



**Australian Government**

**Australian Law Reform Commission**

# Grey Areas—Age Barriers to Work in Commonwealth Laws

ISSUES PAPER

You are invited to provide a submission  
or comment on this Issues Paper

This Issues Paper reflects the law as at 1 April 2012

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

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## Making a submission

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### **Making a submission to the Inquiry**

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

The closing date for submissions to this Issues Paper is 14 June 2012.

There are a range of ways to make a submission or comment on the questions in this Issues Paper.

#### ***Online submission tool***

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

Further instructions are available on the site. If you have any difficulties using the online submission form, please email [web@alrc.gov.au](mailto:web@alrc.gov.au), or phone +61 2 8238 6333.

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

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### **Open inquiry policy**

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents. Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.



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# Terms of Reference

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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* (Cth).

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



# Questions

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## Framing principles

**Question 1.** The ALRC has identified as framing principles: participation; independence; self-agency; system stability; system coherence; and fairness. Are there other key principles that should inform the ALRC's deliberations?

## Age Pension

**Question 2.** As there is a five year difference in qualifying age for a Service Pension under the *Veterans' Entitlement Act 1986* (Cth), should it be increased incrementally in the same manner as for the Age Pension?

**Question 3.** In what ways, if any, should the means test for the Age Pension be changed to remove barriers to mature age participation in the workforce or other productive work?

**Question 4.** In what ways, if any, should the Pension Bonus Scheme be changed to remove barriers to mature age participation in the workforce?

**Question 5.** How effective has the Work Bonus been in removing barriers to work for mature age persons? In what ways, if any, could it be improved?

## Income tax

**Question 6.** In what ways, if any, can the complexity of the tax-transfer system be minimised to remove barriers to mature age participation in the workforce?

**Question 7.** In what ways, if any, do the tax exemptions for social security payments affect mature age participation in the workforce?

**Question 8.** A number of tax offsets are available to encourage mature age participation in the workforce including the Senior Australians Tax Offset, Pensioner Tax Offset, Low Income Tax Offset and the Mature Age Worker Tax Offset.

- (a) In what ways, if any, might these offsets be improved to encourage participation?
- (b) The Australia's Future Tax System Review recommended that these tax offsets be removed. What disincentives would this create for mature age participation in the workforce?

**Question 9.** What other changes, if any, should be made to income tax laws to remove barriers to mature age participation in the workforce and other productive work?

## Superannuation

**Question 10.** What changes, if any, should be made to the Superannuation Guarantee scheme, to remove barriers to work for mature age persons?

**Question 11.** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) prescribe age-based restrictions on voluntary contributions. Members cannot:

- (a) make voluntary contributions from age 65 until age 75 unless they meet a work test; or
- (b) make voluntary contributions from age 75.

What effect do these restrictions have on mature age participation in the workforce? What changes, if any, should be made to these regulations to remove barriers to work for mature age persons?

**Question 12.** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) prescribe age-based restrictions in relation to members splitting contributions with a spouse and making contributions to a spouse's fund. Members cannot:

- (a) split contributions for a spouse aged 65 and over;
- (b) split contributions for a retired spouse of preservation age and over;
- (c) make spouse contributions for a spouse aged 70 and over; or
- (d) make contributions for a spouse aged 65 but under 70 unless the spouse meets a work test.

What effect do these restrictions have on mature age participation in the workforce? What changes, if any, should be made to these regulations to remove barriers to work for mature age persons?

**Question 13.** In what ways, if any, does the age restriction on government co-contributions in the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) create barriers to work for mature age persons? What changes should be made to the Act to remove such barriers?

**Question 14.** What effect, if any, does the increased concessional contributions cap for persons aged 50 years and over have on mature age participation in the workforce?

**Question 15.** What effect, if any, does the 'bring forward rule' (in relation to the non-concessional contributions cap) have on mature age participation in the workforce? What changes should be made to this rule to address barriers to such participation?

**Question 16.** The age settings for access to superannuation benefits are:

- (a) 55 years increasing to 60 years for 'preservation age'—when persons may access superannuation if retired; and
- (b) 65 years for unrestricted access to superannuation.

The Australia's Future Tax System Review recommended that the preservation age be raised to 67 years. In what ways, if any, do existing age settings provide incentives for retirement for mature age persons, rather than continued workforce participation? What changes should be made to address these incentives?

**Question 17.** In practice, how do the 'transition to retirement' rules encourage continued mature age participation in the workforce? What changes, if any, should be made to these rules to encourage continued workforce participation?

**Question 18.** In practice, do persons of preservation age have sufficient access to the 'transition to retirement' rules? If not, what measures could improve such access?

**Question 19.** What changes, if any, should be made to the taxation of superannuation benefits to remove barriers to work for mature age persons?

**Question 20.** What other changes, if any, should be made to superannuation laws, including tax laws, to remove barriers to mature age participation in the workforce?

## Social security

**Question 21.** A number of social security payments and entitlements may affect mature age persons' participation in the workforce or other productive work. In practice, how accessible to mature age persons is information about eligibility for such social security payments and entitlements?

**Question 22.** Several tools and processes are in place to determine a person's capacity to work and to recommend the content of a person's activity test or participation requirements. In what ways, if any, should these tools and processes be changed to assist mature age participation in the workforce?

**Question 23.** Different activity test and Employment Pathway Plan requirements apply for mature age job seekers. In what ways, if any, should they be changed to assist mature age participation in the workforce?

**Question 24.** Do the 2012 changes to the Disability Support Pension present a barrier to mature age participation in the workforce or other productive work? In what ways, if any, should the Disability Support Pension be changed to remove barriers to participation in the workforce or other productive work for mature age persons with disability?

**Question 25.** In practice, does the 25 hour work, volunteering, study and training limitation for Carer Payment present a barrier to mature age participation in the workforce or other productive work? What changes, if any, should be made to remove barriers to mature age participation in the workforce or other productive work?

**Question 26.** What changes, if any, to Working Credit should be made to remove barriers to mature age participation in the workforce or other productive work?

**Question 27.** Do the rules concerning the retention of concession cards act as a barrier to mature age participation in the workforce or other productive work? In what ways, if any, could these rules be improved?

**Question 28.** In practice, how effective is the operation of the ‘employment income nil rate period’ in removing barriers to mature age participation in the workforce or other productive work? In what ways, if any, could this be improved?

**Question 29.** In what ways, if any, should the eligibility requirements for Austudy, ABSTUDY and Pensioner Education Supplement be changed to address barriers to mature age participation in the workforce or other productive work?

**Question 30.** What other changes, if any, should be made to social security laws and the *Guide to Social Security Law* to remove barriers to mature age participation in the workforce and other productive work?

### **Family assistance**

**Question 31.** What changes, if any, should be made to family assistance laws and the *Family Assistance Guide* to remove barriers to mature age participation in the workforce and other productive work?

**Question 32.** When grandparents and mature age carers raise children:

- (a) does Child Care Benefit meet its objective to provide recipients with incentives to participate in the workforce; and
- (b) does the Child Care Rebate meet its objectives to provide recipients with incentives for community participation, insofar as this includes work or voluntary work?

What changes, if any, should be made?

### **Child support**

**Question 33.** What changes, if any, should be made to child support laws and *The Guide—CSA’s Online Guide to the Administration of the New Child Support Scheme* to remove barriers to mature age participation in the workforce and other productive work?

### **Employment**

**Question 34.** In what ways, if any, can the practices of private recruitment agencies be regulated to remove barriers to mature age employees entering or re-entering the workforce?

**Question 35.** Should s 65 of the *Fair Work Act 2009* (Cth) be amended to include age as a basis upon which an employee may request flexible working arrangements?

**Question 36.** In practice, do mature age employees negotiate individual flexibility arrangements made under s 202 of the *Fair Work Act 2009* (Cth)? Are such arrangements a useful and appropriate flexibility mechanism for mature age employees?

**Question 37.** In practice, how effective are the general protections provisions under the *Fair Work Act 2009* (Cth) where a mature age employee, or prospective employee, has been discriminated against on the basis of age?

**Question 38.** How does the operation of the modern award system affect mature age employees and in what ways, if any, can modern awards be utilised or amended to account for the needs of mature age employees?

**Question 39.** A number of compulsory retirement ages and licensing or re-qualification requirements exist in particular industries and professions. In what ways, if any, do these create barriers to mature age participation in the workforce or other productive work? If they do create barriers, should they be changed or are they appropriate?

**Question 40.** In what ways, if any, can strategic plans developed under the Australian Work Health and Safety Strategy 2012–2022 take account of occupational health and safety issues of particular relevance to mature age workers?

**Question 41.** Where is it best to include information about occupational health and safety issues relevant to mature age workers?

**Question 42.** In what ways, if any, do occupational health and safety duties and responsibilities act as a barrier to volunteering for mature age persons?

**Question 43.** What measures involving regulation and monitoring, if any, should be introduced to ensure:

- (a) employers are responsive to the needs of mature age employees; and
- (b) mature age employees are actively involved in developing and implementing such measures?

**Question 44.** What are some examples of employment management best practice aimed at attracting or retaining mature age employees?

**Question 45.** What are the most effective ways of raising awareness and providing education and training to remove barriers to mature age participation in the workforce and other productive work?

**Question 46.** What other changes, if any, should be made to the employment law framework to remove barriers to mature age participation in the workforce or other productive work?

## **Workers' compensation and insurance**

**Question 47.** Should volunteers be eligible for workers' compensation at a Commonwealth level or is current state and territory coverage sufficient?

**Question 48.** In what ways, if any, should retirement provisions in Commonwealth workers' compensation legislation be amended? For example, are any of the following approaches appropriate:

- (a) removing all age based restrictions;
- (b) removing all age based restrictions, but imposing benefit period or amount restrictions; or
- (c) increasing the age at which compensation is no longer payable to age 67, except in certain circumstances?

**Question 49.** What other changes, if any, should be made to the Commonwealth workers' compensation scheme to remove barriers to mature age participation in the workforce or other productive work?

**Question 50.** In what ways, if any, do age-based limitations and higher premiums for insurance policies for mature age persons act as a barrier to participation in the workforce or other productive work?

**Question 51.** In what ways, if any, should the insurance industry be regulated to address barriers to mature age participation in the workforce or other productive work? For example:

- (a) Should insurance industry Codes of Practice be amended to encourage or mandate the removal or extension of age-based limitations on insurance policies?
- (b) Should a regulatory framework be introduced to ensure that age-based limitations on insurance policies are appropriate?

**Question 52.** What other changes, if any, should be made to insurance laws to remove barriers to mature age participation in the workforce or other productive work?

## Migration

**Question 53.** A skilled migration visa under the *Migration Regulations 1994* (Cth) may only be obtained if the applicant is under 50 years of age. Should the age limit be increased?

**Question 54.** In order to obtain a range of visas under the General Skilled Migration category, applicants must obtain a pass mark in a 'points test' where points are allocated according to age, with no points for those aged 45 and over. Should this be amended, and if so, how?

**Question 55.** An applicant over 50 years of age may not apply for a permanent employer-sponsored visa under the *Migration Regulations 1994* (Cth) from 1 July 2012 unless they are an ‘exempt person’.

- (a) Should the age limit be increased?
- (b) What considerations should be taken into account in determining whether a person should be eligible for an age exemption?





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## The Inquiry

### Demographic shifts—the policy challenge

1. Australia's population is ageing. The Productivity Commission described it as 'the quiet transformation, because it is gradual, but also unremitting and ultimately pervasive'.<sup>1</sup> The Commission estimated that by 2044–45, almost one in four Australians will be aged 65 years and over;<sup>2</sup> and in every year between 2012–2028, 'the aged share of the Australian population is projected to increase by more than 0.35 percentage points—an increase around 4 times the long-term average'.<sup>3</sup>

2. Such shifts have significant economic implications. The 2005 study of the Productivity Commission, *Economic Implications of an Ageing Australia*, described them as 'far-reaching':

It will slow Australia's workforce and economic growth, at the very time that burgeoning demands are placed on Australia's health and aged care systems. Unless offsetting action is taken, a gap will open between Government revenue and spending that will need to be closed. Every jurisdiction in Australia is affected in different ways, depending on their specific responsibilities and capacity for raising revenue. Population ageing will require new policy approaches at all levels of government.<sup>4</sup>

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

With present policy settings, age-related spending will exceed the growth of tax revenue. This will open a fiscal gap equal to around 6½ per cent of GDP by 2044–45.<sup>5</sup>

4. In a report of December 2011 prepared for the Consultative Forum on Mature Age Participation, *Ageing and the Barriers to Labour Force Participation in Australia*,<sup>6</sup> it was commented that the demographic shift in Australia's population 'implies a greater role for mature age Australians both economically and in society more generally'.<sup>7</sup>

5. The initiation of this Inquiry forms part of the Australian Government response to population ageing. On 7 March 2012, the Attorney-General of Australia, the Hon Nicola Roxon MP, asked the Australian Law Reform Commission (ALRC) to inquire into and report on Commonwealth legal barriers to older persons participating in the workforce or other productive work. The final Report is to be delivered by 31 March 2013.

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

2 Ibid, xiv.

3 Ibid, xiv.

4 Ibid, xiii.

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

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

7 Ibid, 6.

## Request for submissions

6. This Issues Paper has been released to form a basis for consultation. It is intended to encourage informed community participation in the Inquiry by providing some background information and highlighting the issues so far identified by the ALRC as relevant with respect to each of the areas listed in the Terms of Reference. The Issues Paper may be downloaded free of charge from the ALRC website, <[www.alrc.gov.au](http://www.alrc.gov.au)>. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

7. The Issues Paper will be followed by the publication of a Discussion Paper later in 2012. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC's current thinking in the form of specific proposals for reform. The ALRC will then seek further submissions and undertake another round of national consultations in relation to these proposals before preparing the final Report.

8. The ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided.

9. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred. Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

Submissions using the ALRC's online submission form can be made at: <[www.alrc.gov.au/content/age-barriers-work-issues-paper](http://www.alrc.gov.au/content/age-barriers-work-issues-paper)>. In order to inform the content of the Discussion Paper, submissions addressing the questions in this Issues Paper should reach the ALRC by **Thursday 14 June 2012**.

## Terms of Reference

10. The Terms of Reference<sup>8</sup> direct the ALRC to consider Commonwealth legislation and related legal frameworks that either directly, or indirectly, impose limitations or barriers that could discourage older persons from participating, or continuing to participate, in the workforce or other productive work, including:

- superannuation law;

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

- 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).

### **Terminology**

11. **Older persons.** 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.

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

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

13. **Other productive work.** The Terms of Reference require the ALRC to consider barriers to participation in the workforce ‘or other productive work’. Under this expanded scope, the ALRC will be considering participation in volunteer work. In its 2010 General Social Survey, the Australian Bureau of Statistics found that 38% of the adult population (6.4 million people) had undertaken some voluntary work in the previous 12 months and, of these, the group aged 45 to 54 years reported the highest rate of doing so (44%) and 32.5% were aged 55 years and over.<sup>9</sup> As noted by Volunteering Australia, the work undertaken by the nearly 2 million volunteers in the plus 55 category, ‘represents a significant social and economic contribution to this nation’.<sup>10</sup>

14. Another type of contribution that may be considered ‘productive work’, but which the ALRC will not be considering in this Inquiry, is in the nature of ‘informal care’—unpaid care provided by family members.<sup>11</sup> Such care includes the care of adult children, children with disability, the care of elderly, care of persons with long-term health conditions or viabilities, the care of spouses and parents, and the care of

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

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

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

grandchildren.<sup>12</sup> The ALRC recognises that the provision of such care is an important economic and social contribution to Australian society, being estimated to be in the value of in excess of \$40 billion annually.<sup>13</sup>

15. The ALRC acknowledges that providing informal care can have a significant impact on a person's ability to enter and maintain employment in the workforce. There is also evidence that this impact disproportionately affects women.<sup>14</sup> However, in defining the scope of 'productive work' in this Inquiry, the ALRC is focusing on barriers to more formal working arrangements, in addition to paid employment, such as volunteering and civic duties.

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

### **Other inquiries**

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

- the Advisory Panel on the Economic Potential of Senior Australians including its initial, second and final reports;<sup>15</sup> and
- the Consultative Forum on Mature Age Participation and any recommendations made in the Forum's interim report and final reports.<sup>16</sup>

18. In addition, the ALRC is to have regard to:

- the work to be undertaken during 2012 by Safe Work Australia to investigate options to address age discrimination in workers' compensation legislation; and

12 The Australian Bureau of Statistics data 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. The Human Rights Commission considers informal care to cover the broader categories stated above: S Ryan, 'Barriers facing older women's workforce participation' (Paper presented at International Association for Feminist Economics Symposium in Valuing Care Work, Sydney, 5 December 2011).

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

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

15 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).

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

- the work being undertaken by the Attorney-General's Department to consolidate Commonwealth anti-discrimination laws into a single Act.

19. **Consolidation of anti-discrimination laws.** With respect to the last item in this list, in September 2011, the Australian Government released a discussion paper seeking submissions in relation to the consolidation of Commonwealth anti-discrimination law. The project to consolidate existing Commonwealth anti-discrimination law into a single Act is a key component of Australia's Human Rights Framework.<sup>17</sup> Submissions on the issues raised in the discussion paper closed on 1 February 2012 and a draft bill is due to be released for further public consultation in mid-2012.

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

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

22. **Age Pension, Tax and Superannuation reviews.** In addition to the ongoing work noted above, there have been the significant reviews in relation to superannuation, tax and the age pension. In 2008–09 the Australian Government initiated the Australia's Future Tax System Review, chaired by Dr Ken Henry AC ('the Tax Review'); the superannuation systems review, chaired by Mr Jeremy Cooper ('the Super System Review'); and the Pension Review, chaired by Dr Jeff Harmer AO.

23. 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.<sup>18</sup> The Super System Review addressed the governance, efficiency, structure and operation of Australia's superannuation system. The Pension Review examined measures to strengthen the financial security of older Australians, carers and people with disability. These reviews made a number of recommendations for reform.

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17 Attorney-General, *Australia's Human Rights Framework* (2010).

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

## Framing principles

24. In the context of Australia's ageing population, the Government's overarching objective is to keep people in work, and paying taxes, longer—rather than being in receipt of old age pensions—and to support people into self-funded retirement.

25. In this Inquiry the ALRC considers that, in defining the new policy settings in the form of specific framing principles for the Inquiry, assistance may be derived from both the international and domestic arenas.<sup>19</sup> The ALRC considers that six interlinking principles are strongly evident: participation; independence; self-agency; system stability; system coherence; and fairness.

26. '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.<sup>20</sup>

27. The principle of 'participation' has a number of elements. First, it involves having the opportunity to work. Secondly, participation involves the ability to contribute towards the formulation and implementation of policies affecting older people. Thirdly, older persons should be able to serve the community by working in a voluntary or philanthropic capacity.

28. The Social Inclusion Agenda emphasises the opportunity of all Australians to

- **Learn** by participating in education and training;
- **Work** by participating in employment, in voluntary work and in family and caring;
- **Engage** by connecting with people and using their local community's resources; and
- **Have a voice** so that they can influence decisions that affect them.<sup>21</sup>

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

Achieving this outcome for all Australians means delivering policies and programs which support people to learn and strengthen their ability to participate actively in the labour market and in their communities.<sup>22</sup>

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

20 Australian Government, *The Social Inclusion Agenda*, Australian Government <[www.socialinclusion.gov.au/](http://www.socialinclusion.gov.au/)> at 19 April 2012.

21 Ibid.

22 Ibid, 'Social Inclusion Principles', 1.

30. The principle of ‘independence’ includes the aspects of participation above, recognising that ‘supporting people to take independent decisions and to negotiate priorities through participation’ is critical to ‘capacity building’.<sup>23</sup> It also embodies the idea of being able to determine when and at what pace withdrawal from work takes place.<sup>24</sup> Independence also involves having access to appropriate training to support work participation.

31. The principle of ‘self-agency’ was a key principle identified in the ALRC’s inquiry into family violence and Commonwealth laws—that an individual needed to be respected in the right to make decisions about matters affecting him or her.<sup>25</sup> The principle of self-agency is one that underpins the idea of ‘independence’ and of ‘participation’. It also embodies the importance of being treated with dignity and respect, as reflected in the National Statement on Social Inclusion.<sup>26</sup>

32. The principle of ‘system stability’ is particularly relevant in areas like superannuation. The Super System Review identified as a key principle 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.<sup>27</sup>

33. Concerns about the pace of change in the area of superannuation were also noted in the Tax Review.<sup>28</sup>

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

35. The Tax Review identified ‘system coherence’ as a priority for targeted assistance, by which was meant system consistency, simplicity and transparency for individuals.<sup>29</sup> ‘Fairness’ can be a consequence of coherence, consistency and the stability of the relevant systems involved. It can also reflect a commitment to a fair distribution of national resources and a balancing of responsibility between individuals and government. In reflecting upon the ‘three-pillar architecture’ of Australia’s retirement income system, consisting of the means-tested Age Pension, compulsory saving through mandatory superannuation contributions (‘Superannuation Guarantee’) and voluntary saving for retirement, the panel advocated that:

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23 Ibid, 1.

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

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

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

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

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

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



The three-pillar architecture should be founded on the presumption that the responsibility for providing for retirement is shared between government and individuals.

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

Individuals should save or insure during their working lives to provide resources in their retirement. Inevitably under this approach, retirement outcomes will differ for different people, depending on the extent to which they can and do make self-provision.<sup>30</sup>

**Question 1.** The ALRC has identified as framing principles: participation; independence; self-agency; system stability; system coherence; and fairness. Are there other key principles that should inform the ALRC's deliberations?

## Age Pension

36. The Age Pension is designed to provide income support to older Australians who need it, while encouraging Age Pensioners to maximise their overall incomes. It is not designed to provide a replacement for income achieved over a working life.<sup>31</sup> As explained by the Tax Review, 'the balance between the role of the Age Pension as a safety net and its role as a supplement to retirement savings is a threshold issue for the design of the Age Pension and its integration with the retirement income system'.<sup>32</sup>

37. In 2009, fewer than 5% of Age Pensioners had earnings from employment.<sup>33</sup> In particular, the Age Pension is likely to provide the majority of retirement income for individuals with broken work patterns—such as women (who are more likely to have career interruptions because of caring responsibilities), intermittent workers, carers and people with disability.<sup>34</sup>

38. A number of initiatives have been introduced to encourage continued workforce participation in the early years of retirement, such as the Pension Bonus Scheme, Work Bonus and changes to the means test. In addition, if an Age Pension recipient or his or her partner undertakes a continuous period of employment of up to three months, payment of the pension is suspended so that it can be restored on cessation of employment. Suspension should only occur if earning and other income combined would yield a nil rate of payment. For any longer periods of employment, the payment is cancelled.<sup>35</sup>

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30 Ibid, 1.

31 The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 1.

32 The Treasury, *Australia's Future Tax System: Retirement Income Consultation Paper* (2008), 12.

33 Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009 (Cth), Bills Digest.

34 The Treasury, *Australia's Future Tax System: Retirement Income Consultation Paper* (2008), 16.

35 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.4.1.60].

### Qualifying age

39. With increasing life expectancy, a growing number of people are reaching Age Pension age and receiving payments for a longer period than has previously been the case.<sup>36</sup> In line with other countries—such as the United Kingdom and United States—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 by 1 July 2023.<sup>37</sup> As a result, it is anticipated that people will spend longer periods in employment increasing the tax base and reducing the amount of time that people need to cover with their own savings, including superannuation, and enable them to add to these savings.<sup>38</sup>

40. The qualifying age for a Service Pension under the *Veterans' Entitlements Act 1986* (Cth) is different. The Service Pension is essentially an income support payment payable subject to a means test,<sup>39</sup> available five years earlier than the Age Pension in recognition of premature ageing of service personnel.<sup>40</sup> It is currently available to male veterans who are 60 years or older, and to female veterans who are 55 years or older.<sup>41</sup>

41. In order to retain consistency with the incremental increase of the qualifying age for the Age Pension to 67 years—and to create incentives to remain in paid employment—the question is whether the ages for eligibility for the Service Pension under the *Veterans' Entitlement Act* should also be increased incrementally.

**Question 2.** As there is a five year difference in qualifying age for a Service Pension under the *Veterans' Entitlement Act 1986* (Cth), should it be increased incrementally in the same manner as for the Age Pension?

### Means test

42. The Age Pension, like other income support payments, is subject to a means test—comprising either an income test or an assets test. Under the means test, people with significant income or assets must draw on them before 'calling on the community for assistance' through the Age Pension.<sup>42</sup>

43. The income test assumes that a person's need for support can be determined by the level of income. The assets test is designed to ensure that individuals, who have

36 The Treasury, *Australia's Future Tax System: Consultation Paper* (2008), 100. When the Commonwealth Government first paid the Age Pension at age 65, average life expectancy was 55 for men and 59 for women; those numbers now are 80 and 83 respectively: D Stammer, 'The Four Pillars of Retirement Need Strengthening', *The Australian*, 15 July 2009.

37 *Social Security Act 1991* (Cth) ss 23(5A), 23(5D).

38 FaHCSIA, *Pension Review Report* (2009), xxi.

39 The rates of payment are the same as for the Age Pension and it is subject to the same income and assets tests as the Age Pension.

40 Department of Veterans' Affairs, *Report of the Review of Veterans' Entitlements* (2003), 248. It is also available on grounds of permanent unemployability at any age and pulmonary tuberculosis at any age.

41 *Veterans' Entitlements Act 1986* (Cth) ss 5QA, 5QB.

42 The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 1.

substantial assets, use their assets to support themselves in retirement. The rate of income support payable depends on the income and assets test. A person is paid under the test that produces the lower rate of payment. The combined operation of the two tests targets payments based on need.<sup>43</sup>

44. Income test rules changed for the Age Pension on 20 September 2009, with the introduction of the Secure and Sustainable Pension Reform Package. Prior to September 2009, income was assessed annually. Since then, it has been assessed fortnightly.

45. The operation of these tests can mean that it is more financially beneficial to remain on income support (and receive the various concessions and supplements attached to them)<sup>44</sup> than to seek work. The operation of these tests can therefore act as a disincentive to work. Some measures have already been introduced in an attempt to counter this disincentive such as the Pension Bonus Scheme; Work Bonus and a range of offsets within the personal taxation system.<sup>45</sup>

46. If income earned from employment was exempt from the income test for the Age Pension, this barrier would be removed. However, to adjust the income or asset test for all income support payments for mature age persons would lead to differential treatment between those who are over 45 and those who are not.

**Question 3.** In what ways, if any, should the means test for the Age Pension be changed to remove barriers to mature age participation in the workforce or other productive work?

### Pension Bonus Scheme

47. The Pension Bonus Scheme pays a one-off tax free lump sum to people who qualify for the Age Pension but defer receipt and remain working for at least 960 hours a year.<sup>46</sup> A full year bonus period is a period of 365 days of accruing membership. The actual period can be more than one year if the bonus period is interrupted by a period of non-accruing membership.<sup>47</sup> Bonus periods cannot be accrued once the member has turned 75 years of age.<sup>48</sup>

43 The Treasury, *Australia's Future Tax System: Retirement Income Consultation Paper* (2008), 36; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [4].

44 Such as Concession Card; Health Care Card and Rent Assistance.

45 FaHCSIA, *Australia's Future Tax System: Pension Review Background Paper* (2008), 9.

46 *Social Security Act 1991* (Cth) ss 92T(1)(3), 92X(1); FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.4.7.60]; Pension Bonus Bereavement Payment may be paid to the surviving partner of a deceased Pension Bonus Scheme member who did not claim Pension Bonus Scheme before death: *Social Security Act 1991* (Cth) s 93WA FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [1.2.3.70].

47 *Social Security Act 1991* (Cth) s 92P; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [1.1.B.80].

48 *Social Security Act 1991* (Cth) s 92C; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [1.2.3.70]; [3.4.7.40].

48. The Pension Bonus Scheme was designed to act as an incentive for Age Pensioners to undertake or continue some level of workforce participation where they are able to do so. The amount of the pension bonus is based on the length of time a person deferred their receipt of Age Pension and the amount of Age Pension that is eventually received.

49. The Department of Veterans Affairs (DVA) administers a parallel scheme. Like qualifying age, eligibility ages for veterans with qualifying service and widow/ers are five years lower than for Age Pension. Pension bonus generally ceases to accrue under the DVA scheme when a person reaches 70 years, compared to 75 in the social security scheme.<sup>49</sup>

50. Registration in the Pension Bonus Schemes is closed to new entrants other than those who qualified for Age Pension before 20 September 2009,<sup>50</sup> and registration for the scheme must have occurred within 13 weeks of first qualifying for the Age Pension.<sup>51</sup> Some who were eligible may have missed out on the Pension Bonus Scheme because they had not pre-registered before reaching Age Pension age,<sup>52</sup> or were unaware of the work test requirements.<sup>53</sup> While no new incentive scheme similar to the Pension Bonus Scheme has been introduced, a range of other incentives—in particular Work Bonus, tax offsets and changes to superannuation—also encourage participation in the workforce.<sup>54</sup>

**Question 4.** In what ways, if any, should the Pension Bonus Scheme be changed to remove barriers to mature age participation in the workforce?

## Work Bonus

51. Work Bonus was introduced in 2009 to reduce the amount of assessable employment income in an instalment period.<sup>55</sup> Work Bonus was expanded on 1 July 2011 to allow Age Pensioners, especially those with seasonal or intermittent jobs, to

49 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.4.7.50]; [3.4.7.20].

50 *Social Security Act 1991* (Cth) s 92J(1A); FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.4.7.20]; The Pension Bonus Scheme was closed following a finding by the Pension Review that the Scheme was complex and not serving its goal of increasing workforce participation: FaHCSIA, *Pension Review Report* (2009), 95; Explanatory Memorandum, Social Security and Other Legislation Amendment (Pension Reform And Other 2009 Budget Measures) Bill 2009 (Cth).

51 *Social Security Act 1991* (Cth) s 92H; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [1.2.3.70].

52 FaHCSIA, *Pension Review Report* (2009), 94.

53 Commonwealth Ombudsman, *Annual Report 2005–2006* (2006).

54 The Australian Institute for Social Research, *Experience Works: The Mature Age Employment Challenge* (2009), prepared for National Seniors Australia, 37.

55 *Social Security Act 1991* (Cth) s 1073AA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [4.2.1.10]. An instalment period is a period of a maximum of 14 days: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.1.14].

keep more of their Age Pension if they choose to work. A person can earn up to \$250 a fortnight, without it being assessed as income under the pension income test.<sup>56</sup>

52. Any unused amount of the fortnightly \$250 Work Bonus accumulates in an ‘Employment Income Concession Bank’, up to a maximum amount of \$6,500. Credit in the income bank can then be carried forward and be used to offset employment income that would otherwise be assessable under the pension income test. Work Bonus is not available to a person who is self-employed.<sup>57</sup>

**Question 5.** How effective has the Work Bonus been in removing barriers to work for mature age persons? In what ways, if any, could it be improved?

## Income tax

53. There are two principal Commonwealth Acts governing income tax in Australia: the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth).<sup>58</sup>

54. In general, individuals face the same tax requirements regardless of their activities or status. There are two key departures from this approach, one of which is age-based taxation evident through available tax offsets such as the Senior Australians Tax Offset.<sup>59</sup> This means that people of different ages may have different average tax rates for the same level of income.<sup>60</sup>

55. As recognised by the Tax Review, the imposition of income tax, together with reductions in income support payments (‘transfers’) as people earn more income, reduces the financial rewards from work, which may make work less attractive.<sup>61</sup> Higher tax rates can act to reduce incentives to work since people have a smaller

56 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [4.2.2].

57 Ibid, [4.3.3.20].

58 There are also two sets of regulations: the *Income Tax Regulations 1936* (Cth) and the *Income Tax Assessment Regulations 1997* (Cth). Generally, these regulations prescribe how certain parts of ITAA36 and ITAA97 are to be implemented. The *Taxation Administration Act 1953* (Cth) (TAA), and the regulations made under it, contain provisions dealing with the administration of the tax laws by, and the powers of, the Australian Taxation Office (ATO). Other Commonwealth Acts also impose tax in special circumstances. These include the *A New Tax System (Ultimate Beneficiary Non-Disclosure Tax) Act (No 1) 1999* (Cth), the *General Interest Charge (Imposition) Act 1999* (Cth), the *Family Trust Distribution Tax (Primary Liability) Act 1998* (Cth), the *Income Tax (Franking Deficit) Act 1987* (Cth), the *Income Tax (Deferred Interest Securities) (Tax File Number Withholding Tax) Act 1991* (Cth), the *Superannuation Contributions Tax Imposition Act 1997* (Cth) and the *Termination Payments Tax Imposition Act 1997* (Cth).

59 The second is through occupation and sector-specific benefits, such as income exemptions for certain defence force and foreign income: The Treasury, *Australia’s Future Tax System: Consultation Paper* (2008), 45.

60 Ibid, 83.

61 The Treasury, *Australia’s Future Tax System: Architecture of Australia’s Tax and Transfer System* (2008), 239.

marginal gain from employment. However, others may work more to achieve a certain target level of income that they consider adequate for their needs.<sup>62</sup>

### Effective Marginal Tax Rate

56. An Effective Marginal Tax Rate (EMTR) is the percentage of additional income lost due to the withdrawal of means-tested benefits (such as social security payments) and additional income tax payable as a result of working. A higher EMTR may discourage mature age persons from seeking to work. For example, research has found that one in five pensioners who wanted to work declined part-time employment opportunities because it would cause a reduction in pension entitlements.<sup>63</sup> The Tax Review suggested that ‘one of the most effective ways to improve financial incentives ... is to set effective tax rates that support part-time work’.<sup>64</sup>

57. However, as noted in the Tax Review, some people may not change their work effort in response to a higher EMTR.<sup>65</sup> Other factors may have a greater influence on a person’s decision to work or not to work, such as the cost of child care, lack of public transport, absence of support services and poor health.<sup>66</sup> External factors such as these are beyond the scope of this Inquiry.

58. Calculation of a person’s EMTR is very complex due to the number of factors that contribute to it, including means testing, Work Bonus and tax offsets. There may be circumstances where a person decides not to work as it is simply too complex to determine whether it would be more financially advantageous to work or not. Therefore, the complexity of the tax-transfer system itself could act as a barrier to work.

**Question 6.** In what ways, if any, can the complexity of the tax-transfer system be minimised to remove barriers to mature age participation in the workforce?

### Exemptions

59. Tax is levied on the *taxable income* of a taxpayer derived during the income year. Taxable income is calculated by deducting all allowable deductions from the taxpayer’s *assessable income*.<sup>67</sup> An amount of income will not form part of a person’s

<sup>62</sup> FaHCSIA, *Pension Review Report* (2009), 18.

<sup>63</sup> The Australian Institute for Social Research, *Experience Works: The Mature Age Employment Challenge* (2009), prepared for National Seniors Australia; National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for Consultative Forum on Mature Age Participation, 25.

<sup>64</sup> The Treasury, *Australia’s Future Tax System: Final Report* (2010), 9.

<sup>65</sup> Ibid, 17.

<sup>66</sup> D Trewin, *Towards a Stronger, More Equitable and Efficient Tax-Social Security System: Overview of the Castles Tax and Social Security Roundtable* (2012), Academy of the Social Sciences, 5.

<sup>67</sup> Assessable income consists of ordinary and statutory income: *Income Tax Assessment Act 1997* (Cth) s 6-1(1).

assessable income if exempt.<sup>68</sup> Tax offsets (or rebates)<sup>69</sup> are not deducted from the assessable or taxable income but from a person's computed tax to determine the final tax payable.<sup>70</sup>

60. Most social security payments are assessable, with a portion of the payment exempt.<sup>71</sup> A tax exemption applies to Disability Support Pension (if the recipient is under Age Pension age), Wife Pension (if both spouses are under Age Pension age), and Carer Payment (if the carer and care receiver are under Age Pension age).<sup>72</sup> Only supplementary amounts of these payments, such as rent assistance, are exempt if a person is of Age Pension age or over.<sup>73</sup> Similar exemptions apply for certain *Veterans' Entitlement Act* and war-time compensation payments.<sup>74</sup> The Tax Review recommended that, to improve simplicity, all pensions should be tax exempt.<sup>75</sup>

**Question 7.** In what ways, if any, do the tax exemptions for social security payments affect mature age participation in the workforce?

## Offsets

61. In certain circumstances, tax offsets (or rebates) are available to reduce or eliminate the tax assessable on pensions and benefits. Tax offsets are subtracted from the tax calculated on a person's taxable income.<sup>76</sup>

62. A number of offsets are available for persons of Age Pension age depending on their particular circumstances. These include: the Senior Australians Tax Offset; the Pensioner Tax Offset and the Low Income Tax Offset. These tax offsets are designed to encourage workers to delay retirement and/or to make a more gradual transition into retirement by effectively increasing the returns from work.<sup>77</sup>

63. Certain low income aged pensioners and self-funded retirees are entitled to the Senior Australians Tax Offset (SATO).<sup>78</sup> The SATO increases the effective tax-free threshold for people of Age Pension or Veterans Service Pension age.<sup>79</sup>

68 Ibid s 6-15(2); 6-20(1).

69 The term 'tax offset' is a generic term used in Ibid to describe what in *Income Tax Assessment Act 1936* (Cth) are called 'rebates' and 'credits'.

70 *Income Tax Assessment Act 1997* (Cth) s 4-10.

71 Ibid ss 52-5 to 52-40.

72 Ibid s 52-10.

73 Ibid s 52-15.

74 Ibid s 768-105.

75 The Treasury, *Australia's Future Tax System: Final Report* (2010), Rec 4.

76 *Income Tax Assessment Act 1997* (Cth) s 4-10. In contrast, a deduction is subtracted from assessable income in calculating the taxable income on which tax is payable.

77 The Treasury, *Australia's Future Tax System: Retirement Income Consultation Paper* (2008), 37-38.

78 This offset is officially described in the legislation as the 'low income aged persons rebate': *Income Tax Assessment Act 1936* (Cth) s 160AAAA.

79 Unused amounts of SATO can be transferred between partners up to the point where the maximum combined offset amount has been used.

64. Certain social security or veterans affairs pensioners may be eligible for a separate offset, commonly referred to as the Pensioner Rebate or Pensioner Tax Offset.<sup>80</sup> This offset may apply to a person whose 'rebate income'<sup>81</sup> falls below a certain threshold and includes the Age Pension or another listed income support payment.<sup>82</sup> However, a person cannot claim the Pensioner Tax Offset if he or she is entitled to the SATO.<sup>83</sup> From July 2012, the Pensioner Tax Offset will be merged with the SATO to create the Senior Australians Pensioner's Tax Offset.<sup>84</sup>

65. A non-refundable Mature Age Worker Tax Offset is available to taxpayers, aged 55 years or over by 30 June of the relevant year, who have net income from working of less than \$63,000. It provides a maximum offset of \$500.<sup>85</sup> Only net income from working is eligible for the offset. Accordingly, taxpayers with only superannuation, social security benefits, rental income, interests or dividends will not be eligible. This offset is also aimed at encouraging older workers to remain working or to rejoin the workforce.

66. Other tax offsets that may be available to mature age workers include the Low Income Tax Offset<sup>86</sup> and the Beneficiary Rebate.<sup>87</sup>

67. The Tax Review recommended that, to simplify the income tax system, these tax offsets should be removed as separate components of the system and incorporated into the personal income tax rates scale.<sup>88</sup> However, this may also remove incentives to work for those eligible for the offsets.

**Question 8.** A number of tax offsets are available to encourage mature age participation in the workforce including the Senior Australians Tax Offset, Pensioner Tax Offset, Low Income Tax Offset and the Mature Age Worker Tax Offset.

80 *Income Tax Assessment Act 1936* (Cth) s 160AAA(1), (2). The Pensioner Tax Offset is available to recipients of specified payments made under the *Social Security Act 1991* (Cth) and the *Veterans' Entitlements Act 1986* (Cth).

81 Rebate income is defined as the sum of a person's taxable income, reportable superannuation contributions, total net investment loss and adjusted fringe benefits total for the year of income: *Income Tax Assessment Act 1936* (Cth) s 6.

82 Bereavement Allowance; Carer Payment; Disability Support Pension (tax payers of age pension age); Mature Age Allowance (if first received before 1 July 1996); Parenting payment (single); widow B pension; age service pension; income support supplement; invalidity service pension (taxpayers of age pension age); partner service pension; mature age partner allowance; or wife pension. *Income Tax Regulations 1936* (Cth) reg 151.

83 Section 63-10(1) of the *Income Tax Assessment Act 1997* (Cth) sets out the order of priority for offsets.

84 *Clean Energy (Tax Laws Amendment) Act 2011* (Cth).

85 *Income Tax Assessment Act 1997* (Cth) ss 61-555 to 61-570. The maximum offset has been \$500 since it became available on 1 July 2004: The Treasury, *Australia's Future Tax System: Architecture of Australia's Tax and Transfer System* (2008), 70.

86 *Income Tax Assessment Act 1936* (Cth) ss 159H, 159N.

87 Ibid s 160AAA(1), (3). Payments that entitle a taxpayer to the rebate include certain social security payments such as Newstart Allowance and Widow Allowance.

88 The Treasury, *Australia's Future Tax System: Final Report* (2010), Rec 5.



- (a) In what ways, if any, might these offsets be improved to encourage participation?
- (b) The Australia's Future Tax System Review recommended that these tax offsets be removed. What disincentives would this create for mature age participation in the workforce?

**Question 9.** What other changes, if any, should be made to income tax laws to remove barriers to mature age participation in the workforce and other productive work?

## Superannuation

68. The primary aim of the superannuation system is to 'deliver private income to enhance the living standards of retired Australians'.<sup>89</sup> It is one of the most significant forms of wealth for many Australians.<sup>90</sup> Other policy aims of the superannuation system include:

- helping to address the challenges posed by Australia's ageing population;<sup>91</sup>
- intergenerational equity—so that the increased costs of an ageing population are not 'fully borne by the generation that will be working in several decades' time when the dependency ration is higher';<sup>92</sup> and
- income smoothing—'to enable individuals to smooth their income over their lifetime, and thus maintain their standard of living once they retire'.<sup>93</sup>

69. Superannuation is generally provided through a trust structure in which trustees hold the funds on behalf of members. Trustees owe members statutory fiduciary duties under the *Superannuation Industry (Supervision) Act 1993* (Cth).<sup>94</sup> The Act and its regulations govern the operation of superannuation funds. Funds are also governed by their trust deeds and governing rules. The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Tax Commissioner supervise superannuation funds.<sup>95</sup>

<sup>89</sup> Super Systems Review Panel, *Super System Review* (2010), pt 1, 15.

<sup>90</sup> Australian Government, *Stronger Super—Government Response to the Super System Review* (2010), 3.

<sup>91</sup> The Treasury, *Towards Higher Retirement Incomes for Australians: A history of the Australian Retirement Income System since Federation* (2001), 83.

<sup>92</sup> 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.

<sup>93</sup> FaHCSIA, *Australia's Future Tax System: Pension Review Background Paper* (2008), 116. See also R Hanegbi, 'Australia's Superannuation System: A Critical Analysis' (2010) 25 *Australian Tax Forum* 303, 312–313; The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 2.

<sup>94</sup> *Superannuation Industry Supervision Act 1993* (Cth) s 52.

<sup>95</sup> *Superannuation Industry Supervision Act 1993* (Cth) s 3(1).

70. Most Australians have their superannuation in an ‘accumulation fund’,<sup>96</sup> in which a member’s superannuation benefits in retirement are based on the amount contributed by his or her employers, the amount contributed voluntarily by the member, and the amount earned by the superannuation fund in investing the contributions.

71. There are a number of age-based rules in superannuation law, providing when members can access their superannuation, and restricting the accumulation of superannuation for older persons when they reach certain ages. The former group of rules may constitute a ‘pull’ to early retirement if age-settings are too low. The latter group of rules, by contrast, has the potential to ‘push’ older persons from employment due to the messages conveyed about retirement expectations. Some age restrictions may be necessary to ensure that tax concessions are targeted to best support the accumulation of superannuation over the course of a working life.

72. Superannuation can be taxed at three stages: when it goes into the fund—contributions stage; while it is in the fund—earnings stage; and when it leaves the fund—benefits stage.<sup>97</sup> Taxation at the contribution and disbursement stages is explored below, as specific age-based rules apply at these stages.

73. Superannuation generally receives preferential tax treatment across these three stages. The Tax Review outlined the rationale for this treatment, including that tax concessions on superannuation deliver a ‘more neutral overall tax treatment of deferred consumption relative to current consumption’<sup>98</sup> and reflect the ‘social benefits of overcoming life cycle myopia’:<sup>99</sup>

people not saving adequately for retirement because it is too far in the future for them to adequately ‘see’, and so make adequate provision for their needs.<sup>100</sup>

74. Some commentators have criticised Australia’s superannuation system on a number of grounds, including that it is inequitable. It has been noted that a small portion of high income earners receive a substantial percentage of superannuation tax benefits.<sup>101</sup> Lower income earners may receive comparatively little benefit—including those who spend time out of the workforce, or work part-time, to care for others. This particularly affects women, who overall ‘benefit much less from superannuation’.<sup>102</sup>

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96 ‘Types of super funds’, ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 19 April 2012. These are also known as ‘defined contribution funds’.

97 As discussed below, ‘non-concessional contributions’ do not receive concessional treatment at the contributions stage.

98 The Treasury, *Australia’s Future Tax System—The Retirement Income System: Report on Strategic Issues*, 3.

99 *Ibid.*, 19.

100 *Ibid.*, [2.4].

101 R Hanegbi, ‘Improving our superannuation regime: a post-Henry review look at superannuation taxation, raising superannuation balances and longevity insurance’ (2010) 25 *Australian Tax Forum* 425, 441.

102 R Hanegbi, ‘Australia’s Superannuation System: A Critical Analysis’ (2010) 25 *Australian Tax Forum* 303, 314, referring to E Cox, ‘Financing our Futures—How Privatising Retirement Discriminates Against Women’ (2007) 26(3) *Dialogue* 42.

75. Another criticism is that the justifications for the superannuation system are weak, or that it does not meet its underpinning policy aims.<sup>103</sup> For example, Dr Richard Denniss argues that the system fails to achieve

its stated goal of taking pressure off the Commonwealth budget by reducing outlays on the age pension. A dollar spent on tax concessions for super simply does not lead to a dollar's reduction in the cost of providing the age pension, now or in the future. It doesn't even come close.<sup>104</sup>

### Superannuation contributions

76. The *Income Tax Assessment Act 1997* (Cth) refers to two categories of contributions. These are 'concessional contributions'<sup>105</sup> (also known as 'before-tax' or 'deducted' contributions) and 'non-concessional contributions'<sup>106</sup> (also known as 'after-tax' and 'undeducted' contributions). Concessional contributions include employer contributions—including mandatory and voluntary contributions, and most contributions made by self-employed persons.<sup>107</sup> Non-concessional contributions include members' personal contributions and contributions for a spouse.

77. A further type of superannuation contribution comprises government contributions and co-contributions under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth).<sup>108</sup>

### Concessional contributions

78. **Mandatory (or 'mandated') employer contributions.** These include Superannuation Guarantee contributions as well as contributions made under an industrial agreement or award.<sup>109</sup> The Superannuation Guarantee contribution is currently 9% of an employee's ordinary earnings.<sup>110</sup> Employers are currently not required to pay Superannuation Guarantee contributions for employees 70 years and over.<sup>111</sup>

79. Employers may fund Superannuation Guarantee contributions by making contributions under 'salary sacrifice' arrangements, in which an employee agrees that an employer will pay a portion of salary or wages directly into superannuation—that is, from pre-tax income. The employee pays less income tax as a consequence, and the arrangement may also have tax benefits for the employer.

103 See in particular R Hanegbi, 'Australia's Superannuation System: A Critical Analysis' (2010) 25 *Australian Tax Forum* 303.

104 Richard Denniss, 'Super Rort for Wealthy', *Canberra Times* (Canberra), 4 February 2012, <www.canberratimes.com.au>.

105 *Income Tax Assessment Act 1997* (Cth) ss 292-25, 292-165, 995-1.

106 *Ibid* ss 292-90, 292-165.

107 The 15% concessional tax rate applies to 'most contributions made by the self-employed': R Hanegbi, 'Australia's Superannuation System: A Critical Analysis' (2010) 25 *Australian Tax Forum* 303, 307.

108 These contributions are taxed similarly in the fund as non-concessional contributions but do not fall into this category: *Income Tax Assessment Act 1997* (Cth) s 292-90(2)(c)(i).

109 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 5.01(1).

110 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19(2).

111 *Ibid* s 27(1).

80. Amendments that commence on 1 July 2013 will change superannuation laws to gradually increase the minimum superannuation contribution rate from 9% to 12%; and to remove the maximum age limit for an employee at which the Superannuation Guarantee no longer needs to be provided.<sup>112</sup>

81. The Assistant Treasurer and the Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, stated that removing the age limit will ‘provide an incentive for those older Australians who wish to remain in the workforce longer not to be discriminated against if they do so’.<sup>113</sup>

82. **Voluntary employer contributions.** Employees may also enter into arrangements with employers to deduct extra portions of money from their salary and pay it into their superannuation accounts. The *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) restrict contributions to superannuation funds, other than mandatory employer contributions, based on the age of the fund member as follows:

- under 65 years—no restrictions;
- 65 until 75 years—contributions can be made when the member meets a work test: they must be ‘gainfully employed’ on a part-time basis, that is, at least 40 hours over a 30-day period in the financial year;<sup>114</sup> and
- 75 years and over—contributions cannot be made.<sup>115</sup>

83. The Australian Government has noted that persons aged 70 to 74 are ‘less likely to be able to negotiate voluntary superannuation contributions with their employers’<sup>116</sup>—perhaps because of the current 70-year age limit for Superannuation Guarantee contributions.

84. The above age-based restrictions on non-mandated employer contributions are a barrier to accumulating superannuation for mature-age persons. The ALRC is interested in hearing about the effect these restrictions have on mature age workforce participation. While these restrictions may send a certain message about retirement age expectations, the application of the work test may act as an incentive to continued employment.

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112 *Superannuation Guarantee (Administration) Amendment Act 2012* (Cth) s 2; sch 1. The Act received royal assent on 29 March 2012.

113 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 2 November 2011, B Shorten—Assistant Treasurer and Minister for Financial Services and Superannuation), 1243.

114 See also *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 1.03, 7.01. ‘Gainful employment’ is employment or self-employment ‘for gain or reward in any business, trade, profession, vocation, calling, occupation or employment’: reg 1.03.

115 The rules are provided for in Ibid reg 7.04.

116 Australian Government, *Tax Policy Statement: Stronger Fairer Simpler—A Tax Plan for our Super* (2010), 26.

85. The Tax Review has recommended that the restrictions on persons aged 75 and over making contributions should be removed, but that a work test should continue to apply for persons aged 65 and over.<sup>117</sup>

86. **Contributions by self-employed.** Self-employed persons may, but are not required to, make superannuation contributions for themselves. Contributions by the self-employed are concessional when they claim a deduction for them, as discussed below.

87. The Tax Review has recommended against extending the Superannuation Guarantee for small business people. It stated that they may face higher ‘costs of compulsion’ than employees, and that ‘[m]any small business people have alternative strategies for saving for their retirement, often with different time profiles than those applying to employees’.<sup>118</sup>

88. **Concessional contributions are tax deductible.** Employers are currently entitled to deductions for contributions made for employees under the age of 75 years, and for contributions mandated by industrial agreements or awards.<sup>119</sup> The self-employed may also claim a tax deduction for contributions made until they reach age of 75 years.<sup>120</sup> Deductions may be claimed for both mandatory and voluntary contributions.<sup>121</sup>

89. From 1 July 2013, employers will be able to claim income tax deductions for Superannuation Guarantee contributions for employees age 75 and over.<sup>122</sup> This aligns ‘the availability of an income tax deduction to an employer with the measure to remove the Superannuation Guarantee maximum age limit’.<sup>123</sup>

90. The measure does not extend to remove the age limits on deductions for voluntary contributions for employees or for contributions for self-employed persons. This is consistent with SIS Regulation restrictions on persons aged 75 and over making voluntary contributions.

91. **Contribution splitting.** Members of a superannuation fund may apply to split certain concessional superannuation contributions with their ‘spouse’.<sup>124</sup> The *Superannuation Industry Supervision Act* defines ‘spouse’ to include a person:

- that the member is in a relationship that is registered under certain state and territory laws (including registered same-sex relationships); and

117 The Treasury, *Australia’s Future Tax System: Final Report* (2010), Rec 20.

118 The Treasury, *Australia’s Future Tax System—The Retirement Income System: Report on Strategic Issues*, [2.4].

119 *Income Tax Assessment Act 1997* (Cth) ss 290-60(1); 290-80(1).

120 *Ibid* subdiv 290-C.

121 *Ibid* subdiv 290-A.

122 *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth) sch 5.

123 Revised Explanatory Memorandum, *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011* (Cth), [5.5].

124 *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7. Non-concessional contributions made before 5 April 2007 can also be split: reg 6.41(3).

- who lives with the member on a genuine domestic basis in a couple relationship.<sup>125</sup>

92. Superannuation funds are not required to offer their members the option to split their superannuation contributions.<sup>126</sup> Maximum limits apply to the amount of superannuation that may be split, and the member is also limited to one application per financial year.<sup>127</sup>

93. Members cannot split their contributions for a spouse aged 65 years or older, or a retired spouse who has reached preservation age—that is, the age that a person may access superannuation benefits when retired.<sup>128</sup> It has been noted that, without this provision, a spouse who has reached 65 years or is permanently retired could immediately access the contributions.<sup>129</sup>

### ***Non-concessional contributions***

94. Individual fund members may make voluntary personal contributions to their superannuation funds from after-tax income or capital. Employees usually cannot claim a deduction for personal contributions.<sup>130</sup> The age-based restrictions in the SIS Regulations apply to voluntary personal contributions.<sup>131</sup> As discussed above, these restrictions, and the associated work test, may affect mature age participation in the workforce.

95. A person may make a non-deductable 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).<sup>132</sup> The maximum rebate for the income year is \$540.<sup>133</sup>

96. The *Income Tax Assessment Act 1997* definition of a spouse, applicable in this context, is consistent with the definition in the *Superannuation Industry (Supervision) Act*.<sup>134</sup> A person is not entitled to the offset if living separately from the spouse on a permanent basis.<sup>135</sup>

97. Spouse contributions can be made where the spouse is 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.<sup>136</sup>

125 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

126 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.45.

127 Ibid regs 6.40, 6.44.

128 Ibid reg 6.44; APRA, *Prudential Practice Guide: SPG 270—Contribution and Benefit Accrual Standards for Regulated Superannuation Funds* (2012), [58].

129 Eg, CCH Australia, *Australian Superannuation Commentary* (2012), [2-980].

130 See *Income Tax Assessment Act 1997* (Cth) subdiv 290-C.

131 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04.

132 *Income Tax Assessment Act 1997* (Cth) s 290-230.

133 Ibid s 290-235(2).

134 Ibid s 995-1(1).

135 Ibid s 290-230(3).

136 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04(1).

**Government contributions**

98. Low-income earners making personal after-tax superannuation contributions may be eligible for Australian Government co-contributions under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) and regulations. The purpose of government co-contributions is to help low-income earners save for retirement.<sup>137</sup>

99. The co-contribution amount depends on the personal contribution amount and the individual's income. From 2008–09, the maximum government co-contribution is \$1,000 per income year.<sup>138</sup> The government co-contribution will be reduced when the Low Income Earners Government Contribution scheme (discussed below) commences on 1 July 2012.<sup>139</sup>

100. Persons aged 71 years and over are ineligible for government co-contributions.<sup>140</sup> This affects workers who are aged 71 but under 75 years (as noted above, persons 75 years and over cannot make voluntary contributions to their superannuation funds). The ALRC is interested in hearing whether the ineligibility of persons aged 71 years and over for government co-contributions is a disincentive to employment for mature persons.

101. In addition to the co-contribution scheme, the Australian Government has introduced the Low Income Earners Government Contribution.<sup>141</sup> This will provide workers earning less than \$37,000 per year with a superannuation contribution of up to \$500 annually.<sup>142</sup> This measure is aimed at improving the fairness of the Superannuation Guarantee system<sup>143</sup>—particularly in relation to tax concessions:

Currently, 3.6 million low-income Australians, including around 2.1 million women get no (or minimal) tax benefit from contributing to superannuation, due to the fact that the 15 per cent superannuation contribution tax is above or equivalent to their income tax rate.<sup>144</sup>

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137 Explanatory Memorandum, *Superannuation (Government Co-Contribution for Low Income Earners) Bill 2003* (Cth), [1.4].

138 *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) s 9.

139 B Shorten, 'Superannuation Measures as Part of the Mid-Year Economic and Fiscal Outlook' (Press Release, 29 November 2011).

140 *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) s 6(1). This restriction is intended to limit the cost of superannuation tax concessions: The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 32.

141 This measure is provided for in the *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth), which received royal assent on 29 March 2012.

142 Ibid sch 4. The income figure relates to adjusted taxable income.

143 Australian Government, *Tax Policy Statement: Stronger Fairer Simpler—A Tax Plan for our Super* (2010), 13.

144 *Debates*, House of Representatives, 2 November 2011, 12417 (B Shorten—Assistant Treasurer and Minister for Financial Services and Superannuation), 12418.

102. This measure will ‘effectively return the tax on the superannuation contributions made to their fund’.<sup>145</sup> In contrast with the co-contribution scheme, no age test will apply to Low Income Earners Government Contribution.

**Question 10.** What changes, if any, should be made to the Superannuation Guarantee scheme, to remove barriers to work for mature age persons?

**Question 11.** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) prescribe age-based restrictions on voluntary contributions. Members cannot:

- (a) make voluntary contributions from age 65 until age 75 unless they meet a work test; or
- (b) make voluntary contributions from age 75.

What effect do these restrictions have on mature age participation in the workforce? What changes, if any, should be made to these regulations to remove barriers to work for mature age persons?

**Question 12.** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) prescribe age-based restrictions in relation to members splitting contributions with a spouse and making contributions to a spouse’s fund. Members cannot:

- (a) split contributions for a spouse aged 65 and over;
- (b) split contributions for a retired spouse of preservation age and over;
- (c) make spouse contributions for a spouse aged 70 and over; or
- (d) make contributions for a spouse aged 65 but under 70 unless the spouse meets a work test.

What effect do these restrictions have on mature age participation in the workforce? What changes, if any, should be made to these regulations to remove barriers to work for mature age persons?

**Question 13.** In what ways, if any, does the age restriction on government co-contributions in the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) create barriers to work for mature age persons? What changes should be made to the Act to remove such barriers?

145 Australian Government, *Tax Policy Statement: Stronger Fairer Simpler—A Tax Plan for our Super* (2010), 2. Taxation and superannuation contributions are discussed in more detail below.



### Taxing superannuation contributions

103. Concessional contributions are taxed at 15%.<sup>146</sup> This rate is substantially lower than the marginal tax rates applicable to the income of most full-time earners.<sup>147</sup> Non-concessional contributions are generally not taxed in the fund, as the member has already paid tax on them.

104. There are restrictions, or ‘caps’, on the contributions that members can make each financial year before they must pay excess tax. In effect, the caps limit superannuation contributions. The purpose of the caps is to:

- ensure that superannuation benefits result from contributions ‘that have been made gradually over the course of the person’s life’;<sup>148</sup>
- ensure that tax concessions for superannuation are fiscally sustainable and appropriately targeted;<sup>149</sup> and
- restrict the use of superannuation as a tax-minimising vehicle.<sup>150</sup>

105. There are different caps for concessional and non-concessional contributions. Government contributions and co-contributions do not count towards the caps.

106. The ‘concessional contributions cap’ is indexed annually to average weekly ordinary time earnings, and in 2011–12 was set at \$25,000. Concessional contributions over this cap are taxed at an additional 31.5%.<sup>151</sup>

107. From 2007–8 to 2011–12, an increased transitional concessional contributions cap applies to contributions made by members aged 50 years and over. In 2011–12 this transitional cap is \$50,000. In certain previous years—namely 2007–08 and 2008–09—the transitional cap was \$100,000. The transitional concessional contributions cap is scheduled to expire on 1 July 2012.<sup>152</sup>

108. The Australian Government has announced that, from 1 July 2012, the \$50,000 concessional contributions cap will continue for persons aged 50 years or over with superannuation balances below \$500,000.<sup>153</sup>

109. The Australian Government’s rationale for continuing the increased cap is that it allows persons over 50 years ‘to “catch up” on their superannuation contributions at the stage in their lives when they are most able to do so’; and that this should particularly

146 *Income Tax Assessment Act 1997* (Cth) s 295-160.

147 See R Hanegbi, ‘Improving our superannuation regime: a post-Henry review look at superannuation taxation, raising superannuation balances and longevity insurance’ (2010) 25 *Australian Tax Forum* 425, 428.

148 *Income Tax Assessment Act 1997* (Cth) s 292-5.

149 Australian Government, *A Plan to Simplify and Streamline Superannuation—Detailed Outline* (2006) 27, 30, Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth), [1.11].

150 Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth), [1.12].

151 *Income Tax Assessment Act 1997* (Cth) subdiv 292-B; *Superannuation (Excess Concessional Contributions Tax) Act 2007* (Cth) s 5.

152 *Income Tax (Transitional Provisions) Act 1997* (Cth) s 292-20.

153 Australian Government, *Fact Sheet: Superannuation—Concessional Contributions Caps* (2011).

assist those who have spent periods out of the workforce, for example, ‘women with broken work patterns’.<sup>154</sup> In November 2011, the Hon Bill Shorten MP stated that the Australian Government will undertake ‘further consultation on compliance cost issues raised by industry’ in relation to this measure.<sup>155</sup>

110. The ALRC is interested in whether this measure affects mature age participation in the workforce.

111. The ‘non-concessional contributions cap’ is a multiple of the concessional contributions cap. For example, in 2011–12, the non-concessional contributions cap is \$150,000—six times the \$25,000 concessional contributions cap. Contributions over the cap are taxed at 46.5%.<sup>156</sup>

112. Persons under 65 years may bring forward two years’ entitlement for non-concessional contributions.<sup>157</sup> This is referred to as the ‘bring-forward rule’, under which non-concessional contributions of up to three times non-concessional contributions cap in a year may be made—for example, up to \$450,000 in 2011–12. The full amount may be contributed in the first year. Alternatively, a contribution of less than the full amount in the first year may be made, followed by a contribution of the shortfall in the second year, the third year, or across both years.<sup>158</sup> The bring-forward rule is automatically triggered when a person under 65 years exceeds the non-concessional contributions cap.<sup>159</sup>

113. Persons aged 63 or 64 years can use the bring-forward rule without meeting the work test imposed by reg 7.04 of the SIS Regulations in the following years of the three-year period (that is, when they reach 65 years, as discussed above). The bring-forward rule is therefore particularly important for those who are just about to retire and do not intend to continue working after the age of 65, as it can be used ‘as a last-minute dash into super before the gates close’.<sup>160</sup> However, if the person did not make the full contribution in the first year, and wishes to contribute in the second or third year, he or she must satisfy the work test if he or she has reached 65.

114. To ‘help prevent a person from inadvertently contributing more than the non-concessional contributions cap’,<sup>161</sup> the SIS Regulations also limit the amount of non-concessional contributions that superannuation funds can accept. For persons aged 64 years or less, the maximum contribution amount is three times the non-concessional

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154 Ibid.

155 B Shorten, ‘Superannuation Measures as Part of the Mid-Year Economic and Fiscal Outlook’ (Press Release, 29 November 2011). See also Australian Government, *Concessional Superannuation Contribution Caps for Individuals aged 50 and over* (2011).

156 *Income Tax Assessment Act 1997* (Cth) subdiv 292-C; *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* (Cth) s 5.

157 *Income Tax Assessment Act 1997* (Cth) s 292-85(3)–(4). Specifically, the person must be under 65 years at any time in the relevant financial year: s 292-85(3)(b).

158 Ibid s 292-85(4).

159 Ibid s 292-85(3).

160 The Bull, *How to dump \$450,000 into your super in one year* <[www.thebull.com.au](http://www.thebull.com.au)> at 11 April 2012.

161 *Explanatory Statement, Superannuation Industry (Supervision) Amendment Regulations (No. 1) 2007* (Cth), item 80.

cap. For persons aged 65 to 75 years, the limit is the non-concessional contributions cap.<sup>162</sup>

**Question 14.** What effect, if any, does the increased concessional contributions cap for persons aged 50 years and over have on mature age participation in the workforce?

**Question 15.** What effect, if any, does the ‘bring forward rule’ (in relation to the non-concessional contributions cap) have on mature age participation in the workforce? What changes should be made to this rule to address barriers to such participation?

### Release of superannuation benefits

115. The SIS Regulations provide conditions for the release of superannuation benefits—that is, when, and in what form, benefits may be accessed by superannuation fund members. Generally—and subject to the superannuation fund’s governing rules—members may access benefits as a lump sum, an income stream, or a combination of both.

#### *When can members access superannuation?*

116. *At age 65.* There are no restrictions on the way persons 65 years and over may access their superannuation benefits.<sup>163</sup>

117. *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.<sup>164</sup>

118. Accordingly, the preservation age ‘is legislated to increase from 55 to 60 between the years 2015 and 2025’.<sup>165</sup>

119. A person of, or over, the preservation age is considered retired when an arrangement under which he or she was ‘gainfully employed’ has ended and the superannuation fund trustee is ‘reasonably satisfied’ that he or she does not intend to

<sup>162</sup> *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04(3). This provision refers to members’ ages on 1 July of the relevant financial year.

<sup>163</sup> *Ibid* sch 1 item 106.

<sup>164</sup> *Ibid* reg 6.01.

<sup>165</sup> Australian Government, *A Plan to Simplify and Streamline Superannuation—Detailed Outline* (2006), x.

become gainfully employed again either part-time or full-time; or he or she has reached the age of 60 years before or on retiring.<sup>166</sup>

120. There are no restrictions on the way members of, or over, the preservation age can access their superannuation when they retire.<sup>167</sup>

121. *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).<sup>168</sup> No more than 10% of the account balance—as at the beginning of the financial year—may be paid each year.<sup>169</sup> Members can continue working in any capacity while receiving superannuation benefits under the transition to retirement rules, as no work test applies.<sup>170</sup>

122. *Early access.* The *Superannuation Act 1976* (Cth) and SIS Regulations provide limited grounds for the early release of benefits, including severe financial hardship and certain compassionate grounds.<sup>171</sup>

### ***Raising the preservation age?***

123. The preservation age rules may encourage people to leave the workforce as soon as they can access their superannuation—although this may be ameliorated by the transition to retirement rules, as discussed below. Preservation age settings that are too low may also constitute a disincentive to mature age workplace participation due to the message it sends about retirement expectations.<sup>172</sup> The ALRC is interested in comments on this issue.

124. The Tax Review recommended that the preservation age be increased to 67 years. This aligns with an increase to the Age Pension age, also recommended by the Tax Review, as discussed above. The recommendation implies the convergence of the preservation age and the unrestricted access age at 67 years and, potentially, upwards of 67 years—subject to further review by 2020 also recommended in the Tax Review.<sup>173</sup> This may displace the transition to retirement rules, because these rules apply in the gap between the preservation age and age 65 (the unrestricted access age).

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166 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(7).

167 *Ibid* sch 1 item 101.

168 *Ibid* regs 1.05(11A)(a); 1.06 (9A)(a); 6.01; sch 1 item 110.

169 *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).

170 ATO, *Transition to retirement—information for superannuation professionals* (2006).

171 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.01, 6.19A.

172 See The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, 131.

173 The Treasury, *Australia’s Future Tax System—The Retirement Income System: Report on Strategic Issues*, 171.

***Transition to retirement rules: a workforce incentive?***

125. The policy objective behind the transition to retirement (TTR) rules is to ‘encourage people to retain a connection with the workforce for a longer period’ by providing flexibility in the rules to access superannuation benefits.<sup>174</sup>

126. 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 ‘people deciding to retire prematurely just so they can access their superannuation’.<sup>175</sup> Accordingly, the TTR rules to some extent were designed to address this incentive for early retirement.

127. 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’.<sup>176</sup> The TTR rules were intended to facilitate continued employment by providing flexibility—enabling preservation-age persons to reduce work hours and supplement their income with a superannuation income stream.

128. The ALRC is interested in hearing from stakeholders whether the transition to retirement rules are an effective incentive to continued workforce participation, as intended.

129. Another way mature age persons can use the TTR rules is to work full-time and boost superannuation. The TTR income stream enables preservation-age workers:

to salary sacrifice more of their remuneration package into superannuation, with the TTR pension income replacing the salary income they would have received if they did not salary sacrifice. Here, the person’s current lifestyle and cashflow can remain the same and, in effect, the super pension withdrawals can fund superannuation contributions.<sup>177</sup>

130. For those who have met their concessional cap through salary sacrificing, it can sometimes be tax effective to fund non-concessional contributions in this way.<sup>178</sup> This use of the TTR rules is limited by the caps on superannuation contributions.

131. It is possible that this use of the TTR rules is an incentive to continued full-time workforce participation for persons of preservation age. It is also possible that this strategy is used by persons who do not intend to retire but are interested in benefiting from the concessional tax treatment applied to superannuation. The ALRC is interested in stakeholder comment in this regard.

132. Access to the TTR rules may be restricted, because not all superannuation funds offer the income stream products that enable members to use this option. In these circumstances, members may need to change superannuation funds if they wish to use

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174 The Treasury, *Transition to Retirement Consultation Paper*, 2004, 4.

175 The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 10.

176 Ibid, 10.

177 D Shirlow, ‘Bringing the use of TTR pensions closer to home’ (2011) (4) *CCH Australian Superannuation News*.

178 Ibid.

the TTR rules. The ALRC is interested in hearing whether this is a barrier to the TTR option—and, consequently, continued workforce participation. If this does constitute a barrier, the ALRC is interested in hearing about measures that could address this issue.

**Question 16.** The age settings for access to superannuation benefits are:

- (a) 55 years increasing to 60 years for ‘preservation age’—when persons may access superannuation if retired; and
- (b) 65 years for unrestricted access to superannuation.

The Australia’s Future Tax System Review recommended that the preservation age be raised to 67 years. In what ways, if any, do existing age settings provide incentives for retirement for mature age persons, rather than continued workforce participation? What changes should be made to address these incentives?

**Question 17.** In practice, how do the ‘transition to retirement’ rules encourage continued mature age participation in the workforce? What changes, if any, should be made to these rules to encourage continued workforce participation?

**Question 18.** In practice, do persons of preservation age have sufficient access to the ‘transition to retirement’ rules? If not, what measures could improve such access?

### Taxing superannuation benefits

133. The tax rate on superannuation benefits depends on a member’s age, whether benefits are taken in lump sum or income stream form, and whether the superannuation fund is exempt from paying tax on contributions and earnings.<sup>179</sup> Benefits from non-concessional contributions (including spouse contributions) and government contributions and co-contributions are tax-free regardless of these factors.<sup>180</sup>

134. In most cases, persons aged 60 years and over are not required to pay tax when they receive superannuation benefits—irrespective of whether benefits are disbursed as lump sums or income streams.<sup>181</sup> Tax-free superannuation for persons 60 years and

179 Most superannuation funds are taxed on their contributions and earnings: R Hanegbi, ‘Improving our superannuation regime: a post-Henry review look at superannuation taxation, raising superannuation balances and longevity insurance’ (2010) 25 *Australian Tax Forum* 425, 431; ‘Key factors that affect how your super payout is taxed’, ATO website <www.ato.gov.au> at 11 April 2012. Funds that are more likely to be untaxed include ‘certain public sector funds or schemes, such as government funds for public servants’ ATO website <www.ato.gov.au> at 11 April 2012.

180 *Income Tax Assessment Act 1997* (Cth) 307-135; subdiv 307D. *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth) sch 4, item 2, s 12B.

181 *Income Tax Assessment Act 1997* (Cth) s 301-10. Disbursements to members over 60 years from untaxed funds are taxed, albeit at a lower rate than those under 60 years. *Income Tax Assessment Act 1997* (Cth) subdiv 301-C.

over was introduced in July 2007 as an incentive for people to stay in the workforce. The Australian Government commented that:

As superannuation benefits would no longer be assessable income, there would be an incentive to continue to work while drawing down on superannuation as people will pay less tax on their work income.<sup>182</sup>

135. However, it is possible that a relatively large sum of tax-free benefits may provide a person 60 years and over with an incentive to retire. Tax-free benefits may conversely constitute a ‘pull’ into retirement.

136. The Tax Review did not examine this issue, as its Terms of Reference directed that it reflect Australian Government policy to ‘preserve tax-free superannuation payments for the over 60s’.<sup>183</sup> It did note, however, that the Australian Government ‘may wish to consider whether the age for tax-free superannuation should increase in line with future increases in the preservation age’.<sup>184</sup>

137. Persons who have reached preservation age but who are under 60 years old can generally withdraw lump sum amounts up to a ‘low rate cap’ amount of superannuation tax-free.<sup>185</sup> The low rate cap is a lifetime limit. In 2011–12 it is \$165,000.<sup>186</sup> Amounts above the low cap rate are taxed up to 15% (plus Medicare levy).<sup>187</sup> Benefits paid as an income stream to persons in this age bracket are assessable income taxed at marginal rates (plus Medicare levy) less a 15% offset.<sup>188</sup> The Tax Review considered that the taxation of benefits for this age group should not change.<sup>189</sup>

**Question 19.** What changes, if any, should be made to the taxation of superannuation benefits to remove barriers to work for mature age persons?

### Other barriers to work in superannuation

138. There may be other barriers to work for mature age persons in the superannuation context which the ALRC has not identified in this Issues Paper. The ALRC is interested in hearing from stakeholders about any other ways in which superannuation laws present barriers to work.

139. For example, there may be certain barriers to work for members of defined benefit schemes. Defined benefit schemes pay benefits according to a formula based on factors such as years of service, age and salary—unlike accumulation funds which are

182 Australian Government, *Budget Strategy and Outlook—Budget Paper No. 1* (2006-07), 1–11.

183 ‘Terms of Reference’, The Treasury, *Australia’s Future Tax System* <[www.taxreview.treasury.gov.au/Content/Content.aspx?doc=html/home.htm](http://www.taxreview.treasury.gov.au/Content/Content.aspx?doc=html/home.htm)> at 11 April 2012.

184 The Treasury, *Australia’s Future Tax System—The Retirement Income System: Report on Strategic Issues* 17.

185 *Income Tax Assessment Act 1997* (Cth) s 301-20.

186 *Ibid* s 307-345; ‘Low cap rate amount’, ATO website <[www.ato.gov.au](http://www.ato.gov.au)> at 11 April 2012.

187 *Income Tax Assessment Act 1997* (Cth) s 301-20.

188 *Ibid* s 301-25.

189 The Treasury, *Australia’s Future Tax System: Final Report* (2010), 117.

based on contributions and earnings. Defined benefit schemes are declining—most are closed to new members.<sup>190</sup>

140. In particular, there may be certain incentives for early retirement for some Australian Public Service employees in defined benefit or ‘hybrid’ funds,<sup>191</sup> such as the ‘54/11’ incentive for some members of the Commonwealth Superannuation Scheme (CSS). As explained by the Australian Public Service Commission, this incentive arises

where a member would be disadvantaged if they remain in employment until age 55 or later by reason that their deferred benefit on resignation before age 55 can be significantly higher than their benefit on retirement at age 55.<sup>192</sup>

141. Similarly, the Public Sector Superannuation Scheme (PSS) has certain design features that may support early retirement for some older scheme members—although analysis has found that the impact is small.<sup>193</sup> The scheme also does not enable members to access TTR rules.<sup>194</sup>

142. Both schemes are closed to new members—the CSS since 1990 and the PSS since 2005.<sup>195</sup>

**Question 20.** What other changes, if any, should be made to superannuation laws, including tax laws, to remove barriers to mature age participation in the workforce?

## Social security

143. The transfer, or social security, system affects incentives for labour market participation in many ways, including financially—through maximum rates of payments; means test structures (including their interaction with the income tax system); eligibility criteria for payments; and obligations (such as requirements to look for work) attached to payments.<sup>196</sup>

144. Financial incentives, however, are only part of the story. A person’s responsiveness to them will depend on the role played by other factors that influence

190 Super Systems Review Panel, *Super System Review* (2010), pt 2, 176. The review also states that in 2009 ‘only 2 per cent of members of large APRA funds were in ‘pure’ defined benefit funds, (that is, funds where all members receive only a defined benefit on retirement) 39 per cent were in ‘hybrid’ funds (funds that offer both defined benefit and accumulation benefits to an individual member, or more commonly have some defined benefit members and a much larger number of pure accumulation benefit members)’.

191 See footnote above for a definition of hybrid funds.

192 ‘Superannuation and mature-aged APS workers’, Australian Public Service Commission website <www.apsc.gov.au> at 19 April 2012.

193 Management Advisory Committee, *Organisational Renewal* (2003), Commonwealth of Australia, 4.

194 Public Sector Superannuation Scheme and Australian Reward Investment Alliance, *Fact Sheet: Transition to Retirement* (2007).

195 ‘Commonwealth Superannuation Scheme’ and ‘The Public Sector (PSS) Superannuation Scheme’, Department of Finance and Deregulation, *Website* <www.finance.gov.au> at 11 April 2012.

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



workforce participation. A person may take into account many other considerations, such as: meeting basic financial needs; work ethic; caring responsibilities; health and disability status; level of wealth; social expectations; the availability of child care; working conditions; and the benefits of remaining attached to the labour market as it affects career prospects and expected future earnings.<sup>197</sup>

145. The legislative basis of the social security system is the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth).<sup>198</sup> While legislation governs and sets out the decision-making framework, the *Guide to Social Security Law* provides guidance to decision makers for implementing the legislation.<sup>199</sup>

146. There are two long-standing values that provide the basis of the Australian social security system. One is the recognition of government and community responsibility to assist those in need.<sup>200</sup> Need is measured by reference to the income and assets of the applicant through income and assets tests—known as the means test. The other value is that private provision outside the social security system is to be encouraged as far as possible,<sup>201</sup> with the social security system seen primarily as a safety net.

147. Income support payments made through the social security system can reduce incentives to work.<sup>202</sup> In addition, the level of income support relative to minimum wages can influence workforce incentives. The Tax Review argued that the higher the level of income support for people of working age, the more likely it is a disincentive to work.<sup>203</sup>

148. While the amount of any income support payment may be relevant to incentives or disincentives to work for mature age persons, this aspect of social security—and its budgetary and financial implications—is not a focus of this Inquiry.

149. Social security law is administered by the Department of Human Services (DHS) through Centrelink while policy responsibility is spread between the Department of Education, Employment and Workplace Relations (DEEWR) and the

197 The Treasury, *Australia's Future Tax System: Architecture of Australia's Tax and Transfer System* (2008), 240.

198 In addition, the *Social Security (International Agreements) Act 1999* (Cth) governs agreements relating to social security between Australia and other countries.

199 The *Guide to Social Security Law* is updated monthly to reflect changes in government policy and legislative interpretation and is publicly available online: FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012. Although not binding in law, it is a relevant consideration for the decision maker and, as such, is a significant aspect of the 'legal frameworks' being considered in this Inquiry: *Stevens and Secretary, Department of Family and Community Services* [2004] AATA 1137.

200 Accordingly, an entitlement to social security is viewed as a right based on need, rather than as something to be 'bought' by paying a financial contribution akin to social insurance (which is the model in many other countries): A Herscovitch and D Stanton, 'History of Social Security in Australia' (2008) 80 *Family Matters* 51.

201 Such as a mandatory system of private superannuation, worker's compensation and personal tax concessions: *Ibid*; P Whiteford and G Angenent, *The Australian System of Social Protection: An Overview* (2002).

202 The Treasury, *Australia's Future Tax System: Final Report* (2010), 505.

203 *Ibid*, 496.

Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

150. As discussed below, certain payments and entitlements available through the social security system affect mature age participation in the workforce or other productive work. It is therefore important that mature age persons can access the information they require from Centrelink.

**Question 21.** A number of social security payments and entitlements may affect a mature age persons' participation in the workforce or other productive work. In practice, how accessible to mature age persons is information about eligibility for such social security payments and entitlements?

### Activity-tested income support

151. Australian unemployment assistance through the social security system is based on the notion of 'reciprocal' or 'mutual obligations'—that taxpayers in general will support a person through income support payments in return for the person actively pursuing ways to avoid the need for further support, such as by undertaking activities that will improve their skills and increase their employment prospects.<sup>204</sup> Job seekers receiving certain income support payments therefore have an activity test or participation requirements to qualify—and remain qualified—for the payment.<sup>205</sup>

### Job Seeker Classification Instrument

152. Once a job seeker registers for activity-tested income support, Centrelink, or in some cases a Job Services Australia (JSA) provider, administers a questionnaire—the Job Seeker Classification Instrument (JSCI)—to determine a job seeker's relative level of disadvantage in the labour market and, therefore, the likely difficulty in obtaining employment.<sup>206</sup>

153. The JSCI collects 18 categories of information, including age and gender.<sup>207</sup> Job seekers are assigned 'points' according to their answers to specific questions: a higher

204 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [1.1.M.160]; T Carney and P Hanks, *Social Security in Australia* (1994).

205 Payments that are activity-tested include Newstart Allowance, Youth Allowance, Special Benefit and Parenting Payment: *Social Security Act 1991* (Cth) ss 500A, 541, 601, 729; FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [1.1.A.40].

206 In some cases, where the results of the JSCI indicate 'significant barriers to work', job seekers will be referred to one of two additional assessments, either an Employment Service Assessment (ESAt) or Job Capacity Assessment (JCA). Additional mechanisms for re-assessment include referral to an ESAt or JCA or, in the context of a JSCI, through a Change of Circumstances Reassessment (COCR). When job seekers have been receiving participation payments for 12 months, they are re-assessed in a Stream Services Review, to determine whether they are still placed in the most appropriate stream or whether they should be transferred to the 'work experience phase'.

207 DEEWR, *Job Seeker Classification Instrument: Factors and Points version 1.0*, 4. Other categories of information collected include gender; recency of work experience; vocational qualifications; Indigenous status; access to transport; disability/medical conditions; stability of residence; phone contactability; proximity to a labour market and personal characteristics.

score should reflect a greater level of disadvantage. The table below illustrates the points assigned to a person according to his or her age and gender.<sup>208</sup> Generally, older job seekers attract more points than younger job seekers.<sup>209</sup>

Sub-factors	Points—male	Points—female
Non-disadvantaged 15–19 years	0	5
Disadvantaged 15–19 years	4	9
20–34 years	4	7
35–44 years	5	5
45–49 years	6	6
50–54 years	7	8
55–59 years	10	12
60+ years	15	16

154. Job seekers are classified as ‘Stream 1’ if they have fewer than 19 points; ‘Stream 2’ if they have 20–28 points; and ‘Stream 3’ if they have more than 29 points. Entry to ‘Stream 4’—the stream for the most disadvantaged job seekers—is based on an Employment Services Assessment (ESAt) or Job Capacity Assessment (JCA).

#### ***Employment Services Assessments***

155. Applicants are referred for an ESAt or a JCA where the results of the JSCI indicate ‘significant barriers to work’.<sup>210</sup> An ESAt or JCA is a more comprehensive assessment of a job seeker’s capacity and barriers to employment than a JSCI.<sup>211</sup> The assessment informs the kinds of activities that a person will be required to undertake to improve their capacity to meet activity test requirements and, in some circumstances, indicates whether a person may be eligible for an exemption from these requirements.<sup>212</sup>

#### ***Employment services providers***

156. Like all job seekers, mature aged job seekers may use JSA,<sup>213</sup> the Australian Government’s national employment services system, to enter or re-enter paid

208 Ibid, 5.

209 Ibid, 4.

210 Department of Human Services, *Job Capacity Assessment Review: Summary Paper* (2008), 9. On 1 July 2011, the JCA program was replaced with the ESAt. JCAs are now largely used for Disability Support Pension claims and reviews and are not primarily employment services driven: DEEWR, *Correspondence*, 26 July 2011.

211 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [1.1.E.104]; [1.1.J.10].

212 Ibid, [3.2.1.10], [3.2.1.45], [3.5.1.220].

213 Previously known as Job Network.

employment.<sup>214</sup> The focus of the JSA system as a whole is on a job seeker's capacity and readiness to work. JSA places job seekers with JSA providers—private and community organisations that provide job search assistance. The Disability Employment Services (DES) system provides employment services for job seekers with disability. The role of JSA and DES providers is to assist individual job seekers to gain sustainable employment including connecting job seekers to skills development and training opportunities.

157. JSA and DES delivery is provided by employment service providers who are contracted by DEEWR under Employment Services Deeds, due to expire on 30 June 2012. As part of the Codes of Practice contained in the Deeds, providers 'commit to assisting employers meet their skill and labour shortage needs by [among other things] working with employers to identify job and industry specific training needs and how they can be met'.<sup>215</sup>

158. The Australian Chamber of Commerce and Industry's (ACCI) publication *Employ Outside the Box*, indicates that the use of JSA by employers has 'fallen to as low of 5% of recruitment'.<sup>216</sup> ACCI stresses the importance of a stronger engagement between employers and JSAs to ensure that providers understand the needs of employers, job seekers have the necessary skills for work, and employers develop an appreciation of the JSA's offerings to employers.<sup>217</sup>

159. There may also be concerns about the effectiveness of JSA and DES providers in assisting mature age job seekers to find suitable employment and training opportunities.

**Question 22.** Several tools and processes are in place to determine a person's capacity to work and to recommend the content of a person's activity test or participation requirements. In what ways, if any, should these tools and processes be changed to assist mature age participation in the workforce?

### *Activity test requirements*

160. Activity-tested income support payments have an activity test or participation requirements that applicants must satisfy to qualify—and remain qualified—for the payment.<sup>218</sup> The activity test is designed to ensure that unemployed persons receiving

214 Separate employment services are available for Indigenous job seekers through the Indigenous Employment Program (IEP): DEEWR, *Indigenous Employment Program* <[www.deewr.gov.au/Indigenous/Employment](http://www.deewr.gov.au/Indigenous/Employment)> at 19 April 2012. In areas with poor labour markets, Community Development Employment Projects (CDEP) are available.

215 DEEWR, *Employment Services Deed 2009-2012: SS NEIS 2009*; DEEWR, *Disability Employment Services Deed 2010-2012*.

216 Australian Chamber of Commerce and Industry, 'Employ Outside the Box: the rewards of a diverse workforce' (2012), 15.

217 Ibid, 15.

218 Payments that are activity-tested include Newstart Allowance, Youth Allowance, Special Benefit and Parenting Payment: *Social Security Act 1991* (Cth) ss 500A, 541, 601, 729; FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [1.1.A.40].

income support payments are ‘actively looking for work and/or doing everything that they can to become ready for work in the future’.<sup>219</sup> Similarly, participation requirements aim to ensure that a person ‘looks for, and undertakes, paid work in line with their work capacity in order to increase workforce participation ... and reduce welfare dependency’.<sup>220</sup>

161. There are opposing views as to whether such activity test and participation requirements improve employment prospects for job seekers.<sup>221</sup>

162. Generally, job seekers must be ‘actively seeking and willing to undertake any paid work that is not unsuitable’.<sup>222</sup> This usually requires job seekers to search for a job, perform paid or voluntary work, study or participate in other activities.<sup>223</sup> A person who does not meet the activity test or participation requirements may have a ‘failure’ imposed, which may result in suspension of his or her payment.

163. Generally, people aged over 50 years who are in receipt of certain income support payments are not required to participate in an ‘approved program of work’.<sup>224</sup> Approved programs of work include Work for the Dole; Drought Force (as a category of Work for the Dole); and Green Corps.<sup>225</sup>

164. In addition, different activity requirements apply for job seekers who are aged 55 years or over,<sup>226</sup> who are taken to satisfy the activity test if they undertake at least 30 hours per fortnight of voluntary work, paid work (including self-employment) or a combination of the two.<sup>227</sup> A person must still register and remain connected to a provider while undertaking these activities and is also required to accept suitable paid work or referral to interviews.<sup>228</sup>

219 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [1.1.A.40].

220 Ibid, [3.5.1.160].

221 Summarised in L Fowkes, ‘Long-term Unemployment in Australia’, *Australian Policy Online*, 26 October 2011.

222 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [1.1.U.55], [3.2.9.20].

223 An activity test or participation requirement may include: a specified number of job searches; accepting all suitable work offers; attending all job interviews; attending interviews with Centrelink and a person’s JSA provider; attending training courses; never leaving a job, training course or program without a valid reason; and entering into and complying with the terms of an Employment Pathway Plan: Ibid, [3.2.8.20], [3.2.9.10].

224 *Social Security Act 1991* (Cth) ss 28(4), 607B, 501D, 731M.

225 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.2.9.60], [3.2.9.80], [3.2.9.90].

226 *Social Security Act 1991* (Cth) ss 16B, 502A, 603AA, 731G; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.2.9.20]. Previously this was extended to job seekers aged 50 years and over. As a result of Welfare to Work, job seekers aged in the 50–54 range are treated consistently with other job seekers: Participation Review Taskforce, *Participation Review Taskforce Report* (2008), 9.

227 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.2.8.10], [3.2.8.20], [3.2.8.50], [3.2.9.20]. Normally 25 hours per week is required: [3.2.9.10].

228 Ibid, [3.2.8.50].

165. The Australian Institute for Social Research notes that the driver for relaxing mutual obligation requirements for older workers is that they experience longer periods of unemployment.<sup>229</sup> As at July 2011, the average period of unemployment for those aged 55 and over was 63 weeks, compared to only 33 weeks for those aged 15–54.<sup>230</sup> However, according to DEEWR data, job seekers who choose the voluntary/part-time option are generally unemployed for much longer than those who actively look for a job.<sup>231</sup>

166. While noting that ‘volunteering can be both a pathway and an alternative to employment’, the Participation Review Taskforce, established by the Minister for Employment Participation, recommended that mature age job seekers should have the same participation requirements as other job seekers unless they have no, or very limited, chance of success in the labour market.<sup>232</sup> However, the Taskforce recommended that this change should be preceded by actions to combat negative attitudes towards older workers.<sup>233</sup> However, there may be concerns that some mature age job seekers have ill health, and while not qualified for Disability Support Pension, find the activity tests too onerous.<sup>234</sup>

### ***Employment Pathway Plans***

167. For job seekers who receive an activity-tested income support payment, JSA providers work with them to identify the mix of vocational and non-vocational activities they need to participate in to obtain employment. These activities are outlined in an individualised Employment Pathway Plan (EPP).<sup>235</sup>

168. In setting the terms of a person’s EPP, Centrelink or a JSA provider must take into consideration, among other things, ‘the person’s education, experience, skills, age, physical condition and health (including mental health)’.<sup>236</sup>

169. Exemptions or suspensions from EPPs are available in certain circumstances and for a defined period.<sup>237</sup> In addition, the Employment Pathway Fund (EPF) is available in some circumstances to purchase assistance to address vocational barriers,<sup>238</sup> while the Employment Assistance Fund (EAF) helps people with disability and their

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229 The Australian Institute for Social Research, *Experience Works: The Mature Age Employment Challenge* (2009), prepared for National Seniors Australia, 46–47.

230 National Seniors Australia, *Submission to 2012-2013 Budget*, 10.

231 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for Consultative Forum on Mature Age Participation, 26.

232 Participation Review Taskforce, *Participation Review Taskforce Report* (2008), 20.

233 *Ibid.*, 7, 20, 21.

234 Such persons may be able to demonstrate a ‘reasonable excuse’ for failing to meet an activity or participation test requirement: FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.1.13.90].

235 *Ibid.*, [3.2.8.10], [3.2.9.20], [3.5.1.160].

236 *Social Security Act 1991* (Cth) ss 501A, 606; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.2.8.50], [3.5.1.160].

237 *Social Security Act 1991* (Cth) ss 501E, 502C, 542, 542F, 542H, 544E, 602B, 603A, 607C.

238 The Australian Institute for Social Research, *Experience Works: The Mature Age Employment Challenge* (2009), prepared for National Seniors Australia, 36–37.

employers by providing financial assistance for work-related equipment, modifications and services.<sup>239</sup>

### ***Experience+***

170. *Experience+* is a suite of pilot programs designed to help mature age job seekers who are not eligible for the Government's employment services, and to help existing workers who may be at risk of losing their job or exiting the labour market. The pilots commenced on 1 June 2010 and are due to end on 30 June 2014.

171. *Experience+* offers a range of services: career advice; on the job support; job transition support; and *Experience+* Training. More Help for Mature Age Workers is also available under *Experience+*, allowing mature age persons with trade skills to access a skills assessment and gap training to achieve a qualification.<sup>240</sup>

**Question 23.** Different activity test and Employment Pathway Plan requirements apply for mature age job seekers. In what ways, if any, should they be changed to assist mature age participation in the workforce?

### **Work requirements for Disability Support Pension and Carer Payment**

172. Working age payments, such as Disability Support Pension and Carer Payment, are made conditionally on the basis of a person being unable to undertake substantial employment because of disability or caring responsibilities. Neither payment is subject to activity or participation requirements, as recipients are considered 'either unable or unavailable to participate in significant part-time work in the open labour market'.<sup>241</sup>

173. The Pension Review considered it important that Carer Payment and Disability Support Pension more actively address questions of workforce participation to ensure that, where people have the capacity to support themselves and are no longer eligible for the pension, they can establish or re-establish themselves in the workforce.<sup>242</sup>

239 DEEWR, *Employment Assistance Fund*, <[www.deewr.gov.au/Employment/Programs/DES/Employer\\_Support/Pages/EAF.aspx](http://www.deewr.gov.au/Employment/Programs/DES/Employer_Support/Pages/EAF.aspx)>.

240 Administered through the Department of Innovation, Industry, Science, Research and Tertiary Education.

241 The Treasury, *Australia's Future Tax System: Final Report* (2010), 494. However, as of 1 July 2012, Disability Support Pension recipients under 35 years with a work capacity of at least eight hours a week will be required to attend regular participation interviews with Centrelink to develop participation plans, tailored to their individual circumstances. While attendance at Centrelink interviews will be compulsory, participation in activities identified in the plan will be on a voluntary basis: Social Security and Other Legislation Amendment (Disability Support Pension Participation Reforms) Bill 2012 (Cth), Second Reading Speech.

242 FaHCSIA, *Pension Review Report* (2009), 144; The Treasury, *Australia's Future Tax System: Final Report* (2010), 507.

### ***Disability Support Pension***

174. Disability Support Pension is an income support payment for people who are unable to work due to permanent physical, intellectual or psychiatric impairment.<sup>243</sup>

175. Return-to-work 'suspension' provisions apply to Disability Support Pension recipients who no longer eligible for the payment due to earnings from work to return to the payment within two years if they later cease work or reduce their earnings below the income test limit.<sup>244</sup>

176. Currently, recipients of Disability Support Pension granted on or after the Welfare to Work changes on 11 May 2005 can only work up to 15 hours a week before their payment is suspended or cancelled.<sup>245</sup> However, as of 1 July 2012, more generous rules will be introduced to allow all Disability Support pensioners to work up to 30 hours per week without having their payment suspended or cancelled. They will be able to receive a part pension, subject to usual means testing arrangements.

**Question 24.** Do the 2012 changes to the Disability Support Pension present a barrier to mature age participation in the workforce or other productive work? In what ways, if any, should the Disability Support Pension be changed to remove barriers to participation in the workforce or other productive work for mature age persons with disability?

### ***Carer Payment***

177. Carer Payment provides income support to people who, because of the demands of their caring role, are unable to support themselves through substantial paid employment. Although Carer Payment is available to young carers as well as older carers, the majority of carers are aged 35 to 64 years, many of whom are females aged 45 years and over.<sup>246</sup> According to the Australian Bureau of Statistics, 'the likelihood of a person providing care to someone else increases with age, peaking for women between the ages of 55 years and 64 years and for men aged over 75'.<sup>247</sup>

178. If a person works, volunteers, studies or trains for over 25 hours per week (including time taken to travel), he or she is ineligible for Carer Payment.<sup>248</sup> In addition, any income received for work undertaken under the permitted 25 hours per

243 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [1.2.5.10].

244 Ibid, [8.2.2], [3.6.1.100].

245 Recipients granted before this date were 'grandfathered' and can work up to 30 hours a week before their pension is suspended or cancelled: Social Security and Other Legislation Amendment (Disability Support Pension Participation Reforms) Bill 2012 (Cth), Second Reading Speech.

246 Taskforce on Care Costs, *The Hidden Face of Care: Combining Work and Caring Responsibilities for the Aged and People with a Disability* (2007), 13.

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

248 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.6.4.70].



week may affect the rate of payment, due to the income and assets tests.<sup>249</sup> As argued by Carers Australia, this can mean that ‘caring and paid work can become an either/or proposition that does not fit for those wanting and needing to combine the two roles’.<sup>250</sup>

179. Some measures have been put in place to address this concern including:

- Working Credit;
- payment of certain supplementary benefits during an ‘employment income nil rate period’;
- the ability to have the payment resumed during the employment income nil rate period if a person reports a fall in income sufficient for Carer Payment to be payable again; and
- continued use of a person’s Pensioner Concession Card for a certain period after payment ceases to be payable.<sup>251</sup>

180. Although these measures are available to people aged below 45, in light of the high percentage of mature age carers, these mechanisms are discussed below.

**Question 25.** In practice, does the 25 hour work, volunteering, study and training limitation for Carer Payment present a barrier to mature age participation in the workforce or other productive work? What changes, if any, should be made to remove barriers to mature age participation in the workforce or other productive work?

### *Working Credit*

181. Working Credit applies to people who are below Age Pension age and are in receipt of certain income support payments, including Carer Payment and Disability Support Pension.<sup>252</sup> Working Credit allows payment recipients to accrue ‘working credits’ that are then depleted when employment income is received.

182. Working Credit aims to encourage people of workforce age who get income support payments to take up full-time, part-time, or casual work by:

- allowing them to keep more of their Centrelink payments while working;

249 Employment in the home within the care situation does not impact on qualification provided it is consistent with the care receiver’s need for frequent personal care or constant supervision.

250 Carers Australia (2008), *Submission to the Pension Review*, 1.

251 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.6.4.130].

252 Ibid, [3.1.11.10]. Recipients of the following payments also have access to Working Credit: Newstart Allowance; Youth Allowance; Mature Age Allowance; Partner Allowance; Bereavement Allowance; Sickness Allowance; Disability Support Pension; Parenting Payment; Widow Allowance; Wife Pension; and Widow B Pension.

- making it easier for people to get their Centrelink payments and benefits back if a short-term job (12 weeks duration) ends;<sup>253</sup> and
- allowing a recipient to keep the Pensioner Concession Card or Health Care Card for a period after starting work.

183. A person eligible for Working Credit will accrue working credits for a day if the person has, for that day, a fortnightly rate of total ordinary income that is less than \$48.<sup>254</sup>

184. A person who has accrued Working Credits and begins to receive employment income will remain qualified for income support while they reduce their Working Credit balance.<sup>255</sup> For example, a Carer Payment recipient who has a Working Credit balance and who ceases to provide constant care for more than 25 hours a week and part or all of the cessation is due to taking up or increasing paid work, is treated as still being qualified for the period it takes to run down their Working Credit balance.<sup>256</sup> This continues until their Working Credit balance is reduced to nil or their qualification or payability (other than related to employment) is lost.

**Question 26.** What changes, if any, to Working Credit should be made to remove barriers to mature age participation in the workforce or other productive work?

### *Concession cards*

185. Services and concessions, through discounted fees and user charges, have an important impact on the wellbeing of income support recipients. Concessions and services that are directly linked with the receipt of pensions and allowances—such as concession cards—can enhance the total value of these payments. As such, the loss of support when paid work is undertaken can therefore be greater than just the withdrawal of primary payments.

186. To address this, concession cards are available for a period on return to work, and alternative concession cards are available to some beyond the pension and allowance cut-outs.<sup>257</sup> The length of time individuals can retain a concession card, when their or their partner's income stops their payment, depends upon which payment they received, which concession card they hold and the reason their payment stopped. This can lead to confusion.

253 Centrelink, *Working Credit* <[www.centrelink.gov.au](http://www.centrelink.gov.au)> at 19 April 2012.

254 *Social Security Act 1991* (Cth) ss 1073F, 1073H; FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.1.11.20].

255 *Social Security Act 1991* (Cth) s 1073J.

256 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.6.4.10].

257 FaHCSIA, *Australia's Future Tax System: Pension Review Background Paper* (2008), 11–12. For example, Pensioner Concession Cards may be extended for 12, 26 or 52 weeks—depending on the payment and the cardholder circumstances: FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.9.2.30].

187. One such circumstance is where a person qualifies for an ‘employment income nil rate period’. A person whose income support payment is not payable because of ordinary income, made up entirely or partly of employment income, may qualify for an employment income nil rate period.<sup>258</sup> During this period the recipient can be paid certain supplementary benefits and retain a Pensioner Concession Card or Health Care Card and have his or her payment resumed if income is reduced sufficiently for the income support payment to be payable again.<sup>259</sup>

**Question 27.** Do the rules concerning the retention of concession cards act as a barrier to mature age participation in the workforce or other productive work? In what ways, if any, could these rules be improved?

**Question 28.** In practice, how effective is the operation of the ‘employment income nil rate period’ in removing barriers to mature age participation in the workforce or other productive work? In what ways, if any, could this be improved?

### Re-skilling for employment

188. Mature age people are likely to require new or updated skills development. Some income support payments are available to assist those undertaking full-time study. However, thresholds established for these payments regarding the length of time in training and education may actively discourage mature age workers and others from participation in programs that provide qualifications that will lead to sustainable employment.

### *Austudy and Pensioner Education Supplement*

189. Austudy provides financial help to those aged 25 years or over and studying or undertaking an Australian Apprenticeship full-time.<sup>260</sup>

190. Pensioner Education Supplement (PES) assists with the costs of full or part-time study. 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.<sup>261</sup> There is no maximum age limit for PES.<sup>262</sup>

258 FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.1.12].

259 *Social Security Act 1991* (Cth) s 1061ZEA. 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.

260 *Ibid* s 570; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.3.3.10]. ABSTUDY is available to Aboriginal and Torres Strait Islander persons.

261 *Social Security Act 1991* (Cth) s 1061PA; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.8.3.10], [3.8.3.20].

262 *Social Security Act 1991* (Cth) s 1061PK; FaHCSIA, *Guide to Social Security Law* (2012) <www.fahcsia.gov.au/guides\_acts> at 11 April 2012, [3.8.3.10].

191. For the purposes of PES<sup>263</sup> and Austudy,<sup>264</sup> approved courses of education or study include secondary courses, tertiary courses including pre-vocational, diplomas, graduate certificates and masters courses.<sup>265</sup> There is no minimum duration for a course to be approved.<sup>266</sup> A person is not eligible for PES or Austudy if they have completed a course for a Masters degree (for PES) or Doctorate (for PES and Austudy), or a qualification of the same standing at an educational institution.<sup>267</sup>

192. A person must complete a course within the time it usually takes to complete that course, whether part-time or full-time—known as the ‘allowable time’. Time already spent in study at the same level is deducted from the allowable time to determine whether the recipient is still qualified for the payment.<sup>268</sup> An exception applies where a person has exceeded the allowable time for time spent studying in a course more than 10 years ago.<sup>269</sup>

193. There may be concerns for mature age persons around eligibility requirements for these payments such as the requirement to study full-time for Austudy; the impact of previous studies on eligibility; and the types of courses approved for eligibility for Austudy and PES.

### ***Productivity Places Program***

194. To address certain skills shortages, the Australian Government introduced the Productivity Places Program (PPP). As part of a national agreement between the Commonwealth and state governments, the PPP provides funding for qualifications for existing workers and job seekers in priority skills areas. The program only provides qualifications that are either an entry pathway to occupations in demand or will allow individuals to gain or update their skills, ensuring that they improve and maintain those skills needed in their industry.<sup>270</sup> Courses include specified Certificates II, III and IV, Diplomas and Advanced Diplomas. The PPP concludes in June 2012.

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263 *Social Security Act 1991* (Cth) ss 1061PB(1), 1061PC.

264 *Ibid* ss 569A(b), 569B.

265 *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).

266 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [1.1.A.210].

267 *Social Security Act 1991* (Cth) ss 23(1), 569A, 1061PB(2); FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [1.1.Q.40], [3.3.3.10], [3.3.4.10], [3.8.3.20].

268 FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.3.4.70].

269 *Social Security Act 1991* (Cth) ss 569H, 1061PI(7); FaHCSIA, *Guide to Social Security Law* (2012) <[www.fahcsia.gov.au/guides\\_acts](http://www.fahcsia.gov.au/guides_acts)> at 11 April 2012, [3.3.4.80], [3.8.3.70].

270 DEEWR, *Productivity Places Program* <[www.deewr.gov.au/Skills/Programs/SkillTraining/ProductivityPlaces/Pages/default.aspx](http://www.deewr.gov.au/Skills/Programs/SkillTraining/ProductivityPlaces/Pages/default.aspx)> at 19 April 2012.

**Question 29.** In what ways, if any, should the eligibility requirements for Austudy, ABSTUDY and Pensioner Education Supplement be changed to address barriers to mature age participation in the workforce or other productive work?

### Other barriers to work

195. The ALRC is interested in hearing from stakeholders about other ways in which social security laws present barriers to work.

**Question 30.** What other changes, if any, should be made to social security laws and the *Guide to Social Security Law* to remove barriers to mature age participation in the workforce and other productive work?

### Family assistance

196. The Commonwealth has provided family allowances since 1941.<sup>271</sup> The current framework for family assistance comprises a range of payments and is primarily governed by two statutes: *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth). Family assistance payments play a significant role in supporting low-income families.<sup>272</sup>

197. Mature age persons may be eligible for family assistance when they care for children—frequently grandchildren. In 2009–2010, there were 16,000 Australian families in which grandparents were raising children 17 years and younger.<sup>273</sup> Arrangements for care may be formal (when carers have legal responsibility for children), or informal (by private agreement).<sup>274</sup>

198. Mature age persons may also be eligible for family assistance as parents. The ALRC does not propose to identify and examine workplace barriers that may affect parents as a group. Reforms to address the workplace barriers faced by parents of all ages are beyond the scope of this Inquiry.

199. The two primary family assistance payments that grandparents and other mature age non-parent carers may be eligible for are Family Tax Benefit (FTB) and Child Care Benefit (CCB). FTB is comprised of two parts. FTB Part A is the ‘primary payment designed to help with the cost of raising children’.<sup>275</sup> It is paid to eligible parents and

271 P Whiteford and G Angenent, *The Australian System of Social Protection: An Overview* (2001), 12.

272 See Australian Institute of Health and Welfare, *Australia's Welfare 2005* (2005), 75.

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

274 FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012 [2.1.1.85]. This terminology is used within the family assistance framework, although these terms have slightly different meanings across different contexts.

275 Family Assistance Office, *Website* <[www.familyassist.gov.au](http://www.familyassist.gov.au)> at 19 April 2012.

carers for each dependent child. FTB Part B is a benefit for eligible single parent families and families with one primary income earner.

200. CCB assists with the costs of child care. It is discussed in detail below, as is Child Care Rebate (CCR), as both have specific policy objectives relevant to this Inquiry. Grandparents and other mature age carers may also be eligible for a range of other payments including: baby bonus; maternity immunisation allowance; and double orphan allowance.

201. The ALRC is interested in hearing from stakeholders whether any aspects of family assistance laws and payments operate as a barrier to mature age participation in the workforce or other productive work.

**Question 31.** What changes, if any, should be made to family assistance laws and the *Family Assistance Guide* to remove barriers to mature age participation in the workforce and other productive work?

### Child Care Benefit

202. CCB is an income-tested payment that assists eligible parents and non-parent carers with the cost of child care.<sup>276</sup> Other CCB objectives are to provide incentives for parents and carers with low and middle incomes to participate in the workforce and community, and to support parents and carers to ‘balance work and family commitments’.<sup>277</sup>

203. CCB is available to parents or carers responsible for child care costs where their children attend approved child care services,<sup>278</sup> including: long day care services; family day care services; in-home care services; occasional care services; and outside school hours care services.<sup>279</sup>

204. Most parents and carers and their partners must meet a work/training/study test to receive up to 50 hours of CCB a week when children are cared for by approved child care services. To satisfy the test, parents and carers must undertake 30 hours per fortnight of work, training or study. If they do not meet this test, they may receive CCB at a lower weekly limit of 24 hours.<sup>280</sup>

<sup>276</sup> *A New Tax System (Family Assistance) Act 1999* (Cth) addresses eligibility for CCB at pt 3 div 4.

<sup>277</sup> FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [1.2.4].

<sup>278</sup> These services are approved for the purposes of family assistance law: *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 195(1).

<sup>279</sup> *Ibid* s 194. CCB is also available when child care is provided by a person who has been approved as a registered carer—for example grandparents, friends, relatives or nannies.

<sup>280</sup> *A New Tax System (Family Assistance) Act 1999* (Cth) ss 53; 54; FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [2.6.3.10]. Parents and carers may also be eligible for more than the default rate when they meet other conditions provided for in the legislation.

205. The work/training/study test does not apply to grandparents who are the ‘principal carers’ of a child in approved care.<sup>281</sup> Grandparent principal carers may therefore receive up to 50 hours weekly CCB without meeting this test.<sup>282</sup> ‘Principal carers’ are sole or major providers of ongoing daily care who make day-to-day decisions about the child.<sup>283</sup> ‘Grandparent’ is defined broadly to mean the ‘natural, adoptive or step grandparent or great grandparent of the grandchild’. It also includes a grandparent’s or great-grandparent’s current or former partner.<sup>284</sup>

206. The ALRC is interested in stakeholder views about the grandparents’ exception to the work/training/study test—in particular whether this amounts to a disincentive to participation in work or work-related activities. However, removing this exception may dismantle a source of financial support for mature age persons who are principal carers of grandchildren. This is of concern given that children may be out of their parents’ care for reasons including: family violence; drug or alcohol misuse; child abuse or neglect; the incarceration or death of a parent; and due to problems arising from mental or physical illness or intellectual disability.<sup>285</sup>

### Child Care Rebate

207. CCR covers 50% of out-of-pocket child care expenses for approved child care up to a maximum legislated amount per year (currently \$7,500 per child).<sup>286</sup> CCR is not income tested. As the *Family Assistance Guide* explains, the policy aims of CCR are to:

- assist families with the cost of approved child care,
- provide incentives for families with dependent children to participate in the community, and
- support parents in balancing work and family commitments.<sup>287</sup>

208. Parents and carers who are eligible for CCB are also eligible for CCR, even if their CCB entitlement is nil due to their income.<sup>288</sup> As for CCB, applicants and their partners must meet a work/training/study test to be eligible for CCR. Applicants and their partners are not required to meet a minimum number of hours to satisfy this test—they need only have a work, or work-related commitment (as provided for in the

281 FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [2.6.3.10].

282 Grandparents receiving an income support payment may also be eligible for Grandparent Child Care Benefit—a higher rate of CCB: *A New Tax System (Family Assistance) Act 1999* (Cth) s 82A; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) pt 3 div 4 subdiv CA; FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [2.6.8].

283 FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [1.1.P.125].

284 Ibid, [1.1.G.15]. See also *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 50R.

285 E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ 76 *Family Matters* 70; B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) 76 *Family Matters* 76, 77; Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [3.3.1], [5.3], [6.5.2].

286 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 84A, 84F; FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [1.2.7].

287 FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [1.2.7].

288 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 57EAA; 57EA; 57F.

legislation and the Family Assistance Guide) at some point during the week for which CCR is claimed.<sup>289</sup> As for CCB, grandparents and great grandparents who are principal carers are not required to meet this test to receive CCR.<sup>290</sup>

209. The ALRC is interested in hearing from stakeholders about the exception to the work/training/study test for grandparents for CCR—in particular whether this is a disincentive to community participation, insofar as this relates to work or voluntary work.

**Question 32.** When grandparents and mature age carers raise children:

- (a) does Child Care Benefit meet its objective to provide recipients with incentives to participate in the workforce; and
- (b) does the Child Care Rebate meet its objectives to provide recipients with incentives for community participation, insofar as this includes work or voluntary work?

What changes, if any, should be made?

## Child support

210. Mature-age persons may be eligible for, or liable to pay, child support. It is possible that aspects of child support legislation and policy may create barriers to employment and other productive work for parents and non-parent carers. As noted above, the ALRC will not examine such barriers faced by parents as a group as this is beyond the scope of the reference. However, the ALRC is interested in workplace barriers that may be faced by grandparents and other mature-age non-parent carers.

211. The legislative basis of the child support scheme is the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth). Parents and non-parent carers may be eligible for child support when they provide at least 35% of care.<sup>291</sup> The Child Support Agency uses a legislative formula to assess how much child support a parent should pay. The assessment takes into account both parties' income, the care arrangements, and the number of dependent children.<sup>292</sup> Payees may choose to collect child support privately, or for the CSA to collect and transfer child support payments on their behalf.<sup>293</sup>

212. Non-parent carers such as grandparents may receive, but are not liable to pay, child support. There are certain limitations on the child support eligibility of non-parent

289 Ibid s 14; FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [2.9], [2.6.3.10].

290 FaHCSIA, *Family Assistance Guide* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 19 April 2012, [2.6.3.10].

291 *Child Support (Assessment) Act 1989* (Cth) ss 5(3), 7B(1).

292 Ibid pt 5.

293 *Child Support (Registration and Collection) Act 1988* (Cth) s 24A.



carers when there are no court orders in place providing for the care arrangements.<sup>294</sup> As the ALRC was advised in the Family Violence and Commonwealth Laws Inquiry, the number of non-parent carers in the child support scheme is relatively small: in December 2010 there were approximately 3,900 non-parent carers out of around 1,330,500 payers and payees in the scheme.<sup>295</sup>

213. The ALRC seeks comments from stakeholders as to whether aspects of the child support scheme impose barriers or limitations to mature age persons participating in the workforce and other productive work, such as voluntary work.

**Question 33.** What changes, if any, should be made to child support laws and *The Guide—CSA’s Online Guide to the Administration of the New Child Support Scheme* to remove barriers to mature age participation in the workforce and other productive work?

## Employment

214. In light of demographic changes in Australia and government objectives aimed at prolonging workforce participation, the ability of the employment law framework to respond to the needs of mature age employees and their employers is crucial. As stated by the Advisory Panel on the Economic Potential of Senior Australians, the ‘challenge is to re-shape workplaces’ and the employment law framework to facilitate the ongoing involvement of mature age people in the workforce and other productive work.<sup>296</sup>

215. However, in doing so, whether through examining mechanisms for greater flexibility or strengthening statutory protections, there is a need to strike an appropriate balance between flexibility for employees and employers on the one hand—recognising that what flexibility means to each may be different—and statutory protections as well as minimum terms and conditions on the other. It is also important to ensure measures do not have unforeseen consequences, including for example, that protections and measures aimed at assisting mature age employees do not in turn make them unattractive to employers by imposing unreasonable additional regulatory requirements or costs.

216. This section examines barriers in employment law to mature age persons participating in the workforce or other productive work. It considers barriers at various stages of employment, from the recruitment and job search process to post-termination

294 *Child Support (Assessment) Act 1989* (Cth) s 7B(2)–(3). These limitations are discussed in Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2011), ch 12. The ALRC made two recommendations addressed at repealing these limitations, or alternatively broadening the eligibility criteria for non-parent carers in certain cases: Recs 12–6, 12–7.

295 FaHCSIA, *Correspondence*, 14 April 2011.

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

of employment remedies. Specifically, it identifies a number of potential barriers and ways in which these may be addressed including in relation to:

- entering and re-entering the workforce—the recruitment practices and administration of private recruiters;
- maintaining employment—amendment of the *Fair Work Act 2009* (Cth) and instruments made under that Act;
- occupational health and safety; and
- employment management practices.

217. The ALRC acknowledges that there are a range of processes and inquiries currently being undertaken in the areas of anti-discrimination and employment law, the outcomes of which will be taken into account in this Inquiry.<sup>297</sup>

### Entering and re-entering the workforce

218. Mature age jobseekers face multiple and intersecting difficulties in entering or re-entering paid employment and often utilise either the national employment services system or the services of private recruitment agencies. The operation of national employment services is discussed earlier in this Issues Paper.

219. Increasingly, however, private recruitment agencies are playing a role as ‘intermediaries between job seekers and employers’.<sup>298</sup> A number of significant reports have highlighted that some recruitment agencies are ‘reluctant to accept older workers as clients or recommend them to employers’.<sup>299</sup> Indeed, unlawful age discrimination in recruitment has been described as ‘rampant, systemic and the area of employment decision-making where managers use age to differentiate between people most extensively’.<sup>300</sup>

220. While private recruitment agencies operate under contractual arrangements with individual employers, there are a number of approaches to addressing recruitment practices that disadvantage mature age employees. The Hon Susan Ryan AO, Age Discrimination Commissioner, has indicated her concerns in this area and is already involved in discussions with the recruitment industry to ‘discuss how businesses do and could take constructive, supportive approaches to hiring’ mature age employees.<sup>301</sup>

297 For example: the consolidation of Commonwealth anti-discrimination law; the review of the *Fair Work Act 2009* (Cth); the introduction of the Fair Work Amendment (Better Work/Life Balance) Bill 2012; work being undertaken by Safe Work Australia; and research being conducted by Fair Work Australia.

298 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for Consultative Forum on Mature Age Participation, 18.

299 Ibid.

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

301 S. Ryan, Six Months On, [Uhttp://olderworkers.com.au/articles/index.php?option=com\\_content&view=category&layout=blog&id=1&Itemid=2&limitstart=10](http://olderworkers.com.au/articles/index.php?option=com_content&view=category&layout=blog&id=1&Itemid=2&limitstart=10) at 23 April 2012. Commissioner Ryan was also appointed an ALRC part-time Commissioner for this Inquiry.

221. In addition, agencies are required to comply with relevant statutory obligations, including in relation to age discrimination. Where recruitment agencies discriminate against mature age employees, whether through their own practices or by following discriminatory employer preferences or requests, such agencies may face potential liability under anti-discrimination law.<sup>302</sup>

222. A minimum regulatory approach—providing for regulation of private recruitment agencies by way of standards, codes of conduct or guidelines—may be another way to address these concerns. For example, such material may include information about appropriate engagement with mature age jobseekers. A number of useful models that could be adapted already exist. For example, members of the Recruitment and Consulting Services Association are required to comply with a code for professional conduct; and Australian Human Resources Institute members are required to comply with a code of ethics and professional conduct. The ALRC is interested in stakeholder feedback on these and any other approaches to the regulation of private recruitment practices which disadvantage mature age employees.

**Question 34.** In what ways, if any, can the practices of private recruitment agencies be regulated to remove barriers to mature age employees entering or re-entering the workforce?

### Maintaining employment

223. The *Fair Work Act* is one of the key Commonwealth legislative instruments that, through regulating employment and workplace relations, provides a framework within which mature age employees may choose to remain in paid employment.<sup>303</sup> 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 Act also creates a compliance and enforcement regime and establishes several bodies to administer the Act, including Fair Work Australia (FWA) and the Office of the Fair Work Ombudsman (FWO).<sup>304</sup>

224. In December 2011, the Australian Government announced details of a review of the *Fair Work Act* (the Review),<sup>305</sup> to examine and report on the extent to which the legislation is operating as intended and areas where the operation of the legislation

302 For example, by analogy through the reasoning in *Elliot v Nanda* (2011) 111 FCR 240.

303 The *Fair Work Act 2009* (Cth) regulates ‘national system’ employers and employees. Employment that is not covered under the national industrial relations system remains regulated by the relevant state industrial relations systems. However, some entitlements under the *Fair Work Act 2009* (Cth) extend to non-national system employees.

304 The *Fair Work Regulations 2009* (Cth) address matters of detail within the framework established by the *Fair Work Act 2009* (Cth).

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

could be improved consistent with the objects of the Act. The Review is due to be completed by 31 May 2012.

225. While recognising that any recommendations for change to the *Fair Work Act* arising from the Review may affect issues considered in the course of this Inquiry, the ALRC considers that the *Fair Work Act*, or agreements and instruments made under the Act, may be potential areas for amendment, including:

- amending the National Employment Standards to provide an entitlement to flexible working arrangements on the basis of age;
- greater flexibility under the award system; and
- utilising flexibility clauses in enterprise agreements.

226. In addition to comments on these possible reforms, the ALRC is also interested in hearing about the effectiveness of the general protections provisions and other possible avenues for reform under the *Fair Work Act*.

### **Flexible working arrangements**

227. The Consultative Forum on Mature Age Participation has emphasised that the ‘ability to work part-time or flexible hours has been found to be the most important facilitator, after good health, for older people to work beyond retirement age’.<sup>306</sup> Examining legislative mechanisms for ensuring access to flexible working arrangements is vital to encouraging mature age employees to enter, re-enter or remain in the workforce. The Advisory Panel on the Economic Potential of Senior Australians commented that mature age persons have

diverse requirements for flexibility: some want part-time work; some want casual work; and some want to work for blocks of time, take leave and return to work ... Others wish to scale-down and work fewer hours, allowing more time for recreation. Many find it difficult to work full-time, standard hours because of their health, caring responsibilities or other specific circumstances.<sup>307</sup>

228. The two key legal, as opposed to policy-based, mechanisms which currently provide access to flexible working arrangements are the right to request flexible working arrangement provisions under the National Employment Standards (NES), and enterprise agreements.

### **National Employment Standards**

229. The NES enshrine 10 statutory minimum requirements that apply to all ‘national system’ employees.<sup>308</sup> The NES encompass areas such as working hours and arrangements, leave, and termination and redundancy pay. The NES are an absolute

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

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

308 The definition 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.

legislative safety net and cannot be excluded by an enterprise agreement or modern award.<sup>309</sup> Any amendments to the NES would therefore have a wide-ranging impact on the entitlements of mature age employees.

230. Under the NES, an employee who satisfies the service requirements,<sup>310</sup> who is a parent or otherwise has responsibility for a child who is under school age, or who is under 18 and has a disability, may request that his or her employer change his or her working arrangements to assist with the care of that child.<sup>311</sup> Such a request may only be refused on ‘reasonable business grounds’.<sup>312</sup>

231. A number of issues arise in relation to this provision. In particular, the provision is procedural rather than substantive. It provides that an employee is entitled to request flexible working arrangements, receive a response and, if that request is refused, be provided with a written statement of reasons.<sup>313</sup> In addition, there are limited enforcement mechanisms available.<sup>314</sup>

232. While in its current formulation the right to request flexible working arrangements is based on parental or child-care related responsibilities, potentially the section could be extended to include other bases upon which an employee could request these arrangements. For example, the Australian Government has indicated its intention to consider expanding the right to those with caring responsibilities more generally.<sup>315</sup>

233. The Advisory Panel on the Economic Potential of Senior Australians recommended that the right be extended to people aged 55 and over.<sup>316</sup> In addition, in February 2012, Adam Bandt MP introduced the Fair Work Amendment (Better Work/Life Balance) Bill 2012, which would, among other things, amend the *Fair Work Act* by extending the right to request to all employees and remove the flexible working arrangements provisions from the NES and create a new Part of the Act.<sup>317</sup>

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

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

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

312 Ibid s 65(5).

313 Ibid s 65.

314 Section 44 of the *Fair Work Act 2009* (Cth) provides that an order cannot be made under the civil remedies provisions in relation to contraventions of s 65(5). As a result, civil remedies for breaches of the flexible working arrangement NES do not apply if an employer refuses a request other than on reasonable business grounds.

315 See, eg, National Carer Strategy, launched on 3 August 2011.

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

317 The Bill also includes other significant changes, including specifically in relation to carers, unions and the role of Fair Work Australia. The Bill was referred to the House of Representatives Standing Committee on Education and Employment.

234. Despite some support for such an expansion, peak industry bodies such as the Australian Chamber of Commerce and Industry have expressed strong opposition to the extension of the right to request flexible working arrangements provisions.<sup>318</sup>

**Question 35.** Should s 65 of the *Fair Work Act 2009* (Cth) be amended to include age as a basis upon which an employee may request flexible working arrangements?

### *Enterprise agreements*

235. The *Fair Work Act* provides that there are several types of agreements, referred to as enterprise agreements, that can prevail over contracts of employment.<sup>319</sup> Enterprise agreements govern the terms and conditions of employment and can be made between one or more employers and either their employees, or one or more employee organisations.

236. Section 202 of the *Fair Work Act* requires that every enterprise agreement must include a ‘flexibility term’, allowing the employer and the employee to make a specific ‘individual flexibility arrangement’ (IFA) that would vary the effect of the enterprise agreement to account for the employee’s particular circumstances.<sup>320</sup> Therefore, under every enterprise agreement a mature age employee is entitled to negotiate an IFA with the employer, for example, to vary work arrangements.

237. Concerns have been raised that some mature age employees may not be in a position, or feel able, to negotiate an effective or useful IFA.

**Question 36.** In practice, do mature age employees negotiate individual flexibility arrangements made under s 202 of the *Fair Work Act 2009* (Cth)? Are such arrangements a useful and appropriate flexibility mechanism for mature age employees?

### **General protections provisions**

238. Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections.<sup>321</sup> These general protections, among other things, prohibit an employer from taking ‘adverse action’ against an employee or prospective

<sup>318</sup> Australian Chamber of Commerce and Industry, *Submission to Fair Work Act Review* (2012).

<sup>319</sup> Under the *Fair Work Act 2009* (Cth) there are three types of enterprise agreements: single-enterprise agreements, involving a single employer or one or more employers cooperating in what is essentially a single enterprise; multi-enterprise agreements, involving two or more employers that are not all single interest employers; and greenfields agreements, involving a genuinely new enterprise that has not yet employed employees: *Fair Work Act 2009* (Cth) s 172.

<sup>320</sup> Ibid s 202. Further, particular requirements must be met for an IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 203.

<sup>321</sup> *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

employee on the basis of the employee having, exercising or not exercising, or proposing to exercise or not exercise, a ‘workplace right’, or to prevent the exercise of a ‘workplace right’.<sup>322</sup> Measures that may constitute ‘adverse action’ taken by an employer against an employee include dismissal, injury or discrimination, or, in the case of a prospective employee, refusing to employ or discriminating in the terms or conditions of offer,<sup>323</sup> and threatening any of the above.<sup>324</sup>

239. The *Fair Work Act* prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons and outlines a number of grounds of discrimination.<sup>325</sup> Age is specifically listed as a protected attribute upon which a mature age employee may be able to pursue a claim of discrimination under the general protections provisions.<sup>326</sup>

240. There are a range of issues with the current provisions. For example, the ALRC is aware of differing views as to the interpretation of the exclusion of actions that are ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’.<sup>327</sup>

241. Some commentators have suggested, however, that the general protections provisions may provide a more useful avenue for redress in circumstances of age discrimination in the employment context than state or federal anti-discrimination legislation. In particular, Therese MacDermott argues that the general protections regime encompasses a number of important aspects that can better be ‘used to the advantage of individuals pursuing age discrimination complaints’, including: the reverse onus of proof; the enforcement powers of the FWO; the cost implications of using the jurisdiction; and the availability of injunctive relief.<sup>328</sup> In addition, as the regime is available to employees and prospective employees, it may also provide a useful mechanism for mature age people to combat discrimination in recruitment.

242. The general protections provisions provide statutory protection for mature age employees and may therefore act as an incentive for mature age workers to remain in the workforce.

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

323 *Ibid* s 342(1).

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

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

326 *Ibid* ss 351(1), 772(1)(f).

327 *Ibid* s 351(2)(a). See Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2011), [16.90].

328 T MacDermott, ‘Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation’ (2011) 34(1) *UNSW Law Journal* 182, 199-200.

**Question 37.** In practice, how effective are the general protections provisions under the *Fair Work Act 2009* (Cth) where a mature age employee, or prospective employee, has been discriminated against on the basis of age?

## Other reform possibilities

### Modern awards

243. 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.<sup>329</sup> A modern award cannot exclude any provisions of the NES but can provide additional detail in relation to the operation of an NES entitlement. Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement<sup>330</sup> and is not a 'high income employee'<sup>331</sup> may be covered by a modern award.<sup>332</sup> In general, a modern award applies to employees in a particular industry or occupation and is used as the benchmark for assessing enterprise agreements before they are approved by FWA.

244. As is the case with enterprise agreements, modern awards must include a 'flexibility term', allowing the employer and the employee to make a specific IFA to vary the effect of the enterprise agreement to account for the employee's particular circumstances.<sup>333</sup> Mature age employees are therefore entitled to negotiate IFAs with their employer under modern awards, for example, to vary their work arrangements.

245. Beginning in 2012, there will be several reviews of modern awards.<sup>334</sup> The most important of these reviews will commence as soon as practicable after 1 January

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329 Beginning in 2008, the Australian Industrial Relations Commission, and then its successor FWA, conducted an award modernisation process which reviewed and rationalised existing awards to create streamlined 'modern awards'. The award modernisation process was completed by the end of 2009, with 122 modern awards commencing operation on 1 January 2010. FWA continues the modernisation process in relation to enterprise instruments and certain former state awards preserved by the national system. See Fair Work Australia, *About Award Modernisation* <<http://www.fwa.gov.au>> at 23 April 2012 8 November 2011; A Stewart and P Alderman, 'Awards' in CCH Australia, *Australian Master Fair Work Guide* (2010) 147.

330 *Fair Work Act 2009* (Cth) s 57.

331 *Ibid* s 47(2).

332 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.

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

334 Fair Work Australia is first required to undertake an initial review of modern awards in 2012. However, the scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives and are operating effectively, without anomalies or technical problems arising from the award modernisation process. See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6.



2014.<sup>335</sup> The reviews are ‘the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.<sup>336</sup> The ALRC suggests that the 2014 review may provide an opportunity to consider the effect of the award system on mature age employees. In the meantime, the ALRC is interested in stakeholder feedback about how the operation of modern awards affects mature age employees.

**Question 38.** How does the operation of the modern award system affect mature age employees and in what ways, if any, can modern awards be utilised or amended to account for the needs of mature age employees?

### ***Compulsory retirement provisions***

246. While compulsory retirement has been abolished for Commonwealth statutory office holders and other public servants, a number of direct and indirect mandatory retirement practices remain. For example:

- 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.<sup>337</sup> While the section provides that Parliament may make a law fixing a lower age, it does not make such provision for a higher age.<sup>338</sup>
- The compulsory retirement age for Australian Defence Force personnel is 60 years (65 years for reservists). However, there is provision for the Minister or the Chief to extend the compulsory retirement age for either a specific officer or member or a class of officers or members.

247. In addition, while not having a specific compulsory retirement age, a range of other occupations require re-licensing and qualification.

**Question 39.** A number of compulsory retirement ages and licensing or re-qualification requirements exist in particular industries and professions. In what ways, if any, do these create barriers to mature age participation in the workforce or other productive work? If they do create barriers, should they be changed or are they appropriate?

### **Occupational health and safety**

248. Mature age workers may face barriers to employment that are related to occupational health and safety (OHS). However, ‘as everyone ages differently, we

335 The *Fair Work Act* provides for review of each modern award every four years: *Fair Work Act 2009* (Cth) s 156.

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

337 *Australian Constitution* s 72.

338 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.

cannot generalise about older workers and assume they will have certain characteristics' that translate into potential OHS risks.<sup>339</sup> It may be necessary, therefore, to adjust workplace processes and practices to account for the needs of mature age workers. This may be particularly so in certain industries or types of 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.<sup>340</sup>

249. The ALRC is interested in stakeholder comment on mature age workers and OHS generally and in particular, on whether there is scope for recognition of the connection in strategic plans under the Australian Work Health and Safety Strategy 2012–2022 and OHS guidance material.

### ***Legislative framework***

250. On 1 January 2012, mirror OHS legislation was introduced in several Australian jurisdictions, including the *Work Health and Safety Act 2011* (Cth) (WHS Act),<sup>341</sup> based on model legislation, regulations and codes of practice released by Safe Work Australia—the statutory agency tasked with improving OHS and workers' compensation arrangements in Australia.<sup>342</sup> These reforms have been described as 'the most significant reform' to OHS laws in Australia in the last 30 years.<sup>343</sup>

251. The WHS Act provides for a primary duty of care under which a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable: the health and safety of workers while they are at work; the health and safety of others is not put at risk from work carried out; the provision and maintenance of a safe work environment; and a range of other requirements.<sup>344</sup> Workers also have a primary duty to take reasonable care for their own safety at work, 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 employer.<sup>345</sup>

339 Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the safety and health needs of your workplace: older workers and safety* (2010) 2.

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

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

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

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

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

345 Ibid s 28. Note, officers also have a range of duties: *Work Health and Safety Act 2011* (NSW) ss 27–29.

*Strategic plans*

252. At a national level, Safe Work Australia is currently seeking comment on a draft Australian Work Health and Safety Strategy 2012–2022 (WHS Strategy). Issues arising in relation to older workers and OHS issues are likely to be particularly relevant in the context of the ‘Healthy and Safe by Design’ action area.<sup>346</sup> The two strategic outcomes under this action area are that: structures, plant, equipment and substances are designed to eliminate or minimise hazards or risks before they are introduced into the workplace; and work and work processes and systems of work are designed and managed to eliminate or minimise hazards or risks.<sup>347</sup>

253. In addition to community consultation and comment on the draft, the Australian Government and all state and territory governments, as well as peak employer and employee representative groups, will develop strategic plans that are consistent with the WHS Strategy to ‘support the improved work health and safety of their constituents’.<sup>348</sup>

**Question 40.** In what ways, if any, can strategic plans developed under the Australian Work Health and Safety Strategy 2012–2022 take account of occupational health and safety issues of particular relevance to mature age workers?

*Guidance material*

254. In addition to OHS legislation, there is a range of guidance provided to duty holders about OHS matters in the form of regulations, Codes of Practice and other material produced by Safe Work Australia, Comcare and similar bodies.<sup>349</sup> The inclusion of information on mature age workers and OHS issues could be included in guidance material, but could potentially also be included in Codes of Practice.

255. By way of example, at a state level, WorkSafe WA developed the bulletin, ‘Understanding the Safety and Health Needs of Your Workplace: Older Workers and Safety’, to raise awareness in relation to OHS issues relevant to older workers and provide guidance on risk assessment and adapting work practices according to the needs of mature age workers.<sup>350</sup>

256. The ALRC is interested in stakeholder views on the necessity and appropriateness of including information on mature age workers and OHS issues in Codes of Practice or other guidance material.

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<sup>346</sup> Draft Australian Work Health and Safety Strategy 2012–2022.

<sup>347</sup> Ibid.

<sup>348</sup> Ibid, Introduction.

<sup>349</sup> For example: ‘How to Manage Work Health and Safety Risks’, ‘How to Consult on Work Health and Safety’; and ‘Managing the Work Environment and Facilities’.

<sup>350</sup> Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the safety and health needs of your workplace: older workers and safety* (2010).

**Question 41.** Where is it best to include information about occupational health and safety issues relevant to mature age workers?

### **Volunteers**

257. The WHS Act expands the class of persons to whom a duty is owed to 'workers', rather than employees. Workers include employees, subcontractors, outworkers, apprentices, students and volunteers.<sup>351</sup> As a result, the WHS Act applies to a range of volunteering organisations, but only those with paid staff. Safe Work Australia has developed a Volunteer Assistance Package and Assistance Line in order to assist volunteer organisations to understand and comply with the requirements under the Act.

258. Recognising that 32.5% of volunteers are aged 55 and over,<sup>352</sup> the ALRC welcomes stakeholder comment on the effect of the recent OHS changes on mature age volunteers.

**Question 42.** In what ways, if any, do occupational health and safety duties and responsibilities act as a barrier to volunteering for mature age persons?

### **Approaches to regulation and monitoring**

259. In order to encourage employers to consider strategies and creative employment management practices with respect to mature age employees, there are a range of potentially useful models involving regulation and monitoring, including for example:

- equity employment plans as required under statute in some international jurisdictions which document objectives, strategies, measurables and responsibilities; and
- a reporting framework similar to the one currently administered by the Equal Opportunity for Women in the Workplace Agency, which would require employers to report against equality indicators related to age.<sup>353</sup>

260. The ALRC understands that there may be unintended consequences of such regulation, particularly with respect to employer views and stereotyping and welcomes stakeholder comment on these measures. More generally, the ALRC is interested in comment on measures that encourage employer responsiveness to the needs of mature age employees and provide support and assistance to them where necessary.

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351 Both definitions expand existing definitions of 'employer' and 'employee': *Work Health and Safety Act 2011* (NSW) s 7.

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

353 The Senate Standing Committee on Education, Employment and Workplace Relations is conducting an Inquiry into the Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth) which would make changes to the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), including to its name, objects and coverage as well as the reporting framework and agency functions.

**Question 43.** What measures involving regulation and monitoring, if any, should be introduced to ensure:

- (a) employers are responsive to the needs of mature age employees; and
- (b) mature age employees are actively involved in developing and implementing such measures?

### Education and awareness

261. In addition to the legislative, regulatory and practice-based approaches outlined above, there may also be a need for increased awareness and effective education around barriers to workforce participation for mature age people and appropriate responses.

262. From an employer perspective, there are a range of employment management practices that may contribute to removing barriers to mature age employees entering, re-entering and remaining in the workforce. These primarily include policies, procedures, awareness-raising measures, education and training.

263. A key example of such measures is the Australian Chamber of Commerce and Industry publication and campaign, *Employ Outside the Box*.<sup>354</sup> General educative material, such as that released by FWO, also plays an important role in educating employees and employers about their rights and responsibilities.

264. The ALRC welcomes stakeholder comment on examples of best practice employment management practices in this area, the most appropriate approaches to raising awareness and on providing education and training in order to remove barriers to mature age persons participating in the workforce and other productive work.

**Question 44.** What are some examples of employment management best practice aimed at attracting or retaining mature age employees?

**Question 45.** What are the most effective ways of raising awareness and providing education and training to remove barriers to mature age participation in the workforce and other productive work?

**Question 46.** What other changes, if any, should be made to the employment law framework to remove barriers to mature age participation in the workforce or other productive work?

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354 Australian Chamber of Commerce and Industry, 'Employ Outside the Box: the rewards of a diverse workforce' (2012).

**Workers' compensation and insurance**

265. Age restrictions on workers' compensation payments and insurance cover can mean that, in certain circumstances, workers aged over 65 are unable to access compensation or insurance cover in the event of a workplace accident.

266. Workers' compensation is compensation payable to an employee who suffers an injury or disease arising from or during his or her employment. In addition to workers' compensation, a range of types of insurance cover may be available such as income protection insurance, travel insurance and personal accident and public liability insurance.

267. Where a worker is aged over 65 and is unable to access workers' compensation or insurance in the event of a work-related accident, this may act as a disincentive for mature age workers to remain in the workforce. In addition, employers may have concerns about retaining or employing workers not covered by insurance. This may act as a barrier to employment—both for the worker and the employer.

**Workers' compensation**

268. At the Commonwealth level, workers' compensation benefits can only be paid until age 65 or, in certain cases, for up to two years afterwards. However, there is no age limit to incapacity or medical compensation payments.

269. The original rationale for such restrictions was that, once an injured worker reached the retirement age of 65, the worker would have access to superannuation or other forms of income support, such as the Age Pension. A number of issues relevant to this Inquiry arise from these restrictions.

270. First, difficulty in accessing workers' compensation may act as a disincentive for mature age workers to remain in the workforce. Secondly, where a mature age worker is unable to access workers' compensation and the worker is injured while at work, he or she will progressively become ineligible for the Age Pension due to the incremental increase in Age Pension age.<sup>355</sup> As a result, he or she may be forced to access other forms of income support such as the Disability Support Pension, superannuation and other forms of private savings. Where this results in a depletion or exhaustion of superannuation or private savings, he or she may then be required to access additional income support on a long-term basis rather than self-funding retirement. This outcome is at odds with government policy objectives outlined earlier in this Issues Paper aimed at keeping people in work rather than in receipt of the Age Pension, and supporting people into self-funded retirement. In order to address these issues the ALRC considers a number of possible reform approaches below and welcomes stakeholder feedback on the most appropriate approach.

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355 From July 2017, eligibility for the Age Pension will rise to 65.5 years of age then by 6 months every 2 years to age 67 by 2013.

**Commonwealth scheme**

271. Each state and territory has its own workers' compensation scheme and the Commonwealth has three schemes. The *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) establishes the workers' compensation scheme covering Commonwealth employees and statutory authorities, the ACT Government and its agencies, and the employees of licensed corporations. Benefits under the SRC Act include weekly or fortnightly payments based on the employee's normal salary and all reasonable medical expenses.

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

273. The *Military Rehabilitation and Compensation Act 2004* (MRC Act) provides rehabilitation, medical treatment and compensation for members and former members of the Australian Defence Force and their dependants in respect of injury, disease or death related to service rendered on or after 1 July 2004.<sup>356</sup>

274. Seacare is the national scheme of OHS, workers' compensation and rehabilitation arrangements that applies to defined seafaring employees.<sup>357</sup> The Seacare scheme is overseen by the Seafarers Safety, Rehabilitation and Compensation Authority which monitors and administers the operation of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act).<sup>358</sup>

**National Action Plan**

275. Safe Work Australia is the statutory agency tasked with improving OHS and workers' compensation arrangements in Australia.<sup>359</sup> Safe Work Australia's Strategic Issues Group for Workers' Compensation was responsible for developing the National Workers' Compensation Action Plan 2010–2013. Relevantly, one of the key deliverables under the Action Plan is to 'investigate and report on national consistency for a number of agreed terms within workers' compensation legislation', including 'retirement age for workers' compensation premium purposes'.<sup>360</sup> In order to progress reforms under the Action Plan seven temporary advisory groups (TAG) were established with representatives from each jurisdiction as well as employer groups and unions. The ALRC understands that the project to investigate retirement age has

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

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

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

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

360 *National Workers' Compensation Scheme Action Plan 2010-2013*.

commenced and that the work being undertaken by the relevant TAG may provide an appropriate opportunity to consider the issues raised in this section.

### **Volunteers**

276. As outlined earlier, 32.5% of Australians who volunteer are aged 55 and over.<sup>361</sup> However, volunteers are not eligible for workers' compensation at a Commonwealth level. By comparison, volunteers in some jurisdictions are so eligible, either because they are deemed to be employees under the relevant legislation or the legislation specifically provides compensation for certain categories of volunteers.

277. It may not be necessary for volunteer coverage at a Commonwealth level as, for example, national not-for-profit organisations are often based in one jurisdiction. However, in light of differences in coverage between jurisdictions, the ALRC would be interested in stakeholder feedback on whether volunteers should be eligible for workers' compensation at a Commonwealth level.

**Question 47.** Should volunteers be eligible for workers' compensation at a Commonwealth level or is current state and territory coverage sufficient?

### **Retirement provisions**

278. Most jurisdictions have retirement provisions that restrict access to workers' compensation, in particular income replacement payments, when a worker reaches the age of 65. At the Commonwealth level, benefits can be paid until age 65 or in certain cases for up to two years afterwards. There is no limit, however, to total incapacity or medical payments. For example:

- General: Compensation is not payable to an employee who has reached 65 years of age, however if an employee who has reached 63 years of age suffers an injury, compensation is payable for a maximum of 104 weeks which may extend beyond age 65.<sup>362</sup>
- Military personnel: Compensation is not payable to an employee/former member who has reached 65 years of age, however if an employee/former member who has reached 63 years of age suffers an injury, compensation is payable for a maximum of 104 weeks, which may extend beyond age 65.<sup>363</sup>
- Seacare: If an employee suffers an injury before reaching 64 years of age, compensation is not payable for the injury after age 65. If an employee suffers an injury after 64 years of age, compensation is payable for 12 months after date of injury, which may extend beyond age 65.<sup>364</sup>

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

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

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

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



279. A number of state and territory jurisdictions have similar provisions. By comparison, neither Queensland nor Western Australia has retirement provisions.<sup>365</sup> However, in these jurisdictions there is a range of other restrictions, such as to the benefit period and the maximum amount of compensation an employee can receive during the life of the claim, in terms of weekly payments for loss of earnings.<sup>366</sup>

### ***Options for reform***

280. There appear to be a number of possible options for reform at a Commonwealth level in order to address issues arising from age-based restrictions on workers' compensation.

281. First, all age-based restrictions could be removed from the SRC Act, MRC Act and Seafarers Act. While removal of age based restrictions would clearly benefit mature age workers, the ALRC is conscious of the cost implications of such a move. For example, statistics indicate that, of claims for Australian Government premium payers accepted during 2010–2011, age groups 35–44 and 65 years and over had the highest average total cost of claims.<sup>367</sup> As a result, a second approach may be to remove age-based restrictions but impose benefit period restrictions—such as is the case under the SRC Act with respect to employees who have reached 63 years of age—on all employees. The current benefit period restriction under the SRC Act is 104 weeks; however this period could potentially be increased, for example to 260 weeks.

282. Finally, the ALRC is conscious that limiting benefits or payment periods would affect entitlements for all employees. As a result, a third approach could involve amendment of the retirement provisions to increase the relevant age at which compensation is no longer payable to 67 years of age, in line with the planned increase of Age Pension eligibility to 67 years of age. This would mean that compensation would not be payable to an employee who has reached 67, however if an employee who has reached 65 suffers an injury, compensation is payable for a maximum of 104 weeks, which may extend beyond the age of 67.

**Question 48.** In what ways, if any, should retirement provisions in Commonwealth workers' compensation legislation be amended? For example, are any of the following approaches appropriate:

- (a) removing all age based restrictions;
- (b) removing all age based restrictions, but imposing benefit period or amount restrictions; or
- (c) increasing the age at which compensation is no longer payable to age 67, except in certain circumstances?

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

366 Ibid and *Workers' Compensation and Rehabilitation Act 2003* (Qld).

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

**Question 49.** What other changes, if any, should be made to the Commonwealth workers' compensation scheme to remove barriers to mature age participation in the workforce or other productive work?

## Insurance

283. At the Commonwealth level, the insurance industry is governed by two primary pieces of legislation—the *Insurance Act 1973* (Cth) and the *Insurance Contracts Act 1984* (Cth).<sup>368</sup> Chapter 7 of the *Corporations Act 2001* (Cth) governs the regulation of insurance intermediaries such as agents and brokers.

284. The Australian general insurance industry is regulated by the Australian Prudential Regulation Authority (APRA) under the *Insurance Act*. 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 for the general insurance industry.

285. The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia and oversees the General Insurance Code of Conduct—a self-regulatory code that binds all general insurers who are signatories to it.<sup>369</sup>

## Income protection insurance

286. Income protection insurance (otherwise known as personal accident, sickness and disability insurance) 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, that is, a wage substitute. Income protection insurance is of particular importance to certain individuals such as sole traders, where workers' compensation is not available.

287. Income protection insurance is generally unavailable to persons aged over 65.<sup>370</sup> This leaves those people who choose to continue to work after that age unable to cover themselves in this way in the event of illness or injury. By comparison, some income protection policies have a limited benefit period and only provide a wage subsidy for a limited time spent out of the workforce (generally two or five years).<sup>371</sup> This could have adverse implications for mature age workers who are forced to exit the workforce and upon the expiry of their benefit period must attempt to re-enter employment. Anecdotal evidence provided to the ALRC indicates that age discrimination affects

368 The power to legislate in relation to insurance is found in s 51(xiv) and (xx) of the *Australian Constitution*.

369 The Code is approved by the Australian Securities and Investment Council (ASIC) pursuant to s 1101A of the *Corporations Act 2001* (Cth).

370 Aon Hewitt, 'Time for a Change in Executive Remuneration Design?' (2011) 1(2) *HR Connect Australia*

371 Income Protection Direct, *Income Protection Quotes* (2012) <[www.incomeprotectiondirect.com.au/income-protection-insurance/compare-quotes](http://www.incomeprotectiondirect.com.au/income-protection-insurance/compare-quotes)> at 19 April 2012.

people seeking employment from the age of 45.<sup>372</sup> This, compounded by illness or injury and a substantial period out of the workforce, could present a barrier to older workers.

288. In addition, premiums for cover by income protection policies generally increase exponentially with age. These gaps in the availability of income protection insurance for workers aged over 65 may necessitate reliance upon retirement savings or the Age Pension for any illness or injury sustained through work and consequently acts as a disincentive to paid employment. It may also discourage mature age workers from embarking on self-employed enterprises as a transitional phase to retirement.

### ***Travel insurance***

289. Travel insurance provides for the payment of agreed sums to cover losses or expenses incurred in the course of travel, including medical expenses. Anecdotal evidence suggests that age limitations and higher insurance premiums are placed on travel insurance policies thereby excluding insurance for some mature age persons.<sup>373</sup>

290. The higher cost, or unavailability, of travel insurance for some mature age persons may act as a barrier to work where a person is required to travel as part of his or her employment or wish to volunteer overseas or interstate.

### ***Insurance cover in the workplace***

291. Personal accident and public liability insurance is generally taken out by organisations that have volunteer members. In some cases, the insurance policy may not cover volunteers over a certain age or be severely limited in covering older persons. This may act as a barrier to mature age persons participating in a volunteer capacity,<sup>374</sup> as demonstrated by the case study below:

In one case, a group of retired workers in a small country town offered to assist the state government to keep their railway station open by volunteering to build up the existing platform to the required height. However, their offer of voluntary assistance was refused because, due to their age, they could not be covered by the government's insurance provisions.<sup>375</sup>

372 Australian Human Rights Commission, *Age Discrimination--Exposing the Hidden Barrier for Mature Age Workers* (2010).

373 See, for example, media coverage on the issue: K Needham, 'Cap on Age Forces Tests for Travel Insurance', *Sydney Morning Herald* (Sydney), 13 January 2003; B Shorten, 'Picking on Aged Australians is a Dangerous Policy', *The Daily Telegraph* (Sydney), 7 December 2011; J Fraser, 'Never too old to shop around online', *Sydney Morning Herald*, 25 September 2011.

374 Volunteering Australia, *Submission to the Core Consultative Group on Age Discrimination* (2002). Volunteering Victoria, *Submission to the Inquiry into the opportunities for participation of Senior Victorians* (2011); Z Gill, *Older People and Volunteering* (2006), produced for the Office of Volunteers. In Tasmania the Office of the Anti-Discrimination Commissioner is undertaking an inquiry into the matter and released *Volunteers, Insurance & Age: Investigation Issues Paper* in May 2011; Volunteering Australia, *Submission to the Core Consultative Group on Age Discrimination* (2002), 6, 9.

375 Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination* (2000), 84.

292. There may be increased costs to insuring a workplace with mature age workers. This may lead to employers discriminating against mature age workers and job seekers<sup>376</sup> as the cost to the employer is increased and therefore act as a barrier to employment.

### ***National Insurance Disability Scheme***

293. The recently announced National Disability Insurance Scheme<sup>377</sup> will not extend to provide support to people over the age of 65. This could potentially present a barrier to work for mature age people with disability.

### ***Age Discrimination Act exemption***

294. The issues identified above are of a private nature—insurance contracts are made between insurers and the insured rather than through any legislative instrument. The current exemption in the *Age Discrimination Act 2004* (Cth) enables insurance companies to determine the premium of a policy or whether a policy is available to a person due to their age.<sup>378</sup> The discrimination must be:

- 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.<sup>379</sup>

295. Although s 54 of the *Age Discrimination Act* provides for the Australian Human Rights Commission and its President to have the power to require the production of actuarial or statistical data where a person has acted in a way that would, apart from the above exemptions, be unlawful,<sup>380</sup> the data relied upon by insurance companies to set their age caps and premiums is not publicly available.

296. The current consolidation of anti-discrimination legislation is considering the exemption on which insurance companies rely. The ALRC is monitoring progress of the consolidation process including the exemption for insurance.

### ***Options for reform***

297. While age-based limitations and premiums in insurance are not legislated, there may be other mechanisms of regulation that could remove the insurance-related barriers to work for mature age persons. One such mechanism is through the Insurance Reform Advisory Group, which will consider the insurance needs of older

376 Westfield Wright Pty, *Attitudes to Older Workers* (2012), 9.

377 National Disability Insurance Scheme, *Website* <[www.ndis.gov.au](http://www.ndis.gov.au)> at 19 April 2012.

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

379 *Ibid* s 37(3).

380 It is an offence not to provide the source of any such actuarial or statistical data if required to do so and attracts a penalty of 10 penalty units (s 52). It is an offence of strict liability (s 52(3)).

Australians.<sup>381</sup> Alternatives may include making statistical or actuarial data publicly available or through industry Codes of Practice.

**Question 50.** In what ways, if any, do age-based limitations and higher premiums for insurance policies for mature age persons act as a barrier to participation in the workforce or other productive work?

**Question 51.** In what ways, if any, should the insurance industry be regulated to address barriers to mature age participation in the workforce or other productive work? For example:

- (a) Should insurance industry Codes of Practice be amended to encourage or mandate the removal or extension of age-based limitations on insurance policies?
- (b) Should a regulatory framework be introduced to ensure that age-based limitations on insurance policies are appropriate?

**Question 52.** What other changes, if any, should be made to insurance laws to remove barriers to mature age participation in the workforce or other productive work?

## Migration

298. One of the key Australian Government policy objectives underlying this Inquiry is to attract and retain people in the workforce, and paying taxes, longer. A complementary objective is to utilise the skills and experience of older persons, including to fill labour market shortages.

299. The Department of Immigration and Citizenship (DIAC) is responsible for the administration of the *Migration Act 1958* (Cth). The object of the *Migration Act* is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.<sup>382</sup> The *Migration Act* empowers the Minister for Immigration and Citizenship to grant a non-citizen a visa to remain in Australia, either temporarily or permanently.<sup>383</sup>

300. Australia's Skilled Migration Program is aimed at attracting highly skilled workers from overseas to fill labour market shortages. But where the migration law system imposes barriers that could discourage older persons from migrating to Australia in order to participate in the workforce, this may conflict with Government policy objectives in relation to utilising the skills of older persons. However, there are also concerns that mature age skilled migrants may contribute to the financial strain on

381 Insurancenews, *Shorten tells insurers to get with the times on older workers* <<http://insurancenews.com.au/regulatory-government/shorten-tells-insurers-to-get-with-the-times-on-older-workers>> at 27 February 2012.

382 *Migration Act 1958* (Cth) s 4.

383 *Ibid* s 29.

the Australian economy posed by an ageing population where they are not in a position to self-fund retirement.<sup>384</sup>

301. There are two pathways by which a person can gain entry into Australia as a skilled migrant: the General Skilled Migration (GSM) program (for those who are not sponsored by an Australian employer), or through Employer Nominated Categories (where a person needs to be sponsored by an employer).<sup>385</sup>

### General Skilled Migration

302. The current age threshold for GSM visas is set at 50 years of age.<sup>386</sup> According to DIAC, the age limit 'reflects the level of benefit to the Australian work force and economy expected of persons entering the Australia under this stream of the migration program'.<sup>387</sup>

303. In order to obtain a range of visas under the General Skilled Migration category, applicants must obtain a pass mark in a 'points test'.<sup>388</sup> The points test provides a 'transparent and objective method of selecting skilled migrants', based on a number of factors, including the applicant's age at the time of application.<sup>389</sup> The points that may be awarded for age for GSM visa applicants range from 0–30, with the least points for applicants aged 40–44 and no points for those aged 45–49.<sup>390</sup>

304. The age limit and the points test reflect the policy position that:

workers do not reach their full potential until their mid to late 40s, and that significant work experience is a key factor in determining a skilled migrant's labour market performance. While applicants aged 45–49 will be eligible to apply, no points will be

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384 Such arguments were made in Joint Standing Committee on Migration, *To make a contribution: Review of skilled labour migration programs 2004*, Parliament of the Commonwealth of Australia, 109. Such concerns about strains on the welfare system may be tempered by the fact that there is a 10 year waiting period for eligibility for the aged pension.

385 See Department of Immigration and Citizenship, *Professionals and other Skilled Migrants* <[www.immi.gov.au/skilled/general-skilled-migration/visa-options.htm](http://www.immi.gov.au/skilled/general-skilled-migration/visa-options.htm)> at 10 April 2012. However, some visas in the GSM program require an applicant to be sponsored by a relative or a nomination from a state or territory government.

386 The requirement that a person be under 50 years of age is expressed as a criterion for making a valid application. For example, see, *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.

387 Department of Immigration and Citizenship, *Procedures Advice Manual 3*, Schedule 6B General points test—Qualifications and points (General Skilled Migration visas).

388 See Department of Immigration and Citizenship, *What is the points test* <[www.immi.gov.au/skilled/general-skilled-migration/points-test.htm](http://www.immi.gov.au/skilled/general-skilled-migration/points-test.htm)> at 10 April 2012. These include: Skilled (Migrant) (Class VE) Independent subclass 175; Skilled (Migrant) (Class VE) Sponsored subclass 176; Skilled (Provisional) (Class VC) Regional—Sponsored subclass 487; Skilled (Provisional) (Class VF) Regional—Sponsored subclass 475; Skilled (Residence) (Class VB) Independent subclass 885; Skilled (Residence) (Class VB) Sponsored subclass 886.

389 See *Migration Regulations 1994* (Cth) sch 6. Other factors include the applicant's English skills, employment in a skilled occupation in Australia or overseas, educational qualifications and nomination or sponsorship by a state/territory government.

390 Ibid, sch 6B which applies to GSM visa applications made after 1 July 2011.

awarded for age. This means that those applicants will have to have outstanding results in other areas in order to meet the pass mark.<sup>391</sup>

305. Both New Zealand and Canada have similar skilled migration programs. In New Zealand, the age limit is set at 55 years of age and points are available under the points test for those in the 40–44, 45–49 and 50–55 age ranges.<sup>392</sup> In Canada, there is no upper age limit, however, zero points are awarded for those who are aged 54 or above at the time of application.<sup>393</sup>

306. The current arrangements with respect to age may impose a barrier that could discourage mature age skilled migrants seeking to work in Australia. The age limits may also in turn affect Australia's ability to compete with other countries for such skilled workers. For example, 12.3% of principal applicants in New Zealand's skilled migration program were aged between 45–54, compared to only 1.6% for Australia.<sup>394</sup> This may suggest that the higher age limit is a factor in New Zealand's ability to attract highly skilled mature age workers.

**Question 53.** A skilled migration visa under the *Migration Regulations 1994* (Cth) may only be obtained if the applicant is under 50 years of age. Should the age limit be increased?

**Question 54.** In order to obtain a range of visas under the General Skilled Migration category, applicants must obtain a pass mark in a 'points test' where points are allocated according to age, with no points for those aged 45 and over. Should this be amended, and if so, how?

### Permanent employer-sponsored visa program

307. Most permanent employer-sponsored visas do not require an applicant to meet the 'points test'. However, one criterion for applying for such visas is that the applicant is under 45 years of age.<sup>395</sup>

391 Department of Immigration and Citizenship, *Procedures Advice Manual 3*, sch 6B General points test - Qualifications and points (General Skilled Migration visas).

392 These are 20, 10, and 5 points, respectively. See Immigration New Zealand, *Points and bonus points* <[www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply/points/default.htm](http://www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply/points/default.htm)> at 10 April 2012.

393 See Citizenship and Immigration Canada, *Skilled Workers and Professionals—Selection factors Age* <[www.cic.gc.ca/english/immigrate/skilled/factor-age.asp](http://www.cic.gc.ca/english/immigrate/skilled/factor-age.asp)> at 10 April 2012.

394 International Migration Settlement and Employment Dynamics, *Competing for Skills: Migration Policies and Trends in New Zealand and Australia* (2011), prepared for Department of Labour, 70.

395 For example, a time of application criterion for Employer Nomination (Migrant) Subclass 121 visa specifies that an applicant be less than 45 years of age at the time of application: *Migration Regulations 1994* (Cth), sch 2, cl 121.210(1)(a).

308. In March 2012, the Australian Government announced reforms to the employer-sponsored visa program, to take effect from 1 July 2012.<sup>396</sup> The reforms seek to streamline and simplify the visa classes, and create simplified pathways to permanent residence. As part of the package of reforms, the upper age limit for visas in the employer-sponsored program are to be raised from 45 to 50 years of age.<sup>397</sup>

309. The upper age limit will apply unless the person is an 'exempt person'. DIAC has indicated that age exemptions will be available to applicants:

- nominated in specific occupations where the typical age profile is older due to the specialised or technical nature of the work;<sup>398</sup> or
- applying through the Temporary Residence Transition stream and has been employed with their sponsor for the last four years, with a salary equivalent to the Fair Work high income threshold (currently \$118,000).<sup>399</sup>

310. These exemptions are intended to 'provide more clarity and certainty to applicants, while ensuring that visa programs are still able to respond flexibly to unique cases'.<sup>400</sup> It is not clear how these reforms will be implemented in legislation, most likely through changes to the *Migration Regulations 1994* (Cth).

**Question 55.** An applicant over 50 years of age may not apply for a permanent employer-sponsored visa under the *Migration Regulations 1994* (Cth) from 1 July 2012 unless they are an 'exempt person'.

- (a) Should the age limit be increased?
- (b) What considerations should be taken into account in determining whether a person should be eligible for an age exemption?

396 Department of Immigration and Citizenship, *Reforms to the Permanent Employer-Sponsored Visa Program* <[www.immi.gov.au/skilled/skilled-workers/\\_pdf/perm-sponsored-reforms.pdf](http://www.immi.gov.au/skilled/skilled-workers/_pdf/perm-sponsored-reforms.pdf)> at 10 April 2012. It is not clear how these changes will translate to legislation, as they are likely to result from changes to the *Migration Regulations 1994* (Cth), rather than from legislative change to the *Migration Act 1958* (Cth).

397 Ibid.

398 Ibid. For example, researchers or scientists employed by the Commonwealth Scientific and Industrial Research Organisation or the Australian Nuclear Science and Technology Organisation.

399 This could mean, for example, that a 46 year old person who is sponsored for four years could be eligible for permanent residence when he or she is 50. Such a situation is not possible under the current arrangements.

400 Department of Immigration and Citizenship, *Reforms to the Permanent Employer-Sponsored Visa Program* <[www.immi.gov.au/skilled/skilled-workers/\\_pdf/perm-sponsored-reforms.pdf](http://www.immi.gov.au/skilled/skilled-workers/_pdf/perm-sponsored-reforms.pdf)> at 10 April 2012.