



Australian Government  
The Treasury

**TSY/AU**

# Early release of superannuation benefits

Under compassionate and  
**financial hardship** grounds and for victims  
of crime compensation

December 2017

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# CONSULTATION PROCESS

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## Request for feedback and comments

Interested parties are invited to comment on this consultation paper. While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

## Closing date for submissions: 12 February 2018

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# MINISTER'S FOREWORD

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The rules governing early release of superannuation benefits have not changed substantially since 1997. The superannuation system has come a long way since then and it is important to ensure they remain fit for purpose.

Key issues that stakeholders have raised with me include:

- the rapid increase in the use of superannuation for medical treatment;
- whether the mortgage foreclosure ground should be extended to rental eviction;
- whether the current rules for release on grounds of severe financial hardship appropriately balance the need for simplicity and consistency with fairness; and
- whether an offender's superannuation should be available to pay compensation or restitution to victims of crime.



This is why the Turnbull Government has asked Treasury to review the current rules governing early release of superannuation on grounds of severe financial hardship and compassionate grounds.

This review will complement the work currently being undertaken by the Department of Health, in consultation with the Treasury and the Department of Human Services, to understand better the recent trends and practices in the early release of superannuation for medical purposes.

The review will also consider whether, and the circumstances in which, an offender's superannuation assets should be available to pay compensation or restitution to victims of crime.

Other existing grounds for early release of superannuation benefits, such as for terminal medical conditions, incapacity, or departing Australia will not be considered as part of this review.

This review is one of a range of measures the Government is undertaking to ensure that the rules governing the compulsory superannuation system serve the interests of consumers.

Submissions to the review are requested by 12 February 2018.

The review will make recommendations to Government in March 2018.

I look forward to working with stakeholders to ensure that the rules governing early release of superannuation benefits remain fit for purpose.

A handwritten signature in black ink, appearing to read 'Kelly O'Dwyer', with a stylized flourish at the end.

**Kelly O'Dwyer MP**  
**Minister for Revenue and Financial Services**

# PRINCIPLES UNDERPINNING EARLY RELEASE

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The Government recognises there should be guiding principles to provide a framework for this review, to assess whether the provisions for early release of superannuation benefits under compassionate grounds and severe financial hardship are fit for purpose.

The principles will not always point in the same direction. Every ground of release reflects a trade-off between members' immediate needs and the long-term objective of building retirement income. This will never be easy. However, highlighting these trade-offs is important when considering whether the rules should be amended.

Below are three proposed guiding principles for this review.

- **Preservation:** Superannuation benefits should generally be preserved to provide income in retirement to substitute or supplement the Age Pension. Early access to superannuation for other purposes is inconsistent with the preservation principle.
- **Genuine hardship:** There will be circumstances where the benefits of early access to superannuation for an individual will exceed the benefits of preserving balances until retirement. The challenge for policy-makers is to identify the point at which the need for compassion outweighs the broader policy objective of the superannuation system.
- **Last resort:** Early release of superannuation benefits should generally be a last resort where other sources of financial support have been exhausted. It is not an appropriate replacement for existing health and income support policies.
- **Fair and effective:** The rules should be able to be administered fairly and effectively; that is, the rules should be sufficiently clear and objective to allow applications to be dealt with in a timely and consistent fashion, and ensure that similar cases can be treated alike. Rules that are highly subjective in nature will necessarily cause more red tape, expense and difficulty for applicants, trustees and Government.

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

# PART 1: EARLY RELEASE ON COMPASSIONATE GROUNDS

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## Background

Prior to 1997, there was no separate provision for early release of superannuation benefits on compassionate grounds. In 1997, changes were made to the early release provisions to tighten the eligibility criteria and clarify the circumstances covered by the conditions for release of benefits on compassionate grounds in order to provide a more objective test. These changes were introduced by the *Superannuation Industry (Supervision) Regulations (Amendment) 1997 No 152*.

Early release of superannuation benefits on compassionate grounds is currently governed by Regulation 6.19A of the *Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations)*. This sets out the circumstances in which superannuation may be released upon compassionate grounds and works in conjunction with Schedule 1 of those regulations, which sets out, for certain grounds of release, the maximum amounts and permitted frequency of release. Equivalent regulations are contained in Regulation 4.22A of the *Retirement Savings Account Regulations 1997* in respect of Retirement Savings Accounts (RSAs).

Benefits may be released on compassionate grounds to meet expenses in respect of the following (for the applicant or the applicant's dependant):

- medical treatment;
- medical transport;
- modifications necessary for the family home or motor vehicle due to severe disability; and
- palliative care.

Funds may also be released on compassionate grounds to prevent foreclosure of a mortgage or exercise of a power of sale over the member's principal place of residence; or to pay for expenses associated with a dependant's death, funeral or burial.

The regulations also allow funds to be released under grounds that are 'consistent with' one or more of the above grounds, providing some degree of discretion to the Regulator to determine specific grounds for release.

In all cases in which early release of superannuation is sought on compassionate grounds, the applicant must satisfy the Regulator that they do not have the financial capacity to meet the relevant expense (SIS Regulation 6.19A(2)(b)).

Responsibility for administration of the early release of superannuation on compassionate grounds has changed over time. It was initially the responsibility of the Insurance and Superannuation Commission. It passed to the Australian Prudential Regulation Authority (APRA) when this body was created from the Insurance and Superannuation Commission in 1998. It was then transferred to the Department of Human Services (DHS) in 2011. The Government has recently announced that it will transfer responsibility for administering early release on compassionate grounds from DHS to the Australian Taxation Office. These new arrangements are expected to commence in 2018.

To obtain early release of superannuation benefits on compassionate grounds, individuals apply to the Regulator and provide identity documents, quotes and unpaid invoices for the amount of funds required, and the prescribed documentation specified in the regulations to prove the individual needs the funds requested.

Individuals can apply under multiple grounds, although the documentation required is different for each ground of release. For example, a person seeking early release for medical treatment must provide written evidence from at least two medical practitioners – one of whom must be a specialist – certifying that the treatment or medical transport:

- is necessary to treat a life threatening illness or injury; or alleviate acute or chronic pain; or alleviate an acute or chronic mental disturbance; **and**
- is not readily available to the individual or their dependant through the public health system.

The Regulator determines the maximum amount of benefits to be released early, taking account of the ground of release and the individual's financial capacity. There are no financial limits for early release of superannuation on compassionate grounds, except in the case of early release to prevent foreclosure on a mortgage, where the amount must not exceed the sum of three months' repayments and 12 months' interest on the outstanding balance of the loan.

Currently, DHS sends a letter to an individual, generally within 28 days after application, notifying them if they have been approved for early release on compassionate grounds or why their application has been denied. If approved, the applicant must then approach their superannuation fund trustee, who has ultimate discretion regarding the release of the funds.

## Data on benefits released on compassionate grounds

The total amount released early from the superannuation system under compassionate grounds has increased markedly over time, from around \$42 million in 2000-01 to around \$290 million in 2016-17. This represents a small fraction of total superannuation assets – in 2016-17, just over 0.01 per cent of the total \$2.5 trillion of assets held in the superannuation system were released on compassionate grounds.

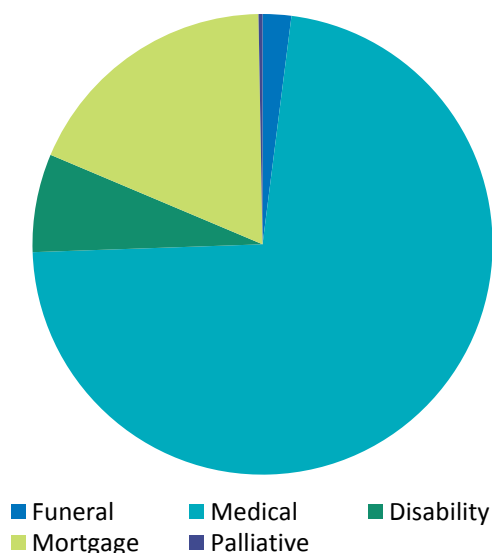
The two main categories for the approval of early release on compassionate grounds in 2016-17 were medical treatment and transport (comprising around 72 per cent of funds approved for release), and mortgage payments (comprising around 18 per cent of total funds approved) (Chart 1, overleaf).



Over the past 17 years (since 2000-01), the amount of superannuation approved for early release on medical grounds has increased the most rapidly. Release on medical grounds has increased by around \$205 million over the period since 2000-01, which is nearly a five-fold increase compared to all other grounds of compassionate release, which have increased by around \$43 million over the same period. This rapid increase in benefits released on medical grounds has occurred from around 2010-11 onwards (Chart 2, overleaf).

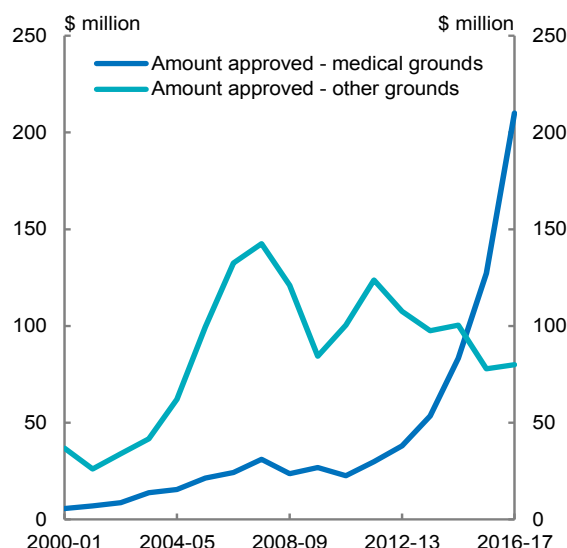
The Department of Health is currently undertaking a consultation process, with support from Treasury and DHS, to learn more about the early release of superannuation for medical purposes, including the reasons for the increase in the number of applications and the amount released upon medical grounds. The findings from this process will feed into this broader review of early release of superannuation benefits.

**Chart 1: Proportion of funds approved for early release on compassionate grounds, 2016-17**



Source: Department of Human Services.

**Chart 2: Amount approved for early release on medical grounds and other compassionate grounds, 2000-01 to 2016-17**

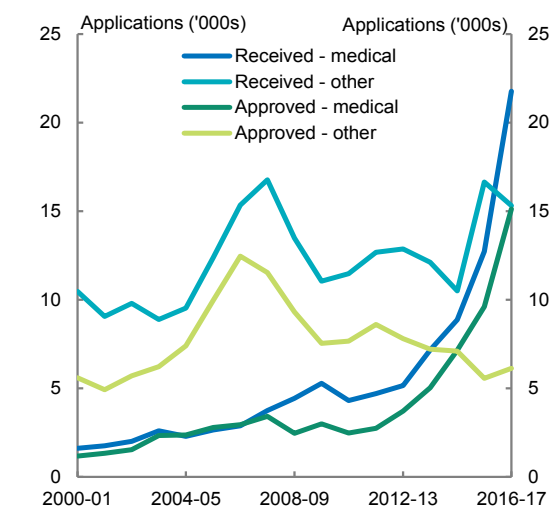


A driver of the increase in funds released on medical grounds has been an increase in the number of applications received and approved. The number of applications for early release on medical grounds has increased around four-fold, from around 4,000 in 2010-11 to around 22,000 in 2016-17. Applications approved on medical grounds have increased around five-fold since 2010-11, from around 2,500 in 2010-11 to around 15,000 in 2016-17 (Chart 3). The number of applications received or approved on other compassionate grounds has not experienced a similar increase.

It is important to note that some of the increase in the number of applications for early release on compassionate grounds from 2015-16 onwards is likely to have resulted from a change in the way applications are recorded by the Department of Human Services, following the introduction of a new online claim process in July 2015.

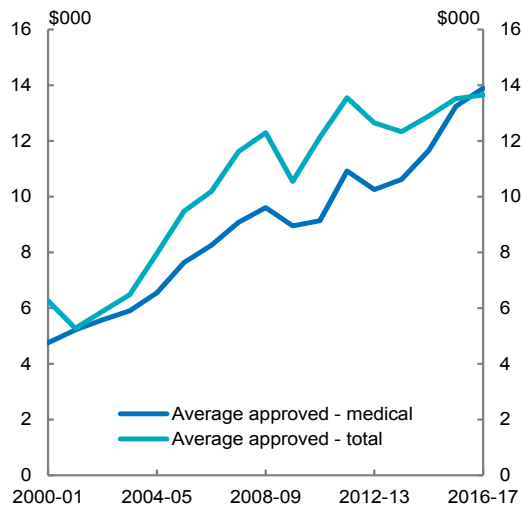
By contrast, the average amount of superannuation approved for early release per application on medical grounds has not increased as significantly. It has risen from around \$9,000 per medical ground application in 2010-11 to around \$14,000 in 2016-17 (not taking into account inflation) (Chart 4, overleaf).

**Chart 3: Number of applications received and approved for early release on medical grounds and other compassionate grounds, 2000-01 to 2016-17**



Source: Department of Human Services.

**Chart 4: Average amount approved for early release on medical grounds and all compassionate grounds, 2000-01 to 2016-17**



## Discussion against the principles

This consultation paper seeks feedback on early release on all compassionate grounds – including the appropriateness of the current grounds for release. Feedback from stakeholders and members of the public, the number of applications received and the relative amount of funds released, generally suggests that the two main areas of focus are medical and housing.

It can be argued that the rapid increase in the early release of superannuation on medical grounds suggests the current rules are too lenient and that the wording of the current regulations is too broad. Conversely, other stakeholders consider that the current rules are sufficient but that the administration of the early release provisions could be tightened and the regulations read more strictly.

Feedback we have received can be considered in the context of the principles outlined above. In particular:

- the **preservation principle** – that such a rapid increase in the release of funds, as well as there being no restriction on the number of times one can apply for early release on compassionate grounds, is putting at risk the objective of superannuation to preserve superannuation benefits to provide income in retirement;
- the **last resort principle** – that funds are being accessed for out-of-pocket expenses even though some treatments and procedures are covered by the Medical Benefits Scheme (MBS) or private health insurance; and

- the **genuine hardship** principle – that funds are being accessed for *some* procedures that should not be considered necessary to address genuine hardship.

By contrast, other stakeholders have suggested that the rules governing early release of superannuation on housing grounds are too restrictive because they focus on owner occupiers rather than renters; making it inconsistent with:

- the **genuine hardship** principle – renters who cannot make their rental payments may experience as much hardship as property owners who cannot meet their mortgage payments; and
- the **fair and effective** principle – renters and mortgagees should have equal access to their superannuation benefits as they are in similar situations (that is, both might lose their home).

A contrasting view is that the current housing ground is appropriate as it is consistent with:

- the **preservation** principle – a mortgage is supporting eventual ownership of a long-term asset, whereas renting does not, so it may be reasonable for superannuation benefits to be used to preserve an asset that will add to overall retirement wealth.

Stakeholders are encouraged to consider whether these two grounds, as well as the other grounds for compassionate release, should be modified (and whether they should be enlarged or narrowed) through the lens of the proposed guiding principles outlined above.

## Financial capacity

In all cases in which early release of superannuation is sought on compassionate grounds, the individual must satisfy the Regulator that they do not have the financial capacity to meet the relevant expense (SIS Regulation 6.19A(2)(b)).

### Key issues

The current rules contain no further guidance about the meaning of ‘financial capacity’. This is in contrast to the strict and objective definition of ‘severe financial hardship’ contained in SIS Regulation 6.01 (see Part 2 of this paper).

An individual with significantly higher than average income may be able to demonstrate that they do not have the financial capacity to meet an expense, even if this is a result of the individual’s poor financial decisions/financial management. This is because an individual is not required to be in financial hardship to show they do not have the financial capacity to meet a relevant expense.

#### QUESTION

- 1.1 Should the assessment of financial capacity be made more prescriptive and/or objective? If so, how? What information might applicants need to provide?

## Medical treatment grounds

The current rules impose evidential requirements before the Regulator can be satisfied that money is required for medical treatment or medical transport for the individual or the individual's dependant.

Specifically, under SIS Regulation 6.19A(3), at least two medical practitioners – one of whom must be a specialist – must certify that the treatment:

- is necessary to treat a life threatening illness or injury; or alleviate acute or chronic pain; or alleviate an acute or chronic mental disturbance; **and**
- is not readily available to the individual or their dependant through the public health system.

Similar restrictions apply in respect of medical transport (SIS Regulation 6.19A(4)).

Further, release will only be available where the individual does not have the financial capacity to meet the medical expense (SIS Regulation 6.19A(2)), as mentioned above.

## Key issues

### Increase in applications

As discussed earlier in this paper, there has been a rapid increase in the amount of superannuation benefits released on medical grounds, which is mainly attributable to the rapid increase in the number of applications received and approved.

Although a gradual increase in the amount of superannuation approved is to be expected as the superannuation system matures and account balances grow, the rapid pace of the increase warrants attention.

There may need to be additional limitations on the amount of superannuation released on medical grounds. Conversely, if the release of superannuation on medical grounds provides a long-term benefit to the individual and is used in cases of undue hardship as a last resort, this may justify the early release of superannuation benefits.

### QUESTIONS

- 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?
- 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?
- 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?

## Treatments and costs that can be covered

A significant proportion of recent applications appear to relate to out-of-pocket expenses associated with bariatric surgery (that is, weight loss surgery), with a smaller proportion attributable to assisted reproductive treatment (ART), also referred to as in-vitro fertilisation (IVF) treatment.

In the period July to September 2016, around 56 per cent of approved medical ground applications were for bariatric surgery (1,857 applications) and around 7 per cent were for ART (239 applications). Most commonly, funds to pay for bariatric surgery are accessed on the basis that the surgery will treat a life threatening illness, or alleviate acute or chronic pain. This clinical determination is made by the treating surgeon.

Funds can also be accessed for treatments to alleviate chronic mental disturbance; and in these situations a different assessment criterion is used. Examples in this category include a medical service that could be considered an aesthetic improvement (such as breast augmentation), or ART. For these services it is most commonly a psychiatrist who makes the determination that the treatment claimed will alleviate the chronic mental disturbance.

There can be difficulties for the Regulator in determining whether the amount claimed for a particular treatment is reasonable – even where it is accepted that the treatment is medically necessary. For example, where a treatment is available in Australia but the patient chooses to undertake the procedure overseas, the overall cost may be much greater owing to travel and accommodation expenses. Similarly, where the applicant has sought the assistance of a third party provider in organising a treating practitioner and lodging their application with the Regulator, there may be cases where the cost of the treatment appears to be higher than normal.

### QUESTIONS

- 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?
- 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?
- 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)?
- 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)?
- 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?

## Dental treatment

Some stakeholders have noted that the current rules do not explicitly provide for early access to superannuation in order to meet the costs associated with dental treatment (although some applications are approved for dental treatment where the Regulator determines that such release is 'consistent with' the other grounds of release under SIS Regulation 6.19A(1)(f)).

## QUESTION

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?

### Severity of condition to be treated

The current test simply requires that the relevant medical procedure ‘alleviate’ acute or chronic pain or mental disturbance (SIS Regulation 6.19A(3)(a)(ii) and (iii)). It is not necessary that the procedure ‘treat’ the pain or disturbance (in contrast to cases of life threatening illness or injury).

The term ‘alleviate’ directs attention to whether the treatment temporarily provides symptomatic relief rather than to whether the treatment aims to heal or cure the individual’s condition.

Under this provision, individuals are not excluded from seeking early access to superannuation because the particular illness from which they suffer can be alleviated but not cured. However, since the regulations say nothing about the severity of the pain or distress or the extent to which a particular treatment will alleviate it, the current threshold to access superannuation early may be lower than compassion would warrant in some cases (the **genuine hardship** principle). That will be particularly so if, for example, the relief provided by the treatment is modest and short-term.

## QUESTION

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?

### Medical practitioners

Individuals can apply for early release of superannuation benefits independently or with the assistance of third party commercial providers, who assist the individual with their application and may also facilitate a relationship between the individual and a relevant medical professional. This medical professional may not have had a prior relationship with the individual.

The current regulations do not specify whether the medical specialist referred to in SIS Regulation 6.19A(3) must be a specialist in the field of medicine to which the individual’s condition relates.

Furthermore, the regulations do not specify whether the Regulator is entitled to appoint, or rely upon the advice of, particular medical professionals. In practice, this means that the Regulator will generally be restricted to relying upon the evidence presented to them by the medical practitioner (or an associate) who would be carrying out the treatment.

Given the need to ensure that the rules are **fair and effective**, and applied consistently, the current arrangements may raise concerns that they lack sufficient objectivity.

**QUESTIONS**

- 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?
- 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?

**Funeral expenses grounds**

SIS Regulation 6.19A(1) allows early release of superannuation benefits on the ground that release is required to pay for expenses associated with a dependant's palliative care, death, funeral or burial.

The term 'dependant' is defined in the *Superannuation Industry (Supervision) Act 1993* (and equivalently in the *Retirement Savings Account Act 1997*). Dependant, in relation to a person, includes the spouse of the person, any child of the person and any person with whom the person an 'interdependency relationship'.

**Key issues**

The current rules only apply where the deceased or the individual in palliative care has/had a dependency relationship with the individual. This means that a person would not necessarily be able to access their superannuation for the purposes of attending the funeral of a family member in another jurisdiction, or for the purposes of contributing towards the costs of the funeral for a non-dependant (for example, a sibling or parent). This may be seen to be meeting the '**fair and effective**' principle insofar as it provides an objective test. On the other hand, it could undermine the principle on the basis that similar family cases are not treated alike.

The current test does not impose any requirement that the funeral expense in question be reasonable, nor does it impose any other form of threshold or cap. This may be contrary to the **genuine hardship** principle if early release is available to meet the costs of a particularly lavish funeral, for example.

**QUESTIONS**

- 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?
- 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).

**Housing grounds**

Superannuation benefits may be released early on the grounds that release is required to enable the individual to make a payment on a loan, to prevent foreclosure of a mortgage on their home or exercise of the mortgagee's power of sale (SIS Regulation 6.19A(1)(b)).

The Regulator cannot approve an application on these grounds unless the individual provides a written statement from the mortgagee, stating that a payment is overdue and that non-payment will result in foreclosure or mortgagee sale (SIS Regulation 6.19A(5)).

The maximum amount that can be released within a 12 month period is equal to three months' repayments and 12 months' interest on the outstanding balance of the loan (SIS Regulation 6.19A(6)).

### Key issues

Some concerns have been raised about how the current provisions apply to homeowners. For example, a few stakeholders have raised concerns that an individual's superannuation cannot be accessed if that individual's name is not on the mortgage title, even though the home is the individual's principal place of residence.

A greater volume of correspondence has been received from stakeholders noting that the current rules make no provision for Australians who face being evicted from a rental property. This means people who are renting their home and cannot meet their rental payments are treated differently from those who own their own home and cannot meet mortgage repayments.

There is a trade-off in releasing superannuation benefits for current-day consumption rather than **preserving** it for retirement income purposes. One argument for allowing early release to prevent mortgage foreclosure is that the principal place of residence represents a long-term financial asset that is likely to contribute towards the adequacy of a person's retirement wealth.

This argument does not apply to rental payments. The **genuine hardship** and **fair and effective** principles draw attention to the fact that the immediate consequences for the loss of one's home may be the same, as discussed further above.

### QUESTIONS

- 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?
- 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)?

## Severe disability grounds

The current provisions allow for early access of superannuation benefits to modify a person's principal place of residence, or vehicle, to accommodate the special needs of the person or the person's dependant, arising from severe disability (SIS Regulation 6.19A(1)(c)).



## Key issues

The current rules make no specific provision for disability aids, such as a mobility scooter, although there may be cases in which the Regulator may approve the release of funds for disability aids under the residual discretion in SIS Regulation 6.19A(1)(f) (see below). The current rules may reflect the fact that a residence or vehicle is an asset that is likely to be held by the member over the long term, so that the modification should provide a long-term benefit (which may help to offset any detriment to the member's retirement income).

To ensure that early access to superannuation is only available once the welfare system has proved insufficient, one stakeholder has suggested that superannuation benefits should be available for expenses associated with severe disability only where other Government sources (for example, the National Disability Insurance Scheme) do not cover costs fully, in doing so, aligning with the '**last resort**' principle.

### QUESTIONS

- 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?
- 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?

## Regulator's residual discretion

In addition to the specific grounds of release listed in the regulations, the Regulator is also empowered to release benefits in cases that it determines are 'consistent with' those grounds (SIS Regulation 6.19A(1)(f)).

This rule is consistent with the **fair and effective** principle, because it allows the Regulator to treat similar cases alike (where a case does not fall strictly within the ambit of the specific rules); for example, by allowing release for certain dental expenses.

On the other hand, the existence of discretion of any sort risks undermining the deliberate strictness and objectivity of the overall rules (undermining the **fair and effective** principle), unless carefully and narrowly applied, as well as increasing the costs of administering the early release of benefits.

### QUESTION

- 1.20 Should the Regulator's residual discretion in SIS Regulation 6.19A(1)(f) be removed? What would be the consequence of doing so?

## Other potential new grounds, not currently in the legislation

As part of this review, the Government is consulting on whether the current grounds for early release of superannuation benefits should be expanded to include new grounds. Several possible new grounds have been discussed above (for example, dental expenses, medical aids and rental expenses). Any expansion of the grounds should be considered in the context of the guiding principles.

### Victims of domestic violence

Another potential new ground for early release which has been raised by several stakeholders is for victims of domestic violence, where an individual is experiencing a situation of family violence or financial abuse by a domestic partner.

Early access to superannuation benefits may reduce financial security in retirement and exacerbate the savings gap between men and women. The Government recognises the difficulties facing victims of domestic violence and provides support through timely and targeted assistance, including through the welfare system.

There is a trade-off between the principles of **'genuine hardship'** whereby superannuation may help meet short-term financial needs, and **'preservation'** of income for retirement. It is an open question whether early release for victims of domestic violence should be considered as a **'last resort'** where other forms of assistance have been inadequate.

Further, in considering this issue, it is worth noting that the Australian Law Reform Commission (ALRC) did not consider it appropriate to include family violence as a purpose for which an individual may apply for early access on compassionate grounds, or to create a new ground of early release on the basis of family violence (Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks (ALRC Report 117)*). In making this recommendation, the ALRC noted that many stakeholders had emphasised the importance of preserving superannuation benefits until retirement.

This issue may also apply to the victims of crime discussion, in Part 3 of this paper.

#### QUESTIONS

- 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?
- 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?

## PART 2: EARLY RELEASE ON THE GROUNDS OF SEVERE FINANCIAL HARDSHIP

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The current arrangements for early release of superannuation benefits for severe financial hardship were introduced in 1997 in place of the broad discretion previously held by the Insurance and Superannuation Commissioner to determine whether a person was in severe financial hardship.

Before this time, assessments of financial hardship tended to be ad hoc, and different funds had different rules. Members in similar circumstances often received different treatment. This test gives consistency to applications for early access to superannuation on financial hardship grounds although, unlike early release of superannuation on compassionate grounds, the ultimate discretion to release funds lies with the trustee of the superannuation fund.

To access superannuation on the grounds of severe financial hardship, individuals who have not reached preservation age must be able to show they are currently and have been in receipt of a qualifying Commonwealth income support payment for a continuous 26-week period and satisfy the trustee of their fund that they are unable to meet reasonable and immediate family living expenses.

The maximum amount that can be released in a 12-month period is no less than \$1,000 (unless preserved benefits are less than that amount) and no more than \$10,000.

Those who have reached preservation age can access superannuation on severe financial hardship grounds if they have received a qualifying Commonwealth income support payment for 39 weeks after reaching preservation age and were not gainfully employed on the application date. There is no limit on the amount of superannuation that can be released in these circumstances.

The test for 'severe financial hardship' is contained in SIS Regulation 6.01(5). This rule is deliberately strict and objective. It ensures that early access to superannuation is available only as a last resort if the income support system – which is the preferred way of delivering financial support to Australians in need – has proved insufficient.

Qualifying payments are generally designed to provide financial support to people experiencing financial hardship because of an unexpected life event such as disability or loss of employment. ABSTUDY and some types of income support payments such as Austudy and Youth Allowance, are not considered to be qualifying payments. Recipients of ABSTUDY, Austudy and full-time students on Youth Allowance make a voluntary decision to pursue a course of study having regard to both the immediate and future financial consequences of doing so.

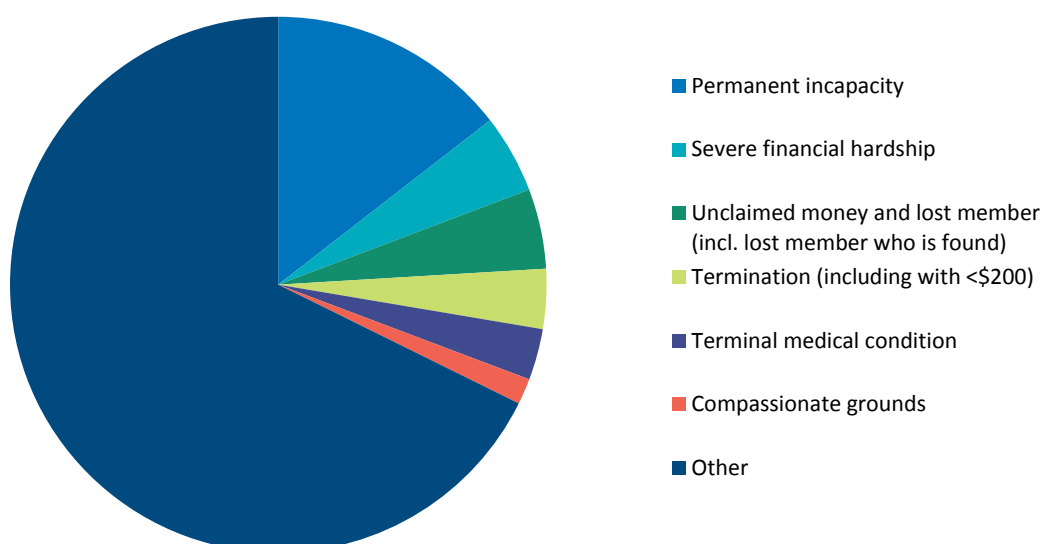
In determining whether to release superannuation on the basis of serious financial hardship, the trustee of a member's superannuation fund must be satisfied that the individual meets the objective test (regarding qualifying Commonwealth income support payments) and that 'the person is unable to meet reasonable and immediate family living expenses'. The regulations do not prescribe the matters that the trustee is required to take into account in determining the latter.

## Data on benefits released on the severe financial hardship grounds

According to data from the Australian Prudential Regulation Authority (APRA), in 2015-16 around \$550 million in superannuation benefits from entities with more than four members was released on financial hardship grounds. This represents around 2 per cent of all benefits released by entities with more than four members in the 2015-16 financial year. This ratio has been consistent over the past three years (since 2013-14, when data became available).

If the more common conditions of release (retirement, attaining age 65, attaining preservation age and death) are excluded from the calculation, release of superannuation benefits on financial hardship grounds comprised around 5 per cent of benefits released by entities with more than four members (Chart 5), compared to around 2 per cent of benefits released on compassionate grounds. These percentages have also been broadly consistent over the past three years.

**Chart 5: Proportion of benefits released by condition of release (ex. retirement, attaining age 65, attaining preservation age and death), entities with more than four members, June 2016**



Note: The large 'Other' category includes release of funds from one superannuation entity to another, where the specific condition of release was not specified ('unrestricted non-preserved benefits'), as well as insurance benefits released to individuals through their superannuation account.

Source: APRA *Annual Superannuation Bulletin*, June 2016.

## Discussion against the principles

In general, the objective test for severe financial hardship – introduced in 1997 – appears to work well in ensuring a consistent and **effective** way to assess whether individuals qualify for early release on severe financial hardship grounds. The test is targeting release of benefits to those members of the community who are considered to be in **genuine hardship** based on broader social policy parameters. In doing so, the test may also be considered to meet:

- the **fairness** principle – by limiting eligible Commonwealth income support payments to those which provide financial support to people experiencing financial hardship because of an unexpected life event (for example, loss of employment or disability). In contrast, recipients of ABSTUDY, Austudy and Youth Allowance make a voluntary decision to study.
- the **last resort** principle – as the social security system needs to be accessed first.

However, some stakeholders have raised concerns that the current criteria for financial hardship are too strict. As such, they may argue the ground is inconsistent with:

- the **genuine hardship** principle – early release is not available to individuals where they ‘break’ the 26 weeks of continuous eligible Commonwealth income support payments rule. For example, an individual may have had to forgo one week of Centrelink payments because they worked intermittently; and
- the **fair and effective** principle:
  - early release is not available to individuals in receipt of ABSTUDY, Austudy or Youth Allowance;
  - Australian residents overseas and some foreign workers cannot access their superannuation on financial hardship grounds because they are not eligible for Commonwealth income support; and
  - a lack of definition or objective test for ‘unable to meet reasonable and immediate family living expenses’ means trustees of superannuation funds may permit early release of superannuation on financial hardship grounds inconsistently.

### QUESTIONS

- 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?
- 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?



# PART 3: VICTIMS OF CRIME COMPENSATION

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## Introduction

Victims of crime cannot generally access the superannuation of a perpetrator where they are owed a payment as a result of a court proceeding. This consultation paper asks whether, and in what circumstances, victims of crime might be able to recover unpaid compensation or restitution from a perpetrator's superannuation.

Currently, there are three ways that a victim of crime can seek compensation from the perpetrator:

- State and Territory statutory compensation regimes, where the state pays compensation to a victim of crime.
- Compensation or restitution orders requiring the perpetrator to pay the victim, handed down as part of the sentencing process in a criminal trial.
- A victim pursuing civil action against a perpetrator or alleged perpetrator for damages (either following their conviction or in the absence of a conviction).

The perpetrator's superannuation is protected in each of these processes. This is because superannuation trustees are unable to pay preserved benefits except in specified situations (including paying out the proceeds of crime) under Division 6.3 of the Superannuation Industry (Supervision) Regulations 1994.

While a victim can seek to recover compensation or restitution debts owed by the perpetrator from the perpetrator's non-superannuation assets, he or she cannot generally access the perpetrator's superannuation.

Where the perpetrator has little or no assets outside of superannuation, a victim may be unable to pursue compensation or may be left with unpaid debts in the event they are able to secure a compensation order or civil judgment.

The special protection afforded to superannuation balances reflects a longstanding view that preserving a person's private retirement income is important.

Providing access to a perpetrator's superannuation account balance for victims of crime would represent a departure from the existing retirement income framework. However, a victim may already access other assets that may be used in future by an individual to support their retirement, including a person's home and non-superannuation financial assets (including interests in non-superannuation managed investment schemes and other fixed trusts).

## How do victims get compensation now?

### State and Territory statutory compensation schemes

Each State and Territory has its own statutory victims of crime compensation scheme. Under most schemes, a victim who has been injured by an act of violence and wants to seek compensation can apply to a government body (or tribunal). The body will assess the victim's claim and if the assessment is in favour of the victim's claim, it will pay the victim with state funds. There is no general victims-of-crime compensation scheme at the Commonwealth level, although there are schemes that can be accessed in particular circumstances (such as the Australian Victims of Terrorism Overseas Payments).

The definition of victim is broad in most jurisdictions, encompassing: the primary victim (the person who has been injured); related victims, such as parents or financial dependents; witnesses who have been injured by hearing or seeing an act of violence; and those who incur funeral expenses in cases of homicide. Notably, under these frameworks a criminal conviction is generally not necessary for compensation to be available to a victim – and in some cases can even be available where an alleged perpetrator was found not guilty.

The amount of compensation available varies between States and Territories, with some schemes capping assistance to a related victim at \$10,000, compared to others that cap assistance at \$150,000 (for multiple offences committed by the same offender).

Generally, compensation from statutory schemes is not provided if funds are obtained by the victim from other sources like Medicare, third party compensation, workers' compensation or motor vehicle compensation schemes.

Appendix B compares the state and territory statutory compensation schemes.

These schemes remove the need for a victim of crime to seek compensation from the perpetrator. The victim receives compensation directly from the scheme, so access to superannuation is largely irrelevant to them. However, if the perpetrator is convicted of the alleged crime the state may subsequently take action against the perpetrator to recover the amount.

### Court ordered compensation during criminal trial

The courts in most States and Territories, except Western Australia, have the power to order an offender to pay compensation or restitution for loss, injury or damage as a sentencing option in a criminal trial. In Western Australia, the power to order compensation or reparation is restricted to loss or damage to property.

A court order of this type is a judgement debt against the offender. If the offender does not pay, the victim is able to enforce the debt through the court system, including petitioning for bankruptcy. In these circumstances, the victim (and any other creditors) will be able to access most of the perpetrator's assets, but not amounts kept in the perpetrator's superannuation account.

### Civil court action

Victims of crime can also seek damages from the perpetrator through the civil courts, in addition to statutory victims of crime regimes.



If a civil court hands down an order to pay the victim damages, a judgement debt arises against the perpetrator and the mechanism for enforcing payment is the same as the criminal compensation orders outlined above. The victim is able to petition for bankruptcy of the perpetrator if the amount is unpaid, and able to access the perpetrator's assets (outside of superannuation) as a creditor to the bankrupt estate.

Notably, civil actions may have no connection to a criminal trial or conviction. The application is decided on the balance of probabilities (rather than the criminal standard of proof which is beyond reasonable doubt) and the amounts payable are uncapped.

## Bankruptcy

Generally, superannuation account balances are protected from creditors in the event of a bankruptcy. Exceptions include when contributions have been made by individuals into their own superannuation account or a third party's superannuation account (for example, the bankrupt's spouse's or child's account) in order to defeat creditors.

When looking at whether a contribution was made to defeat creditors, the law has regard to whether the person had previously established a pattern of making contributions and if the contribution, when considered in light of that pattern, is out of character.

Superannuation lump sums that are withdrawn on or after the date of bankruptcy are generally also protected from creditors.

If the after-tax income of a person who is subject to bankruptcy is over a certain threshold, the person may have to make compulsory payments to their bankruptcy trustee to fulfil their debts. Income that is counted towards this threshold includes any income stream payments from superannuation, as well as amounts that are salary sacrificed into superannuation.

Most compensation orders are provable in bankruptcy, meaning that a scheme or individual victim of crime can lodge a claim to be paid and may be able to recover part or all of the compensation.

In most States and Territories (except Queensland), debts arising out of compensation/restitution orders are extinguished upon discharge from bankruptcy. This means an offender who is ordered to pay compensation but has no assets outside of superannuation may declare bankruptcy and have these debts extinguished.

## Issues

### Issue 1 – Should victims of crime have access to a perpetrator's superannuation?

The first issue is whether the objective of preserving an individual's superannuation balance for retirement should continue to prevail over the rights of victims of crime in most circumstances.

#### QUESTION

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

## Issue 2 – Should there be a requirement for a criminal conviction?

As previously noted, victims of crime may obtain compensation or restitution orders against perpetrators as part of the sentencing process in a criminal trial or in subsequent civil proceedings relating to a conviction. However, they can also access compensation through state statutory compensation schemes or civil proceedings in the absence of a conviction. This raises the issue of whether superannuation should only be available to meet unpaid compensation claims relating to crimes for which a conviction is recorded or whether it should be available in the absence of a conviction – which is a much lower threshold.

### QUESTION

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

## Issue 3 – Should it only be available for particular offences?

The type and degree of severity of crimes varies drastically. This raises the issue of whether access to superannuation should be confined to particular crimes.

Types of crime include violent crime, property crime and financial crime. Within each category there is a wide range of severity. While violent and sexual crimes can have significant impact on the victim and their relatives, others such as minor theft may have relatively little impact in some cases.

### QUESTION

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)?

## Issue 4 – Should access to superannuation only be available if there are out-of-character contributions?

Under one possible approach, superannuation could be available to pay outstanding victims compensation orders from a criminal case if it can be established that the perpetrator made out-of-character contributions to superannuation to shelter assets.

This would directly address the issue of superannuation being used as a method to avoid paying compensation to victims.

### QUESTION

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?

## Issue 5 – How might a victim’s right to a perpetrator’s superannuation be enforced?

A potential option could be to allow perpetrators to access their superannuation voluntarily pay outstanding compensation orders, if they wish to preserve other assets, or do not have other assets outside of superannuation.

However, in cases where perpetrators are unwilling to access their superannuation to pay outstanding compensation orders there are a range of issues related to enforcing the victim’s right to the superannuation.

Generally, a victim will not have visibility over the perpetrator’s superannuation assets. There is no established mechanism for disclosing superannuation assets and petitioning for access to those funds, outside of existing bankruptcy proceedings.

### QUESTION

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?

## Issue 6 – Should there be limits on the amount of superannuation that can be accessed?

For perpetrators close to retirement age, taking their superannuation may mean they have limited capacity to support their retirement leading to reliance on the Age Pension.

To address this issue, the amount of superannuation available to fulfill a compensation order could be capped at a dollar figure.

Some perpetrators may have low superannuation balances, below the dollar figure cap that is imposed. This may mean in some cases that a perpetrator has no superannuation left after the superannuation is seized to pay a debt.

Alternatively, a percentage cap could be used. This would be a certain proportion of the perpetrator’s superannuation balance, meaning that even those with low balances would not be left with zero superannuation after paying the outstanding debt.

Additional consideration should be given for more complex scenarios. As an example, in circumstances where an offender has a spouse or dependent children, there may need to be safeguards in place to ensure financially dependent third parties (such as children) will not be unduly affected.

Further, in instances where a couple has jointly contributed to only the offender’s account, claims by the victim of crime may need to be treated differently.

Matters arising from family law proceedings where the splitting of superannuation is sought as a result of a relationship breakdown are discussed below at issue 10 – Family Law.

## QUESTION

- 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)?

## Issue 7 – If access were permitted, should it only be for lump sums?

There are different types of superannuation interests. Where an individual is in accumulation phase of a 'defined contribution' product, there is an account balance associated with that product – so access to lump sums should be relatively straightforward.

However, some individuals also hold 'defined benefit' interests or annuity products that do not have an account balance and cannot be commuted. Access to superannuation in these cases, especially when the individual has not retired and a pension is not being paid, would be more complicated.

When an individual retires and starts an income stream, either account based or defined benefit, there are two possible options: a portion of the income payments go towards paying a compensation debt over time; or the individual could be required to take out a lump sum (if possible) to pay the compensation all at once.

However, a requirement to make ongoing payments from a superannuation pension to a victim of crime may be inconsistent with the notion that bankrupts should be given a fresh start at the end of the bankruptcy period.

## QUESTION

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

## Issue 8 – If access to superannuation was permitted, would it apply to existing compensation orders?

Most changes to law are prospective – that is, they only apply from the date the law changes. However, in exceptional circumstances they can apply to past conduct. Retrospective changes to the law which alter rights and obligations can raise issues of fairness.

The question that arises here is whether victims of crimes committed in the past should be eligible for access to superannuation (if such a change was made).

**QUESTION**

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?

## Issue 9 – Should State/Territory compensation schemes be able to recover their costs from the perpetrator's superannuation?

Victims of crime may seek compensation from State and Territory statutory schemes. Where a statutory scheme makes a payment to a victim, it may be able to seek to recover its costs, or a portion of its costs, from the perpetrator if there is a conviction. As part of this process, it may consider the perpetrator's capacity to pay and the impact on their dependants.

This raises the issue of whether statutory schemes should be able to access superannuation to recover their costs and whether they should take this into account in determining the proportion of costs to be recovered from the perpetrator.

**QUESTION**

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

## Issue 10 – Overlap with Family Law

Access to superannuation is possible through family law provisions that override the individual nature of a superannuation asset in particular circumstances – the breakdown of a marriage or de facto relationship.

The *Family Law Act 1975* provides an extensive and flexible regime for apportioning property rights justly in the event of a relationship breakdown (including injunctive relief pending decisions of the court as well as superannuation splitting orders).

There are two ways that superannuation is split under family law – payment splitting and interest splitting.

Payment splitting means that, as and when a payment from a superannuation interest becomes payable to the member spouse (usually because a condition of release has been met, such as retirement), a certain amount will be paid to the non-member spouse and the remainder will be paid to the member spouse.

Payment splitting does not create a separate new superannuation interest for the non-member spouse.

Interest splitting involves the creation of a new interest for the non-member spouse. The law may also permit a transfer or roll-over of benefits for the non-member spouse to another fund. This lets the non-member spouse access entitlements independently of the member spouse.

Some superannuation interests are 'unsplittable interests'.

Most superannuation can be split either by agreement or court order. It is not possible to split superannuation of little or no value when it would not be cost effective to do so. Superannuation interests with a withdrawal benefit of less than \$5,000 and those paying a non-commutable pension or an annuity of less than \$2,000 per annum, are prescribed as unsplittable interests.

In circumstances where there has been a relationship breakdown, a perpetrator of crime's superannuation balance may be subject to competing claims from their partner and a victim of crime. It would be necessary to determine how these competing claims should be addressed and prioritised.

#### **QUESTION**

3.11 In circumstances where there are concurrent family law and victim of crime compensation proceedings, how should these matters be addressed and prioritised?

What other issues might arise?

# APPENDIX A: CONSOLIDATED LIST OF QUESTIONS

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## Principles underpinning early release

- Question 0.1** Do these proposed principles provide an appropriate guide to determine the grounds for early release under compassionate and financial hardship grounds, and for victims of crime compensation? If not, what should these principles be?
- Question 0.2** Having regard to these principles, should early release of superannuation benefits generally be more or less difficult to obtain?

## Part 1: Compassionate grounds

- Question 1.1** Should the assessment of financial capacity be made more prescriptive and/or objective? If so, how? What information might applicants need to provide?
- Question 1.2** What factors might be driving the increase in the amount of superannuation released on medical grounds and are these factors any cause for concern?
- Question 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?
- Question 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?
- Question 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?
- Question 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?
- Question 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)?
- Question 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)?
- Question 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?

- Question 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?
- Question 1.11** Should SIS Regulation 6.19A(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?
- Question 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 proposed condition being treated?
- Question 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 receive a reference from a list of approved medical practitioners, to ensure the objectiveness of the assessment?
- Question 1.14** Should early access to superannuation benefits to meet expenses associated with palliative care, death, funeral or burial be limited to where there is a dependency relationship? Why/why not? Could there be any unintended consequences from expanding this provision?
- Question 1.15** Should there be a maximum amount that can be released to meet a funeral expense? (For example, the amount that the Regulator considers reasonable.)
- Question 1.16** Should early release of superannuation benefits be available to meet mortgage payments regardless of whether a person’s name is on the mortgage title for their principal place of residence? What might be the implications of broadening the provisions in this way and what additional limitations might be required? For example, should release be limited to dependants or spouses or partners?
- Question 1.17** Is there a fundamental difference between meeting mortgage payments and meeting rental payments which would warrant a difference in treatment (for example, in respect of the asset available to mortgagees once all repayments have been made)? Or should early release on compassionate grounds be extended to include individuals who are unable to meet rental payments? If so, what evidence should be required and what should be the threshold for release (for example, in rental arrears or rental eviction notice)?
- Question 1.18** Are the current disability grounds fit for purpose, or should early release be extended 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?
- Question 1.19** Should individuals for 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 would this requirement be administered?
- Question 1.20** Should the Regulator’s residual discretion in SIS Regulation 6.19A(1)(f) be removed? What would be the consequence of doing so?



**Question 1.21** Are there situations outside of the current compassionate grounds which may justify inclusion in the early release of superannuation provisions, balanced against the need to preserve superannuation benefits to provide income in retirement?

**Question 1.22** Should access to superannuation benefits be available to assist victims of domestic violence? Why / why not? If yes, under what particular grounds (for example, financial hardship, homelessness, victims of crime), which expenses should be included, and what evidence should be required?

## Part 2: Severe financial hardship ground

**Question 2.1** Having regard to the necessary trade-off between simplicity, objectivity and flexibility, should the criteria for severe financial hardship be amended? If so, how? In particular, is there merit in expanding or contracting the 26-week rule and/or the definition of qualifying Commonwealth income support payments?

**Question 2.2** Should there be a prescribed standard of proof of being 'unable to meet reasonable and immediate family living expenses'? How can the legislation guard against non-genuine claims?

## Part 3: Victims of crime compensation

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

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

**Question 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)?

**Question 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?

**Question 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?

**Question 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)?

**Question 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?

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

**Question 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?

**Question 3.10** Should State and Territory compensation schemes be able to recover their payments to victims from the perpetrator's superannuation?

**Question 3.11** In circumstances where there are concurrent family law and victim of crime compensation proceedings, how should these matters be addressed and prioritised? What other issues might arise?

# APPENDIX B: STATE AND TERRITORY STATE-FUNDED COMPENSATION REGIMES

LEGISLATION AND SCHEME	COVERED VICTIMS	TIME LIMITS	CAP ON ASSISTANCE
<p>NSW – <i>Victims Rights and Support Act 2013</i></p> <p>NSW – <i>Victims Rights and Support Regulations 2013</i></p> <p>Scheme name: Victims Support Scheme</p>	<ul style="list-style-type: none"> <li>Primary, secondary and family victims</li> <li>Guardian for child who is a primary victim</li> <li>Non-family members who incur funeral and other expenses</li> </ul>	<p>Application must be made within two years of event.</p>	<ul style="list-style-type: none"> <li>\$35,000 for primary victims</li> <li>\$30,000 for guardians</li> <li>\$18,000 for family</li> <li>\$13,000 for non-family members</li> <li>Recognition payments up to \$15,000</li> </ul>
<p>VIC – <i>Victims of Crime Assistance Act 1996</i></p> <p>Scheme name: Victims of Crime Assistance Tribunal (VOCAT)</p>	<ul style="list-style-type: none"> <li>Primary, secondary or related victims</li> <li>Person who incurs funeral expenses</li> </ul>	<p>Application must be made within two years of event.</p>	<ul style="list-style-type: none"> <li>\$60,000 for primary victims (plus special assistance up to \$10,000)</li> <li>\$50,000 for secondary victims</li> <li>\$50,000 for related victims (with a pool of \$100,000 available for all related victims)</li> </ul>
<p>QLD – <i>Victims of Crime Assistance Act 2009</i></p> <p>Scheme name: Victim Assist Queensland scheme</p>	<ul style="list-style-type: none"> <li>Primary, parent secondary, witness secondary and related victims</li> <li>Person who incurs funeral expenses</li> </ul>	<p>Application must be made within 3 years of event.</p>	<ul style="list-style-type: none"> <li>\$60,000 for primary victims (plus special assistance up to \$10,000)</li> <li>\$50,000 for secondary victims</li> <li>\$50,000 for related victims (with a pool of \$100,000 available for all related victims)</li> </ul>
<p>SA – <i>Victims of Crime Act 2001</i></p> <p>Scheme name: VOC compensation scheme</p>	<ul style="list-style-type: none"> <li>Primary victims</li> <li>People directly related to victims</li> <li>Non-related people representing dependants (if the victim died, no previous order for compensation and the court determines the person suitable to represent)</li> <li>Person who incurs funeral expenses</li> </ul>	<p>Application must be made within three years of the act or 12 months if act resulted in death of victim.</p>	<ul style="list-style-type: none"> <li>Assistance is capped at \$100,000 in total. Composed of an amount based on how severe the non-financial loss is.</li> <li>Compensation for grief is capped at \$20,000 and total funeral expenses at \$14,000.</li> </ul>

## Early release of superannuation benefits

LEGISLATION AND SCHEME	COVERED VICTIMS	TIME LIMITS	CAP ON ASSISTANCE
<p>WA – <i>Criminal Injuries Compensation Act 2003</i></p> <p>Scheme name: Criminal Injuries Compensation Scheme</p>	<ul style="list-style-type: none"> <li>The victim of an offence where they suffered injury</li> <li>A close relative of a person killed</li> </ul>	Application must be made within three years of the violent act.	<ul style="list-style-type: none"> <li>Assistance is capped at \$75,000 or, for certain situations, \$150,000.</li> </ul>
<p>NT – <i>Victims of Crime Assistance Act</i></p> <p>Scheme name: Victims Financial Assistance Scheme</p>	<ul style="list-style-type: none"> <li>Primary, secondary, family and related victims</li> </ul>	Application must be made within two years of the violent act.	<ul style="list-style-type: none"> <li>\$40,000 for a primary victim</li> <li>\$40,000 for secondary victims (if there is more than one secondary victim this amount is shared)</li> <li>\$40,000 for family victims (if there is more than one family victim this amount is shared)</li> </ul>
<p>TAS – <i>Victims of Crime Assistance Act 1976</i></p> <p>Scheme name: Victims of Crime Assistance</p>	<ul style="list-style-type: none"> <li>Primary, secondary and related victims</li> <li>Person who incurs funeral expenses</li> </ul>	Application must be made within three years of the date of the offence.	<ul style="list-style-type: none"> <li>\$30,000 for a primary victim</li> <li>\$20,000 for a secondary victim</li> <li>\$10,000 for a related victim (for multiple claims relating to the same incident, the maximum total for related victims is \$50,000)</li> </ul>
<p>ACT – <i>Victims of Crime (Financial Assistance) Act 2016</i></p> <p>ACT – <i>Victims of Crime (Financial Assistance) Regulation 2016</i></p> <p>Scheme name: New Financial Assistance Scheme</p>	<ul style="list-style-type: none"> <li>Primary victims</li> <li>Class A related victims</li> <li>Class B related victims</li> <li>Class C related victims</li> <li>Homicide witnesses</li> <li>Person who incurs funeral expenses</li> </ul>	Application must be made within three years of the date of the offence.	<ul style="list-style-type: none"> <li>\$50,000 for a primary victim</li> <li>\$30,000 for a Class A related victim</li> <li>\$20,000 for a Class B related victim</li> <li>\$10,000 for a Class C related victim</li> <li>\$10,000 for a homicide witness</li> <li>\$8,000 for funeral assistance</li> </ul>

# APPENDIX C: TERMS OF REFERENCE OF THE REVIEW

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Treasury will review whether the current rules governing the early release of superannuation benefits on compassionate grounds and in cases of severe financial hardship (regulations 6.19A and 6.01 of the *Superannuation Industry (Supervision) Regulations 1994*, respectively) remain fit for purpose.

In making recommendations, it will consider whether these rules appropriately balance the need to:

- preserve superannuation benefits to meet the objective of providing income in retirement to substitute or supplement the Age Pension;
- ensure that superannuation is available for current consumption in certain, limited cases of genuine hardship or where warranted for compassionate reasons; and
- ensure the rules can be administered fairly and effectively.

The review will also consider and make recommendations on whether a perpetrator's superannuation should be accessible to pay compensation or restitution to a victim of crime; and, if so, the circumstances in which this may be appropriate.

The review will not examine other general conditions of release for superannuation.

Treasury will report to the Government in March 2018.