

SUBMISSION

Submission to AFCA — Consultation on superannuation death benefits Approach

25 October 2024

**The Association of Superannuation
Funds of Australia Limited**
Level 11, 77 Castlereagh Street
Sydney NSW 2000

PO Box 1485
Sydney NSW 2001

T +61 2 9264 9300
1800 812 798 (outside Sydney)

F 1300 926 484

W www.superannuation.asn.au

ABN 29 002 786 290 CAN 002 786 290

File: 2024/43

Ms Heather Gray
Lead Ombudsman – Superannuation
Australian Financial Complaints Authority
Via email: consultation@afca.org.au

25 October 2024

Dear Ms Gray

Consultation on superannuation death benefits approach

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to AFCA's consultation on its updated *Approach to superannuation death benefit complaints*.

About ASFA

ASFA has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

ASFA has a keen focus on matters that impact the outcomes achieved by individuals through the superannuation system, their experiences with the system, and issues that impede the industry's operational effectiveness.

Our feedback on the draft update to the *Approach to superannuation death benefit complaints* ("the draft Approach") is set out below.

If you have any queries or comments in relation to our submission, please contact Julia Stannard, Senior Policy Advisor, on (02) 8079 0819 or by email JStannard@superannuation.asn.au.

Yours sincerely

James Koval
Head of Policy and Advocacy

General comments

ASFA welcomes AFCA's efforts to expand and update its suite of Approaches. The provision of information about the way AFCA assesses and determines complaints about particular matters provides all stakeholders with a valuable reference point and supports transparency, consistency and efficiency – all of which are vital aspects of an industry funded external dispute resolution process.

ASFA also commends AFCA for adopting a forward-looking annual program to review its Approaches. Regular review and updating of the Approaches will ensure they keep pace with emerging issues and continue to provide meaningful guidance to stakeholders.

With respect to the draft Approach that is the subject of the current consultation, ASFA supports amendments that clarify AFCA's expectations in relation to complaints about payment of superannuation death benefits. In particular, our members have broadly welcomed the additional guidance on identifying eligible beneficiaries and paying to legal personal representatives (LPRs) and adult children.

We note that some of these changes seek to ensure alignment of superannuation distribution decisions with community expectations of what would constitute a "fair and reasonable" decision. While ASFA understands and supports this intent, our members have identified some aspects of the draft Approach that would benefit from further clarification as well as some points on which additional guidance would be beneficial. In the event that AFCA considers the latter to be beyond the scope of the Approach, ASFA requests that consideration is given to providing this guidance in other forms – for example, there may be scope to address some topics in an expanded way in standalone factsheets that can be read alongside the Approach where relevant, to prevent it becoming unwieldy in length and detail.

We very much appreciated the opportunity to meet with you and Superannuation Ombudsman Ben Taylor during the consultation period; that discussion has informed our submission.

Comments on specific aspects of the draft Approach

Section 1 'At a glance'

Section 1.3 Summary

The draft Approach notes that "The primary purpose of a superannuation death benefit is to provide for those dependants of a superannuation fund member who would have continued to rely on the member for financial support, but for the member's death." ASFA recommends a minor amendment to make this sentence clearer, by insertion of the word "ongoing", as follows: "The primary purpose of a superannuation death benefit is to provide for those dependants of a superannuation fund member who would have continued to rely on the member for *ongoing* financial support, but for the member's death."

Section 3 'In detail'

Section 3.1.1 Trustee discretion

The draft Approach states (our emphasis): "*Most* superannuation fund rules require the trustee to decide how the death benefit should be distributed among the potential beneficiaries, although they may allow the member to make a non-binding nomination indicating the member's preference."

ASFA understands there has been, over time, an increase in the incidence of funds adopting prescribed payment of death benefits in their governing rules (and we note that the matter of prescribed payment is addressed in section 3.1.3 of the draft Approach). We suggest it might be appropriate to slightly soften the first sentence in section 3.1.1, so that it commences instead with “*Many* superannuation fund rules...”.

Further, ASFA members would appreciate guidance around weighting of a death benefit distribution where there are multiple eligible beneficiaries. Where there are competing beneficiaries providing evidence of partial financial dependency and/or meeting other relevant aspects of dependency (such as spouse or a minor child), it is often a challenging process for the trustee to determine an appropriate apportionment of the benefit. When the grounds on which the apportionment were conducted are communicated to the beneficiaries as part of the claim staking process, this generally leads to beneficiaries proposing alternate distributions on a subjective basis. Additional guidance on this matter would both assist trustees and educate beneficiaries about the process.

Section 3.1.2 Binding nomination

It is our understanding that where a binding nomination is deemed to be valid by the trustee at the time of death, claim staking is not available to other potential beneficiaries. However, AFCA make an allowance for parties that may have an interest in the death benefit to submit a complaint if such parties are identified in the course of the death claim assessment. To this end, some trustees may issue a letter to these parties informing them that a decision has been made based on a binding death benefit nomination (generally providing no further information about the nominated beneficiaries, given privacy considerations) and that they may complain to AFCA if they wish to do so. Any resulting AFCA complaint can draw out the payment of the death benefit unnecessarily, given the trustee is compelled to pay the benefit in accordance with a binding nomination and this would be confirmed by AFCA except in isolated instances where an issue is discovered with the nomination’s validity.

ASFA members would appreciate guidance both about this ‘interested parties’ process where a valid binding death benefit nomination is on foot, and how to expedite an outcome in these scenarios so that payment to the nominated beneficiary is not unnecessarily delayed.

Section 3.1.4 Fair and reasonable

ASFA appreciates the inclusion of wording acknowledging there may be a range of trustee decisions that might be considered fair and reasonable. ASFA members would welcome further information about how AFCA determines that range of decisions and whether the decision that is the subject of the complaint falls within it. We note that this matter is not limited to decisions regarding death benefits and suggest it could be addressed in more general guidance rather than within this Approach.

Section 3.2.1 Superannuation legislation

Who is a ‘dependant’?

The draft Approach notes that a ‘dependant’ includes “any person who was financially dependent (whether wholly or partly) on the deceased member”. ASFA recommends an amendment to make this sentence clearer, as follows: “any person who was financially dependent (whether wholly or partly) on the deceased member *at the time leading up to the member’s death*”.

In addition, we note the language in the draft Approach has been revised to refer to the meaning of 'dependant' under "superannuation legislation", where the current version refers to "superannuation law". (This is also the case for the definition of 'dependant' in section 5.1.) ASFA considers it would be preferable to retain the phrasing used in the current version. The definition of 'dependant' contained in the draft Approach does not strictly replicate the definition in section 10 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). For example, the SIS Act definition does not explicitly refer to persons who were financially dependent. We recognise that the SIS Act definition is inclusive and is interpreted as including dependants in the ordinary meaning of that word, and therefore to include those who were financially dependent on the deceased. For that reason, we consider "superannuation law" to be more appropriate terminology, in this context, that "superannuation legislation".

Who is a 'spouse'?

The draft Approach notes that "The definition of the term 'spouse' in SIS is an inclusive one, and therefore includes a person who was legally married to the deceased member." ASFA members request the inclusion in this section of an express comment on the impact of a divorce – that is, on completion of the divorce, the surviving person is no longer the 'spouse' of the deceased. The position of a former spouse is alluded to in the last paragraph of section 3.2 in the context of financial dependency, however a direct comment in addressing the termination of the spousal relationship via divorce in the section dealing specifically with the meaning of 'spouse' would add clarity.

Further, we note that the existence of a 'de facto' relationship is often contested by beneficiaries. It would therefore be useful if the Approach also set out what AFCA views as generally determinative of a 'de facto' relationship (similar to its observations on interdependency).

Who is a 'child'?

We note that there exist differences between the definition of 'child' for SIS when compared with definitions in family law (state and territory based). Uncertainties around the definition of child in the cases of adoption and surrogacy can lead to delays and additional costs, as trustees may identify a need to seek judicial guidance. While the numbers of these cases are low, ASFA members would appreciate guidance from AFCA. In particular:

- The draft Approach includes new wording addressing the status of biological children who have been adopted away. In particular, it notes (our emphasis) that "The SIS definition is inclusive and includes a person's biological child. *AFCA considers this can also include a biological child who has been adopted away from the deceased member unless the trust deed says otherwise.*"

We understand from our discussions with you that the status of adopted away children is considered uncertain as the matter has not been resolved via case law. We note your advice that AFCA's position, in the absence of such legal certainty, is that even if adopted away a biological child will always be a 'child' for SIS purposes. We appreciate your clarification that where a trustee becomes aware of an adopted away child, either as a result of that child making a claim for a death benefit or otherwise as part of its ordinary inquiries, the trustee would be expected to consider the child in determining the appropriate distribution of the death benefit, but otherwise there is no proactive obligation on a trustee to inquire into the potential existence of any adopted away children. We recommend that the new wording in the Approach is expanded to address these matters.

- Similar questions arise in situations where an individual acts as a surrogate for another party. We seek clarity on AFCA’s approach as to claims made by a biological child of the deceased, where that child is born out of surrogacy - would the child in these cases be considered to be a dependant for SIS Act purposes?

We consider it would also be appropriate to address the cessation of a parent/step-child relationship. In particular, guidance would be useful on the question whether a former stepchild could ever be considered the ‘child’ of the deceased if a close relationship – in practical terms akin to a parent/child relationship – was maintained between the deceased and the former stepchild following the breakdown of the relationship between the deceased and the child’s biological parent, in circumstances where there is no financial dependence. (We acknowledge that where the relationship ended only because the biological parent pre-deceased the fund member, the parent/stepchild relationship is taken to have continued.)

Finally, we note that the kinship structures that may apply within First Nations communities can be complex and may not be adequately reflected in superannuation legislation. Community members can have kinship relationships that extend beyond the current definition of ‘dependant’ under superannuation law and, as part of these, an individual might be culturally recognised as a ‘child’ of the deceased in the absence of a biological parent-child relationship.

ASFA has developed recommendations for legislative amendment to allow trustees to explicitly and separately consider First Nations kinship arrangements when allocating death benefits to potential beneficiaries, in addition to the existing classes of potential beneficiaries¹. Pending any such regulatory change, ASFA members would welcome the inclusion in the Approach of guidance, under the current law, on how kinship relationships may be considered when determining who may be a ‘child’ of the deceased for the purposes of payment of a superannuation death benefit. Alternatively, this matter could be addressed as part of more general guidance addressing issues particular to First Nations complainants/claimants.

When is there an interdependency relationship?

ASFA members have noted that the revised wording around the definition of an interdependency relationship may be open to misinterpretation. Specifically, the phrasing – with the use of the past tense when referring to the claimant and deceased having “had a close personal relationship” and/or having “lived together” – could potentially be interpreted as meaning any person *who at any time in the past* had “lived together” with or “had a close personal relationship” with the deceased. We recommend a very minor amendment to the opening wording under the heading ‘basic test’, replacing “Two people were in an interdependency relationship at the time one of them died *if they*” with “Two people were in an interdependency relationship *if, at the time one of them died, they*”.

In addition, we recommend that the sentence “All four criteria must be met for an interdependency relationship.” be slightly amended to “All four criteria must be met for an interdependency relationship under the basic test.” This will allow the guidance to flow more naturally into the discussion of the living apart test, which may apply where the basic test is not satisfied.

ASFA members would welcome additional guidance on the evidence that may be indicative of – or alternatively may be taken as not supporting – an interdependency relationship. In particular, ASFA members note the challenges often presented in distinguishing between an interdependency relationship and the relationship that exists between housemates.

¹ ASFA, [Policy Proposals](#), September 2024

Financial dependant

ASFA members would appreciate clarification of AFCA's views in situations where there are multiple dependants in differing financial positions. We note that instances often arise where a deceased member's will appears to cater well for some beneficiaries and not others. The wording added to the draft Approach indicates AFCA's view that a person's financial position does not alter whether they were financially dependent, and therefore a dependant of the deceased. Given that both the estate and superannuation death benefits are only payable upon the member's death, and noting that bequests of assets can often be more substantial in value than a superannuation death benefit, ASFA members would appreciate further guidance from AFCA on this matter.

In addition, we note the statement that "child support payments are financial support of the child, not the child's parent or guardian". ASFA members note that a child support payment is made to the child's parent or guardian to use for the child's benefit and in that sense, the parent/guardian could be seen as reliant on that support. As a result, we would appreciate further clarification of AFCA's views in relation to child support payments.

Section 3.3.3 Who had an expectation of ongoing financial support?

This section notes that a child would generally be expected to be financially dependent on a parent up to age 18, with some exceptions where the child is receiving regular support (such as for education) or there was a reasonable expectation that support would be provided after age 18.

ASFA members have expressed concern that this may be out of alignment with some contemporary norms in 2024, or may not be fully reflective of traditional parent/child relationships. In particular, it fails to acknowledge that every child still living at home – whether receiving specific additional financial support or not – is still wholly or partially reliant on their parents for shelter, food, clothing and/or other day to day living expenses.

While we anticipate that AFCA may not be intending to carve out these situations, the use of the phrase "*such as for further education expenses*" gives the impression that AFCA is setting limits or that only limited exceptions apply. We suggest that this sentence be amended as follows: "However, there will be exceptions to this if regular support (*such as, but not limited to, further education expenses, food, clothing and shelter*) has been provided, or was reasonably expected to be provided, after age 18."

We acknowledge there is a need to 'draw a line in the sand' at some point when assessing a child's future dependency, and that in other contexts (for example, for income tax purposes), that line in the sand is age 18. We submit, however, that death benefit distributions are different, and assessed on a case by case basis (because the decisions are in many cases discretionary), and as a result there should be more flexibility.

Additionally, section 3.3.3 provides no guidance on AFCA's views about cultural expectations as a relevant consideration when deciding whether a beneficiary had a reasonable expectation of ongoing or future financial support. There is, in some cultures, an expectation for some children to provide support to their parents in old age/retirement. However, absent any objective evidence showing actual financial dependency, the trustee is often bound to pay the death benefit to those dependents who can prove they were reliant on the deceased member as at the date of their death. This may lead to culturally insensitive outcomes. We note that dependency is to be assessed solely at the time of death. As a result, any expectation a claimant may have had that financial support would (if not for the member's death) have been provided at some future time in the future is not relevant. While this is perhaps not an issue that is suited to addressing within the Approach, we suggest it could potentially be addressed as part of information AFCA produces for claimants from particular cultural backgrounds.

Section 3.3.4 The member's wishes

The proposed revisions could be read as implying that only a will that was made in close proximity to a member's death (or while they were terminally ill) can "provide helpful information about the member's intentions".

In ASFA members' experience, all wills may contain or provide helpful information irrespective of when they are made. Ultimately, the weight to be given to that information is to be determined by the particular will in evidence, and this will include consideration of how recently it was made. We suggest that the relevant paragraph is amended to simply say: "However, a member's Will may provide helpful information about the member's intentions with respect to their superannuation."

Section 3.3.5 Other relevant considerations – where there has been violence or abuse in a relationship, or a claimant was involved in the member's death

It is ASFA's strong view that the legal and regulatory framework for death benefits should prevent people who have been convicted of crimes such as abuse, assault and family violence from claiming their victims' death benefit.

Community expectations are that trustees would consider issues of crime and abuse if they are apparent, but the regulatory environment constrains that consideration. Where a perpetrator is an eligible dependant, a charge or finding does not negate their entitlement to their victim's superannuation death benefit. This applies even if the perpetrator has been convicted of family violence offences, or in cases when there was proven systemic abuse which indirectly contributed to the cause of the victim's death.

Under existing laws, an abuser can receive a victim's superannuation death benefit unless they are the direct cause of that person's death. Theoretically, the trustee can intervene where an eligible dependant has been convicted of a member's murder under the Common Law principle of the forfeiture rule, that prevents murderers benefitting from their crime. Beyond this most extreme circumstance, however, there is a lack of protection from the distribution of abuse victims' death benefit payments being made to perpetrators.

ASFA, in collaboration with our members and industry experts, has identified a number of policy proposals and recommendations ² for regulatory and legislative change to address this situation. These include:

- expanding the Forfeiture Rule beyond murder, to prevent those convicted of violent crimes against the deceased member from receiving their victim's death benefit, *regardless of whether the crime contributed to the victim's death*
- investigating legislative reforms that would allow superannuation funds to withhold death benefits on receipt of court (or similar) orders/judgements substantiating the violence-related crime against the deceased member. The types of orders or convictions that would exclude a perpetrator from consideration in the death benefit distribution process should be set out in the regulations so that the trustee has certainty in the same way as other forfeiture and bankruptcy orders.

A key aspect of these recommendations is that the exclusion of a person from the distribution of a superannuation death benefit on the basis of their involvement in crimes such as abuse, assault and family violence should not fall to trustees to decide as an exercise of discretion, but should be supported by an appropriate legislative framework.

² ASFA, [Policy Proposals](#), September 2024

In particular, ASFA consider it is inappropriate to require a fund trustee to investigate and make assessments about the alleged violence or abuse, and then render a judgment on the level of culpability of the alleged offender. This is a task that would require access to extensive evidence including – but not necessarily limited to – medical reports, police reports, court orders (for example, restraining orders) and court judgments determining a person’s culpability. We strongly advocate that evidence of violence and abuse be determined by the courts and legal system, and that fund trustees use this information in their decision-making process regarding death benefit payments.

ASFA considers these policy recommendations are in line with community expectations, and we will continue to advocate for the necessary regulatory and legislative changes.

In the meantime, we recognise that AFCA is constrained by the law as it currently applies, and we greatly appreciate AFCA seeking to provide trustees with some guidance on these complex matters. However, we note that the proposed addition to the Approach raises some evidentiary and causal issues, where additional clarification of some aspects would be beneficial:

- The Approach states that “evidence about the behaviour of a person who is claiming a death benefit, including evidence about violence or abuse within a relationship or towards the deceased member, may be relevant to the fairness or reasonableness of a decision about the allocation of that benefit”. While ‘behaviour of the person’ would include evidence about violence or abuse within a relationship, it is a non-exhaustive term which would require a trustee to make an objective decision on the moral character of a beneficiary. We understand from our discussions with you that there is no intent to imply that trustees should take on the role of ‘moral arbiter’, and we request that this be clarified in the Approach.
- The Approach further states that: “Where a trustee has *persuasive evidence* that a claimant was involved in the death of the deceased member, in circumstances where there was *moral culpability*, AFCA would generally consider it fair and reasonable for the trustee not to allocate any part of the death benefit to the claimant.” (our emphasis)
 - The concept of what constitutes ‘persuasive evidence’ for the trustee to determine that the person was subject to violence or abuse would benefit from further guidance. We note that the wording in the draft the Approach has raised some concerns that a trustee might be expected to form its own assessment of a person’s involvement in a death in circumstances where that person has not been charged and/or convicted of any crime. We understand from our discussions with you that this is not the case, rather this aspect of the Approach is primarily referring to instances where the person has been convicted in relation to their involvement in the death. We recommend that this is clarified in the Approach.
 - Additional clarification of what is meant by the claimant being ‘involved’ in the death of the deceased member is required. We understand from our discussions that indirect involvement may, depending on the evidence available to the trustee, be sufficient – for example, where a person had been convicted as an accessory to the deceased’s murder. It would be helpful if AFCA clarified this by making a reference to direct or indirect involvement in the Approach.
 - ‘Moral culpability’ is a concept that is open to interpretation. For example, where a superannuation member is murdered by their spouse, the moral culpability of the spouse is clear. However, the position may be less clear where the fund member committed suicide – for example, there may be allegations of domestic violence and competing allegations that the member suffered from other mental health issues that contributed to their suicide. Given your confirmation that it is not a trustee’s role to act as a ‘moral arbiter’, we anticipate this will in practice mean that trustees decide a potential death benefit recipient had ‘moral culpability’ only in limited and very clear instances.

- Based on our discussions with you, it is clear that a conviction on charges relating to the deceased's death – or equally, an acquittal – will carry significant weight as a trustee determines whether it is fair or reasonable to exclude a person from a death benefit distribution. In most cases, there will be a lengthy process following the member's death involving investigation, laying of charges, through to the handing down of a judgment by the relevant court. This raises the question whether, in such cases, a trustee may appropriately defer making its final decision in relation to distribution of the death benefit. We understand from our discussions with you that AFCA considers such a deferral may indeed be appropriate, and we request that this is clarified in the Approach.

Section 3.4 When might adult children receive a share of a superannuation death benefit?

The draft Approach notes there is scope for an adult child to receive a portion of a death benefit where the benefit exceeds the amount required to fulfill the expectation of continuing financial support of financial dependants. ASFA considers the insertion of this wording aligns with community expectations and allows more flexibility at a trustee level to reach a decision satisfactory to all parties. The Approach would, in ASFA's view, benefit from additional guidance on how trustees are to calculate the future expectation of financial support for a minor child.

The draft Approach notes that a trustee may consider it reasonable for a small part of a death benefit to be allocated to an adult child in recognition of their relationship with deceased, even if there was no financial dependency. ASFA members have expressed concern that this may set an expectation that such a payment will be considered in each case, regardless of the circumstances – noting there will frequently be eligible beneficiaries with substantial financial dependency and therefore a distribution to a non-financially dependant adult child would not be appropriate. Any such expectation would be inconsistent with AFCA's comments in section 1.3 that "preference is generally given to those dependants who might have expected to continue to receive financial support from the member or who had an ongoing right to receive financial support from the member".

The draft Approach further states that "AFCA does not expect a trustee will allocate part of a death benefit to an adult child simply because the deceased member may have failed to provide support for them when they were a minor or because the deceased member did not include them in the deceased member's Will. It is not a purpose of superannuation to right past wrongs." It is unclear how a trustee would determine the part to be distributed to the adult child "in recognition of their relationship with the deceased member" as this appears to involve making a value judgement on that relationship. For example, to what extent would a trustee be expected to consider an adult child's "closeness" to the deceased in deciding the amount to be allocated?

ASFA suggests that further guidance and examples on this matter would be beneficial, to ensure both trustees and beneficiaries have a clear understanding of AFCA's expectations. We note that a significant proportion of objections received by trustees to proposed death benefit distributions currently are from adult children who believe they have a right to their deceased parent's superannuation death benefit, regardless of any financial support they may have been receiving.

Section 3.5 Can a person claim reimbursement of funeral expenses from a death benefit?

The draft Approach notes that "Under superannuation legislation, there is no provision to allow funeral expenses to be paid from a death benefit. A person who has paid funeral expenses is not a dependant by reason only of paying the deceased member's funeral expenses".

While ASFA agrees that a person seeking reimbursement in such cases cannot be considered for payment as a dependant (unless they otherwise satisfy that definition), we note it is possible they could be considered an intermeddling LPR (executor de son tort – a person who acts as the deceased’s personal representative without lawful authority to do so). We understand this means the person could potentially be considered if there is no estate to seek the reimbursement from, or the estate is insolvent and therefore unable to reimburse the expenses. We would appreciate AFCA providing guidance on this matter.

Section 3.6 When can a superannuation death benefit be paid to a deceased member’s LPR?

While this section already has significant proposed revisions, ASFA recommends that some further refinements are made to improve its flow. In particular, we note that the second paragraph, the draft Approach notes that in the absence of a valid binding (or non-lapsing) nomination in favour of the LPR, or a provision of the fund rules requiring payment to the LPR, a discretionary decision to pay the member’s LPR would generally only be fair and reasonable if there are no dependants. This is somewhat in contrast with the newly added fourth paragraph, which states that there will be circumstances where payment of some or all of a death benefit to an LPR is fair and reasonable even where there are dependents.

Section 3.7 When is a binding nomination valid?

ASFA members:

- would appreciate clarification of whether there is a requirement for a binding nomination to have been received by the fund prior to the deceased member’s death, or whether it is sufficient there is evidence it had been executed and sent prior to the deceased’s death.
- welcome the helpful addition of wording confirming that a trustee is no longer bound once a binding nomination has expired, regardless of whether the member had seen or understood information from the fund alerting them to the expiry of the nomination.
- consider that the comments in section 3.7 about non-lapsing nominations might be better set out as a new separate section 3.8, with the heading ‘When are non-lapsing nominations valid?’.

In addition, ASFA notes the statement that “The governing rules of some funds have the effect that expired binding nominations become non-binding nominations.” We understand this to simply be an observation of fact based on trust deeds relevant to complaints AFCA has considered, and not intended to suggest that an expired binding nomination should not be used by a trustee as an indication of the deceased’s wishes, absent any such provision in the trust deed. We suggest that this wording could be clarified to avoid any potential confusion.

Section 3.8 Who should hold a share of the death benefit on trust for a minor child?

We welcome the inclusion of a section addressing this matter.

The draft Approach states that a trustee other than the surviving parent “would only be appropriate in exceptional circumstances”. ASFA agrees that in principle the surviving parent will generally be the appropriate trustee, particularly where the surviving and deceased parents were part of a family unit at the date of death. However, there will, in practice, be circumstances where the trustee considers it is in the best interests of the child to appoint an alternative trustee. ASFA members indicate that the frequency of such cases is such that the use of the term “exceptional circumstances” may be too restrictive.

Further, we note that some trustees may allow for payment of amounts (typically below a particular monetary threshold) direct to the guardian ‘for the benefit of’ a minor child. It would be helpful if AFCA’s views on this were addressed in the Approach.

Section 4 'Context'

Section 4.1.3 Case study three – children and expectation of financial support.

As noted in our comments regarding section 3.4, it would be helpful if AFCA could provide guidance on the type of evidence it would consider when determining the reasonable expectation of financial support for a minor child through to age 18. Case study three illustrates a scenario where the parties were in agreement as to the amount needed. ASFA members would appreciate an indication of the methodology/evidence that would be considered to determine the reasonable expectation in instances where the parties are not in agreement.

Section 5 'References'

Definition of 'dependant'

As noted in relation to section 3.2.1, ASFA recommends that the terminology used in outlining the relevant definition of 'dependant' is not revised to "under superannuation legislation" and the reference to "superannuation law" is instead retained.

Definition of 'LPR'

The draft Approach contains the definition of LPR as specified in the SIS Act, which includes "a person who holds an enduring power of attorney granted by a person".

An enduring power of attorney (EPOA) granted by a superannuation fund member ceases to have effect on the member's death. Given the draft Approach deals solely with complaints about the payment of death benefits, we suggest that the use of the SIS Act definition, without qualification, may potentially cause confusion. We note that the current version of the Approach includes a modified definition of LPR that excludes any reference to an EPOA, to avoid such confusion. We recommend that either the current (modified) definition is maintained, or a note is added to address the cessation of an EPOA upon the death of the fund member.

Additional matters

ASFA and our members have identified a number of additional areas where we consider it would be beneficial to provide additional guidance. In the event that AFCA considers these matters to be beyond the scope of the Approach, ASFA requests that consideration is given to providing this guidance in other forms – for example, there may be scope to address some topics in an expanded way in standalone factsheets, that could then be linked (cross-referenced) into the Approach, to prevent it becoming unwieldy in length and detail.

'Unmeritorious complaints' about the distribution of death benefits

ASFA notes that a common reason for the delay in distribution of death benefits is where there are competing claims in relation to the benefit. In these circumstances there is no lack of trustee diligence, but trustees are unable to negotiate a settlement between the parties.

The recently released AFCA Independent Decision Review assessed a random sample of AFCA complaints that proceeded to decision noted that "in several cases a party had a weak or even hopeless case and was advised by AFCA accordingly from an early stage. Despite that detailed advice, the parties insisted on proceeding with the full AFCA process through to determination."³

³ AFCA Independent Decision Review 2023-2024, 'An Overview' para 52.

While the observation by the independent reviewer was not made specifically in relation to unmeritorious complaints about superannuation death benefits, ASFA considers it highly pertinent to this scenario. Unmeritorious complaints relating to death benefit distributions that AFCA decides to deal with have the capacity to cause undue delay of payments to beneficiaries and can exacerbate delays in payment and emotional and financial stress being suffered for extended periods.

ASFA, in collaboration with our members and industry experts, has recently developed a set of policy recommendations designed to improve the efficiency of death benefit nomination and payment processes and ensure there are no unintended consequences for members and beneficiaries. As part of these, we have encouraged AFCA to more actively apply the powers provided by rule A.8.3 of its governing rules, in relation to ‘unmeritorious’ complaints⁴. These permit AFCA to decide that it is not appropriate to continue to consider a complaint in circumstances where the complaint is without merit. Concurrently, we recommend that consideration is given to encouraging a more expeditious withdrawal of unmeritorious complaints about the distribution of superannuation death benefits.

Noting that AFCA’s Approach documents are intended to provide guidance to all stakeholders – including consumers – we would ask AFCA to consider providing some messaging directed to potential claimants of a death benefit, outlining the approach it will take where it considers a claim for payment of all or part of a death benefit to be unmeritorious.

Additional guidance on evidentiary matters

ASFA notes that the Approach does not address the level, standard and quality of evidence, or what evidence AFCA considers generally acceptable. Given many other AFCA documents⁵ typically say that AFCA takes an ‘evidence-based approach’ or relies on objective and/or contemporaneous evidence when deciding complaints, guidance on this matter would be welcome.

While this is a matter that could be addressed in more general guidance, there are some aspects that have particular importance to the distribution of death benefits. For example:

- ASFA members have noted instances where the trustee’s death benefit distribution decision was set aside as AFCA identified a financial dependant, even though there was no evidence of dependency other than the beneficiary’s submissions.
- there is frequently conflicting evidence from various parties who are potential dependants – for example, contradictory statutory declarations with two persons suggesting they were de-facto spouses of the late member, in situations where neither can provide any further substantive evidence.

ASFA also considers it important that there is recognition that that a trustee’s decisions are based on the evidence and information to which it had access at that time. However, as noted in the Approach, when AFCA “determines a complaint, it ‘stands in the shoes’ of the trustee and the insurer (if applicable) and has all the powers and discretions of the trustee and the insurer. This means AFCA is not confined to considering only the information that was before the trustee or the insurer when it made its decision.” Two important considerations flow from this:

⁴ ASFA, [Policy Proposals](#), September 2024

⁵ For example, The AFCA Approach to proof of despatch (undated); The AFCA Approach to misleading conduct, June 2021

- frequently, potential beneficiaries who object to a proposed distribution do not provide, as part of an objection to the trustee, additional evidence that they later raise as part of a complaint made to AFCA. It may be helpful if the Approach included messaging for claimants urging them to take advantage of the 28-day objection period, upon notification of the trustee's proposed payment, to provide any additional evidence to the trustee for consideration as part of its final decision.
- when new evidence comes to light as part of a complaint to AFCA, the trustee (and where applicable, the insurer) must be provided with adequate opportunity to review this and make a new, informed decision. It is important that claimants and complainants understand that this is a reasonable and necessary part of the process and does not of itself constitute unreasonable delay on the part of the trustee (and/or insurer).

Eligible beneficiaries who 'withdraw' from a claim

ASFA members advise that frequently a person who is an eligible beneficiary of a death benefit will 'withdraw' from making a claim for the death benefit, by stating that they do not wish to be considered for distribution. It would be helpful if AFCA could indicate in the approach whether, in such cases, it would nonetheless join these beneficiaries as interested parties to the complaint (even though they do not wish to be considered eligible for distribution) and, if they did, what weight they would give to those wishes.

Potential beneficiaries who cannot be located

One additional matter that ASFA members would appreciate AFCA providing guidance about its expectations in situations where a trustee is unable to locate a potential dependant. For example, situations may arise where a trustee is notified that a deceased member may have a minor child that lives overseas but no contact details can be provided and the trustee is unable to locate them.

Complaints made outside the statutory timeframe

Noting that potential complainants are an intended audience of the Approach, it would be helpful if AFCA could include a statement making it clear AFCA does not have the capacity to consider a complaint unless a potential claimant has objected to the trustee within 28 days of being notified of the proposed payment **and** made their complaint to AFCA within 28 days of being notified of the trustee's final decision.

Resolving complaints at the objection stage, before they come to AFCA

Resolving a dispute about a death benefit distribution at the objection stage is clearly preferable to a situation where a complaint progresses to AFCA, however this can be challenging and sometimes impossible – while trustees undertake the death benefit distribution process with care and diligence, on occasion claimants refuse to accept that they are not eligible to receive an allocation or that others have a greater claim to the benefit.

ASFA members would welcome any observations from AFCA on what it considers 'better practice' for trustees engaging with claimants in a proactive attempt to resolve a complaint at the objection stage of the death benefit distribution process.