



AIST submission

**Response to ALRC: Family Violence and
Superannuation Law (DP 76)**

October 2011

Background

The 2010 inquiry into family violence by the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission identified issues beyond its scope relating to the impact of Commonwealth laws (other than the *Family Law Act 1975*) on those experiencing family/domestic violence.

In addition, the 2009 report of the National Council to Reduce Violence against Women and their Children, *Time for Action*, acknowledges the importance of examining Commonwealth laws that have an impact upon the safety of women and children.

The ALRC released Issues papers in March 2011, one of which focused on Employment and Superannuation Law. AIST made a verbal submission to this paper and was also involved in an expert panel that reviewed the findings.

This discussion paper (DP76) subsequently generated sets out an overview of the policy framework and sets out specific questions and proposals to be considered in submissions.

AIST

The Australian Institution of Superannuation Trustees (AIST) is a national not-for-profit organisation whose members are superannuation fund trustee directors and officers of industry, public sector, and corporate superannuation funds who operate with a representative Trustee Board of Directors.

AIST advocates on behalf of its members, it undertakes research, develops policy and provides professional training, consulting services and supports trustee directors and staff to help meet the challenges of managing superannuation funds and advancing the interests of their fund members. AIST members manage \$450 billion of retirement savings for Australian workers.

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Executive Summary

AIST welcomes the opportunity to make a submission to the ALRC regarding family violence and superannuation law. AIST and the not-for-profit superannuation funds that it represents are cognisant of the enormous damage and sufferings caused by domestic violence and, where possible, deal with such matters with prompt and sympathetic approach.

However, AIST is of the view that a significant underlying risk of early release under family violence provisions is that a victim may be coerced by an offender to apply for money to be released for the express benefit of the offender. Therefore, the feature of preservation for superannuation monies and the fact that the monies are held in trust provide a high level of protection for victims of family violence. Notwithstanding the express need for victims to access money, we do not believe that these facts should be ignored.

We agree with the proposal from the ALRC that trustees of APRA regulated funds should not be obliged to consider an application for superannuation contributions splitting is being made as a result of coercion. Further, AIST would not be opposed to a review for the revocation of superannuation contributions splitting.

AIST supports greater education for SMSF trustees and agrees that the awareness of the effects of family violence for SMSF trustees can be part of this education process. SMSFs are predominantly run by spouses (with the male partner predominantly being the driving force) so it is our opinion that issues associated with family violence should be dealt with by the relevant court system.

AIST proposes that family violence be added as a new category under the current compassionate grounds early release condition rather than creating a new condition purely for family violence. We feel the creation of a new category may have differing criteria for release and may be manipulated by perpetrators of family violence in order to access victim's money.

AIST is happy to work with other industry bodies to assist the relevant government departments to develop guidelines to assist trustees and victims when dealing with cases of family violence.

Response

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?

AIST agrees with the ALRC's proposition that trustees should not have an express obligation to take family violence into account with regards to superannuation contributions splitting applications. Although the definitions and conditions for contributions to be split is currently narrow and there is also a maximum amount based on the applicable concessional contribution limit, superannuation guarantee and salary sacrifice payments are included within the definition. Protection of these contributions in particular should be paramount.

Whilst we understand that this question relates specifically to the subject of contribution splitting, we should point out that we do not support changes to existing family law splitting of superannuation interests.

As discussed in previous consultations, the establishment of clawback provisions where family violence is proven in a court of law would provide restitution to the victim. The clawback provisions should allow for non-super monies to be used to repay the victim and also investment performance should be taken into account.

AIST would not be opposed to a review for the revocation of superannuation contributions splitting, however we understand that this is outside the scope of this review.

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.

AIST agrees with this proposal.

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?

AIST is not of the opinion that the ATO should be required to consider family violence when determining appropriate compliance action. However, should the ATO be alerted to the fact that family violence is a key component of the failure to comply with superannuation or taxation law (most likely through the court system), then the ATO should ensure its subsequent decisions do not impact on the victim (e.g. non-complying fund status, forced sale of asset which may have adverse capital and tax consequences, etc).

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?

Additional education content on the responsibilities of an SMSF trustee and rules on the operation of running an SMSF would be helpful. Specifically, information and warnings should be included with respect to family violence/fraud and the effect this can have on a potential victim's superannuation savings. Suggestions and examples of best practice, such as joint signatories on bank accounts, would also equip trustees with greater knowledge of how to protect their interests. This information should be made available to SMSF service providers (ie accountants, auditors, financial planners) so that they can begin to advise and implement such best practice.

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

The fact that interests in superannuation are visible to the court and they can be divided in the event of marriage breakdown make it more equitable for victims and ensure monies cannot be hidden or preserved in super. As mentioned in the discussion paper, the majority of SMSFs have two trustees and most of these would be spouses. Therefore the SMSF should be considered effectively as a joint asset of the couple and dealt with by the family or criminal courts.

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.

AIST agrees with this proposal.

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?

One difficulty may come in proving that one cannot meet reasonable and immediate family living expenses. There may be scope for the superannuation industry bodies to create trustee guidelines to help both applicants provide the necessary documentation to allow trustees to make a quicker and more informed decision.

Another difficulty is proving receipt of Government income payments. A suggestion would be the availability of a standard document from Centrelink stating the period of receipt of payments that can be ordered or downloaded.

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'?

AIST does not recommend that the above mentioned payments be included as payments to access early release, notwithstanding those individuals in receipt of these payments can be subject to

family violence. Our concern falls back to the primary purpose of superannuation to provide a retirement income. Further, and generally speaking, recipients of the above mentioned payments will most likely have very low levels of superannuation and therefore any early lump sum releases will have a significant impact on the total level of superannuation. Recipients of youth allowance are necessarily young (under 25) and will have low levels due to their short time in the superannuation system. Recipients of CDEP do not actually receive SG contributions as part of the payments and therefore may have no superannuation at all. Issues regarding indigenous Australians and superannuation (e.g. Proof of Identity, lost super, preservation age) are both widespread and significant. Further, if early access is granted to individuals with low superannuation balances there may be a risk that they could lose their insurance benefits.

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?

Yes, AIST supports the proposal that the types of payments mentioned above should be included. The applicant will still need to successfully meet the condition that they cannot meet reasonable and immediate family living expenses.

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?

Yes. See also our answer to Question 19-9

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?

AIST would be happy to work with APRA alongside the other superannuation industry bodies to develop suitable guidance for trustees with regard to early release of superannuation on the basis of ‘severe financial hardship’.

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?

Superannuation funds typically have a service-standard to pay benefits within 3-5 days of receiving all required information/documentation. Generally, financial hardship claims are given priority and are typically handled faster than other claims.

A claimant may perceive delays/obstructions by the fund, however these are primarily due to the need to obtain proof of eligibility for financial hardship. This is generally through establishing if the claimant has been receiving Government support for 26 weeks which can be done electronically after gaining member approval. Another difficulty for victims of family violence can be providing the necessary ID as required to meet AML/CTF obligations and funds also use this ID check to minimise the risk of fraud.

Funds usually encourage payment directly into the bank account of the member, but only after written evidence is provided that prove that account is in the name of the member (victim). Bank account payments are not considered appropriate if it is a joint account with the “family violence offender” as this could allow the offender to gain access to the money or worse, that the offender is coercing the victim to release monies for their explicit benefit.

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?

Superannuation funds do not have direct transparency regarding delays APRA processes. Members apply directly to APRA and are only generally involved once APRA issues their release authorisation.

The requirement for documentary evidence to support an application limits the scope for APRA to allow online applications.

It is noted that this process is now managed by Medicare Australia.

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.

AIST agrees with this proposal and is willing to assist APRA (or Medicare Australia) in amending the guide.

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?

AIST agrees that a new category regarding family violence be included under early release under compassionate grounds.

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?

AIST is not supportive for the creation of a new condition of early release purely for victims of family violence. It is our opinion that it can be sufficiently covered by the inclusion of a family violence category under the current compassionate grounds conditions. We fear that the creation of a new condition which may have different requirements for early access to super may become a focus of abuse in circumstances involving fraud and coercion.

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?

It is our understanding that some applications already include details of family violence (albeit voluntarily included by the victim to support their case). In the cases of financial hardship and compassionate grounds, the amendment of the form to allow applicants to provide more relevant details and the provision of guidelines for both applicants and decisions makers (fund staff and APRA staff) is supported.

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?

Financial hardship applications are generally reviewed by senior fund staff. As mentioned above, some applications already include details of family violence which can be disturbing for the reviewer. We agree that it is appropriate that staff should be suitably trained to assess such claims and similarly, to have access to support if confronted with severe cases. The staff also need to be given the authority and latitude to make decisions quickly and sympathetically in these cases, particularly around the member proving the violence occurred.

With regards to compassionate grounds, since this is proposed to be under the auspices of APRA, we consider that a centralised unit would quickly gain the knowledge and expertise to deal quickly and professionally with these claims.

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

With regards to superannuation funds, the member makes initial contact through a fund call centre, typically. Family violence cases can advise of a change of address at that time. Communication, including issue of any forms, would be determined at that stage. Most 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

(b) the disclosure of information about the application?

Funds recognise the sensitivity of financial hardship applications and respect the privacy of the individual. Funds do not acknowledge that an application has been submitted unless it has confirmation that it is speaking to the member concerned. Information contained on the application are not disclosed which may identify the victim’s new contact details.

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?

AIST does not believe that that time period should be reduced to 30 days from 90 days as we feel this may lead to rushed responses and superficial analyses in order to meet the deadline. In these instances, there is often the need to consult with an insurer, obtain tax/legal advice or retrieve correspondence from archives. Also the fund staff member involved in the complaint may be on leave, for instance, and this staff member should be given the opportunity to rebut the claim.

Further, and more generally, some complaints require complex calculations with regards to changing investment options over long time periods including transactions. Such calculations are specialised and require expert support. It should be noted that “simple” complaints are usually resolved in relatively short time frames. Certainly not all complaints take 90 days to complete. We also do not believe that a special case should be made for family violence cases as this will create a two tiered system.

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?

As part of Stronger Super, APRA will be collecting greater levels of data and AIST would support the inclusion of early release data to be provided to APRA for collation for APRA regulated funds. All early release data should be captured so a better understanding can be gained of whom and why members are trying to access early release of their benefits. The data should be provided on an annual basis as part of normal data provisions to APRA. It will need to be flagged with APRA and the ATO as the required data fields will ideally need to be included in the SuperStream (SBR) taxonomy.