

Review of Early Release of Superannuation Benefits

Legal Aid NSW submission to
The Treasury

February 2019

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Legal Aid
NEW SOUTH WALES 

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Consumer issues constitute the largest category of service for our Civil Law Division, with over 8,000 services in the 2017-18 financial year.

Legal Aid NSW welcomes the opportunity to make a submission to the Treasury's further consultation and draft proposals on early release of superannuation benefits. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to Treasury's further consultation in respect of the review of the rules governing early release of superannuation. Legal Aid NSW also provided a submission to the initial consultation paper in February 2018.

This submission focuses on four of the 13 draft proposals: Draft Proposals 7, 8, 11 and 12. These Draft Proposals most directly affect our clients, who are some of the most disadvantaged people in New South Wales.

In providing our response, we refer to our comments made in our February 2018 submission paper, our casework experience, and the specialist expertise of our following services:

- Civil Law Service for Aboriginal Communities
- Domestic Violence Unit
- Consumer Law Group
- Mortgage Hardship Service

Draft Proposal 7 – Family and Domestic Violence

Add a new compassionate ground of release for victims of family and domestic violence by permitting multiple releases over a 24 month period, per person, up to a \$10,000 cashing restriction, subject to judicial evidence or two pieces of specific non-judicial evidence confirming the individual is a victim of family and domestic violence.

Legal Aid NSW supports the intention of Draft Proposal 7 to add a new compassionate ground for early release of superannuation for victims of family and domestic violence. We note that in many states, there are victims support schemes, brokerage and other services to assist victims of family and domestic violence – including funding for immediate needs, such as relocation. We recognise that in circumstances where these alternative options are not available, early release of superannuation may be the most suitable option to support victims leaving family and domestic violence.

We support the consultation paper's comments that applications will be streamlined through the Australian Tax Office (**ATO**), and assessed within a 14-day timeframe. However, we submit that further consultation is needed about the application process so that:

- (a) The victim's safety is paramount, including ensuring that the perpetrator does not directly or indirectly benefit from the release of funds;
- (b) It is simple, fast and accessible, and is guided by a trauma-informed approach;

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- (c) There are no unintended negative consequences, such as impacting on a victim's eligibility for Centrelink, legal aid or other means tested services; and
 - (d) The victim is referred to specialist family and domestic violence support services at an early stage of the process.

Evidence

Draft Proposal 7 provides an option for applicants to either provide judicial evidence or two forms of non-judicial evidence in support of their application to access superannuation on the grounds of family and domestic violence. We strongly support the Draft Proposal's acceptance of non-judicial evidence in the application process. Judicial evidence (such as an Apprehended Domestic Violence Order) may be too onerous, stressful, and time-consuming for a victim to obtain.

In terms of acceptable non-judicial evidence, Draft Proposal 7 suggests either a report, record of assault, witness statement or statutory declaration made by a police officer, along with a certificate from a medical practitioner, a member of the Australian Association of Social Workers or a registered psychologist is appropriate. Such documents should state that the professional is of the opinion that the applicant is suffering from family violence.

In respect of the first form of non-judicial evidence, we recommend that a victim's statutory declaration (witnessed in the usual way) outlining the applicant's circumstances should suffice to establish family and domestic violence for the purpose of an early release application on this ground. There should not be a requirement that the only statutory declaration to be accepted would be made by a police officer, as this may deter potential applicants who are already distrusting of authority.

With reference to the second form of non-judicial evidence, we recommend that a report from a family violence specialist support worker could also be provided. In NSW, these workers are employed by Women's Domestic Violence Court Advocacy Services (**WDVCAS**). Legal Aid NSW administers NSW Government funding for a network of 29 WDVCASs across the State. These services are locally-based, not-for-profit, non-government service providers. WDVCAS workers are domestic and family violence specialists who provide women and their children with information, advocacy and safety planning. Under *Safer Pathway*,¹ the NSW Government's coordinated response for domestic and family violence victims, WDVCAS workers provide female victims with threat assessment, case coordination (i.e. warm referrals to local services for key needs) and safety planning.

¹ *Safer Pathway* is a streamlined assessment and referral process which aims to ensure that all victims of domestic and family violence across NSW receive timely and effective support to secure their safety and support their recovery.

WDVCAS workers are uniquely placed to provide verification that an applicant for early release of superannuation is suffering from family violence. We note that there are similar evidentiary requirements to show that an applicant for a visa has been the victim of family violence by providing a letter or assessment completed by a women's refuge or family/domestic violence crisis centre.²

Further, the ATO should provide guidance for applicants, health care professionals and any other report provider about what the certificate is, what is to be included, and whether there would be a prescribed form. This guidance will prevent confusion and delay.

Draft Proposal 8 - Housing

- A. *Tighten access under the mortgage foreclosure ground to permit a release once in a 24 month period, per person, that is equal to the sum of 3 months' repayments and 12 months' interest on the outstanding balance of the loan.*
- B. *Extend the current evidentiary requirements so that the person must give the Regulator a written statement from the mortgagee that they believe the mortgage is serviceable by the person once the arrears have been rectified.*

Legal Aid NSW strongly supports the intention of Draft Proposal 8 that early release of superannuation on the grounds of mortgage arrears is a means of addressing only short-term financial hardship. However, we have some concerns about the approach proposed to achieve this intention.

The existing provisions relating to early release on this ground require the co-operation of the mortgagee to provide a written statement containing the information required by regulation 6.19A(5)-(6) of the *Superannuation Industry (Supervision) Regulations 1994*. In our experience, it can be challenging for mortgagors to obtain documents from their mortgagee, particularly during times of financial stress or where the mortgagor is a vulnerable person. We submit that Draft Proposal 8 should be amended to provide the ATO with the power to compel the production of information required by the Regulations from the mortgagee, if the mortgagor has been unable to obtain it.

We support the goal of Part B of the Draft Proposal to require evidence that the loan will likely be serviceable after the arrears are cleared. However, given the difficulties our clients already encounter in obtaining written statements from mortgagees, we are concerned that the current proposal places too great a burden on applicants.

Legal Aid NSW recommends that Part B be amended such that an applicant must:

² Ministerial Instrument IMMI 12/116 *Evidentiary Requirements* pursuant to 1.24(b) of the *Migration Regulations 1994* (Cth).

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- (a) be referred by the ATO to a financial counsellor for advice about their financial hardship;
 - (b) provide evidence that they have applied for a hardship variation (on any terms other than access to superannuation to clear the loan's arrears), and that the application was refused by the mortgagee (see below); and
 - (c) engage with a specialised team within the ATO dedicated to conducting assessments about the applicant's ability to pay the loan on an ongoing basis (see below).

(b) Requiring a hardship variation rejection

Requiring an applicant to pursue a hardship variation first may reduce instances of applicants accessing their superannuation to pay arrears when a reduction of payments for a period of time, capitalisation of arrears by the mortgagee, or a moratorium on payments due may have resolved the issue.

(c) Serviceability assessment conducted by the ATO

We consider that the serviceability assessment should be conducted by a specialised team within the ATO, rather than the mortgagee. This would streamline and expedite the application process, promote consistency in decision making, allow decisions and systemic issues to be monitored, ensure a level of expertise and accountability in decision making processes, and remove the onus on the applicant to liaise directly with the mortgagee.

The applicant would be required to consent to the specialised team within the ATO requesting and obtaining their financial information (such as their account history, loan information and hardship notes). The ATO would use this robust information, in conjunction with the outcome of a conference with the applicant, to determine if the loan will be serviceable following the release of the applicant's superannuation. We consider that the ATO is well-placed to conduct these kinds of assessment as its staff already have the skills to enter into affordable repayment arrangements with people with tax debts.

Should Part B of Draft Proposal 8 remain the favoured approach, we suggest the following amendments:

1. An applicant's request to a mortgagee to provide a written statement should be considered a hardship notice in accordance with section 72(1) of the *National Credit Code* (Schedule 1 to the *National Consumer Credit Protection Act 2010* (Cth)).
2. The rules should prescribe a reasonable period within which a mortgagee must respond to an applicant's request for a written statement to ensure that the application process is not prolonged. This could be in line with the time periods prescribed in the

National Credit Code. If a mortgagee fails to respond within the relevant period, the ATO should make inquiries with the mortgagee to encourage completion of the written statement.

3. If the mortgagee makes an assessment that the loan would not be serviceable if the arrears were cleared, the mortgagee should provide the applicant with reasons for this decision, the name and contact details of the Australian Financial Conduct Authority scheme, and the applicant's rights under that scheme in accordance with section 72(4)(b) of the *National Credit Code*.
4. Where the mortgagee has obtained judgment for possession of the property and where the mortgagee has also made an assessment that the loan will be serviceable by the applicant if the arrears are cleared, the ATO should require the mortgagee and applicant to enter an agreement that the mortgagee will not enforce the judgment, provided the applicant meets their required payments, prior to releasing the applicant's superannuation.

Draft Proposal 10 – Residual Discretion

Remove the Regulator's residual discretion to approve release on grounds that are 'consistent with' the prescribed compassionate grounds of release.

Legal Aid NSW notes the Review's proposal to remove the Regulator's discretion to approve early release applications in circumstances where an applicant has been denied access on technical grounds, but where an application would otherwise have met the criteria, and to clarify and expand on some compassionate grounds that are currently being captured under the discretion.

Legal Aid NSW is concerned that removing the Regulator's discretion altogether could negatively affect the housing ground for early release, by removing the ability to access superannuation for the purpose of paying council rate arrears. We therefore support maintaining the Regulator's discretion to approve early release applications, to cover such circumstances.

Alternatively, if the Regulator's discretion is removed, we consider that payment of outstanding council rate arrears and strata debts should be a separate ground for release. We refer to our discussion in the 'other issues for consideration' section below. In summary, we propose that allowing access to superannuation due to strata and council arrears would indirectly preserve an important asset.

Draft Proposal 11 – Severe Financial Hardship Test

Amend the severe financial hardship ground by:

- *Expanding the Commonwealth income support payment test to a cumulative period of 26 weeks out of 40 weeks; and*
- *Permitting multiple releases over a 24 month period, per person, up to the \$10,000 cashing restriction.*

Commonwealth income support payment test

Legal Aid NSW considers that expansion of the Commonwealth income support payment test to a cumulative period of 26 weeks out of 40 weeks does not go far enough in supporting applicants to access their superannuation on the grounds of severe financial hardship.

We regularly assist clients experiencing severe financial hardship because they have not been in receipt of Centrelink for a continuous period, or at all, and cannot access their superannuation on financial hardship grounds.

These clients include people who are:

- working intermittently or seasonally, disrupting the continuity of Centrelink payments;
- without an income and waiting for their Centrelink application to be approved; or
- ineligible for Centrelink (as shown in the case study below).

Case study - Renny

Renny presented to Legal Aid NSW in acute financial hardship. He was an asylum seeker whose application for a protection visa had been rejected. Renny had agreed to leave Australia, but was waiting for travel documents to be issued by his country of origin so he could return home. He did not have any visa, could not work and was not eligible for Centrelink. He was dependent on a modest Status Resolution Support Service (SRSS) payment, administered by the Red Cross.

Despite Renny's income being less than a Centrelink payment, Renny could not access his superannuation on financial hardship grounds because he was ineligible for Centrelink. There were also no compassionate grounds relevant to his circumstances. Renny had to wait until he had permanently left Australia before he could obtain his superannuation and continued to live in acute financial hardship, with the support of community support services in the interim.

Expanding the income support payment test to a cumulative period of 26 weeks out of 40 weeks may not capture those people working intermittently or seasonally, and will exclude those waiting for their Centrelink application to be approved, and those who are ineligible for Centrelink.

We recommend the following alternative position that an applicant will be deemed to meet the criteria of the severe financial hardship ground where **both** the following are satisfied:

1. The *objective* test that:
 - (a) They have been in receipt of Centrelink benefits for a cumulative period of 26 weeks out of 52 weeks; or
 - (b) For the previous 3 months, the applicant's household income has been below a recognised measure of financial hardship, such as the Henderson Poverty Index or the Household Expenditure Measure; and
2. The *subjective* test that they are unable to meet reasonable living expenses. The applicant should be required to provide a standard statement of financial position (which is viewable, printable and editable online), and a bank statement showing that the applicant does not have sufficient funds to meet reasonable living expenses.

Multiple releases over 24 month period

Legal Aid NSW supports the proposal to amend the severe financial hardship ground to allow multiple releases over a 24 month period, per person, up to the \$10,000 cashing restriction. The ATO should provide applicants with advice or encourage applicants to obtain advice about the tax implications that multiple releases may have, as compared with a lump sum release of \$10,000.

Draft Proposal 12 – Administration of Severe Financial Hardship

Transfer the administration function of the severe financial hardship ground to the Australian Tax Office (ATO), consistent with the transfer of the compassionate ground function to the ATO.

Legal Aid NSW supports the intention of the Review's Draft Proposal 12 to transfer the administration function of the severe financial hardship ground to the ATO, as consistent with the transfer of the compassionate ground function to the ATO as at 1 July 2018.

As identified in our February 2018 submission, the current arrangement whereby severe financial hardship applications are determined through the Department of Human Services (**DHS**) in conjunction with the individual fund, and the compassionate grounds applications

determined by the ATO poses some key administrative challenges from our casework experience. Some challenges include:

- confusion about the difference between compassionate grounds and severe financial hardship applications;
- delays in the approval process, with financial hardship applications to DHS taking up to 28 days; and
- lack of consistency across funds, particularly in relation to some funds offering the option to apply for early release on the basis of severe financial hardship, and others not.

Transferring the administrative function of the severe financial hardship ground to the ATO (and therefore removing the discretion of DHS and the individual trustees) will eliminate the issue of some funds offering early release on financial hardship grounds while others do not. This will significantly benefit those in superannuation funds which do not currently offer early release on the severe financial hardship ground.

The current process through DHS also requires a burdensome level of identity documentation, as specified on page 5 of our February 2018 submission. This particularly disadvantages Aboriginal people, who can have difficulty obtaining identity documents. In many states (including NSW), a fee must ordinarily be paid to obtain these documents regardless of one's financial circumstances.

Legal Aid NSW supports the transfer of the administration function of the severe financial hardship ground to the ATO as a 'one stop shop'. We strongly suggest that the Treasury should use this transfer of functions as an opportunity to improve early release processes. In our view, the Treasury's proposals should ensure that:

1. the ATO is well-resourced to process applications in the fast-tracked 14-day turnaround time;
2. training is compulsory for all ATO staff processing applications, especially in relation to working with vulnerable consumers; and
3. there is clear communication to consumers about the transfer of the administration function of the severe financial hardship ground to the ATO, including a media campaign if possible.

Other issues for consideration

Legal Aid NSW raised a number of concerns and comments in our response to the initial consultation paper, which have not been taken up in the further consultation paper. While

we note the reasons provided in the current paper, we remain particularly concerned about the following issues, and submit that they require further consideration.

Early release on compassionate grounds

Medical treatment

Legal Aid NSW supports the Review's proposal that individuals seeking early release of their superannuation should have an existing relationship with either of the two medical practitioners required for certification, and agree that this may address some concerns about third party intermediaries assisting applicants with the certification of the application.

However, Legal Aid NSW considers that even under this new proposal, there is scope for for-profit companies to take advantage of vulnerable consumers attempting to access their superannuation benefits in circumstances where most consumers can make these applications themselves, or with assistance from a free financial counsellor.

We suggest that further consideration be given to prohibiting or strongly regulating for-profit providers operating under this model.

Funeral expenses

The consultation paper focusses on whether the current restriction of a dependency relationship is appropriate where a person wishes to access superannuation benefits to pay for expenses associated with palliative care, death, funeral or burial.

We propose that this ground be expanded to recognise Aboriginal kinship systems in Aboriginal communities, and the responsibilities and obligations associated with them, by allowing the early release of superannuation to pay for the expenses of a non-dependent with whom they have a culturally significant familial relationship (**kinship ties**).

The consultation paper notes our proposal, but considers that limiting the provision to cover only dependants provides a degree of protection against financial abuse of an applicant by family or social networks, concluding that the current threshold of financial dependency appropriately limits the early release of superannuation to applicants on funeral expenses grounds. In our view, this unfairly disregards familial structures within Aboriginal communities.

In order to address this concern, we propose that:

- early access to superannuation for the purposes of funding funeral expenses on the grounds of kinship ties should be limited to burial costs, and

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- withdrawal on this ground be limited to once every five years. Provision could be made to accommodate early access to superannuation more than once in a five year period in exceptional circumstances only. Additional information, such as a letter from an Elders Group or Land Council, could be required to support an application such as this in exceptional circumstances.

Given that a majority of stakeholders suggested early release of superannuation on funeral related grounds should not be restricted to dependants as currently defined in the *Superannuation Industry (Supervision) Act 1993*, we ask that further consideration be given to this issue. This review presents an important opportunity to update legislation, policy and practice so that it accommodates the wide range of family dynamics and cultures in our community.

A report on Aboriginal Customary Laws released by the Law Reform Commission of Western Australia described Kinship as follows:

Kinship is at the heart of Aboriginal society and underpins the customary law rules and norms....Importantly, kinship governs all aspects of a person's social behaviour...it is important to note...that while the kinship system was an undeniable part of traditional Aboriginal society...it is also strongly instilled in contemporary Aboriginal society, including urban Aboriginals...certain kinship obligations, such as the duty to accommodate kin, are taken very seriously regardless of urban or remote location³.

For Aboriginal families, the expected reciprocity of caregiving for immediate family members encompasses the extended family with which a person was brought up. This often includes obligations to one's aunts, uncles, and cousins, along with those who marry into a family's community of shared responsibility. Whereas non-Aboriginal families are ordinarily considered as being 'free' from kinship ties conceived of in this way,⁴ Aboriginal social structures place significant weight on them.

We have suggested that guidance be drawn from other statutory frameworks that recognise kinship arrangements. We consider that a properly-regulated process for early release under this ground will alleviate the risk of financial abuse or pressure noted in the consultation paper.

We also reiterate our proposal that superannuation should not be released under this ground where the deceased has a death benefit, in accordance with the 'last resort' principle.

³ Law Reform Commission of Western Australia, 2006 *The interaction of WA law with Aboriginal law and culture* Project 94, 66.

⁴ Heffernan J., Heffernan K., IAD Press Alice Springs *A Learner's Guide to Pintupi-Luritja* 1999, 160.

Preventing loss of dwelling due to strata and council arrears

Legal Aid NSW strongly encourages consideration of an additional compassionate ground of loss of dwelling due to strata debt and council rate arrears.

We note that the consultation paper proposes removing the Regulator's residual discretion under the compassionate ground, which will affect the housing ground of early release by removing the ability to access super for the purpose of paying council rate arrears.

This is likely to have negative consequences on consumers experiencing financial hardship who prioritise mortgage payments and fall into arrears on strata levies and council rates. We note the consultation paper's observation that council rates do not directly provide an asset in retirement, and we also note the NSW Government's recent announcement of Debt Management and Hardship Guidelines for all councils in NSW which may in time improve the policies and procedures of councils when collecting debts from those in financial hardship. However, we consider that both strata levies and council rates are inherently linked to home ownership. Allowing access to superannuation due to strata and council arrears would indirectly preserve an important asset.

Low balance accounts where applicant is permanently unable to work and contribute further to superannuation

For the reasons set out in our initial submission, we suggest that a person should be able to withdraw up to the total of their superannuation where:

1. the total super balance across all funds is \$10,000 or less; and
2. the applicant is permanently unable to join the workforce (as established by eligibility for the Disability Support Pension or a successful Total and Permanent Disability claim).