



Law Council
OF AUSTRALIA

Office of the President

4 October 2023

Director
Superannuation Insurance and Governance Unit
Member Outcomes and Governance Branch
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: superannuationobjective@treasury.gov.au

Dear Sir/Madam

LEGISLATING THE OBJECTIVE OF SUPERANNUATION

This submission has been prepared by the Law Council of Australia, with input from the Law Society of New South Wales, and in consultation with the Superannuation Committee of the Law Council's Legal Practice Section. It follows a submission sent to you by the Legal Practice Section on 5 April 2023.¹ That submission in turn followed relevant commentary in a 2016 submission from the Legal Practice Section on the Exposure Draft of the Superannuation (Objective) Bill 2016.² The commentary below should be read in the context of those earlier submissions.

Given that this initiative is proceeding by way of legislation, the Law Council is pleased to say that the Exposure Draft has been well drafted and has carefully addressed almost all of the potential issues that were identified in our earlier submissions. We thank you for the spirit with which you have approached this consultation which has yielded a better Exposure Draft.

Some more detailed and technical comments follow.

Background

The Law Council notes that the present consultation concerns the Superannuation (Objective) Bill 2023 Exposure Draft, and the Superannuation (Objective) (Consequential and Transitional Provisions) Bill 2023 Exposure Draft. The consultation commentary states that the draft legislation and explanatory materials reflect feedback received from stakeholders on the need to legislate the objective of superannuation to provide a shared direction for government, the superannuation industry and Australians.

The Law Council acknowledges that the previous submission made by the Superannuation Committee of the Legal Practice Section (in response to the February 2023 Consultation Paper) expressed the view that the objective of superannuation need not be introduced by

¹ April 2023 submission available at: <<https://lawcouncil.au/resources/submissions/legislating-the-objective-of-superannuation>>.

² 2016 submission available at: <https://www.lawcouncil.asn.au/publicassets/3ac9cc26-f0bc-e611-80d2-005056be66b1/3183 - Superannuation_reform_package.pdf>.

way of legislation. However, the measures that have been adopted under the Exposure Draft Bills and explanatory materials appear to be consistent with the alternative suggestions made by the Superannuation Committee in the event that the Government proceeded to legislate. For this reason, we have little by way of further comment to make.

General Comments

The Law Council broadly supports the Exposure Draft Bills, noting that they are consistent with reforms proposed in the February 2023 Consultation Paper. The proposed reforms do not alter superannuation trustees' existing obligations, nor do they alter how members' money can be invested or accessed.

In the Law Council's view, legislating a clear, principles-based objective for Australia's superannuation system will improve Government accountability and transparency and promote certainty in future reform.

We acknowledge that legislating the objective of superannuation cannot bind future Parliaments or guarantee that policy makers will always make decisions consistent with the objective. However, in the Law Council's view, the absence of an objective potentially exposes retirement savings to erosion, as occurred during the period 2019–2021. During that period, early withdrawals of retirement savings beyond the exceptional hardship framework were approved by the Parliament to offset the economic consequences of the COVID-19 pandemic national emergency, arguably in lieu of government-funded social security or disaster payments.

Other suggested improvements

In its response to the February 2023 Consultation Paper, the Legal Practice Section observed that the proposed legislated objective could be improved by incorporating words to avoid doubt that future laws will not apply retrospectively.

It remains the Law Council's position that future superannuation reforms, even those consistent with the legislated objective, '[should] not infringe the premises on which Australians have previously foregone salary and wages, and submitted to those moneys being preserved until retirement'. However, in rare circumstances, a limited form of retrospectivity may be appropriate: for example, if it is curative in nature. For this reason, the Law Council suggests any clarification with respect to retrospectivity might be better dealt with in the explanatory materials.

Finally, given the regulatory focus on risks of greenwashing arising from the use of words such as 'sustainable', we reiterate the suggestion contained in the earlier submissions that such words should not be used in the legislated objective of superannuation.

If you would like to discuss any aspect of this submission, please contact [REDACTED], Senior Policy Lawyer at [REDACTED] or on [REDACTED].

Yours sincerely



Luke Murphy
President