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

Email: [cwlth\\_family\\_violence@alrc.gov.au](mailto:cwlth_family_violence@alrc.gov.au)

**RE: Family Law and Commonwealth Laws Issues Paper – Employment and Superannuation**

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.

The matters raised in the issues paper are broad. ASFA has however, concentrated on addressing those issues that are specific to superannuation. 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 AFSA 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 notes that there already exists 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 consider the merits of such a broadening and will do so over the coming months.

In the meantime, ASFA's responses to the superannuation specific questions raised in the issues paper are as follows (question numbers are taken from the issues paper):

**Question 27** *Should a trustee have any obligation to consider whether a request to transfer an amount to a spouse under the superannuation contribution splitting regime is being made as a result of coercion?*

No.

As requests for contribution splits are made in writing, a trustee has no capacity to know whether or not the spouse is being coerced into making the request. ASFA does not consider it practical to expect the trustee to make enquiries about family violence before actioning a split. ASFA's concern is that if the trustee simply asks the direct question, any victim of coercion would most likely say they are not being coerced, while other members would be offended at the question.

However, should the member separately contact the trustee advising that a splitting application had been made under duress the trustee would consider this as part of its decision making process as to whether or not the splitting request should be actioned.

ASFA considers that the fund trustee should not be expected or required to consider competing arguments between the spouses. This is not their role, and investigating the bone fides of both arguments raises the significant question of who should meet the cost of such enquiries. ASFA is also concerned that by making a decision in such a dispute the trustee opens itself up to potential legal action by one or both parties.

**Question 28** *Should a 'claw-back' provision be introduced so that a victim of family violence may seek to recover benefits that they have been coerced into transferring to their spouse under the superannuation contribution splitting regime?*

ASFA would have no objection to a claw back provision being introduced to protect the interests of those members who have been coerced into transferring contributions to their spouse.

However, ASFA would be concerned to ensure that such a provision operated by way of a decision made by the Family court or other Court and which directed a trustee of a superannuation fund to return the claw back amount. ASFA considers that such a provision should operate in a similar manner to Family law orders where the requirement on the trustee is merely to follow a lawful direction given by an appropriately constituted and authorised body.

ASFA would have grave concerns should a trustee be required to consider the competing arguments of spouses on the *bona fides* of a contribution split.

ASFA has not investigated what administrative arrangements would need to be put in place to administer such a process but would assume the establishment costs would be similar to those incurred in establishing arrangements to deal with Family Law splits.

This impact has not been further analysed at this point.

**Question 29** *What mechanisms should be established to provide better protection to people experiencing family violence from financial abuse in the context of self-managed superannuation funds (SMSFs)? For example, should the jurisdiction of the Superannuation Complaints Tribunal be extended to cover complaints concerning SMSFs?*

ASFA would not support disputes of this type involving members of SMSFs being referred to the SCT. The SCT is an administrative tribunal, not a criminal court. ASFA notes that SMSFs do not currently have access to the SCT's processes and, unlike APRA regulated funds, do not contribute towards the SCT's running costs. It is considered that there are better resourced and more experienced judicial institutions for dealing with disputes between members of an SMSF

**Question 30** *Should the Superannuation Industry (Supervision) Regulations 1994 (Cth) 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 (or some other period)?*

ASFA would not support such a change.

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 access.

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 are unable to meet reasonable and immediate family living expenses and they are still on the benefit at the time of application. The concern with the current proposal, and any similar proposal, is that it suggests that a person could qualify for early release where they are currently in employment.

ASFA does not consider that amending the definition of severe financial hardship in the case of family violence would address the core issues raised by the ALRC in its paper.

ASFA is also concerned that, because the financial hardship test is administered by trustees, superannuation fund trustees do not possess the requisite skills to determine whether or not someone is the victim of family violence,

In summary, ASFA does not support an early release mechanism for the domestic violence victims being managed through the severe financial hardship process.

**Question 31** *Should the Superannuation Industry (Supervision) Regulations 1994 (Cth) be amended to provide a specific 'compassionate ground' to enable the early release of superannuation benefits to a victim of family violence?*

ASFA does not consider it appropriate to amend the regulations to the Superannuation Industry (Supervision) Act 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.

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

Yours sincerely



David Graus  
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