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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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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 Summary 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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The Inquiry

Inquiry progress

This is 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. This Discussion Paper Summary provides an overview of the policy framework and the proposals and questions contained in the full Discussion Paper—available online. The full Discussion Paper sets out in detail the issues raised by the Terms of Reference, the research behind the proposals and questions, a thorough analysis and discussion of stakeholder views and the ALRC's views to date.

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 The Issues Paper, the Discussion Paper and this Discussion Paper Summary may be downloaded free of charge from the ALRC website, <www.alrc.gov.au>. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

This summary document is designed specifically with stakeholders in mind. It provides the essential minimum for easy access to the ALRC's thinking at this stage in the Inquiry. The next stage, after submissions close, will be the preparation of the final Report, to be delivered to the Attorney-General of Australia by the end of March 2013.

How to make a submission

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.

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.

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 the Discussion Paper must reach the ALRC by **Friday 23 November 2012**.

The context

The ageing population—a public policy challenge

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;³ 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'.⁴

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

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

3 Ibid, xiv.

4 Ibid, xiv.

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.⁵ 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.⁶

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 2044–45.⁷

The December 2011 report, *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’.⁸ A report prepared by Deloitte Access Economics for the Australian Human Rights Commission and 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.

A 5 percentage point lift in participation among this group would see around \$48 billion in extra GDP—or 2.4% of national income.⁹

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’. The report also stated 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’.¹⁰

5 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, 3.

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

7 Productivity Commission, ‘Long Term Ageing is Today’s Policy Challenge’ (Press Release, 27 October 2005).

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, 6.

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

10 *Ibid.*, i.

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.¹¹ 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.¹²

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, including: family assistance, child support and social security laws; employment law; insurance law; and compensation laws.

What is retirement?

The concept of 'retirement' is increasingly difficult to define. While life cycles are usually divided into 'childhood, working age and retirement',¹³ it can be difficult to place dividing lines between working age and 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.¹⁴

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'.

In addition to the unclear distinctions of work/non-work and work/retirement, the delineation between unemployment and retirement can also be 'problematic'.¹⁵ This is particularly the case in industries or sectors where continuous work is not the norm. For example, in the construction industry, employment is often 'defined by a discrete project'. This may affect older workers' opportunities for continued employment:

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

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

13 *Ibid.*, 3.

14 National Seniors Australia, *Submission 27*.

15 Cbus, *Submission 41*.

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.¹⁶

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.

Framing principles

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. While not in itself a framing principle, this sets the background for the Inquiry.

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.¹⁷ The ALRC considers that six interlinking principles are strongly evident:

- participation;
- independence;
- self-agency;
- system stability;
- system coherence; and
- fairness.

Participation

‘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.¹⁸

16 Ibid.

17 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).

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

The ‘Social Inclusion Principles’ emphasise that ‘maximum participation in economic, social and community life is a defining characteristic of an inclusive society’. Achieving this involves policies and programs supporting people to actively participate in the workforce and in communities.¹⁹

The principle of participation may be particularly relevant for disadvantaged older persons. Workforce participation can increase financial and social wellbeing, and reduce the significant risk of social exclusion, for this cohort.²⁰ As noted by the Brotherhood of St Laurence, workforce participation can provide ‘income, the capacity to build retirement savings, a sense of purpose and a connection with the community’.²¹

Independence

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’.²²

Independence also embodies the idea of a person being able to determine when and at what pace to withdraw from work.²³ National Seniors Australia submitted that while multiple factors affect decisions about work—such as health, income and caring responsibilities—‘artificial barriers based on age should not be amongst them’.²⁴ The ability to make decisions about work is also about choice—a principle encompassed by independence. The Australian Council of Trade Unions has stressed that choices for older persons need to be ‘real choices’ about ‘when, where and how they work’.²⁵

Another way choice can play a role is in terms of older people choosing to contribute to society by volunteering. 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:

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.²⁶

19 Ibid, ‘Social Inclusion Principles’, 1.

20 Brotherhood of St Laurence, *Submission 54*.

21 Ibid.

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

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

24 National Seniors Australia, *Submission 27*.

25 ACTU, *Submission 38*.

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

Again, 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

‘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.²⁷ 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 encompasses choice. Self-agency also embodies the importance of being treated with dignity and respect, as reflected in the National Statement on Social Inclusion.²⁸

System stability

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.²⁹

Stakeholders in this Inquiry 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’. It 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’.³⁰

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 employers and employees require reasonable stability for productive employment arrangements to endure.³¹

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

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

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

30 National Seniors Australia, *Submission 27*.

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

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

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.³²

A number of stakeholders in this Inquiry expressed concerns about the lack of consistency, simplicity or transparency.³³ Stakeholders identified complexity, in particular, 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’.³⁴

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 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’.³⁵ 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.³⁶

Fairness

‘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.³⁷

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

33 See Australian Institute of Superannuation Trustees, *Submission 47*; Olderworkers, *Submission 22*; R Spencer, *Submission 08*; W Trinder, *Submission 01*.

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

35 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’.

36 AIST provided as an example misunderstanding about the interaction of the Age Pension and the income and assets tests: Australian Institute of Superannuation Trustees, *Submission 47*.

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

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.³⁸ 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.

In considering fairness, the ALRC has had regard to the ‘gendered difference in ageing’.³⁹ The Older Women’s Network New South Wales Inc (OWN) stated that ‘good policy and legal protection’ requires an understanding that ‘ageing is experienced differently according to gender’. It submitted that ‘unlike most men, most women accumulate poverty over their lifetime’.⁴⁰ 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 include fewer years of wealth building than men, lower savings in superannuation funds, and less superannuation coverage.⁴¹

Another issue relevant to fairness that can affect older persons is discrimination. In its submission, the Diversity Council of Australia referred to a finding of its 2010 survey that age discrimination was ‘the most commonly reported type of discrimination’.⁴² The intersection of age and sex discrimination is a particular issue affecting older women. The Diversity Council’s survey indicated that ‘women were more likely than men to feel they had been discriminated against because of their age’.⁴³ The Government of South Australia also commented on this ‘double discrimination’ based on gender and age, noting that ‘stereotypes and assumptions prevent older women from being selected for jobs or from being considered for training and promotional opportunities’.⁴⁴

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- 38 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.
- 39 Older Women’s Network NSW Inc, *Submission 26*. See also Brotherhood of St Laurence, *Submission 54*; J Willis, *Submission 42*.
- 40 Older Women’s Network NSW Inc, *Submission 26*. Citing: Australian Human Rights Commission, *Accumulating Poverty? Women’s Experiences of Inequality Over the Lifecycle* (2009).
- 41 Brotherhood of St Laurence, *Submission 54*, citing: S Kelly, *Reform of the Australian Retirement Income System* (2009), prepared for Brotherhood of St Laurence.
- 42 Diversity Council of Australia, *Submission 40*.
- 43 See, eg, *Ibid*; Government of South Australia, *Submission 30*. COTA considered that discrimination should be included as a framing principle: COTA, *Submission 51*.
- 44 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*.

Overview of Discussion Paper

The Discussion Paper comprises nine chapters. A summary of each chapter and its proposals and questions follows. The Discussion Paper contains 36 proposals for reform, and 15 questions, on which the ALRC is seeking public input.

Chapter 1: Introduction to the Inquiry

Chapter 1 provides an outline of the background to the Inquiry, an analysis of the scope of the Inquiry as defined by the Terms of Reference, and detailed discussion of the framing principles for the Inquiry. The Terms of Reference are included at the end of this Discussion Paper Summary.

Chapter 2: Recruitment and Employment Law

Chapter 2 identifies a number of barriers to mature age workforce participation at various stages of employment. It considers 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.

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.

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.

Chapter 3: Work Health and Safety and Workers’ Compensation

The first part of Chapter 3 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.

The second part of the chapter focuses on workers’ compensation. 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.

The second part also discusses the inconsistent coverage of volunteers under workers’ compensation and the treatment of superannuation payments in the calculation of workers’ compensation incapacity payments.

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?

Chapter 4: Insurance

Chapter 4 examines the key concerns with respect to mature age workers and insurance that emerged during this Inquiry. These 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.

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 asks whether the General Insurance Code of Practice or similar industry standards or codes might usefully play a role in this area.

Chapter 4 also 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.

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.

Chapter 5: Social Security

Chapter 5 makes a number of proposals to address aspects of the social security system that may act as barriers to work for mature age persons. 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.

In relation to specific income support payments, the ALRC invites 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.

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.

Chapter 6: Family Assistance and Child Support

Family assistance and child support 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. Chapter 6 discusses two family assistance payments that the ALRC has given particular consideration: Child Care Benefit and Child Care Rebate. Both payments have specific policy objectives relevant to this Inquiry.

Chapter 7: Income Tax

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 Tax Review has previously recommended cohesive tax reform with a view to incentives for workforce participation. Chapter 7 discusses several aspects of the income tax system that may be pertinent to mature age workforce participation and notes relevant Tax Review recommendations.

Chapter 8: Superannuation

Superannuation laws contain a number of age-based rules regarding the accumulation of, and access to, superannuation. Chapter 8 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.

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?

Chapter 9: Migration

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—the ALRC does not propose reforms in this area.

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.

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.

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.

Nicola Roxon

Attorney-General