

**Submission to the review of  
the early release of  
superannuation benefits**  
Submission by Legal Aid Queensland



# Review of the early release of superannuation benefits

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission to the Treasury Consultation on the review of the early release of superannuation benefits. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit lawyers have extensive experience providing specialist advice and representation to clients in consumer law and NDIS matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to NDIS mortgage stress, housing repossession, banking and financial issues, financial hardship and the early release of superannuation insurance, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ regularly assists and represents clients who are considering applying for the early release of superannuation for a variety of reasons. This submission is informed by that knowledge and experience.

## 1. Principles Underpinning Early Release of Superannuation

*0.1. Do these proposed principles provide an appropriate guide to determine the nature and scope of the rules for early release under compassionate and financial hardship grounds, and for victims of crime compensation? If no, what should the principles be?*

LAQ supports the principles outlined on page VI of the paper as an appropriate guide in determining the grounds for the early release of superannuation funds under compassionate and financial hardship grounds.

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

In LAQ's submission, the early release of superannuation should be difficult to obtain because:

- (a) It is important that superannuation provide some income for consumers during retirement; and
- (b) Consumers should only be able to access superannuation when they are in severe financial trouble.

In this context, LAQ believes a benefits test may be appropriate by asking, in the context of the four principles mentioned, whether the release of funds is for the consumer's long term benefit and whether such a benefit is likely to endure into a consumer's retirement. If a consumer is proposing to access their superannuation savings prior to retirement age (or preservation age as the case may be) then it is worth considering whether the early release of funds would provide a long term benefit to the member in a manner different to accumulating a financial reserve.

## **2. Part 1 Early Release on Compassionate Grounds**

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

LAQ does not support a more prescriptive application of the financial capacity test for the early release of superannuation of compassionate grounds. In LAQ's submission it is important that any compassionate early release of superannuation is based upon a consumer's individual circumstances because the objective should be to assist them to deal with their difficult circumstances. A more prescriptive approach makes it harder for decisions to be based upon the individual circumstances of the consumer.

### *1.2 What factors might be driving the increase in the amount of superannuation released on medical grounds and are these factors any cause for concern?*

In LAQ's submission the increase in the amount of superannuation released on medical grounds is in part driven by:

- (a) The increased costs of basic living expenses such as food, electricity and other utilities.
- (b) An ageing population;
- (c) Increased awareness among consumers about their rights to access superannuation on medical grounds. and
- (d) Costs of medical treatment and the difficulties faced by individuals in accessing the public health system.

The continued increased cost of basic necessities is likely to see requests for early access to superannuation for medical expenses and on the grounds of severe financial hardship continue to increase.

### *1.3 Do the current provisions for early release on medical grounds strike the appropriate balance between preserving income for retirement and providing assistance in times of genuine hardship? If no, what are the alternatives?*

LAQ supports the current balance being maintained.

*1.4 Should there be a limit on the number of releases permitted within a certain timeframe (for example, 12 months) and/or should there be cashing restrictions on the amount released? If so, should there be different restrictions for different medical conditions?*

LAQ prefers such restrictions focus on:

- the legitimacy of proposed early releases; and
- whether a proposed early withdrawal will provide a long term benefit that otherwise can't be funded from a member's personal assets or other avenues available to them (e.g. government schemes).

*1.9 Should the rules explicitly require that the Regulator be satisfied that the amount claimed for a particular treatment is 'reasonable'? If so, what evidence might be relevant to that determination?*

LAQ supports the rules requiring the Regulator to be satisfied that the amount claimed for a particular treatment is reasonable.

As a mechanism to ensure claimants are paying a reasonable price for goods and services funded by the early release of their superannuation, LAQ suggests potential claimants provide quotes from at least three providers and that the Regulator develop a knowledge of market rates for various services to ensure third parties are not inducing claimants to release more than a reasonable amount of funds to pay for their products and services.

*1.11 Should SIS Regulation 6.19A(3)(a)(ii) and (iii) be amended to refer to 'treatment' rather than 'alleviation' of acute or chronic pain? Alternatively, should those provisions be removed entirely (so that early access is only available where the individual's condition is life-threatening)? What would be the consequences of this approach?*

LAQ supports the early release of superannuation being available for the alleviation of acute or chronic pain. In LAQ's submission, part of the consideration about the need to ensure superannuation is preserved is that superannuation should be available to improve a person's quality of life as they get older. The alleviation of acute and chronic pain is a way of improving the quality of life of individuals.

*1.12 Should the reference to a medical specialist in SIS Regulation 6.19A(3) be clarified to ensure that the practitioner is a specialist in the field most relevant to the condition being treated?*

LAQ supports the rules being clarified to ensure that the medical practitioner is a specialist in the field most relevant to the condition being treated. However, LAQ would note that individuals seeking to access superannuation on these grounds can often find it very difficult to obtain an appointment with a relevant specialist in a reasonable time. Consideration should be given by the government as to how these waiting times can be reduced.

*1.13 Should the Regulator be entitled to seek a second opinion from an approved medical practitioner/s, or should the individual be required to obtain a reference from a list of approved medical practitioners, to ensure the objectiveness of the assessment?*

LAQ is concerned that requiring a 2<sup>nd</sup> medical opinion would unreasonably and unnecessarily raise costs for individuals seeking to access early release of superannuation on medical grounds.

*1.14 Should early access to superannuation benefits to meet expenses associated with palliative care, death, funeral or burial be limited to where there is a dependency relationship? Why/why not? Could there be any unintended consequences from expanding this provision?*

LAQ:

- supports early access to superannuation benefits for palliative care for an individual from their own superannuation.
- does not express a view about whether an individual be permitted to use their superannuation to fund palliative care for a dependant.
- does not support anyone other than the member or their dependants benefitting from an early release of a member's superannuation for palliative care.

LAQ supports the current restriction and is not aware of any existing problem that would require a relaxing of the existing system beyond the dependency relationship.

*1.15 Should there be a maximum amount that can be released to meet a funeral expense? (For example, the amount that the Regulator considers reasonable).*

LAQ supports the Regulator being given the discretion to determine what is a reasonable amount for funeral expenses because it allows the Regulator to make decisions based on what is fair and reasonable in each claimant's individual circumstances.

*1.16 Should early release of superannuation benefits be available to meet mortgage payments regardless of whether a person's name is on the mortgage title for their principal place of residence? What might be the implications of broadening the provisions in this way and what additional limitations might be required? For example, should release be limited to dependants or spouses or partners?*

LAQ recommends caution in regards to early release of superannuation to fund mortgage payments.

LAQ is concerned that allowing the early release of superannuation benefits to meet mortgage repayments even if that person is not named on the mortgage puts that person at risk of:

- (a) Elder abuse;
- (b) Domestic violence; and
- (c) Undue pressure being placed on a person by their family to access superannuation when it would not benefit them.

Also, LAQ has observed that while an early release of superannuation to clear mortgage arrears may be useful in giving the mortgagor time to find a buyer or perhaps address short term financial stress, in many instances such releases are ineffective and increase losses to the mortgagor. This is common where mortgagors have little equity in their property, have little prospect of servicing their debt, have a property located in a depressed market or have some other difficulty in selling their property. In these situations it is

often only the mortgagee who benefits from early release since they are obtaining a source of payment that would otherwise not be available to them. The mortgagor in these situations has done little more than expose their otherwise protected superannuation funds for no benefit.

To deal with these problems LAQ proposes the following for consideration:

1. An ability for the superannuation fund to claw back such payments from financiers if the home owner does not continue to occupy the subject property for a minimum period (e.g. three years) or, in the case of a sale during that period, the sale price less transactional costs (e.g. agents commission, conveying fees and outlays) does not cover the costs of removing the mortgage (e.g. principal debt, legal fees and Land Titles Office costs for removal of mortgage). Where there is a surplus then the superannuation fund should be able to claw back the amount released.

Instead of clawing back these funds, the early release may also operate as a loan to ensure it may be repaid. Such a loan may be registered as a mortgage or caveat as the case may be.

2. The mortgagee demonstrates that a minimum level of equity (as a percentage of market value) is held in the home. The purpose is to use this test as a means of limiting early releases to those situations where the owner is likely to continue long term ownership.

*1.17 Is there a fundamental difference between meeting mortgage payments and meeting rental payments which would warrant a difference in treatment (for example, in respect of the asset available to mortgagees once all repayments have been made)? Or should early release on compassionate grounds be extended to include individuals who are unable to meet rental payments? If so, what evidence should be required and what should be the threshold for release (for example, in rental arrears or rental eviction notice)?*

In LAQ's submission there is a fundamental difference between accessing for mortgage and accessing superannuation for rental payments. Paying a mortgage preserves an asset that an individual can live in as they get older and it also builds wealth for the individual as equity is built up in the home. Conversely, accessing superannuation to pay rent is a short term fix that may not resolve the problems an individual is experiencing and does not build wealth or equity.

*1.18 Are the current disability grounds fit for purpose, or should early release be extended, for example, to disability aids? If the latter, which expenses should be included, what evidence should be required, and should there be a cap on funds released?*

LAQ does not express a view about this issue but does draw the Review's attention to the fact that the establishment of the NDIS has created a robust system with a clear application process and criteria which should be relied upon when considering requests for disability aids or on other disability grounds. If after application of the internal and external review process the disability aid is found not to be reasonable and necessary it is difficult to see how access to early release of superannuation to fund such a disability aid could be justified.

Where a person is unable to access the NDIS because they do not meet the disability criteria then there may be some argument to support early release of superannuation to meet health needs.

There should be recognition that access to superannuation for these aids should be an avenue of last resort and only for that subset of people who cannot access the NDIS.

*1.19 Should individuals seeking early release of superannuation under disability grounds be required to demonstrate that they have sought assistance from other Government or non-Government programs prior to being approved? If so, how should this requirement be administered?*

LAQ refers to the response provided to Question 1.19.

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

LAQ supports the Regulator's residual discretion being maintained because it provides the regulator with greater scope to make decisions based on the individual circumstances of each claimant.

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

LAQ does not support the expansion of the current compassionate grounds for the early release of superannuation.

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

LAQ does not support the expansion of superannuation benefits to those individuals affected by domestic violence because:

- it risks exacerbating the existing imbalance in superannuation balances between men and women.
- There is a substantial risk such withdrawal will benefit the perpetrator; and
- Victims typically have immediate needs and the response to applications is unlikely to be timely.

### **3. Part 2: Early Release on the Grounds of Severe Financial Hardship**

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

LAQ supports changes to the rules which apply to the early release of superannuation on the grounds of severe financial hardship.

In LAQ's experience:

- (a) Individuals who are receiving Commonwealth income support payments are in severe financial hardship well before the current 26 week exclusion period;
- (b) Many individuals such as those people born overseas are unable to access superannuation when in severe financial hardship because they are not eligible for income support payments.
- (c) Individuals receiving benefits other than income support payments often find themselves in severe financial hardship but unable to access their superannuation.

LAQ supports the loosening of the current rules to allow those individuals in the circumstances outlined above to access their superannuation early when they experience severe financial hardship.

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

LAQ does not support a prescribed standard of proof for “unable to meet reasonable and immediate family living expenses.” In LAQ’s submission, it is important that flexibility be maintained during this process so that the individual circumstances of each applicant are taken into account.

#### **4. Part 3: Victims of Crime Compensation**

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

LAQ does not have a view either way but draws the Review’s attention to the following:

- (a) Superannuation is protected in bankruptcy proceedings.
- (b) Superannuation cannot be accessed in general civil enforcement proceedings
- (c) Many perpetrators suffer from mental health issues and other social exclusion issues. Allowing their superannuation to be accessed in these circumstances is likely to exacerbate these health issues and further increase their social exclusion.

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

LAQ does not express a view about this issue but draws the Review’s attention to Chapter 3 Part 16 of the Victims of Crime Assistance Act 2009 (QLD) which assists the State to recover financial assistance for an act of violence from a person who is convicted of a relevant offence for the act. Notice should also be given to the time limit for recovery under section 110A of the above Act.

*3.3 Should access to a perpetrator’s superannuation be available for compensation or restitution arising from all crimes, just violent crimes, or another threshold (such as the maximum penalty for offence)?*

LAQ does not express a view about this issue.

*3.4 Should access to a perpetrator’s superannuation only be available if the perpetrator made irregular or out of character contributions to superannuation to shelter assets?*

LAQ does not express a view about this issue.



*3.5 How would a victim's right to a perpetrator's superannuation be enforced? How would the victim gain visibility over the perpetrator's superannuation assets?*

LAQ does not express a view about this issue.

*3.6 How much of a perpetrator's superannuation should be available? Should the amount be different based on the perpetrator's circumstances (for example, low balances, dependent children)?*

LAQ recommends a balance at least sufficient to cover life insurance premiums for the perpetrator's period of incarceration be preserved. This would ensure that in the event the perpetrator dies during incarceration that life insurance would be available to fund compensation orders and be available to assist the perpetrator's superannuation death benefit dependants. Otherwise LAQ has no firm views.

*3.7 Should access to a perpetrator's superannuation be in the form of a lump sum, portions of income stream payments or both? How should defined benefit products and annuities that have not yet commenced payments be treated?*

LAQ does not have a view.

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

LAQ does not have a view.

*3.9 Where a criminal conviction has been made, should victims be able to access a perpetrator's superannuation to pay either outstanding compensation or restitution orders?*

LAQ does not have a view either way.

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

LAQ does not have a view either way but draws the Review's attention to Chapter 3 Part 16 of the Victims of Crime Assistance Act 2009 (QLD) which assists the State to recover financial assistance for an act of violence from a person who is convicted of a relevant offence for the act. Notice should also be given to the time limit for recovery under section 110A of the above Act.

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

In LAQ's experience, there are a significant number of family law property settlement proceedings where the only asset being divided is the superannuation. In LAQ's submission, the family law property settlement proceedings should be prioritised before the victims of crime compensation proceedings are resolved. Any recovery by victims of crime should be from the perpetrator's share.

The main issue LAQ sees is whether an order for payment arising from victim of crime proceedings would be treated as a debt to be deducted from the perpetrator's and their partner's asset pool or whether it is to be borne by the perpetrator alone.

If deducted from the partners' shared pool, then the innocent partner risks contributing to the victim's compensation. If deducted from the perpetrator's assets only, there is a risk perpetrator's may separate from their partners to preserve their assets since a separation would see the partner take a good share of the assets and take that share out of the victim's reach.. LAQ views the former as more likely to occur and would therefore prefer such orders be paid by the perpetrator alone and without any direct or indirect contribution from the innocent party.