also creates a compliance and enforcement regime and establishes several bodies to administer the Act, including Fair Work Australia (FWA) and the FWO.

2.45 There are a number of aspects of the *Fair Work Act* that present potential opportunities to address legal barriers to participation by mature age workers and in relation to which the ALRC makes proposals. These include:

- the right to request flexible working arrangements;
- modern awards;
- provisions relating to notice of termination of employment; and
- the general protections provisions.

Relevant reviews and research

2.46 In December 2011, the Australian Government announced a review of the *Fair Work Act* (the Fair Work Act Review),⁵³ to examine and report on the extent to which the legislation is operating as intended and areas where the operation of the legislation could be improved consistent with the objects of the Act. In August 2012, the Australian Government released the Fair Work Act Review Panel’s Final Report. The Government is currently considering its response. The Fair Work Act Review was the

⁵¹ The definitions of ‘national system employee’ and ‘national system employer’ are contained in ss 13 and 14 of the *Fair Work Act 2009* (Cth) and are extended by ss 30C, 30D, 30M and 30N to cover employers in referring states: *Fair Work Act 2009* (Cth) ss 13, 14, 30C, 30D, 30M and 30N.

⁵² For example, non-national system employees are entitled to unpaid parental leave, notice of termination, payment in lieu of notice and protection from unlawful termination of employment: *Fair Work Act 2009* (Cth) pts 6–3, 6–4.

⁵³ B Shorten (Minister for Employment and Workplace Relations), ‘Fair Work Act Review announced’ (Press Release, 20 December 2011). The Australian Government had committed to reviewing the operation of the legislation two years after its full commencement: Explanatory Memorandum, Fair Work Bill 2008 (Cth).

subject of much controversy and attracted submissions from a wide range of stakeholders. Although the Fair Work Act Review found that the effects of the *Fair Work Act* ‘have been broadly consistent with the objects’ of the Act and that it is ‘operating broadly as intended’, there were 53 recommendations for reform. The key recommendations of relevance to this Inquiry relate to the right to request flexible working arrangements, and a number of changes to the operation of individual flexibility arrangements and the general protections provisions.⁵⁴

2.47 Under the *Fair Work Act*, the General Manager of FWA is required to provide a number of research reports, including on: developments in enterprise agreement making; the use and content of individual flexibility arrangements; and the operation of the National Employment Standards (NES) relating to employee requests for flexible working arrangements.⁵⁵ The reports are due to be submitted to the Minister by 24 November 2012.

Flexible working arrangements

2.48 The Consultative Forum on Mature Age Participation has emphasised that the ‘ability to work part-time or flexible hours has been found to be the most important facilitator, after good health, for older people to work beyond retirement age’.⁵⁶ Examining legislative mechanisms for ensuring access to flexible working arrangements is vital to encouraging mature age workers to enter, re-enter or remain in the workforce. The Advisory Panel on the Economic Potential of Senior Australians commented that mature age persons have ‘diverse requirements for flexibility’:

some want part-time work; some want casual work; and some want to work for blocks of time, take leave and return to work ... Others wish to scale-down and work fewer hours, allowing more time for recreation. Many find it difficult to work full-time, standard hours because of their health, caring responsibilities or other specific circumstances.⁵⁷

2.49 Increasingly, there are a range of government and industry initiatives and reports focused on developing and implementing flexible work arrangements as standard business practice.⁵⁸

2.50 The key legal, as opposed to policy-based, mechanism which currently provides access to flexible working arrangements is the right to request flexible working arrangement provisions under the NES. However, the ALRC is also interested in stakeholder feedback about ways, other than through changes to the *Fair Work Act*,

54 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012) recs 5, 9, 10–13, 47, 49.

55 *Fair Work Act 2009* (Cth) s 653.

56 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 23.

57 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 15.

58 See, eg, Australian Government, *Investing in Experience Tool Kit* (2012); Diversity Council of Australia, *Get Flexible: Mainstreaming Flexible Work in Australian Business* (2012); National Australia Bank, *My Future*, referred to in Comcare, *Submission 29*.

that the Australian Government should develop or encourage flexible working arrangements for mature age workers.

The right to request flexible working arrangements

2.51 The NES enshrine ten statutory minimum requirements that apply to all ‘national system’ employees. The NES encompass areas such as working hours and arrangements, leave, and termination and redundancy pay. The NES cannot be excluded by an enterprise agreement or modern award.⁵⁹

2.52 The NES were introduced following significant consultation⁶⁰ to provide a ‘safety net which is fair for employers and employees and supports productive workplaces’.⁶¹ The NES replaced the Australian Fair Pay and Conditions Standard (AFPCS)⁶² and many of the entitlements under the AFPCS and then NES arise from a long history of test cases.⁶³ As a result, amendment to the NES would have a wide-ranging impact on the entitlements of mature age workers and involve a significant change to the *Fair Work Act* framework.

2.53 Under the NES, an employee who satisfies the service requirements,⁶⁴ who is a parent or otherwise has responsibility for a child who is under school age, or who is under 18 and has a disability, may request that his or her employer change his or her working arrangements to assist with the care of that child.⁶⁵ Such a request may only be refused on ‘reasonable business grounds’.⁶⁶

2.54 FWA’s 2011 survey in relation to provisions under the NES found that 3.8 % of employers surveyed had considered a request for flexible working arrangement by an employee to care for a child, and that 0.9 % of employees surveyed had made such a request.⁶⁷

Extending the right to request

2.55 The key concern expressed by stakeholders, with respect to the current provision and its effect on mature age workers, is limited eligibility to request flexible working

59 Enterprise agreements and modern awards are instruments which govern the terms and conditions of employment and are discussed below.

60 Prior to the introduction of the NES, the Australian Government published an Exposure Draft, in response to which it received 129 submissions from stakeholders as well as engaging in broader consultations. The proposed NES were subsequently released on 16 June 2008. The *Fair Work Act 2009* (Cth) retains the substance of the Exposure Draft, with some amendments.

61 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 25.

62 Introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which amended the *Workplace Relations Act 1996* (Cth).

63 See, eg, J Murray and R Owens, ‘The Safety Net: Labour Standards in the New Era’ in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 40–42.

64 In order to be eligible to request flexible work arrangements, the employee must have 12 months of continuous service, or for a casual employee, be a long-term casual employee with a reasonable expectation of continuing employment on a regular and systemic basis: *Fair Work Act 2009* (Cth) s 65.

65 Ibid s 65(1), (2). The note to s 65(1) states that examples of changes in working arrangements include changes in hours of work, patterns of work and location of work.

66 Ibid s 65(5).

67 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 96.

arrangements.⁶⁸ While other systemic concerns with the provision have been discussed and addressed in the course of the Fair Work Act Review,⁶⁹ the focus of the ALRC in this Inquiry is concerns about eligibility.

2.56 As outlined above, flexible working arrangements are vital for mature age workers. For example, mature age workers may request such arrangements to adjust working hours to accommodate caring responsibilities, allowing them to prolong workforce participation.

2.57 In many workplaces, both employers and employees work cooperatively to address the needs of employees, including through flexible working arrangements. Under existing arrangements, while employees are able to request flexible working arrangements outside the scope of the NES, they are not entitled to a response or reasons for refusal.⁷⁰

2.58 While in its current formulation the right to request flexible working arrangements is based on parental or child-care related responsibilities, potentially the section could be extended to include other bases upon which an employee could request flexible arrangements.

2.59 Notably, the UK right to request scheme, upon which the Australian provisions were based, has been incrementally extended. It applies to parents and carers of children up to the age of 16 and those with caring responsibilities for a wide range of adults requiring care, including: relatives, spouses, civil partners and other household members.⁷¹

2.60 A number of bodies and reports have recommended the extension of the Australian provision. For example, the Fair Work Act Review Panel recommended that, in order to increase workplace equity and remove current inequities, s 65 should be amended to ‘extend the right to request flexible working arrangements to a wider range of caring and other circumstances’.⁷² The Australian Government is currently consulting on possible expansion of the right to those with caring responsibilities more generally,⁷³ and the House of Representatives Standing Committee on Family, Community, Housing and Youth recommended in 2009 that the right to request be extended to all employees ‘who have recognised care responsibilities, including to

68 Stakeholders also expressed other concerns, echoed in submissions to the Fair Work Act Review, about the current structure and operation of the provision, including its procedural nature, the limited availability of enforcement mechanisms and the grounds for refusal.

69 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 95–99.

70 The Fair Work Act Review Panel recommended that s 65 be amended to require that an employer and employee hold a meeting to discuss the request, unless the employer has agreed to the request: *Ibid*, rec 5.

71 *Employment Rights Act 1996* (UK) ss 80F, 80G; *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* (UK) (SI 2002 No 3236) and *Flexible Working (Procedural Requirements) Regulations 2002* (UK) (SI 2002 No 3207). For discussion of the evolution of the provisions see Centre for Employment and Labour Relations Law, *University of Melbourne, Submission to Fair Work Act Review* (17 February 2012), 5.

72 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), rec 5.

73 See Australian Government, *National Carer Strategy* (2011), 8.

those who are caring for adults with disabilities, mental illness, chronic illness or who are frail aged'.⁷⁴

2.61 The Advisory Panel on the Economic Potential of Senior Australians recommended that the right be extended to persons aged 55 and over.⁷⁵ In February 2012, Adam Bandt MP introduced the Fair Work Amendment (Better Work/Life Balance) Bill 2012, which would, among other things, amend the *Fair Work Act* by extending the right to request to all employees and remove the flexible working arrangements provisions from the NES and create a new part of the Act.⁷⁶

2.62 Despite some support for such an expansion, peak industry bodies such as the Australian Chamber of Commerce and Industry (ACCI) have expressed strong opposition to the extension of the right to request flexible working arrangements provisions.⁷⁷

2.63 In the ALRC's view, amendment of the NES to extend the right to request in this context is an important reform that balances one of the key objects of the *Fair Work Act*, which is to help employees balance their work and family responsibilities by providing flexible working arrangements, with the need to encourage workforce participation by mature age workers. It may also reduce the need for mature age workers to seek casual employment to achieve flexibility, or rely solely on the goodwill of their particular employer to access flexible working arrangements and provide statutory basis for such requests.

2.64 There are a number of possible approaches to extension of the right to request provisions in this context. The first is an extension of the right to request to all employees. However, a proposal of this nature might be seen as beyond the ALRC's Terms of Reference. The second possible approach is an extension of the right to request to mature age workers. The ALRC considers that this narrow extension may contribute to discrimination against mature age workers and further entrench negative stereotypes about this group, for example by acting as a disincentive for employers to engage mature age workers. The third potential approach, in line with the submissions and recommendations outlined above, would be to extend the right to request to all employees who have caring responsibilities.

2.65 In the ALRC's view the third approach is the most appropriate for a number of reasons. Australian Bureau of Statistics (ABS) figures indicate that the likelihood of a person providing care to someone else increases with age and that the majority of

74 House of Representatives Standing Committee on Family, Community, Housing and Youth—Parliament of Australia, *Who Cares ...? Report on the inquiry into better support for carers* (2009) rec 40.

75 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 15.

76 The Bill also includes other significant changes, including specifically in relation to carers, unions and the role of Fair Work Australia. The Bill was referred to the House of Representatives Standing Committee on Education and Employment which reported in June 2012 and at the time of writing was before the House of Representatives.

77 Australian Chamber of Commerce and Industry, *Submission to Fair Work Act Review* (2012).

carers in Australia are aged 45 years and over.⁷⁸ As a result, mature age workers would predominantly benefit by an extension of the right to request to employees with caring responsibilities. Such an extension would provide mature age workers with the right to request flexible working arrangements to accommodate their caring responsibilities, and in light of the often gendered nature of caring, such a reform is of particular importance to mature age women. The ALRC therefore proposes that the Australian Government extend the right to request flexible working arrangements to all employees who have caring responsibilities.

2.66 In addition, the ALRC proposes that the FWO develop a guide to requesting, considering and implementing flexible working arrangements, in consultation with unions, employer organisations and seniors organisations. The guide should include information about circumstances in which employees might seek such arrangements and give employers guidance on accommodating requests and include model flexibility strategies.

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.

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.

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?

Individual flexibility arrangements

2.67 Section 202 of the *Fair Work Act* requires that every enterprise agreement must include a ‘flexibility term’, allowing the employer and the employee to make a specific ‘individual flexibility arrangement’ (IFA) that would vary the effect of the enterprise agreement to account for the employee’s particular circumstances.⁷⁹ Therefore, under every enterprise agreement a mature age worker is entitled to negotiate an IFA with the employer, for example, to vary work arrangements.

2.68 Similarly, modern awards must include a ‘flexibility term’, allowing the employer and the employee to make a specific IFA to vary the effect of the enterprise

⁷⁸ Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, Cat No 4430.0* (2003), 10, 49.

⁷⁹ *Fair Work Act 2009* (Cth) s 202. Further, particular requirements must be met for an IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 203.

agreement to account for the employee's particular circumstances.⁸⁰ Mature age workers are therefore entitled to negotiate IFAs with their employer under modern awards, for example, to vary their work arrangements.

2.69 There is limited data available about the use of IFAs since the introduction of the *Fair Work Act*. The Fair Work Act Review noted that a 2011 survey by FWA indicated that of the employers surveyed,

six percent had used IFAs, although more than a third of these entities had only made one such arrangement. Around 3.5 per cent of employees surveyed had entered into an IFA.⁸¹

2.70 This finding was consistent with observations in submissions to this Inquiry. For example, JobWatch stated that it was 'not aware of any older workers who have negotiated (or attempted to negotiate) IFAs under an enterprise agreement or modern award'.⁸²

2.71 Stakeholder responses to questions about the use of IFAs and, in particular, the reasons for limited use of IFAs, were mixed.⁸³ However, in light of the limited use of IFAs and the systemic nature of any reforms aimed at IFAs, the ALRC does not consider it is appropriate to make any proposals with respect to IFAs. The ALRC notes that the Fair Work Act Review Panel gave the issue of IFAs 'extensive consideration' and made a number of recommendations on their operation under both enterprise agreements and modern awards.⁸⁴

Modern awards

2.72 A modern award is an industrial instrument that regulates the minimum terms and conditions for a particular industry or occupation in addition to the statutory minimum outlined by the NES.⁸⁵ A modern award cannot exclude any provisions of the NES, but can provide additional detail in relation to the operation of an NES entitlement. The *Fair Work Act* prescribes terms which must, must not, or may, be

80 *Fair Work Act 2009* (Cth) s 144. Note particular requirements must be met for the IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 143.

81 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 108.

82 JobWatch, *Submission 25*. See also Australian Industry Group, *Submission 37*.

83 See, eg, JobWatch, *Submission 25*; Government of South Australia, *Submission 30*; Australian Industry Group, *Submission 37*; ACTU, *Submission 38*; Diversity Council of Australia, *Submission 40*; Australian Chamber of Commerce and Industry, *Submission 44*; The Employment Law Centre of WA, *Submission 45*; Law Council of Australia, *Submission 46*.

84 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), [5.3.2], recs 9–13.

85 Beginning in 2008, the Australian Industrial Relations Commission, and then its successor FWA, conducted an award modernisation process which reviewed and rationalised existing awards to create streamlined 'modern awards'. The award modernisation process was completed by the end of 2009, with 122 modern awards commencing operation on 1 January 2010. FWA continues the modernisation process in relation to enterprise instruments and certain former state awards preserved by the national system. See Fair Work Australia, *About Award Modernisation* <<http://www.fwa.gov.au>> at 23 April 2012; A Stewart and P Alderman, 'Awards' in CCH Australia, *Australian Master Fair Work Guide* (2010) 147.

included in a modern award.⁸⁶ Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement⁸⁷ and is not a ‘high income employee’⁸⁸ may be covered by a modern award.⁸⁹ In general, a modern award applies to employees in a particular industry or occupation and is used as the benchmark for assessing enterprise agreements before they are approved by FWA.

2.73 FWA is currently undertaking a review of all modern awards, based on applications to vary modern awards, as part of a range of reviews required under the *Fair Work Act* and associated legislation.⁹⁰ The scope of its current review is limited to considering whether modern awards achieve the modern awards objectives and are operating effectively, without anomalies or technical problems arising from the award modernisation process. The modern award review is unlikely to revisit issues already determined during the award modernisation process unless there are cogent reasons, such as where there has been a significant change in circumstances.⁹¹

2.74 In addition, the *Fair Work Act* provides for review of each modern award every four years.⁹² The first review of this kind will commence in 2014, and FWA has indicated that it will be broader in scope than the 2012 review.⁹³ The reviews are ‘the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.⁹⁴

2.75 ACCI submitted that ‘the Productivity Commission should conduct research or be specifically requested to inquire, into the effects of certain award terms and conditions on mature age workers, including the impact of minimum wages’.⁹⁵ In the ALRC’s view, the legislatively mandated FWA review processes present the appropriate mechanism for FWA to consider issues relating to mature age workers in the context of modern awards. Importantly, in conducting the review, FWA is required to take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of, among other attributes, age.⁹⁶

86 See *Fair Work Act 2009* (Cth) ch 2, pt 2–3, div 3.

87 Ibid s 57.

88 Ibid s 47(2).

89 The *Fair Work Act 2009* (Cth) draws a distinction between where a modern award *covers* an employee, employer, or organisation (where it is expressed to cover them) and where it *applies* (if it actually imposes obligations or grants entitlements): Ibid ss 46–48. There is an obligation to comply with a modern award: *Fair Work Act 2009* (Cth) s 45.

90 See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6. The *Fair Work Act* provides for review of each modern award every four years: *Fair Work Act 2009* (Cth) s 156. There is also a process for varying modern awards outside the four yearly review: *Fair Work Act 2009* (Cth) s 157.

91 *Modern Award Review 2012 [2012] FWAFB 5600* at [89], [99]. For an outline and timetable on the Review, see *Modern Award Review 2012–Timetable [2012] FWA 5721*.

92 *Fair Work Act 2009* (Cth) s 156.

93 *Modern Award Review 2012 [2012] FWAFB 5600* at [99].

94 Explanatory Memorandum, *Fair Work Bill 2008* (Cth), [600].

95 Australian Chamber of Commerce and Industry, *Submission 44*.

96 *Fair Work Act 2009* (Cth) s 578.

2.76 Stakeholders raised a number of issues that could be considered in the course of the review. For example, an issue raised by the Government of South Australia was the inclusion of Graduated Retirement Provisions, which would

offer a voluntary option for persons who have reached a certain age to access a number of flexible working arrangements that meet their needs. The provisions should provide a range of graduated retirement options that would be most suited to the needs of the industry, the employer and the worker. The graduated retirement provisions should specify an age at which a worker may access these provisions, and this age should reflect the occupational requirements of modern awards for each industry or profession.⁹⁷

2.77 The submission further explained that Graduated Retirement Provisions could assist in workforce planning processes and ‘provide the platform for conversation about how the experienced employee could best contribute to the workplace’.⁹⁸

2.78 The Australian Council of Trade Unions (ACTU) suggested a suite of amendments to modern awards, primarily for the benefit of part-time workers, including:

access to part-time employment options, greater employee control over rosters and greater certainty over hours of work which assisted many older workers to transition to reduced hours of work.⁹⁹

2.79 Finally, ACCI suggested that three hour minimum shift requirements in awards can

impact mature age employees, who wish to work for less than the required minimum shift requirement (ie only want to work as a casual for 1 hour on certain days and not for 3 hours for each shift—the employer must pay for three hours, regardless of the amount of work available and whether the employer only operates at certain hours).¹⁰⁰

2.80 In light of the issues outlined above, the ALRC proposes that in the course of the 2014 FWA review, the inclusion or modification of terms to encourage the participation of mature age workers should be considered. The ALRC considers that s 139(1) of the *Fair Work Act* is sufficiently broad to allow scope for the inclusion of any such additional terms as required.

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.

⁹⁷ Government of South Australia, *Submission 30*.

⁹⁸ *Ibid.*

⁹⁹ ACTU, *Submission 38*.

¹⁰⁰ Australian Chamber of Commerce and Industry, *Submission 44*.

Notice of termination of employment

2.81 The NES establish the minimum period of notice, or payment in lieu of notice, that an employer must give an employee to terminate their employment without reasonable cause.¹⁰¹ The amount of notice or payment in lieu of notice is determined according to the employee's period of continuous service with the employer.¹⁰² However, that period is increased by one week for employees over age 45 who have completed at least two years continuous service.¹⁰³

2.82 Evidence suggests that, of those experiencing age discrimination, the largest proportion of that discrimination constitutes having their employment terminated or being made redundant before their younger counterparts.¹⁰⁴ JobWatch identified that mature age workers 'are often the first target when businesses restructure and downsize' and highlighted that in some cases 'redundancy was used as a means of removing the [mature age worker] from their job in order to replace them with younger workers'.¹⁰⁵

2.83 Statistics from the ABS indicate that unemployed mature age persons are more likely to be long-term unemployed than their younger counterparts. For example, in 2010–11, 33% of unemployed people aged 45–64 were long-term unemployed, compared to 22% of the total unemployed.¹⁰⁶ Further, mature age job seekers registered with Job Services Australia aged 55 years and over experience an average duration of unemployment of 73 weeks compared to 37 weeks for job seekers aged 25–44.¹⁰⁷

2.84 The Employment Law Centre of WA (ELCWA) suggested that the 'minimum additional entitlement to notice for older employees be increased to reflect the greater difficulty that an older worker may encounter in finding alternative employment'.¹⁰⁸ ELCWA also proposed 'removing the requirement that a worker over the age of 45 years complete a minimum period of service prior to qualifying for this additional notice entitlement'.¹⁰⁹

2.85 In order to provide incentives for employers to retain mature age workers the ALRC proposes that the minimum additional period of notice for employees over age 45 should be four weeks. However, the ALRC is conscious of concerns that additional rights and entitlements for mature age workers may have unintended consequences by making them less attractive to employers and welcomes stakeholder feedback on this proposal.

101 *Fair Work Act 2009* (Cth) s 117.

102 *Ibid* s 117(3)(a).

103 *Ibid* s 117(3)(b).

104 Westfield Wright Pty, *Attitudes to Older Workers* (2012), 13.

105 JobWatch, *Submission 25*.

106 Australian Bureau of Statistics, *Australian Social Trends, Cat No 4102.0* (2011).

107 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 27.

108 The Employment Law Centre of WA, *Submission 45*.

109 *Ibid*.

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.

General protections

2.86 The general protections provisions provide statutory protection for mature age workers seeking to challenge discriminatory treatment. The general nature and operation of the general protections provisions was considered in detail in the course of the Fair Work Act Review.¹¹⁰ In addition, the High Court of Australia provided greater clarity about the operation of the general protections provisions in a recent decision concerning determination of the reason for the relevant conduct in a general protections claim.¹¹¹ Rather than considering the operation of the provisions in any detail, the ALRC's focus in this Inquiry is, therefore, on the interaction between the general protections provisions and anti-discrimination legislation.

Legislative framework

2.87 Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections.¹¹² These general protections, among other things, prohibit an employer from taking 'adverse action' against an employee or prospective employee on the basis of the employee having, exercising or not exercising, or proposing to exercise or not exercise, a 'workplace right', or to prevent the exercise of a 'workplace right'.¹¹³ Measures that may constitute 'adverse action' taken by an employer against an employee include dismissal, injury or discrimination, or, in the case of a prospective employee, refusing to employ or discriminating in the terms or conditions of offer,¹¹⁴ and threatening any of the above.¹¹⁵

110 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), ch 11.

111 *Board of Bendigo Institute of Technical and Further Education v Barclay* [2012] HCA 32. See also discussion in Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 236.

112 *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

113 A 'workplace right' exists where a person: is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument (such as an award or agreement) or an order made by an industrial body; is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or has the capacity under a workplace law to make a complaint or inquiry to a person or body to seek compliance with that workplace law or instrument, or in the case of an employee, in relation to their employment: *Ibid* s 341.

114 *Ibid* s 342(1).

115 An employee cannot make a general protections dismissal application at the same time as an unfair dismissal application: *Ibid* s 725.

2.88 The *Fair Work Act* prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons and outlines a number of grounds of discrimination.¹¹⁶ Age is specifically listed as a protected attribute upon which a mature age worker may be able to pursue a claim of discrimination under the general protections provisions.¹¹⁷

2.89 The general protections provisions provide statutory protection and may, therefore, provide greater security and an incentive for mature age workers to remain in the workforce. However, it is difficult to evaluate the effectiveness of the general protections provisions with respect to mature age job seekers and workers ‘in the absence of information as to the number of matters brought and the outcomes’.¹¹⁸

2.90 While stakeholders identified a range of difficulties with the current general protections provisions,¹¹⁹ many expressed the view that the provisions 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’.¹²⁰

Interaction with anti-discrimination legislation

2.91 The introduction of general protections provisions in the *Fair Work Act* provides employees with an additional choice of forum for complaints of discrimination; and that choice ‘can be a complex exercise’.¹²¹ Some commentators and stakeholders have suggested that the general protections provisions may provide a more useful avenue for redress in circumstances of age discrimination in the employment context than state or federal anti-discrimination legislation.¹²²

2.92 The key advantages of these provisions from the perspective of mature age workers seeking to challenge discriminatory treatment 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.¹²³

116 Ibid s 351(1). Similarly, s 772(1)(f), which extends coverage to non-national system employees, prohibits termination of an employee’s employment on the basis of the same discriminatory grounds. However, s 772(1)(f) is more limited than s 351(1) as it only applies to termination of employment, rather than ‘adverse action’ more generally.

117 Ibid ss 351(1), 772(1)(f).

118 Law Council of Australia, *Submission 46*. See also Government of South Australia, *Submission 30*; JobWatch, *Submission 25*.

119 Law Council of Australia, *Submission 46*; Australian Industry Group, *Submission 37*; Victoria Legal Aid, *Submission 34*; JobWatch, *Submission 25*.

120 Government of South Australia, *Submission 30*. See also Victoria Legal Aid, *Submission 34*; JobWatch, *Submission 25*.

121 C Andreas, *Intersections Between ‘General Protections’ Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries*, Working Paper No 47 (2009), Centre for Employment Law and Labour Relations, 11.

122 See, eg, Law Council of Australia, *Submission 46*; Victoria Legal Aid, *Submission 34*. See also T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 199–200.

123 Law Council of Australia, *Submission 46*; The Employment Law Centre of WA, *Submission 45*; Government of South Australia, *Submission 30*; JobWatch, *Submission 25*. See also T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 199–200.

2.93 Legal Aid Victoria submitted that, in addition to providing a ‘more effective avenue for recourse than other anti-discrimination legislation’, the provisions represent ‘a progressive solution to a problematic feature of other Australian anti-discrimination legislation’.¹²⁴

2.94 The value of the general protections provisions is highlighted in the following case study:

Mick is a 63 year old man who lost his job after 20 years of continuous employment. Mick applied for a job as a cleaner. After attending an interview and passing a medical examination he was offered and accepted the job. The company sent Mick the appropriate paperwork, which he completed and returned. The day after he sent in the paperwork the company said that Mick could no longer have the job. Mick was distressed because in the meantime he had turned down other work and he could not work out why he was now being told that he could not have the job. The only thing that had changed was that he had sent the company a copy of his driver’s licence, which revealed his age. Mick suspected that the company had decided not to employ him because he is 63. He asked the company whether this was the case and, if not, why it had decided not to employ him, but the company refused to provide a reason. Under the *Fair Work Act*, Mick could make a general protections application to Fair Work Australia alleging age discrimination in regard to a prospective employee. Once he had established a prima facie case, from which age discrimination could be inferred, if the company was not able to provide a compelling alternative reason for suddenly revoking the job offer, it would be presumed that the reason was age, as alleged by Mick. In the absence of s 361, the company could simply stay silent as to its reason for revoking the offer, and in the absence of direct evidence of age discrimination Mick’s claim would not be successful.¹²⁵

2.95 The Fair Work Act Review Panel acknowledged that ‘there is substantial overlap’ between the discrimination provisions in the *Fair Work Act* and other Commonwealth anti-discrimination laws.¹²⁶ This issue is being considered in the context of the consolidation of Commonwealth anti-discrimination law. In the discussion paper for the consolidation project, the Government asked ‘should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the *Fair Work Act*?’¹²⁷

2.96 The Law Council submitted that the consolidation project ‘provides the opportunity to minimise this duplication and promote clarity and consistency for complainants and respondents seeking to navigate these regimes’.¹²⁸

2.97 The ALRC is interested in the approach taken by the Government to the issue of overlap and duplication with anti-discrimination legislation and will consider the draft consolidated anti-discrimination legislation upon its release. The ALRC is also

124 Victoria Legal Aid, *Submission 34*.

125 Ibid.

126 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 239. See also Law Council of Australia, *Submission 46*.

127 Australian Government Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011).

128 Law Council of Australia, *Submission 46*.

interested in stakeholder comment on what ways, if any, Commonwealth anti-discrimination legislation or the *Fair Work Act* could be amended to improve or clarify their interaction in circumstances of age discrimination.

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?

Compulsory retirement

2.98 While compulsory retirement has been abolished for Commonwealth statutory office holders and other public servants, a number of direct and indirect mandatory retirement practices remain. In addition, while not having a specific compulsory retirement age, a range of other occupations require licensing and re-qualification. Clearly, these practices may create barriers to mature age participation in the workforce.

2.99 As a matter of principle, the ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. The imposition of compulsory retirement fails to account for the capacity of individuals, reinforces stereotypes about the abilities of mature age workers and reduces utilisation of the workforce contribution of mature age workers.¹²⁹ National Seniors emphasised that,

while it may be acceptable to have an age determined review point, it is not appropriate to have age determined cut off points. Licensing and re-qualification should be dependent on capacity, not chronological age. People of the same age often have widely differing physical and mental capacity.¹³⁰

2.100 While recognising that mature age workers should generally decide the time and manner in which they leave the paid workforce, in certain circumstances and instances it may be appropriate for public policy reasons to assess their capacity to remain in their position. For example, the Ai Group emphasised that ‘in some cases these restrictions are necessary and justified on health and safety grounds’.¹³¹

2.101 In order to balance the desire to encourage workforce participation of mature age workers with public policy requirements around health and safety, individual capacity-based assessment rather than the imposition of compulsory retirement is a preferable approach.¹³² As suggested by the Law Institute of Victoria, assessment should occur on the basis of a ‘person’s ability to perform the tasks of their particular

129 Ibid; JobWatch, *Submission 25*. See also World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011), 47.

130 National Seniors Australia, *Submission 27*.

131 Australian Industry Group, *Submission 37*.

132 COTA, *Submission 51*; Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*.

job, regardless of their age'.¹³³ This approach was echoed in submissions by stakeholders such as the ACTU, which 'generally supports an approach to licensing and/or re-qualification which is based on risk factors rather than age',¹³⁴ and the Diversity Council, which stated that 'individuals should only be assessed on whether they can carry out the inherent requirements of the job in question'.¹³⁵

2.102 In the ALRC's view, industry and professional bodies are best placed to determine the most appropriate assessment and safeguards for mature age workers in their industry or profession. However, the provision of principles or guidelines may assist such bodies in reviewing licensing or re-qualification requirements with a view to removing age-based restrictions in favour of capacity-based requirements.

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.

Independent reviews of compulsory retirement

2.103 As outlined above, as a matter of principle, the ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. However, in certain circumstances and instances it may be appropriate for public policy reasons to assess the capacity of mature age workers to remain in their position. Two key examples of this are judicial and quasi-judicial officers, and Australian Defence Force personnel.

2.104 In order to consider these examples, the ALRC proposes that there should be two independent reviews of existing compulsory retirement—one in relation to judicial and quasi-judicial appointments and the other in relation to the military. This approach is consistent with the one advocated by stakeholders, such as the South Australian Government, which suggested that

it may be more appropriate for those areas that have compulsory retirement ages to be reviewed separately to consider whether the set age limits remain appropriate to the contemporary work practices.¹³⁶

Judicial and quasi-judicial officers

2.105 Under s 72 of the *Australian Constitution*, the maximum age for Justices of the High Court and any court created by Parliament is 70 years.¹³⁷ While the section

¹³³ Law Council of Australia, *Submission 46*.

¹³⁴ ACTU, *Submission 38*.

¹³⁵ Diversity Council of Australia, *Submission 40*.

¹³⁶ Government of South Australia, *Submission 30*.

¹³⁷ *Australian Constitution* s 72.

provides that Parliament may make a law fixing a lower age, it does not make such provision for a higher age.¹³⁸

2.106 There is jurisdictional inconsistency in the compulsory retirement provisions relating to judicial and quasi-judicial officers, such as Ombudsmen. Under state and territory constitutions and legislation compulsory retirement ages range from age 65 to 72 years of age.¹³⁹

2.107 The Government of South Australia favoured national consistency and observed that, although the compulsory retirement provisions affect a relatively small number of people, they have important symbolic implications with respect to the Australian Government's view of the 'capacity of people to work competently until they are of a certain age'.¹⁴⁰

2.108 Other stakeholders such as National Seniors supported the removal of compulsory retirement ages for judicial officers, consistent with the 'abolition of compulsory retirement ages for Commonwealth statutory office holders and public servants'.¹⁴¹

2.109 There are certain complexities associated with removing compulsory retirement for judicial officers, including Constitutional requirements and public policy reasons for compulsory retirement. There may also be flow on effects with respect to judicial pensions.¹⁴²

2.110 Rather than proposing the removal of compulsory retirement ages, the ALRC proposes that the Australian Government, in cooperation with state and territory governments, should initiate an inquiry to consider removing the compulsory ages of judicial and quasi-judicial appointments or, at a minimum, to achieve national consistency in such ages.

Proposal 2–10 The Australian Government should initiate an inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

138 In 1977 the *Constitution Alteration (Retirement of Judges) Act 1977* (Cth) was proclaimed following a successful referendum. It created a retirement age of 70 for all judges in federal courts.

139 *Federal Magistrates Act 1999* (Cth) ss 9 & sch 1 pt 1 cl 1(4); *Judicial Officers Act 1986* (NSW) ss 44(1), 44(3); *Supreme Court of Queensland Act 1991* (Qld) s 23(1); *District Court of Queensland Act 1967* (Qld) s 14(1); *Magistrates Act 1991* (Qld) s 42(d); *Supreme Court Act 1935* (SA) s 13A(1); *District Court Act 1991* (SA) s 16(1); *Magistrates Act 1983* (SA) s 9(1)(c); *Supreme Court Act 1887* (Tas) s 6A(1); *Magistrates Court Act 1987* (Tas) s 9(4)(a); *Constitution Act 1975* (Vic) s 77(3); *County Court Act 1958* (Vic) ss 8(3), 14(1)(b), 14(1)(c); *Magistrates' Court Act 1989* (Vic) s 12(a); *Judges' Retirement Act 1937* (WA) s 3; *District Court of Western Australia Act 1969* (WA) s 16; *Magistrates Court Act 2004* (WA) s 5 & sch 1 cl 11(1)(a); *Supreme Court Act 1993* (ACT) s 4(3); *Magistrates Court Act 1930* (ACT) s 7D(1); *Supreme Court Act 1979* (NT) s 38; *Magistrates Act 1979* (NT) s 7(1).

140 Government of South Australia, *Submission 30*.

141 National Seniors Australia, *Submission 27*.

142 To be eligible a judge must have served as a judge for not less than 10 years. If the judge has served less, the pension entitlement reduces proportionately and no pension is paid where a judge has served less than 6 years. For Commonwealth judges see *Judges' Pensions Act 1968* (Cth).

Military personnel

2.111 The compulsory retirement age for Australian Defence Force (ADF) personnel is 60 years and 65 years for reservists.¹⁴³ However, there is provision for the Minister or the Chief of the Defence Force to extend the compulsory retirement age for either a specific officer or member or a class of officers or members. In the 12 months up to 30 June 2012, 35 ADF personnel were granted an extension to their compulsory retirement age.¹⁴⁴

2.112 While the current average number of years of service for ADF personnel is nine years,¹⁴⁵ statistics indicate that of the 56,728 ADF personnel, 3,019 were aged 50 years and above and are approaching compulsory retirement age. In August 2012, there were 50 ADF personnel over 60 years of age.¹⁴⁶

2.113 The Alliance of Defence Service Organisations (ADSO) emphasised the operational capability reasons for ensuring that ADF personnel 'deployed into operations are of an age and physical fitness to meet the rigours of battle in defence of the nation'.¹⁴⁷ ADSO provided two examples:

Firstly, the infantry soldier, wearing body armour and carrying his weapon and a heavy pack, could not cope with the rigours of a fire-fight unless he or she is relatively young, very fit and highly trained; secondly, the pilot, flying a high performance fighter aircraft, capable of pulling 7G and delivering precision weapons in a hostile air environment, could not cope unless he or she is relatively young, very fit and highly trained.¹⁴⁸

2.114 The ADSO submitted that 'the need for a relatively young ADF is obvious and ADSO is very strongly opposed to any change in compulsory retirement age for the ADF'.¹⁴⁹ However, ADSO did not oppose the current provision for the extension of compulsory retirement age by the Minister or Chief.

2.115 As a matter of principle the ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. The Defence, Science and Technology Organisation (DSTO), in partnership with the University of Wollongong, is currently conducting a Physical Employment Standards (PES) Review Project.¹⁵⁰ In seeking to identify objective criteria for physical standards across the ADF, the ALRC suggests that this, and similar projects, may provide a useful basis upon which to reconsider the compulsory retirement ages.

143 The last increase in the compulsory retirement age occurred in 2007.

144 Department of Defence, *Correspondence*, 3 August 2012.

145 Ibid.

146 Ibid. Of the 50 ADF personnel over 60 years of age, 59 were men and one was a woman.

147 Alliance of Defence Service Organisations, *Submission 49*.

148 Ibid.

149 Ibid.

150 The research is being conducted through the Centre of Expertise for the Physical Employment Standards Project, a partnership between the Defence Science and Technology Organisation and University of Wollongong: G Combet (Minister for Defence Personnel, Materiel and Science), 'Physical Standards for Military Service to be Benchmarked' (Press Release, 21 August 2009). See also Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force: Phase 2 Report* (2012), 32.

2.116 The ALRC's view is that the most appropriate approach to this issue is to propose that the Australian Government initiate an inquiry to review the compulsory retirement ages for ADF personnel. Proposing a review rather than removal of the compulsory retirement ages recognises the concerns expressed by stakeholders such as the ADSO, and the need for a detailed examination of this issue undertaken in cooperation with the ADF and key defence force and veterans organisations. Any such inquiry should consider a range of possible alternatives, including a capacity-based approach and any unintended consequences arising from a change to compulsory retirement ages with respect to the calculation of death and invalidity benefits paid under military superannuation and benefits schemes.¹⁵¹

Proposal 2–11 The Australian Government should initiate an inquiry to review the compulsory retirement ages for military personnel.

Regulation and monitoring framework

2.117 There are a number of bodies within the employment law framework tasked with regulation and monitoring of obligations and requirements under legislation such as anti-discrimination and industrial relations legislation. A number of stakeholders have suggested that the Equal Opportunity for Women in the Workplace Agency (EOWA) model might provide a useful one upon which to establish a similar body or process of recognition of employer best practice with respect to mature age workers.

Is there an appropriate model?

2.118 EOWA is a statutory authority with a role in administering the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWA Act) and focuses on assisting organisations to achieve equal opportunity for women, including through education.¹⁵² EOWA has an 'Employer of Choice for Women' citation which acknowledges organisations that are recognising and advancing women in their workplace.

2.119 In 2012, the Australian Government introduced amendments to the EOWA Act. Under the Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth), employers with over 100 employees must report annually against 'gender equality indicators' which relate to the gender composition of employees and governing bodies, remuneration, flexible working arrangements and consultation on gender equality issues.¹⁵³

¹⁵¹ Compulsory retirement ages for most ADF personnel were increased in 2007, and this had an unintended effect on the calculation of death and invalidity payments under the Military Superannuation and Benefits Scheme. See Australian Government Actuary, *Military Superannuation and Benefits Scheme and Defence Force Retirement and Death Benefits Scheme (MSBS and DFRDB)* (2008), [2.9].

¹⁵² *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

¹⁵³ See, Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth) for further details of proposed amendments, including renaming EOWA the Workplace Gender Equality Agency. At the time of writing the Bill was before the Senate after a report examining the Bill was released by the Senate Education, Employment and Workplace Relations Committee on 10 May 2012.

2.120 The broader Canadian model may also provide a useful model. The aim of the *Employment Equity Act 1995* SC c 44 (Canada) is to ensure that federally regulated employers provide equal opportunities for employment to four designated groups: women; Aboriginal peoples; persons with disabilities; and members of visible minorities.¹⁵⁴

How would an age-related model work?

2.121 Stakeholders expressed differing views on the appropriateness of introducing an age-related reporting or best practice recognition framework, or a body responsible for monitoring such a framework.

2.122 The Law Council of Australia suggested that the employment of mature age workers ‘could be promoted by providing recruitment agencies and employers with formal public recognition’ and that this could be modelled on the annual awards and employer of choice lists compiled by EOWA.¹⁵⁵

2.123 The ACTU also supported the approach and submitted that

such frameworks assist employers and employees to self-identify internal practices and procedures which may hinder or assist maintaining a diverse workforce, including mature age workers ... The ACTU supports the introduction of the benchmarks and would suggest such a model be adapted as part of any prospective framework for mature age employees.¹⁵⁶

2.124 However, some stakeholders opposed the establishment of a reporting framework requiring employers to report against equality indicators related to age, expressing concerns about the regulatory burden and cost implications.¹⁵⁷ The Ai Group expressed the view that such an approach may also ‘encourage negative stereotypes’ about mature age workers and may ‘shift the focus from developing positive and flexible management practices to the burden of complying with a reporting framework’.¹⁵⁸

2.125 Given such concerns, the ALRC considers that the establishment of a body or process of recognition of employer best practice on the basis of age would need to be less formal and onerous than the EOWA framework. The ALRC also emphasises that the focus of any such framework should be on both formal policies, and on outcomes and experience in practice.

2.126 In light of divergent stakeholder views about the appropriateness of establishing a body or process of recognition of employer best practice similar to EOWA, but on the basis of age, the ALRC is interested in further comment by stakeholders on this issue.

¹⁵⁴ *Employment Equity Act 1995* SC c 44 (Canada).

¹⁵⁵ Law Council of Australia, *Submission 46*. See also JobWatch, *Submission 25*.

¹⁵⁶ ACTU, *Submission 38*.

¹⁵⁷ Australian Industry Group, *Submission 37*. See also Diversity Council of Australia, *Submission 40*.

¹⁵⁸ Australian Industry Group, *Submission 37*.

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?

National education and awareness campaign

2.127 A central theme that has emerged in the course of this Inquiry is the need for increased awareness and effective education and training about barriers to workforce participation for mature age persons, and the benefits of employing mature age workers.¹⁵⁹ Both these elements are fundamental to ensuring that the employment law system is able to respond appropriately to address such barriers.

2.128 A range of bodies and reports have highlighted the prevalence of negative perceptions and stereotypes about mature age workers and age discrimination. For example, the Consultative Forum on Mature Age Participation reported that

Age discrimination in employment of mature age people arises from a combination of social perceptions and economic justifications but is usually justified in terms of productivity, whereby older people are stereotyped for having some assumed behaviours regardless of the individual's actual conditions and characteristics.¹⁶⁰

2.129 The Advisory Panel on the Economic Potential of Senior Australians noted that

negative views about older people can be based on generalisations and stereotypes. Stereotypes tend to group people together, taking away their individuality and diversity.¹⁶¹

2.130 A key report produced by the Productive Ageing Centre and National Seniors outlined the impact of stereotype threats on mature age workers. It stated that

evidence shows that stereotypes relating to mature age workers are consistently negative, and apply across different occupations. These findings suggest that older adults are likely to be susceptible to stereotype threat in the workplace.¹⁶²

2.131 In May 2011, the *Age Discrimination Act 2004* (Cth) was amended to create an office for an Age Discrimination Commissioner within the AHRC. The AHRC has been allocated funding to enable the Commissioner to undertake a project addressing the stereotyping of mature age persons including research, roundtables and community education and awareness activities to promote positive portrayal of mature age

¹⁵⁹ See, eg, COTA, *Submission 51*.

¹⁶⁰ National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 17.

¹⁶¹ Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 45.

¹⁶² National Seniors Productive Ageing Centre, *Stereotype Threat and Mature Age Workers* (2011), prepared for National Seniors Australia, 3.

persons.¹⁶³ The position of Age Discrimination Commissioner and this project mean the AHRC is most appropriately placed to lead and coordinate a national education and awareness campaign in support of the workforce participation of mature age persons. This type of approach was recommended by the Advisory Panel on the Economic Potential of Senior Australians.¹⁶⁴

2.132 The ALRC considers that a national campaign should be appropriately resourced, and be based on a coordinated whole-of-government approach involving all key stakeholders and participants in the employment law system, including: employees, employers, unions, employer organisations, government agencies and departments, and seniors organisations. The Age Discrimination Commissioner should coordinate the campaign and bodies such as unions, employer organisations, the FWO and Safe Work Australia should also play a key role. Anti-discrimination bodies should also play a role including through the publication of material such as the Victorian Equal Opportunity and Human Rights Commission's, publication, *Mature-age Workers and the Equal Opportunity Act—Know Your Rights*.¹⁶⁵

2.133 Stakeholders highlighted numerous examples of best practice in attracting, retaining and supporting mature age workers in industries across Australia which could be built upon and developed in the course of the campaign.¹⁶⁶ The Australian Government has also taken a leading role in this area, for example through the Australian Public Service 200 Project which was 'established to tackle barriers to a longer productive life of work in the APS'.¹⁶⁷

2.134 There are a range of initiatives that the ALRC suggests could usefully form part of the national education and awareness campaign, including:

- education and training in workplaces around Australia, including of employees, employers, and their representatives;

163 Australian Government, *Budget Measures 2012–13, Budget Paper No 2* (2012) Part 2 Expense Measures, 'Economic Potential of Senior Australians—countering negative stereotypes and promoting positive media portrayal of older Australians'. In relation to creating positive attitudes see Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 35.

164 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 36: 'The federal Age Discrimination Commissioner develop a community education and awareness campaign that identifies ageism and age discrimination and promotes positive images of ageing'.

165 Victorian Equal Opportunity and Human Rights Commission, 'Mature-age Workers and the Equal Opportunity Act: Know Your Rights' (2012) .

166 Australian Government, *Investing in Experience Tool Kit* (2012); Australian Chamber of Commerce and Industry, *Employ Outside the Box: The Rewards of a Diverse Workforce* (2012); Department of Education, Employment and Workplace Relations, *Corporate Champions* <www.deewr.gov.au/Employment/Programs/ExpPlus/Employers/Pages/CorporateChampions.aspx> at 13 September 2012; APS 200 referred to in Comcare, *Submission 29*.

167 Comcare, *Submission 29*.

- development of guidelines and other resources, such as mature age employment strategies, to complement legislative or workplace entitlements;¹⁶⁸
- establishment of best practice benchmarks;
- posters, newsletters, factsheets, online information and advertisements;
- material relating to redesign of work arrangements and processes; and
- additional research and the development of an evidence base, including case studies.¹⁶⁹

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.

168 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 13: ‘The federal government engage peak employer and industry groups to assist individual employers to develop and implement older worker employment strategies, starting with a series of high profile seminars across the country’.

169 See, eg, Comcare, *Submission 29*; JobWatch, *Submission 25*.

3. Work Health and Safety and Workers' Compensation

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Summary

3.1 This chapter makes a range of law reform proposals with respect to work health and safety and workers' compensation aimed at addressing and removing potential barriers to workforce participation for mature age workers.

3.2 The first part of the chapter examines work health and safety. The ALRC proposes that Safe Work Australia, in its activities and research, should consider and recognise health and safety issues that may affect mature age workers. Safe Work Australia should also, in conjunction with state and territory work health and safety regulators, develop guidance material around these issues.

3.3 The second part of the chapter focuses on workers' compensation. In this part the ALRC considers potential reform to the retirement provisions in the Commonwealth workers' compensation system in order to remove the barriers to mature age workers remaining in, or returning to, the workforce. In principle, the removal of barriers should require the elimination of all age-based restrictions from Commonwealth workers' compensation legislation. However, given the potential cost implications and unintended consequences for other workers in receipt of workers' compensation benefits, the ALRC considers it may be necessary to take a three-tiered approach to reform. First, retirement provisions should be legislatively tied to Age

Pension age. Secondly, the ALRC asks whether incapacity payment periods should be extended. Thirdly, the ALRC asks whether workers over Age Pension age who can prove that, had they not been injured, they would have continued to work should receive a supplementary payment.

3.4 The second part also discusses the inconsistent coverage of volunteers under workers' compensation and the ALRC proposes that Safe Work Australia consider this issue. Finally, the ALRC asks whether the treatment of superannuation payments in the calculation of workers' compensation incapacity payments creates a barrier to workforce participation for mature age workers.

Work health and safety

3.5 A basic premise in the Australian Work Health and Safety Strategy 2012–2022 is that all workers have the 'fundamental right to be free from the risk of work-related death, injury and illness'.¹ Increasingly however, governments, work health and safety regulators, and employers and their workers need to recognise and accommodate the differing work health and safety needs and priorities of 'an intergenerational workforce'.²

3.6 Legislative and regulatory duties under the Commonwealth work health and safety system appear to be sufficiently broad to protect mature age workers. Therefore, the ALRC does not consider it necessary to amend legislative work health and safety duties and obligations. Rather, the ALRC suggests that it may be necessary to adjust workplace processes and practices to account for the needs of mature age workers, and to provide assistance to organisations and workers to do so. In making proposals for reform in this area the ALRC notes that, while the health and safety needs and priorities of mature age workers may differ from workers in other age groups, changes to work environments and processes and positive organisational cultures around work health and safety are likely to benefit all workers.

Workplace injuries and age-related changes to workers

3.7 As outlined in earlier chapters, there are a range of significant differences within the mature age worker cohort, defined as aged 45 years and over. For example, statistics indicate that workers aged 65 years and over have the lowest rate of work-related illness or injury, but workers aged 45 to 49 years have the highest rates of work-related illness or injury.³

3.8 In considering the implications of ageing in work health and safety terms, because everyone 'ages differently', it is unhelpful to generalise about mature age workers or to assume that they will have certain characteristics or requirements.⁴ Comcare submitted that 'issues associated with older workers' employability are not

1 Australian Work Health and Safety Strategy 2012–2022.

2 Comcare, *Submission 29*.

3 Australian Bureau of Statistics, *Work-Related Injuries, Australia, 2009–10, Cat No 6324.0* (2010).

4 Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the Safety and Health Needs of Your Workplace: Older workers and safety* (2010), 2.

wholly age-related, and in fact, there may be greater similarities with other measures of disadvantage'.⁵ However, age-related factors that can affect an individual's ability to work safely

in some cases may include age-related wear and tear and degenerative changes to the body and ill health. There are different types of long-term physical conditions associated with older age groups, such as cardiovascular disease, diabetes and arthritis or osteoporosis, which may impact on a person's ability to work safely.⁶

3.9 Nonetheless, even where workers experience common physical and cognitive changes associated with ageing, these 'can be easily be managed in the workplace through an effective work health and safety policy and appropriate supporting practices'.⁷

3.10 The Consultative Forum on Mature Age Participation has emphasised the beneficial health effects of working:

improving the quality of the working environment not only attracts mature age people into the workforce, but also it can increase longevity in employment. The creation of roles and work practices specific to mature age workers, such as the creation of more ergonomic working conditions, has been suggested as a means to recruit and retain such employees.⁸

3.11 In complying with work health and safety obligations and requirements, and in fulfilling their responsibilities to provide safe and healthy work environments and processes, Safe Work Australia submitted that it is important that organisations 'accommodate the abilities, diversity and vulnerabilities of all Australian workers'.⁹

Legislative framework

3.12 On 1 January 2012, mirror work health and safety legislation commenced in several Australian jurisdictions, including the *Work Health and Safety Act 2011* (Cth) (WHS Act),¹⁰ based on model legislation, regulations and codes of practice released by Safe Work Australia—the statutory agency tasked with improving occupational health and safety (OHS) and workers' compensation arrangements in Australia.¹¹ These reforms have been described as 'the most significant reform' to OHS laws in Australia in the last 30 years.¹²

5 Comcare, *Submission 29*.

6 Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the Safety and Health Needs of Your Workplace: Older workers and safety* (2010), 2.

7 Diversity Council of Australia, *Submission 40*.

8 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 31.

9 Safe Work Australia, *Submission 18*.

10 The following legislation has been passed: *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT). The *Work Health and Safety Act 2011* (Tas) is due to commence on 1 January 2013. Mirror legislation has not yet passed in Victoria, South Australia or Western Australia.

11 Safe Work Australia is the statutory agency tasked with improving OHS and workers' compensation arrangements in Australia: *Safe Work Australia Act 2008* (Cth) ss 3, 6.

12 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.

3.13 The WHS Act provides for a primary duty of care under which a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable: the health and safety of workers while they are at work; the health and safety of others is not put at risk from work carried out; the provision and maintenance of a safe work environment; and a range of other requirements.¹³ Workers also have a primary duty to take reasonable care for their own safety at work, and that their own acts or omissions do not adversely affect the health and safety of others as well as to cooperate with reasonable policies and instructions from the PCBU.¹⁴

Australian Work Health and Safety Strategy 2012–2022

3.14 The Australian Work Health and Safety Strategy 2012–2022 (the Strategy) has been approved by Safe Work Australia members and is awaiting endorsement by the Select Council on Workplace Relations. It will be launched across Australia in late 2012.

3.15 The Strategy aims to support organisations and workers to improve work health and safety and has seven action areas:

- healthy and safe by design;
- supply chains and networks;
- work health and safety capabilities;
- culture and leadership;
- research and evaluation;
- government; and
- responsive regulatory framework.¹⁵

3.16 While the Strategy ‘does not specifically mention mature age workers’,¹⁶ the action area ‘Healthy and Safe by Design’, which includes the strategic outcome that ‘work and work processes and systems of work are designed and managed to eliminate or minimise hazards or risks’, is of particular relevance to this cohort.¹⁷

3.17 Following the launch of the Strategy, ‘national activities will be developed in consultation with key stakeholders to address specific issues for a range of vulnerable

13 The other requirements include, for example: to provide information and training to protect all persons from risks to their health and safety; monitoring of the health of workers for the purposes of preventing illness or injury arising from the conduct of the business or undertaking; and a duty to consult: *Work Health and Safety Act 2011* (Cth) ss 19(1)–(3), 28, 47.

14 Ibid s 28. Officers also have a range of duties: *Work Health and Safety Act 2011* (Cth) ss 27–29.

15 *Australian Work Health and Safety Strategy 2012–2022*.

16 Comcare, *Submission 29*.

17 *Australian Work Health and Safety Strategy 2012–2022*. See also Comcare, *Submission 29*.

workers including mature age workers'.¹⁸ The aim is to 'eliminate or minimise hazards by improving the design of structures, plant, substances, work and work systems'.¹⁹

3.18 Stakeholders like the Australian Council of Trade Unions (ACTU) have emphasised that they would not support forms of implementation, such as the 'development of strategic plans, which propose differing treatment based on the age of workers'.²⁰

3.19 The ALRC understands that implementation of the Strategy will occur at a Commonwealth, state and territory level. The specific nature of implementation is unclear at this stage. However, the implementation of the Strategy across jurisdictions presents an opportunity for work health and safety issues potentially affecting mature age workers to be considered, in particular through activities aimed at improving the design of work and work systems. In light of the high level nature of the Strategy, the ALRC suggests that in the course of implementation, specific consideration should be given to tailoring solutions and approaches to ensure they meet the needs of all workers, including mature age workers.

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.

Research, guidance material and awards

3.20 There is a need for further research into work health and safety issues facing mature age workers. There is also a need for the development and distribution of guidance material in order to increase PCBU and worker understanding and recognition of these issues. The ALRC therefore proposes that Safe Work Australia: include health and safety issues that may affect mature age workers in its research agenda; be involved in the development of guidance material; and promote recognition of best practice approaches to work health and safety initiatives involving mature age workers.

Research

3.21 One of the key action areas under the Strategy is research and evaluation. The Strategy acknowledges that development of effective work health and safety policies, programs and practices needs to be informed by robust evidence.²¹

3.22 In its submission Safe Work Australia stated that its research 'typically includes age as an analysis variable' and that this research 'informs the development of related

18 Australian Work Health and Safety Strategy 2012–2022.

19 Safe Work Australia, *Submission 18*.

20 ACTU, *Submission 38*.

21 Australian Work Health and Safety Strategy 2012–2022.

national policy, practice and programs’.²² In addition, Safe Work Australia indicated that it monitors ‘relevant national and international research including those relating to changing workforce demographics’ through its ‘emerging issues surveillance program’.²³

3.23 The ALRC considers that additional and targeted research by Safe Work Australia, as well as other relevant bodies, should be undertaken into work health and safety issues facing mature age workers.²⁴ Conducting such research in an Australian context, informed by relevant developments and evidence across jurisdictions, is central to ensuring best practice approaches to work health and safety. This research should underlie the development of evidence-based guidance material.

3.24 As a preliminary step, the ALRC proposes that Safe Work Australia should include health and safety issues that may affect mature age workers in its research agenda.

Guidance material

3.25 There is a range of guidance material currently provided to PCBU, workers and duty holders about work health and safety matters in the form of regulations, Codes of Practice and other material produced by Safe Work Australia, Comcare and similar bodies.²⁵

3.26 In the Issues Paper, the ALRC asked where it is best to include information about work health and safety issues relevant to mature age workers.²⁶ Stakeholders expressed strong support for the development and dissemination of guidance material of this type, and suggested a range of formats and forms.

3.27 The Ai Group opposed the inclusion of such information in Codes of Practice, instead favouring its inclusion in bulletins and other informal documents intended to provide guidance, ‘without creating onerous legal obligations on the employer’.²⁷ The Government of South Australia submitted that

certain industries employing older workers with particular hazards in place may benefit from guidance material specific to those industry sectors. However, this may be addressed by way of more informal guidance such as information sheets, hazard alerts or bulletins.²⁸

3.28 In addition, stakeholders suggested work health and safety bodies should develop a health and safety kit for mature age workers, to ‘address misconceptions about older persons, ageing and occupational health and safety risks’.²⁹ It was

22 Safe Work Australia, *Submission 18*.

23 Ibid.

24 See, eg, Diversity Council of Australia, *Submission 40*.

25 For example: Safe Work Australia, *Code of Practice: How to Manage Work Health and Safety Risks* (2010); Safe Work Australia, *Code of Practice: How to Consult on Work Health and Safety* (2010); and Safe Work Australia, *Code of Practice: Managing the Work Environment and Facilities* (2010).

26 Issues Paper, Question 41.

27 Australian Industry Group, *Submission 37*.

28 Government of South Australia, *Submission 30*.

29 JobWatch, *Submission 25*.

suggested that it could 'also deal with issues such as work task and job design, work organization and work environment'.³⁰

3.29 In an Australian Public Service context, Comcare identified a number of potential opportunities for the collection of data and publication of guidance material, such as the publication of a chapter focused on mature age workers in the Australian Public Service State of the Service Report or Census Survey, and periodic 'pulse surveys' along the lines of the Department of Human Services Mature Age Worker Survey conducted in late 2011'.³¹

3.30 Comcare suggested that Safe Work Australia should also play a role in 'brokering industry benchmarks on work ability and ageing to guide national or industry directed strategies and interventions'.³²

3.31 The ALRC proposes that Safe Work Australia and state and territory work health and safety regulators should develop guidance material around work health and safety issues that may affect mature age workers. Guidance material should contain information about: legislative responsibilities and duties; best practice work design and processes; risk assessment; and health and wellbeing. The *Investing in Experience* guide and WorkSafe WA bulletin, *Understanding the Safety and Health Needs of Your Workplace: Older Workers and Safety*, provide useful models.³³ Such guidance material should be developed to suit a range of industries and professions, and widely available from a range of sources.³⁴

3.32 The ALRC suggests that the development of guidance material should be linked to the national education and awareness campaign proposed in Chapter Two.

Awards

3.33 The annual Safe Work Australia Awards acknowledge excellence in work health and safety innovation and practice at a governmental, organisational and individual level. The awards include a number of categories, such as best workplace health and safety management system; best solution to an identified workplace health and safety issue; and best individual contribution to workplace health and safety.³⁵

3.34 The awards play a key role in raising awareness about work health and safety and could play an important role in placing this issue on the national work health and safety agenda. There may be scope for recognition of systems, solutions and individuals that address mature age-related work health and safety issues within these

30 Ibid.

31 Comcare, *Submission 29*. For example, s 44 of the *Public Service Act 1999* (Cth) provides that the Australian Public Service Commissioner must provide a report each year to the Minister for presentation to the Parliament, which includes a report on the state of the Australian Public Service during the year.

32 Ibid.

33 Australian Government, *Investing in Experience Tool Kit* (2012), ch 7; Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the Safety and Health Needs of Your Workplace: Older workers and safety* (2010).

34 ACTU, *Submission 38*.

35 Safe Work Australia, *Annual Safe Work Australia Awards* <www.safeworkaustralia.gov.au> at 13 September 2012.

existing categories. Alternatively, it may be appropriate to establish a new category. Regardless of the approach taken, in the ALRC's view, Safe Work Australia should recognise best practice approaches to work health and safety involving mature age workers in its Safe Work Australia Awards.

Proposal 3–2 Safe Work Australia should include work health and safety issues that may affect mature age workers in its research agenda.

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.

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.

Volunteers

3.35 The WHS Act expands the class of persons to whom a duty is owed to 'workers', rather than employees. Workers include employees, subcontractors, outworkers, apprentices, students and volunteers.³⁶ In this way, the WHS Act applies to a range of volunteering organisations, but only those with paid staff. In 2010, 32.5% of volunteers were aged 55 and over.³⁷

3.36 In the Issues Paper, the ALRC asked in what ways, if any, OHS duties and responsibilities act as a barrier to volunteering by mature age persons.³⁸

3.37 COTA Australia (COTA) submitted that 'there is some evidence that the increasing OHS responsibilities of volunteers are a deterrent' to mature age participation in volunteering and for organisations in offering volunteering opportunities for mature age people. COTA also noted that 'the compliance cost of OHS for volunteers is often high, particularly for small community organisations and this acts as a disincentive for volunteers'.³⁹

36 Both definitions expand previous definitions of 'employer' and 'employee': *Work Health and Safety Act 2011* (Cth) s 7.

37 Australian Bureau of Statistics, *General Social Survey: Summary Results, Cat No 4159.0* (2010).

38 Issues Paper, Question 42.

39 COTA, *Submission 51*.

3.38 Suncorp observed that work health and safety 'duties and responsibilities place a compliance burden on volunteering organisations, and may act as a barrier to volunteering'.⁴⁰

3.39 While emphasising that volunteers deserve the same health and safety protections as other workers,⁴¹ other stakeholders expressed the view that work health and safety laws are 'not a barrier to encouraging volunteers and potential volunteers from undertaking volunteer work'.⁴²

3.40 Issues associated with the regulatory burden for volunteers and voluntary organisations and compliance costs associated with work health and safety laws are systemic and extend beyond the scope of this Inquiry. Safe Work Australia has examined issues relating to volunteers and work health and safety and developed a dedicated volunteer resource kit.⁴³ However, as volunteering is a significant form of other productive work, the ALRC suggests that Safe Work Australia should continue its work with the volunteering sector to address any remaining concerns.

Workers' compensation in Australia

3.41 Workers' compensation is compensation payable to a worker who suffers an injury or disease arising from, or during, his or her employment. Workers' compensation benefits encompass the payment of: incapacity payments to compensate for lost earnings; medical and related expenses; and lump sum payments for permanent impairment or death. Each state and territory has its own workers' compensation scheme and the Commonwealth has three schemes.⁴⁴

3.42 The purposes of workers' compensation are to:

- provide injured workers with financial support;
- provide injured workers with medical benefits and other forms of non-economic support;
- enable employers and workers to work cooperatively to maintain an injured worker at work, or to achieve an early, safe and appropriate return to work.⁴⁵

3.43 At a Commonwealth level, the workers' compensation system is a 'long tail' rather than a 'short tail' system; that is, it pays benefits for the duration of a worker's incapacity rather than imposing a benefit period or amount restriction.

3.44 A range of stakeholders in this Inquiry have emphasised the importance of all workers receiving appropriate support and being 'protected against financial hardship

40 Suncorp Group, *Submission 39*.

41 See, eg, Government of South Australia, *Submission 30*.

42 Comcare, *Submission 29*.

43 Safe Work Australia, *Volunteers and the New Work Health and Safety Laws* <www.safeworkaustralia.gov.au> at 13 September 2012.

44 In addition, there are also a number of minor schemes not discussed in this Discussion Paper. See, eg, *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth).

45 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

associated with sustaining a work-related injury’.⁴⁶ In addition, the ALRC emphasises that, in order to encourage the ongoing participation of mature age persons in the workforce, the focus of workers’ compensation schemes needs to be on appropriately supporting and compensating workers, but also ensuring post-injury rehabilitation and return to work programs.

3.45 As the Insurance Council of Australia has emphasised, ‘effective workers’ compensation systems focus on preventing injuries and providing appropriate care for injured workers’.⁴⁷ This necessarily results in the interaction of work health and safety and workers’ compensations schemes. Indeed, the workers’ compensation scheme operates within a broader policy framework of work health and safety, industrial relations, the entitlement to social security and superannuation policy and access. In circumstances where mature age workers are not covered by workers’ compensation, such as self-employed people, insurance becomes increasingly important. Insurance, including income protection insurance, is discussed in Chapter Four.

3.46 To operate effectively, workers’ compensation schemes need to be financially viable. As stakeholders such as Suncorp emphasised, to ‘maintain an affordable and sustainable scheme, it is important to regularly review and define benefit periods and amounts, to ensure the scheme is cost effectively supporting injured workers’.⁴⁸ This Inquiry and the upcoming review of the Commonwealth workers’ compensation system provide a useful opportunity to provide such review. While the particular focus of this Inquiry is on removing age barriers, the aim in this area should be to ‘enable greater workforce participation without unduly impacting the sustainability and affordability of workers’ compensation schemes nationally’.⁴⁹

Commonwealth workers’ compensation

3.47 The *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) establishes the workers’ compensation scheme covering employees of the Commonwealth and statutory authorities, the ACT Government and its agencies, and the employees of licensed corporations. Military personnel injured prior to 1 July 2004 during non-operational service are covered by the SRC Act as well as the *Veterans’ Entitlements Act 1986* (Cth).

3.48 The SRC Act also establishes Comcare, which is responsible for workplace safety, rehabilitation and compensation, and the Safety, Rehabilitation and Compensation Commission (SRCC)—a statutory body with regulatory functions relating to workers’ compensation and OHS.

3.49 The *Military Rehabilitation and Compensation Act 2004* (MRC Act) provides rehabilitation, medical treatment and compensation for members and former members of the Australian Defence Force and their dependants in respect of injury, disease or

46 Suncorp Group, *Submission 39*.

47 Insurance Council of Australia, *Submission 21*.

48 Suncorp Group, *Submission 39*.

49 Ibid.

death related to service rendered on or after 1 July 2004.⁵⁰ The workers' compensation provided under the MRC Act is 'based on the SRC Act and VEA provisions'.⁵¹

3.50 Seacare is the national scheme of OHS, workers' compensation and rehabilitation arrangements that applies to defined seafaring employees.⁵² The Seacare scheme is overseen by the Seafarers Safety, Rehabilitation and Compensation Authority which monitors and administers the operation of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act).⁵³

3.51 The focus of this chapter is on the Commonwealth statutory arrangements. At a Commonwealth level there is also limited access to common law remedies against employers. To have access to common law remedies the worker must have a successful permanent impairment claim.⁵⁴ Common law remedies are restricted to damages for non-economic loss; and election of common law is irrevocable.⁵⁵

Safe Work Australia

3.52 Safe Work Australia is the statutory agency tasked with improving OHS and workers' compensation arrangements in Australia.⁵⁶ Safe Work Australia is a representative body and mainly consists of members who represent the Commonwealth, states and territories, workers and employers.⁵⁷

3.53 As part of its work, Safe Work Australia's Strategic Issues Group for Workers' Compensation (SIG) developed the National Workers' Compensation Action Plan 2010–2013. There are two key action areas under the National Plan relevant to this Inquiry. The first is to 'investigate and report on policy matters referred to or relevant to Safe Work Australia', which includes considering 'recommendations from the Older People and the Law report relating to ageing and retirement, and develop[ing] policy responses'.⁵⁸ Relevantly, the report recommended that

50 The *Safety, Rehabilitation and Compensation Act 1988* (Cth) provides cover for service rendered before 1 July 2004.

51 Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (March 2011), 28.

52 See *Seafarers Rehabilitation and Compensation Act 1992* (Cth).

53 The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) establishes a workers' compensation and rehabilitation scheme for seafarers employed on certain trips engaged in trade or commerce within a territory, interstate or overseas and on other vessels declared by the Australian Maritime Safety Authority. The Seacare Authority also oversees the operation of a range of other legislation and regulations made under that legislation.

54 That is, a benefit payable under the relevant Commonwealth Act: *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 45; *Military Rehabilitation and Compensation Act 2004* (Cth) s 389; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 55.

55 See *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 45; *Military Rehabilitation and Compensation Act 2004* (Cth) s 389; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 55.

56 *Safe Work Australia Act 2008* (Cth) ss 3, 6.

57 *Ibid* s 10.

58 *National Workers' Compensation Scheme Action Plan 2010–2013*.

the Australian Government, in cooperation with state and territory governments, review the application of workers' compensation legislation to ensure that older workers are not disadvantaged.⁵⁹

3.54 The second action area is to 'investigate and report on options for nationally consistent definitions for the purposes of workers' compensation'.⁶⁰ One of the seven temporary advisory groups (TAGs) established to investigate and report to the SIG on policy options for improving national consistency in key priority areas will consider definitions. In April 2012, the SIG reviewed the definitions to be investigated and agreed that the Definitions TAG should focus its work on 'retirement age and any barriers for older workers in workers' compensation schemes'.⁶¹

3.55 Safe Work Australia indicated that it is

currently developing an options paper for alignment or removal of the age limit to address age discrimination and avoid income gaps for older workers. This will be considered in late 2012. The options paper will take into consideration the views of governments, employers and workers through representation at the working group level.⁶²

Inquiry into Commonwealth workers' compensation scheme

3.56 On 24 July 2012, the Hon Bill Shorten MP, Minister for Employment and Workplace Relations, announced a review of the Commonwealth workers' compensation scheme, in particular the SRC Act. It is expected that the review panel will report to the Australian Government in February 2013.

3.57 The review is inquiring into any legislative anomalies and updates that need to be addressed, the performance of the Comcare scheme and ways to improve its operation. The terms of reference include

ensuring the application of workers' compensation legislation does not disadvantage workers over the age of 65 and there is no gap between the workers' compensation age limit and the foreshadowed increase to the age pension eligibility age to 67 by 2023.

3.58 In September 2012, an issues paper was released for consultation as part of the review.⁶³ The issues paper includes discussion of appropriate coverage arrangements when the Age Pension age is increased as well as in relation to injured workers who receive incapacity payments and superannuation benefits.⁶⁴

3.59 The ALRC expresses a preliminary view with respect to the necessary reforms to Commonwealth workers' compensation in this Discussion Paper. In making

59 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007), rec 42.

60 *National Workers' Compensation Scheme Action Plan 2010–2013*.

61 Safe Work Australia, *National Workers' Compensation Action Plan 2010–2013, Progress to April 2012* <www.safeworkaustralia.gov.au/sites/SWA/WorkersCompensation/Action%20Plan/Pages/progress-WC-Action-Plan-2010-2013.aspx> at 11 September 2012.

62 Safe Work Australia, *Submission 18*.

63 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

64 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012), 20, 21, 23–25.

recommendations in the final Report, the ALRC will consider the work of Safe Work Australia and the outcome of this review of the Commonwealth workers' compensation scheme.

Workers' compensation and mature age workforce participation

3.60 The Law Council of Australia suggests that the inability to access workers' compensation in the event of a work-related accident may, in some circumstances, act as a disincentive for mature age workers to remain in, or return to, the workforce.⁶⁵

3.61 This barrier has been emphasised by bodies such as the Advisory Panel on the Economic Potential of Senior Australians,⁶⁶ and a number of stakeholders in the course of this Inquiry.⁶⁷ It is also acknowledged by Safe Work Australia in its current development of policy options to address retirement provisions in workers' compensation legislation—in part to remove legislative barriers that 'stop older people working'.⁶⁸ Removing this disincentive was also one of the key drivers of recent Western Australian workers' compensation reform.⁶⁹

Retirement provisions

3.62 Most jurisdictions have retirement provisions that restrict access to incapacity payments when a worker reaches the age of 65. Under the Commonwealth scheme there is no limit to total incapacity or medical payments, but the following restrictions apply to incapacity payments:

- Employees of the Commonwealth and statutory authorities, the ACT Government and its agencies, licensed corporations, and military personnel injured before 1 July 2004: If a worker suffers an injury before reaching 63 years of age, incapacity payments cease when the worker reaches aged 65. However, a worker injured at any age after 63 years of age may receive incapacity payments for up to 104 weeks.⁷⁰
- Military personnel injured on or after 1 July 2004: If a member or former member suffers an injury before reaching 63 years of age, incapacity payments cease when the member or former member reaches aged 65. However, a member or former member injured at any age after 63 years of age may receive incapacity payments for up to 104 weeks.⁷¹
- Seacare: If a worker suffers an injury before reaching 64 years of age, incapacity payments cease when the worker reaches aged 65. However, a worker injured at

⁶⁵ Law Council of Australia, *Submission 46*.

⁶⁶ Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27.

⁶⁷ Law Council of Australia, *Submission 46*; WA Equal Opportunity Commission, *Submission 23*; Olderworkers, *Submission 22*; Safe Work Australia, *Submission 18*.

⁶⁸ Safe Work Australia, *Submission 18*.

⁶⁹ Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 2012, 1689d–1697a (S O'Brien—Minister for Commerce).

⁷⁰ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23.

⁷¹ *Military Rehabilitation and Compensation Act 2004* (Cth) s 121.

any age after 64 years of age may receive incapacity payments for up to 12 months after the date of injury.⁷²

3.63 The original rationale for such restrictions was that once an injured worker reached aged 65 it was assumed that, but for the injury, that was the point at which the worker would ‘retire’.

3.64 During the Second Reading Speech of the Commonwealth Employees’ Rehabilitation and Compensation Bill 1988 (Cth), which introduced age restrictions, the Minister for Social Security justified these restrictions on the basis that the government did not ‘consider it appropriate that employees should continue to receive workers’ compensation benefits after the normal retirement age’.⁷³ In addition, at the time the restrictions were introduced, at 65 years of age workers would have access to superannuation or other forms of income support, such as the Age Pension. The imposition of age restrictions may also have been an attempt to restrict benefits paid under the scheme, as between 1976 and 1986—prior to the introduction of the age restrictions—‘Commonwealth expenditure on workers’ compensation increased by over 700 percent’.⁷⁴

3.65 A number of states and territories have provisions similar to those under the Commonwealth system. However, neither Queensland nor Western Australia has retirement provisions.⁷⁵ The key difference in these jurisdictions is that other restrictions apply, such as to the benefit period and the maximum amount of compensation a worker can receive during the life of the claim in terms of weekly payments for loss of earnings.⁷⁶

Why is there a need for reform?

3.66 A number of other bodies and reviews have considered age restrictions in workers’ compensation. In particular, the Advisory Panel on the Economic Potential of Senior Australians recommended, in its 2011 report, that the ‘federal government work with state and territory governments to amend workers’ compensation regimes (including incapacity payments) to ensure older workers are not disadvantaged’.⁷⁷ The Australian Human Rights Commission (AHRC) also raised a number of concerns in its 2012 report, *Working Past our 60s*.⁷⁸

3.67 In the course of the Inquiry, a range of stakeholders have expressed concern about the existence of age restrictions on the payment of workers’ compensation

72 *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

73 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

74 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

75 On 1 October 2011 amendments to the *Workers’ Compensation and Injury Management Act 1981* (WA) commenced which removed all age-based limits on workers’ compensation.

76 Ibid and *Workers’ Compensation and Rehabilitation Act 2003* (Qld).

77 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27.

78 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012).

benefits. The key concerns include: the potential disincentive to workforce participation for mature age workers if they are not covered; the impending age gap in light of increases in Age Pension age; and the vulnerability of mature age workers where access to workers' compensation is restricted.

3.68 The Age Pension age for women has incrementally increased from aged 60 in 1995 to the current age of 64.5 years. It will align with the qualifying age for men, which is 65 years, from 1 July 2013. From 1 July 2017, the qualifying age for the Age Pension will increase from 65 to 65.5 years. The qualifying age will then rise by six months every two years, reaching 67 years of age by 1 July 2023.

3.69 With the incremental increase in Age Pension age, a mature age worker whose incapacity payments cease at aged 65 may face a gap between the cessation of workers' compensation and eligibility for Age Pension.⁷⁹ In such circumstances, a worker may be forced to access alternative forms of income support such as the Disability Support Pension, superannuation and other forms of private savings. Where this results in a depletion or exhaustion of superannuation or private savings, he or she may then need to access additional income support on a long-term basis, rather than self-funding retirement. This outcome is at odds with government policy objectives aimed at keeping people in work rather than in receipt of the Age Pension, and supporting people into self-funded retirement.

3.70 Stakeholders expressed the view that this situation is of 'serious concern'.⁸⁰ The Law Council of Australia noted 'inequity in the cessation of compensation at age 65 when pension and other entitlements are increasing'.⁸¹ Safe Work Australia noted in its submission that changes to Age Pension age

have the potential to increase disparities between jurisdictional workers' compensation arrangements. Safe Work Australia views addressing age issues in workers' compensation as a priority and is developing policy options to balance reducing barriers for older workers with ensuring that entitlements for the wider work force are not reduced.⁸²

3.71 A related concern expressed by the Advisory Panel on the Economic Potential of Seniors Australians is that limited access to workers' compensation 'increases the vulnerability of older workers, leaving them in a potential situation of being suddenly without an income for an extended time'.⁸³

3.72 However, the Australian Industry Group (Ai Group) has suggested that, rather than acting as a disincentive to remain in, or return to, the workforce, 'the retirement

79 From July 2017, eligibility for the Age Pension will rise to 65.5 years of age then by 6 months every 2 years to age 67 by 2023.

80 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

81 Law Council of Australia, *Submission 46*.

82 Safe Work Australia, *Submission 18*.

83 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27.

provisions act as an incentive to mature age workers to recover and return to work, rather than rely on weekly benefits'.⁸⁴ The Ai Group also noted that

studies suggest that the longer a person is away from work because of a workplace injury, the less likely the person will return back to the workplace. If mature age employees are able to access weekly benefits for an indefinite period of time, this may act as a disincentive to continued participation in the workforce.⁸⁵

3.73 The ALRC recognises the highlighted connection between period of time out of the workplace and the likelihood of returning to work and emphasises the importance of the focus on post-injury rehabilitation and return to work programs.

3.74 The ability of mature age workers to access incapacity payments is likely to ensure that they receive adequate financial support and remain engaged with rehabilitation services and appropriate return to work programs. Where a worker does not receive such payments they may decide to leave the workforce, or abandon attempts to return to work, in order to access superannuation or the Age Pension. The inability to access workers' compensation may therefore, in some circumstances, act as a disincentive for mature age workers to remain in, or return to, the workforce. As a result, there is a need for reform in this area. The ALRC considers a number of possible reform approaches below and welcomes stakeholder feedback on the most appropriate approach.

The pathway to reform

3.75 There are a number of possible approaches to reform at a Commonwealth level to address issues arising from age-based restrictions on workers' compensation. These include:

- the removal of all age-based restrictions;
- the removal of all age-based restrictions, but the imposition of benefit period or amount restrictions; or
- linking retirement provisions to Age Pension age.

3.76 The ALRC supports the principle that there should be no age-based restrictions in Commonwealth workers' compensation legislation. However, there are a number of difficulties and cost implications of such an approach. As a result, it may be necessary to take a more nuanced approach to reform, involving three key components. First, retirement provisions should be legislatively tied to Age Pension age. Secondly, there may be a need to extend the incapacity payment period. Thirdly, workers over Age Pension age who can prove that, had they not been injured, they would have continued to work should potentially receive a supplementary payment.

⁸⁴ Australian Industry Group, *Submission 37*.

⁸⁵ *Ibid.*

Should all age-based restrictions be removed?

3.77 The most substantial approach to reform would involve the removal of all age-based restrictions from Commonwealth workers' compensation legislation. A number of stakeholders supported this approach. For example, the ACTU submitted that it considers age-based restrictions to be 'exclusionary and discriminatory':

Mature age workers should have access to compensation for all injuries that arise out of, or in the course of work, including during their breaks.⁸⁶

3.78 Similarly, National Seniors Australia, COTA and organisations such as Olderworkers supported the removal of such restrictions.⁸⁷ For example, COTA submitted that 'all upper age limits on workers' compensation should be abolished'.⁸⁸ The AHRC has also expressed its support for the removal of age-based restrictions in workers' compensation.⁸⁹

3.79 However, Comcare emphasised that removal of all age-based restrictions altogether, with no other limits in place,

would appear to be outside the generally accepted norms of workers' compensation schemes in Australia. As incapacity payments are the biggest drivers of claim costs, scenarios such as paying incapacity until a person died as they 'never intended to retire at x age and planned on continuing work' could pose substantial scheme sustainability issues.⁹⁰

3.80 Further, the Law Council of Australia noted that the forerunner to the SRC Act

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.⁹¹

3.81 The ALRC welcomes stakeholder feedback on this approach. However, recognising its potential cost implications, the second possible approach to reform may involve the removal of age-based restrictions from workers' compensation legislation, but the imposition of benefit period or amount restrictions. This would ensure that the scheme remains financially viable. A number of stakeholders supported this approach,⁹² and this is the approach taken in Western Australia.

3.82 For example, My Longevity acknowledged that the removal of age-based restrictions 'may require more strict criteria for entitlements to be continued but such

86 ACTU, *Submission 38*.

87 COTA, *Submission 51*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*.

88 COTA, *Submission 51*.

89 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

90 Comcare, *Submission 29*.

91 Law Council of Australia, *Submission 46*.

92 Suncorp Group, *Submission 39*; Government of South Australia, *Submission 30*; My Longevity Pty Limited, *Submission 15*.

an approach allows for relevant individual differences to be taken into account, for which age is an unreliable proxy'.⁹³

3.83 The reasoning underlying the 2011 removal of all age-based limits on workers' compensation in WA, but the imposition of benefit amount restrictions in the form of a 'prescribed amount',⁹⁴ was that:

Apart from addressing the clear inequity of the current arrangements, the removal of the discriminatory provisions will also have a positive impact on the State's economy. The State has an ageing workforce, record low unemployment and a need to maintain a skilled and experienced workforce. There is a need to encourage older workers to remain at work and the State's workers' compensation scheme must adequately reflect this environment. Past relationships between workers' compensation and the aged pension are increasingly irrelevant in an environment where many workers are continuing to work beyond the age at which pension entitlements become available.⁹⁵

3.84 While supporting the removal of age-based restrictions, Suncorp emphasised that it is important

to always consider how increased cover will impact the overall sustainability and affordability of the workers' compensation scheme. To maintain an affordable and sustainable scheme, it is important to regularly review and define benefit periods and amounts, to ensure the scheme is cost effectively supporting injured workers.⁹⁶

Difficulties with removing age-based restrictions

3.85 There are a number of potential difficulties associated with the removal of all age-based restrictions, even with the imposition of benefit period or amount restrictions. These include:

- cost implications, including potential cost blow-out and cost shifting;
- reduction in entitlements for workers with a long-term reduction in their capacity to earn; and
- difficulty in determining and addressing the link between work-related injuries and the ageing process.

3.86 While removal of age-based restrictions would clearly benefit mature age workers, such a move has cost implications. For example, statistics indicate that persons aged 65 years and over record the lowest rate of work-related injuries and illnesses.⁹⁷ However, age groups 35–44 and 65 years and over had the highest average

⁹³ My Longevity Pty Limited, *Submission 15*.

⁹⁴ The maximum 'prescribed amount' for the year beginning 1 July 2012 in WA is \$198,365: *Workers' Compensation and Injury Management Act 1981* (WA) s 5; WorkCover WA, *Variations in Prescribed Amount and Other Workers' Compensation Payments* (2012).

⁹⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 2012, 1689d–1697a (S O'Brien—Minister for Commerce).

⁹⁶ Suncorp Group, *Submission 39*.

⁹⁷ 30 per 1,000 persons (28.3 per 1,000 men and 33.5 per 1,000 women): Australian Bureau of Statistics, *Work-Related Injuries, Australia, 2009–10, Cat No 6324.0* (2010).

total cost of claims for Australian Government premium payers accepted during 2010–11.⁹⁸

3.87 Stakeholders highlighted a number of cost-related concerns. For example, Ai Group submitted that the removal of age-based restrictions in workers' compensation legislation 'would have significant cost implications for employers'.⁹⁹

3.88 The report prepared by PriceWaterhouseCoopers in the context of the removal of age-based restrictions from WA workers' compensation legislation noted that 'the potential cost impacts can take several years to emerge, while individuals reach the affected ages and changes in claimant behaviour occur'.¹⁰⁰

3.89 Comcare submitted that removing all age-based restrictions, but limiting the benefit period 'imposes risks for significant costs shifting to social security benefits and changes the scheme from a long tail to short tail claims model'.¹⁰¹

3.90 The ALRC considers that the removal of age-based restrictions and the imposition of benefit period or amount restrictions may have unintended consequences for other workers receiving incapacity payments under the scheme. In particular, any such restriction may disadvantage workers injured at a young age. Such workers may be reliant on workers' compensation for long periods and therefore may exhaust their entitlements and become reliant on Commonwealth income support, essentially transferring the cost from one Commonwealth scheme to another.

3.91 Comcare echoed this concern, emphasising that such a change would 'represent a significant reduction in the entitlements under the SRC Act for workers with a long-term reduction in their capacity to earn'.¹⁰²

3.92 Finally, a range of stakeholders also expressed concern about the 'difficulty in determining and addressing the link between injuries and the ageing process'.¹⁰³ For example, Suncorp noted that

a significant consideration of an ageing workforce is the growing issue of degenerative conditions, and the subsequent complication of separating these from workplace injuries. This problem will become more prevalent in manual industries and will potentially lead to increased claims management costs, which in turn will impact claims costs and employer engagement with the workers' compensation system.¹⁰⁴

3.93 Overall, the ALRC supports the principle that there should be no age-based restrictions in Commonwealth workers' compensation legislation. However, there appear to be a range of difficulties associated with such a reform. The first is the significant potential cost implications. The second difficulty is, given the likely need to

98 Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers' Compensation Statistics* (2011), 28.

99 Australian Industry Group, *Submission 37*.

100 PriceWaterhouseCoopers, *WorkCover WA: Removal of Age Limits Costings* (September 2011), ii.

101 Comcare, *Submission 29*.

102 *Ibid.*

103 Australian Industry Group, *Submission 37*.

104 Suncorp Group, *Submission 39*.

have accompanying payment period or amount restrictions to address cost concerns, a number of unintended consequences for other workers. Further analysis of these potential approaches to reform, including assessment of cost implications would be useful in guiding reform. The ALRC therefore welcomes stakeholder feedback on this issue and welcomes the contribution to be made by Safe Work Australia and the upcoming Commonwealth review to this discussion.

Linking retirement provisions to Age Pension age

3.94 In light of the above, in the ALRC's view it may be necessary to take a three-tiered approach to reform. This would involve:

- legislatively tying retirement provisions under the SRC Act, MRC Act and Seafarers Act to Age Pension age;
- extending the incapacity payment period under the Seafarers Act, and possibly also under the SRC Act and MRC Act; and
- provision of a supplementary payment in certain circumstances.

3.95 As the qualifying age for Age Pension increases, there will be an increasing gap between the current age restriction of 65 years under workers' compensation and the new Age Pension age. In order to address this issue a number of stakeholders, including Comcare, suggested that retirement provisions in workers' compensation be legislatively tied to Age Pension age.¹⁰⁵ Comcare expressed the view that such a change is 'consistent with the original policy intent'.¹⁰⁶

3.96 The Diversity Council of Australia supported this approach:

given concerns that removing all age-based restrictions could lead to significant increases in costs of premiums to employers, DCA recommends that as a first step, the age at which compensation is no longer payable be pegged to the age of Age Pension eligibility.¹⁰⁷

3.97 This approach was also noted in the terms of reference for the upcoming review of the Commonwealth workers' compensation scheme, which include ensuring that workers' compensation legislation

does not disadvantage workers over the age of 65 and there is no gap between the workers' compensation age limit and the foreshadowed increase to the age pension eligibility age to 67 by 2023.

3.98 Similarly, in April 2012, the Workers Rehabilitation and Compensation (Retirement Age) Amendment Bill 2012 (SA) was introduced to increase age

105 Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; Comcare, *Submission 29*.

106 Comcare, *Submission 29*.

107 Diversity Council of Australia, *Submission 40*.

restrictions under South Australian workers' compensation legislation to reflect future changes to Age Pension age.¹⁰⁸

3.99 In order to achieve consistency across Commonwealth workers' compensation legislation with respect to age restrictions, the ALRC suggests that the SRC Act, MRC Act and Seafarers Act should be amended to provide that retirement provisions under these Acts be legislatively tied to the age at which the worker would, subject to satisfying other requirements, be eligible to receive the Age Pension.

3.100 The ALRC anticipates these reforms operating in practice as follows. From 1 July 2017 there would be incremental increases in the age restrictions under Commonwealth workers' compensation legislation. Ultimately, under the SRC Act and MRC Act, if a worker suffered an injury before reaching 65 years of age, incapacity payments would cease when the worker reached aged 67. However, a worker injured at any age after 65 years may receive incapacity payments for up to 104 weeks. Under the Seafarers Act, if a worker suffered an injury before reaching 66 years of age, incapacity payments would cease when the worker reached aged 67. However, a worker injured at any age after 66 years of age may receive incapacity payments for up to 12 months. The potential extension of these payment periods is considered below.

3.101 Any amendment should only operate to the advantage of workers. For example, it should not operate to disadvantage women in the period prior to 1 July 2013, at which time the Age Pension ages for men and women align.

3.102 Other benefits, such as access to medical treatment, would remain unaffected. This includes 'access to medical treatment, attendant care, household service and permanent impairment lump sum, which continue for the life of the compensation claim'.¹⁰⁹

3.103 Comcare has noted that this option would

increase Comcare's outstanding claims liabilities under the SRC Act, which will reduce Comcare's reported funding ratio and require premium increases to fund the additional liability.¹¹⁰

3.104 While noting the potential increase in premiums associated with such a change, the ALRC considers this approach appropriately balances cost and equity considerations.

108 Workers' Rehabilitation and Compensation (Retirement Age) Amendment Bill 2012 (SA). See also Government of South Australia, *Submission 30*.

109 Comcare, *Submission 29*.

110 Ibid.

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.

Should the incapacity payment period be extended?

3.105 Another issue which arises is the sufficiency of the incapacity payment period for those workers who suffer an injury any age after age 63 under the SRC Act and MRC Act, or age 64 under the Seafarers Act.

3.106 Under the SRC Act and MRC Act, if a worker is injured at any age after age 63 they are entitled to a maximum of 104 weeks incapacity payments. Under the Seafarers Act, if a worker is injured at any age after age 64 they are entitled to a maximum of 12 months incapacity payments.

3.107 In order to ensure consistency between Commonwealth legislation and to ensure there are no barriers to persons wishing to work beyond Age Pension age doing so, the ALRC proposes that the Seafarers Act be amended to provide that workers who are injured at any age after two year prior to Age Pension age (rather than one year) should receive incapacity payments for up to 104 weeks.

3.108 As outlined in Chapter One, there are difficulties in defining the line between working age and retirement. In recognition of the changing nature of work and the ‘work-retirement continuum’, the ALRC is interested in comments on whether it is appropriate and necessary to amend the SRC Act, MRC Act and Seafarers Act to provide that workers who are injured at any age after two years prior to Age Pension age should receive incapacity payments for a period longer than 104 weeks.

3.109 The ALRC is conscious of the concerns expressed by stakeholders that ‘extension of coverage would impact workers’ compensation insurance premiums’.¹¹¹ However, SRCC statistics indicate that for premium payers’ claims accepted in 2010–11, in only 4% of claims for injury and 10% for disease was 26 or more weeks of time lost to date. These figures were 1% and 2% respectively for licensed self-insurers.¹¹² In terms of mature age workers, the 2009 Legislative Review of the WA workers’ compensation scheme indicated that ‘in the three years to 2007–08 only 0.02% of claims involved a worker aged more than 65 years receiving weekly compensation’ for the full year to which they were entitled.¹¹³

3.110 Any additional period of incapacity payment would need to be accompanied by ongoing rehabilitation and return to work support to ensure the focus is on increasing

¹¹¹ Suncorp Group, *Submission 39*.

¹¹² Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers’ Compensation Statistics* (2011), 45.

¹¹³ WorkCover WA, *Workers’ Compensation and Injury Management Act 1981 (WA) Legislative Review* (2009), 57.

workforce participation, rather than simply providing additional workers' compensation benefits to injured mature age workers.

A supplementary payment?

3.111 The third step in the ALRC's suggested reform approach—in addition to ensuring that retirement provisions are legislatively tied to Age Pension age and the potential extension of the incapacity payment period, involves a supplementary payment. In light of the ALRC's focus on capacity rather than age, the ALRC seeks stakeholder feedback on the appropriateness of introducing a supplementary payment for mature age workers.

3.112 Some Australian jurisdictions have legislation which provides that workers over age 65 years are entitled to a weekly supplementary payment, after normal incapacity payments have ceased, if the worker can prove that they would have continued working after the age of 65, had they not been injured.¹¹⁴ The supplementary amount is generally based on the amount a person receiving the Age Pension is eligible to earn before the pension is affected.

3.113 The ALRC is interested in stakeholder feedback on whether a similar provision should be introduced at a Commonwealth level and, if so, how it should operate. For example, should workers over age 67 be entitled to a weekly supplementary amount after normal incapacity payments have ceased, if the worker can prove that they would have continued working after the age of 67, had they not been injured?

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.

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?

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)?

114 See, eg, *Workers' Rehabilitation and Compensation Act 1988* (Tas) s 87. See also *Workers' Compensation and Injury Management Act 1981* (WA) prior to its amendment to remove all age-based restrictions.

Jurisdictional inconsistency

3.114 Each jurisdiction currently has its own workers' compensation arrangements. This has 'resulted in numerous inconsistencies in the operation and application' of these arrangements.¹¹⁵

3.115 A range of bodies, including the AHRC have emphasised that 'there is a need for a nationally consistent workers' compensation framework that provides coherence and fairness' for those who work beyond the age at which they may be eligible for Age Pension.¹¹⁶ The ACTU emphasised that it supports the 'development of nationally consistent workers' compensation standards which are available to all members of the workforce regardless of the retirement age (including the self-employed)'.¹¹⁷

3.116 Similarly, Suncorp submitted that it 'believes that nationally consistent reform is important to improve the way in which all Australians are protected at work' and particularly noted inconsistent coverage of volunteers.¹¹⁸

3.117 In order to progress reform, the AHRC has recommended that 'State and Territory governments should now review the age limits on their workers' compensation schemes with the view to removing them'.¹¹⁹ The Law Council of Australia has suggested that 'it would be appropriate for the Commonwealth to take a "leadership" role in attempting to standardise entitlements across State, Territory and Commonwealth jurisdictions'.¹²⁰

3.118 However, the Government of South Australia observed that while the ideal is to have consistent provisions in place across jurisdictions, this would 'have significant cost impacts for workers' compensation authorities'.¹²¹

3.119 The functions of Safe Work Australia include the development of: national policy relating to workers' compensation; proposals relating to harmonising workers' compensation arrangements across the Commonwealth, states and territories; and national workers' compensation arrangements for employers with workers in more than one of those jurisdictions.¹²² The ALRC acknowledges the difficulties associated with harmonising workers' compensation legislation but, in light of Safe Work Australia's functions, and the importance of clarity and fairness for workers with respect to their entitlements, supports consistency across jurisdictions.

115 Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (March 2011), 9.

116 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

117 ACTU, *Submission 38*.

118 Suncorp Group, *Submission 39*.

119 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

120 Law Council of Australia, *Submission 46*.

121 Government of South Australia, *Submission 30*.

122 *Safe Work Australia Act 2008* (Cth) s 6, items 1 and 11.

Volunteer coverage

3.120 In addition to concerns about jurisdictional inconsistency with respect to age restrictions under workers' compensation, stakeholders also expressed concerns about inconsistency with respect to the coverage of volunteers.

3.121 A significant number of mature age people participate in voluntary work. Australian Bureau of Statistics (ABS) figures indicate that 32.5% of Australians who volunteer are aged 55 years and over.¹²³ However, there is no consistent coverage of volunteers under workers' compensation schemes. Volunteers in some jurisdictions are eligible, either because they are deemed to be workers under the relevant legislation, or the legislation specifically provides compensation for certain categories of volunteers.

3.122 At a Commonwealth level, the SRC Act deems a number of classes of people to be employees of the Commonwealth for the purposes of being eligible to receive workers' compensation, provided they perform certain duties.¹²⁴ It also allows for the coverage of volunteers, as declared by the Minister.¹²⁵ Comcare indicated that there are a number of declarations made under the SRC Act covering volunteers, for example:

persons who, under the control or direction of a Commonwealth officer, take part, without receiving any remuneration (excluding payment of expenses incurred), in search and rescue activities or training exercises carried out by the Department of Infrastructure and Transport or the Civil Aviation Safety Authority, and persons who, under the control or direction of a Commonwealth officer, render services, without receiving remuneration (excluding payment of expenses incurred), in an institution or for a service conducted by the Department of Veterans' Affairs.¹²⁶

3.123 Under the MRC Act, the Defence Minister may make a similar determination.¹²⁷ The Seafarers Act does not include any category of deemed worker.

3.124 The issues paper released as part of the review of the SRC Act raises questions about the definition of 'employee' under the SRC Act.¹²⁸ The ALRC will consider the outcome of the review in making recommendations in the final Report. However, there are two key action areas under the National Plan relevant to volunteers in the context of this Inquiry. First, to 'investigate and report on options for nationally consistent definitions for the purposes of workers' compensation' and, secondly, to 'investigate and report on issues of concern for multi-state employers'.¹²⁹ Given the inconsistent coverage of volunteers and the focus of this Inquiry on both paid employment and 'other productive work', including volunteering, the ALRC suggests that the Safe Work Australia SIG should ensure this matter is considered in the course of its work in this area.

123 Australian Bureau of Statistics, *General Social Survey: Summary Results, Cat No 4159.0* (2010).

124 *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5(2), (6), (15).

125 *Ibid* s 5(6).

126 Comcare, *Submission 29*.

127 *Military Rehabilitation and Compensation Act 2004* (Cth) s 8.

128 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

129 *National Workers' Compensation Scheme Action Plan 2010–2013*.

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.

Workers’ compensation and superannuation

3.125 Under the ‘superannuation-offset provisions’ of the SRC Act, the incapacity payments of workers are affected by their receipt of superannuation.¹³⁰ The effect of the retirement income system and, in particular, superannuation, on workforce participation is considered in Chapter Eight of this Discussion Paper. However, in the context of workers’ compensation, the Law Council of Australia expressed concern about the potential disincentive that the treatment of superannuation payments in the calculation of incapacity payments may create:

the Commonwealth scheme is the only scheme 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. At a policy level, superannuation entitlements ought not to have any effect on compensation entitlements however stakeholder comment is sought on whether it creates a barrier to workforce participation and what changes could be made.¹³¹

3.126 Conversely, the Department of Veterans’ Affairs indicated that, upon separation from the Australian Defence Force, superannuation payments are offset against MRC Act incapacity payments, and expressed the view that ‘this is consistent with the principle that the Government should not make duplicate income maintenance payments to the same person through superannuation and compensation’.¹³²

3.127 In the issues paper released as part of the review of the SRC Act, a number of broad questions were asked about whether the superannuation-offset provisions should be modernised, simplified or amended.¹³³ The ALRC is interested in specific stakeholder feedback on whether the treatment of superannuation payments in the calculation of incapacity payments under the Commonwealth workers’ compensation system creates a barrier to workforce participation for mature age workers.

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?

130 *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 20, 21, 21A.

131 Law Council of Australia, *Submission 46*.

132 Department of Veterans’ Affairs, *Submission 52*.

133 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012), 21.

4. Insurance

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Summary

4.1 This chapter examines some of the key concerns with respect to mature age workers and insurance that emerged during the course of this Inquiry. These concerns include: the availability of, and information about, insurance products for mature age workers; age-based limitations and premiums for some insurance products; and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing occurs.

4.2 The ALRC is of the view that the Insurance Reform Advisory Group (IRAG) is the most appropriate body to consider many of these matters in more detail. Accordingly, the ALRC proposes that IRAG examine mechanisms for reviewing age-based underwriting and pricing processes and ensuring reliance on relevant and appropriate actuarial and statistical data. The ALRC also suggests that IRAG consider options for the development of a central information source to provide clear information about available insurance products and discuss the design of comprehensive and affordable insurance products tailored to meet the needs of mature age persons. The ALRC also asks whether the General Insurance Code of Practice or similar industry standards or codes might usefully play a role in this area.

4.3 The second part of this chapter examines the operation of the insurance exemption under the *Age Discrimination Act 2004* (Cth) (ADA). The ALRC asks

whether, if retained in the course of the consolidation of Commonwealth anti-discrimination law, the exemption could be amended, for example, to limit its application. The ALRC also asks whether the powers of the Australian Human Rights Commission (AHRC) to request actuarial information from insurers are sufficient. The ALRC proposes that the AHRC and the insurance industry should develop guidance material about the application of any insurance exemption under the ADA or consolidated discrimination legislation.

Insurance in Australia

4.4 Insurance is a ‘risk transfer, loss-spreading arrangement’.¹ Its purpose is to distribute risk through providing a mechanism by which individuals and organisations purchase, by way of a premium, insurance products to mitigate that risk. Risk is then transferred to the insurer which indemnifies them against future events that may cause loss.

4.5 There are three key categories of insurance in Australia: health, life and general insurance. The focus of this Inquiry is on life and general insurance. Life insurance encompasses a variety of products that provide payment upon death or injury. General insurance encompasses cover purchased by individuals—such as travel insurance; and that purchased by organisations—including product and public liability and professional indemnity insurance.

4.6 There are several key insurance concepts of relevance to the discussion in this chapter. These include:

- insurance premium—the amount paid by an insured in return for the insurer undertaking to cover the agreed risks or events;
- underwriting—the process by which individual applications for insurance are assessed; and
- reinsurance—a form of insurance for insurers that allows the original insurer to ‘distribute its potential liability by giving off parts of its risk to another insurer (the reinsurer) with the object of reducing the amount of its possible loss’.²

Legislative and regulatory framework

4.7 At the Commonwealth level, the insurance industry is governed by two primary pieces of legislation—the *Insurance Act 1973* (Cth) and the *Insurance Contracts Act 1984* (Cth).³ Chapter 7 of the *Corporations Act 2001* (Cth) governs the regulation of insurance intermediaries such as agents and brokers.

1 G Pynt, *Australian Insurance Law: A First Reference* (2nd ed, 2011), 4.

2 Thomson Reuters, *The Laws of Australia* (2009) *Insurance*, 22.1.260.

3 Part V of the *Insurance Contracts Act 1984* (Cth) provides for a number of prescribed classes of insurance contract. Prescribed contracts are outlined in the *Insurance Contracts Regulations 1985* (Cth) and encompass a range of insurance policies, including sickness and accident insurance and travel insurance. The Regulations outline the minimum requirements for such policies, for example the minimum sum insured and the required risks or insured events covered by the contract.

4.8 The general insurance industry in Australia is regulated by a prudential regulator and a corporate regulator. The prudential regulator is the Australian Prudential Regulation Authority (APRA), which is responsible for general administration of the *Insurance Act*.⁴ APRA has the authority to set prudential standards for the general insurance industry and has developed a detailed framework of prudential standards and practice guides. The corporate regulator is the Australian Securities and Investments Commission (ASIC), which is responsible for, among other things, the general administration of the *Insurance Contracts Act*, monitoring and promoting market integrity and consumer protection and licensing.⁵

4.9 The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia. The ICA oversees the General Insurance Code of Practice—a self-regulatory code that binds all general insurers who are signatories to it.⁶ The Financial Services Council (FSC) is the industry association for the financial services sector, which includes the life insurance industry. Compliance with the FSC Code of Ethics and Code of Conduct is compulsory for all FSC members.⁷

4.10 Another key legislative regime with bearing on the insurance industry is the Commonwealth anti-discrimination regime, under which there are a number of exemptions for insurance. The ADA provides that insurers may discriminate on the grounds of age in offering an insurance policy, or the terms or conditions upon which such a policy is offered, if certain conditions are satisfied.⁸ The conditions are satisfied if the discrimination is:

- based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- reasonable having regard to the matter of the data and other relevant factors; or
- in a case where no such actuarial or statistical data is available, and cannot reasonably be obtained, reasonable having regard to any other relevant factors.⁹

4.11 Section 54 of the ADA provides power for the AHRC and its President to require the production of actuarial or statistical data where a person has acted in a way that would, apart from the above exemptions, be unlawful. However, much of the data relied upon by insurance companies in the underwriting and pricing processes is not publicly available.

4.12 As outlined in Chapter 1, the Australian Government is currently conducting a process to consolidate Commonwealth anti-discrimination legislation. In the course of the consolidation the Government is considering the exemption which may be invoked

4 *Australian Prudential Regulation Authority Act 1998* (Cth).

5 *Australian Securities and Investments Commission Act 2001* (Cth).

6 Insurance Council of Australia, *General Insurance Code of Practice*.

7 Financial Services Council, *Standard No 1, Code of Ethics and Code of Conduct*.

8 *Age Discrimination Act 2004* (Cth) s 37.

9 *Ibid* s 37(3).

by insurers. Submissions from a number of stakeholders were received on this issue.¹⁰ The ALRC will consider any changes to the insurance exemption arising from the consolidation process following the release of the exposure draft legislation expected later in 2012. A number of questions about the exemption are raised in the second part of this chapter.

Insurance Reform Advisory Group

4.13 In addition to the legislative and regulatory structures outlined above, in April 2011, an IRAG was established. The purpose of IRAG is to bring together peak industry bodies, consumer and government representatives to exchange views ‘about issues in the insurance field that should be considered for reform—be it legislative change or changes to regulatory or industry practices’.¹¹

How does insurance affect mature age workforce participation?

4.14 In its submission to this Inquiry, Suncorp expressed the view that it ‘has not observed that age-based limits and premiums have any noticeable influence over workforce participation rates’.¹² Suncorp went on to argue that:

in the unlikely event that the underwriting or pricing of insurance products does negatively influence workforce participation, Suncorp would contend that this influence is likely to be appropriate in the circumstances.¹³

4.15 It is recognised however, that ‘the extent to which age-based limitations and premiums influence mature age workforce participation will vary on the nature of each particular product’.¹⁴ Indeed, a number of other stakeholders have submitted that access to insurance poses difficulties for mature age workers. It was submitted that the imposition of age limits and the inclusion of age in the underwriting and pricing process, which may result in increased premiums, ‘act as a disincentive to employment and other productive work’.¹⁵

4.16 The key barriers for mature age workers appear to arise in relation to income protection insurance, travel insurance and workplace insurance. Each of these and their effect on mature age participation in the workforce is discussed below.

Income protection insurance

4.17 Income protection insurance (otherwise known as personal accident, sickness and disability insurance) protects the insured in the event of being unable to work due

10 See, eg, Insurance Council of Australia, *Submission to Consolidation of Commonwealth Anti-Discrimination Laws*, 1 February 2012.

11 InsuranceNEWS, *Shorten Sets up Another Insurance Review Body* <www.insurancenews.com.au> at 18 April 2011. See also The Hon Bill Shorten, ‘Launch of the Report Reducing the Risks: Improving Access to Home Contents and Vehicle Insurance for Low-Income Australians,’ (Paper presented at Brotherhood of St Laurence, Fitzroy, 9 June 2011).

12 Suncorp Group, *Submission* 39.

13 Ibid.

14 Ibid.

15 COTA, *Submission* 51. See also National Seniors Australia, *Submission* 27; The South Australian Equal Opportunity Commission, *Submission* 11.

to sickness or injury (the ‘prescribed risk’). The benefit is provided by way of regular periodic payments—a wage substitute.

4.18 Overall demand for income protection insurance in Australia is ‘low across all age groups’ and 69% of Australians choose not to take out income protection insurance.¹⁶ However, income protection insurance is of particular importance to specific groups of workers such as sole traders, where workers’ compensation is not available.

4.19 Significantly, with some exceptions, income protection insurance is unavailable to persons aged over 65.¹⁷ This leaves those persons who choose to continue to work after that age unable to cover themselves in this way in the event of illness or injury. In addition, some income protection policies have a limited benefit period and only provide a wage subsidy for limited time spent out of the workforce (generally two or five years).¹⁸

4.20 These limitations have implications for mature age workers who choose to work past aged 65. These also affect those who are forced to exit the workforce and upon the expiry of their benefit period must attempt to re-enter employment, particularly in light of discrimination faced by people seeking employment from the age of 45.¹⁹ This, compounded by illness or injury and a substantial period out of the workforce, presents a barrier to the workforce participation of mature age workers.

4.21 In addition, premiums for cover by income protection policies generally increase with age. These gaps in the availability and affordability of income protection insurance for workers aged over 65 may mean workers must rely on retirement savings or the Age Pension for any illness or injury sustained through work. This may act as a disincentive to workforce participation. It may also discourage mature age workers from embarking on self-employed enterprises as a transitional phase to retirement.

Travel insurance

4.22 Travel insurance provides for the payment of agreed sums to cover losses or expenses, including medical expenses, incurred in the course of travel. Age limitations and, in certain circumstances, higher insurance premiums, are placed on some travel insurance policies. Such limitations and premiums differ according to product and insurer,²⁰ however where they exist may exclude insurance for mature age persons. This is reinforced by the findings of a 2012 survey by National Seniors Australia and COTA Australia (COTA) on ageism in travel insurance, which found that:

16 Suncorp Group, *Submission 39*.

17 Aon Hewitt, ‘Time for a Change in Executive Remuneration Design?’ (2011) 1(2) *HR Connect Australia*

18 Income Protection Direct, *Income Protection Quotes* (2012) <www.incomeprotectiondirect.com.au/income-protection-insurance/compare-quotes> at 19 April 2012.

19 Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010).

20 For example, correspondence received from the Insurance Council of Australia outlined a range of travel insurance policies available to mature age people: Insurance Council of Australia, *Correspondence*, 29 August 2012.

- almost a third of respondents (32%) reported that they have had to pay higher travel insurance premiums because of their age;
- five per cent of respondents reported that they had been refused travel insurance because of their age; and
- almost two-thirds of respondents (63%) have difficulty in understanding how age restrictions operate after reading through information provided by insurers in Product Disclosure Statements, brochures and websites.²¹

4.23 The higher cost, or unavailability, of travel insurance for these mature age persons may act as a barrier to work where a person is required to travel as part of his or her employment or wishes to volunteer, for example overseas or interstate.

4.24 Travel insurance for mature age persons is an issue specifically being considered by IRAG.²²

Insurance and volunteers

4.25 Personal accident and public liability insurance is generally taken out by organisations that have volunteers. The ALRC has heard that age limitations and age-related premiums on insurance can restrict volunteering opportunities for mature age people.²³ This is highlighted by the following case study:

In one case, a group of retired workers in a small country town offered to assist the state government to keep their railway station open by volunteering to build up the existing platform to the required height. However, their offer of voluntary assistance was refused because, due to their age, they could not be covered by the government's insurance provisions.²⁴

4.26 The Tasmanian Anti-Discrimination Commission has released an issues paper, as part of its current inquiry into volunteers, insurance and age discrimination, in which it notes that:

community organisations have argued that age discrimination in the provision of volunteer insurance can have a negative impact on the community, volunteer organisations, and individuals, by restricting volunteer opportunities for younger and older people.²⁵

21 The data for the survey was gathered from a survey of 7,500 National Seniors members and approximately 6,100 COTA members. Of survey respondents, 12% travelled within Australia and 6% travelled overseas for business or volunteer work: National Seniors Australia and COTA, *Ageism in Travel Insurance 2012 Survey Report* (2012).

22 A number of reports prepared for IRAG are publicly available. See, eg, *Ibid*.

23 See, eg, Volunteering Victoria, *Submission to the Inquiry into the opportunities for participation of Senior Victorians* (2011); Volunteering Australia, *Submission to the Core Consultative Group on Age Discrimination* (2002); Z Gill, *Older People and Volunteering* (2006), produced for the Office of Volunteers.

24 Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination* (2000), 84.

25 Office of the Anti-Discrimination Commissioner Tasmania, *Volunteers, Insurance and Age: Investigation Issues Paper* (2011), 2.

4.27 The impact of this is two-fold: it curtails the ability of organisations to benefit from the skills and experience of mature age volunteers; and acts as a barrier to volunteering and remaining engaged in productive work.

4.28 While the ICA recognised that some age limits in available insurance cover remain, it highlighted that

Volunteering Australia reports that access to ‘affordable insurance cover has improved over the past decade and there is evidence that access to insurance is not a significant barrier to volunteerism in formal not-for-profit agencies’.²⁶

4.29 However, in the same report Volunteering Australia concluded that

the changing nature of volunteering and the trend towards less formal, episodic and more mobile volunteer workforce may increasingly expose volunteers to situations where they find themselves unprotected by legislation or insurance coverage.²⁷

4.30 According to the ICA, the ‘changing nature and diversity of volunteering activities can present challenges to the assessment of the relevant level of risk to be covered’ but that there are a variety of volunteer insurance products available.²⁸ For example, Volunteering Australia and AON have developed a *Volunteers Vital Pack*—a package of insurance to cover volunteer organisations. However, these products include some age-related limitations.²⁹

4.31 The ICA acknowledged that

surveys have shown many volunteer organisations find insurance complex and there is a widespread lack of awareness of the level of insurance cover held by the volunteer organisation.³⁰

4.32 Volunteering Australia has also called for

greater harmonisation of Commonwealth and State legislation to ensure that all volunteers, regardless of the circumstances of their volunteer effort, enjoy universal protection against loss.³¹

4.33 The ALRC will consider any recommendations made by the Tasmanian Anti-Discrimination Commission in this area. However, at this stage the ALRC considers the most appropriate approach to insurance issues concerning volunteers is the systemic one proposed by the ALRC involving IRAG and the insurance exemption.

Insurance products and processes

4.34 A number of key tensions arise in the context of insurance, primarily between the importance of risk assessment and pricing that reflects the risk, and the insurance needs of groups within the community such as mature age workers.

26 Insurance Council of Australia, *Submission 21*.

27 Volunteering Australia, *Issues Related to Insurance Protection for Volunteers*, Issues Paper (2010), 11.

28 Insurance Council of Australia, *Submission 21*.

29 Volunteering Australia and AON, *Volunteers Vital Pack: Summary of Insurance Cover for Charitable, Not For Profit Voluntary Organisations and Organisations that Involve Volunteers* (2011).

30 Insurance Council of Australia, *Submission 21*.

31 Volunteering Australia, *Issues Related to Insurance Protection for Volunteers*, Issues Paper (2010), 11.

4.35 There is a broad suite of underwriting and pricing factors, including an applicant's age, considered relevant to assessing risk.³² The ICA emphasises that 'a lawful ability to reasonably differentiate on the basis of risk, is essential to the provision of affordable general insurance for the community'.³³ Throughout this Inquiry insurers have emphasised that any restriction on the use of age as an underwriting factor would have adverse consequences for the insurance market. In particular, insurers have argued that such consequences may affect insurance offerings and premiums.³⁴ In its submission, Suncorp emphasised the highly competitive nature of the insurance industry and noted that

the ability to target products and premiums to specific demographics—including age-based demographics—allows insurers to bring competitive offers to market. Regulation or restriction on the use of age as an underwriting factor, above what is already in place under anti-discrimination legislation, would significantly reduce competition in the market and lead to poor market performance.³⁵

4.36 However, as outlined above, a number of stakeholders have also expressed a range of concerns with respect to mature age workers and insurance.³⁶

4.37 The ALRC recognises that there is a need to improve the availability and affordability of insurance for mature age workers and to prevent discrimination against this group in insurance. However, in doing so there is a need to ensure that legislative and regulatory frameworks do not inadvertently hinder legitimate risk assessment by insurers.

4.38 To address concerns about specific types of insurance—such as income protection, travel and workplace insurance—there is a need for systemic reform of some aspects of the insurance industry. The focus of such reform is: the availability of, and information about, insurance products for mature age workers; age-based limitations on some insurance products; and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing processes occur.

4.39 Many of the concerns highlighted by stakeholders require complex and multifaceted solutions. Such solutions may not involve legislative or regulatory changes, but are essentially market-based issues that will require cooperation between the insurance industry, seniors organisations, consumer groups and the Australian Government. IRAG is a key forum at which each of these stakeholders are represented. The ALRC therefore considers that IRAG is the most appropriate body to consider a number of the systemic reforms outlined in this chapter and accordingly makes two key proposals directed at this group.

32 Suncorp Group, *Submission 39*; Insurance Council of Australia, *Submission 21*.

33 Insurance Council of Australia, *Submission 21*.

34 Suncorp Group, *Submission 39*.

35 Ibid.

36 COTA, *Submission 51*; National Seniors Australia, *Submission 27*; The South Australian Equal Opportunity Commission, *Submission 11*. See also Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012).

4.40 The following sections of this chapter outline issues that stakeholders raised with the ALRC. The ALRC suggests that IRAG further consider these areas for reform in its work. The specific areas for reform—access to information about insurance products; age limits and the need to redesign insurance products; and underwriting and actuarial data—are outlined in turn below.

Access to information about insurance products

4.41 One of the difficulties for mature age workers, aside from the age-related barriers and limitations on insurance products themselves, is accessing information about available insurance products. While there are a range of insurance products available for mature age workers, many have differing age restrictions, coverage and premiums.³⁷

4.42 A number of comments from respondents received as part of the 2012 survey by National Seniors Australia and COTA on ageism in travel insurance noted difficulties in understanding and comparing insurance policies:

The schedules of what is covered and what is not are very difficult to compare as the insurance companies tend to use different and confusing language to describe the same thing.³⁸

4.43 Another respondent suggested that ‘it would be useful to have a website for travel insurance where one specifies their requirements and a list of qualifying requirements are displayed’.³⁹

4.44 While mature age workers, like all consumers, have a level of individual responsibility for sourcing and comparing insurance policies, if lack of awareness is contributing to perceptions of age discrimination in insurance, the development of information sources is one necessary aspect of reform. Consequently, as a preliminary reform step, the ALRC suggests that the insurance industry, seniors organisations, consumer groups and the Australian Government should work cooperatively to establish central information sources about insurance for mature age workers.

4.45 There are a number of existing sources and initiatives in this area including *MoneySmart*,⁴⁰ and the Consumer Referral Service launched by the ICA on 1 July 2012 that provides contact details for insurers, including a listing for ‘Seniors Travel Insurance’.⁴¹

4.46 These sources could be utilised, or contribute to the development of a new central information portal or source, in order to provide mature age people with clear

37 See, eg, Insurance Council of Australia, *Correspondence*, 29 August 2012 which provided an overview of some insurance products available for mature age people.

38 National Seniors Australia and COTA, *Ageism in Travel Insurance 2012 Survey Report* (2012), 24.

39 Ibid.

40 ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 30 August 2012.

41 Insurance Council of Australia, *Find an Insurer* <www.findaninsurer.com.au> at 13 September 2012. The service is similar to the British Insurance Brokers’ Association ‘Find a Broker’ service and website: British Insurance Brokers’ Association, *Find a Broker* <www.biba.org.uk/ConsumerHome.aspx> at 13 September 2012.

and simple information about available insurance products. This information should extend beyond the provision of contact details for insurers. Any such guide should be available online and in hardcopy and be reviewed regularly.

4.47 The ALRC also suggests that insurers ensure appropriate training of employees in their insurance distribution networks about engaging with mature age people and the range of products available for them. There may also be a need for peak volunteering organisations to ensure employees who manage volunteers are provided with information about insurance and mature age workers, including coverage and available products.⁴²

Age limits and the need to redesign insurance products

4.48 Another key component of addressing barriers to workforce participation for mature age persons arising from insurance is the examination of age limits on insurance offerings, as well as the need to redesign insurance products to suit the needs and circumstances of mature age workers.

Reconsidering age limits

4.49 Age limits on insurance products currently offered in the Australian market for mature age workers differ, but tend to range from 65 to 70, and in some cases older.⁴³ The South Australian Equal Opportunity Commission submitted that age limits in insurance products

hail from a time when the 65 retirement age was ‘set in stone’. With the retirement age due to increase, and the better health of Australians leading to extended participation in the workforce, the 65 age limit imposed is no longer relevant. It prevents capable people from participating fully as a member of society.⁴⁴

4.50 The AHRC has expressed the view that ‘insurance companies should be encouraged to extend their coverage of workers based on health and wellbeing measures and not on age limits’.⁴⁵

4.51 Some insurers ‘have already lifted their age limits’.⁴⁶ For example, Suncorp submitted that it is ‘committed to increasing the maximum age of cover as soon as practicable’ and that ‘recent review of Suncorp’s age limits has shown that IP insurance is sustainable in some low risk occupations, and as a result, cover has been extended to age 70’.⁴⁷ However, insurers have also emphasised the importance of risk-based underwriting and pricing, including on the basis of age. Many warned that any move to prohibit consideration of age as a factor would have serious consequences for the insurance industry.

42 Insurance Council of Australia, *Submission 21*.

43 Insurance Council of Australia, *Correspondence*, 29 August 2012.

44 The South Australian Equal Opportunity Commission, *Submission 11*.

45 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012).

46 Ibid.

47 Suncorp Group, *Submission 39*.

4.52 In circumstances where age limits differ between insurers and products, the ALRC suggests that IRAG consider mechanisms for reviewing age-based insurance pricing and underwriting across the industry. In addition, given the effect of increased demand for insurance products on competition and the insurance pool, ‘financial education, increased information provision (both to consumers and insurers) and encouraging insurance uptake’,⁴⁸ approaches supported by stakeholders such as the AHRC and Suncorp, may also be worth considering.

4.53 In circumstances where insurers continue to consider age a vital factor in underwriting and pricing processes, there is a need to ensure that decisions considering age are based on relevant and appropriate actuarial and statistical information available to consumers, an approach discussed in more detail below.

Redesign of insurance products

4.54 Throughout the Inquiry the ALRC has heard concerns from stakeholders about the design of insurance products available to mature age workers. For example, the design of travel insurance was raised by stakeholders as problematic where a number of pre-existing medical conditions (common in mature age persons) limit access to travel insurance, necessarily precluding basic cover for luggage and personal effects.

4.55 Insurers have submitted that it is not necessary to resort to regulation with respect to insurance offerings, as

mature age workers represent a significant market opportunity for insurers and Suncorp is confident competition will ensure concerns surrounding age-based limitations and premiums are resolved as soon as practicable.⁴⁹

4.56 The ICA noted that

insurers constantly review the market and reassess opportunities for expansion of their business within their particular business objectives. It is therefore natural in a free market economy that insurers offer policies targeted at particular groups. Even with the best of policy goals in mind, requiring uniform policy offerings, for example in the case of seniors, would distort competition and significantly impact insurers’ prudential requirements.⁵⁰

4.57 The ALRC recognises the nature of the insurance market and the importance of ‘risk appetite’ for insurance offerings. However, in order to ensure there are a range of insurance products available to mature age workers with reasonable premiums, the ALRC suggests that IRAG should discuss appropriate product design and redesign, balancing the need for risk assessment with the potentially discriminatory effects for mature age people of existing insurance offerings and design of products. In particular, IRAG should examine the design and redesign of comprehensive and affordable insurance products tailored to the needs and circumstances of mature age people.

48 Ibid.

49 Ibid.

50 Insurance Council of Australia, *Submission 21*.

Underwriting and actuarial data

4.58 In order to ‘assess risk factors and determine ... risk appetite’, insurers ‘may consider available reliable data (such as the Australian Bureau of Statistics and the Australian Institute of Health and Welfare) and their claims book experience’.⁵¹

4.59 Aside from complaint processes under anti-discrimination legislation or formal judicial review, the current system offers no independent oversight of whether insurers are basing decisions on reasonable actuarial or statistical data. There are a number of possible approaches to addressing this issue in light of stakeholder concerns.

4.60 For example, IRAG may wish to consider the establishment of some body or mechanism by which this information could be considered independently. This could, for example, involve consideration of whether the Government should establish a body or group responsible for providing advice to the insurance industry on the relevance and use of age in insurance underwriting and pricing. This is an approach similar to the one recommended by the ALRC in *Essentially Yours*, ALRC Report 96, with respect to insurance and genetic information.⁵² The data collection role of any such body could draw upon the existing data collection functions of APRA or the Institute of Actuaries.

4.61 Another possible approach may involve the quarterly publication of a report by insurers outlining their claims experience based on age and other relevant data upon which their ongoing reliance on the exemption is based. Any such requirement would need to ensure commercially sensitive data was protected. By way of example, the Association of British Insurers (ABI) and the British Insurance Brokers’ Association have entered into a non-statutory agreement with the UK government which requires ABI to publish aggregate data for the industry as a whole indicating how age is used when assessing risk and pricing travel and motor insurance products.⁵³ The ALRC suggests that IRAG could consider a similar agreement and requirement in Australia. A number of alternative approaches are discussed below in the context of the insurance exemption, however the ALRC would be interested in stakeholder feedback on these potential approaches.

International developments

4.62 There are a range of developments, specifically in Europe, with respect to insurance that may increasingly be of relevance in an Australian insurance context.⁵⁴ In

51 Ibid.

52 Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96 (2003).

53 Association of British Insurers, British Insurance Brokers’ Association and HM Government, *Transparency and Access in Motor and Travel Insurance for Older People: An Agreement on Age in Insurance* (2012). The first data was made available in June 2012: Association of British Insurers, *Data by Age and Gender* <www.abi.org.uk/Facts_and_Figures/Data_by_Age_and_Gender.aspx> at 13 September 2012.

54 The Council of the European Union, *Council Directive 2004/113/EC*, 13 December 2004 prohibits all discrimination based on sex in the access to and supply of goods and services. However, there is an exemption (similar to the Australian exemption) on the basis of actuarial and statistical data provided it is reliable, regularly updated and available to the public. The European Court of Justice held that in the insurance services sector, reliance on the exemption (that is, derogation from the general rule of unisex

light of this, in addition to its consideration of the matters outlined in Proposal 4–1, the ALRC proposes that IRAG should keep a watching brief on developments in the insurance industry in relation to age, both in Australia and overseas, with a view to reviewing Australian insurance practices as the need arises. The ALRC also considers that bodies such as the ICA and FSC and individual insurers should be aware of, and respond to, such developments as necessary.

Proposal 4–1 In April 2011, the Australian Government established an Insurance Reform Advisory Group. The group should examine:

- (a) options for the development of a central information portal or source in order to provide mature age persons with clear and simple information about available insurance products;
- (b) the design and redesign of comprehensive and affordable insurance products tailored to the needs and circumstances of mature age persons;
- (c) mechanisms for reviewing age-based insurance pricing and underwriting across the industry;
- (d) mechanisms for ensuring that the insurance industry utilises relevant and appropriate actuarial and statistical data upon which to make decisions about insurance offerings, based on age; and
- (e) training of insurance distributors in order to facilitate the provision of clear and simple information about available insurance products.

Proposal 4–2 The Insurance Reform Advisory Group should keep a watching brief on developments in the insurance industry in relation to age, both in Australia and overseas, with a view to reviewing Australian insurance practices as the need arises.

The General Insurance Code of Practice

4.63 The ALRC is of the view that it is not appropriate for the General Insurance Code of Practice (the Code), or any other industry code, to mandate the removal or extension of age-based limitations on insurance policies. However, the ALRC proposes that ways in which the Code could be amended to encourage insurers to consider the needs and circumstances of mature age workers in insurance should be examined in the current review of the Code.

4.64 The Code was developed and introduced by ICA in 1994. It applies to all general insurance products, including travel insurance and sickness and accident

premiums and benefits) is invalid with effect from 21 December 2012: *Association belge des Consommateurs Test-Achats ASBL v Conseil des ministres (Test Achats)* (Unreported, ECJ, 1 March 2011). In light of this, the ALRC understands that there may be potential challenges to exemptions from anti-discrimination directives which discriminate on the grounds of age.

insurance. It does not apply to workers' compensation or cover reinsurance. The objectives of the Code are to:

- promote better, more informed relations between insurers and their customers;
- improve consumer confidence in the industry;
- provide complaint and dispute resolution mechanisms; and
- commit insurers and other insurance professions to high standards of customer service.⁵⁵

4.65 The Code is binding on all signatories, including members of the ICA. The Financial Ombudsman Service (FOS) monitors compliance with the Code. Its findings are reported to the independent Code Compliance Committee, which has power to make determinations and impose sanctions.⁵⁶ The ICA has indicated it will seek ASIC approval for the revised Code, as provided for under the *Corporations Act 2001* (Cth).⁵⁷

4.66 The Code provides that an independent party will be appointed by the ICA to review the Code every three years. The last review occurred in 2009, however other amendments were made in early 2012 and these commenced on 1 July 2012. In July 2012 a new review of the Code commenced. The review is being conducted by Mr Ian Enright and an advisory panel. An issues paper is due to be released in September 2012 and the final report in mid-2013.⁵⁸

Removing age-based limitations on insurance policies

4.67 In the Issues Paper, the ALRC asked whether insurance industry codes of practice should be amended to encourage or mandate the removal or extension of age-based limitations on insurance policies.⁵⁹

4.68 Any such amendment was strongly opposed by those stakeholders who addressed this question, on two bases.

4.69 First, the ICA submitted that mandating the removal of age-based assessments, through whatever means,

has the potential to adversely impact the willingness to offer particular insurance or, if offered, could lead to serious consequences in relation to an insurer's obligations under the prudential regime supervised by Australian Prudential Regulatory Authority where increased risk profiles have increased capital requirements.⁶⁰

55 Insurance Council of Australia, *General Insurance Code of Practice*, cl 1.17.

56 Ibid, cls 7.13–7.23.

57 *Corporations Act 2001* (Cth) s 1101A. ASIC approves codes of conduct as set out in Australian Securities and Investments Commission, *Approval of Financial Services Sector Codes of Conduct*, Regulatory Guide 183.

58 General Insurance Code of Practice 2012 Review <www.codeofpracticereview.com.au/Home.aspx> at 18 September 2012.

59 Issues Paper, Question 51.

60 Insurance Council of Australia, *Submission 21*.

4.70 Secondly, other stakeholders suggested that the Code is not an ‘appropriate tool to mandate or encourage’ the removal of age-based limitations.⁶¹ In addition, Suncorp highlighted the customer service nature of the Code and submitted that the ‘inclusion of product availability and affordability promises in a customer service code would be counterintuitive’.⁶²

4.71 In the ALRC’s view it is not appropriate for the Code, or any other industry code, to mandate the removal or extension of age-based limitations on insurance policies.

A more appropriate role for the Code?

4.72 The Code sets minimum standards of customer service and contains a number of specific obligations of particular relevance for mature age workers. The existing provisions already contain some scope for addressing insurance issues faced by mature age workers.

4.73 COTA raised concerns about the effectiveness of industry codes. It submitted that

consumers do not have a great deal of faith in the self regulation model as they have seen little evidence that it provides strong consumer protection. We support some external regulation and believe a framework that requires insurance companies to provide detailed and contestable evidence as to why they should have age limits would be the best approach.⁶³

4.74 The ALRC suggests that IRAG’s consideration of the matters outlined above should encompass discussion of external regulation and the need for current, accurate and accessible evidence. However, the current review also provides an opportunity to consider useful potential amendments in this area. A number of stakeholders supported this approach.⁶⁴

4.75 Accordingly, the ALRC proposes that in the course of the current review, the independent reviewer should consider the following areas of the Code and ways in which they may be amended to incorporate the needs and circumstances of mature age persons seeking insurance:

- training of employees and authorised representatives;⁶⁵
- access to information relied upon in assessing claims;⁶⁶
- provision of up-to-date, clear and accessible information to customers;⁶⁷
- complaints handling procedures;⁶⁸ and

61 Suncorp Group, *Submission 39*.

62 Ibid.

63 COTA, *Submission 51*.

64 See eg, Suncorp Group, *Submission 39*; Insurance Council of Australia, *Submission 21*.

65 Insurance Council of Australia, *General Insurance Code of Practice*, cls 2.4, 3.7.

66 Ibid, cl 3.5.

67 Ibid, cl 5.

- any other relevant areas.

4.76 The ALRC also welcomes stakeholder feedback on possible amendments to other industry standards or codes to encourage insurers to consider the needs and circumstance of mature age persons in insurance. However, the ALRC notes concern by some stakeholders about having to comply with multiple codes as industry associations develop new codes based on the Future of Financial Advice reforms.⁶⁹

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.

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?

Anti-discrimination legislation and the insurance exemption

4.77 The ADA contains an exemption which provides that insurers may discriminate on the grounds of age in offering an insurance policy, or the terms or conditions upon which such a policy is offered, if certain conditions are satisfied.⁷⁰ The conditions are satisfied if the discrimination is:

- based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- reasonable having regard to the matter of the data and other relevant factors; or
- in a case where no such actuarial or statistical data is available, and cannot reasonably be obtained, reasonable having regard to any other relevant factors.⁷¹

4.78 The Australian Government is currently considering exemptions in the course of the consolidation of Commonwealth anti-discrimination legislation. Specifically, the Government has asked whether any consolidated act should include a general limitations clause rather than retaining the existing range of specific exemptions, and whether any particular specific exemptions should be retained.⁷² Stakeholders who made submissions to the consolidation process expressed differing views on the merits of introducing a general limitations clause and retaining the insurance exemption.

68 Ibid, cl 6.

69 Treasury, *Future of Financial Advice Reforms* <<http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm>> at 13 September 2012.

70 *Age Discrimination Act 2004* (Cth) s 37.

71 Ibid s 37(3).

72 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011), 37.

4.79 In this Discussion Paper, the ALRC proceeds on the basis that the exemption will be retained in its current form for the purposes of age discrimination under any consolidated act. Following the release of the draft consolidated legislation in 2012, the ALRC may need to reconsider its approach to reform in preparing the final Report if there are changes to exemptions under the legislation.

4.80 At this stage, the ALRC is of the view that, in the course of the consolidation process, if a specific insurance exemption is retained, the Government should consider what changes may be needed to the exemption and its associated provisions to address stakeholder concerns. In order to facilitate further discussion of these issues in the final Report, the ALRC asks a range of questions below.

Should the insurance exemption be amended?

4.81 Throughout this Inquiry stakeholders have expressed a range of concerns with respect to the insurance exemption. The key concerns centre on the nature of the exemption itself and the relevancy, accuracy and availability of the actuarial or statistical data relied upon by insurers in invoking the exemption.

4.82 Some of these concerns echo those conveyed to the Productivity Commission in its 2004 review of the *Disability Discrimination Act 1992* (Cth) (DDA). The Productivity Commission outlined several concerns about the insurance exemption under the DDA, including: access to insurance; the nature of, and access to, actuarial and statistical data; the nature of ‘any other relevant factors’; and reliance on stereotypes.⁷³

The application of the exemption

4.83 A range of stakeholders have suggested amendments to the insurance exemption. Some stakeholders have suggested that the exemption should not apply automatically provided the conditions are satisfied. Instead, stakeholders have suggested that insurers should be required to apply for a specific exemption or show reasonable cause why an applicant over age 65 should not be covered by an insurance policy, or to justify discrimination in the terms or conditions of the policy. The ALRC is interested in stakeholder comments on the application and operation of the exemption as well as review mechanisms.

Disclosure of data to the customer

4.84 Other stakeholders have suggested that actuarial or statistical data relied on by insurers for the purposes of the exemption should be provided to the customer or to an independent regulator.

4.85 The *Sex Discrimination Act 1984* (Cth) (SDA) requires insurers to disclose the actuarial or statistical data to the customer, however there is no such requirement under

73 Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004).

the ADA. However, there are a range of obligations under the Code with respect to the provision of such information.⁷⁴

4.86 In its submission, Suncorp emphasised that actuarial and statistical data is commercially sensitive and expressed the view that

the publication of this data would reduce age-based competition by allowing all insurers access to their competitors internal actuarial and statistical data. Suncorp does not believe reduced age based competition is in the ultimate interests of mature age Australians. In addition, age data is commonly obtained from a variety of sources and is therefore difficult to interpret. Age data is used in conjunction with an insurer's commercial expertise to determine underwriting and pricing. Presenting data without the underlying knowledge of its meaning or intended use is likely to have limited value for the community.⁷⁵

4.87 However, the ALRC suggests that provision for an individual to request and receive the actuarial or statistical data on which the action or decision was based may address some stakeholder concerns in this area.

Power to require data

4.88 The ADA enables the AHRC and its President to require the production of actuarial or statistical data where a person has acted in a way that would, apart from the stated exemptions, be unlawful. The ADA, SDA and DDA all contain an offence for failing to disclose the source of actuarial or statistical data to the AHRC.⁷⁶

4.89 Other than under the AHRC complaint process, or formal review by a court, the current system offers no independent oversight of whether insurers are basing decisions on reasonable actuarial or statistical data, or whether the decision is otherwise reasonable.⁷⁷ In light of this, stakeholders have expressed concerns about the limited nature of these powers.

4.90 However, insurers such as Suncorp submitted that, while 'it is appropriate for insurers to be required to justify their age-based underwriting and pricing ... Suncorp would encourage use of the existing regulatory framework, where necessary, to achieve this'.⁷⁸

4.91 The ALRC is interested in stakeholder feedback on whether the powers of the AHRC are sufficient, or whether there should be some other mechanism for requesting or requiring either the actual actuarial information relied upon by insurers seeking to rely on the insurance exemption, or a meaningful explanation for their reliance on that information.

⁷⁴ Insurance Council of Australia, *General Insurance Code of Practice*.

⁷⁵ Suncorp Group, *Submission 39*.

⁷⁶ For example, it is a strict liability offence not to provide the source of any such actuarial or statistical data if required to do so and attracts a penalty of 10 penalty units: *Age Discrimination Act 2004* (Cth) s 52.

⁷⁷ This concern was also expressed by the ALRC in *Essentially Yours*, in which the ALRC outlined concerns about the need for a mechanism to evaluate the reliability and relevance of actuarial data relied upon by insurers in relation to genetic information: Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96 (2003).

⁷⁸ Suncorp Group, *Submission 39*.

Any ‘other relevant factors’

4.92 The insurance exemption provides that in a case where no actuarial or statistical data is available, and cannot reasonably be obtained, the condition is satisfied if the discrimination is reasonable having regard to any ‘other relevant factors’.⁷⁹

4.93 The meaning of ‘other relevant factors’ has been partly considered by the Federal Court in the context of the DDA in *QBE Travel Insurance v Bassanelli*,⁸⁰ in which Mansfield J held that an insurer cannot pick and choose which material it considers in the context of any ‘other relevant factors’. Instead, it must consider ‘any matter which is rationally capable of bearing upon whether the discrimination is reasonable’ and must not rely on stereotypes in doing so.⁸¹ The Federal Court also confirmed that the onus of proof is on an insurer to qualify for an exemption under the equivalent section under the DDA.

4.94 The ALRC welcomes stakeholder feedback on whether it is necessary to amend the insurance exemption to provide greater clarity as to what constitutes any ‘other relevant factors’ or whether this is best left for judicial interpretation and guidance material.

4.95 The ALRC does not suggest that insurers routinely make decisions without sufficient actuarial, statistical or other reasonable basis such that they fall outside the terms of the insurance exemption. However, given the preliminary concerns expressed by stakeholders, in addition to the mechanisms the ALRC suggests should be examined by IRAG, the ALRC welcomes stakeholder feedback on a range of potential reform options aimed at addressing these concerns.

The development of guidance material

4.96 Regardless of the form the exemption that covers insurance takes, it is necessary to develop guidance material for insurers about the application of any exemption.

4.97 The AHRC developed *Guidelines for Providers of Insurance and Superannuation* with respect to the insurance and superannuation exemptions under the DDA. Last revised in 2005, the guidelines are not binding but provide the AHRC’s view on the interpretation of the exemption under the Act and relevant case law. The Guidelines are intended to:

- clarify the difference between lawful and unlawful disability discrimination in providing insurance and superannuation; and
- help providers of insurance and superannuation in complying with the DDA, in making decisions in individual cases and in developing broader policies and procedures; and
- explain what distinctions or exclusions may be reasonable in offering insurances to people with a disability, and

79 *Age Discrimination Act 2004* (Cth) s 37(3).

80 *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

81 *Ibid.*

- explain factors that courts may take into account in deciding a complaint about disability discrimination.⁸²

4.98 The ALRC proposes that the AHRC develop such guidance material for the purposes of age, in consultation with the insurance industry. In particular, such guidelines could: outline what is reasonable;⁸³ list sources of actuarial or statistical data that are acceptable for the purposes of the exemption; summarise recent case law; outline what are ‘other relevant factors’; and provide case studies.

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’?

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?

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.

82 Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation* <www.humanrights.gov.au/disability_rights/standards/Insurance/insurance_adv.html> at 13 September 2012.

83 For example, Mansfield J in *QBE Travel Insurance v Bassanelli* [2004] FCA 396 outlined instances where data would not be reliable.

5. Social Security

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Summary

5.1 This chapter considers aspects of the social security system that may act as barriers to work for mature age persons, and makes a number of proposals to address these barriers. The ALRC proposes that the methods for communicating information about social security payments and entitlements to mature age persons be evaluated, and that staff of employment services providers receive training in the barriers to work faced by mature age persons.

5.2 In relation to specific income support payments, the ALRC invites further stakeholder comment on the possible effects on workforce participation of changes to the income test withdrawal rate for mature age Newstart Allowance recipients. Comment is also sought on the ways in which the review process for qualification for the Disability Support Pension may create barriers to mature age participation in the

workforce or other productive work. The ALRC proposes that a more flexible interpretation to combining care with work, education, training or voluntary work be taken when assessing qualification for Carer Payment. The ALRC also proposes that the Work Bonus amount for Age Pension and Veterans' Age Service Pension be indexed, and that Pensioner Education Supplement be extended to recipients of Age Pension and Veterans' Age Service Pension.

Australia's social security system

5.3 The primary purpose of Australia's transfer, or social security, system is to provide individuals with a 'minimum adequate standard of living'.¹ The main Australian Government transfers are income support payments and payments to families, including age and other pensions, Newstart Allowance and other allowance payments, Family Tax Benefit and supplementary payments.² Income support payments are made to individuals identified as being unable to support themselves through work or savings. A person's need for support is measured by means testing of income and assets.

5.4 Concession cards provide additional assistance to persons receiving income support, as well as those with low incomes and seniors meeting a separate income test. These cards provide access to a range of discounts or subsidies on Commonwealth, state and territory and local government fees and charges.³

5.5 The legislative basis of the social security system is the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth), and for family payments, *A New Tax System (Family Assistance Act) 1999* (Cth) and *A New Tax System (Family Assistance Act) (Administration) Act 1999* (Cth).⁴ In addition, the *Guide to Social Security Law* and the *Family Assistance Guide*, produced by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) provide guidance to decision makers in implementing this legislation.⁵

5.6 Social security law is administered by the Department of Human Services (DHS) through Centrelink. Policy responsibility is spread between the Department of Education, Employment and Workplace Relations (DEEWR), FaHCSIA and the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE).

1 The Treasury, *Australia's Future Tax System: Final Report* (2010), 485.

2 The Treasury, *Australia's Future Tax System: Architecture of Australia's Tax and Transfer System* (2008), xiii. See also T Carney, *Social Security Law and Policy* (2006).

3 The Treasury, *Australia's Future Tax System: Final Report* (2010), 621.

4 Family assistance as it relates to mature age persons is addressed in Chapter 6.

5 The Guides are updated monthly to reflect changes in government policy and legislative interpretation and are publicly available online: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012. Although not binding in law, they are a relevant consideration for the decision maker and, as such, part of the 'legal frameworks' being considered in this Inquiry: *Stevens and Secretary, Department of Family and Community Services* [2004] AATA. Policy will usually be followed unless there are cogent reasons in a particular case for not doing so: *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639–645.

5.7 The social security system has been the subject of two recent major reviews. In 2010, the Tax Review considered social security in the wider context of the tax and transfer system.⁶ In 2009, the Pension Review considered pension payments for seniors, carers and people with disability.⁷

Income support payments and work

5.8 This section outlines some of the major elements of the design of income support payments, focusing on how these may affect a person's participation in the workforce. Reform to income support payments may have some impact on reducing barriers to work for mature age job seekers. However, these barriers are multi-faceted. Stakeholders have argued that the willingness of employers to hire mature age persons significantly contributes to joblessness for persons in this age group.⁸ Mature age persons may also have multiple barriers to employment, in addition to age. For example, National Welfare Rights Network (NWRN) noted that 'some Indigenous job seekers may have to address issues of not just age discrimination, but also discrimination on the basis of race'.⁹ The Older Women's Network NSW Inc (OWN) and the Premier's Council for Women South Australia noted that there may be gendered differences in the barriers to work faced by mature age job seekers.¹⁰ Commenting generally on job seekers, Professor Peter Whiteford has noted that

the problems of the most disadvantaged and long-term jobless appear to include very low levels of educational attainment ... lack of access to reliable transport ... and complex personal problems including poor health and disabilities ... While it is possible that poorly designed tax and transfer systems might exacerbate these problems, it is difficult to see that transfer reform can resolve them.¹¹

Categories of income support payments

5.9 While income support payments are aimed primarily at alleviating poverty, the different qualification requirements and payment rates attached to various payments also reflect judgments about recipients' expected relationship to the labour force.

5.10 The primary income support payments are categorised into two groups—pensions and allowances. Pensions, including the Age Pension, Carer Payment, Parenting Payment,¹² and Disability Support Pension, have historically been provided on the basis that recipients were not expected to undertake paid work. Pension recipients generally have no requirement to seek work as a condition of payment. They

6 The Treasury, *Australia's Future Tax System: Final Report* (2010).

7 FaHCSIA, *Pension Review Report* (2009).

8 COTA, *Submission 51*; JobWatch, *Submission 25*.

9 National Welfare Rights Network, *Submission 50*.

10 Older Women's Network NSW Inc, *Submission 26*; The Premier's Council for Women South Australia, *Submission 13*.

11 P Whiteford, 'Transfer Issues and Directions for Reform: Australian Transfer Policy in Comparative Perspective' in *Melbourne Institute—Australia's Future Tax and Transfer Policy Conference Proceedings of a Conference* (2010) 20, 59.

12 While there may be some mature age recipients of Parenting Payment, the ALRC has not identified and examined workplace barriers that may affect parents as a group in this Inquiry.

are paid at a higher rate to reflect the expectation that the pension will be their sole source of income for an extended period.¹³

5.11 Allowances for job seekers, including the main working age payment, Newstart Allowance, have traditionally been paid on the basis that recipients were willing and able to work. Recipients were not expected to need income support for an extended period.¹⁴ Allowance payments are also made to students, again on the basis that the period of time on income support will be limited.¹⁵

5.12 Allowances for job seekers have ‘activity test’ or ‘participation’ requirements, obliging the recipient to seek work or participate in some other labour force preparation activity as a condition of payment.¹⁶ Allowances are also paid at a lower rate than pensions to act as an incentive to obtain paid employment, or in the case of students, because the payment is intended to be supplemented by other means.¹⁷

5.13 The distinction between pensions and allowances has become less pronounced in recent years. For example, the shift towards a social rather than a medical model of disability has seen more emphasis on the capacity of people with disability to work.¹⁸ In 2009, the Pension Review also emphasised that pensions paid to those below Age Pension age should actively support people to participate in employment.¹⁹

Adequacy of allowance payments

5.14 It has been argued that the current rate of Newstart Allowance²⁰ is set too low to achieve its primary purpose of providing an adequate minimum standard of

13 The Treasury, *Australia's Future Tax System: Final Report* (2010), 496.

14 The Treasury, *Australia's Future Tax System: Consultation Paper* (2008), 92. However, a large proportion of Newstart Allowance recipients spend long durations on the payment. At June 2012, approximately 62% of Newstart Allowance recipients had been in continuous receipt of the payment for one year or more. 46% had been in continuous receipt of payment for two years or more: DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 63.

15 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 15. Student allowance payments include Austudy, Youth Allowance (student) and ABSTUDY.

16 Payments that have an activity test or participation requirements include Newstart Allowance, Youth Allowance, Special Benefit and Parenting Payment: *Social Security Act 1991* (Cth) ss 500A, 541, 601, 729; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.1.A.40].

17 The Treasury, *Australia's Future Tax System: Final Report* (2010), 493, 496. National Welfare Rights Network noted that the low rate of payment for Austudy may act as a barrier to study for mature age persons: National Welfare Rights Network, *Submission 50*. The ALRC does not propose to make any changes to student income support payments, on the basis that systemic reform of these payments is beyond the scope of this Inquiry.

18 Productivity Commission, *Disability Care and Support* (2011), 271.

19 FaHCSIA, *Pension Review Report* (2009), xxi.

20 From 20 September 2012, the basic rate of Newstart Allowance for a single person with no children is \$492.60 per fortnight. For a single person aged 60 years or over after nine continuous months on payment, the rate is \$533 per fortnight: J Macklin, *Rates Indexation—September 2012* (2012) <<http://jennymacklin.fahcsia.gov.au/node/2051>> at 10 September 2012.

living, as well as to enable effective job search activity.²¹ This may be particularly so for mature age job seekers, who are likely to have more financial commitments.²²

5.15 The adequacy of the allowance payment system for jobseekers is currently the subject of inquiry by the Senate Education, Employment and Workplace Relations References Committee (Allowance Payment Inquiry).²³ A number of submissions to the Allowance Payment Inquiry argue that the rate of payment of Newstart Allowance creates barriers to work.²⁴ For example, the Business Council of Australia argued that

trying to survive on \$35 a day [the approximate daily base rate for a single person receiving Newstart Allowance] is likely to erode the capacity of individuals to present themselves well or maintain their readiness for work.²⁵

5.16 NWRN submitted to the ALRC that the rate of payment is a barrier to workforce participation, arguing that ‘income support payments need to provide a sufficient income to enable people to look for work and to cover job search costs including transport and telephone costs’.²⁶

5.17 The gap between pensions and allowances increased markedly in 2009 with the increase to pension amounts introduced by the Secure and Sustainable Pension Reforms Package.²⁷ This gap is also widening due to the different indexation methods for each payment.²⁸ The Tax Review noted that, ‘if the current indexation arrangements remain in place ... by 2040 a single pensioner would be paid more than twice as much as a single unemployed person’.²⁹

5.18 NWRN argued that this gap ‘creates perverse incentives for unemployed people to seek higher, non-activity-tested payments especially when they are older and have been unemployed for lengthy periods of time’.³⁰ The Tax Review has also noted that

21 Whiteford argued that there was ‘wide acceptance’ among participants at the Tax Forum in October 2011 that Newstart Allowance was inadequate: P Whiteford, ‘Social Security Reform: The Tax Forum and Beyond’ (2012) 31(1) *Economic Papers: A Journal of Applied Economics and Policy* 24, 25.

22 Gosnells Community Legal Centre Inc, *Submission to the Allowance Payment Inquiry* (2012).

23 Senate Education, Employment and Workplace Relations References Committee—Parliament of Australia, *Inquiry into the Adequacy of the Allowance Payment System for Jobseekers and Others, the Appropriateness of the Allowance Payment System as a Support into Work and the Impact of the Changing Nature of the Labour Market* (2012). The Committee is due to report by 1 November 2012.

24 Stakeholders who have argued that the rate of payment amounts to a barrier to work include the Australian Council of Social Service; Australian Council of Trade Unions, Brotherhood of St Laurence; Business Council of Australia; National Employment Services Association and Western Australian Council of Social Service.

25 Business Council of Australia, *Submission to the Allowance Payment Inquiry* (August 2012), 46.

26 National Welfare Rights Network, *Submission* 50.

27 *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Act 2009* (Cth).

28 Pensions (other than Parenting Payment (single)) are indexed twice yearly by the greater in the movement of the Consumer Price Index or the Pensioner and Beneficiary Living Cost Index (PBLCI). The maximum base pension rate is then compared with 41.76 % of Male Total Average Weekly Earnings (MTAWE) for pensioner couples combined and around 27.7 % of MTAWE for single pensioners. If the pension is below the MTAWE wages benchmark, it is increased to that rate. Newstart Allowance is indexed twice yearly by the increase in CPI: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [5.1.8.50], [5.8.1.20].

29 The Treasury, *Australia’s Future Tax System: Final Report* (2010), 501.

30 National Welfare Rights Network, *Submission* 50.

the differences in rates of payment can ‘create disincentives to work or incentives to move to higher payments’.³¹

Means testing and employment income

5.19 The means tests for income support payments have two parts: an income test and an assets test. Payment is calculated by applying the test that results in the least amount of payment.³²

5.20 The income test and the assets test have two structural elements: a ‘free area’, and a ‘withdrawal rate’, or ‘taper’. The free area allows a person to have a threshold level of income or assets before eligibility for the full rate of payment is affected. The withdrawal rate subsequently gradually reduces the rate at which a payment is made as income and/or assets increase. In other words, payment ‘tapers out’ as a person’s private means increase.³³

5.21 The income test allows a person to earn some employment income while receiving an income support payment. The settings of the income test differ between types of payments, reflecting the different grounds upon which payments are made. For example, because pension recipients are not expected to support themselves through paid work, pension payments generally taper out more slowly than allowance payments. This allows a pension recipient to combine income support and employment income for longer.³⁴

Transitions between income support and work

5.22 In addition to the income test, a number of aspects of the design of income support payments help to ease the transition between income support and work, or to allow persons with fluctuating earnings to combine work and income support.

5.23 ‘Working Credit’ aims to encourage people of workforce age who receive income support payments to take up full-time, part-time, or casual work.³⁵ When a person’s total income (including employment income) is less than \$48 per fortnight, working credits are automatically accrued, up to a maximum of 1,000.³⁶ Accrued working credits are then used to offset employment income, effectively increasing the income free area for a payment.³⁷

31 The Treasury, *Australia’s Future Tax System: Final Report* (2010), 61.

32 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [4].

33 FaHCSIA, *Pension Review Report* (2009), 122.

34 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 27.

35 *Social Security Act 1991* (Cth) s 1073D; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.1.11.10].

36 Eligible recipients of Youth Allowance can accrue up to 3,500 working credits: *Social Security Act 1991* (Cth) ss 1073F, 1073H; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.1.11.20].

37 *Social Security Act 1991* (Cth) ss 1073F, 1073H; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.11.30]. In addition, in some circumstances where a person would otherwise no longer be qualified to receive income support, a person may remain qualified for the payment while they reduce their Working Credit balance: *Social Security Act 1991* (Cth)

5.24 Work Bonus allows Age Pension recipients to receive employment income up to \$250 per fortnight without its being assessed as income under the pension income test.³⁸ Work Bonus is discussed more fully below.

5.25 Concession cards are also available for a period on return to work, and alternative concession cards are available to some beyond the pension and allowance cut-outs.³⁹ Concession cards are discussed more fully below.

5.26 An income support payment recipient who is below Age Pension age may also qualify for supplementary benefits during an ‘employment income nil rate period’. Where income support payment is not payable because of ordinary income, made up entirely or partly of employment income, a recipient can be paid certain supplementary benefits and remain eligible for a concession card.⁴⁰ In addition, payment may be resumed without reapplication during this period if income is reduced sufficiently for the income support payment to be payable again.⁴¹

5.27 Other specific elements of payment design allow a person receiving Disability Support Pension or Carer Payment to work while remaining qualified for payment. These are discussed below.

Complexity as a barrier to work

5.28 In this section, the ALRC proposes that DHS should evaluate the effectiveness of its methods for communicating information about social security payments and entitlements to mature age persons. The income support payment system in Australia is highly targeted, both through making distinctions between payment categories—such as for carers, people with disability and those unemployed—and by means testing of payments.⁴² The object is to direct payments to those most in need and to maintain the sustainability of the system.⁴³ The result is ‘the most targeted system of cash transfers in the OECD’.⁴⁴

s 1073J; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.11.30].

38 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [4.2.2].

39 FaHCSIA, *Australia’s Future Tax System: Pension Review Background Paper* (2008), 11–12. For example, Pensioner Concession Cards may be extended for 12, 26 or 52 weeks depending on the payment and the cardholder circumstances: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.9.2.30].

40 *Social Security Act 1991* (Cth) ss 23(4A), 23(4AA), 1061ZEA, 1061ZMA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.1.12].

41 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.1.12]. The employment income nil rate period does not apply to a person who lost their qualification for Carer Payment because they have paid work for more than 25 hours per week: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.4.70].

42 The Treasury, *Australia’s Future Tax System: Final Report* (2010), 494.

43 Ibid, 489.

44 P Whiteford, ‘Transfer Issues and Directions for Reform: Australian Transfer Policy in Comparative Perspective’ in *Melbourne Institute—Australia’s Future Tax and Transfer Policy Conference Proceedings of a Conference* (2010) 20, 20.

5.29 A corollary of targeting is complexity. Submissions to this Inquiry said that this complexity itself is a barrier to work.⁴⁵ Without large scale reform of the social security system, which is beyond the Terms of Reference for this Inquiry, this complexity will remain. It is therefore important to ensure that information about social security payments is as clear and accessible as possible, to assist individuals to manage this complexity.

Information provision

5.30 DHS utilises a range of methods to provide information about income support payment eligibility, conditions and the effect of work upon payments, including, for example, the DHS website,⁴⁶ and the News for Seniors magazine published three times a year.⁴⁷ However, the ALRC has heard that mature age persons find this information difficult to understand and navigate.

5.31 A number of submissions identified access to information about income support payments as a problem for mature age persons.⁴⁸ While noting that this issue was not limited to mature age persons, the Acting Commonwealth Ombudsman reported that:

we commonly receive complaints in which people say they have only just learned about a payment or entitlement that would have been of assistance to them earlier. This problem ... reflects the complexity of the social security system as well as the difficulty departments have in ensuring that important messages are appropriately targeted and promoted.⁴⁹

5.32 The increasing emphasis on providing information online was also identified as a potential problem, especially for mature age persons whose access to and familiarity with information technology may be limited.⁵⁰

5.33 However, even where information is available, a number of stakeholders suggested that mature age persons find this information difficult to understand.⁵¹ For example, the Australian Institute of Superannuation Trustees submitted that the Age Pension means test was ‘overly complex and difficult for the layperson to

45 Australian Institute of Superannuation Trustees, *Submission 47*; J Willis, *Submission 42*; Queensland Tourism Industry Council, *Submission 28*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*.

46 DHS, *How Can We Help You?* (2012) <www.humanservices.gov.au> at 4 September 2012.

47 DHS, *News for Seniors magazine* (2012) <www.humanservices.gov.au/customer/publications/rt010> at 4 September 2012.

48 COTA, *Submission 51*; L Masters, *Submission 36*; National Seniors Australia, *Submission 27*; J Walker, *Submission 20*; Commonwealth Ombudsman Office, *Submission 16*; My Longevity Pty Limited, *Submission 15*; L Gabor, *Submission 05*; W Trinder, *Submission 01*.

49 Commonwealth Ombudsman Office, *Submission 16*.

50 Ibid; L Masters, *Submission 36*; National Seniors Australia, *Submission 27*.

51 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Institute of Superannuation Trustees, *Submission 47*; Australian Chamber of Commerce and Industry, *Submission 44*; J Willis, *Submission 42*; L Masters, *Submission 36*; Olderworkers, *Submission 22*; My Longevity Pty Limited, *Submission 15*; L Gabor, *Submission 05*.

understand'.⁵² My Longevity stated that 'many people need third party advice to make sense of these entitlements'.⁵³

5.34 Some stakeholders argued that information about incentives to take up paid work is not effectively communicated to mature age income support recipients.⁵⁴ For example, COTA Australia (COTA) stated that 'there is not a good understanding of how the Work Bonus operates ... It needs to be promoted more widely'.⁵⁵

5.35 There may be opportunities to improve communication with persons engaged in the social security system. For example, the Australia Institute has suggested that the data-matching tool used by Centrelink to identify when income support recipients have been overpaid could in turn be used to identify those who may be receiving less than their current entitlements.⁵⁶ This would allow targeted advice to be provided about payments for which a person may qualify. In addition, tools enabling income support recipients to calculate the effect of work upon their overall income could be further developed and given more prominence in DHS information material.⁵⁷

5.36 Difficulty in accessing and comprehending information about qualification for income support payments, as well as the effect of employment income upon these payments, appears to act as an impediment to mature age income support recipients' willingness to engage in employment. The ALRC considers that the DHS should evaluate how it could communicate this information to mature age persons more effectively.

Proposal 5-1 The Department of Human Services should evaluate the effectiveness of its methods for communicating information to mature age persons about social security. In its evaluation, it should consider the communication of information about:

- (a) eligibility for income support payments;
- (b) participation obligations for activity-tested payments, including information about the circumstances in which exemptions from the activity test may be available;
- (c) how to calculate the effect of taking up paid work on income support payments, for example through online rate calculators; and

52 Australian Institute of Superannuation Trustees, *Submission 47*.

53 My Longevity Pty Limited, *Submission 15*.

54 COTA, *Submission 51*; Australian Institute of Superannuation Trustees, *Submission 47*; Olderworkers, *Submission 22*.

55 COTA, *Submission 51*.

56 D Baker, 'Match making: Using data-matching to find people missing out on government assistance' (2012) 54 *Australia Institute Policy Brief*, 1.

57 While online estimators are available through the DHS website, they are not promoted on the main page for job seekers: DHS, *Online Estimators* (2012) <www.humanservices.gov.au/customer/enablers/online-estimators> at 4 September 2012; DHS, *Job seekers* (2012) <www.humanservices.gov.au/customer/themes/job-seekers> at 4 September 2012.

- (d) incentives to take up paid work, for example through Working Credit, Work Bonus, the employment income nil rate period and retention of concession cards.

Employment services

5.37 This section outlines the Australian Government's employment services system, and employment assistance provided to mature age job seekers. The ALRC proposes that DEEWR ensure that capacity-building measures are made available to employment services provider staff about the barriers to work faced by mature aged persons.

5.38 Job Services Australia (JSA) is the Australian Government's employment services system. General employment services are delivered by JSA providers: a mix of for-profit and not-for-profit organisations that are contracted by DEEWR under Employment Services Deeds.⁵⁸ The Disability Employment Services (DES) system provides employment services for job seekers with disability.⁵⁹ JSA and DES providers assist individual job seekers to gain sustainable employment, and connect job seekers to skills development and training opportunities.⁶⁰ Integrated Indigenous employment services are available through the JSA network, in conjunction with the Indigenous Employment Program (IEP) and, in remote areas with poor labour markets, Community Development Employment Projects (CDEP). From 1 July 2013, the delivery of employment and participation services and community development programs in remote areas—currently provided by JSA, DES, IEP and CDEP—will be provided by a new integrated service, the Remote Jobs and Communities Program.⁶¹

5.39 Generally, job seekers are required to connect with a JSA provider as a condition of fulfilling their activity test.⁶² Job seekers who receive non-activity-tested payments, such as Disability Support Pension and Carer Payment, may also volunteer to use JSA or DES.⁶³

58 DEEWR, *Job Services Australia providers* (2012) <www.deewr.gov.au/Employment/JSA/EmploymentServices/Pages/serviceProviders.aspx> at 4 September 2012.

59 DEEWR, *Disability Employment Services* (2012) <www.deewr.gov.au/Employment/Programs/DES/Pages/default.aspx> at 4 September 2012. DES providers also provide employment services under contract with DEEWR.

60 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 129.

61 Australian Government, *Remote Jobs and Communities Program General Fact Sheet* (2012).

62 *Social Security Act 1991* (Cth) s 601; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.2.8.10].

63 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 129–130.

Employment assistance for mature age job seekers

5.40 The amount of employment assistance job seekers receive is determined by their placement in one of four ‘streams’ of support. Persons in a higher stream will receive more intensive assistance.⁶⁴

5.41 Some stakeholders argued that the Australian Government’s employment services system requires through reform in respect of both the resources and assistance provided to disadvantaged and long-term unemployed job seekers.⁶⁵ The ALRC also heard concerns that mature age job seekers are not receiving the employment assistance needed to re-engage in the workforce.⁶⁶

5.42 The Australian Government has recognised that mature age job seekers may benefit from additional employment assistance. The Mature Age Participation—Job Seeker Assistance Program, announced in the 2012–13 Budget, will increase the support available to some job seekers aged 55 years and over who are engaged with Jobs Services Australia. This program will provide approximately 6,700 mature age job seekers with intensive employment assistance.⁶⁷

5.43 While this measure will provide targeted assistance for mature age job seekers, its scope is limited. In addition to the limited number of job seekers it will assist, the program is also restricted to ‘particular regions or industries, as prioritised by the Government’.⁶⁸ The Australian Human Rights Commission (AHRC) has suggested that there may be a need to further expand this program to all locations, and to Newstart Allowance recipients aged 45 years and older.⁶⁹

Tailoring of employment services

5.44 JSA providers work with job seekers who receive an activity-tested income support payment to identify the mix of vocational and non-vocational activities they need to participate in to obtain employment. These activities are outlined in an

64 Age is taken into account in the Job Seeker Classification Instrument (JSCI), a questionnaire taken by job seekers that determines the level of assistance they will be given. Generally, older job seekers attract more points in the JSCI than younger job seekers, in recognition that age can be an employment barrier: DEEWR, *Job Seeker Classification Instrument: Factors and Points version 1.1*. Where the JSCI indicates that a person has significant barriers to work, the person is referred for an Employment Services Assessment (ESAt) or Job Capacity Assessment (JCA) to determine work capacity and the most suitable employment service: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.1.E.104], [1.1.J.10].

65 Brotherhood of St Laurence, *Submission 54*; National Welfare Rights Network, *Submission 50*.

66 Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*.

67 Australian Government, *Budget 2012–13: Budget Paper No. 2 (2012)* <www.budget.gov.au> at 3 September 2012. In addition, the Experience+ Career Advice service provides professional career counselling and a resume appraisal service to all job seekers and workers aged 45 years and over: DEEWR, *Free Career Advice* (2012) <www.deewr.gov.au/Employment/programs/expplus/jobseekers/pages/freecareeradvice.aspx> at 4 September 2012.

68 Australian Government, *Budget 2012–13: Budget Paper No. 2 (2012)* <www.budget.gov.au> at 3 September 2012.

69 AHRC, *Submission to the Allowance Payment Inquiry*, (August 2012).

individualised Employment Pathway Plan (EPP).⁷⁰ In setting the terms of an EPP, ‘the person’s education, experience, skills, age, physical condition and health (including mental health)’, among other things, must be taken into consideration.⁷¹

5.45 While the EPP is intended to be ‘individually tailored’ and negotiated between the job seeker and the provider, commentators have argued that this tailoring and negotiation does not occur in practice.⁷² In an analysis of employment assistance reforms between 1998 and 2008, Professor Mark Considine, Associate Professor Jenny Lewis and Dr Siobhan O’Sullivan concluded that frontline employment services staff ‘do not exercise significant discretion in tailoring services and the trend over time is towards high levels of standardisation for both staff and jobseekers’.⁷³

5.46 The apparent disjunction between law and practice in the tailoring of employment assistance has implications for mature age job seekers, as for other job seekers. Mature age job seekers may have particular needs for tailoring of their EPPs, given the increased likelihood of acquiring some degree of disability with age,⁷⁴ and the increased likelihood of caring responsibilities for people with disability, the frail aged and grandchildren.⁷⁵ These considerations may also require that a mature age person has access to the available exemptions or suspensions from EPPs.⁷⁶ NWRN reported that

Welfare Rights Centres ... receive many enquiries from recipients of activity-tested payments not yet 55 years of age who suffer from a range of health problems ... It is our experience that the activity testing obligations and the consequences for a person not able to comply can be daunting for an older person in poor health.⁷⁷

5.47 Difficulties in meeting activity test requirements are likely also to amount to barriers to participating in the workforce. It is important that the content of an EPP appropriately identifies and addresses these issues, and that exemptions or suspensions from EPPs are granted in appropriate circumstances.

5.48 The extent to which the contracting out of employment services puts the discretion and tailoring exercised by employment services providers beyond public scrutiny and review has also attracted comment. Emeritus Professor Terry Carney has noted that, where the ‘substance of a social security or welfare issue is contracted out

70 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.2.8.30].

71 *Social Security Act 1991* (Cth) ss 501A, 606; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.2.8.50].

72 L Fowkes, *Rethinking Australia’s Employment Services*, Whitlam Institute Perspectives Papers 6 (2011), 14; M Considine, J Lewis, S O’Sullivan, ‘Quasi-markets and Service Delivery Flexibility Following a Decade of Employment Assistance Reform in Australia’ (2011) 40(4) *Journal of Social Policy* 811, 825–826.

73 M Considine, J Lewis, S O’Sullivan, ‘Quasi-markets and Service Delivery Flexibility Following a Decade of Employment Assistance Reform in Australia’ (2011) 40(4) *Journal of Social Policy* 811, 825–826.

74 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 80.

75 Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, Cat No 4430.0* (2003); National Welfare Rights Network, *Submission 50*.

76 See, eg, *Social Security Act 1991* (Cth) ss 603, 603A, 603C.

77 National Welfare Rights Network, *Submission 50*.

to private providers, that issue becomes largely insulated from the public gaze ... and is much less responsive to orthodox external administrative review'.⁷⁸ In the case of EPPs, there is a much diminished capacity to obtain external review of their terms.⁷⁹ Carney has suggested that increased debate about the methods of accountability for, and review of, decisions taken by private providers—including decisions about the content of EPPs—is timely.⁸⁰ Greater transparency about these decisions would benefit mature age job seekers, as well others engaged with employment assistance.

5.49 A respect for self-agency—one of the framing principles of this Inquiry—requires that mature age job seekers have some opportunity to participate in setting the terms of their participation obligations. The Acting Commonwealth Ombudsman reported that some mature age persons expressed a 'sense that their age means they are not treated with respect' by employment services providers, and offered the following case study:

Mr L informed our office that he is 63 years old and has been unemployed for six years. Mr L said he was meeting his job seeker obligations, but he felt his JSA provider was becoming more demanding in what it required of him. Mr L told us he had lengthy experience as a senior manager, but felt that his age was preventing him from getting work. Mr L considered that his JSA provider was rude and failed to show any sympathy for his situation ... Mr L said he wanted to be treated with 'respect, dignity and professionalism'. Mr L also said he was thinking of cancelling his Newstart Allowance, and therefore ceasing his job search obligations or regular contact with the JSA provider, to try to live off his superannuation until he reached age pension age.⁸¹

5.50 Olderworkers, a mature age job board, submitted that in a recent survey of its registered job seekers

approximately 50% of respondents were accessing JSA and over 90% stated they were unhappy with services provided. Many of the respondents stated they had actually been advised they were wasting their time looking for a job at their age. They also stated they had felt age discrimination from many of the workers in these organisations ... Some had actually been compared to the recruiter's mother or father. Some had been asked why they wanted to work at their age.⁸²

5.51 The ALRC considers that the responsiveness of employment services providers to mature age job seekers could be improved, and proposes that DEEWR ensure that capacity-building measures are made available to JSA, DES and IEP staff about the barriers to work faced by mature aged persons. The ALRC notes the launch in August 2012 of the Mental Health Capacity Building e-learning package, designed to assist employment services provider staff to identify and support people living with mental illness.⁸³ The mental health training package was developed with input from

78 T Carney, 'Social Security Law: What Does the Politics of 'Conditional Welfare' Mean for Review and Client Representation?' (2012) 12(2) *Sydney Law School Research Paper* 1, 17.

79 Ibid, 16.

80 Ibid, 22–24.

81 Commonwealth Ombudsman Office, *Submission* 16.

82 Olderworkers, *Submission* 22.

83 K Ellis, MP, K Carr, MP, M Butler, MP, 'Frontline Training to Stop Job Seekers Living with Mental Illness Falling Through the Cracks' (Press Release, 4 September 2012).

mental health organisations, psychiatric rehabilitation services and employment service provider peak bodies.⁸⁴ A similar package, drawing on relevant expertise, may be beneficial for mature age persons. The ALRC also seeks stakeholder comment about other ways that employment assistance for mature age persons could be improved.

Proposal 5–2 To enhance the capacity of Job Services Australia, Disability Employment Services and Indigenous Employment Program staff to respond to the needs and circumstances of mature age job seekers, the Department of Education, Employment and Workplace Relations should ensure they are provided with information about:

- (a) age discrimination, including what constitutes ageist behaviour;
- (b) the effect that illness, disability and caring responsibilities may have on mature age persons' capacity to work;
- (c) the ways in which barriers to work for mature age persons may be affected by gender, cultural and linguistic diversity, Aboriginal and Torres Strait Islander status, and sexual orientation; and
- (d) Australian government programs targeted at increasing mature age workforce participation.

Question 5–1 In what other ways, if any, could the Australian Government's employment services system be improved to provide better assistance to mature age job seekers?

Newstart Allowance and mature age job seekers

5.52 This section considers the situation of mature age job seekers in receipt of Newstart Allowance. The ALRC does not propose to make any changes to activity test requirements for those aged 55 years and older. However, the ALRC asks for stakeholder comment about whether changes to the withdrawal rate for Newstart Allowance for recipients aged 55 years and older would have an effect on incentives for workforce participation.

5.53 At June 2012, there were 550,000 recipients of Newstart Allowance. Of these, approximately 22% were aged 40–49, almost 19% were aged 50–59, and 9.1% were aged 60–64.⁸⁵

⁸⁴ Ibid.

⁸⁵ DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 58–59. At August 2010, 198,327 (32%) of Newstart Allowance recipients were aged 44 years or older: ACOSS, *Beyond Stereotypes: Myths and Facts about People of Working Age who Receive Social Security*, ACOSS Paper 175 (2011), 11.

5.54 For the purposes of Newstart Allowance, ‘mature age’ is defined as 55 years and older. At June 2012, there were 98,050 recipients, or 18% of the total Newstart Allowance population, in this age group.⁸⁶ This number has almost doubled since June 2002,⁸⁷ driven by the phasing out of Partner Allowance, Mature Age Allowance and Widow Allowance, as well as the increasing age of eligibility of the Age Pension for women.⁸⁸

5.55 Approximately 50,000 Newstart Allowance recipients aged 55 years and older are ‘very long-term’ income support recipients (in receipt of income support for two years or more).⁸⁹ This represents approximately half of the total Newstart Allowance recipients in this age bracket,⁹⁰ as well as 20% of all very long-term income support recipients.⁹¹

5.56 Some Newstart Allowance recipients have been assessed as having a partial capacity to work: a physical, intellectual or psychiatric impairment that prevents a person from working at least 30 hours per week at the relevant minimum wage or above, independently of a program of support, for the next two years.⁹² At June 2012, there were 99,884 Newstart Allowance recipients with a partial capacity to work.⁹³ Of these, 27.1% were aged 55 years and older.⁹⁴ Persons with a partial capacity to work made up 27.6% of all Newstart Allowance recipients in this age group.⁹⁵

Activity test requirements for mature age job seekers

5.57 Different activity tests and participation obligations apply to some mature age persons. Job seekers aged 55 years and over have a concessional activity test option: they may satisfy the activity test if they undertake at least 30 hours per fortnight of approved and suitable voluntary work, paid work (including self-employment) or a combination of the two.⁹⁶ At 29 June 2012, 19,582 (21.8%) of all activity-tested mature age job seekers were satisfying their requirements in this way.⁹⁷

5.58 Where mature age job seekers are satisfying their activity test in this way, they are generally not required to attend appointments with their employment services provider. They must still register and remain connected to a provider while undertaking

86 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 44, 92.

87 Ibid, 92.

88 Ibid, 59, 92.

89 Ibid, 79.

90 Ibid, 44.

91 Ibid, 79.

92 *Social Security Act 1991* (Cth) s 16B; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.1.P.56].

93 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 80.

94 Ibid.

95 Ibid, 44, 80.

96 This concessional activity test is available to persons aged 55 years and over and in receipt of Newstart Allowance as well as Parenting Payment and Special Benefit: *Social Security Act 1991* (Cth) ss 502A, 603AA, 731G; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.2.8.20].

97 DEEWR, *Correspondence*, 23 July 2012.

these activities and are required to accept suitable paid work or referral to interviews.⁹⁸ In addition, they may access or continue to access the full range of services available through their employment services provider on a voluntary basis.⁹⁹ Job seekers who do not satisfy their activity test through undertaking 30 hours per fortnight of voluntary work, paid work, or a combination of the two, have the same participation obligations as other job seekers.¹⁰⁰

5.59 In 2009, the Participation Review Taskforce considered the different activity test rules for job seekers aged 55 years and over. It recommended that, in the medium term, mature age job seekers should have the same participation requirements as other job seekers.¹⁰¹ However, the Taskforce recommended that this change should be preceded by actions to combat negative attitudes towards older workers.¹⁰²

5.60 In the Issues Paper, the ALRC asked if the current activity test requirements for mature age job seekers should be changed.¹⁰³ Some stakeholders argued that the current concessional activity test sends an inappropriate message about the expected workforce participation of mature age persons. For example, the Australian Chamber of Commerce and Industry argued that the current exemptions for mature age workers can discourage participation in the workforce.¹⁰⁴ COTA agreed that allowing persons to satisfy their activity test by volunteering ‘could be seen to be discouraging older people from trying to re-enter the paid workforce’.¹⁰⁵

5.61 Other stakeholders were opposed to any tightening of the activity test for job seekers aged 55 years and over. They argued that the concessional activity test was appropriate in light of the current employment prospects for mature age job seekers.¹⁰⁶ Despite its reservations about the message sent by the current activity test, COTA also did not support any immediate change.¹⁰⁷ NWRN and the Brotherhood of St Laurence did not support tightening the current activity test for this group of income support recipients.¹⁰⁸ For NWRN, changes to the activity test would force older job seekers into ‘a cycle of constant rejection and humiliation’.¹⁰⁹

98 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.2.8.50].

99 DEEWR, *Correspondence*, 23 July 2012. Providers will receive service fees as well as placement and outcome fees if mature age job seekers voluntarily participate in employment services.

100 Participation Review Taskforce, *Participation Review Taskforce Report* (2008), 9.

101 Ibid, 21.

102 Ibid, 7, 20, 21.

103 Issues Paper, Question 23.

104 Australian Chamber of Commerce and Industry, *Submission 44*.

105 COTA, *Submission 51*.

106 Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*.

107 COTA, *Submission 51*.

108 Brotherhood of St Laurence, *Submission 54*; National Welfare Rights Network, *Submission 50*.

109 National Welfare Rights Network, *Submission 50*.

5.62 Writing about the prospects for an ageing labour force, Professor Philip Taylor makes a similar argument:

While older workers may nowadays be somewhat closer to the labour market than they once were, their employability is often quite poor ... Something that even its most ardent proponents must recognize is that 'activation' in terms of offering the 'right' of older people to work when there is no work to be had due to age discrimination, a lack of skills currency, or failing health may simply be condemning many to 'active' ageing in the form of labour force participation, but with little or no prospect of meaningful job opportunities.¹¹⁰

5.63 The ALRC considers that there should be no further tightening of the current activity test for job seekers aged 55 years and over. The test as it currently operates serves to provide a concession for the barriers to work faced by persons in this age group. Given that job seekers may voluntarily continue to engage with their employment services provider, the current activity test requirements do not appear to be acting as a barrier to mature age participation.

5.64 In addition, the concessional activity test recognises the value of volunteering, not only as a potential pathway to paid employment, but also as a form of productive work in its own right.¹¹¹

Taper rates for mature age job seekers

5.65 Newstart Allowance has undergone significant reform since the early 2000s. The primary consequence of the reforms has been a significant extension of the scope of Newstart Allowance to encompass a wider population group, including parents of young children, people with a partial capacity to work and the mature aged.¹¹² These reforms have meant that Newstart Allowance increasingly treats groups of recipients differently—for instance, through different activity test requirements.¹¹³

5.66 In general, however, Newstart Allowance recipients have the same income free area and withdrawal rate applied to any income received. The current income free area is \$62 per fortnight.¹¹⁴ Income between \$62 and \$250 per fortnight reduces payments by 50 cents in the dollar. Income above \$250 per fortnight reduces payment by 60 cents in the dollar.¹¹⁵

110 P Taylor, 'Conclusions: The Prospects for Ageing Labour Forces' in P Taylor (ed) *Ageing Labour Forces: Promises and Prospects* (2008) 204, 207.

111 M Levy, 'Volunteering as a Participation Option for Income Support Recipients: Unconscionable or Underutilised?' (2009) 14 *Australian Journal on Volunteering* 27; J Warburton, J Paynter, A Petriwskyj, 'Volunteering as a Productive Aging Activity: Incentives and Barriers to Volunteering by Australian Seniors' (2007) 26(4) *Journal of Applied Gerontology* 333.

112 For a summary of the reforms, see: DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 28–29, 139–146.

113 Different activity tests may apply for principal carers, persons with a partial capacity to work, and job seekers aged 55 years and over: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.1.A.40].

114 DHS, *A Guide to Australian Government Payments 1 July–19 September 2012* (2012), 34. By comparison, the income free area for pension payments is \$152 per fortnight.

115 Ibid. In general, partner income that exceeds the earning thresholds also reduces payment by 60 cents in the dollar.

5.67 The AHRC notes that the low income free area for Newstart Allowance recipients ‘acts as a specific disincentive to part-time or casual work’.¹¹⁶ NWRN reported that ‘older job seekers tell us that the exceedingly low “income free” area ... is a major impediment to undertaking additional hours of work’.¹¹⁷

5.68 The income free area, together with the withdrawal rate, is intentionally designed in this way to maintain the incentive to take up full-time paid work.¹¹⁸ In a joint submission to the Allowance Payment Inquiry, DEEWR, FaHCSIA, DHS and DIISRTE argued that ‘if people in receipt of payments are encouraged to take part time employment there is an inherent risk that they will substitute this for full time permanent work’.¹¹⁹ They contended that this is at odds with the ‘message that people should be making the maximum effort to fully support themselves’.¹²⁰

5.69 However, DEEWR, FaHCSIA, DHS and DIISRTE also acknowledged the changing nature of the cohort in receipt of Newstart Allowance. This has changed from a group of job seekers notionally with the capacity and availability to work full time, to one including those with partial capacity to work, caring responsibilities, and the mature aged. This change was said to present ‘new challenges to the allowance payment system to assist people in the transition off payment and into work’.¹²¹ There is some evidence that part-time or casual work can act as a stepping stone or pathway to full-time work.¹²² There is also evidence that persons aged 55 years and older (particularly men) may remain in casual employment for an extended period, possibly as a step towards retirement.¹²³

5.70 In addition, the different activity tests for different Newstart Allowance payment groups means that fully meeting participation obligations may not result in sufficient employment income to move completely off income support. This may be the case for principal carers and those with a partial capacity to work, who have part-time participation obligations.¹²⁴ This may also be the case for Newstart Allowance recipients aged 55 years and older satisfying the concessional activity test.¹²⁵

5.71 The financial benefit derived from combining paid work and income support can be improved by modifying the income free area or withdrawal rate. This is the policy intent behind the changes to the income test for single principal carers, to take effect

116 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 8.

117 National Welfare Rights Network, *Submission 50*.

118 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 26.

119 *Ibid.*, 27.

120 *Ibid.*

121 *Ibid.*, 70.

122 Although this may be more likely for men than women: H Buddelmeyer, M Wooden and S Ghantous, *Transitions from Casual Employment in Australia* (2006), Melbourne Institute of Applied Economic and Social Research Report prepared for the Department of Employment and Workplace Relations, iii.

123 *Ibid.*, 30.

124 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 70.

125 *Social Security Act 1991* (Cth) s 603AA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.2.8.20].

from 1 January 2013. This change will introduce a flat withdrawal rate of 40 cents per dollar for each dollar received over the income free area.¹²⁶

5.72 There may be merit in introducing a less severe withdrawal rate for Newstart Allowance recipients aged 55 years and over to improve the financial incentives for combining part-time or casual work with income support.¹²⁷ As the AHRC has noted, mature age persons may face particular barriers to obtaining full-time work—despite their maximum efforts—because of the prevalence of age discrimination.¹²⁸ Additionally, in some circumstances part-time or casual work may be more suited to managing ill health or disability or combining work with caring responsibilities.

5.73 It has been said that ‘ongoing, purposeful reform to the allowance payment system which promotes higher workforce participation and productivity growth is critical to helping Australia manage an ageing population’.¹²⁹ The OECD and others have suggested that payment reform should move in the direction of fewer distinctions between payment recipients, not more.¹³⁰ However, the ALRC invites stakeholder comment about whether changes to the income test withdrawal rate for Newstart Allowance recipients aged 55 years and over should form part of the process of ongoing reform.

Question 5–2 The ‘withdrawal’ or ‘taper’ rate for an income support payment operates to reduce gradually the rate at which a payment is made as income or assets increase. What effect, if any, would changing the income test withdrawal rate for Newstart Allowance recipients aged 55 years and over have on their incentives for workforce participation?

Disability Support Pension

5.74 Disability Support Pension (DSP) recipients are numerically the most populous group of working age income support recipients. At June 2011, there were 818,850 recipients of DSP.¹³¹ Of these, 67.5% were aged 45 years or over; 65% aged 45–64; and 2.5% aged 65 years and over.¹³²

126 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 26; *Social Security and Other Legislation Amendment (Income Support and Other Measures) Act 2012* (Cth) sch 3.

127 The Brotherhood of St Laurence support reducing the taper rates for mature age Newstart Allowance recipients: Brotherhood of St Laurence, *Submission 54*.

128 AHRC, *Submission to the Allowance Payment Inquiry*, (August 2012), 6.

129 DEEWR, FaHCSIA, DHS and DIISRTE, *Submission to the Allowance Payment Inquiry* (2012), 32.

130 OECD, *Sickness, Disability and Work: Breaking the Barriers* (2010), 17–18; Reference Group on Welfare Reform, *Participation Support for a More Equitable Society* (2000), 19; ACOSS, *Out of the Maze: A Better Social Security System for People of Working Age*, ACOSS Paper 163 (2010), 2.

131 FaHCSIA, *Characteristics of Disability Support Pension Recipients June 2011* (2011), 10.

132 Ibid.

5.75 Uncertainty about the possible effect of workforce participation on qualification for DSP may act as a disincentive for recipients of the payment, the majority of whom are mature age. The ALRC invites stakeholder comment about the process of review of qualification for DSP.

Disability Support Pension and work

5.76 DSP provides income support on the basis of a person being unable to undertake substantial employment because of his or her disability. It is not generally subject to participation obligations.¹³³

5.77 To qualify for DSP a person must generally have a ‘continuing inability to work’ due to permanent physical, intellectual or psychiatric impairment.¹³⁴

5.78 The severity of impairment to a person’s work functioning is rated by reference to ‘Impairment Tables’.¹³⁵ New entrants to the DSP must have an impairment rating of 20 points or more.¹³⁶

5.79 To have a continuing inability to work, new entrants to the DSP must be unable to work at least 15 hours per week independently of a program of support, or be re-skilled for such work, within the next two years.¹³⁷ A person whose impairment is not severe¹³⁸ must also have participated in a program of support.¹³⁹

5.80 Comparatively few DSP recipients receive employment income. At May 2012, 70,243 recipients (less than 10%) had income from employment.¹⁴⁰ Recent changes to the DSP are aimed at promoting workforce participation among recipients.

- From 1 July 2012, all DSP recipients can work up to 30 hours per week without affecting their qualification for the payment.¹⁴¹ Previously, recipients of DSP

133 However, from 1 July 2012, DSP recipients under age 35, with a work capacity of at least eight hours per week, are required to attend regular interviews with Centrelink to develop participation plans to help build their capacity to work: *Social Security Act 1991* (Cth) ss 94(1)(da), 94A.

134 Ibid s 94. A person must also be at least 16 years of age and meet residence requirements.

135 The Tables and the rules to be complied with in applying them are found in Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 .

136 *Social Security Act 1991* (Cth) s 94(1)(a), 94(1)(b).

137 Ibid s 94(1)(c)(i), 94(2), 94(5). Alternatively, the person must be participating in the supported wage system: *Social Security Act 1991* (Cth) s 94(1)(c)(ii). Persons whose start date for payment was before 11 May 2005 must have had a continuing inability to work 30 hours or more per week: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.1.10].

138 A person’s impairment is severe if it rates 20 points or more under the Impairment Tables, of which 20 points or more are under a single Impairment Table: *Social Security Act 1991* (Cth) s 94(3B).

139 Ibid s 94(2)(aa). A person who is assessed as being permanently blind is automatically qualified for a Disability Support Pension, and do not have to demonstrate a continuing inability to work: *Social Security Act 1991* (Cth) s 95; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.2.40].

140 Senate Community Affairs Committee—Parliament of Australia, *2012–13 Budget Estimates Hearings Families, Housing, Community Services and Indigenous Affairs Portfolio: Answers to Estimates Questions on Notice, Question 354* (FaHCSIA) (24 July 2012).

141 *Social Security Act 1991* (Cth) s 96(2).

granted on or after 11 May 2005 could only work up to 15 hours a week before their payment was suspended or cancelled.¹⁴²

- Return-to-work ‘suspension’ provisions allow DSP recipients who are no longer eligible for the payment due to earnings from work to return to the payment within two years if they later cease work or reduce their earnings below the income test limit.¹⁴³

5.81 NWRN welcomed the change allowing DSP recipients to work up to 30 hours per week, noting that it will ‘provide a greater incentive to work and work for longer periods’.¹⁴⁴ However, NWRN argued that recipients of DSP receive mixed messages about the effect of workforce participation on their continued qualification for payment. NWRN stated that ‘from the individual’s perspective, from what they hear and read, the aim of the Government is to get them off the DSP—and thus many respond with fear and anxiety’.¹⁴⁵

5.82 NWRN submitted that DSP recipients are concerned that any increase in their workforce participation will trigger a review of their eligibility for the payment.¹⁴⁶ A range of reviews may apply to DSP recipients.

5.83 A DSP recipient may be subject to a ‘Service Update Review’, which may assess a person’s medical circumstances, income and assets, earnings and other relevant personal circumstances.¹⁴⁷

5.84 A person may also be selected for a ‘manual medical/work capacity review’. The *Guide to Social Security Law* directs that this review should occur when a Centrelink customer service adviser is not convinced that a person remains qualified for DSP (for example, because the customer service adviser discovers that the recipient is working).¹⁴⁸

5.85 Centrelink also conducts ‘profiling reviews’ of DSP recipients, selectively identifying and reviewing certain recipients.¹⁴⁹ FaHCSIA has stated that its practice is not to make public the parameters used to select a person for review, but that ‘employment predictors by themselves are not enough to select a pensioner’.¹⁵⁰

142 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.1.12].

143 *Social Security (Administration) Act 1999* (Cth) s 97A; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [8.2.2], [3.6.1.100].

144 National Welfare Rights Network, *Submission 50*.

145 Ibid.

146 Ibid.

147 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [6.2.5.15].

148 Ibid, [6.2.5.18].

149 Ibid, [6.5].

150 Senate Community Affairs Committee—Parliament of Australia, *Social Security and Other Legislation Amendment Bill 2011 – Schedule 3 (Disability Support Pension Impairment Tables): Responses to Questions on Notice (FaHCSIA)* (12 September 2011).

5.86 All reviews of a person's qualification for DSP will use the current Impairment Tables to assess the level of impairment.¹⁵¹ These Tables were reviewed in 2011 and revised Tables took effect from 1 January 2012.¹⁵² Analysis carried out for FaHCSIA on the use of the new Impairment Tables suggested that 36–45% of existing successful claimants would fail in a claim under the new Tables.¹⁵³ This has led to concern about the possible impact of review upon qualification for DSP.¹⁵⁴

5.87 While accepting that it is appropriate that there should be some mechanism for review of a person's continued qualification for DSP, the ALRC considers that the lack of clarity around the circumstances of review may be acting as a disincentive to increased workforce participation. The ALRC therefore seeks stakeholder comment on the DSP review process and its effect on mature age DSP recipients' workforce participation.

Question 5–3 In what ways, if any, does the review process for qualification for the Disability Support Pension create barriers to mature age participation in the workforce or other productive work? For example, does the lack of information about how Disability Support Pensioners are selected for review act as a disincentive to work?

Carer Payment

5.88 Carer Payment provides income support to people who, because of caring responsibilities, are unable to support themselves through substantial paid employment.¹⁵⁵ This section considers the limitations on participation in education or training, or paid or other productive work, associated with qualification for Carer Payment. The ALRC proposes that the current rules be more flexibly interpreted to allow carers in receipt of Carer Payment, the majority of whom are mature age, better to combine care with work or study.

Carer Payment and mature age persons

5.89 There is a correlation between informal care, mature age and gender. According to the Australian Bureau of Statistics, 'the likelihood of a person providing care to someone else increases with age, peaking for women between the ages of 55 years and 64 years and for men aged over 75'.¹⁵⁶

151 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.3].

152 Ibid, [3.6.3].

153 Taylor Fry, *Analysis of the Testing of Draft Impairment Tables* (2011), 1.

154 Senate Community Affairs Legislation Committee, *Disability Impairment Tables: Provisions of Schedule 3 of the Social Security and Other Legislation Amendment Bill 2011* (2011), 19.

155 FaHCSIA, *Pension Review Report* (2009), 10.

156 Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, Cat No 4430.0* (2003), 49.

5.90 The age profile of Carer Payment recipients reflects this correlation. At December 2011, there were 195,183 Carer Payment recipients. Of these, 69% were aged 45 years and older; 57% were aged 45–64 and 11% were aged over 65.¹⁵⁷ Carer Payment recipients were predominantly women—69% of total recipients at December 2011.¹⁵⁸

5.91 The main policy intent of Carer Payment is to provide income support to carers who cannot participate substantially in paid work. However, Professor Michael Bittman, Dr Trish Hill and Ms Cathy Thomson have noted that Carer Payment also fits within a broader policy setting that aims to support the private provision of care, through self-care and informal care in the home. This is a form of care that is likely to increase with the ageing of the population. This ‘privatisation of care’ objective, they argue, stands in tension with the goal of promoting workforce participation, given the difficulty of combining paid work and care.¹⁵⁹

5.92 The question of how to promote workforce participation of those in receipt of Carer Payment falls squarely within these policy tensions. Longitudinal studies have shown that working age carers experience difficulties in combining paid work and care, with carers more likely than non-carers to reduce their hours of work or exit from the labour force and to earn lower levels of income.¹⁶⁰

Qualification for Carer Payment

5.93 To qualify for Carer Payment, a person must, among other things, be providing ‘constant care’ to a care receiver in the care receiver’s home.¹⁶¹ Constant care is not defined in the *Social Security Act*. However, the *Guide to Social Security Law* states that it amounts to care for a significant period each day of at least the equivalent of a normal working day.¹⁶²

5.94 Carer Payment recipients are permitted in specific circumstances temporarily to cease caring and remain qualified for Carer Payment. A Carer Payment recipient may cease caring for not more than 25 hours per week (including travel time) to undertake training, education, unpaid voluntary work or paid employment.¹⁶³ This is often referred to as the ‘25-hour rule’.

157 Senate Standing Committee on Education Employment and Workplace Relations, *Additional Budget Estimates 2011–2012: Answers to Questions on Notice, Question No EW1043_12 (DEEWR)* (30 April 2012).

158 Ibid.

159 M Bittman, T Hill and C Thomson, ‘The Impact of Caring on Informal Carers’ Employment, Income and Earnings: a Longitudinal Approach’ (2007) 42(2) *The Australian Journal of Social Issues* 255, 256.

160 Ibid, 261.

161 *Social Security Act 1991* (Cth) ss 197B–197K, 198; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.4.10].

162 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.1.C.310].

163 *Social Security Act 1991* (Cth) s 198AC(4); FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.4.70]. A person may also temporarily cease caring in certain other circumstances, including for up to 63 whole days per year: *Social Security Act 1991* (Cth) s 198AC; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.4.40].

5.95 A number of stakeholders considered that the 25-hour rule acted as a barrier to mature age workforce participation.¹⁶⁴ COTA argued that ‘the 25-hour rule is too restrictive and ... it severely limits carers’ opportunities to participate in the workforce ... or prepare themselves to do so in the future’.¹⁶⁵

5.96 Carers Australia argued that there is a need for more flexibility in the application of the 25-hour rule for Carer Payment.¹⁶⁶ Carers Australia has stated that the current income support structure is limited in its ability to support transitions between caring and employment, and that ‘without strong supports for these transitions, caring will be viewed as carrying too many financial, social and health risks for many to take on such a role’.¹⁶⁷

5.97 A number of commentators have highlighted the difficulties faced by carers in re-entering the workforce when caring responsibilities cease.¹⁶⁸ This was echoed in submissions to this Inquiry.¹⁶⁹ For example, OWN submitted that ‘informal carers returning to work are concerned their qualifications and skills are out of date and they may have lost confidence in their abilities and report being told they are too old’.¹⁷⁰

5.98 The *Guide to Social Security Law* states that a person’s qualification should be reviewed if a carer ceases to care for more than 25 hours per week to participate in training, education, employment or voluntary work, as the person may no longer satisfy the constant care criteria.¹⁷¹ NWRN suggested that this test was strictly applied, reporting that

in 2010–11 there were 2,398 rejections of Carer Payment due to the carer working, volunteering, or studying or training for more than 25 hours a week. In the same period there were 1,822 cancellations of Carer Payment because the carer worked, volunteered, studied or trained for more than 25 hours a week.¹⁷²

164 Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; ACTU, *Submission 38*.

165 COTA, *Submission 51*.

166 Carers Australia, *Correspondence*, 13 August 2012.

167 Carers Australia, *Submission to the Pension Review* (2008), 21.

168 M Bittman, T Hill and C Thomson, ‘The Impact of Caring on Informal Carers’ Employment, Income and Earnings: a Longitudinal Approach’ (2007) 42(2) *The Australian Journal of Social Issues* 255; B Cass, ‘Care Giving and Employment: Policy Recognition of Care and Pathways to Labour Force Return’ (2006) 32(3) *Australian Bulletin of Labour* 240.

169 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Older Women’s Network NSW Inc, *Submission 26*.

170 Older Women’s Network NSW Inc, *Submission 26*. NWRN similarly noted the significant disadvantage in the labour market faced by carers after caring responsibilities cease: National Welfare Rights Network, *Submission 50*.

171 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.4.70]. Working Credit provides some flexibility when a person takes up paid work. If a person takes up paid work for more than 25 hours per week that causes them to fail the constant care criterion, they are treated as qualified for the period it takes to run down their working credit balance. However, Working Credit will not apply where a person increases time spent in education, training or voluntary work.

172 National Welfare Rights Network, *Submission 50*.

5.99 Removing barriers to participation in paid or voluntary work, as well as to the ability to obtain or update skills through training or education, may benefit Carer Payment recipients, not only in their current situation, but also in equipping them to work after they cease caring.

5.100 There appears to be scope for a more flexible interpretation of the current 25-hour rule to assist Carer Payment recipients to combine care with work, training, education or voluntary work. The ALRC proposes that the *Guide to Social Security Law* be amended to reflect this.

5.101 The Guide currently provides one example of how employment in the home may be compatible with the constant care requirement.¹⁷³ There are a number of other employment, training and education activities—for example, online learning—that might be undertaken within the care receiver’s home that would also be compatible with the need to provide constant care. The ALRC proposes that the Guide should be amended to provide further examples of such activities.

Proposal 5–3 The *Guide to Social Security Law* should provide that a temporary cessation of constant care due to participation in employment, voluntary work, education or training that exceeds 25 hours per week:

- (a) does not result in automatic cancellation of Carer Payment; and
- (b) may, in some circumstances, be compatible with the constant care requirement for qualification for Carer Payment.

Proposal 5–4 The *Guide to Social Security Law* should provide examples of situations where participation in employment, voluntary work, education or training that exceeds 25 hours per week may be compatible with the constant care requirement for Carer Payment. These examples should include:

- (a) employment, voluntary work, education or training undertaken at home, for example online, provided it is consistent with the care receiver’s need for frequent personal care or constant supervision; and
- (b) short term increases in excess of 25 hours per week of employment, voluntary work, education or training undertaken outside the home.

Concession cards

5.102 Where eligibility for concession cards is directly linked to the receipt of income support, the concessions available to cardholders enhance the total value of these payments. The loss of support when paid work is undertaken can therefore be greater

¹⁷³ The example is: ‘Jane cares for her aunt in her aunt’s home. Jane uses a room in her aunt’s house to make craft items that she sells through mail orders. Jane only attends to her business when she is not providing care for her aunt and can stop doing craftwork or packing orders at any time that her aunt needs her’: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.6.4.70].

than the withdrawal of primary income support payments. Reluctance to lose, or fear of losing, a concession card can act as a disincentive to work.

5.103 Holding a concession card entitles a person to Australian Government concessions, including price subsidies for Pharmaceutical Benefits Scheme medicines and a lower threshold for the Medicare safety net. In addition, state and local governments provide a range of concessions to cardholders, such as discounts on council rates, utilities charges and public transport fares.¹⁷⁴

5.104 The main concession cards available to income support recipients are the Health Care Card and the Pensioner Concession Card. The Health Care Card is available to recipients of Newstart Allowance and certain other payments.¹⁷⁵ The Pensioner Concession Card is available to those who receive a pension (including Age Pension, Disability Support Pension and Carer Payment) and to some recipients of other payments.¹⁷⁶

5.105 The Tax Review noted that, for persons who are heavy users of a concession card, the incentives to retain it may be especially high. As a consequence, persons ‘may be reluctant to jeopardise the concessions they receive ... by testing their ability to work’.¹⁷⁷

5.106 Stakeholders in this Inquiry emphasised that mature age persons place a high value on eligibility for a concession card and argued that the desire to retain the card influences decisions about taking up paid work.¹⁷⁸ For example, NWRN reported that ‘the Pensioner Concession Card is highly valued and ... people often make decisions on the basis of whether they will receive or lose the card’.¹⁷⁹ COTA noted, similarly, that mature age persons ‘highly value their concession cards and their retention is a major consideration in all aspects of their financial situations’.¹⁸⁰

5.107 To address this possible disincentive to work, concession cards may be retained for a period after taking up employment.¹⁸¹ In addition, alternative concession cards

174 The Treasury, *Australia's Future Tax System: Final Report* (2010), 621. State and local governments generally make decisions on the type and level of concessions they offer. The Australian government has contributed funding towards selected state-based concessions through the National Partnership Agreement on Certain Concessions for Pensioners and Seniors Card Holders. This agreement expired on 30 June 2012. The Australian Government has indicated that this agreement will be renegotiated: Australian Government, *Budget 2012–13: Budget Paper No. 3* (2012) <www.budget.gov.au> at 3 September 2012.

175 *Social Security Act 1991* (Cth) s 1061ZK; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.9.1.10].

176 *Social Security Act 1991* (Cth) s 1061ZA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.2.9.10].

177 The Treasury, *Australia's Future Tax System: Final Report* (2010), 622.

178 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Chamber of Commerce and Industry, *Submission 44*.

179 National Welfare Rights Network, *Submission 50*.

180 COTA, *Submission 51*.

181 FaHCSIA, *Australia's Future Tax System: Pension Review Background Paper* (2008), 11–12. For example, Pensioner Concession Cards may be extended for 12, 26 or 52 weeks—depending on the payment and the cardholder circumstances: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.9.2.30].

may be available to those who do not qualify for income support. For example, the Health Care Card is available to low income earners meeting an income test.¹⁸² The Commonwealth Seniors Health Card is available to those who have reached Age Pension age, do not qualify for Age Pension or a pension from the Department of Veterans' Affairs and meet a separate income test.¹⁸³

5.108 However, NWRN submitted that the rules about the retention of concession cards upon taking up paid work are too complex, and that this works against their policy intent:

Welfare Rights Centres receive many enquiries from people confused by the current rules that apply to determine how long a person can retain their concession card ... many social security recipients are incredibly confused by the rules.¹⁸⁴

5.109 One possible way to remove any disincentive to take up paid work caused by loss of a concession card is to broaden eligibility for the card. However, as availability of a concession card widens, 'its value as an indicator of financial need can be diminished'.¹⁸⁵ The increasing unwillingness of general practitioners to bulk-bill card holders as the proportion of their patients in possession of a card increases is one example of this diminution in value.¹⁸⁶ Widening the availability of a concession card also runs counter to the principle of targeting support to those in most need.

5.110 The concessions available to cardholders are provided by all three levels of government. Extending eligibility would have cost implications across all these levels. The Tax Review has noted that it is difficult to determine the total expenditure on concessions, 'because the value of the concession used in some transactions may not be recorded'.¹⁸⁷ It would also be difficult to quantify the cost implications of any change to concession card qualification rules.

5.111 The Tax Review recommended that concessions be reviewed across all levels of government.¹⁸⁸ It considered that the current approach to concession card eligibility may create disincentives to work.¹⁸⁹ The Tax Review also found that the concession card system is complex and may be inequitable. For example, concessions on local government rate payments benefit home-owning but not renting cardholders. In addition, different state governments may provide different levels of concessions to cardholders.¹⁹⁰

5.112 While the ALRC does not make a specific proposal about this issue, the ALRC agrees that a review of the concession card system may be desirable, given stakeholder comments about the complexity of the system and its potential effect on workforce

182 *Social Security Act 1991* (Cth) ss 1061ZO, 1071A.

183 *Ibid* s 1061ZG; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.2.8.30].

184 National Welfare Rights Network, *Submission 50*.

185 The Treasury, *Australia's Future Tax System: Final Report* (2010), 623.

186 FaHCSIA, *Pension Review Report* (2009), 112.

187 The Treasury, *Australia's Future Tax System: Final Report* (2010), 621.

188 *Ibid*, 625.

189 *Ibid*, 624–625.

190 *Ibid*, 623–624.

participation. Such a review would consider factors beyond mature age workforce participation—including general workforce participation. Consequently, proposing a review of the concession card system is beyond the scope of this Inquiry.

5.113 However, the ALRC suggests that any such review, as previously recommended by the Tax Review, could consider how the concession card system might be reformed to remove or minimise disincentives to mature age workforce participation. Examples of issues that could be considered include: reducing complexity; the basis for eligibility for a card; the concessions associated with different cards and income support payment types; and the periods of time that cards are retained after losing qualification for income support.

Age-based pension payments

5.114 In this section, the ALRC considers the qualifying age for Veterans' Age Service Pension, and the treatment of employment income in means testing for Age Pension recipients.

5.115 No changes to the qualifying age for Veterans' Age Service Pension are proposed. The ALRC proposes that the Work Bonus amount—an amount of employment income that is disregarded in calculating the rate of payment for Age Pension and Age Service Pension—be indexed in order to maintain its value as a workforce incentive.

Veterans' Age Service Pension

5.116 Veterans of the Australian Defence Force who have rendered qualifying service are eligible to receive an age-based income support payment—the Age Service Pension—five years earlier than the civilian Age Pension.¹⁹¹ It is currently available to male veterans who are aged 60 years and older and to female veterans who are aged 55 years and older.¹⁹²

5.117 The qualifying age for Age Service Pension is not scheduled to increase in line with forthcoming changes that will increase Age Pension age to 67.¹⁹³ The Tax Review proposed that the current five-year difference between qualifying age for Age Pension and Age Service Pension be retained with any increase to Age Pension age.¹⁹⁴

5.118 The Australian Institute of Superannuation Trustees supported maintaining the five-year gap between Age Pension age and Age Service Pension age.¹⁹⁵ Ex-service

191 *Veterans' Entitlements Act 1986* (Cth) s 36. A Service Pension may also be granted on the grounds of permanent incapacity to work: *Veterans' Entitlements Act 1986* (Cth) s 37. Veterans' Age Service Pension is paid at the same rate as Age Pension and is subject to the same income and assets tests.

192 *Veterans' Entitlements Act 1986* (Cth) ss 5QA, 5QB.

193 Age Pension age will rise incrementally from 65 to 67 between 1 July 2017 and 1 July 2023: *Social Security Act 1991* (Cth) ss 23(5A), (5D).

194 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 3.

195 Australian Institute of Superannuation Trustees, *Submission 47*.

organisations opposed any increase to the qualifying age for the Age Service Pension.¹⁹⁶

5.119 The Returned & Services League of Australia (RSL) and the Alliance of Defence Service Organisations (ADSO) argued that the qualifying age for Age Service Pension is not related to the qualifying age for the Age Pension.¹⁹⁷ ADSO said that the qualifying age is ‘an independent judgement based on the effects of war and should be seen as an absolute figure, not a top-down figure with reference to age pension’.¹⁹⁸

5.120 Stakeholders submitted that military service has adverse health effects for veterans.¹⁹⁹ The Department of Veterans’ Affairs stated that ‘studies into the health and well-being of veterans following military deployment have found statistically significant increases in mortality and morbidity among our veterans’.²⁰⁰ The RSL submitted that the contemporary experience of military service, including the multiple deployments served by many military personnel, may mean that the ageing effects of war are greater now than in the past.²⁰¹

5.121 Eligibility for an age-based income support payment may act as an incentive to leave the workforce, or a disincentive to continue participating in paid work.²⁰² However, the ALRC considers that there is a distinction to be made between removing barriers to work and raising the qualification age for an income support payment. The latter may compel veterans to remain in the labour force. In light of this and of evidence of the continuing adverse health effects of military service, the ALRC does not propose any increase to the qualifying age for Veterans’ Age Service Pension.

Age Pension and employment income

5.122 As well as its place in the social security system, the Age Pension forms one pillar of Australia’s three-pillar retirement income system, alongside compulsory saving through the superannuation guarantee and voluntary superannuation.²⁰³ The Age Pension acts as a safety net payment—ensuring that people over Age Pension age have access to an income that provides a reasonable minimum standard of living.²⁰⁴

196 Alliance of Defence Service Organisations, *Submission 49*; TPI Federation of Australia, *Submission 48*; The Returned & Services League of Australia Ltd, *Submission 24*. NWRN also opposed any increase to the qualifying age for Age Service Pension: National Welfare Rights Network, *Submission 50*.

197 Alliance of Defence Service Organisations, *Submission 49*; The Returned & Services League of Australia Ltd, *Submission 24*.

198 Alliance of Defence Service Organisations, *Submission 49*.

199 Ibid; Department of Veterans’ Affairs, *Submission 52*.

200 Department of Veterans’ Affairs, *Submission 52*.

201 The Returned & Services League of Australia Ltd, *Submission 24*.

202 B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 91.

203 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 8.

204 Ibid, 10.

5.123 A high proportion—68.3%—of persons over Age Pension age were in receipt of the Age Pension at March 2012.²⁰⁵ 40.9% of these were in receipt of the full rate of Age Pension.²⁰⁶ When combined with all forms of income support (including Commonwealth Seniors Health Card) 85% of persons over Age Pension age were in receipt of some income support at March 2012.²⁰⁷

5.124 A person may continue to work after reaching Age Pension age. If so, employment income will be assessed as part of the income test in determining eligibility to receive the Age Pension. At March 2012, 3.9% of Age Pension recipients had earnings from employment.²⁰⁸

5.125 A number of elements in the design of the Age Pension allow continued workforce participation after reaching Age Pension age. These include the design of the means test and Work Bonus.²⁰⁹

Means testing for Age Pension

5.126 Employment income, along with income from other sources, is assessed under the income test for Age Pension.²¹⁰ Each dollar of assessable income over the free area amount reduces the level of payment by 50 cents in the dollar.²¹¹

5.127 A number of submissions argued that the income test provided disincentives to work for Age Pension recipients.²¹² For example, the Australian Chamber of Commerce and Industry argued that ‘once eligible for an aged pension and associated benefits recipients become reluctant to seek higher remuneration from paid employment’.²¹³ The Government of South Australia supported removing or relaxing the income test for the Age Pension.²¹⁴ The Australian Council of Trade Unions and the Superannuated Commonwealth Officers’ Association Inc also supported a relaxation of the income test.²¹⁵

5.128 The increase in the payment rate for Age Pension in 2009 was weighed against a change in the withdrawal rate from 40 cents in the dollar to 50 cents in the dollar.²¹⁶

205 Senate Community Affairs Committee—Parliament of Australia, *2012-13 Budget Estimates Hearings Families, Housing, Community Services and Indigenous Affairs Portfolio: Response to Questions on Notice Question 76 (FaHCSIA)* (28 May 2012).

206 Ibid.

207 Ibid.

208 FaHCSIA, *Correspondence*, 6 July 2012.

209 The same means tests apply to Veterans’ Age Service Pension, and Work Bonus is also available to veterans.

210 *Social Security Act 1991* (Cth) s 1064-E1; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [4.2.1.10].

211 The current free area amount for a single person is \$152: DHS, *A Guide to Australian Government Payments 1 July–19 September 2012* (2012), 32.

212 Australian Chamber of Commerce and Industry, *Submission 44*; J Willis, *Submission 42*; ACTU, *Submission 38*; Australian Industry Group, *Submission 37*; Government of South Australia, *Submission 30*; Queensland Tourism Industry Council, *Submission 28*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*; Superannuated Commonwealth Officers Association, *Submission 14*.

213 Australian Chamber of Commerce and Industry, *Submission 44*.

214 Government of South Australia, *Submission 30*.

215 ACTU, *Submission 38*; Superannuated Commonwealth Officers Association, *Submission 14*.

216 National Welfare Rights Network, *Submission 50*.

This increase was justified on the basis of ensuring the long-term sustainability of the pension system, and so that increases in the payment could be targeted at those most in need.²¹⁷ Professor Peter Whiteford, Associate Professor Gerry Redmond and Dr Bruce Bradbury have noted that the increases in the Age Pension payment rate more than halved the poverty among persons aged 65 years and older.²¹⁸

5.129 The calibration of the means test is designed to strike a balance between the cost of an income support payment to the taxpayer, the adequacy of the payment and the incentives for people to undertake employment or earn other income. This is known as the ‘iron triangle’ of means testing.²¹⁹ Changes to the design of the means test along any of these axes will involve some trade-off against one or both of the others. For example, relaxation or removal of the means test would increase the cost of the income support payment to taxpayers.²²⁰

5.130 The ALRC is conscious that the primary purpose of the Age Pension is to act as a safety net payment. This is in keeping with the targeted nature of the system of income support payments. Significant relaxation or removal of the income test is at odds with such a targeted approach. The current income test appears to be an appropriate compromise between payment adequacy and incentives for private provision. Therefore, the ALRC does not propose any changes to the income test. Proposed changes to the Work Bonus scheme, addressed below, are intended to promote incentives to work while remaining consistent with payment design.

Work Bonus

5.131 ‘Work Bonus’ was introduced in 2009 to reduce the amount of employment income that is assessable in the Age Pension income test in an instalment period. Work Bonus allows a person to earn up to \$250 per fortnight, without it being assessed as income under the pension income test.²²¹ Any unused amount of the fortnightly \$250 Work Bonus accumulates in an ‘Employment Income Concession Bank’, up to a maximum amount of \$6,500.²²² Credit in this income bank can then be carried forward and be used to offset employment income that would otherwise be assessable under the pension income test.²²³ Work Bonus is also available to Veterans’ Age Service Pension recipients.²²⁴

217 Explanatory Memorandum, Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009 (Cth).

218 P Whiteford, G Redmond and B Bradbury, ‘Razor Gangs and Welfare Reformers Must Not Lose Sight of Evidence’, *The Age* (online), 20 April 2012, <www.theage.com.au/opinion/politics/>. However, the Brotherhood of St Laurence argued that the current assets test is inequitable in its treatment of home owners versus non-home owners: Brotherhood of St Laurence, *Submission 54*.

219 The Treasury, *Australia’s Future Tax System: Final Report* (2010), 498.

220 Ibid.

221 *Social Security Act 1991* (Cth) s 1073AA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.1.14.10], [3.1.14.30].

222 *Social Security Act 1991* (Cth) s 1073AB.

223 Ibid s 1073AA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.1.14.30].

224 *Veterans’ Entitlements Act 1986* (Cth) ss 46AA, 46AC.

5.132 Work Bonus was introduced in place of another incentive designed to promote prolonged workforce participation after Age Pension age, the Pension Bonus Scheme.²²⁵ Stakeholders largely welcomed the Work Bonus scheme.²²⁶ NWRN noted that Work Bonus appeared, on preliminary data, to be having some effect on the workforce participation of Age Pension recipients, as well as upon the amount of employment income they received.²²⁷ However, some submissions felt that awareness and understanding of Work Bonus was low among Age Pension recipients, and proposed greater information about and promotion of this scheme.²²⁸

5.133 Some stakeholders called for an increase in the Work Bonus amount, either through regular indexation or through a wholesale increase.²²⁹

5.134 The Pension Review noted that the indexing of pensions is critical to maintaining the standard of living of pension recipients.²³⁰ The ALRC considers that it is similarly important to index the Work Bonus amount to maintain over time the incentive for workforce participation for Age Pension recipients.²³¹ The ALRC therefore proposes that the Work Bonus amount be automatically indexed in the same manner as for Age Pension.

Proposal 5–5 The objective of Work Bonus is to provide incentives for recipients of Age Pension and Veterans' Age Service Pension to continue in employment. To ensure that Work Bonus continues to achieve its objective, the following amounts should be indexed to the Pensioner and Beneficiary Living Cost Index:

- (a) the income concession amount under s 1073AA of the *Social Security Act 1991* (Cth) and s 46AA of the *Veterans' Entitlements Act 1986* (Cth); and

225 ACCI recommended re-opening the Pension Bonus Scheme: Australian Chamber of Commerce and Industry, *Submission 44*. The majority of submissions received in relation to the Pension Bonus Scheme did not support such a re-opening: COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Institute of Superannuation Trustees, *Submission 47*; R Spencer, *Submission 08*.

226 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Institute of Superannuation Trustees, *Submission 47*; National Seniors Australia, *Submission 27*; Older Women's Network NSW Inc, *Submission 26*; Superannuated Commonwealth Officers Association, *Submission 14*.

227 National Welfare Rights Network, *Submission 50*.

228 Australian Institute of Superannuation Trustees, *Submission 47*; Olderworkers, *Submission 22*; Commonwealth Ombudsman Office, *Submission 16*.

229 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; National Seniors Australia, *Submission 27*; Older Women's Network NSW Inc, *Submission 26*; Superannuated Commonwealth Officers Association, *Submission 14*.

230 FaHCSIA, *Pension Review Report* (2009), 70. The maximum basic rate of Age Pension is indexed on 20 March and 20 September each year: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [5.1.8.50].

231 Indexation of the Student Income bank amount for Austudy and ABSTUDY commenced on 1 July 2012: *Social Security and Other Legislation Amendment (Income Support for Students) Act 2010* (Cth) sch 1, pt 2, div 4.

- (b) the maximum unused concession balance under s 1073AB of the *Social Security Act 1991* (Cth) and s 46AC of the *Veterans' Entitlements Act 1986* (Cth).

Pensioner Education Supplement for Age Pension recipients

5.135 Pensioner Education Supplement (PES) is available to pension recipients (and certain other income support recipients) to assist with the costs of full or part-time study.²³² It is intended to help students improve their chance of finding a job through study.²³³ There is no maximum age limit for PES,²³⁴ however it is not available to Age Pension recipients or to persons in receipt of the Age Service Pension under the *Veterans' Entitlements Act*.²³⁵

5.136 For the purposes of PES, approved courses of education or study include secondary courses, tertiary courses including pre-vocational, diplomas, graduate certificates and Masters courses.²³⁶ There is no minimum duration for a course to be approved.²³⁷ A person is not eligible for PES if they have completed a course for a Masters degree, Doctorate or a qualification of the same standing at an educational institution.²³⁸

5.137 NWRN submitted that PES should be extended to Age Pension recipients, arguing that this restriction on eligibility is 'out of step with other Government policies which support participation through life-long learning'.²³⁹

5.138 The ALRC considers that there is a principled basis for extending PES to those over Age Pension or Veterans' Age Service Pension age. While the link between PES and workforce participation is not direct, extending access to PES for Age Pension and Veterans' Age Service Pension recipients is consistent with the broad objective of promoting mature age workforce participation. Excluding these pension recipients from access to PES arguably implies that they are 'retired' from the workforce.

232 *Social Security Act 1991* (Cth) s 1061PA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.8.3.10], [3.8.3.20]. To qualify for PES, a person must be receiving a payment that attracts PES, be at least 16 years of age and be undertaking qualifying study.

233 DHS, *Pensioner Education Supplement* (2012) <www.humanservices.gov.au/customer/services/centrelink/pensioner-education-supplement> at 4 September 2012.

234 *Social Security Act 1991* (Cth) s 1061PK; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [3.8.3.10].

235 *Social Security Act 1991* (Cth) s 1061PJ.

236 Ibid ss 1061PB(1), 1061PC; *Student Assistance Act 1973* (Cth) s 5D. *Student Assistance (Education Institutions and Courses) Determination (No 2) 2009* (Cth); *Student Assistance (Education Institutions and Courses) Amendment Determination (No 2) 2011* (Cth).

237 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.1.A.210].

238 *Social Security Act 1991* (Cth) ss 23(1), 1061PB(2); FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides_acts> at 30 August 2012, [1.1.Q.40].

239 National Welfare Rights Network, *Submission 50*.

Proposal 5–6 Pensioner Education Supplement is a payment to assist in meeting the costs of study in eligible secondary or tertiary courses. Section 1061PJ of the *Social Security Act 1991* (Cth) should be amended to provide that Age Pension and Veterans' Age Service Pension are payments attracting Pensioner Education Supplement.

6. Family Assistance and Child Support

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Summary

6.1 This chapter discusses two areas of law: child support and family assistance. These laws may be relevant to mature age persons, in particular when they raise grandchildren. Specific barriers to work for mature age persons within these laws have not been identified. Consequently, the ALRC does not propose reforms to child support or family assistance laws.

Grandparents and mature age carers

6.2 Mature age persons may be eligible for family assistance and child support when they care for children—frequently grandchildren.¹ In 2009–2010, there were 16,000 Australian families in which grandparents were raising children 17 years or younger.² There are a number of reasons why grandchildren may be in the principal care of their grandparents, including: family violence; drug or alcohol misuse; child abuse or neglect; the incarceration or death of a parent; and due to problems arising from mental or physical illness or intellectual disability.³

6.3 Mature age persons may also be eligible for family assistance and child support—or be liable to pay child support—as parents. The ALRC has not examined workplace barriers that affect parents as a group, as reforms to address workforce disincentives to parents of all ages are beyond the scope of this Inquiry.

1 The two primary family assistance payments that grandparents and other mature age non-parent carers may be eligible for are Family Tax Benefit and Child Care Benefit. They may also be eligible for other payments including: Child Care Rebate; Baby Bonus; Maternity Immunisation Allowance; and Double Orphan Allowance.

2 Australian Bureau of Statistics, *Family Characteristics, Australia, Cat No 4442.0* (2009–10). Arrangements for care may be formal (when carers have legal responsibility for children), or informal (by private agreement): FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [2.1.1.85].

3 E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ 76 *Family Matters* 70; B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) 76 *Family Matters* 76, 77; COTA National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [3.3.1], [5.3], [6.5.2].

6.4 Generally, the ALRC and stakeholders in this Inquiry have not identified particular barriers to participation in the workforce, or other productive work, for grandparents and other mature age carers in family assistance and child support laws.⁴ Consequently, the ALRC has not proposed reforms to these laws.⁵ The section below explores two family assistance payments that the ALRC has given particular consideration—Child Care Benefit (CCB) and Child Care Rebate (CCR). Both payments have specific policy objectives relevant to this Inquiry.

6.5 The ALRC acknowledges that when grandparents raise grandchildren, this may constitute a barrier to workforce participation in itself—though not a legal barrier. Grandparents may find their ‘employment and retirement plans thrown into chaos’, and be forced to give up work to look after the children.⁶ However, raising grandchildren may have a converse effect on grandparents’ participation in the paid workforce and they may need to continue working beyond their planned retirement date.⁷

6.6 Raising grandchildren is productive work with significant benefits to children whose parents cannot care for them—and by extension, significant benefits to society. The benefits to children have been described as:

reducing separation trauma, providing greater stability, preserving significant attachments, reinforcing cultural identity, and preserving the family unit.⁸

Child Care Benefit and Child Care Rebate

6.7 CCB and CCR are usually only paid to parents and carers who satisfy a work/training/study test. Grandparents who raise their grandchildren do not need to satisfy the test to be eligible for these benefits. If they were also required to satisfy the test, it might be argued that this would encourage these grandparents to participate in the paid workforce or in voluntary work. This section briefly considers CCB and CCR, and concludes that family assistance policy should not be changed to require grandparents to satisfy the work/training/study test to be eligible for CCB or CCR.

4 Following the writing of this chapter, the ALRC received a submission from the Brotherhood of St Laurence which stated that the Age Pension should be included among the Centrelink payments for eligibility for Jobs, Education and Training Child Care Fee Assistance: Brotherhood of St Laurence, *Submission 54*. The ALRC notes that grandparents who are principal carers of grandchildren are eligible for an alternative benefit for certain child care fees, that is, Grandparent Child Care Benefit: *A New Tax System (Family Assistance) Act 1999* (Cth) s 82A; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) pt 3 div 4 subdiv CA; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [2.6.8], see also [2.8.2.10].

5 In the Issues Paper, the ALRC asked what changes, if any, should be made to family assistance and child support laws and policy to remove barriers to mature age participation in the workforce and other productive work: Questions 31 and 33. Relevant statutes include: *A New Tax System (Family Assistance) Act 1999* (Cth); *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth); *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth). The policy guides are: FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012 and Child Support Agency, *The Guide—CSA’s Online Guide to the Administration of the New Child Support Scheme* (2012) <www.guide.csa.gov.au> at 04 September 2012.

6 COTA National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.2.2].

7 Ibid, [6.2.2].

8 B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) 76 *Family Matters* 76, 77.

6.8 CCB is an income-tested payment that assists eligible parents and non-parent carers with the cost of child care.⁹ Other CCB objectives are to provide incentives for parents and carers with low and middle incomes to participate in the workforce and community, and to support parents and carers to ‘balance work and family commitments’.¹⁰ CCB is available to parents or carers responsible for child care costs when the children attend approved child care services.¹¹

6.9 Most parents and carers and their partners must meet a work/training/study test to receive up to 50 hours of CCB a week when children are cared for by approved child care services. To satisfy the test, parents and carers must undertake 30 hours per fortnight of work (including voluntary work in certain circumstances), training or study. If they do not meet this test, they may receive CCB at a lower weekly limit of 24 hours.¹²

6.10 The work/training/study test does not apply to grandparents who are the ‘principal carers’ of a child in approved care.¹³ Grandparent principal carers may therefore receive up to 50 hours weekly CCB without meeting this test.¹⁴ ‘Principal carers’ are sole or major providers of ongoing daily care who make day to day decisions about the child.¹⁵ ‘Grandparent’ is defined broadly to mean the ‘natural, adoptive or step grandparent or great grandparent of the grandchild’. It also includes a grandparent’s or great-grandparent’s current or former partner.¹⁶

6.11 Parents and carers who are eligible for CCB are also eligible for CCR, even if their CCB entitlement is nil due to their income.¹⁷ CCR is not income tested. It covers 50% of out-of-pocket child care expenses for approved child care up to a maximum legislated amount per year (currently \$7,500 per child).¹⁸ The policy aims of CCR are to:

- assist families with the cost of approved child care,
- provide incentives for families with dependent children to participate in the community, and

9 *A New Tax System (Family Assistance) Act 1999* (Cth) addresses eligibility for CCB at pt 3 div 4.

10 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [1.2.4].

11 Approved services include: long day care services; family day care services; in-home care services; occasional care services; and outside school hours care services. These services are approved for the purposes of family assistance law: *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) ss 194, 195(1). CCB is also available when child care is provided by a person who has been approved as a registered carer—for example grandparents, friends, relatives or nannies: *A New Tax System (Family Assistance) Act 1999* (Cth) ss 41(2), 45.

12 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 53, 54; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [2.6.3.10]. Parents and carers may also be eligible for more than the default rate when they meet other conditions provided for in the legislation.

13 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [2.6.3.10].

14 As noted above, grandparents receiving an income support payment may also be eligible for Grandparent Child Care Benefit—a higher rate of CCB.

15 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [1.1.P.125].

16 Ibid, [1.1.G.15]. See also *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 50R.

17 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 57EAA, 57EA, 57F.

18 Ibid ss 84A, 84F; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [1.2.7].

- support parents in balancing work and family commitments.¹⁹

6.12 As for CCB, applicants and their partners must meet a work/training/study test to be eligible for CCR. Applicants and their partners are not required to meet a minimum number of hours to satisfy this test—they need only have a work, or work-related commitment (as provided for in the legislation and the *Family Assistance Guide*) at some point during the week for which CCR is claimed.²⁰ As for CCB, grandparents and great-grandparents who are principal carers are not required to meet this test to receive CCR.²¹

6.13 The ALRC does not consider that grandparents' exception to the work/training/study test for CCB and CCR should be removed in order to extend a workforce incentive to mature age cohorts of carers. In consultations, stakeholders did not express support for such a reform. The Brotherhood of St Laurence stated in response to this issue that the 'aim of legislation should be not to penalise older Australians who are not in the workforce but to ensure there are not barriers to their participation'.²²

6.14 In the ALRC's view, removing the exception may dismantle a source of financial support for grandparents raising grandchildren. This is undesirable given the reasons that children may be in grandparents' care, the significant benefits that flow from such arrangements and the financial impact of raising grandchildren. Additional expenses include 'clothing, bedding, home modifications and perhaps even extensions'.²³ Further, the ALRC has been advised that the exception for grandparents from the work/training/study test has been considered international best practice.²⁴

19 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [1.2.7].

20 *A New Tax System (Family Assistance) Act 1999* (Cth) s 14; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [2.9], [2.6.3.10].

21 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 30 August 2012, [2.6.3.10].

22 Brotherhood of St Laurence, *Submission 54*.

23 E Baldock, 'Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues' 76 *Family Matters* 70, 75.

24 Social Policy Research Centre, *Correspondence*, 8 August 2012; Social Policy Research Centre, *Consultation*, Sydney, 24 July 2012.

7. Income Tax

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Summary

7.1 Personal income tax laws may affect workforce participation, including for mature age cohorts. Addressing this issue requires consideration of systemic reforms to the tax system—a task beyond the scope of this Inquiry. The 2009 Australia’s Future Tax System Review (the Tax Review) has recommended cohesive tax reform with a view to incentives for workforce participation. This chapter discusses several aspects of the income tax system that may be pertinent to mature age workforce participation and notes relevant Tax Review recommendations.

Income tax and workforce participation

7.2 Personal income tax has been linked to workforce participation. The imposition of income tax, together with reductions in income support payments (‘transfers’) as people earn more income, reduces the financial rewards from work, which may make work less attractive.¹ Higher tax rates can reduce incentives to work since people have a smaller marginal gain from employment and they may consequently choose not to undertake paid work. Conversely, others may work more to achieve a certain target level of income that they consider adequate for their needs. In economic terminology, these contrary effects are described as the ‘income effect’ and the ‘substitution effect’.²

7.3 The Issues Paper discussed several aspects of the income tax system in relation to mature age workforce participation, including:

- Effective Marginal Tax Rates (EMTRs);
- the complexity of the tax transfer system;

1 See: The Treasury, *Australia’s Future Tax System: Architecture of Australia’s Tax and Transfer System* (2008), 239.

2 FaHCSIA, *Pension Review Report* (2009), 18. Higher tax rates and smaller marginal gains from employment may mean that some people will choose leisure time over work.

- tax exemptions for social security payments; and
- tax offsets.

7.4 Responses from key stakeholders largely focused on systemic reforms to the tax system. For example, the Australian Council of Trade Unions (ACTU) stated that, having regard to the Inquiry’s framing principles of system coherence and stability, it would not support ‘significant structural change to one payment ... in the absence of change to other forms of income support payments’.³

7.5 Systemic tax reform is beyond the scope of this Inquiry. Further, such a project was completed in 2009, when the Tax Review examined, and recommended cohesive reforms to, the tax transfer system with a particular focus on ensuring appropriate incentives for workforce participation.⁴

7.6 Consequently, this section does not propose reforms to income tax laws. It summarises the income tax issues raised in the Issues Paper and the responses from key stakeholders, and points to relevant Tax Review recommendations.

Effective Marginal Tax Rate

7.7 EMTR is the percentage of additional income lost due to the withdrawal of means-tested benefits (such as social security payments) and additional income tax payable as a result of working. A higher EMTR may discourage workforce participation, including among mature age cohorts. As found in the Tax Review, ‘effective tax rates can be high for some people, including for those likely to reduce their level of work as a result’.⁵

7.8 The ACTU suggested that people are more likely to work ‘if they keep a larger proportion of an extra dollar they earn, in particular, low-income earners who are more responsive to changes in their net incomes’. However, it stated that tax reforms should be targeted at low and middle income earners, ‘where they get the biggest “bang for the buck”’—therefore arguing against tax cuts for higher-income earners aged over 45 years.⁶

7.9 COTA Australia (COTA) was also concerned with reducing the EMTR, stating that:

The interaction of the now increased income tax free threshold, income free threshold, taper rates and marginal tax rates need to be examined to see if there are ways to reduce the effective marginal tax rates that people face when they move between the transfer and tax systems.⁷

3 ACTU, *Submission 38*. See also: COTA, *Submission 51*; Olderworkers, *Submission 22*.

4 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 1, vii, Terms of Reference.

5 Ibid, pt 2, vol 1, 21.

6 ACTU, *Submission 38*.

7 COTA, *Submission 51*. As discussed below, from 1 July 2012, the Australian Government has increased the tax-free threshold: Australian Government, *Budget 2012–13: Budget Overview (2012)* (2012) <www.budget.gov.au> at 3 September 2012, ‘Tax Reform—Road Map’.

7.10 The Tax Review addressed this issue in a ‘key point’ underpinning recommended reforms to this area. It stated that the income tax system should ‘support workforce participation by limiting high effective tax rates, especially for those people who are likely to be most responsive to financial incentives to work’.⁸

Complexity of the tax transfer system

7.11 There may be circumstances where a person decides not to work as it is simply too complex to determine whether it would be more financially advantageous to work or not.⁹ Olderworkers noted that in a survey of jobseekers aged over 45 years, a large percentage considered the tax transfer system ‘extremely complex’. It stated that to encourage mature age workforce participation, the Australian Government should ‘develop a much less complex tax-transfer system’.¹⁰

7.12 Reducing tax system complexity requires systemic and comprehensive reforms, and was a specific focus of the Tax Review.¹¹ The Tax Review recommended 16 specific reforms to the personal income tax system.¹²

7.13 Another way to address complexity in the tax system is through providing information to mature age persons. COTA stressed the value of ‘easy to understand, clear and concise information’, suggesting a free service to provide accurate information based on individual circumstances.¹³ Similarly, the Australian Chamber of Commerce and Industry (ACCI) suggested more ‘promotion of seminars and programs to mature aged [so they can] understand the range of tax benefits available’.¹⁴ Information about income tax—including income tax calculators—is contained on the Australian Securities and Investments Commission’s ‘Moneysmart’ website and the Australian Taxation Office website.¹⁵

Exemptions

7.14 Another issue raised in the Issues Paper was tax exemptions for social security payments.¹⁶ By way of background, tax is levied on the *taxable income* of a taxpayer derived during the income year. Taxable income is calculated by deducting all

8 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 11.

9 In the Issues Paper, the ALRC asked whether the complexity of the tax-transfer system could be minimised to remove barriers to mature age workforce participation: Question 6. See discussion of system coherence in Ch 1.

10 Olderworkers, *Submission 22*.

11 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 1, vii, Terms of Reference.

12 Ibid, Recs 2–17.

13 COTA, *Submission 51*.

14 Australian Chamber of Commerce and Industry, *Submission 44*.

15 ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 30 August 2012; ATO website <www.ato.gov.au> at 11 April 2012.

16 The ALRC asked whether these exemptions affect mature age workforce participation: Question 7.

allowable deductions from the taxpayer's *assessable income*.¹⁷ An amount of income will not form part of a person's assessable income if exempt.¹⁸

7.15 Most social security payments are assessable, with a portion of the payment exempt.¹⁹ A tax exemption applies to Disability Support Pension (if the recipient is under Age Pension age), Wife Pension (if both spouses are under Age Pension age), and Carer Payment (if the carer and care receiver are under Age Pension age).²⁰ Only supplementary amounts of these payments, such as rent assistance, are exempt if a person is of Age Pension age or over.²¹ Similar exemptions apply for certain *Veterans' Entitlement Act 1986* (Cth) and war-time compensation payments.²²

7.16 In the Issues Paper, the ALRC asked if tax exemptions for social security payments affect mature age participation in the workforce.²³ Several stakeholders considered that these tax exemptions may deter workforce participation. COTA considered that they 'probably act as a disincentive to move from income support to paid employment'—however it considered that this should be ameliorated by the July 2012 increase to the tax-free threshold.²⁴ The Superannuated Commonwealth Officers' Association Inc considered that this disincentive may particularly affect mature age carers.²⁵ The Australian Industry Group stated that exemptions 'generally raise disposable income and reduce the imperative to earn income'.²⁶

7.17 The Tax Review recommended that, to improve simplicity, all income support and supplementary payments should be tax exempt.²⁷ It further stated that taxing these payments can interfere with their main objective 'to increase poor households' real income'.²⁸

Tax offsets

7.18 Tax offsets directly reduce the amount of tax a person must pay.²⁹ They are subtracted from the tax calculated on a person's taxable income.³⁰ Tax offsets effectively increase the returns from work and arguably reduce disincentives to keep working.³¹ In the Issues Paper, the ALRC asked whether tax offsets might be improved

17 Assessable income consists of ordinary and statutory income: *Income Tax Assessment Act 1997* (Cth) s 6-1(1).

18 Ibid s 6-15(2); 6-20(1).

19 Ibid ss 52-5 to 52-40.

20 Ibid s 52-10.

21 Ibid s 52-15.

22 Ibid s 768-105.

23 Question 7.

24 COTA, *Submission 51*.

25 Superannuated Commonwealth Officers Association, *Submission 14*.

26 It also stated that exemptions may raise EMTRs: Australian Industry Group, *Submission 37*.

27 The Treasury, *Australia's Future Tax System: Final Report* (2010), rec 4.

28 Ibid, pt 2, vol 1, 28.

29 The term 'tax offset' is a generic term used in the *Income Tax Assessment Act 1997* (Cth) to describe what in *Income Tax Assessment Act 1936* (Cth) are called 'rebates' and 'credits'.

30 *Income Tax Assessment Act 1997* (Cth) s 4-10. In contrast, a deduction is subtracted from assessable income in calculating the taxable income on which tax is payable.

31 See: The Treasury, *Australia's Future Tax System: Retirement Income Consultation Paper* (2008), 37.

to encourage mature age workforce participation, and whether their removal—as recommended by the Tax Review—would create disincentives for mature age workforce participation.³²

7.19 A number of tax offsets are available for mature age persons, depending on their particular circumstances.³³ These tax offsets have been subject to changes in 2012, as described below.

- The Senior Australians Pensioner Tax Offset was introduced on 1 July 2012. Previously, this was comprised of two separate offsets: the Pensioner Tax Offset and the Senior Australians Tax Offset.³⁴
- In the 2012–13 Budget, the Australian Government announced it would phase out the Mature Age Worker Tax Offset for taxpayers born on or after 1 July 1957.³⁵
- The Low Income Tax Offset has been reduced as the Australian Government has more than tripled the tax-free threshold.³⁶

7.20 Most stakeholders commenting on this issue did not consider tax offsets an effective incentive for mature age workforce participation. National Seniors Australia commented that

The complexity and consequent lack of transparency of the taxation system inhibit the effectiveness of such offsets as incentives. An incentive that is not understood as such is not an incentive.³⁷

7.21 Olderworkers stated that amounts are so small they would have little if any impact on decisions about work.³⁸ ACCI pointed out that the effect of the tax offset is experienced ‘in an ex-post manner—well after the event and beyond the time for implementing remedies or adjustments from a tax planning perspective’.³⁹

7.22 In relation to the changes to the tax offsets and the low-income threshold, the National Welfare Rights Network commented that these are well-targeted and should ‘simplify the interaction that some older people have with the taxation system’. It argued that tax should be based on income rather than age, and that removing mature

32 Issues Paper, Question 8.

33 For further information about these offsets, see the Issues Paper at [63]–[66].

34 *Clean Energy (Tax Laws Amendments) Act 2011 (Cth)* sch 3.

35 Australian Government, *Budget 2012–13: Budget Paper No. 2 (2012)* <www.budget.gov.au> at 3 September 2012, Revenue Measures. The Treasury has released exposure draft legislation and explanatory material for public comment in relation to the phase-out. Submissions closed on 17 August 2012: ‘Changes to Phase Out the Mature Age Worker Tax Offset’, The Treasury, *Website* (2012) <www.treasury.com.au> at 3 September 2012.

36 *Clean Energy (Tax Laws Amendments) Act 2011 (Cth)* sch 1; *Clean Energy (Income Tax Rates Amendments) Act 2011 (Cth)* sch 1.

37 National Seniors Australia, *Submission 27*.

38 Olderworkers, *Submission 22*.

39 Australian Chamber of Commerce and Industry, *Submission 44*.

age persons from the taxation system is ‘unfair on younger taxpayers and is financially irresponsible’—particularly given the ageing Australian population.⁴⁰

7.23 The changes to tax offsets, and the raising of the tax-free threshold, are consistent with the Tax Review recommendation that tax offsets should be removed as separate components of the system and incorporated into the personal income tax rates scale.⁴¹

40 National Welfare Rights Network, *Submission 50*.

41 The Treasury, *Australia's Future Tax System: Final Report* (2010), rec 5.

8. Superannuation

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Summary

8.1 Superannuation laws contain a number of age-based rules regarding the accumulation of, and access to, superannuation. This chapter examines these restrictions and explores whether they affect mature age workforce participation. The ALRC outlines two main directions for potential reform. First, the ALRC proposes the removal of age-based rules restricting superannuation accumulation. The proposed reforms aim to address the messages these rules convey about retirement expectations. Secondly, the ALRC questions whether the age-based rules regarding access to superannuation benefits are appropriately set to facilitate mature age workforce participation—particularly given contemporary trends regarding increased longevity, improved health and the nature of work.

Superannuation: an overview

The superannuation system

8.2 The primary aim of the superannuation system is to ‘deliver private income to enhance the living standards of retired Australians’.¹ For many people, superannuation is one of the most significant forms of wealth.² Other policy aims of the superannuation system include:

- helping to address the challenges posed by Australia’s ageing population;³
- intergenerational equity—so that the increased costs of an ageing population are not ‘fully borne by the generation that will be working in several decades’ time when the dependency ratio is higher’;⁴ and
- income smoothing—‘to enable individuals to smooth their income over their lifetime, and thus maintain their standard of living once they retire’.⁵

8.3 The superannuation system broadly consists of two components: mandatory employer contributions to private superannuation savings (the ‘Superannuation Guarantee’), and voluntary contributions encouraged by preferential tax treatment. As noted in Chapter 1, mandatory and voluntary superannuation savings respectively constitute the second and third pillars of Australia’s three-pillar retirement income system.⁶

8.4 Superannuation is generally provided through a trust structure in which trustees hold funds on behalf of members. Trustees owe members statutory fiduciary duties under the *Superannuation Industry (Supervision) Act 1993* (Cth).⁷ Superannuation funds are governed by this Act, its regulations, trust deeds and governing rules. Superannuation funds are regulated by the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Tax Commissioner.⁸

1 Super Systems Review Panel, *Super System Review* (2010), pt 1, 15.

2 Australian Government, *Stronger Super—Government Response to the Super System Review* (2010), 3.

3 The Treasury, *Towards Higher Retirement Incomes for Australians: A history of the Australian Retirement Income System since Federation* (2001), 83.

4 R Hanegbi, ‘Australia’s Superannuation System: A Critical Analysis’ (2010) 25 *Australian Tax Forum* 303, 312. See also The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 30. In the former article, Hanegbi challenges the assumptions on which this position is based.

5 FaHCSIA, *Australia’s Future Tax System: Pension Review Background Paper* (2008), 116. See also R Hanegbi, ‘Australia’s Superannuation System: A Critical Analysis’ (2010) 25 *Australian Tax Forum* 303, 312–313; The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 2.

6 The third pillar also includes other forms of private long-term savings. The first pillar is the means-tested Age Pension. See, eg, The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 8–13.

7 *Superannuation Industry Supervision Act 1993* (Cth) s 52.

8 *Superannuation Industry Supervision Act 1993* (Cth) s 3(1).

8.5 Most Australians have their superannuation in a ‘defined contribution’ (also known as ‘accumulation’) fund.⁹ In these funds, a member’s superannuation benefits in retirement are based on the amount contributed by his or her employers, the amount contributed voluntarily by the member, and the amount earned by the superannuation fund in investing the contributions.¹⁰

8.6 There are a number of age-based rules in superannuation law. These rules restrict the accumulation of superannuation for older persons when they reach certain ages, and stipulate when members can access their superannuation. The former group of rules has the potential to ‘push’ older persons out of employment due to the messages conveyed about retirement expectations. The latter group of rules, by contrast, may constitute a ‘pull’ to early retirement if age settings are too low.

8.7 Some age and other 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. As noted by the Law Council of Australia (LCA), age restrictions

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

8.8 In considering the role of superannuation in the context of barriers to mature age workforce participation, it is worth noting that the system is not yet ‘mature’. As stated in Australia’s Future Tax System Review (the Tax Review):

The retirement income system is still in transition and will not fully mature until the late 2030s when employees retire after a full working life (for modelling purposes, usually assumed to be 35 years) of compulsory superannuation contributions.¹²

8.9 The Superannuation Guarantee (SG) was introduced in 1992. Generally, this means that older cohorts have had less time to accrue retirement savings through the SG system than younger cohorts. The following examples roughly illustrate how this transitional period may affect people of different ages:

- a person who retires at age 65 years in 2012 will have received 20 years of SG contributions—less any period he or she has spent out of the paid workforce, for example, due to caring responsibilities;

9 ‘Types of super funds’, ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 30 August 2012.

10 By contrast, ‘defined benefit’ funds pay benefits according to a formula based on factors such as years of service, age and salary. Certain defined benefit schemes may present particular barriers to work, as identified in the Issues Paper. The ALRC does not make proposals with respect to defined benefit schemes, as these barriers are generally embedded in the design of individual schemes. Further, defined benefit schemes are declining, with most closed to new members: Super Systems Review Panel, *Super System Review* (2010), pt 2, 176.

11 Law Council of Australia, *Submission 46*.

12 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 24.

- a person who is aged 55 years in 2012, and retires at age 65 years in 2022, will have received 30 years of SG contributions—less any period out of the paid workforce; and
- a person who is aged 35 years in 2012, who started working in 1995, will have SG coverage during her entire working life—less any period out of the paid workforce.

8.10 Superannuation can be taxed at three stages: when it goes into the fund—the contributions stage; while it is in the fund—the earnings stage; and when it leaves the fund—the benefits stage.¹³ Taxation at the contribution and benefits stages is discussed in this chapter, as specific age-based rules apply at these stages.

8.11 Superannuation generally receives preferential tax treatment across these three stages. The Tax Review outlined the rationale for this treatment. This included that tax concessions on superannuation deliver a ‘more neutral overall tax treatment of deferred consumption relative to current consumption’¹⁴ and reflect the ‘social benefits of overcoming life cycle myopia’,¹⁵ that is, ‘people not saving adequately for retirement because it is too far in the future for them to adequately “see”, and so make adequate provision for their needs’.¹⁶

Assessment of superannuation

8.12 Australia’s retirement income system (including the superannuation system) is considered strong by world standards. It ranks second in the Melbourne Mercer Global Pension Index survey of 18 countries. This report describes Australia’s system as of ‘sound structure, with many good features’, though with some areas for improvement.¹⁷

8.13 Notwithstanding the strengths of Australia’s superannuation system, some commentators have criticised it on a number of grounds—including that it is inequitable. The Australia Institute states, for example, that tax concessions are designed so that ‘the more income a person earns the more taxpayer support they will receive’.¹⁸ It is also argued that a small portion of high income earners receive a substantial percentage of superannuation tax benefits.¹⁹ Lower income earners may

13 As discussed below, ‘non-concessional contributions’ do not receive concessional treatment at the contributions stage.

14 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 3.

15 Ibid, 19.

16 Ibid, 10.

17 Australian Centre for Financial Studies, *Melbourne Mercer Global Pension Index* (2011) <www.mercer.com/articles/global-pension-index> at 17 September 2012, 5.

18 The Australia Institute, *Can the Taxpayer Afford ‘Self-funded Retirement’?: Policy Brief No 42* (2012), 3.

19 R Hanegbi, ‘Improving our Superannuation Regime: A post-Henry Review Look at Superannuation Taxation, Raising Superannuation Balances and Longevity Insurance’ (2010) 25 *Australian Tax Forum* 425, 441. For an alternative perspective see ASFA, *The Equity of Government Assistance for Retirement Income in Australia* (2012).

receive comparatively little benefit—and lowest income earners may receive no benefits.²⁰ The Australia Institute comments:

Despite Australia's superannuation system often being described as 'universal' in fact a substantial portion of the working age population does not make contributions to superannuation and, in turn, receive none of the \$30 billion available to 'boost retirement incomes'.²¹

8.14 This may particularly affect those who spend time out of the workforce, or work part time, to care for others. As noted by the National Welfare Rights Network (NWRN), 'carers for children with disabilities, or adult family members or older frail parents' have limited opportunities to accumulate superannuation.²² Women, in particular, do 'exceedingly poorly in the superannuation stakes'.²³ This can result from the gendered nature of care provision²⁴—'women who spend their lives caring for others are at the highest risk of spending their retirement having to care for themselves'.²⁵ Additionally, women's superannuation may be affected by 'domestic and family violence and divorce or separation' and the 'gender pay gap and women's lower earnings in general'.²⁶

8.15 Another criticism made of the superannuation system is that its justifications are weak, or that it does not meet its underpinning policy aims.²⁷ For example, it has been argued that the system fails to achieve its 'stated goal of taking pressure off the Commonwealth budget by reducing outlays on the age pension'.²⁸ The Australia Institute refers to the cost of superannuation concessions:

Australian taxpayers contributed \$30.2 billion to the private accounts of that portion of the population with superannuation [in] 2011–12. By 2015–16 this sum is projected by Treasury to rise to more than \$45 billion by which time it will be, by far, the single largest area of government expenditure. By 2015–16 the taxpayer contribution of \$45 billion to private superannuation balances will account for almost twice the \$24 billion projected to be spent on defence in that year.²⁹

20 The Australia Institute, *Can the Taxpayer Afford 'Self-funded Retirement'?: Policy Brief No 42* (2012), 3.

21 Ibid, 3.

22 National Welfare Rights Network, *Submission 50*. See also Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality Over the Lifecycle* (2009).

23 National Welfare Rights Network, *Submission 50*.

24 See Ch 1 for discussion of statistics regarding higher proportions of female care providers.

25 The Australia Institute, *Can the Taxpayer Afford 'Self-funded Retirement'?: Policy Brief No 42* (2012), 14.

26 Government of South Australia, *Submission 30*.

27 See in particular R Hanegbi, 'Australia's Superannuation System: A Critical Analysis' (2010) 25 *Australian Tax Forum* 303.

28 Richard Denniss, 'Super Rort for Wealthy', *Canberra Times* (Canberra), 4 February 2012, <www.canberratimes.com.au>.

29 The Australia Institute, *Can the Taxpayer Afford 'Self-funded Retirement'?: Policy Brief No 42* (2012), 3.

8.16 Dr Richard Denniss of the Australia Institute also notes that:

A dollar spent on tax concessions for super simply does not lead to a dollar's reduction in the cost of providing the age pension, now or in the future. It doesn't even come close.³⁰

Reviews of superannuation

8.17 As discussed in Chapter 1, in 2008 and 2009 the Australian Government initiated two major reviews addressing superannuation: the Tax Review (chaired by Dr Ken Henry AC) and the Super Systems Review (chaired by Jeremy Cooper).

8.18 The Tax Review examined the retirement income system—including the superannuation system—as a key part of the tax-transfer system. It made a wide range of recommendations for significant reform of the superannuation system, particularly in relation to taxation arrangements.³¹ Some relevant recommendations are discussed in this chapter.

8.19 The Super Systems Review addressed the governance, efficiency, structure and operation of Australia's superannuation system. The review proposed ten recommendation packages aimed at creating member-orientated architecture for the superannuation industry.³² This included the creation of 'MySuper'—a simple, low cost default superannuation product' and 'SuperStream'—measures to improve the 'back office' of superannuation, improving its productivity and ease of use.³³ The Australian Government's response to the review is the 'Stronger Super' package, and it is in the process of implementing the Stronger Super reforms.³⁴

Superannuation contributions

Types of superannuation contributions

8.20 The *Income Tax Assessment Act 1997* (Cth) refers to two categories of contributions. These are 'concessional contributions'³⁵ (also known as 'before-tax' or 'deducted' contributions) and 'non-concessional contributions'³⁶ (also known as 'after-tax' and 'undeducted' contributions). Concessional contributions include employer contributions—including mandatory and voluntary contributions, and most contributions made by self-employed persons.³⁷ Non-concessional contributions include members' personal contributions and contributions for a spouse.

30 Richard Denniss, 'Super Rort for Wealthy', *Canberra Times* (Canberra), 4 February 2012, <www.canberratimes.com.au>.

31 The Tax Review's recommendations about superannuation are contained in The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 1, Recs 18–24 and The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), collated at 2–4.

32 Super Systems Review Panel, *Super System Review* (2010), pt 2.

33 The Treasury, *Stronger Super* (2012) <www.strongersuper.treasury.gov.au> at 3 September 2012.

34 Australian Government, *Stronger Super—Government Response to the Super System Review* (2010). See also The Treasury, *Stronger Super* (2012) <www.strongersuper.treasury.gov.au> at 3 September 2012.

35 *Income Tax Assessment Act 1997* (Cth) ss 292–25, 292–165, 995–1.

36 *Ibid* ss 292–90, 292–165.

37 The 15% concessional tax rate applies to 'most contributions made by the self-employed': R Hanegbi, 'Australia's Superannuation System: A Critical Analysis' (2010) 25 *Australian Tax Forum* 303, 307.

8.21 A further type of superannuation contribution comprises government contributions and co-contributions under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth).³⁸

Concessional contributions

Superannuation Guarantee and other mandatory employer contributions

8.22 Mandatory ('mandated') employer contributions include SG contributions as well as contributions made under an industrial agreement or award.³⁹ The SG contribution is currently equivalent to 9% of an employee's ordinary earnings.⁴⁰ Although SG contributions are made by the employer, the Tax Review noted that 'the incidence is likely to fall on the employee through lower real wages'.⁴¹ Employers are currently not required to pay SG contributions for employees 70 years and over.⁴²

8.23 Employers may fund SG contributions by making contributions under 'salary sacrifice' arrangements. In these arrangements, an employee agrees that an employer will pay a portion of salary or wages directly into superannuation—that is, from pre-tax income. The employee pays less income tax as a consequence, and the arrangement may also have tax benefits for the employer.

8.24 Amendments that commence on 1 July 2013 will change superannuation laws to gradually increase the minimum superannuation contribution rate from 9% to 12%. They will also remove the maximum age limit for an employee at which the SG no longer needs to be provided.⁴³ The Minister for Superannuation, the Hon Bill Shorten MP, stated that removing the age limit will 'provide an incentive for those older Australians who wish to remain in the workforce longer not to be discriminated against if they do so'.⁴⁴

8.25 A number of stakeholders to this Inquiry welcomed this reform.⁴⁵ For example, COTA Australia (COTA) stated that it would remove 'one of the more significant barriers to older people wanting to stay in employment'.⁴⁶ The LCA supported the measure on equity grounds—stating that it is 'difficult to identify a sound policy reason

38 These contributions are taxed similarly in the fund as non-concessional contributions but do not fall into this category: *Income Tax Assessment Act 1997* (Cth) s 292-90(2)(c)(i).

39 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 5.01(1).

40 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19(2).

41 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 9.

42 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 27(1).

43 *Superannuation Guarantee (Administration) Amendment Act 2012* (Cth) s 2 and sch 1. The Act received royal assent on 29 March 2012.

44 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 2 November 2011, B Shorten—Assistant Treasurer and Minister for Financial Services and Superannuation), 12423.

45 COTA, *Submission 51*; Law Council of Australia, *Submission 46*; ACTU, *Submission 38*; Government of South Australia, *Submission 30*; National Seniors Australia, *Submission 27*. See also Media Entertainment & Arts Alliance, *Submission 33*; Olderworkers, *Submission 22*; My Longevity Pty Limited, *Submission 15*.

46 COTA, *Submission 51*.

for employers to have different obligations for remuneration of employees based solely on their age'.⁴⁷

8.26 However, the Australian Industry Group (AIG) raised a concern that removing the maximum SG age limit 'may raise costs of employment and have a detrimental impact on the incentive to employ older people'.⁴⁸ COTA similarly expressed concern that this may affect employers' willingness to employ older workers, suggesting this is 'something that will need to be monitored'.⁴⁹

Voluntary employer contributions

8.27 Employees may enter into arrangements with employers to deduct extra portions of money from their salary and pay it into their superannuation accounts. The *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) restrict contributions to superannuation funds, other than mandatory employer contributions, based on the age of the fund member as follows:

- under 65 years—no restrictions;
- 65 to 75 years—contributions can be made when the member meets a work test: they must be 'gainfully employed' on at least a part-time basis, that is, at least 40 hours over a 30-day period in the financial year; and
- 75 years and over—contributions cannot be made.⁵⁰

8.28 There are therefore two limits on mature age workers who wish to make voluntary contributions: an absolute limit on those aged 75 years and over; and a conditional limit on those aged 65 to 75 years. The work test aims to ensure that persons in the latter age group can only make voluntary contributions when they 'maintain a bona fide link with the paid workforce'.⁵¹

Contributions by self-employed

8.29 Self-employed persons may, but are not required to, make superannuation contributions for themselves.⁵² Contributions by the self-employed are concessional when they claim a deduction for them, as discussed below.

⁴⁷ Law Council of Australia, *Submission 46*.

⁴⁸ Australian Industry Group, *Submission 37*.

⁴⁹ COTA, *Submission 51*.

⁵⁰ The rules are provided for in *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 7.01, 7.04. 'Gainful employment' is employment or self-employment 'for gain or reward in any business, trade, profession, vocation, calling, occupation or employment': reg 1.03

⁵¹ Explanatory Statement, *Superannuation Industry (Supervision) Regulations (Amendment) 1997* (Cth) Attachment B.

⁵² The Tax Review recommended against extending the SG for small business people. It stated that they may face higher 'costs of compulsion' than employees, and that '[m]any small business people have alternative strategies for saving for their retirement, often with different time profiles than those applying to employees': The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 12.

Concessional contributions are tax deductible

8.30 Employers are currently entitled to income tax deductions for contributions made for employees under the age of 75 years, and for contributions mandated by industrial agreements or awards.⁵³ The self-employed may also claim a tax deduction for contributions made until they reach the age of 75 years.⁵⁴ Tax deductions may be claimed for both mandatory and voluntary contributions.⁵⁵

8.31 From 1 July 2013, employers will be able to claim tax deductions for SG contributions for employees aged 75 and over.⁵⁶ This aligns ‘the availability of an income tax deduction to an employer with the measure to remove the Superannuation Guarantee maximum age limit’.⁵⁷

8.32 The measure does not extend to remove the age limits on tax deductions for voluntary contributions for employees or for contributions for self-employed persons. This is consistent with SIS Regulations restriction on persons aged 75 years and over making voluntary contributions.

Contribution splitting

8.33 Members of a superannuation fund may apply to split certain concessional superannuation contributions with their spouse.⁵⁸ The *Superannuation Industry (Supervision) Act* defines ‘spouse’ to include a person:

- who is in a relationship with a member where the relationship is registered under certain state and territory laws (including registered same-sex relationships); and
- who lives with the member on a genuine domestic basis in a couple relationship.⁵⁹

8.34 Members cannot split their contributions for a spouse aged 65 years or older, or a retired spouse who has reached ‘preservation age’—that is, the age at which a person may access superannuation benefits when retired.⁶⁰ Maximum limits apply to the amount of superannuation that may be split, and the member is limited to one application per financial year.⁶¹

53 *Income Tax Assessment Act 1997* (Cth) ss 290-60(1), 290-80(1).

54 *Ibid* subdiv 290-C.

55 *Ibid* subdiv 290-A.

56 *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth) sch 5.

57 Revised Explanatory Memorandum, Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011 (Cth), [5.5].

58 *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7. Non-concessional contributions made before 5 April 2007 can also be split: reg 6.41(3).

59 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

60 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.44; APRA, *Prudential Practice Guide: SPG 270—Contribution and Benefit Accrual Standards for Regulated Superannuation Funds* (2012), [58]. As discussed below, preservation age is age 55 to 60 years, depending on year of birth.

61 *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.40, 6.44. Superannuation funds are not required to offer their members the option to split their superannuation contributions: *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.45.

Non-concessional contributions

Personal contributions

8.35 Individual fund members may make voluntary personal contributions to their superannuation funds from after-tax income or capital. Employees cannot claim a deduction for personal contributions.⁶² The age-based restrictions in the SIS Regulations apply to voluntary personal contributions.⁶³

Spouse contributions

8.36 A person may make a non-deductible superannuation contribution on behalf of a spouse, and may be eligible for a tax offset when the spouse is receiving low or no income (less than \$13,800 for the income year).⁶⁴ Spouse contributions can be made where the spouse is aged under 65 years, or has reached 65 but not yet 70 years and is gainfully employed on a part-time basis. Contributions cannot be made on behalf of a spouse aged 70 years and over.⁶⁵

Government contributions

Co-contributions

8.37 Low-income earners making personal after-tax superannuation contributions may be eligible for Australian Government co-contributions under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) and regulations. The purpose of government co-contributions is to help low-income earners save for retirement.⁶⁶ The co-contribution amount depends on the personal contribution amount and the individual's income.

8.38 In 2012–13, it is proposed that the maximum co-contribution amount will be \$500—reduced from a maximum of \$1,000 in 2011–12. It is also proposed that reductions will be made to the higher eligibility threshold and matching rate. These proposed changes are not yet law at the time of writing.⁶⁷ They are a consequence of the introduction of the Low Income Earners Government Contribution scheme (discussed below) on 1 July 2012.⁶⁸

⁶² See *Income Tax Assessment Act 1997* (Cth) subdiv 290-C.

⁶³ *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04.

⁶⁴ *Income Tax Assessment Act 1997* (Cth) s 290-230. The maximum rebate for the income year is \$540: *Income Tax Assessment Act 1997* (Cth) s 290-235(2). The *Income Tax Assessment Act 1997* definition of a spouse, applicable in this context, is generally consistent with the definition in the *Superannuation Industry (Supervision) Act: Income Tax Assessment Act 1997* (Cth) ss 290-230(3), 995-1(1).

⁶⁵ *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04(1).

⁶⁶ Explanatory Memorandum, *Superannuation (Government Co-Contribution for Low Income Earners) Bill 2003* (Cth), [1.4].

⁶⁷ 'Key superannuation rates and thresholds: Co-contribution rates and thresholds', 'Changes to super for individuals', ATO website <www.ato.gov.au> at 11 April 2012.

⁶⁸ B Shorten, 'Superannuation Measures as Part of the Mid-Year Economic and Fiscal Outlook' (Press Release, 29 November 2011).

8.39 Persons aged 71 years and over are ineligible for government co-contributions.⁶⁹ This affects workers who are aged 71 but under 75 years (as noted above, persons 75 years and over cannot make voluntary contributions to their superannuation funds).

Low Income Earners Government Contribution

8.40 In addition to the co-contribution scheme, the Australian Government has introduced the Low Income Earners Government Contribution.⁷⁰ This will provide workers earning less than \$37,000 a year with a superannuation contribution of up to \$500 annually.⁷¹ This measure is aimed at improving the fairness of the SG system⁷²—particularly in relation to tax concessions:

Currently, 3.6 million low-income Australians, including around 2.1 million women get no (or minimal) tax benefit from contributing to superannuation, due to the fact that the 15 per cent superannuation contribution tax is above or equivalent to their income tax rate.⁷³

8.41 This measure will ‘effectively return the tax on the superannuation contributions made to their fund’.⁷⁴ In contrast with the co-contribution scheme, no age test will apply to the Low Income Earners Government Contribution.

Removing age restrictions on contributions?

8.42 Age-based restrictions on contributions may constitute barriers to accumulating superannuation for mature age persons. A question for this Inquiry is whether they also constitute a barrier to mature age workforce participation. In the Issues Paper, the ALRC asked if the various age limits affected mature age participation in the workforce, and if changes should be made.⁷⁵ This section outlines stakeholder responses and proposes reforms removing age limits on contributions.

8.43 The age limits regarding superannuation contributions are summarised in the table below. The SG age limit has not been included, given that the Australian Government has legislated for its removal.

69 *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) s 6(1). This restriction is intended to limit the cost of superannuation tax concessions: The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 32.

70 This measure is provided for in the *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth), which received royal assent on 29 March 2012.

71 Ibid sch 4. The income figure relates to adjusted taxable income.

72 Australian Government, *Tax Policy Statement: Stronger Fairer Simpler—A Tax Plan for our Super* (2010), 13.

73 *Debates*, House of Representatives, 2 November 2011, 12417 (B Shorten—Assistant Treasurer and Minister for Financial Services and Superannuation), 12418.

74 Australian Government, *Tax Policy Statement: Stronger Fairer Simpler—A Tax Plan for our Super* (2010), 2. Taxation and superannuation contributions are discussed in more detail below.

75 Issues Paper, Questions 11–13.

Category	Statute or regulation	Age restriction
Voluntary contributions	<i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)	Members cannot: (a) make voluntary contributions from age 65 until age 75 unless they meet a work test; or (b) make voluntary contributions from age 75.
Income tax deductions for voluntary contributions	<i>Income Tax (Assessment) Act 1997</i> (Cth)	Deductions cannot be claimed by: (a) employers for voluntary contributions made for employees aged 75 years and over; or (b) self-employed workers for contributions made when they are aged 75 years and over.
Contribution splitting	<i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)	Members cannot: (a) split contributions for a spouse aged 65 and over; or (b) split contributions for a retired spouse of preservation age and over.
Spouse contributions	<i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)	Members cannot: (a) make spouse contributions for a spouse aged 70 and over; or (b) make contributions for a spouse aged 65 but under 70 unless the spouse meets a work test.
Government co-contributions	<i>Superannuation (Government Co-contribution for Low Income Earners) Act 2003</i> (Cth)	The Australian Government will not make co-contributions for persons aged 71 years and over.

Limits on voluntary contributions

8.44 The Tax Review recommended that the restriction on persons aged 75 and over from making voluntary contributions should be removed—but that a work test should continue to apply for persons age 65 years and over.⁷⁶ The ALRC agrees with the recommendation of the Tax Review as it may encourage mature age workforce participation, as discussed below.

⁷⁶ The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 2, vol 1, rec 20.

8.45 Most stakeholders who responded to this issue considered that the 75-year age limit should be removed.⁷⁷ A number of stakeholders argued that the 75-year age limit on voluntary contributions constituted a workforce disincentive.⁷⁸

8.46 Stakeholders gave a range of arguments for this reform, beyond improving mature age workforce participation. While the aim of this Inquiry is to consider reforms to remove barriers to work for mature age persons, it is worth noting other potential benefits that may flow from the removal of the 75-year age limit on contributions. Stakeholders argued that the age limit should be removed:

- as it restricts the ability of mature age workers to save for their retirement—particularly affecting ‘people on low incomes who may wish to work longer to build their superannuation level and women who may have returned to the workforce after long absences’;⁷⁹
- for equity reasons, with one stakeholder arguing that the age limit is discriminatory;⁸⁰
- as mature age workers should have choices in this regard—if ‘they choose to input into superannuation then they should be able to do so’;⁸¹ and
- for consistency—as the SG age limit has been lifted, so too should the 75-year age limit on voluntary contributions.⁸²

8.47 The ALRC considers that removing the 75-year age limit on voluntary contributions may correct undesirable messages about retirement age expectations conveyed by the existing restriction. Importantly, this reform will also introduce consistency in the treatment of voluntary and SG contributions—and consistency in message across these laws.

77 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Industry Group, *Submission 37*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*; Association of Independent Retirees, *Submission 17*; R Spencer, *Submission 08*; L Gabor, *Submission 05*. NWRN argued that Treasury should analyse the changes to determine ‘which groups of older people would benefit from these reforms’: National Welfare Rights Network, *Submission 50*. The Brotherhood of St Laurence considered that ‘an individual’s ability to make voluntary contributions should depend primarily on the balance in their superannuation accounts, rather than their age’: Brotherhood of St Laurence, *Submission 54*. LCA and ACCI conditionally supported removing the 75-year age limit: Law Council of Australia, *Submission 46*; Australian Chamber of Commerce and Industry, *Submission 44*.

78 COTA, *Submission 51*; Australian Chamber of Commerce and Industry, *Submission 44*; National Seniors Australia, *Submission 27*; Association of Independent Retirees, *Submission 17*. For example, ACCI stated that removing the age limit enhances the likelihood of mature age workers ‘returning to work or extending their involvement in paid work’. See also: J Willis, *Submission 42*.

79 National Seniors Australia, *Submission 27*. See also: COTA, *Submission 51*.

80 COTA, *Submission 51*. See also Law Council of Australia, *Submission 46*; My Longevity Pty Limited, *Submission 15*.

81 Olderworkers, *Submission 22*. See also Australian Chamber of Commerce and Industry, *Submission 44*.

82 Law Council of Australia, *Submission 46*.

8.48 In relation to the work test that applies from the age of 65 years, stakeholders had mixed views. Opposition to the work test was expressed most strongly by the Government of South Australia and the Association of Independent Retirees (AIR).⁸³ The Government of South Australia argued that the ability to make voluntary contributions should be guaranteed at all ages, ‘irrespective of work patterns’. It added that to

deny workers this right not only acts as a disincentive and goes against government policy to support people to stay in work longer and be self funded in retirement, it also arguably constitutes discrimination on the basis of age.⁸⁴

8.49 AIR noted that ‘the interest of many retired people in work is to supplement their income, not to meet basic living necessities’. It commented that many people do not have interest in, or opportunities for, work as required by the work test. AIR observed that retirees may work in ways not accommodated by the work test—on a short-term basis, or otherwise less than 40 hours in 30 days. It gave examples such as working at polling booths during elections, emergency work in teaching or nursing, or standing in for a family member.⁸⁵

8.50 In contrast, the LCA considered that age-based restrictions on superannuation accumulation are ‘an appropriate component of superannuation regulation’, and that the work test ‘is an appropriate basis for framing the restrictions’.⁸⁶ The LCA supported retaining the work test for persons aged over 65 years, as did the Australian Institute of Superannuation Trustees (AIST) and AIG. These stakeholders considered that the 75-year age limit should be removed if the existing work test were extended to apply to this older cohort.⁸⁷

8.51 The position of the LCA, AIST and AIG reflect the Tax Review recommendation on this issue, which was explicitly endorsed by the LCA. In making this recommendation, the Tax Review stated that the 75-year age limit is unnecessary if other age-based restrictions on accessing superannuation tax concessions are retained. These restrictions include contribution caps (discussed below) and the work test. It noted that restrictions are consistent with ‘the primary purpose of the retirement income system, which is to smooth income over a person’s lifetime rather than be a concessional estate planning vehicle’.⁸⁸

8.52 In line with the Tax Review recommendation, the ALRC considers that the work test should be retained and extended to persons age 75 years and over. This gives workers who wish to continue to accumulate superannuation an incentive to continue to participate in the workforce at a minimum level. Further, imposing a work test on

83 Government of South Australia, *Submission 30*; Association of Independent Retirees, *Submission 17*. See also COTA, *Submission 51*; J Willis, *Submission 42*; National Seniors Australia, *Submission 27*; R Spencer, *Submission 08*; L Gabor, *Submission 05*.

84 Government of South Australia, *Submission 30*.

85 Association of Independent Retirees, *Submission 17*.

86 Law Council of Australia, *Submission 46*.

87 Australian Institute of Superannuation Trustees, *Submission 47*; Law Council of Australia, *Submission 46*; Australian Industry Group, *Submission 37*.

88 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 115–116.

older workers facilitates the primary policy purpose of superannuation as a retirement income vehicle. As noted by the Australian Government in 2004:

removing the work test for people aged over 65 is inconsistent with superannuation's intended role as [a] retirement vehicle. Without a work test people could abuse the taxation concessions provided to superannuation.⁸⁹

8.53 It noted that retaining the work test is necessary for the 'integrity' of the superannuation system.⁹⁰

8.54 The ALRC considers that retaining the work test for persons aged 65 years and over is therefore logical, particularly given the proposed removal of the 75-year age limit for voluntary contributions.

8.55 Further, to ensure that the intended policy purpose of superannuation is not undermined—given the proposed removal of the 75-year age limit—the ALRC is considering whether the work test should be amended. A minimum of 40 hours over a 30-day period in a financial year may not be sufficient to ensure the intended bona fide link with the workforce. The ALRC is interested in stakeholder comment in this regard.

8.56 The ALRC also seeks comment regarding any other changes that should be made to the work test. For example, the Superannuated Commonwealth Officers Association (SCOA) suggested that a work test could be introduced at the earlier age of 55 years. It noted that the work test encourages workforce participation only from age 65, so that persons under this age who wish to contribute to superannuation have less incentive to keep working.⁹¹

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 and over, and to extend the work test to these members.

89 Explanatory Statement, *Superannuation Industry (Supervision) Amendment Regulations (No 4) 2004* (Cth)

90 Ibid.

91 Superannuated Commonwealth Officers Association, *Submission 14*. The LCA conversely suggested a potential *increase* to the age at which the work test applies, in the context of an alignment with any future increase to the unrestricted access age for superannuation benefits: Law Council of Australia, *Submission 46*. The unrestricted access age is discussed below.

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?

Income tax deductions for voluntary contributions

8.57 The ALRC considers that the proposed reform to lift the 75-year age limit on voluntary contributions should prompt two consequential reforms:

- employers should be able to claim income tax deductions for voluntary contributions made for employees aged 75 and over; and
- self-employed workers should be able to claim income tax deductions for contributions made from the age of 75 years.

8.58 This would align the availability of the income tax deduction with the proposed measure to enable voluntary contributions for persons aged 75 years and over.

8.59 The Government of South Australia argued for the second reform proposed above. It considered that the reform should follow changes to enable employers to claim income tax deductions for SG contributions for employees aged 75 years and over. The Government of South Australia stated that, given

the large number of small businesses and family businesses in South Australia, which must also be reflected in other parts of the country, this limitation on self-employed appears inequitable and could serve to discourage small business.⁹²

8.60 The proposed reforms are necessary to ensure that, should the 75-year age limit on voluntary contributions be removed, voluntary contributions are as available to persons aged 75 years and over as to persons in other age groups. The benefits of removing the 75-year age limit on voluntary contributions will be significantly limited if employers do not offer workers of this age the option of making voluntary concessional contributions (that is, via salary sacrifice) because they cannot claim income tax deductions. Extending the deduction to the self-employed ensures fair and consistent treatment.⁹³

⁹² Government of South Australia, *Submission 30*.

⁹³ If the proposed reform is implemented, it is likely that further consequential amendments will be required to *Superannuation Industry (Supervision) Regulations 1994* (Cth) and other legislation. For example, as discussed below, reg 7.04(3) provides that superannuation funds may accept an amount of contributions no more than the non-concessional contributions cap for members of superannuation funds aged 65 to 75 years. This section will require amendment so it applies to members aged 65 years and over.

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 s 290-80 to enable employers to claim deductions for voluntary contributions made for employees aged 75 years and over.

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 s 290-165(2) to enable these workers to claim deductions for contributions made at age 75 years and over.

Spouse contributions and contribution splitting

8.61 The ALRC’s preliminary view is that certain restrictions on spouse contributions and contribution splitting should be removed—that is:

- the 65-year age limit on spouses for contribution splitting; and
- the 70-year age limit on spouses for spouse contributions.

8.62 The following restrictions should be retained:

- the restriction on contribution splitting for retired spouses who have reached preservation age; and
- the condition that spouse contributions may only be made for spouses aged 65 years and over when they meet a work test.

8.63 In addition, the removal of the 65-year limit on contribution splitting should be conditional. The spouse should be required to meet a work test the same as, or similar to, the work test that applies for spouse contributions as well as for voluntary personal contributions. Further, any reforms to enhance the work test for voluntary personal contributions (see Question 8–1) should also apply to the work tests for both spouse contributions and the proposed work test for spouse contribution splitting.

8.64 These proposed reforms may be problematic in some respects, as discussed below. The ALRC welcomes stakeholder comment.

8.65 Key stakeholders differed in their responses regarding the age limits on spouse contributions and contribution splitting. The LCA argued that the age limits should be retained as they 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’.⁹⁴

⁹⁴ Law Council of Australia, *Submission 46*.

8.66 Other key stakeholders considered that the age restrictions should be removed.⁹⁵ The Government of South Australia referred to gender disparity between the superannuation savings of men and women, noting that ‘women may have no superannuation at all were it not for contributions made on their behalf by their spouse’. It further commented that the restrictions are ‘arguably sexually discriminatory’.⁹⁶

8.67 While COTA supported removing the age limits, its comments may imply support for a work test. It argued that where people ‘continue to work then they should be able to continue to contribute to superannuation on the same basis as anyone else in the workforce and not be subjected to discrimination on the basis of age’.⁹⁷

8.68 The ALRC considers that the proposed reform—to remove age limitations on spouse contributions and contribution splitting but retain or impose work tests—balances the concerns of stakeholders and other competing objectives. This proposal introduces, or preserves, a workforce incentive for spouses; facilitates the policy intention of superannuation as a retirement income vehicle; and also removes age limits that send messages about retirement expectations.

8.69 However, some specific reservations about the proposal should be noted. First, AIST stated its understanding that

member splitting and spouse contributions are not commonly used and it is arguable that, for simplicity reasons, these could be removed altogether. These types of rules create confusion and complexity.⁹⁸

8.70 AIST considered that the age limits on spouse-related contributions ‘have very little effect on mature age participation’.⁹⁹ If the regulations regarding contribution splitting and spouse contributions are not commonly used or understood, removing the specified age restrictions contained in those regulations may have little effect in shaping retirement expectations.

8.71 Secondly, if the specified age restrictions are removed, this may encourage the use of provisions regarding contribution splitting and spouse contributions for tax purposes rather than for retirement savings. This is particularly pertinent for contribution splitting, as these contributions are concessional and are therefore taxed at 15% when entering a superannuation fund—rather than at a member’s personal tax rates. However, it is possible that spouse contributions may be made simply to attract the tax offset.

8.72 The way the proposed measures might increase possibilities for using spouse contributions and contribution splitting for tax minimisation is that, if the specified age limits are removed, a spouse aged 65 years or over will be able to access these

95 COTA, *Submission 51*; Australian Chamber of Commerce and Industry, *Submission 44*; Government of South Australia, *Submission 30*; Association of Independent Retirees, *Submission 17*. See also R Spencer, *Submission 08*; L Gabor, *Submission 05*.

96 Government of South Australia, *Submission 30*.

97 COTA, *Submission 51*.

98 Australian Institute of Superannuation Trustees, *Submission 47*.

99 Ibid.

contributions immediately. This is because the spouse has reached the unrestricted access age for superannuation benefits. Superannuation benefits are also tax-free at this age.¹⁰⁰

8.73 This may be of particular relevance when the member making contributions on behalf of his or her spouse is under 65 years old and is otherwise ineligible to access superannuation benefits. In relation to spouse contributions, this issue is one that exists in the current regulatory framework. That is because the spouse currently has unrestricted access to his or her superannuation benefits from age 65 years, and spouse contributions are conditionally permitted until the spouse is aged 70 years.

8.74 The ALRC is interested in responses to its proposed reforms that address these issues and comments about any other potential difficulties that may arise.

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:

- (a) aged 70 years or over; and
- (b) aged from 65 years until 70 years, unless he or she meets a work test, that is, being gainfully 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.

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.

Government co-contributions

8.75 The ALRC proposes that the 71-year age limit on government co-contributions for low-income earners should be removed. A number of key stakeholders indicated support for such an approach.¹⁰¹ Several stakeholders considered that this measure

¹⁰⁰ The unrestricted access age and the tax-free access age for superannuation benefits are discussed below.

¹⁰¹ Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*; Australian Institute of Superannuation Trustees, *Submission 47*; Government of South Australia, *Submission 30*; Superannuated Commonwealth Officers Association, *Submission 14*. The Brotherhood of St Laurence considered that the co-contribution scheme should apply at least to age 75 years (as the age at which voluntary contributions are restricted).

would provide an incentive for mature age workers to remain in the workforce.¹⁰² The Government of South Australia noted that Australian Government policy is to

encourage people to remain in work as long as they are able to, and if a person is still working at and past the age of 71 years, they should not receive less benefit from Superannuation schemes than other low income earners.¹⁰³

8.76 A further point is that the Low Income Earners Government Contribution does not have an age limit (as discussed above) and ‘it would make sense to have both contributions applied on a consistent basis’.¹⁰⁴

8.77 The proposed removal of the 71-year age limit for government co-contributions would provide consistency across both schemes. More importantly, it would address the message about retirement expectations currently conveyed by the age-limit.

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.

Taxing superannuation contributions

Tax rate on contributions

8.78 Concessional contributions are taxed at 15%.¹⁰⁵ This rate is substantially lower than the marginal tax rates applicable to the income of most full-time earners.¹⁰⁶ Non-concessional contributions are generally not taxed in the fund, as the member has already paid tax on them.

Contributions caps

8.79 There are restrictions, or ‘caps’, on the contributions that members can make each financial year before they must pay extra tax (‘excess contributions tax’). In effect, the caps limit superannuation contributions. The purpose of the caps is to:

- ensure that superannuation benefits result from contributions ‘that have been made gradually over the course of the person’s life’;¹⁰⁷

102 COTA, *Submission 51*; Australian Institute of Superannuation Trustees, *Submission 47*; Superannuated Commonwealth Officers Association, *Submission 14*. The LCA took a contrary view, submitting that the ‘cessation of Government co-contributions at a specified age is an appropriate restriction on accumulation’: Law Council of Australia, *Submission 46*.

103 Government of South Australia, *Submission 30*.

104 Australian Institute of Superannuation Trustees, *Submission 47*.

105 *Income Tax Assessment Act 1997* (Cth) s 295-160.

106 See R Hanegbi, ‘Improving our Superannuation Regime: A post-Henry Review Look at Superannuation Taxation, Raising Superannuation Balances and Longevity Insurance’ (2010) 25 *Australian Tax Forum* 425, 428.

107 *Income Tax Assessment Act 1997* (Cth) s 292-5.

- ensure that tax concessions for superannuation are fiscally sustainable and appropriately targeted;¹⁰⁸ and
- restrict the use of superannuation as a tax-minimising vehicle.¹⁰⁹

8.80 There are different caps for concessional and non-concessional contributions. Government contributions and co-contributions do not count towards the caps.

Concessional contributions cap

8.81 This section considers the cap on concessional contributions. The ALRC does not propose reforms in this area, as this is predominantly a retirement savings issue, rather than a mature age workforce participation issue. To the extent that the concessional contributions cap may have an effect on mature age workforce participation, that effect is likely to vary depending on individuals' circumstances and preferences.

8.82 The 'concessional contributions cap' is indexed annually to average weekly ordinary time earnings and, in 2012–13, is set at \$25,000. Concessional contributions over this cap are taxed at an additional 31.5%.¹¹⁰

8.83 From 2007–8 to 2011–12, an increased transitional concessional contributions cap applied to contributions made by members aged 50 years and over. In 2011–12 this transitional cap was \$50,000. In certain previous years—namely 2007–08 and 2008–09—the transitional cap was \$100,000.¹¹¹

8.84 Until recently, it was expected that the \$50,000 concessional contributions cap would be retained for certain mature age persons. In the 2010–11 Budget, the Australian Government announced that, from 1 July 2012, the cap would continue for persons aged 50 years or over with superannuation balances below \$500,000.¹¹² However, in the 2012–13 Budget, the Australian Government announced that it will defer this measure for two years. This means that the general concessional contributions cap of \$25,000 will apply to all persons aged 50 years and over until 2014–15.¹¹³

8.85 The Australian Government's rationale for an increased cap is that it allows persons over 50 years 'to "catch up" on their superannuation contributions at the stage in their lives when they are most able to do so'; and that this should particularly assist

108 Australian Government, *A Plan to Simplify and Streamline Superannuation—Detailed Outline* (2006), 27, 30; Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth), [1.11].

109 Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth), [1.12].

110 *Income Tax Assessment Act 1997* (Cth) subdiv 292-B; *Superannuation (Excess Concessional Contributions Tax) Act 2007* (Cth) s 5.

111 *Income Tax (Transitional Provisions) Act 1997* (Cth) s 292-20.

112 Australian Government, *Budget 2010–11: Budget Paper No 1* (2010) <www.budget.gov.au> at 3 September 2012, Statement 1: Budget Overview. See also Australian Government, *Fact Sheet: Superannuation—Concessional Contributions Caps* (2011).

113 Australian Government, *Budget 2012–13: Budget Paper No 2* (2012) <www.budget.gov.au> at 3 September 2012, pt 1: Revenue Measures.

those who have spent periods out of the workforce, for example, ‘women with broken work patterns’.¹¹⁴

8.86 Stakeholders supported the increased cap—or opposed its deferral—for reasons related to the adequacy of retirement savings.¹¹⁵ The LCA considered the higher caps 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 LCA noted that women are likely to fall into the latter groups.¹¹⁶

8.87 The ALRC has also heard accounts of women who had taken time out of the workforce to attend to caring responsibilities. Upon re-entering the workforce, and reaching a position where they can make substantial superannuation contributions to provide for their retirement, the cap has restricted them from boosting their retirement savings. This situation may be exacerbated for current mature age cohorts, given the superannuation system has not yet matured—as noted above. As a result, these women were less likely to benefit from superannuation accumulation earlier in their working lives.

8.88 The NWRN presented a different viewpoint, stating that while ‘there may be a few isolated examples’ of the scenario described above, ‘putting these larger amounts into super, so close to retirement, is probably not going to bring the financial benefits that come from superannuation funds growing over the longer term, as is intended’. It added:

People who can afford to put more than \$25,000 into their superannuation in a single year are not those who would generally be in need of extra support and are most likely to be able to obtain a retirement standard better than the average worker.¹¹⁷

8.89 Similarly, the Australian Council of Trade Unions (ACTU) stated that

A higher cap would likely only benefit those employees on higher incomes who are already more likely to remain in work, and who may already have multiple streams of retirement income.¹¹⁸

8.90 Stakeholders had different opinions about how the concessional contributions cap affected workforce participation.¹¹⁹ For example, the ACTU considered that the \$25,000 cap ‘is set at an appropriate level to encourage older workers to remain employed for longer and thereby increase their retirement savings’.¹²⁰ AIST considered

114 Australian Government, *Fact Sheet: Superannuation—Concessional Contributions Caps* (2011).

115 Law Council of Australia, *Submission 46*; Government of South Australia, *Submission 30*. See also: Australian Chamber of Commerce and Industry, *Submission 44*; Media Entertainment & Arts Alliance, *Submission 33*.

116 Law Council of Australia, *Submission 46*.

117 National Welfare Rights Network, *Submission 50*.

118 ACTU, *Submission 38*.

119 In the Issues Paper, the ALRC asked about the effects of the increased concessional contributions cap for persons aged 50 years and over on mature age participation in the workforce: Question 14.

120 ACTU, *Submission 38*.

that the increased contributions cap does not have an effect on workforce participation.¹²¹ In contrast, the Brotherhood of St Laurence stated that the higher cap is

likely to provide incentives to continue to work through allowing older workers to have a lower tax rate on a proportion of their income and to save a relatively higher proportion of their income in superannuation prior to retirement.¹²²

8.91 The cap may affect workers in different ways, depending on their individual preferences. As noted by the Melbourne Institute of Applied Economic and Social Research (the Melbourne Institute), a higher cap may encourage workers who wish to ‘maximise remaining lifetime income (or make a large bequest) to make considerable gains’—thus providing incentives for workforce participation.¹²³ Conversely, a higher cap can assist workers to reach their retirement savings targets earlier than a lower cap—thus facilitating earlier retirement where workers prefer leisure. The Melbourne Institute summarised the effects of an increased cap:

Earlier retirement became more expensive because the net returns from work and investing in superannuation increased. At the same time, extra after-tax income offered incentives for more leisure (full or partial retirement) and less work.¹²⁴

8.92 In economic terms, such conflicting behavioural consequences are described as the ‘substitution effect’ and the ‘income effect’.¹²⁵

8.93 While the setting of the concessional contributions cap is an important issue, it is primarily an issue about the adequacy of retirement savings, rather than mature age workforce participation. As noted by AIST, the cap ‘is more linked to adequacy and the affordability for the individual to save for retirement in a tax advantaged environment’.¹²⁶ The ALRC therefore does not make any proposals for change in this area.

Non-concessional contributions cap

8.94 This section discusses the non-concessional contributions cap and the related ‘bring-forward rule’. While the bring-forward rule is an age-based restriction, the ALRC does not propose reforms in this area. The rule is primarily an issue about retirement savings rather than workforce participation. In relation to workforce participation, the rule may have conflicting individual effects.

121 Australian Institute of Superannuation Trustees, *Submission 47*.

122 Brotherhood of St Laurence, *Submission 54*. See also: COTA, *Submission 51* and Superannuated Commonwealth Officers Association, *Submission 14*. However, COTA stated that it had seen ‘no evidence to suggest that the increased cap had any impact either way on workforce participation’ and awaited the effects of the deferral of the \$50,000 cap.

123 B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 53.

124 Ibid, 53.

125 Ibid, 53. See Ch 7 for a description of these effects.

126 Australian Institute of Superannuation Trustees, *Submission 47*.

8.95 The ‘non-concessional contributions cap’ is a multiple of the concessional contributions cap. For example, in 2012–13, the non-concessional contributions cap was \$150,000—six times the \$25,000 concessional contributions cap. Contributions over the non-concessional cap are taxed at 46.5%.¹²⁷

8.96 Persons under 65 years may bring forward two years’ entitlement for non-concessional contributions.¹²⁸ This is referred to as the bring-forward rule, under which non-concessional contributions of up to three times the non-concessional contributions cap in a year may be made—for example, up to \$450,000 in 2012–13. The full amount may be contributed in the first year. Alternatively, a contribution of less than the full amount in the first year may be made, followed by a contribution of the shortfall in the second year, the third year, or across both years.¹²⁹ The bring-forward rule is automatically triggered when a person under 65 years exceeds the non-concessional contributions cap.¹³⁰

8.97 Persons aged 63 or 64 years can use the bring-forward rule without meeting the work test imposed by reg 7.04(1) of the SIS Regulations in the following years of the three-year period (that is, when they reach 65 years, as discussed above). The bring-forward rule is therefore particularly important for those who are just about to retire and do not intend to continue working after the age of 65, as it can be used ‘as a last-minute dash into super before the gates close’.¹³¹ However, if the person did not make the full contribution in the first year, and wishes to contribute in the second or third year, he or she must satisfy the work test from age 65 years.

8.98 Several stakeholders argued that the bring-forward rule constitutes a disincentive to workforce participation.¹³² For example, SCOA stated that the rule is a disincentive to remain in the workforce past age 65 years:

as many employees like to make additional non-concessional contributions to a superannuation fund at the time they cease employment. This allows them to set up an adequate account based pension to fund their retirement.¹³³

8.99 However, the ‘income effect’ is also likely to apply. That is, if people are able to contribute large amounts to superannuation in one year (up to \$450,000) they may meet their retirement savings targets sooner, and retire earlier. In either case, the rule is likely to affect a small cohort of mature age persons: those who are in a position to contribute more than \$150,000 in non-concessional superannuation contributions in one year.

127 *Income Tax Assessment Act 1997* (Cth) subdiv 292-C; *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* (Cth) s 5.

128 *Income Tax Assessment Act 1997* (Cth) s 292-85(3)–(4). Specifically, the person must be under 65 years at any time in the relevant financial year: s 292-85(3)(b).

129 *Ibid* s 292-85(4).

130 *Ibid* s 292-85(3).

131 The Bull, *How to Dump \$450,000 into your Super in One Year* <www.thebull.com.au> at 11 April 2012.

132 Australian Institute of Superannuation Trustees, *Submission 47*; National Seniors Australia, *Submission 27*; Superannuated Commonwealth Officers Association, *Submission 14*. In the Issues Paper, the ALRC asked about the effect of the bring forward rule on mature age workforce participation: Question 15.

133 Superannuated Commonwealth Officers Association, *Submission 14*. See also Australian Institute of Superannuation Trustees, *Submission 47*, National Seniors Australia, *Submission 27*.

8.100 As the bring-forward rule does not increase a person's overall cap entitlement—but only allows a person to use more of the cap in one year—it arguably affects substantially only mature age persons who do not work or intend to stop working. If persons continue to meet the work test after age 65 years, they will have the same entitlement over a three-year period as a person of any other age. In this way, the bring-forward rule may be viewed as a specific workforce incentive for persons aged 65 years and over who wish to add more than \$150,000 to their retirement savings.

8.101 Consequently, the ALRC does not make a proposal in relation to the bring-forward rule, as it is equally—and perhaps more—likely to operate as a workforce incentive than as a workforce disincentive, due to the application of the work test from the age of 65 years.

8.102 Stakeholders raised certain other concerns about the bring-forward rule. The LCA commented that:

persons aged 65 and over may be in a position, for the first time in their lives, to contribute substantial lump sums into 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.¹³⁴

8.103 While this rule may in some cases limit the accumulation of superannuation for mature age persons, this issue is outside the ambit of this Inquiry.

8.104 ACCI raised a further issue—the detrimental financial impact of breaches of the cap (that is, due to excess contributions tax).¹³⁵ However, an existing law appears to address this issue. To 'help prevent a person from inadvertently contributing more than the non-concessional contributions cap',¹³⁶ the SIS Regulations limit the amount of non-concessional contributions that superannuation funds can accept. For persons aged 64 years or less, the maximum contribution amount is three times the non-concessional cap. For persons aged 65 to 75 years, the limit is the non-concessional contributions cap.¹³⁷

Superannuation benefits

Release of superannuation benefits

8.105 The SIS Regulations provide conditions for the release of superannuation benefits—that is, when, and in what form, benefits may be accessed by superannuation fund members. Generally—and subject to the superannuation fund's governing rules—members may access benefits as a lump sum, an income stream, or a combination of both.

¹³⁴ Law Council of Australia, *Submission 46*.

¹³⁵ Australian Chamber of Commerce and Industry, *Submission 44*.

¹³⁶ *Explanatory Statement, Superannuation Industry (Supervision) Amendment Regulations (No 1) 2007* (Cth) item 80.

¹³⁷ *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04(3).

When can members access superannuation?

8.106 *At age 65.* There are no restrictions on the way persons 65 years and over may access their superannuation benefits.¹³⁸

8.107 *At ‘preservation age’ if retired.* The preservation age ranges from 55 to 60 years, depending on year of birth:

- (a) for a person born before 1 July 1960—55 years; or
- (b) for a person born during the year 1 July 1960 to 30 June 1961—56 years; or
- (c) for a person born during the year 1 July 1961 to 30 June 1962—57 years; or
- (d) for a person born during the year 1 July 1962 to 30 June 1963—58 years; or
- (e) for a person born during the year 1 July 1963 to 30 June 1964—59 years; or
- (f) for a person born after 30 June 1964—60 years.¹³⁹

8.108 Accordingly, the preservation age is ‘legislated to increase from 55 to 60 between the years 2015 and 2025’.¹⁴⁰

8.109 A person of, or over, the preservation age is considered retired when an arrangement under which he or she was ‘gainfully employed’ has ended and the superannuation fund trustee is ‘reasonably satisfied’ that the person does not intend to become gainfully employed again either part time or full time; or he or she has reached the age of 60 years before or on retiring.¹⁴¹

8.110 There are no restrictions on the way members of, or over, the preservation age can access their superannuation when they retire.¹⁴²

8.111 *Under the Transition to Retirement rules.* These rules enable members who are of, or over, preservation age to access their superannuation before they retire. Members may only take superannuation benefits as a non-commutable income stream (that is, an income stream that cannot be converted into a lump sum).¹⁴³ No more than 10% of the account balance may be paid each year.¹⁴⁴ Members can continue working in any capacity while receiving superannuation benefits under the Transition to Retirement (TTR) rules, as no work test applies.¹⁴⁵

138 Ibid sch 1 item 106.

139 Ibid reg 6.01.

140 Australian Government, *A Plan to Simplify and Streamline Superannuation—Detailed Outline* (2006), x.

141 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(7).

142 Ibid sch 1 item 101.

143 Ibid regs 1.05(11A)(a); 1.06 (9A)(a); 6.01; sch 1 item 110.

144 Ibid reg 6.01. This reflects the underlying policy that the rules are ‘not intended to provide people with a vehicle to dissipate their superannuation savings excessively before retirement’: Explanatory Statement, *Superannuation Industry (Supervision) Amendment Regulations (No 2) 2005* (Cth).

145 ATO, *Transition to Retirement—Information for Superannuation Professionals* (2006).

8.112 *Early access.* The *Superannuation Act 1976* (Cth) and SIS Regulations provide limited grounds for the early release of benefits, including severe financial hardship and certain compassionate grounds.¹⁴⁶

Taxing superannuation benefits

8.113 The tax rate on superannuation benefits depends on a member's age, whether benefits are taken in lump sum or income stream form, and whether the superannuation fund is exempt from paying tax on contributions and earnings.¹⁴⁷ Benefits from non-concessional contributions (including spouse contributions) and government contributions and co-contributions are tax-free regardless of these factors.¹⁴⁸

8.114 In most cases, persons aged 60 years and over are not required to pay tax when they receive superannuation benefits—irrespective of whether benefits are disbursed as lump sums or income streams.¹⁴⁹

8.115 Persons who have reached preservation age but who are under 60 years old can generally withdraw lump-sum amounts up to a 'low rate cap' amount of superannuation tax-free.¹⁵⁰ The low rate cap is a lifetime limit. In 2012–13 it is \$175,000.¹⁵¹ Amounts above the low cap rate are taxed up to 15% (plus Medicare levy).¹⁵² Benefits paid as an income stream to persons in this age bracket are assessable income taxed at marginal rates (plus Medicare levy) less a 15% offset.¹⁵³ The Tax Review considered that the taxation of benefits for this age group should not change.¹⁵⁴

Transition to Retirement rules: a workforce incentive?

8.116 The ALRC proposes that the Australian Government should initiate a review the TTR rules in light of evidence that they do not meet their underlying policy objective. The objective of the TTR rules is to 'encourage people to retain a connection with the workforce for a longer period' by providing flexibility in the rules to access

146 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.01, 6.19A.

147 Most superannuation funds are taxed on their contributions and earnings: R Hanegbi, 'Improving our Superannuation Regime: A post-Henry Review Look at Superannuation Taxation, Raising Superannuation Balances and Longevity Insurance' (2010) 25 *Australian Tax Forum* 425, 431; 'Key factors that affect how your super payout is taxed', ATO website <www.ato.gov.au> at 11 April 2012. Funds that are more likely to be untaxed include 'certain public sector funds or schemes, such as government funds for public servants' ATO website <www.ato.gov.au> at 11 April 2012.

148 *Income Tax Assessment Act 1997* (Cth) s 307-135; subdiv 307D. *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth) s 12B.

149 *Income Tax Assessment Act 1997* (Cth) s 301-10. Disbursements to members over 60 years from untaxed funds are taxed, albeit at a lower rate than those under 60 years. *Income Tax Assessment Act 1997* (Cth) subdiv 301-C.

150 *Income Tax Assessment Act 1997* (Cth) s 301-20.

151 Ibid s 307-345; 'Low cap rate amount', ATO website <www.ato.gov.au> at 11 April 2012.

152 *Income Tax Assessment Act 1997* (Cth) s 301-20.

153 Ibid s 301-25.

154 The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 2, vol 1, 117.

superannuation benefits.¹⁵⁵ This objective is consistent with this Inquiry's framing principles of participation and self-agency.¹⁵⁶

8.117 By way of background, prior to the introduction of the rules in 2005, workers under 65 years of age generally had to retire before accessing any superannuation benefits. In 2004, the Australian Government noted that this may have led 'people deciding to retire prematurely just so they can access their superannuation'.¹⁵⁷ Accordingly, the TTR rules to some extent were designed to address this incentive for early retirement.

8.118 The Australian Government also noted that the pre-2005 laws did not 'adequately cater for more flexible workplace arrangements where people may choose to reduce their work hours as they get older'.¹⁵⁸ The TTR rules were intended to facilitate continued employment by providing flexibility—enabling preservation-age persons to reduce work hours and supplement their income with a superannuation income stream.

8.119 A number of stakeholders supported the TTR rules, and a couple also considered them a workforce incentive for mature age persons.¹⁵⁹ However, in a 2010 report commissioned by the Department of Education, Employment and Workplace Relations, the Melbourne Institute analysed the effect of the TTR reforms. The Melbourne Institute concluded that the TTR rules had 'no significant effect' on the workforce participation' of mature age men and women.¹⁶⁰

8.120 Mature age workers do not necessarily use the TTR rules in accordance with their initial design to facilitate continued employment through flexible work. There is a second way to use the rules—by working full-time and increasing superannuation savings. This is an accepted use of the rules—for example, it is described on ASIC's Moneysmart website as a way to boost superannuation.¹⁶¹

8.121 This use of the TTR rules operates as follows. The TTR income stream enables preservation-age workers:

to salary sacrifice more of their remuneration package into superannuation, with the TTR pension income replacing the salary income they would have received if they did not salary sacrifice. Here, the person's current lifestyle and cashflow can remain the

155 The Treasury, *Transition to Retirement Consultation Paper*, 2004, 4.

156 See Ch 1.

157 The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 10.

158 Ibid, 10.

159 Australian Institute of Superannuation Trustees, *Submission 47*; Australian Chamber of Commerce and Industry, *Submission 44*; Australian Industry Group, *Submission 37*; National Seniors Australia, *Submission 27*. See also Law Council of Australia, *Submission 46*. In the Issues Paper, the ALRC asked whether the TTR rules encourage continued mature age workforce participation and if any changes should be made to the rules: Question 17.

160 B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 83–85.

161 'Transition to retirement', ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 30 August 2012.

same and, in effect, the super pension withdrawals can fund superannuation contributions.¹⁶²

8.122 For those who have met their concessional cap through salary sacrificing, it can sometimes be tax effective to fund non-concessional contributions in this way.¹⁶³ However this use of the TTR rules is limited by the caps on superannuation contributions.

8.123 The above strategy can be utilised by persons who do not intend to retire, but are interested in benefiting from the concessional tax treatment applied to superannuation. Stakeholders were divided in the way they perceived this use of the TTR rules. For example, AIST considered that this strategy provides workers with

a tax effective way of saving more for retirement. It allows many pre-retirees a crucial few years to catch up, particularly post [global financial crisis].¹⁶⁴

8.124 The Australian Chamber of Commerce and Industry and AIST considered this use of the rules an incentive for workforce participation.¹⁶⁵

8.125 On the other hand, COTA characterised ‘churning of salaries through such schemes’ as manipulation of the TTR rules for tax concessions. It considered that more stringent tests need to be applied for the TTR rules to be effective in keeping mature age workers in the workforce.¹⁶⁶ The Australia Institute has commented similarly on the TTR rules, noting it is a key way that superannuation is popularly utilised as a tax-planning and tax-avoidance vehicle.¹⁶⁷

8.126 Given its Terms of Reference, the ALRC’s primary concern regarding the TTR rules is that they may not meet their policy objective of encouraging continued mature age participation in the workforce. The rules should be reviewed, with a view to their redesign, so they may effectively facilitate this policy objective.

8.127 Such a review of the TTR rules is predominantly an economic project. Consequently the ALRC is not best placed to conduct this review. The ALRC proposes that the Australian Government should initiate a separate review into this issue. The review should consider:

- the use of the rules in practice;
- the relationship to the setting of the concessional contributions cap;
- eligibility criteria for the rules; and

162 D Shirlow, ‘Bringing the use of TTR pensions closer to home’ (2011) (4) *CCH Australian Superannuation News*.

163 Ibid.

164 Australian Institute of Superannuation Trustees, *Submission 47*. See also Australian Chamber of Commerce and Industry, *Submission 44*.

165 Australian Institute of Superannuation Trustees, *Submission 47*; Australian Chamber of Commerce and Industry, *Submission 44*.

166 COTA, *Submission 51*.

167 The Australia Institute, *Can the Taxpayer Afford ‘Self-funded Retirement’?: Policy Brief No 42* (2012), 13.

- comparable international schemes.

8.128 A further issue raised in the Issues Paper is that access to the TTR rules may be restricted.¹⁶⁸ Superannuation funds do not all 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. However, stakeholders did not raise this as a specific barrier to access. The LCA noted that the portability requirements—whereby superannuation funds are obliged to transfer or rollover members' benefits to another fund on request—should, in principle, provide sufficient access to the TTR rules.¹⁶⁹

8.129 There may be certain other barriers to the TTR rules. First, some employers do not offer salary sacrifice. Consequently, their employees will not have access to the TTR rules.¹⁷⁰ Secondly, the ALRC has heard that the TTR rules are more accessible to higher-income workers (who can afford to salary sacrifice) and those with higher superannuation balances than other workers. Thirdly, mature age workers may be unaware of the TTR rules,¹⁷¹ and this may affect accessibility. The ALRC therefore considers that the proposed review should also examine whether mature age workers have sufficient access to the TTR rules.

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.

168 The ALRC asked whether, in practice, persons of preservation age have sufficient access to the TTR rules, and what measures could improve accessibility: Question 18.

169 Law Council of Australia, *Submission 46*. See also Australian Institute of Superannuation Trustees, *Submission 47*. The portability requirements are set out in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.33–6.35.

170 Australian Institute of Superannuation Trustees, *Submission 47*.

171 National Seniors Australia, *Submission 27*. See also Law Council of Australia, *Submission 46*.

Raising access ages

8.130 In summary, there are three key age settings for access to superannuation benefits:

- preservation age at 55 to 60 years (depending on date of birth), when people can access superannuation benefits at retirement or under the TTR rules;
- the tax-free access age at 60 years; and
- the unrestricted access age at 65 years.

8.131 Another age setting relevant to the discussion is the Age Pension eligibility age. This is set at 65 years. From 2017 to 2023, the Age Pension age will incrementally increase to 67 years.¹⁷²

8.132 The ALRC is interested in comment on whether the age settings to access superannuation benefits should be increased beyond the legislated increase to the preservation age. In particular, the ALRC seeks submissions on whether the preservation age should be increased to age 62 or 67 years (noting the latter age setting would displace the unrestricted access age at 65 years). A change to the preservation age may have particular consequences for the TTR rules and tax-free superannuation access, as discussed below. The ALRC also seeks comment as to whether the tax-free access age should be raised, as an alternative to raising the preservation age.

Preservation age

8.133 The preservation age rules may encourage people to leave the workforce as soon as they can access their superannuation—although the TTR rules were introduced to ameliorate this effect. Preservation age settings that are too low may also constitute a disincentive to mature age workplace participation due to the message they send about retirement expectations.¹⁷³

8.134 The Tax Review recommended that the preservation age be increased to 67 years. This aligns with the increase to the Age Pension age, which was also recommended by the Tax Review. The recommendation implies the convergence of the preservation age and the unrestricted access age at 67 years and, potentially, upwards of 67 years—subject to further review by 2020, also recommended in the Tax Review.¹⁷⁴

8.135 A preservation age setting that is lower than the Age Pension age enables mature age persons to access retirement income—and consequently retire—prior to reaching the Age Pension age. When the gradual increases to both age settings have been completed, there will be a seven-year gap between them—with the preservation age at

172 *Social Security Act 1991* (Cth) ss 23(5A), 23(5D).

173 See The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 2, vol 1, 131. In the Issues Paper, the ALRC asked if existing age settings to access superannuation provide incentives for retirement, and whether changes should be made: Question 16.

174 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 17.

60 years (from 2025) and the Age Pension age at 67 years (from 2023). One reason for the increase to the preservation age—legislated in 1998¹⁷⁵—was to reduce the gap between it and the Age Pension age.¹⁷⁶ However, the changes to the Age Pension age—legislated in 2009¹⁷⁷—mean that this gap will be increased by 2 years, that is, from the intended five-year gap to a seven-year gap. The Grattan Institute has commented that

Many workers retire before reaching the pension age and start using their superannuation. ... The ability to use superannuation like this weakens the incentive to continue to work until the pension age.¹⁷⁸

8.136 Raising the preservation age may therefore be expected to increase mature age workforce participation.¹⁷⁹ The OECD states that

financial incentives embedded in both public pensions and in other formal and informal early retirement schemes play an important role in determining retirement decisions... These decisions will be influenced by the age at which (early) retirement benefits can be first accessed.¹⁸⁰

8.137 The OECD identifies Australia's superannuation system as an 'early retirement' scheme.¹⁸¹

8.138 However, raising the preservation age will increase mature age workforce participation less by encouraging mature age persons to work and more by compelling them to do so. This is because they will be unable to access their retirement income until they reach the increased preservation age. Given the Inquiry's framing principles of independence and self-agency—both of which encompass the principle of choice, this is an important consideration.¹⁸² As noted by the LCA, raising the preservation age 'may force people who would otherwise have retired before then to continue working, even if they have sufficient superannuation to retire earlier'. It argued that this does 'not recognise legitimate retirement expectations'.¹⁸³

8.139 Such limitations on choices about work may particularly affect those engaged in hard physical labour who may not want, or be able, to extend their working lives—for

¹⁷⁵ *Superannuation Industry (Supervision) Regulations (Amendment) 1998* (Cth) item 4.3.

¹⁷⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 May 1997, 3393 (P Costello—Treasurer)

¹⁷⁷ *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Act 2009* (Cth) sch 11. The Age Pension age for women has been incrementally increasing from age 60 years since 1995 and will reach age 65 years from 1 July 2013: *Social Security Act 1991* (Cth) ss 23(5A)–(5D).

¹⁷⁸ J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 54.

¹⁷⁹ *Ibid.*, 50. The Grattan Institute identifies raising the preservation age as one of two key policy changes that would increase mature age workforce participation.

¹⁸⁰ *Ibid.*, 53, quoting OECD, *Live Longer, Work Longer* (2006).

¹⁸¹ OECD, *Pensions at a Glance 2011: Retirement-Income Systems in OECD and G20 Countries* (2011), 112.

¹⁸² See Ch 1.

¹⁸³ Law Council of Australia, *Submission 46*. The ACTU and the Government of South Australia expressed similar concerns about restricting individual choice in this way: ACTU, *Submission 38*; Government of South Australia, *Submission 30*.

example, ‘blue-collar’ and ‘pink-collar’ workers such as construction workers and nurses respectively. The Government of South Australia noted that construction workers ‘are considered “mature aged” at the age of 40 years due to the physical demands of the job’.¹⁸⁴ Construction and Building Industry Super (Cbus) noted that, in its experience, the ‘dominant factor influencing the supply of labour by older construction workers’ is their

capacity to continue to meet the physical demands of the work. Put simply, increasing ... the preservation age will be unlikely to boost participation by older workers.¹⁸⁵

8.140 Stakeholders also raised the relative importance of demand and supply factors in determining mature age workforce participation. COTA commented that

If we can get changes to employer attitudes to older workers that mean people can reasonably expect to be able to get and retain a job up to 67 then there would be a case to revisit the preservation age.¹⁸⁶

8.141 In the absence of such change, COTA expressed concern that raising the preservation age would consign mature age persons to ‘live on Newstart Allowance and other lower levels of income support for long periods if they lose their jobs’.¹⁸⁷ Similarly, National Seniors—referring to Australian Bureau of Statistics (ABS) data indicating that the share of long-term unemployed in Australia increased significantly with age—stated:

Unless these barriers are addressed effectively and older workers are able to obtain and retain employment as easily as younger workers, there is a real risk that raising the preservation age will simply lead to a ballooning of the unemployment figures and a greater drain on the social security system, rather than to increased workforce participation.¹⁸⁸

8.142 Nonetheless, the ALRC considers that there are some strong arguments for raising the preservation age—most importantly, for the purposes of this Inquiry, that lower age settings reduce workforce participation rates.¹⁸⁹

8.143 Arguments supporting an increased preservation age relate to systemic benefits and the public interest. The Tax Review noted that responding to increasing longevity by increasing the preservation age would ‘enhance the acceptability, adequacy and sustainability of the retirement income system’.¹⁹⁰ It anticipated a ‘moderation of total pension costs’¹⁹¹ and a lesser ‘tax burden on those who work’.¹⁹² The Grattan Institute

184 Government of South Australia, *Submission 30*.

185 Cbus, *Submission 41*.

186 COTA, *Submission 51*. See also Olderworkers, *Submission 22*.

187 COTA, *Submission 51*.

188 National Seniors Australia, *Submission 27*. The LCA and SCOA made a similar point: Law Council of Australia, *Submission 46*; Superannuated Commonwealth Officers Association, *Submission 14*.

189 See The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 37.

190 Ibid, 35.

191 Ibid, 35.

192 Ibid, 37.

argued that increasing the preservation age would ‘reduce intergenerational unfairness’.¹⁹³

8.144 Increasing the preservation age may assist individuals—in addition to reducing potential costs to the Australia Government—by facilitating access to sufficient private retirement funds and reducing the likelihood of exhausting these savings.¹⁹⁴ Further, and relevant to the focus of this Inquiry, it is easier for mature age persons to continue working than to withdraw from the workforce and later seek to re-enter when their retirement savings are diminished. As found by the Grattan Institute:

Aligning incentives for older people to stay in work seems to be more important than helping them find it. Measures to encourage people to work for longer in life are likely to have the greatest impact on older age workforce participation.¹⁹⁵

8.145 An increase to preservation age settings may also ensure that superannuation laws respond to the contemporary reality of increasing life expectancy and ‘healthy life expectancy’—that is, the extent to which additional years are lived in good health.¹⁹⁶ According to the Australian Institute of Health and Welfare, healthy life expectancy is

increasing for older Australians: in 2009, at age 65, females could expect to live a further 16.1 years without requiring assistance with core activities, and males could expect another 15.2 years without requiring assistance.¹⁹⁷

8.146 It is also arguably a legitimate response to another contemporary reality—‘the shift of employment away from blue-collar work to professional and paraprofessional jobs’.¹⁹⁸ Clearly, however, blue- and pink-collar workers are an important and continuing component of the modern workforce, despite more general trends. To address the circumstances of these workers—who may be unable to continue working into their 60s—the Grattan Institute has suggested they be allowed access to superannuation benefits (or the Age Pension) when they have worked in a nominated industry or meet eligibility conditions for the Disability Support Pension.¹⁹⁹

193 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 50.

194 As noted by the Tax Review, allowing superannuation savings to finance early retirement ‘reduc[es] the amount of savings available to fund retirement’, and is ‘inconsistent with the need to consider ways to reduce the risk of people outliving their savings due to increasing life expectancies’. The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 37; see also: 38.

195 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 52.

196 Australian Institute of Health and Welfare, *Australia’s Health 2012* (2012) <www.aihw.gov.au> at 3 September 2012, 82.

197 Ibid, 82.

198 P MacDonald, ‘Employment at Older Ages in Australia: determinants and trends’ in T Griffin and F Beddie (eds), *Older Workers: research readings* (2011) 25, 39. See also J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 57; B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 11.

199 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 57.

8.147 Finally, delaying the age at which a person can access superannuation income is arguably justified, given that it is in the public interest of improving retirement savings outcomes for individuals. An important component of this argument is that superannuation cannot be conceived of as entirely ‘private’, due to the concessional tax treatment it attracts—at significant cost to the Australian Government.²⁰⁰ Indeed, as discussed above, concessional treatment of superannuation is offered in return for deferred consumption (or ‘preservation’)—and, as noted by Professor John Piggott, this may be considered the ‘implicit contract’ underpinning the superannuation system.²⁰¹

8.148 The ALRC seeks further stakeholder comment on whether the preservation age should be increased and, if so, on the appropriate age setting. There are two principled options regarding the latter issue. An age setting of 67 years, as recommended by the Tax Review, will align the preservation age with the Age Pension age. Alternatively, an age setting of 62 will maintain a five-year gap between preservation age and Age Pension age as the latter rises from 65 to 67 years.

8.149 The ALRC anticipates that any such reform would be implemented gradually over the medium term. Further, any changes to the age setting may be subject to further changes. As noted above, the Tax Review recommended further review of the preservation age setting by 2020.

Consequences of raising the preservation age

8.150 If the preservation age is raised to 67 years, two notable consequences will follow. First, the TTR rules will be displaced, because these rules apply in the gap between the preservation age and age 65 (the unrestricted access age). This would not be an immediate outcome, as the increase to the preservation age is likely to be incremental over a number of years.²⁰²

8.151 The displacement of the TTR rules may not be problematic—should the preservation age be increased, the TTR rules are likely to become unnecessary as a workforce incentive. However, improved TTR rules may be a desirable component of the superannuation system in the short to medium term—that is, until the preservation age increase aligns with the unrestricted access age. The Australian Government may also consider that improved TTR rules are worth retaining despite an increase to the preservation age.

8.152 Second, this potential reform would displace the 65-year age setting for unrestricted access to superannuation benefits. The Tax Review did not comment specifically on the unrestricted access age. In its submission, AIST stated that the age setting ‘provides motivation to retire’ and is ‘arguably out of date’ given increasing

200 For an example of this viewpoint, see R Gittins, ‘These Well-off Retirees’ Claims are a Bit Rich’, *Sydney Morning Herald* (online), 15 August 2012, <www.smh.com.au>. Gittins argues against the notion that those persons receiving superannuation benefits (instead of the Age Pension) are ‘self-funded’.

201 J Piggott, *Correspondence*, 13 August 2012.

202 As noted above, the legislated increase to the preservation age from 55 to 60 years will not be completed until 2025.

longevity and the shift from ‘the industrial worker to the knowledge worker’.²⁰³ If the preservation age is increased to 67, the ALRC anticipates that the two age settings will converge and release of benefits will be permitted no earlier than 67—that is, there will not be an option for release at an earlier age when a person retires. The exception to this are the early release provisions that apply in the limited circumstances noted above.

8.153 The above consequences would not follow an increase to the preservation age to 62 years, as the gap—and the distinction—between preservation age and the unrestricted access age would be maintained.

Tax-free access age

8.154 The age setting for tax-free access to superannuation benefits is due to align with the preservation age when the latter rises to the age of 60 years in 2025. However, if the preservation age is further increased—as discussed above—this will introduce a gap between the tax-free access age and preservation age. This may not have a strong impact on workforce participation, given that mature age persons will be unable to take advantage of the tax-free treatment while under preservation age, except when they are eligible for early release of superannuation.

8.155 The Tax Review did not examine the tax-free access age, as its Terms of Reference directed that it reflect Australian Government policy to ‘preserve tax-free superannuation payments for the over 60s’.²⁰⁴ However, the Tax Review noted that the Australian Government ‘may wish to consider whether the age for tax-free superannuation should increase in line with future increases in the preservation age’.²⁰⁵

8.156 An alternative approach is to raise the tax-free access age while retaining the preservation age at 60 years (from 2025). For example, the tax-free access age could be increased from 60 years to:

- 62 years—to maintain the current five-year gap with the Age Pension age when the latter increases from 65 to 67 years;
- 65 years—to align with the unrestricted superannuation access age; or
- 67 years—to align with the Age Pension Age.

8.157 This may provide an incentive for persons who have reached preservation age to delay accessing superannuation benefits until they reach the tax-free access age—consequently remaining in the workforce for longer.

8.158 Raising the tax-free access age is a softer approach than raising the preservation age, as it allows mature age persons to access superannuation benefits at age 60 years (rather than, for example, 62 or 67 years) if they choose to do so. In other words, it

203 Australian Institute of Superannuation Trustees, *Submission 47*.

204 ‘Terms of Reference’, The Treasury, *Australia’s Future Tax System* <www.taxreview.treasury.gov.au> at 30 August 2012.

205 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 17.

uses the ‘carrot’ of tax incentives rather than the ‘stick’ of raising the age at which a person can access their retirement savings.²⁰⁶ This may be more consistent with this Inquiry’s framing principles of independence and self-agency. Other alternatives to raising the preservation age are discussed below.

Alternatives to raising the preservation age

8.159 This section discusses, but does not propose, restricting lump-sum access to superannuation benefits. The Grattan Institute has stated that, given political resistance to increases to the preservation age, ‘second best’ alternatives might be considered:

These might include quarantining a significant proportion of superannuation balances until pension age, or only allowing withdrawal of a limited income stream (rather than a lump sum before reaching the pension age).²⁰⁷

8.160 In its submission to the Inquiry, AIST argued that the ability to withdraw tax-free lump sums of superannuation should be modified ‘with some minimum (either dollar or percentage of balance based) being compulsorily allocated to a retirement income product’.²⁰⁸

8.161 The issue of restricting lump-sum access was previously considered by the Tax Review. It did not recommend such a measure, stating that flexibility in the use of superannuation benefits enables people ‘to make decisions in their best interests and is likely to result in outcomes largely consistent with the broader objective of promoting retirement saving’.²⁰⁹

8.162 Further, the Tax Review noted that people ‘already draw down their assets in an orderly fashion’,²¹⁰ and that ‘evidence suggests that people make conservative decisions on how they use their assets in retirement’.²¹¹ Retirees’ use of lump sums has been captured in ABS statistics:

Many of those who received a lump sum payment used it to pay off or improve their existing home or purchase a new home (34% of men and 27% of women), to buy or pay off a motor vehicle (16% of men and 11% of women), or clear other outstanding debts (13% of men and 13% of women). Some reinvested their lump sum payment into a bank account, personal savings or other investment (23% of men and 20% of women), or an approved deposit fund, deferred annuity or other superannuation scheme (21% of men and 17% of women).²¹²

206 This terminology is used to describe tax incentives as opposed to raising preservation age in R Chomik and J Piggott, *Mature-Age Labour Force Participation: Trends, Barriers, Incentives, and Future Potential—Centre of Excellence in Population Ageing Research Briefing Paper 2012/01* (2012), 11.

207 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 54.

208 Australian Institute of Superannuation Trustees, *Submission 47*.

209 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 45.

210 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 107.

211 Ibid pt 2 vol 1 p122. The Tax Review refers to Lim-Applegate et al, *Part rate pensioners: characteristics and changes* (2005), prepared for Australian Government.

212 Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2010 to June 2011, Cat No 6238.0* (2011), 7.

8.163 Given conservative use of assets in retirement, it would appear that lump sum access may not be substantially more likely to constitute a ‘pull’ into retirement than other forms of superannuation benefits. Further, restricting lump sum access may have adverse effects on mature age persons—limiting their ability to use superannuation benefits in a manner tailored for their personal retirement needs. Another potential adverse consequence is reflected in the Super Systems Review:

In countries with compulsory annuitisation, members ... can be locked into lower income streams if markets fall shortly before their retirement as the value of the annuity is based on the value of their lump sum and market conditions on retirement day. In contrast, Australians can continue to invest in growth assets after retirement and thus potentially benefit from subsequent market upswings.²¹³

8.164 Additionally, there is an impediment to measures restricting lump sum access. The retirement income product market is ‘under-developed’²¹⁴—an issue dealt with in both the Tax Review and the Super Systems Review.²¹⁵ The Tax Review considered this a ‘structural weakness’ in Australia’s retirement income system.²¹⁶ It found that the Australian Government should support the development of products that allow people to manage longevity risk, and better facilitate the private-sector provision of such products.²¹⁷

8.165 Given the above factors, the ALRC does not make a proposal to restrict lump-sum access to superannuation benefits. It may be appropriate to revisit this issue in the medium term if future mature age cohorts draw down their retirement assets less conservatively than current cohorts—assuming a more developed income product market in Australia.

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 age and the preservation age; or
- (b) 67 years—aligning the preservation age with the Age Pension age?

²¹³ Super Systems Review Panel, *Super System Review* (2010), pt 2, 196.

²¹⁴ Ibid, pt 2, 193.

²¹⁵ Ibid, pt 2, Ch 7; The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 117–127.

²¹⁶ The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 95.

²¹⁷ Ibid, pt 2, vol 1, 95. See also Recs 21 and 22.

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 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?

9. Migration

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Summary

9.1 Australia's skilled migration policy is designed to target migrants with skills for which there is a shortage in the Australian labour market. The skilled migration program is selective and discriminates between applicants on the basis of a range of criteria, including age, to determine which applicants are likely to make the greatest economic contribution. While such an approach does not necessarily sit easily with the position under Australian law—that discrimination on the basis of age is unlawful—for a number of reasons, the ALRC does not propose reforms in this area.

9.2 The focus of the Terms of Reference for this Inquiry is on Commonwealth legislation and related legal frameworks that impose limitations or barriers that could discourage mature age persons from participating in the workforce or other productive work. The failure by an applicant to obtain a skilled visa is not primarily a limitation or barrier to participation in the workforce, but rather is a barrier to entering or remaining in Australia for the purposes of work.

9.3 The ALRC is informed by stakeholder submissions emphasising that: there are policy reasons for retaining age as a criterion; there are a range of skilled visa options for potential migrants, only some of which contain age restrictions, and points tests and exemptions operate to the benefit of highly skilled applicants regardless of age; and the Australian Government's priority should be on developing an Australian skilled labour supply.

Australia's skilled migration framework

9.4 The Department of Immigration and Citizenship (DIAC) is responsible for the administration of the *Migration Act 1958* (Cth), the object of which is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.¹ The *Migration Act* empowers the Minister for Immigration and Citizenship to grant a non-citizen a visa to remain in Australia, either temporarily or permanently.² The *Migration*

1 *Migration Act 1958* (Cth) s 4.

2 *Ibid* s 29.

Regulations 1994 (Cth) address matters of detail within the framework established by the *Migration Act*.

9.5 Australia's skilled migration program plays a 'crucial role in assisting Australia to meet human capital needs',³ and one of the key policy goals is to 'maximise lifetime earnings—and therefore the maximum contribution to productivity growth and fiscal impact'.⁴ There are several key pathways by which a person can gain entry into Australia as a skilled migrant: the General Skilled Migration (GSM) program (for those who are not sponsored by an Australian employer); Employer-Nominated Categories (employer-sponsored visas);⁵ and the temporary skilled worker program (referred to as the '457 scheme').

General Skilled Migration

9.6 The current age limit for GSM visas is set at 50 years of age.⁶ The age limit 'reflects the level of benefit to the Australian work force and economy expected of persons entering Australia under this stream of the migration program'.⁷

9.7 In order to obtain a range of visas under the GSM category, applicants must obtain a pass mark in a 'points test'.⁸ The points test provides a 'transparent and objective method of selecting skilled migrants' based on a number of factors, including the applicant's age at the time of application.⁹ The points awarded for age reflect the applicant's 'potential contribution to the Australian economy in their lifetime'.¹⁰ The points that may be awarded for age for GSM visa applicants range from 0–30, with the fewest points for applicants aged 40–44 and no points for those aged 45–49.¹¹

9.8 In correspondence, DIAC emphasised that there are strong arguments for using the points test in order to target those potential migrants with the most 'human capital'.

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- 3 R Cameron, 'Responding to Australia's Regional Skill Shortages Through Regional Skilled Migration' (2011) 14 (3) *Journal of Economic and Social Policy* Article 4, 12.
 - 4 Department of Immigration and Citizenship, Correspondence, June 2012.
 - 5 See Department of Immigration and Citizenship, *Professionals and other Skilled Migrants* <www.immi.gov.au/skilled/general-skilled-migration/visa-options.htm> at 10 April 2012. Some GSM visas require sponsorship by a relative or nomination by a state or territory government.
 - 6 The requirement that a person be under 50 years of age is expressed as a criterion for making a valid application. See, eg, *Migration Regulations 1994* (Cth) sch 1 item 1135(3)(b) in relation to a Skilled (Independent) subclass 175 visa. For applications made prior to 1 July 2011, the age limit was 45 years.
 - 7 Department of Immigration and Citizenship, *Procedures Advice Manual 3*, sch 6B General points test—Qualifications and points (General Skilled Migration visas).
 - 8 See Department of Immigration and Citizenship, *What is the points test?* <www.immi.gov.au/skilled/general-skilled-migration/points-test.htm> at 10 April 2012. These include: Skilled (Migrant) (Class VE) Independent subclass 175; Skilled (Migrant) (Class VE) Sponsored subclass 176; Skilled (Provisional) (Class VC) Regional—Sponsored subclass 487; Skilled (Provisional) (Class VF) Regional—Sponsored subclass 475; Skilled (Residence) (Class VB) Independent subclass 885; Skilled (Residence) (Class VB) Sponsored subclass 886.
 - 9 See *Migration Regulations 1994* (Cth) sch 6. Other factors include the applicant's English skills, employment in a skilled occupation in Australia or overseas, educational qualifications and nomination or sponsorship by a state/territory government.
 - 10 Department of Immigration and Citizenship, *Procedures Advice Manual 3*, sch 6B General points test—Qualifications and points (General Skilled Migration visas).
 - 11 *Migration Regulations 1994* (Cth) sch 6B which applies to GSM visa applications made after 1 July 2011.

In selecting migrants in order to achieve the policy goal of maximising lifetime earnings and therefore contribution, DIAC modelling indicates that the optimal points differential for age includes zero points for those aged 45–49 as there is ‘some risk that their lifetime earnings in Australia may not reach the base case’, that is of the ‘typical’ Australian male commencing work at age 20 whose earnings trajectory follows that of all males based on a median figure.¹² It then follows that the age limit of 50 reflects a concern about the higher risk that a migrant’s lifetime earnings in Australia may not reach the base case.

9.9 Both New Zealand and Canada have similar skilled migration programs. In New Zealand, the age limit is set at 55 years of age and points are available under the points test for those in the 40–44, 45–49 and 50–55 age ranges.¹³ In Canada, there is no upper age limit, however, zero points are awarded for those who are aged 54 years and over at the time of application.¹⁴ In the Issues Paper, the ALRC noted that in addition to imposing a barrier to mature age skilled migrants seeking to work in Australia, the age limits may also in turn affect Australia’s ability to compete with other countries for such skilled workers. It is important to note, however, that there are structural and contextual differences with respect to the migration policy of each of these countries. For example, Australia’s GSM program designates significantly more skilled migration occupations than Canada.¹⁵ The age criterion and other criteria for skilled migration may therefore reflect the need to impose some form of restriction in order to limit applicants for GSM visas.

Employer-sponsored visas

9.10 While most permanent employer-sponsored visas do not require an applicant to meet the points test, one criterion for applying for such visas is that the applicant is under 50 years of age.¹⁶ This age limit will apply unless the person is an ‘exempt person’ specified in the relevant legislative instrument.¹⁷ The current instrument specifies exempt persons to include ministers of religion;¹⁸ researchers, scientists and

12 Department of Immigration and Citizenship, Correspondence, June 2012.

13 These are 20, 10, and 5 points, respectively. See Immigration New Zealand, *Points and bonus points* <www.immigration.govt.nz/migrant/stream/work/skilledmigrant/canapply/points/default.htm> at 10 April 2012.

14 See Citizenship and Immigration Canada, *Skilled Workers and Professionals—Selection factors Age* <www.cic.gc.ca/english/immigrate/skilled/factor-age.asp> at 10 April 2012.

15 There are approximately 190 skilled occupations on the Skilled Occupation List for Australia which applies to applicants for GSM visas on or after 1 July 2012: Department of Immigration and Citizenship, *IMMI 12/023 Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migration Visas, Schedule 1*. In Canada’s equivalent General Skilled Migration Program, there are only 29 ‘designated occupations’: Government of Canada, *Ministerial Instructions (MI 3): Federal Skilled Workers, Immigrant Investor Program, Entrepreneurs* <www.cic.gc.ca/english/department/mi/index.asp#mi3> at 11 September 2012.

16 See, eg, *Migration Regulations 1994* (Cth) sch 2, subclass 186–Employer Nomination Scheme, cl 186.221 (Temporary Residence Transition Scheme), cl 186.231 (Direct Entry Scheme).

17 Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*. The age exemptions apply in relation to the Temporary Transition and Direct Entry Scheme.

18 Ministers of religion who have applied for a visa under the *Migration Regulations 1994* (Cth) to occupy a position as nominated by a religious institution: Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*.

technical specialists;¹⁹ senior academics;²⁰ and holders of a 457 visa for at least four years immediately prior to applying whose annual earnings for each year in that period were at least the equivalent to the ‘Fair Work high income threshold’.²¹

9.11 In 2011, DIAC undertook a comprehensive review of the permanent employer-sponsored visa program. As a result of the review, the upper age limit was increased from 45 to 50 years of age,²² and revised exemptions were introduced in order to ‘provide more clarity and certainty to applicants, while ensuring that visa programs are still able to respond flexibly to unique cases’.²³

Other visa categories

9.12 The temporary 457 visa scheme is ‘the most commonly used program for employers to sponsor overseas workers to work in Australia on a temporary basis’,²⁴ subject to certain sponsorship and eligibility requirements. As at 31 March 2012, the total number of 457 visa workers in Australia had increased by 22% in the previous year.²⁵ There is no age limit on applications under the 457 scheme or a cap on the number of 457 visas issued.

Approach to reform

9.13 The focus of the Terms of Reference for this Inquiry is on Commonwealth legislation and related legal frameworks that impose limitations or barriers that could discourage mature age people from participating in the workforce or other productive work. The ALRC has formed the view that the failure by an applicant to obtain a skilled visa, whether as a result of being barred from making an application or being unsuccessful, is not primarily a limitation or barrier to their participation in the workforce, but rather is a barrier to entry to Australia for the purposes of work. In light of this, the ALRC considers that it would extend beyond the scope of this Inquiry to make proposals for reform in this area.

9.14 However, during the Inquiry to date, stakeholders have raised a number of issues of general concern discussed below.

19 At ANZSCO skill levels 1 or 2: Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*. The *Procedures Advice Manual 3* suggests that such specialist positions could include Chief of Division, Chief Research Scientist, Director of Institute, Post-doctoral Fellow and Principal Researcher: Department of Immigration and Citizenship, *Procedures Advice Manual 3*.

20 A senior academic is a person to be employed at an Academic Level of B, C, D or E as a University Lecturer (ANZSCO: 242111) or Faculty Head (ANZSCO: 134411): Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*.

21 See *Ibid.* The Fair Work high income threshold is indexed annually. From 1 July 2012 it is \$123,000. See *Fair Work Regulations 2009* (Cth) reg 2.13; Fair Work Ombudsman, *Website* <www.fairwork.gov.au> at 6 September 2012.

22 Department of Immigration and Citizenship, *Reforms to the Permanent Employer-Sponsored Visa Program* <www.immi.gov.au/skilled/skilled-workers/_pdf/perm-sponsored-reforms.pdf> at 10 April 2012.

23 *Ibid.*

24 R Cameron, ‘Responding to Australia’s Regional Skill Shortages Through Regional Skilled Migration’ (2011) 14 (3) *Journal of Economic and Social Policy* Article 4, 19.

25 ACTU, *Submission 38*.

Should age limitations be increased or removed?

9.15 As a general matter a number of stakeholders supported either an increase in the age limitations for GSM and employer-sponsored visas to 55 years,²⁶ or their removal altogether.²⁷ Some stakeholders expressed the view that age restrictions are ‘lagging behind the eligibility criteria in many OECD countries’ and highlighted the economic advantages of mature age workers.²⁸

9.16 The Government of South Australia argued that, as age limits for qualification for the Age Pension increase, ‘so too should age limits under skilled migration programs increase to reflect current realities and expectations of the working age population’.²⁹

9.17 In addition, as the effects of ‘ageing populations and declining fertility rates’ are felt worldwide, it is likely that global competition for skilled migrants will intensify.³⁰ The Brotherhood of St Laurence submitted that age restrictions create

risks of losing the global competition for older workers, losing potential knowledge and skills. The existing age restrictions on migration should be reviewed with reference to international developments (eg in the OECD) and the overall contribution that older migrants could make to productivity.³¹

9.18 The ALRC acknowledges these concerns. However, if the policy goal of the skilled migration program is to maximise lifetime earnings and therefore contribution, on the basis of DIAC modelling it appears that the age limit of 50 may be appropriate in order to achieve that goal. It is also ‘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’.³² Nonetheless, the ALRC suggests that, in light of the views expressed above, it may be appropriate for DIAC to consider the role of age as a criterion in the skilled migration program.

Age and the structure and operation of the skilled visa program

9.19 In addition to the overriding limitation set by the scope of the Inquiry concerning the making of proposals for reform in this area, and arguments around the policy function of age as a criterion in assessing visa applications, the ALRC considers that the structure and operation of skilled visas may mean that reform is unnecessary. For example, there is no age restriction on the increasingly used 457 visas and age

26 Government of South Australia, *Submission 30*. See also Australian Chamber of Commerce and Industry, *Submission 44*, which supported the increase but with other restrictions.

27 National Seniors Australia, *Submission 27*.

28 Brotherhood of St Laurence, *Submission 54*. See also National Seniors Australia, *Submission 27*.

29 Government of South Australia, *Submission 30*.

30 R Cameron, ‘Responding to Australia’s Regional Skill Shortages Through Regional Skilled Migration’ (2011) 14 (3) *Journal of Economic and Social Policy* Article 4,14.

31 Brotherhood of St Laurence, *Submission 54*.

32 Law Council of Australia, *Submission 46*. See also Universities Australia, *Supplementary Submission to the Department of Immigration and Citizenship on the Review of General Skilled Migration Points Test* (April 2010) in which Universities Australia recognised the value of the age point system for national benefit, but recommended its recalibration along the lines of reforms subsequently implemented.

restrictions under the GSM and employer-nominated visas are offset to a certain degree by the operation of the points test and the exemptions to the age restriction.

9.20 The age limit and the points test for GSM visas reflect the ‘level of benefit to the Australian workforce and economy expected of persons entering Australia’ under the GSM stream of the migration program.³³ The structure of the points test therefore makes provision for highly skilled and capable mature age workers, up to age 50, to meet the pass mark. As no points are awarded for age where the applicant is aged 45–49, applicants in that age bracket ‘will have to have outstanding results in other areas in order to meet the pass mark’.³⁴

9.21 The exemptions allow migrants in a range of professions, outlined above, to be exempted from age restrictions. This appears to strike an appropriate balance between valuing the skills and experience of mature age workers in line with the underlying objective of filling labour and skills shortages.

Australian labour supply and market

9.22 A number of stakeholders recognised the important role of migration in filling labour and skills shortages, but expressed the view that the Government’s priority ‘should be on training and assisting Australian workers, including older workers, to find employment before looking to fill the gaps through migration’.³⁵

9.23 Stakeholders such as Olderworkers highlighted the existing barriers facing Australian mature age workers in obtaining employment;³⁶ and the Australian Council of Trade Unions emphasised the need for ‘genuine labour market testing before employers can sponsor overseas workers’.³⁷

9.24 In addition, the Australian Industry Group stated that it ‘does not believe that raising age limits should be a priority’, and noted that:

without a significant increase in the overall intake (and more than proportional increases in immigration of younger people), raising the immigration age limits would detract from the benefits that immigration has in ameliorating the impacts of our ageing society.³⁸

33 Department of Immigration and Citizenship, *Procedures Advice Manual* 3, sch 6B General points test—Qualifications and points (General Skilled Migration visas).

34 Ibid, sch 6B General points test—Qualifications and points (General Skilled Migration visas).

35 ACTU, *Submission* 38. See also R Cameron, ‘Responding to Australia’s Regional Skill Shortages Through Regional Skilled Migration’ (2011) 14 (3) *Journal of Economic and Social Policy* Article 4, 15.

36 Olderworkers, *Submission* 22.

37 ACTU, *Submission* 38.

38 Australian Industry Group, *Submission* 37.