

## 19. Superannuation Law

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### Contents

Summary	459
Overview of the superannuation system	460
Superannuation legislation	460
Regulatory bodies	461
Superannuation Complaints Tribunal	461
Superannuation policy	462
Superannuation principles	462
Purposes of superannuation	462
Superannuation and family violence	463
Superannuation and coercion	464
Spousal contributions	464
Self-managed superannuation funds	467
Gaining early access to superannuation	472
Severe financial hardship	474
Compassionate grounds	480
Other issues	485

### Summary

19.1 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.<sup>1</sup> 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.<sup>2</sup>

19.2 In this chapter the ALRC examines ways in which the Australian superannuation system does, or could, respond to protect those people experiencing family violence. The ALRC makes a number of recommendations, but in doing so acknowledges the specific role that 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.

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

2 By 2050, almost one in four Australians will have reached retirement age, compared to one in seven in 2010: *Ibid.*

19.3 This chapter consists 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 spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the context of a wider inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth). The ALRC also makes a number of suggestions with respect to compliance action taken in relation to SMSFs and recommends changes to guidance material with respect to establishing, managing and winding up a SMSF.

19.4 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 example, for the purposes of leaving a violent relationship. In considering early release on the basis of severe financial hardship, the ALRC recommends amendments to the eligibility requirements for making an application and to guidance material for decision makers in granting early release. The ALRC also considers early release of superannuation on compassionate grounds and makes recommendations in relation to guidance material and training for decision makers.

## **Overview of the superannuation system**

### **Superannuation legislation**

19.5 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 the:

- *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 the Australian Prudential Regulatory Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Commissioner of Taxation;<sup>3</sup> and
- *Superannuation Industry (Supervision) Regulations 1994* (Cth) (*SIS Regulations*)—which articulate the grounds for early access to superannuation.

19.6 Two other pieces of legislation are also relevant for the purposes of specific issues within this chapter. First, as outlined in Chapter 1, detailed consideration of, or proposals with respect to amending, the *Family Law Act 1975* (Cth) is beyond the

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

Terms of Reference for this Inquiry.<sup>4</sup> 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 (2010). However, in the present Inquiry, 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.

19.7 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.

### Regulatory bodies

19.8 The superannuation system is regulated by several 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*;
- APRA—the prudential regulator that regulates superannuation funds other than SMSFs and reviews compliance with the *SIS Act*; and provides guidance to trustees in relation to the early release of superannuation entitlements on the basis of severe financial hardship;<sup>5</sup> and
- the Department of Human Services (DHS), in particular Medicare—which is responsible for the administration of applications for early release on compassionate grounds.<sup>6</sup>

19.9 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.<sup>7</sup>

### Superannuation Complaints Tribunal

19.10 The Superannuation Complaints Tribunal was established under the *SRC Act* to deal with complaints about superannuation—specifically in the areas of Regulated Superannuation Funds, annuities and deferred annuities, and Retirement Savings

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4 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

5 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).

6 The general administration of the early release of superannuation and RSA benefits on compassionate grounds was transferred from APRA and the Commissioner of Taxation to the Chief Executive Medicare on 1 November 2011: *Superannuation Legislation Amendment (Early Release of Superannuation) Act 2011* (Cth).

7 For example, the Association of Superannuation Funds of Australia and the Australian Institute of Superannuation Trustees.

Accounts. The Tribunal’s jurisdiction does not, however, extend to complaints concerning SMSFs.

## **Superannuation policy**

19.11 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.<sup>8</sup>

## **Superannuation principles**

19.12 In the course of the Super System Review, the Review Panel formulated ten superannuation principles as the ‘guiding principles by which policy is developed in relation to superannuation generally’.<sup>9</sup> A number of principles are of particular relevance to this Inquiry, including the need for: a well regulated superannuation system in which members can have confidence; a system which allows and respects individual choice, but also recognises associated increased responsibility which comes with that choice; and for superannuation-related decision making to be taken with a long term perspective.<sup>10</sup> These principles provide a useful touchstone for this chapter, in addition to the key themes articulated in Chapter 2.

## **Purposes of superannuation**

19.13 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.<sup>11</sup>

19.14 In the course of this Inquiry, two of these pillars are considered—this chapter focuses on superannuation and Chapters 5–9 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.

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8 Australian Government, *‘Stronger Super’: Government Response to the Super System Review* (2010). 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 detail in this Chapter.

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

10 Ibid, Overview, 4.

11 Ibid, Overview, 15.

19.15 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.<sup>12</sup>

19.16 A number of key policy tensions have emerged in the course of this Inquiry with respect to family violence and superannuation.

19.17 First, superannuation is generally provided through a trust structure where trustees hold the superannuation funds 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 of members, 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 proper role of trustees in the context of superannuation fund management.

19.18 Secondly, a tension exists between the need for a well-regulated superannuation system on the one hand, and the need for individual choice with respect to, for example, contributions splitting or the type or management of superannuation funds. This tension is particularly evident in considering SMSFs in light of suggestions about the power imbalances often present in SMSFs.

19.19 The third 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.

### **Superannuation and family violence**

19.20 The Terms of Reference for this Inquiry require the ALRC to consider reforms to improve the safety of people experiencing family violence. In the superannuation context, the ALRC considers that safety encompasses both physical safety and safety derived from financial independence and economic security.

19.21 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, and that for women who were unable to stabilise their financial situation, the consequence was a downward spiral of debt and poverty.<sup>13</sup> The ADFVC also stressed that financial hardship in turn impacts on the safety of victims of family violence. For example, it affects their

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12 ASFA, *Submission CFV 24*.

13 ADFVC, *Submission CFV 26*.

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.<sup>14</sup>

19.22 In addition, the Australian Institute of Superannuation Trustees (AIST) estimated that the ‘median superannuation balance for women aged between 55 and 64 years is \$53,000, compared to \$90,000 for men in the same age group’.<sup>15</sup>

19.23 Against this backdrop, in the course of this Inquiry stakeholders have emphasised that superannuation is another area through which victims of family violence experience coercion and control in the form of economic abuse, or that may provide necessary funds to leave a violent relationship.<sup>16</sup> As a result, this chapter examines three key areas of superannuation in which the impact of family violence is likely to be most obvious: superannuation contributions splitting; SMSFs; and early access to superannuation.

### **Superannuation and coercion**

19.24 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 contributions under reg 6.44 of the *SIS Regulations*, or a SMSF.

### **Spousal contributions**

19.25 Since 1 January 2006, eligible superannuation members have been able to request that their superannuation contributions be split with their ‘spouse’.<sup>17</sup> The payment of the split contributions to a member’s spouse is known as a ‘contributions-splitting superannuation benefit’.<sup>18</sup> Maximum limits apply to the amount of superannuation that may be split in each financial year.<sup>19</sup>

19.26 The *SIS Regulations* provide that superannuation trustees are not required to offer their members the option to split their superannuation contributions.<sup>20</sup> If a

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14 Ibid.

15 AIST, *Super-Poor, But Surviving: Experiences of Australian Women in Retirement* (2011), 10.

16 National Welfare Rights Network, *Submission CFV 150*; AIST, *Submission CFV 146*; Office of the Australian Information Commissioner, *Submission CFV 142*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Confidential, *Submission CFV 91*; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

17 The term spouse is defined to include: a person to whom the member is legally married; a person that a 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: *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

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

19 The ‘maximum splittable amount’ is defined in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.40.

20 Ibid reg 6.45.

superannuation fund does provide members with 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.<sup>21</sup>

19.27 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 contributions 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.

***Trustee obligations to consider coercion***

19.28 Superannuation trustees possess a number of duties and obligations and are subject to a range of regulatory requirements.<sup>22</sup> 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. In carrying out their fiduciary duty to act in the best interests of the member, it may be difficult for trustees 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.

19.29 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 expose decisions to legal challenge. It may also be beyond what a prudent trustee is expected to consider as part of their fiduciary duty.

19.30 In considering how a trustee or another body could consider coercion and what if any steps they could take to limit or ameliorate the effect of that on a victim of family violence, stakeholders expressed the view 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 the decision about the splitting application.<sup>23</sup> However, beyond that, while some stakeholders supported the introduction of an obligation on trustees,<sup>24</sup> most stakeholders reiterated their concerns in relation to the

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21 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.

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

23 ASFA, *Submission CFV 24*.

24 ACTU, *Submission CFV 39*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

difficulty and inappropriateness of imposing obligations of this kind on trustees.<sup>25</sup> Accordingly, the ALRC does not make any recommendations with respect to the contributions splitting regime.

***How could a victim of family violence recover their superannuation?***

19.31 Where benefits have been transferred under a superannuation contributions 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. While the ALRC considers that victims of family violence should be able to recover superannuation transferred in such circumstances, it is clear that any such mechanism would need to be included in the *Family Law Act*.

19.32 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.<sup>26</sup> In making such orders, superannuation benefits transferred under the superannuation contributions splitting regime as a result of coercion cannot be ‘clawed back’, but may be taken into account in considering the contributions of the parties—to the property, including financial and non-financial contributions and contributions to the welfare of the family—and ultimately in the distribution of assets between the parties.<sup>27</sup>

19.33 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. In the case of *In the Marriage of Kennon* the Family Court of Australia 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.<sup>28</sup> 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.

19.34 As outlined above, detailed consideration of, and proposals to amend, the *Family Law Act* goes beyond the Terms of Reference for this Inquiry. The ALRC therefore considers the most appropriate approach to this issue is to refer to the

25 See, eg, AIST, *Submission CFV 146*; ASFA, *Submission CFV 24*; Law Council of Australia, *Submission CFV 23*.

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

27 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—*Hickey and Hickey* (2003) 30 FamLR 355); or whether superannuation interests should be valued separately from other items of property (a ‘two pools’ approach—*In the Marriage of Coghlan* (2005) 33 Fam LR 414); identify and assess the contributions that the parties have made to the property; identify and assess the earning capacity, needs and child support obligations of each party; and make an order that is just and equitable in all the circumstances: *Family Law Act 1975* (Cth) ss 75(2); 79(2); 79(4)(a)–(g); 90SF(3); 90SM(3); 90SM(4)(a)–(g).

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



recommendation in *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.<sup>29</sup>

19.35 Such an inquiry could consider, for example:

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*.<sup>30</sup>

19.36 In particular, the ALRC recommends that any such inquiry should include consideration of the treatment of superannuation in property proceedings involving family violence. This was supported by stakeholders in this Inquiry.<sup>31</sup>

**Recommendation 19–1** In *Family Violence—A National Legal Response*, ALRC Report 114 (2010) 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

19.37 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.<sup>32</sup> SMSFs are restricted to a maximum of four members.

19.38 The majority of SMSFs—more than 90%—are funds with two members<sup>33</sup> and ‘most of these would be spouses’.<sup>34</sup> SMSFs constitute the largest sector within Australia’s superannuation sector by both number of assets and asset size.<sup>35</sup> At 30 March 2010, there were approximately 423,000 SMSFs, representing 99% of all superannuation funds, and comprising over 30% of total superannuation assets.<sup>36</sup> The

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

30 *Ibid.*, ch 17.

31 See, eg, ASFA, *Submission CFV 154*; AIST, *Submission CFV 146*.

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

33 *Ibid.*, 222.

34 AIST, *Submission CFV 146*.

35 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), 218.

36 *Ibid.*

SMSF sector has grown rapidly: in the five years to 30 June 2009, it has experienced an annualised growth rate of 20%.<sup>37</sup>

19.39 The Super System Review concluded that ‘the SMSF sector is largely a successful and well-functioning part of the system’.<sup>38</sup> However, 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, SMSFs are subject to a less onerous regulatory regime than some other forms of superannuation funds.<sup>39</sup>

#### ***SMSFs and family violence***

19.40 In circumstances of family violence involving the trustees 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. In light of this, and 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.<sup>40</sup>

19.41 However, many of the possible amendments to the regulation of the SMSF sector would involve sector-wide amendment and have a more systemic impact than only in relation to those experiencing 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 wider than 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.

19.42 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. This was reinforced by stakeholders who emphasised that many SMSFs ‘have a combination of active and passive trustees’ and that ‘a feature of SMSF trusteeship today, be it proper or not, is that not all trustees are equal’.<sup>41</sup>

19.43 As a result, the ALRC makes a number of suggestions and recommendations for reform to the regulation of SMSFs and associated guidance material to protect the safety of trustees experiencing family violence.

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37 Ibid.

38 Ibid, Overview, 16.

39 APRA, ‘A Recent History of Superannuation in Australia’ (2007) 2 *APRA Insight* 3, 8.

40 See Rec 3–4 in relation to the need for a consistent definition of family violence.

41 ASFA, *Submission CFV 154*.

***ATO guidance material***

19.44 SMSFs are regulated by the ATO, which publishes a range of material which is designed to assist SMSF trustees. This includes a SMSF Newsletter; guidance material on winding-up a SMSF; as well as a SMSF specific advice process through which a trustee can write to the ATO and request advice about how superannuation law applies to a particular transaction or arrangement for a SMSF. The ATO legal database and electronic super-audit tool also contain material relevant to SMSFs.<sup>42</sup>

19.45 Ensuring such material provides individuals establishing SMSFs with sufficient information about the following matters may go some way to protecting SMSF trustees experiencing family violence:

- setting up a SMSF—including creating appropriate safeguards, for example ‘joint signatories on bank accounts’;<sup>43</sup>
- 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.

19.46 As a result, the ALRC recommends that the ATO amend existing guidance material designed to assist SMSF trustees to equip trustees generally and, in particular, those experiencing family violence, with ‘greater knowledge of how to protect their interests’.<sup>44</sup> Guidance material could, for example, include case studies illustrating the potential impact family violence may have in the context of establishing, managing and winding up a SMSF as well as ‘suggestions and examples of best practice’.<sup>45</sup> In addition, the ALRC considers that the inclusion of general information about the potential effect of family violence on superannuation savings and SMSFs would be useful.<sup>46</sup>

***Determining appropriate compliance action***

19.47 In circumstances where a person using family violence is a SMSF trustee, and they fail to comply with superannuation or taxation law and are therefore the subject of compliance action, it is important to avoid that action exacerbating the harm or disadvantage suffered by the trustee experiencing family violence who is not the subject of compliance action. In order to ensure that the ATO is able to consider family

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42 ATO, *Self-managed Superannuation Funds* <[www.ato.gov.au/superfunds/](http://www.ato.gov.au/superfunds/)> at 1 July 2011; ATO, *How to Apply for SMSF Specific Advice* <[www.ato.gov.au/businesses/content.aspx?doc=/content/00206984.htm](http://www.ato.gov.au/businesses/content.aspx?doc=/content/00206984.htm)> at 17 November 2011; ATO, *Winding-Up a SMSF: What You Need to Know* (2010); ATO, *Legal Database Online* <<http://law.ato.gov.au/atolaw/index.htm>> at 17 November 2011 contains SMSF rulings and determinations.

43 AIST, *Submission CFV 146*.

44 Ibid.

45 Ibid.

46 Ibid.

violence in determining the most appropriate compliance action in such circumstances, the ALRC suggests that the ATO consider the impact of compliance action and provide trustees with the additional guidance material recommended in Recommendation 19–2.

19.48 The following ATO example outlines a circumstance in which a dispute may arise between trustees—potentially involving family violence—and the negative consequences that may follow from such a dispute.<sup>47</sup>

**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.

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.

19.49 In dealing with circumstances in which a fund may be non-compliant, such as in the case study 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;

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47 ATO, *How Your Self-Managed Super Fund is Regulated* (2011).

- disqualification of trustees; and
- in serious cases, civil prosecution of trustees.<sup>48</sup>

19.50 In determining the appropriate action, the ATO sends fund trustees a letter, outlining the basis for their non-compliance and providing them with an opportunity to provide any additional information. The letter outlines that the ATO will consider the tax consequences of treating the fund as a non-complying fund, the seriousness of the contravention and all other relevant circumstances.<sup>49</sup>

19.51 ‘Differentiated compliance treatments’ are a feature of the Stronger Super SMSF reforms,<sup>50</sup> and there is an increasing move away from making a fund non-compliant.<sup>51</sup> However, in its submission, AIST expressed the view that the ATO should not be required to consider family violence when determining appropriate compliance action, except where the ATO is alerted to the fact that family violence ‘is a key component’ of the conduct.<sup>52</sup>

19.52 In light of ATO moves towards a more nuanced approach to compliance, and stakeholder views, the ALRC does not consider it is necessary to make a recommendation in this respect. However, the ALRC emphasises that in exercising its discretion in compliance matters the ATO should ensure, as far as possible, compliance action does not have a negative impact on the victim, for example by way of non-complying fund status or forced sale of assets that may have adverse capital and tax consequences.<sup>53</sup> The ALRC suggests, in line with the views of stakeholders, that the ATO, in determining the appropriate compliance action, should consider all available material and ‘grade each breach and determine whether the contravention occurred intentionally or accidentally based on [a] reasonably arguable position’.<sup>54</sup> In doing so, there appears to be a need for the ATO to take into account that ‘not all trustees are equal’<sup>55</sup> and the potential impact of family violence.

19.53 In addition, the ALRC also suggests that amended ATO material, as set out in Recommendation 19–2, should be provided to trustees with the compliance letter referred to above, to ensure they are aware that circumstances such as family violence, where relevant, can be considered by the ATO should the trustee provide the ATO with relevant material. Where material is provided which indicates family violence is a key component of the conduct, the ATO then has discretion to consider such material in determining the appropriate compliance action.

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

49 Correspondence from ATO, 6 October 2011; *Superannuation Industry (Supervision) Act 1993* (Cth) s 42A(5).

50 ASFA, *Submission CFV 154*.

51 ATO, *Consultation*, by telephone, 28 September 2011.

52 AIST, *Submission CFV 146*.

53 *Ibid.*

54 ASFA, *Submission CFV 154*.

55 *Ibid.*

### ***SMSF professionals***

19.54 There is no formal requirement to be a licensed SMSF adviser.<sup>56</sup> Stakeholders have expressed the view that advice regarding the establishment and operation of SMSFs, received from accountants, tax agents, fund administrators, lawyers and financial advisers, can be 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. As a result, in consultations, some stakeholders suggested that requiring these professionals to provide additional information to individuals establishing a SMSF may go some way to protecting trustees experiencing family violence.

19.55 Developments such as the Future of Financial Advice reforms, among others, will be important in reviewing existing professional standards and training requirements as well as licensing exemptions.<sup>57</sup> As a result, the ALRC suggests that, in this context, 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.

19.56 Stakeholders have also suggested that guidance material, developed in accordance with Recommendation 19–2, should be made available to SMSF professionals ‘so that they can begin to advise and implement such best practice’.<sup>58</sup>

**Recommendation 19–2** The Australian Taxation Office publishes a range of guidance material which is designed to assist SMSF trustees. The Australian Taxation Office should review and amend such guidance material to ensure that trustees experiencing family violence are provided with specific information about: their obligations; setting up and managing a SMSF; and winding up a SMSF in such circumstances.

## **Gaining early access to superannuation**

19.57 There are three key forms of superannuation benefits:

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56 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.

57 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 Licence 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.

58 AIST, *Submission CFV 146*.

- preserved benefits—which must be retained in superannuation until ‘preservation age’;<sup>59</sup>
- 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.

19.58 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*.<sup>60</sup>

19.59 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.

19.60 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. However, stakeholders such as Women’s Legal Services NSW argued that victims of family violence should be entitled to early access to superannuation only as a ‘last resort’ and that

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.<sup>61</sup>

19.61 In its submission, the Association of Superannuation Funds of Australia (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.<sup>62</sup>

19.62 Consequently, ideally, 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.<sup>63</sup>

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

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

61 Women’s Legal Services NSW, *Submission CFV 28*.

62 ASFA, *Submission CFV 24*.

63 See Chs 5–8.

19.63 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 person using family 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;<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

### **Severe financial hardship**

19.64 The *Superannuation Act* and *SIS Regulations* provide for early release of superannuation benefits on the grounds of ‘severe financial hardship’.<sup>67</sup> Fund trustees are responsible for determining the release of benefits on this basis. Different conditions for early release apply, depending on the age of the member, in particular whether the member is under or over ‘preservation age’.<sup>68</sup>

19.65 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 that they:

- have been receiving ‘Commonwealth income support payments’ continuously for the past 26 weeks;<sup>69</sup>
- 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);<sup>70</sup> and
- are unable to meet reasonable and immediate family living expenses.<sup>71</sup>

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64 AIST, *Submission CFV 146*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

65 AIST, *Super-Poor, But Surviving: Experiences of Australian Women in Retirement* (2011), 10. See also ACTU, *Submission CFV 39*.

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

67 The rules of the superannuation fund must also allow early access on this basis.

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

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

70 Centrelink’s role is to ‘supply, on request from an income support recipient, confirmation that the income support recipient has received income support payments for the required period’: FaHCSIA, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 1 November 2011.

71 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(5), (5A).



19.66 If these requirements are satisfied, the trustee may release a lump sum of between \$1,000 and \$10,000.<sup>72</sup>

19.67 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 that they:

- have been receiving ‘Commonwealth income support payments’ for a cumulative period of 39 weeks after they reached their preservation age; and
- 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’.<sup>73</sup>

19.68 Where a person satisfies these requirements, there is no limit on the amount that can be released.<sup>74</sup>

### ***Qualifying period***

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

19.70 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 increasing the flexibility of the current requirement for 26 weeks continuous receipt of income support payments to 26 out of a possible 40 weeks.<sup>75</sup>

19.71 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 5–8, the ALRC is concerned that the current formulation may operate to exclude victims of family violence from accessing early release on this ground. In particular, as stakeholders have emphasised, 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.<sup>76</sup> The Commonwealth 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.<sup>77</sup>

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72 Ibid sch 1, pt 1.

73 Ibid reg 6.01(5)(b).

74 Ibid sch 1, pt 1.

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

76 National Welfare Rights Network, *Submission CFV 150*; WRC (NSW), *Submission CFV 70*; Commonwealth Ombudsman, *Submission CFV 16*; WEAVE, *Submission CFV 14*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

77 Commonwealth Ombudsman, *Submission CFV 16*.

**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.

19.72 Such difficulties may also arise where victims are not previously eligible for social security payments due to income or assets tests, as 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 eligible for early access to superannuation during the period when they are suffering the most severe financial hardship.<sup>78</sup>

19.73 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'.<sup>79</sup>

19.74 However, the ALRC is 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.<sup>80</sup>

19.75 Accordingly, and in line with the recommendation made by the Senate Select Committee on Superannuation and Financial Services, the ALRC recommends 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. This amendment would still provide an objective financial hardship test but is likely to

78 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 Chs 5–8.

79 ASFA, *Submission CFV 24*.

80 Commonwealth Ombudsman, *Submission CFV 16*.

result in a more ‘consistent and sensitive approach’ in relation to those seeking early access to their superannuation, including people experiencing family violence.<sup>81</sup>

19.76 The ALRC did not receive any feedback from stakeholders indicating that there are particular difficulties for a person over the preservation age 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***

19.77 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 and Youth Allowance paid to a person who is undertaking full-time study.<sup>82</sup>

19.78 The ALRC considers that recommending amendment to the definition of ‘Commonwealth income support payments’ is beyond the scope of the Terms of Reference for this Inquiry, given its systemic impact on people across the social security and superannuation systems.<sup>83</sup>

19.79 The policy underlying exclusion of some of these payments was, in part, 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. As a result, a number of stakeholders opposed any amendment to the definition.<sup>84</sup> Stakeholders also opposed amendment on the basis that recipients of excluded payments are generally likely to have ‘low levels of superannuation and therefore any early lump sum releases will have a significant impact on the total level of superannuation’.<sup>85</sup>

19.80 However, the ALRC notes that, 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

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81 Ibid. See also National Welfare Rights Network, *Submission CFV 150*; AIST, *Submission CFV 146*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

82 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(2). The ALRC understands that the definition also excludes NEIS, Abstudy, workers’ compensation, as well as transport accident and personal income protection payments: National Welfare Rights Network, *Submission CFV 150*. The Ombudsman advised that complaints received in relation to NEIS payments ‘may indicate an anomaly. NEIS payments assist an eligible job seeker to commence their own business. NEIS payments provide the same level of assistance as Newstart Allowance and are described as ‘ongoing income support, but are not included in the payments that meet the requirements of a “Commonwealth income support payment” for the purpose of applying for an early release of superannuation’: Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

83 See, eg, ASFA, *Submission CFV 154*.

84 Ibid; Treasury, *Consultation*, by telephone, 21 September 2011.

85 AIST, *Submission CFV 146*.

financial hardship,<sup>86</sup> and a number of stakeholders reiterated the same view throughout this Inquiry, submitting that the exclusion is ‘unfair and unreasonable’.<sup>87</sup>

### **Guidance material**

19.81 The trustees of a superannuation fund are responsible for determining the release of benefits on the basis of severe financial hardship. However, APRA provides guidance to trustees across a range of areas, including in relation to applying the ground of severe financial hardship. APRA is progressively issuing Superannuation Prudential Practice Guides (SPG) to replace existing Circulars, Guidance Notes and other materials. Guidance in this area is currently provided by Superannuation Circular No I.C.2 *Payment Standards for Regulated Superannuation Funds*.<sup>88</sup> However, in December 2011, APRA proposes to issue a final version of a draft Superannuation Prudential Practice Guide, SPG 280—*Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds* released for consultation in August 2011.<sup>89</sup> Neither the current Circular nor the draft SPG provide any direction for trustees in determining whether, for example, an applicant is unable to meet reasonable and immediate family living expenses.<sup>90</sup>

19.82 The ALRC understands that the SPGs are designed to provide high level advice to trustees, in this instance to assist in determining whether an applicant satisfies the ground of severe financial hardship.<sup>91</sup> However, the ALRC considers there is a need for guidance material that provides trustees with more specific guidance 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.

19.83 The ALRC therefore recommends that APRA 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.<sup>92</sup> The ALRC considers such guidance could:

- contain a definition of family violence;<sup>93</sup>

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

87 National Welfare Rights Network, *Submission CFV 150*.

88 APRA, *Superannuation Circular No I.C.2: Payment Standards for Regulated Superannuation Funds* (2006).

89 APRA, *Guidance for Superannuation Licensees: Contribution and Benefit Accrual Standards, Payment Standards* (2011), 10.

90 APRA, *Superannuation Circular No I.C.2: Payment Standards for Regulated Superannuation Funds* (2006); APRA, *Prudential Practice Guide Draft, Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds*, SPG 280 (2011).

91 APRA, *Consultation*, by telephone, 23 September.

92 Supported by: AIST, *Submission CFV 146*. ASFA indicated that while this issue is not ‘unimportant’, given the present reform agenda, APRA ‘may not view providing such guidance as a high priority’: ASFA, *Submission CFV 154*.

93 As recommended in Rec 3–4.

- 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;<sup>94</sup> 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.

19.84 In addition to developing the guide, the ALRC suggests that AIST, ASFA and other relevant bodies should encourage superannuation funds to provide staff involved in assessing applications for early release of superannuation on the basis of severe financial hardship, training in relation to the effect family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses.

#### ***Time limit***

19.85 The Terms of Reference for this Inquiry require the ALRC to focus on those experiencing family violence. However, throughout this Report the ALRC has been 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 a benefit—in this case, faster early access to superannuation funds.

19.86 There is currently no time limit within which fund trustees must process applications for early release on the basis of severe financial hardship. While an application for early release of superannuation made by a victim of family violence is likely only to be made in extreme cases, this is also the case for other people making applications for early release of superannuation. As a result, the period of time before any applicant can access the funds (if early release is approved) should be as short as possible. Stakeholders have submitted that applications should be processed as quickly as possible and that, while some delays may arise from the need to obtain proof of eligibility and of identity, such claims are 'given priority'.<sup>95</sup> In light of this, and the ALRC's desire to avoid creating a two-tier system, the ALRC considers that no legislative or regulatory changes could usefully be made in relation to facilitating the prompt processing of applications for early release in circumstances involving family violence.<sup>96</sup>

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

95 AIST, *Submission CFV 146*.

96 Ibid; ATO Superannuation Consultative Committee, *Consultation*, Sydney, 13 September 2011.

**Recommendation 19–3** The Australian Government should consider amending regulation 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) 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.

**Recommendation 19–4** The Australian Prudential Regulation Authority, in conjunction with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies, should develop guidance for trustees in relation to early release of superannuation on the basis of ‘severe financial hardship’ under the *Superannuation Act 1976* (Cth) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth). Guidance could include information in relation to:

- (a) what may constitute 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.

### Compassionate grounds

19.87 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.<sup>97</sup>

19.88 A person may apply to DHS for early access on compassionate grounds where the benefits are required for a category of narrowly defined expenses:

- 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

<sup>97</sup> *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1).

- expenses in other cases where APRA has determined that the release is consistent with one of the foregoing grounds.<sup>98</sup>

19.89 DHS determines applications for early release on compassionate grounds. DHS (or more specifically, the assessor) must be satisfied that the applicant's circumstances fit into one of the specified grounds and that the applicant lacks the financial capacity to meet the expenses without a release of benefits.<sup>99</sup> 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.<sup>100</sup>

19.90 If a person satisfies the requirements, DHS may release a single lump sum of an amount reasonably required, taking account of the ground upon which the application was made and the applicant's financial capacity.<sup>101</sup>

19.91 The DHS *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (Guidelines) provide guidance to DHS assessors.<sup>102</sup> 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 capacity 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'.<sup>103</sup>

19.92 Throughout this Inquiry, stakeholders have commented on two key areas in relation to early release on compassionate grounds. The first is the current administration of the compassionate grounds—the ALRC recommends additional training and guidance in this regard. The second relates to options for reform of the compassionate grounds—the ALRC does not recommend amendment to existing compassionate grounds or creation of a new ground to account for early release for purposes stemming from family violence.

98 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1). In *Flanagan v APRA* [2004] FCA 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: APRA, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010) 52–65.

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

100 See *Ibid* reg 6.19A(2)–(5).

101 The sum must not exceed an amount determined by DHS 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.

102 The ALRC understands these Guidelines were transferred to DHS but mirror the former APRA, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010).

103 *Ibid*, 8.

***Administration of compassionate grounds***

19.93 Administration of early release of superannuation on compassionate grounds was transferred from APRA to DHS following legislative changes in September 2011.<sup>104</sup>

19.94 Throughout the Inquiry a number of stakeholders expressed general concerns about the administration of compassionate grounds. For example, the Ombudsman expressed the view that assessment of applications for early release of superannuation on compassionate grounds ‘should involve processes capable of identifying and responding to vulnerable applicants’ and that ‘the process should have the flexibility to identify vulnerable applicants at any stage and ensure that a single assessor is responsible for their application’.<sup>105</sup>

19.95 DHS has advised that upon transfer of responsibility for administration, the assessment team was transferred from APRA into DHS and that while there is a ‘sense of continuity in the management of the program’, a number of ‘service delivery improvements’ are planned.<sup>106</sup> The improvements will in part draw upon the experience and resources of the broader DHS portfolio to provide financially vulnerable customers, including those seeking early access to superannuation, with increased and coordinated support and access to services as well as case management.<sup>107</sup>

19.96 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 DHS. The ALRC considers that many of the service delivery improvements planned by DHS in this area appear positive. However, where a compassionate ground may otherwise be made out, the ALRC considers that the Guidelines and associated training may be two areas in which the administration of compassionate grounds may be amended to account for applicants experiencing family violence.

***Time period***

19.97 The Service Delivery Agreement between APRA and DHS requires applications for early release on compassionate grounds to be assessed by DHS within 10 business days; however ‘this turnaround time can increase in busy periods’.<sup>108</sup> DHS also administers ‘prioritisation criteria which allow for applicants in certain circumstances to have their applications assessed within 48 hours of prioritisation being approved’.<sup>109</sup>

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104 *Superannuation Legislation Amendment (Early Release of Superannuation) Act 2011* (Cth). Between February and September 2011, APRA delegated responsibility for early release on compassionate grounds to DHS following Machinery of Government Changes: DHS, *Submission CFV 155*.

105 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

106 DHS, *Consultation*, by telephone, 30 September 2011.

107 *Ibid* *Consultation*.

108 DHS, *Submission CFV 155*.

109 *Ibid*.



19.98 Of the complaints the Ombudsman's office investigated in 2010 about 'processing of applications for approval of early release of superannuation on compassionate grounds', the Ombudsman 'found that ... delay was attributed to two main factors'—'complainants reported difficulty in understanding or obtaining the documents' required, and 'APRA's administrative arrangements concerning the order in which applications are assessed and reassessed can cause delays in processing'.<sup>110</sup>

19.99 The ALRC suggests that, in the course of developing and revising material made available to customers wishing to make an application for early release, or with respect to the application forms themselves, DHS should consider any changes that could usefully be made to more clearly outline the process and documents required in support of an application for early release. The ALRC considers that the DHS case management approach and prioritisation criteria may assist in addressing some stakeholder concerns with respect to administrative arrangements and associated delays.

### **Guidelines**

19.100 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 that DHS should amend the Guidelines to ensure that they:

- contain a definition of family violence;<sup>111</sup>
- 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.<sup>112</sup>

### **Training**

19.101 DHS has advised that in late 2011 and early 2012, it will review and implement training of assessors in order to ensure sensitive and appropriate customer engagement:

Recently we have rolled out training around disability awareness, mental health issues ... by extension, we could look at rolling out training for family violence issues.<sup>113</sup>

19.102 The ALRC considers that the amendment of the Guidelines to include family-violence related considerations, case management and new administration

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110 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

111 As recommended in Rec 3–4.

112 This is linked to the issue of separation under one roof in the context of social security considered in Ch 6. Supported by AIST, *Submission CFV 146*.

113 DHS, *Consultation*, by telephone, 30 September 2011.

arrangements provide a useful opportunity to introduce consistent, regular and targeted training in this respect.<sup>114</sup> The ALRC recommends that DHS staff involved in assessing applications for early release of superannuation on compassionate grounds should be provided with training in relation to family violence, including: the potential impact on applicant's circumstances; and responding appropriately to applicants who disclose, or who are experiencing, family violence.

### ***Options for reform***

19.103 The ALRC does not consider it is appropriate to include family violence as a purpose for which an applicant may apply for early access on compassionate grounds; or to create of a new ground of early release on the basis of family violence.

19.104 Broadly speaking, several 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.<sup>115</sup> 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.

19.105 Many stakeholders however reiterated the overarching policy concerns as the basis for opposing the inclusion of an additional ground, emphasising the importance of preservation of superannuation benefits until retirement, and argued that this policy objective should prevail over expanding grounds for early release.<sup>116</sup>

19.106 The ALRC notes that if reg 6.19A of the *SIS Regulations* were to be amended, the ALRC considers the preferable approach would be to add family violence to the existing list of purposes for which an applicant may apply for early release on compassionate grounds. In doing so, the ALRC considers that any such ground should be subject to the same eligibility criteria as the existing purposes.<sup>117</sup> However, careful consideration of the types of information applicants might reasonably be required to provide to DHS in support of their application would be necessary,<sup>118</sup> and 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.<sup>119</sup>

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114 Confidential, *Submission CFV 165*; National Welfare Rights Network, *Submission CFV 150*; AIST, *Submission CFV 146*.

115 ASFA, *Submission CFV 154*; AIST, *Submission CFV 146*; ACTU, *Submission CFV 39*; Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; WEAVE, *Submission CFV 14*.

116 ASFA, *Submission CFV 24*. See also ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*.

117 ACTU, *Submission CFV 39*.

118 Ibid; Commonwealth Ombudsman, *Submission CFV 16*.

119 Commonwealth Ombudsman, *Submission CFV 16*.

**Recommendation 19–5** In any guidelines for early release of superannuation benefits on compassionate grounds, the Department of Human Services should incorporate information about family violence. This should include 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.

**Recommendation 19–6** Department of Human Services staff involved in assessing applications for early release of superannuation on compassionate grounds under the *Superannuation Act 1976* (Cth) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be provided with consistent, regular and targeted training in relation to family violence, including:

- (a) the potential impact of family violence on applicants' circumstances; and
- (b) responding appropriately to applicants who disclose, or who are experiencing, family violence.

## Other issues

### *Contacting applicants*

19.107 In situations involving family violence, an applicant 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 applicant experiencing family violence may be jeopardised in circumstances if the superannuation fund or DHS contacts them in relation to their application.

19.108 In the course of this Inquiry stakeholders advised that applicants are contacted using the 'contact details nominated', which includes a preferred telephone number and a postal address that can be separate from the residential address.<sup>120</sup> AIST emphasised that fund staff 'do not acknowledge that an application has been submitted unless it has confirmation that it is speaking to the member concerned'.<sup>121</sup> AIST also advised that most superannuation fund 'administration systems facilitate the inclusion of a "flag" on the member's account to indicate special treatment when the account is accessed in the future'.<sup>122</sup>

19.109 However, ASFA indicated that it is difficult to suggest a mechanism that would guarantee the safety of members experiencing family violence as there is 'no guarantee as to who is controlling the application', the person using or experiencing family violence.<sup>123</sup>

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120 DHS, *Submission CFV 155*.

121 AIST, *Submission CFV 146*.

122 Ibid.

123 ASFA, *Submission CFV 154*.

19.110 The ALRC makes no recommendations in this regard, but suggests that any family violence-related training provided to DHS and superannuation fund staff could assist in raising awareness about the potential use of existing processes such as identity verification and administrative flags where family violence is identified.

***Data collection***

19.111 The guiding principles developed in the course of the Super System Review include principles with respect to the need for high quality research and data.<sup>124</sup> The ALRC understands that as part of the Stronger Super reforms APRA will be ‘collecting greater levels of data’.<sup>125</sup>

19.112 Accordingly, given the importance of comprehensive data in providing a sound evidence base upon which the Government can make future policy in this area, the ALRC suggests that superannuation funds, AIST, ASFA, APRA and DHS should consider ways in which early release data could be captured in order to provide a ‘better understanding ... of whom and why members are trying to access early release of their benefits’.<sup>126</sup> This would be particularly useful in the course of any future consideration of whether family violence should be added to the existing list of purposes for which an applicant may apply for early release of superannuation on compassionate grounds.

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

125 AIST, *Submission CFV 146*.

126 *Ibid.*