

File Name: 2018/03

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

via e-mail to [superannuation@treasury.gov.au](mailto:superannuation@treasury.gov.au)

Dear Mr Jeremenko,

**Re: Consultation on the *Early release of superannuation benefits***

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission in response to the consultation on the *Early release of superannuation benefits: Under compassionate and financial hardship grounds and for victims of crime compensation* (Consultation Paper).

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 14.8 million Australians with superannuation.

**A. General comments**

ASFA welcomes the consultation on the early release of superannuation benefits. Our overarching observation is that the sole purpose of the superannuation system is to save and invest to produce an income in retirement and, accordingly, it should not be used to fund gaps in other policy areas – in particular healthcare and income support (e.g. where Medicare does not covering particular treatment/procedures).

As such, we are pleased to hear that the Department of Health is undertaking a consultation process to learn more about the early release of superannuation for medical purposes, including the reasons for the increase in the number of applications and the amount released upon medical grounds, and that the findings will feed into this review.

To the extent that superannuation is accessed early it will have the effect of reducing the amount available in retirement. Any such reduction in retirement income will serve to increase the reliance on the age pension in future.

Acknowledging that some people will need financial assistance and early access to their superannuation, the current level of superannuation benefits generally is not sufficient to cater for both present needs, such as healthcare, and needs in retirement. Accordingly, if there is a desire to allow people to access their superannuation early, the level of contribution to superannuation will need to increase to compensate for this.

There are, and will always be, cases where early access to superannuation can be justified. Given that superannuation is for retirement, however, there should be stringent controls over enabling such access.

As allowing early release of superannuation generally will result in greater reliance on the age pension in future this means that future taxpayers effectively are subsidising the member's current expenditure. This is grounds for ensuring that early access to superannuation should be restricted to circumstances where it is essential to do so.

The main issues are whether there is a real and immediate financial need, for medical or other reasons, and whether the member potentially may have access to financial resources other than superannuation.

With respect to access to financial resources, ASFA members have suggested that, if a member has other assets, they should be utilised first before granting early access to superannuation. The lack of liquidity of a particular asset, for example an investment property, should not be a reason to discount it as a financial resource as, for example, it may be possible for the member to borrow against it.

Accordingly, ASFA members have recommended that a type of asset test - more than just 'cash in the bank' - should be developed with respect to claims made on compassionate grounds.

In addition, to make it easier for members and advisers to understand a member's potential eligibility for early access, and to minimise the compliance burden on affected stakeholders (including the ATO and fund trustees) we recommend making the criteria as objective and clear as possible, while retaining an appropriate degree of flexibility and discretion to provide for different circumstances.

## **B. Responses to specific questions**

### **Principles underpinning early release**

#### **Questions**

- 0.1. Do these proposed principles provide an appropriate guide to determine the nature and scope of the rules for early release under compassionate and financial hardship grounds, and for victims of crime compensation? If no, what should the principles be?
- 0.2. Having regard to these principles, should early release of superannuation benefits generally be more or less difficult to obtain?

01. We support the proposed guiding principles as providing an appropriate guide to determine the nature and scope of rules for the early release of superannuation benefits.
02. On balance, having regards to these proposed guiding principles, we believe that where there is a genuine case for early release of superannuation on compassionate grounds or to alleviate financial hardship, generally we should not be increasing the barriers to gain such early access. Having said that, it is clear there are shortfalls/gaps with respect to certain medical treatments and procedures that should be addressed within the public health system, not by the superannuation system. Given that early access to superannuation to finance medical treatment effectively amounts to a cross-subsidisation of the public health system by the superannuation system, there is a need for minimum eligibility criteria to be specified to ensure that the right balance is being struck when determining whether to grant early access to superannuation and how much superannuation to release.

## Part 1: Early release on compassionate grounds

### Financial capacity

#### Question

- 1.1 Should the assessment of financial capacity be made more prescriptive and/or objective? If so, how? What information might applicants need to provide?

- 1.1 ASFA members have indicated that the assessment of financial capacity should be more objective, including investigating the merit of introducing some form of means testing, in particular an asset test. As per the proposed guiding principles in the Consultation Paper, early access to superannuation should be considered only as a last resort. If a member has significant other assets outside superannuation that could be accessed or borrowed against, this avenue should be explored prior to any consideration of granting early access to superannuation. Similarly, consideration could be given to requiring the Regulator to have regard to the income/earnings of the member at the time of making the application.

### Medical treatment grounds

#### Questions

- 1.2 What factors might be driving the increase in the amount of superannuation released on medical grounds and are these factors any cause for concern?
- 1.3 Do the current provisions for early release on medical grounds strike the appropriate balance between preserving income for retirement and providing assistance in times of genuine hardship? If no, what are the alternatives?
- 1.4 Should there be a limit on the number of releases permitted within a certain timeframe (for example, 12 months) and/or should there be cashing restrictions on the amount released? If so, should there be different restrictions for different medical conditions?

- 1.2 Factors that may be driving the increase in the amount of superannuation released on medical grounds include growing gaps in the public health care system. Another potential factor that could be explored is the role played by the third party commercial providers who facilitate a relationship with a treating practitioner as well as assisting members with their application to the Regulator.

- 1.3 The current provisions for early release on medical grounds, as drafted, generally appear to strike the appropriate balance between preserving income for retirement and providing assistance in times of genuine hardship. One avenue for investigation could be the application of the provisions in practice.
- 1.4 We do not agree that there should be a limit imposed on the number of releases permitted within a certain timeframe or a cashing restriction on the amount released. If the illness/injury is life threatening, or the member is in acute or chronic pain, or is suffering from an acute or chronic mental disturbance, then it is not reasonable or appropriate to impose a limit on the number or amount of releases.

### Treatments and costs that can be covered

#### Questions

- 1.5 Have you observed any trends in the types of treatments that are being funded by superannuation benefits and are these trends any cause for concern?
- 1.6 Are there certain treatments for which early release of superannuation should not be permitted? If so, what is the basis upon which these treatments should be excluded?
- 1.7 When might ART (IVF) be necessary to treat a life threatening illness or alleviate acute or chronic pain or mental disturbance (in general – noting that this will depend upon the specific circumstances of each case)?
- 1.8 When might bariatric surgery be genuinely necessary to treat a life threatening illness or alleviate acute or chronic pain or mental disturbance (in general – noting that this will depend upon the specific circumstances of each case)?
- 1.9 Should the rules explicitly require that the Regulator be satisfied that the amount claimed for a particular treatment is ‘reasonable’? If so, what evidence might be relevant to that determination?

- 1.5 One ASFA member, a large industry fund, has indicated that during the last 12 months the majority of claims for early release on compassionate grounds were for the following reasons:
- dental work
  - Assisted Reproductive Treatment (ART), such as In Vitro Fertilisation
  - weight loss surgery

- elective surgery - e.g. knee reconstruction - where there is an extensive waiting list for treatment as a public patient in a public hospital and, as the member feels they cannot afford to wait that long for treatment, they elects to be treated privately.

- 1.6 Treatments for which early release of superannuation should be permitted are those that are directly treating an illness/injury that is life threatening or acute/chronic pain or an acute/chronic mental disturbance. Provided these conditions are met such treatment should be included. The key issue appears to be the administration of the eligibility criteria and whether the conditions being treated meet the criteria.
- 1.7 ART may be necessary to alleviate chronic mental disturbance of the member or their dependant as a result of their infertility.
- 1.8 Bariatric surgery may be necessary to treat a life threatening illness or alleviate chronic pain or mental disturbance in circumstances where the member or dependant's morbid obesity genuinely may be causing, or exacerbating, the illness/injury or chronic pain or chronic mental disturbance. Conversely, the member's or dependant's morbid obesity may be preventing, or materially reducing the effectiveness of, treatment for a life threatening illness/injury, chronic pain or chronic mental disturbance. By way of example, in some cases, in order for a patient to be eligible to be placed as a recipient on an organ transplant list, they need to be under a certain BMI and on occasions bariatric surgery may be the only viable option.

One option may be to consider requiring certification from a medical specialist - other than a bariatric surgeon – that the medical treatment is necessary to treat a life threatening illness/injury, chronic pain or chronic mental disturbance. Allowing the treating specialist – in this case the bariatric surgeon - to be the sole specialist certifying as to the need for the surgery represents a conflict of interest.

- 1.9 Given that early access to superannuation is being considered, the rules should require the Regulator to be satisfied that the amount claimed for a particular treatment is 'reasonable'. The evidence could take the form of certification from a relevant specialist that the treatment is/has been performed in a cost effective manner (e.g. not overseas unless necessary because not available in Australia/state of residence). To the extent that the cost of the treatment exceeds/exceeded what is reasonable in the circumstances the Regulator would approve the release of funds only up to the reasonable amount.

## Dental treatment

### Question

- 1.10 Should there be an additional category of early release in respect of dental treatment? If so, under what circumstances should early release be available and should there be any limits or restrictions?

- 1.10 There should be an additional category of early release in respect of dental treatment, where that treatment is necessary to alleviate acute or chronic pain or the member is at risk of recurring infections. This would have the benefit of being clearer to members and advisers and would contribute to fairer, more consistent and effective outcomes. The amount released should be restricted to a reasonable amount to cover the treatment.

## Severity of condition to be treated

### Question

- 1.11 Should SIS Regulation 6.19A(3)(a)(ii) and (iii) be amended to refer to ‘treatment’ rather than ‘alleviation’ of acute or chronic pain? Alternatively, should those provisions be removed entirely (so that early access is only available where the individual’s condition is life-threatening)? What would be the consequences of this approach?

- 1.11 The SIS Regulations should be amended to clarify that only in circumstance where the underlying illness giving rise to the acute or chronic pain, or the injury causing the pain, cannot be cured or heal can funds be released for medical treatment that is necessary to alleviate the pain, but not cure/heal the condition.

## Medical practitioners

### Questions

- 1.12 Should the reference to a medical specialist in SIS Regulation 6.19A(3) be clarified to ensure that the practitioner is a specialist in the field most relevant to the condition being treated?
- 1.13 Should the Regulator be entitled to seek a second opinion from an approved medical practitioner/s, or should the individual be required to obtain a reference from a list of approved medical practitioners, to ensure the objectiveness of the assessment?

- 1.12 Given the significance of the early release of superannuation benefits, not only should the reference to a medical specialist in the SIS Regulation be clarified to ensure that the practitioner is a specialist in the field most relevant to the condition being treated, but certification should be received from a second specialist in that field.
- 1.13 In our view the individual should be required to obtain a reference from a second specialist in the field, to ensure the objectiveness of the assessment as to the necessity for, and appropriateness of, the treatment.

### Funeral expenses grounds

#### Questions

- 1.14 Should early access to superannuation benefits to meet expenses associated with palliative care, death, funeral or burial be limited to where there is a dependency relationship? Why/why not? Could there be any unintended consequences from expanding this provision?
- 1.15 Should there be a maximum amount that can be released to meet a funeral expense? (For example, the amount that the Regulator considers reasonable).

- 1.14 Generally early access to a member's superannuation to meet the expenses associated with the palliative care, death, funeral or burial of another was limited to where there is/was a dependency relationship between the member and that person, as in this circumstance the member has a responsibility to provide for them. In circumstances where the ill or deceased person is/was reliant upon the member to provide financial assistance for palliative care/a funeral, even if they are a sibling or a parent, there is a strong argument that the person is/was financially dependent on the member and so would be a dependant anyway. We would have some concerns if the provision were to be extended to cover travel to attend a funeral.
- 1.15 There should there be a maximum amount that can be released to meet a funeral expenses. That amount should be an amount the Regulator considers reasonable for a base level funeral in the circumstances.

## Housing grounds

### Questions

- 1.16 Should early release of superannuation benefits be available to meet mortgage payments regardless of whether a person's name is on the mortgage title for their principal place of residence? What might be the implications of broadening the provisions in this way and what additional limitations might be required? For example, should release be limited to dependants or spouses or partners?
- 1.17 Is there a fundamental difference between meeting mortgage payments and meeting rental payments which would warrant a difference in treatment (for example, in respect of the asset available to mortgagees once all repayments have been made)? Or should early release on compassionate grounds be extended to include individuals who are unable to meet rental payments? If so, what evidence should be required and what should be the threshold for release (for example, in rental arrears or rental eviction notice)?

- 1.16 Firstly, it is unclear as to why, under the regulations, early release of superannuation benefits are not able to be made available to meet mortgage payments for a member's principle place of residence, in circumstances where their name is not on the title or they are not a party to the mortgage. All that the regulations require is that it be with respect to the member's principle place of residence.

Even if this is the correct interpretation of the regulations, early release of superannuation benefits should be able to be made available to meet mortgage payments for a member's principal place of residence, even where their name is not on the title and/or they are not a party to the mortgage. If there were concerns about the provision being gamed it could be restricted to circumstances where the person whose name is on the title/mortgagor is a spouse/partner or dependant. An additional limitation could be a minimum period of residence, possibly evidence by tax returns of the member, and making payment directly to the mortgagee.

- 1.17 The fundamental difference between meeting mortgage payments and meeting rental payments is that with the former the (ultimate) ownership of the principle place of residence represents a long-term financial asset that will help to maintain a reasonable standard of living in retirement.

That distinction may not be of particular relevance, however, if the objective of early release is to relieve financial hardship and prevent eviction/homelessness. If this is the stated objective then there should be no difference in treatment between individuals who are unable to meet rental payments and those unable to meet mortgage payments. We acknowledge, however, that potentially making early access to superannuation available for rental payments would be at risk of being open to be exploited and could have unintended consequences.

The necessary evidence would be similar to financial hardship, such as a copy of bank statements, as proof of the member's inability to pay, together with a statement of other financial assets that could be utilised or borrowed against, such as an investment property. The threshold for release should be a rental eviction notice.

### Severe disability grounds

#### Questions

- 1.18 Are the current disability grounds fit for purpose, or should early release be extended, for example, to disability aids? If the latter, which expenses should be included, what evidence should be required, and should there be a cap on funds released?
- 1.19 Should individuals seeking early release of superannuation under disability grounds be required to demonstrate that they have sought assistance from other Government or non-Government programs prior to being approved? If so, how should this requirement be administered?

- 1.18 This matter reflects our overarching observation that superannuation should not be used to fund gaps/shortfalls in other policy areas, such as in the National Disability Insurance Scheme.

The current disability grounds are fit for purpose and should not be extended.

- 1.19 Individuals seeking early release of superannuation under disability grounds should be required to demonstrate that they have sought assistance from other Government or non-Government programs prior to being approved. Access to superannuation should be a last resort.

## Regulator's residual discretion

### Question

- 1.20 Should the Regulator's residual discretion in SIS Regulation 6.19A(1)(f) be removed? What would be the consequence of doing so?

- 1.20 The Regulator's residual discretion in SIS Regulation 6.19A(1)(f) should not be removed. The existence of a discretion is important to ensure that the regulations are administered in a fair and effective manner, as it enables the Regulator to treat similar cases alike, where a particular case does not fall strictly within the eligibility criteria.

To provide more clarity for consumers, advisers and trustees we recommend that the Regulator publish guidance as to what may, and may not, be covered under this discretion. This may have a flow on benefit of assisting in managing the costs of administering this discretion.

## Other potential new grounds, not currently in the legislation

### Victims of domestic violence

#### Questions

- 1.21 Are there situations outside of the current compassionate grounds which may justify inclusion in the early release of superannuation provisions, balanced against the need to preserve superannuation benefits to provide income in retirement?
- 1.22 Should access to superannuation benefits be available to assist victims of domestic violence? Why / why not? If yes, under what particular grounds (for example, financial hardship, homelessness, victims of crime), which expenses should be included, and what evidence should be required?

- 1.21 There are situations outside the current compassionate grounds, such as domestic violence, that may justify inclusion in the early release of superannuation provisions, albeit balanced against the need to preserve superannuation benefits to provide income in retirement.
- 1.22 Superannuation benefits should be available to assist victims of domestic violence. In many cases of domestic violence the victim does not have access to funds to support them to leave the perpetrator and find a new place to live.

We would support claims being made on compassionate grounds and would suggest that specific eligibility criteria be prescribed. The evidence should be that the member has accessed domestic violence support services, including through the welfare system.

We suggest that the amount released should be restricted to a bond to obtain new accommodation, together with an amount for short-term living costs, say for a period of 3 months, possibly using the HEM index as a guide.

## Part 2: Early release on the grounds of severe financial hardship

### Questions

- 2.1 Having regard to the necessary trade-off between simplicity, objectivity and flexibility, should the criteria for severe financial hardship be amended? If so, how? In particular, is there merit in expanding or contracting the 26-week rule and/or the definition of qualifying Commonwealth income support payments?
- 2.2 Should there be a prescribed standard of proof of being 'unable to meet reasonable and immediate family living expenses'? How can the legislation guard against non-genuine claims?

- 2.1 Consideration could be given to amending the criteria for severe financial hardship by altering the '26-week rule' to where the member is in receipt of a qualifying Commonwealth income support payment at the time of application and has been in receipt of the payment for a cumulative total of 26 weeks during the previous 52 weeks. This would work to overcome the difficulties experienced, for example, where a member may have had to forgo one week of Centrelink payments because they have worked intermittently.
- 2.2 While it would be desirable to have a standard of proof of being 'unable to meet reasonable and immediate family living expenses', this may prove difficult to prescribe in practice, as everybody's financial and personal circumstances differ greatly.

### **Part 3: Victims of crime compensation**

#### **Issue 1 – Should victims of crime have access to a perpetrator’s superannuation?**

The first issue is whether the objective of preserving an individual’s superannuation balance for retirement should continue to prevail over the rights of victims of crime in most circumstances.

##### **Question**

3.1 Should victims of crime be able to access a perpetrator’s superannuation for compensation?

3.1 Victims of crime should be able to access a perpetrator’s superannuation for compensation only in the event that there has been a criminal conviction, and only to the extent that contributions have been made by the perpetrator into their superannuation, or the superannuation of a third party, in order to defeat creditors or a compensation/restitution order.

#### **Issue 2 – Should there be a requirement for a criminal conviction?**

##### **Question**

3.2 Should access to superannuation be limited to cases where a criminal conviction has been made?

3.2 Access to superannuation should be limited to cases where a criminal conviction has been made.

#### **Issue 3 – Should it only be available for particular offences?**

##### **Question**

3.3 Should access to a perpetrator’s superannuation be available for compensation or restitution arising from all crimes, just violent crimes, or another threshold (such as the maximum penalty for offence)?

3.3 If access to superannuation is limited to cases where a criminal conviction has been made, then reliance could be placed on the judge’s discretion in making a compensation/restitution order, taking into account all of the circumstances of the case.

#### **Issue 4 – Should access to superannuation only be available if there are out-of-character contributions?**

##### **Question**

3.4 Should access to a perpetrator’s superannuation only be available if the perpetrator made irregular or out of character contributions to superannuation to shelter assets?

3.4 As superannuation is for retirement, and there may well be dependants involved, access to a perpetrator's superannuation should only be available if the perpetrator made irregular or out of character contributions to superannuation to shelter assets.

#### **Issue 5 – How might a victim's right to a perpetrator's superannuation be enforced?**

##### **Question**

3.5 How would a victim's right to a perpetrator's superannuation be enforced? How would the victim gain visibility over the perpetrator's superannuation assets?

3.5 A victim's right to a perpetrator's superannuation should be enforced in the same way criminal compensation/restitution orders are enforced. If necessary, the victim could be given a statutory right to gain visibility over the superannuation assets of the perpetrator and of the superannuation of any third parties to whom the perpetrator made irregular or out of character contributions to shelter assets. Conversely, this could form part of the process of making the order for compensation/restitution, although given that the criminal justice system generally is state based this may necessitate the states enacting legislation to give effect to this.

#### **Issue 6 – Should there be limits on the amount of superannuation that can be accessed?**

##### **Question**

3.6 How much of a perpetrator's superannuation should be available? Should the amount be different based on the perpetrator's circumstances (for example, low balances, dependent children)?

3.6 Access to a perpetrator's superannuation should only be available if the perpetrator made irregular or out of character contributions to superannuation to shelter assets.

The amount of the superannuation that should be available should be the amount of those contributions, increased by fund earnings over the relevant period, from when the contributions were made until when they are paid out of the fund. There should not be a need to vary the amount based on the perpetrator's circumstances, as all of their mandatory contributions, and any voluntary contributions in character with an established pattern of making contributions, together with the earnings on those contributions, will remain in superannuation and provide for the perpetrator's dependents and their retirement.

### Issue 7 – If access were permitted, should it only be for lump sums?

#### Question

3.7 Should access to a perpetrator's superannuation be in the form of a lump sum, portions of income stream payments or both?

How should defined benefit products and annuities that have not yet commenced payments be treated?

3.8 Should contributions into superannuation after a compensation order has been made count towards the amount that can be accessed?

3.7 Ideally, access to a perpetrator's superannuation should be in the form of a lump sum if at all possible.

Defined benefit products and annuities that have not yet commenced payments should have an offset account created, in a similar fashion to payment splitting orders made under the Family Law provision or for the purposes of administering the Division 293 tax.

3.8 If access to superannuation is only available to the extent that the perpetrator made irregular or out of character contributions to superannuation to shelter assets, then contributions made into superannuation after a compensation order has been made would not count towards the amount that can be accessed.

### Issue 8 – If access to superannuation was permitted, would it apply to existing compensation orders?

#### Question

3.9 Where a criminal conviction has been made, should victims be able to access a perpetrator's superannuation to pay either outstanding compensation or restitution orders?

3.9 Victims should not be able to access a perpetrator's superannuation to pay outstanding compensation or restitution orders. Any such amendments to the law should be prospective in effect.

### Issue 9 – Should State/Territory compensation schemes be able to recover their costs from the perpetrator’s superannuation?

#### Question

3.10 Should State and Territory compensation schemes be able to recover the cost of their payments to victims from the perpetrator’s superannuation?

3.10 If it is decided that State/Territory compensation schemes should be able to recover the cost of their payments to victims from the perpetrator’s superannuation this should only be to the extent that the perpetrator made irregular/out of character contributions to shelter assets.

### Issue 10 – Overlap with Family Law

#### Question

3.11 In circumstances where there are concurrent family law and victim of crime compensation proceedings, how should these matters be addressed and prioritised?  
What other issues might arise?

3.11 Superannuation for criminal compensation should be accessed only to the extent that the perpetrator made irregular/out of character contributions to shelter assets. Accordingly, where there are concurrent family law and victim of crime compensation proceedings, the crime compensation proceedings should be determined first, with respect to the affected contributions, prior to the family law proceedings dealing with the balance of the perpetrator’s superannuation.

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Thank you for the opportunity to provide comments on the *Early release of superannuation benefits* Consultation Paper. We would welcome the opportunity to discuss this submission with Treasury.

Should you have any questions on any of the matters raised in this submission please do not hesitate to contact me on (03) 9225 - 4021 or 0431 490 240 or via [fgalbraith@superannuation.asn.au](mailto:fgalbraith@superannuation.asn.au).

Yours sincerely



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