

Review of early release of superannuation benefits

Legal Aid NSW submission to The
Treasury

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323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

Legal Aid
NEW SOUTH WALES 

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW's Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, tenancy, employment, social security and access to essential social services. The Civil Law practice provides legal services to people through our Central Sydney office, 13 regional offices

our outreaches across Sydney, regional and remote NSW. Currently, we have over 150 civil lawyers who provide advice across all areas of civil law, including specialist teams that assist consumers experiencing financial hardship.

This submission draws on the casework experience of our civil lawyers in providing these services.

Legal Aid NSW welcomes the opportunity to make a submission to the Treasury's Review of early release of superannuation benefits. Should you require any further information, please contact:

Rebekah Doran

Senior Solicitor (Consumer)

Combined Civil Law Specialist Team

Civil Law

(02) 9219 5067

or

Robyn Gilbert

Law Reform Solicitor,

Policy, Planning and Programs

(02) 9213 5207

robyn.gilbert@legalaid.nsw.gov.au

Introduction

Legal Aid NSW welcomes the opportunity to contribute to the review of the rules governing the early release of superannuation in Australia. Our casework experience and the issues outlined in the consultation paper suggest a review of these rules is timely and necessary.

In this response to the consultation paper, we draw on our casework experience working with some of the most disadvantaged people and communities in Australia. In particular, we draw on the specialist expertise of the following services:

- Civil Law Service for Aboriginal Communities
- Domestic Violence Unit
- Prisoners Legal Service
- Mortgage Hardship Service
- Consumer Law Group
- Housing Law Group

The experience of these solicitors is that there is scope for amendment to the rules governing the early release of superannuation to reflect the current legislative and social environment. There is also an urgent need to improve the process of applying for the early release of superannuation so that it is clear, quick, consistent and user-centred.

Given the levels of disadvantage¹ and increasing financial hardship² in Australia, it is critical these rules are complemented by state and federal government policies to mitigate the impact of unexpected events such as ill health and loss of employment. This not only involves appropriate funding for financial counselling and material assistance services, but also policies that maximise the ability of people to manage unexpected health and financial challenges. Our response to the consultation therefore suggests a number of complementary mechanisms to ensure that superannuation, wherever possible, is able to be preserved for retirement.

Principles underlying 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?

¹ The Australian Council of Social Services report, Poverty in Australia 2016 found that 3 million people in Australia are living in poverty: <http://www.acoss.org.au/wp-content/uploads/2016/10/Poverty-in-Australia-2016.pdf>

² Australian Financial Security Authority has reported a 2% increase in personal insolvency activity in 2016 / 17: <https://www.afsa.gov.au/statistics/annual-statistics>. Digital Finance Analytics reported in January 2018 that almost 30% of Australians are experiencing mortgage hardship: <http://digitalfinanceanalytics.com/blog/mortgage-stress-still-with-us-in-2018/>

Compassionate and financial hardship grounds

Legal Aid NSW supports the proposed principles as an appropriate basis to inform decisions about the rules governing the early release of superannuation on compassionate and financial hardship grounds; and the rules governing these arrangements. These principles are:

- Preservation
- Genuine hardship
- Last resort
- Fair and effective

Legal Aid NSW suggests that consideration be given to an additional principle that superannuation released on severe financial hardship and compassionate grounds will assist the person to resolve the issue that has given rise to the application. While this may be implied or obvious, we see this an important element to ensure that where superannuation is accessed early, it makes a positive and sustainable difference to applicant's life. This principle could mitigate situations where superannuation is accessed under duress for the benefit of another (see comments at page 10) or where superannuation is used to pay mortgage arrears when the applicant has no prospect of maintaining the mortgage long term (see comments at page 8).

Victims of crime compensation

Legal Aid NSW is concerned about the application of these principles to circumstances in which a third party is attempting to access a person's superannuation to fund victim's restitution or compensation. This is a distinct situation, effectively seeking an amendment to the s.116(2) Bankruptcy Act which protects superannuation from creditors. When judged against these principles, it is difficult to envision a circumstance where access to an alleged perpetrator's superannuation by a creditor could be justified. Our concerns about this proposal are outlined at Part 3.

<p>Question 0.2 Having regard to these principles, should early release of superannuation benefits generally be more or less difficult to obtain?</p>
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Legal Aid NSW does not propose a general rule that it should be more or less difficult to access one's own superannuation benefits early. Decisions need to be made on a case by case basis with reference to the rules and the proposed principles. This nuanced approach requires consideration of what is appropriate in the particular circumstances.

In terms of the *process* of accessing one's own superannuation benefits, Legal Aid NSW strongly proposes this is made clearer and simpler. Key challenges arising from our casework experience include:

- Confusion about the difference between a compassionate grounds and severe financial hardship applications;
- the two-step compassionate grounds application process, requiring approval by the Department of Human Service in addition to the approval of the individual fund;

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- lack of consistency across funds; making it difficult for consumers and assistance services to predict whether funds would be released; and
 - delays in the approval process – applications to DHS can take up to 28 days; with a further assessment then needed by the fund.

In addition, aspects of the application process are likely to exclude some of the most disadvantaged people in our community who have low literacy and limited access to assistance services. In particular, the application:

- is document heavy;
- can only be completed via a myGov or Centrelink online account; and requires the applicant to know the fund's ABN and their exact account superannuation balance to proceed with the application.

The application also requires burdensome level of identity documentation, despite the fact that applications are made through the myGov or Centrelink online portal. This particularly disadvantages Aboriginal people who can have difficulty obtaining identity documents. In many states (including NSW) a fee must be paid to obtain these documents regardless of your financial circumstances. These are unreasonable hurdles when the client has already established their identity when applying for Centrelink benefits and creating an online Centrelink or myGov account.

Suggestions for improvement

In line with best practice across the financial services industry, we suggest the amended application form be user tested by consumers, financial counsellors and advocates who regularly assist people to access their superannuation benefits. The application form needs to:

- be viewable and downloadable in advance so that applicants can prepare their application;
- not require the applicant to know the superannuation fund's ABN number or current account balance;
- not require ID documents, where the application is made through the user's myGov or Centrelink online account;
- prompt the applicant to consider alternative options before proceedings, in particular:
 - checking with your superannuation fund whether you have any relevant insurance policies;
 - suggesting the client speak with a financial counsellor; and
 - referrals for material assistance services.

With the ATO taking over management of this process from the DHS, this is an opportune time to make improvements to the process. Legal Aid NSW would be pleased to be involved in further consultation about improvements to the application process.

Legal Aid NSW also proposes that:

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- a fast tracked application process be made available for urgent applications;
 - where a form is not completed properly or information is missing the regulator should contact the applicant and give him or her an opportunity to remedy the form rather than rejecting the application;
 - all superannuation funds be required to offer early release on compassionate and financial hardship grounds;
 - application forms and processes be consistent across superannuation funds wherever possible;
 - s58(2) SIS Act be amended to include directions from the ATO to release funds on compassionate grounds.

Removing the discretion of the fund to refuse a compassionate grounds release would mean the decision of the regulator would essentially be binding, reducing levels of confusion and complexity for applicants and generate much needed speed in the application process. Our experience is that the fund will rarely, if ever, refuse a compassionate grounds application.

Part 1: Early release on compassionate grounds

Assessment of financial capacity

<p>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?</p>

To ensure consistency and clarity for consumers, Legal Aid NSW agrees that some form of prescription and objectivity in the assessment process is desirable. However, each application should also be determined on its merits; as an overly prescriptive process may place unreasonable burdens on vulnerable consumers and act as a barrier to access.

In addition to the comments above, Legal Aid NSW suggests:

- a standard statement of financial position which is viewable, printable and editable from online to help consumers prepare their application. This form could reflect the Financial Ombudsman Service's (FOS) statement of financial position, which is readily identifiable by financial counsellors and FOS members.
- the 1800 007 007 credit and debt hotline number be printed on the form, encouraging consumers to see a financial counsellor for advice about their financial situation and/or obtain help completing the form;
- bank statement, establishing the consumer does not have sufficient funds to pay for the relevant expense;
- evidence of the expense relating to the specific ground, such as a medical invoice or document establishing arrears as described at page 8 below.

Medical treatment

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?

Legal Aid NSW has limited experience assisting consumers to access superannuation on this ground, however we do assist many clients who experience financial hardship due the cost of medical treatment and related expenses. For example, people in regional and remote communities paying for travel and accommodation expenses to obtain treatment or consult specialists; or clients obtaining high costs short term loans to cover out of pocket medical expenses. Legal Aid NSW also assists Medicare ineligible clients who incur large debts for treatment provided to them or their family members in public hospitals. This casework experience suggests that many people having difficulty meeting medical expenses.

Legal Aid NSW is also concerned about reports that for profit companies are assisting clients to obtain their superannuation benefits. This profit incentive may also be driving an increase in demand and is a worrying trend given the experience of for profit debt management companies³. Given that most consumers can make this application without assistance, or can obtain assistance from a financial counsellor, we suggest that consideration be given to prohibiting or strongly regulating for profit providers.

Question 1.3 to Question 1.13 Specific questions relating to medical and dental treatment

Legal Aid NSW does not have any comments about the specific questions relating to the early release of superannuation benefits for medical and dental treatment.

Palliative care, death and funeral expenses

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?

Legal Aid NSW proposes that this ground be expanded to recognise kinship arrangements in Aboriginal families and communities by allowing the early release of superannuation to pay for the palliative care, death, burial and funeral expenses of a non-dependent with whom they have a significant family and/or cultural relationship.

In considering how these provisions could be drafted, guidance can be drawn from the arrangements recognising Aboriginal kinship relationships exist in other statutory frameworks, for example:

³ ASIC Report 465, 'Paying to get out of debt or clear your record: The promise of debt management firms', January 2016.

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- an alternative scheme for distributing the estate of an Aboriginal or Torres Strait Islander person who has died intestate is established under Part 4.4 of the *Succession Act 2006*; and
 - s.13 of the *Children and Young Persons (Care and Protection) Act 1998* regulates the order for placement of Aboriginal and Torres Strait Islander children and young people in out of home care.

The relationship between the applicant and the deceased can be confirmed by the applicant signing a statutory declaration attesting to the relationship. This could be certified by a declaration of an Aboriginal Elder or Aboriginal Organisation.

These reforms are important to ensure that the rules governing the early release of superannuation are relevant to Aboriginal families and cultures, and responsive to the needs of the Aboriginal community.

Legal Aid NSW also proposes that early release on this ground should not be available where the deceased has a death benefit; as one mechanism to ensure that early release of superannuation is a last resort. Consideration should be given to developing a mechanism for the superannuation fund to certify that the deceased has a death benefit and prioritise release to funeral directors for those costs over other beneficiaries.

Complementary reforms could include state-based regulation requiring all funeral providers to offer pre-paid funeral products and payment plans for people experiencing financial hardship. Access to these arrangements would offer a genuine alternative to individuals who cannot pay for expenses associated with a funeral up front without needing to access superannuation, obtaining a high cost loan or struggling to meet living costs.

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.)

Legal Aid NSW is not aware of any issues that may arise by not having a limit on the amount of superannuation to be released under this ground. Expenses can vary significantly across funerals, particularly when remoteness, funeral size and the cost of burial are taken into account. However, to manage the amount of superannuation that is released on this ground, Legal Aid NSW proposes a limit of one release in every three years.

In addition, Legal Aid NSW proposes that funeral insurance premiums be specifically excluded as an 'expense' associated with a dependant's funeral; given the problematic nature of funeral insurance, particularly in Aboriginal communities.⁴

Mortgage arrears

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

⁴ ASIC Report 454, 'Funeral insurance: A snapshot', October 2015.

in this way and what additional limitations might be required? For example, should release be limited to dependants or spouses or partners?

Legal Aid NSW supports the continued availability of superannuation to pay for mortgage arrears. However, the legislative framework for consumer lending has changed dramatically since these provisions were initially introduced. In particular, the *National Consumer Credit Protection Act 2010* (Cth) and *National Credit Code* (Schedule 1 of the Act) (NCC) means that:

- all home loan providers, including those for residential investment properties must hold a credit licence;
- they must consider hardship applications and provide reasons for any refusal; and
- as a condition of a license, lenders must be a member of an external dispute resolution scheme.

This means that a consumer's ability to obtain a hardship variation from their mortgage provider has greatly increased. Based on our casework experience, there are now very few circumstances in which obtaining superannuation will be the most appropriate response to mortgage hardship.

Legal Aid NSW therefore suggests a number changes to the requirements of the mortgage arrears ground to ensure that consumers and lenders both properly consider a hardship arrangement before seeking to access superannuation.

The applicant must have:

- Unsuccessfully sought a hardship variation from the lender; and
- Unsuccessfully attempted to resolve the matter through an external resolution scheme.

Evidence of this must be provided with the application for early release of superannuation.

To protect superannuation funds being used to pay mortgage arrears where there is no prospect of maintaining the mortgage we also suggest a prohibition on early release in circumstances where:

- There is no evidence that the loan can be serviced once the arrears are cleared; and
- Where the lender has obtained judgment for possession of the property; unless the lender agrees to set-aside the judgment on receipt of the funds.

We also suggest changes to the documentation required as part of the application process. Given the challenge that consumers face in obtaining these documents from their lender, it would be helpful if a standard form could be generated allowing consumers to take this to their lender for completion. We also note that many of the current requirements could be met by production of default notice issued under s.88 NCC.

While Legal Aid NSW does not support increasing the amount available under this ground, we propose changing the formulation so that it is easier for consumers to understand and

calculate themselves. It is difficult to determine “12 months of interest payments” as the amount of interest can change each month, is not easily ascertainable in advance and can be difficult for some consumers to calculate. As an alternative, Legal Aid NSW proposes that the total amount available be limited to the equivalent amount of monthly payments.

Legal Aid NSW also cautiously supports an amendment allowing a resident of the mortgaged property to use their superannuation to pay mortgage arrears, with additional protections to minimise the risk of financial abuse. This is to account for the many familial arrangements where only one person may be on the title of the property but many benefit from residing there, often multiple generations.

We suggest that the following additional criteria should be met to access superannuation early on this ground. The applicant must be:

- in a dependency relationship with the property owner; and
- at risk of homelessness if the mortgagee were to exercise its power of sale; and
- be required to obtain independent legal advice about the proposal.

The funds must also be paid directly into the loan account, rather than via any third party.

Rental arrears

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)?

Legal Aid NSW understands that the objective of superannuation being made available for mortgage arrears is to prevent foreclosure, essentially providing the applicant with housing security and protecting an asset that will assist them in retirement. While many Australian now rely on the rental market, allowing early access to superannuation to pay for rental areas cannot be supported when measured against these objectives.

In NSW ss. 84 and 85 of the *Residential Tenancies Act* allow the landlord to end an agreement at will. Eviction is mandatory regardless of the tenant’s circumstances. In jurisdictions such as NSW where landlords are able to terminate a tenancy with no grounds, the payment of arrears by accessing their superannuation is not likely to generate financial or housing security for tenants; and could rapidly contribute the erosion of retirement savings. Legal Aid NSW therefore does not support the expansion of this ground to rental arrears.

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?

No. Legal Aid NSW is not aware of any circumstances that give rise to the need to remove the regulator's residual discretion.

Additional compassionate grounds

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?

Yes. Legal Aid NSW proposes two additional grounds.

To prevent loss of dwelling due to strata and council arrears

While home loan providers are required by law to consider a consumer's experience of financial hardship, there is no equivalent regime for unpaid strata levies or council rates. Our experience, particularly in relation to strata levies, is that often consumers experiencing financial hardship will mistakenly prioritise their mortgage payments and fall into arrears on these other expenses.

In the absence of a legislative framework requiring an Owners' Corporation to develop a payment arrangement with consumers in financial hardship, our casework experience is that an owners corporation can be quick to commence legal action and proceed to bankruptcy, with significant expenses added to the debt. This can have devastating consequences on the home owner.

Legal Aid NSW strongly encourages an additional compassionate ground of loss of dwelling due to strata debt. This should include the full amount claimed the Owners' Corporation, including enforcement expenses. Evidence provided for this ground should be a notice from the Owners' Corporation or a copy of relevant court documents up to and including a creditor's petition.

While our experience is that loss of dwelling due to council debt is less common, local councils retain the power to take possession of the subject property to pay council debt. Legal Aid NSW proposes that unpaid council rates be included in this ground, with evidence required being an unpaid rates notice, letter of demand or relevant court documents.

Case study 1: Ms McAlister⁵

Legal Aid NSW assisted Ms McAlister, the respondent in bankruptcy proceedings commenced by the Owners' Corporation of her strata unit. The petition related to judgment for strata arrears which had accumulated over the course of approximately two years. Legal costs and expenses of recovery had been added to the debt, bringing the total claim to approximately \$10,000.

Ms McAlister's unit was worth approximately \$160,000 with a mortgage of just under \$110,000. She worked part-time earning a modest income which allowed her to service the

⁵ Note: fictitious names used case studies

mortgage, strata levies and other expenses. She was also responsible for the care of her teenage child.

The debt which gave rise to the bankruptcy proceedings arose essentially out of an administrative error. The client inadvertently paid \$3,500 of levies into an incorrect bank account of the strata managing agent. Although those payments were ultimately received by the strata managing agent, this fact did not come to light until after the institution of the bankruptcy proceedings. We were unsuccessful in negotiating a settlement agreement with the Owners' Corporation and the bankruptcy proceedings continued.

Ms McAlister could afford to pay the levies as and when they arose however she could not pay the additional enforcement expenses incurred since the bankruptcy proceedings were commenced. She had in the past entered into and adhered to repayment plans and it was only because of the administrative error described above that she fell into the level of arrears such that the bankruptcy threshold of \$5,000 was reached.

Ms McAlister sought early release of her superannuation to prevent a sequestration order being made. She was unsuccessful as she did not qualify under the financial hardship ground or any compassionate grounds. Ms McAlister lost her home, most of the equity in it and is now living as an undischarged bankrupt.

Low balance accounts where the applicant is permanently unable to work and contribute further to their superannuation fund

Legal Aid NSW often assists clients who have no prospect of working and have very small superannuation balances accumulated during a time of previous employment. This group of people will see very little benefit from their superannuation once administration fees are deducted and no further contributions are made up to retirement age. This is particularly the case for Aboriginal and Torres Strait Islander people, who are well-recognised as being disadvantaged by the current preservation age given their lower life expectancy. Legal Aid NSW proposes that a person be able to withdraw up to the total of their superannuation balance where the:

- The total superannuation balance across all funds is \$10,000 or less; and
- The applicant is permanently unable to join the workforce (as established by eligibility for the Disability Support Pension or a successful Total and Permanent Disability claim).

Complementary amendments would need to be made to Centrelink eligibility rules to ensure these funds were not considered income for Centrelink purposes.

Case study 2: Andrew

Legal Aid NSW assisted Andrew, an Aboriginal man in his late forties living in a remote community and dependant on the Disability Support Pension. Andrew had a superannuation balance of approximately \$7,000 and wanted to access this money to buy a vehicle. A vehicle would allow him to travel to the town centre and between remote communities reducing the need to rely on family and the very limited public transport. However, Andrew's financial position meant that he would not be eligible for early access to superannuation on financial hardship grounds and there were no applicable compassionate grounds.

However, given the life expectancy of Aboriginal men and the extremely low balance of the account this superannuation was not likely to be of any use in retirement. It would likely erode due to administration fees and the lack of future contributions. Andrew was frustrated that he would likely never access his own superannuation and could not access it to meet his immediate needs.

Case study 3: Mr and Mrs Moon

Mr and Mrs Moon fell into arrears on their strata levies. The Owners' Corporation obtained a Local Court judgment against our clients and proceeded to issue a creditor's petition when the judgment remained unpaid. Mrs Moon was in receipt of Centrelink income and Mr Moon was working on a modest income. Mr Moon had more than enough available in superannuation for the arrears to be paid and a financial counsellor helped them to apply for early release on compassionate grounds. This was refused as the debt was not mortgage arrears and the Owners' Corporation did not have an automatic right to sell the property – they needed to bankrupt the client first. Mrs Moon did not have any superannuation. Mr Moon could not apply to the fund directly on financial hardship grounds, because it was his wife, not him, who had been on Centrelink benefits for the minimum 26 weeks.

The clients were able to negotiate time to sell the property, however this was a lengthy process through which they incurred significant legal costs on the part of the Owners' Corporation which was added to the debt. This could have been avoided had the clients been able to access their superannuation at an earlier point in the enforcement process.

Domestic and family violence

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?

Based on our casework experience, there are limited circumstances in which the early release of superannuation will be the most appropriate mechanism to assist victims of domestic and family violence. In many states there are victims support schemes, brokerage and other services to assist women in these circumstances – including funding for immediate needs, such as relocation. Appropriate levels of funding and ease of access to these types of schemes are critical for supporting women experiencing domestic and family violence.

However, there may be circumstances where alternate options are not available, and early release of superannuation will be the most suitable option to support women leaving domestic and family violence. Legal Aid NSW suggests that upon application to the ATO, a social worker or specialised staff member assist the woman to identify possible alternative options for assistance.

Applications would also need to be fast-tracked, as the current 28 day processing time is too slow to assist women who need to move quickly and decisively. Women should not be required to have reported the violence to the police or obtain an apprehended domestic violence order, as there are a number of reasons why women may chose not to do this, such as fear of retribution or distrust of authorities. A statutory declaration outlining the circumstances should be sufficient.

If this ground is to be introduced, further consultation with specialist domestic and family violence services is needed about how it would be implemented to ensure that:

- women's safety is paramount;
- the application process is simple, fast and accessible; and
- the perpetrator must not benefit directly or indirectly from the funds;
- there are no unintended negative consequences, such as impacting on a women's eligibility for Centrelink, Legal Aid or other means tested services.

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

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?

Legal Aid NSW strongly supports amending the current criteria used by superannuation funds when assessing severe financial hardship. Legal Aid NSW regularly assist clients experiencing severe financial hardship because they have not been in receipt of Centrelink for a continuous period of 26 weeks and cannot access their superannuation on financial hardship grounds. For example, the person is:

- working intermittently or seasonally, disrupting the continuity of Centrelink payments;
- without an income and waiting for their application to be approved; or
- ineligible for Centrelink.

There are many reasons a person may not be receiving Centrelink payments, aside from having income and assets exceeding the limits. For example:

- Residential requirements. For example, New Zealand citizens who live in Australia but arrived after 21 February 2001 have limited entitlement to social security payments because of residency rules. If they lose their job due to ill-health or an accident they may not be entitled to any social security payments.
- A person may have a compensation preclusion period which prevents them from receiving Centrelink payments for a period of time due to receipt of compensation. These preclusion periods can be very long and a person may run out of funds before the period has expired.

There is also a number of working Australians experiencing severe financial hardship who may not be eligible for Centrelink based on means.

Legal Aid NSW proposes the following objective criteria as an appropriate balance between simplicity, objectivity and flexibility. The applicant will be deemed to meet the criteria of financial hardship if:

- They have been in receipt of Centrelink benefits for any 26 weeks of the previous 12 month period; or
- For the previous 3 months the applicant's household income has been below a recognised measure of financial hardship, such as the Henderson Poverty Index or Household Expenditure Index.

This criteria can be applied objectively and quickly by superannuation funds when assessing financial hardship. However, it captures situations where a Centrelink payment period has been disrupted by periods of employment; or where client is not in receipt of Centrelink but the household is experiencing severe financial hardship, as shown in Case Study 3.

Case study 4 - Renny

Renny presented to Legal Aid NSW in acute financial hardship. Renny was an asylum seeker whose application for a protection visa had been rejected. Renny had agreed to leave Australia, but was waiting for travel documents to be issued by his country of origin so he could return home. He did not have any visa, could not work and was not eligible for Centrelink. He was dependent on a modest Status Resolution Support Service (SRSS) payment, administered by the Red Cross. Despite Renny's income being less than a Centrelink payment, Renny could not access his superannuation on financial hardship grounds because he was ineligible for Centrelink. There were also no compassionate grounds relevant to his circumstances. Renny had to wait until he had permanently left Australia before he could obtain his superannuation and continued to live in acute financial hardship, with the support of community support services in the interim.

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?

Legal Aid NSW suggests that the same statement of financial position and supporting evidence proposed at Question 1.1 above for compassionate grounds claims could be utilised by the funds when assessing financial hardship applications. This could contribute to consistency in the process and encourage clients to seek the advice of a financial counsellor before submitting their application.

Legal Aid NSW is not aware of clients seeking to access their superannuation benefits when they are not experiencing financial hardship. We recommended the criteria outlined above to demonstrate severe financial hardship. Our suggestions are based on our casework

experience that clients who are dependant on Centrelink, have no income or are working and living below the poverty line generally have difficulty meeting reasonable and immediate family living expenses.

Part 3: Victims of crime compensation

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

Legal Aid NSW does not support allowing victims of crime access to a perpetrator's superannuation to pay for compensation. This is a significant shift away from the public policy that superannuation is preserved for retirement. Legal Aid NSW is concerned the proposal is:

- Inconsistent with the proposed principles for early release;
- Unnecessary;
- Likely to result in a number of unintended consequences for state justice systems; and
- Administratively complex.

When considering whether this proposal is fit for purpose, it is also worth noting research indicating the higher levels of disadvantage, trauma and abuse experienced by the prisoners compared to the general population. Allowing victims access to a perpetrator's superannuation may contribute to entrenching the long term disadvantage of this population⁶.

Principles of early release

The consultation paper at page iv outlines the competing principles underpinning early release of superannuation:

- Superannuation benefits should generally be preserved to provide income in retirement, and
- There will be circumstances where the benefits of early access to superannuation for an individual will exceed the benefits of preserving balances until retirement.

Permitting access to superannuation for victims of crime would conflict with the preservation principle. It would also fall outside the second principle, which refers to the benefits 'for the individual', that is, the person for whom the contributions were made.

Superannuation contributions are held 'on trust for', or for the benefit of, the owner of the fund. Currently, the grounds for early release on compassionate grounds, or on the grounds of severe financial hardship, require the decision maker to consider whether the benefits of early release exceed preservation. It would be a significant and serious move away from these principles to permit early release for the benefit of someone else. Such a move could also

⁶ *Psychological distress and experience of sexual and physical assault among Australian prisoners*, SCHNEIDER, K and RICHTERS, J, published *Criminal Behaviour and Mental Health* 21: 333–349 (2011) Published online 14 June 2011 in Wiley Online Library (wileyonlinelibrary.com) DOI: 10.1002/cbm.816

become a precedent for other moves to access a person's superannuation, such as to satisfy debts for personal injury compensation.

The consultation paper notes that victims may already access other assets that may be used to support a person's retirement, including their home. However there is an important distinction between superannuation and other assets—that is, superannuation is, at least in part, compulsory. Australian law compels employers to contribute a proportion of employees' wages into superannuation funds, on the basis that the contributions and their earnings will be held for them until their retirement. It would be more difficult to justify compulsory savings if those savings can be accessed to satisfy certain debts.

Mechanisms for enforcing compensation debts

There are currently sufficient mechanisms for a victim to access compensation through State-based compensation schemes, the NSW fines enforcement system (which is available to enforce victim restitution orders (**VROs**), and private civil litigation.

Legal Aid NSW considers that the current process for enforcing debts related to Victims Compensation are effective. Since March 2017, VROs made by NSW courts can be enforced by Revenue NSW under the *Fines Act 1996* (NSW). The fines enforcement system imposes heavy progressive sanctions for non-payment.⁷ The hierarchy of sanctions is as follows:

- Driving sanctions – licence or car registration is suspended or cancelled, and RMS business restrictions may be imposed, such as refusing to renew car registration or transferring registration.
- Civil enforcement – property seizure order, garnishee order on wages or bank accounts, charge on land or examination summons
- Community Service Order - breach can lead to imprisonment, although this has not happened in practice since the Fines Act was passed in 1996.
- Enforcement fees are added to the amount owing.

Court orders can also be enforced via garnishee order, examination notice, and writ of execution (which permits the Office of the Sheriff to seize and sell a person's property, including furniture, jewellery, cars, boats, houses and land).⁸

Should the debtor apply for bankruptcy, creditors will have access to any contributions to superannuation made in order to defeat creditors—as the consultation paper notes, these contributions are not protected in bankruptcy.⁹ Legal Aid NSW considers that this is appropriate, and should be considered the limit to which superannuation funds can be accessed by victims of crime.

⁷ See further Revenue NSW *Civil sanctions* <http://www.revenue.nsw.gov.au/fines/ea/civil> accessed 7 February 2018.

⁸ See further Justice NSW *Enforcing a court decision* http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/after_court_decision/enforcing_court_decision.aspx#Enforcement_of_civil accessed 7 February 2018.

⁹ The Treasury *Early release of superannuation benefits* (2017) 19.

Potential impact on guilty pleas

People who are convicted of crimes frequently have a disrupted and unstable employment history and may not have significant superannuation assets. However, for those who do have significant superannuation assets, the prospect of losing their retirement savings would create an additional deterrent to pleading guilty (assuming that a conviction is a prerequisite for access to the assets). The victims in these matters would be more likely to have to give evidence, which can be stressful and traumatic. It could also create extra costs for legal assistance services and increase court delays.

Potential impact on number of civil claims

The option to enforce civil compensation orders against a perpetrator's superannuation may lead to an increase in civil claims; in circumstances where these matters would not otherwise have been litigated due to the low likelihood of enforcing a judgment.

Potential impact on victims' willingness to make claims

It is the experience of Legal Aid NSW solicitors that some victims are unwilling to make a claim for compensation if that money will be recovered from the offender, because they are concerned about retribution by the offender. Even where a victim applies for a 'recognition payment' from the NSW statutory scheme, action is taken to recover the amount from the offender.¹⁰ These concerns could be amplified if the offender's superannuation was also at risk.

Administratively complex

Questions 3.2 to Question 3.9 Specific questions about administering victim's access to a perpetrator's superannuation

The consultation paper raises a number of questions about how and in what circumstances a perpetrator's superannuation could be accessed to satisfy debts related to victims' compensation. Legal Aid NSW does not support such access and has not addressed these questions, except to note that it would be difficult to provide such access in a consistent and administratively straightforward way; and in a manner that could do justice to victims, offender's families (including partners who are seeking a superannuation split in family law), and offenders with varying financial arrangements (for example, those in receipt of defined benefits versus those with a lump sum).

¹⁰ Justice NSW *Recognition payments*
http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_financial_support/vs_recognitionpayment.aspx accessed 7 February 2018

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?

For the reasons outlined at questions 3.1 to 3.9 above, Legal Aid NSW does not support allowing State and Territory Governments access to a perpetrator's superannuation to recover the cost of their payments to victims under state victims' compensation schemes.

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.