



Australian Government

Australian Law Reform Commission

Access All Ages—Older Workers and Commonwealth Laws

FINAL REPORT

This Final Report reflects the law as at 21 March 2013.

The Australian Law Reform Commission 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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Australian Government
Australian Law Reform Commission

The Hon Mark Dreyfus QC MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

31 March 2013

Dear Attorney-General

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

On 31 March 2012, the Australian Law Reform Commission received Terms of Reference to undertake a review into Commonwealth legal barriers to older persons participating in the workforce.

On behalf of the Members of the Commission involved in this Inquiry—including the Hon Susan Ryan AO, Age Discrimination Commissioner, and in accordance with the *Australian Law Reform Commission Act 1996*—I am pleased to present you with the Final Report on this reference, *Access All Ages—Older Workers and Commonwealth Laws*.

Yours sincerely,

A handwritten signature in cursive script, reading "Rosalind Croucher".

Professor Rosalind Croucher
President

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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.

Nicola Roxon

Attorney-General

Executive Summary

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Why this Inquiry?

This Inquiry by the Australian Law Reform Commission (ALRC) arose out of concerns about the implications of an ageing population and the recognition that expanding the workforce participation of older Australians may go some way to meeting such concerns. Much energy and activity—nationally and internationally—has been directed towards encouraging mature age people to remain in, or re-enter, paid work. The Treasury published intergenerational reports in 2002, 2007, and 2010; and the Productivity Commission produced *Economic Implications of an Ageing Society* (2005). There is also the work of the Advisory Panel on the Economic Potential of Senior Australians (Advisory Panel)¹ and the Consultative Forum on Mature Age Participation.² This Inquiry also contributes to finding answers.

1 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).

2 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; National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

Breaking down the barriers

How do you break down the barriers to workforce participation faced by mature age people? What are the barriers that stand in the way? What can law and legal frameworks do about it? These were the key challenges for the ALRC in this Inquiry.

Law reform can remove barriers to mature age workforce participation by removing specific age limits and by making discrimination on the basis of age unlawful. But law can only go so far. Achieving cultural change was singled out by stakeholders in the Inquiry as crucial for reform. It is the ‘real game changer’.³ Law reform has its part in contributing to cultural change and can lead it in some respects.

What the ALRC contributes in this Inquiry is a range of 36 targeted recommendations that capture some of the momentum for reform, complementing other work in the broader area of policy development affecting mature age people. The ALRC also gives voice to wider concerns where those have been highlighted throughout the Inquiry.

Developing the law reform response

Defining the brief

The ALRC’s work is defined by Terms of Reference from the Commonwealth Attorney-General. They provide the constraint within which any law reform project undertaken by the ALRC must operate, in addition to the direction given under the ALRC’s constituting legislation, the *Australian Law Reform Commission Act 1996* (Cth). In this Inquiry the focus was on ‘limitations or barriers’ to participation in ‘the workforce or other productive work’. The ALRC was asked to identify ‘what, if any, changes could be made to relevant Commonwealth legislation and legal frameworks to remove such barriers’. A number of issues arose in defining the brief.

First, the ALRC took a wide approach to the idea of ‘limitations or barriers’. And in responding to the question of what changes could be made to remove them, the ALRC developed a set of framing principles that provided the lens for the consideration of any reform recommendations.

Secondly, the Terms of Reference defined ‘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). The age cohort therefore comprised a very wide group, with varying capacities and needs stretching over several decades—raising particular challenges for the development of policy responses in this Inquiry.

Thirdly, the Terms of Reference recognised that ‘work’ is a wider concept than work in the labour market as paid work, through its inclusion of ‘other productive work’, which includes volunteer work and caring. There is a tension, however, between the concepts of ‘work’ and ‘other productive work’, where other productive work may itself act as a barrier to paid work—particularly with respect to unpaid care work. To resolve this tension, the ALRC focused on developing reform recommendations to enhance the

3 National Welfare Rights Network (NWRN), *Submission 99*.

capacity to combine paid work and caring—recognising the value of that care but also looking to enable workforce attachment and participation.

Fourthly, having to consider ‘legal frameworks’ in addition to laws meant that the Inquiry concerned more than just specific legislative provisions. It required consideration of things such as policy and practice guides, codes of conduct, education and training about legal rights and responsibilities, and other related matters.

Report structure

This Report is divided into eight chapters. The first two chapters introduce the Inquiry, describe the reform process and set out relevant conceptual and contextual issues. Chapter 3 concerns the keystone recommendation of a National Mature Age Workforce Participation Plan, to provide a coordinated policy response to addressing barriers to the participation of mature age persons in the Australian labour market. The ALRC suggests that the Advisory Panel on Positive Ageing, or a similar body, lead the development of this plan.

This is followed by five chapters focusing upon the specific areas identified in the Terms of Reference, as follows:

- Recruitment and Employment—Chapter 4
- Work Health Safety and Workers’ Compensation—Chapter 5
- Insurance—Chapter 6
- Social Security—Chapter 7
- Superannuation—Chapter 8

Framing principles

The Recommendations for reform were developed in the light of six interlinking principles: participation, independence, self-agency, system stability, system coherence, and fairness:

- *Participation*—all Australians should feel valued and have the opportunity to participate fully in the life of our society. This reflects the Australian Government’s ‘Social Inclusion Agenda’.⁴
- *Independence*—older persons should have the ability to make choices about the form of participation they wish to make, including the capacity to determine when and at what pace withdrawal from paid employment takes place.⁵ It also involves the ability to make genuine choices between participation in paid work, unpaid work, or some combination of both.

4 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 21 March 2012.

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

- *Self-agency*—an individual should have the right to make decisions about matters affecting him or her. The principle of self-agency is one that underpins the idea of ‘independence’ and of ‘participation’. Like the principle of independence, self-agency also encompasses choice and the importance of being treated with dignity and respect, as reflected in the National Statement on Social Inclusion.⁶
- *System stability*—laws and systems that are complex should remain stable and predictable. This is particularly relevant in areas such as superannuation. The Super System Review Panel emphasised that, because superannuation is a large and complex system, with ‘an increasingly important social and macroeconomic dimension’, rule changes ‘should be made sparingly and in a way that engenders member confidence’.⁷ 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*—systems should be consistent, simple and transparent for individuals. This was a priority identified by the review of Australia’s tax system, chaired by Dr Ken Henry AC, in its review of the retirement income system.⁸ Complexity may cause disengagement in paid work. Lack of accessible information is another aspect of system coherence and an element of complexity, leading to poor understanding of rules and entitlements.
- *Fairness*—national resources should be distributed fairly and responsibility should be balanced between individuals and government. Fairness can be a consequence of coherence, consistency and the stability of the relevant systems involved. 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. Fairness also encompasses ensuring basic rights and freedoms are enjoyed by older persons, and that there exists equality of opportunity in participation in paid and other productive work.

These reform principles guided the development of the targeted set of recommendations addressing the Terms of Reference in this Report.

The recommendations

Net effect

The Terms of Reference required the ALRC to review a number of distinct and discrete areas of law, to identify potential barriers to mature age persons’ workforce

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

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

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

participation, and to recommend law reform solutions. As finding the answers to enabling workforce participation by older Australians requires a broader focus than just on law, the ALRC considers that a major coordinating initiative is needed in the form of a National Mature Age Workforce Participation Plan. This is the first and keystone recommendation in this Report.⁹ Taken together, the other recommendations will amount to specific strategies in the implementation of the National Plan. Their net effect will be to provide

- a coordinated policy response to enabling mature age workforce participation;
- consistency across Commonwealth laws and between Commonwealth and state and territory laws to support mature age workforce participation;
- a reduction in age discrimination;
- a greater awareness of mature age workers' rights and entitlements;
- support for maintaining attachment to the workforce for mature age persons; and
- work environments, practices and processes that are appropriate for mature age workers.

Achieving a coordinated policy response

In addition to the recommendation for a National Plan, other recommendations throughout the Report also reflect the theme of achieving a coordinated policy response to mature age workforce participation, with the aim that:

- the social security and superannuation systems do not discourage or prevent workforce participation;¹⁰
- policy responses are guided by relevant reviews, which have considered issues affecting mature age workers;¹¹ and
- certain agencies or bodies will work together to facilitate the development of coordinated policy responses.¹²

Improving consistency of laws

Some of the recommendations aim to improve consistency across Commonwealth laws and between Commonwealth and state and territory laws to support mature age workforce participation. These recommendations concern:

- Commonwealth workers' compensation laws;¹³
- the retirement age of judicial and quasi-judicial appointments;¹⁴ and

9 Recommendation 3-1.

10 Recommendations 7-3, 7-4, 7-5, 8-1, 8-3.

11 Recommendations 4-3, 4-4, 4-10, 4-12.

12 Recommendations 4-5, 4-6, 4-11, 4-12, 5-1, 5-3, 5-4, 6-4.

13 Recommendation 5-5.

14 Recommendation 4-13.

- the insurance exceptions in Commonwealth, state and territory anti-discrimination legislation.¹⁵

Removing age discrimination

A number of recommendations are directed towards removing age discrimination in legislation and practice. In some cases, the ALRC recommends amendments; in some, reviews. For example, reviews are recommended for:

- compulsory retirement ages of judicial and quasi-judicial appointments, and military personnel;¹⁶
- licensing or re-qualification requirements, with the Australian Human Rights Commission facilitating the development of guidelines to assist;¹⁷ and
- the insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.¹⁸

Amendments are recommended in specific areas:

- to ensure access to incapacity payments under Commonwealth workers' compensation schemes;¹⁹
- to provide that government co-contributions of superannuation for low-income earners do not cease at age 71 years;²⁰ and
- to ensure the amount of compensation payable to an employee under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) is not reduced by reference to superannuation.²¹

Age discrimination is also addressed through recommendations directed towards promoting awareness of the rights and entitlements of mature age workers.

Promoting awareness of rights and entitlements

Recommendations throughout this Report reflect the importance of promoting awareness of mature age workers' rights and entitlements: by recruiters, by job services providers, by employers, and by mature age workers. Mature age workers also need information that supports their ability to make choices in employment. They need to know what rights and entitlements they have to make such choices.

15 Recommendation 6–4.

16 Recommendations 4–13, 4–14.

17 Recommendation 4–11.

18 Recommendation 6–4.

19 Recommendations 5–5, 5–7.

20 Recommendation 8–2.

21 Recommendation 5–9.

Promoting awareness of the rights and entitlements of mature age workers is therefore crucial and is seen in recommendations in this Report about:

- codes of conduct;²²
- national campaigns and audits;²³
- training;²⁴
- information provision;²⁵
- guidance material;²⁶ and
- recognition of best practice.²⁷

Maintaining workforce attachment

A number of recommendations in this Report seek to enable mature age people to remain attached to the workforce. Maintaining workforce attachment is supported through recommendations to ensure:

- insurance coverage is available and appropriate for continued participation in work or other productive work;²⁸
- there are no gaps under the Commonwealth workers' compensation schemes in entitlement, and that incapacity payment periods are extended, to ensure injured mature age workers remain connected to rehabilitation and return to work support services;²⁹ and
- mature age workers are provided with longer periods of notice for termination of employment.³⁰

Recommendations are also directed towards improving employment services for unemployed mature age people. Recruiters are key gatekeepers in the employment process. Ensuring that they are aware of their obligations and appreciate the value of mature age workers is essential.³¹ Similarly, mature age job seekers need to be supported by Job Services Australia staff who understand their needs.³²

22 Recommendations 4-3, 4-4, 6-6.
 23 Recommendations 4-2.
 24 Recommendation 4-5, 7-2.
 25 Recommendation 4-8, 6-1, 7-1.
 26 Recommendations 4-5, 4-8, 4-11, 5-3, 6-5, 7-3, 7-4.
 27 Recommendations 4-6, 5-4.
 28 Recommendations 6-1, 6-2, 6-3.
 29 Recommendations 5-5, 5-6, 5-7.
 30 Recommendation 3-7.
 31 Recommendations 4-3, 4-4, 4-5.
 32 Recommendation 7-2.

Other recommendations seek to remove disincentives to work that may be associated with receipt of income support payments, including the Age Pension and Disability Support Pension.³³

Two recommendations in this Report are directed towards enabling carers to retain an attachment to the paid workforce. These recommendations:

- recognise the compatibility of paid work and caring responsibilities;³⁴ and
- support the flexibility in work that enables choices to be made in relation to caring.³⁵

Improving work environments, practices and processes

Ensuring that work environments, practices and processes are safe and conducive to worker health and wellbeing is central to facilitating the ongoing participation of mature age workers in paid employment and other productive work. Recommendations in this Report are therefore directed towards ensuring that health and safety issues affecting mature age workers are:

- considered in implementing the Australian Work Health and Safety Strategy 2012–2022;³⁶
- included in Safe Work Australia’s research and evaluation strategy and work plans;³⁷ and
- acknowledged through recognition of best practice.³⁸

Summary

The approach to law reform in this Report includes a mix of strategies, directed, for example, at legislation, codes of practice, guidelines, education and training. Although the Report is presented to the Attorney-General, some of its recommendations are directed to other government agencies and bodies, professional associations and institutions, for action or consideration.

The Terms of Reference did not give unlimited licence to consider matters that were wider than ones anchored in the idea of workforce participation. Many throughout this Inquiry spoke about broader issues—and the ALRC gives voice to such concerns throughout this Report—but the Recommendations are kept within the brief as defined by the Terms of Reference. By drawing attention to wider concerns, however, this Report can provide a catalyst to further work as well as complement initiatives already in train. All such activity will have a place within the framework set by a National Mature Age Workforce Participation Plan.

³³ Recommendations 7–3, 7–5.

³⁴ Recommendation 7–4.

³⁵ Recommendation 4–7.

³⁶ Recommendation 5–1.

³⁷ Recommendation 5–2.

³⁸ Recommendations 4–6, 5–4.

Recommendations

3. National Mature Age Workforce Participation Plan

Recommendation 3–1 The Australian Government should develop a National Mature Age Workforce Participation Plan.

4. Recruitment and Employment

Recommendation 4–1 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 could 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.

Recommendation 4–2 The Australian Human Resources Institute should review its Code of Ethics and Professional Conduct to consider ways in which the Code could 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.

Recommendation 4–3 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

to assist recruitment agencies and consultants to engage constructively with, and recruit, mature age job seekers.

Recommendation 4–4 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.

Recommendation 4–5 Section 65 of the *Fair Work Act 2009* (Cth) should be amended to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

Recommendation 4–6 The Fair Work Ombudsman (FWO) has developed material relevant to negotiating and implementing flexible working arrangements. The FWO should amend such material to include information for mature age workers, in consultation with unions, employer organisations and seniors organisations.

Recommendation 4–7 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. In the course of amending the *Fair Work Act 2009* (Cth), the Australian Government should consider increasing this period.

Recommendation 4–8 From 2014, the Fair Work Commission will conduct the first four-yearly review of modern awards. The review should consider the inclusion or modification of terms to encourage workforce participation of mature age workers.

Recommendation 4–9 The Australian Human Rights Commission and the Fair Work Commission, in consultation with the Australian Council of Human Rights Agencies, should develop guidance to:

- (a) clarify the interaction of the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth, state and territory anti-discrimination legislation; and
- (b) outline potential avenues for redress under this legislation for mature age workers.

Recommendation 4–10 Professional associations and industry representative groups are often responsible for developing or regulating licensing or re-qualification requirements. The Australian Human Rights Commission should facilitate the development of 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.

Recommendation 4–11 The Australian Government should initiate an independent inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

Recommendation 4–12 The Australian Government should initiate an independent inquiry to review the compulsory retirement ages for military personnel.

Recommendation 4–13 In conducting national campaigns and audits to ensure compliance with Commonwealth workplace laws, the Fair Work Ombudsman should ensure issues relating to mature age workers and job seekers are considered.

5. Work Health and Safety and Workers' Compensation

Recommendation 5-1 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.

Recommendation 5-2 Safe Work Australia should include work health and safety issues that may affect mature age workers in its research and evaluation strategy and work plans.

Recommendation 5-3 Safe Work Australia and state and territory work health and safety regulators have developed guidance material to assist persons conducting a business or enterprise, workers, and the representatives of each to respond to health and safety issues of all workers. Such material should be reviewed to ensure it includes information about issues that may affect mature age workers, including information about:

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

Recommendation 5-4 Safe Work Australia should work with state and territory health and safety regulators, unions and industry representatives to recognise best practice in work health and safety with respect to mature age workers in Commonwealth, state and territory work health and safety awards.

Recommendation 5-5 The *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) should be amended to align the retirement provisions with the qualifying age for the Age Pension under the *Social Security Act 1991* (Cth).

Recommendation 5-6 The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) should be amended to provide that workers who are injured after two years prior to Age Pension age may receive incapacity payments for the same period as under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and *Military Rehabilitation and Compensation Act 2004* (Cth).

Recommendation 5-7 If amended in line with Recommendations 5-5 and 5-6, the *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) will provide that workers and members injured after two years prior to Age Pension age are entitled to receive incapacity payments for a period of 104 weeks. This period should be extended.

Recommendation 5–8 Safe Work Australia’s Strategic Issues Group for Workers’ Compensation should consider the definition of those categories of people covered by Commonwealth, state and territory workers’ compensation legislation to ensure volunteers are covered consistently.

Recommendation 5–9 Sections 20, 21 and 21A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) reduce the amount of compensation payable to an employee by reference to the amount of superannuation derived from the employer’s contributions and by a further 5 % of the employee’s Normal Weekly Earnings. These sections should be repealed.

6. Insurance

Recommendation 6–1 The Insurance Reform Advisory Group, or a similar body, should facilitate the development of a central information source to provide mature age persons with clear and simple information about relevant and available insurance products.

Recommendation 6–2 The Australian Government should negotiate an agreement with insurers offering products in the Australian market requiring the publication of data upon which decisions about insurance offerings based on age are made.

Recommendation 6–3 The Australian, state and territory governments should review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.

Recommendation 6–4 The Australian Human Rights Commission should, in consultation with key insurance and superannuation bodies, develop guidance material about the application of any insurance exception as it applies to age under Commonwealth anti-discrimination legislation.

Recommendation 6–5 The General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

7. Social Security

Recommendation 7–1 The Department of Human Services should evaluate the effectiveness of communication of 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 possible exemptions from the activity test;
- (c) how to calculate the effect of taking up paid work on income support payments; 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.

Recommendation 7–2 To enhance the capacity of staff of Job Services Australia, Disability Employment Services and the Indigenous Employment Program 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 and training tools about:

- (a) age discrimination;
- (b) the effect that illness, disability and caring responsibilities may have on the capacity of mature age persons to work;
- (c) diversity among mature age job seekers; and
- (d) Australian Government programs targeted at mature age job seekers.

Recommendation 7–3 The *Guide to Social Security Law* should be amended to provide that undertaking paid work for fewer than 30 hours per week will not trigger a review of qualification for Disability Support Pension.

Recommendation 7–4 The *Guide to Social Security Law* should provide that a temporary cessation of constant care due to participation in paid employment, unpaid 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.

Recommendation 7–5 The objective of Work Bonus is to provide an incentive for recipients of Age Pension and Veterans' Age Service Pension to continue in paid employment. To ensure that Work Bonus continues to achieve its objective, the following amounts should be indexed:

- (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).

8. Superannuation

Recommendation 8–1 The *Superannuation Industry (Supervision) Regulations 1994* (Cth) prohibit contributions by members aged 65–74 unless the member meets a work test. The work test requires the member to work for at least 40 hours over a 30-day period in the financial year. The Australian Government should review the work test and consider:

- (a) the policy objective of the work test;
- (b) whether that policy objective remains relevant;

- (c) how the work test contributes to achieving that policy objective; and
- (d) whether the work test in the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) should be consistent with the work test in the *Superannuation Industry (Supervision) Regulations 1994* (Cth).

Recommendation 8–2 Section 6(1)(e) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth), which provides that government co-contributions are payable only for people aged under 71 years, should be repealed.

Recommendation 8–3 The ‘Transition to Retirement’ rules were introduced into the *Superannuation Industry (Supervision) Regulations 1994* (Cth) to encourage continued mature age workforce participation. The Australian Government should review these rules to determine what changes, if any, are required to ensure they meet their policy objective. The review should consider matters including:

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

1. Inquiry Overview

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Summary

1.1 This Report comprises the final step by the Australian Law Reform Commission (ALRC) in the Inquiry into Commonwealth legal barriers to older persons participating in the workforce or other productive work. The Inquiry was initiated under Terms of Reference from the then Attorney-General of Australia, the Hon Nicola Roxon MP, issued in March 2012. This chapter provides a snapshot of the background to the Inquiry, its scope and the processes of reform leading to this Report and its 36 recommendations.

Background to the Inquiry

The ageing population—public policy challenges

1.2 Australia's population is ageing. It is estimated that by 2044–45, almost one in four Australians will be aged 65 years and over; and in every year between 2012–28, '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'.¹ This also means that the population will comprise fewer people of 'working age', with only 2.7

1 Productivity Commission, *Economic Implications of an Ageing Australia* (2005), xiv.

people of working age to support each Australian aged 65 years and over by 2050, in contrast to five in 2010 and 7.5 in 1970.²

1.3 The ageing of the population has implications for a wide range of public policy concerns, including, for example:

- public health;
- aged care;³
- infrastructure;
- city design;
- workplace design; and
- the retirement income system—the Age Pension and superannuation.

1.4 As noted in the *Intergenerational Report 2010*, decisions taken ‘in the near term’ will have an impact on ‘the wellbeing of future generations’.

Productivity-enhancing reforms, particularly through nation building infrastructure and improving the skills base, will grow the economy, improve living standards, and partly offset the fiscal pressures of ageing. With an ageing population, productive growth is the key driver of future growth prospects. Reforms that reduce barriers to participation will also lift growth and reduce future pressures.⁴

1.5 Increasing the labour force participation of older Australians is one response. But there are others. The tensions between ‘work’ and ‘retirement’, ‘work’ and ‘caring’, for example within the context of Australia’s Social Inclusion Agenda, are considered in Chapter 2.

Related activity

1.6 There has been a considerable amount of activity and initiatives directed towards ageing populations—both internationally and within Australia. Since the mid-1990s, numerous international organisations have considered the impact of population ageing on economic productivity, pension system design, and health policy. These include:

- the World Bank;⁵
- the Organisation for Economic Co-operation and Development (OECD);⁶
- the World Health Organization;⁷ and
- the United Nations.⁸

2 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), viii.

3 See, eg, Law Council of Australia, *Submission 96*.

4 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), vii.

5 World Bank, *Averting the Old Age Crisis* (1994).

6 Organisation for Economic Co-operation and Development, *Maintaining Prosperity in an Ageing Society* (1998); OECD, *Live Longer, Work Longer* (2006). *Live Longer, Work Longer* is a series on ageing and employment policies, including reports on 21 countries.

7 World Health Organization, *Active Ageing: A Policy Framework* (2002).

8 United Nations, *World Population Ageing: 1950–2050* (2002).

1.7 In the Australian context, the Treasury published intergenerational reports in 2002, 2007, and 2010;⁹ and the Productivity Commission produced the report, *Economic Implications of an Ageing Society*, in 2005.¹⁰ There is also the work listed in the Terms of Reference for this Inquiry, namely that of the Advisory Panel on the Economic Potential of Senior Australians (Advisory Panel);¹¹ and the Consultative Forum on Mature Age Participation (Consultative Forum).¹²

1.8 The Consultative Forum was established in February 2010 to provide ‘evidence-based advice on ways to overcome the barriers to employment participation confronting many mature age people’.¹³ The Forum’s final report was completed in August 2012.¹⁴ The work of the Consultative Forum overlapped with this Inquiry and the issuing of Terms of Reference to the ALRC was one of the Forum’s key recommendations. The Forum’s work will continue through the Advisory Panel on Positive Ageing, to ‘support a strategic approach to maximising the potential of an ageing population’.¹⁵ The membership of the Consultative Forum included the Hon Susan Ryan AO, who was appointed as Australia’s first Age Discrimination Commissioner with the Australian Human Rights Commission on 30 July 2011. Ms Ryan was also appointed as a part-time Commissioner to the ALRC to assist in this Inquiry.

1.9 Significant reviews have also been conducted into specific areas related to this Inquiry. 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 System Review, chaired by Mr Jeremy Cooper; and the Pension Review, chaired by Dr Jeff Harmer AO.¹⁶ 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.¹⁷ 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

9 The Treasury, *Intergenerational Report 2002–03* (2002); The Treasury, *Intergenerational Report 2007* (2007); The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010).

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

11 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).

12 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; National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

13 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 1.

14 Ibid.

15 Ibid, 7.

16 The Treasury, *Australia’s Future Tax System: Final Report* (2010); Super System Review Panel, *Super System Review* (2010); FaHCSIA, *Pension Review Report* (2009).

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

Australians, carers and people with disability.¹⁸ These reviews made a number of recommendations for reform, which are noted as relevant in this Report.

1.10 In the field of the Commonwealth workers' compensation schemes, the Government announced a review of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) in July 2012 and an issues paper was released in September.¹⁹ At the time of writing, the final report of the review had not been made public.

1.11 With respect to employment law, in August 2012 the Australian Government released the final report of the review of the *Fair Work Act 2009* (Cth). In October 2012, the Government announced it would implement the first tranche of recommendations arising from the review and on 1 January 2013 the provisions of the *Fair Work Amendment Act 2012* (Cth) took effect.²⁰ In March 2013, the Fair Work Amendment Bill 2013 (Cth) was introduced into Parliament.²¹

1.12 The project to consolidate existing Commonwealth anti-discrimination laws into a single Act was also relevant to this Inquiry as the *Age Discrimination Act 2004* (Cth) is one of the pieces of legislation being examined.²² This project forms a key component of Australia's Human Rights Framework.²³ In November 2012 an exposure draft Human Rights and Anti-Discrimination Bill 2012 was released and was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. The Committee's Report was released on 21 February 2013. In March 2013, the Government announced that, aside from amendments to the *Sex Discrimination Act 1984* (Cth) in relation to sexual orientation, gender identity and intersex status, the consolidation process involved a number of issues requiring 'deeper consideration' and that the Attorney-General's Department will 'continue working on this project'.²⁴

1.13 A further initiative that may be relevant in the mature age context is Disability Care Australia (formerly the National Disability Insurance Scheme)—a response to the Productivity Commission's inquiry into a National Disability Long-term Care and Support Scheme.²⁵ The scheme is to provide funding and support to eligible Australians with disability. The National Disability Insurance Scheme Bill 2013 was passed by Parliament on 21 March 2013.

18 FaHCSIA, *Pension Review Report* (2009).

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

20 *Fair Work Amendment Act 2012* (Cth); B Shorten (Minister for Employment and Workplace Relations), 'Government implements first tranche response to Fair Work Act Review' (Press Release, 15 October 2012).

21 Fair Work Amendment Bill 2013 (Cth).

22 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.

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

24 The Hon Mark Dreyfus QC MP (Attorney-General) and the Senator the Hon Penny Wong (Minister for Finance and Deregulation), 'New Anti-Discrimination Laws to Cover Sexual Orientation, Gender Identity and Intersex Status' (Media Release, 20 March 2013).

25 Productivity Commission, *Disability Care and Support* (2011).

1.14 Beginning in July 2013, Disability Care Australia will be launched at a number of sites around Australia.²⁶ To become a participant in the launch a person must be under the age of 65 on the date the access request is made.²⁷ Given that the details of the scheme and its potential impact on older workers with disability have yet to be worked out at the time of writing, it is not considered in this Report. However, issues with respect to disability-related social security payments as well as insurance more broadly are discussed—in Chapters 5 and 6 respectively.

Defining the scope of the Inquiry

Terms of Reference

1.15 The Terms of Reference²⁸ 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. The laws to be considered include:

- superannuation law;
- family assistance, child support and social security law;
- employment law;
- insurance law;
- compensation laws; and
- any other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004* (Cth).

1.16 Defining the scope of the Inquiry required consideration of the meaning of a number of terms: ‘limitations or barriers’; ‘older persons’; ‘other productive work’; and ‘legal frameworks’.

1.17 The ALRC also had to determine the extent of barriers, if any, in the areas identified for consideration in the Terms of Reference. Some topics clearly sat outside; and in others that were considered, the ALRC concluded that no recommendations were to be made. These are noted below.

26 Council of Australian Governments, *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch* <www.coag.gov.au/node/485> at 21 March 2013.

27 National Disability Insurance Scheme Bill 2013 (Cth) cl 22. The Bill passed both houses of parliament on 21 March 2013. The Senate Community Affairs Legislation Committee released its report on the Bill on 13 March 2013. The Committee recommended that the Government, through the Council of Australian Governments, ‘identify mechanisms by which to provide adequate specialised disability support for people 65 and over who have disabilities not resulting from the natural process of ageing’.

28 The full Terms of Reference are set out at the front of this Report.

Terminology

Barriers

1.18 The Terms of Reference refer to the ‘obstacles’ to workforce participation by older persons and the desirability of ‘removing limitations on, or disincentives to’ such participation. The ALRC is then asked to identify ‘barriers’ in Commonwealth laws and legal frameworks to participation, or continuing active participation, in the workforce or other productive work. ‘Barriers’ to continuing active workforce participation may include specific limitations, such as age limits. Barriers in a broad sense may also include other things, such as disincentives to remain in the workforce and even incentives to leave.

1.19 How wide, then, is the notion of ‘barriers’ for the purposes of this Inquiry? The Terms of Reference required first, the identification of barriers in Commonwealth legislation and legal frameworks and, secondly, determining what, if any, changes to law and legal frameworks were necessary to remove them. The ALRC took a wide approach to the idea of ‘obstacles’ or ‘barriers’. In determining what changes should be made, the ALRC developed a set of framing principles—set out in Chapter 2. They provided the lens for the consideration of what, if any, reform recommendations were to be made in response.

1.20 The Consultative Forum’s final report included a summary of 14 key barriers to workforce participation.²⁹ They provide an instructive analysis in the wider context of the ageing population and a useful backdrop to the consideration of barriers in laws and legal frameworks considered in this Inquiry:

- *Discrimination in employment on the basis of age.* Can manifest itself both directly and indirectly in the recruitment and retention of staff. Often, age discrimination interacts with other barriers.
- *Care-giving responsibilities.* Significantly impacts the ability to secure and retain employment—in particular for those with disrupted careers due to child care and other responsibilities.
- *Flexibility of employment arrangements.* Is an important factor enabling mature age people to extend their working lives or to increase the employment participation of older Australians who face other barriers.
- *Issues around private recruitment firm practices.* The increasing role of private recruitment agencies in job search has opened avenues for age-based discrimination to be experienced at the recruitment stage.
- *Job search assistance.* Mature age job seekers can have trouble finding employment because of outdated job search skills, and [this] may discourage them from seeking employment.

29 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

- *Leisure time trade-off.* Efforts to increase employment participation of mature age Australians are challenged by a tendency for many to retire early to pursue leisure activities.
- *Mental health barriers.* Evidence has demonstrated the connections between mental illness and early retirement, job loss, unemployment, or difficulties re-entering employment.
- *Mismatch of job skills and experience with industry demands.* Changes in the economy in recent decades, including a decline in manufacturing, means that some mature age people have skills less suited to the modern economy.
- *Physical illness, injury and disabilities.* Have a major impact on early retirement, job loss, unemployment, and can create difficulties re-entering employment.
- *Re-entry issues barriers of the Very Long-Term Unemployed (of 24 months or more in duration).* Many mature age job seekers have experienced significant difficulties in re-entering the workforce because of structural changes in the economy, among other reasons.
- *Re-training and up-skilling barriers.* The ability of mature age people lacking prior qualifications to find employment is reliant upon the availability of appropriate training opportunities, as well as their aspirations to upgrade their skills.
- *Superannuation.* Individual superannuation decisions, as well as government policies, can significantly impact retirement timing decisions.
- *Tax transfer system.* In Australia there is evidence that the tax transfer system is complex and may act as a disincentive for mature age people to work.
- *Workplace barriers.* Improving the quality of workplaces with physically demanding occupations and inappropriate conditions can attract and retain mature age people in the workforce.³⁰

1.21 The characterisation of ‘barriers’ in this list is a wide one. Some of these barriers are about law and legal frameworks; some are broader. Some are about incentives to leave work; some about disincentives to stay in the paid workforce. Some are personal—specific to an individual; some are structural—affecting whole groups.³¹ For example, experiencing mental and physical illness may be a barrier to workforce participation at an individual level, and so may having care-giving responsibilities. In relation to such matters the focus of the ALRC in this Report is on enhancing a person’s capacity to participate in the workforce where laws and legal frameworks can play a role—for example, in the number of hours a person may work while in receipt of Disability Support Pension or Carer Payment.

30 Ibid, 1–6.

31 Ibid, 10.

1.22 The Consultative Forum’s list includes as a barrier that the timing of retirement may be an individual matter of choice—a ‘leisure time trade-off’. The Forum also notes that decisions to leave the paid workforce may also be significantly affected by superannuation settings. Both are listed as ‘barriers’. However in considering whether to make a recommendation in relation to superannuation settings in this Report, the ALRC’s framing principles for this Inquiry, set out in Chapter 2, became dominant considerations. In this context the principles of self-agency, independence and participation were critical.

1.23 Some stakeholders expressed objections to the ALRC’s approach to the breadth of the ‘barriers’, suggesting, for example, that adding a right or entitlement for older workers was not about removing ‘barriers’.³² The ALRC considers that an approach that enhances the position of older workers by recommending, in some instances, the expansion of an entitlement, is appropriate where to do so addresses an obstacle affecting workforce participation. For example, flexible employment arrangements may enable mature age people to extend their working lives or to increase their employment participation.³³ The ALRC considers that facilitating such flexibility removes a barrier by enhancing the capacity of older persons to maintain workforce attachment.

Older persons

1.24 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).³⁴ This is a very wide group, with varying capacities and needs stretching over several decades—raising particular challenges for the development of policy responses.

1.25 The Advisory Panel noted that there is no agreed definition of ‘seniors’ or ‘older Australians’, and that ‘the effects of ageing vary from person to person in terms of their capability’.³⁵ The Australian Institute of Health and Welfare refers to older Australians as being 65 years and over;³⁶ and older Indigenous people as being 50 years and

32 Australian Chamber of Commerce and Industry, *Submission 85* and Australian Chamber of Commerce and Industry, *Submission 44*. See also Australian Industry Group, *Submission 97*; Business Council of Australia, *Submission 93*.

33 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 18.

34 The Queensland Industry Tourism Council expressed concern about the use of the term ‘older persons’ and suggested replacing it with ‘mature age worker’, ‘given that the ABS definition for “older persons” is often an arbitrary classification that differs between each of their publications’: Queensland Tourism Industry Council, *Submission 67*. Given that the Terms of Reference for this Inquiry are headed specifically with the term ‘older persons’, the ALRC considers it appropriate to use this term throughout the Report.

35 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011), 4.

36 Australian Institute of Health and Welfare, *Australia’s Health 2012* (2012) <www.aihw.gov.au> at 21 March 2013, 9.

over.³⁷ The Population Division of the Department of Economic and Social Affairs of the United Nations refers to older persons as 60 years and over.³⁸ Its 2002 report on *World Population Ageing* divided its consideration of older persons into three cohorts: 60 years and over; 65 years and over; and 80 years and over.³⁹

1.26 Stakeholders in this Inquiry noted the difficulty of characterising persons as ‘older’ from the age of 45 years.⁴⁰ The Brotherhood of St Laurence, for example, described the term ‘older people’ as a ‘slippery concept’ and pointed to the problem of cohort differences:

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 80–100.⁴¹

1.27 In developing the recommendations in this Report, the ALRC has taken into account that public policy responses require consideration of ‘older persons’ as comprising many varied cohorts, with varying needs. As the Advisory Panel commented: ‘People do not suddenly become old at a set age. Rather all people age and are ageing’.⁴²

Other productive work

1.28 The Terms of Reference recognise that ‘work’ is a wider concept than work in the labour market as paid work. ‘Work’ includes ‘other productive work’, which includes volunteer work and caring. The Terms of Reference also note the obstacles faced by older persons participating actively in the workforce. There is a tension, however, between the concepts of ‘work’ and ‘other productive work’, where other productive work may itself act as a barrier to paid work. This may particularly be the case with unpaid care work. The Consultative Forum identified ‘care-giving responsibilities’ in its list of barriers to employment participation, because it ‘significantly impacts the ability to secure and retain employment—in particular for those with disrupted careers due to child care and other responsibilities’.⁴³

1.29 To resolve this tension, the ALRC focused on how to enhance the capacity to combine paid work and caring—recognising the value of that care but also looking to enabling paid workforce participation. This is considered further in Chapter 2. As a

37 Australian Institute of Health and Welfare, *Older Aboriginal and Torres Strait Islander People Cat No IHW 44* (2011), 1.

38 United Nations, *World Population Ageing: 1950–2050* (2002).

39 Ibid.

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

41 Brotherhood of St Laurence, *Submission 54*. Quoting: H Kimberley and B Simons, *The Brotherhood’s Social Barometer: Living the Second Fifty Years* (2009). 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*.

42 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011), 4.

43 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

matter of terminology, where the expression ‘workforce participation’ is used in this Report, it refers to participation in the paid workforce, unless otherwise stated.

1.30 The tension between ‘work’, as income generating, and ‘other productive work’ in activities such as caring and volunteering, is considerable. It is a key part of the wider context of ageing and the challenges of developing policy responses. As noted in the *Intergenerational Report 2010*:

Policy responses need to reflect a sound understanding of the complex nature of mature age participation. Retirees make a valuable contribution to the economy and living standards through activities such as volunteering or carer activities.⁴⁴

1.31 The Consultative Forum recommended that the Government should ask the Productivity Commission to examine the broad thematic issues around caring, beyond employment and beyond mature age carers.⁴⁵

Legal frameworks

1.32 The Terms of Reference direct the ALRC to consider ‘all relevant Commonwealth legislation and related legal frameworks’. The Business Council of Australia criticised what it described as an ‘unusually broad view of legislation and legal frameworks’.⁴⁶ The ALRC considers that the reference to ‘legal frameworks’ means that the ALRC is directed to consider not only legislative instruments, but also policy and practice guides, codes of conduct, education and training about legal rights and responsibilities and other related matters.

Coverage of particular issues

Migration

1.33 In the Issues Paper for this Inquiry, the ALRC asked a number of questions relating to migration,⁴⁷ as the Terms of Reference directed the ALRC to consider ‘other relevant Commonwealth legislation exempt under the *Age Discrimination Act 2004*’, which includes the *Migration Act 1958* (Cth).⁴⁸ The ALRC looked at issues concerning skilled migration visas and age limits imposed—for example, the 50 year age limit for entry as a skilled migrant under the General Skilled Migration (GSM) program.⁴⁹ A number of stakeholders supported either an increase in the age

44 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), xiv.

45 National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 1.

46 Business Council of Australia, *Submission 93*.

47 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Questions 53–55.

48 *Migration Act 1958* (Cth) s 43.

49 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. Similarly, one criterion for applying for employer-sponsored visas is that the applicant is under 50 years of age: 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).

limitations for the GSM and employer-sponsored visas to 55 years,⁵⁰ or the removal of the age limitations altogether.⁵¹

1.34 During the next stage of the Inquiry, the ALRC concluded 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, was not primarily a limitation or barrier to their participation in the workforce—the focus of the Terms of Reference—but rather a barrier to entry to Australia for the purposes of work. In light of this, the ALRC signalled that proposals for reform in this area would be beyond the scope of this Inquiry.⁵² The ALRC suggested that, given the views expressed in this Inquiry, it may be appropriate for the Department of Immigration and Citizenship (DIAC) to consider the role of age as a criterion in the skilled migration program.⁵³

1.35 DIAC supported this approach,⁵⁴ submitting that

Australia's skilled migration program is carefully managed so as to yield the maximum benefit for the Australian community serving a range of economic, social and demographic objectives.

Demographic research indicates that, in the near future, our ageing population will also begin to act as a constraint on the supply of younger skilled workers. The department's planned migration program will help address skills shortages. It will also offset the major decline in the size of Australia's working age population, which would otherwise begin to affect the Australian community in a few years time, as the majority of 'baby boomer' generation moves into retirement.⁵⁵

1.36 DIAC also drew attention to the series of reforms of the skilled migration program that commenced on 1 July 2012—including a review of the points test used to assess skilled migrants.⁵⁶

50 Australian Chamber of Commerce and Industry, *Submission 44*; Government of South Australia, *Submission 30*.

51 National Seniors Australia, *Submission 27*. The Brotherhood of St Laurence submitted that age restrictions create 'risks of losing the global competition for older workers, losing potential knowledge and skills': Brotherhood of St Laurence, *Submission 54*. An article by Professor Simon Briggs and others referred to the fact the Issues Paper had raised the issue of older workers in Australia's migration program and supported the idea of valuing older workers, both within Australia and through immigration within 'globalised economies' to 'capitalise upon this resource': S Biggs, M Fredvang, Irja Haapala, 'Not in Australia: Migration, Work and Age Discrimination' (2012) *Australasian Journal on Ageing* 1, 3.

52 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), ch 9. The ACTU, for example, argued that 'the Commonwealth 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': ACTU, *Submission 38*.

53 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), [9.18].

54 Department of Immigration and Citizenship, *Submission 79*. The ALRC concluded not to make a recommendation. This is not the same thing as a recommendation that 'no changes be made to the age limits under Australia's skilled migration framework'.

55 Ibid.

56 Ibid.

Family assistance and child support

1.37 The Terms of Reference referred to legal barriers to work for mature age persons in the areas of child support and family assistance.⁵⁷ These laws may be relevant to mature age persons, in particular when they raise grandchildren.⁵⁸ Specific barriers to work for mature age persons within these laws have not been identified.⁵⁹ Consequently, the ALRC makes no recommendation to reform child support or family assistance laws.

Tax

1.38 In the Discussion Paper, the ALRC noted that personal income tax laws may affect workforce participation, including for mature age cohorts.⁶⁰ The Issues Paper discussed several aspects of the income tax system in relation to mature age workforce participation, including:

- effective marginal tax rates;
- the complexity of the tax transfer system;
- tax exemptions for social security payments; and
- tax offsets.⁶¹

1.39 Responses from key stakeholders were summarised in the Discussion Paper,⁶² largely focusing 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'.⁶³ Further submissions reiterated the concerns identified in the Discussion Paper.⁶⁴

1.40 While several aspects of the income tax system that may be relevant to mature age workforce participation were traversed in the Discussion Paper, the ALRC

57 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* (2013) <www.fahcsia.gov.au/guides_acts/> at 21 March 2013 and Child Support Agency, *The Guide—CSA's Online Guide to the Administration of the New Child Support Scheme* (2013) <www.guide.csa.gov.au/> at 21 March 2013.

58 The Inquiry did not consider barriers to work in child support and family assistance laws that affect mature age parents.

59 For consideration of these laws as they may affect mature age persons, see: Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), 147–150.

60 Ibid, Ch 7.

61 Ibid, 25–28.

62 Submissions dealing with these issues included: COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Chamber of Commerce and Industry, *Submission 44*; ACTU, *Submission 38*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*; Superannuated Commonwealth Officers' Association, *Submission 14*.

63 ACTU, *Submission 38*.

64 For example, National Seniors Australia, *Submission 92*; Brotherhood of St Laurence, *Submission 86*.

concluded that addressing them required consideration of systemic reforms to the tax system—a task beyond the scope of this Inquiry. Further, such a project was completed in 2009, when the Tax Review recommended comprehensive reforms to the tax transfer system with a particular focus on ensuring appropriate incentives for workforce participation.⁶⁵

1.41 Following the release of the Discussion Paper, three stakeholders raised the issue of the tax treatment of redundancy payments.⁶⁶ Preferential tax treatment is accorded to a ‘genuine redundancy payment’, a component of which is based on the person’s years of service.⁶⁷ There are two limitations on what amounts to a ‘genuine redundancy payment’: namely, if the dismissal occurs after the employee’s 65th birthday, or ‘if the employee’s employment would have terminated when he or she reached a particular age or completed a particular period of service—the day he or she would reach the age or completed the period of service (as the case may be)’.⁶⁸ In such cases, an employee may pay ‘considerably more tax on their termination payment than a worker who has the same period of service but has not yet attained 65 years of age’.⁶⁹

1.42 The Superannuation Committee of the Law Council of Australia (Superannuation Committee) submitted that, ‘as an employee now generally cannot be compulsorily retired at a particular age or after a particular period of service, this restriction ... is now effectively obsolete’.⁷⁰

1.43 While reaching a certain age is clearly a relevant criterion to the determination of whether a payment is a ‘genuine redundancy payment’, the ALRC considers that this does not sit within the Terms of Reference as a ‘barrier’ to workforce participation. As the Superannuation Committee commented, ‘employees generally have very limited control, if any, over the timing of their redundancy’, hence it did not have a view ‘as to whether the different tax treatment is a disincentive for older workers, who are made redundant, to seek further work’.⁷¹

Re-skilling

1.44 The Consultative Forum identified the difficulty that mature age people may face if the employment they are seeking requires certain qualifications, or they need to update or upgrade their skills—described as ‘re-training and up-skilling barriers’.⁷² The Advisory Panel also noted that workers, or those seeking work ‘may need to look for re-skilling opportunities’:

The Australian economy has transformed significantly in recent decades. We have seen a decline in manufacturing jobs and an increase in occupations in the services

⁶⁵ The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 1, vii, Terms of Reference.

⁶⁶ J Constable, *Submission 98*; Law Council of Australia, *Submission 96*; C Lanyon, *Submission 61*.

⁶⁷ *Income Tax Assessment Act 1997* (Cth) s 83-170.

⁶⁸ *Ibid* s 83-175(2)(a).

⁶⁹ Law Council of Australia, *Submission 96*.

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

⁷² National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation, 1–6.

and information technology sectors. Some older Australians have skills that were well-suited to jobs of the past but may not be as relevant to the jobs of today.⁷³

1.45 The third report of the Advisory Panel, *Turning Grey into Gold*, included four recommendations under the label, ‘Lifelong learning’, helping individuals to ‘remain active participants in a changing society and a changing economy’:

Lifelong learning contributes to an innovative and adaptable workforce, creative and strong communities, and more satisfying personal lives.⁷⁴

1.46 The report suggested that to support people who want to remain in the workforce but want to take a different career direction—to pursue ‘encore careers’—educational settings ‘need to be flexible’. Having options in relation to vocational study at any age is ‘important in maintaining workforce participation’.⁷⁵ The Advisory Panel therefore recommended that:

The federal government, in conjunction with employer and employee peak bodies, examine mechanisms that support older workers to take up skilling and educational opportunities, including:

- investigating the concept of ‘educational leave’
- reviewing the availability of financial assistance and concessional tax arrangements to assist individuals to undertake vocational study in order to re-skill or change careers.⁷⁶

1.47 The *Intergenerational Report 2010* identified the need to support mature age participation through practical measures such as retraining and re-skilling programs.⁷⁷ The development of the *Investing in Experience Tool Kit* is an example of such a government response.⁷⁸ Additionally, since 1 January 2013, \$35 million from the National Workforce Development Fund is available to businesses to provide training to new and existing workers aged 50 years and over.⁷⁹

1.48 Concerns were repeated throughout this Inquiry about such matters as: the need for programs to assist carers to re-enter the paid workforce or obtain or regain skills;⁸⁰ and the difficulties faced by immigrants in having their qualifications and experiences recognised.⁸¹

1.49 The ALRC recognises the importance of retraining and re-skilling as issues affecting continued workforce participation. As seen in the work of the Advisory Panel, however, ‘lifelong learning’ is an issue that not only concerns workforce participation, but also contributes to community and personal wellbeing. To the extent

73 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Changing Face of Society* (2011), 12.

74 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 29.

75 Ibid, 33.

76 Ibid.

77 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), xxiii–xxiv.

78 Australian Government, *Investing in Experience Tool Kit* (2012).

79 DEEWR, DHS and FaHCSIA, *Submission 101*.

80 National Welfare Rights Network (NWRN), *Submission 99*.

81 Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*.

that education touches on workforce participation, it is included in various ways in the text and recommendations in this Report.

The law reform process

Building an evidence base

1.50 Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base. A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.⁸² Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.⁸³

1.51 The process for each law reform project may differ according to the scope of the inquiry, the range of key stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference—and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC’s website.⁸⁴

Community consultation

1.52 A multi-pronged strategy of seeking community comments was used. Two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry. After an initial period of research and consultation, an Issues Paper was released on 1 May 2012, *Grey Areas: Age Barriers to Work in Commonwealth Laws* (ALRC IP 41, 2012). The Issues Paper set out the proposed framing principles for the Inquiry and raised a range of questions in relation to barriers to mature age workforce participation in each of the areas of law under review. On 2 October 2012, the ALRC released the Discussion Paper, *Grey Areas: Age Barriers to Work in Commonwealth Laws* (ALRC DP 78, 2012), accompanied by a Discussion Paper Summary, putting forward 36 proposals and 15 questions to assist the ALRC to develop its recommendations for reform.

1.53 Two national rounds of stakeholder consultation meetings, forums and roundtables were also conducted following the release of each of the consultation documents. In addition, the ALRC developed consultation strategies for engaging with Indigenous peoples, those from culturally and linguistically diverse backgrounds,

82 B Opeskin, ‘Measuring Success’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.

83 *Australian Law Reform Commission Act 1996* (Cth) s 38.

84 <www.alrc.gov.au/law-reform-process> at 21 March 2013.

people with disability and people who identify themselves as lesbian, gay, transgender or intersex.

1.54 The Terms of Reference for this Inquiry directed the ALRC to ‘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’. The individuals, Departments, agencies and the many bodies consulted in the Inquiry are included at the end of this Report.

1.55 The ALRC received 101 submissions, a full list of which is included at the end of this Report. Submissions were received from a wide range of people and agencies, including: bodies representing older Australians; individuals; academics; lawyers; unions; employer organisations; employment agencies; community legal centres; law societies and representative groups; state and federal government agencies; and peak bodies in the fields of recruitment, superannuation and insurance.

1.56 The ALRC acknowledges the contribution of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions. This can have a significant impact in organisations with limited resources. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

Appointed experts

1.57 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of Advisory Committees, panels, roundtables and the appointment by the Attorney-General of part-time Commissioners. The Advisory Committee for this Inquiry had eight members, listed at the end of this Report. Two meetings were held in Sydney on 9 August and 6 December 2012; the first to consider draft proposals and the second, draft recommendations for reform.

1.58 In this Inquiry the ALRC was able to call upon the expertise and experience of two part-time Commissioners: the Hon Justice Berna Collier of the Federal Court, a standing part-time Commissioner of the ALRC; and the Hon Susan Ryan AO, Age Discrimination Commissioner, who was appointed specifically to assist the ALRC in this Inquiry. The ALRC was also assisted by a number of people as expert readers who commented on particular aspects of the Discussion Paper and Report. They are included in the list of participants in this Inquiry.

1.59 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, Panel or Roundtable and the enlisting of expert readers are invaluable aspects of ALRC inquiries—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the considerable contribution made by the Advisory Committee and the expert readers in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

Implementation

1.60 Once tabled in the Australian Parliament, this Report becomes a public document.⁸⁵ ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2011–2012 records that 59% of ALRC reports are substantially implemented and 30% are partially implemented, representing an overall implementation rate of 89%.⁸⁶

Report structure

1.61 This Report is divided into eight chapters. The first two chapters introduce the Inquiry, describe the reform process and set out relevant conceptual and contextual issues—including the framing principles for reform.

1.62 Chapter 3 concerns the keystone recommendation of a **National Mature Age Workforce Participation Plan**, to provide a coordinated policy response to addressing barriers to the participation of mature age persons in the Australian labour market. The ALRC suggests that the Advisory Panel on Positive Ageing, or a similar body, lead the development of the plan.

1.63 This is followed by five chapters focusing upon the specific areas identified in the Terms of Reference.

1.64 **Recruitment and Employment** is covered in Chapter 4. This chapter examines barriers in an employment context to mature age persons participating in the paid workforce or other productive work. It identifies barriers in relation to both finding and keeping a job and recommends ways these barriers may be addressed, including legislative and regulatory reform and measures to increase education and awareness. The ALRC makes a number of recommendations aimed at: addressing the practices of recruitment agencies; extending the right to request flexible working arrangements; periods for notice of termination of employment; modern awards; reviewing compulsory retirement; and supporting education and awareness raising and the development of guidance material in a range of areas. The ALRC also recommends that the Fair Work Ombudsman consider issues relating to mature age workers in conducting national campaigns and audits.

1.65 **Work Health and Safety and Workers' Compensation** is the subject of Chapter 5. This chapter makes a range of recommendations with respect to work health and safety and workers' compensation. With respect to work health and safety, the ALRC recommends that Safe Work Australia, in implementing the Australian Work Health and Safety Strategy 2012–2022 and in its other activities and research, should consider and recognise health and safety issues that may affect mature age workers.

85 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

86 Australian Law Reform Commission, *Annual Report 2011–2012* (ALRC Report 119), 30 and see Appendix F.

Safe Work Australia should also review guidance material and promote recognition of best practice approaches to work health and safety involving mature age workers.

1.66 With respect to workers' compensation, the ALRC recommends amendments to Commonwealth workers' compensation legislation to align retirement provisions with the qualifying age for the Age Pension and to extend incapacity payment periods. The inconsistent coverage of volunteers under workers' compensation is also identified and the ALRC recommends that Safe Work Australia consider this issue. Finally, the ALRC recommends that the superannuation offset provisions under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) be repealed.

1.67 **Insurance** is covered in Chapter 6. This chapter examines some of the key concerns with respect to mature age workers and insurance that emerged during the Inquiry, including: the availability of, and information about, insurance products for mature age persons and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing occurs.

1.68 To facilitate the provision of clear and simple information about available insurance products for mature age persons, the ALRC recommends that the Insurance Reform Advisory Group consider options for the development of a central information source. The ALRC recommends a two-fold approach to addressing concerns about actuarial and statistical data. First, the ALRC recommends that the Australian Government and insurers negotiate an agreement requiring the publication of data upon which insurance offerings based on age are made. Secondly, the ALRC recommends review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to age. A related recommendation is the development of guidance material about the application of any insurance exception under Commonwealth legislation. Finally, the ALRC recommends that the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct be amended. The codes should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

1.69 **Social Security** is covered in Chapter 7. It considers aspects of the social security system that act as barriers to work for mature age persons. The ALRC recommends an evaluation of the methods for communicating information about social security payments and entitlements to mature age persons, and that staff of employment services providers be provided with training tools to improve the quality of job search assistance provided to mature age persons.

1.70 The ALRC also makes recommendations about specific income support payments. The ALRC recommends that the review process for Disability Support Pension be clarified. It also recommends that a more flexible interpretation to combining care with work, education, training or voluntary work be taken when assessing qualification for Carer Payment. Finally, the ALRC proposes that the Work Bonus amount for the Age Pension and Veterans' Age Service Pension be indexed.

1.71 **Superannuation** is the focus of Chapter 8. This chapter considers whether the age-based rules regarding the accumulation of, and access to, superannuation impose

limitations or barriers that could discourage mature age workforce participation. The ALRC has not found specific evidence that the age limits on contributions create barriers to workforce participation, and has made no recommendations regarding the removal of the age limits. However, concerns have been raised about the work test imposed on people over 65 if they wish to contribute to superannuation. It is not clear that the work test is meeting its policy objective and the ALRC has recommended that the Government review the test.

1.72 There is evidence that age-based rules regarding withdrawals from superannuation accounts have a significant impact on mature age workforce participation. Access to superannuation funds makes retirement possible, or at least more attractive, and increasing access ages is likely to increase older people's workforce participation rates. Access to superannuation may amount to an incentive to leave the workforce. Delaying access to superannuation may therefore delay retirement and compel workforce participation. As such an outcome would conflict with the framing principles for this Inquiry, particularly independence and self-agency, the ALRC has not made any recommendations for changes to access rules.

1.73 The relationship between access to superannuation and older people's workforce participation is of significant public interest. For this reason, this chapter reviews the issue and reports on the submissions received on this topic. In particular, the arguments made both for and against changing access rules are examined. Arguments for increasing access ages are concerned with improving the adequacy and sustainability of the superannuation system. They are also concerned with the economic benefits that would accrue if mature age workforce participation increased. If a recommendation to increase access ages is to be made, this should occur after an inquiry that fully considers all of these issues.

Stop press—release of SRC Act Review Report

1.74 On 30 March 2013, as this Report was going to press, the Australian Government released the final Report of the *Safety, Rehabilitation and Compensation Act 1988 (Cth) Review*.⁸⁷

1.75 The ALRC's work in this Inquiry is referred to throughout the SRC Act Review Report and the Review made a number of recommendations of relevance to this Report. In particular, SRC Act Review Recommendation 7.16 is similar to ALRC Recommendation 5-5 and is in line with the ALRC's suggested approach in Recommendation 5-8. In addition, SRC Act Review Recommendation 7.5 mirrors ALRC Recommendation 5-9.

⁸⁷ P Hanks QC, *Safety, Rehabilitation and Compensation Act 1988 (Cth) Review: Report* (2013) prepared for Department of Education, Employment and Workplace Relations.

2. Concepts and Context

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Summary

2.1 This chapter sets out a number of conceptual and contextual issues relevant to the Inquiry. Considering these issues assists to frame and situate deliberations about barriers to mature age participation in paid and other productive work. The first section considers concepts of age and ageing. It also sets out data about population ageing in Australia. The next sections consider the definition of ‘work’ and ‘retirement’, as well as levels of mature age participation in both paid and other productive work. The chapter then details potential effects of removing barriers to mature age participation in paid and other productive work. Finally, the chapter sets out the framing principles for the Inquiry.

Framing mature age and ageing

Concepts of age and ageing

2.2 The concepts of ‘old age’ and ‘ageing’ are not self-evident, but rather have different meanings according to their social and historical contexts.¹ For example, Marthe Fredvang and Professor Simon Biggs argue that age-related pensions and retirement policies have played a role in shaping understandings of old age. They note that ‘the institutionalising of age-related retirement led to a consensus on when individuals became “old”, regardless of their actual abilities’.² In this way, some have argued that conceptions of ageing are closely linked to workforce participation, such that ‘the life cycle of a worker has been generalized as normal aging’.³

2.3 Others have noted the influence of medical knowledge on how ageing is understood. Professor Sol Encel remarked that medical ideas in the late 19th and early 20th centuries categorised old age as a period of ‘senile decay’.⁴ Indeed, in 1905, Sir William Onsler, an eminent physician, expressed the view that:

the ‘constructive’ or ‘anabolic’ phase of life was from 25 to 40, a golden period followed by ‘comparative uselessness’, and a further period of total uselessness after the age of 60.⁵

2.4 Public policy responses to demographic change also contribute to framing ageing in particular ways. For example, the language of the ‘crisis’ or ‘peril’ of ageing conceptualises the growing numbers of older persons as a ‘problem’ that needs to be addressed.⁶ It also, according to Fredvang and Biggs, ‘rests upon the assumption that older persons are in some way separate from those who are not yet old’.⁷

2.5 The widespread adoption of a ‘productive’ or ‘active’ ageing policy agenda can be seen as one response to the ‘problem’ of ageing. An emphasis on productivity or activity implicitly contests a characterisation of ageing as a process marked by dependency and decline.⁸ However, Professors Carroll L Estes, Simon Biggs and Chris Phillipson point out that these competing accounts of ageing themselves contain judgments about what it is to ‘age well’.⁹ In the case of productive ageing, the ‘crisis’

1 M Fredvang and S Biggs, *The Rights of Older Persons: Protection and Gaps Under Human Rights Law* (2012), Brotherhood of St Laurence and University of Melbourne Centre for Public Policy Social Policy Working Paper 16, 6.

2 Ibid.

3 B Brents, ‘Policy Intellectuals, Class Struggle and the Construction of Old Age: The Creation of the Social Security Act of 1935’ (1986) 23 *Social Science and Medicine* 1251, 1252; and see S Encel, ‘Retirement Ages and Pension Ages—A Complex History’ (1996) *Social Security Journal* 3, 7.

4 S Encel, ‘Retirement Ages and Pension Ages—A Complex History’ (1996) *Social Security Journal* 3, 8.

5 Cited in Ibid, 8.

6 See, eg, World Bank, *Averting the Old Age Crisis* (1994); World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011).

7 M Fredvang and S Biggs, *The Rights of Older Persons: Protection and Gaps Under Human Rights Law* (2012), Brotherhood of St Laurence and University of Melbourne Centre for Public Policy Social Policy Working Paper 16, 6.

8 C Estes, S Biggs and C Phillipson, *Social Theory, Social Policy and Ageing: A Critical Introduction* (2003), 67.

9 Ibid, 67–68.

of ageing is approached through the lens of economic usefulness, ‘where work and work-like activities have been presented as turning the burden of an ageing population into an asset and an opportunity’.¹⁰

Population ageing

2.6 Australia’s population is ageing as a result of the combination of increasing life expectancy and lower fertility levels.¹¹ Population ageing is also a global phenomenon. In 1950, 8% of the world’s population was 60 years or older. In 2011, this rose to 11%, and it is projected to rise to 22% by 2050.¹²

Increasing life expectancy

2.7 The life expectancy for Australians has increased significantly since the early 20th century. In 2009–2011, life expectancy at birth for males was 79.7 years and females 84.2 years.¹³ Residual life expectancy (the average number of additional years that a person at a certain age can expect to live) for males aged 65 years was 19.1 years and females 22 years.¹⁴

2.8 By comparison, in 1901–10, the life expectancy at birth for males was 55.2 years and for females 58.8 years. Residual life expectancy for males aged 65 years was 11.3 years and females 12.9 years.¹⁵

2.9 The Australian Institute of Health and Welfare (AIHW) explains the implications of these changes in life expectancy for population ageing:

life expectancies at birth increased steadily in the first half of the century. This was partly due to the continuation of factors which improved health in the 19th Century: eradication of infectious disease, improving public hygiene and rising living standards. This is illustrated by the fact that, during this period, life expectancy at birth saw much greater gains than life expectancy at age 65, suggesting more children were surviving into adulthood, as opposed to people simply living longer ...

After a relative plateau in the 1960s, life expectancy has been steadily increasing since the 1970s. This includes life expectancy at age 65, suggesting that most of these gains are through people living longer (as opposed to childhood survival). Indeed, between 1970 and 2004, reductions in mortality for the over-50s contributed 70% and 73% to the increase in male and female life expectancy respectively ... Thus, increasing life expectancy is presently closely tied to population ageing.¹⁶

10 Ibid, 71.

11 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia’s Older People? Cat No 2071.0* (2012).

12 World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011), 5.

13 Australian Bureau of Statistics, *Gender Indicators, Australia, Cat No 4125.0* (2013).

14 Ibid.

15 Australian Institute of Health and Welfare, *Australian Trends in Life Expectancy* (2012) <www.aihw.gov.au/australian-trends-in-life-expectancy> at 21 March 2013.

16 Ibid.

2.10 ‘Healthy life expectancy’—that is, the extent to which additional years are lived in good health—is also increasing.¹⁷ According to the AIHW,

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.¹⁸

2.11 However, average life expectancy figures conceal important variations in life expectancy between different groups in the population. For example, Aboriginal and Torres Strait Islander persons have a significantly lower life expectancy than other Australians:

In 2005–2007, life expectancy at birth for Aboriginal and Torres Strait Islander males was 67.2 years, 11.5 years less than that for non-Indigenous males (78.7 years). For Aboriginal and Torres Strait Islander females, life expectancy at birth was 9.7 years less than for non-Indigenous females (72.9 years and 82.6 years respectively). The lower life expectancy for Aboriginal and Torres Strait Islander Australians can be attributed to a higher infant mortality rate, and a higher incidence of diseases such as diabetes mellitus, respiratory disorders, ear disease, eye disorders and some cancers.¹⁹

Increasing proportion of older Australians

2.12 In addition to increasing life expectancy, the proportion of older persons in the Australian population is increasing. In 2011, persons aged 45 years and older made up 39.3% of the total Australian population, up from 38.1% in 2006.²⁰ The proportion of the population aged 65 years and older has increased markedly since the beginning of the 20th century. In 2011, 14% of the population was aged 65 years and older. This compares with 4% in 1901.²¹

2.13 The number of persons in this age group will grow further in coming years, as the cohort of the population known as ‘Baby Boomers’ ages past 65 years.²² The Australian Bureau of Statistics (ABS) explains:

The first year of the Baby Boom cohort (people born in 1946) entered the 65–69 age group in 2011. Baby Boomers will entirely constitute the 65–69 group for the 2016 Census and will contribute to a larger aged population in the years to come.²³

17 Australian Institute of Health and Welfare, *Australia’s Health 2012* (2012) <www.aihw.gov.au> at 21 March 2013, 82.

18 Ibid.

19 Australian Bureau of Statistics, *Gender Indicators, Australia, Cat No 4125.0* (2013). See also Australian Bureau of Statistics, *Experimental Life Tables for Aboriginal and Torres Strait Islander Australians, Australia, 2005–2007, Cat No 3302.0.55.003* (2009).

20 Australian Bureau of Statistics, *2011 Census QuickStats* <www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0?opendocument&navpos=95> at 21 March 2013.

21 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia’s Older People? Cat No 2071.0* (2012).

22 Baby Boomers are those persons born between 1946 and 1966: Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: 100 Years of Australian Lives—Population, Cat No 2071.0* (2012).

23 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia’s Older People? Cat No 2071.0* (2012).

Diversity among mature age persons

2.14 As noted in Chapter 1, the Terms of Reference define ‘older persons’ as anyone over the age of 45 years. There is significant diversity among this age bracket. In addition to age differences, differences of gender, cultural and linguistic diversity and disability—among other things—characterise persons aged 45 years and older. This diversity affects the needs and priorities of older persons, and must be factored into policy considerations.

Gender

2.15 Gender significantly affects experiences of ageing, to the extent that some have argued that a gendered approach to ageing is required.²⁴ While women have a longer life expectancy than men, older women have relatively lower incomes and fewer assets than men.²⁵ Contributing factors to this include lower average weekly ordinary time earnings for women (a 17.4% ‘gender pay gap’ at February 2012) as well as career breaks to undertake unpaid care work.²⁶

2.16 Women tend to have lower superannuation balances and retirement payouts than men. Analysis of data from the ABS Survey of Income and Housing 2009–10 shows that the average superannuation balance for men was \$71,645 for men and \$40,475 for women.²⁷ The average retirement payout in 2009–10 was \$198,000 for men and \$112,600 for women.²⁸ Approximately 60% of women aged 65–69 in 2009–10 had no superannuation.²⁹

2.17 Women make up a greater proportion of Age Pension recipients. At June 2011, women comprised 56.6% of recipients.³⁰ Of these, 61.2% received the full rate of Age Pension.³¹

2.18 The cumulative effects of this mean that older women face the prospect of living longer with less financial security, ‘accumulating poverty’ over a lifetime.³²

24 Older Women’s Network NSW Inc, *Submission 26*; The Premier’s Council for Women South Australia, *Submission 13*; United Nations Population Fund and HelpAge International, *Ageing in the Twenty-First Century: A Celebration and a Challenge* (2012).

25 Australian Human Rights Commission, *Accumulating Poverty? Women’s Experiences of Inequality Over the Lifecycle* (2009), 7.

26 Equal Opportunity for Women in the Workplace Agency, *Gender Pay Gap Statistics* (2012).

27 R Clare, *Developments in the Level and Distribution of Retirement Savings*, Association of Superannuation Funds of Australia Research Paper (2011), 3.

28 Ibid.

29 Ibid.

30 FaHCSIA, *Income Support Customers: A Statistical Overview 2011* (2012), 6.

31 Ibid.

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

Aboriginal and Torres Strait Islander persons

2.19 Older Aboriginal and Torres Strait Islander persons occupy an important place in their communities. They play a significant role in maintaining traditions and links to Aboriginal and Torres Strait Islander culture, and act as ‘role models, supporters and educators for the young’.³³

2.20 However, Aboriginal and Torres Strait Islander persons aged 50 years and older tend to have poorer health and higher levels of socio-economic disadvantage, and lower life expectancy than the broader Australian population.³⁴

2.21 The Aboriginal and Torres Strait Islander population is relatively young when compared to the broader Australian population. In 2006, the number of Aboriginal and Torres Strait Islander persons aged 50 years and older represented 12% of the total Aboriginal and Torres Strait Islander population. By contrast, 31% of the non-Aboriginal and Torres Strait Islander population were aged 50 years and older in 2006.³⁵

Culturally and linguistically diverse persons

2.22 In 2006, over 1.1 million persons aged 50 years and older were born in non-English speaking or culturally and linguistically diverse (CALD) countries. This amounted to 19% of the total Australian population in this age group.³⁶ In contrast to the Aboriginal and Torres Strait Islander population, persons born in CALD countries are relatively older than those born in Australia. In 2006, more than 42% of persons born in CALD countries were aged 50 years and older.³⁷

2.23 The growth in number of mature age Australians from non-English speaking countries is faster than the growth of the older population as a whole. This is largely because of the ageing of post-war migrants who arrived as adults.³⁸ Older persons from CALD countries have a lower rate of participation in paid work when compared with those born in Australia and from English speaking countries.³⁹

Disability

2.24 Older persons with disability include persons with disability acquired at an early age, as well as those who acquire disability with age. Rates of disability increase with age. The AIHW stated in 2011 that:

33 Australian Institute of Health and Welfare, *Older Aboriginal and Torres Strait Islander People Cat No IHW 44* (2011), 1.

34 Ibid, v.

35 Ibid, 2.

36 National Seniors Australia Productive Ageing Centre, *The Ageing Experience of Australians from Migrant Backgrounds* (2011), 11.

37 Ibid.

38 Social Policy Research Centre, *Supporting Older People from Culturally and Linguistically Diverse Backgrounds*, Report Briefing 4 (2010).

39 National Seniors Australia Productive Ageing Centre, *The Ageing Experience of Australians from Migrant Backgrounds* (2011), 22.

After around 50 years of age the prevalence of disability rose considerably, from 20% in the 50–54 years age group to more than 80% among people aged 85 years or over. Rates of severe or profound core activity limitations were even more strongly associated with ageing. This degree of disability was reported for fewer than one in 20 Australians up to the age of 55 years (excluding the peak in boys aged 10–14 years), but almost one-third of people aged 75 years or over.⁴⁰

2.25 The number of older persons with disability as a proportion of the total number of persons with disability is likely to increase with population ageing:

In addition to an increase in disability overall, population ageing changes the composition of the population with disability. In 1981, 10% of all Australians with disability were aged under 15 years and 31% were 65 years or older; in 2009, 7% of the population with disability were aged 0–14 years and 39% were 65 years or over. If this continues, the mix of services and support required by older people with disability will need to increase, relative to those required by younger people.⁴¹

Where do older persons live?

2.26 Within Australia, Tasmania and South Australia have relatively older populations.⁴² At 30 June 2012, Tasmania's median age was 40.9 years.⁴³ South Australia had the second oldest median age, at 39.7 years.⁴⁴ In contrast, the median age of the Australian population was 37.4 years, up 4.7 years from 32.7 years at 30 June 1992.⁴⁵

2.27 In 2011, Tasmania had the highest proportion of people aged 65 years and over (16.1%), followed by South Australia (15.9%). The Northern Territory had the lowest proportion of persons in this age group (5.5%).⁴⁶

2.28 The age profile of populations in capital cities is younger than other areas. In 2010, almost one in three (31%) persons living in capital cities were aged 20–39, compared to one in four (25%) persons living in other areas'.⁴⁷ The ageing of regions outside capital cities is projected to continue. According to the ABS:

In the non-capital city areas of New South Wales, Victoria, South Australia and Tasmania, it is projected that by 2056 there will be less than two people of working age for every person aged 65 years and over. In contrast, capital cities such as Sydney, Melbourne, Brisbane and Perth are projected to have considerably younger populations with around three people of working age for every one aged 65 years and over.⁴⁸

40 Australian Institute of Health and Welfare, *Australia's Welfare 2011* (2011), 11.

41 Ibid, 12.

42 The Government of South Australia highlighted South Australia's ageing workforce in its submission: Government of South Australia, *Submission 30*.

43 Australian Bureau of Statistics, *Australian Demographic Statistics, Jun 2012, Cat No 3101.0* (2012).

44 Ibid.

45 Ibid.

46 Australian Bureau of Statistics, *Population by Age and Sex, Regions of Australia, 2011, Cat No 3235.0* (2012).

47 Australian Institute of Health and Welfare, *Australia's Welfare 2011* (2011), 23.

48 Australian Bureau of Statistics, *Australian Social Trends, March 2009, Cat No 4102.0* (2009).

Framing work and retirement

Paid work and other productive work

2.29 ‘Work’ is often used to refer solely to the ‘production of economic goods and services’.⁴⁹ On this definition of work, persons providing care, as well as those who are retired or not otherwise seeking work, are considered to be not working or ‘outside the labour force’.⁵⁰ The ABS uses this definition of work in its Labour Force Survey. It includes among its examples of those who are ‘not working’, persons who are ‘staying home to look after children’.⁵¹

2.30 On this view, those in the ‘labour force’—the total number of employed plus unemployed persons—are ‘economically active’, while those outside the labour force are ‘economically inactive’.

2.31 However, an alternative definition takes a broader view of what may constitute ‘work’. Professor Barbara Pocock summarises this approach, arguing that:

Any account of Australian work, family and care cannot accurately represent experiences of ‘work’ without reference to a broad definition of labour ... including both the spheres of production and reproduction, voluntary work, paid work and unpaid household work.⁵²

2.32 On this broad view, work includes both paid and unpaid work, and unpaid work encompasses caring, household work, and voluntary work.

2.33 When adopting this broader characterisation, a gendered picture of work emerges, in which women are under-represented in paid work, and over-represented in unpaid work.⁵³

Unpaid work

Unpaid care work

2.34 Unpaid care work includes ‘parental’ care for a dependent child or children. This care may be provided by a parent (adoptive, biological or step-parent), foster parent, guardian or grandparent.⁵⁴ Grandparents may also provide child care for grandchildren while the children’s parents work. Unpaid care work also includes care

49 Australian Bureau of Statistics, *Labour Force* (2003) <www.abs.gov.au/AUSSTATS/abs@.nsf/DSSbyCollectionid/> at 21 March 2013.

50 Australian Bureau of Statistics, *Persons Not in the Labour Force, Australia, Sep 2011, Cat No 6220.0* (2012). At September 2011, there were almost 6 million persons outside the labour force—approximately one-third of the population. Of these, 60% were women.

51 Australian Bureau of Statistics, *Labour Force, Australia, Jan 2013, Cat No 6202.0* (2013).

52 B Pocock, ‘Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case’ (2005) 12 *Gender, Work & Organization* 32, 33. See also Organisation for Economic Co-operation and Development, ‘Cooking and Caring, Building and Repairing: Unpaid Work Around the World’ in *Society at a Glance 2011: OECD Social Indicators* (2011), which defines unpaid work as ‘the production of goods and services by family members that are not sold on the market’: 10.

53 B Pocock, ‘Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case’ (2005) 12 *Gender, Work & Organization* 32, 33.

54 Australian Human Rights Commission, *Investing in Care: Recognising and Valuing Those Who Care*, Research Report Volume 1 (2013), 21.

for ‘a family member or friend with disability, chronic illness or frailty due to older age, either co-resident or in a kinship or friendship network’.⁵⁵ This form of care is often referred to as ‘informal care’.⁵⁶

2.35 Unpaid care work is mainly provided by women, a point highlighted by a number of submissions to this Inquiry.⁵⁷ A more detailed discussion of mature age carers is provided below.

2.36 While the value of unpaid care is excluded from conventional economic measures of productivity, such care does have economic value.⁵⁸ Dr Rania Antonopolous points out that unpaid care work acts as an invisible support to the paid workforce, arguing that ‘unpaid care work entails a systemic transfer of hidden subsidies to the rest of the economy that go unrecognized’.⁵⁹ In 2010, the annual ‘replacement value’ of informal care by family members—the cost of replacing unpaid carers with paid carers—was estimated at over \$40 billion.⁶⁰

2.37 Care also has value outside of an economic frame of reference. The Australian Human Rights Commission (AHRC) points out that:

Caring is valuable, necessary work ... It occurs within a system of relationships in our society and is crucial to the social and economic fabric. Care will affect all of us in our lives, either as carers and/or being cared for ... The recognition of care provision, both paid and unpaid, reflects the value placed on our shared humanity and the periods in our lives in which we all experience a need for support.⁶¹

Voluntary work

2.38 The ABS defines voluntary work as ‘the provision of unpaid help willingly undertaken in the form of time, service or skills, to an organisation or group, excluding work done overseas’.⁶² Voluntary work, like unpaid care work, provides both economic and social benefits. In 2006–07, volunteering was estimated to amount to

55 Ibid.

56 The ABS refers 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.

57 Australian Bureau of Statistics, *Census of Population and Housing: Basic Community Profile, 2011 Second Release Cat No 2001.0* (2012), Table B22; Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings Cat No 4430.0* (2009), 10. Brotherhood of St Laurence, *Submission 54*; Older Women’s Network NSW Inc, *Submission 26*; The Premier’s Council for Women South Australia, *Submission 13*.

58 The ABS summarises this as follows: ‘the economically active population is defined as all people who, during a specified time, contribute to or are available to contribute to the production of economic goods and services as defined by the United Nations System of National Accounts’: Australian Bureau of Statistics, *Labour Statistics: Concepts, Sources and Methods, Apr 2007 Cat No 6102.0.55.001* (2007).

59 R Antonopolous, *The Unpaid Care Work–Paid Work Connection* (2008), The Levy Economics Institute Working Paper No 541, 6.

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

61 Australian Human Rights Commission, *Investing in Care: Recognising and Valuing Those Who Care*, Research Report Volume 1 (2013), 18.

62 Australian Bureau of Statistics, *Voluntary Work, Australia, 2010 Cat No 4441.0* (2011), 63.

\$14.6 billion worth of unpaid labour.⁶³ Professor Jeni Warburton sums up the social benefits of voluntary work:

high levels of volunteering within a society contribute to quality of life, security, safety, lower levels of crime, and better educational outcomes. These are all significant advantages, and are over and above, the direct contributions made by volunteers to the economically disadvantaged, the lonely and socially isolated, or those with poor health.⁶⁴

2.39 In its submission, the Returned & Services League of Australia Ltd (RSL) highlighted the economic and social contribution made by RSL volunteers:

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 ... 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.⁶⁵

The relationship between paid and unpaid work

Unpaid care work and paid work

2.40 While unpaid caring is a form of productive work, it also acts as a barrier to participation in the paid workforce. Providing care can have a significant impact on a person's ability to enter and maintain employment. There is evidence that this impact disproportionately affects women.⁶⁶ Professor Bettina Cass, Dr Trish Hill and Cathy Thomson sum up the impact of care upon mature age women's participation in employment:

Overall, 58 per cent of mature aged women primary carers were not in employment. Of this group 42 per cent had worked prior to taking on the caring role. Among the non-employed primary carers, around one quarter indicated that they would like to be in paid employment while caring for their main recipient.⁶⁷

2.41 As a barrier to employment, unpaid care also restricts the accumulation of retirement income savings. The feminised nature of unpaid care contributes to the 'gender gap' in superannuation, whereby women have lower superannuation balances than men.⁶⁸

63 Volunteering Australia, *State of Volunteering in Australia 2012* (2012), 10.

64 J Warburton, *Volunteering by Older People: The Benefits and Challenges for Seniors and for Organisations: Latest Research Evidence* (2012), 3.

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

66 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; 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.

67 B Cass, T Hill, C Thomson, *Care to Work? Expanding Choice and Access to Workforce Participation for Mature Aged Women Carers* (2012), HC Coombs Policy Forum, 22.

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

2.42 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. For example, some grandparents provide child care for their grandchildren so that the children's parents can work.

Increasing paid work and the impact on unpaid work

2.43 The interaction of paid work and unpaid care work is in flux. This is particularly the case because women, who have historically undertaken the bulk of unpaid care work, have increased their participation in the paid workforce. Pocock summarises the changes for women's participation in these spheres over the latter half of the 20th century and early 2000s:

In 1966, 36 per cent of women were in the labour market, leaving 64 per cent outside it, participating in various forms of care and home life. By mid-2002, the situation was reversed, with over half of women—55 per cent—in the labour market and 45 per cent outside of it.⁶⁹

2.44 This increased participation in the paid workforce has implications for the provision of care, which must be met by the 'intensification of unpaid care work, or a contraction in the amount of unpaid care work that is done, or its redistribution to others'.⁷⁰

2.45 Policy making in this area must navigate the complexity of the interaction between paid workforce participation and unpaid work.⁷¹ This is particularly important in the context of an ageing population, as demands for care are likely to increase as the population ages.⁷²

2.46 A focus on promoting paid workforce participation must also consider how and by whom care work is to be performed. Pocock argues that decisions about who will undertake care work should not be seen as purely individual choices. Instead they occur within a 'work/care regime': a set of interrelated social, cultural and institutional factors that shape the individual choices made about who will care.⁷³

2.47 Policy decisions will affect the contours of this work/care regime. Responses that seek to value the contributions of both paid work and unpaid care work, and which enhance the capacity of persons to make choices about their engagement in various forms of productive work, will be multifaceted.

69 B Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12 *Gender, Work & Organization* 32, 34.

70 Ibid. The Federation of Ethnic Communities' Councils of Australia identified the intensification of unpaid care work as a particular issue for CALD communities: Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*.

71 See, eg N Skinner, C Hutchinson and B Pocock, *Australian Work and Life Index 2012 The Big Squeeze: Work, Home and Care in 2012* (2012), 14.

72 The Law Council of Australia highlighted the need also to consider aged care policy in this context: Law Council of Australia, *Submission 46*.

73 B Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12 *Gender, Work & Organization* 32, 38.

2.48 These will involve measures to improve the recognition and reward for unpaid care work, as well as enhancement of support services for carers.⁷⁴ Women in Social and Economic Research submitted that improvements to institutional support for carers are required for all carers, whether or not they are engaged in additional paid work. These support services ‘are likely to include the provision of affordable high quality residential, day and respite care for frail aged and adults and children with disabilities’.⁷⁵

2.49 Another key area for policy focus is improving the ability to combine unpaid care work and paid work. This Inquiry contributes to this latter project by making recommendations aimed at addressing legal barriers inhibiting or preventing the combination of paid work and unpaid care work.

2.50 The notion of a work/care regime suggests that, while policy responses can have some impact on its form, they will also interact with cultural factors. These factors include workplace cultures, as well as norms of gendered behaviour—including understandings about the ‘normal’ or ‘appropriate’ division of labour between women and men.⁷⁶

2.51 Similar tensions arise when considering the effect of increasing paid work participation on voluntary work. Bessy Andriotis notes that extended paid workforce participation at older ages is likely to have an impact on availability for voluntary work.⁷⁷

Changing nature of paid work

2.52 The characteristics of paid work have undergone significant change since the early 1990s. These changes have continued a longer term trend of the ‘shift of employment away from blue-collar work to professional and paraprofessional jobs’.⁷⁸ The 2012 Fair Work Act Review Panel summed up some of these changes:

the proportion of employed people working in service industries has increased from 67 per cent to 72 per cent. The mining and construction workforces have increased, while the manufacturing and agriculture workforces have declined ...

Over coming decades the manufacturing workforce will likely continue its long decline. As the current boom in new projects levels out, the rate of growth of the construction workforce will slow. The mining workforce will continue to expand but,

74 The Australian Government has developed a National Carers Recognition Framework. This framework has two pillars: the *Carer Recognition Act 2010* (Cth) and the National Carer Strategy: Australian Government, *National Carer Strategy* (2011). The Australian Human Rights Commission make a number of suggestions for further reform to better recognise unpaid care in: Australian Human Rights Commission, *Investing in Care: Recognising and Valuing Those Who Care*, Research Report, Volume 1 (2013).

75 Women in Social & Economic Research (WiSER), *Submission 72*.

76 B Pocock, ‘Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case’ (2005) 12 *Gender, Work & Organization* 32, 38.

77 B Andriotis, *Hand in Glove—Participation in Paid and Voluntary Work by Older Australians* (2012), prepared for Volunteering Tasmania’s State of Volunteering Report 2012, 173.

78 P McDonald, ‘Employment at Older Ages in Australia: Determinants and Trends’ in T Griffin and F Beddie (eds), *Older Workers: Research Readings* (2011) 25, 39.

even after doubling its relative size over the last decade, it remains (at 2 per cent) a small share of total employment.⁷⁹

2.53 Forms of employment have also undergone major changes. One third of employment is now part-time, compared with less than one quarter in the early 1990s. Additionally, just under 25% of workers are employed casually. In 1992, casual employees constituted just over 20% of employment.⁸⁰

2.54 Some argue that these more flexible employment arrangements promote productivity. The Fair Work Act Review Panel stated that:

More flexible labour market arrangements played a significant part in supporting continued strong growth ... as well as limiting the impact of the global financial crisis (GFC) on unemployment by allowing for adjustments in hours worked rather than layoffs.⁸¹

2.55 Others argue that the growth of casual work erodes the rights and entitlements of workers. The Australian Council of Trade Unions (ACTU) submitted that:

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 ... 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.⁸²

Retirement

2.56 Australia has no compulsory retirement age, and the distinction between 'working life' and 'retirement' can be difficult to draw.⁸³

2.57 Australia's retirement income system facilitates the redistribution of income over a person's lifetime, providing financial support after the cessation of paid work.⁸⁴ Australia's retirement income system has three pillars: the Australian Government funded, means tested Age Pension; compulsory saving through employer superannuation contributions (the superannuation guarantee); and voluntary superannuation savings.⁸⁵

79 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 56.

80 Ibid.

81 Ibid, 64.

82 ACTU, *Submission 38*.

83 For an overview of the history of compulsory retirement in Australia, see R Patterson, 'The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern' (2004) 3 *Elder Law Review* 1.

84 FaHCSIA, *Pension Review Report* (2009), 5.

85 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 8. The Age Pension is considered in more detail in Chapter 7. Superannuation is considered in Chapter 8.

2.58 Access ages for these sources of retirement income do not provide a definitive marker of the division between work and retirement.⁸⁶ Many retired persons do report that reaching the age of eligibility for the Age Pension or access to superannuation was their main reason for retirement.⁸⁷ However, a person with sufficient private means may choose to retire before this time. Moreover, it is possible in certain circumstances to combine the receipt of the Age Pension with employment income, and to access superannuation while remaining in paid work. These circumstances are detailed in Chapters 6 and 7.

2.59 The conventional view of a cessation of paid work as ‘retirement’ may accord more with a normative male experience of working life than that of females. Eva Cox submitted that the language of working life and retirement is

built mainly on a male post industrial revolution view of the worker who leaves home to go to waged work, has leisure out of the job hours and eventually ‘retires’ to presumably pursue full time leisure.⁸⁸

2.60 Where the notion of work is broadened to include both paid and unpaid work, it becomes clear that, for many, ‘retirement’ involves continued work in the form of unpaid caring. Additionally, many older persons perform voluntary work after ceasing paid work.

2.61 Even when working with a traditional understanding of retirement as a final cessation of paid work, the decision to stop working may not be voluntary. For example, among retired persons whose last job was fewer than 20 years ago, 26% of men and 21% of women reported that the main reason for retirement was ‘sickness, injury or disability’.⁸⁹

2.62 In addition, the line between a retired person and a ‘discouraged job seeker’ may be difficult to draw. Older persons make up a large proportion of the pool of ‘discouraged job seekers’: persons who are willing and able to work, but are not looking for a job because they believe that they would not find one.⁹⁰ ABS statistics

86 Persons may access superannuation benefits at ‘preservation age’ if retired, or under the ‘Transition to Retirement Rules’; or at age 65 with no restrictions: *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01; sch 1 item 101; sch 1 item 110; sch 1 item 106. The current preservation age is 55 years, increasing gradually to 60 years between 2015–2025: *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01. The qualifying age for the Age Pension is 65 years for men and 64.5 years for women: *Social Security Act 1991* (Cth) ss 23(5A), (5C). From 1 July 2013 the qualifying age for women will be 65 years: *Social Security Act 1991* (Cth) s 23(5D). Age Pension age for both men and women will rise incrementally from 65 to 67 between 1 July 2017 and 1 July 2023: *Social Security Act 1991* (Cth) s 23(5A), (5D).

87 The ABS reports that ‘among both retired men and women whose last job was fewer than 20 years ago, the most commonly reported main reason for ceasing their last job was “reached retirement age/eligible for superannuation/pension” (44% of men and 27% of women)’: Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2010 to June 2011, Cat No 6238.0* (2011), 5.

88 Women’s Equity Think Tank, *Submission 63*.

89 Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2010 to June 2011, Cat No 6238.0* (2011), 5. Additionally, a 2012 study by the National Seniors Productive Ageing Centre found that 45.4% of surveyed retirees had ceased work due to health reasons: National Seniors Productive Ageing Centre, *Ageing Baby Boomers in Australia: Informing Actions for Better Retirement* (2012), 4.

90 Australian Bureau of Statistics, *Persons Not in the Labour Force, Australia, Sep 2011, Cat No 6220.0* (2012).

showed in 2011 that over half of discouraged job seekers (56%) were aged over 55 years.⁹¹

2.63 The changing nature of the paid labour force also means that a model of continuous participation in paid work, followed by retirement, may no longer be the norm. Instead, working life may be marked by a cycling in and out of paid work.

2.64 This may be particularly the case in certain industries or sectors. 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.⁹²

2.65 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.⁹³

2.66 Summing up the implications of these changes to the later stages of paid working life, National Seniors suggested that a ‘work-retirement continuum’ has emerged:

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.⁹⁴

Levels of mature age participation

Paid work

2.67 The rate of mature age labour force participation has changed over time. In recent years, the labour force participation rate has generally been trending upwards for both mature age men and women, particularly at older ages.⁹⁵ However, the change in participation rates for men and women has followed different trajectories over time.

91 Ibid. Of these, 32% were aged 65 years and over and 24% were aged 55–64 years.

92 Cbus, *Submission 41*.

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

94 National Seniors Australia, *Submission 27*.

95 At May 2012, the labour force participation rate of persons aged 45–64 was 73.9%: DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 44.

2.68 Older men's labour force participation rate was high in 1966, declined through the 1980s and 1990s, and has increased in the 2000s (with the exception of men aged 45–54, whose participation rate remained relatively steady).⁹⁶ The labour force participation rate for men aged 45–54 was 96% in 1966. This has since declined, fluctuating between 87% and 90% from the mid-1980s to 2011. At 2011, the participation rate stood at 88%.⁹⁷ For men aged 55–64, the participation rate was also high in 1966, at 86%. It declined to a low of 60% in 1997. Since then, the labour force participation rate of men in this age range has increased to 72% in 2011.⁹⁸ In 1966, the labour force participation rate for men aged 65 years and older was 23%. This fell to a low of 8% in 1993, before increasing to 16% in 2011.⁹⁹

2.69 In contrast, the labour force participation of mature age women was at its highest point in 2011, having increased from relatively low levels in 1966. In 1966, women aged 45–54 had a labour force participation rate of 37%. This has generally increased since then, reaching 54% in 1986 and 78% in 2011. Women aged 55–64 had a labour force participation rate of 21% in 1966. This increased to 25% in 1972, before declining to 20–21% in the mid-1980s. Since then, their participation rate has increased significantly to 55% in 2011. The participation rate of women aged 65 years and older remains low, standing at 4% in 1966 and 7% in 2011.¹⁰⁰

2.70 Persons are less likely to be employed full-time and more likely to engage in part-time work at older ages. The ABS notes that, in the year to June 2010:

two-thirds of men aged 55–59 years were employed full time, declining to 44% of those aged 60–64 years, and 18% for those aged 65–69 years. By contrast, the rate of part-time work among older men actually increases with age, from 10% of men aged 55–59 years, to 13% of those between the ages of 60 and 69 years.

The proportion of women employed full time also declines with age, though from a smaller base than for men. In the year to June 2010, 35% of women aged 55–59 years worked full time compared with 18% of women aged 60–64 and 6% of those aged 65–69 years. As with men, in progressively older age groups women who work part time make up a greater share of the shrinking number of labour force participants.¹⁰¹

2.71 Participation for both men and women aged 55–64 in Australia is higher than the OECD average. However, it is lower than a number of OECD countries, including New Zealand, United States and United Kingdom.¹⁰²

96 Organisation for Economic Co-operation and Development, *Online OECD Employment Database* <www.oecd.org/employment/emp/onlineoecdemploymentdatabase.htm> at 21 March 2013.

97 Ibid.

98 Ibid; R Chomik and J Piggott, *Mature-Age Labour Force Participation: Trends, Barriers, Incentives, and Future Potential* (2012), Centre of Excellence in Population Ageing Research Briefing Paper 2012/01, 3–4.

99 Organisation for Economic Co-operation and Development, *Online OECD Employment Database* <www.oecd.org/employment/emp/onlineoecdemploymentdatabase.htm> at 21 March 2013.

100 Ibid.

101 Australian Bureau of Statistics, *Australian Social Trends Sep 2010 Cat No 4102.0* (2010).

102 R Chomik and J Piggott, 'Pensions, Ageing and Retirement in Australia: Long-Term Projections and Policies' (2012) 45 *Australian Economic Review* 350, 354.

Unemployment

2.72 Persons aged 45 years and older have a longer duration of unemployment than younger unemployed persons. At May 2012, the average duration of unemployment for persons aged 45 years and older was 62 weeks.¹⁰³ This compares with 34 weeks for persons aged 25–44 years, and 24 weeks for those aged 15–24 years.¹⁰⁴

Older persons not in the labour force

2.73 At September 2009, 3.3 million persons aged 55 years and over were not in the labour force. Of these, 1.6 million were aged 55 to 69 years.¹⁰⁵

2.74 For persons aged 55–69, 40% of those not in the labour force were retired or voluntarily inactive. Another 26% (mostly women) listed their main occupation as ‘home duties’. A further 15% of persons not in the labour force reported long-term health or disability. The ABS notes that 13% of persons aged 55–69 who were not in the labour force reported that they would like to work.¹⁰⁶

Determinants and trends in mature age participation in the paid workforce

2.75 The labour force participation rate of mature age men in the 1980s and 1990s was particularly affected by economic and industry restructuring.¹⁰⁷ Mature age male workers were often targeted for retrenchment in sectors, such as manufacturing, affected by restructuring.¹⁰⁸

2.76 By contrast, the increase in women’s labour force participation is attributed to the ‘cohort effect’ of women who joined and remained attached to the labour force at younger ages and who have now entered mature age.¹⁰⁹

2.77 Commentators have suggested that a range of additional factors have contributed to more recent increases in mature age labour force participation. These factors are related to both labour force supply and demand, as well as social and demographic changes, and include:

- increased demand for labour since the mid-1990s;¹¹⁰
- persons affected by retrenchments in the 1980s and 1990s ageing out of the main working ages;¹¹¹

103 DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 47.

104 Ibid.

105 Australian Bureau of Statistics, *Australian Social Trends Sep 2010 Cat No 4102.0* (2010).

106 Ibid.

107 H Kimberley and D Bowman, ‘Understanding Mature-age Workforce Participation in Australia’ in T Griffin and F Beddie (eds), *Older Workers: Research Readings* (2011) 84, 90.

108 R Chomik and J Piggott, *Mature-Age Labour Force Participation: Trends, Barriers, Incentives, and Future Potential* (2012), Centre of Excellence in Population Ageing Research Briefing Paper 2012/01, 3–4.

109 Ibid, 3.

110 Ibid, 5.

111 P McDonald, ‘Employment at Older Ages in Australia: Determinants and Trends’ in T Griffin and F Beddie (eds), *Older Workers: Research Readings* (2011) 25, 27–28.

- work is less physically demanding, with the shift from blue-collar work to professional and paraprofessional jobs;¹¹²
- increasing education levels;¹¹³
- successive cohorts have commenced work at a later age and therefore will continue working longer;¹¹⁴
- the effect of the Global Financial Crisis on retirement savings, leading some mature age persons seeking to remain participants in the labour force;¹¹⁵ and
- better health at older ages.¹¹⁶

2.78 A number of these factors can be seen to be related to broad policy developments, such as the promotion of better health and education outcomes. However, none of these are specifically related to policies targeted towards mature age participation.¹¹⁷ Rafal Chomik and Professor John Piggott suggest that ‘even if government does not act, improvements in health, work conditions and education will continue to affect the participation of older workers’.¹¹⁸

2.79 It is important to note that, while the broad trend is toward increased labour force participation at older ages, particular groups are affected differently. For example, employment levels are lower for those whose competency in English is low.¹¹⁹ For workers who are employed in blue-collar jobs, poor health and an inability to continue to meet the physical demands of a job may contribute to workforce exit.¹²⁰ In addition, those without a post-school qualification are less likely to be in the workforce at older ages than those with such a qualification.¹²¹

Other productive work

Mature age carers

2.80 According to ABS statistics, mature age persons provide the majority of informal care for persons with disability or persons aged 60 years and older. In 2009, 62% of total carers were mature age. Mature age persons also comprised 70% of

112 Ibid, 39.

113 Ibid.

114 Ibid.

115 R Chomik and J Piggott, *Mature-Age Labour Force Participation: Trends, Barriers, Incentives, and Future Potential* (2012), Centre of Excellence in Population Ageing Research Briefing Paper 2012/01, 5.

116 Ibid, 5–6.

117 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, 129–130.

118 R Chomik and J Piggott, ‘Pensions, Ageing and Retirement in Australia: Long-Term Projections and Policies’ (2012) 45 *Australian Economic Review* 350, 354.

119 P McDonald, ‘Employment at Older Ages in Australia: Determinants and Trends’ in T Griffin and F Beddie (eds), *Older Workers: Research Readings* (2011) 25, 30.

120 Cbus, *Submission 41*.

121 P McDonald, ‘Employment at Older Ages in Australia: Determinants and Trends’ in T Griffin and F Beddie (eds), *Older Workers: Research Readings* (2011) 25, 29–30.

primary carers (the person who provides the most ongoing assistance to a care recipient) for persons with disability or aged 60 years or over.¹²²

2.81 Mature age women undertake proportionally more care than mature age men. In 2009, women made up 54% of total carers in the mature age bracket, and 64% of mature age primary carers.¹²³

2.82 Grandparents also provide a significant proportion of child care for grandchildren. ABS data suggests that ‘around a quarter of all children (26%) were usually cared for by their grandparents’.¹²⁴ Research in 2011 suggested that grandmothers were more likely than grandfathers to perform child care daily or several times a week, while grandfathers were more likely than grandmothers to be doing care a few times a year or less often.¹²⁵

2.83 Some mature age persons also provide ‘parental’ care for dependent children. However, with the exception of grandparents providing such care, the ALRC has not considered this aspect of care work in this Inquiry.¹²⁶

Mature age volunteers

2.84 ABS data suggests that 36.2% of persons aged 18 years and over participate in voluntary work in Australia.¹²⁷ Mature age persons provide a significant amount of voluntary work, with approximately 43% of those aged 45–64 doing volunteer work.¹²⁸ Additionally, approximately 37% of persons aged 65–74 and 28% of persons aged 75–84 are volunteers.¹²⁹

Effects of removing barriers to mature age participation

2.85 Removing legal barriers to mature age participation in paid and other productive work may have a range of effects, including upon the economy, social inclusion and in relation to compliance with international obligations.

Economic effects

2.86 Various estimates have been made of the economic effect of increased labour force participation by mature age persons.

2.87 The *Intergenerational Report 2010* projects that an ageing population will bring with it a slowing of economic growth. The Report notes that, ‘as the proportion of the

122 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings Cat No 4430.0* (2009), 10.

123 Ibid.

124 Australian Bureau of Statistics, *Childhood Education and Care, Australia: Summary, Cat No 4402.0* (2011).

125 B Horsfall and D Dempsey, ‘Grandmothers and Grandfathers Looking After Grandchildren: Recent Australian Research’ (2011) 18 *Family Relationships Quarterly* 10, 10.

126 With respect to grandparents providing ‘parental’ care, the ABS notes that, in 2009–10, there were 16,000 Australian families in which grandparents were raising children aged 17 years and younger: Australian Bureau of Statistics, *Family Characteristics, Australia, Cat No 4442.0* (2009–10).

127 Australian Bureau of Statistics, *Voluntary Work, Australia, 2010 Cat No 4441.0* (2011), 9.

128 Ibid.

129 Ibid.

population of traditional working age falls, the rate of labour force participation across the whole population is projected to fall'.¹³⁰

2.88 In addition, there will be increased government spending associated with age-related payments and services. Spending on health is also projected to increase in the future, a result of the combination of technological advances in health care and demand for higher quality health services.¹³¹ The projected effect of ageing and health pressures is that spending is expected to exceed revenue (creating a 'fiscal gap') by 2.75% of Gross Domestic Product (GDP) in 2050.¹³²

2.89 Increased labour force participation by mature age persons will potentially narrow or close this projected fiscal gap. For example, increasing the participation rate of persons aged 50–69 by 10% by 2050 would increase real GDP and real GDP per capita by 2.4%.¹³³

2.90 However, as noted above, increased participation in paid work by mature age persons will have an impact on ability to undertake unpaid care work and voluntary work.

Social inclusion

2.91 Reducing impediments to mature age participation in paid and other productive work may also promote social inclusion. The Australian Government defines a socially inclusive society as one where persons have the resources, opportunities and capability 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 they can influence decisions that affect them.¹³⁴

2.92 Participation in paid work can be seen as an indicator of social inclusion, promoting financial security as well as social connectedness.

2.93 Participation in other productive work is also an element of a socially inclusive society. Caring may be considered as a form of participation, and an indicator of social inclusion. For example, the OECD has argued that the provision of care for grandchildren by grandparents is 'vital in buttressing intergenerational solidarity'.¹³⁵

130 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), ix.

131 Ibid, x.

132 Ibid. This projected fiscal gap was revised downwards from 3.25% in the 2007 *Intergenerational Report*.

133 Ibid, 29–30, 121–22; R Chomik and J Piggott, *Mature-Age Labour Force Participation: Trends, Barriers, Incentives, and Future Potential* (2012), Centre of Excellence in Population Ageing Research Briefing Paper 2012/01, 1.

134 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 21 March 2013.

135 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.

2.94 However, responsibilities to provide care may also limit choices and the ability to take up opportunities in other spheres of participation, such as paid work.¹³⁶ Carers Tasmania has argued that:

Carers contribute greatly to the wellbeing and social inclusion of the people they care for, but this contribution often disadvantages the carer as the time and the cost of providing care becomes a barrier which prevents social participation.¹³⁷

2.95 Additionally, persons providing unpaid care face significant financial disadvantage, considered an indicator of social exclusion.¹³⁸ Hill, Thomson and Cass argue that ‘questions of choice and agency in the taking on of caring roles’ must be a key part of considering the social inclusion of carers.¹³⁹

2.96 Removing legal barriers that limit the ability of mature age persons to combine paid work and care, or to move between work and care, will promote social inclusion by enabling a more ‘genuine’ choice between forms of participation and support continued workforce attachment.

2.97 Removing barriers to mature age participation in voluntary work may also promote social inclusion. Warburton notes that:

research shows that some of the indirect benefits contributed by older people also include helping to build positive inter-generational relationships, helping other older people to remain living in the community, and maintaining and promoting cultural diversity. In all of these ways, volunteers can be said to add social value to society and to their communities.¹⁴⁰

International obligations

2.98 When conducting an Inquiry, the ALRC is directed to have regard to ‘all of Australia’s international obligations that are relevant to the matter’.¹⁴¹

2.99 Such international instruments do not become part of Australian law until incorporated into domestic law by statute. However, as the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* has stated, a convention can assist with the interpretation of domestic law:

The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.¹⁴²

136 T Hill, C Thomson and B Cass, ‘Social Inclusion and the Intersection of Care and Employment’ (Paper presented at Brotherhood of St Laurence Care, Social Inclusion and Citizenship Symposium, Melbourne, 25 October 2010).

137 Carers Tasmania, *Social Inclusion and Carers in Tasmania: A Carers Tasmania Position Paper* (2009).

138 Australian Human Rights Commission, *Investing in Care: Recognising and Valuing Those Who Care*, Research Report Volume 1 (2013), 30.

139 T Hill, C Thomson and B Cass, ‘Social Inclusion and the Intersection of Care and Employment’ (Paper presented at Brotherhood of St Laurence Care, Social Inclusion and Citizenship Symposium, Melbourne, 25 October 2010), 8.

140 J Warburton, *Volunteering by Older People: The Benefits and Challenges for Seniors and for Organisations: Latest Research Evidence* (2012), 3.

141 *Australian Law Reform Commission Act 1996* (Cth) s 24(2).

142 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288.

2.100 No specific human rights convention safeguards the rights of older persons. However, older persons are protected equally with other persons by the core international human rights treaties.¹⁴³

2.101 Relevantly for this Inquiry, these include the right to work and to the enjoyment of just and favourable conditions of work in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁴⁴ The ICESCR also prescribes rights to social security, to an adequate standard of living and to enjoyment of the highest attainable standard of physical and mental health.¹⁴⁵

2.102 Human rights treaties also provide protection from discrimination. The International Covenant on Civil and Political Rights (ICCPR) affirms that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.¹⁴⁶ The ICESCR commits States Parties to the Covenant to guarantee that the rights contained within it be exercised without discrimination of any kind.¹⁴⁷

2.103 While not having the same legal status as a convention, a number of other international instruments set out rights and protections for older persons. Of particular importance are the United Nations Principles for Older Persons, adopted by the United Nations General Assembly in 1991.¹⁴⁸ Included among these are the principles that older persons should:

- have the opportunity to work or to have access to other income-generating opportunities;¹⁴⁹

143 The core treaties are: the *International Covenant on Civil and Political Rights*, 16 December 1966, ATS 23 (entered into force on 23 March 1976); the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, ATS 5 (entered into force on 3 January 1976); the *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, ATS 40 (entered into force on 4 January 1969); the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, ATS 9 (entered into force on 3 September 1981); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, ATS 21 (entered into force on 26 June 1987); the *Convention on the Rights of Persons with Disabilities*, 13 December 2006, ATS 12 (entered into force on 3 May 2008); and the *Convention on the Rights of the Child*, 20 November 1989, ATS 4 (entered into force on 2 September 1990).

144 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, ATS 5 (entered into force on 3 January 1976) arts 6, 7.

145 Ibid, arts 9, 11, 12.

146 *International Covenant on Civil and Political Rights*, 16 December 1966, ATS 23 (entered into force on 23 March 1976) art 26.

147 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, ATS 5 (entered into force on 3 January 1976) art 2(2). Neither the ICCPR nor the ICESCR list age as a specifically proscribed ground of discrimination alongside enumerated grounds including race, sex, language or religion. However, both Covenants prohibit discrimination on the basis of ‘other status’. The Committee on Economic, Social and Cultural Rights has suggested that the prohibition of discrimination on the grounds of ‘other status’ could be interpreted as applying to age. It comments that the range of matters in relation to which such age discrimination can be accepted is very limited: Committee on Economic, Social and Cultural Rights, *General Comment No 6: The Economic, Social and Cultural Rights of Older Persons* (8 December 1995), 13th sess, UN Doc E/1996/22, [27].

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

149 Ibid, principle 2.

- be able to participate in determining when and at what pace withdrawal from the labour force takes place;¹⁵⁰
- remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations;¹⁵¹
- be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities;¹⁵²
- be able to pursue opportunities for the full development of their potential;¹⁵³ and
- be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.¹⁵⁴

2.104 Removing legal barriers to participation in paid and other productive work may promote compliance with Australia's international obligations in relation to the rights of older persons.

Framing principles

2.105 The ALRC has developed recommendations for reform in this Inquiry in the light of six interlinking principles: participation; independence; self-agency; system stability; system coherence; and fairness.

2.106 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'.¹⁵⁵ 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).¹⁵⁶

Participation

2.107 '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.¹⁵⁷

150 Ibid, principle 3.

151 Ibid, principle 7.

152 Ibid, principle 8.

153 Ibid, principle 15.

154 Ibid, principle 18.

155 Australian Industry Group, *Submission 37*.

156 National Welfare Rights Network, *Submission 50*.

157 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 21 March 2013.

2.108 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.¹⁵⁸

2.109 The Association of Independent Retirees noted that a person's workforce participation may vary significantly in the wide age range covered by this Inquiry:

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.¹⁵⁹

2.110 Suncorp submitted that the appropriate retirement age will vary for each individual. Hence, 'it is important to remove age barriers wherever appropriate and allow greater flexibility in the transition to retirement'.¹⁶⁰

Independence

2.111 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'.¹⁶¹

2.112 Independence involves the ability of older persons to make choices about the form of participation. This includes the capacity to determine when and at what pace withdrawal from work takes place.¹⁶² It also involves the ability to make genuine choices between participation in paid work, unpaid work, or some combination of both.

2.113 These elements of independence were affirmed by submissions from stakeholders. National Seniors Australia said 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.¹⁶³

158 Brotherhood of St Laurence, *Submission 54*.

159 Association of Independent Retirees, *Submission 17*.

160 Suncorp Group, *Submission 66*.

161 Australian Government, *The Social Inclusion Agenda*, <www.socialinclusion.gov.au/> at 21 March 2013, 1.

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

163 National Seniors Australia, *Submission 27*.

2.114 The Government of South Australia also highlighted that continued workforce participation may not be an option for some older person. Other choices need to be available:

Mature workers should have choices about how and when they relinquish employment, based on whether they have capacity to extend paid employment or involve themselves in ‘service to the community’ through volunteering.¹⁶⁴

2.115 For those ‘in physically demanding occupations’, having choices was seen as important. These older persons

may experience physical discomfort or health concerns, which do not qualify them for a disability pension ... 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.¹⁶⁵

2.116 The ACTU urged that ‘mature workers have already contributed significantly to the workforce throughout their lives, and should have the right to choose when to retire’.¹⁶⁶ The ACTU also stressed that ‘making it more difficult for workers to retire will not necessarily lead to those workers finding or retaining meaningful paid employment. Moreover, choices for older persons needed to be ‘real choices’—about ‘when, where and how they work’.¹⁶⁷

Self-agency

2.117 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.¹⁶⁸ 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. These choices include the timing of retirement, ‘as well as the work that they are asked to perform prior to retirement’. It noted that workers in insecure employment are often denied such meaningful choice.¹⁶⁹

2.118 Self-agency also embodies the importance of being treated with dignity and respect, as reflected in the National Statement on Social Inclusion.¹⁷⁰ In its submission,

¹⁶⁴ Government of South Australia, *Submission* 95.

¹⁶⁵ 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.

¹⁶⁶ ACTU, *Submission* 88.

¹⁶⁷ *Ibid.*

¹⁶⁸ Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2011), Ch 2.

¹⁶⁹ ACTU, *Submission* 38. The ACTU also submitted that ‘job security and quality of employment’ be included as an additional framing principle.

¹⁷⁰ Australian Government and Social Inclusion Unit, *A Stronger, Fairer Australia—National Statement on Social Inclusion*.

the National Welfare Rights Network emphasised the importance of the values of ‘the inherent dignity and respect due to each person’.¹⁷¹

System stability

2.119 The principle of ‘system stability’ is particularly relevant in areas such as 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.¹⁷²

2.120 Concerns about the pace of change in the area of superannuation were also noted in the Tax Review.¹⁷³ 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 Australian 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.¹⁷⁴

2.121 National Seniors Australia gave the example of repeated changes to superannuation. It argued that such changes ‘erode community confidence in the superannuation system and encourage more Australians to minimise, rather than maximise, their superannuation savings’.¹⁷⁵

2.122 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.¹⁷⁶

2.123 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.

171 National Welfare Rights Network, *Submission 50*.

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

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

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

175 National Seniors Australia, *Submission 27*.

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

System coherence

2.124 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.¹⁷⁷ 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!’¹⁷⁸

2.125 Complexity, in particular, was identified as a cause of disengagement in paid work. ACCI, for example, stated that the complexity of laws that may affect an older person’s workforce participation ‘can often tip the balance against a decision to continue working’.¹⁷⁹

2.126 The Australian Institute of Superannuation Trustees (AIST) also made the connection between complexity and disengagement. It submitted that laws and regulations about superannuation have become ‘convoluted’, with the effect that

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.¹⁸⁰

2.127 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. For example, one stakeholder raised concerns about the difficulty of navigating various aspects of the social security system, stating that the ‘system should be more transparent’ and less complicated.¹⁸¹

2.128 COTA Australia argued that ‘more effort needs to be put into providing easy to understand, clear and concise information’ for older persons.¹⁸² 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. It suggested 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.¹⁸³

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

178 W Trinder, *Submission 01*.

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

180 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.

181 R Spencer, *Submission 08*.

182 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’.

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

Fairness

2.129 ‘Fairness’ can be a consequence of coherence, consistency and the stability of the relevant systems involved.

2.130 Fairness can reflect a commitment to a fair distribution of national resources and a balancing of responsibility between individuals and government. In the context of retirement, the Tax Review panel contended that responsibility for providing retirement income should be 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.¹⁸⁴

2.131 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.¹⁸⁵ Stability may be considered an important component of intergenerational equity, in which persons of working age support the retirement incomes of others because they anticipate similar support when they become older. AIST submitted that ‘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’.¹⁸⁶

2.132 Fairness also encompasses ensuring basic rights and freedoms are enjoyed by older persons, and that there exists equality of opportunity in participation in paid and other productive work.

2.133 In this regard, the ALRC has noted the ‘gendered difference in ageing’ 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’.¹⁸⁷

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.¹⁸⁸

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

185 A Gosseries, *Theories of Intergenerational Justice: A Synopsis* <<http://sapiens.revues.org/165>> at 721 March 2013. 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).

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

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

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

2.134 Two stakeholders raised issues of age and sex discrimination—and its intersection.¹⁸⁹ The Government of South Australia commented that ‘older women face double discrimination based on both their gender and age’. It argued that ‘stereotypes and assumptions prevent older women from being selected for jobs or from being considered for training and promotional opportunities’.¹⁹⁰

2.135 A further aspect of fairness was advocated by employer groups, namely the potential cost impacts on employers of any recommendations.¹⁹¹

2.136 The six framing principles—participation, independence, self-agency, system stability, system coherence, and fairness—have assisted in balancing a range of competing priorities in evaluating directions for reform, and underpin the recommendations in this Report.

189 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*.

190 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*.

191 Australian Industry Group, *Submission 97*.

3. National Mature Age Workforce Participation Plan

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Summary

3.1 A coordinated policy response is needed to address barriers to the participation of mature age persons in the Australian labour market. The development of a National Mature Age Workforce Participation Plan would guide reform and action and provide a framework for a national whole-of-government and community approach to address the barriers to participation identified in this and other reports. In this chapter the ALRC recommends the development of a National Plan and suggests that the Advisory Panel on Positive Ageing, or a similar body, should lead its development.

Why do we need a National Plan?

3.2 The National Mature Age Workforce Participation Plan (the National Plan) can build on and bring together the significant work undertaken to date. There have been a number of inquiries and reports directed towards Australia's ageing population, as outlined in Chapter 1. Many of these have addressed workforce participation and related issues such as discrimination, education, skills and training.¹ As a result, an evidence-based plan for addressing barriers to workforce participation for mature age persons could be developed using the recommendations in this Report and existing sources.

¹ See, eg, The Treasury, *Intergenerational Report 2002–03* (2002); The Treasury, *Intergenerational Report 2007* (2007); The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010); Productivity Commission, *Economic Implications of an Ageing Australia* (2005); 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); 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; National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation.

3.3 National plans to guide reform and action have facilitated long-term strategic and whole-of-government responses to a diverse range of issues.² It is this type of approach that is required to address barriers to workforce participation for mature age persons. These barriers are both legal and cultural and require complex and diverse legal and policy responses. A National Plan would provide a framework for action, identifying priority reform areas, performance indicators and appropriate responsibility and oversight for such reform.

3.4 The purposes of this National Plan would be to:

- establish a national policy framework to guide government, industry and community policies, initiatives and programs with respect to the workforce participation of mature age persons;
- outline a plan for action by government and the community; and
- establish specific performance indicators and monitoring mechanisms to ensure accountability and establish a basis for measuring progress.

3.5 The National Plan would complement a number of existing national plans and strategies, including those in relation to workforce development, caring and disability. For example, the *National Workforce Development Strategy* addresses issues such as productive workplaces; transitions between education, training and work; tertiary education and training sectors; and regional development.³ In addition, the *National Carer Strategy* gives effect to the principles of the *Carer Recognition Act 2010* (Cth) and complements the *National Disability Strategy*.⁴ It contains a number of priority action areas and is supported by an Action Plan, an Implementation Plan and annual progress reports.⁵

Developing the National Plan

3.6 The ALRC suggests that the Advisory Panel on Positive Ageing (or a similar body) is well placed to lead the development of the National Plan, in consultation with key stakeholders.

2 See, eg, National Council to Reduce Violence Against Women, *National Plan to Reduce Violence Against Women and Their Children 2010–2022* (2011). The inquiry that led to the report, Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2011), was one of the strategies for action under the preliminary work undertaken by the National Council: National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009).

3 Australian Workforce and Productivity Agency, *Future Focus: 2013 National Workforce Development Strategy* (2013), 75–77.

4 Australian Government, *National Disability Strategy 2010–2020* (2010); *Carer Recognition Act 2010* (Cth).

5 Australian Government, *National Carer Strategy* (2011); Australian Government, *National Carer Strategy Action Plan 2011–2014*; Australian Government, *National Carer Strategy Progress Report 2011–2012*.

3.7 In the 2012–13 Budget, the Australian Government announced funding to establish a new ongoing Advisory Panel on Positive Ageing. The role of the Advisory Panel is to:

lead a national dialogue on ageing issues, improve coordination of policy design across portfolios, and work with the Government on implementation and design of ageing policy, including in response to the recommendations of the Advisory Panel on the Economic Potential of Senior Australians.⁶

3.8 Leading and facilitating the development of the National Plan complements the scope of work of the Advisory Panel, including: raising awareness; commenting on policy design across government; conducting targeted consultations with key stakeholders; and considering emerging issues.⁷ However, given the scope of such an undertaking, the Advisory Panel would require additional assistance to develop such a plan. In part, this assistance may be provided by Commonwealth, state and territory governments and the Age Discrimination Commissioner (who is also a member of the Advisory Panel).⁸ It could also be provided by bodies such as: the Centre for Workplace Leadership;⁹ the Fair Work Ombudsman; Safe Work Australia; the Insurance Reform Advisory Group; the Australian Human Resources Institute and the Recruitment and Consulting Services Association; unions, industry and peak bodies; and seniors organisations.

3.9 In developing the National Plan, national consultation should be undertaken to provide opportunities for contributions by individuals and relevant organisations. The consultation and National Plan should take into account the different experiences and needs of mature age workers, including across gender, disability and cultural and linguistic diversity.

3.10 The National Plan should contain a number of priority areas. Such areas could include, but need not be limited to:

- economic security—including social security, insurance, workers' compensation and superannuation;
- rights protection and legislation—including employment and industrial relations and anti-discrimination;
- work processes, practices and environments—including work health safety and workers' compensation;

6 The Treasury, *Advisory Panel on Positive Ageing* (2013) <www.treasury.gov.au> at 21 March 2013.

7 Ibid.

8 In May 2011, the *Age Discrimination Act 2004* (Cth) was amended to create an office for an Age Discrimination Commissioner within the Australian Human Rights Commission.

9 The Centre for Workplace Leadership will be an independent centre which aims to 'encourage high performing, innovative workplaces and stronger leadership capability in Australian workplaces'. Its role will include: delivery of training; research; publication of research reports and material; and leadership of public debate on leadership, workplace culture and people management: B Shorten (Minister for Employment and Workplace Relations), 'Centre for Workplace Leadership' (Press Release, 14 October 2012); B Shorten (Minister for Employment and Workplace Relations), 'Leading Australian Workplaces into the Future' (Press Release, 3 December 2012); DEEWR, *Program Guidelines 2012–2016 for Centre for Workplace Leadership Fund* (2012).

- skills, education and training;¹⁰ and
- education, awareness and best practice.

3.11 Each key priority area should include performance indicators that can then be monitored. Identifying the appropriate oversight for all action areas will also be important.

3.12 The priority areas identified represent the key areas for reform that have emerged in the course of this Inquiry. This Report provides a basis for reform of legislation and legal frameworks. The recommendations could populate the National Plan, supplemented by the work of other bodies outlined above, as well as areas for reform identified in the course of national consultations.

3.13 The ALRC's recommendations encompass a number of key legislative and regulatory regimes and broader legal frameworks. Education and awareness raising can build on these foundations to influence cultural change and addressing negative stereotypes about mature age workers, as well as age discrimination more broadly.¹¹ It is also important to ensure awareness of, and compliance with, legislative obligations. Stakeholders expressed strong support for a national education and awareness campaign in support of the workforce participation of mature age persons.¹² Development of an education and awareness component of the National Plan is also consistent with a recommendation made by the House of Representatives Standing Committee on Education, Employment and Workplace Relations.¹³

10 The ALRC recognises the importance of re-training and re-skilling as issues affecting continued workforce participation. While it is not the main focus of the ALRC's work, to the extent that education touches on workforce participation it is included in various ways in this text and recommendations in this Report. These issues should also form part of the broader agenda of the National Plan.

11 For discussion of negative perceptions and stereotypes about mature age workers see: 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; Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 45; National Seniors Productive Ageing Centre, *Stereotype Threat and Mature Age Workers* (2011), prepared for National Seniors Australia, 3.

12 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–12. See, eg, National Welfare Rights Network (NWRN), *Submission 99*; Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Chamber of Commerce and Industry, *Submission 85*; Australian Federation of Disability Organisations, *Submission 78*; South Australian Equal Opportunity Commission, *Submission 70*; Adage, *Submission 69*; Queensland Tourism Industry Council, *Submission 67*; DOME Association, *Submission 62*; JobWatch, *Submission 60*.

13 The Committee recommended that the Australian Government develop a sustained national strategy and campaign targeting employers to promote the benefits of maturity and age-balance in the workforce. It recommended the campaign be developed in consultation with state and territory governments, and be subject to formal assessment and evaluation: House of Representatives Standing Committee on Education, Employment and Workplace Relations, *Age Counts: An Inquiry into Issues Specific to Mature-Age Workers* (2000), rec 1.

3.14 This Report includes many recommendations that could form part of the education and awareness component of the National Plan, including:

- education and training;¹⁴
- development and enhancement of guidance material and resources about legislative or workplace entitlements;¹⁵
- development of other resources to explain or complement legislative or workplace entitlements;¹⁶
- establishment of best practice;¹⁷
- material relating to re-design of work arrangements and processes;¹⁸ and
- additional research to improve the evidence base, including case studies.¹⁹

3.15 There are also a range of existing programs and examples of best practice in industries across Australia that could be built upon and developed in the National Plan.²⁰

3.16 In addition, the Australian Human Rights Commission (AHRC) has been allocated funding to enable the Age Discrimination Commissioner to undertake a project addressing the stereotyping of mature age persons.²¹ The position of Age Discrimination Commissioner and this project mean the AHRC is appropriately placed to coordinate the education and awareness component in support of the workforce participation of mature age persons. This approach was recommended by the Advisory Panel on the Economic Potential of Senior Australians.²²

14 See, eg, Recs 4–3, 7–2.

15 See, eg, Recs 4–3, 4–9, 5–3, 6–4, 7–2. See also Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 13.

16 See, eg, Rec 4–6, 4–10, 6–4.

17 See, eg, Rec 4–4, 5–4.

18 See, eg, Rec 5–3.

19 See, eg, Rec 5–2.

20 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/experience-corporate-champions> at 21 March 2013; APS 200 referred to in Comcare, *Submission 29*. Diversity Council of Australia, *Get Flexible: Mainstreaming Flexible Work in Australian Business* (2012); Australian Government, *APS 200 Public Sector Innovation Project* <<http://innovation.govspace.gov.au/2010/08/13/aps-200-public-sector-innovation-project>> at 21 March 2013.

21 The project includes research, roundtables and community education and awareness activities to promote positive portrayal of mature age persons: 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’. See also Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 35.

22 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), rec 36.

3.17 The ALRC suggests other initiatives should be tailored to meet the particular needs of employees and employers as well as specific cohorts of mature age persons, including Indigenous persons, members of culturally and linguistically diverse communities, and mature age people with disability.²³

Recommendation 3–1 The Australian Government should develop a National Mature Age Workforce Participation Plan.

23 See, eg, Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*; Australian Federation of Disability Organisations, *Submission 78*.

4. Recruitment and Employment

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Summary

4.1 The Australian employment landscape has undergone significant shifts in recent years, with changes to the nature of the labour market, work relationships and arrangements as well as the legislative and regulatory framework. Sustaining and increasing workforce participation by mature age workers is critical to meeting the policy challenges presented by an ageing population.¹ The challenge is therefore to ‘re-shape workplaces’ and the employment law framework to facilitate the ongoing involvement of mature age persons in the paid workforce and other productive work.²

4.2 This chapter examines barriers in an employment context to mature age persons participating in the paid workforce or other productive work. It identifies barriers at various stages of employment and ways in which these may be addressed, including in

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; The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010).

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

relation to: entering and re-entering the workforce; maintaining employment; protections surrounding termination of employment; regulation and monitoring; and education and awareness.

4.3 Reform in this area must address complex and interrelated barriers to workforce participation. This requires a combination of legislative and regulatory reform, as well as measures to increase education and awareness and address perceptions and stereotypes surrounding mature age workers. In this chapter the ALRC makes a number of recommendations aimed at: addressing the practices of recruitment agencies; extending the right to request flexible working arrangements; periods for notice of termination of employment; modern awards; reviewing compulsory retirement; and supporting education and awareness raising and the development of guidance material in a range of areas. The ALRC also recommends that the Fair Work Ombudsman (FWO) consider issues relating to mature age workers in conducting national campaigns and audits.

Recruitment

4.4 Mature age job seekers face multiple and intersecting difficulties in entering or re-entering the paid workforce.³ Once unemployed, mature age job seekers experience longer periods of unemployment⁴ and are more likely to become discouraged job seekers than their younger counterparts.⁵ Recruitment agencies can play an important role in facilitating the employment of mature age workers. However, recruitment practices and personnel may also operate as a barrier to mature age workforce participation, as ‘recruitment agencies often perform a gate-keeping function that can exclude mature age workers’.⁶

4.5 There are a range of both government funded and private ‘intermediaries between job seekers and employers’.⁷ The focus of this section is on private recruitment agencies and the role such agencies play in the recruitment of mature age job seekers.⁸

4.6 The key concerns that emerged in course of this Inquiry were:

3 In many cases these difficulties are exacerbated for Indigenous mature age job seekers as well as job seekers from culturally and linguistically diverse backgrounds and those with disability: See, eg, Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*; Australian Federation of Disability Organisations, *Submission 78*.

4 DEEWR, DHS and FaHCSIA, *Submission 101*.

5 Australian Bureau of Statistics, *Persons Not in the Labour Force, Australia, Sep 2011, Cat No 6220.0* (2012).

6 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.

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, 18; Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010), Ch 4. See also ACTU, *Submission 38*.

8 The role played by Australian Government employment service is discussed in Chapter 7.

- perceived discrimination against mature age job seekers by some recruiters and recruitment agencies;
- limited understanding of obligations under anti-discrimination law among some recruiters;⁹ and
- lack of awareness by some recruiters of the benefits of employing mature age job seekers, or of ways to engage appropriately and constructively with mature age job seekers.

4.7 To address such concerns, the ALRC makes a number of recommendations that focus on recruitment agencies and consultants. These involve the development and provision of ongoing education, training and guidance material, as well as the recognition of best practice in the recruitment of mature age job seekers. In addition, the ALRC recommends increased regulation, specifically by way of amendment to industry codes of conduct.

Regulatory framework

4.8 While private recruitment agencies operate under contractual arrangements with individual employers, a number of regulatory frameworks are relevant, including anti-discrimination and industrial relations legislation, industry codes of practice and state and territory licensing regimes.

4.9 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). Where recruitment agencies discriminate against mature age job seekers, 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—they may face potential liability under anti-discrimination law.¹⁰ In addition, the general protections provisions under the *Fair Work Act* extend protection from discrimination on the basis of age to prospective employees.¹¹ As a result, recruitment agencies that discriminate against a prospective employee on the basis of age are in breach of their obligations under both anti-discrimination law and the *Fair Work Act*.

4.10 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.¹² Stakeholders such as Jobwatch and the Law

9 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*.

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

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

12 For example, in South Australia, Western Australia and the ACT, specific registration legislation requires licensing: *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). However, in Queensland there is a Code of Conduct: *Private Employment Agents (Code of Conduct) Regulation 2005* (Qld).

Council of Australia suggested that 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’.¹³ While the ALRC is of the view that greater consistency across jurisdictions in this area would be favourable, proposing a new Commonwealth licensing regime for the recruitment industry is a systemic reform that is wider than the scope of this Inquiry. However, some elements of such a regime suggested by stakeholders, including regular training and education about statutory obligations, addressing negative stereotypes, and outlining the benefits of employing mature age workers, are incorporated into the recommendations the ALRC makes below.

Review and amendment of codes of conduct

4.11 There are two key recruitment industry codes of conduct. The ALRC considers that reviews of both codes provide opportunities for considering amendment to promote better engagement with mature age job seekers.

4.12 All members of the Recruitment and Consulting Services Association (RCSA)—recruitment agencies and agency personnel—are bound by its Code for Professional Conduct (RCSA Code) and associated Disciplinary and Dispute Resolution Procedures.¹⁴

4.13 The RCSA Code contains both general principles and a number of specific principles, including respect for laws, and 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.¹⁵

4.14 Australian Human Resources Institute (AHRI) members—in-house human resources practitioners—are also required to comply with a Code of Ethics and Professional Conduct (AHRI Code).¹⁶ The AHRI Code outlines a number of specific principles, including lawfulness and justice, and provides that

AHRI members will foster equal opportunity and non-discrimination and seek to establish and maintain fair, reasonable and equitable standards of treatment of individuals by their employer and by all employees in the organisation, through their own behaviour and through the policies and practices of their employer.¹⁷

4.15 In 2013, the RCSA is conducting a review of its Code. The ALRC’s proposal that the review consider ways in which the RCSA Code could emphasise client

¹³ Law Council of Australia, *Submission 46*. See also JobWatch, *Submission 25*.

¹⁴ The RCSA Code is a non-prescribed voluntary industry code of conduct. The Australian Competition and Consumer Commission provides guidance to industry associations developing such codes but has no formal enforcement role. For prescribed industry codes and ACCC enforcement powers see *Competition and Consumer Act 2010* (Cth) pt IVB.

¹⁵ Recruitment and Consulting Services Association of Australia and New Zealand, *Code for Professional Conduct*, General Principle 1.

¹⁶ Australian Human Resources Institute, *By-Law 1: Code of Ethics and Professional Conduct*.

¹⁷ *Ibid.*

diversity, constructive engagement with mature age job seekers and age-related anti-discrimination and industrial relations legislative obligations,¹⁸ was supported by a number of key stakeholders.¹⁹ For example, the South Australian Government supported including the ‘principle of respect of client diversity and other minimum standards of professional and ethical conduct that discourage age discrimination practices across the recruitment industry’ in the RCSA Code.²⁰ Adage suggested that

every opportunity should be taken to leverage this review to campaign for mature age workers and making this audience a feature of the review—even a review is a marketing opportunity.²¹

4.16 The Code of Professional Practice developed by the Recruitment and Employment Confederation (REC) of the United Kingdom (UK Code) represents a useful model.²² The UK Code is binding on all corporate members of the REC and their associated companies.²³ 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.²⁴

4.17 The RCSA stated that it was committed to actively considering ‘ways in which the Code may further emphasise diversity, engagement with mature aged workers and responsibilities within its upcoming review’.²⁵ In addition, AHRI submitted that ‘there could be some value for AHRI to undertake an equivalent code-of-conduct review or a survey on the matter with our members, and we will look at the matter’.²⁶

18 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–2.

19 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*; ACTU, *Submission 88*; Australian Human Resources Institute, *Submission 87*; Brotherhood of St Laurence, *Submission 86*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; Diversity Council of Australia, *Submission 71*.

20 Government of South Australia, *Submission 95*.

21 Adage, *Submission 69*.

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

23 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 21 March 2013.

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

25 Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

26 Australian Human Resources Institute, *Submission 87*.

4.18 Conducting a review of industry codes of conduct would provide a useful opportunity to consider amendments, including to address barriers to workforce participation faced by mature age job seekers in the context of recruitment. In the ALRC's view, the most useful additions to such codes relate to diversity, engagement with mature age job seekers and legislative obligations. Such reviews also provide a timely opportunity to consider intersectional discrimination and difficulties faced by Indigenous mature age job seekers as well as those from culturally and linguistically diverse communities and job seekers with disability.

Recommendation 4-1 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 could 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.

Recommendation 4-2 The Australian Human Resources Institute should review its Code of Ethics and Professional Conduct to consider ways in which the Code could 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

4.19 The ALRC recommends that industry bodies such as AHRI and the RCSA provide recruitment consultants with ongoing training and guidance material about engaging constructively with and recruiting mature age job seekers. The training should be regular, consistent and targeted. This work should be conducted with support from the Australian Government, Australian Human Rights Commission (AHRC), unions, industry bodies and community organisations.

4.20 The results of a 2012 survey of recruitment professionals conducted by AHRI indicated approximately one-third of respondents (35%) believed their organisation was biased to some extent against employing mature age workers.²⁷ The survey also found that 56% of respondents considered negative perceptions of mature age people influenced employment decisions to some extent in their organisation or were unsure

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

whether employment decisions were influenced by such perceptions.²⁸ This was echoed in submissions to this Inquiry. For example, the South Australian Government, expressed the view that ‘discrimination on the basis of age is a prominent issue in the recruitment practices of many Australian private recruitment agencies’.²⁹

4.21 In addition, JobWatch noted that many ‘recruitment agencies do not know or understand their legal obligations’,³⁰ and 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’.³¹ AHRI conceded that ‘some organisations could be more conscious of their legal obligations in the area of workplace age discrimination’.³²

4.22 However, it appears that discriminatory practices and reluctance to engage mature age workers may arise as a result of recruiters’ ‘own view of older workers [as well as] under instructions (implicit or otherwise) from their clients’.³³ The ALRC makes a number of recommendations with respect to employers later in this chapter.

4.23 Addressing discriminatory treatment of mature age workers primarily requires broad attitudinal and cultural change. Many of the measures necessary to facilitate such change require multifaceted solutions, and some go beyond the scope of a law reform project like this Inquiry. For example, several key reports and a number of stakeholders have emphasised the need to provide labour market information, re-training and skills development, career guidance and other job-readiness assistance to mature age job seekers.³⁴

4.24 The ALRC suggests that the development and provision of education, training and guidance material for the recruitment industry about mature age job seekers may go some way to addressing these issues. This approach was supported by stakeholders.³⁵ It is designed to increase the awareness of those in recruitment of the

28 Australian Human Resources Institute, *Submission 87*.

29 Government of South Australia, *Submission 30*. See also Brotherhood of St Laurence, *Submission 54*; Diversity Council of Australia, *Submission 40*; WA Equal Opportunity Commission, *Submission 23*.

30 JobWatch, *Submission 25*. See also ACTU, *Submission 38*.

31 Diversity Council of Australia, *Submission 40*. See also Law Council of Australia, *Submission 46*.

32 Australian Human Resources Institute, *Submission 87*.

33 National Seniors Australia, *Submission 27*.

34 See, eg, National Seniors Productive Ageing Centre, *Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation* (2012), prepared for the Consultative Forum on Mature Age Participation; Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011); The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010).

35 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*; ACTU, *Submission 88*; Australian Human Resources Institute, *Submission 87*; Brotherhood of St Laurence, *Submission 86*; Diversity Council of Australia, *Submission 71*; South Australian Equal Opportunity Commission, *Submission 70*; Adage, *Submission 69*; Queensland Tourism Industry Council, *Submission 67*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*; 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*.

benefits of mature age workers, the difficulties mature age job seekers may face, as well as recruiter obligations and can build on existing developments in this area.

4.25 Stakeholders outlined a range of existing initiatives that could be extended or adapted in implementing this recommendation. For example, the RCSA submitted that it has coordinated a number of education and training programs focusing on diversity, including working with mature age workers, and in 2013 will be rolling out a Participation Forum with the aim of engaging Government, recruiters, employers and candidates to increase workforce participation.³⁶

4.26 AHRI noted it has

developed a workshop program on ‘Unconscious Bias’ that is marketed to organisations and individual practitioners and which takes up issues related to bias in recruitment, retention and promotion practices with respect to various sub-groups in the community such as those that relate to employment and ethnicity, religion, gender, disability, sexual preference and age.³⁷

4.27 AHRI has also conducted workshops including ‘Older Workers and Younger Managers’ and runs an annual National Diversity and Inclusion Conference. In addition, the *Investing in Experience Toolkit*, a practical guide developed in partnership with the Australian Industry Group (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 that provides a useful model for guidance material.³⁸

4.28 Both AHRI and the RCSA indicated they would be ‘open to developing other relevant intellectual property that could be used for training purposes in mature age employment’.³⁹ The RCSA indicated it proposes a ‘survey of members to gather information about workplace practices of members in working with mature aged candidates’.⁴⁰ In addition, the RCSA and AHRI Codes are supported by resource and education programs and the organisations have a Memorandum of Understanding in place that provides the basis for close cooperation between the two, including coordinated education and training programs.⁴¹ This provides a solid basis for the development and provision of the recommended education, training and guidance material.

4.29 However, AHRI cautioned that

people often do not see this as a compliance area of HR practice despite the prevalence of anti-discrimination laws, and so getting engagement that amounts to course enrolments can be difficult.⁴²

36 Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

37 Australian Human Resources Institute, *Submission 87*.

38 Australian Government, *Investing in Experience Tool Kit* (2012).

39 Australian Human Resources Institute, *Submission 87*.

40 Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

41 Ibid.

42 Australian Human Resources Institute, *Submission 87*.

4.30 Adage emphasised that, in light of the high turnover of recruitment consultants, regular and consistent training is important, and that

we need to be careful we don't feed into negative stereotypes of mature workers through dissemination of bulky, formal and outdated communications. The messaging and communication methods need to appeal to these individuals we are trying to influence.⁴³

4.31 In addition, the Federation of Ethnic Communities' Councils of Australia (FECCA) emphasised the barriers faced by particular groups of mature age workers, including for example those from culturally and linguistically diverse communities.⁴⁴ In the course of developing education, training and guidance material, ways these could appropriately address the barriers faced by Indigenous people, mature age job seekers from culturally and linguistically diverse backgrounds and those with disability should be considered.

Recommendation 4-3 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
- to assist recruitment agencies and consultants to engage constructively with, and recruit, mature age job seekers.

Recognition of best practice

4.32 A number of stakeholders have emphasised the importance of best practice approaches in the recruitment of mature age workers.⁴⁵ The ALRC recommends that both AHRI and the RCSA should recognise excellence in initiatives and programs involving the recruitment of mature age workers, including in workplace awards.

4.33 Recognition of best practice is particularly important in light of evidence suggesting that some 'recruiters may fail to provide an appropriate level of service' to mature age job seekers.⁴⁶ A 2012 survey of mature age job seekers conducted by

⁴³ Adage, *Submission 69*.

⁴⁴ See, eg. Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*.

⁴⁵ Law Council of Australia, *Submission 96*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*; South Australian Equal Opportunity Commission, *Submission 70*; Adage, *Submission 69*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*; and importantly Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*. See also: COTA, *Submission 51*; Comcare, *Submission 29*.

⁴⁶ Government of South Australia, *Submission 30*.

Adage found that 88% of respondents were ‘dissatisfied with the level of response received from recruiters’.⁴⁷

4.34 The work of mature age-specific recruitment initiatives and agencies are an important development in supporting workforce participation by mature age persons.⁴⁸ In addition, formal public recognition of employers, recruitment agencies or consultants who develop initiatives or workplace processes geared towards mature age job seekers and workers is important in engendering cultural and practical change.

4.35 Both AHRI and the 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.⁴⁹ The RCSA submitted that it will

actively consider the inclusion of a Workforce Participation Award within the awards program to provide public recognition of best practice from the recruitment industry in supporting workforce participation and diversity within the workforce, including mature aged workers.⁵⁰

4.36 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.⁵¹

Recommendation 4–4 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)

4.37 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. The *Fair Work Act* regulates ‘national system’ employers and employees.⁵² Employment that is not covered under the national industrial relations system remains regulated by the relevant state

⁴⁷ Adage, ‘Mature Jobseekers Not Happy With Recruiters, Employers’ (Press Release, 13 November 2012).

⁴⁸ 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 21 March 2013.

⁴⁹ Australian Human Resources Institute, *Age Diversity in the Workplace Award* <www.awards.ahri.com.au/diversity/age_diversity.php> at 21 March 2013.

⁵⁰ Recruitment and Consulting Services Association of Australia and New Zealand, *Submission 90*.

⁵¹ AARP, *Best Employers for Workers Over 50 Award—International* <<http://aarpinternational.prod.bridgelinesw.net/aarp-international/best-employers---international>> at 21 March 2013.

⁵² 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.

industrial relations systems. However, some entitlements under the *Fair Work Act* extend to non-national system employees.⁵³ The Act also creates a compliance and enforcement regime and establishes several bodies to administer the Act, including the Fair Work Commission (FWC)—previously Fair Work Australia—and the FWO.

4.38 As outlined in Chapter 1, in August 2012 the Australian Government released the final Report of the Fair Work Act Review.⁵⁴ On 1 January 2013, the provisions of the *Fair Work Amendment Act 2012* (Cth) implementing some of the Review's recommendations took effect.⁵⁵ In March 2013, the Fair Work Amendment Bill 2013 (Cth) was introduced into Parliament.⁵⁶

4.39 The ALRC makes recommendations about a number of aspects of the *Fair Work Act* to address legal barriers to workforce participation by mature age workers, including:

- the National Employment Standards (NES), in particular the right to request flexible working arrangements and provisions relating to notice of termination of employment;
- modern awards; and
- the general protections provisions.

Flexible working arrangements

4.40 There are a number of grounds upon which the right to request flexible work arrangements under the *Fair Work Act* could be extended. However, the Terms of Reference for this Inquiry require the ALRC to focus on barriers to work for mature age persons. There are two possible grounds upon which an extension is likely to provide most assistance to mature age workers: extending the right to all mature age workers on the basis of their age; or to all employees who have caring responsibilities, a high proportion of whom are mature aged.⁵⁷ The ALRC prefers the latter approach

53 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.

54 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012). The Australian Government had committed to reviewing the operation of the Act two years after its commencement: Explanatory Memorandum, Fair Work Bill 2008 (Cth).

55 *Fair Work Amendment Act 2012* (Cth); B Shorten (Minister for Employment and Workplace Relations), 'Government implements first tranche response to Fair Work Act Review' (Press Release, 15 October 2012).

56 Fair Work Amendment Bill 2013 (Cth). Following introduction the Bill was referred to the Senate Standing Committees on Education Employment and Workplace Relations which is due to report in May 2013 and the House of Representatives Standing Committee on Education and Employment. For Australian Government announcements about relevant amendments, see, eg: B Shorten (Minister for Employment and Workplace Relations), 'Gillard Government to Further Enhance Fair Work Act' (Press Release, 8 March 2013); B Shorten (Minister for Employment and Workplace Relations), 'Expanding the Right to Request Flexible Work Arrangements to Help Modern Australian Families' (Press Release, 11 February 2013).

57 In light of the often gendered nature of caring, such a reform is of particular importance to mature age women: see, eg, Chapter 2.

and recommends that s 65 of the *Fair Work Act* be amended to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

The importance of flexibility

4.41 The Consultative Forum on Mature Age Participation 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’.⁵⁸ Flexible working arrangements may allow mature age workers to prolong workforce participation, maintain workforce attachment and facilitate the participation of those whose caring responsibilities affect their ability to participate in the paid workforce. This is particularly important for mature age workers: Australian Bureau of Statistics (ABS) figures indicate that the likelihood of a person providing care to a person with disability or an elderly person increases with age and that the majority of carers in Australia are aged 45 years and over.⁵⁹ In addition, the Diversity Council of Australia submitted that findings from its ‘Grey Matters’ survey highlighted that

A considerable number of mature-age employees reported having current caring responsibilities. Some 13% reported current caring roles for elderly family members, 13% for children and grandchildren, 9% for a family member with health issues and 7% for a family member with a disability.⁶⁰

4.42 The Advisory Panel on the Economic Potential of Senior Australians emphasised 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.⁶¹

4.43 As a result, examining a range of legislative and other mechanisms for ensuring access to flexible working arrangements is central to enabling mature age workers to enter, re-enter or remain in the paid workforce.⁶²

58 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.

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

60 Diversity Council of Australia, *Submission 40*.

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

62 A number of stakeholders made submissions with respect to the structure and operation of individual flexibility arrangements (IFAs). However, as outlined in the Discussion Paper, given the limited use of IFAs by mature age workers and the systemic nature of any reforms aimed at IFAs, the ALRC does not consider it is appropriate to make any recommendations about IFAs: Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), [2.67]–[2.71].

The right to request flexible working arrangements

4.44 Under the NES,⁶³ an employee who is a parent or otherwise has responsibility for a child under school age, or under 18 and has a disability, may request a change in working arrangements to assist with the care of that child.⁶⁴ To be eligible to request flexible work arrangements, the employee must satisfy certain service requirements.⁶⁵ Such a request may only be refused by an employer on ‘reasonable business grounds’.⁶⁶

4.45 The ALRC’s proposal to extend the right to request flexible working arrangements to all employees who have caring responsibilities received support from a number of key stakeholders.⁶⁷ A number of bodies and reports have recommended the extension of the provision along these lines. For example, 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 those who are caring for adults with disabilities, mental illness, chronic illness or who are frail aged’.⁶⁸ 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’.⁶⁹ In addition, in 2013 the AHRC’s Report, *Investing in Care*, recommended extending the right to ‘include parents of children of all ages and to encompass all forms of family and carer responsibilities such as disability and elder care’.⁷⁰

63 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 and cannot be excluded by an enterprise agreement or modern award, discussed below. The NES were introduced following significant consultation to provide a ‘safety net which is fair for employers and employees and supports productive workplaces’: Explanatory Memorandum, Fair Work Bill 2008 (Cth), 25. The NES replaced the Australian Fair Pay and Conditions Standard (AFPCS) and many of the entitlements under the AFPCS and then NES arise from a long history of test cases: 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.

64 *Fair Work Act 2009* (Cth) 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.

65 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: *Ibid* s 65.

66 *Ibid* s 65(5).

67 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–5. See, eg, National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Carers Australia, *Submission 81*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*; Queensland Tourism Industry Council, *Submission 67*; Suncorp Group, *Submission 66*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*; The Employment Law Centre of WA, *Submission 57*.

68 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.

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

70 Australian Human Rights Commission, *Investing in Care: Recognising and Valuing Those Who Care*, Research Report, Volume 1 (2013), 38.

4.46 Similarly, 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. It also applies to those with caring responsibilities for a wide range of adults including: relatives, spouses, civil partners and other household members.⁷¹

4.47 Some stakeholders and reports have suggested a wider approach—including extending the right to request on the basis of age—or more broadly.⁷² For example, Women in Social and Economic Research (WiSER) suggested that there are a range of reasons aside from caring why mature age persons may require flexible working arrangements, including for example:

poor health, injuries and other life circumstances can make it difficult for older people to work full-time, standard hours. The RTR is important to all older workers and not only those with informal caring roles.⁷³

4.48 The Advisory Panel on the Economic Potential of Senior Australians recommended that the right be extended to persons aged 55 and over.⁷⁴ In 2012, the Fair Work Amendment (Better Work/Life Balance) Bill 2012 was introduced that would, among other things, amend the *Fair Work Act* by extending the right to request to all employees. It would also remove the flexible working arrangements provisions from the NES and create a new part of the Act.⁷⁵ In addition, in March 2013, the Fair Work Amendment Bill 2013 (Cth) was introduced to amend the *Fair Work Act*. The proposed amendments include extending the right to request to a range of workers, including those with caring responsibilities and employees aged 55 years and over.⁷⁶

4.49 However, peak industry bodies such as the Australian Chamber of Commerce and Industry (ACCI) and the Ai Group have expressed strong opposition to the extension of the right to request flexible working arrangements provisions on the basis of either caring responsibilities or mature age.⁷⁷ For example, the Ai Group emphasised that:

in practice, many mature age workers request and are granted flexible work arrangements without using the right to request provisions. This is the result of open dialogue between employees and their employers about achieving meaningful

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 See, eg, Women in Social & Economic Research (WiSER), *Submission 72*.

73 Ibid.

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

75 The Bill also includes other significant changes, including 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. At the time of writing the Bill was before the House of Representatives.

76 Fair Work Amendment Bill 2013 (Cth) pt 3.

77 Australian Industry Group, *Submission 97*; Australian Chamber of Commerce and Industry, *Submission 85*; Chamber of Commerce and Industry of Western Australia, *Submission 76*.

flexibility in the workplace. This, in our view, is a more effective means of promoting working arrangements that balance the needs of mature age employees with the operational requirements of their employers.⁷⁸

4.50 Stakeholders also expressed concerns about possible stigmatisation of mature age workers if the right to request were extended to mature age workers on the basis of age alone.⁷⁹

On what basis should the right to request be extended?

4.51 Amendment to the NES would involve a significant change to the *Fair Work Act* framework. However, in the ALRC's view, amendment of the NES to extend the right to request is an important reform to enable the workforce participation of mature age persons.

4.52 The ALRC considers extending the right to request to all employees with caring responsibilities is the preferable approach to reform in this area. Given that the largest proportion of carers are mature age people, extension of the right to request to employees with caring responsibilities would predominantly benefit mature age workers. Extension on this basis would provide mature age workers with the right to request flexible working arrangements to accommodate their caring responsibilities and address a key barrier to ongoing workforce participation. Such reform balances one of the key objects underlying the right to request—to help employees balance their work and family responsibilities by providing flexible working arrangements—with the need to enable the workforce participation of mature age workers.⁸⁰ 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. It would also provide a statutory basis for such requests. Extension of the right to request on this basis, rather than on the basis of age alone, is also consistent with an incremental purposive extension of the right to request.

Recommendation 4–5 Section 65 of the *Fair Work Act 2009* (Cth) should be amended to extend the right to request flexible working arrangements to all employees who have caring responsibilities.

Complementary approaches

4.53 In addition to recommending extension of the right to request provisions, the ALRC suggests a range of other complementary approaches to encourage the uptake of flexible working arrangements by mature age workers.

⁷⁸ Australian Industry Group, *Submission 97*.

⁷⁹ See, eg, Brotherhood of St Laurence, *Submission 54*; COTA Victoria, *Consultation*, by telephone, 30 May 2012.

⁸⁰ *Fair Work Act 2009* (Cth) s 3.

4.54 The Australian Work and Life Index 2012 indicated that 20.6% of Australian employees had made a request for a change to working arrangements in the past 12 months, although the proportion that relied upon the formal right to request provision is unclear.⁸¹ The survey indicated that a majority of Australian employees were unaware of the existence of the right to request provisions,⁸² and that there has been no significant change in request-making following enactment of the right to request provisions.⁸³

4.55 Further, FECCA emphasised that provisions such as the right to request may be unfamiliar concepts for mature age people from culturally and linguistically diverse backgrounds. As a result, ‘they may not have the confidence to assert their rights, even if they are aware of them, for a range of inter-linked reasons such as unfamiliarity, distrust of institutions and a lack of confidence’.⁸⁴

4.56 The ALRC recommends that, as part of the National Mature Age Workforce Participation Plan discussed in Chapter 3, attention be paid to ensuring that the legislative right to request is complemented by initiatives designed to encourage

worker and management knowledge of the new right, a commitment to genuinely enact the right ... worker confidence that they will not be directly or indirectly punished or stigmatised for asking, management’s perception that agreeing to requests is worthwhile and that unreasonable refusal will have negative consequences for them.⁸⁵

4.57 There are a range of useful government and industry initiatives and reports focused on promoting flexible work arrangements as standard business practice that could contribute to achieving these changes.⁸⁶ For example, the Diversity Council of Australia outlined a range of strategies to ‘mainstream flexible work in the Australian labour market’, including changing language, building flexibility into business strategy, engaging at a management level as well as developing broader community awareness.⁸⁷ In their joint submission, DEEWR, DHS and FaHCSIA highlighted the role that teleworking initiatives and the Centre for Workplace Leadership may play in this area.⁸⁸

81 N Skinner, C Hutchinson and B Pocock, *Australian Work and Life Index 2012 The Big Squeeze: Work, Home and Care in 2012* (2012), 62.

82 Ibid, 61.

83 Ibid, 63.

84 Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*.

85 N Skinner, C Hutchinson and B Pocock, *Australian Work and Life Index 2012 The Big Squeeze: Work, Home and Care in 2012* (2012), 60.

86 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*; AHRC *Investing in Care Toolkit* (2013); Department of Education, Employment and Workplace Relations, *Corporate Champions* <www.deewr.gov.au/experience-corporate-champions> at 21 March 2013.

87 Diversity Council of Australia, *Submission 71*.

88 DEEWR, DHS and FaHCSIA, *Submission 101*.

4.58 In addition, the ALRC's proposal that the FWO should develop a guide to negotiating and implementing flexible working arrangements for mature age workers,⁸⁹ received support from a range of stakeholders.⁹⁰

4.59 The FWO has developed a fact sheet about the right to request as well as a Best Practice Guide on the use of individual flexibility arrangements. The ALRC recommends that the FWO, in consultation with unions, employer organisations and seniors organisations, amend the fact sheet and associated material to include information for mature age workers. A Best Practice Guide on the right to request could expand the information provided in the fact sheet and should: include case studies involving mature age workers; outline circumstances in which employees might seek flexible work arrangements; provide employers with guidance on considering and accommodating requests; and include model flexibility strategies. The material should be accessible for all members of the community—including Indigenous people, members of culturally and linguistically diverse communities and people with disability.

Recommendation 4–6 The Fair Work Ombudsman (FWO) has developed material relevant to negotiating and implementing flexible working arrangements. The FWO should amend such material to include information for mature age workers, in consultation with unions, employer organisations and seniors organisations.

Other concerns

4.60 Many stakeholders expressed concerns, echoed in submissions to the Fair Work Act Review, about the current structure and operation of the right to request provision, including in relation to eligibility, its procedural nature, the limited availability of enforcement mechanisms and the grounds for refusal. For example, Carers Australia expressed particular concern about the provision failing to 'reflect the diversity of caring situations' and the service requirements which 'effectively remove the capacity for carers seeking to enter or re-enter the workforce to request flexible working arrangements'.⁹¹

4.61 The Law Institute of Victoria submitted that there should be a right of review for unsuccessful requests for flexible working arrangements and that the FWC should also

89 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–6.

90 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Carers Australia, *Submission 81*; Australian Federation of Disability Organisations, *Submission 78*; Queensland Tourism Industry Council, *Submission 67*; DOME Association, *Submission 62*; JobWatch, *Submission 60*; R Christiansen, *Submission 58*.

91 Carers Australia, *Submission 81*.

have the power to make binding orders where a request for flexible working arrangements has been denied for reasons which do not amount to reasonable business grounds.⁹²

- 4.62 The Australian Council of Trade Unions (ACTU) expressed the view that simply extending the scope of the right to request flexible work arrangements without amending the legislation to include real, enforceable procedural rights, does not address the fact the provision, in practice, is nothing more than a right to ask for something.⁹³

4.63 Stakeholder concerns about the nature and awareness of the existing provision are significant and the Fair Work Act Review Panel made a number of recommendations for reform in this area.⁹⁴ The Fair Work Amendment Bill 2013 (Cth) provides a non-exhaustive list of what might constitute ‘reasonable business grounds’,⁹⁵ but does not appear otherwise to address these concerns. While recommending systemic reform of the provision goes beyond the scope of this Inquiry, the ALRC suggests that the Australian Government examine these concerns in developing any further proposed amendments to the *Fair Work Act*.

Notice of termination of employment

4.64 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.⁹⁶ The amount of notice or payment in lieu of notice is determined according to the employee’s period of continuous service with the employer.⁹⁷ However, that period is increased by one week for employees over age 45 who have completed at least two years continuous service.⁹⁸ The ALRC recommends that the Australian Government consider amending s 117(3)(b) to increase this period.

4.65 The origins of the provision lie in the 1984 *Termination, Change and Redundancy Case* of the former Australian Conciliation and Arbitration Commission.⁹⁹ In deciding that employees over 45 years of age should be entitled to an additional week’s notice of termination after satisfying service requirements, the Commission noted that:

Extended notice based on age is also supported by the evidence before us which indicates that persons in higher age groups often find it more difficult to obtain and adapt to comparable work elsewhere.¹⁰⁰

92 Law Council of Australia, *Submission* 96.

93 ACTU, *Submission* 88.

94 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 95–99, rec 5.

95 Fair Work Amendment Bill 2013 (Cth).

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

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

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

99 *Termination, Change and Redundancy Case* (1984) 1 IR 34.

100 *Ibid*.

4.66 Mature age people continue to remain unemployed for longer than their younger counterparts. In May 2012, the average duration of unemployment for people aged aged 45 and over was 62 weeks, compared to 34 weeks for job seekers aged 25–44.¹⁰¹

4.67 Evidence also 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.¹⁰² 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’.¹⁰³

4.68 Extending the minimum period of notice of termination may provide incentives for employers to retain mature age workers, given the additional costs potentially associated with terminating a mature age worker’s employment. Where the employment is terminated, the longer notice period would also provide the worker with additional time or remuneration to facilitate the job search process.

4.69 Stakeholder responses to extending the notice period were mixed.¹⁰⁴ For example, the Employment Law Centre of Western Australia submitted that ‘an increase in the minimum period of notice would reflect the greater difficulty that older employees may encounter in finding alternative employment’.¹⁰⁵ However, stakeholders such as ACCI and the Ai Group opposed any extension on the basis that the provision of additional notice for employees over 45 years is a ‘long-standing workplace standard’,¹⁰⁶ the ‘lack of evidence to justify it and [that] the unintended consequences would outweigh any perceived benefit’.¹⁰⁷

4.70 The Australian Government has introduced two sets of legislative responses to the Fair Work Act Review. While the Fair Work Act Review determined that the notice of termination provisions ‘appear to be operating as intended’,¹⁰⁸ the ALRC suggests that the Australian Government should consider whether these provisions could be

101 DEEWR, DHS and FaHCSIA, *Submission 101*, 47.

102 Westfield Wright Pty, *Attitudes to Older Workers* (2012), prepared for the Financial Services Council, 13. Research also suggests mature age workers are targeted in times of economic downturn: see, eg, M Bittman, M Flick and J Rice, *The Recruitment of Older Australian Workers: A Survey of Employers in a High Growth Industry*, Social Policy Research Centre Report 6/01 (2001), 12.

103 JobWatch, *Submission 25*.

104 In the Discussion Paper, the ALRC proposed that the Australian Government consider amending s 117(3)(b) of the *Fair Work Act* to provide 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 four weeks, rather than one week: Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–8.

105 The Employment Law Centre of WA, *Submission 57*. Other stakeholders in support included ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Women in Social & Economic Research (WiSER), *Submission 72*; R Christiansen, *Submission 58*.

106 Australian Industry Group, *Submission 97*.

107 Australian Chamber of Commerce and Industry, *Submission 85*. Caution recommended by Diversity Council of Australia, *Submission 71*.

108 Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 104.

amended to encourage retention of mature age employees. The ALRC therefore recommends that in the course of considering amendments to the *Fair Work Act*, the Australian Government should consider amending the provision to increase the minimum notice period for employees over 45 years of age.

Recommendation 4–7 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. In the course of amending the *Fair Work Act 2009* (Cth), the Australian Government should consider increasing this period.

Modern awards

4.71 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.¹⁰⁹ The ALRC considers that the inclusion or modification of terms in modern awards, which may assist in addressing barriers to workforce participation for mature age workers, should be considered in the course of the 2014 review of modern awards.

How do modern awards operate?

4.72 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 included in a modern award.¹¹⁰ Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement¹¹¹ and is not a ‘high income employee’¹¹² may be covered by a modern award.¹¹³ However, ‘only 15.2% of the Australian workforce has their pay and conditions set by awards, while approximately 80% derive their pay and conditions from collective and individual agreements’.¹¹⁴ 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 the FWC.

109 Beginning in 2008, the Australian Industrial Relations Commission, and then its successor Fair Work Australia (now Fair Work Commission) 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. The Fair Work Commission continues the modernisation process including by conducting a review of modern awards as well as in relation to enterprise instruments and termination of instruments. See, eg, Fair Work Commission, *About Award Modernisation* <www.fwc.gov.au> at 21 March 2013.

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

111 Ibid s 57.

112 Ibid s 47(2).

113 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.

114 DEEWR, DHS and FaHCSIA, *Submission 101*.

Reviews of modern awards

4.73 In 2012–2013, the FWC is undertaking a review of all modern awards, based on applications to vary modern awards.¹¹⁵ The scope of the 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.¹¹⁶ The current review is scheduled to conclude in May 2013.¹¹⁷

4.74 In addition, the *Fair Work Act* provides for review of each modern award every four years.¹¹⁸ The first review of this kind will commence in 2014, and the FWC has indicated that it will be broader in scope than the 2012–2013 review.¹¹⁹ The reviews are ‘the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.¹²⁰

4.75 The ALRC proposed that, in the course of the 2014 review, the inclusion or modification of terms in the awards to encourage workforce participation of mature age workers should be considered.¹²¹ The proposal received support from many stakeholders.¹²²

4.76 However, in its joint submission, DEEWR, DHS and FaHCSIA suggested that ‘encouraging mature worker participation might be more effectively pursued through other initiatives’.¹²³ The Chamber of Commerce and Industry of Western Australia (CCIWA) opposed the proposal. It submitted that such terms are ‘not an appropriate matter for inclusion in awards and in-turn should not be considered during the four-yearly award review process’, as modern awards

set minimum terms and conditions of employment (as opposed to statements of aspiration). CCI[WA] submit that terms that relate to encouraging mature age workers participation in the workforce cannot be appropriately categorised as a term or condition of employment; and if such terms are included, they will increase the already onerous regulatory burden on employers.¹²⁴

115 See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6. The *Fair Work Act 2009* (Cth) 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.

116 The modern award review is unlikely to revisit issues already determined during the award modernisation process unless there are cogent reasons to do so, such as where there has been a significant change in circumstances: *Modern Award Review 2012 [2012] FWA FB 5600* at [89], [99].

117 For an outline and timetable on the Review, see *Modern Award Review 2012–Timetable [2012] FWA 5721*.

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

119 *Modern Award Review 2012 [2012] FWA FB 5600*, [99].

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

121 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–7.

122 Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*; DOME Association, *Submission 62*; JobWatch, *Submission 60*.

123 DEEWR, DHS and FaHCSIA, *Submission 101*.

124 Chamber of Commerce and Industry of Western Australia, *Submission 76*.

4.77 While it may be a matter for parties to make applications for variation in the course of the review,¹²⁵ the ALRC considers that the legislatively-mandated FWC review process presents the appropriate mechanism for the FWC to consider issues relating to mature age workers in the context of modern awards.

What should be considered in the 2014 review?

4.78 The ALRC considers that s 139(1) of the *Fair Work Act*—which outlines the terms that may be included in modern awards—is sufficiently broad to allow scope for the inclusion of any such additional terms as required. However, terms that are discriminatory must not be included in modern awards, an issue that will need to be considered by the FWC.¹²⁶

4.79 In exercising its functions, the FWC 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.¹²⁷

4.80 In addition, stakeholders raised a number of issues that could be considered in the review. For example, the Government of South Australia raised 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.¹²⁸

4.81 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’.¹²⁹

4.82 The 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.¹³⁰

4.83 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

125 See, eg, Australian Industry Group, *Submission 97*.

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

127 Ibid s 578.

128 Government of South Australia, *Submission 30*.

129 Ibid.

130 ACTU, *Submission 38*. See also ACTU, *Submission 88*.

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).¹³¹

4.84 In light of the issues outlined above, the ALRC recommends that, in the course of the 2014 FWC review, the inclusion or modification of terms to remove barriers to workforce participation by mature age workers should be considered.

Recommendation 4–8 From 2014, the Fair Work Commission will conduct the first four-yearly review of modern awards. The review should consider the inclusion or modification of terms to encourage workforce participation of mature age workers.

Interaction between the *Fair Work Act* and anti-discrimination legislation

4.85 There is substantial overlap between the general protections provisions under the *Fair Work Act* and anti-discrimination legislation at a Commonwealth, state and territory level.¹³² The ALRC recommends that the AHRC and the FWC should develop guidance to clarify how these interact and outline potential avenues for redress under this legislation for mature age workers.

4.86 A number of stakeholders suggested that ‘Commonwealth anti-discrimination laws should cover the field in discrimination legislation’.¹³³ However, as explained in the joint submission from DEEWR, DHS and FaHCSIA,

among the reasons the Government included anti-discrimination provisions in the Act’s general protections was to address situations where breaches of both workplace relations laws and anti-discrimination obligations occurred. This allows most employment-related matters to be dealt with simultaneously, rather than the affected parties participating in multiple claims in multiple jurisdictions.¹³⁴

4.87 Other stakeholders, such as Victoria Legal Aid, noted that:

due to the complexity of Australian anti-discrimination law and the various options for legal redress that are available, it is common for clients to make a complaint under legislation that is not the most appropriate to the subject matter of their complaint.¹³⁵

4.88 Victoria Legal Aid suggested that one improvement aimed at addressing this issue would involve updating and simplifying information available on the National Anti-Discrimination Information Gateway to

assist people, particularly those who do not have legal representation, to understand and evaluate the available options. For example, an aggregated comparative table setting out the protected attributes, requirements and limitations and the available

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

132 For general protections see *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

133 Diversity Council of Australia, *Submission 71*; Suncorp Group, *Submission 66*.

134 DEEWR, DHS and FaHCSIA, *Submission 101*.

135 Victoria Legal Aid, *Submission 83*.

remedies under the respective statutes would assist potential complainants to make this assessment.¹³⁶

4.89 The ALRC considers that the AHRC and the FWC should work cooperatively, including with the Australian Council of Human Rights Agencies,¹³⁷ to develop guidance which clarifies the interaction of the general protections provisions under the *Fair Work Act* and Commonwealth, state and territory anti-discrimination legislation. The guidance should also outline the potential avenues for redress for mature age workers.

Recommendation 4-9 The Australian Human Rights Commission and the Fair Work Commission, in consultation with the Australian Council of Human Rights Agencies, should develop guidance to:

- (a) clarify the interaction of the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth, state and territory anti-discrimination legislation; and
- (b) outline potential avenues for redress under this legislation for mature age workers.

Compulsory retirement

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

4.91 The ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. This position was strongly supported by stakeholders throughout the Inquiry.¹³⁸ The imposition of compulsory retirement fails to account for the differing capacities of individuals at older ages, reinforces stereotypes about the abilities of mature age workers and reduces utilisation of the workforce contribution of mature age workers.¹³⁹ National Seniors emphasised that,

¹³⁶ Ibid.

¹³⁷ The Australian Council of Human Rights Agencies is comprised of Australia's national human rights institution, the AHRC, and human rights bodies at the state and territory level.

¹³⁸ See, eg, Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Federation of Disability Organisations, *Submission 78*; Women in Social & Economic Research (WiSER), *Submission 72*; Suncorp Group, *Submission 66*; JobWatch, *Submission 60*; Government of South Australia, *Submission 30*.

¹³⁹ Law Council of Australia, *Submission 46*; JobWatch, *Submission 25*. See also World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011), 47.

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.¹⁴⁰

4.92 It may be necessary in some circumstances to assess a person's capacity to remain in their position. For example, the Ai Group emphasised that in some cases age-based restrictions 'are necessary and justified on health and safety grounds'.¹⁴¹ However, individual capacity-based assessments can account for health and safety concerns, and are preferable to imposing a compulsory retirement age.¹⁴² 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 job, regardless of their age',¹⁴³ an approach echoed in submissions by other stakeholders.¹⁴⁴

4.93 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, such bodies may benefit from guidance. The ALRC proposed that the AHRC 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'.¹⁴⁵

4.94 Stakeholders also emphasised the need for industry and professional bodies to recognise and account for potential barriers faced by mature age workers in renewing their professional qualifications. For example, the ACTU submitted that

re-qualification schemes often require workers to attend professional development training before their license can be renewed. In some industries, due to limited resources there may not be sufficient training opportunities for all staff. Older workers may therefore be denied access to career and professional development training in favour of younger workers, which can negatively affect their re-qualification.¹⁴⁶

4.95 The ACTU suggested that, 'if an older worker can demonstrate that they have attempted to attend refresher training but have been denied the opportunity, they should not be restricted from re-registering on this basis' alone.¹⁴⁷

4.96 The ALRC considers that the provision of national principles or guidelines may assist industry and professional bodies in reviewing licensing or re-qualification requirements with a view to removing age-based restrictions in favour of capacity-based requirements. Such principles and guidelines may also assist to address issues

140 National Seniors Australia, *Submission 27*.

141 Australian Industry Group, *Submission 37*. See also JobWatch, *Submission 60*.

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

143 Law Council of Australia, *Submission 46*.

144 See, eg Suncorp Group, *Submission 66*; Diversity Council of Australia, *Submission 40*; ACTU, *Submission 38*.

145 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–9.

146 ACTU, *Submission 88*. See also Australian Active Doctors Association Incorporated, *Submission 35* in relation to senior doctors.

147 ACTU, *Submission 88*.

such as those raised with respect to access to training opportunities and should be developed in cooperation with industry and professional bodies.

Recommendation 4–10 Professional associations and industry representative groups are often responsible for developing or regulating licensing or re-qualification requirements. The Australian Human Rights Commission should facilitate the development of 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.

Judicial and quasi-judicial officers

4.97 The ALRC recommends that the Australian Government should initiate an independent inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

4.98 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.¹⁴⁸ While the section provides that Parliament may make a law fixing a lower age, it does not make such provision for a higher age.¹⁴⁹

4.99 There is jurisdictional inconsistency in the compulsory retirement provisions relating to other 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.¹⁵⁰ Inconsistency also arises as a result of provisions for the appointment of acting judges and magistrates in some jurisdictions beyond these ages.¹⁵¹

4.100 While such 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'.¹⁵²

148 *Australian Constitution* s 72.

149 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.

150 *Federal Magistrates Act 1999* (Cth) s 9, sch 1 pt 1 cl 1(4); *Judicial Officers Act 1986* (NSW) s 44(1), (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), (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).

151 For example, in NSW acting judges and magistrates can be appointed for 12 months up to either age 75 or 77: *Supreme Court Act 1970* (NSW) s 37; *District Court Act 1973* (NSW) s 18; *Land and Environment Court Act 1979* (NSW) s 11; *Local Court Act 2007* (NSW) s 16.

152 Government of South Australia, *Submission 30*.

4.101 In the Discussion Paper, the ALRC proposed that the Australian Government should initiate an inquiry to consider removing the compulsory ages of judicial and quasi-judicial appointments.¹⁵³ Key stakeholders, including the Law Council, expressed support for such a review.¹⁵⁴

4.102 The ALRC prefers this approach to recommending immediate removal of compulsory retirement ages as suggested by some stakeholders,¹⁵⁵ particularly in light of the complexities associated with removing compulsory retirement for judicial officers such as Constitutional requirements and public policy reasons for compulsory retirement. There may also be flow-on effects with respect to judicial pensions.¹⁵⁶

4.103 The ALRC suggests that the inquiry should be conducted in cooperation with state and territory governments and consider current inconsistencies and alternatives to compulsory retirement ages. At a minimum the inquiry should consider national consistency in the compulsory retirement ages of judicial and quasi-judicial appointments.

Recommendation 4–11 The Australian Government should initiate an independent inquiry to review the compulsory retirement ages of judicial and quasi-judicial appointments.

Military personnel

4.104 The ALRC recommends that the Australian Government initiate an independent inquiry to review the compulsory retirement ages for Australian Defence Force (ADF) personnel.

4.105 The compulsory retirement age for ADF personnel is 60 years and 65 years for reservists. 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 to 30 June 2012, 35 ADF personnel were granted an extension to their compulsory retirement age.¹⁵⁷

4.106 While the current average number of years of service for ADF personnel is nine years,¹⁵⁸ 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.¹⁵⁹

153 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–10.

154 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; JobWatch, *Submission 60*.

155 See, eg. National Seniors Australia, *Submission 27*.

156 See *Judges' Pensions Act 1968* (Cth).

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

158 Ibid.

159 Ibid. Of the 50 ADF personnel over 60 years of age, 49 were men and one was a woman.

4.107 The ALRC favours individual capacity-based assessments and proposed that the Australian government should initiate an inquiry to review the compulsory retirement ages for military personnel.¹⁶⁰

4.108 While a number of stakeholders supported this approach,¹⁶¹ some stakeholders expressed concerns. For example, 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’.¹⁶² 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.¹⁶³

4.109 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’.¹⁶⁴ However, ADSO did not oppose the current provision for the extension of compulsory retirement age by the Minister or Chief.

4.110 The Government of South Australia expressed concern that ‘mature military personnel in occupations associated with increased physical discomfort or physical demands may be further disadvantaged by increases to mandatory retirement ages’.¹⁶⁵ The ALRC is of the view that a shift to a capacity rather than age-based compulsory retirement regime is unlikely to disadvantage military personnel in this way. Rather, it would provide military personnel who wish to remain in the ADF beyond age 60 (or 65 for reservists) an opportunity, but no compulsion, to do so, thereby removing a barrier to work for mature age military personnel.

4.111 The Defence, Science and Technology Organisation, in partnership with the University of Wollongong, is currently completing a Physical Employment Standards Review Project.¹⁶⁶ The Department of Defence ‘plans to implement the new employment standards that focus on removing barriers for women across all three

¹⁶⁰ Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–11.

¹⁶¹ See, eg, ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; JobWatch, *Submission 60*.

¹⁶² Alliance of Defence Service Organisations, *Submission 49*.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Government of South Australia, *Submission 95*.

¹⁶⁶ 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: Defence Science and Technology Organisation, Physical Employment Standards, <<http://www.dsto.defence.gov.au/research/6962/>> at 21 March 2013; 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.

Services in the first phase of its five year plan'.¹⁶⁷ The focus of the new standards is on removing barriers for women in the ADF. However, as this projects seeks to identify objective criteria for physical standards across the ADF, the ALRC suggests that this, and similar projects,¹⁶⁸ may provide a useful basis upon which to reconsider the compulsory retirement ages.

4.112 The ALRC therefore recommends that the Australian Government initiate an independent inquiry to review the compulsory retirement ages for ADF personnel. Recommending such a review recognises the concerns expressed by stakeholders 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. It should also consider 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.¹⁶⁹

Recommendation 4–12 The Australian Government should initiate an independent inquiry to review the compulsory retirement ages for military personnel.

Regulation and monitoring framework

4.113 There are a number of bodies within the employment law framework that have responsibility for regulation and monitoring of obligations and requirements under legislation such as anti-discrimination and industrial relations legislation. In this section the ALRC examines the role of the FWO and recommends that in conducting national campaigns and audits the FWO should consider issues relating to mature age workers. The ALRC also considers the potential role of a new reporting framework or body, like that of Workplace Gender Equality Agency, with respect to age.

A role for the FWO

4.114 The ALRC recommends that the FWO build into its national campaigns and audits, consideration of employment practices that affect mature age workers and job seekers.

¹⁶⁷ W Snowdon (Minister for Defence Science and Personnel), 'New Physical Standards Open Paths for Women in Defence' (Press Release, 27 November 2012).

¹⁶⁸ For example, arising from the research projects and studies presented at the First Australian Conference on Physiological and Physical Employment Standards: N Taylor and D Billing (eds), 'Physiological and Physical Employment Standards I' (Paper presented at Proceedings from the First Australian Conference on Physiological and Physical Employment Standards, Canberra, 27–28 November 2012).

¹⁶⁹ Compulsory retirement ages for most ADF personnel were increased in 2007. 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].

4.115 The ALRC considers that the FWO is well placed to play a key role in this area. The FWO is an independent statutory office created by the *Fair Work Act*.¹⁷⁰ 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.¹⁷¹ 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.¹⁷²

4.116 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*,¹⁷³ including through targeted compliance and audit campaigns. In addition, in October 2012, the FWO launched its first age discrimination prosecution.¹⁷⁴

4.117 In the Discussion Paper, the ALRC proposed that the FWO ‘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’.¹⁷⁵

4.118 A number of stakeholders supported the proposal.¹⁷⁶ However, the FWO submitted that it

conducts four national campaigns per year. In order to ensure that these campaigns provide the most benefit for the community, the FWO prepares a four year, evidence based, targeted campaign strategy focusing on high risk industries.¹⁷⁷

¹⁷⁰ *Fair Work Act 2009* (Cth) s 681.

¹⁷¹ *Ibid* s 682(1).

¹⁷² Fair Work Ombudsman, *Investigations* <<http://www.fairwork.gov.au/complaints/the-complaints-process/pages/investigations.aspx>> at 21 March 2013; Fair Work Ombudsman, *Audits and Campaigns* <www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx> at 21 March 2013.

¹⁷³ Centre for Employment and Labour Relations Law, University of Melbourne, *Submission to Fair Work Act Review* (17 February 2012), 9.

¹⁷⁴ FWO, ‘Court Action Over Restaurant’s Response to Employee’s Request for Long Service Leave’ (Press Release, 9 October 2012).

¹⁷⁵ Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 2–1.

¹⁷⁶ National Welfare Rights Network (NWRN), *Submission* 99; Law Council of Australia, *Submission* 96; Government of South Australia, *Submission* 95; ACTU, *Submission* 88; Brotherhood of St Laurence, *Submission* 86; Australian Federation of Disability Organisations, *Submission* 78; Diversity Council of Australia, *Submission* 71; DOME Association, *Submission* 62.

4.119 While the recruitment industry was not identified as a high risk industry and is currently not included in the four year plan, the FWO indicated that it will ‘consider opportunities to address recruitment practices during targeted campaigns in priority industries’.¹⁷⁸ The FWO suggested that it could ‘address non-compliant recruitment practices affecting mature age job seekers and workers in the course of compliance and education activities’.¹⁷⁹

4.120 The FWO can play a role in examining and addressing employment practices that affect mature age job seekers and workers across a range of industries. The ALRC recommends that in conducting its campaigns and audits, the FWO should consider issues relating to mature age workers and job seekers.

Recommendation 4–13 In conducting national campaigns and audits to ensure compliance with Commonwealth workplace laws, the Fair Work Ombudsman should ensure issues relating to mature age workers and job seekers are considered.

New reporting framework or body

4.121 In the Discussion Paper, the ALRC asked whether the Australian Government should 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, now the Workplace Gender Equality Agency (WGE Agency), or its reporting framework.¹⁸⁰

4.122 The WGE Agency is a statutory authority with a role in administering the *Workplace Gender Equality Act 2012* (Cth) (WGE Act). It focuses on promoting gender equality, including through education, supporting employers to remove barriers to the full and equal participation of women and through fostering workplace consultation.¹⁸¹

4.123 Under the WGE Act, 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, consultation on gender equality issues and sex-based harassment and discrimination.¹⁸² In addition, from the 2014–15 reporting period, evidence-based minimum standards will apply. The agency also has an ‘Employer of Choice for Women’ citation which

177 Fair Work Ombudsman, *Submission 100*.

178 Ibid.

179 Ibid.

180 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Question 2–3.

181 *Workplace Gender Equality Act 2012* (Cth).

182 Ibid. See also Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No 1) which establishes the specific reporting matters for the reporting period 1 April 2013 to 31 March 2014.

acknowledges organisations that are recognising and advancing women in their workplace.¹⁸³

4.124 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. For example, the ACTU expressed its support for the establishment of an age-related body or framework suggesting that it would be likely to

encourage employers to monitor and analyse the employment patterns of older workers, any impact existing workplace policies, procedures and practices may have on older workers and the effectiveness of programs used to eliminate discrimination and promote equal employment opportunity for older workers.¹⁸⁴

4.125 Similarly, Adage expressed the view that such a body or framework would ‘incentivise organisations to change behaviour in a productive and positive way’.¹⁸⁵

4.126 Other stakeholders preferred a broader approach. They highlighted the Canadian model outlined in the Discussion Paper, the aim of which 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.¹⁸⁶ Stakeholders suggested that the existing WGE Agency framework be expanded to include age and a range of other attributes, such as in Canada.¹⁸⁷

4.127 However, some stakeholders opposed the establishment of a new body or framework, expressing concerns about the regulatory burden and cost implications of this approach.¹⁸⁸ 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’.¹⁸⁹

4.128 An alternative approach was recommended in a 2000 report by the House of Representatives Standing Committee on Education, Employment and Workplace Relations:

The inclusion of the age profile of employees in the annual reports of all listed companies would draw attention to firms which do not have a normal diversity of age groups in their workforce. This should prompt employers to consider whether their recruitment practices, perhaps inadvertently, involve some form of age discrimination. The Committee is aware that age discrimination might occur unintentionally or sub-consciously. The availability of such profiles would also make possible greater

183 At the time of writing, the Employer of Choice for Women citation criteria were under review and were expected to be announced in September 2013.

184 ACTU, *Submission 88*.

185 Adage, *Submission 69*. See also Australian Federation of Disability Organisations, *Submission 78*.

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

187 DOME Association, *Submission 62*.

188 Australian Industry Group, *Submission 37*. See also Suncorp Group, *Submission 66*; Diversity Council of Australia, *Submission 40*.

189 Australian Industry Group, *Submission 37*.

scrutiny by shareholders and other interested parties, providing an added spur for employers to give proper consideration to employing mature-age job seekers.¹⁹⁰

4.129 Following the introduction of the new framework under the WGE Act, it is necessary to allow time for monitoring and evaluation of its operation. However, following such monitoring and evaluation, the ALRC suggests that the Australian Government should consider extending the framework to include age (and potentially a range of other attributes). This approach would ensure adequate consideration of the operation of the existing framework, limit compliance costs and avoid duplication.

190 House of Representatives Standing Committee on Education, Employment and Workplace Relations, *Age Counts: An Inquiry into Issues Specific to Mature-Age Workers* (2000), 4.17.

5. Work Health and Safety and Workers' Compensation

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Summary

5.1 This chapter makes a range of recommendations for reform with respect to work health and safety and workers' compensation aimed at removing barriers to workforce participation for mature age workers. The first part of the chapter examines work health and safety; the second, workers' compensation.

5.2 With respect to work health and safety, the ALRC recommends that Safe Work Australia, in implementing the Australian Work Health and Safety Strategy 2012–2022 and in its other activities and research, should consider and recognise health and safety issues that may affect mature age workers. Safe Work Australia should also review guidance material and promote recognition of best practice approaches to work health and safety involving mature age workers.

5.3 In the second part of the chapter the ALRC recommends amendments to Commonwealth workers' compensation legislation to align retirement provisions with the qualifying age for the Age Pension and the extension of incapacity payment periods. The second part also discusses the inconsistent coverage of volunteers under workers' compensation and the ALRC recommends that Safe Work Australia consider this issue. Finally, the ALRC recommends that the superannuation offset provisions under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) be repealed.

Work health and safety

5.4 Ensuring that work environments, practices and processes are safe and conducive to worker health and wellbeing is central to facilitating the ongoing participation of mature age workers in paid employment and other productive work. The Consultative Forum on Mature Age Participation has emphasised that

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.¹

5.5 To facilitate this, the ALRC recommends that Safe Work Australia and state and territory work health and safety regulators consider health and safety issues that may affect mature age workers in implementing the Australian Work Health and Safety Strategy 2012–2022 (Australian Strategy). The ALRC also recommends that Safe Work Australia:

- include health and safety issues that may affect mature age workers in its research agenda; and
- review guidance material and promote recognition of best practice approaches to work health and safety initiatives involving mature age workers.

5.6 In 2012 and early 2013, mirror work health and safety legislation commenced in several Australian jurisdictions, including the *Work Health and Safety Act 2011* (Cth) (WHS Act).² The legislation is based on model legislation, regulations and codes of practice released by Safe Work Australia—the statutory agency with the responsibility for improving occupational health and safety (OHS) and workers’ compensation arrangements in Australia.³ The key objects of the WHS Act include: protecting all workers against harm to their health, safety and welfare through the elimination or minimisation of risks; promotion of improvements in work health and safety practices; and provision of advice, information, education and training in relation to work health and safety.⁴

1 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.

2 The following legislation has commenced: *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2011* (Tas). Mirror legislation has not yet been enacted in Victoria or Western Australia.

3 Safe Work Australia is a representative body and consists mainly of members who represent the Commonwealth, states and territories, workers and employers: *Safe Work Australia Act 2008* (Cth) ss 3, 6, 10.

4 *Work Health and Safety Act 2011* (Cth) s 3. The *Work Health and Safety Act 2011* (Cth) provides for a primary duty of care under which a person conducting a business or undertaking (PCBU)—formerly an employer—must ensure, so far as is reasonably practicable: the health and safety of workers while they are at work; that 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. Workers also have a primary

5.7 It is increasingly necessary to recognise and accommodate the differing work health and safety needs and priorities of 'an intergenerational workforce'.⁵ Evidence suggests that age-related factors can affect an individual's ability to work safely.⁶ However, it is unhelpful to generalise about mature age workers or to assume that they will have certain characteristics.⁷ For example, statistics indicate that workers aged 45 to 49 years have the highest rates of work-related illness or injury, but workers aged 65 years and over have the lowest rate.⁸

5.8 Even where workers experience common physical and cognitive changes associated with ageing, these 'can easily be managed in the workplace through an effective work health and safety policy and appropriate supporting practices'.⁹ Indeed, Comcare noted that 'issues associated with older workers' employability are not wholly age-related, and in fact, there may be greater similarities with other measures of disadvantage'.¹⁰

5.9 Organisations are required to comply with work health and safety obligations and requirements and to fulfil their responsibilities to provide safe and healthy work environments and processes. In doing so it is important that organisations 'accommodate the abilities, diversity and vulnerabilities of all Australian workers'.¹¹

5.10 Accordingly, while the focus of the ALRC's recommendations in this chapter is on mature age workers, work health and safety strategies should aim to improve work environments, practices, processes or organisational culture more broadly. Recommendations that result in changes to these are likely to benefit a wide range of workers.

Australian Work Health and Safety Strategy 2012–2022

5.11 The ALRC recommends that Safe Work Australia and state and territory work health and safety regulators consider health and safety issues that may affect mature age workers in implementing the Australian Strategy.

duty to take reasonable care for their own safety at work, and to ensure that their own acts or omissions do not adversely affect the health and safety of others and to cooperate with reasonable policies and instructions from the PCBU: *Work Health and Safety Act 2011* (Cth) ss 19(1)–(3), 28, 47. Officers and other persons at the workplace also have a range of duties: *Work Health and Safety Act 2011* (Cth) ss 27–29.

5 Comcare, *Submission 29*.

6 These factors 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': 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 Ibid, 2.

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

9 Diversity Council of Australia, *Submission 40*. See also Women in Social & Economic Research (WiSER), *Submission 72*.

10 Comcare, *Submission 29*.

11 Safe Work Australia, *Submission 18*.

5.12 The Australian Strategy was launched on 31 October 2012 and aims to support organisations and workers to improve work health and safety.¹² Comcare submitted that the Australian Strategy provides an

opportunity to work with workers, workplaces, across government, general practice and the wider community to strengthen the capacity of workplaces to provide safe, healthy and supportive workplaces for an age diverse workforce and better equip workplaces to accommodate differences in the health status of workers.¹³

5.13 The Australian Strategy does not specifically mention mature age workers.¹⁴ However, the action area, ‘Healthy and Safe by Design’, including 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 mature age workers.¹⁵

5.14 Improving the ‘design of structures, plant, substances, work and work systems’¹⁶ will positively affect the health and safety of all workers—including mature age workers. Age should be viewed as ‘one aspect of diversity present in today’s working population’.¹⁷ As the Australian Strategy is implemented, consideration should be given to meeting the work health and safety needs of all workers. Safe Work Australia, as well as a range of other stakeholders supported such an approach.¹⁸ This is also in keeping with statements in the Australian Strategy which indicate its implementation will involve development of national activities ‘in consultation with key stakeholders to address specific issues for a range of vulnerable workers including mature age workers’.¹⁹

5.15 There will be annual reporting in relation to the Australian Strategy and a review in 2017.²⁰ This provides timely opportunities for further consideration and review of the Strategy broadly, and with respect to the needs of particular cohorts of workers, including mature age workers.

Recommendation 5–1 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.

12 Australian Work Health and Safety Strategy 2012–2022.

13 Comcare, *Submission 91*.

14 Comcare, *Submission 29*.

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

16 Safe Work Australia, *Submission 18*.

17 European Agency for Safety and Health at Work, *Workforce Diversity and Risk Assessment: Ensuring Everyone is Covered* (2009), 31.

18 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; Comcare, *Submission 91*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Safe Work Australia, *Submission 68*; R Christiansen, *Submission 58*; Diversity Council of Australia, *Submission 40*.

19 Australian Work Health and Safety Strategy 2012–2022.

20 Ibid.

Research, guidance material and awards

5.16 There is a need for research that considers both the work health and safety issues facing mature age workers and work re-design more broadly. This will ensure evidence-based policy development and implementation of the Australian Strategy. Guidance material should also be developed to increase the understanding of these issues by persons conducting a business or undertaking (PCBU) and workers. The ALRC therefore recommends that Safe Work Australia include health and safety issues that may affect mature age workers in its research agenda and review guidance material. It should also promote recognition of best practice approaches to work health and safety initiatives involving mature age workers.

Research

5.17 One of the key action areas under the Australian 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

5.18 In the Discussion Paper, the ALRC proposed that Safe Work Australia include health and safety issues that may affect mature age workers in its research agenda.²² A range of stakeholders expressed support for the proposal.²³ For example, the Diversity Council submitted that it supports

further research being undertaken into the occupational health and safety issues facing mature age workers and the dissemination of evidence-based information to employers about these issues, including their rights and responsibilities.²⁴

5.19 Safe Work Australia stated that it 'continues to include age as an analysis variable in its research to inform the development or evaluation of national policy relating to work health and safety and workers' compensation'.²⁵ Safe Work Australia also indicated it is undertaking a longitudinal study, *Personality and Total Health Through Life*, in collaboration with the Centre for Research on Ageing, Health and Wellbeing at the Australian National University. The project involves a community survey that includes three age groups: 20–24 years; 40–44 years; and 60–64 years.

Each cohort will be interviewed every four years for 20 years at which point the age groups will overlap thus capturing the total adult life span. Safe Work Australia has included work related questions to allow a broader examination of issues specific to the workplace. The project enables study of the inter-relationship between work and health across the life course.²⁶

21 Ibid.

22 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 3–2.

23 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Diversity Council of Australia, *Submission 71*; Suncorp Group, *Submission 66*.

24 Diversity Council of Australia, *Submission 71*.

25 Safe Work Australia, *Submission 68*.

26 Ibid.

5.20 This project represents a positive research development and may assist not only in responding to work health and safety issues that may affect mature age workers, but also in the establishment of preventative measures.

5.21 Research and initiatives in other jurisdictions, such as the European Union, also provide instructive models with respect to changes to work and workplace design and broader health and wellbeing initiatives.²⁷

5.22 Safe Work Australia and other relevant bodies should undertake additional research into work health and safety issues facing mature age workers, as well as job and workplace re-design. Safe Work Australia has committed to continuing ‘to look for opportunities to include the work health and safety issues that may affect mature age workers as part of its research and evaluation strategy and work plans’.²⁸ 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 inform the development of evidence-based guidance material.

Recommendation 5–2 Safe Work Australia should include work health and safety issues that may affect mature age workers in its research and evaluation strategy and work plans.

Guidance material

5.23 Guidance material should include information about work health and safety issues that may affect mature age workers. There is a range of guidance material currently provided to PCBUs, workers and duty holders about work health and safety matters. This material takes the form of regulations, Codes of Practice and other material produced by Safe Work Australia, Comcare and similar bodies.²⁹ Safe Work Australia explained that it has produced a wide range of guidance material, some of which

is aimed at all work and workplaces (for example the Code of Practice on How to Manage Work Health and Safety Risks) while others relate to specific risks (for example the Code of Practice on Managing Noise and Preventing Hearing Loss at Work). Such guidance applies to all workers including mature age workers.³⁰

27 See, eg, J Ilmarinen, *Promoting Active Ageing in the Workplace* (2012), European Agency for Safety and Health at Work; Eurofound, *Living Longer, Working Better—Active Ageing in Europe* <www.eurofound.europa.eu/resourcepacks/activeageing.htm> at 21 March 2013; A Walker and P Taylor, *Combating Age Barriers in Employment: A European Portfolio of Good Practice* (1998), European Foundation for the Improvement of Living and Working Conditions.

28 Safe Work Australia, *Submission 68*.

29 For example: Safe Work Australia, *Code of Practice: How to Manage Work Health and Safety Risks* (2011); Safe Work Australia, *Code of Practice: Work Health and Safety Consultation, Co-operation and Co-ordination* (2011) and Safe Work Australia, *Code of Practice: Managing the Work Environment and Facilities* (2011).

30 Safe Work Australia, *Submission 68*.

5.24 The focus of guidance material should be on assisting PCBU's, workers and others to understand and comply with their obligations and address work environments, practices and processes that pose a risk to health and safety. However, guidance should also address the particular issues that may affect different groups of workers, including mature age workers.

5.25 Safe Work Australia agreed that guidance could be developed for mature age workers if 'issues which are specific to the needs of mature age workers are identified and are not adequately covered' in existing material.³¹ Stakeholders made a range of suggestions about ways to ensure material is appropriate and effective.³² For example, Suncorp suggested that guidance material should be supported by 'effective education and communication mechanisms' to 'ensure the information reaches the intended audience'.³³ JobWatch submitted that 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'.³⁴ JobWatch also suggested that it could 'also deal with issues such as work task and job design, work organisation and work environment'.³⁵

5.26 The Government of South Australia noted 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.³⁶

5.27 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'.³⁷

5.28 The Australian Industry Group (Ai Group) opposed the inclusion of such information in binding guidelines or Codes of Practice that 'import an element of legislative significance'.³⁸ Ai Group favoured the inclusion of information in bulletins and other informal documents intended to provide guidance, 'without creating onerous legal obligations on the employer'³⁹ or adding an 'unnecessary layer of prescriptive regulation on employers'.⁴⁰

31 Ibid.

32 Law Council of Australia, *Submission 96*; Comcare, *Submission 91*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Diversity Council of Australia, *Submission 71*; Suncorp Group, *Submission 66*.

33 Suncorp Group, *Submission 66*.

34 JobWatch, *Submission 25*.

35 Ibid.

36 Government of South Australia, *Submission 30*.

37 Comcare, *Submission 29*.

38 Australian Industry Group, *Submission 97*.

39 Australian Industry Group, *Submission 37*.

40 Australian Industry Group, *Submission 97*.

5.29 The ALRC recommends that Safe Work Australia and state and territory work health and safety regulators review guidance material to ensure it includes information about work health and safety issues that may affect mature age workers in particular. 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 Toolkit* and guidance such as *Understanding the Safety and Health Needs of Your Workplace: Older Workers and Safety*, provide instructive models, as do the approaches suggested by stakeholders.⁴¹ Such guidance material should be developed to suit a range of industries and professions and should be available from a range of sources. Guidance material should also be appropriate and accessible for all sections of the community.⁴²

Recommendation 5–3 Safe Work Australia and state and territory work health and safety regulators have developed guidance material to assist persons conducting a business or enterprise, workers, and the representatives of each to respond to health and safety issues of all workers. Such material should be reviewed to ensure it includes information about issues that may affect mature age workers, including information about:

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

Awards

5.30 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: workplace health and safety management system; solution to an identified workplace health and safety issue; and individual contribution to workplace health and safety.⁴³

5.31 In the Discussion Paper, the ALRC suggested that Safe Work Australia recognise best practice approaches in work health and safety with respect to mature age workers in the Awards. The award finalists are the winner of each of the relevant categories in the respective jurisdictional awards.⁴⁴ As a result, the cooperation of all

41 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).

42 See, eg, Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*; ACTU, *Submission 38*.

43 Safe Work Australia, *Annual Safe Work Australia Awards* <www.safeworkaustralia.gov.au> at 21 March 2013.

44 Safe Work Australia, *Submission 68*.

jurisdictions is required to ensure that mature age-related work health and safety responses are recognised in existing award categories. Where this is not possible within existing categories, it may be necessary to establish a new category. To facilitate this, the ALRC recommends that Safe Work Australia work in consultation with state and territory health and safety regulators, unions and industry representatives.

Recommendation 5-4 Safe Work Australia should work with state and territory health and safety regulators, unions and industry representatives to recognise best practice in work health and safety with respect to mature age workers in Commonwealth, state and territory work health and safety awards.

Workers' compensation

5.32 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. The purposes of workers' compensation include:

- providing injured workers with financial support, medical benefits and other non-economic support;
- enabling employers and workers to work cooperatively to maintain an injured worker at work; or
- achieving an early, safe and appropriate return to work.⁴⁵

5.33 Each state and territory in Australia has its own workers' compensation scheme. The Commonwealth has three schemes.⁴⁶ Under the Commonwealth schemes, mature age workers are entitled to workers' compensation benefits.⁴⁷ There are no age-related restrictions on the payment of medical or related expenses or lump sum payments for

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

⁴⁶ The key legislation for each scheme is: *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Military Rehabilitation and Compensation Act 2004* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth); *Veterans' Entitlements Act 1986* (Cth). There are also a number of minor schemes not discussed in this final Report. See, eg, *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth). Unlike other workers' compensation schemes, there is limited access to common law actions at the Commonwealth level.

⁴⁷ Provided they are eligible to make a claim for workers' compensation because they are injured or become ill arising out of, or in the course of, their employment.

permanent impairment.⁴⁸ However, ‘retirement provisions’⁴⁹ impose some age-related restrictions on incapacity payments.⁵⁰

5.34 A number of states and territories have provisions similar to those under the Commonwealth scheme. However, neither Queensland nor Western Australia has age-related limits on workers’ compensation payments.⁵¹ Instead, these jurisdictions restrict the benefit period or maximum amount of compensation a worker can receive by way of weekly payments for loss earnings during the life of the claim.⁵²

5.35 There are two categories of mature age workers for the purposes of Commonwealth workers’ compensation. Those injured:

- before age 63 or 64 are entitled to incapacity payments until age 65; and
- after age 63 or 64 are entitled to up to one or two years of incapacity payments, whether consecutive or not.⁵³

5.36 In the course of the Inquiry, concerns were raised in relation to both categories and the effect of entitlement to workers’ compensation on mature age workforce participation. In particular, stakeholders expressed concern about the potential disincentive to workforce participation created by not being entitled to incapacity payments, or only being entitled to limited incapacity payments.⁵⁴

5.37 To address such concerns, the ALRC recommends a three-fold approach to reform. First, it recommends that Commonwealth workers’ compensation legislation be amended to align retirement provisions with the qualifying age for the Age Pension. This will address the impending age gap between cessation of incapacity payments and eligibility for the Age Pension and is particularly important for mature age workers injured before age 63 or 64.

48 For example, a person’s access to medical treatment, attendant care, household services and permanent impairment lump sum continues for the life of any compensation claim.

49 See *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23; *Military Rehabilitation and Compensation Act 2004* (Cth) s 121; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

50 The original rationale for the ‘retirement provisions’ was that, once an injured worker reached 65 years of age, it was assumed that, but for the injury, this was the point at which the worker would ‘retire’. At the time the restrictions were introduced, at age 65 workers would have access to superannuation or other forms of income support. 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’: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

51 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.

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

53 See *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23; *Military Rehabilitation and Compensation Act 2004* (Cth) s 121; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

54 See, eg, Law Council of Australia, *Submission 46*; WA Equal Opportunity Commission, *Submission 23*; Olderworkers, *Submission 22*; Safe Work Australia, *Submission 18*. See also: Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27. Removing this disincentive was also one of the key drivers of Western Australian workers’ compensation reform: Western Australia, *Parliamentary Debates*, Legislative Council, p1689d (S O’Brien—Minister for Commerce).

5.38 Secondly, the ALRC recommends that the incapacity payment period under Commonwealth workers' compensation legislation be extended. This would benefit the workers injured after age 63 or 64 who are currently entitled to up to one or two years of incapacity payments.

5.39 Thirdly, the ALRC recommends that there be consistency across Commonwealth workers' compensation legislation. The ALRC also makes a number of other recommendations in relation to volunteer coverage and the interaction between superannuation and incapacity payments under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act). These recommendations would benefit all mature age workers, regardless of the age at which they were injured.

Age-based restrictions on workers' compensation

5.40 The ALRC recommends that Commonwealth workers' compensation legislation be amended to align retirement provisions with the qualifying age for the Age Pension. The ALRC considers this approach is preferable to other possible reform options including, for example, removing all age-based restrictions or imposing benefit period or amount restrictions.

The eligibility gap

5.41 The ALRC's recommendation involves amendments to the SRC Act,⁵⁵ *Military Rehabilitation and Compensation Act 2004* (Cth) (MRC Act),⁵⁶ and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act).⁵⁷

5.42 Under the SRC Act and MRC Act, if a worker, member, or former member suffers an injury before reaching 63 years of age, incapacity payments cease when they reach age 65. A worker, member, or former member injured at any age after 63 years of age, however, may receive incapacity payments for up to 104 weeks.⁵⁸

55 The 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 which self-insure under the scheme. 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) (VE Act).

56 The 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 death related to service rendered on or after 1 July 2004. The workers' compensation provided under the MRC Act is based on the SRC Act and VE Act provisions: Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (March 2011), 28.

57 The Seafarers Act 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 scheme is overseen by the Seafarers Safety, Rehabilitation and Compensation Authority which monitors and administers the operation of the Seafarers Act.

58 *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23, *Military Rehabilitation and Compensation Act 2004* (Cth) s 121.

5.43 Under the Seafarers Act, if a worker suffers an injury before reaching 64 years of age, incapacity payments cease when the worker reaches age 65. A worker injured at any age after 64 years of age however, may receive incapacity payments for up to 12 months after the date of injury.⁵⁹

5.44 In light of future changes to Age Pension age there is an impending age gap between the cessation of incapacity payments at age 65 and the qualifying age for the Age Pension.⁶⁰ In such circumstances, an injured worker may be forced to access alternative forms of income support—such as the Disability Support Pension, superannuation or other forms of private savings. Where this results in a depletion or exhaustion of superannuation or private savings, the worker may then need to access additional income support on a long-term basis, rather than self-funding retirement.

5.45 The unavailability of workers' compensation incapacity payments may, in some circumstances, act as a disincentive for mature age workers to remain in, or return to, the paid workforce. Access to incapacity payments ensures workers receive financial support and remain engaged with rehabilitation services and appropriate return to work programs. Where a worker does not receive such payments, he or she may decide to leave the workforce, or abandon attempts to return to work, to access superannuation or the Age Pension. As a result, there is a need for reform in this area.

5.46 Comcare has recognised that 'present arrangements can be unfair for older workers', highlighting the following example:

A federal worker on a 5-year contract who is injured at age 65 will have a maximum entitlement to 104 weeks' incapacity payments, even if the compensable injury is sustained early in their contract. This means they might effectively lose several years' worth of potential earnings as the provisions of the Act do not recognise the fact the worker would have been able to complete their contract but for the injury.⁶¹

5.47 The Australian Human Rights Commission (AHRC) expressed the view that this situation is of 'serious concern'.⁶² The Law Council of Australia noted 'inequity in the cessation of compensation at age 65 when pension and other entitlements are increasing'.⁶³ Safe Work Australia submitted 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.⁶⁴

⁵⁹ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

⁶⁰ The Age Pension age for women has incrementally increased from age 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: *Social Security Act 1991* (Cth) ss 23(5A)–(5D).

⁶¹ Comcare, *Submission 91*.

⁶² Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

⁶³ Law Council of Australia, *Submission 46*.

⁶⁴ Safe Work Australia, *Submission 18*.

5.48 The Advisory Panel on the Economic Potential of Senior Australians highlighted 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'.⁶⁵

5.49 The Ai Group suggested, however, that 'the retirement provisions act as an incentive to mature age workers to recover and return to work, rather than rely on weekly benefits'.⁶⁶ 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.⁶⁷

5.50 The ALRC recognises the highlighted connection between the period of time out of the workplace and the likelihood of returning to work. This connection underscores the importance of ensuring injured workers remain engaged in the workers' compensation system to facilitate post-injury rehabilitation and return to work programs.

Closing the eligibility gap

5.51 To close the eligibility gap, the ALRC recommends that Commonwealth workers' compensation legislation be amended to align retirement provisions with the qualifying age for Age Pension.

5.52 This approach was supported by a range of stakeholders.⁶⁸ For example, Comcare expressed the view that such a change is 'consistent with the original policy intent'.⁶⁹ This was also the approach taken and recommended by a number of other bodies. In April 2012, a bill was introduced to increase age restrictions under South Australian workers' compensation legislation to reflect future changes to Age Pension age.⁷⁰ In November 2012, the Safe Work Australia Strategic Issues Group (SIG) for Workers' Compensation considered a draft options paper informed by the ALRC's Discussion Paper which recommended that all jurisdictions legislatively tie their retirement provisions to Age Pension age.⁷¹

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

66 Australian Industry Group, *Submission 37*.

67 Ibid.

68 Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; Comcare, *Submission 29*. See also: Suncorp Group, *Submission 66*; Australian Shipowners Association, *Submission 65*; Department of Defence, *Submission to Safety, Rehabilitation and Compensation Act 1988 (Cth) Review* (2012); ACTU, *Submission to Safety, Rehabilitation and Compensation Act 1988 (Cth) Review* (2012).

69 Comcare, *Submission 29*.

70 Workers' Rehabilitation and Compensation (Retirement Age) Amendment Bill 2012 (SA). See also Government of South Australia, *Submission 30*. At the time of writing, the bill was before the SA Legislative Council.

71 Safe Work Australia, *Submission 68*.

5.53 In July 2012, a review of the Commonwealth workers' compensation schemes, in particular the SRC Act, was announced.⁷² In September 2012, an issues paper was released for consultation as part of the review. The issues paper includes discussion of appropriate coverage arrangements when the Age Pension age is increased. It also includes discussion in relation to injured workers who receive incapacity payments and superannuation benefits.⁷³ However, at the time of writing, the final report of the Review was not publicly available.

5.54 Stakeholders also acknowledged the potential flow-on effects of aligning retirement provisions with Age Pension age. For example, Comcare noted that

increasing the incapacity entitlement cut off to age 67 also increases Comcare's outstanding claims liabilities and subsequently reduces Comcare's reported funding ratio, something that would also affect the licensed self-insurers in the Comcare scheme. The impact of this would be increased premiums to fund the additional liability (for premium-paying employers in the scheme) or increased liabilities (for self-insurers). These scheme implications will need to be fully considered in any change to current legislative age limits.⁷⁴

5.55 The ALRC anticipates its recommendation would be implemented by incrementally increasing age restrictions in Commonwealth workers' compensation legislation in line with increases in Age Pension age. 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 age 67. However, a worker injured at any age after 65 years could receive incapacity payments for up to 104 weeks. Under the Seafarers Act as it currently operates, if a worker suffered an injury before reaching 66 years of age, incapacity payments would cease when the worker reached age 67. However, a worker injured at any age after 66 years of age could receive incapacity payments for up to 12 months. The ALRC recommends the extension of these payment periods below.

5.56 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. Other benefits, such as access to medical treatment, should remain unaffected.

Removing all age-based restrictions and other options

5.57 A range of stakeholders preferred the removal of all age-based restrictions under Commonwealth workers' compensation legislation. The Australian Council of Trade Unions (ACTU) submitted that age-based restrictions are 'exclusionary and discriminatory' and that 'mature age workers should have access to compensation for

72 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 for the review include ensuring that: 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 of Age Pension eligibility age to 67 by 2023. See P Hanks QC, *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

73 Ibid, 20, 21, 23–25.

74 Comcare, *Submission 91*.

all injuries that arise out of, or in the course of work, including during their breaks'.⁷⁵ Similarly, National Seniors Australia, COTA and Olderworkers, supported the removal of such restrictions.⁷⁶ For example, COTA submitted that 'all upper age limits on workers' compensation should be abolished'.⁷⁷ The AHRC has also expressed its support for the removal of age-based restrictions in workers' compensation.⁷⁸ Similarly, Comcare acknowledged that 'it is increasingly becoming unrealistic to assign an arbitrary end-point to the careers of workers simply because they have reached a particular age'.⁷⁹

5.58 However, there are difficulties associated with removing age-based restrictions from Commonwealth workers' compensation legislation. Some of these difficulties arise under the Commonwealth workers' compensation system because it 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.

5.59 The first key difficulty is the potential for cost blow-out and cost shifting. Statistics indicate that persons aged 65 years and over record the lowest rate of work-related injuries and illnesses.⁸⁰ However, age groups 35–44 and 65 years and over had the highest average total cost of claims for Australian Government premium payers accepted during 2010–11.⁸¹

5.60 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'.⁸² The Diversity Council of Australia stated that,

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.⁸³

5.61 To operate effectively, workers' compensation schemes need to be financially viable. As a result, 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'.⁸⁴

75 ACTU, *Submission 38*.

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

77 COTA, *Submission 51*.

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

79 Comcare, *Submission 91*.

80 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).

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

82 Australian Industry Group, *Submission 37*.

83 Diversity Council of Australia, *Submission 40*.

84 Suncorp Group, *Submission 39*.

5.62 If age-based restrictions were removed, some form of benefit period or amount restriction would be necessary to address cost concerns. However, this may have unintended consequences for other workers, such as a reduction in entitlements for workers with a long-term reduction in their capacity to earn.

5.63 Comcare submitted that removing all age-based restrictions, but limiting the benefit period, ‘imposes risks for significant costs shifting to Commonwealth social security benefits and changes the scheme from a long tail to short tail claims model’.⁸⁵ Similarly, Safe Work Australia said:

the introduction of time and/or payment limits to weekly incapacity payments irrespective of age would disadvantage younger workers with significant work-related injuries who may be reliant on incapacity payments for long periods and whose entitlements may be exhausted before they have recovered.⁸⁶

5.64 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. The risk is that they may exhaust their entitlements and become reliant on Commonwealth income support, essentially transferring the cost from one Commonwealth scheme to another.

5.65 As a result, and as outlined above, the ALRC considers that the most appropriate approach to reform is to align retirement provisions with the qualifying age for the Age Pension.

Recommendation 5–5 The *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) should be amended to align the retirement provisions with the qualifying age for the Age Pension under the *Social Security Act 1991* (Cth).

Consistency across Commonwealth workers’ compensation legislation

5.66 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.⁸⁷ 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.⁸⁸

5.67 The ALRC recommends that the Seafarers Act be amended to be consistent with the SRC Act and MRC Act. This would ensure consistency across Commonwealth

⁸⁵ Comcare, *Submission 29*.

⁸⁶ Safe Work Australia, *Submission 68*. See also Comcare, *Submission 29*.

⁸⁷ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23; *Military Rehabilitation and Compensation Act 2004* (Cth) s 121.

⁸⁸ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

workers' compensation legislation and that there are no barriers to prevent persons wishing to work beyond Age Pension age from doing so. This would mean the Seafarers Act would provide that workers who are injured at any age after two years prior to Age Pension age (rather than one year), are entitled to receive incapacity payments for up to 104 weeks. Such an approach is consistent with the Terms of Reference for the review of the Seafarers Act, which include ensuring consistency between the Seafarers Act and the SRC Act.⁸⁹

5.68 The Australian Shipowners Association considered that 'as far as practicable entitlements under worker's compensation regimes should be consistent'.⁹⁰ However, it was concerned that, by

increasing the potential instances of eligibility for compensation and the period for which compensation is payable, the likely result would be an increase rather than decrease in the costs of premiums payable by employers under the Seacare scheme.⁹¹

5.69 Other stakeholders supported this approach.⁹² For example, Comcare noted that

the Seacare scheme is also populated by an ageing workforce. In recent years, mature aged seafarers contributed the highest proportion of employees to the Seacare scheme and this proportion is increasing. These statistics are indicative of the willingness and ability of mature aged employees to participate and contribute to the workforce in the Seacare scheme and highlights the need to remove the barriers that may restrict them from doing so.⁹³

Recommendation 5–6 The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) should be amended to provide that workers who are injured after two years prior to Age Pension age may receive incapacity payments for the same period as under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and *Military Rehabilitation and Compensation Act 2004* (Cth).

Incapacity payment periods

5.70 Under the SRC Act and MRC Act—and under the Seafarers Act if Recommendation 5–6 is implemented—a worker injured at any age after two years prior to Age Pension age is entitled to receive incapacity payments for up to 104 weeks, whether consecutive or not. The ALRC recommends that the Australian Government 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 non-consecutive weeks.

⁸⁹ On 16 October 2012, the Hon Bill Shorten MP, Minister for Employment and Workplace Relations, announced a review of the Seafarers Act. The focus of the review is on coverage, scope and necessity for amending and updating any legislative inconsistencies, reducing scheme costs and governance arrangements. The review panel was due to report to the Australian Government on 22 February 2013, however at the time of writing, this report was not publicly available.

⁹⁰ Australian Shipowners Association, *Submission 65*.

⁹¹ *Ibid.*

⁹² Eg, ACTU, *Submission 88*; Suncorp Group, *Submission 66*.

⁹³ Comcare, *Submission 91*.

5.71 The focus of workers' compensation schemes needs to be not only on appropriately supporting and compensating workers, but also ensuring access to post-injury rehabilitation and return to work programs. Aligning retirement provisions with the qualifying age for the Age Pension and the extension of incapacity payment periods is likely to encourage ongoing engagement with the workers' compensation system. Access to rehabilitation services and supports increases the likelihood of mature age workers returning to work following work-related injury.

5.72 Comcare cautioned, however, about significantly extending the incapacity payment period. It submitted that, while it may encourage mature age workforce participation,

there would be drawbacks to the scheme more broadly. Incapacity payments are the biggest drivers of claim costs; hence any increase to a period significantly longer than 104 weeks could pose substantial scheme sustainability issues.⁹⁴

5.73 A number of key stakeholders opposed any extension of the incapacity payment period. For example, the Ai Group argued that it would result in increased workers' compensation premiums.⁹⁵ The Personal Injuries Committee of the Law Council of Australia also expressed concern about extension on the basis of cost, and argued that

a number of equity issues arise as a result of allowing a person to receive incapacity payments for more than 104 weeks in situations where they have been injured after two years prior to Age Pension age. Central to this is the fact that an injured worker would potentially receive more payment after retirement, compared to someone who had worked throughout the period.⁹⁶

5.74 Safe Work Australia advised that members of the SIG for Workers' Compensation have agreed to conduct actuarial assessments on two possible reform options. These include incapacity payment periods of 104 and 130 weeks for mature age workers.⁹⁷ The SIG for Workers' Compensation is due to consider an options paper in early 2013.

5.75 The ALRC is conscious of the concerns expressed by stakeholders that 'extension of coverage would impact workers' compensation insurance premiums'.⁹⁸ However, Safety Rehabilitation and Compensation Commission 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. These figures were 1% and 2% respectively for licensed self-insurers.⁹⁹ In terms of mature age workers, the 2009 Legislative Review of the WA workers' compensation scheme indicated that 'in the

94 Ibid.

95 Australian Industry Group, *Submission 97*.

96 Law Council of Australia, *Submission 96*.

97 Safe Work Australia, *Submission 68*.

98 Suncorp Group, *Submission 39*.

99 These figures represent time lost to date: Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers' Compensation Statistics* (2011), 45.

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.¹⁰⁰

5.76 The ALRC recommends that the SRC Act, MRC Act and Seafarers Act be amended 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 non-consecutive weeks. For example, with Age Pension age at 65, this would mean that workers and members injured at 63 or older would be entitled to receive incapacity payments for a period longer than 104 weeks. In 2023, with Age Pension age at 67, this would mean that workers and members injured at 65 or older would be entitled to receive incapacity payments for a period longer than 104 weeks.

5.77 The length by which the period should be extended should be determined following actuarial assessments and costings. 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 workforce participation.

Recommendation 5–7 If amended in line with Recommendations 5–5 and 5–6, the *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) will provide that workers and members injured after two years prior to Age Pension age are entitled to receive incapacity payments for a period of 104 weeks. This period should be extended.

Supplementary payments

5.78 Some Australian jurisdictions have legislation providing that workers over age 65 are entitled to a weekly supplementary payment, after normal incapacity payments have ceased. The entitlement follows a tribunal determination that the worker would have continued working after the age of 65, had they not been injured.¹⁰¹ The entitlement is decided on a case by case basis and the supplementary amount is generally based on the amount a person receiving the Age Pension is eligible to earn before the payment is affected.

5.79 The ALRC does not consider it is necessary or appropriate to introduce a supplementary payment of this type at a Commonwealth level.

5.80 Stakeholders expressed strong opposition to the introduction of such a supplementary payment.¹⁰² Comcare acknowledged that, although such a provision might be useful in some circumstances, 'it would not readily fit into the current

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

101 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.

102 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Australian Chamber of Commerce and Industry, *Submission 85*.

legislative scheme of the SRC Act, particularly given the significant differences in the review processes for claims'.¹⁰³ Comcare also noted its potentially burdensome nature and the difficulty in implementing such a provision uniformly in the Comcare scheme—'given that certain workers in the scheme continue to be entitled to incapacity payments well after age 65 whereas others do not'.¹⁰⁴

5.81 ACCI highlighted that the provision

came about at another time and in a significantly different environment with respect to people working beyond normal retirement age and other changes some of which are already in place for a number of jurisdictions and are likely to be recommended for others (retirement age tied pension eligibility age).¹⁰⁵

5.82 The Law Council noted that 'the main benefit of the Tasmanian legislation is that medical expenses are tied to a person's entitlement to receive incapacity payments'.¹⁰⁶ This is not an issue under the Commonwealth scheme. Further, Safe Work Australia highlighted member concerns about the 'potential for disputation based on this provision'.¹⁰⁷

Volunteer coverage

5.83 Throughout this Inquiry, stakeholders have expressed concerns about inconsistency with respect to the coverage of volunteers under workers' compensation legislation. The ALRC recommends that Safe Work Australia consider the definition of those categories of people covered by Commonwealth, state and territory workers' compensation legislation.¹⁰⁸

5.84 A significant number of mature age people participate in voluntary work. Australian Bureau of Statistics figures indicate that 32.5% of Australians who volunteer are aged 55 years and over.¹⁰⁹ 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 employees under the relevant legislation, or the legislation specifically provides compensation for certain categories of volunteers.

5.85 At the 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.¹¹⁰ It also allows for the coverage of volunteers, by declaration of the Minister.¹¹¹ Comcare indicated that there

103 Comcare, *Submission 91*.

104 *Ibid.*

105 Australian Chamber of Commerce and Industry, *Submission 85*.

106 Law Council of Australia, *Submission 96*.

107 Safe Work Australia, *Submission 68*.

108 For example, 'employee' under the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) or 'member' under the *Military Rehabilitation and Compensation Act 2004* (Cth).

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

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

111 *Ibid* s 5(6).

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.¹¹²

5.86 Under the MRC Act, the Defence Minister may make a similar determination with respect to members.¹¹³ The Seafarers Act does not include any category of deemed employee or member.

5.87 As part of its work, Safe Work Australia's SIG for Workers' Compensation developed the National Workers' Compensation Action Plan 2010–2013. Two of the key action areas are to 'investigate and report on options for nationally consistent definitions for the purposes of workers' compensation' and 'investigate and report on issues of concern for multi-state employers'.¹¹⁴ In April 2012, the SIG for Workers' Compensation decided to defer work on a project to investigate the definition of worker. It agreed that the Definitions Temporary Advisory Group¹¹⁵ should focus its work on 'retirement age and any barriers for older workers in workers' compensation schemes'.¹¹⁶

5.88 As a result, in the Discussion Paper, the ALRC proposed that the SIG for Workers' Compensation should consider the definition of 'worker' under Commonwealth, state and territory workers' compensation legislation to ensure volunteers are consistently covered.¹¹⁷

5.89 A number of stakeholders supported this approach. For example, academics from the University of New England indicated their support, but suggested that

it is only a beginning but it is a start to an important recognition of the legislative inconsistency that exists with respect to the status of volunteers before the law as compared to the paid employee, and we would support the ALRC to go further and embrace legislative enquiry around the rights and protection of volunteers as productive workers in our society.¹¹⁸

112 Comcare, *Submission 29*.

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

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

115 A number of temporary advisory groups (TAGs) were established to investigate and report to the SIG on policy options for improving national consistency in key priority areas.

116 Safe Work Australia, *National Workers' Compensation Action Plan 2010–2013, Progress to April 2012* <www.safeworkaustralia.gov.au/> at 21 March 2013. See also Safe Work Australia, *Submission 68*.

117 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 3–7.

118 M Oppenheimer, A Kilarr and A Edwards, *Submission 75*.

5.90 The Brotherhood of St Laurence expressed the view that,

while it is imperative that volunteers are eligible for compensation, it may be problematic to include them as ‘workers’ as this could raise new barriers for volunteering eligibility and so discourage the voluntary contribution of many older Australians. Volunteers are not a substitute for paid employees and should not be deployed in such positions whether full-time, part-time or casual. A compensation scheme specific to volunteers should be established which includes criteria which encourage voluntary contribution to the community.¹¹⁹

5.91 The Ai Group submitted that volunteers should generally not be deemed to be workers for the purposes of workers’ compensation legislation.¹²⁰

5.92 The issues paper released as part of the review of the SRC Act raised questions about the definition of ‘employee’ under the SRC Act.¹²¹ However, at the time of writing, the final report of the Review was not publicly available.

5.93 In November 2012, Safe Work Australia considered the ALRC’s proposal and ‘agreed to defer a decision on whether to commence work on the definition of ‘worker’ until after the ALRC has presented its final report’.¹²²

5.94 There is inconsistent coverage of volunteers under workers’ compensation legislation and this may affect the participation of mature age volunteers. As a result, the ALRC recommends that the Safe Work Australia SIG for Workers’ Compensation should consider this matter.

Recommendation 5–8 Safe Work Australia’s Strategic Issues Group for Workers’ Compensation should consider the definition of those categories of people covered by Commonwealth, state and territory workers’ compensation legislation to ensure volunteers are covered consistently.

Workers’ compensation and superannuation

5.95 The treatment of superannuation payments in the calculation of incapacity payments under the SRC Act creates a potential barrier to participation in the paid workforce for mature age workers. To address this barrier the ALRC recommends that the superannuation-offset provisions under the SRC Act be repealed.

5.96 Under the SRC Act, the compensation payable to an employee who is incapacitated for work as a result of an injury is reduced where that employee has ‘retired’ and ‘received’ a superannuation pension and/or a lump sum benefit. The compensation is reduced by reference to the employer’s superannuation contributions and by a further 5% of the employee’s Normal Weekly Earnings.¹²³

119 Brotherhood of St Laurence, *Submission 86*.

120 Australian Industry Group, *Submission 97*.

121 P Hanks QC, *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

122 Safe Work Australia, *Submission 68*.

123 *Safety, Rehabilitation and Compensation Act 1988 (Cth)* ss 20(3), 21(3), 21A(3).

5.97 However, where an employee elects to preserve their superannuation, or remains employed and chooses to access his or her superannuation, the application and operation of the offset provisions is less clear and may have perverse outcomes. For example, in *Re Mirkovic and Telstra*, the Administrative Appeals Tribunal found that, in rolling over his superannuation, Mr Mirkovic had notionally 'received' the funds and had his incapacity payments reduced.¹²⁴

5.98 A number of stakeholders, including the Law Council of Australia, submitted that the treatment of superannuation in the calculation of incapacity payments creates a barrier to workforce participation for mature age workers:

This is particularly the case with respect to individuals who want to re-enter the workforce, where superannuation pensions would reduce incapacity payments after the first 45 weeks.¹²⁵

5.99 The Law Council also noted that

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.¹²⁶

5.100 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.¹²⁷ In submissions to the Review, stakeholders emphasised the unfairness of the 5% reduction in compensation. For example, the Superannuated Commonwealth Officers' Association submitted that

The 5% superannuation deduction should be removed to put those who are in receipt of superannuation on the same footing as those who are still in the contribution phase of a modern superannuation fund. The 5% deduction does not act to encourage severely injured and vulnerable people to return to the workforce, it merely adds to their financial and mental distress.¹²⁸

5.101 In its submission to this Inquiry, Comcare acknowledged that, in light of superannuation reforms since the introduction of the provisions, mature age workers are not always able—or may not choose—to access their superannuation benefit. As a result, 'the current superannuation offset provisions in the Act are out of step with the superannuation reforms'.¹²⁹ Comcare also noted a number of practical difficulties with the superannuation offset provisions.¹³⁰

124 *Re Mirkovic and Telstra Corporation* [1993] 18 AAR 492.

125 Law Council of Australia, *Submission 96*.

126 Law Council of Australia, *Submission 46*. See also Australian Industry Group, *Submission 97*.

127 P Hanks QC, *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012), 21.

128 Superannuated Commonwealth Officers' Association, *Submission to Safety, Rehabilitation and Compensation Act 1988 (Cth) Review* (2012).

129 Comcare, *Submission 91*.

130 *Ibid*.

5.102 However, stakeholders such as DOME expressed the view that there is no need for amendment. DOME submitted that ‘there is no evidence indicating individual’s decisions to participate in the workforce take any account of this potential impediment’.¹³¹

5.103 The ALRC favours consistency across Commonwealth workers’ compensation legislation and considers that schemes should provide incentives for injured employees who choose to preserve or roll over their superannuation, rather than superannuation affecting incapacity payment entitlements. The ALRC therefore recommends that the superannuation offset provisions under the SRC Act be repealed.

Recommendation 5–9 Sections 20, 21 and 21A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) reduce the amount of compensation payable to an employee by reference to the amount of superannuation derived from the employer’s contributions and by a further 5 % of the employee’s Normal Weekly Earnings. These sections should be repealed.

131 DOME Association, *Submission 62*.

6. Insurance

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Summary

6.1 A number of key concerns with respect to mature age workers and insurance were expressed during the course of this Inquiry. These concerns relate to the availability of, and information about, insurance products for mature age persons; and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing occurs.

6.2 To facilitate the provision of clear and simple information about available insurance products for mature age persons, the ALRC recommends that the Insurance Reform Advisory Group (IRAG) consider options for the development of a central information source.

6.3 The ALRC recommends a two-fold approach to addressing concerns about actuarial and statistical data. First, the ALRC recommends that the Australian Government and insurers negotiate an agreement requiring the publication of data upon which insurance offerings based on age rely. Secondly, the ALRC recommends review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to age. A related recommendation is the development of guidance material about the application of any insurance exception under Commonwealth anti-discrimination legislation.

6.4 Finally, the ALRC recommends that the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct be amended. The codes should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

Insurance and mature age workers

6.5 Insurance is a ‘risk transfer, loss-spreading arrangement’.¹ Its purpose is to distribute risk through providing a mechanism for individuals and organisations to purchase, by way of a premium, insurance products to mitigate that risk. Risk is then transferred to the insurer which indemnifies the insured against future events that may cause loss. Rigorous risk assessment is the ‘basic principle that underpins the successful operation of insurance models’.² This risk assessment determines the criteria used in the underwriting process—in which individual applications for insurance are assessed—and pricing, which ‘ensures that the premiums paid by each policyholder reflect their risk relative to the whole pool’.³

6.6 At the Commonwealth level, the insurance industry is governed by two primary pieces of legislation.⁴ There are three key categories of insurance in Australia: health, life and general insurance. Life insurance encompasses a variety of products that provide payment upon death or injury, including income protection insurance.⁵ General insurance encompasses cover purchased by individuals—such as travel insurance;⁶ and that purchased by organisations—including product and public liability and professional indemnity insurance. The general insurance industry in Australia is regulated by a prudential regulator⁷ and a corporate regulator.⁸

6.7 The focus of this chapter is on life and general insurance, given their potential effect on the participation of mature age workers and volunteers. The key barriers for mature age workers appear to arise in relation to income protection insurance, travel insurance and volunteer insurance.⁹ These barriers include: accessing information about available and appropriate insurance products; limitations on availability of insurance; and increased premiums and restriction of benefits as a result of the imposition of age restrictions.¹⁰

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

2 Insurance Council of Australia, *Submission 94*.

3 Financial Services Council, *Submission 89*.

4 *Insurance Act 1973* (Cth) and *Insurance Contracts Act 1984* (Cth). Chapter 7 of the *Corporations Act 2001* (Cth) governs the regulation of insurance intermediaries such as agents and brokers.

5 Income protection insurance is otherwise known as personal accident, sickness and disability insurance and protects the insured in the event of being unable to work due to sickness or injury (the ‘prescribed risk’). The benefit is provided by way of regular periodic payments—a wage substitute.

6 Travel insurance provides for the payment of agreed sums to cover losses or expenses, including medical expenses, incurred in the course of travel.

7 The prudential regulator is the Australian Prudential Regulation Authority (APRA), which is responsible for general administration of the *Insurance Act 1973* (Cth): *Australian Prudential Regulation Authority Act 1998* (Cth). 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.

8 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 1984* (Cth), monitoring and promoting market integrity and consumer protection and licensing: *Australian Securities and Investments Commission Act 2001* (Cth).

9 The types of insurance relevant to volunteers include public liability insurance, directors/officers insurance and personal injury/accident insurance.

10 See, eg, COTA, *Submission 51*; National Seniors Australia, *Submission 27*; South Australian Equal Opportunity Commission, *Submission 11*. See also Australian Human Rights Commission, *Working Past*

6.8 Such barriers may act as a disincentive to employment and other productive work for mature age persons.¹¹ For example, where mature age workers are unable to access income protection insurance, this leaves them vulnerable in the event of illness or injury. This is of particular concern to specific groups of workers, such as sole traders, where workers' compensation is not available.¹² A case study provided by the South Australian Equal Opportunity Commission highlights this point:

I am a self-employed primary producer now aged 69 years and cannot access accident or illness insurance to cover me at work. I was told I was too old for illness insurance, but could get some cover for accident insurance at greatly reduced benefits up to the age of 70. I have therefore been working full time without any illness cover for 5 years, and soon will have no accident cover either when I turn 70. I have a clean bill of health each year from my GP which I submit to the insurance company. The government encourages us to work after retirement age, but does not care that insurance companies say we are uninsurable.¹³

6.9 In the case of mature age volunteers, the Tasmanian Anti-Discrimination Commissioner reported that, of the 25 insurance arrangements held by organisations examined by her, all private insurers had arrangements that discriminated on the basis of age.¹⁴ Where insurance coverage for volunteers is not available, this either results in volunteering activity continuing without coverage, with potentially significant consequences, or acts as a barrier to volunteering. The following case study illustrates the potential consequences of continuing without coverage:

Whilst doing this volunteer work [my mother and father] were involved in a horrific accident which left my Dad in a coma for 6 months before he finally passed away. The [organisation] involved said that he was not covered by their insurance because he was too old (he was just 75.6 years old).¹⁵

6.10 However, the extent to which age-based limitations, premiums and restricted benefits 'influence mature age workforce participation will vary on the nature of each particular product'.¹⁶

6.11 To address the concerns outlined above would require systemic reform of certain elements of the insurance framework in Australia. Two key systemic issues have emerged which are much wider than the focus of this Inquiry on barriers to work for mature age persons. The first issue is whether age is an appropriate indicator of risk. The second issue involves the insurance products available in the market and their design.

Our 60s: Reforming Law and Policies for the Older Worker (June 2012); National Seniors Australia and COTA, *Ageism in Travel Insurance 2012 Survey Report* (2012); Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report. At the time of writing, the ALRC was provided with an advance copy of the report, prior to its public release.

11 See, eg, COTA, *Submission 51*; National Seniors Australia, *Submission 27*; South Australian Equal Opportunity Commission, *Submission 11*.

12 See, eg, South Australian Equal Opportunity Commission, *Submission 70*.

13 Ibid.

14 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, 34.

15 Private Submission to Ibid, 39. Note, this scenario also raises issues relating to common law liability of organisations with volunteers.

16 Suncorp Group, *Submission 39*.

6.12 There is a broad suite of underwriting and pricing factors, including an applicant's age, considered relevant to assessing risk.¹⁷ The Insurance Council of Australia (ICA) emphasised that 'a lawful ability to reasonably differentiate on the basis of risk, is essential to the provision of affordable general insurance for the community'.¹⁸ 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 this may affect insurance offerings and premiums.¹⁹ In its submission, Suncorp emphasised the highly competitive nature of the insurance industry, noting 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.²⁰

6.13 However, the Tasmanian Anti-Discrimination Commissioner rejected arguments that the removal of age-based distinctions would make offering certain insurance products 'uneconomic or distort the cost structure of insurance products'.²¹ In addition, the Australian Human Rights Commission (AHRC) has suggested that risk assessment should be conducted on the basis of factors other than age.²²

6.14 Examination of whether age is an appropriate indicator of risk, or should be used in the underwriting and pricing process at all, is a much wider question than the focus of this Inquiry. As a result, the ALRC makes no specific recommendations concerning the review or removal of age-based insurance pricing and underwriting.

6.15 The second systemic issue is product innovation and design. A number of stakeholders submitted that

the competitive marketplace and increasing market demand is the most powerful driver of product innovation. As the population ages and people remain in the workforce longer we submit that products have, and will continue, to be developed to meet the needs of older workers.²³

6.16 Product innovation and design are essentially market-based issues and reform will require the cooperation of the insurance industry, seniors organisations, consumer groups and the Australian Government.²⁴ The ALRC recognises the nature of the

17 Ibid; Insurance Council of Australia, *Submission 21*.

18 Insurance Council of Australia, *Submission 21*.

19 See, eg, Suncorp Group, *Submission 39*.

20 Ibid.

21 The Commissioner noted that there is no suggestion that insurers be required to make uniform insurance offerings. Any intention to account for different appetites for risk is not in and of itself discriminatory: Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, 85.

22 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 14.

23 Financial Services Council, *Submission 89*. See also Suncorp Group, *Submission 39*.

24 While product innovation and design are essentially market-based issues, refusal to offer an existing insurance policy to persons on the basis of their age would be unlawful under anti-discrimination legislation, except if the conditions under the insurance exception are satisfied.

insurance market and the importance of ‘risk appetite’ for insurance offerings. While not recommending legislative or regulatory reform in this area, the ALRC considers that IRAG is an appropriate forum for discussion of these issues.²⁵ The ICA has indicated that it ‘welcomes continuing discussions within IRAG on consumer needs and wants’ and recognises the ‘potential role of IRAG discussion as an inspiration for product innovation’.²⁶

Access to information about relevant insurance products

6.17 To improve access to information about relevant insurance products the ALRC recommends that IRAG, or a similar body, consider the development of a central information source. The source should provide mature age workers and volunteers with clear and simple information about insurance products relevant to their participation in paid employment or volunteering.

6.18 Mature age workers, like all consumers, have a level of individual responsibility for sourcing and comparing insurance policies. However, if lack of awareness is contributing to perceptions of age discrimination in insurance, or is acting as an additional insurance-related barrier to workforce participation, the development of information sources is a constructive option for reform.

6.19 A number of comments from respondents received as part of a 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.²⁷

6.20 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’.²⁸

6.21 The Financial Services Council (FSC) acknowledged that ‘it is likely that awareness of the range of products that are presently available for older Australians may be low’.²⁹

6.22 There are a number of existing sources and initiatives in this area, including *MoneySmart*,³⁰ and the Consumer Referral Service (CRS) launched by the ICA in

25 IRAG was established in April 2011. The purpose of IRAG is to bring together peak industry bodies, consumer and Australian 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’: 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).

26 Insurance Council of Australia, *Submission 94*.

27 National Seniors Australia and COTA, *Ageism in Travel Insurance 2012 Survey Report* (2012), 24.

28 Ibid.

29 Financial Services Council, *Submission 89*.

30 ASIC, *MoneySmart* <www.moneysmart.gov.au> at 21 March 2013.

2012. The CRS provides contact details of insurers, including a listing for ‘Seniors Travel Insurance’.³¹ These sources could be revised, or could contribute to the development of a new central information source, to provide mature age persons with clear and simple information about available insurance products.

6.23 Suncorp acknowledged the limitations of the current CRS and indicated it is ‘committed to supporting the ongoing enhancement of the portal’.³² If the CRS is extended or used as a model, Suncorp suggested that ‘enhanced search capabilities to meet the needs of consumers from diverse backgrounds will be an important function for inclusion in the portal going forward’.³³

6.24 In addition, any such source should be accessible for all members of the community, including people with disability, Indigenous people and members of culturally and linguistically diverse communities. In developing such a source a number of practical issues would also need to be considered. These include: cost; responsibility for ongoing updates and maintenance; and the most appropriate ways to distribute such information in hard copy.³⁴

6.25 Ideally, the information incorporated should extend beyond provision of contact details of insurers to include, for example: the products available; the terms of cover; and any age-related restrictions. However, general insurers sell on a ‘no advice’ model.³⁵ Insurers have submitted that obligations governing the provision of financial advice limit their ability and willingness to provide information to mature age consumers that may be considered general or personal advice rather than factual information.³⁶ For example, Suncorp suggested that such obligations and resulting uncertainty results in ‘a generally conservative approach being taken in the provision of information’ by insurers.³⁷ In addition, while the FSC indicated it is ‘supportive of initiatives to improve consumer awareness and accessibility of life insurance products offered by its members’, it submitted that

it is important to ensure that any proposals with respect to the centralisation of product-specific information are balanced with the appropriate consumer protection in

31 Insurance Council of Australia, *Find an Insurer* <www.findaninsurer.com.au> at 21 March 2013. The service is similar to the British Insurance Brokers’ Association ‘Find a Broker’ service and website: British Insurance Brokers’ Association, *Find an Insurance Broker* <www.biba.org.uk/ConsumerHome.aspx> at 21 March 2013.

32 Suncorp Group, *Submission 66*.

33 Ibid.

34 See, eg, Insurance Council of Australia, *Submission 94*.

35 For example, *Corporations Act 2001* (Cth) ch 7; ASIC, *Regulatory Guide 36: Licensing Financial Product Advice and Dealing* (April 2011); ASIC, *Regulatory Guide 146: Licensing: Training of Financial Product Advisers* (July 2012); ASIC, *Regulatory Guide 175: Licensing: Financial Product Advisers—Conduct and Disclosure* (December 2012).

36 An Australian Financial Services (AFS) licence is not required to provide factual information regarding a product to customers. However, providing general or personal financial advice does require an AFS licence, and is the subject of obligations under the *Corporations Act 2001* (Cth) and the supporting Regulatory Guides issued by the Australian Securities and Investment Commission. See, eg, Insurance Council of Australia, *Submission 94*; Financial Services Council, *Submission 89*; Suncorp Group, *Submission 66*.

37 Suncorp Group, *Submission 66*.

light of regulatory requirements for product issuers in regard to obligations that limit the provision of personal versus general advice.³⁸

6.26 The definition and scaling of factual information, general and personal advice is the focus of the ‘Future of Financial Advice’ reforms.³⁹ Consideration of these issues is broader than the scope of this Inquiry. However, insurer concerns and the effect these have on assistance provided to mature age persons seeking insurance need to be considered in the course of developing the central information source. The ALRC welcomes developments that will facilitate the provision of clear and simple information to all people seeking insurance, including mature age persons.⁴⁰

Recommendation 6–1 The Insurance Reform Advisory Group, or a similar body, should facilitate the development of a central information source to provide mature age persons with clear and simple information about relevant and available insurance products.

Actuarial and statistical data

6.27 Data, in particular actuarial and statistical data, informs evidence-based risk assessment in insurance. Stakeholders expressed concerns about the accuracy, relevance and currency of data relied upon by insurers in making decisions about insurance on the basis of age. To address these concerns, the ALRC recommends that the Australian Government and insurers negotiate an agreement requiring the publication of data upon which decisions about insurance offerings based on age are made. In the course of negotiating such an agreement, the ALRC suggests that other approaches to addressing such concerns be explored.

Agreement requiring publication of aggregate data

6.28 In assessing risk and determining ‘risk appetite’, insurers may use available data, including from the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, and their own claims book experience.⁴¹ Insurers often also rely on guidelines issued by reinsurers.⁴² However, aside from complaint processes under anti-discrimination legislation or formal judicial review, the current system offers

38 Financial Services Council, *Submission 89*.

39 Treasury, *Future of Financial Advice Reforms* <<http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm>> at 21 March 2013.

40 For example, ICA submitted that it has ‘had productive discussions with ASIC on how tailored information can be provided to a customer without triggering general or personal advice obligations. We are hopeful that the regulatory guidance which ASIC issues on this subject will facilitate the provision of clear and simple information which will help consumers make better insurance purchasing decisions’: Insurance Council of Australia, *Submission 94*. See also Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, rec 14.

41 Insurance Council of Australia, *Submission 21*.

42 Reinsurance is 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’: Thomson Reuters, *The Laws of Australia* (2009), Vol 22, ‘Insurance’ as at 14 March 2013, [22.1.260].

limited independent oversight of whether insurers are basing decisions on reasonable actuarial or statistical data.

6.29 The ALRC recommends that the Australian Government and insurers should negotiate an agreement requiring the publication of aggregate data upon which decisions about insurance offerings based on age are made.

6.30 A recent investigation by the Tasmanian Anti-Discrimination Commissioner into volunteers, age and insurance concluded that the data being relied upon by insurers and provided to the Commissioner was not ‘of sufficient detail or relevance’.⁴³ The Commissioner stated that the data was insufficient ‘to support the claim that older volunteers pose a greater insurance risk ... because of their age’.⁴⁴ The Commissioner also expressed the view that the current approach of insurers is ‘based solely on age and not on risk’.⁴⁵

6.31 In addition, stakeholders in this Inquiry expressed broad concerns about lack of transparency. For example, the South Australian Equal Opportunity Commission submitted that

the lack of transparency and the imbalance of power compounds the disadvantage experienced. A more transparent industry would enable those seeking insurance to be provided with and understand the reasons behind any refusal.⁴⁶

6.32 The ALRC is of the view that increased transparency around such data would address some of these concerns. The Association of British Insurers (ABI) and the British Insurance Brokers’ Association have entered into a non-statutory agreement with the UK government. The agreement 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.⁴⁷ The agreement was negotiated in part to respond to consumer concerns that changes in insurance premiums ‘due to a person’s age are not always proportionate to risk and the cost of claims’.⁴⁸ The agreement contains a number of general principles, including to:

- publish the aggregated data in the form of a table or chart;
- explain the chart or table, and any technical terms, in a form that is intelligible to someone who is not an insurance expert;
- identify which companies provided the data and the period to which it relates;
- review and, if necessary, update the data at intervals not exceeding one year; and

43 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, iv.

44 Ibid, 83.

45 Ibid.

46 South Australian Equal Opportunity Commission, *Submission 70*.

47 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 21 March 2013.

48 Ibid.

- make the data available free of charge on the ABI website, in electronic forms to other organisations and as a hard copy on request.⁴⁹

6.33 However, insurers expressed significant concerns about disclosing data. For example, Suncorp submitted that

the data and analysis within the underwriting process is key intellectual property for insurers and is the process in which insurers can differentiate themselves and compete in the market.⁵⁰

6.34 The ICA also stressed the sensitive nature of data and expressed some concern about the

utility of the proposal to require the provision of data, statistics and other relevant information, which is the intellectual property of insurers, and which would be difficult to interpret by most people without statistical or actuarial training.⁵¹

6.35 The ALRC recommends that the Australian Government and insurers should negotiate an agreement similar to the one in the UK. The agreement should require the publication of aggregate data upon which decisions about insurance offerings based on age are made. This approach allows consideration by key stakeholders of the need to balance increased transparency and confidence in the data and insurer decision-making with issues of commercial sensitivity and intellectual property. In line with the approach taken in the UK, the publication of such data should be: aggregated; easily understood by the general community; identify the contributing insurers and periods; up-to-date and reviewed as necessary; and accessible free of charge.

6.36 In addition, in the course of negotiating such an agreement the ALRC suggests that IRAG and similar bodies explore other approaches to addressing the concerns raised about data.

6.37 For example, one possible approach involves extending the Australian Prudential Regulation Authority's (APRA) existing prudential and data collection role. APRA's current focus is on prudential standards, and data is collected primarily for the purposes of feeding into APRA's supervision of insurers. The focus of such data includes insurers' financial performance, financial position and capital adequacy.⁵² However, the Tasmanian Anti-Discrimination Commissioner recommended that 'insurers be required to submit for publication' information about 'products where age is a factor used to exclude coverage or determine premiums and benefits and the data on which these decisions rely'.⁵³ If APRA's role were extended to include the collection of such data, this would centralise reporting requirements for insurers.

49 Association of British Insurers, *Age and Insurance: Helping Customers Understand Insurers' Use of Age in Motor and Travel Insurance* (June 2012), 5.

50 Suncorp Group, *Submission 66*.

51 Insurance Council of Australia, *Submission 94*.

52 See, eg, APRA, *Confidentiality of General Insurance Data and Changes to General Insurance Statistical Publications, Discussion Paper* (February 2013).

53 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, rec 8.

Moves towards increased insurance-related data transparency by APRA would, in turn, assist in increasing the transparency of age-related insurance data.⁵⁴

Recommendation 6–2 The Australian Government should negotiate an agreement with insurers offering products in the Australian market requiring the publication of data upon which decisions about insurance offerings based on age are made.

Anti-discrimination legislation and the insurance exception

6.38 There are a range of different insurance exceptions under Commonwealth, state and territory anti-discrimination legislation. The exceptions allow insurers to 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. In the course of the Inquiry, stakeholders expressed concerns about two aspects of the insurance exception regime. First, stakeholders were concerned by the nature of the exceptions. Secondly, stakeholders expressed reservations about the relevancy, accuracy and availability of the actuarial or statistical data relied upon by insurers to satisfy the exceptions. The ALRC recommends that the Australian, state and territory governments review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation to address such concerns. The ALRC also recommends that guidance material be developed about the application of the insurance exception under Commonwealth anti-discrimination legislation.

How does the Commonwealth insurance exception operate?

6.39 The *Age Discrimination Act 2004* (Cth) (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.⁵⁵ 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.⁵⁶

54 For example, the Australian Prudential Regulation Authority (APRA) is the prudential regulator and a national statistical agency for the Australian financial sector. APRA is proposing amendment to publication of data provided to it, including making such data non-confidential, introducing group-level statistics and incorporating more detailed industry-level statistics into its publications: APRA, *Confidentiality of General Insurance Data and Changes to General Insurance Statistical Publications, Discussion Paper* (February 2013).

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

56 *Ibid* s 37(3).

6.40 As outlined in Chapter 1, the Australian Government is in the process of consolidating Commonwealth anti-discrimination legislation. The specific insurance exception under the Human Rights and Anti-Discrimination Bill 2012 (Cth) (HRAD Bill) provides that an additional condition must be satisfied. If the individual has given the insurer a written request for access to the data, the insurer must have provided the individual with a copy of the data or reasonable access to the data.⁵⁷

6.41 The HRAD Bill contains a different approach to exceptions from the one under existing Commonwealth anti-discrimination legislation. It proposes moving to a more general approach to exceptions, while retaining some specific exceptions. The Bill incorporates a general justifiable conduct exception. The specific exceptions under existing legislation, including in relation to insurance, fall within this general exception.

6.42 In addition, s 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 exceptions, be unlawful. However, the HRAD Bill replaces the AHRC's specific power to require production of data with a general power to obtain information in complaints and inquiries.⁵⁸

6.43 A range of similar provisions operate at a state and territory level.⁵⁹

Reviewing the exceptions

6.44 A number of stakeholders expressed concerns about the operation of the insurance exception. Particular concerns included: that insurers may rely on the exception without considering whether they have the necessary and appropriate data; and whether reliance is reasonable having regard to other relevant factors. For example, the Tasmanian Anti-Discrimination Commissioner expressed the view that

decisions to exclude people within certain age brackets or to provide coverage on the basis of increased premiums and/or reduced benefits, is taking place without the evidentiary basis required.⁶⁰

6.45 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. These included: access to insurance; the nature of, and access to, actuarial and statistical data; the nature of 'any other relevant factors'; and reliance on stereotypes.⁶¹

6.46 Stakeholders suggested a range of approaches to address such concerns. Some submitted that specific exceptions should be removed and that the general exception

57 This must have occurred within a reasonable period after the request: Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 39(5)(a)(iii).

58 Ibid cl 107, 140.

59 See, eg, *Anti-Discrimination Act 1998* (Tas) s 34; *Equal Opportunity Act 1984* (SA) s 85R(2).

60 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, 90.

61 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth)* (2004).

included in the HRAD Bill should apply. Others argued that insurers should be required to apply for a specific exception. For example, the Law Society of New South Wales (LSNSW) submitted that

insurers ought to be required to apply for a specific exemption or show why an applicant over 65 years should not be covered by an insurance policy. This approach is favoured by the LSNSW rather than the general statutory exemption.⁶²

6.47 The South Australian Equal Opportunity Commission supported a reverse onus of proof, suggesting that

any adverse decision based upon a ground protected by anti-discrimination legislation, such as age, should be assumed to be discrimination unless the insurance company provides evidence to rebut that presumption.⁶³

6.48 However, a number of insurers and the ICA expressed strong support for retaining the insurance exception. The ICA submitted that

there is already in place in Australia a strong legislative regime to require the insurer to prove it meets all evidentiary requirements to rely on an insurance exemption.⁶⁴

6.49 Suncorp submitted that ‘it is critical for the insurance industry to be able to lawfully discriminate during the underwriting process’.⁶⁵

6.50 Insurers also highlighted the relatively low number of complaints in relation to insurance under the ADA. Insurers argue this suggests that the ‘current statutory insurance exemption accurately reflects insurer practice and assists insurers to explain the underwriting process to consumers, aiding early resolution of complaints’.⁶⁶ The ALRC considers that, given the individualised complaints-based nature of the ADA system, a low number of complaints does not necessarily mean the system is operating as intended.

6.51 In the Tasmanian context, the Tasmanian Anti-Discrimination Commissioner concluded that ‘the case had not been made for the application of the insurance exception’ under s 34 of the *Anti-Discrimination Act 1998* (Tas). As a result, insurers relying on the data provided to the Commissioner are ‘potentially offering services, in the form of insurance, in breach of the Tasmanian Act’.⁶⁷

6.52 Amendment to the insurance exception under Commonwealth legislation would have a significant effect on all types of insurance, not just those types of insurance that are the focus of this Inquiry. Further, many of the suggested amendments to the exception involve a fundamental shift in the structure of the exception framework, for example from general and specific to general exceptions alone, or from permanent exceptions to temporary exceptions.

62 Law Council of Australia, *Submission 96*. See also Brotherhood of St Laurence, *Submission 86*.

63 South Australian Equal Opportunity Commission, *Submission 70*.

64 Insurance Council of Australia, *Submission 94*.

65 Suncorp Group, *Submission 66*.

66 Ibid. See also Insurance Council of Australia, *Submission 94*; Financial Services Council, *Submission 89*.

67 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, iii.

6.53 As a result, the ALRC does not consider it appropriate to recommend the retention or removal of the insurance exception. However, the ALRC considers it would be useful to have a separate review of the insurance exception. A separate review would be particularly valuable given the de-regulatory focus of the consolidation process and the complexity and scope of the effect any amendment to the insurance exception may have. While the HRAD Bill provides for review of all exceptions in three years, the ALRC recommends that the Australian Government review the insurance exception in Commonwealth anti-discrimination legislation prior to this time.

6.54 In addition, the ALRC suggests that a review at a Commonwealth level presents a timely opportunity to review similar provisions under state and territory anti-discrimination legislation. This is particularly so in light of the recommendations arising from the Tasmanian investigation, national stakeholder concern and the lack of consistency between jurisdictions. This approach was supported by stakeholders such as Suncorp, which suggested that this offered an opportunity to ‘harmonise the insurance exemption clause across all Commonwealth anti-discrimination laws and nationally’.⁶⁸ The ALRC therefore recommends that the Australian, state and territory governments should review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.

6.55 In the course of reviewing the insurance exceptions, the ALRC suggests that a number of key issues which emerged in the course of this Inquiry should be considered. These include: provision for individuals to request and receive the data on which the decision was based;⁶⁹ that the data it is reasonable for insurers to rely upon; and the meaning of ‘other relevant factors’ for the purposes of the exception.⁷⁰ Further, the insurance exception requires and assumes that insurers possess data upon which age-based decisions are made. However, in practice insurers may rely on the data possessed by global reinsurers. As a result, this issue should also be considered in the course of the review.

⁶⁸ Suncorp Group, *Submission 66*.

⁶⁹ In the Discussion Paper, the ALRC suggested that, at a Commonwealth level, provision for an individual to request and receive the actuarial or statistical data on which the action or decision was based, as under the *Sex Discrimination Act 1984* (Cth), may address some stakeholder concerns in this area. This provision was subsequently incorporated into cl 39(5)(a)(iii) of the HRAD Bill. While a number of stakeholders supported the inclusion of this provision, some were concerned about the ability of an individual consumer to understand the data, as well as the commercially sensitive nature of data. The ICA and FSC suggested that, instead, there be provision for a court or other body to request and receive ‘such information on a confidential basis and for use only in the matter under investigation’: Financial Services Council, *Submission 89*. See also Insurance Council of Australia, *Submission 94*.

⁷⁰ *Age Discrimination Act 2004* (Cth) s 37(3); Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 39(5)(b). The meaning of ‘other relevant factors’ has been considered by the Federal Court in the context of the *Disability Discrimination Act 1992* (Cth) in *QBE Travel Insurance v Bassanelli*, 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. 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: *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

6.56 There are also a range of international developments with respect to insurance that may be of relevance in an Australian insurance context.⁷¹

Recommendation 6–3 The Australian, state and territory governments should review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.

Guidance material

6.57 To make certain insurers and consumers understand the operation of the insurance exception, the ALRC recommends that the AHRC should develop guidance material about the application of any insurance exception as it applies to age under Commonwealth anti-discrimination legislation. Such guidance should be developed in consultation with key insurance and superannuation bodies.

6.58 A range of stakeholders supported the development of such guidance material.⁷² For example, Suncorp noted that although guidelines are not binding, they could provide the AHRC's 'view on the interpretation of the exemption under the Act and relevant case law'.⁷³ In addition, the ICA indicated it 'would be pleased to co-operate with the AHRC and industry stakeholders on this matter'.⁷⁴ The Tasmanian Anti-Discrimination Commissioner made a similar recommendation.⁷⁵

6.59 By way of example, the AHRC developed *Guidelines for Providers of Insurance and Superannuation* with respect to the insurance and superannuation exceptions under the DDA. Last revised in 2005, the guidelines 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

71 See, eg, the release of United Nations Environment Program Finance Initiative, *Principles for Sustainable Insurance* (2012). In Europe, 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 exception) 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 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.

72 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Insurance Council of Australia, *Submission 94*; Financial Services Council, *Submission 89*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Suncorp Group, *Submission 66*.

73 Suncorp Group, *Submission 66*.

74 Insurance Council of Australia, *Submission 94*.

75 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, rec 9.

- 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
- explain factors that courts may take into account in deciding a complaint about disability discrimination.⁷⁶

6.60 The ALRC suggests that guidelines about the exception applying to age could: outline how the exception applies; discuss the nature of actuarial or statistical data that may be acceptable for the purposes of the exception; summarise recent case law; clarify the meaning of ‘other relevant factors’; and provide case studies.

Recommendation 6–4 The Australian Human Rights Commission should, in consultation with key insurance and superannuation bodies, develop guidance material about the application of any insurance exception as it applies to age under Commonwealth anti-discrimination legislation.

Insurance codes of practice

6.61 There are two key insurance industry codes of practice in Australia. The General Insurance Code of Practice (the Code) is a self-regulatory code that binds all general insurers who are signatories to it.⁷⁷ The FSC Code of Ethics and Code of Conduct (the FSC Code) is compulsory for all FSC members.⁷⁸ Industry codes such as these ‘play an important part in how financial products and services are regulated in Australia’.⁷⁹

6.62 The ALRC recommends that both codes should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

General Insurance Code of Practice

6.63 The Code was developed and introduced by the ICA—the representative body of the general insurance industry in Australia—in 1994. It applies to all general insurance products, including travel insurance and sickness and accident 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;

⁷⁶ Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation* <www.humanrights.gov.au/disability_rights/standards/Insurance/insurance_adv.html> at 21 March 2013.

⁷⁷ Insurance Council of Australia, *General Insurance Code of Practice*.

⁷⁸ Financial Services Council, *Standard No 1, Code of Ethics and Code of Conduct*. The Financial Services Council is the industry association for the financial services sector, which includes the life insurance industry.

⁷⁹ ASIC, *Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct* (March 2013), 183.1.

- 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.⁸⁰

6.64 The Code is binding on all signatories, including members of the ICA.⁸¹ The Financial Ombudsman Service monitors compliance with the Code. Its findings are reported to the Code Compliance Committee which monitors compliance with the Code and has power to make determinations and impose sanctions.⁸²

6.65 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. A final report is due in May 2013.⁸³

6.66 The ALRC proposed that the review examine ways in which the Code could be amended to encourage insurers to consider the needs and circumstances of mature age persons.⁸⁴ A number of stakeholders supported this approach.⁸⁵ Others, such as Suncorp, opposed the proposal on the basis that the Code

is a statement of principles designed to guarantee exceptional customer service standards and to protect the rights of policyholders and is supported by the objectives of the Code. Suncorp is of the view it is not appropriate, in any way, to limit these standards to a specific target group but considers it should apply to all consumers, without exception within the community.⁸⁶

6.67 Similarly, the ICA submitted that while it ‘does not consider the Code an appropriate place to address anti-discrimination issues in detail, having regard to the strong regulatory regime already in place’ it recognised that

it may be appropriate to have an overarching principle in the Code committing Code participants to working to satisfy the general insurance needs of the whole community regardless of financial situation, age or disability.⁸⁷

80 Insurance Council of Australia, *General Insurance Code of Practice*, cl 1.17.

81 ASIC has the power to approve codes in the financial services sector such as the General Insurance Code of Practice as set out in *Regulatory Guide 183* and in accordance with the *Corporations Act 2001* (Cth) which provides ASIC with statutory power to approve voluntary industry codes of conduct: *Corporations Act 2001* (Cth) s 1101A; ASIC, *Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct* (March 2013).

82 Insurance Council of Australia, *General Insurance Code of Practice*, cls 7.13–7.23.

83 General Insurance Code of Practice 2012 Review <www.codeofpracticereview.com.au/Home.aspx> at 21 March 2013.

84 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 4–3.

85 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; ACTU, *Submission 88*; Australian Chamber of Commerce and Industry, *Submission 85*.

86 Suncorp Group, *Submission 66*.

87 Insurance Council of Australia, *Submission 94*.

6.68 Mr Enright has indicated that issues of access and diversity have been raised in the course of the review, and they are ‘terribly important’. However he has suggested that addressing such issues in the Code at this stage would be a ‘significant shift’ and is not possible in the timeframe remaining for the review of the Code.⁸⁸ The ALRC suggests that issues of access and diversity, including in relation to mature age persons, might usefully be considered in the course of the next review of the Code and recommends the inclusion within it of a diversity statement or objects clause.

The FSC Code of Ethics and Code of Conduct

6.69 The FSC is the industry association for the financial services sector, which includes the life insurance industry. Compliance with the FSC Code is compulsory for all FSC members.⁸⁹ It contains specific rules as well as broader ethical principles to guide decision-making.

6.70 In response to the ALRC’s question about the review of other industry codes such as the FSC Code, the FSC submitted that its Code is not life insurance specific or tailored and

is not relevant to the specific subject matter relating to insurers and mature age persons. Therefore it should not be reviewed in the context of insurers and mature age persons. The intent of the [FSC Code] is to promote the highest integrity among the broad FSC membership. We do not believe it is appropriate to limit (or tailor) the operation of this Standard to a particular group or demographic.⁹⁰

6.71 The ALRC recognises the particular roles these two codes play in the context of Australia’s insurance industry. The ALRC does not consider it appropriate to encourage or mandate the removal or extension of age-based limitations on insurance policies, or to limit the standards contained in the codes to a specific group, in this case mature age persons. However, the ALRC is of the view that it is appropriate for the codes to contain a diversity statement or objects clause that encourages consideration of the needs and circumstances of a diverse range of consumers. Such a statement should include reference to mature age persons, among other consumers.

Recommendation 6–5 The General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

88 InsuranceNEWS, *Code Overhaul to Move Compliance Committee “Front and Centre”*, 18 February 2013 <www.insurancenews.com.au> at 21 March 2013.

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

90 Financial Services Council, *Submission 89*.

7. Social Security

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Summary

7.1 This chapter considers aspects of the social security system that act as barriers to work for mature age persons. The ALRC recommends an evaluation of the methods for communicating information about social security payments and entitlements to mature age persons. It also recommends that staff of employment services providers be provided with training tools to improve the quality of job search assistance for mature age persons.

7.2 The ALRC also makes recommendations about specific income support payments. The ALRC recommends that the process for review of Disability Support Pension be clarified. It also recommends that a more flexible interpretation to combining care with work, education, training or voluntary work be taken when assessing qualification for Carer Payment. Finally, the ALRC recommends that the

Work Bonus amount for the Age Pension and Veterans' Age Service Pension be indexed.

Australia's social security system

7.3 The primary purpose of Australia's social security, or transfer, 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 individuals and families. These include age and other pensions, Newstart Allowance and other allowance payments, Family Tax Benefit and supplementary payments.² Income support payments are made to people 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.

7.4 Concession cards provide additional assistance to persons receiving income support, as well as to those with low incomes and seniors who meet a separate income test. These cards provide access to a range of discounts or subsidies on Commonwealth, state, territory and local government fees and charges.³

7.5 The legislative basis of the social security system is the *Social Security Act 1991* (Cth) (the *Social Security Act*) and the *Social Security (Administration) Act 1999* (Cth). The legislative basis for family payments is *A New Tax System (Family Assistance Act) 1999* (Cth) and *A New Tax System (Family Assistance Act) (Administration) Act 1999* (Cth). 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.⁴

7.6 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).

7.7 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 a review of the

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. Concession cards and their effect on mature age workforce participation are addressed in the Discussion Paper: Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), 137–140.

4 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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013; FaHCSIA, *Family Assistance Guide* (2013) <www.fahcsia.gov.au/guides_acts/> at 21 March 2013. 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 1137. 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.

tax and transfer system.⁵ In 2009, the Pension Review considered pension payments for seniors, carers and people with disability.⁶ In addition, in 2012, the Senate Education, Employment and Workplace Relations References Committee conducted an inquiry into the ‘adequacy and appropriateness of the allowance payment system for job seekers 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’ (the Allowance Payment Inquiry).⁷

7.8 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, the ALRC recognises that these barriers are multi-faceted, and unlikely to be resolved by law reform alone. For example, stakeholders have argued that the lack of willingness of employers to hire mature age persons contributes significantly to joblessness for persons in this age group.⁸

7.9 Mature age persons may also have multiple barriers to employment, in addition to age. For example, the National Welfare Rights Network (NWRN) noted that ‘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, Professor Peter Whiteford has cautioned against seeing social security reform as a standalone remedy for the difficulties faced by many job seekers:

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

7.10 Income support payments are aimed primarily at providing a minimum adequate standard of living. However, the different qualification requirements and payment rates

5 The Treasury, *Australia’s Future Tax System: Final Report* (2010).

6 FaHCSIA, *Pension Review Report* (2009).

7 Senate Education, Employment and Workplace Relations References Committee—Parliament of Australia, *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).

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.

attached to various payments also reflect judgments about recipients' expected relationship to the labour force.

7.11 The primary income support payments are categorised into two groups—pensions and allowances. Pensions have historically been provided on the basis that recipients were not expected to undertake paid work. These include: Age Pension, Carer Payment, Parenting Payment,¹² and Disability Support Pension. Pension recipients generally are not required to seek paid work as a condition of payment. They are paid at a higher rate than allowances to reflect the expectation that the pension will be a person's sole source of income for an extended period.¹³

7.12 Allowances for job seekers, including the main working age payment, Newstart Allowance, are paid on the basis that recipients are willing and able to work, and not expected to need income support for an extended period.¹⁴

7.13 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.¹⁵ Allowances are also paid at a lower rate than pensions to act as an incentive to obtain paid employment.¹⁶

7.14 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.¹⁷ In 2009, the Pension Review also found that pensions paid to those below Age Pension age should actively support people to participate in employment.¹⁸ In addition, while allowance payments were historically designed as short term payments, a large proportion of Newstart Allowance recipients spend long periods of time on the payment.¹⁹

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.

13 The Treasury, *Australia's Future Tax System: Final Report* (2010), 496.

14 The Treasury, *Australia's Future Tax System: Consultation Paper* (2008), 92. Allowance payments, including Austudy and ABSTUDY, are also made to students, again on the basis that the period of time on income support will be limited.

15 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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [1.1. A.40].

16 The Treasury, *Australia's Future Tax System: Final Report* (2010), 493, 496.

17 A medical model of disability sees disability as caused by a person's impairment. By contrast, a social model considers disability as the effect of the interaction between a person with a particular impairment and their social and physical environment: Productivity Commission, *Disability Care and Support* (2011), 271.

18 FaHCSIA, *Pension Review Report* (2009), xxi.

19 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, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 63.

Means testing and employment income

7.15 The means test for an income support payment has two parts: an income test and an assets test. Payment is calculated by applying the test that results in the least amount of payment.²⁰

7.16 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.²¹

7.17 The income test allows a person to earn some employment income while still 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.²²

7.18 In addition to the income test, other aspects of income support payment design help to smooth the transition between income support and work, or to allow persons with fluctuating earnings to combine work and income support.

7.19 ‘Working Credit’ aims to encourage people of workforce age who receive income support payments to take up full-time, part-time, or casual work.²³ 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 1,000.²⁴ Accrued working credits are then used to offset employment income, effectively increasing the income free area for a payment.²⁵

20 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [4].

21 FaHCSIA, *Pension Review Report* (2009), 122.

22 DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 27.

23 *Social Security Act 1991* (Cth) s 1073D; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.1.11.10].

24 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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.1.11.20]. The Allowance Payment Inquiry recommended that the Working Credit limit be increased from 1,000 to the equivalent of three months work at the minimum wage: Senate Education, Employment and Workplace Relations References Committee—Parliament of Australia, *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), vii.

25 *Social Security Act 1991* (Cth) ss 1073F, 1073H; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [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)

7.20 ‘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.²⁶ Work Bonus is discussed more fully below.

7.21 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 that is made up entirely or partly of employment income, a recipient can be paid certain supplementary benefits and remain eligible for a concession card.²⁷ In addition, payment may be resumed without reapplication during this period if income reduces to a level where income support is payable again.²⁸ The Allowance Payment Inquiry recommended that the period of time that a person may resume payment without reapplication after ceasing to receive income support be increased to one year.²⁹

7.22 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.³⁰

7.23 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

7.24 In this section, the ALRC recommends that DHS should evaluate the effectiveness of its methods for communicating information about social security payments and entitlements to mature age persons.

7.25 The income support payment system in Australia is highly targeted. It achieves this through making distinctions between payment categories—such as for carers, people with disability and those unemployed—and by means testing of payments.³¹ The object is to direct payments to those most in need and to maintain the sustainability

s 1073J; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.11.30].

26 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.1.14.30].

27 *Social Security Act 1991* (Cth) ss 23(4A), 23(4AA), 1061ZEA, 1061ZMA; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.1.12].

28 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [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: DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), [3.1.12].

29 Senate Education, Employment and Workplace Relations References Committee—Parliament of Australia, *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).

30 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’s circumstances: FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.9.2.30].

31 The Treasury, *Australia’s Future Tax System: Final Report* (2010), 494.

of the system.³² The result is ‘the most targeted system of cash transfers in the OECD’.³³

7.26 A corollary of targeting is complexity. Submissions to this Inquiry suggested that this complexity itself is a barrier to work.³⁴ 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

7.27 DHS utilises a range of methods to provide information about income support payment eligibility, conditions and the effect of work upon payments. This includes advice to mature age persons on application for income support.³⁵ Information is also provided: online; in print, through letters and publications including the *News for Seniors Magazine*; as well as by telephone. DHS has emphasised its commitment to improving the way it communicates information, submitting that it

endeavours to display information to the public in a simple, logical manner and recently became the first government department to achieve a gold level certification for the use of plain language on the Human Services website from the Plain English Foundation.³⁶

7.28 However, the ALRC has heard that mature age persons find information about social security difficult to understand and navigate. A number of submissions identified access to information about income support payments as a problem for mature age persons.³⁷

7.29 The increasing emphasis on providing information online was also identified as a potential problem for mature age persons, whose access to and familiarity with information technology may be limited.³⁸ Research conducted in 2011 by DHS suggested that a range of communication methods are appropriate for mature age persons. This research found that mature age job seekers utilise the DHS website, but also value ‘direct contact with staff members as part of ongoing support’.³⁹ Self-funded

32 Ibid, 489.

33 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.

34 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*.

35 DEEWR, DHS and FaHCSIA, *Submission 101*.

36 Ibid.

37 Australian Chamber of Commerce and Industry, *Submission 85*; 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*.

38 National Seniors Australia, *Submission 92*; L Masters, *Submission 36*; National Seniors Australia, *Submission 27*; Commonwealth Ombudsman Office, *Submission 16*.

39 DEEWR, DHS and FaHCSIA, *Submission 101*.

retirees were found to be relatively more ‘comfortable with online channels, while ... most aged pensioners preferred printed and face-to-face communication’.⁴⁰

7.30 Mature age persons from culturally and linguistically diverse (CALD) backgrounds may find it particularly difficult to access social security information. The Federation of Ethnic Communities Councils of Australia (FECCA) noted that:

Unfamiliarity with concepts such as social welfare, communication issues and lack of knowledge restricts older CALD people’s ability to understand and access many mechanisms that established Australians take for granted, including a full understanding of social security entitlements.⁴¹

7.31 In addition to ensuring that information is accessible, stakeholders emphasised that such information must be easy to understand. A number of stakeholders suggested that mature age persons currently find information about social security difficult to comprehend.⁴²

7.32 NWRN submitted that activity test requirements were poorly understood by mature age job seekers. It argued that many mature age job seekers were concerned about the impact of ill health on their ability to comply with the conditions of their income support payment:

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.⁴³

7.33 Other submissions suggested that mature age persons find it difficult to understand the effect of paid work upon income support payments. For example, the Australian Chamber of Commerce and Industry (ACCI) commented that ‘there are generally no problems with accessibility to information but the areas of concern involve the complexity of eligibility arrangements and the consequences of altered circumstances’.⁴⁴ National Seniors commented that:

Older Australians continue to report a lack of knowledge and a high level of confusion regarding the eligibility for income support payments and work incentives. There is also fear about the potential loss of concessions and support payments if seniors undertake additional paid work.⁴⁵

7.34 Some stakeholders argued that information about incentives to take up paid work is not effectively communicated to mature age income support recipients. For example, in relation to the Age Pension, COTA noted that ‘there is not a good

40 Ibid.

41 Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*.

42 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*.

43 National Welfare Rights Network, *Submission 50*.

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

45 National Seniors Australia, *Submission 92*.

understanding of how the Work Bonus operates ... It needs to be promoted more widely'.⁴⁶

7.35 Difficulty in accessing and comprehending information about 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 recommends that the DHS should evaluate how it could communicate this information to mature age persons more effectively.

7.36 DEEWR, DHS and FaHCSIA agreed that 'it would be feasible for DHS to undertake targeted evaluation of its methods for communication information to mature age persons about social security, contingent on funding and resources'.⁴⁷

Recommendation 7-1 The Department of Human Services should evaluate the effectiveness of communication of 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 possible exemptions from the activity test;
- (c) how to calculate the effect of taking up paid work on income support payments; 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.

Employment services

7.37 This section outlines the Australian Government's employment services system, and employment assistance provided to mature age job seekers. The ALRC recommends that DEEWR ensure that training tools are made available to employment services provider staff about the barriers to work faced by mature aged persons.

7.38 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.⁴⁸ The Disability Employment Services (DES) system provides employment services for job seekers with disability.⁴⁹ JSA and DES providers

⁴⁶ COTA, *Submission 51*.

⁴⁷ DEEWR, DHS and FaHCSIA, *Submission 101*.

⁴⁸ DEEWR, *Job Services Australia* (2013) <<http://deewr.gov.au/job-services-australia-jsa>> at 21 March 2013.

⁴⁹ DEEWR, *Disability Employment Services* (2012) <<http://deewr.gov.au/disability-employment-services>> at 21 March 2013. DES providers also provide employment services under contract with DEEWR.

assist individual job seekers to find paid work, and also connect job seekers to skills development and training opportunities.⁵⁰ 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).⁵¹

7.39 Australian Government employment services are generally provided to persons in receipt of an income support payment.⁵² Job seekers receiving activity-tested payments, such as Newstart Allowance, are required to connect with a JSA provider as a condition of fulfilling this test.⁵³ Job seekers who receive non-activity-tested payments, such as Disability Support Pension and Carer Payment, may also volunteer to use JSA or DES.⁵⁴

Employment services reform

7.40 A number of submissions to this Inquiry argued that the employment services system requires thorough reform in respect of both the resources and assistance provided to disadvantaged and long-term unemployed job seekers.⁵⁵ Such comprehensive reform is beyond the scope of this Inquiry.

7.41 The contract arrangements for JSA, as well as one arm of DES, expire on 30 June 2015.⁵⁶ The Australian Government has begun consultations about potential reform of the employment services system in advance of this new contracting period.⁵⁷

50 DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 129.

51 From 1 July 2013, 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: Australian Government, *Remote Jobs and Communities Program General Fact Sheet* (2012).

52 In some cases, persons not in receipt of income support may be eligible to access Australian Government employment services. Persons aged 15–21 not employed for more than 15 hours per week or in full time education and vulnerable persons aged 15–21 who are full time students and ‘Drought Force’ participants are considered ‘fully eligible’ for employment services. Other persons who are not: full time students; working in paid employment for 15 hours or more per week and not on income support; overseas visitors on working holiday visas or studying in Australia; or prohibited by law from working in Australia may access limited services from employment services providers: DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 129–30.

53 *Social Security Act 1991* (Cth) s 601; DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), [3.2.8.10].

54 DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 129–130.

55 ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 54*; National Welfare Rights Network, *Submission 50*.

56 There are two types of services provided by DES. The Employment Support Service is for people with a permanent disability and with an assessed need for longer-term, regular, ongoing support in the workplace. The Disability Management Service is for people with disability, an injury, or a health condition who need the help of an employment service but do not expect to need long-term support in the workplace: DEEWR, *Disability Employment Services* (2012) <<http://deewr.gov.au/disability-employment-services>> at 21 March 2013. Employment Support Service contracts were re-tendered in 2012 and will run from March 2013 to June 2018: DEEWR, *Employment Services—Building on Success Issues Paper* (2012), 7.

57 DEEWR, *Employment Services—Building on Success Issues Paper* (2012).

7.42 This consultation process provides opportunities for reform of the employment services system to provide better support for mature age job seekers. The ALRC agrees with NWRN that it is essential that ‘older job seekers and their representatives and advocates have the opportunity to have their say in the improvements needed in employment services’ in this consultation process.⁵⁸

Accessing job search assistance

7.43 There may be a waiting period between the date a person becomes unemployed and the date they become eligible to receive income support. Access to Australian Government employment services is generally linked to receipt of income support. This means that there will often be a delay before a person can begin to receive help to find a job.

7.44 For example, persons claiming the main unemployment payment, Newstart Allowance, may be subject to a ‘liquid assets waiting period’ before they will qualify for payment. If a person has liquid assets above a ‘maximum reserve amount’, this waiting period will apply. The maximum reserve amount for a single person with no dependants is \$2,500. For a person who is a member of a couple or who has a dependent child, the amount is \$5,000.⁵⁹ The maximum reserve amounts will double from 1 July 2013.⁶⁰ Depending on the amount of liquid assets a person possesses above the maximum reserve amount, the liquid assets waiting period may range from one week to a maximum of 13 weeks.⁶¹

7.45 Early employment assistance may be particularly beneficial for mature age job seekers. As the Tax Review noted, ‘skills and the likelihood of gaining employment decline if people are out of work for long periods’.⁶² A person with liquid assets above the maximum reserve amount may wait up to 13 weeks before accessing such assistance. However, the liquid assets waiting period is a matter affecting all those seeking Newstart Allowance, and therefore wider than the scope of this Inquiry. The ALRC suggests that waiting periods for access to employment services could be further reviewed when considering reform of the employment services system for the new contracting period from 1 July 2013.

Job search assistance and job seeker obligations

7.46 JSA and DES providers are required by the Employment Services Code of Practice to provide individualised job search assistance to job seekers.⁶³ The level of employment assistance job seekers receive is determined by an assessment of their level of disadvantage in the labour market. Disadvantage is assessed based on a range

58 National Welfare Rights Network (NWRN), *Submission 99*.

59 *Social Security Act 1991* (Cth) s 14A.

60 *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012* (Cth) sch 2.

61 The Liquid Assets waiting period begins from the date of ceasing work or study, or making a claim for income support: *Social Security Act 1991* (Cth) s 598.

62 The Treasury, *Australia’s Future Tax System: Consultation Paper* (2008), 111. See also Brotherhood of St Laurence, *Submission 54*.

63 DEEWR, *Employment Services Code of Practice* (2013) <www.foi.deewr.gov.au/documents/employment-services-code-practice> at 21 March 2013.

of factors including age, gender, recency of work experience and vocational qualifications.⁶⁴ Persons assessed as being relatively more disadvantaged receive more intensive assistance.

7.47 To satisfy their activity test requirements, Newstart Allowance recipients are generally required by social security law to enter into an Employment Pathway Plan (EPP) with an employment services provider.⁶⁵ An EPP sets out a mix of vocational and non-vocational activities that a job seeker must participate in as a condition of payment.⁶⁶ The activities contained in an EPP are intended to improve a person's employment prospects.⁶⁷ In setting the terms of an EPP, a person's age, as well as characteristics including education, experience, skills, physical condition and health, must be taken into consideration.⁶⁸

7.48 The EPP is intended to be 'individually tailored' and negotiated between the job seeker and the provider. However, commentators have argued that this tailoring and negotiation may not occur in practice.⁶⁹ 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'.⁷⁰

7.49 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,⁷¹ and the increased likelihood of their having caring responsibilities for people with disability, the frail aged and grandchildren.⁷² These considerations may also require that a mature age person has access to the available exemptions or suspensions from EPPs.⁷³

64 DEEWR, *Job Seeker Classification Instrument: Factors and Points version 1.1*.

65 In specified circumstances, a job seeker may be exempt from the activity test and not be required to enter into an EPP: *Social Security Act 1991* (Cth) s 605; DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), [1.1. E.103].

66 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.2.8.30].

67 DEEWR, DHS and FaHCSIA, *Submission 101*.

68 *Social Security Act 1991* (Cth) ss 501A, 606; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.2.8.50].

69 L Fowkes, *Rethinking Australia's Employment Services*, Whitlam Institute Perspectives Papers 6 (2011), 14; M Considine, J Lewis and 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.

70 M Considine, J Lewis and 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.

71 DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 80.

72 Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, Cat No 4430.0* (2003); National Welfare Rights Network, *Submission 50*.

73 See, eg, *Social Security Act 1991* (Cth) ss 603, 603A, 603C.

Employment assistance for mature age job seekers

7.50 During this Inquiry, the ALRC heard concerns that mature age job seekers are not receiving the appropriate employment assistance needed to re-engage in the workforce.⁷⁴ Some stakeholders submitted that employment services providers were insufficiently responsive to the needs of mature age job seekers. For example, 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.⁷⁵ 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.⁷⁶

7.51 These difficulties may be compounded for mature age job seekers with multiple barriers to work. For example, the Australian Federation of Disability Organisations (AFDO) submitted that its members ‘often hear complaints that DES providers do not have sufficient understanding of the issues related to disability’.⁷⁷ FECCA reported that its consultations with CALD communities across Australia had found a ‘low level of cultural competency ... among Job Services Australia staff’.⁷⁸

7.52 The Australian Government has recognised that mature age job seekers may benefit from additional employment assistance. From 1 January 2013, the Mature Age Participation—Job Seeker Assistance Program provides increased support to some job seekers aged 50 and over who are registered with Job Services Australia. This program will provide approximately 6,700 mature age job seekers with intensive employment assistance.⁷⁹

7.53 The ALRC does not make specific recommendations for additional job search assistance to be provided to mature age job seekers. As the NWRN pointed out, age is only one indicator of potential need for increased assistance.⁸⁰ While supporting appropriate recognition of the needs and preferences of mature age job seekers, NWRN argued that

the employment service system should provide high quality support for all job seekers, and [NWRN] would be alarmed if ... [it] were to be fragmented according to

74 Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*.

75 Commonwealth Ombudsman Office, *Submission 16*.

76 Olderworkers, *Submission 22*.

77 Australian Federation of Disability Organisations, *Submission 78*.

78 Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*.

79 Australian Government, *Budget 2012–13: Budget Paper No 2* (2012) <www.budget.gov.au> at 21 March 2013; Australian Government, *Mid-Year Economic and Fiscal Outlook 2012–13* (2012), 211. In addition, the Experience+ Career Advice service provides professional career counselling and a resumé appraisal service to all job seekers and workers aged 45 years and over: DEEWR, *Free Career Advice* (2012) <www.deewr.gov.au/> at 21 March 2013.

80 National Welfare Rights Network (NWRN), *Submission 99*.

age as opposed to vulnerabilities and identified barriers to employment. Additional high quality, tailored and individualised supports need to be provided, for example, to young job seekers, Indigenous job seekers and those who are long term unemployed.⁸¹

7.54 However, the ALRC does recommend that DEEWR provide employment services provider staff with training tools about the barriers to work faced by mature age job seekers.⁸² Stakeholders supported this idea when proposed in the Discussion Paper.⁸³ In the Employment Services Code of Practice, the Australian Government has undertaken to support employment services providers by ‘evaluating and sharing best practice to enable continuous improvement in the delivery of employment services’.⁸⁴ The provision of training tools by the Australian Government is in keeping with this statement.

7.55 The ALRC notes the recommendation made by the Advisory Panel on Employment Services Administration and Accountability that the employment services workforce be professionalised. Such professionalisation would include ‘agreed knowledge, skills and competency standards for provider staff ... [and] recommended minimum qualifications’.⁸⁵ Improving the ability of employment services provider staff to engage appropriately with mature age job seekers accords with the more general goal of improving staff competence.

7.56 This recommendation will also promote better compliance with social security law, by improving the ability of employment services provider staff to tailor EPPs appropriately for mature age job seekers.

7.57 This recommendation could be integrated into existing systems so as not to unduly increase the compliance burden on providers. For example, access to training about mature age job seekers could be provided as part of the existing suite of ‘Learning Centre Training modules’ provided by DEEWR.⁸⁶ For example, an online cultural awareness training package in relation to Indigenous job seekers has recently been developed.⁸⁷ Similarly, in August 2012 a Mental Health Capacity Building e-learning package was released to assist employment services provider staff to identify and support people living with mental illness.⁸⁸ The mental health training package was developed with input from mental health organisations, psychiatric

81 Ibid.

82 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 5–2.

83 Australian Industry Group, *Submission 97*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*; Australian Federation of Disability Organisations, *Submission 78*; Diversity Council of Australia, *Submission 71*.

84 DEEWR, *Employment Services Code of Practice* (2013) <<http://foi.deewr.gov.au/documents/employment-services-code-practice>> at 21 March 2013.

85 DEEWR, *Advisory Panel on Employment Services Administration and Accountability Final Report* (2013), 28.

86 DEEWR, DHS and FaHCSIA, *Submission 101*.

87 Ibid.

88 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).

rehabilitation services and employment service provider peak bodies.⁸⁹ A similar package, drawing on relevant expertise, may be beneficial for mature age persons.

Recommendation 7–2 To enhance the capacity of staff of Job Services Australia, Disability Employment Services and the Indigenous Employment Program 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 and training tools about:

- (a) age discrimination;
- (b) the effect that illness, disability and caring responsibilities may have on the capacity of mature age persons to work;
- (c) diversity among mature age job seekers; and
- (d) Australian Government programs targeted at mature age job seekers.

Newstart Allowance and mature age job seekers

7.58 This section considers the situation of mature age job seekers in receipt of Newstart Allowance. The ALRC does not make any recommendations for reform of Newstart Allowance, on the basis that any reforms to this payment are not most appropriately targeted based on the age of recipients.

7.59 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 60–64.⁹⁰

7.60 For the purposes of Newstart Allowance, ‘mature age’ is defined as 55 years and over. At June 2012, there were 98,050 recipients, or 18% of the total Newstart Allowance population, in this age group.⁹¹ This number has almost doubled since June 2002.⁹² The increase has been driven by the phasing out of Partner Allowance, Mature Age Allowance and Widow Allowance, as well as the increasing age of eligibility for the Age Pension for women.⁹³

7.61 Approximately 50,000 Newstart Allowance recipients aged 55 years and over are ‘very long-term’ income support recipients (in receipt of income support for two years or more).⁹⁴ This represents approximately half of the total Newstart Allowance

⁸⁹ Ibid.

⁹⁰ DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (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.

⁹¹ DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 44, 92.

⁹² Ibid, 92.

⁹³ Ibid, 59, 92.

⁹⁴ Ibid, 79.

recipients in this age bracket,⁹⁵ as well as 20% of all very long-term income support recipients.⁹⁶

7.62 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.⁹⁷ At June 2012, there were 99,884 Newstart Allowance recipients with a partial capacity to work.⁹⁸ Of these, 27.1% were aged 55 years and over.⁹⁹ Persons with a partial capacity to work made up 27.6% of all Newstart Allowance recipients in this age group.¹⁰⁰

Adequacy of allowance payments

7.63 It has been argued that the current rate of Newstart Allowance¹⁰¹ is too low to provide an adequate minimum standard of living, as well as to enable effective job search activity.¹⁰² This may be particularly so for mature age job seekers, who may have substantial financial commitments.¹⁰³

7.64 NWRN submitted that the rate of Newstart Allowance is a barrier to workforce participation. It argued that ‘income support payments need to provide a sufficient income to enable people to look for work and to cover job search costs’.¹⁰⁴

7.65 Additionally, NWRN argued that the gap between payment rates for pensions and allowances ‘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’.¹⁰⁵ The Tax Review has also noted that the differences in rates of payment can ‘create disincentives to work or incentives to move to higher payments’.¹⁰⁶

95 Ibid, 44.

96 Ibid, 79.

97 *Social Security Act 1991* (Cth) s 16B; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [1.1. P.56].

98 DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 80.

99 Ibid.

100 Ibid, 44, 80.

101 At 20 March 2013, the basic rate of Newstart Allowance for a single person with no children is \$497 per fortnight. For a single person aged 60 years or over after nine continuous months on payment, the rate was \$537.80 per fortnight: FaHCSIA, *Indexation Rates March 2013* (2013).

102 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.

103 Gosnells Community Legal Centre Inc, *Submission to the Allowance Payment Inquiry* (2012).

104 National Welfare Rights Network, *Submission 50*.

105 Ibid.

106 The Treasury, *Australia’s Future Tax System: Final Report* (2010), 61.

7.66 In 2012, the Allowance Payment Inquiry considered the adequacy of the allowance payment system for jobseekers.¹⁰⁷ A number of submissions to that Inquiry argued that the rate of payment of Newstart Allowance creates barriers to work.¹⁰⁸ 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.¹⁰⁹

7.67 The Allowance Payment Inquiry found that ‘Newstart Allowance does not allow people to live at an acceptable standard in the long term’.¹¹⁰ However, rather than recommend any increase to the rate of Newstart Allowance the Inquiry recommended that additional resources be focused on moving people off income support and into work.¹¹¹

Activity test requirements for mature age job seekers

7.68 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.¹¹² At 29 June 2012, 19,582 (21.8%) of all activity-tested mature age job seekers were satisfying their requirements in this way.¹¹³

7.69 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 these activities and are required to accept suitable paid work or referral to interviews.¹¹⁴ In addition, they may access or continue to access the full range of

107 Senate Education, Employment and Workplace Relations References Committee—Parliament of Australia, *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).

108 Stakeholders who argued that the rate of payment amounts to a barrier to work included: 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.

109 Business Council of Australia, *Submission to the Allowance Payment Inquiry* (August 2012), 46.

110 Senate Education, Employment and Workplace Relations References Committee—Parliament of Australia, *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), 54.

111 Ibid. An income support bonus of \$105 (to be indexed by the CPI) for a single Newstart Allowance recipient (as well as recipients of certain other payments) will be paid on a twice-yearly basis beginning in March 2013: *Social Security Act 1991* (Cth) ss 919, 920, 1191–1194.

112 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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.2.8.20].

113 DEEWR, *Correspondence*, 23 July 2012.

114 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.2.8.50].

services available through their employment services provider on a voluntary basis.¹¹⁵ Job seekers not satisfying the concessional activity test have the same participation obligations as other job seekers.¹¹⁶ In the Discussion Paper, the ALRC decided against proposing that any changes be made to this activity test.¹¹⁷

Withdrawal rates for mature age job seekers

7.70 Newstart Allowance has undergone significant reform since the early 2000s. The primary consequence of the reforms has been a significant extension of its scope to encompass a wider population group, including parents of young children, people with a partial capacity to work and the mature aged.¹¹⁸ These reforms have meant that Newstart Allowance increasingly treats groups of recipients differently—for instance, through different activity test requirements.¹¹⁹

7.71 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.¹²⁰ Income between \$62 and \$250 per fortnight reduces payment by 50 cents in the dollar. Income above \$250 per fortnight reduces payment by 60 cents in the dollar.¹²¹

7.72 In the Discussion Paper, the ALRC asked about the possible effect on incentives for workforce participation of changing the income test withdrawal rate for Newstart Allowance recipients aged 55 years and over.¹²²

7.73 There was some support for reducing the withdrawal rate for mature age recipients of Newstart Allowance.¹²³ The Brotherhood of St Laurence (BSL) contended that the current withdrawal rates act as a barrier to taking up part-time or casual work:

harsh taper rates result in little financial benefit from part-time work and many people are wary of the risks of taking up casual or short-term employment, namely the job coming to an end and having to reapply for income support. Facilitating and supporting the transition into part-time employment may have benefits for longer-

115 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.

116 Participation Review Taskforce, *Participation Review Taskforce Report* (2008), 9.

117 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), 127–129.

118 For a summary of the reforms, see: DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 28–29, 139–146.

119 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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [1.1. A.40].

120 DHS, *A Guide to Australian Government Payments: 1 January–19 March 2013* (2013), 34. By comparison, the income free area for pension payments is \$152 per fortnight.

121 *Ibid.* In general, partner income that exceeds the earning thresholds also reduces payment by 60 cents in the dollar.

122 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012).

123 National Seniors Australia, *Submission 92*; Brotherhood of St Laurence, *Submission 86*; Australian Chamber of Commerce and Industry, *Submission 85*.

term and more highly disadvantaged jobseekers in relation to confidence and work experience, and with assistance, may lead to full-time employment.¹²⁴

7.74 However, other stakeholders argued against any change to the income test for mature age job seekers.¹²⁵ The Australian Council of Trade Unions (ACTU) did not support any change, on the basis that it could ‘lead to an increase in the complexity of the income support system’. The ACTU and NWRN suggested that, rather than making changes for mature age Newstart Allowance recipients alone, the income test for all Newstart Allowance recipients should be considered in a more comprehensive review of the income support system.¹²⁶

7.75 The ALRC has concluded that changes to the withdrawal rate are more appropriately considered in the context of a systemic review of income support payments. As a consequence, it makes no recommendation to change the income test withdrawal rate for mature age Newstart Allowance recipients.

7.76 The ALRC notes the Allowance Payment Inquiry recommendation that the income free area—the amount of income that a person may receive before their Newstart Allowance payment starts to reduce—be increased to six hours work per fortnight at the minimum wage for long-term Newstart Allowance recipients.¹²⁷ The Allowance Payment Inquiry made no recommendation to change the withdrawal rate.

7.77 Any increase to the income free area would improve the financial reward from paid work for all long-term Newstart Allowance recipients, including those who are mature age. The ALRC supports further consideration of the Allowance Payment Inquiry’s recommendation to this effect.

Disability Support Pension

7.78 Uncertainty about the possible effect of paid work on qualification for Disability Support Pension (DSP) may act as a disincentive to work for recipients of the payment, the majority of whom are mature age. The ALRC recommends that the *Guide to Social Security Law* should be amended to clarify that undertaking paid work for fewer than 30 hours per week will not trigger a review of qualification for DSP.

7.79 DSP recipients are the largest group of working age income support recipients. At June 2011, there were 818,850 recipients of DSP.¹²⁸ Of these, 67.5% were aged 45 years or over; 65% aged 45–64; and 2.5% aged 65 years and over.¹²⁹

124 Brotherhood of St Laurence, *Submission 86*.

125 Australian Industry Group, *Submission 97*; ACTU, *Submission 88*.

126 National Welfare Rights Network (NWRN), *Submission 99*; ACTU, *Submission 88*.

127 Senate Education, Employment and Workplace Relations References Committee—Parliament of Australia, *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), vii. A ‘long term’ Newstart Allowance recipient is a person who has been in continuous receipt of payment for 12 months or more: DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 63.

128 FaHCSIA, *Characteristics of Disability Support Pension Recipients June 2011* (2011), 10.

129 Ibid.

Qualification for Disability Support Pension

7.80 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.¹³⁰

7.81 To qualify for DSP a person must generally have a ‘continuing inability to work’ due to permanent physical, intellectual or psychiatric impairment.¹³¹ The severity of impairment to a person’s work functioning is rated by reference to ‘Impairment Tables’.¹³² Applicants for the DSP must have an impairment rating of 20 points or more.¹³³

7.82 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.¹³⁴ A person whose impairment is not severe¹³⁵ must also have participated in a program of support.¹³⁶

7.83 Proportionally few DSP recipients receive employment income. At May 2012, 70,243 recipients (less than 10%) had income from employment.¹³⁷

7.84 Since 1 July 2012, all DSP recipients can work for at least 15 hours per week but fewer than 30 hours per week without their qualification for the payment being affected.¹³⁸ This is the case notwithstanding that to qualify for DSP a person must be assessed as having a work capacity of fewer than 15 hours a week.¹³⁹

Review of qualification for Disability Support Pension

7.85 The review process for qualification for DSP may act as a disincentive to workforce participation for recipients.

130 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.

131 Ibid s 94. A person must also be at least 16 years of age and meet residence requirements.

132 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.

133 *Social Security Act 1991* (Cth) s 94(1)(a), (1)(b).

134 Ibid s 94(1)(c)(i), (2), (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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.1.10].

135 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).

136 Ibid s 94(2)(aa). A person who is assessed as being permanently blind is automatically qualified for a Disability Support Pension, and does not have to demonstrate a continuing inability to work: *Social Security Act 1991* (Cth) s 95; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.2.40].

137 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).

138 *Social Security Act 1991* (Cth) s 96.

139 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.1.12].

7.86 A range of reviews may apply to DSP recipients. 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.¹⁴⁰

7.87 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 customer remains qualified for DSP (eg because the customer service adviser discovers that the recipient is working)’.¹⁴¹

7.88 Centrelink also conducts ‘profiling reviews’ of DSP recipients, selectively identifying and reviewing certain recipients.¹⁴² FaHCSIA has stated that its practice is not to make public the parameters used to select a person for a profiling review, but that ‘employment predictors by themselves are not enough to select a pensioner’.¹⁴³

7.89 All reviews of qualification for DSP use the Impairment Tables that are currently in force to assess a person’s level of impairment.¹⁴⁴ These Tables were reviewed in 2011 and new Tables took effect from 1 January 2012.¹⁴⁵ Analysis carried out for FaHCSIA suggested that 36–45% of persons who qualified for DSP under previous Impairment Tables would not qualify when assessed under the new Tables.¹⁴⁶

7.90 This has led to concern about the effect of taking up paid work upon the likelihood of being reviewed for qualification for DSP.

7.91 DEEWR, DHS and FaHCSIA submitted that ‘there is no evidence that the processes for reviewing ongoing eligibility for Disability Support Pension (DSP) create barriers to mature age participation in the workforce’.¹⁴⁷

7.92 However, other stakeholders submitted that a lack of information about the review process for qualification for DSP was acting as a disincentive to paid work for recipients.¹⁴⁸ NWRN strongly endorsed a ‘recommendation to encourage the Government to provide greater transparency about the circumstances that can trigger a review’.¹⁴⁹ NWRN reported that

140 Ibid, [6.2.5.15].

141 Ibid, [6.2.5.18].

142 Ibid, [6.5].

143 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).

144 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.3].

145 Ibid.

146 Taylor Fry, *Analysis of the Testing of Draft Impairment Tables* (2011), 1.

147 DEEWR, DHS and FaHCSIA, *Submission 101*.

148 National Welfare Rights Network (NWRN), *Submission 99*; National Seniors Australia, *Submission 92*; Brotherhood of St Laurence, *Submission 86*.

149 National Welfare Rights Network (NWRN), *Submission 99*.

The information and advice lines at our member centres receive consistent and regular feedback from people anxious that any history of work or earnings will potentially trigger a review, at some point in the future.¹⁵⁰

7.93 BSL agreed that lack of clarity about the review process for DSP qualification may act as a disincentive to mature age participation.

7.94 It is appropriate that there should be some mechanism for review of a person's continued qualification for DSP. However, uncertainty about the circumstances of review may be acting as a disincentive to increased workforce participation for DSP recipients. The ALRC therefore recommends that the *Guide to Social Security Law* be amended to ensure that the parameters for review are consistent with recent amendments to the *Social Security Act* that allow a DSP recipient to work at least 15 hours per week but fewer than 30 hours per week and remain qualified for DSP.¹⁵¹

Recommendation 7–3 The *Guide to Social Security Law* should be amended to provide that undertaking paid work for fewer than 30 hours per week will not trigger a review of qualification for Disability Support Pension.

Carer Payment

7.95 Carer Payment provides income support to people who, because of caring responsibilities, are unable to support themselves through substantial paid employment.¹⁵² 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 recommends that the current rules be more flexibly interpreted to better allow carers in receipt of Carer Payment, the majority of whom are of mature age, to combine care with work or study.

Carer Payment and mature age persons

7.96 There is a correlation between informal care, mature age and gender. 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'.¹⁵³

7.97 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 over; 57% were aged 45–64 and 11% were aged 65 years and

150 Ibid.

151 *Social Security Act 1991* (Cth) s 96.

152 FaHCSIA, *Pension Review Report* (2009), 10.

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

over.¹⁵⁴ Carer Payment recipients were predominantly women—69% of total recipients at December 2011.¹⁵⁵

7.98 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.¹⁵⁶ This is a form of care that is likely to increase with the ageing of the population.

7.99 Bittman, Hill and Thomson's longitudinal study has shown that working age carers experience difficulties in combining paid work and care. Carers are more likely than non-carers to reduce their hours of work or exit from the labour force and to earn lower levels of income.¹⁵⁷ Thus, the 'privatisation of care' objective stands in tension with the goal of promoting workforce participation, given the difficulty of combining paid work and care.¹⁵⁸ The question of how to enable Carer Payment recipients to establish or maintain an attachment to the paid workforce falls squarely within these policy tensions.

Qualification for Carer Payment

7.100 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.¹⁵⁹ 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.¹⁶⁰

7.101 In specific circumstances Carer Payment recipients are permitted to cease caring temporarily 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.¹⁶¹ This is often referred to as the '25-hour rule'.

154 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).

155 Ibid.

156 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.

157 Ibid, 261.

158 Ibid, 256.

159 *Social Security Act 1991* (Cth) ss 197B–197K, 198; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.4.10].

160 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [1.1. C.310]. See also *Milne and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2008] AATA 689, [7]; *Callaghan and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] AATA 506, [26]; *Yanz and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] AATA 410; *Del Vecchio and Secretary, Department of Families, Community Services and Indigenous Affairs* [2007] AATA 1145.

161 *Social Security Act 1991* (Cth) s 198AC(4); FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.4.70]. A person may also temporarily cease

7.102 DEEWR, DHS and FaHCSIA submitted that the 25-hour rule provided ‘a reasonable amount of time to work, study or train and still meet the constant care requirement’.¹⁶² By contrast, a number of other stakeholders considered that the 25-hour rule acted as a barrier to mature age workforce participation.¹⁶³ 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’.¹⁶⁴

7.103 Carers Australia has stated that the current income support structure is limited in its ability to support transitions between caring and employment. It argued 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’.¹⁶⁵

7.104 A number of commentators have highlighted the difficulties faced by carers in re-entering the workforce when caring responsibilities cease.¹⁶⁶ For example, research published by the Australian Institute of Family Studies has noted that:

many carers, particularly those of working age, will not remain carers all their life. Caring status can change for a number of reasons, including the death of the person being cared for, the requirement for institutional care, partial or full recovery of the person requiring care, and a change of primary carer. There is strong evidence that long periods out of the labour force can make it difficult to re-enter the labour market.¹⁶⁷

7.105 This was echoed in submissions to this Inquiry.¹⁶⁸ 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’.¹⁶⁹

7.106 The rules restricting participation in paid or unpaid work or study, while still in receipt of Carer Payment, may act as barriers to work for mature age carers. The *Guide to Social Security Law* states that qualification for Carer Payment should be reviewed if a person ceases to care for more than 25 hours per week to participate in training,

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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.4.40].

162 DEEWR, DHS and FaHCSIA, *Submission 101*.

163 Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; ACTU, *Submission 38*.

164 COTA, *Submission 51*.

165 Carers Australia, *Submission to the Pension Review* (2008), 21.

166 For example, 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.

167 B Edwards, D Higgins, M Gray, N Zmijewski, and M Kingston, *The Nature and Impact of Caring For Family Members with a Disability in Australia* (2008), Australian Institute of Family Studies Research Report 16, 108.

168 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Older Women’s Network NSW Inc, *Submission 26*.

169 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*.

education, employment or voluntary work, as the person may no longer satisfy the constant care criteria.¹⁷⁰

7.107 In the Discussion Paper, the ALRC proposed that the *Guide to Social Security Law* be amended to indicate that the current 25-hour rule be more flexibly applied.¹⁷¹ Most stakeholders supported this proposal.¹⁷² While supporting this proposal, BSL was concerned to emphasise that the care provided by Carer Payment recipients should be acknowledged as productive work in its own right.¹⁷³ BSL also asserted that Carer Payment recipients should not be obliged to engage in paid employment.¹⁷⁴

7.108 There are a number of instances in which participation in paid or voluntary work, education or training that exceeds 25 hours per week may be compatible with the constant care requirement. For example, Carers Australia noted that

changes in the use of technology, particularly the widespread use of internet capacities open up a wide range of opportunities for carers to combine employment, training volunteer work or educational pursuits from home with their ongoing caring responsibilities.¹⁷⁵

7.109 The *Guide to Social Security Law* currently recognises one example where paid work, voluntary work, education or training undertaken in the home may be compatible with a care recipient's need for constant care.¹⁷⁶ There is scope for further examples to be included in the *Guide to Social Security Law* to illustrate how care may be combined with home-based work or study. Such examples could include online education or training, or teleworking.¹⁷⁷

7.110 The ALRC considers that making it easier to retain an attachment to the paid workforce, to volunteer, or to obtain or update skills through training or education will

170 FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [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.

171 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 5–3.

172 National Welfare Rights Network (NWRN), *Submission 99*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Chamber of Commerce and Industry, *Submission 85*; Carers Australia, *Submission 81*; Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*; Australian Federation of Disability Organisations, *Submission 78*. Australian Industry Group supported Proposal 5–4: Australian Industry Group, *Submission 97*.

173 Brotherhood of St Laurence, *Submission 86*. See Chapter 2 for further discussion of unpaid care work.

174 Ibid.

175 Carers Australia, *Submission 81*.

176 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 5–4. The Guide currently provides one such example. 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* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.6.4.70].

177 Colmar Brunton Research and Deloitte Access Economics, *NBN Enabled Telework: The Economic and Social Impact on Labour Force Participation* (2012), prepared for the Department of Broadband, Communications and the Digital Economy.

benefit Carer Payment recipients. It may assist recipients to combine work and care, or in equipping them to engage in paid work after they cease caring. To facilitate this, the ALRC recommends that the Guide be amended to reflect a more flexible application of the 25-hour rule, and to provide further examples of combining care with work or study.

Recommendation 7–4 The *Guide to Social Security Law* should provide that a temporary cessation of constant care due to participation in paid employment, unpaid 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.

Age-based pension payments

7.111 There are two age-based pension payments: the Age Pension and the Veterans' Age Service Pension.¹⁷⁸ This section considers the treatment of employment income in means testing for these payments. The ALRC recommends that the Work Bonus amount—an amount of employment income that is disregarded in calculating the rate of payment for Age Pension and Veterans' Age Service Pension—be indexed in order to maintain its value as a workforce incentive.

7.112 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. 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.¹⁷⁹

Age Pension and employment income

7.113 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 saving.¹⁸⁰ The Age Pension acts as a 'safety net' payment—ensuring that people over Age

178 The current qualifying age for the Age Pension is 65 years for men and 64.5 years for women: *Social Security Act 1991* (Cth) s 23(5A), (5C). From 1 July 2013 the qualifying age for women will be 65 years: *Social Security Act 1991* (Cth) s 23(5D). Age Pension age for both men and women will rise incrementally from 65 to 67 between 1 July 2017 and 1 July 2023: *Social Security Act 1991* (Cth) s 23(5A), (5D). Veterans' Age Service Pension is available to veterans of the Australian Defence Force who have rendered qualifying service: *Veterans' Entitlements Act 1986* (Cth) s 36. It is currently available to male veterans who are aged 60 years and over and to female veterans who are aged 55 years and over: *Veterans' Entitlements Act 1986* (Cth) ss 5QA, 5QB. The Veterans' Age Service Pension is paid at the same rate as the Age Pension and is subject to the same income and assets tests.

179 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 3.

180 Ibid, 8.

Pension age have access to an income that provides a reasonable minimum standard of living.¹⁸¹

7.114 A high proportion—68.3%—of persons over Age Pension age were in receipt of the Age Pension at March 2012.¹⁸² Of these, 40.9% were in receipt of the full rate of Age Pension.¹⁸³

7.115 There is no requirement for Age Pension recipients to engage in paid work as a condition of receiving payment. However, 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.¹⁸⁴

7.116 If a person continues to work after reaching Age Pension age, employment income will be assessed as part of the income test in determining eligibility to receive the Age Pension. Each dollar of assessable income over the free area amount reduces the level of payment by 50 cents in the dollar.¹⁸⁵ At March 2012, 3.9% of Age Pension recipients had earnings from employment.¹⁸⁶

Work Bonus

7.117 Work Bonus reduces 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.¹⁸⁷ Any unused amount of the fortnightly \$250 Work Bonus accumulates in an 'Employment Income Concession Bank', up to a maximum amount of \$6,500.¹⁸⁸ 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.¹⁸⁹ Work Bonus is also available to Veterans' Age Service Pension recipients.¹⁹⁰

7.118 DEEWR, DHS and FaHCSIA reported that early indicators show that Work Bonus is having a positive impact on workforce participation and on the amount of employment income earned by Age Pension recipients:

Since the new Work Bonus was introduced, the number of pensioners of Age Pension age with employment income in the previous 12 months grew by around 15.25 per cent from 118,000 (July 2011) to over 136,000 (July 2012). During that same period

181 Ibid, 10.

182 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).

183 Ibid.

184 The same means tests apply to the Veterans' Age Service Pension. Work Bonus is also available to Veterans' Age Service Pension recipients.

185 The current income free area for Age Pension is \$152. DHS, *A Guide to Australian Government Payments: 1 January–19 March 2013* (2013), 32.

186 FaHCSIA, *Correspondence*, 6 July 2012.

187 *Social Security Act 1991* (Cth) s 1073AA; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.1.14.10], [3.1.14.30].

188 *Social Security Act 1991* (Cth) s 1073AB.

189 Ibid s 1073AA; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.1.14.30].

190 *Veterans' Entitlements Act 1986* (Cth) ss 46AA, 46AC.

the average gross employment income of pensioners with employment income grew by more than 5 per cent from \$16,694 to \$17,498.¹⁹¹

7.119 In the Discussion Paper, the ALRC proposed indexing the Work Bonus amount.¹⁹² Most stakeholders supported this proposal.¹⁹³ As the Pension Review noted, the indexing of pensions is critical to maintaining the standard of living of pension recipients.¹⁹⁴ The ALRC considers that it is similarly important to index the Work Bonus amount to maintain over time the incentive for Age Pension recipients to maintain an attachment to the workforce.¹⁹⁵ The ALRC therefore recommends that the Work Bonus amount be automatically indexed.

Recommendation 7–5 The objective of Work Bonus is to provide an incentive for recipients of Age Pension and Veterans’ Age Service Pension to continue in paid employment. To ensure that Work Bonus continues to achieve its objective, the following amounts should be indexed:

- (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).

Pensioner Education Supplement

7.120 Pensioner Education Supplement (PES) is a payment available to most pension recipients (and certain other income support recipients) undertaking qualifying study.¹⁹⁶ There is no maximum age limit for PES.¹⁹⁷ However, it is not available to

191 DEEWR, DHS and FaHCSIA, *Submission 101*.

192 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 5–5.

193 National Welfare Rights Network (NWRN), *Submission 99*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Australian Chamber of Commerce and Industry, *Submission 85*; Federation of Ethnic Communities’ Council of Australia (FECCA), *Submission 80*.

194 FaHCSIA, *Pension Review Report* (2009), 70. The maximum basic rate of the Age Pension is indexed on 20 March and 20 September each year: FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [5.1.8.50].

195 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.

196 *Social Security Act 1991* (Cth) s 1061PA; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [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. 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: *Social Security Act 1991* (Cth) 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).

197 *Social Security Act 1991* (Cth) s 1061PK; FaHCSIA, *Guide to Social Security Law* (2013) <www.fahcsia.gov.au/guides_acts> at 21 March 2013, [3.8.3.10].

Age Pension recipients or to persons in receipt of the Veterans' Age Service Pension under the *Veterans' Entitlements Act 1986* (Cth).¹⁹⁸

7.121 In the Discussion Paper, the ALRC proposed that PES be extended to Age Pension and Veterans' Age Service Pension recipients. There was some support for such an extension.¹⁹⁹ For example, NWRN submitted that the current restriction on eligibility is 'discriminatory and unfair' and 'out of step with other Government policies which support participation through life-long learning'.²⁰⁰

7.122 Undertaking study after Age Pension or Veterans' Age Service Pension Age may allow a person to gain or update employment-related skills.²⁰¹ It may also have other benefits. It may promote social inclusion and social connectedness, as well as better health.²⁰²

7.123 However, the payment of a supplement to engage in study is at least one step removed from workforce participation, in that there is no necessary connection between its receipt and subsequent engagement in paid work. The ALRC has concluded that there is an insufficiently direct link between payment of PES and workforce participation to justify a recommendation to extend PES to Age Pension and Veterans' Age Service Pension recipients in the context of this Inquiry.

7.124 However, access to education, training and skills development is an important broader issue that affects mature age persons' ability to participate in the workforce. The ALRC has recognised this in recommending that skills, education and training be a priority area in a National Mature Age Workforce Participation Plan.²⁰³

198 *Social Security Act 1991* (Cth) s 1061PJ.

199 National Welfare Rights Network (NWRN), *Submission 99*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*.

200 National Welfare Rights Network, *Submission 50*; National Welfare Rights Network (NWRN), *Submission 99*.

201 See Chapter 1 for further discussion of re-skilling issues for mature age persons.

202 National Seniors Productive Ageing Centre, *Later Life Learning: Unlocking the Potential for Productive Ageing* (2010), 12.

203 See Rec 3–1.

8. Superannuation

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Summary

8.1 Superannuation laws contain age-based rules regarding the accumulation of, and access to, superannuation. This chapter considers whether the age-based rules amount to limitations or barriers to mature age workforce participation.

8.2 The ALRC has not found specific evidence that the age limits on contributions create barriers to workforce participation. Accordingly, no recommendations regarding the removal of the age limits have been made. However, concerns have been raised about the work test imposed on people aged 65 years and over if they wish to contribute to superannuation. It is not clear that the work test is meeting its policy objective and the ALRC recommends that the Government review the test.

8.3 There is evidence that age-based rules regarding withdrawals from superannuation accounts have a significant impact on mature age workforce participation. Access to superannuation funds makes retirement possible, or at least more attractive, and increasing access ages is likely to increase older people's workforce participation rates.

8.4 The Terms of Reference for this Inquiry direct the ALRC to consider legislation that imposes limitations or barriers that could discourage older people from working. The ALRC considers that these terms require the identification of disincentives to participation and incentives to leave the workforce.¹ The ALRC has also identified six framing principles for the Inquiry: participation; independence, self-agency; system stability; system coherence; and fairness.²

8.5 Access to superannuation may amount to an incentive to leave the workforce. However, it is also an earned benefit and a statutory right. Delaying access to superannuation may delay retirement and compel workforce participation. Such an outcome would conflict with the framing principles for this Inquiry, particularly independence and self-agency. Accordingly, the ALRC has not recommended changes to access rules.

8.6 The relationship between access to superannuation and older people's workforce participation is of significant public interest. For this reason, this chapter reviews the issue and reports on the submissions received on this topic. In particular, the arguments made both for and against changing access rules are examined. Arguments for increasing access ages are concerned with improving the adequacy and sustainability of the superannuation system. They are also concerned with the economic benefits that would accrue if mature age workforce participation increased. If a recommendation to increase access ages is to be made, this should occur after an inquiry that fully considers all of these issues.

The superannuation system—an overview

8.7 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 2, mandatory and voluntary superannuation savings respectively constitute the second and third pillars of Australia's three-pillar retirement income system.³

8.8 Most Australians have their superannuation in a 'defined contribution' (also known as an 'accumulation') fund.⁴ In these funds, a member's superannuation benefits in retirement are based on the amount contributed by his or her employers, the

1 See Chapter 1.

2 See Chapter 2.

3 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.

4 ASIC, *Types of Super Funds* <www.moneysmart.gov.au> at 21 March 2013.

amount contributed voluntarily by the member, and the amount earned by the superannuation fund in investing the contributions.⁵

8.9 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).⁶ Superannuation generally receives concessional tax treatment across these three stages.

8.10 The *Income Tax Assessment Act 1997* (Cth) refers to two categories of contributions: ‘concessional contributions’ and ‘non-concessional contributions’.⁷ Concessional contributions include mandatory employer contributions made according to the superannuation guarantee or under an industrial agreement or award,⁸ contributions made under ‘salary sacrifice’ arrangements, voluntary contributions and most contributions made by self-employed people. Currently, concessional contributions are taxed at 15% on entry to the fund⁹ and there is a cap of \$25,000 per year on concessional contributions.¹⁰

8.11 Non-concessional contributions are those made by members from after-tax income, including contributions for a spouse. They are not further taxed on entry to the fund.

8.12 Investment earnings within superannuation funds are taxed at 15%, and withdrawals after the age of 60 years are tax-free.

Reviews and recent developments

8.13 The Australian Government initiated two major reviews addressing superannuation: the Tax Review (chaired by Dr Ken Henry AC) and the Super System Review (chaired by Jeremy Cooper). Both reviews reported in 2010.

8.14 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.¹¹ Part of the Australian Government’s response to the review was to increase the superannuation guarantee levy from 9% to 12% and to remove the exclusion of employees 70 and over from the entitlement to the

5 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 recommendations 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 System Review Panel, *Super System Review* (2010), pt 2, 176.

6 As discussed below, ‘non-concessional contributions’ do not receive concessional treatment at the contributions stage.

7 *Income Tax Assessment Act 1997* (Cth) ss 292–25, 292–90, 292–165, 995–1.

8 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 5.01(1).

9 ASIC, ‘Tax & Super’, 29 June 2012 <www.moneysmart.gov.au> at 21 March 2013.

10 *Income Tax Assessment Act 1997* (Cth) s 292–20.

11 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), 2–4.

superannuation guarantee.¹² The Australian Government also introduced the Low Income Earners Government Contribution that returns the tax paid on contributions to low income earners.¹³

8.15 The Super System Review addressed the governance, efficiency, structure and operation of Australia's superannuation system. The review made recommendations aimed at creating member-orientated architecture for the superannuation industry.¹⁴ These 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.¹⁵ The Australian Government responded to the review with the 'Stronger Super' package, and it is in the process of implementing the Stronger Super reforms.¹⁶

Age-based rules and work tests

8.16 There are a number of age-based rules in superannuation law. These rules restrict contributions to superannuation by members when they reach certain ages, and stipulate when members can access their superannuation.

8.17 Some age-based rules are necessary to encourage and support the accumulation of superannuation over the course of a working life. As noted by the Law Council of Australia (Law Council), 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).¹⁷

8.18 The present settings allow a person to make voluntary contributions to superannuation until the age of 75 and to withdraw from the age of 55.¹⁸ These settings mean that people can make their own decisions about when to work and contribute to superannuation funds, and when to retire and withdraw from superannuation funds. The settings are consistent with contemporary values of choice and flexibility. However these settings also create a risk that, for people between the ages of 55 and 75, the tax incentives of superannuation will be used to increase current expenditure rather than to save further for retirement.

8.19 One response to this risk is to allow continued contributions after a certain age if the person is working—that is, to impose a work test. Contributions made while a person is working are consistent with saving for retirement. This has been the approach taken regarding voluntary contributions by people aged 65 to 75 years, contribution

12 *Superannuation Guarantee (Administration) Amendment Act 2012* (Cth). These amendments altered the *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19 (increased levy) and s 27 (age limit).

13 *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth).

14 Super System Review Panel, *Super System Review* (2010), pt 2.

15 The Treasury, *Stronger Super* <strongersuper.treasury.gov.au> at 21 March 2013.

16 Australian Government, *Stronger Super—Government Response to the Super System Review* (2010). See also The Treasury, *Stronger Super* <strongersuper.treasury.gov.au> at 21 March 2013.

17 Law Council of Australia, *Submission 46*.

18 These settings are discussed in more detail later in the chapter.

splitting with spouses who are 65 and over, and spouse contributions to spouses between 65 and 70. As the Tax Review put it, the contribution caps, work tests and age limits are ‘consistent with the primary purpose of the retirement income system, which is to smooth income over a person’s lifetime’.¹⁹

8.20 This chapter considers whether removing the upper age limits and extending the work tests would have an impact on workforce participation.

Superannuation in context

8.21 This Inquiry examines superannuation legislation in order to determine whether it incorporates limitations or barriers to mature age workforce participation. In conducting such an examination, it is useful to consider the context of the legislation—the purposes of the superannuation system, its effectiveness in achieving these purposes, and its impact on equity and fairness.

8.22 The superannuation system contributes to the ‘smoothing’ of income by delivering private income to retired Australians.²⁰ While the Age Pension is intended to satisfy the minimum needs of Australians, the mandatory superannuation contribution is intended to contribute to ‘the improved wellbeing of employees in retirement’.²¹ Voluntary contributions allow people to increase their retirement incomes.²²

8.23 The superannuation system is also intended to help address the challenges posed by Australia’s ageing population.²³ By making saving for retirement compulsory, the superannuation system ensures 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’.²⁴

8.24 Australia’s retirement income system—including the superannuation system—is considered strong by world standards. The Melbourne Mercer Global Pension Index survey of 18 countries ranked Australia third. The system was described as having ‘a sound structure, with many good features, but has some areas for improvement’.²⁵ It rated well across the three domains of adequacy, sustainability and integrity.²⁶

8.25 However, there are concerns that the superannuation system reproduces existing income inequalities. High income earners receive a substantial proportion of

19 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 115–116.

20 Super System Review Panel, *Super System Review* (2010), pt 1, 15.

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

22 Ibid, 8.

23 The Treasury, *Towards Higher Retirement Incomes for Australians: A History of the Australian Retirement Income System since Federation* (2001), 83.

24 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.

25 Australian Centre for Financial Studies, *Melbourne Mercer Global Pension Index* (2012) <www.mercer.com/articles/global-pension-index> at 21 March 2013, 6.

26 Ibid, 7

superannuation tax benefits, while low income earners receive comparatively little benefit, and some of the lowest income earners receive no benefit.²⁷ Because superannuation is linked to workforce participation, people who take time out of the workforce to care for others are likely to have lower retirement incomes.²⁸ The Australian Human Rights Commission reports that women's retirement incomes are affected by their caring responsibilities, domestic and family violence, separation and divorce, and the gender pay gap.²⁹

8.26 Recent changes to the system have responded to these problems but not resolved them.³⁰ These changes include a reduced cap on contributions, a low income government contribution, and an additional contributions tax on those earning more than \$300,000.³¹

8.27 There are also concerns that the withdrawal or 'decumulation' stage of the system is not well developed. The authors of the Melbourne Mercer survey recommended a requirement that retirement benefits be taken as an income stream rather than a lump sum. They also said the system would be improved if the time between access to superannuation and access to the Age Pension was not more than five years.³² The Actuaries Institute indicated that there is low consumer awareness of income stream products such as annuities, and considers that current tax and social security laws present barriers to the development of these products.³³

8.28 These observations regarding the strengths and weaknesses of the Australian superannuation system provide a context for this Inquiry. The Inquiry's Terms of Reference require a specific focus on the impact of superannuation rules on workforce participation. Issues of equity, efficiency and the policy goals of the superannuation system are taken into account when considering the interaction between superannuation's age-based rules and workforce participation. The framing principles, including fairness and self-agency, are also relevant.

27 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 28–29. The Australia Institute, *Can the Taxpayer Afford 'Self-funded Retirement'?: Policy Brief No 42* (2012), 3. For an alternative perspective see ASFA, *The Equity of Government Assistance for Retirement Income in Australia* (2012) and Financial Services Council, *Submission 89*.

28 National Welfare Rights Network, *Submission 50*. See also Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality Over the Lifecycle* (2009).

29 Australian Human Rights Commission, *Investing in Care: Recognising and Valuing Those Who Care*, Research Report Volume 1 (2013), 53; Government of South Australia, *Submission 95*.

30 K Swoboda, 'Thirty Percent Tax for High-income Earners, Delayed Changes to Contributions Cap' <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs> at 21 March 2013. According to ASFA, in 2009–2010 (after the co-contribution and the reduced cap, but before the increased contributions tax), those on the highest marginal income tax rate received 15% of the total tax concessions while making up only 2.4% of wage earners: ASFA, *The Equity of Government Assistance for Retirement Income in Australia* (2012), Tables 2.1, 2.2.

31 K Swoboda, 'Thirty Percent Tax for High-income Earners, Delayed Changes to Contributions Cap' <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs> at 21 March 2013.

32 Australian Centre for Financial Studies, *Melbourne Mercer Global Pension Index* (2012) <www.mercer.com/articles/global-pension-index> at 21 March 2013, 23.

33 M Howes, *Exploring Barriers to Australia's Annuities Market* (2012).

8.29 Finally, there are concerns about the frequency of change in the superannuation system.³⁴ The Inquiry's framing principles of stability and system coherence are particularly important in the case of superannuation because of the long-term nature of superannuation savings and because almost every working person is affected. A lack of certainty about superannuation rules reduces the response to incentives,³⁵ discourages contributions³⁶ and makes retirement planning more difficult.³⁷ Stakeholders emphasised that incentives to work or save are not effective if they are not understood.³⁸ The ALRC's consideration of superannuation and workforce participation is guided by the framing principles and is undertaken in a context where system stability is highly valued.

Voluntary contributions

8.30 People aged under 65 may enter into arrangements with employers to deduct money from their wages and pay it into their superannuation accounts. These are known as voluntary contributions. However, people aged 65–74 are not permitted to make voluntary contributions to superannuation unless they meet a work test. They must be 'gainfully employed' for at least 40 hours over a 30-day period in the financial year.³⁹ People aged 75 years and over are not permitted to make voluntary contributions at all.⁴⁰

Is the work test a participation incentive?

8.31 The ALRC has not found evidence that the age-based restrictions on contributions constitute a barrier to mature age workforce participation. The restrictions might amount to a barrier if the inability to contribute to superannuation, and the loss of access to the associated tax concessions, discouraged people from working. However, the decision to work or retire does not appear to be significantly influenced by the availability of tax concessional saving. The major determinants of retirement are discussed later in this chapter, and include 'reaching retirement age', eligibility for superannuation or a pension, sickness, injury or disability, and care responsibilities.⁴¹

34 Super System Review Panel, *Super System Review* (2010), 7; Suncorp Group, *Submission 66*; National Seniors Australia, *Submission 27*; Association of Independent Retirees, *Submission 17*.

35 B Headey, 'Economics of Population Ageing: Australia May Not Have a Labour Supply Problem, but Recent Superannuation Reforms Have Not Helped' in T Griffin and F Beddie (ed) *Older Workers: Research Readings* (2011).

36 National Seniors Australia, *Submission 27*.

37 National Seniors Australia, *Submission 92*.

38 Ibid; J Willis, *Submission 42*.

39 *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 7.01(3).

40 Ibid reg 7.04.

41 Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2010 to June 2011, Cat No 6238.0* (2011). There is no compulsory retirement age in Australia, but 'reached retirement age/eligible for superannuation/pension' is a reason for retirement in the ABS survey. Certain occupational groups, such as judges and military personnel, have compulsory retirement provisions: see Chapter 4.

8.32 The Australian Government has indicated that the work test is intended to ensure that people aged 65–75 can only make voluntary contributions when ‘they maintain a bona fide link with the paid workforce’.⁴² The Explanatory Statement to an amendment to the regulations regarding the work test indicated that allowing contributions only to people in the workforce is consistent with superannuation’s ‘intended role as a retirement vehicle. Without a work test people could abuse the taxation concessions provided to superannuation’.⁴³

8.33 There is no suggestion in the Explanatory Statements that the work test was designed as a workforce participation incentive. A work test intended to encourage mature age workers to make a substantial commitment to work would be set at a higher level than the present test.

8.34 Further, it does not appear that the work test is, in fact, a workforce participation incentive. When making a decision whether to work or retire, people take into account their personal preferences, health, income, and caring responsibilities.⁴⁴ As the Financial Services Council submission put it, those who work past 65 are likely to do so either because they ‘genuinely wish to work, or have inadequate retirement savings and therefore have a financial need to continue working’.⁴⁵ In either case, the presence or absence of a work test for superannuation contributions does not appear to drive the decision to work.

8.35 Finally, if the work test does have a workforce participation function, it is not well targeted. For example, the Association of Independent Retirees (AIR) noted that Australian Tax Office (ATO) statistics show that only about 10% of the three million people aged 65 and over paid tax above the 15% marginal rate.⁴⁶ The reason people invest in superannuation rather than elsewhere is the concessional tax rate of 15% on contributions and earnings. The work test could only motivate a person to work (in order to contribute to superannuation) if the person is paying more than 15% tax on their income. Therefore, only the 300,000 taxpayers identified by the AIR have an incentive to work and contribute to superannuation. These people are likely to have the highest incomes in their cohort. Financial incentives for workforce participation are more likely to be effective if they are directed to low to middle income earners, rather than to the highest 10%.

8.36 The ALRC concludes that the work test for superannuation contributions by people aged 65–75 appears not to have a significant impact on workforce participation by this age group. However, stakeholders raised a range of other concerns about the work test, and these are outlined in the next section.

42 Explanatory Statement, Superannuation Industry (Supervision) Regulations (Amendment) No 117 1997 (Cth) Attachment B.

43 Explanatory Statement, Superannuation Industry (Supervision) Amendment Regulations (No 4) 2004 (Cth).

44 The determinants of retirement are discussed in more detail below.

45 Financial Services Council, *Submission 89*.

46 Association of Independent Retirees, *Submission 59*.

Reviewing the work test

8.37 As noted above, the work test is intended to ensure that the superannuation system is used by working people to save for their retirement. There is some doubt as to whether the work test, as presently framed, achieves this goal. The ALRC recommends that the Australian Government review the work test to determine whether the test is necessary, and whether it achieves its policy objective.

The integrity of the superannuation system

8.38 Without a link between contributions and work, superannuation moves away from its purpose as a retirement savings scheme. It becomes ‘a more generalized savings mechanism that can also be utilized by people who are outside the workforce’.⁴⁷ Stakeholders in the superannuation industry indicated that the work test is intended to ‘prevent abuse of a low tax environment’⁴⁸ and to ‘maintain a level of integrity for the superannuation system’.⁴⁹

8.39 The work test may not be effective in maintaining the link between contributions and work. Contributions do not have to be sourced from work-related income. A person 65 or over can work for as little as 40 hours in a year and contribute up to \$25,000 from non-work income (for example, from inheritance, rent or dividends).

8.40 The Law Council suggested that, while the work test was originally ‘an “integrity” measure to avoid excessive accumulation in a tax concessional environment’, it is no longer needed because contribution caps now perform this function.⁵⁰ Abolition of the work test would improve system coherence because contribution rules would then be the same irrespective of a member’s age.⁵¹ The Council was concerned, however, that removing the work test might be a disincentive to work. For the reasons given above, the ALRC does not consider this to be a risk.

Does the work test cater for older people’s work patterns?

8.41 The current work test of 40 hours in 30 days replaced a test which required at least 10 hours work per week. It was intended to be consistent with work patterns of older people who ‘prefer to work on an irregular part-time basis’.⁵² Despite this change, there are still concerns that the work test is not sufficiently flexible. Women In Super pointed out that the work test ‘excludes workers who ... might work a significant

47 A Borowski, ‘Back at the Crossroads: The Slippery Fish of Australian Retirement Income Policy’ (2008) 43 *Australian Journal of Social Issues* 311, 329.

48 Women in Super, *Submission 64*.

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

50 Law Council of Australia, *Submission 96*.

51 *Ibid.*

52 Explanatory Statement, Superannuation Industry (Supervision) Amendment Regulations (No 4) 2004 (Cth).

number of hours in blocks'.⁵³ Such workers might include exam invigilators or polling officials.⁵⁴

8.42 Suggestions for reform included the removal of the work test,⁵⁵ or the replacement of the work test with a test based on:

- earnings or superannuation balance;⁵⁶
- a minimum number of hours per year;⁵⁷ or
- a requirement that funds contributed come from work-related income.⁵⁸

8.43 The Australian Council of Trade Unions (ACTU) suggested that the work test under the Paid Parental Leave Scheme might be a suitable model. This test is significantly more stringent than the current work test, requiring work for at least 330 hours in 10 months.⁵⁹ Some stakeholders supported the work test in its current form,⁶⁰ and others thought that increasing the amount of work required might be appropriate.⁶¹

Compliance with the work test

8.44 The Australian Institute of Superannuation Trustees (AIST) raised concerns about compliance with the work test:

Currently, it is left to the member's discretion to confirm that they satisfy the work test and it is not actively audited by superannuation funds. Therefore, there is an opportunity for people to take advantage of this and make contributions when they have not worked, knowing they are unlikely to be audited.⁶²

8.45 AIST suggested that increased auditing by the ATO might be necessary.

The nature of the review

8.46 In the light of the concerns raised above, the ALRC considers that the Government should review the work test to determine whether it is meeting its policy objective. This Inquiry has considered whether the age-based work test for superannuation contributions is a barrier or disincentive to work. The ALRC has concluded that it is not likely to have a significant impact on workforce participation by people aged 65–75 years. A further review should consider more broadly whether the work test is necessary for maintaining the integrity of the superannuation system. It

53 Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Australian Institute of Superannuation Trustees, *Submission 77*; Women in Super, *Submission 64*; Association of Independent Retirees, *Submission 59*.

54 Women in Super, *Submission 64*.

55 Government of South Australia, *Submission 95*; Financial Services Council, *Submission 89*; Association of Independent Retirees, *Submission 17*.

56 Association of Independent Retirees, *Submission 17*.

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

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

59 ACTU, *Submission 88*.

60 National Seniors Australia, *Submission 92*; P Gerrans, *Submission 74*.

61 Australian Industry Group, *Submission 97*; DOME Association, *Submission 62*.

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

should also consider whether the current settings are suitable for achieving this objective.

8.47 This review should also consider the work test for the government co-contribution, discussed further below. The work test for the government co-contribution is 10% of total income from work. It is different from the work test for voluntary contributions and spousal contributions, which is 40 hours in 30 days. It would contribute to system coherence if the work tests were the same. This review should consider whether the work test for voluntary contributions and spousal contributions should be consistent with the work test for the government co-contribution.

Recommendation 8–1 The *Superannuation Industry (Supervision) Regulations 1994* (Cth) prohibit contributions by members aged 65–74 unless the member meets a work test. The work test requires the member to work for at least 40 hours over a 30-day period in the financial year. The Australian Government should review the work test and consider:

- (a) the policy objective of the work test;
- (b) whether that policy objective remains relevant;
- (c) how the work test contributes to achieving that policy objective; and
- (d) whether the work test in the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) should be consistent with the work test in the *Superannuation Industry (Supervision) Regulations 1994* (Cth).

Workers 75 years and over

8.48 A person over 75 years may not make voluntary contributions to superannuation, and therefore cannot access the tax advantages of this form of saving. In the Discussion Paper, the ALRC asked if this restriction should be removed and the work test extended to people over 75 years.⁶³

8.49 Some stakeholders suggested that removing the restriction and extending the work test would encourage workforce participation by people 75 years and over.⁶⁴ However, for reasons similar to those set out above in relation to workers aged 65–75 years, the ALRC is not convinced that such a change would have a significant impact on workforce participation. The predominant determinants of the decision to work or retire include personal preference, health and disability, financial security and caring responsibilities. There does not appear to be evidence that the opportunity to contribute

⁶³ Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 8–1.

⁶⁴ National Seniors Australia, *Submission 92*; Brotherhood of St Laurence, *Submission 86*; Suncorp Group, *Submission 66*.

to superannuation would create an incentive to work. If it did so, the incentive would only exist for those people 75 years and over who have a marginal tax rate higher than 15%, who are the highest earning workers in this age bracket.

8.50 The ALRC has received submissions from stakeholders who report that age-based restrictions are objectionable because of their discriminatory nature.⁶⁵ However, identifying age-based discrimination is not in itself a sufficient justification for removing the age-based restrictions on contributions. The superannuation system is an age-based scheme. It both compels and encourages younger people to save for their retirement. Some age-based rules are essential to ensure that superannuation is used for retirement savings, rather than for tax minimisation or for estate planning purposes.⁶⁶

8.51 Stakeholders also raised concerns that the restrictions discourage people who are 75 years and over from saving for their retirement.⁶⁷ While the ALRC notes such concerns, contributions made at this age do not necessarily have the advantage of significant long term investment returns.

8.52 Many stakeholders considered that people aged 75 years and over should be able to make contributions subject to a work test, in the same way as people aged 65–75.⁶⁸

8.53 One submission suggested that both age restrictions on contributions and the work test should be removed altogether, in order to eliminate age discrimination.⁶⁹ Similarly, as the Law Council points out, removing the age-based restrictions might improve system coherence as the rules would be consistent for members of all ages.⁷⁰

8.54 There are considerable concerns about the age-based restrictions on voluntary contributions. The ALRC makes no recommendation as it has not been convinced that these restrictions affect workforce participation. The ALRC also considers that some age-based restrictions are justified in superannuation legislation. However, the Australian Government should consider removing the restriction on contributions by people 75 years and replacing it with a work test. This approach could alleviate concerns about age discrimination without undermining the retirement savings

65 National Welfare Rights Network (NWRN), *Submission 99*; Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; Financial Services Council, *Submission 89*; COTA, *Submission 51*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*; My Longevity Pty Limited, *Submission 15*.

66 P Gerrans, *Submission 74*; Law Council of Australia, *Submission 46*.

67 Government of South Australia, *Submission 95*; Financial Services Council, *Submission 89*; Suncorp Group, *Submission 66*; COTA, *Submission 51*; National Seniors Australia, *Submission 27*.

68 National Welfare Rights Network, *Submission 99*; Law Council of Australia, *Submission 96*; Australian Industry Group, *Submission 97*; Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; Financial Services Council, *Submission 89*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Institute of Superannuation Trustees, *Submission 77*; P Gerrans, *Submission 74*; Suncorp Group, *Submission 66*; Women in Super, *Submission 64*; Women's Equity Think Tank, *Submission 63*; Brotherhood of St Laurence, *Submission 54* (age restrictions should be replaced with eligibility based on account balance); COTA, *Submission 51*; Australian Institute of Superannuation Trustees, *Submission 47*; Australian Chamber of Commerce and Industry, *Submission 44*; Media Entertainment & Arts Alliance, *Submission 33*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*.

69 Association of Independent Retirees, *Submission 17*.

70 Law Council of Australia, *Submission 96*.

objective of the system. Such a change has the potential to affect revenue, but if the work test is retained, the impact would be minor. At present, very few people over 75 are in the work force.

Some consequential changes

8.55 If the Government decides to remove the age limit on voluntary contributions, two consequential reforms will be necessary. First, employers should be able to claim income tax deductions for voluntary contributions made for employees aged over 75.⁷¹ If voluntary contributions are tax deductible then employers can offer employees aged over 75 access to salary sacrifice arrangements. Without this option, the benefits of removing the age limit on voluntary contributions would be significantly limited.

8.56 Secondly, self-employed workers should be able to claim income tax deductions for contributions made from the age of 75 years.⁷² Extending the deduction to the self-employed ensures fair and consistent treatment.

8.57 Stakeholders uniformly agreed that if the age limits for employees were removed, then the contributions should be tax deductible for both employers and self-employed workers.⁷³

Spouse contributions and contribution splitting

8.58 A person may make superannuation contributions on behalf of a spouse, or may split contribution contributions with a spouse. There are age restrictions on spouse contributions and contribution splitting. This section considers whether these age restrictions should be removed and contributions made conditional on the spouse meeting a work test.

8.59 The ALRC has concluded that such a change is not likely to have an impact on workforce participation, and therefore makes no recommendation for change.

The current law and its rationale

Contribution splitting

8.60 The current law does not allow contribution splitting with 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.⁷⁴

⁷¹ *Income Tax Assessment Act 1997* (Cth) s 290–80 currently prevents employers claiming these deductions.

⁷² *Ibid* s 290–165(2) currently prevents self-employed workers claiming these deductions.

⁷³ Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; Financial Services Council, *Submission 89*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Chamber of Commerce and Industry, *Submission 85*; Australian Institute of Superannuation Trustees, *Submission 77*; Suncorp Group, *Submission 66*; Women in Super, *Submission 64*.

⁷⁴ *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.

8.61 If there were no age restrictions on contribution splitting, a younger spouse could split contributions with an older spouse who could immediately withdraw the money. This would minimise tax but not contribute to retirement savings.

8.62 Before 2007, there was a maximum amount that a person could contribute to a superannuation fund at concessional tax rates (the ‘reasonable benefit limit’). It was therefore beneficial for a person approaching the reasonable benefit limit to split contributions with a spouse with a lower balance. The reasonable benefit limit was abolished in 2007.⁷⁵ The remaining taxation advantage of contribution splitting is for those who reach preservation age and retire before 60 years of age. Withdrawals before the age of 60 are subject to tax, but splitting contributions can allow a couple to take full advantage of two tax-free amounts of \$175,000.⁷⁶

8.63 According to the AIST, contribution splitting is not common.⁷⁷ However, splitting contributions with a spouse may become more popular if the Australian Government reintroduces arrangements based on superannuation balances. The Australian Government has announced its intention to increase the contributions cap for individuals aged over 50 years with balances under \$500,000 in their accounts, but has delayed implementation of this measure.⁷⁸ AIST submitted that, if introduced, this would encourage some members to split their contributions with a spouse with a lower balance in order to stay under \$500,000.⁷⁹

Spouse contributions

8.64 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).⁸⁰ 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.⁸¹

⁷⁵ *Tax Laws Amendment (Simplified Superannuation) Act 2007* (Cth).

⁷⁶ See for example ESS Super, ‘Contribution Splitting’, 11 February 2013 <www.esssuper.com.au> at 21 March 2013.

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

⁷⁸ ATO, ‘Key Superannuation Rates and Thresholds’ <www.ato.gov.au> at 21 March 2013.

⁷⁹ Australian Institute of Superannuation Trustees, *Submission 77*.

⁸⁰ *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 1993* (Cth): *Income Tax Assessment Act 1997* (Cth) ss 290–230(3), 995–1(1).

⁸¹ *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04(1).

Contribution splitting, spouse contributions and workforce participation

8.65 There is no work test associated with contribution splitting. In the Discussion Paper, the ALRC proposed that the age restriction on contribution splitting should be removed and replaced with a work test on a receiving spouse aged 65 or over.⁸²

8.66 There is a work test associated with spouse contributions when the spouse is aged between 65 and 70. In the Discussion Paper the ALRC proposed that the upper age limit should be removed and replaced with a work test on a receiving spouse aged 65 or over.⁸³

8.67 These proposals were intended to introduce, or preserve, a workforce incentive for spouses and facilitate the policy intention of superannuation as a retirement income vehicle.⁸⁴

8.68 Some stakeholders agreed that such reforms would create workforce participation incentives.⁸⁵ Others indicated, however, that rules about spouse contributions have little impact on decisions concerning work and retirement.⁸⁶

8.69 The ALRC has concluded that removing the age limit on contribution splitting and spouse contributions, subject to a work test, would not have a significant impact on workforce participation decisions. The reasons are the same as those discussed above in relation to voluntary contributions by people over 75 years—namely, that the retirement decision is not usually influenced by the availability of tax concessional savings, and very few people in this age group would benefit from the tax concessions of superannuation. Furthermore, in the case of contribution splitting, the proposed reforms may facilitate the use of superannuation for tax minimisation purposes.⁸⁷ Accordingly, no recommendation has been made.

8.70 Several stakeholders argued that the age restrictions should be removed to eliminate age discrimination.⁸⁸ Another suggested that removing the restrictions would encourage contributions to lower income spouses' (usually women's) accounts.⁸⁹ It appears, however, that contribution splitting and spouse contributions are currently not widely used among people aged under 65. Therefore it seems unlikely that these arrangements would be widely used if extended to people aged 65 and over. The ALRC acknowledges the problem of women's lower superannuation balances, but

82 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 8–5.

83 Ibid, Proposal 8–4.

84 Ibid, [8.68].

85 Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; Financial Services Council, *Submission 89*; Australian Chamber of Commerce and Industry, *Submission 44*.

86 P Gerrans, *Submission 74*; Australian Institute of Superannuation Trustees, *Submission 47*.

87 The problem does not exist regarding spouse contributions as these contributions are made from after-tax income.

88 National Seniors Australia, *Submission 92*; Financial Services Council, *Submission 89*; COTA, *Submission 51*.

89 Government of South Australia, *Submission 95* (this submission supported the removal of the age restrictions but not the imposition of a work test).

considers that removing the age restrictions is not likely to make a significant contribution to improving the situation.

8.71 The Law Council supported the current rules as a reasonable restriction on accumulation, but suggested that a change in the age limit might be justified for simplicity and consistency.⁹⁰ Similarly, Suncorp suggested that the age restrictions should be consistent with the restrictions imposed on voluntary contributions, that is, an upper limit of 75 years and a work test from the age of 65.⁹¹

8.72 AIST pointed out 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.⁹²

8.73 Issues of age discrimination, measures to improve women's superannuation balances, and measures to reduce the complexity of superannuation rules should be considered in future reviews of superannuation.

Government co-contribution

8.74 If a low-income earner aged under 71 years makes a voluntary contribution to his or her superannuation fund, the Government makes a matching co-contribution. The ALRC recommends that eligibility for the co-contribution be extended to people aged up to 75 years. This would be consistent with the present restrictions on voluntary contributions generally, and would be a workforce participation incentive for people aged between 71 and 75 years.

The current law

8.75 Low-income earners making personal after-tax superannuation contributions may be eligible for co-contributions under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth). The purpose of government co-contributions is to help low-income earners save for retirement.⁹³ The co-contribution amount depends on the personal contribution amount and the individual's income. In 2011–2012, the maximum co-contribution amount was \$1,000, but it is expected to be \$500 in 2012–2013.⁹⁴

8.76 The co-contribution is subject to both a work test and an age limit. A co-contribution is only payable if 10% or more of the person's total income for the year comes from work or carrying on a business.⁹⁵

90 Law Council of Australia, *Submission 96*.

91 Suncorp Group, *Submission 66*.

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

93 Explanatory Memorandum, *Superannuation (Government Co-Contribution for Low Income Earners) Bill 2003* (Cth), [1.4].

94 *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) s 10. The Tax and Superannuation Laws Amendment (2013 Measures No 2) Bill 2013, that reduces the maximum co-contribution, was introduced into Parliament on 21 March, 2013.

95 *Ibid* s 6(1)(b), (2).

8.77 People aged 71 years and over are ineligible for government co-contributions.⁹⁶ The age restriction affects workers who are aged 71 but under 75 years (because people 75 years and over cannot make voluntary contributions to their superannuation funds). It is possible that the exclusion of those aged 71–74 years was unintentional: the co-contribution bill had its second reading in October 2002, only a few months after the age limit on voluntary contributions moved from 70 to 75 years.

Should the restriction be removed?

8.78 The proposal to remove the exclusion of workers aged 71–74 years⁹⁷ was widely supported by stakeholders, both on the basis that it would be a workforce incentive,⁹⁸ and to avoid discrimination.⁹⁹ AIST reported, moreover, that women interviewed on their experiences in retirement confirmed that the government co-contribution was, in fact, an incentive to remain in the workforce.¹⁰⁰

8.79 One word of caution was offered by the Law Council. The Council noted that low income earners over 71 years may also be entitled to access the Age Pension and ‘funding of the Co-contribution without any age limit might create complexities in term of avoiding a duplication of entitlements’.¹⁰¹ The Australian Industry Group also considered that the proposal should be more thoroughly assessed.¹⁰²

8.80 The ALRC is not able to calculate the cost of extending eligibility, but it is not likely to be high. In 2009, only a quarter of people eligible for the co-contribution made voluntary contributions.¹⁰³ In the year to June 2011, there were only 94,400 people over 70 years still in the labour force.¹⁰⁴ The ALRC recommends that the age restriction should be removed on the basis that it would be an incentive to workforce participation for people on low incomes. It would bring the age limit for the co-contribution in line with the age limit for voluntary contributions, contributing to system coherence and simplification. Finally, it would avoid unnecessary age discrimination.

96 Ibid 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.

97 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 8–6.

98 Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; Financial Services Council, *Submission 89*; Australian Institute of Superannuation Trustees, *Submission 77*; Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*; Superannuated Commonwealth Officers' Association, *Submission 14*.

99 Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; COTA, *Submission 51*.

100 Tom Garcia, Policy and Regulatory Manager, Australian Institute of Superannuation Trustees, personal communication, 18 January 2013. The interviews were conducted as part of a survey. The results were reported in AIST, *Super-poor but surviving. Experiences of Australian Women in Retirement* (2011).

101 Law Council of Australia, *Submission 96*.

102 Australian Industry Group, *Submission 97*.

103 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 30.

104 Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2010 to June 2011, Cat No 6238.0* (2011), Table 1.

Recommendation 8–2 Section 6(1)(e) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth), which provides that government co-contributions are payable only for people aged under 71 years, should be repealed.

Accessing superannuation

Introduction

8.81 The ALRC has been directed to consider legislation that imposes limitations or barriers that could discourage older people from working. This consideration requires identifying disincentives to participation and incentives to leave the workforce.¹⁰⁵

8.82 Access to superannuation may amount to an incentive to leave the workforce. However it is also an earned benefit and a statutory right. Delaying access to superannuation may delay retirement and compel workforce participation. This outcome would conflict with the framing principles for this Inquiry, particularly independence and self-agency.

8.83 Accordingly, the ALRC has not recommended changes to access rules. If such recommendations were to be made, then they should be made after a review considering all aspects of the superannuation system, including equity, adequacy and sustainability, and not only its impact on workforce participation.

8.84 However, because the relationship between access to superannuation and older people's workforce participation is of significant public interest, this section reviews the issue and reports on the submissions received on this topic.

8.85 The Transition to Retirement (TTR) rules were designed to encourage continued workforce participation among mature age workers. There is no evidence that they are meeting this goal, and some evidence that they might be a disincentive to participation. The ALRC recommends that the TTR rules be further reviewed to determine what changes are required to ensure that the rules encourage workforce participation.

When can members access superannuation?

8.86 Members of superannuation funds can withdraw their money as follows:

8.87 *At age 65.* There are no restrictions on the way people 65 years and over may access their superannuation benefits.¹⁰⁶

105 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), 1.12.

106 *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1 item 106.

8.88 ***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.¹⁰⁷

8.89 In other words, the preservation age will increase from 55 to 60 years between the years 2015 and 2025.

8.90 A person who has reached preservation age (but is less than 60 years old) is considered retired if an employment arrangement has come to an end and the superannuation fund is satisfied that the person does not intend to become employed again. If the person is aged 60 years or over, the person is considered retired if an employment arrangement has come to an end after the person turned 60 years.¹⁰⁸

8.91 There are no restrictions on the way members of, or over, the preservation age can access their superannuation when they retire.¹⁰⁹

8.92 ***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).¹¹⁰ No more than 10% of the account balance may be paid each year.¹¹¹ Members can continue working in any capacity while receiving superannuation benefits under the TTR rules, as no work test applies.¹¹²

8.93 ***Early access.*** Early release of benefits is possible but the grounds are limited. They include severe financial hardship and certain compassionate grounds.¹¹³

8.94 There are two further age settings relevant to superannuation: the tax-free access age at 60 years, and the Age Pension age. In 2013, the Age Pension age is 65 years. From 2017 to 2023, the Age Pension age will incrementally increase to 67 years.¹¹⁴

107 Ibid reg 6.01.

108 Ibid reg 6.01(7).

109 Ibid sch 1 item 101.

110 Ibid regs 1.05(11A)(a); 1.06 (9A)(a); 6.01; sch 1 item 110.

111 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).

112 ATO, *Transition to Retirement—Information for Superannuation Professionals* (2006).

113 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.01, 6.19A.

114 *Social Security Act 1991* (Cth) s 23(5A), (5D).

How do superannuation access ages affect workforce participation?

8.95 There are many determinants of continued participation in the paid workforce among older workers: health and disability, educational attainment, a spouse's retirement, caring responsibilities, employer attitudes, and financial resources (including superannuation and Age Pension eligibility).¹¹⁵ Access to training and skills development, and opportunities for flexible work also affect the decision to work or retire.¹¹⁶

8.96 Access to superannuation is clearly a highly relevant factor. The Australian Bureau of Statistics (ABS) reported that, among retired men and women whose last job was fewer than 20 years ago,

the most commonly reported main reason for ceasing their last job was 'reached retirement age/eligible for superannuation/pension' (44% of men and 27% of women). These people had one of the highest average retirement ages of 62.0 years (62.8 years for men and 60.8 years for women).¹¹⁷

8.97 Superannuation, an annuity or allocated pension was the main source of income at retirement for 27% of men and 13% of women.¹¹⁸ For the 44% of women whose partner's income was their main source of funds at retirement,¹¹⁹ their partner's access to superannuation might be a relevant factor in their retirement decision.

8.98 There are substantial numbers of people whose retirement decision is affected by having reached the access age for superannuation, and those numbers will rise as the superannuation system matures. Changes to the access age for superannuation can be expected to affect the workforce participation rates for these people.

8.99 However, many people retire due to sickness, injury or disability (26% of men and 21% of women), because of unemployment (10% of men and 9% of women),¹²⁰ or to care for children or an ill, disabled or elderly person (11% of women and 3% of men).¹²¹ These people are, on average, younger than those who retire because they have 'reached retirement age or are eligible for superannuation or a pension'.¹²² For these people, a change to the access age is less likely to affect workforce participation, but it may affect their financial circumstances. Some of these people rely on

115 J Borland, *Transitions to Retirement: A Review*, Melbourne Institute Working Paper 03 (2005), Melbourne Institute of Applied Economic and Social Research, the University of Melbourne, 19–26.

116 C Phillipson and A Smith, *Extending Working Life: A review of the research literature*, Research Report No 299 (2005), Department for Work and Pensions, 44–50.

117 Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2010 to June 2011, Cat No 6238.0* (2011), 5.

118 Ibid, Table 7.

119 Ibid, 6.

120 Ibid, 5.

121 Ibid, Table 5.

122 Ibid, 5. There is no compulsory retirement age in Australia, but 'reached retirement age/eligible for superannuation/pension' is a reason for retirement in the ABS survey. Certain occupational groups, such as judges and military personnel, have compulsory retirement provisions: see Chapter 4.

superannuation funds to replace or supplement income support payments until reaching Age Pension age.¹²³

8.100 The gap between the superannuation preservation age and Age Pension age is of concern both in terms of workforce participation and the sustainability of the superannuation system. The Grattan Institute said 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.¹²⁴

8.101 In other words, access to superannuation funds creates an incentive to withdraw from work and rely on superannuation funds until Age Pension age.¹²⁵ Drs Diana Warren and Umut Oguzoglu measured this incentive, finding that

for men aged between 60 and 64 years, there are significant financial incentives to retire from the labour force and once the age pension eligibility age has been reached, the incentive to retire is much stronger. For women, the financial incentives before the age pension eligibility age are not significant, but there appears to be a weak incentive to retire once the age pension eligibility age has been reached.¹²⁶

8.102 In 2004, the Australian Government made changes to superannuation arrangements that were intended to reduce incentives to retire. Taxes on lump sum withdrawals, and on earnings on superannuation accounts in pension phase were abolished, and income from superannuation was disregarded in assessing income tax. It was thought that these arrangements would encourage people over 60 years to remain in the workforce.¹²⁷ This did not prove to be the case. While there is an upward trend for mature age participation in the workforce, the trend was not affected by the 2004 changes.¹²⁸

Calls for increased access ages

8.103 The Tax Review recommended that the preservation age be increased to 67 years, to align with the increased Age Pension age.¹²⁹ This recommendation was framed as a response to a changing environment for the retirement income system, including:

Dramatic long term changes in Australia's demographic structure, with an increasing proportion of aged people and a declining proportion of working-age people;

123 Women in Super, *Submission 64*.

124 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012-5* (2012), 54.

125 J Freebairn and D Warren, 'Retirement Incomes and Employment Decisions of the Mature Aged' (2010) 43(3) *Australian Economic Review* 312.

126 D Warren and U Oguzoglu, 'Retirement in Australia: a Closer Look at the Financial Incentives' (2010) 43(4) *Australian Economic Review* 357. This article models the effect of changes to the pension age but not changes to superannuation access ages.

127 B Headey, 'Economics of Population Ageing: Australia May Not Have a Labour Supply Problem, but Recent Superannuation Reforms Have Not Helped' in T Griffin and F Beddie (ed) *Older Workers: Research Readings* (2011).

128 Ibid.

129 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 17.

Increasing life expectancies, leading to a longer average period in retirement and particularly strong growth in the number of people in the oldest age groups;

Advances in health technology that are improving the quality of life for many people with previously debilitating ailments.¹³⁰

8.104 The changes were said to create problems for the sustainability of the retirement income system. In particular, future taxpayers will have to pay much higher taxes to pay for the health care and pensions of older people who will make up a higher proportion of the population.¹³¹

8.105 There are also concerns about the adequacy of retirement incomes. Superannuation was intended to improve retirement incomes, but longer periods in retirement mean that people may not be able to accumulate sufficient savings to make a real difference to their retirement incomes.¹³² Submissions from the superannuation industry were particularly concerned about the adequacy of superannuation in light of increased longevity.¹³³

8.106 The approaching seven year gap between the preservation age of 60 years (from 2025) and the Age Pension age of 67 years (from 2023) may contribute to problems of sustainability and adequacy. Early retirement funded by superannuation savings both increases the length of retirement and reduces retirement savings, resulting in increased dependence on the Age Pension.¹³⁴ 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’.¹³⁵ It anticipated that increasing the preservation age would reduce total pension costs and reduce tax for workers.¹³⁶

8.107 A related concern arising from the changing demographics of the Australian population is that Australia will have a labour supply problem, leading to reduced economic growth. The *Intergenerational Report (2010)* suggests that average annual growth in real GDP will slow from 3.3% to 2.7% in 40 years, and says the ageing of the population is ‘the major factor driving the slowing in economic growth’.¹³⁷ The

130 Ibid, 15.

131 Ibid, 15. This analysis has been disputed by Hanegbi who suggests that the increased costs of an ageing population will be dwarfed by the increase in GDP per capita, so that the tax burden on future tax payers will be insignificant: R Hanegbi, ‘Australia’s Superannuation System: A Critical Analysis’ (2010) 25 *Australian Tax Forum* 303, 310.

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

133 Financial Services Council, *Submission 89*; Australian Institute of Superannuation Trustees, *Submission 77*; Suncorp Group, *Submission 66*.

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

135 Ibid, 35.

136 Ibid, 37.

137 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010), ix. Not all commentators agree that Australia’s changing demographics create concerns about economic growth. Heady notes that participation rates for both men and women aged 55–64 have been steadily increasing since the mid-1980s, driven by improvements in health and education, changed attitudes to women’s participation and more white collar jobs. He argues that these trends are likely to continue and the participation rate of 55–64 year olds ‘will easily surpass the 67% level mentioned as desirable by

report calls for improved labour force participation and, in particular, the removal of barriers to participation for mature aged people who want to work.¹³⁸ However, the report stops short of calling for the removal of incentives to retire, such as access to superannuation at 60 years.

8.108 Increasing the preservation age may assist individuals by encouraging workforce attachment, increasing their superannuation savings and reducing the likelihood of exhausting these savings. It is easier for mature age people to continue working rather than to withdraw from the workforce and later seek to re-enter when their retirement savings are diminished. In particular, people without financial literacy may retire at 60 believing their superannuation is sufficient to fund their retirement until reaching Age Pension age. If they are incorrect and their funds are exhausted before they reach 67, they face having to try to re-enter the workforce after a long absence.¹³⁹ This is more difficult for older workers, who tend to have a longer duration of unemployment than younger workers.¹⁴⁰ The Grattan Institute found that:

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.¹⁴¹

8.109 Stakeholders said that an increase in the preservation age is consistent with increases in life expectancy,¹⁴² particularly healthy life expectancy.¹⁴³ One stakeholder noted that it is a legitimate response to another contemporary reality, the replacement of labour intensive work with less demanding white collar work.¹⁴⁴

Objections to an increased preservation age

8.110 Access to superannuation funds has a significant impact on retirement decisions in Australia. However, financial resources are not the only determinant in the retirement decision. ABS data indicates that many people retire for health reasons, because of unemployment, or because of caring responsibilities. Stakeholders emphasised that many people do not choose when to retire,¹⁴⁵ and were particularly concerned about workers in labour intensive industries who are physically unable to

Treasury': B Headey, 'Economics of Population Ageing: Australia May Not Have a Labour Supply Problem, but Recent Superannuation Reforms Have Not Helped' in T Griffin and F Beddie (ed) *Older Workers: Research Readings* (2011), 70.

138 The Treasury, *Intergenerational Report 2010—Australia to 2050: Future Challenges* (2010).

139 J Piggott, *Correspondence*, 13 August 2012.

140 In May 2012, the average duration of unemployment for people aged 45 and over was 62 weeks, compared to 34 weeks for those aged 25–44 years: DEEWR, FaHCSIA, DHS, DIISRTE, *Submission to the Senate Inquiry on the Adequacy of the Allowance Payment System for Job Seekers and Others* (2012), 47.

141 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 52.

142 Australian Industry Group, *Submission 37*.

143 Suncorp Group, *Submission 66*. See further Chapter 2.

144 Financial Services Council, *Submission 89*. See also P McDonald, 'Employment at Older Ages in Australia: Determinants and Trends' in T Griffin and F Beddie (eds), *Older Workers: Research Readings* (2011) 25, 39.

145 Government of South Australia, *Submission 95*; DOME Association, *Submission 62*.

work until aged 67 years.¹⁴⁶ Stakeholders reported significant discrimination against older workers,¹⁴⁷ and there is evidence suggesting that, while unlawful, this form of discrimination may be widespread.¹⁴⁸ Unemployed mature age people spend longer looking for work than do younger people. For these workers, an increased preservation age might increase the time they have to rely on the Disability Support Pension or unemployment benefits.

8.111 While there is a shift away from labour intensive work, this work remains an important and continuing component of the modern workforce. A number of submissions said that it is unreasonable and unfair to expect people who have spent their entire adult lives doing hard physical work to continue to do so until aged 67 years.¹⁴⁹

8.112 An increased preservation age would also have a disproportionate impact on Aboriginal and Torres Strait Islander people who have a life expectancy approximately 10 years less than other Australians.¹⁵⁰

8.113 These submissions highlight the difficulty of setting a preservation age that applies to all workers, and does not take individual differences into account. While most people over 60 years are in good health and do not do hard physical labour, the preservation age should be fair for all workers. One way to achieve this goal might be to expand the early access provisions, which currently allow early access because of ‘severe financial hardship or on compassionate grounds’.¹⁵¹ The regulations limit the grounds for release to specified situations including a need to pay for medical treatment, palliative care, funeral or burial or to avoid foreclosure of a mortgage or the forced sale of a home.¹⁵² AIST suggested that another approach would be to vary the preservation age according to ‘a person’s gender, occupation or other factors that may impact on a person’s ability to participate in the workforce’.¹⁵³

8.114 A number of stakeholders reiterated the importance of choice for older people.¹⁵⁴ This concern is consistent with the framing principles for the Inquiry. These principles include independence and self-agency, both of which encompass the principle of choice. The ACTU stated that it

146 Australian Institute of Superannuation Trustees, *Submission 77*; Women in Super, *Submission 64*; Cbus, *Submission 41*; but see Financial Services Council, *Submission 89*: ‘labour intensive sections of the workforce make up a declining portion of the total workforce, and should not be afforded a disproportionate level of emphasis’.

147 Law Council of Australia, *Submission 96*; National Seniors Australia, *Submission 92*; COTA, *Submission 51*; Olderworkers, *Submission 22*.

148 See Chapter 3.

149 Law Council of Australia, *Submission 96*; ACTU, *Submission 88*; Australian Institute of Superannuation Trustees, *Submission 77*; Women in Super, *Submission 64*; Cbus, *Submission 41*.

150 Australian Bureau of Statistics, *Experimental Life Tables for Aboriginal and Torres Strait Islander Australians, Australia, 2005–2007, Cat No 3302.0.55.003* (2009).

151 *Superannuation Act 1976* (Cth) s 79B.

152 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A.

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

154 Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Suncorp Group, *Submission 66*.

rejects the notion that existing age settings encourage workers in meaningful paid employment to retire before they are ready to, and increasing such age settings would only serve to unfairly limit their choices, restrict individual agency, and would provide no incentive or assistance for workers who wish to remain in employment to do so.¹⁵⁵

8.115 While some stakeholders rejected the proposal regarding raising access ages outright,¹⁵⁶ others indicated that the preservation age should not be raised ‘at this time’.¹⁵⁷ For example, both National Seniors Australia and COTA Australia (representing older Australians) suggested that the preservation age should not be increased until there are changes in employer attitudes to older workers so that people can reasonably expect to be employed until the age of 67 years.¹⁵⁸ Other stakeholders said that the preservation age should not be raised without further review, consultation or research.¹⁵⁹ Among these stakeholders, there seems to be a recognition that, in the long term, the preservation age will require adjustment. The adjustment may need to be accompanied by some flexibility for workers who have worked in labour intensive industries, who have health problems, disability, or caring responsibilities. Future reconsideration of the preservation age should also include reconsideration of the early access provisions.

The tax-free access age

8.116 This section considers whether to raise the age at which a person of preservation age may access superannuation (above a set cap) without paying tax. The ALRC concludes that this change should not be recommended—because there is little evidence that it would increase workforce participation.

8.117 The taxation arrangements for superannuation benefits are complex and are not fully described here. For the purposes of this Inquiry, it is sufficient to note that, in most cases, people aged 60 years and over are not required to pay tax when they receive superannuation benefits.¹⁶⁰

8.118 People who have reached preservation age, but who are under 60 years old, can generally withdraw funds up to a ‘low rate cap’ amount tax-free.¹⁶¹ The low rate cap is a lifetime limit. In 2012–2013 it is \$175,000.¹⁶² Amounts above the low rate cap are taxed up to 15% (plus Medicare levy).¹⁶³

8.119 In the Discussion Paper, the ALRC asked whether, as an alternative to raising the preservation age, the tax-free access age should be raised from 60 years to:

155 ACTU, *Submission 88*.

156 Ibid; DOME Association, *Submission 62*; Cbus, *Submission 41*.

157 National Seniors Australia, *Submission 92*; COTA, *Submission 51*; Olderworkers, *Submission 22*.

158 National Seniors Australia, *Submission 92*; COTA, *Submission 51*.

159 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Australian Institute of Superannuation Trustees, *Submission 77*; Women in Super, *Submission 64*.

160 *Income Tax Assessment Act 1997* (Cth) s 301–10.

161 Ibid s 301–20.

162 Ibid s 307–345; ATO, ‘Low Rate Cap on Super Lump Sum Benefits’ <www.ato.gov.au> at 21 March 2013.

163 *Income Tax Assessment Act 1997* (Cth) s 301–20.

- 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.¹⁶⁴

8.120 Raising the tax-free access age may be a softer approach than raising the preservation age. It would allow mature age people to access superannuation benefits at age 60 (rather than, for example, 62 or 67 years) if they choose to do so. In other words, it uses the ‘carrot’ of tax incentives rather than the ‘stick’ of raising the age at which a person can access their retirement savings.¹⁶⁵ Professor John Freebairn and Dr Diana Warren, in their examination of ways to increase mature age participation, said that aligning the tax-free access age with the Age Pension age is a ‘logical policy option’.¹⁶⁶ This approach may be more consistent with this Inquiry’s framing principles of independence and self-agency. Some stakeholders agreed that raising the tax-free age might amount to an incentive to continue working.¹⁶⁷

8.121 However, the evidence that increasing the tax-free access age will result in increased workforce participation by older workers is not strong. Until 2007, lump sum superannuation withdrawals up to \$129,000 were tax-free.¹⁶⁸ In 2007, tax-free access was extended to all withdrawals made by people aged over 60 years. This was intended to be an incentive to continue working until at least that age.¹⁶⁹

8.122 In a 2008 survey of 2,501 Australian workers aged 40–59, around half of the respondents indicated that the change was likely to influence them to stay in the workforce up to, or past, the age of 60.¹⁷⁰ However, a 2010 report from the Melbourne Institute assessed the 2007 changes and found that they did not have a statistically significant impact on mature age workforce participation.¹⁷¹ In particular, men aged 55–59, who would be expected to be affected by the changed arrangements, did not increase their participation.¹⁷² Modelling commissioned by Mercer Asia Pacific also showed that the reforms had a ‘marginal’ impact on workforce participation by people

164 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Question 8–3.

165 This terminology is used in R Chomik and J Piggott, *Mature-Age Labour Force Participation: Trends, Barriers, Incentives, and Future Potential* (2012), Centre of Excellence in Population Ageing Research Briefing Paper 2012/01, 11.

166 J Freebairn and D Warren, ‘Retirement Incomes and Employment Decisions of the Mature Aged’ (2010) 43(3) *Australian Economic Review* 312, 318.

167 Australian Chamber of Commerce and Industry, *Submission 85*; Suncorp Group, *Submission 66*; Women in Super, *Submission 64*.

168 A Borowski, ‘Back at the Crossroads: The Slippery Fish of Australian Retirement Income Policy’ (2008) 43 *Australian Journal of Social Issues* 311, 327.

169 P Costello (Treasurer), ‘A Plan to Simplify and Streamline Superannuation’ (Press Release, 9 May 2006).

170 M Walter, N Jackson, and B Felmingham, ‘Keeping Australia’s Older Workers in the Labour Force: A Policy Perspective’ (2008) 43 *Australian Journal of Social Issues* 291, 301.

171 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, 131.

172 *Ibid.*, 74.

over 55.¹⁷³ It has been suggested that a likely reason for the lack of impact is that the removal of the tax on amounts over \$129,000 only affected a small number of high income workers.¹⁷⁴

8.123 The tax-free amount for members accessing superannuation before the age of 60 years is now \$175,000.¹⁷⁵ Increasing the tax-free age would still allow people to access up to \$175,000 tax-free at preservation age. This amount is much higher than the median superannuation balance for people aged 55–59 in 2009–10 (\$35,932).¹⁷⁶ While balances will certainly grow as the system matures, it will take some time before the tax-free age can be expected to be a workforce participation incentive for a large portion of the population.

8.124 Further, as noted earlier, many people are not able to take advantage of financial incentives to stay in the workforce. Many leave the workforce involuntarily due to disability, unemployment or caring responsibilities. For these people, loss of tax-free status until reaching 62, 65 or 67 years could mean a lower standard of living in retirement and heavier reliance on the Age Pension or other income support payments.¹⁷⁷

8.125 Several stakeholders opposed raising the tax-free age on the basis that it would not remove barriers to work, but would limit choice and restrict the independence of older people.¹⁷⁸

8.126 There was little support among stakeholders for raising the tax-free age but not the preservation age. Those supporting an increased tax-free age thought that both the tax-free age and the preservation age should increase.¹⁷⁹ It was suggested that this would both reduce complexity and maintain the present five-year gap between the tax-free age and the Age Pension age.

8.127 Some stakeholders also indicated that the tax-free status of superannuation is unaffordable and should be reconsidered.¹⁸⁰

173 P Promnitz, 'Better Super: 12 Months On' <www.ceoforum.com.au> at 21 March 2013.

174 J Freebairn, *Some Policy Issues in Providing Retirement Incomes* (2007), Melbourne Institute Working Paper Series, Working Paper No 6/07, 18.

175 *Income Tax Assessment Act 1997* (Cth) s 307–345; ATO, 'Low Rate Cap on Super Lump Sum Benefits' <www.ato.gov.au> at 21 March 2013.

176 R Clare, *Developments in the Level and Distribution of Retirement Savings*, Association of Superannuation Funds of Australia Research Paper (2011), Table 2. The median balance is quite low because many people (32% of males and 39% of females) have no superannuation: *ibid*, 9.

177 National Seniors Australia, *Submission 92*.

178 Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*.

179 Financial Services Council, *Submission 89*; Brotherhood of St Laurence, *Submission 86*; Australian Chamber of Commerce and Industry, *Submission 85*; Suncorp Group, *Submission 66*. The Law Council of Australia submitted that the tax-free age and the preservation age should be the same: Law Council of Australia, *Submission 96*.

180 National Welfare Rights Network (NWRN), *Submission 99*; Australian Institute of Superannuation Trustees, *Submission 77*.

8.128 Finally, stakeholders suggested that the question of the appropriate age for tax-free access should be considered as part of an inquiry that can consider all aspects of the superannuation system and conduct broad public consultation.

8.129 The ALRC concludes that the evidence that raising the tax-free age (rather than the preservation age) would encourage workforce participation among mature age workers is not strong, and therefore no recommendation to raise this age has been made.

Transition to Retirement (TTR) rules

8.130 The TTR rules allow workers to access their superannuation when they have reached preservation age but not retired. The TTR rules were introduced to encourage continued workforce participation, but do not appear to have done so. The ALRC recommends that the Australian Government initiate a review of the rules to determine what changes are required to ensure that they encourage workplace participation.

8.131 Prior to the introduction of the TTR 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 to ‘people deciding to retire prematurely just so they can access their superannuation’.¹⁸¹ 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 superannuation access rules.¹⁸²

8.132 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’.¹⁸³ The TTR rules were intended to facilitate continued employment by enabling people over preservation age to reduce work hours and supplement their income with a superannuation income stream.

8.133 The TTR rules can also be used to allow workers 55 years and over to increase their contributions to superannuation and reduce their tax. This is an accepted use of the rules—for example, it is described on the Australian Securities and Investments Commission’s Moneysmart website as a way to boost superannuation.¹⁸⁴

8.134 The TTR income stream enables workers over preservation age 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 same and, in effect, the super pension withdrawals can fund superannuation contributions.¹⁸⁵

181 The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 10.

182 The Treasury, *Transition to Retirement Consultation Paper* (2004), 4.

183 The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 10.

184 ASIC, ‘Transition to Retirement’, 29 June 2012 <www.moneysmart.gov.au> at 21 March 2013.

185 D Shirlow, ‘Bringing the Use of TTR Pensions Closer to Home’ (2011) (4) *CCH Australian Superannuation News*.

8.135 This use of the TTR rules is limited by the caps on superannuation (although it can sometimes be tax effective to fund non-concessional contributions in this way).¹⁸⁶ This approach to TTR is not available to all workers, as some employers do not offer salary sacrifice arrangements.

8.136 The above strategy can be used by people who do not intend to retire, but wish to benefit from the concessional tax treatment applied to superannuation. The benefits vary according to a person's taxable income and the balance in the fund. In 2012–2013, they were said to be between \$2,473 and \$8,154 per year.¹⁸⁷

Do TTR rules encourage workforce participation?

8.137 A 2008 survey of 2,501 Australian workers aged 40–59 asked respondents about their awareness of the TTR rules and how they might use them. Only half of the respondents were aware of the TTR rules, and only 29% of respondents aged 50–54 thought they would use them.¹⁸⁸ Of those who were aware of the TTR rules, two thirds said they were likely or very likely to use the rules to *reduce* their workforce participation (by working fewer hours and still retiring at the same age).¹⁸⁹

8.138 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.¹⁹⁰ Professor Paul Gerrans suggested that the TTR rules are now primarily a tax planning mechanism rather than a workforce participation incentive.¹⁹¹

8.139 The ALRC has not found any evidence that the TTR rules are encouraging workforce participation. The determinants of retirement, reviewed above, include financial resources, health and disability, the availability of work and caring responsibilities. The availability of tax concessional retirement savings arrangements does not appear to be a significant incentive or disincentive.

8.140 On the other hand, the superannuation industry and others contend that the TTR rules create workforce participation incentives.¹⁹² The Financial Services Council suggested that the Melbourne Institute study may not have found a workplace participation effect because the 2001–2008 period examined was also a time of mining,

186 Ibid.

187 SMSF Academy Managing Director Aaron Dunn cited in J Frost, 'Breach cap and you'll wear it', *The Australian*, 14 July 2012.

188 M Walter, N Jackson, and B Felmingham, 'Keeping Australia's Older Workers in the Labour Force: A Policy Perspective' (2008) 43 *Australian Journal of Social Issues* 291, 299.

189 Ibid, 300.

190 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, 83–85.

191 P Gerrans, *Submission 74*.

192 Financial Services Council, *Submission 89*; Australian Institute of Superannuation Trustees, *Submission 77*; Suncorp Group, *Submission 66*; Australian Chamber of Commerce and Industry, *Submission 44*.

asset price and share market booms in Australia that may have encouraged earlier retirement.¹⁹³

8.141 Some stakeholders supported the TTR rules on the basis that they encourage retirement savings.¹⁹⁴ The original policy intention of the rules was to encourage workforce participation and to cater for more flexible workplace arrangements—not to encourage retirement savings. It is not clear that their continued existence could be supported on the retirement savings ground alone. The targeting of the incentives to middle and upper income earners aged 55–65 could be difficult to justify on equity grounds.¹⁹⁵ Access to TTR arrangements for the purpose of increasing retirement savings is also limited because some employees do not have access to salary sacrifice arrangements;¹⁹⁶ and many are unaware of the existence of the rules.¹⁹⁷ Setting up a TTR arrangement can be complex and it is usually necessary to speak to a financial adviser before doing so.¹⁹⁸ This creates a barrier to access for those who do not normally use an adviser to manage their finances.

8.142 The TTR rules do not represent a limitation or barrier to mature age workforce participation. However the ALRC is concerned that they may not meet their policy objective of encouraging continued mature age participation in the workforce. In the Discussion Paper, the ALRC proposed that the rules should be reviewed to determine what changes, if any, are required to ensure that the rules meet their policy objective.¹⁹⁹ Many stakeholders addressing this issue supported such an inquiry.²⁰⁰ No further evidence has come to light indicating that TTR rules are encouraging mature age participation in the workforce. Accordingly, the ALRC recommends that an inquiry be held into the TTR rules to consider whether they should be altered to ensure that the rules meet their policy objective.

193 Financial Services Council, *Submission 89*.

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

195 A Borowski, 'Back at the Crossroads: The Slippery Fish of Australian Retirement Income Policy' (2008) 43 *Australian Journal of Social Issues* 311, 324–326.

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

197 DOME Association, *Submission 62*; Law Council of Australia, *Submission 46*; National Seniors Australia, *Submission 27*. See also M Walter, N Jackson, and B Felmingham, 'Keeping Australia's Older Workers in the Labour Force: A Policy Perspective' (2008) 43 *Australian Journal of Social Issues* 291.

198 ASIC, 'Transition to Retirement', 29 June 2012 <www.moneysmart.gov.au> at 21 March 2013.

199 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 8–7.

200 National Welfare Rights Network (NWRN), *Submission 99*; Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; National Seniors Australia, *Submission 92*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Australian Chamber of Commerce and Industry, *Submission 85*; P Gerrans, *Submission 74*; DOME Association, *Submission 62*. AIST 'would not object' (Australian Institute of Superannuation Trustees, *Submission 77*) and the FSC opposed the proposed review as 'neither appropriate or necessary' (Financial Services Council, *Submission 89*).

Recommendation 8–3 The ‘Transition to Retirement’ rules were introduced into the *Superannuation Industry (Supervision) Regulations 1994* (Cth) to encourage continued mature age workforce participation. The Australian Government should review these rules to determine what changes, if any, are required to ensure they meet their policy objective. The review should consider matters including:

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

Participants

Australian Law Reform Commission

President and Commissioner in Charge

Professor Rosalind Croucher

Part-time Commissioners

The Hon Justice Berna Collier

The Hon Susan Ryan AO, Age Discrimination Commissioner, Australian Human Rights Commission

Executive Director

Sabina Wynn

Senior Legal Officer

Sara Peel (until 12 November 2012)

Legal Officers

Amanda Alford

Robyn Gilbert (from 1 November 2012)

Krista Lee-Jones (until 17 May 2012)

Julie MacKenzie (from 10 April 2012)

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Carolyn Kearney (until 10 August 2012)

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Ellenor Hayes

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Hannah Innes

Jillian Morrison

Hannah Ryan

Fritz Siregar, Indonesia's National Law Reform Program

Michael Springer, Harvard University

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Emeritus Professor Terry Carney, Faculty of Law, University of Sydney

Anne de Salis, Director, ME Bank, Sydney

Anne Lampe, Freelance Journalist, Sydney

Emeritus Professor Ron McCallum AO, UN Committee on the Rights of Persons with Disabilities, Faculty of Law, University of Sydney, Sydney

Therese MacDermott, Macquarie Law School, Macquarie University, Sydney

Michael O'Neill, Chief Executive, National Seniors Australia, Brisbane

Scientia Professor John Piggott, Australian School of Business, University of New South Wales; Director, ARC Centre of Excellence in Population Ageing Research; Director, Australian Institute for Population Ageing Research, Sydney

Professor Philip Taylor, Director, Research and Graduate Studies, Monash University, Melbourne

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Submissions

<i>Name</i>	<i>Number</i>	<i>Date</i>
Acting Commonwealth Ombudsman	16	14 June 2012
ACTU	88	27 November 2012
	38	21 June 2012
Adage	69	27 November 2012
Association of Independent Retirees (AIR) Ltd	59	20 November 2012
	17	14 June 2012
Australian Chamber of Commerce and Industry	85	27 November 2012
	44	25 June 2012
Australian Federation of Disability Organisations	78	26 November 2012
Australian Human Resources Institute	87	27 November 2012
Australian Industry Group	97	3 December 2012
	37	21 June 2012
Australian Institute of Superannuation Trustees	77	23 November 2012
	47	2 July 2012
Australian Mines and Metals Association	73	23 November 2012
Australian Shipowners Association	65	22 November 2012
E Baskerville	07	30 May 2012
J Bodey	10	11 June 2012

Brotherhood of St Laurence	86	27 November 2012
	54	17 August 2012
C Busby	09	6 June 2012
Business Council of Australia	93	30 November 2012
	19	14 June 2012
Carers Australia	81	26 November 2012
Cbus	41	21 June 2012
Chamber of Commerce and Industry of Western Australia (Inc)	76	23 November 2012
R Christiansen	58	20 November 2012
Comcare	29	15 June 2012
	91	29 November 2012
Community Care Consortium	56	26 October 2012
Confidential	01	22 May 2012
Confidential	02	24 May 2012
Confidential	03	24 May 2012
Confidential	04	29 May 2012
Confidential	05	12 June 2012
Confidential	06	15 June 2012
Confidential	07	22 June 2012
Confidential	08	22 June 2012
Confidential	09	9 October 2012
Confidential	10	14 November 2012
Confidential	11	21 November 2012

J Constable	98	7 December 2012
COTA	51	16 July 2012
Defence Force Welfare Association	49	6 July 2012
Department of Education, Employment and Workplace Relations, Department of Human Services and Department of Families, Housing, Community Services and Indigenous Affairs	101	10 January 2013
Department of Immigration and Citizenship	79	26 November 2012
Department of Veterans' Affairs	52	10 August 2012
Diversity Council Australia	71 40	23 November 2012 21 June 2012
DOME Association	62	21 November 2012
Employment Law Centre of WA	57 45	19 November 2012 26 June 2012
Fair Work Ombudsman	100	12 December 2012
Federation of Ethnic Communities' Councils of Australia	80	26 November 2012
Financial Services Council	89	29 November 2012
L Gabor	05	28 May 2012
P Gerrans	74	23 November 2012
Government of South Australia	95 30	30 November 2012 19 June 2012
Insurance Australia Group	13	12 June 2012
Insurance Council of Australia	94 21	30 November 14 June 2012

JobWatch	60	21 November 2012
	25	15 June 2012
F Johnson	35	21 June 2012
C Lanyon	61	21 November 2012
Law Council of Australia	96	30 November 2012
	46	26 June 2012
P LeMay	43	18 June 2012
R Marschall	55	23 October 2012
L Masters	36	21 June 2012
G McPherson	53	23 November 2012
Media Entertainment & Arts Alliance	33	20 June 2012
My Longevity Pty Ltd	82	26 November 2012
	15	13 June 2012
National Seniors Australia	92	29 November 2012
	27	15 June 2012
National Welfare Rights Network	99	20 December 2012
	50	11 July 2012
P Nelson	31	20 June 2012
C Norville	03	25 May 2012
T Novak	02	23 May 2012
V O'Farrell	32	20 June 2012
Older Women's Network NSW Inc	26	15 June 2012
	04	28 May 2012
Olderworkers	22	14 June 2012

M Oppenheimer, A Kilarr, A Edwards	75	23 November 2012
Premier's Council for Women South Australia	12	6 June 2012
Queensland Tourism Industry Council	67 28	23 November 2012 15 June 2012
Recruitment and Consulting Services Association	90	29 November 2012
Returned & Services League of Australia	24	15 June 2012
Safe Work Australia	68 18	23 November 2012 14 June 2012
Shop, Distributive and Allied Employees' Association	84	27 November 2012
South Australian Equal Opportunity Commission	70 11	23 November 2012 12 June 2012
R Spencer	08	2 June 2012
Suncorp Group	66 39	22 November 2012 21 June 2012
Superannuated Commonwealth Officers' Association	14	13 June 2012
TPI Federation of Australia	48	2 July 2012
W Trinder	01	4 May 2012
S Turner	06	29 May 2012
Victoria Legal Aid	83 34	26 November 2012 20 June 2012
J Walker	20	14 June 2012
Western Australian Equal Opportunity Commission	23	14 June 2012

J Willis	42	22 June 2012
Women's Equity Think Tank	63	22 November 2012
Women in Social & Economic Research	72	23 November 2012
Women in Super	64	22 November 2012

Consultations

Notes:

1. Some of those listed were consulted on more than one occasion.
2. Where a number of people were consulted as a group, only the group name is listed.

Name	Location
Aboriginal Legal Service of Western Australia (Inc)	Perth
Adage	Sydney
Prem Aleema, Office of the Commonwealth Ombudsman	Sydney
Associate Professor Siobhan Austen, Curtin University of Technology	Perth
Attorney-General's Department	Canberra
Australian Chamber of Commerce and Industry	Sydney
Australian Council of Social Service	Sydney
Australian Council of Trade Unions	Melbourne
Australian Federation of Disability Organisations	Melbourne
Australian Human Resources Institute	Melbourne
Australian Human Rights Commission	Sydney
Australian Human Rights Commission, Age Discrimination Team	Sydney
Australian Industry Group	Sydney
Australian Institute of Superannuation Trustees	Melbourne
Australian Prudential Regulation Authority	Sydney
Australian Securities and Investments Commission	Sydney
Australian Taxation Office	Canberra

Name	Location
Australian Workplace Innovation and Social Research Centre	Adelaide
Robin Banks, Anti-Discrimination Commissioner, Tasmania	Sydney & telephone conference
Associate Professor Hazel Bateman, Australian School of Business, University of New South Wales	Sydney
Brotherhood of St Laurence	Melbourne
Carers Australia	Canberra & telephone conference
Emeritus Professor Terry Carney, Faculty of Law, University of Sydney	Sydney & telephone conference
Centre for Work + Life, University of South Australia	Adelaide
Chamber of Commerce and Industry Western Australia	Telephone conference
Ross Clare, Director, Research and Resource Centre, Association of Superannuation Funds of Australia	Sydney
Comcare	Canberra
Everald Compton	Sydney
Jeremy Cooper, Chairman, Retirement Incomes, Challenger	Sydney
COTA South Australia	Telephone conference
COTA Tasmania	Hobart
COTA Victoria	Melbourne
COTA Western Australia	Perth

Name	Location
Eva Cox, University of Technology Sydney	Sydney
Dr Richard Denniss, The Australia Institute	Canberra
Department of Defence	Telephone conference
Department of Education, Employment and Workplace Relations	Canberra
Department of Education, Employment and Workplace Relations	Telephone conference
Department of Education, Employment and Workplace Relations, Department of Families, Housing, Community Services and Indigenous Affairs, Department of Human Services	Canberra
Department of Families, Housing, Community Services and Indigenous Affairs	Canberra
Department of Human Services	Canberra
Department of Immigration and Citizenship	Canberra
Department of Industry, Innovation, Science, Research and Tertiary Education	Telephone conference
Department of the Prime Minister and Cabinet	Canberra
Department of Veterans' Affairs	Canberra
Disability Employment Australia	Melbourne
DOME	Adelaide
Joanne Dwyer, Superannuation Committee, Law Council of Australia	Sydney
Employment Law Centre of WA (Inc)	Telephone conference

Name	Location
Ian Enright, Independent Reviewer, General Insurance Code of Practice	Sydney
Equal Opportunity Commission (SA)	Adelaide
Fair Work Australia	Telephone conference
Fair Work Commission	Melbourne
Fair Work Ombudsman	Melbourne
The Federation of Ethnic Communities' Councils of Australia	Canberra
Financial Services Council	Sydney
Lisa Fowkes, Independent Consultant	Sydney
Val French AM, Older People Speak Out	Brisbane
Jocelyn Furlan, Superannuation Complaints Tribunal	Melbourne
Professor Paul Gerrans, Business School, University of Western Australia	Sydney
GLBTI Retirement Association	Perth
Government of South Australia, Office for Women, Premier's Council for Women	Adelaide
Grandparents Australia	Melbourne
Rami Hanegbi, School of Law, Deakin University	Melbourne
Peter Hanks QC and Safety, Rehabilitation and Compensation Act Review Secretariat	Sydney
Hobart Community Legal Service Inc	Hobart
Industry Super Network	Sydney
Insurance Council of Australia	Sydney

Name	Location
JobWatch	Melbourne
Legal Aid Western Australia	Perth
Therese MacDermott, Macquarie Law School, Macquarie University	Sydney
National Employment Services Association	Melbourne
National Seniors Australia	Sydney
National Welfare Rights Network	Sydney
Office of the Anti-Discrimination Commissioner (Tasmania)	Hobart
Older Women's Network NSW Inc	Sydney
Scientia Professor John Piggott, Australian School of Business, University of New South Wales; Director, ARC Centre of Excellence in Population Ageing Research; Director, Australian Institute for Population Ageing Research, Sydney	Sydney
Recruitment and Consulting Services Association Australia	Melbourne
Safe Work Australia	Telephone conference
SMSF Professionals' Association of Australia	Sydney
Social Policy Research Centre, University of NSW	Sydney
Social Security Rights Victoria	Melbourne
Robin Stewart-Crompton and Seafarers Rehabilitation and Compensation Act Review Secretariat	Sydney
Suncorp	Melbourne
Professor Philip Taylor, Director, Research and Graduate Studies, Monash University, Melbourne	Telephone conference
The Treasury	Canberra

Name	Location
Union Roundtable	Sydney
Volunteering Tasmania	Hobart
Professor Peter Whiteford, Crawford School of Public Policy, Australian National University	Canberra
Hewitt Whyman, Aboriginal Legal Service NSW/ACT, based in Wagga Wagga	Telephone conference
WorkCover WA	Perth
Workplace Gender Equality Agency	Telephone Conference
Worksafe Victoria	Melbourne

Abbreviations

ABI	Association of British Insurers
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
ADA	<i>Age Discrimination Act 2004 (Cth)</i>
ADF	Australian Defence Force
ADSO	Alliance of Defence Service Organisations
AFDO	Australian Federation of Disability Organisations
Advisory Panel	Advisory Panel on the Economic Potential of Senior Australians
AHRC	Australian Human Rights Commission
AHRI	Australian Human Resources Institute
Ai Group	Australian Industry Group
AIHW	Australian Institute of Health and Welfare
AIST	Australian Institute of Superannuation Trustees
Allowance Payment Inquiry	Senate Education, Employment and Workplace Relations References Committee Inquiry into the adequacy and appropriateness of the allowance payment system for job seekers 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
ALRC	Australian Law Reform Commission
APRA	Australian Prudential Regulation Authority

ASA	Australian Shipowners Association
ASIC	Australian Securities and Investments Commission
ATO	Australian Tax Office
Australian strategy	Australian Work Health and Safety Strategy 2012–2022
BSL	Brotherhood of St Laurence
CALD	Culturally and linguistically diverse
Cbus	Construction and Building Industry Super
CDEP	Community Development Employment Projects
the Code	the General Insurance Code of Practice
Consultative Forum	Consultative Forum on Mature Age Participation
CRS	Consumer Referral Service
DDA	<i>Disability Discrimination Act 1992</i> (Cth)
DEEWR	Department of Education, Employment and Workplace Relations
DES	Disability Employment Services
DHS	Department of Human Services
DIAC	Department of Immigration and Citizenship
DIISRTE	Department of Industry, Innovation, Science, Research and Tertiary Education
DSP	Disability Support Pension
DSTO	Defence Science and Technology Organisation
EPP	Employment Pathway Plan

FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
FECCA	Federation of Ethnic Communities' Councils of Australia
FSC	Financial Services Council
FSC Code	FSC Code of Ethics and Code of Conduct
FWA	Fair Work Australia
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
GDP	Gross Domestic Product
GSM	General Skilled Migration
HRAD Bill	Human Rights and Anti-Discrimination Bill 2012 (Cth)
ICA	Insurance Council of Australia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEP	Indigenous Employment Program
IRAG	Insurance Reform Advisory Group
JSA	Job Services Australia
LSNSW	Law Society of New South Wales
LSSA	Law Society of South Australia
MRC Act	<i>Military Rehabilitation and Compensation Act 2004</i> (Cth)
NDIS	National Disability Insurance Scheme
NES	National Employment Standards
NWRN	National Welfare Rights Network

OHS	occupational health and safety
OWN	Older Women's Network NSW Inc
OECD	Organisation for Economic Co-operation and Development
PCBU	person conducting a business or enterprise
PES	Pensioner Education Supplement
RCSA	Recruitment and Consulting Services Association
REC	Recruitment and Employment Confederation
RCSA	Recruitment and Consulting Services Association
Seacare Authority	Seafarers Safety, Rehabilitation and Compensation Authority
Seafarers Act	<i>Seafarers Rehabilitation and Compensation Act 1992 (Cth)</i>
SIG	Strategic Issues Group for Workers' Compensation
<i>Social Security Act</i>	<i>Social Security Act 1991 (Cth)</i>
SRC Act	<i>Safety, Rehabilitation and Compensation Act 1988 (Cth)</i>
SRCC	Safety, Rehabilitation and Compensation Commission
Superannuation Committee	Superannuation Committee of the Law Council of Australia
Tax Review	Australia's Future Tax System Review
TAG	temporary advisory group
Tasmanian ADA	<i>Anti-Discrimination Act 1998</i>
TTR	Transition to Retirement
VE Act	<i>Veterans' Entitlements Act 1986 (Cth)</i>

WGE Act	<i>Workplace Gender Equality Act 2012 (Cth)</i>
WGE Agency	Workplace Gender Equality Agency
WHS Act	<i>Work Health and Safety Act 2011 (Cth)</i>
WISER	Women in Social and Economic Research

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- ALRC 115 Managing Discovery: Discovery of Documents in Federal Courts, 2011
- ALRC 117 Family Violence and Commonwealth Laws—Improving Legal Frameworks, 2012
- ALRC 118 Classification—Content Regulation and Convergent Media, 2012