

19. Superannuation Law

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Summary

19.1 In this chapter the ALRC examines ways in which the Australian superannuation system does, or could, respond to protect those people experiencing family violence. In doing so, the ALRC acknowledges the specific role superannuation plays as a long-term form of savings and recognises the policy tension between the need to preserve superannuation benefits until retirement and the need, in limited circumstances, to allow early access to superannuation funds.

19.2 The chapter consist of two main parts. The first part deals with circumstances in which a victim of family violence may have been coerced into taking action in respect of their superannuation. It considers superannuation agreements, spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the context of an inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth) and considers changes to the regulation of, and guidance material with respect to, SMSFs.

19.3 The second part of the chapter examines circumstances in which a victim of family violence may wish to seek early access to superannuation benefits for the purposes of, for example, leaving a violent relationship. In considering early release on the basis of severe financial hardship, the ALRC proposes amendments to the eligibility requirements for making an application and to guidance material for decision makers in granting early release. The ALRC also considers whether compassionate grounds could be amended to account for family violence, or whether a new ground of early release on the basis of family violence should be introduced. The part also outlines a range of other issues relevant to early release, including in relation to application forms, training, applicant safety measures, time limits and data collection and systems integrity measures.

Terminology

19.4 As outlined in Chapter 2, the concept of safety in the course of this Inquiry is a broadly constructed one, and as a result, for the purposes of this chapter safety primarily refers to the safety arising from economic security and independence.

19.5 Family violence in this context is defined according to the definition recommended in Proposal 3–2, which the ALRC suggests should be inserted into the *Superannuation Industry (Supervision) Regulations 1994* and, where appropriate, in all Australian Prudential Regulation Authority, Australian Taxation Office and superannuation trustee material.

Matters outside this Inquiry

19.6 As outlined in Chapter 1, detailed consideration of, or proposals with respect to amending, the *Family Law Act 1975* (Cth) is beyond the Terms of Reference for this Inquiry.¹ To a certain extent, some of the issues raised in relation to superannuation and family violence were addressed in *Family Violence—A National Legal Response* (ALRC Report 114). Accordingly, where appropriate the ALRC refers to recommendations made in *Family Violence—A National Legal Response*.

19.7 There are also a number of systemic matters which have arisen in the course of the Inquiry which the ALRC considers are beyond the Terms of Reference. These primarily relate to early access to superannuation and include whether:

- the administration of all claims for early release of superannuation benefits should be the responsibility of one agency;
- the current monetary limits on the amount of superannuation able to be released early are appropriate; and
- one external review body or mechanism should be established to review decisions on early release of superannuation applications.

¹ The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at www.alrc.gov.au.

19.8 Many of these issues were considered in 2002 by the Senate Select Committee on Superannuation and Financial Services.²

19.9 In addition, in 2009, the Australian Government commissioned a review into the governance, efficiency, structure and operation of Australia's superannuation system. The final report by the Super System Review Panel was released on 5 July 2010. The Government's response to the Review, *Stronger Super*, introduced a range of reforms to the superannuation system including MySuper and SuperStream.³ The reforms introduced as part of *Stronger Super* are wide-ranging, but few appear to respond to, or account for circumstances involving family violence. Accordingly, these reforms will not be considered in the course of this Inquiry, other than with respect to data collection issues outlined towards the end of this chapter.

Superannuation policy

Superannuation principles

19.10 In the course of the Super System Review, the Panel formulated ten superannuation principles to be the 'guiding principles by which policy is developed in relation to superannuation generally'. The principles of relevance to this Inquiry include:

- Superannuation must always be for the benefit of members.
- The superannuation system needs to be well-regulated to address prudential and other risks so that members can have the confidence to invest their retirement savings for their long-term financial benefit.
- Individual choices for members should be available and respected, but members must recognise and accept the increased responsibility that comes with making those choices.
- The superannuation system must be supported by high quality research and data, as well as by intermediaries with high professional standards.
- Superannuation is a large and complex system with an increasingly important social and macroeconomic dimension. It must be regulated and administered coherently and rule changes, including to taxation rules, should be made sparingly and in a way that engenders member confidence.
- The system must have sufficient flexibility to accommodate its inherent growth path and should strive for continual improvement, rather than abrupt changes. Where possible, government and trustee decisions about superannuation should be taken with a long-term perspective.⁴

19.11 These principles provide a useful touchstone for this chapter, in addition to the key themes articulated in Chapter 2.

2 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002).

3 Australian Government, *'Stronger Super': Government Response to the Super System Review* (2010).

4 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), Overview, 4.

Purposes of superannuation

19.12 The primary aim of the superannuation system is to ‘deliver private income to enhance the living standards of retired Australians’:

Successive governments have committed to the ‘three pillar’ framework as the underpinning of Australia’s retirement incomes policy, blending near-universal employee participation in the superannuation system with an adequate social security safety net and incentives for discretionary savings by individuals beyond the employer-mandated levels.⁵

19.13 In the course of this Inquiry, two of these pillars are considered—this chapter focuses on superannuation and Chapters 5–8 consider family violence in the context of social security. However, to the extent that some of the issues raised in this chapter relate to provision of early access to superannuation, essentially as a form of supplementary income support, early access should be considered in the broader context of the adequacy of current social security measures and should be seen as a last resort for those experiencing financial difficulties.

19.14 Key stakeholders in this Inquiry have also consistently emphasised the policy aims underlying the superannuation system, expressing the view that, for example:

Permitting individuals to use superannuation savings for other purposes ... would be poor public policy and contrary to the government’s retirement incomes policy and the intent for which tax concessions are given to superannuation savings.⁶

19.15 The two key policy tensions that have emerged in the course of this Inquiry with respect to family violence and superannuation relate to the two parts of this chapter—the first relates to superannuation and coercion, the second to early access to superannuation.

19.16 First, superannuation is generally provided through a trust structure where trustees hold the superannuation on behalf of members. As a result, trustees owe members a fiduciary duty to act in the best interests of members while managing the superannuation fund. However, in the context of family violence, a question arises as to the extent of the obligation owed by trustees to members and as to how any such obligation should operate in practice. For example, should a trustee be obliged to inquire as to the motivation behind superannuation-related decisions, in the event that, for example, they are the result of coercion arising from family violence? The tension here is between the duty to act in the best interests of members, and the limits imposed by resources, experience and expertise of trustees.

19.17 The second key policy tension arises between the need to preserve superannuation benefits until retirement and the need, in limited circumstances, to allow early access to superannuation funds. This tension is discussed in more detail in the second part of this chapter.

5 Ibid, Overview, 15.

6 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

Overview of the superannuation system

19.18 Superannuation, as a form of long-term saving for retirement, serves an important role and, for many Australians, is one of the most significant forms of wealth.⁷ As Australia's population ages, successive governments have introduced measures to maintain and enhance superannuation savings, largely through compulsory superannuation membership and contribution and preferential tax treatment.⁸

Superannuation legislation

19.19 There are a number of pieces of legislation and subordinate legislation that govern the operation of the superannuation system. For the purposes of examining ways in which the superannuation system as a legal framework could be improved to protect the safety of victims of family violence, the key pieces of legislation and subordinate legislation of relevance are:

- *Superannuation Act 1976* (Cth)—specifically, the provisions with respect to early access to superannuation;
- *Superannuation (Resolution of Complaints) Act 1993* (Cth) (SRC Act)—which establishes the Superannuation Complaints Tribunal;
- *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act)—which makes provision for the prudent management of certain superannuation funds and supervision by Australian Prudential Regulatory Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Commissioner of Taxation;⁹ and
- *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations)—which articulate the grounds for early access to superannuation.

19.20 Two other pieces of legislation are also relevant for the purposes of specific issues within this chapter. First, the *Family Law Act* is relevant to the extent that it provides that parties may make a superannuation agreement and family court property proceedings provide a means by which court orders about spouse entitlements to superannuation may be made.

19.21 Secondly, the *Financial Services Reform Act 2001* (Cth) (FSR Act) is designed to provide standardisation within the financial services industry. It is governed and administered by ASIC. Also relevant, is ASIC Regulatory Guideline 146, which provides for minimum training standards for people who provide financial product advice to retail clients.¹⁰

7 Australian Government, 'Stronger Super': *Government Response to the Super System Review* (2010), 3.

8 By 2050, almost one in four Australians will have reached retirement age, compared to one in seven today: *Ibid.*

9 *Superannuation Industry (Supervision) Act 1993* (Cth) s 3(1).

10 Australian Securities and Investments Commission, *Regulatory Guide 146: Licensing: Training of Financial Product Advisers* (2009).

Superannuation Complaints Tribunal

19.22 The Superannuation Complaints Tribunal (SCT) was established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) to deal with complaints about superannuation—specifically in the areas of regulated Superannuation Funds, annuities and deferred annuities, and Retirement Savings Accounts. The Tribunal’s jurisdiction does not, however, extend to complaints concerning self-managed superannuation funds (SMSF).

Regulatory bodies

19.23 The superannuation system is regulated by three key government agencies:

- the Australian Taxation Office (ATO)—which administers the relevant legislation for SMSFs and assists SMSF trustees to comply with their obligations;
- ASIC—which regulates financial services to protect consumers, including monitoring compliance with the *FSR Act*; and
- APRA—the prudential regulator that regulates superannuation funds other than SMSFs, reviews compliance with the *SIS Act* and plays a role in early release of superannuation entitlements.¹¹

19.24 Individual superannuation funds also have internal regulatory mechanisms and there are a number of superannuation peak bodies which, while not necessarily serving a regulatory function, provide funds with guidance and training.¹²

Superannuation and coercion

19.25 A victim of family violence may be coerced into taking action that relinquishes some control over, or access to, his or her superannuation. This could potentially leave the victim facing a financially difficult retirement, or deprive them of assets to which they have contributed during a partnership. Such situations may involve:

- superannuation agreements made under pt VIIIAB of the *Family Law Act*;
- contributions under reg 6.44 of the *SIS Regulations*; or
- self-managed superannuation funds.

Superannuation agreements

19.26 Parties to a marriage or to a de facto relationship (contemplated or actual) may make a binding agreement in respect of how their property or financial resources are to

11 The Financial System Inquiry Report of 1997 recommended, amongst other things, the establishment of a new category of small superannuation fund to be regulated by the ATO as well as the establishment of ASIC and APRA: S Wallis and others, *Financial System Inquiry: Final Report* (1997).

12 Eg, the Association of Superannuation Funds of Australia and the Australian Institute of Superannuation Trustees.

be dealt with, or other matters.¹³ Under the *Family Law Act*, such an agreement is known as a ‘financial agreement’—if it concerns a marriage; and as a ‘pt VIIIAB financial agreement’—if it concerns a de facto relationship.

19.27 When the agreement, or any component of it, deals with either or both spouse parties’ superannuation interests (existing or not yet in existence) as if those interests were ‘property’, the agreement, or that part of it, is known as a ‘superannuation agreement’.¹⁴ A superannuation agreement is of no effect unless and until the spouse parties marry or enter into the de facto relationship (whichever was contemplated).¹⁵

19.28 To be enforceable, the financial agreement or pt VIIIAB financial agreement, of which the superannuation agreement is a component, must have been made in accordance with the formal requirements set out in ss 90G or 90UJ respectively of the *Family Law Act*.¹⁶ Sections 90G and 90UJ require that:

- the agreement has been signed by all parties;
- each party has, before signing the agreement, been provided with independent legal advice from a legal practitioner about the effect of the agreement on that spouse’s rights and the advantages and disadvantages to them of making the agreement at that point in time;
- either before or after signing the agreement, the legal practitioner who has provided independent legal advice provides a signed statement to their client spouse party that attests to having given that advice;
- a copy of that signed statement has been given to the other party or that other party’s legal practitioner; and
- the agreement has not been terminated and has not been set aside by a court.

19.29 A court may, on application by a party to the agreement, order that the agreement is binding on the parties notwithstanding a failure to satisfy some of the requirements set down in ss 90G or 90UJ if it is satisfied that it would be unjust or inequitable if the agreement were not binding on the spouse parties.¹⁷

19.30 A court may set aside a financial agreement or a termination agreement (an agreement terminating a financial agreement) if it is satisfied that any of the factors in s 90K(1) are established, or, in the case of a pt VIIIAB financial agreement or a pt VIIIAB termination agreement, it is satisfied that any of the largely similar provisions in s 90UM(1) of the *Family Law Act* are met.¹⁸

13 *Family Law Act 1975* (Cth) pts VIIIA, VIIIAB div 4. The former concerns marriages and the latter de facto relationships.

14 *Ibid* ss 90MH(1)–(2), 90MHA(1)–(2).

15 *Ibid* ss 90MH(4), 90MHA(4).

16 *Ibid* s 90MG(1)–(2).

17 A court may only do so where the agreement has been signed by both parties and has not been terminated or otherwise set aside by a court: *Ibid* ss 90G(1A), 90G(1B); 90UJ(1A); 90UJ(1B).

18 *Ibid* ss 90K(1), 90UM(1).

19.31 Sections 90K(1) and 90UM(1) provide that, among other things, a court may make an order setting aside an agreement if the court is satisfied that:

- the agreement is void, voidable or unenforceable;¹⁹
- in the circumstances that have arisen since the agreement was made it is impracticable for the agreement, or a part of the agreement, to be carried out;²⁰
- since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage/de facto relationship) and as a result of the change, the child or—if the applicant has ‘caring responsibility’ for the child—a party to the agreement will suffer hardship if the court does not set the agreement aside;²¹ or
- in respect of the making of a financial agreement or pt VIIIAB financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.²²

19.32 With respect to whether the agreement is void, voidable or unenforceable, the Further Revised Explanatory Memorandum to the Family Law Bill 2000 explains that:

These grounds reflect the principles of common law and equity, under which an agreement would fail because of lack of certainty, lack of intention to enter legal relations, or because the agreement is affected by duress, undue influence, unconscionability, misrepresentation or operative mistake. The inclusion of unconscionability as a separate ground is simply to make it clear that this ground is included within the grounds for setting aside an agreement.²³

19.33 Sections 90KA and 90UN of the *Family Law Act* direct a court to determine the validity, enforceability and effect of financial agreements and termination agreements according to the applicable principles of law and equity concerning contracts and purported contracts. Section 90MR(2) provides an equivalent provision for the enforcement of superannuation agreements.

19.34 Family violence has been held to constitute unconscionable conduct sufficient to set aside an agreement. For example, the decision of the Federal Magistrates Court in *Moreno v Moreno* is an example of a victim succeeding in having a financial agreement set aside under s 90K of the *Family Law Act*.²⁴

19 Ibid ss 90K(1)(b), 90UM(1)(e).

20 Ibid ss 90K(1)(c), 90UM(1)(f).

21 Ibid ss 90K(1)(d), 90UM(1)(g).

22 Ibid ss 90K(1)(e), 90UM(1)(h).

23 Further Revised Explanatory Memorandum, Family Law Bill 2000 (Cth), [160].

24 *Moreno & Moreno* [2009] FMCAfam 1109. In that case Ms Moreno, who had limited proficiency in English, had come to Australia from Russia in order to marry Mr Moreno. She was physically and verbally abused by her husband, and signed a financial agreement that was very unfavourable to her on the understanding that, if she did not sign, the marriage and her visa would end. After separation from her husband, she sought to overturn this agreement on the grounds of unconscionability. The court held that these circumstances constituted duress significant enough to amount to unconscionable conduct under s 90K of the *Family Law Act* and the agreement was set aside.

19.35 The somewhat limited scope for courts to set aside financial agreements (and therefore superannuation agreements) has been justified on the basis that parties will have obtained prior independent legal advice.²⁵

Submissions and consultations

19.36 In *Family Violence and Commonwealth Law—Employment and Superannuation Laws*, Issues Paper 36 (2011) (Superannuation Law Issues Paper), the ALRC asked whether the Family Court’s powers to set aside a superannuation agreement—whether a financial agreement or a pt VIIIAB financial agreement—under the *Family Law Act* are adequate to protect people experiencing family violence.²⁶

19.37 While there were limited submissions made by stakeholders in response to this issue, responses were mixed.

19.38 One submission advocated the inclusion of family violence as an additional ground for setting aside superannuation agreements under ss 90K(1) and 90UM(1) of the *Family Law Act*.²⁷ Overall however, stakeholders submitted that the conditions required to be met before entering into a superannuation agreement—including the requirement that both parties obtain independent legal advice—offer sufficient protection to minimise the risk of coercion prior to a party entering into an agreement.²⁸

19.39 An additional protection emphasised in submissions is the power of the court to set aside agreements where unconscionable conduct has occurred. The Law Council of Australia (Law Council) suggested that this offers an adequate remedy where a person experiencing family violence has been coerced into entering a superannuation agreement.²⁹

19.40 Finally, the Law Council also noted the need to consider implications for third parties where that third party has taken action in reliance upon a superannuation agreement that is subsequently set aside. The Law Council suggested that

the court’s powers may need to be extended and further protection will need to be provided to superannuation trustees which act upon an order setting aside a previous superannuation agreement.³⁰

ALRC’s views

19.41 The ALRC’s preliminary view is that the requirements under ss 90G and 90UJ of the *Family Law Act* already go some way to protecting the interests of people experiencing family violence. In particular, the requirement that parties seek independent legal advice provides some assurance that the parties have had explained

25 Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2000 (Cth), 2.

26 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 26.

27 WEAVE, *Submission CFV 14*, 5 April 2011.

28 See, eg, Law Council of Australia, *Submission CFV 23*, 5 April 2011.

29 Ibid.

30 Ibid.

to them the consequence of signing a superannuation agreement. The ALRC also considers that, while somewhat limited, the powers of the court to set aside an agreement under ss 90K(1) and 90UM(1), specifically on the basis that the agreement is void, voidable or unenforceable, are likely to cover many situations involving family violence.

19.42 The provisions are broadly drafted and it would be difficult, given the nature and dynamics of family violence, to propose an amendment that would account for all situations in which one partner was intent on coercing or controlling the other into signing a superannuation agreement.

19.43 In any event, any proposal expanding the powers of the Family Court to set aside superannuation agreements would involve amendments to the *Family Law Act* that extend beyond the Terms of Reference. In addition, the ALRC has formed the view that any proposal aimed at amending the requirements in ss 90G and 90UJ of the *Family Law Act* would have systemic consequences, with an impact on parties to marriages and de facto relationships not involving family violence. Accordingly, the ALRC does not intend to make a proposal with respect to this issue.

Spousal contributions

19.44 Since 1 January 2006, eligible superannuation members have been able to request that their superannuation contributions be split with their ‘spouse’. The term spouse is defined to include:

- a person to whom the member is legally married;
- a person that the member is in a relationship with that is registered under certain state and territory laws (including registered same-sex relationships); and
- a person, of the same or different sex, who lives with the member on a genuine domestic basis in a couple relationship.³¹

19.45 The payment of the split contributions to a member’s spouse is known as a ‘contributions-splitting superannuation benefit’.³² Maximum limits apply to the amount of superannuation that may be split in each financial year.³³

19.46 The *SIS Regulations* provide that superannuation trustees are not required to offer their members the option to split their superannuation contributions.³⁴ If a superannuation fund does permit members the option to split superannuation contributions, a member may request that the superannuation trustee roll-over, transfer or allot an amount of the member’s superannuation benefits to a spouse.³⁵

31 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

32 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.40.

33 The ‘maximum splittable amount’ is defined in *Ibid* reg 6.40.

34 *Ibid* reg 6.45.

35 *Ibid* div 6.7, reg 6.44. An application may be accepted provided certain requirements are met: *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.44, 6.45.

19.47 In circumstances where family violence exists, it may be possible for one spouse to coerce the other into splitting their superannuation contributions under the superannuation contribution splitting regime. For example, this may occur where both parties are under preservation age and one spouse forces the other to split their contributions so that the superannuation is in the controlling spouse's superannuation account. As a result of the possibility of such circumstances arising, in the Superannuation Law Issues Paper, the ALRC proposed two possible mechanisms by which to limit or ameliorate such coercion—providing that a trustee should consider whether member's requests are done voluntarily; and, where the split has already occurred, some form of claw-back mechanism to recoup the coerced contributions.

Trustee obligations to consider coercion

19.48 Superannuation trustees have a range of duties and obligations and are subject to regulation at a number of levels.³⁶

19.49 In considering applications for contributions-splitting superannuation benefits, trustees are not currently required to consider whether the member's request to transfer any benefits to the receiving spouse was done voluntarily or as a result of coercion. Consequently, in the Superannuation Law Issues Paper, the ALRC asked if a trustee should have an obligation to consider whether an application to transfer an amount to a spouse under the superannuation contribution splitting regime is being made as a result of coercion.³⁷

Submissions and consultations

19.50 Overwhelmingly, submissions in response to this question opposed the expansion of trustee obligations to consider the possibility of coercion in superannuation contribution splitting applications.³⁸ Stakeholders opposed this expansion on the basis that it would not be appropriate to place this obligation on trustees as:

- it would be administratively burdensome;
- trustees lack the resources and expertise to make such determinations; and
- it may leave a decision on contribution-splitting applications open to legal challenge.³⁹

19.51 For example, the Law Council and the Association of Superannuation Funds of Australia (ASFA) opposed the introduction of any obligation on the trustee to consider

36 Including under common law and legislation such as the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Corporations Act 2001* (Cth).

37 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 27.

38 Law Council of Australia, *Submission CFV 23*, 5 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

39 Law Council of Australia, *Submission CFV 23*, 5 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

coercion, suggesting that such investigations would be beyond the capacity, resources and expertise of the trustee.⁴⁰ The Law Council submitted that:

It would not be appropriate for a trustee of a superannuation fund in receipt of a contributions splitting application to determine whether the request was made as a result of coercion. Beyond requiring a declaration from the applicant member, it is unclear how a trustee (other than the trustee of a self-managed superannuation fund) could identify a contributions splitting request which was made as a result of coercion.⁴¹

19.52 ASFA argued that:

The fund trustee should not be expected or required to consider competing arguments between the spouses. This is not their role, and investigating the bona fides of both arguments raises the significant question of who should meet the costs of such enquiries. ASFA is also concerned that by making a decision in such a dispute the trustee opens itself up to potential legal action by one or both parties.⁴²

19.53 However, ASFA noted that should a trustee become aware that the splitting application was made as a result of coercion, the trustee should consider this as part of implementing its decision about the splitting application.⁴³

19.54 Conversely, two submissions did support the introduction of an obligation on trustees to consider if applications for superannuation splitting were being made as a result of coercion.⁴⁴

ALRC's views

19.55 Superannuation trustees possess a number of duties and obligations and are subject to a range of regulatory requirements. In carrying out their fiduciary duty to act in the best interests of the member, it may be difficult for a trustee to determine whether granting a member's application is in the member's best interests, or to make enquiries about the motives and circumstances in which the application was made and, where it involves family violence, refuse the application. This is made particularly difficult given both granting the application (in terms of the concerns outlined about the depletion of superannuation entitlements) or refusing the application (where that may result in the member not having the financial resources to leave the relationship or take safety measures) may affect the member's safety.

19.56 The ALRC acknowledges concerns about the practical difficulties that an obligation to consider the possibility of coercion in superannuation splitting applications would create in terms of administrative burden and additional cost, the lack of trustee expertise to determine such matters and the possibility that this may

40 Law Council of Australia, *Submission CFV 23*, 5 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

41 Law Council of Australia, *Submission CFV 23*, 5 April 2011.

42 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

43 *Ibid.*

44 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011.

expose decisions to legal challenge. Accordingly, the ALRC's preliminary view is that it would be inappropriate for trustees to be obliged to consider the motives behind a member's application for contribution splitting.

19.57 However, the ALRC would be interested in hearing from stakeholders whether there are any other mechanisms through which trustees, or another body, could consider whether an application for superannuation splitting is being made as a result of coercion and take some steps to limit or ameliorate the effect of that on victims of family violence.

Claw-back provision

19.58 Where benefits have been transferred under a superannuation contribution-splitting regime as a result of coercion, a question arises as to whether, and by what means, the benefits could be recovered by the spouse who has been coerced.

19.59 As a result, in the Superannuation Law Issues Paper, the ALRC invited comment about whether a person experiencing family violence should be entitled to 'claw-back' benefits they have been coerced into transferring to a spouse under the superannuation contribution-splitting regime.⁴⁵

19.60 In practice, the primary means by which victims of family violence may be able to recover their superannuation entitlement where it has been transferred to their spouse, is through property proceedings in federal family courts regarding the distribution of assets following the breakdown of their marriage or de-facto relationship.

19.61 The *Family Law Act* permits federal family courts to make orders about the distribution of the property of parties to a marriage or de facto relationship upon the breakdown of that relationship.⁴⁶ In making such orders, superannuation benefits transferred under the superannuation contribution-splitting regime as a result of coercion cannot be 'clawed back' as such, but may be taken into account in considering the contributions of the parties and ultimately in the distribution of assets between the parties.

19.62 In determining how property should be distributed, courts:

- identify the property, liabilities and financial resources of the parties—there is conflicting judicial opinion as to whether superannuation should be listed and valued along with all other property at this stage (a 'global' approach); or whether superannuation interests should be valued separately from other items of property (a 'two pools' approach);⁴⁷

45 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 28.

46 *Family Law Act 1975* (Cth) s 79 (marriage), s 90SM (de facto relationships).

47 The Full Court of the Family Court in *Hickey and Hickey and Attorney-General (Cth)* (2003) 30 FamLR 355 took the former approach, while the Full Court of the Family Court in *In the Marriage of Coghlan* (2005) 33 Fam LR 414 preferred the latter. The distinction turns on the interpretation to be given to the s 90MC(1) of the *Family Law Act*: 'A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause in section 4'.

- identify and assess the contributions that the parties have made to the property, including financial and non-financial contributions and contributions to the welfare of the family;⁴⁸
- identify and assess the earning capacity, needs and child support obligations of each party;⁴⁹ and
- make an order that is just and equitable in all the circumstances.⁵⁰

19.63 In making an order in relation to the distribution of property interests, a court is entitled to make orders in relation to superannuation interests.⁵¹ In particular, a court may direct that a superannuation interest be split between the parties.⁵²

19.64 An overarching issue arising out of the way in which superannuation should be considered by the court, both in assessing contributions, and ultimately, in the distribution of assets between the parties, is the extent to which family violence can be taken into account.

19.65 In the case of *In the Marriage of Kennon* the Family Court held that, when assessing a party's contributions, the court can take into account a course of violent conduct by one party towards the other that has had a significant adverse impact on that party's contribution or has made his or her contributions significantly more arduous than they ought to have been.⁵³

19.66 In addition, when considering the future needs of a party, the consequences of family violence—for example its effect on the state of the victim's health, or physical and mental capacity to gain appropriate employment—can be taken into account.

19.67 In *Family Violence—A National Legal Response*, the ALRC and the NSW Law Reform Commission reviewed the current approach to dealing with evidence of family violence in property proceedings and subsequently recommended that the Australian Government should initiate an inquiry into how family violence should be dealt with in respect to property proceedings under the *Family Law Act*.⁵⁴

Submissions and consultations

19.68 Stakeholders were largely supportive of the introduction of some form of claw-back provision.⁵⁵ Most submissions that expressed a view on the operation of a claw-

48 *Family Law Act 1975* (Cth) ss 79(4)(a)–(c); 90SM(4)(a)–(c).

49 *Ibid* ss 79(4)(d); 90SM(4)(d); 79(4)(e); 75(2); 90SM(4)(e); 90SF(3); 79(4)(f); 90SM(4)(f); 79(4)(g); 90SM(4)(g).

50 *Ibid* ss 79(2); 90SM(3).

51 *Ibid* s 90MS.

52 In accordance with s 90MS a court may make one of three types of splitting orders in relation to superannuation interests. See *Ibid* s 90MT(1).

53 *In the Marriage of Kennon* (1997) 139 FLR 118, 140.

54 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010) Recommendation 17–2.

55 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

back mechanism indicated a preference for it to be effected by way of court order.⁵⁶ For example, ASFA submitted that:

such a provision should operate in a similar manner to Family law orders where the requirement on the trustee is merely to follow a lawful direction given by an appropriately constituted and authorised body.⁵⁷

19.69 However, stakeholders expressed uncertainty as to how a court order would operate in practice, with a concern about establishing precisely the circumstances in which a court would make such an order.

19.70 Stakeholders indicated there would be a range of issues to consider with respect to the practical operation of a claw-back provision. For example, one issue is in relation to the trustee's responsibility for any appreciation or depreciation of the funds in the period between the transfer of a benefit under the superannuation contribution-splitting regime and the claw-back of that benefit. In particular, the Australian Institute of Superannuation Trustees (AIST) submitted that the trustee should not bear responsibility for any change in value of a benefit in that period.⁵⁸

19.71 Stakeholders also expressed concern about the adequacy of current processes to track benefits transferred to a spouse under the superannuation contribution-splitting regime. If a person who has split superannuation benefits as a result of coercion is to be able to 'claw-back' that amount, records of the amount of benefit that has been split must be accessible.

19.72 In consultations the ALRC heard that the current record keeping in relation to superannuation contributions splitting may not be adequate to allow these contributions to be tracked, particularly if a party's superannuation benefit is later rolled over or transferred between superannuation funds.

ALRC's views

19.73 While the ALRC considers that victims of family violence should be able to recover superannuation transferred under a superannuation contribution-splitting regime in circumstances of family violence, it is clear that any such mechanism would need to be provided for under the *Family Law Act*.

19.74 As outlined above, detailed consideration of, and proposals to amend, the *Family Law Act* go beyond the Terms of Reference for this Inquiry. The ALRC therefore considers the most appropriate approach to this issue is to propose, as recommended in the *Family Violence—A National Legal Response*, that the Australian Government should initiate an inquiry into the manner in which federal family courts consider family violence in property proceedings. The inquiry could consider, for example:

56 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

57 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

58 Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

whether the Family Law Act should refer expressly to the impact of violence on past contributions and on future needs; the form that any such legislative provisions should take; and the definition of family violence that should apply for the purposes of the property proceedings under the Family Law Act.⁵⁹

19.75 In particular, the ALRC proposes that any such inquiry should include consideration of the treatment of superannuation in property proceedings involving family violence.

Question 19–1 The ALRC is not proposing that a trustee should have an express obligation to consider whether an application for superannuation splitting is being made as a result of coercion. Are there any other ways a trustee or another body could consider this issue? If so, what if any steps could they take to limit or ameliorate the effect of that on a victim of family violence?

Proposal 19–1 In *Family Violence—A National Legal Response* (ALRC Report 114) the Australian Law Reform Commission and NSW Law Reform Commission recommended that the Australian Government should initiate an inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth). Any such inquiry should include consideration of the treatment of superannuation in proceedings involving family violence.

Self-managed superannuation funds

19.76 Self-managed superannuation funds (SMSFs) are funds where the trustees are the only members of the fund. That is, all members are natural persons who are trustees or directors of a body corporate trustee. However, most SMSFs do not have a corporate trustee.⁶⁰ SMSFs are restricted to a maximum of four members.

19.77 The majority of SMSFs—more than 90%—are funds with two members.⁶¹ SMSFs constitute the largest sector within Australia’s superannuation sector by both number of assets and asset size.⁶² At 30 March 2010, there were approximately 423,000 SMSFs, representing 99% of all superannuation funds, and comprising over 30% of total superannuation assets.⁶³ The SMSF sector has grown rapidly: in the five years to 30 June 2009, it has experienced an annualised growth rate of 20%.⁶⁴

59 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010) ch 17.

60 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), 223.

61 *Ibid.*, 222.

62 *Ibid.*, 218.

63 *Ibid.*

64 *Ibid.*

19.78 The Super System Review concluded that ‘the SMSF sector is largely a successful and well-functioning part of the system’.⁶⁵

Regulation and compliance

19.79 SMSFs are regulated by the ATO. The ATO publishes a range of guidance in relation to SMSFs.⁶⁶ However, SMSFs are subject to a less onerous regulatory regime than some other forms of superannuation funds, because all members are considered to be directly involved in the management of the fund and are therefore considered to be able to protect their own interests sufficiently.⁶⁷

19.80 Accordingly, in circumstances of family violence involving the trustees/members of a SMSF, there is greater potential for one partner or family member to coerce another into making decisions or managing the SMSF in a certain way, and less external regulatory involvement or oversight to prevent that from occurring.

19.81 For example, the following ATO example outlines an example of where a dispute may arise between trustees and the negative financial consequences that may follow from such a dispute.⁶⁸

Example

Bernard and Cathy are married and are the members and trustees of the Ber-Cat Super Fund. The fund held \$200,000 worth of assets in an interest-bearing cash account. Both members had \$100,000 in retirement savings in the fund.

Over time, Bernard and Cathy developed relationship problems and ceased communicating as trustees. Bernard withdrew \$150,000 from the fund and spent the money on personal items and holidays. Due to this, Cathy lost 50% of her retirement savings in the fund. Bernard failed to comply with the requirements of the super laws as he had withdrawn the money without meeting a condition of release.

The ATO was notified of Bernard’s actions and his income tax return was amended to include the \$150,000 that was taxed at his marginal rate plus penalties. In reviewing this case the ATO took into account all the circumstances surrounding the breaches. After considering the compliance options available, including making the fund non-complying and taking civil prosecution action against Bernard, the ATO decided to disqualify him as trustee. This prevented him from becoming a trustee of any super fund. This was in addition to the tax penalty imposed on his individual return. To make the fund non-complying would have penalised Cathy as she would lose half of her remaining assets in the fund.

Cathy approached the Superannuation Complaints Tribunal and was informed they could not assist in any SMSF dispute resolution. She then contacted the ATO. The ATO advised they could not help her recover her money and she could not obtain compensation from the government under the super laws (an option available for APRA funds). However she could seek legal advice to pursue the matter.

65 Ibid, Overview, 16.

66 Australian Taxation Office, *Self-managed Superannuation Funds* <<http://www.ato.gov.au/superfunds/>> at 1 July 2011.

67 Australian Prudential Regulation Authority, ‘A Recent History of Superannuation in Australia’ (2007) 2 *APRA Insight* 3, 8.

68 Australian Taxation Office, *How Your Self-Managed Super Fund is Regulated* (2011).

After speaking with her SMSF professional, she concluded her options were to:

- carry on her SMSF as a single member fund by appointing either another individual trustee or a corporate trustee, or
- wind up the Ber-Cat Super fund and roll the remaining funds into a large fund.

If she decides to continue with the fund, she will make sure any new trustees sign the trustee declaration and use safeguards, such as joint bank account signatories, to protect the fund's assets. She now understands the importance of taking an active role in managing her fund.

19.82 As foreshadowed above, there are a range of enforcement and compliance actions available to the ATO, including:

- accepting an undertaking to rectify the breach;
- making the fund a non-complying fund;
- disqualification of trustees; and
- in serious cases, civil prosecution of trustees.⁶⁹

SMSF professionals

19.83 There is no formal requirement to be a licensed SMSF adviser. There are a range of registration and licensing arrangements which apply to the professionals involved in advising on the establishment and management of SMSFs, including accountants, tax agents, fund administrators, lawyers and financial advisers.⁷⁰ Developments such as the Future of Financial Advice reforms, amongst others, will be important in reviewing existing professional standards and training requirements as well as licensing exemptions.⁷¹

⁶⁹ See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 262A (undertakings), 298 (causing civil proceedings to begin). See also: Australian Taxation Office, *How Your Self-Managed Super Fund is Regulated* (2011).

⁷⁰ For example, tax agents must be registered under the *Income Tax Assessment Act 1936* (Cth) and complaints can be referred to the Tax Practitioners Board. Accountants are often also tax agents. Accountants were historically exempted from holding an Australian Financial Services License, however see discussion below of the Future of Financial Advice Reforms. Lawyers must hold a practising certificate and complaints can be referred to the relevant law society. Under the *Corporations Act 2001* (Cth) other professionals who provide financial services must hold an Australian Financial Services License. Those who provide financial product advice are also subject to training requirements under Australian Securities and Investments Commission, *Regulatory Guide 146: Licensing: Training of Financial Product Advisers* (2009).

⁷¹ The Future of Financial Advice Reforms form the basis of the Government's response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into financial products and services in 2009. The package includes a range of reforms including the establishment of an advisory panel on standards and ethics for financial advisers and the announcement that the existing exemption for accountants from holding an Australian Financial Services License will be removed: Australian Treasury, *The Future of Financial Advice* <<http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=faq.htm>> at 4 July 2011.

Issues Paper

19.84 In the Superannuation Law Issues Paper, the ALRC suggested that, in light of the large and increasing share of the superannuation landscape now occupied by SMSFs, it is important to consider the potential for misuse of SMSFs in situations of family violence, particularly where economic abuse is a component of this violence.⁷²

19.85 In particular, the ALRC asked what mechanism might be introduced to better protect people experiencing family violence from financial abuse in the context of SMSFs and suggested that one mechanism might be the expansion of the SCT to hear complaints concerning SMSFs.⁷³

Submissions and consultations

19.86 Stakeholders responding to this question overwhelmingly opposed the extension of the jurisdiction of the SCT to complaints concerning SMSFs.⁷⁴ Stakeholders who opposed the extension of the Tribunal's jurisdiction expressed concern about funding and resource implications any extension would involve. In particular, they noted that the SCT is not resourced appropriately to cope with the increased workload that would be associated with dealing with complaints about the operation of SMSFs.⁷⁵

19.87 The nature and role of the SCT also formed the basis for opposition from stakeholders to the SCT dealing with complaints concerning SMSFs. Stakeholders emphasised that the administrative nature of the SCT makes it an inappropriate forum for dealing with family violence issues. For example, ASFA submitted that family violence in the context of a SMSF is more appropriately dealt with by courts with criminal and family law jurisdiction.⁷⁶

19.88 Further, the Law Council noted that:

The Superannuation Complaints Tribunal was established to resolve complaints about the decisions of trustees in superannuation funds. When the trustee is the trustee of an SMSF, the trustee will also be a member and a relative of the complainant. Any complaint about the trustee's decision, particularly where family violence is in issue, will, very rarely be limited to its decision or conduct as trustee. It is very likely that any such complaint or dispute will also raise matters which would generally be dealt with by the criminal or family courts.⁷⁷

19.89 One submission, however, supported the extension of the SCT's jurisdiction.⁷⁸

72 See chapter 3 for discussion of the definition of family violence.

73 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 29.

74 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Law Council of Australia, *Submission CFV 23*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

75 See, eg. Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

76 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Law Council of Australia, *Submission CFV 23*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

77 Law Council of Australia, *Submission CFV 23*, 5 April 2011.

78 WEAVE, *Submission CFV 14*, 5 April 2011.

19.90 In consultations the ALRC heard that advice regarding the establishment and operation of SMSFs received from accountants, tax agents, fund administrators, lawyers and financial advisers is inconsistent and in some cases may not adequately explain the full implications of membership of such a fund, or the procedures involved in exiting a SMSF. Some stakeholders suggested that requiring these professionals to provide additional information to individuals establishing a SMSF may go some way to protecting trustees/members experiencing family violence.

19.91 Submissions received in response to the Superannuation Law Issues Paper did not canvas other mechanisms that might be introduced to better protect people experiencing family violence from financial abuse in the context of SMSFs.

ALRC's views

19.92 The ALRC is of the view that family violence that arises in the context of an SMSF is better dealt with by courts with criminal and/or family law jurisdiction rather than the SCT, as in many cases it is likely the trustee will also be a family member and any complaint is unlikely to be limited to their decision or conduct as a trustee. In light of this and the role and resources of the SCT, the ALRC does not intend to make a proposal to expand the jurisdiction of the SCT to cover SMSFs.

19.93 The ALRC is conscious that many of the possible amendments to the regulation of the SMSF sector would involve sector-wide amendment and have a more systemic impact than just on victims of family violence. Consideration of the adequacy of regulation or guidance more broadly, or the obligations owed by professionals in the financial services sector are systemic issues and the ALRC considers that they are beyond the Terms of Reference for this Inquiry. The ALRC notes that, in line with the guiding principles articulated earlier in the chapter, systemic changes of this nature must be the product of coherent regulation and flexible and continual improvement focused on long-term change.

19.94 The ALRC recognises the importance of individual choice, as outlined in Chapter 2 and in the guiding principles for this chapter. This individual choice includes, for example, the choice to become a trustee in a SMSF. While with such choice comes increased responsibility for the consequence of these choices, the ALRC considers that family violence, in many cases, creates an exception to this principle and that victims of family violence who are also trustees of SMSF require additional protection.

19.95 As a result, there are a number of possible areas of reform to the regulation and operation of SMSFs to protect the safety of victims of family violence about which the ALRC would be interested in stakeholder comment, including in relation to ATO compliance decisions and provision of information.

19.96 For example, in light of the case study outlined above, the ALRC would be interested in stakeholder views on the ATO's compliance options. In particular, the ALRC would be interested in hearing about the extent to which the ATO does, or could, consider family violence in determining the most appropriate compliance action in relation to SMSF trustees who fail to comply with superannuation or taxation law

where that action may exacerbate the harm or disadvantage suffered by the member/trustee who is not the subject of compliance action.

19.97 The ALRC considers that ensuring individuals establishing SMSFs are provided with sufficient information about a range of matters may go some way to protecting people experiencing family violence. These matters include:

- setting up a SMSF—including creating appropriate safeguards;
- managing a SMSF—the importance of being actively involved in managing investments, accepting contributions as well as reporting and record keeping;
- trustee obligations, including compliance with relevant laws as well as possible compliance action by the ATO; and
- winding up a SMSF.

19.98 As a result, the ALRC would be interested in stakeholder submissions on the adequacy of material currently provided by the ATO in relation to these issues, and whether any amendment to existing material, or the provision of additional material or guidance, may assist SMSF trustees experiencing family violence.

19.99 The ALRC also suggests that the Australian Government (including the ATO, ASIC, and Treasury) and relevant professional bodies should consider the extent to which SMSF adviser and professional obligations or training could be amended, where possible and appropriate, to protect individuals experiencing family violence. This may be most appropriate in the context of the Future of Financial Advice reforms.

19.100 Finally, the ALRC would also be interested in submissions which more broadly address possible approaches or mechanisms through which people experiencing family violence may be protected in the context of SMSFs.

Question 19–2 What changes, if any, are required to ensure that the Australian Tax Office considers family violence in determining appropriate compliance action in relation to trustees of SMSFs who fail to comply with superannuation or taxation law, where that action may affect a trustee who is:

- (a) a victim of family violence; and
- (b) not the subject of compliance action?

Question 19–3 What changes, if any, to guidance material produced by the Australian Tax Office may assist in protecting people experiencing family violence who are members or trustees of a SMSF?

Question 19–4 What approaches or mechanisms should be established to provide protection to people experiencing family violence in the context of SMSFs?

Gaining early access to superannuation

19.101 There are three key forms of superannuation benefits:

- Preserved benefits—which must be retained in superannuation until ‘preservation age’;⁷⁹
- Restricted non-preserved benefits—which cannot be accessed until an employee meets a condition of release; and
- Unrestricted non-preserved benefits—which do not require an employee to meet a condition of release and may be accessed upon request.

19.102 Generally, superannuation funds cannot be accessed before the member reaches the required ‘preservation age’. However, s 79B of the *Superannuation Act* provides limited grounds for the early release of preserved or restricted non-preserved benefits, on the basis of severe financial hardship or compassionate grounds. These grounds are defined in the *SIS Regulations*.⁸⁰

19.103 The grounds for early release are limited in order to reflect the policy balance sought: on the one hand, the overriding policy objective that superannuation benefits are to be preserved to provide income for retirement, and on the other, the recognition that certain exceptional circumstances may justify the early release of benefits to a member.

19.104 In the context of family violence, there are a number of additional tensions with respect to early release. For example, in the course of this Inquiry, many stakeholders have emphasised the need to consider the impact of family violence on the financial independence and security, and ultimately safety, of victims.

19.105 The Australian Domestic and Family Violence Clearinghouse (ADFVC) noted that, in their research on the impact of family violence on women’s financial security, the overwhelming majority of women were experiencing financial hardship as a result of the abuse, and that for women who were unable to stabilise their financial situation, the consequence was a downward spiral of debt and poverty.⁸¹

19.106 The ADFVC also stressed that financial hardship in turn impacts on the safety of victims of family violence. For example, it affects their

decisions to leave the relationship, their capacity to take up safety measures (like locks, alarms, or to relocate), to seek treatment for recovery (e.g. physiotherapy, psychiatric treatment, operations, dental or optical treatment/surgery). Some women spoke about returning to partners because of being unable to support themselves (and their children) on their own.⁸²

79 Preservation age ranges from 55 to 60 depending on date of birth.

80 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01.

81 ADFVC, *Submission CFV 26*, 11 April 2011.

82 *Ibid.*

19.107 In light of concerns about the impact of family violence and financial hardship on victims, it may be appropriate for a victim of family violence to gain early access to superannuation, for example to leave a violent relationship or take measures to ensure their safety.

19.108 Ideally however, as outlined at the beginning of this chapter, social security should be the system through which victims of family violence are able to access immediate financial support.⁸³

19.109 For example, Women's Legal Services NSW argued that victims of family violence should be entitled to early access to superannuation:

only as a last resort. Instead, access to adequate financial support should be improved by addressing issues with social security, employment and victims' compensation, including access to legal services that can be necessary to access these funds.⁸⁴

19.110 In its submission, ASFA emphasised that it was:

supportive of the need for the Australian community to more broadly support means by which impacted individuals can obtain relief and escape the circumstances of domestic violence. These other means should emerge from the social security framework where urgent and immediate funding could be provided to victims.⁸⁵

19.111 In addition, other concerns include that:

- the purpose of early release of superannuation to victims of family violence—namely increasing safety through improved financial independence and security—may be frustrated if the funds released were accessed at the instigation of, or by, the perpetrator of violence. In particular, in such circumstances early release may deplete a victim's retirement funds, which may otherwise have been the only source of funds a victim could protect; and
- women, in particular, are already significantly disadvantaged in the accumulation of adequate superannuation by virtue of the gender pay gap and broken and casual employment histories.⁸⁶ In light of this disadvantage, and given that women experience family violence at higher rates than men, early access to superannuation risks compounding the inadequacy of a female victim's superannuation benefits on retirement.⁸⁷

19.112 With these tensions in mind, in determining what changes can be made to the superannuation legal framework to protect the safety of victims of family violence, the ALRC is considering possible circumstances in which victims may be able to gain early access to superannuation. In particular, the ALRC is considering the extent to which people experiencing family violence can access the existing grounds for early

83 See chapters 5–8 of the Discussion Paper.

84 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011.

85 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

86 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

87 See, eg, Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994).

release, and whether an additional ground specifically designed for victims of family violence should be created.

Severe financial hardship

19.113 The *Superannuation Act* and *SIS Regulations* provide for early release of superannuation benefits on the grounds of severe financial hardship. Different conditions for early release apply depending on the age of the member, in particular whether the member is under or over ‘preservation age’.⁸⁸

19.114 To satisfy the ground of ‘severe financial hardship’ under regs 6.01(5)(a) and 6.01(5A) of the *SIS Regulations*, applicants (if under preservation age) must prove:

- they have been receiving ‘Commonwealth income support payments’ continuously for the past 26 weeks;⁸⁹
- they were still in receipt of those payments at the date of the written evidence provided in support of the application (which must not be more than 21 days prior to the application); and
- they are unable to meet reasonable and immediate family living expenses.⁹⁰

19.115 If these requirements are satisfied, the trustee may release a lump sum of between \$1,000 and \$10,000.⁹¹

19.116 To satisfy the ground of ‘severe financial hardship’ under reg 6.01(5)(b) of the *SIS Regulations*, applicants (if they have reached preservation age plus 39 weeks) must prove:

- they have been receiving ‘Commonwealth income support payments’ for a cumulative period of 39 weeks after they reached their preservation age; and
- they were not ‘gainfully employed on a full-time, or part-time, basis on the date of the application for cashing of his or her benefits, or restricted non-preserved benefits, in the entity’.⁹²

19.117 Where a person satisfies these requirements, there is no limit on the amount that can be released.⁹³

19.118 The definition of ‘Commonwealth income support payments’ is the same with respect to the requirements for applicants under and over the preservation age. The definition includes income support payments, supplements and pensions, but excludes: Austudy, Youth Allowance paid to a person who is undertaking full-time study, payments made under the Community Development Employment Projects

88 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1, reg 6.01(5).

89 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(2).

90 *Ibid* reg 6.01(5), (5A).

91 *Ibid* sch 1, pt 1.

92 *Ibid* reg 6.01(5)(b).

93 *Ibid* sch 1, pt 1.

Scheme (CDEP Scheme) and certain drought relief and farm income support payments.⁹⁴ The ALRC understands that these payments were excluded on the basis that they were designed to assist in meeting study and other costs, the intention was not to provide full financial support and, where it involves a study related cost, individuals chose to undertake a course of study having regard to the financial consequences of doing so.

19.119 The definition also excludes other forms of payment including workers' compensation and transport accident and personal income protection payments due to disabilities. In 2002, the Senate Select Committee on Superannuation and Financial Services identified the potential need for people on these types of payments to be eligible to apply for early access on the basis of severe financial hardship.⁹⁵

19.120 The trustees of a superannuation fund are responsible for determining the release of benefits on the basis of severe financial hardship. APRA provides guidance to trustees in applying the severe financial hardship ground requirements in the form of Superannuation Circular No I.C.2 *Payment Standards for Regulated Superannuation Funds*.⁹⁶ The Circular does not provide any direction for trustees in determining whether, for example, an applicant is unable to meet reasonable and immediate family living expenses.⁹⁷

19.121 There is no prescribed time limit within which funds must process applications for early release on the ground of severe financial hardship.

Issues Paper

19.122 In the Superannuation Law Issues Paper, the ALRC noted that victims of family violence may face difficulty in accessing early release of superannuation on grounds of severe financial hardship.

19.123 The ALRC focused attention on the requirements in relation to applicants under the preservation age. In particular, the ALRC outlined concerns expressed in relation to the requirement under reg 6.01(5) of the *SIS Regulations* that an applicant must have been receiving Commonwealth income support payments continuously for the 26 weeks prior to making the application for early release. For example, the ALRC outlined that where victims were not previously eligible for social security payments due to income or assets tests, they may only be eligible to receive them once they are no longer considered to be a 'member of a couple' and their income and assets are no longer pooled. Accordingly, victims may have to wait at least 26 weeks to become

94 Ibid reg 6.01(2). The ALRC understands that from 1 July 2009, CDEP participants were required to apply for other income support payments but that CDEP participants who were earning CDEP wages at 30 June 2009 can continue to receive wages until at least 1 April 2012, as long as they remain eligible: Centrelink, *Community Development Employment Projects* <www.centrelink.gov.au/internet/internet.nsf/services/cdep.htm> at 5 July 2011.

95 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002).

96 Australian Prudential Regulation Authority, *Superannuation Circular No I.C.2: Payment Standards for Regulated Superannuation Funds* (2006).

97 Ibid.

eligible for early access to superannuation. The ALRC noted that this may be the period when they are suffering the most severe financial hardship.

19.124 In 2002, the Senate Select Committee on Superannuation and Financial Services recommended that the Australian Government should consider extending the criteria that govern early access to superannuation. It expressed the opinion that there was merit in the suggestion of increasing the flexibility of the current requirement for 26 weeks continuous receipt of income support payments to 26 out of a possible 40 weeks.⁹⁸ In line with that recommendation, in the Superannuation Law Issues Paper the ALRC asked if the *SIS Regulations* should be amended to require that an applicant, as part of satisfying the ground of ‘severe financial hardship’, has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks, rather than the current requirement of continuous receipt of payment for 26 weeks.⁹⁹

Submissions and consultations

19.125 As the ALRC only raised issues with respect to applicants under the preservation age in the Superannuation Law Issues Paper, stakeholder responses focused on this issue.

19.126 As a preliminary point, a number of submissions noted that eligibility for early access to superannuation benefits on the basis of severe financial hardship is limited to those who are already in receipt of income support payments.¹⁰⁰

19.127 The Commonwealth Ombudsman expressed support for the suggested amendment of the 26-week test to 26 out of a possible 40 weeks, stating that:

The suggested amendment would mean that a more consistent and sensitive approach is taken to assist people, including those subject to family violence, to gain early access to their superannuation.¹⁰¹

19.128 Similarly, several stakeholders criticised the inflexibility of the 26-week test under reg 6.01(5) of the *SIS Regulations*, submitting that it may be difficult for victims of family violence to demonstrate continuous receipt for 26 weeks where payments have been stopped or suspended for a range of reasons.¹⁰²

19.129 The Ombudsman’s submission provided a number of examples of cases where a person may experience severe financial hardship but fail the 26-week test, including the following case study.¹⁰³

98 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002), [4.36]–[4.40].

99 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 30.

100 See, eg, Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

101 Ibid.

102 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

103 Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

Case Study

Ms B was employed and also received a Parenting Payment Single from Centrelink. The rate of her payment was affected by her fluctuating employment hardship—in some weeks she did not receive any payment although she remained qualified to receive it. In 2009 she lost her job and the bills began to mount up. She applied to have some of her superannuation released on the grounds of serious financial hardship and requested a Q230 letter [evidencing the receipt of Centrelink payments] from Centrelink. However in the preceding 26 weeks, she had not received continuous payments, therefore Centrelink could not issue the Q230 ...The test did not have the flexibility to take into account the fact that, if averaged over the period, Ms B's fluctuating income was low enough to receive a payment.

19.130 A fuller discussion of the reasons as to why an income support payment may have been stopped or suspended, the effect of a partner's income on income support payments, the provision of evidence as to receipt of income support, and submissions in relation to those issues is included in chapters 5 and 7.

19.131 The Ombudsman also expressed concern that the policy intent of the 26-week test—requiring evidence of a person's dependence on welfare payments to support a claim of severe financial hardship—was not achieved where people whose payments have been interrupted, but were in no better financial position than those in continuous receipt of income support, were denied access to their superannuation benefits.¹⁰⁴

19.132 However, in acknowledging the competing policy objectives, the Ombudsman expressed the view that:

I recognise the public interest in the policy intention of preservation of superannuation to fund retirements and believe that this may be accommodated through an appropriate restriction on the amount a person can access.¹⁰⁵

19.133 Submissions opposing amendment to the 26-week test argued that doing so would potentially increase the ease with which superannuation may be accessed early, thereby eroding the overarching goal of preservation of superannuation benefits. For example, ASFA submitted that the appropriate balance between the need to preserve a superannuation benefit with the recognition of limited appropriate circumstances for the grant of early access had already been achieved. It expressed concern that an alteration of this test may allow 'a person to qualify for early release where they are currently in employment'.¹⁰⁶

ALRC's views

Qualifying period

19.134 The ALRC considers that the current requirement that applicants under the preservation age, have been receiving a Commonwealth income support payment for

104 Ibid.

105 Ibid.

106 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

26 weeks as part of satisfying the ground of ‘severe financial hardship’, under reg 6.01(5)(a) of the *SIS Regulations* is unnecessarily restrictive.

19.135 In light of the particular issues faced by victims of family violence in obtaining and remaining on continuous income support, many of which are discussed in more detail in Chapters 6 and 7, the ALRC is concerned that the current formulation may operate to exclude victims of family violence from accessing early release on this ground.

19.136 The ALRC is also of the view that the policy intention underlying the test—requiring evidence of a person’s dependence on welfare payments to support a claim of severe financial hardship—is not achieved where people, whose payments have been interrupted but were in no better financial position than those in continuous receipt of income support, are denied early access to their superannuation benefits.

19.137 Accordingly, and in line with the recommendation made by the Senate Select Committee on Superannuation and Financial Services, the ALRC proposes that reg 6.01(5)(a) of the *SIS Regulations* should be amended to require that an applicant, as part of satisfying the ground of ‘severe financial hardship’, has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks.

19.138 In relation to the requirements where an applicant is over the preservation age, the ALRC would be interested in hearing from stakeholders whether there any particular difficulties for a person experiencing family violence in meeting the requirements under reg 6.01(5)(b) of the *SIS Regulations* as part of satisfying the ground of severe financial hardship.

Definition of Commonwealth income support payments

19.139 The policy underlying exclusion of certain payments such as Austudy, Youth Allowance and CDEP Scheme payments from the definition of Commonwealth income support payments was, in part, that these payments were designed to assist in meeting study and other costs, and not to provide full financial support, and the view that individuals choosing to undertake a course of study must have regard to the financial consequences of doing so.

19.140 However, the ALRC has formed the preliminary view that in order to recognise the need of people—and in particular those experiencing family violence—to re-skill or re-enter the workforce and to ensure that someone in receipt of these payments does not need to withdraw from study in order to qualify for a different form of income support, the *SIS Regulations* may need be amended so as not to preclude an applicant, who may otherwise be able to satisfy the requirements for early release, from applying for access to superannuation.

19.141 In particular, the ALRC would be interested in stakeholder comment on whether Austudy, Youth Allowance and CDEP Scheme payments should be considered Commonwealth income support payments for the purposes of early access on the grounds of severe financial hardship.

19.142 The ALRC welcomes stakeholder feedback on whether the other forms of payment should be included in the determination of Commonwealth income support payments, for example: drought or farm-related payments; workers' compensation; transport accident; or personal income protection payments due to disability.

APRA guidance

19.143 As outlined above, the trustees of a superannuation fund are responsible for determining the release of benefits on the basis of severe financial hardship. APRA provides very limited guidance to trustees in determining whether an applicant satisfies the ground of severe financial hardship. In particular, as noted above, Superannuation Circular No I.C.2 *Payment Standards for Regulated Superannuation Funds*, provides no guidance on determining whether an applicant is unable to meet reasonable and immediate family living expenses.

19.144 The ALRC is interested in feedback from stakeholders as to whether it would be appropriate for APRA to amend the Circular in order to provide guidance to trustees in determining what constitutes a reasonable and immediate family living expense for the purposes of the second part of the severe financial hardship test; and the impact family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses.

19.145 In the alternative, the ALRC considers that APRA could work cooperatively with AIST, ASFA and other relevant bodies to develop guidance for superannuation trustees in the form of model guidelines which include information on, for example, what constitutes reasonable and immediate family living expenses.

19.146 Whether included in the Circular or as a separate publication, the ALRC considers such guidance could:

- contain a definition of family violence;¹⁰⁷
- explain the nature, features and dynamics of family violence;
- indicate that it may not be appropriate to consider a family's combined resources and outgoings in determining whether an applicant is suffering severe financial hardship in circumstances of family violence;¹⁰⁸ and
- indicate that what constitutes a reasonable and immediate living expense may differ in cases involving family violence, for example, where an applicant needs to flee their home.

Time limit

19.147 An application for early release of superannuation made by a victim of family violence is likely only to be made in extreme cases. As a result, the period of time before the victim can access the funds (if early release is approved) should be as

107 As recommended in proposal 3–2 of this Discussion Paper.

108 This is linked to the issue of separation under one roof in the context of social security considered in chapter 6.

short as possible. This issue is also discussed below with respect to time limits for processing of applications for early release on compassionate grounds.

19.148 There is currently no time limit within which funds must process applications for early release on the basis of severe financial hardship. As a result, the ALRC would be interested in stakeholder experiences in relation to the length of time taken in practice to process applications for early release on the basis of severe financial hardship and, if necessary, what procedural steps could be taken to facilitate the prompt processing of claims, particularly in circumstances involving family violence.

19.149 In saying this, the ALRC is cautious about suggesting procedural steps or imposing time limits with respect to applications involving family violence where this would create a two-tier system, or where it may provide an incentive to disclose family violence as a means to obtain early access to superannuation funds more quickly. The ALRC also acknowledges stakeholder concerns about imposing additional obligations on trustees, in particular requiring them to make decisions about the existence of family violence.

Proposal 19–2 Regulation 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be amended to require that an applicant, as part of satisfying the ground of ‘severe financial hardship’, has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks.

Question 19–5 Are there any difficulties for a person experiencing family violence in meeting the requirements under reg 6.01(5)(b) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) as part of satisfying the ground of ‘severe financial hardship’? If so, what changes are necessary to respond to such difficulties?

Question 19–6 Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to allow recipients of Austudy, Youth Allowance and CDEP Scheme payments to access early release of superannuation on the basis of ‘severe financial hardship’?

Question 19–7 Should reg 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that applicants must either be in receipt of Commonwealth income support payments or some other forms of payment—for example, workers’ compensation, transport accident or personal income protection payments because of disabilities?

Question 19–8 Should APRA Superannuation Circular No I.C.2, *Payment Standards for Regulated Superannuation*, be amended to provide guidance for trustees in relation to:

- (a) what constitutes a ‘reasonable and immediate family living expense’ in circumstances involving family violence; and

- (b) the effect family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses?

Question 19–9 As an alternative to Question 19–8 above, should APRA work with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies to develop guidance for trustees in relation to early release of superannuation on the basis of ‘severe financial hardship’, including information in relation to:

- (a) what constitutes a ‘reasonable and immediate family living expense’ in circumstances involving family violence; and
- (b) the effect family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses?

Question 19–10 In practice, how long do superannuation funds take to process applications for early release of superannuation on the basis of ‘severe financial hardship’? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

Compassionate grounds

19.150 The *SIS Act* and *SIS Regulations* provide—in addition to severe financial hardship—for the early release of preserved benefits and restricted non-preserved benefits on specified compassionate grounds.¹⁰⁹

19.151 A person may apply to APRA for early access on compassionate grounds where the benefits are required for a category of narrowly defined expenses. A person may apply for the release of benefits where these are required for:

- medical treatment costs or medical transport costs (in either case, of the person or a dependant);
- mortgage assistance to prevent the foreclosure or sale of the person’s principal place of residence;
- costs associated with modifying the person’s principal place of residence, or vehicle, to accommodate the person’s special needs relating to a severe disability (of the person or a dependant);
- costs associated with palliative care;
- costs associated with a dependant’s palliative care, death, funeral, or burial; or
- expenses in other cases where APRA has determined that the release is consistent with one of the foregoing grounds.¹¹⁰

¹⁰⁹ *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1).

19.152 APRA determines applications for early release on compassionate grounds. APRA (or more specifically, the assessor) must be satisfied that the applicant's circumstances fit into one of the specified grounds outlined above and, also, that the applicant lacks the financial capacity to meet the expenses without a release of benefits.¹¹¹

19.153 The *SIS Regulations* also require an assessor to have regard to certain other matters before they can be satisfied that a release is required on the medical treatment, medical transport or mortgage grounds outlined above.¹¹²

19.154 If a person satisfies the requirements, APRA may release a single lump sum which APRA is satisfied is an amount reasonably required, taking account of the ground upon which the application was made and the applicant's financial capacity.¹¹³

19.155 APRA's *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (Guidelines) provide guidance to APRA assessors.¹¹⁴ The Guidelines do not currently refer to the impact family violence may have, for example, on whether an applicant lacks the financial capacity to meet the relevant expenses without a release of benefits. The Guidelines provide that an assessor is required to assess this in light of the evidence provided by the applicant, that assessors may require further information from the applicant and that the evidence should be 'sufficient to satisfy a reasonable person that the person has met the conditions for release'.¹¹⁵

Time limits

19.156 The Guidelines provide that 'given the nature of the applications, assessors should keep in mind that applicants have a reasonable expectation that APRA will make decisions promptly'.¹¹⁶

19.157 APRA's material for applicants requesting early release on compassionate grounds indicates they aim to process applications within 14 working days (5 days for initial letter and 10 days for application) but it could be up to 30 working days in busy periods. Currently applications can be made using postal mail, fax or email.¹¹⁷

110 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1). In *Flanagan v APRA* [2004] FCA 1321 1321, Sackville J explored the meaning of 'consistent with' and concluded it was necessary to find out the purpose or objective underpinning the other grounds for release and then the assessor must identify the essential criteria under the new/proposed ground to determine whether they are met. The Guidelines also contain examples of permissible and non-permissible releases under the final ground: Australian Prudential Regulation Authority, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010) 52-65.

111 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(2).

112 See *Ibid* reg 6.19A(2)-(5).

113 The sum must not exceed an amount determined by the Regulator being an amount that: a) taking account of the ground and of the person's financial capacity, is reasonably required; and b) in the case of the mortgage ground, does not exceed an amount equal to the sum of 3 months' repayments and 12 months' interest on the outstanding balance of the loan: *Ibid* column 3, pt 1, sch 1.

114 Australian Prudential Regulation Authority, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010).

115 *Ibid*, 8.

116 *Ibid*, 12.

117 Australian Prudential Regulation Authority, *Website* <<http://www.apra.gov.au/>> at 4 July 2011.

Submissions and consultations

19.158 In the Superannuation Law Issues Paper, the ALRC asked whether the *SIS Regulations* should be amended to provide a specific compassionate ground to enable the early release of superannuation benefits to a victim of family violence. The ALRC envisaged that this would involve amendment to the purposes for which a person may apply for the release of benefits on compassionate grounds to allow early access where required for family violence-related purposes.

19.159 Stakeholders were broadly supportive of the inclusion of family violence for the purposes of early access to superannuation. However, it was unclear whether stakeholders supported the inclusion of family violence as a purpose for which early access to superannuation on compassionate grounds may be required, or the establishment of an entirely new and separate ground of family violence which, because of its nature, would be considered a compassionate ground for early release.

Overarching issues and policy tensions

19.160 The overarching issues and policy tensions in relation to early access to superannuation highlighted by stakeholders were discussed earlier in this chapter. Stakeholders reiterated two key points in the context of early release.

19.161 First, stakeholders emphasised that early access to superannuation should be considered as a last resort;¹¹⁸ and that, as a first priority, the social security system should be strengthened to allow for the provision of urgent and immediate financial assistance to victims of family violence.¹¹⁹

19.162 Secondly, submissions stressed the need to consider this issue in the broader context of the financial position of women generally at retirement, as well as the particular economic situation of victims in situations of family violence.¹²⁰

Family violence and early release

19.163 Broadly speaking, many stakeholders were supportive of the inclusion of family violence as an additional ground for early release of superannuation benefits on compassionate grounds, emphasising the importance of early access to financial resources to enable people experiencing family violence to remove themselves from situations of harm.¹²¹

19.164 On the other hand, some stakeholders reiterated the overarching policy concerns as the basis for opposing the inclusion of an additional ground, emphasising

118 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

119 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

120 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011. This issue is discussed in more detail earlier in the chapter.

121 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

the importance of preservation of superannuation benefits until retirement, and argued that this policy objective should prevail over expanding grounds for early release.¹²²

19.165 However, in considering the potential for any new ground of release, stakeholders emphasised that the eligibility criteria and evidentiary requirements for release would require careful consideration.¹²³ For example, the ACTU supported making any additional ground for early release ‘subject to the same eligibility criteria as the existing compassionate grounds covered by the Act’.¹²⁴ The Ombudsman submitted that careful consideration of the types of information applicants might reasonably be required to provide to the regulator in support of their application was required and that any evidentiary requirements introduced

should take into account the difficulties that people experiencing family violence may have in disclosing this fact and the types of evidence that might realistically be available to them in the situation.¹²⁵

ALRC’s views

19.166 The ALRC considers that there are two key areas in relation to which it is necessary to make comment. The first is the current operation of the compassionate grounds, and the second relates to options for reform of the compassionate grounds, specifically to account for early release for purposes related to family violence.

Current administration of compassionate grounds

19.167 At the outset, the ALRC acknowledges that the purposes for which an applicant may seek early release on compassionate grounds are narrow and involve the exercise of very limited discretion by APRA. That said, where a compassionate ground may otherwise be made out, the ALRC considers that the Guidelines and time limits may be two areas in which the administration of compassionate grounds may be amended to account for applicants experiencing family violence.

19.168 As outlined above with respect to early release on the basis of severe financial hardship, an application for early release of superannuation made by a victim of family violence is likely to be made only in extreme cases. As a result, the period of time before the victim can have access to the funds—if early release is approved—should be as short as possible. While the Guidelines remind APRA assessors that applicants have a reasonable expectation that their application will be dealt with promptly, the ALRC considers that up to 30 working days, even in busy periods, is a long period for processing applications where this may compromise the ability of applicants to take measures to protect their safety.

19.169 In saying this, the ALRC is cautious about suggesting procedural steps or imposing time limits with respect to applications involving family violence, where this would create a two-tier system or where it may ‘incentivise’ disclosure of family

122 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

123 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

124 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

125 Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

violence as a means to obtain access to superannuation funds more quickly. The ALRC also acknowledges potential concerns about imposing additional obligations on APRA assessors: in particular, requiring them to make decisions about the existence of family violence.

19.170 Accordingly, the ALRC would be interested in stakeholder experiences in relation to the length of time taken in practice to process applications for early release on compassionate grounds, and comments on what procedural steps could be taken to facilitate the prompt processing of claims, particularly in circumstances involving family violence.

19.171 The second issue arising in relation to the current administration of the compassionate grounds relates to the content of the Guidelines. The Guidelines do not currently make any reference to the impact that family violence may have, for example, on whether an applicant lacks the financial capacity to meet their expenses without an early release of benefits. The ALRC considers APRA should amend the Guidelines to ensure that they:

- contain a definition of family violence;¹²⁶
- explain the nature, features and dynamics of family violence; and
- indicate that it may not be appropriate to consider a family's combined resources and outgoings in determining whether an applicant lacks the financial capacity to meet the expenses without a release of benefits in circumstances of family violence.¹²⁷

19.172 The ALRC notes that the inclusion of such information would necessarily result in a need for additional training of APRA assessors in considering family violence-related information.

Options for reform

19.173 The ALRC considers there are two possible approaches to achieve the suggested inclusion of family violence as a ground upon which an applicant may seek early release. These are: to include family violence as a purpose for which an applicant may apply for early access on compassionate grounds; or the creation of a new ground of early release on the basis of family violence.

19.174 If reg 6.19A of the *SIS Regulations* were to be amended to add family violence to the existing list of purposes for which an applicant may apply for early release on compassionate grounds, the ALRC considers that it should be subject to the same eligibility criteria as the existing purposes. The ALRC would be interested in stakeholder comments on how any such amendment should operate in practice, including the types of:

126 As recommended in Proposal 3–1 of this Discussion Paper.

127 This is linked to the issue of separation under one roof in the context of social security considered in Chapter 6.

- family violence-related costs that should be included under the new purpose; and
- evidence an applicant may be required to provide in support of their application.

19.175 Another approach may be to establish a new separate ground of early release. While the ALRC considers that the inclusion of a new ground may supplement the limited existing provisions for early release, the ALRC has several concerns with respect to establishing a new ground, including in relation to:

- the overarching policy tensions referred to above; and
- the impact an additional early release ground may have on superannuation funds, if they were to administer the new ground, though it appears that APRA would be the most appropriate body within the current system to administer any new ground.

19.176 The ALRC welcomes submissions on whether a new ground of release is appropriate and, if so, how any such ground would operate in practice. For example:

- which body should be responsible for administering the new ground—APRA, individual funds or some other body;
- what criteria should apply;
- what evidence should be required;
- if individual funds administer the new ground, should there be common rules for granting early release on the new ground; and
- what appeal mechanisms should be established—for example, should appeals and/or complaints go to the SCT or the Ombudsman?

Question 19–11 In practice, how long does APRA take to process applications for early release of superannuation on compassionate grounds? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

Proposal 19–3 APRA should amend the *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* to include information about family violence, including that family violence may affect the test of whether an applicant lacks the financial capacity to meet the relevant expenses without a release of benefits.

Question 19–12 Should reg 6.19A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that a person may apply for early release of superannuation on compassionate grounds where the release is required to pay for expenses associated with the person's experience of family violence?

Question 19–13 Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide for a new ground for early release of superannuation for victims of family violence? If so, how should it operate? For example:

- (a) which body should be responsible for administering the new ground;
- (b) what criteria should apply;
- (c) what evidence should be required;
- (d) if individual funds administer the new ground, should there be common rules for granting early release on the new ground; and
- (e) what appeal mechanisms should be established?

Other issues

19.177 In addition to the issues and proposals outlined above, there are a range of other areas of more general application in relation to which amendments may further protect the financial independence and security of victims of family violence. These include:

- application forms for early release;
- training and education in the context of applications for early release;
- appropriate ways of contacting applicants for early release who have disclosed family violence;
- time limits for funds to respond to complaints about applications for early release; and
- data collection and system integrity measures.

Application forms for early release

19.178 In light of many of the questions and proposals outlined above with respect to early access to superannuation, the question arises as to what is the most appropriate way to make provision for applicants to disclose family violence where they consider it is relevant to their application for early release. For example, in demonstrating severe financial hardship, or that they lack the financial capacity to meet particular expenses, an applicant may need to indicate that their partner's income should not be considered. One such way may be through amendment to application forms for early release. The ALRC would be interested in stakeholder feedback on whether application forms for early release currently include some area, box or similar under which an applicant could disclose family violence where it is relevant to the application for early release. If they do not, should they do so, and if so, how?

Training

19.179 Throughout this Inquiry, stakeholders have consistently emphasised the need to complement proposals for reform with appropriate education and training. In light of some of the questions and proposals outlined above, which would necessarily result in APRA (and possibly superannuation fund) staff having to consider issues of family violence in determining whether to grant early release, it is necessary to consider the training needs of those staff.

19.180 As a result, the ALRC would be interested in stakeholder feedback on what training is currently provided to APRA and superannuation fund staff, and whether family violence and its impact on the circumstances of an applicant could be included, either as a specific component of existing training, or as a separate type of training.

Contacting applicants

19.181 In situations involving family violence, an applicant victim may have made an application for early release of superannuation for the purposes of, preparing to leave a violent relationship. In such circumstances the safety of the victim may be jeopardised in circumstances where the superannuation fund or APRA contacts the victim in relation to their application.

19.182 For example, the Guidelines provide that when additional information is required in relation to an application, it should be sought ‘as quickly as possible, usually by telephone’.¹²⁸

19.183 The ALRC would be interested in hearing about:

- ways superannuation funds and APRA currently contact applicants; and
- whether there is, or should be, some mechanism or process in relation to applications involving family violence that would ensure the safety of victims. For example, inclusion of a ‘safety flag’ on a member or applicant’s file that would alert anyone accessing the file to be conscious of the need to ensure information about any early release application is only disclosed to the applicant, and in a safe and appropriate manner.

19.184 The ALRC is conscious that the release of information is already governed in part by the *Privacy Act 1988* (Cth).

Time limits for fund responses to complaints

19.185 Where the trustee of a superannuation fund has made a decision, for example, to deny an application for early access, an applicant may make a complaint to the SCT that the decision is or was unfair or unreasonable.¹²⁹

128 Australian Prudential Regulation Authority, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010), 12.

129 *Superannuation (Resolution of Complaints) Act 1993* (Cth) ss 14, 15. Section 15 outlines who may make such a complaint.

19.186 However, under s 19 of the *SRC Act*, the SCT can only deal with a complaint under s 14 if:

- (a) a complaint about the same subject matter was previously made to an appropriate person under arrangements for dealing with such complaints made under section 101 of the [*SIS Act*]; and
- (b) the complaint so made was not settled to the satisfaction of the complainant within 90 days or such longer period as the Tribunal allows.¹³⁰

19.187 Section 101 of the *SIS Act* provides that trustees have a duty to establish arrangements for dealing with inquiries or complaints and that an inquiry or complaint will be dealt with within 90 days after it was made.¹³¹

19.188 Where a complaint about a fund not granting an application for early release is made by a victim of family violence, it is likely the application was made in circumstances where time is of the essence. A three month waiting period for a response, prior to being able to make an application to the SCT, appears to restrict access by individuals to a review mechanism in circumstances where they require urgent consideration of their complaint.

19.189 While the ALRC acknowledges the administrative considerations involved in imposing a shorter timeframe, and the view that urgent payments may be more appropriately made available through the social security system,¹³² the ALRC would be interested in feedback from stakeholders as to the impact of the 90 day period on applicants who are experiencing family violence and whether a 30 day period may address any concern about the length of the waiting period.

Data collection and systems integrity

19.190 As outlined in Chapter 2, systems integrity is an important theme underlying this Inquiry. The early release of superannuation benefits is currently allowed in certain limited circumstances outlined above. If a new ground for early release of superannuation on the basis of family violence were introduced (and potentially, in any event) the ALRC considers it would be useful to introduce some data collection mechanism to:

- ensure system integrity—that is, to avoid applicants making multiple applications for early release on different grounds or from different funds; and
- provide comprehensive data, the availability of which would provide a sound evidence base upon which the government could make policy in this area.

19.191 This is consistent with the guiding principles developed in the course of the Super System Review with respect to the need for high quality research and data.¹³³

130 Ibid s 19.

131 *Superannuation Industry (Supervision) Act 1993* (Cth) s 101.

132 For example, through a crisis payment. For discussion of social security measures see chapters 5–8.

133 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), Overview 4.

19.192 The ALRC welcomes feedback on how such data should be collected, particularly in light of *Super Stream* reforms and standard business reporting, whether APRA is the most appropriate body to collect any such data and how it should be available.

Other issues

19.193 Finally, the ALRC welcomes comment on any other issues of relevance to the treatment of family violence in Commonwealth superannuation law.

Question 19–14 What amendments, if any, should be made to application forms for early release of superannuation to provide for disclosure of family violence where it is relevant to the application?

Question 19–15 What training is provided to superannuation fund staff and APRA staff who are assessing applications for early release of superannuation? Should family violence and its impact on the circumstances of an applicant be included as a specific component of any training?

Question 19–16 In practice, how do superannuation funds and APRA contact members or those who have made an application for early release of superannuation? Is there, or should there be, some mechanism or process in place in relation to applications involving family violence to deal with safety concerns associated with:

- (a) contacting the member or applicant; or
- (b) the disclosure of information about the application?

Question 19–17 Should the 90 day period for a superannuation fund to respond to a complaint by a member be reduced to 30 days?

Question 19–18 Should there be central data collection in relation to applications for early release of superannuation in order to identify:

- (a) the extent to which funds are being accessed early on the basis of any new family violence ground, including numbers of applications and success rates; and
- (b) whether there are multiple claims on the same or different funds?

If so, which body should collect that information, and how?

Question 19–19 Are there any other ways in which superannuation law could be improved to protect those experiencing family violence.