



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

12 February 2017

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

Email: superannuation@treasury.gov.au

Dear Sir/Madam,

Early release of superannuation benefits

The Financial Planning Association (FPA) welcomes the opportunity to provide feedback on the consultation paper: *Early release of superannuation benefits under compassionate and financial hardship grounds and for victims of crime compensation*.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

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Policy Manager

Financial Planning Association of Australia¹

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The Financial Planning Association (FPA) has more than 13,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, or working toward, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

Early release of superannuation benefits

Under compassionate and
financial hardship grounds and
for victims of crime compensation

**FPA submission to
The Treasury**

12 February 2018



Introduction

The superannuation system was established to provide significant tax benefits to Australians as a compulsory means to encourage individuals to save for retirement. Monies saved through superannuation is meant for retirement, not to dip into for expenses that should be covered by income or other savings.

However the FPA supports the early release of superannuation savings on compassionate and financial hardship grounds when it is used as a last resort, in cases of genuine hardship, and to alleviate acute or chronic pain and prolong human life, and to compensate victims of crime.

The circumstances individuals find themselves in that lead to the need to access their superannuation savings prior to retirement are in the main social issues that sit outside the superannuation system. Hence, consideration of the rules and conditions for the early access to superannuation should not be made based on the purpose and principles of the superannuation system alone.

The issues facing individuals with legitimate claims for early release of benefits are more appropriately addressed outside of the superannuation system, through improvements in the health and social security systems, and through effective affordable housing strategies for example.

However the needs of the individual confronted with valid early release circumstances must be the priority. If there is no other viable option, there is a moral obligation to support individuals through the immediate hardship over the objectives of the superannuation system and the preservation of their savings for retirement. This should be seen as an investment in an individual's recovery, health and well-being.

Superannuation trustees' fiduciary obligation applies to its members as a whole, including consideration about the sustainability and stability of the fund, which can conflict with what is in the best interest of an individual member.

However financial planners have a professional obligation to put their client's interest first and are required by law to ensure their advice is in the best interest of the client. The FPA's policy framework mirrors these obligations - our first policy pillar is to act in the public interest at all times.

The health and well-being of Australians is paramount. We would even argue that the long term financial position of an individual does not matter if their health and well-being is severely suffering.

If an individual is in legitimate need and has exhausted all other options for support, the system and processes must make it easy for them to gain early release access to their superannuation savings, with dignity, care and compassion.

We acknowledge that there may be some individuals who may try to take advantage of the early release system, however the rules and conditions of early release should not be created to target the few who are considering doing the wrong thing to the detriment of individuals in legitimate need of early access to their superannuation savings.

We support the intent for the Government to make the rules clearer and more consistent for all parties, with clear boundaries for what is considered a legitimate claim. However the system must focus on enabling those with legitimate claims to access their superannuation savings with ease, and encourage care and compassion to be employed by trustees and their representatives rather than suspicion of fraudulent behaviour.



Principles underpinning early release

Question 0.1 Do these proposed principles provide an appropriate guide to determine the grounds for early release under compassionate and financial hardship grounds, and for victims of crime compensation? If not, what should these principles be?

The proposed principles appear to 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.

However we would urge policymakers to apply a greater weighting to the application of the genuine hardship principle over the preservation principle. Assisting individuals with a legitimate immediate need has the potential to deliver long term benefits.

Question 0.2 Having regard to these principles, should early release of superannuation benefits generally be more or less difficult to obtain?

It depends on how the principles are applied. Greater consistency will ensure the rules are clearer for individuals, trustees and the Regulator. However the needs of Australians with legitimate claims is paramount.

Part 1: Compassionate grounds

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?

As indicated in the consultation paper, the current financial capacity requirement has the potential to allow individuals who may have alternate financial means, early release access to superannuation on compassionate grounds.

While the current requirements around demonstrating financial capacity may warrant attention, the financial hardship test is too harsh for this purpose.

A consistent approach and process for the assessment of financial capacity may help address this issue and the principles banks use for assessing a person's capacity to pay a loan, may be worth consideration.

The FPA notes the transfer of the responsibility for administering early release on compassionate grounds from the Department of Human Services (DHS) to the Australian Taxation Office (ATO) commencing in 2018. While this change offers efficiencies as it consolidates all release authorities under the one Regulator, it is suggested that consideration be given as to the ATO's ability to access the relevant and appropriate information required for assessing early release requests.

The ATO's focus is on past records for tax purposes and for assessing excess contributions for example. However conditions for early release relate to current time circumstances of the individual, which may differ from the information about their past circumstances previously provided to the ATO. The DHS through Centrelink is equipped to access such current time information.



The ATO should be appropriately supported and funded to ensure they can collect people's current income and appropriate financial information to assess their current time circumstances and financial capacity.

Financial planners could also play a role in assessing financial capacity. Personal financial advice takes into consideration the individual's circumstances and short, medium and long term needs. As previously stated, financial planners are required to act in the client's best interest including demonstrating how their advice would put the client in a better position. They also understand and embrace the purpose of the superannuation system as a means of assisting people to save for their retirement.

Financial planners understand the necessity of balancing the immediate and long term needs of their clients. Written advice from a financial planner showing that the client has received appropriate advice and a financial plan recommending access to the early release of benefits on compassionate grounds should assist the ATO in assessing the individual's financial capacity, and offers greater certainty for the individual, the trustee and the superannuation system.

Question 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?

As discussed in the consultation paper, the increase in the amount of superannuation released on medical grounds could be due to many factors impacting on an individual's financial capacity. For example:

- advancements in medical treatment resulting in higher medical costs
- significant increases in private health insurance premiums and greater exclusions leading to a reduction in private cover held by members or increased excesses
- the increased cost of living
- housing affordability and increasing household debt, impacting of household savings
- a greater awareness of the ability to access superannuation early on medical grounds, and
- a change in the way applications are recorded by the Department of Human Services following the introduction of a new online claim process in July 2015, as acknowledged on page 3 of the consultation paper.

However the FPA is concerned about the emergence of organisations that specifically promote and promise the early release of superannuation as a means of funding numerous medical procedures, without providing financial advice or considering the individual's circumstances. This is in direct conflict with the objectives of the superannuation system. For example (but not limited to):

- SuperCare - <http://mysupercare.com.au/>
- Brisbane Obesity Clinic - <http://www.brisbaneobesityclinic.com.au/index.php/costs/early-release-of-superannuation>
- Weight loss and Keyhole Surgery Centre - <http://weightlossandkeyholesurgery.com.au/why-choose-us/payment-information/>
- OClinic, Overcome Obesity - <http://oclinic.sydney/using-superannuation/>
- Fertility First - <http://fertilityfirst.com.au/supercare/>

The FPA has also become aware of a number of "no release no pay" services which will assist in early release claim applications for medical treatment.



Superannuation is a defined financial product under s764A(1)(g) of the Corporations Act. While organisations that spruik the early release for medical treatment continue to do so under the guise of general advice, consumers are left unprotected and exposed to such scrupulous operators. At present there is no transparency around the fees such organisations charge consumers or the commissions they may receive from any source for their service, and consumers are not protected in anyway. There is a real risk consumers are being talked into the early release of benefits with no consideration to alternative funding and support or the impact it will have on their long term financial position. We are also concerned that many such organisations promise early access to superannuation benefits for treatment that goes beyond the intended scope of the early release system.

We recommend spruikers of the early release of superannuation must be brought either into the Australian Financial Services Licensing (AFSL) regime or legal practice laws, to ensure consumer protections are available to individuals in need of assistance. Given the move of regulator to the ATO, a further solution to this unregulated activity may be to extend the TASA regime and require registration with the TPB.

Consideration should also be given to undertaking research/review of previous cases of early release for medical treatment, to understand if it made a significant difference to the life of the individual or whether they feel they were talked into an expensive solution to a problem they had. The purpose of the case review would be to measure whether people feel better for accessing their superannuation early for the medical treatment, versus if they wish they had found another means to fund the treatment and if have suffered financially in the longer term as a result. It would also be worthwhile determining how the individual accessed the funds and whether they sought assistance from a financial counsellor or planner, or through a medical practitioner or spruiker.

From a macroeconomic perspective it is a significant concern that a higher number of Australian's are turning to their superannuation and meeting the conditions of early release on medical grounds in order to cover medical treatment. However this issue is broader than the superannuation system. Hence we do not recommend placing more restrictive limitations on the early release of superannuation conditions for legitimate medical treatment that alleviates acute or chronic pain and/or prolongs life. Rather, efforts should focus on ensuring adequate services and assistance are available for people in such circumstances so they are not placed in a position of last resort reliance of accessing their superannuation early.

The FPA supports the statement in the consultation paper: "Conversely, if the release of superannuation on medical grounds provides long-term benefit to the individual and is used in cases of undue hardship as a last resort, this may justify the early release of superannuation benefits" (p. 6).

Question 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?

Yes. The current provisions under SIS Regulations 6.19A strike an appropriate balance for the requirements for the early release of benefits on medical grounds.



Question 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?

Number of releases and cashing restrictions

Allowing multiple withdrawals in a 12 month period may be administratively burdensome for the ATO, trustees, financial counsellors/advisers, and stressful for the individual themselves who would be required to reapply for each withdrawal. However it may also offer longer term benefits to the member and the system.

If an individual is only permitted one lump sum withdrawal over a 12 month period it may result in over estimating the foreseen and unforeseen medical treatment required and the associated costs during the pending 12 month period, particularly with long term illnesses and chronic pain. However if an individual were permitted to multiple withdrawals, they may be more likely to apply for the release of funds to cover the immediate known and foreseen medical treatment only. They should still be permitted to apply for additional release of funds if further treatment is required within the 12 month period. This would provide them with the immediate support they need while minimising the impact on their retirement savings.

Many medical expenses may be unforeseen. For example, a cancer patient and their treating medical specialist may anticipate that a successful round of treatment would control a long-term/recurring cancer condition for a period of two years, only to have new tumours re-emerge within six months of the treatment. A patient in this life-threatening position should not be unfairly disadvantaged and denied access to monies held in their superannuation account for the random and unforeseen recurrence which is out of their control. Medical treatment can cost hundreds of thousands of dollars and for many sufferers, the only way this could be funded is via this condition of release. Similarly, people suffering chronic pain can experience a worsening of their condition due to unforeseen issues.

It is not possible for a doctor to predict the exact course of a disease as it will depend on each person's individual circumstances and will vary from patient to patient. Many people with recurring, life-threatening or debilitating illness experience a diminished capacity to work, resorting to applying for the disability pension. This in turn reduces their financial capacity and impacts their ability to cover the cost of much needed medical treatment.

Different restrictions for different medical conditions

Introducing different restrictions for different medical conditions would unfairly place the needs of one patient over another purely based on the luck of which disease they are diagnosed with. If the medical treatment is to address acute or chronic pain and/or a life-threatening or debilitating illness, the type of medical condition should be irrelevant. Introducing different restrictions for different medical conditions will also add extra complexity to the system.

It is suggested that Treasury note the significant challenge faced by the life insurance industry in developing medical definitions that can be consistently supported and applied across all entities, without unfairly impacting consumers. The reality is that medical conditions vary and can change over time, impacting the longevity of medical definitions specifically developed for use in the superannuation system. This could be to the detriment of Australian superannuation members.

The FPA opposes the introduction of medical definitions or different restrictions for different medical conditions.



Question 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?

Regardless of the treatment involved, the release of superannuation on compassionate grounds for medical treatment should only be used in severe/debilitating illness, life threatening medical conditions, or to alleviate acute or chronic pain.

It should not be used to fund "lifestyle choices" irrespective of the "mental anguish" suffered. This is to limit superannuation being used to fund medical treatments in the future based on a lifestyle choice under the guise of mental anguish. For example, tattoo removal or changes because it is causing mental anguish.

Question 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)?

There may be some legitimate medical conditions (and specific cases) when IVF may be necessary to treat a life threatening illness or to alleviate acute or chronic pain which, in the current health policy environment may warrant consideration of early access to super as a means of last resort. However this issue is more appropriately addressed through the health system rather than the superannuation system.

Question 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)?

There is an enormous amount of medical research detailing the impacts of obesity on an individual's immediate and long-term health, productivity and well-being. However this research also shows that obesity is a significant issue for society and the economy more broadly. It is a critical healthcare issue.

While we acknowledge that bariatric surgery may offer much needed relief in addressing this issue for some individuals, this would most appropriately be addressed and supported via the public and private health systems which are specifically set up to ensure an individual's healthcare needs are met.

There may be some legitimate cases when bariatric surgery may be necessary to treat a life threatening illness or to alleviate acute or chronic pain which, in the current health policy environment may warrant consideration of early access to super as a means of last resort. However, as mentioned above, we are concerned about the growing number of bariatric surgery specialists who promote superannuation as a means of funding such medical treatment.

This issue is more appropriately addressed with funding and support set up through the public and private health systems, rather than through the superannuation system.



Question 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?

It is reasonable that the Regulator be satisfied that there is an actual cost being incurred for a medical treatment for acute / chronic pain or a life-threatening or debilitating illness. However it would be difficult to set an objective test that can take into account all the variables impacting on the cost of medical treatment that would enable the Regulator to make such an objective determination regarding the reasonableness of the expenses, without unfairly prejudicing some individuals suffering from such medical conditions.

As discussed in the consultation paper, the cost of medical treatments can vary significantly depending on a number of variables including (but not limited to) the level of treatment required, the duration of the treatment and the expected recovery time, location of treatment, travel and accommodation expenses, and the significant range of specialist fees.

The fees associated with medical treatment are out of the control of the individual patient. For example, a specialist may only provide treatment at a medical facility that charges a higher fee to patients, or requires the patient to travel; or they may require patients to use only specific supporting medical practitioners who also charge a higher fee (i.e. well above the fees of other specialists). This can result in a higher gap fee being incurred by the patient.

Introducing rules that explicitly require that the Regulator be satisfied that the amount claimed for a particular treatment is reasonable, may unfairly impact individual members seeking financial support, but who do not have any control over the costs associated with the medical treatment they require.

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?

No.

Question 1.11 Should SIS Regulation 6.19A(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?

No. SIS Regulation 6.19A(a)(ii) and (iii) should not be amended to refer to 'treatment' rather than the 'alleviation' of acute or chronic pain.

Some conditions that cause chronic pain cannot be treated (as per the reference to treatment in the consultation paper). The condition and associated pain can only be managed, not treated or 'fixed'. However the alleviation of the chronic or acute pain for the individual means they can be a more active member of society. If the pain cannot be alleviated it can lead to other issues such as reduced capacity to work, requiring additional support services and social security payments such as the disability pension, mental health issues, and a reduction in physical activity resulting in a higher risk of developing additional medical conditions.



No. These provisions should not be removed and early release of superannuation on medical grounds restricted to where the individual's condition is life-threatening. Acute and chronic pain can be extremely debilitating, impacting an individual's overall health, well-being, livelihood and capacity to earn an income.

Question 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 proposed condition being treated?

Yes. The reference to a medical specialist in the SIS Regulation should be clarified to ensure the practitioner is a specialist in the field most relevant to the proposed condition being treated or causing the acute or chronic pain.

This should include clarification on the appropriate medical specialist for cases involving mental anguish. For example, cosmetic surgery or IVF - should IVF medical treatment require a referral from an IVF specialist, a gynaecologist or psychologist?

Question 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 receive a reference from a list of approved medical practitioners, to ensure the objectiveness of the assessment?

Feedback we have received shows that life insurance companies routinely make it difficult for policyholders to make a claim by sending the individual to multiple doctors for second opinions to avoid claims. This creates additional stress for the individual at a time when the person needs to focus on their health. This experience is also reflective of the workers compensation system.

There is concern that this proposal could be over used by the Regulator and abused by providers, causing detriment to the individual suffering the medical condition. There is a risk that the issues experienced for Australians in the workers compensation and life insurance systems will also occur for individuals with legitimate claims for the early release of their superannuation benefits on medical grounds.

The proposals to allow the Regulator to require an individual to undergo further medical assessment of a Regulator appointed practitioner, or require members to use approved medical practitioners, would have the following side-effects:

- create considerable red tape for individuals with legitimate claims, which creates undue stress at a time when their health and wellbeing should be the focus
- significantly increase administration costs for assessing applications for early release of superannuation
- someone would be required to pay for the additional medical assessments
- could result in legal representation (at significant cost) being required for an individual with a legitimate claim to access the early release of their superannuation savings
- increase the time required to assess claims, to the detriment of the individual



- is particularly degrading and stressful for the individual making a legitimate claim
- risks creating a system (similar to the workers compensation system) fraught with lawyers and medical practitioners' wroughing the system to line their pockets, to the detriment of valid claimants, and
- encourages a system of distrust, rather than compassion between trustees and superannuation members.

The superannuation system and trustees are custodians of the savings of Australians. The current SIS Regulations require a referral from two medical practitioners. Other changes proposed in this consultation paper – including ensuring the medical practitioner is a specialist in the field most relevant to the proposed condition; and addressing medical treatment involving IVF and bariatric surgery through the healthcare system - adequately and appropriately address the concerns raised in the discussion paper in line with the proposed early release objectives.

While we oppose this proposal, should the early release of superannuation conditions be amended to allow the Regulator to seek a second opinion from an approved medical practitioner(s), or the individual be required to receive a reference from a list of approved medical practitioners, this should be restricted to requests over a set threshold (for example \$20,000). This should be supported by data collection and analysis to help identify if any particular medical practitioners were appearing to abuse the system.

Question 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?

As a means of last resort, provisions should allow the early access to superannuation benefits to meet expenses associated with palliative care, death, funeral or burial including for siblings and parents.

As a means of last resort, provisions should also allow consideration of applications in circumstances where a non-dependent who is not a relative (such as a friend) can show they are the primary carer of the individual and neither party has the means to cover such costs.

This is a matter of dignity for the individual.

Question 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.)

It is not unreasonable for a maximum amount to apply to the early release of superannuation for the purposes of meeting funeral expenses. Consideration should be given to cultural and religious customs.



Question 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?

Allowing the early release of superannuation benefits to meet mortgage payments regardless of whether a person's name is on the mortgage title for their principal place of residence, could increase the risk for potential victims of financial abuse.

Should this be permitted, it is suggested specific conditions be included such as the individual requesting the early release of benefits (ie. the individual who is not on the mortgage title) be required to seek the advice of, and apply through, a financial planner or solicitor. The financial planner or solicitor would be in a position to work with their client to determine whether the application for early release is in the best interest of their client and whether the individual may be the subject of potential financial abuse.

As stated in the consultation paper, "a mortgage is supporting the eventual ownership of a long-term asset, so it may be reasonable for superannuation benefits to be used to preserve an asset that will add to overall retirement wealth"(pg. 5). The FPA supports this assessment which is also in line with the preservation principle.

There is concern however that changes in the current market conditions, such as a rise in interest rates or softening of the property market, could have significant ramifications for individuals and families who may have over committed their financial capabilities. This may have ramifications for the superannuation systems.

Question 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)?

There are many sides to the discussion on extending the early release of superannuation to meet rental payments.

Although rental eviction does not involve the loss of a financial asset, unstable living arrangements can reduce a person's opportunities to work and, in turn, save, and lead to social implications and the potential for homelessness.

If an individual faces financial hardship and lacks the financial capacity to the point where they face rental eviction, it can have catastrophic flow on effects to that individual, the cost of which to society and to government (through social security and homelessness support service, work placement etc) would far outweigh the potential longer term costs to the age pension. Access to early release of superannuation could prevent such flow on consequences and help reduce the possibility of that individual needing to rely so heavily on government assistance in the immediate situation and through the age pension through potential future earnings.



However, as with medical treatment, rental assistance is a social policy issue that sits outside the superannuation system and is most appropriately addressed through adequate affordable housing solutions and the social security system. The social security system offers numerous valuable support services to assist individuals to address the many challenges that can lead to financial difficulties and the possibility of rental eviction – such as unemployment and workplace services, counselling assistance, medical assistance, financial counselling, legal aid, etc. If an individual was facing rental eviction and relied on the superannuation system rather than the social services system for support, they may by-pass many of these other support services leaving the underlying challenge that lead to the financial difficulties unaddressed.

Economically, the extra cost to government of providing current-day support and benefits might actually mean it is more efficient to let the member access their superannuation early than to provide current-day benefits. However the long term consequences to taking out even a small amount of superannuation today can dramatically reduce the benefits of compound interest on their superannuation savings in retirement.

There is also a concern about the practicalities of this proposal and whether the superannuation system is agile enough to release the funds in a timely manner to support renters. For example, it can commonly take 28 days for the Regulator to assess a claim for early release, and up to a month for a superannuation fund to process the request and release the funds. The landlord may have issued an eviction notice by this point.

Should the early release of superannuation be expanded to include rental eviction, conditions and caps should apply similar in nature to the early release conditions for mortgage payments, and the individual should be referred to the necessary support services to help them get back on their feet. The individual should be required to provide appropriate evidence including a referral from a financial counsellor, legal aid or the Department of Human Services.

Question 1.18 Are the current disability grounds fit for purpose, or should early release be extended 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?

The FPA supports in principle the suggestion that early release be extended to disability aids.

Experts in the NDIS and disability services should be consulted regarding the expenses that should be included, the evidence required, and whether it is appropriate for a cap to apply to funds released.

Question 1.19 Should individuals for 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 would this requirement be administered?

No comment.



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?

No. The FPA opposes the removal of the Regulator's residual discretion in the SIS Regulation. This provision recognises that the needs and circumstances of Australians who have a legitimate claim for the early release of benefits, may vary and may not always fit within the strict rules and conditions of release. It puts the needs, well-being, and best interest of the individual first, and is in line with the principles of hardship and fairness.

Question 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?

A small business failure and bankruptcy could be considered.

Question 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?

Yes. The FPA supports, in principle, access to superannuation benefits to assist victims of domestic violence. This could be the only means available that would allow the victim to leave the situation.

Experts in assisting victims of domestic violence should be consulted as to the particular grounds and expenses that should be included, and evidence that should be required, for this purpose.

The FPA would also be supportive, in principle, to allowing a victim of domestic violence access to the superannuation of their estranged spouse. This is because people who are leaving a domestic relationship due to violence may not have a lot of superannuation savings as often the same spouse will prevent them from working. One potential solution to the challenge of allowing spousal access to the perpetrator's superannuation benefits could be to treat domestic violence as a crime, and the early access to the perpetrator's superannuation would be to appropriately compensate the victim of the violence.

The spouse (perpetrator) should also not be allowed to access early release of benefits in cases of domestic violence as they can drain the account as a means of preventing the victim spousal access to their super in divorce settlements. In these circumstances, this is a form of financial abuse.

Part 2: Severe financial hardship ground

As stated in the consultation paper, superannuation trustees have the ultimate discretion to release funds under the current test for early access to superannuation benefits on financial hardship grounds. This brings into question the inherent conflict of interest between superannuation trustees' fiduciary obligation to its members as a whole, over and above what is in the best interest of an individual member.

We would argue that the best interest of the individual member when applying for early access to their superannuation savings under financial hardship grounds (or any grounds) must be given priority over the trustee's fiduciary obligations to its membership as a whole.



Question 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?

The current maximum early release benefit an individual can access for severe financial hardship is \$10,000, which was set in 1997. There may be merit in reviewing this cap in line with inflation.

The current rules also limit the early release for severe financial hardship to one payment only in a 12 month period. This could encourage the member to request the maximum amount when they may not necessarily require it, just in case they fall short within the restricted time period. An alternative approach could be to have a maximum amount that can be paid in a 12 month period, with no limit on the number of payments released within the cap.

Question 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?

For transparency and to assist the person making the claim it is beneficial to know what types of documentation, and over what period, the trustee may wish to see to make their decision. This should be published on their website. The trustee should state what their approval process is – i.e. publish their decision tree on their website.

Part 3: Victims of crime compensation

Victims of crime do not volunteer. Criminal behaviour sits outside the superannuation system. Hence, consideration of access to superannuation for the purposes of compensation for victims of crime cannot be made based on the purpose and principles of the superannuation system. This is a social justice issue which must put the compensation and recovery of the victim as the priority. The earning capacity and therefore superannuation contributions of victims could well suffer due to the effects of the crime.

There is a moral obligation to support the victims of crime over the objectives of the superannuation system and the preservation of the perpetrator's retirement savings.

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

Yes. Superannuation is a tax mechanism that offers significant tax benefits to individuals - it minimises the tax paid on contributions, on compounded earnings, and on benefits paid during the pension phase of the system. Superannuation is an integral part of Australia's tax system with any reduction in the government's tax collection, resulting from income contributions into the superannuation system, accounted for in the fiscal outlook.

Therefore, from a social justice perspective, it is difficult to understand why a convicted perpetrator of a crime is allowed to receive the ongoing benefits of the superannuation system (such as compounding interest while they are incarcerated); and also be permitted to quarantine this tax mechanism from victims of their wrongdoing. A perpetrator's superannuation, which may include the proceeds of their crime, should not be allowed to grow with tax benefits for them to potentially access later in life, with little regard to their victims' suffering.



Victims of crime may suffer from trauma as a direct result of the crime, which could affect their capacity to earn an income (or sustain an income to the pre-crime level), impacting their current financial situation and their own superannuation balance and retirement savings.

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

Yes. Access to superannuation should be limited to cases where a criminal conviction has been made, with the early release request made by court order.

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)?

Allowing access to a perpetrator's superannuation for compensation or restitution arising from a select type of criminal behaviour or activity, implies unfair judgement about the impact of the crime upon the victim. It also ignores the different types and severity of impact all criminal behaviour can have on victims. For example, limiting access to just violent crimes ignores the devastation and irreparable damage victims suffer as a result of fraud or white collar crimes.

Access to a perpetrator's superannuation should be available for compensation or restitution arising from all crimes where a criminal conviction has been made. It would be inappropriate and against the principle of fairness to impose a threshold based on the type or severity of criminal activity.

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?

No. A perpetrator could make contributions over a pro-longed period, making them appear normal. The perpetrator may have 'planned ahead', or the criminal behaviour left undetected for a period of time, making contributions seem within character.

Access to a perpetrator's superannuation to compensate victims of crime should be allowed regardless of the perpetrator's contribution habits.

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?

A compensation amount should be set and awarded by court order first.

A statutory order should be included in the law which lists (in order) where victim compensation is to be accessed from. For example, a perpetrator's cash holdings; property; liquidating shares, managed funds, property and business holdings; with superannuation being the last resort.

The perpetrator's superannuation should be a disclosable asset during compensation hearings, and prior to bankruptcy being declared. The SIS Act should be amended to require the disclosure of a perpetrator's superannuation upon subpoena as part of the process for awarding compensation to victims of crime where a criminal conviction has been made.



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)?

Consideration should only be given to the circumstances of the perpetrator in situations where the perpetrator has dependent children or a dependent spouse who could be placed in financial hardship.

The spouse and family of the perpetrator may have also suffered the consequences of the perpetrator's criminal behaviour and have their financial security unduly impacted. Such individuals should be considered victims and therefore may also be eligible to come forward as a claimant.

The entirety of a perpetrator's superannuation should be available to compensate victims of crime where a criminal conviction has been made.

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?

As a principle, access to a perpetrator's superannuation should be in the form of a lump sum, regardless of the type of superannuation account, for the following reasons:

- Allowing compensation to be paid via instalments from income stream payments ties the victim to the perpetrator and unfairly acts as a continual reminder of the crime.
- Victims should not be required to wait until a perpetrator has reached preservation age or entered the pension phase of superannuation. Victim compensation must be a higher priority than the workings of the superannuation system.

While defined benefit accounts are extremely complex, superannuation funds should be required to release lump sum compensation to victims of crime, similar to the early release of funds when financial hardship conditions are met. We recognise the challenge defined benefits may present in this regard.

Defined benefit accounts generally allow access to the funds 'at a point in time', which is usually in the future. Of assistance to this discussion may be the meaning of defined benefit interest provisions of the Family Law (Superannuation) Regulation 5, in relation to spouse splitting of superannuation assets in divorce proceedings. The Regulation states:

(1) Subject to subregulation (2), for these Regulations, a **defined benefit interest** is:

(a) a superannuation interest that a member spouse has in an eligible superannuation plan, being an interest in respect of the whole of which the member spouse is entitled, when benefits in respect of the interest become payable, to be paid a benefit that is, or may be, defined by reference to one or more of the amounts or factors mentioned in subregulation (1A); or

(b) a component of a superannuation interest that a member spouse has in an eligible superannuation plan, being a component in respect of which the member spouse is entitled, when benefits in respect of the interest become payable, to be paid a benefit that is, or may be, defined by reference to one or more of the amounts or factors mentioned in subregulation (1A).

(1A) For subregulation (1), the amounts and factors are as follows:



(a) the amount of:

(i) the member spouse's salary at the date of the termination of the member spouse's employment, the date of the member spouse's retirement, or another date; or

(ii) the member spouse's salary averaged over a period;

(b) the amount of salary, or allowance in the nature of salary, payable to another person (for example, a judicial officer, a member of the Commonwealth or a State Parliament, a member of the Legislative Assembly of a Territory);

(c) a specified amount;

(d) specified conversion factors.

(2) A superannuation interest, or a component of a superannuation interest, is not a **defined benefit interest** for these Regulations if the only benefits payable in respect of the interest, or the component, that are defined by reference to the amounts or factors mentioned in subregulation (1A) are benefits payable on death or invalidity.

As previously stated, the FPA recommends the early release provisions should apply to a perpetrator's superannuation to pay compensation to victims of crime where a criminal conviction has been made. Assuming the perpetrator is incarcerated as part of that conviction, it could also be assumed that the perpetrator would be terminated from employment. This warrants consideration of whether similar provisions to those in s1A(a) for superannuation splitting in divorce procedures, may be of assistance.

We note that the family law regime is immensely expensive and complicated and therefore replicating per se may not actually be the right methodology. Hence we offer this as an example.

Consideration should also be given to instances where the perpetrator is a trustee of a Self Managed Superannuation Fund (SMSF), particularly in single member funds but also more broadly.

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

Yes. Perpetrators could otherwise use and abuse the superannuation system as a way to protect the proceeds of crime and their assets, and avoid paying victim compensation.

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?

Yes.

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

Yes.



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?

No comment.