



12 February 2018

Early Release Review  
Retirement Income Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [superannuation@treasury.gov.au](mailto:superannuation@treasury.gov.au)

Dear Sir/Madam,

## **SMSF ASSOCIATION SUBMISSION ON REVIEW OF THE EARLY RELEASE OF SUPERANNUATION BENEFITS**

The Self Managed Super Fund Association (SMSFA) welcomes the opportunity to make a submission on Treasury's review of the early release of superannuation benefits.

The SMSFA is supportive of reforms that ultimately ensure that money released early from superannuation is for genuine claims only. We have focused our solution on ensuring that the financial capacity aspect of the legislation is tighter and applied correctly rather than including safeguards or limits on specific releases. We believe superannuation can be used to improve an individual's life for serious conditions when they cannot source this money from other savings and assets. A principles-based approach will ensure that the superannuation system has appropriate policy settings to ensure that retirement savings are used in line with the system's objectives while also providing flexibility for the system to change and adapt to a changing workforce and concept of retirement.

### **QUESTIONS**

**0.1. Do these proposed principles provide an appropriate guide to determine the nature and scope of the rules for early release under compassionate and financial hardship grounds, and for victims of crime compensation? If no, what should the principles be?**

We believe the principles provide an appropriate guide for the nature and scope of the rules for early release of superannuation under these grounds. The principles balance the contrasting nature of superannuation benefits that should be kept for retirement against the need to recognise that superannuation benefits are a form of deferred wages which might be needed immediately to aid individuals in their life.

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

With regards to the principles, the early release of superannuation benefits should generally be more difficult to obtain. We believe the principle of 'last resort' indicates that all other genuine options have been exhausted and individuals are left with no choice but to access and utilise their



superannuation. Coupled with the principle of 'genuine hardship', there should not be any optional scenarios where individuals can 'dip' into super.

### **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?**

The SMSFA believes that the assessment of financial capacity needs to be made more prescriptive and/or objective. There may be merit in including an aspect of financial hardship or prescriptive financial assessment to the assessment criteria for a release on compassionate grounds.

We believe that a tightening of this assessment should be able to solve the problem regarding inappropriate access to compassionate grounds. The Department of Human Services website states that to access superannuation on compassionate grounds you must show "that you can't pay any other way, such as using savings or selling assets." Despite the fact we believe this definition should have been effective, it is clear individuals are using 'loopholes' to circumvent this or the criteria are not being correctly applied. Therefore, an increase in prescriptive measures should render financial capacity an effective barrier to accessing superannuation early.

The principle of last resort should resonate in any prescriptive assessment. For example, if a medical procedure is covered by the Medical Benefits Scheme (MBS) or private health insurance, it is likely that individual's will be able to have greater financial capacity to meet the costs of that procedure. Individuals with a high income should not be able to inappropriately access their superannuation by merely proving they cannot meet a relevant expense by virtue of spending beyond their means.

The SMSFA would be supportive of secondary prescriptive principles that must be met before an individual can access superannuation on compassionate grounds. These could include:

- Income below a certain level.
- MBS or private health insurance provides no discernible help.
- Individual did not place themselves in a position unreasonably to access superannuation.
- Individual is experiencing financial hardship.
- Proof of no other financial means (e.g. assets or savings).

### **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?**

The SMSFA is concerned with the figures cited in the consultation paper regarding the increase in the amount of applications for superannuation to be released on medical grounds. We believe this increase in access to super for medical treatment has been driven by greater public awareness of the ability to access super for this reason. We also believe this has been potentially exacerbated by medical professionals promoting early release of superannuation as a way to pay for surgeries that are not covered by the MBS. We highlight the advertising of services below in answer 1.5.

### **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?**



We believe the recent significant increase in access to superannuation on medical grounds shows that the appropriate balance between income for retirement and providing assistance in times of genuine hardship seems is not being achieved. Increasing the prescriptiveness of financial capacity may help this balance. Furthermore, as discussed later in the paper, in addition to improving the general principles for early release the law may be improved by minor amendments to aspects of the medical release legislation.

**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?**

We do not support a restriction on the number of releases permitted. If an individual has a genuine need under a medical condition of release they should be able to access their funds. This is particularly important in life threatening illnesses.

There may potentially be merit in cashing restrictions on the amount released for grounds or procedures that have an aspect of 'optional' or 'alleviation'.

**1.5 Have you observed any trends in the types of treatments that are being funded by superannuation benefits and are these trends any cause for concern?**

We have anecdotally observed an increase in bariatric surgery being promoted to be financed via superannuation. This is concerning to the Association as we do not believe the increase in this type of surgery fits well into the principles discussed in the paper, specifically the principle of last resort and genuine hardship.

It is also concerning that 56% of medical releases are for bariatric surgery, given it is a surgery that is not generally associated as being prevalent. A simple internet search highlights many medical practitioners who are promoting this service. The fact that these websites highlight the early release as an advertisement and short-term financing solution rather than a last resort for a life threatening illness does not fit with the principles for the early release of superannuation. Furthermore, these websites rarely detail that individuals must not have the financial capacity to pay for the procedure in order to access their superannuation.

**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?**

We would have concerns that superannuation is being used for surgery that does not 'need' to be paid by superannuation. The provisions should be sufficiently tight to ensure that elective surgery is removed as an option for early release of superannuation. At the same time, greater analysis of financial capacity is necessary to ensure individuals are not accessing their superannuation when they have the financial capability to do so outside superannuation.

**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)?**

The SMSFA does not specifically see IVF as life threatening or a disease with acute or chronic pain. However, we do believe becoming a parent is a genuine staple of human life, if people so wish, and if



individuals cannot have a child by any other means they may need to consider IVF. If an individual cannot pay for IVF without access to their superannuation we understand the incentive to lodge a claim, possibly under the category of mental disturbance. However, genuine cases are likely to be rare.

**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)?**

We support that the early release of superannuation for bariatric surgery should only be utilised when a doctor judges that the illness is life threatening. We would hope there is no conflict of interest between a surgery legitimately being judged as necessary to treat a life threatening problem and surgeons making an individual aware that they can access their superannuation for an elective procedure for monetary gain.

**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?**

We would support a requirement that the amount claimed is ‘reasonable’. An opinion from an approved medical list of doctors would be evidence of this or using an industry average of fees charged for procedures.

There may be merit in some form of limitations on a released amount for medical grounds that aren’t life threatening.

**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?**

We do not support an additional category for dental treatment. We believe dental treatment is able to fit under the established categories.

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

The SMSFA would support an amendment to ‘treatment’ rather than ‘alleviation’.

There is merit in removing these provisions entirely but we are sympathetic to individuals with those issues and genuinely need early access to superannuation for a better life. We believe that the tightening of the provisions only needs to go so far so that elective surgery is removed as an option for superannuation early release by tightening the rules regarding financial capacity.

**1.12 Should the reference to a medical specialist in SIS Regulation 6.19A(3) be clarified to ensure that the practitioner is a specialist in the field most relevant to the condition being treated?**

We support this amendment as it would bring greater integrity to the provisions.



**1.13 Should the Regulator be entitled to seek a second opinion from an approved medical practitioner/s, or should the individual be required to obtain a reference from a list of approved medical practitioners, to ensure the objectiveness of the assessment?**

We would support the regulator being entitled to seek a second opinion from an approved medical practitioner. As long as the approved medical practitioners have no relation to the individual this should seek to solve problems where the regulator is unsure.

**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?**

We would support the inclusion of immediate family in addition to dependency relationships for this condition of release. This ensures individuals are able to give some form of funeral to their parent, for example, which is another staple of human life.

**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).**

We believe there should be a maximum reasonable amount that can be released to meet a funeral expense.

**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?**

We would support an early release of superannuation benefits be available to meet mortgage payments when an individual's name is not on the mortgage title when it is their principal place of residence.

We would be supportive of broadening the provisions to include spouses and partners of individuals who have their name on the mortgage title on a property that is their principal place of residence.

**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)?**

The SMSFA is supportive of extending compassionate grounds to include individuals who are unable to meet rental payments. If an individual was to be left homeless because they could not access their superannuation this would not satisfy the principles in this paper.

Furthermore, data from the 2016 census by the Bureau of Statistics continue to show that the rate of home ownership is falling, with just 31 per cent of Australians owning their home outright. This is



more than 10 per cent lower since 1991, when more than 40 per cent of Australians owned their home outright. In contrast, there has been a shift towards renting up to 31 per cent from under 27 per cent in 1991, which we would expect to continue to significantly increase further in the coming years.

There must be an aspect of reasonableness to the claim and as stated before, a genuine claim to being financial incapable of meeting rental expenses. We would support a limited release of superannuation for renters, such as six months.

We would also be supportive of protections being in place in order for the release not to be abused. For example, released monies should be paid directly to the landlord to ensure it is used for correct circumstances. Further, protections need to be in place to ensure individuals who are renting premises that are above their means do not access their superannuation to make up a shortfall, especially if they could rent cheaper housing that would meet their needs. We recommend the prescriptive measures in 1.1 would need to be assessed.

We are of the opinion the threshold for early release of superannuation should occur on rental arrears as a rental eviction notice may not give a renter enough time to release funds.

**1.18 Are the current disability grounds fit for purpose, or should early release be extended, for example, to disability aids? If the latter, which expenses should be included, what evidence should be required, and should there be a cap on funds released?**

We are not aware that the current disability grounds are not fit for purpose.

If this ground was extended we would recommend there should be a cap on the funds released.

**1.19 Should individuals seeking early release of superannuation under disability grounds be required to demonstrate that they have sought assistance from other Government or non-Government programs prior to being approved? If so, how should this requirement be administered?**

We would support this amendment.

**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?**

We support the Regulator's residual discretion in SIS Regulation 6.19A (1)(f). The statistics show that this regulation is not being abused and provides a beneficial overarching regulation for grounds that do not fit into a specific category.

**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?**

We do not have any further situations which justify inclusion in the early release of superannuation provisions.

**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?**

The SMSFA supports access to superannuation benefits for victims of domestic violence. We would support this under strict and particular conditions. There is genuine hardship in being stuck in a relationship of domestic violence that an individual cannot remove themselves from due to a lack of financial resources to do so. If the release of superannuation benefits allows them to be free from this situation then this should be utilised.

We believe early release for domestic violence purposes fits under the general principle of genuine hardship and a lack of financial capacity. Applying these high level principles will ensure the law is flexible enough to cater for many different situations and circumstances while protecting the need for superannuation to be preserved for retirement. The provision and applications must ensure there is no financial capacity for a victim to facilitate a move on their own without the use of superannuation benefits.

While we believe a principles based approach to financial capacity should allow for early release of superannuation for domestic violence, a reasonable limit on money released should still apply to ensure superannuation benefits are not exhausted.

We support a limit on reasonable costs being released from superannuation but note that expenses that may need to be incurred are varied and difficult to take a standard approach to (e.g. costs may include moving costs, short-term rental costs, legal costs, short-term costs of living, etc.).



**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 SMSFA is not aware of any systemic problem with the current criteria for severe financial hardship. The fact that the statistics relating to this release have been consistent are promising. We support the current objectivity in the Commonwealth requirements as it supplies a stringent test for trustees to adhere to.

There may be merit in broadening the 26-week rule to allow for individuals who do not qualify due to a minor issue. An example may be including a second limb that could be achieved such as 26 weeks of Commonwealth income support over a year. This would allow individuals who are in severe financial hardship but have undergone intermittent work access to their superannuation.

**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?**

As stated in 2.1, we believe the objective limb regarding Commonwealth income support payments as the objective section of the release.

The evidence that members must currently provide to trustees to proof of being ‘unable to meet reasonable and immediate family living expenses’ should be sufficient. We would imagine bank statements, income and expense documents, and tax returns would form part of this.





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

The SMSFA supports the idea that a victim of crime should be able to access a perpetrator's superannuation for compensation.

When an individual commits a serious crime they should not be able to hide behind legislation that protects their superannuation. We believe if an individual has committed a serious crime against a victim they have sacrificed their rights to full protection of their superannuation and their victim becomes the priority.

Our support is based on reasonable restrictions for the access which we discuss below.

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

Access to superannuation should only be limited to cases where a criminal conviction has been made. This provides clear objectivity to the access.

### **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)?**

The SMSFA recommends that access to a perpetrator's superannuation should only be available for indictable criminal offences and above. This restricts access to those trials which take place in District and Supreme Courts. Typically these offences include armed robbery, rape, murder and serious drug cases.

This prevents crimes which may have little impact such as minor theft leading to a perpetrator's superannuation being accessed by a victim.

### **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?**

There may be merit in a system that reviews if a perpetrator has made out of character contributions to superannuation to shelter assets. However, this may not allow all individuals access to a perpetrator's superannuation and may be hard to regulate. For example, if a perpetrator did not have any finances available outside of superannuation but had not made out of character contributions then a victim would not have any claim to their superannuation assets.

Further, the regulation of out of character contributions introduces a subjective element to the law which may have adverse impacts.

### **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?**

Having regard to the principle of 'last resort', a victim's right to perpetrator's superannuation should only be enforced secondary to a perpetrator's assets outside of superannuation.



A request for information and release to the superannuation trustees should be legislated and required.

**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)?**

We recommend that a maximum percentage limit be enforced for a perpetrator's superannuation. This reduces the strain on perpetrators with low balances who may be unable to source the full amount of compensation or result in an exhaustion of their superannuation benefits.

This percentage potentially could be altered depending on the amount of dependants a perpetrator has. However, we stress that the legislation should be kept as simple as possible.

There may also be merit in removing any limit if an individual has clearly made out of character contributions to shield assets before committing a crime.

**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?**

In the first instance we support access of a perpetrators superannuation as lump sum. This provides an administratively easy process to settling a victim of crime compensation. It also ensures finality with a once off payment.

However, there may concerns that a lump sum might drain an existing balance to nil or small balances. This would result in a perpetrator not being able to rely on compounding returns on their superannuation balance. In this instance an income stream may make more sense. This would result in a victim receiving their compensation periodically, preserving a perpetrators balance. Although the time, emotion and administration involved in this process may make this an unfeasible approach. Alternatively, a percentage limit guards against balances being drained.

The appropriate proportion of Defined benefit products and annuities that have not been commenced should be required to be commuted as a lump sum, in a similar fashion to splitting superannuation for family law purposes.

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

We do not believe contributions into superannuation after a compensation order should count towards an amount that can be accessed unless they are made out of character.

**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?**

We believe any changes to the early release provisions should be prospective.



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

We do not support State and Territory compensation schemes being able to recover the cost of their payments to victims from the perpetrator’s superannuation. Early release for superannuation should only be used as a last resort to compensate a victim and not a compensation scheme.

### **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?**

Our initial view is that these claims should be addressed and prioritised in chronological order. This would mean that the system would not be open to prioritisation ‘loopholes’.

If you have any questions about our submission please do not hesitate in contacting us.

Yours sincerely,

A handwritten signature in black ink that reads 'John L. Maroney'. The signature is fluid and cursive, with the first letters of 'John' and 'Maroney' being significantly larger and more prominent.

John Maroney  
CEO  
SMSF Association

### **ABOUT THE SMSF ASSOCIATION**

The SMSF Association is the peak professional body representing SMSF sector which is comprised of over 1.1 million SMSF members who have \$701 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.