



Law Council
OF AUSTRALIA

Review of the early release of superannuation benefits

The Treasury

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About 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 Law Firms Australia, 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 Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. 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 members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

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

Acknowledgement

The Law Council is grateful to the Law Society of New South Wales for its contribution to this submission.

Introduction

1. The Law Council is grateful for the opportunity to provide a submission to the Treasury in response to the *Review of the early release of superannuation benefits (the Review)*.
2. The Law Council notes that the stated purpose of the Review is to determine whether the superannuation system continues to be fit for purpose and whether it serves the interests of consumers. The Law Council also notes that the Review focuses on the following key issues:
 - the increasing use of superannuation to fund medical treatment;
 - whether the mortgage foreclosure ground should be extended to rental eviction;
 - whether the current rules for release on grounds of severe financial hardship are appropriate; and
 - whether an offender's superannuation and assets should be available to pay compensation or restitution to victims of crime.
3. The Law Council is also grateful for the opportunity to attend a consultation conducted by Treasury in relation to these matters. This submission does not expand on the issues raised by Luke Barrett, Chair of the Law Council's Superannuation Committee, at that consultation and is limited to the below issues raised by one of the Law Council's Constituent Bodies, the Law Society of New South Wales (**Law Society**).

Issues raised by Law Society of New South Wales

General Comments

4. The Law Society's submission does not address the specific questions raised in the Consultation Paper. Rather, the submission focuses on a number of the challenges faced by many Aboriginal and Torres Strait Islander people regarding the early release of superannuation.
5. As an in-principle position, the Law Society supports allowing trustees discretion for the payment of superannuation benefits for severe financial hardship and for medical services based upon the member's particular circumstances. The Law Society notes that the social safety net is not always sufficient to meet individual needs and that there are many people who seek to access superannuation early as a matter of last resort.
6. However, superannuation should not be viewed as a replacement (or indeed, a supplement) for a sufficient social safety net that meets the health, housing, legal, educational and social security needs and rights of individuals. Inadequate social spending requiring individuals to access funds intended for a different, longer term purpose will likely entrench existing disadvantage. If individuals are in fact successful in accessing superannuation assets early to address crises, they may merely be postponing the larger question of financial solvency to a point in time where they are no longer able to generate an income, when they may be older, more unwell and even less able to access services.
7. With this reservation in mind, the Law Society makes the following comments.

Earlier preservation date for Aboriginal and Torres Strait Islander people

8. The significant life expectancy gap between Aboriginal and Torres Strait Islander people and non-Aboriginal and Torres Strait Islander is well-documented.¹ As a result of this gap, Aboriginal and Torres Strait Islander people, on average, reach the preservation and tax-free threshold ages closer to the end of their lives than non-Aboriginal and Torres Strait Islander people.
9. On this basis, the Law Society suggests that consideration be given to implementing flexibility in respect of the preservation and tax-free threshold ages for Aboriginal and Torres Strait Islander people. This would allow Aboriginal and Torres Strait Islander people the same opportunity as the rest of the general population to enjoy a higher standard of living in their retirement years.
10. One strategy could be to adjust the preservation age based on the population average, consistent with the actuarial evidence in this regard. Another approach could be to allow for individual preservation ages to be lowered on a case by case basis, considering the circumstances and likely life expectancy of individuals, in addition to the options for early access now available, for example in cases of terminal illness. Regard will have to be had in respect of an appropriate definition of such medical conditions. In the Law Society's view, such flexibility would be consistent with the preservation principle.

Housing

11. It continues to be very difficult for individuals to access social housing, and the lack of housing affordability in NSW is an acknowledged and ongoing phenomenon. In the experience of the Law Society's members, many low-income people are required to enter into private rental accommodation, often at the edge of their means.
12. The Consultation Paper notes the tension between the preservation principle, and the genuine hardship and fair and effective principles in respect of making superannuation funds available for rental payments. It is the Law Society's position that governments should bear primary responsibility for providing adequate housing, consistent with Australia's obligations under the International Covenant on Social, Economic and Cultural Rights. However, the Law Society acknowledges that the current reality is that governments are not adequately meeting this need.
13. The Law Society notes that our members hold a diversity of views on whether early access to superannuation benefits should be permitted for rental arrears. For example, there is concern that accessing superannuation benefits early to pay rental arrears is in conflict with the preservation principle as no equity is being built. Conversely, there is also a concern that using superannuation in this way might simply run down the assets of disadvantaged individuals, without ultimately resulting in greater housing security, particularly given that no-fault evictions are an option for landlords in NSW.
14. The Law Society also notes concerns that providing access to superannuation benefits early to meet rental arrears may create perverse incentives for landlords. For example, the law Society understands that Housing NSW has the discretion to waive debts but might not do so if it first requires individuals to run down their superannuation benefits.

¹ See eg, Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2018*, 104-17; Public Interest Advocacy Centre, *Securing better outcomes for Aboriginal and Torres Strait Islander people in Superannuation*, 5 April 2013, 2-4.

15. However, these concerns must be balanced against the fact that a person facing rental eviction is in the same situation as a person facing mortgage foreclosure – that is, they are both facing the prospect of homelessness.
16. The Treasury might consider a proposal to allow early access to superannuation benefits to meet rental arrears in limited circumstances. For example, the individual should have already accessed all available emergency government payments. Additionally, the person might be required to be in private rental arrangements, as public housing providers should not be evicting tenants into homelessness (notwithstanding that this is in fact taking place). If the Treasury sees the merit in this suggestion, in the Law Society's view, a rental eviction notice might be the appropriate threshold requirement.
17. Some of the Law Society's members noted that it would not be inconsistent with the preservation principle to allow individuals to access superannuation assets early to provide a rental bond, or to provide a deposit for a small mortgage (for example for accommodation options such as a mobile home). However, other members are concerned that it is incumbent on governments to meet the right to adequate housing, and that allowing access to private funds (intended for retirement) incorrectly shifts the burden on to individuals. The Law Society has not come to a settled view on this issue, and raises it for the Treasury's consideration.

Domestic and Family Violence

18. The Law Society agrees with the view of the Australian Law Reform Commission in the *Family Violence and Commonwealth Laws – Improving Legal Frameworks* Report that it is not appropriate to include family violence as a purpose for which an individual may apply for early access on compassionate grounds, or to create a new ground of early release on the basis of family violence.² In the Law Society's view, the hardships that can arise out of situations of domestic violence, including financial hardship and homelessness, should be met by the social safety net, and to draw on private funds to meet these needs shifts the burden on to individual victims, potentially entrenching disadvantage. The Law Society also notes that there is some funding available to support victims of domestic and family violence under domestic violence reforms in NSW.

Victims of crime compensation

19. The Law Society does not agree that victims of crime should be able to access a perpetrator's superannuation for compensation. In NSW, fines and restitution orders can be rolled into other state debt, which is managed by Revenue NSW. Debtors can pay off their debts through a work and development order scheme, which provides for debtors to undertake various forms of community service, volunteer activities, and health activities, such as participation in rehabilitation or mental health treatment. In NSW, there is currently a positive alternative to bankruptcy or accessing superannuation in relation to such debts. In our view, this system should be made available in other jurisdictions. The Law Society notes that this scheme is not in relation to private debts, such as costs orders or civil awards. In those cases, the Law Society is of the view that the current bankruptcy system correctly protects superannuation and this position should be maintained.

² Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report 117 (November 2011) 484.

Consistency of decision-making

20. In the experience of the Law Society's members, applications to access superannuation early on compassionate grounds or for reasons of financial hardship may receive uneven treatment. It is not clear whether this is due to inconsistency between individuals applying the rules, or whether there is inconsistency between the policies of different funds. In any event, in the Law Society's view, there should be an industry-wide effort to address the issue of standard and consistent decision-making.

Other issues relevant to Aboriginal and Torres Strait Islander people

21. While some of these issues may not be directly within the scope of this Review, the Law Society raises them for consideration as they are broadly relevant to the question of whether the superannuation system is serving the interests of consumers.

22. The Law Society is advised by its members that issues related to accessing lost and unclaimed superannuation are particularly pertinent to Aboriginal and Torres Strait Islander people, where awareness of the superannuation system, and financial literacy levels, may be low. For example, there are issues in respect of nominations that are not updated. Many Aboriginal and Torres Strait Islander people work at many different jobs throughout their working life. The Law Society also understands that many Aboriginal and Torres Strait Islander people start working earlier than the general population and may nominate their partner at the time as a beneficiary. However, they may not revisit the nomination if their life circumstances change.

23. As for many in the general population, education is needed for Aboriginal and Torres Strait Islander communities in respect of superannuation, distribution and to highlight the distinction between superannuation distribution and probate processes.

24. The Law Society supports the recommendation by the Public Interest Advocacy Centre (PIAC) in the *Securing better outcomes for Aboriginal and Torres Strait Islander people in Superannuation* report that there should be a positive obligation on trustees to notify members and beneficiaries about the superannuation benefits of deceased fund members that remain inactive or unclaimed.³ Consideration should be given to processes that could operate to notify trustees, or to actions trustees could be expected to take, to search for information relating to the death of members. . For example, trustees could be obliged to periodically review the online published probate notices NSW (and its equivalent in other States). However, for a number of reasons, this is only a partial solution. Superannuation benefits are often unclaimed because the member changes name, address or both. The probate notice will state the deceased's name in the will, and the address at date of death. These may each be different to the trustee's records. Further, this does not address lost and unclaimed superannuation benefits for deceased fund members where there is no estate.

25. The Law Society suggests that would also assist if superannuation funds made it easier for a deceased person's representative to search for unclaimed money and uncollected superannuation benefits. For example, in the case of a deceased member who may not have worked for some years, the executor or administrator may not have the deceased's tax file number and may not be easily able find it. A search based on a range of factors, such as date of birth, name of former employer, previous name, and previous address, would make it easier for an executor, or administrator, to properly

³ Public Interest Advocacy Centre, *Securing better outcomes for Aboriginal and Torres Strait Islander people in Superannuation*, 5 April 2013, 5.

search. Again, this measure would only address lost and unclaimed superannuation benefits for deceased fund members where there is an estate to administer.

26. Other initiatives that could assist Aboriginal and Torres Strait Islander people in interacting with the superannuation system include:

- (a) specialised training for superannuation fund staff in communicating effectively with Aboriginal and Torres Strait Islander people;
- (b) employment of Aboriginal and Torres Strait Islander people in liaison roles; and
- (c) allocation of additional Federal Government resources to support services which provide assistance to Aboriginal and Torres Strait Islander people applying for superannuation benefits.⁴

⁴ Ibid 7-8.