



8 April 2016

Ms Jenny Wilkinson
Division Head
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuationobjective@treasury.gov.au

Dear Ms Wilkinson

Objective of Superannuation

I am pleased to enclose a submission prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia.

The Committee would welcome the opportunity to discuss the submission further. In the first instance, please contact:

- Ms Michelle Levy, Chair, Superannuation Committee T: 02 9230 5170
E: michelle.levy@allens.com.au or
- Mr Luke Barrett, Deputy Chair, Superannuation Committee T: 03 8831 6145
E: luke.barrett@unisuper.com.au.

Yours sincerely

Margery Nicoll.

MARGERY NICOLL
Deputy Chief Executive Officer



Law Council
OF AUSTRALIA

Objective of Superannuation

The Treasury

Submission by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia

6 April 2016

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About the Law Council of Australia's Superannuation Committee

1. The Law Council of Australia is the peak national representative body of the Australian legal profession; it represents some 60,000 legal practitioners nationwide. [Attachment A](#) outlines further details in this regard.
2. This submission has been prepared by the Law Council of Australia's Superannuation Committee (the Committee), which is a committee of the Legal Practice Section of the Law Council of Australia.
3. The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

Structure of submission

4. Our response to the Australian Government's Discussion Paper entitled "Objective of Superannuation" of 9 March 2016 is in three short parts:
 - our main submission;
 - some further suggestions; and
 - a brief outline of some existing legislative provisions that are relevant to the objectives of superannuation.

Main submission

5. The Government proposes to state the objectives of the superannuation system in legislation. In our view, this is not something that should be done "at large". Instead, the legislation should make it very clear that the objectives are only to be used for the limited purpose of assessing future proposed legislative and regulatory reforms. This is important for a number of reasons.
6. The main reason is that the objectives of the superannuation system are already reflected in a range of existing legislative provisions, most significantly in the [Superannuation Industry \(Supervision\) Act 1993](#) (Cth) (the SIS Act). If the "new" objectives that are proposed to be introduced are not expressed to be for the limited purpose of assessing future legislative and regulatory reforms (as suggested), then there would be a very real prospect of the "new" objectives conflicting with the existing objectives. We provide further details of the existing objectives below, in the section headed "Existing legislative provisions relevant to the objectives of superannuation".
7. Our submission is consistent with the statement in the Discussion Paper that "the purpose of stating the objectives of the superannuation system in legislation is only to guide the policy-making process". The provisions of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) might well serve as a model for achieving that aim.

Further suggestions

8. Consistent with our main submission, when drafting objectives and introducing them into legislation, it should be expressly stated that the objectives:
 - are not intended to bind or constrain trustees in the same way that the "sole purpose test" binds and constrains trustees;
 - are not to be taken into account when interpreting other statutory provisions (achieving this outcome will probably require an amendment to the *Acts Interpretation Act 1901* (Cth): see, in particular, section [15AB](#), concerning the use of extrinsic material in the interpretation of an Act); and
 - are not intended to be an exhaustive statement of how superannuation may be utilised (for example, a primary objective of providing retirement outcomes would not prohibit the commutation of pensions or the payment of death or disablement benefits, nor the release of benefits in cases of financial hardship or on compassionate grounds, nor the splitting of benefits following dissolution of marriage).
9. We do not express a view on how the adequacy of retirement incomes should be expressed or defined. However, we do suggest that:
 - if a statement of adequacy is to be included (e.g. "comfortable" or "adequate" or otherwise), then this should be clearly defined so that those responsible for applying the legislation know precisely what the relevant criteria should be; and
 - if a clear definition cannot be documented, it would be better to avoid including broad language in legislation as this would introduce ambiguity and uncertainty into an initiative which seems to be intended to deliver clarity and certainty of purpose.
10. If the proposed legislation will contemplate there being subsidiary objectives, it seems sensible for there to be a general principle that any subsidiary objectives (including any that may be introduced in future) should be consistent with the primary objective.
11. Assuming the objectives are only intended to be used when assessing future legislation, the subsidiary objectives should not stray into territory which concerns how trustees exercise their powers and discretions, such as a power to make investments. For example, a subsidiary objective of investing in infrastructure would seem to imply that trustees must comply with the objectives.
12. With careful wording, the proposed objectives could be legislated through an amendment to existing legislation (e.g. the SIS Act) or through stand-alone legislation. Particular care would be needed if including the objectives in the SIS Act because of the potential to affect the interpretation of existing statutory duties and the operation of the existing "sole purpose test", and because the new objectives may apply to matters which go beyond the scope of the SIS Act, such as tax matters.

Existing legislative provisions relevant to the objectives of superannuation

13. The existing relevant "objective" provisions are found primarily, but by no means exclusively, in the SIS Act. That Act defines a "superannuation fund" as a fund that is an "indefinitely continuing ... provident, benefit, superannuation or retirement fund" (section [10\(1\)](#)). The definition also extends to include "a public sector superannuation scheme", which in turn means a scheme "for the payment of superannuation, retirement or death benefits" (section [10\(1\)](#)).
14. Further, section [62](#) of the SIS Act is headed "Sole purpose test". Section 62 requires the trustee of a regulated superannuation fund to ensure that the fund is maintained solely for one or more "core purposes", or for one or more core purposes and one or more "ancillary purposes". The "core purposes" relate, broadly, to benefits payable on retirement, attaining a specified age, or death. The "ancillary purposes" relate, broadly, to benefits payable on termination of employment, cessation of work or death, or in other circumstances approved by APRA. APRA has in fact approved other circumstances as comprising ancillary purposes: see the [Superannuation Industry \(Supervision\) approval of provision of benefits No.1 of 2007](#). That is the instrument which enables superannuation funds to provide, for example, disablement benefits (including insured disablement benefits) and financial hardship benefits.
15. While we have great respect for the work of the *Financial System Inquiry (FSI)*, the primary and subsidiary objectives proposed by the FSI do not take into account the purposes and objectives of superannuation as reflected in the existing relevant provisions.
16. The FSI said the primary objective of the system should be: "To provide income in retirement to substitute or supplement the Age Pension". Yet the FSI made no mention of the fact that providing death benefits is, as noted, one of the "core purposes" for which a superannuation fund may be maintained. The primary objective also seems to exclude, or at least diminish, the role of lump sum retirement benefits. Yet it is widely accepted that lump sum retirement benefits are entirely appropriate in many circumstances, especially in the case of small account balances. As another example, the FSI's primary and subsidiary objectives say nothing about disablement benefits, with this apparently suggesting that a key feature of the existing superannuation system may not have any role in the system's future.
17. If the Government is minded to adopt the FSI's primary or subsidiary objectives, the Government will need to carefully consider the interaction between those objectives, on the one hand, and the existing relevant provisions, on the other. As noted in our main submission, we suggest this be achieved by limiting the purposes for which the "new" objectives may be used.
18. Finally, the Government should also be mindful that, leaving aside the SIS Act, there is also a great deal of other existing legislation that applies to the superannuation system and informs the system's current purposes, for example the superannuation guarantee legislation and the income tax legislation.

Contacts

19. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Ms Michelle Levy, Chair, Superannuation Committee T: 02 9230 5170
E: michelle.levy@allens.com.au or
- Mr Luke Barrett, Deputy Chair, Superannuation Committee T: 03 8831 6145
E: luke.barrett@unisuper.com.au.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.