



Australian Government  
The Treasury

**TSY/AU**

# Review of Early Release of Superannuation Benefits

Further consultation and draft proposals  
November 2018

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# Consultation process

## Request for feedback and comments

Interested parties are invited to comment on this consultation paper. While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions **will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence**. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Closing date for submissions: 15 February 2019

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# 1. Executive summary

In December 2017, the then Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, announced that the Treasury would undertake a review of the current framework for the early release of superannuation benefits on compassionate grounds and severe financial hardship grounds ('the Review'). A consultation paper was released on 20 December 2017 and submissions were open until 12 February 2018. Treasury received over 60 submissions, held 10 roundtables and conducted numerous bilateral meetings with stakeholders.

The consultation paper looked at three key issues. One of these issues was whether, and if so the circumstances in which, superannuation should be available to pay compensation to victims of crime. This issue is now being handled through a separate process. A further paper focused solely on victims of crime and superannuation was released for consultation between 28 May and 15 June 2018.

The other two issues raised in the December 2017 consultation paper were whether the current rules governing the early release of superannuation on both compassionate grounds and severe financial hardship grounds remain fit for purpose. The paper proposed four guiding principles (see Box 1) that need to be balanced in the design of rules for early release. Stakeholders broadly supported these principles.

## Box 1: Four guiding principles

- **Preservation:** Superannuation benefits should generally be preserved to provide income in retirement to substitute or supplement the Age Pension. Early access to superannuation for other purposes is inconsistent with the preservation principle.
- **Hardship<sup>^</sup>:** There will be circumstances where the benefits of early access to superannuation for an individual will exceed the benefits of preserving balances until retirement. The challenge for policy-makers is to identify the point at which the need for compassion outweighs the broader policy objective of the superannuation system.
- **Last resort:** Early release of superannuation benefits should generally be a last resort where other sources of financial support have been exhausted. It is not an appropriate replacement for existing health and income support policies.
- **Fair and effective:** The rules should be able to be administered fairly and effectively; that is, the rules should be sufficiently clear and objective to allow applications to be dealt with in a timely and consistent fashion, and ensure that similar cases can be treated alike. Rules that are highly subjective in nature will necessarily cause more red tape, expense and difficulty for applicants, trustees and Government.

<sup>^</sup>The consultation paper suggested the principle of 'genuine hardship'. This has now been amended to remove the word 'genuine', based on stakeholder feedback that it is unnecessary and a value judgement.

Informed by consultations the Review concludes that there is strong support for continuing to allow early release of superannuation on compassionate and severe financial hardship grounds in certain circumstances. There was scant support for substantially curtailing early release through the introduction of much stricter preservation rules. Some stakeholders questioned why individuals should be required to pay for services by accessing their superannuation rather than receiving them from the taxpayer. This was most evident in relation to medical treatment and support for victims of family and domestic violence. However there was also recognition that early access to superannuation could be beneficial in a world of finite government resources, as a supplement to other forms of support.

Consultation did not indicate any widespread view that the current rules are fundamentally flawed or require profound change. Rather, most stakeholders focused on the details of how the current rules operate and proposed refinements to slightly tighten or loosen eligibility criteria and other rules.

The Review has concluded that the existing arrangements governing early release on compassionate and severe financial hardship grounds remain broadly appropriate. However, the Review also considers that there is scope to change the current arrangements at the margins to ensure they operate as intended.

The consultation paper sought comment on two potential extensions to the existing compassionate grounds for early release. The first related to victims of family and domestic violence. The second related to rental arrears. There was more support for the former than the latter (although there were arguments made for and against both proposals in consultations). Broader policy arguments also influenced the Review's final proposals.

The consultation paper also sought comment on whether the existing grounds should be tightened or relaxed. In particular, it questioned whether the recent rapid increase in the amount of superannuation released early on medical grounds was cause for concern. Here again, there were mixed views. On the one hand, it was noted that new medical treatments are becoming available but that these may be rationed in the public health system and in private health insurance coverage (e.g. bariatric surgery). On the other hand, there were concerns that some aspects of the current framework were too lax and potentially open to abuse so that superannuation is being accessed as a first rather than as a last resort. Reflecting these views, the Review has proposed a number of refinements to the rules to ensure the integrity of the system.

Finally, the consultation paper sought views on the administration of the rules. The Review heard two different views on this issue. The first was that the rules should be made much more flexible and allow the Regulator more discretion. The second was that the rules should be made more uniform and consistent; and relatedly that trustees should have a predictable set of rules rather than being required to make judgements on a case-by-case basis.

On this issue, the Review has come down in support of the latter approach. The Review considers that the rules need to be clear to ensure that they can be administered fairly and effectively, even if this means some lack of flexibility for particular circumstances. This is reflected in proposals on eligibility rules and certification requirements for early release on compassionate and severe financial hardship grounds, as well as for the future administration of severe financial hardship applications.

This consultation paper sets out the Review's findings and draft proposals for reform.

**This paper seeks stakeholder views on five proposed changes that would relax aspects of the current regime and provide more scope for individuals to obtain early release of their superannuation.**

- A new compassionate ground of release should be introduced to allow victims of family and domestic violence to gain early access to their superannuation up to a total cap of \$10,000 over a 24 month period. This would supplement existing government and non-government schemes and assist individuals who have experienced family and domestic violence to get back on their feet and begin the process of recovery.
- Compassionate grounds should be extended to include explicit reference to dental treatment being permissible for treatment of a life threatening condition, or acute and chronic pain. This should be subject to broadly equivalent safeguards and evidentiary requirements that apply to other medical treatment, to the extent possible. This will help ensure that dental conditions are treated in the same way as other medical conditions.

- Compassionate grounds should also be extended to explicitly permit early access to superannuation for the purchase of disability aids and modified vehicles on the basis of certification from a medical practitioner that the aid or vehicle is necessary to accommodate the special needs of the individual or a dependant arising from a severe disability.
- The definition of severe financial hardship should be relaxed so that individuals would be eligible for early release if they have been receiving qualifying Commonwealth income support payments for 26 cumulative weeks out of 40 weeks (rather than 26 consecutive weeks) and meet the living expenses test. The definition of a qualifying income support payment should not change.
- Multiple releases should be permitted on severe financial hardship and family and domestic violence grounds (from \$1,000 up to the cap of \$10,000 in a 24-month period) so that applicants are not incentivised to withdraw the maximum amount at once.

**This paper also seeks stakeholder views on a further eight proposed changes to strengthen the integrity of the current arrangements and ensure that superannuation is accessed as a last resort in cases of hardship.**

- The eligibility criterion for release on mental health grounds should be tightened by replacing ‘alleviate an acute or chronic mental disturbance’ with ‘treat a diagnosed mental illness or behavioural disorder’. This will ensure consistency with medical terminology and provide a higher but appropriate threshold for release.
- Early access for overseas medical treatment should only be available for a life threatening illness or injury, or where a person resides overseas. This change is intended to maintain the integrity of release for medical treatment.
- Upon application for early release, the Regulator should provide information to individuals of alternative support that may be available, relevant to the specific compassionate ground for which the individual is applying. This will provide an additional prompt for individuals to consider access to superannuation to be a last resort.
- Two medical practitioners must certify that the treatment for which early release is being obtained is generally accepted by the medical profession as being ‘clinically relevant’ for the patient’s diagnosed condition. This requirement is intended to provide an additional prompt for practitioners during their clinical decision making.
- To secure early release on medical grounds applicants should be required to obtain certification from a specialist in the field relating to the individual’s injury or illness (rather than a specialist in any field) and one of the two required medical practitioners must have an existing relationship with the applicant. This change is intended to ensure the integrity of the certification process.
- Early release under the mortgage foreclosure ground should only be permitted once every 24 months (rather than annually). In addition, the current evidentiary requirements should be extended so that the lender must certify that the individual should be able to meet their repayments in the future once the arrears are cleared. These changes are to ensure superannuation is only released to address short-term financial hardship rather than facilitating

an ongoing incapacity to finance the mortgage. No changes are proposed to the requirement that a person must be listed on the mortgage title.

- The proposed new family and domestic violence ground for early release should also be subject to a cap of \$10,000 per applicant each 24 months as well as a requirement for judicial evidence or two pieces of specific non-judicial evidence. This proposed evidentiary requirement is based on existing requirements of immigration provisions governing visas for individuals suffering family and domestic violence.
- To improve transparency and certainty for the Regulator in administering the rules and for individuals who are applying for early release, the current catch-all provision that allows release on grounds 'consistent with' the rules should be repealed. This provision is not necessary if the explicit grounds are extended to include dental treatment and disability aids.

These draft proposals will supplement integrity measures being adopted by the Australian Taxation Office (ATO), since it assumed responsibility for administering early release on compassionate grounds from the Department of Human Services on 1 July 2018. This includes measures to ensure that caps apply on a 'per person' rather than a 'per superannuation fund' basis, and notifying superannuation funds directly of release approvals at the same time as the applicant to prevent applicants from 'double-claiming' through multiple superannuation accounts.

**Finally, views are sought on two proposed changes to the administration of the rules governing early release on compassionate and severe financial hardship grounds.**

- The ATO should assume responsibility for assessing applications for early release on grounds of severe financial hardship (to complement its new responsibility in respect of applications for early release on compassionate grounds). This would create an early release 'one stop shop' for consumers. Under this proposal, the ATO would approve severe financial hardship applications and notify funds and applicants concurrently. Trustees would not be obliged to permit early release on severe financial hardship grounds, consistent with current practice. However, reducing the cost of handling these applications is expected to encourage a more standardised approach across industry of allowing release on these grounds.
- The revised early release rules should be reviewed five years post-implementation, and this review should be informed by more detailed statistics collected by the ATO through its 'one stop shop' for early release.

## 2. Early release on compassionate grounds

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### Overview

#### Key points

- The Review focused on three issues associated with releases on compassionate grounds: eligibility criteria, including evidentiary requirements under the existing rules; who certifies the evidentiary requirements; and whether the current grounds should be extended to include family and domestic violence and rental arrears.
- In examining eligibility requirements under the current rules it focused on early release for medical treatment, which has seen a substantial rise in total payments since 2012-13.
- The Review identified a number of factors that are driving this trend. Two key integrity issues were also identified. The first relates to what can currently be claimed under medical grounds, with concerns that the current eligibility criteria, particularly ‘mental disturbance’, may not be sufficiently targeted. The second issue relates to who certifies claims for early release on medical grounds, with issues relating to the role and independence of medical practitioners.
- In relation to early release to prevent mortgage foreclosure, there was some concern that this can currently be accessed annually and that there is no requirement for applicants to prove that they are able to meet repayments in the longer term.
- In response to these issues, the Review has proposed a series of refinements to ensure the ongoing integrity of the early release rules. In the case of early release on medical grounds, it proposes:
  - tightening the mental health eligibility grounds by replacing ‘alleviate an acute or chronic mental disturbance’ with ‘treat a diagnosed mental illness or behavioural disorder’;
  - limiting early release for overseas medical treatment to a life threatening illness or injury, or where a person resides overseas;
  - requiring medical practitioners to certify that the prescribed treatment is clinically relevant; and
  - requiring certification by a specialist in the field relating to the individual’s illness or injury and by a registered medical practitioner who has an existing relationship with the applicant.
- In the case of early release to prevent mortgage foreclosure, it proposes:
  - that this only be available once per 24 months; and
  - that the relevant lender must certify that the individual should be able to meet their repayments in future, once the arrears are rectified.
- Ensuring access to superannuation is a last resort was a common theme amongst stakeholders. Although this is difficult to enforce during the application stage, the Review proposes that the Regulator should provide additional information to individuals about alternative support available (such as through social security, or private health insurance) relevant to the specific ground of release for which the individual is applying.
- There was stakeholder support for extending compassionate grounds to include family and domestic violence and rental arrears, however broader policy arguments influenced the Review’s final proposals. The Review proposes extending early release on compassionate

grounds to cover family and domestic violence but not rental arrears.

- The Review also proposes explicitly allowing early release for dental treatment, and purchase of disability aids and modified vehicles, rather than having these covered under the current catch-all 'consistent with' provision, which should be abolished.
- The Review considered the current rules for early release on funeral grounds and has concluded that the current settings are satisfactory.
- Further, the Review considered approaches to ensure the broader integrity of compassionate ground releases. The Review concludes the most practical and cost-effective way to improve integrity is to strengthen the upfront eligibility criteria, including the evidentiary requirements for release. Proposals to this effect are made across a number of sections in the report.

## Medical grounds

The Review's consideration of early release of superannuation on medical grounds follows on from targeted consultation by the Department of Health in late 2017 regarding early release of superannuation for the purpose of covering the costs associated with medical treatment.

The Department of Health's consultation found that the majority of medical stakeholders supported early access to superannuation in exceptional circumstances, and that the current threshold for approval was not too high.

As part of Treasury's broader review of the early release of superannuation benefits, the December 2017 consultation paper asked stakeholders about a range of issues with regards to release under medical grounds, including what is driving the recent rapid increase in the number and type of applications and the amount of funds released.

Based on feedback from consultation, key drivers of this increase include:

- waiting lists for treatment in the public health system (particularly for bariatric surgery);
- increasing out-of-pocket medical treatment costs;
- lack of coverage for particular treatments (out of hospital services) through private health insurance and certain treatments being pushed into the top-tier insurance cover;
- increasing rates of obesity and population ageing requiring intervention (e.g. bariatric surgery); and
- a greater awareness, including through third party intermediaries, of the possibility of using superannuation to pay for treatments.

Stakeholders expressed concerns with this trend of increasing releases for medical expenses. In particular, two key integrity issues emerged.

The first was related to what can be claimed under early release of superannuation on medical grounds, with concerns that the current eligibility criteria may not be sufficiently targeted.

The second problem was the integrity of the medical practitioners who certify the claims for early release on medical grounds, with issues relating to which specialist certifies release, continuity of care, and the independence of medical practitioners.

On both of these problems, a range of possible solutions were canvassed. These are discussed in detail below.

## Issue 1: Eligibility criteria and expenses claimed

The Review identified four possible approaches to better targeting treatments that can be funded through early access to superannuation on medical grounds.

- A. The first is tightening the eligibility criteria, particularly for release on mental health grounds and for overseas treatments.
- B. The second is ensuring access to superannuation is a last resort.
- C. The third potential solution is limiting the amount of expenses that can be claimed.
- D. The final issue considered was limiting the treatments that can be claimed.

### 1A. Tightening the eligibility criteria

#### Mental health

##### Stakeholder views

Consultation with medical practitioners and specialist colleges highlighted that the current eligibility criterion of ‘acute or chronic mental disturbance’ is vague in nature and could capture a very broad range of scenarios – which does not appear to fit with the policy intent. Additionally, ‘mental disturbance’ is not a clinically recognised term – meaning the range of treatments prescribed can vary significantly in nature.

##### Discussion

The Review considers an amendment to the mental health eligibility criteria is required to address the largest grey area – the term ‘mental disturbance’ – rather than a fundamental overhaul of the regulations.

The Review proposes to amend SIS Regulation 6.19A(3)(iii) so it is consistent with clinical terminology that is utilised by the medical profession, namely ‘for the treatment of a diagnosed mental illness or behavioural disorder’. This proposed amendment is consistent with the **preservation** and **hardship** principles.

Medical practitioners have advised that there are accepted frameworks for diagnosing mental disorders; for example, the Diagnostic and Statistical Manual of Mental Disorders (DSM) and the International Classification of Diseases (ICD). The Review does not consider one of these frameworks to have more merit than the other but proposes that the diagnosed mental illness should be in accordance with one of these frameworks.

#### **DRAFT PROPOSAL 1 – MENTAL ILLNESS RELEASE**

Change the eligibility for the mental health ground of release from ‘alleviate an acute, or chronic, mental disturbance’ to ‘treat a diagnosed mental illness or behavioural disorder’.

#### Overseas treatment

##### Stakeholder views

Concerns were also raised by stakeholders about the appropriateness of some applications for overseas medical treatment.

##### Discussion

Applications have been approved for medical treatment overseas where the treatment is available on the Medicare Benefits Schedule (MBS) within Australia. Applications for superannuation in these

cases often request amounts be released to pay for flights and accommodation, not just for the individual undergoing treatment but for companions as well.

Additionally, there have been circumstances where the release has been sought to pay for treatment overseas where that treatment is not available in Australia due to legal or medical reasons (for example, commercial surrogacy arrangements).

The Review considers that the eligibility criteria should be tightened with respect to overseas treatment, to better reflect the **last resort** principle.

The Government currently offers assistance to people with very rare life threatening conditions requiring lifesaving or life extending therapies not offered in public or private settings in Australia. People in these circumstances can apply for financial assistance through the Medical Treatment Overseas Program (MTO) which provides uncapped assistance for patients and their families to travel to renowned international institutions to receive effective therapies.

The Review considers that the existence of government support for certain overseas treatments does not, on the face of it, preclude access to superannuation for overseas treatment. However the limitation of the MTO to life threatening conditions provides a precedent to limit early release of superannuation for overseas treatment to life threatening conditions. The Review would generally expect individuals to seek assistance from programs such as MTO prior to accessing their superannuation; however, if an individual's particular circumstances meant they were not eligible for other assistance and were suffering a life-threatening condition the Review believes it is appropriate that access to superannuation for overseas treatment should still be option for them.

Further, the Review acknowledges that for Australians who are living overseas it may not be feasible to return to Australia to seek medical treatment if they fulfil the eligibility criteria. It seems appropriate for those who have accumulated superannuation to use their superannuation to pay for medical treatment in the country in which they reside. This is consistent with the **fair and effective** principle as similar cases should be treated alike.

In both circumstances, the Review considers it acceptable that amounts released from superannuation could cover necessary travel expenses.

For integrity purposes, 'residing overseas' is taken to mean that the individual has not lived in Australia for the past 12 months and does not intend to return to Australia to live in the next 12 months.

## **DRAFT PROPOSAL 2 – OVERSEAS MEDICAL TREATMENT**

Specify that release for overseas medical treatment is only available in cases of a life threatening illness or injury *or* where the individual currently resides outside of Australia, has done so for the past 12 months and does not intend to return to Australia to live in the next 12 months.

### **1B. Ensuring access to superannuation is a last resort**

#### **Stakeholder views**

Some stakeholders questioned why individuals should be required to pay for services through superannuation rather than receiving them through the public health system.

#### **Discussion**

The Review considers some factors increasing demand for access to superannuation cannot and should not be addressed solely through the superannuation system.

That said the Review recognises that access to superannuation can provide a useful lifeline for people who desperately need medical services, as a supplement to the public and private health care systems. This should be a **last resort**, where other sources of support have been exhausted.

In practice, the last resort principle is difficult to enforce. For example, requiring an applicant to show that they are ineligible for public treatment or that the waitlist is unreasonably long would place additional burden on the individual as well as the healthcare system. There is also a degree of subjectivity involved in determining what qualifies as an ‘unreasonable’ time to wait for public treatment, or where to draw the line on reasonably having sought other supports.

As an alternative approach, the Review proposes that the Regulator should provide additional information to applicants to make them aware of alternative sources of funding and encourage them to reconsider the need for early release of superannuation. For example, for releases on medical grounds, applicants could be prompted to consider if they are eligible for Medicare benefits or private health insurance benefits. This is consistent with ensuring that early release of superannuation is a **last resort** for individuals where other sources of funding have been exhausted or are inadequate.

### DRAFT PROPOSAL 3 – INFORMATION ON ALTERNATIVE SUPPORT

The Regulator should provide information during the application process to individuals on alternative avenues of support relevant to the specific compassionate ground for which the individual is applying.

## 1C. Limiting the amount of expenses that can be claimed

Three ways of limiting the amount of expenses that can be claimed were discussed: introducing caps on the amount or frequency of releases, introducing a ‘reasonableness’ test for the expenses claimed, and requiring multiple quotes.

### Capping the amount or frequency of releases

#### Stakeholder views

Most stakeholders did not support placing a cap on amounts released on medical grounds, or limiting the frequency of releases within a certain timeframe. There was acknowledgment that the cost of medical treatments varies greatly (depending on the type of treatment being sought, location and availability of treatment) and out-of-pocket expenses are generally beyond the control of the individual. Setting an arbitrary cap may mean some people in need would miss out on assistance through their superannuation once they had hit the cap.

A few stakeholders supported caps. One stakeholder suggested a cap of one release per annum with appropriate safeguards in place to deal with exceptional circumstances. Another stakeholder supported caps on both the frequency of releases (once every two years) and the amount released, but with different considerations for life threatening conditions.

#### Discussion

The Review does not consider there is overwhelming evidence in support of capping the number of releases or amounts released early from superannuation for medical treatment. Out-of-pocket expenses for medical treatment are out of the control of the individual and the frequency with which the need for treatment arises is unpredictable.

Caps pose a risk that individuals would not be able to access necessary treatment. This would appear to be inconsistent with the **hardship** principle, where the need for compassion outweighs the objective of **preservation**.

Furthermore, determining the appropriate limits to place on early release for medical grounds would be challenging due to the range of medical conditions and the ever-changing nature of medical costs.

The Review considered an alternative option of limiting the amount that can be claimed to the out-of-pocket costs above the MBS rebate. Although this would meet the **preservation** of superannuation principle, the costs of administration would outweigh the benefits. Furthermore, it would be difficult to take into account private health insurance rebates and other government rebates (such as the Extended Medicare Safety Net).

Taking all of this into consideration, the Review does not propose introducing caps.

### Introducing a 'reasonableness' test

#### Stakeholder views

Stakeholder views were mixed on whether the rules should explicitly require the Regulator to be satisfied that the amount claimed for a particular treatment is 'reasonable'. Some stakeholders argued that the cost of medical treatment varies significantly between practitioners and clinics and that it would be difficult to determine what a 'reasonable' amount was. One stakeholder proposed that the Regulator should only need to be satisfied that there was an actual cost being incurred (rather than the quantum of the cost).

Other stakeholders supported a new requirement for the Regulator to be satisfied that the costs being incurred were reasonable - but there was no consensus on how to objectively define this. One stakeholder suggested that a comprehensive review of current medical costs would be required in order for the Regulator to be able to assess what is reasonable.

#### Discussion

The Review acknowledges that it is difficult to place a requirement on the Regulator that it be satisfied that the costs incurred are 'reasonable'. Any assessment would be subjective and contestable, and go against the **fair and effective** principle.

To make a judgement that amounts claimed are 'reasonable' would require a high degree of specialist knowledge and data about medical costs and may significantly increase application processing times, placing further burden on applicants. On this basis the Review does not propose introducing a 'reasonableness' test.

### Requiring multiple quotes

#### Stakeholder views

As an alternative to a 'reasonableness test', obtaining multiple quotes for applications asking for more than \$20,000 was suggested by some stakeholders. In contrast, others suggested requiring multiple quotes would be unreasonably expensive, time-consuming and (due to specialist waitlists) further delay release, with little net benefit.

#### Discussion

The Review considers that requiring an individual applicant to obtain multiple quotes would place an additional, unnecessary burden on an individual who is already facing difficult circumstances.

This is particularly the case where the treatment is being carried out by a specialist (i.e. a surgeon) and the individual may need to wait to get an initial appointment with another specialist, potentially paying out-of-pocket for the appointment. Additional difficulties may also be faced by individuals in remote or rural areas where there may not be other local specialists. As such, the Review does not propose additional reforms to require multiple quotes for treatment.

## 1D. Limiting treatments that can be claimed

Two options were considered for limiting the medical treatments that can be claimed through superannuation: the first is explicitly excluding treatments, and the second is specifying the severity of the condition to be treated.

### Excluding particular treatments

#### Stakeholder views

Stakeholders were generally not supportive of explicitly excluding particular medical treatments, instead arguing that the provisions should be sufficiently targeted. There was support amongst stakeholders that access on medical treatment grounds should not be used to fund lifestyle choices; for example, tattoo removal.

#### Discussion

The Review acknowledges that personal circumstances can differ and what is an appropriate and effective medical treatment in one case may not be in other cases. This judgement is best left to the medical practitioner(s).

However, the Review is aware that a range of treatments are currently claimed under the medical grounds and proposes amending the regulations to specify that the two registered medical practitioners must each certify that the treatment is generally accepted by the medical profession as being a clinically relevant treatment option for the patient's diagnosed condition.

The Review considers that this requirement provides an additional prompt during clinical decision making to ensure that the treatment is appropriate. Furthermore, the Review acknowledges that the regulations currently allow for the release of superannuation under the Regulator's discretion for treatment that is not medical in nature (but is used to treat an underlying medical condition). The Review considers that release under medical grounds should only be used for treatment that is medical in nature. This issue is further addressed below.

### **DRAFT PROPOSAL 4 – CLINICALLY RELEVANT TREATMENT**

Specify that the two registered medical practitioners must certify that the treatment is generally accepted in the medical profession as being a clinically relevant treatment option for the patient's diagnosed condition.

### Severity of condition to be treated

#### Stakeholder views

Stakeholder views were sought on whether the regulations should be amended to refer to 'treatment' rather than 'alleviation' and whether access to superannuation should only be available in cases where the condition is life threatening.

It was apparent during consultations that the interpretation varied as to what 'alleviate' versus 'treat' means. Furthermore, stakeholders were overwhelmingly supportive of keeping the current wording to allow for treatment in cases where a condition could not be cured or be treated, but alleviation could provide much-needed relief.

Stakeholders did not support restricting early access to superannuation to life threatening conditions. One stakeholder argued this definition was very narrow and the extent of financial **hardship** stemming from a medical condition could vary based on personal circumstances rather than the seriousness of the medical condition.

## Discussion

The Review acknowledges the importance of ameliorating certain medical conditions where there is no cure, such as chronic pain. Again, the judgement of what medical treatment is most appropriate for a patient is best left up to medical practitioners, who are qualified to make these decisions.

Given the inconsistent interpretation of the definition of ‘alleviate’ and ‘treat’, there does not seem to be merit in amending this wording in the SIS Regulations.

Additionally, with the suggested amendments in Draft Proposal 1 (on refining the terminology for access on mental health grounds), Draft Proposal 4 (on clinically relevant treatment) and Draft Proposal 5 (on the role of medical practitioners) the Review considers that the initial eligibility threshold for seeking access to superannuation will be sufficiently tightened to help avoid inappropriate releases. The ATO (as the new Regulator) is also able to collect improved data and identify any concerning trends to be addressed in the future. This issue is further discussed in Chapter 4.

## Issue 2: Certification of early release on medical grounds

The Review identified three potential overarching solutions to address concerns with the integrity of certification of claims for early release of superannuation on medical grounds.

- A. The first relates to the certifying specialist. The SIS regulations do not currently specify that the specialist must be in a field related to the individual’s illness or injury.
- B. The second is requiring the continuity of patient care.
- C. The third potential solution is about ensuring the independence of the certification given. Currently, the Regulator is generally restricted, in practice, to relying on evidence presented to it by medical practitioners (or associates).

### 2A. Certifying specialist

#### Stakeholder views

There was overwhelming support amongst stakeholders to specify in the regulations for release on compassionate grounds that one of the medical practitioners should be a specialist in the field of treatment.

One stakeholder suggested clarifying who is the appropriate medical specialist for cases involving mental disturbance – for example, should fertility treatment require a referral from an Assisted Reproductive Technology specialist, a gynaecologist or a psychologist, if claimed under the mental disturbance ground of release.

A few stakeholders proposed that certification should be required from a second specialist in the field of treatment (so three medical practitioners in total).

#### Discussion

The current regulations imply that the specialist certifying the treatment would be practising in the field of the condition being treated, however there is currently ambiguity in the law. This can result in specialists unrelated to the condition being treated certifying the need for a patient to access their superannuation.

In contrast, the regulations for early release of superannuation on terminal medical illness grounds specify that ‘at least one of the registered medical practitioners is a specialist practicing in an area related to the illness or injury suffered by the person’.

Given the overwhelming stakeholder support to clarify these regulations, the Review proposes amending the regulation so that the certifying specialist must be a specialist in the field of the injury

or illness that the individual is suffering from (and claiming release under that particular illness ground).

This may not always be a specialist in the field of the *medical treatment* the individual wishes to pay for. For example, an individual seeking release on the grounds of mental health issues would require certification from a psychiatrist.

This proposed change is expected to improve the integrity of the early release regime, in accordance with the **fair and effective** principle.

## 2B. Continuity of care

### Stakeholder views

A few stakeholders raised concerns with medical practitioners certifying early release where they did not have an existing doctor-patient relationship with the applicant (particularly in the context of third party intermediaries).

Additionally, some medical practitioners were supportive of ensuring some sort of continuity of care requirements, while recognising that the healthcare system in general does not impose these requirements.

### Discussion

There are currently no requirements for an individual seeking early release of their superannuation to have an existing relationship with either of the two certifying medical practitioners. In practice, this means individuals are able to be directed towards a particularly sympathetic practitioner.

The Review considers that, in general, there should be an existing relationship with at least one (ideally both) of the certifying medical practitioners.

However, the Review acknowledges that prescribing a certain length of time of the relationship or a certain number of appointments would unnecessarily increase the burden (including financial cost) on the individual and increase pressure on the healthcare system.

The Review expects that the individual's regular treating medical practitioner should be in the best position to make the appropriate judgement of the individual's need to access their superannuation on medical grounds, based on their medical history. This would also ensure that the practitioner is able to direct the individual towards alternatives to accessing superannuation in the first instance, which is consistent with the **last resort** principle.

The Review considers that 'regular treating medical practitioner' should include any medical practitioner at the patient's regular medical practice where more than one medical practitioner may treat the patient and where medical records are held for the patient.

On this basis, the Review proposes that the regulations should be amended to specify that at least one of the two registered medical practitioners is the individual's regular treating doctor and the practitioner must attest to this in their certification. The applicant will also need to identify in their application for early release of superannuation which of the certifying practitioners is their regular treating medical practitioner (or medical practitioner at their regular treating medical practice).

This would also address stakeholders' concerns about third party intermediaries assisting applicants with the certification of the application by linking the applicant to a medical practitioner where there is no existing doctor-patient relationship. Having the requirement of a continuity of care relationship will support the integrity of this process by ensuring applicants are referred to another medical practitioner by their treating doctor rather than through third party intermediaries.

It is appropriate that there is an exception to this requirement in extenuating circumstances, as there are conceivable situations in which an individual may not have a regular treating doctor; for example,

if someone has recently moved interstate and has not yet established a relationship with a particular medical practitioner.

The Review proposes that this exception should be explicitly outlined in the regulations and that the certifying medical practitioner should judge whether there are extenuating circumstances in place and provide information as to the nature of those circumstances in their certification.

## 2C. Independent medical advice

### Stakeholder views

On the question of whether the Regulator should be able to seek a further medical opinion, stakeholder views were mixed. Some stakeholders supported giving the Regulator the power to seek a further opinion, through a range of mechanisms. For example, several stakeholders suggested establishing an independent panel of medical practitioners from which a 'second opinion' could be sought.

Alternatively, one stakeholder suggested an approved list of medical practitioners be nominated by appropriate specialist Colleges or specialist associations for the individual to obtain a reference from.

Others did not support any changes to require a second opinion or require certification from a specifically selected panel of medical practitioners, generally on the basis that the current requirements were sufficient or an additional layer of regulation would unreasonably increase costs for the applicant and extend time frames for release.

Related to this, some stakeholders raised concerns about medical practitioners who are in a position to gain financially from an individual who is able to access their superannuation early. This was particularly raised in the context of third party intermediaries, where there may be financial relationships which the applicant is unaware of, but also anecdotally raised in the context of surgeons certifying for treatment they would ultimately perform.

### Discussion

The Review acknowledges stakeholders' concerns about requiring the Regulator to seek a second opinion or requiring the individual to seek certification from an independent panel of medical practitioners, and agrees that this would unreasonably increase the burden on applicants and/or delay releases.

A requirement for the individual to seek certification from an independent list of medical practitioners would likely lead to longer waiting lists and may be inconsistent with Draft Proposal 5 (about regular treating practitioners).

Therefore the Review does not propose either of these two additional requirements.

With regards to the issue stakeholders raised on the independence of medical practitioners, the Review considers there are two potential ways a medical practitioner may gain a financial benefit through the certification of early release of superannuation.

The first may be through a financial arrangement with a third party intermediary that assists with early release of superannuation. The Review was not presented with any concrete evidence of this, and did not investigate whether this was the case as it is beyond the Review's remit.

The second method may be via a medical practitioner who would ultimately be administering the medical treatment and certifies the early release.

It may be appropriate in some cases that the practitioner who is performing the treatment is the practitioner who certifies access to superannuation, as they may be in a position to reduce their fees, particularly if the individual is facing financial hardship.

In the absence of evidence presented to the Review about the independence of certifying medical practitioners, the Review considers the draft proposals of the two additional measures to regulate which practitioners can certify an application (Draft Proposal 5) to be adequate safeguards against inappropriate applications.

#### DRAFT PROPOSAL 5 – MEDICAL PRACTITIONERS

Specify that:

- the specialist medical practitioner must be a specialist practicing *in the field related to the individual's illness or injury*; and
- one of the medical practitioners must be the individual's regular treating practitioner and the practitioner must attest to this in their certification.

## Dental treatment

Applications have been approved for dental treatment by the Regulator where it is determined that such a release is 'consistent with' other grounds of release under SIS Regulation 6.19A(1)(f).

The consultation paper asked stakeholders if an additional category of early release should be added explicitly to include dental treatment and if so, under what circumstances.

### Stakeholder views

Views on extending early release of superannuation under medical grounds to dental treatment were mixed. Some stakeholders were supportive of a new category of release, especially given the limited coverage of dental treatment under the public health system. For example, one stakeholder was supportive of including dental treatment where it is deemed necessary to 'alleviate acute or chronic pain' or where the 'member is at risk of recurring infections', but suggested restricting the amount released to a 'reasonable amount to cover the treatment'. They argued this would make the rules clearer where release is allowed and contribute to fairer and more consistent outcomes. Another stakeholder suggested dental care should be available in order to avoid illness and disability associated with untreated dental problems.

However, other stakeholders were not supportive of introducing an explicit ground of release for dental treatment. Several stakeholders pointed out that dental treatment was already provided for sufficiently under the current legislative provisions, particularly under the alleviation of pain category.

### Discussion

The Review considers that access for dental treatment, where a medical practitioner certifies that treatment is necessary, is consistent with the policy intent of the early release regime. There seems to be little distinction (if any) between medical treatment and dental treatment from a practical perspective in treating a particular condition. This is reflected in the current practice of release under the Regulator's residual discretion (the 'consistent with' ground).

Release for dental treatment seems appropriate on the basis that there are limited publicly-funded alternatives. Although individuals may be able to recover some of the cost of dental treatment through private health insurance, some individuals may still face significant out-of-pocket expenses. Allowing release on this basis would be consistent with the **hardship** principle.

Given Draft Proposal 10 to remove the Regulator's residual discretion, there is merit in clarifying that treatment for pain or a life threatening condition also includes dental treatment. The Review is

aware that the majority of applications for dental treatment are currently approved under the 'acute or chronic pain' eligibility criteria.

The clarification of current practice in the prescribed regulations accords with the **fair and effective** principle in recognition of the similarities between medical treatment and dental treatment such that similar cases are treated alike.

In line with Draft Proposal 3 (discussed earlier) the Review also considers that information about the alternatives for funding dental treatment should be made available to individuals at the point of early release application to help ensure that superannuation is being used as a **last resort**. This could include prompting the individual to check if they (or their dependants) are eligible for funding through the public health system or private health insurance.

### Appropriate thresholds for dental treatment

To the extent practical, the Review considers that similar thresholds should be placed on access to superannuation for dental treatment as for medical treatment.

In this regard, the Review's proposals that the medical treatment be 'clinically relevant' (Draft Proposal 4) and that one of the certifying medical practitioners be the applicant's regular treating practitioner (Draft Proposal 5) should also be applicable to release for dental treatment. This will ensure that similar requirements are placed on the certifying practitioners for medical treatment and dental treatment, recognising the similarity between the two circumstances.

That said it is not practical to completely replicate the eligibility criteria for medical treatment with regards to eligibility for dental treatment. Currently, certification for dental treatment is usually done by two general practitioners, with one of the practitioners signing-off as a specialist general practitioner. This practice does not fit with the Review's Draft Proposal that the specialist must be a specialist in the field of injury or illness.

The Review proposes specifying that in the case of dental treatment the individual must have certification from one medical practitioner (likely to be a general practitioner in most cases) and either one dental practitioner *or* dental specialist.

The Review considered retaining the requirement to have a specialist certify that the dental treatment is required. However, because in many cases it is the general dentist who will perform the treatment, it would not be practical to require specialist certification in all cases. This would add cost and complexity for individuals, and may also be inconsistent with the requirement for continuity of care with at least one of the certifying practitioners, as per Draft Proposal 5.

On this basis, the Review proposes that certification be obtained from one of either a dental practitioner *or* a specialist dental practitioner, depending on who will be providing the dental treatment.

Additionally, the Review proposes limiting the release for dental treatment to those suffering acute or chronic pain, or a life-threatening condition. As the majority of applications for dental treatment received by the Regulator are on the grounds of acute or chronic pain, the Review considers this limitation appropriate. Further, it would constrain releases for cosmetic dental work.

## DRAFT PROPOSAL 6 – DENTAL TREATMENT

Clarify that treatment for a life threatening condition or acute or chronic pain includes dental treatment, with the certification of one medical practitioner and one dental practitioner.

## Victims of family and domestic violence

Stakeholders were asked whether there should be a new compassionate ground for early release of superannuation for victims of family and domestic violence (herein, 'family violence'), where an individual is experiencing violence or financial abuse by an intimate partner or family member; and, if so, what expenses should potentially be claimed and what should be the potential evidentiary requirements.

### Stakeholder views

Support amongst stakeholders for extending early release of superannuation to victims of family violence was mixed, even between family violence advocacy organisations and women's groups.

A number of stakeholders supported extension of early release of superannuation to victims of family violence under compassionate grounds. This was on the basis that family violence is one of those rare instances where the benefit of access to superannuation for short term **hardship** outweighs the need for **preservation** of income in retirement, and that this should be a **last resort** where other support is inadequate to meet the needs of victims.

There was support amongst some stakeholders to specify in the law for what expenses superannuation should be used. For example, one stakeholder proposed that the funds should be released for a rental bond and short term living costs. Conversely, others argued the required expenses will vary depending on personal circumstances so it may be difficult to take a standardised approach. As an alternative, a few stakeholders supported a cap on amounts released under family violence grounds.

However, other stakeholders did not support extending superannuation access to victims of family violence, on the basis that support should be funded by the Government or that early access to superannuation may only exacerbate the financial harm to the victim in the long term. The gender gap in retirement incomes was also mentioned as a reason to be cautious of extending early release to family violence victims.

For example, Safe Steps argued in its submission that an extension of early release specifically on the basis of family violence would only "...compound the long term financial stress experienced by victim-survivors of family violence".

Some stakeholders pointed out that victims of family violence are already eligible to access their superannuation where that violence results in the types of hardship currently provided for in the legislation; that is, where the individual is in severe financial hardship or requires medical treatment under compassionate grounds.

There was also recognition from stakeholders that adequate safeguards must be put in place for any expansion of the ground, to ensure that access to superannuation is not another mechanism that perpetrators of financial abuse can use.

A few stakeholders raised concerns about the timeliness of support, with the consistent message that immediate support is needed in family violence situations, and individuals may not be able to wait for the early release application to be progressed and approved.

## Discussion

The Review acknowledges that timely and targeted assistance through the welfare system is the preferred method of assisting victims of family violence as early access to an individual's own superannuation may reduce financial security in retirement and exacerbate the savings gap between men and women.

However, the policy of early access to superannuation on compassionate grounds recognises that in certain extreme or mitigating circumstances in an individual's life the benefits from current consumption due to **hardship** outweigh the benefits of **preservation** of savings until retirement. This trade-off underpins the announcement as part of the Women's Economic Security Package that early release of superannuation will be extended to victims of domestic and family violence.

The Review agrees that timely support is important for victims of family violence. Notably, the change in administration of release on compassionate grounds from the Department of Human Services (DHS) to the Australian Taxation Office (ATO) is streamlining the application and approval process. Applications will be assessed by the ATO in up to 14 days which is significantly shorter than the DHS timeframe of up to 28 days.

The Review is also cognisant of concerns expressed by some stakeholders that extending early release of superannuation to victims of family violence and normalising the use of personal savings for women in family violence situations might "entrench the structural under-resourcing of the women's service sector" (Australian Women Against Violence Alliance).

As stated earlier in this paper, the early release of superannuation regime is not intended to be a substitute for adequate government support.

To ensure early release of superannuation is a **last resort** for individuals in a family violence situation, Draft Proposal 3 (about providing information of alternative support options) would also apply. In this regard, the ATO, as the new Regulator of early release of superannuation on compassionate grounds, would be expected to provide information to individuals seeking release on the ground of family violence, such as the 1800 RESPECT number and links to state and territory-specific support services.

### Evidentiary requirements

Stakeholders suggested a range of evidentiary requirements for early access to superannuation on family violence grounds; most commonly, judicial orders such as family violence orders (the exact terminology differs between states and territories) and declarations from certain support workers or other professionals such as medical practitioners or police officers.

The Review considers that judicial orders are a sufficient evidentiary threshold to access superannuation on the basis of family violence; however, this should not be the only threshold. Forcing people to obtain a court order to access their superannuation could unnecessarily congest the court system and delay access to financial support for victims.

For the purpose of early release, in the absence of a judicial order, two pieces of specific non-judicial evidence would also be satisfactory.

The proposed pieces of evidence that would be accepted are a report, record of assault, witness statement or statutory declaration made by a police officer and a certificate from one of the following professionals, stating that they are of the opinion that the individual in question is suffering from family violence: a medical practitioner, a member of the Australian Association of Social Workers or a registered psychologist.

This is similar to the evidentiary requirements for family violence provisions with regards to immigration (for immigration purposes the list of professionals is slightly broader).

### Expenses to include

A range of potential expenses for which victims of family violence should be able to use their superannuation have been identified through the consultation process. Most commonly, the costs of establishing housing (including bond payment, rent in advance, removalists, purchase of furniture and whitegoods), necessary transport (such as a car) and installation of security systems to ensure ongoing safety have been suggested as reasonable expenses.

The Review notes that a model of providing flexibility in expenses for family violence victims currently exists in Victoria, under its Government-funded Family Violence Flexible Support Packages. These packages deliver tailored assistance to victims of family violence of up to \$10,000 (with an average spend of around \$3,000), and have few restrictions on what the funds can be used for (for example, funds cannot be used for gambling or to purchase illegal substances).

Because the needs of a family violence victim will reflect their particular circumstances, the Review does not propose placing restrictions on the types of expenses that superannuation may be used for in cases of family violence. Nonetheless, the experience of other financial support schemes such as the one in Victoria shows that in most cases the majority of funds are likely to be used for relocation and housing purposes. The Review considers that \$10,000 is an appropriate cap on amounts released from superannuation for family violence victims, particularly with the alignment of this amount to the amount released from superannuation under severe financial hardship grounds. It also aligns with the Victorian Flexible Support Packages.

In recognition that the expenses incurred from being a victim of family violence can arise at different times, the new ground of early release would allow multiple releases within a 24 month period up to the \$10,000 cashing restriction. This change is consistent with Draft Proposal 7 (discussed further below) to amend the cashing restriction for release on severe financial hardship grounds to permit multiple releases up to the \$10,000 cap.

Additionally, the minimum amount that can be released at any one time will be \$1,000 (unless the preserved benefits in an account are less than this amount), to ensure consistency with other grounds of early release of superannuation.

Given the need for expediency of access to funds and the recognition that flexibility in the use of funds should be prioritised, the Review does not propose requiring any evidence to substantiate the amount being claimed (subject to the proposed cashing restriction of \$10,000 over a 24 month period).

### **DRAFT PROPOSAL 7 – FAMILY AND DOMESTIC VIOLENCE**

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

## Housing grounds

Three key issues with the housing grounds for release were discussed during consultations.

The first was the merits of creating a new ground of release for payment of rental arrears and the evidence that may be required to support early release for this purpose.

Second, stakeholders were asked whether the current provisions to prevent mortgage foreclosure of an individual's principal place of residence should be broadened to be available for those who are not listed on the property title.

The third key issue arose through the consultation process, during which we were informed that some individuals are using the current rules to make 'rolling applications' for early release without addressing the long term serviceability of their mortgage.

### Rental arrears

#### Stakeholder views

There were a range of views on the question of whether rental payments should be covered by compassionate grounds release. Stakeholder support was finely balanced with an almost equal number of stakeholders opposing or supporting the extension to rental arrears.

Stakeholders who did not support extension to rental arrears drew a distinction between a mortgage that 'builds wealth' and provides an asset in retirement, and renting that does not add to the financial security of the individual over the longer term.

Other arguments for not extending the ground to renters included: that payment of arrears does not guarantee financial or housing security for renters (particularly in jurisdictions such as NSW where landlords are able to terminate a tenancy at will), that payment of rent and bond is already captured under the severe financial hardship ground; and that government assistance is already provided for renters (but not for mortgagees).

It was also noted by one stakeholder that opening up superannuation to pay for rent could be taken advantage of and lead to unintended consequences. For example, people could take on a higher level of rent, knowing that they can rely on early release of superannuation to assist if they get into arrears.

A few stakeholders expressed integrity concerns; in particular, that early release of superannuation should only be permitted where the money is paid directly to the landlord to prevent misuse of the released money. Concerns were also raised that extending the ground of release to renters could encourage landlords to increase rent more quickly knowing superannuation could be accessed.

Conversely, preventing homelessness was cited by many stakeholders as a key reason for extending the housing ground of early release, with recognition that the mortgage foreclosure ground aims to achieve the same outcome. A few stakeholders also commented on the rising popularity of renting and the decline of home ownership. One stakeholder raised the idea of release specifically to prevent termination of rent-to-buy agreements.

Whether supportive or not of an extension to renters, most stakeholders agreed that appropriate limits (frequency of release or monetary caps) would be needed; although there was little agreement on what those limits might be.

### Discussion

#### Original policy intent

The original policy intent behind allowing early release for mortgage foreclosure – and not rental arrears – recognised two important elements: first, the value of an owned home as a form of saving and that mortgage foreclosure depreciates the value of this capital; and second, that government assistance with regard to rental subsidies already exists (but not for mortgage stress).

The Review considers there is still merit in this position and does not propose extending the ground to rental arrears. This is discussed further below.

With regard to the value of an owned home as a form of saving, this confers benefits to the home owner both in the short and longer term (i.e. in retirement).

In the short term, the desirability of preventing of a forced sale of the mortgaged property (which tends to lead to a home being sold for less than the market price and carries significant transaction costs) is not reflected in rental situations. Whilst recognising that eviction from a rental property does come with financial consequences, as a general rule these consequences are not in the same order as those of a forced sale.

Over the longer term, whereas a mortgage usually leads to home ownership which forms part of the pool of assets in retirement, there is no equivalent asset conferred upon renters.

Government assistance for renters is available at both the Commonwealth and state and territory levels. Some state and territory governments also provide schemes to assist private renters to meet rental arrears in certain situations. There is no equivalent assistance for those in mortgage arrears.

For these reasons, the Review considers that continuing to allow release for mortgage foreclosure remains appropriate whereas rental arrears does not fit the same objective and therefore should not be extended.

### Applicability of other grounds of release to rental arrears

Whilst not proposing that rental arrears be a new ground for the early release of superannuation, the Review recognises the role that other grounds of early release may have for those who are renting and find themselves in situations of financial hardship. The proposals in this paper, firstly, to amend the severe financial hardship ground of early release and secondly, to provide a new ground of release for victims of family violence, whilst not aimed specifically at those with rental arrears, would both be available to those with rental arrears who meet the eligibility criteria.

Notably, regarding family violence, experience with other financial support packages shows that funds will most often be used by the individual to relocate or re-establish housing for themselves and their dependants. This can include paying rental arrears, but also bond payments, rent in advance and other relocation costs.

### Complexity of interaction with state tenancy laws

As part of the Review's deliberations on whether to recommend the early release of superannuation for rental arrears, the Review reflected on the administrative complexity this would entail.

Given the need to ensure the integrity and **fairness** of any early release provisions it would appear reasonable to require confirmation from an independent third party that eviction was imminent if this ground of release were to be legislated. As there is not always an independent third party rental agent involved in rental agreements (such as in the case of private rental agreements), this would likely need to be a state or territory civil and administrative tribunals or magistrates courts.

This raises a number of administrative issues – in particular around releasing superannuation in a timely manner to prevent an eviction once a tribunal or magistrates court has ordered this outcome and also the ability to administer the ground of release **fairly and efficiently** with differing state and territory arrangements for evicting tenants in rental arrears (outside of the Commonwealth's remit).

There are additional concerns that state and territory laws may permit a landlord to evict a tenant on other grounds once the arrears have been resolved. It is foreseeable that the relationship between the tenant and landlord would have degenerated sufficiently so that eviction on another ground is likely. As such, releasing superannuation to rectify rental arrears may not provide the rental security intended by such a policy change.

In light of these administrative complexities and the lack of certainty that rental eviction would be unequivocally avoided, the Review considers that availability of early release should not be extended to rental arrears.

## Non-mortgage title holders

### Stakeholder views

Stakeholders were reasonably evenly divided on the merits of extending the early release for mortgage arrears ground to those not listed on the title, but where the property is their principal place of residence.

Many stakeholders who were in favour noted that an extension should be limited to certain individuals with pre-defined relationships with the title holder (such as a spouse, partner or dependant), with some stakeholders suggesting that proof that the house is the individual's principal place of residence would be an important evidentiary requirement.

Some stakeholders who were not in favour of extending the ground to non-title-holders noted the potential for abuse that this ground could engender. This included financial abuse of a spouse or elderly relative. One stakeholder opposed this idea on the basis that it would effectively permit a transfer of wealth to the person owning the property whilst another mentioned that the net financial position of the non-mortgage title holder may be worse over time.

### Discussion

There appears to be significant possibility for this ground of early release to be abused if extended to those not on the mortgage title. In particular, and as noted by stakeholders, there are concerns about abuse of elders and family violence victims, amongst others.

Further, the transfer of wealth from one person's superannuation to pay off the asset of another person would appear to be out of step with the **preservation** principle and the purpose of superannuation.

Given these concerns, the Review does not propose extending this ground of release to those not on the mortgage title.

## Tightening the current housing ground of early release

### Stakeholder views

Some stakeholders maintained that the current rules providing early access to superannuation for those in mortgage arrears are too lenient – on a number of fronts.

They expressed concern that people could use early release of superannuation to continue to fund a mortgage that would otherwise be unaffordable. Some argued that allowing access to superannuation every 12 months for an amount that is equal to three months' repayments and 12 months' interest on the loan enables people to repeatedly use their superannuation to pay off the mortgage on a rolling basis. Others expressed concern about the ongoing serviceability of a mortgage where early access to superannuation is granted but does not lead to resolution of the mortgage arrears in a sustainable, ongoing manner.

Stakeholders called for the rules to be tightened to better meet the policy intent. Stakeholders commented, for example, that the provisions are designed for those in mortgage arrears to get a 'second chance' and re-establish themselves, not to provide an ongoing funding source.

A small number of stakeholders also noted that there was a loophole in the legislation enabling those seeking early release of superannuation with multiple superannuation accounts to use the same evidence to request release from more than one superannuation fund.

## Discussion

The Review agrees with the concerns of stakeholders that early release of superannuation for mortgage arrears should only be available to assist individuals, as a **last resort**, to overcome a short-term financial difficulty. As such, to improve the integrity of the early release rules and ensure superannuation is released only where ongoing serviceability of the mortgage is likely, the Review proposes two areas of the mortgage ground of early release be amended.

First, the Review considers there would be merit in limiting the availability of this ground of early release so that it can only be accessed every 24 months rather than every 12 months. This not only brings the frequency of access to this ground of release in line with other grounds of release as proposed in this paper; it also recognises the early release regime is not intended to fund ordinary expenses or ongoing mortgage arrears.

Second, the mortgage ground of release is intended to provide ‘breathing space’ to a person with mortgage arrears. Superannuation should only be released to individuals who will be able to service their mortgage in future once they have rectified the arrears.

For this reason, the Review proposes introducing an additional eligibility requirement for mortgage release; specifically, the financial institution to which the arrears are owed must provide evidence of its belief that the mortgage will be serviceable going forward. This would take the form of a letter and would ensure that early release of superannuation is only available where the asset is likely to be retained long-term and in doing so, contribute to one’s retirement income outcomes.

The transfer of the administrative function to the ATO addresses a third amendment proposed by the Review. Currently, individuals can access the total amount of required superannuation multiple times from multiple superannuation funds. The Review proposes this should be amended to ensure that release is only available once per person, over the application period, for an early release event. This will be facilitated through procedural changes introduced by the ATO; in particular, by requiring an applicant to nominate the superannuation funds from which they will access their release amount, up to the total that their financial institution has nominated as required to prevent a foreclosure event.

If an applicant is successful, the ATO issues a release authority to the relevant superannuation fund(s) as well as the applicant for the amount that equals the mortgage arrears. This reinforces the nature of this ground of early release as a means of addressing short-term financial **hardship** rather than a means to easily access funds to finance other lifestyle decisions.

### DRAFT PROPOSAL 8 – HOUSING

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

## Funeral grounds

Individuals can apply for the early release of superannuation benefits to pay for expenses associated with their or their dependant’s palliative care, or their dependant’s death, funeral or burial. Currently, the regulations do not set a maximum amount that can be released for funeral related expenses. Further, the regulations do not limit the number or frequency of applications for early release of superannuation on these grounds.

The Review focused on two issues with respect to funeral expenses: whether the current restriction of a dependency relationship is appropriate; and whether the amounts released for funeral expenses should be capped.

### Dependency relationship

#### Stakeholder views

A majority of stakeholders suggested that early release of superannuation on funeral related grounds should not be restricted to 'dependants' as currently defined in the SIS Act. Some stakeholders noted there are diverse kinship relationships where the applicant may want, or be socially obliged, to contribute to the cost of the funeral. A small number of stakeholders recommended extending the grounds to immediate family members, or the Regulator having discretion to extend the grounds to non-dependants in exceptional circumstances.

However, several stakeholders supported continuing to limit the early release of superannuation to people covered by the existing definition of 'dependant'. One argued this position is consistent with the sole purpose test for superannuation, which broadly requires superannuation funds to ensure the provision of benefits from the fund is limited to the member or their dependants. Another stakeholder stated it is not aware of any problem that would require a relaxing of the existing system beyond the dependency relationship.

#### Discussion

The arguments presented by stakeholders in favour of expanding the eligibility for early release focused largely on social relationships, which may extend well beyond relationships defined by a continuing financial dependency between the two people. The Review considers that dependency relationships are distinguished from those of social obligation by the ongoing financial responsibility of one party for the costs accrued by the other. Continuing to limit early releases to cases where the beneficiary is a dependant of the applicant is consistent with the **preservation principle**. The current approach is also consistent with the **fair and effective principle**, setting out a clear and objective test for eligibility.

Further, the Review believes that limiting the provision to cover only dependants provides a degree of protection against financial abuse of an applicant by family or social networks, where the applicant may be pressured to make an application for early release for a non-dependant that they would otherwise choose not to make.

Consequently, the Review considers that applying the current threshold of financial dependency appropriately limits the early release of superannuation to applicants on funeral expenses grounds.

### Limiting releases

#### Stakeholder views

The uncapped amount of money that can currently be released to meet funeral related expenses was a concern for the majority of stakeholders who expressed views on this issue. Some stakeholders suggested the amount should be capped at a 'reasonable' level (however defined), with the Regulator to have discretion on a case by case basis. One stakeholder suggested there should be a hard cap on the amount released, arguing that funeral expenses have common fixed costs with an easily determined average expense.

Conversely, some stakeholders raised concerns that a strict cap on the amount to be released would not take into account varying cultural or family expectations about reasonable costs for a funeral.

A further view, expressed by one stakeholder, favoured capping the number of releases on death related grounds to one every three years, rather than capping the amount released.

## Discussion

The Review notes that the Regulator currently has the discretion to limit the amount that can be released for funeral related expenses as appropriate for the particular application. The Review considers that retaining the current arrangements adequately enables an assessment of a 'reasonable' limit at the discretion of the Regulator, taking account of the average cost of a funeral, whilst allowing for a case by case assessment, in exceptional circumstances, to take cultural and other factors into consideration.

The Review does not support the proposal to limit the number of releases for dependants' funeral expenses within a given period. The Review considers that the timing of a dependant's death should not be a determining factor in whether the applicant is given early access to their superannuation to pay for the costs associated with that death.

Therefore no changes are proposed to the funeral expenses ground of release.

## Severe disability

The current provisions allow for early access to superannuation benefits to modify a person's principal place of residence, or vehicle, to accommodate the special needs of the person or the person's dependant, arising from severe disability (SIS Regulation 6.19A(1)(c)).

The current rules make no specific provision for disability aids, such as a mobility scooter, although there may be cases in which the Regulator may approve the release of funds for disability aids under the residual discretion in SIS Regulation 6.19A(1)(f).

The consultation paper asked stakeholders whether the current disability grounds were fit for purpose or whether they should be expanded to explicitly cover disability aids.

### Stakeholder views

Many stakeholders did not comment on the question of expanding the severe disability grounds to cover disability aids

Those who did comment generally recognised that these regulations were developed prior to the introduction of the National Disability Insurance Scheme (NDIS). A few stakeholders were not in support of expansion on the basis that the NDIS would cover this particular expense; however, most considered there was merit in expanding access to disability aids, where access would be in accordance with the **last resort** principle. There was general support for the view that individuals should approach the NDIS in the first instance before seeking early release on disability grounds. However, no suggestions were given of how to enforce this requirement in practice.

The support for expansion was often based on there being appropriate limitations on access (such as monetary caps or evidentiary requirements to qualify for release).

## Discussion

The Review has not brought to light any issues with the current practice of release on severe disability grounds. However, in light of Draft Proposal 10 (below) to remove the Regulator's residual discretion, the Review proposes prescribing the release for disability aids in regulations to provide consistency and transparency for potential applicants – in accordance with the **fair and effective** principle.

Furthermore, the current rules may reflect the fact that a residence or vehicle is an asset that is likely to be held by the member over the long term, so that the modification should provide a long-term benefit (which may help to offset any detriment to the member's retirement income). The Review considers that access to superannuation for disability aids is appropriate as the aids improve the

quality of an individual's life, particularly for those suffering from severe disabilities. This aligns with the **hardship** principle, where the need for compassion outweighs the broader policy objective of the superannuation system.

Although not specifically covered in the discussion paper, the Review is aware that the Regulator's residual discretion is currently used to approve the purchase of a modified vehicle to accommodate the needs arising from severe disability. The Review also considers this to be an appropriate area to clarify in the regulations. As mentioned in the discussion on medical grounds, the Review also considers there is merit in providing additional consumer information to applicants about what avenues of support may be available. For individuals applying on severe disability grounds, applicants will be provided information about the NDIS and state funded support programs.

As an additional integrity measure there is merit in prescribing in the regulations that release on severe disability grounds is only available with the certification of a medical practitioner that the modification or disability aid is necessary to accommodate an individual's disability. This will codify the current practice and make the process consistent and transparent for those needing to access their superannuation early.

#### **DRAFT PROPOSAL9 – SEVERE DISABILITY**

Clarify that release on severe disability grounds can include release for the purchase of disability aids or a specially modified vehicle; and is only available on the basis of certification from a medical practitioner that the disability aid or vehicle is required to accommodate the special needs of the person or a dependant arising from severe disability.

## Regulator's residual discretion

In addition to the specific grounds of release listed in the regulations, the Regulator is empowered to approve the release of superannuation benefits in cases that it determines are 'consistent with' those grounds (SIS Regulation 6.19A(1)(f)).

The December 2017 consultation paper asked stakeholders if the Regulator's residual discretion should be removed and if so, what the consequences of doing so would be.

### Stakeholder views

Overwhelmingly stakeholders did not support removing the Regulator's residual discretion. Stakeholders generally thought that the discretion is an appropriate safeguard for cases that do not fall under the prescriptive circumstances set out in the law but that nonetheless warrant release of superannuation on compassionate grounds.

However, few stakeholders provided an example of what these circumstances might be. The Commonwealth Ombudsman noted, for example, that the discretion is currently used under the housing ground when there are outstanding council rates.

### Discussion

The original policy intent of this discretion was to prevent instances where early release applications were not allowed on technical grounds where an application almost, but not quite, met the criteria.

The law does not provide specific circumstances under which this would occur and the Review notes that most stakeholders, despite their overwhelming support to keep the discretion, did not outline any specific circumstances either.

The wording of the discretion is so broad in nature that in practice any Regulator's interpretation that is seen as unfavourable by the applicant could be open to legal challenge. Examples of applications received and approved for treatments that are non-medical in nature but are deemed to be 'consistent with' medical treatment to alleviate a mental disturbance include the payment of bills, debts, and legal fees, commercial egg donation, overseas holidays and spa treatments. In these cases, two medical practitioners have certified that the non-medical treatment would alleviate the patient's mental disturbance.

The Review considers the Regulator's residual discretion is not in accordance with the **preservation** principle as it is too general and open to abuse. Although there are appropriate cases for early release of superannuation (such as disability aids) which may currently be applied for and released under the 'consistent with' clause, the Review considers it more clear and objective to specify in the law all of the grounds for release; in doing so, meeting the **fair and effective** principle. As noted in the principles underpinning this Review, "Rules that are highly subjective in nature will necessarily cause more red tape, expense and difficulty for applicants, trustees and Government."

Accordingly, the Review proposes removing the Regulator's residual discretion under the compassionate grounds of early release, and clarifying and expanding some compassionate grounds that are currently being captured under the 'consistent with' clause (for example, disability aids).

Notably, this will affect the housing ground of early release by removing the ability to access superannuation for the purpose of paying council rate arrears. The Review considers this is an appropriate tightening of the eligibility criteria as council rates do not provide an asset in retirement (unlike a mortgage).

### DRAFT PROPOSAL 10 – RESIDUAL DISCRETION

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

## Integrity of payments

The question of how to ensure the integrity of the early release of superannuation regime was not directly posed in the December 2017 consultation paper; however stakeholders raised anecdotal evidence during consultations that early release payments are not necessarily being used in all cases for the expenses requested. For example, an applicant who is successful for a surgery may then cancel the surgery once they have received their superannuation and use the funds for other means. This is contrary to the objective of the early release provisions and warrants attention.

### Stakeholder views

Stakeholders made two suggestions to ensure the integrity of the early release of superannuation regime. The first is tightening the eligibility criteria including evidentiary requirements that an applicant must meet at the assessment stage of the application to ensure that release is only provided where appropriate, in cases of **hardship**. The second is confirming that once the money has been released it is used by the applicant for the intended purpose. Some stakeholders proposed the latter could be implemented by requiring successful applicants to keep receipts of the expense or by releasing the funds directly to the third party service provider (for example, the surgeon).

### Discussion

Overall, the Review considers the most practical and cost-effective way to improve the integrity of early release on compassionate grounds is to strengthen the upfront eligibility criteria, including the evidentiary requirements for release. That is why the Review has proposed amendments to a number of release conditions under compassionate grounds, as detailed in the preceding sections.

Proposals to tighten the eligibility criteria and evidentiary requirements for existing grounds of release align with the current practice of screening applications. This approach effectively ‘front loads’ the compliance burden, limiting access to legitimate hardship cases and thereby reducing the likelihood that the applicant will use the funds other than for their intended purpose.

In terms of spending the superannuation monies as outlined in the application, the Review notes the Regulator has enforcement powers. Providing false or misleading statements in an application to the Regulator is a crime under the *Criminal Code Act 1995 (Cth)* with a maximum penalty of 12 months imprisonment. Furthermore, the ATO’s new online application process will require applicants to make a declaration that the superannuation released to them will be used for the expenses outlined in their application. They will also be required to retain invoices and receipts to prove appropriate expenditure of the released funds (where approved). Breaches of the declarations made to the ATO will also be punishable under the *Criminal Code Act*, and may also incur administrative penalties under the *Taxation Administration Act 1953 (Cth)*. These powers, coupled with new requirements to keep invoices and receipts, are considered to be sufficient deterrents against abuse of the early release system.

The Review believes these measures, collectively, strike an appropriate balance between the compliance burden on applicants, through reasonable eligibility and evidentiary requirements at the application stage, and allowing the Regulator to focus its compliance efforts on suspected cases of non-compliance after the fact by relying on its existing powers.

# 3. Early release on severe financial hardship grounds

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## Overview

### Key points

- The Review focused on three issues: who should be eligible for early release of superannuation on severe financial hardship grounds; the amount they should be able to access; and who should determine eligibility.
- It identified three key problems with the current arrangements.
  - The requirement to be in receipt of eligible Commonwealth benefits for 26 continuous weeks is too restrictive (especially where a person may have worked for short periods).
  - It is possible for applicants to withdraw more than \$10,000 per year by making withdrawals from multiple superannuation funds.
  - The rules are administered in different ways by different funds. The trust deeds of some funds do not permit early release on grounds of financial hardship.
- The Review concluded that eligibility should continue to be determined using both an objective and a subjective test for severe financial hardship.
  - The objective test should continue to be based on receipt of Commonwealth income support payments. The rule requiring receipt of income support payments for 26 continuous weeks should be relaxed by extending eligibility to individuals who have received income support payments for a cumulative period of 26 weeks out of 40 weeks.
  - The subjective test should continue to apply so that eligibility is not based solely on receipt of Commonwealth income support payments but also on inability to meet reasonable living expenses. However, this should be determined under a single set of guidelines, including consistent evidentiary requirements, administered by the Australian Taxation Office (ATO).
- The amount of superannuation that eligible individuals can access should be reduced from a maximum of \$10,000 in a 12-month period to a maximum of \$10,000 in a 24 month period. In addition, this cap should apply on an individual rather than on a per fund basis (as it is working in practice). This means individuals would no longer be able to access more than \$10,000 by rolling-over superannuation into multiple accounts. However, individuals should be able to apply more often for multiple smaller amounts up to the maximum \$10,000 cap, rather than being allowed to make only one application every 12 months per fund.
- Responsibility for determining eligibility for early release on grounds of financial hardship should shift from trustees to the ATO. The ATO should develop consistent criteria for approving applications for early release on financial hardship grounds.
- This change would make the system fairer and more consistent and reduce the burden of the current rules on trustees. In turn, this should encourage funds to adopt a more consistent approach to whether or not they allow early release on severe financial hardship grounds.

## Eligibility criteria

The Review asked stakeholders whether the objective test – requiring applicants below preservation age to have received an eligible Commonwealth income support payment for at least a continuous 26 weeks – was too restrictive.

Stakeholders were also asked if changes are required to the definition of qualifying Commonwealth income support payments. ABSTUDY, Austudy or Youth Allowance are not deemed to be eligible payments. Australian residents overseas and some foreign workers who are not eligible for Commonwealth income support payments are also ineligible for release on the grounds of severe financial hardship.

Eligibility is also determined by using a subjective test that allows for a superannuation trustee's discretion to assess severe financial hardship – in particular, whether an individual is 'unable to meet reasonable and immediate family living expenses' – and whether to release superannuation from their member's account. Stakeholders were asked whether this test needs to be changed to a prescribed standard of proof to achieve a more consistent application of the eligibility requirements.

### Stakeholder views

#### The objective test

There was consensus from stakeholders that requiring an individual to receive 26 weeks of continuous Commonwealth income support payments in order to qualify for early release under the severe financial hardship ground is unreasonably restrictive for individuals who have a 'break' in income support payments.

As such, stakeholders broadly agreed that the rule should be changed to a '26-weeks *cumulative*' rule to better reflect modern work practices. Common suggestions put forward in this regard were 26 weeks income support out of 40 weeks or 52 weeks.

Overwhelmingly, stakeholders did not support expanding the definition of eligible Commonwealth income support payments to include ABSTUDY, Austudy or Youth Allowance. Decisions to study were considered to be voluntary rather than a financial necessity.

#### The subjective test

On the subjective 'living expenses' test, several stakeholders (including superannuation funds) raised concerns that superannuation trustees were applying the test inconsistently and with varying evidentiary requirements. For example, some superannuation funds require numerous documents to support the financial hardship application, including evidence of the expense for which funds are sought, and assets and income from payslips and bank statements. In comparison, some funds require only a statutory declaration from the individual. This can lead to 'fund shopping' by individuals.

There was clear support for a defined or objective 'living expenses' test; however, stakeholders were unable to agree on how to achieve this or what the test would look like. Suggestions ranged from clearer and more consistent trustee guidelines including consistent evidentiary requirements, removing the subjective test altogether, or having a central administrator of severe financial hardship releases such as a government agency.

### Discussion

#### The objective test

The Review sees merit in adjusting the '26-week' rule to require a *cumulative* period of income support payments of 26 weeks out of 40 weeks. A more flexible approach would mitigate the disincentive to seek employment, while still being consistent with the **hardship** principle, as an

individual may continue to be in severe financial hardship despite a short break in payments (for example due to intermittent/seasonal work).

Data was obtained from the Department of Social Services (DSS) to test the impact of expanding eligibility to a cumulative period of 26 weeks out of 40 weeks. It showed that this change is likely to lead to a modest increase in those eligible for release under severe financial hardship of around 6 per cent (assuming they also meet the living expenses test).

Further, the Review agrees with the vast majority of stakeholder views to maintain the current definition of qualifying Commonwealth income support payments. The Review considers that the **fairness** principle is met by limiting eligible Commonwealth income support payments to those which provide financial support to people experiencing financial hardship due to an unexpected life event, such a disability or loss of employment.

#### The subjective test

The Review does not see a need to change or remove the subjective test as eligibility should not be based solely on the receipt of Commonwealth income support payments. This test aligns with the **last resort** principle, as it forces applicants to consider if they have other means to pay for their expenses before calling on their superannuation. Furthermore, the requirement for an individual to provide evidence may be sufficient to act as a limiting factor on inappropriate claims.

There is merit in introducing standardised evidentiary requirements to demonstrate that an applicant meets the test. Currently, the Australian Prudential Regulatory Authority (APRA) provides guidance (SPG280) to superannuation trustees on the types of evidence they may take into account in applying the subjective test. These evidentiary requirements could be made mandatory for applicants. However, the Review is cognisant it would still be difficult to achieve consistency in assessment across funds.

The Review proposes introducing standardised evidentiary requirements for the living expenses test and for this to be administered by the Australian Taxation Office (ATO). The ATO should introduce policies and procedures to guide the administration of the subjective test. In doing so this would enable transparent and consistent eligibility, and consistency of member experiences. This would align with the **fair and effective** principle. This proposal is canvassed further below in the section 'Administration'.

## The amount and frequency of releases

### Stakeholder views

Many stakeholders raised concerns about individuals submitting multiple claims for release under the severe financial hardship ground within a 12 month period. Stakeholders highlighted that, in practice, the rules are operating as a cap of \$10,000 per annum *per fund member* rather than *per person* from their total superannuation balance. Some superannuation funds called for a single government agency, such as the ATO, to administer these rules. Others called for a central database to be established to collect and provide information to superannuation funds on amounts released under the severe financial hardship ground to prevent multiple claims.

Furthermore, concerns were raised about the rules allowing people to claim early release of superannuation on an annual basis to meet their ongoing living and household expenses, rather than (as intended) to provide release on **hardship** grounds for unexpected life events.

In addition, concerns were raised that the current arrangements may have the unintended consequence of encouraging members to request release of the maximum allowable amount (currently \$10,000) as they can only make one application per fund every 12 months.

## Discussion

The Review proposes the amount that an eligible individual can access should be reduced from a maximum of \$10,000 in a 12 month period to a maximum of \$10,000 in a 24 month period. This would be consistent with the **preservation** and **hardship** principles as it will provide an individual with short term financial relief but will prevent early release of superannuation being used as an ongoing funding source for living and household expenses.

With this change to extend the relevant period to 24 months, it would also be reasonable to allow multiple applications for smaller amounts, provided they are cumulatively within the \$10,000 total cap. This would reduce the incentive for applicants to seek the maximum cashing amount (based on a preference to avoid the risk of under-applying where they can only make one application every 12 months) when they may not need it at the time, thereby aligning with the **last resort** and **preservation** principles. It would also provide flexibility for more than one application to be made in the event of unforeseen circumstances (in line with the **hardship** principle). The minimum release amount of \$1,000 (unless preserved benefits are less than that amount) would be maintained.

In addition, it is proposed that this cap should apply on a 'per person' rather than 'per fund member' basis. This means individuals would no longer access more than \$10,000 by rolling-over superannuation into multiple accounts. This draft proposal would need to be supported by visibility over the cap between superannuation funds to ensure that this operates as intended. This is canvassed further below, under 'Administration'.

### **DRAFT PROPOSAL 11 – SEVERE FINANCIAL HARDSHIP TEST**

Amend the severe financial hardship ground by:

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

## Administration

The rules are administered in different ways by different funds, leading to inconsistency in member experiences and, anecdotally, abuse of the system (as partly discussed in the 'Eligibility criteria' section above). Some funds choose to offer early release under the severe financial hardship ground, while others do not. This is said to be due to the high administrative burden on funds of processing severe financial hardship applications.

### Stakeholder views

There was broad support from a range of stakeholders to ensure consistency in application of the rules between superannuation funds to prevent 'fund shopping' by members.

As noted above, there were divergent proposals for how to achieve consistency in the administration of this ground. Some stakeholders supported removing the trustees' discretion under the severe financial hardship ground and mandating consistent rules across funds for making a determination of severe financial hardship, however this would be difficult to achieve in practice. There was also broad support for a single decision maker for all early release applications under compassionate and severe financial hardship grounds.

## Discussion

The Review considers there is merit in establishing a central government administrator of the severe financial hardship ground. This would ensure consistency in member experiences and the integrity of the broader early release framework through better visibility of releases. It would also reduce the burden on trustees.

The Review considers the ATO would be best placed to take on this function. The ATO took over administration of the early release of superannuation on compassionate grounds on 1 July 2018 and has implemented a streamlined application process. There is an opportunity to leverage the infrastructure, policies and procedures in the administration of severe financial hardship applications, by transferring this function to the ATO as well.

In doing so, the ATO would be a 'one stop shop' for early release on compassionate and severe financial hardship grounds. Related to this, there is an opportunity to develop consistent evidentiary requirements and guidelines for approving applications for early release on severe financial hardship grounds.

### Visibility of amounts released

To give effect to the idea of a 'one stop shop' for these early release applications, it is envisaged that the individual applicant would only need to apply to one government agency – the ATO. Under the proposed model, the ATO would get proof of the individual meeting the income support payment test (objective test) directly from DHS and would then use that information in assessing an individual's application.

This approach would require significant systems upgrades by the ATO particularly to link with DHS data. To expedite the transfer of the decision-making role from trustees to the ATO, an interim measure could be to continue with the current two step practice, whereby an applicant would get proof of meeting the objective test from DHS and would then apply to the decision-maker (which would change to the ATO) – until such time as the ATO-DHS system build was finalised.

A key benefit of moving to a centralised function is the ATO would be able to provide oversight of the \$10,000 cap on a per person basis (total superannuation balance) rather than on a per fund member basis. It would also be able to monitor released amounts to enable implementation of the draft proposal for individuals to be able to make more than one application within the 24-month period up to the \$10,000 cashing restriction.

Furthermore, the ATO would be able to thwart concurrent claims of \$10,000 by individuals who are members of multiple funds. It could leverage off the infrastructure for compassionate grounds releases by notifying the superannuation fund and the applicant at the same time when a determination is made to release under these grounds. This would improve the integrity of current processes and payments. There is also an opportunity, particularly through a single centralised agency, to collect improved data about early release applications to better analyse whether the framework is working appropriately. This is discussed further in the next section.

### Improving the consumer experience and reducing the burden on trustees

Moving to a central administrator and eventually removing the current two-step process for applicants would improve the consumer experience through likely expediting the release of funds and providing a consistent approach to all early release applications under these grounds.

These proposed changes are also expected to result in the administrative costs of early release being shared across the superannuation industry, through recovery of costs via APRA levies, rather than being borne by individual funds that choose to offer early release (trust deeds can decide not to offer early release). On this basis, it is highly probable that more trustees will choose to offer early release of superannuation on severe financial hardship grounds to their membership if the administrative

costs in assessing applications are removed from individual funds – in doing so, providing a further benefit to members.

**DRAFT PROPOSAL 12 – ADMINISTRATION OF SEVERE FINANCIAL HARDSHIP**

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

## 4. Data collection and future review

One of the challenges the Review has faced is a lack of detailed data on early release of superannuation benefits. Notably, the 2002 Senate Select Committee report on early release recommended that:

*'...information be collected annually on the total number, value and type of early release payments by superannuation funds, in order to allow for analysis of trends in those payments'.*

This recommendation has never been specifically implemented.

While APRA and the Department of Human Services (DHS) have collected some high level data over time, there is no current legislative requirement on the Regulator or superannuation trustees to collect and interpret records of the details of claims made under compassionate or severe financial hardship grounds.

This has meant, in many cases, anecdotal and selected case study evidence is relied upon to draw conclusions and often the magnitude of problems that are identified is unclear. For example, the Review is aware that people may be rolling over superannuation to multiple different funds so they can make a number of contemporaneous claims for severe financial hardship, defeating the general limit of one claim per person of up to \$10,000 per year. However, there is no data that clearly shows how frequently this is occurring— given severe financial hardship is administered by individual superannuation trustees.

The ATO, as the new Regulator of early release on compassionate grounds, has incorporated more detailed data collection into its system build from the outset. In particular, the ATO is collecting data about the number of applications received, applications approved and denied, and the value of applications approved under each of the compassionate grounds, as well as more granular level data under some of the specific compassionate grounds.

If the Review's draft proposals to move the administration of severe financial hardship from the trustees of superannuation funds to the ATO is implemented (Draft Proposal 11), one of the benefits of such a change will be a greater ability to keep data records.

These data records should be used to inform analysis of trends and issues with the early release regime. It is recommended that a review of any reforms arising from this Review should be undertaken five years after implementation. This would allow a useful sample size of data to be collected and inform the Government whether any further changes are needed to ensure the early release system is operating as intended.

### **DRAFT PROPOSAL 13 – FUTURE REVIEW**

Use key statistics collected by the ATO to inform a further review of early release five years after changes to the rules are implemented.

## 5. Transfer of compassionate grounds administration to the ATO

The Government announced on 8 December 2017 that it will transfer responsibility for administering early release on compassionate grounds from DHS to the ATO. These new arrangements commenced on 1 July 2018.

The ATO is responsible for most of an individual's interactions with the superannuation system - in particular, through its ownership of the superannuation portal within myGov for individuals. The ATO also has a strong, existing relationship with the superannuation industry. Transferring the administrative function for early release on compassionate grounds to the ATO is expected to provide a range of benefits. In particular, it enables the ATO to provide a more streamlined, user-friendly service to both individuals and superannuation funds, through:

- providing a link to ASIC's MoneySmart calculators, to help people work out the impact that taking superannuation out early may have on their retirement savings;
- providing information in the web-content page of other support services available (e.g. the National Disability Insurance Agency) to encourage early access to superannuation to be a last resort;
- alerting applicants that third party intermediary fees to assist with completing an application cannot be claimed as part of an early release of superannuation application;
- streamlining the existing four separate DHS paper application forms into one combined application form for all conditions of release on compassionate grounds. This simplification may alleviate the need for third party intermediaries to assist with the application process, for a fee;
- the ability for individuals to upload accompanying documentation simultaneously with their application, which is currently a 'two-step process' under DHS; and
- allowing visibility for individuals of all their superannuation accounts simultaneously whilst applying.

These changes are expected to expedite the processing of applications from the previous 28 days to up to 14 days, and in doing so, expedite the release of funds to successful applicants.

The ATO is also improving the integrity of compassionate ground releases through:

- providing electronic copies of approval letters to superannuation funds at the same time as to the applicant to mitigate fraud risks and negate the need for superannuation funds to independently verify the letter with the Regulator; and
- monitoring the use of the mortgage ground so that releases up to the cashing restriction occur on a 'per person' rather than 'per superannuation fund member' basis.

The other advantage of this transfer is that it aligns with the ATO having similar responsibility for administration of the early release provisions under the First Home Super Saver Scheme.

Note that this transfer of function does not affect the current administrative arrangements for exempt public sector superannuation schemes.

## 6. Consolidated list of draft proposals

### Compassionate grounds

#### **DRAFT PROPOSAL 1 – MENTAL ILLNESS RELEASE**

Change the eligibility for the mental health ground of release from ‘alleviate an acute, or chronic, mental disturbance’ to ‘treat a diagnosed mental illness or behavioural disorder’.

#### **DRAFT PROPOSAL 2 – OVERSEAS MEDICAL TREATMENT**

Specify that release for overseas medical treatment is only available in cases of a life threatening illness or injury *or* where the individual currently resides outside of Australia, has done so for the past 12 months and does not intend to return to Australia to live in the next 12 months.

#### **DRAFT PROPOSAL 3 – INFORMATION ON ALTERNATIVE SUPPORT**

The Regulator should provide information during the application process to individuals on alternative avenues of support relevant to the specific compassionate ground for which the individual is applying.

#### **DRAFT PROPOSAL 4 – CLINICALLY RELEVANT TREATMENT**

Specify that the two registered medical practitioners must certify that the treatment is generally accepted in the medical profession as being a clinically relevant treatment option for the patient’s diagnosed condition.

#### **DRAFT PROPOSAL 5 – MEDICAL PRACTITIONERS**

Specify that:

- the specialist medical practitioner must be a specialist practicing *in the field related to the individual’s illness or injury*; and
- one of the medical practitioners must be the individual’s regular treating practitioner and the practitioner must attest to this in their certification.

#### **DRAFT PROPOSAL 6 – DENTAL TREATMENT**

Clarify that treatment for a life threatening condition, or acute or chronic pain includes dental treatment, with the certification of one medical practitioner and one dental practitioner.

#### **DRAFT PROPOSAL 7 – FAMILY AND DOMESTIC VIOLENCE**

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

#### **DRAFT PROPOSAL 8 – HOUSING**

**A.** Tighten access under the mortgage foreclosure ground to permit a release once in a *24 month* period, *per person*, that is equal to the sum of 3 months' repayments and 12 months' interest on the outstanding balance of the loan.

**B.** Extend the current evidentiary requirements so that the person must give the Regulator a written statement from the mortgagee that they believe the mortgage is serviceable by the person once the arrears have been rectified.

#### **DRAFT PROPOSAL 9 – SEVERE DISABILITY**

Clarify that release on severe disability grounds can include release for the purchase of disability aids or a specially modified vehicle; and is only available on the basis of certification from a medical practitioner that the disability aid or vehicle is required to accommodate the special needs of the person or a dependant arising from severe disability.

#### **DRAFT PROPOSAL 10 – RESIDUAL DISCRETION**

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

### Severe financial hardship grounds

#### **DRAFT PROPOSAL 11 – SEVERE FINANCIAL HARDSHIP TEST**

Amend the severe financial hardship ground by:

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

#### **DRAFT PROPOSAL 12 – ADMINISTRATION OF SEVERE FINANCIAL HARDSHIP**

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

### Other

#### **DRAFT PROPOSAL 13 – FUTURE REVIEW**

Use key statistics collected by the ATO to inform a further review of early release five years after any changes are implemented.