

The Association of Superannuation Funds of Australia Limited
ABN 29 002 786 290
ASFA Secretariat
PO Box 1485, Sydney NSW 2001
p: 02 9264 9300 (1800 812 798 outside Sydney)
f: 1300 926 484
w: www.superannuation.asn.au



11 October 2011

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Email: cwlth_family_violence@alrc.gov.au

RE: Discussion Paper - Family Violence and Commonwealth Laws and Commonwealth Laws

Dear Executive Director,

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission with respect to the above issues paper.

The Association of Superannuation Funds of Australia (ASFA) is a non-profit, non-political national organisation whose mission is to advance effective retirement outcomes for members of superannuation funds through research and advocacy. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds as well service providers some of whom deal with self managed superannuation funds (SMSFs), has over 90% of the approximately 12 million Australians with superannuation as members. ASFA members manage or advise on the bulk of the \$1.3 trillion in superannuation assets as at September 2010. ASFA is the only organisation that represents all types of superannuation funds and associated service providers.

ASFA has considered the questions and proposals posed in Chapter 19 Superannuation of the discussion paper. At the outset ASFA would like to make the important point that superannuation is a tax preferred long term savings and investment vehicle that has as its sole purpose the provision of retirement income for the member. ASFA considers that permitting individuals to use superannuation savings for other purposes ASFA believes would be poor public policy and contrary to the government's retirement incomes policy and the intent for which tax concessions are given to superannuation savings.

ASFA does not consider it appropriate to amend the regulations to the *Superannuation Industry (Supervision) Act 1993* to provide a specific compassionate ground to enable the early release of superannuation benefits to a victim of family violence.

The general early release provisions deal with a need for immediate financial relief. Whilst many victims of family violence may also be in financial difficulty, ASFA is of the view that the narrow focus of the current early release provisions should be retained.

ASFA is supportive of the need for the Australian community to more broadly support means by which impacted individuals can obtain relief and escape the circumstances of domestic violence. These other means should emerge from the social security framework where urgent and immediate funding could be provided to victims. ASFA is concerned that releasing superannuation benefits in such circumstances may, while providing temporary financial relief, actually not be in the long term best interests of the individual. If coercion and violence is a feature in these circumstances, there cannot be a guarantee that the release of any money will end up in the hands of the abused. Ultimately though, a superannuation benefit later in life may in fact be a better outcome than early release with no guarantee of where it ends up.

ASFA notes that there already exist a number of special and limited circumstances under which superannuation fund members can access their savings earlier than normal. To do so super fund members need to satisfy certain strict conditions.

ASFA's initial reaction to the proposals in the discussion paper is that the circumstances under which early release is permissible should not be broadened to include family violence issues. However, ASFA is willing to continue considering the merits of such a broadening and will do so over the coming months as it also addresses a plethora of other superannuation reforms.

Keeping in mind ASFA's overarching position of not being in favour of a broadening of the early release rules, we have, nevertheless, attempted to respond to the questions and proposals raised in the discussion paper at Attachment A to this correspondence.

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We thank you for this opportunity to provide our thoughts on the discussion paper. ASFA looks forward to continuing its involvement in this important work.

Should you have any questions please contact our Senior Policy Adviser, Tony Keir, on 02 8079 0815

Yours sincerely



David Graus
General Manager, Policy & Industry Practice

Attachment A

Law Reform Commission

Question	Response
Part F – Superannuation	
19. Superannuation Law	
<p>Question 19-1 The ALRC is not proposing that a trustee should have an express obligation to consider whether an application for superannuation splitting is being made as a result of coercion. Are there any other ways a trustee or another body could consider this issue? If so, what if any steps could they take to limit or ameliorate the effect of that on a victim of family violence?</p> <p>Proposal 19-1 In <i>Family Violence—A National Legal Response</i> (ALRC Report 114) the Australian Law Reform Commission and NSW Law Reform Commission recommended that the Australian Government should initiate an inquiry into how family violence should be dealt with in respect of property proceedings under the <i>Family Law Act 1975</i> (Cth). Any such inquiry should include consideration of the treatment of superannuation in proceedings involving family violence.</p>	<p>Requests for splitting are made in writing and as such the trustee, or any other person, really has no capacity to know whether or not the member is being coerced into making the request. At the same time ASFA does not think that it is practical to expect the trustee to make enquiries about family violence before actioning the split. However, should the member separately contact the trustee advising that a splitting application has been made under duress that trustee would consider this as part of its decision making process as to whether or not the splitting request should be actioned.</p> <p>Proposal 19-1 if implemented would be able to more fully consider the treatment of superannuation in proceedings involving family violence.</p>
<p>Question 19-2 What changes, if any, are required to ensure that the Australian Tax Office considers family violence in determining appropriate compliance action in relation to trustees of SMSFs who fail to comply with superannuation or taxation law, where that action may affect a trustee who is:</p> <p>(a) a victim of family violence; and (b) not the subject of compliance action?</p> <p>Proposal 19-2 Regulation 6.01(5)(a) of the <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth) should be amended to require that an applicant, as part of satisfying the ground of ‘severe financial hardship’, has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks.</p>	<p>(a) ASFA’s understanding is that, generally speaking, the ATO’s skill lies in taxation issues and the re-distribution of the superannuation guarantee charge. The ATO, like superannuation trustees to some extent, would need a court order of some sort that confirms a family violence circumstance in order to apply a different compliance approach.</p> <p>(b) Differentiated compliance treatments, however, are also a feature of the current Stronger Super SMSF reforms. ASFA believes that the ATO should grade each breach and determine whether the contravention occurred intentionally or accidentally based on a reasonably arguable position, in determining the appropriate compliance treatment.</p> <p>Regard also needs to be given to the fact that many SMSFs have a combination of active and passive trustees. This is no more apparent than when the active trustee dies, generally leaving behind the passive trustee(s) who are then left to a great extent to flounder with the trusteeship of the fund. Notwithstanding the</p>

	<p>fact that trustees have a shared responsibility, the reality is that in many cases one trustee tends to make the decisions. For this reason any differentiated compliance treatment needs to recognise that a feature of SMSF trusteeship today, be it proper or not, is that not all trustees are equal.</p> <p>The same rationale applies to SMSF trustees/members who may breach a requirement as a result of family violence.</p> <p>In regards to Proposal 19-2. ASFA does not support an early release mechanism for family violence victims being managed through the severe financial hardship process. ASFA believes that there needs to be an appropriate balance between the need to preserve a superannuation benefit until retirement and the need to recognise that, in certain limited circumstances it is appropriate to grant early release.</p> <p>ASFA believes that the correct balance has been achieved in the current severe financial hardship rules where an applicant is required to have been receiving Commonwealth income support payments continuously for 26 weeks; they unable to meet reasonable and immediate family living expenses and they are still on the benefit at the time of application.</p> <p>ASFA does not consider that amending the definition of severe financial hardship in the case of family violence would address the core issues in regards family violence that being the protection and safety of the victim.</p>
<p>Question 19–3 What changes, if any, to guidance material produced by the Australian Tax Office may assist in protecting people experiencing family violence who are members or trustees of a SMSF?</p> <p>Proposal 19–3 APRA should amend the <i>Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds</i> to include information about family violence, including that family violence may affect the test of whether an applicant lacks the financial capacity to meet the relevant expenses without a release of benefits.</p>	<p>All guidance material from regulators should reflect the law as enacted. If Proposal 19-3 was to be implemented then the guidance should reflect that change. Otherwise it is difficult to expect ATO guidance to SMSF trustees/members being able to appropriately cover the topic of family violence as it might impact an SMSF trustee/member.</p> <p>In regards to Proposal 19-3. ASFA is not against such an amendment although there needs to be mechanisms that guarantees, as much as possible, that the funds are used to escape family violence and that the money does not end up in the hands of the abuser.</p>

<p>Question 19–4 What approaches or mechanisms should be established to provide protection to people experiencing family violence in the context of SMSFs?</p>	<p>Possibly the ability to freeze the assets of a fund where family violence is proven to exist. There already exists a number of protections unavailable under the <i>Superannuation Industry (Supervision) Act 1993</i> (SIS Act) to freeze assets or impose penalties if access is made to superannuation fund money illegally. It needs to be made clear, however, what is meant by “protection to people experiencing domestic violence”.</p>
<p>Question 19–5 Are there any difficulties for a person experiencing family violence in meeting the requirements under reg 6.01(5) (b) of the <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth) as part of satisfying the ground of ‘severe financial hardship’? If so, what changes are necessary to respond to such difficulties?</p>	<p>Please see earlier response to Proposal 19-2.</p>
<p>Question 19–6 Should the <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth) be amended to allow recipients of Austudy, Youth Allowance and CDEP Scheme payments to access early release of superannuation on the basis of ‘severe financial hardship’?</p>	<p>No. ASFA believes this to be contrary to good public policy. It is arguable as well as to how much value would be in an account for someone in receipt of Austudy or the Youth Allowance. Also it is unclear what the relationship is here between these changes and family violence.</p>
<p>Question 19–7 Should reg 6.01(5)(a) of the <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth) be amended to provide that applicants must either be in receipt of Commonwealth income support payments or some other forms of payment—for example, workers’ compensation, transport accident or personal income protection payments because of disabilities?</p>	<p>No. ASFA believes this to be contrary to good public policy. It is unclear what the relationship is here between these changes and family violence.</p>
<p>Question 19–8 Should APRA Superannuation Circular No I.C.2, <i>Payment Standards for Regulated Superannuation</i>, be amended to provide guidance for trustees in relation to:</p> <ul style="list-style-type: none"> (a) what constitutes a ‘reasonable and immediate family living expense’ in circumstances involving family violence; and (b) the effect family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses? 	<p>No. The current wording is broad enough so as to include any manner of circumstances that might result in being unable to meet reasonable and immediate family living expenses.</p>
<p>Question 19–9 As an alternative to Question 19–8 above, should APRA work with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies to develop guidance for trustees in relation to</p>	<p>Keeping in mind the present reform agenda of the Government and the significant changes that are afoot in super, this issue at this time is at best a secondary issue. This is not saying that it is unimportant, but that at this time APRA may not view providing such guidance as a</p>

<p>early release of superannuation on the basis of 'severe financial hardship', including information in relation to:</p> <p>(a) what constitutes a 'reasonable and immediate family living expense' in circumstances involving family violence; and</p> <p>(b) the effect family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses?</p>	<p>high priority.</p>
<p>Question 19–10 In practice, how long do superannuation funds take to process applications for early release of superannuation on the basis of 'severe financial hardship'? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?</p>	<p>Please see earlier response to Proposal 19-2.</p>
<p>Question 19–11 In practice, how long does APRA take to process applications for early release of superannuation on compassionate grounds? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?</p>	<p>This is a matter for APRA and now Medicare to respond to.</p>
<p>Question 19–12 Should reg 6.19A of the <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth) be amended to provide that a person may apply for early release of superannuation on compassionate grounds where the release is required to pay for expenses associated with the person's experience of family violence?</p>	<p>ASFA is not against such an amendment although there needs to be mechanisms that guarantees, as much as possible, that the funds are used to escape family violence and that the money does not end up in the hands of the abuser. Also any such determination under compassionate grounds takes the decision to release away from the trustee.</p>
<p>Question 19–13 Should the <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth) be amended to provide for a new ground for early release of superannuation for victims of family violence? If so, how should it operate? For example:</p> <p>(a) which body should be responsible for administering the new ground;</p> <p>(b) what criteria should apply;</p> <p>(c) what evidence should be required;</p> <p>(d) if individual funds administer the new ground, should there be common rules for granting early release on the new ground; and</p> <p>(e) what appeal mechanisms should be established?</p>	<p>Please earlier response to Proposal 19-2 and Question 19-12.</p>

<p>Question 19–14 What amendments, if any, should be made to application forms for early release of superannuation to provide for disclosure of family violence where it is relevant to the application?</p>	<p>Please see earlier response to Proposal 19-2.</p>
<p>Question 19–15 What training is provided to superannuation fund staff and APRA staff who are assessing applications for early release of superannuation? Should family violence and its impact on the circumstances of an applicant be included as a specific component of any training?</p>	<p>This is a matter for APRA and now Medicare to respond to.</p>
<p>Question 19–16 In practice, how do superannuation funds and APRA contact members or those who have made an application for early release of superannuation? Is there, or should there be, some mechanism or process in place in relation to applications involving family violence to deal with safety concerns associated with:</p> <p>(a) contacting the member or applicant; or (b) the disclosure of information about the application?</p>	<p>Funds would contact applicants in the manner that the applicant generally nominates. This might be by letter or phone in most cases. It is difficult to suggest a mechanism that would protect the applicant as there is no guarantee as to who is controlling the application i.e. a genuine applicant or the “abuser”. ASFA is unable to offer any workable process here.</p>
<p>Question 19–17 Should the 90 day period for a superannuation fund to respond to a complaint by a member be reduced to 30 days?</p>	<p>ASFA has no evidence that the 90 day period for a superannuation fund to respond to a complaint is inappropriate. Therefore we need answer “no” here.</p>
<p>Question 19–18 Should there be central data collection in relation to applications for early release of superannuation in order to identify:</p> <p>(a) the extent to which funds are being accessed early on the basis of any new family violence ground, including numbers of applications and success rates; and (b) whether there are multiple claims on the same or different funds?</p> <p>If so, which body should collect that information, and how?</p>	<p>Please see earlier response to Proposal 19-2.</p>
<p>Question 19–19 Are there any other ways in which superannuation law could be improved to protect those experiencing family violence?</p>	