

**Submission by**  
**Financial Rights Legal Centre**  
**CHOICE**  
**Superannuation Consumers' Centre**

Treasury

Review of Early Release of Superannuation  
Benefits November 2018

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February 2019

## About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to [www.financialrights.org.au/submission/](http://www.financialrights.org.au/submission/) or [www.financialrights.org.au/publication/](http://www.financialrights.org.au/publication/)

Or sign up to our E-flyer at [www.financialrights.org.au](http://www.financialrights.org.au)

National Debt Helpline 1800 007 007  
Insurance Law Service 1300 663 464  
Mob Strong Debt Help 1800 808 488

Monday – Friday 9.30am-4.30pm

## About CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

To find out more about CHOICE's campaign work visit [www.choice.com.au/campaigns](http://www.choice.com.au/campaigns) and to support our campaigns, sign up at [www.choice.com.au/campaignsupporter](http://www.choice.com.au/campaignsupporter)

## About the Superannuation Consumers' Centre

The Superannuation Consumers' Centre was formed in 2013 as a not-for-profit to advance and protect the interests of superannuation consumers. The SCC aims to educate, advocate on behalf of and directly assist superannuation consumers to improve the standard of living for people of retirement age.

## Introduction

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Thank you for the opportunity to comment on the *Review of Early Release of Superannuation Benefits further consultation and draft proposals*. The Financial Rights Legal Centre (**Financial Rights**) has drafted this submission. CHOICE and the Superannuation Consumers' Centre have endorsed this submission and concur with the concerns raised.

Our positions on the draft proposals are based on the principle of the superannuation system, to provide income in retirement to substitute or supplement the Age Pension.<sup>1</sup> We address the majority of the proposals put forward in the paper, as well as raise several additional issues where there are no draft proposals put forth, namely:

- The Regulator taking on a data-collection role with a view to reducing reliance on early release of superannuation;
- Amendments to the funeral grounds for early release;
- Strata arrears and council rates; and
- Debt Management Firms.

### ***Superannuation and early release guiding principles***

Financial Rights supports the four guiding principles as outlined in Box 1 of the Consultation Paper, namely:

- Superannuation should be generally preserved to provide income in retirement
- There will be circumstances of hardship where the benefits of early access to superannuation for an individual will exceed the benefits of preserving balances until retirement
- Early release should generally be a last resort and is not a replacement for existing services and inadequate income support policies
- The rules should be able to be administered fairly and effectively.

We note that Treasury have dropped the reference to “genuine” hardship and we support this change.

We also acknowledge the challenge for policy makers in identifying the point at which the need for compassion outweighs the broader objectives of the superannuation system. There are many circumstances where it is more than appropriate for somebody to access their superannuation. There are others still where it is less appropriate.

It is important to keep in mind that short term relief via early release of superannuation can exacerbate long term disadvantage and inequality in retirement.

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<sup>1</sup> As per the recommendation of the 2014 Financial System Inquiry. Commonwealth of Australia, *Financial System Inquiry Final Report*, November 2014.

The compound loss on an individual's retirement savings arising out of an early release embeds disadvantage and inequality over their lifetime. For a domestic violence victim in her twenties, for example, withdrawing \$10,000 from her superannuation has the potential to leave that woman hundreds of thousands of dollars poorer come retirement.<sup>2</sup>

Those seeking to access their superannuation early are by definition are the least wealthy and financially secure and are therefore precisely the people who can least afford to give up the financial gains provided by the compounding effect of superannuation. Those who have sought early release of superannuation will then be more likely to need to rely on the Age Pension, to the detriment of both those individuals (as the age pension payment remains below the poverty line) and the government.

In this sense government funding of essential services in the short term - such as funding for family violence support services or urgent health care needs - can save the government significant sums in the long run in provisioning the Age Pension. As acknowledged in the consultation paper, opening up more options to access one's superannuation allows the Government to justify the reduction in taxpayer funded services.

Many of the issues raised by the concept of releasing one's superannuation early are difficult, complex and have real impacts upon people's lives. Financial Rights hears regularly from people experiencing severe financial hardship or disadvantage who simply do not understand why they cannot access retirement funds that they see as their own. Each case is unique and the application of compassion or assistance in each situation will lead to the early release in some situations, and in others require denying such early release. There are many grey areas. Establishing strict hard and fast rules is necessary but early release requires some flexibility, such as the residual discretion on the part of the Regulator.

We are concerned with the emergence of third parties, both in independent businesses and as in-house staff for instance at medical and dental practices, specialising in and profiting from assisting people to access their superannuation early. This practice can be exploitative and harmful, can undermine the principles underpinning early release of superannuation, and can threaten consumers' physical and financial health. Consideration should be given as to ways in which to minimise this practice.

We further note that in several circumstances in which consumers can access their superannuation early, there may be ways for these consumers to instead access funds through super insurance benefits. It is important to the integrity of the superannuation system that for situations in which super insurance is a viable option, this option is taken up rather than early release of superannuation.

The Insurance in Super Code outlines in paragraph 6.11.and 6.12:

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<sup>2</sup> On an account with the median superannuation annual compounding interest rate of 7.5% and assuming a retirement age of 67, a \$10,000 withdrawal at age 27 would leave a person \$180,400 poorer come retirement. On a lower interest rate of 6%, the same withdrawal would leave someone \$102,900 poorer come retirement. On a higher (but still not uncommon) interest rate of 10%, the same withdrawal would leave someone \$452,600 poorer come retirement. A \$10,000 withdrawal at age 57, just ten years away from retirement, on the median 7.5% annual compounding interest rate would leave someone \$20,600 poorer come retirement.

### *Release of funds*

*6.11 If we allow our members to receive early release of some of the money in their account on the basis of severe financial hardship or compassionate grounds, we will clearly explain the process on our website. If we do not allow this, we will explain the reasons for this on our website.*

*6.12 If we grant you release of your superannuation account balance (for example, due to a terminal illness), we will let you know the impact on any insurance cover you still have at the time and that you can choose to leave enough funds in your account to pay the premiums for your cover.*

In our experience consumers regularly have difficulty dealing with their superannuation companies, either in claiming for insurance benefits or claiming early release of super. We think the obligations that currently sit within the voluntary Insurance in Super Code can go further, and should be mandatory, as has been recommended in the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.<sup>3</sup>

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<sup>3</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* recommendation 4.9, p. 316.

## Early Release on Compassionate Grounds

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### Medical 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’.***

In the context of inadequate levels of current government support, Financial Rights supports the changes proposed in draft proposal 1.

Mental illness accounts for 23.6% of the non-fatal collective cost of disease in Australia, representing the largest proportion of non-fatal burden of all illness types.<sup>4</sup> One in five Australians experience a common mental health disorder during a 12-month period.

The cost of mental illness on the Australian economy in the form of welfare, health care, lost productivity, and premature death is \$45.4 billion.<sup>5</sup>

Addressing this problem requires significant resources including adequate government funding for mental health services to increase the capacity for early intervention to prevent illnesses becoming chronic, and offer a wider array of fully funded services to those who experience chronic mental illness. This is particularly the case given the prevalence of mental illness in the Australian population.

Placing the burden for this cost on those experiencing mental health issues through withdrawal of their superannuation funds has the likely consequence of harming their long term financial security – and by extension, long-term health outcomes – in order to access necessary care.

The proposal to tighten the standards for early release of superannuation by requiring a diagnosis increases the incentive for people suffering from mental illnesses or behavioural disorders to engage with mental health professionals.

The current use of the term “alleviate” places an unreasonable onus on an applicant to prove that early access to superannuation will “alleviate” their mental illness. Treatment is a more specific and reasonable guideline for the purpose of the release of superannuation and does not unduly pressure somebody to prove that their illness will be alleviated.

Financial Rights further notes that most super funds provide automatic insurance cover for total and permanent disability, which will pay a lump sum benefit for those unable to work due to injury or illness, including mental illness. In many cases, TPD cover is automatically

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<sup>4</sup> *Australian Burden of Disease Study: impact and causes of illness and death in Australia*, 2011, Australian Institute of Health and Welfare.

<sup>5</sup> Royal Australian and New Zealand College of Psychiatrists (RANZCP), *The economic cost of serious mental illness and comorbidities in Australia and New Zealand*, 2016, <https://www.ranzcp.org/files/publications/ranzcp-serious-mental-illness.aspx>

underwritten when a person joins the super fund, meaning even those with pre-existing mental health conditions can qualify to claim.

As per draft proposal 3 of the consultation paper, those inquiring with ATO about early release of superannuation on mental health grounds should be given clear information of the potential for their super insurance to pay a TPD lump sum or any potential negative impact that early release may have on their insurance (such as balance erosion that results in their policy lapsing), and informed as to the ways in which this is a preferable option to that individual accessing their superannuation early.

As outlined above, we are concerned the current obligations in the Voluntary Insurance in Super Code are insufficient.

Finally, it is critical that data gathered by the Regulator relating to mental health releases of superannuation must be proactively used to assist in government policy development to appropriately fund and resource services. Such data may be related to the geographic areas in which people are most commonly forced to withdraw their superannuation on mental health grounds, and which types of mental illness most commonly lead to withdrawal of superannuation. Targeted government funding can then be directed into those geographic areas or into treatment of such illnesses to address these gaps. The gathering and analysis of this data can therefore be used in a positive way to improve long term outcomes for Australians experiencing mental illness.

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## Recommendations

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1. Financial Rights Legal Centre supports draft proposal 1.
2. Those inquiring with ATO about early release of superannuation on mental health grounds should be given clear information of the potential for their super insurance to pay a TPD lump sum.
3. The ATO should collect data relating to early release on mental health grounds to inform government policy with respect to resourcing mental health services and supporting those with mental illness, with a view to reducing reliance on early release of super.
4. The obligations in the Insurance in Super Code should be mandatory, more robust and industry wide

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### ***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.”***

We have no comment related to draft proposal 2.

### **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.”***

Financial Rights supports draft proposal 3 as it is one important way in which to better inform and empower people when considering accessing their superannuation early. It may lead to more people preserving their superannuation where practical, and ensure that the long-term negative consequences of early withdrawal of superannuation only arise as a last resort.

Financial Rights also recommends that applicants should be provided with details of the National Debt Helpline in order to seek independent financial counselling support and advice. In the event, there is such a recommendation the free community services should be provided sufficient resources to assist consumers.

Superannuation funds should also be obliged to provide assistance in informing the consumer in relation to the impact as outlined above, with the requirements of the insurance in super code expanded and made mandatory

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## **Recommendations**

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5. Applicants should be provided with details of the National Debt Helpline in order to seek independent financial counselling support and advice. The National Debt Helpline adequately resourced
  6. The obligations in the Insurance in Super Code strengthened and superannuation funds providing more information and assistance to consumers
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### **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.”***

***and***

### **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.***

Financial Rights supports tightening the application processes as outlined in draft proposals 4 and 5. These proposals are in keeping with the principle that early access to superannuation should be minimised.

We understand that the intent of draft proposals 4 and 5 is to address the dangers of conflicts of interest and “doctor shopping” that can arise with regard to early release of superannuation for medical purposes. Building on these proposals, we further recommend that Treasury examine ways to prevent exploitation of vulnerable consumers by some private medical practices’ unscrupulous use of in-house staff specialising in accessing consumers’ superannuation early.

Financial Rights is aware of at least one obesity clinic based on Queensland, which has its own staff whose job it is to assist patients through the application process so as to maximise their chance of approval. This creates a significant conflict of interest. Staff are thoroughly versed on the ‘right’ things to say in order to secure early release, all the while standing to gain financially from the application’s approval. Those assisting the patient to apply may therefore not have the best interests of the patients in mind when completing an application. These misaligned incentives can lead to poor consumer outcomes – be it immense long term financial harm to an applicant or poor health outcomes for those who have received a medical service that may not be their best option or strictly necessary.

While it may *seem* helpful to consumers to have dedicated staff at medical centres assist with the at times complex paperwork, the potential for conflict of interest is too great to allow this practice to continue. Instead, medical centres should direct prospective patients to independent financial counsellors who may assist patients to financially plan for any potential surgery or other medical care in a way that is unbiased and has at its core a concern for the patient’s wellbeing.

Treasury should explore the issue of conflicts of interest further to develop an appropriate policy response to this and other practices borne of the conflict of interest. Consideration needs to be given to banning the practice of drafting people’s application forms, banning any reference to early release of superannuation in advertisements for the service, and ensuring all applicants speak to an independent financial counsellor.

#### *Difficulties related to “regular treating practitioner”*

We note that some patients will have difficulty in fulfilling the requirement set out in the second part of draft proposal 5 that at least one of the signing doctors be the patient’s regular treating practitioner (or another practitioner at that patient’s regular healthcare centre). We support outlining exceptions to this requirement.

#### *Timely access to funds*

In many cases of medical release, the timely release of funds is critical. The ATO should ensure that their process is both robust and straightforward.

#### *Difficulties relating to affordability of specialists*

Very few specialists will bulk bill patients. For people in severe financial hardship this can mean that they cannot afford to meet the requirements to apply for early release. We support the requirement of sign-off by a specialist who has adequately examined the patient and their history, but suggest that a mechanism should be explored such that people in such dire financial hardship that they cannot afford to pay for a specialist are still able to access their superannuation. This may be achieved through broad increases in government medical spending.

#### *Data*

As with mental illness, the ATO should collect data with respect to medical treatments releases of superannuation to be used assist in government policy development to appropriately fund and resource services.

#### **Case study – Jason’s story**

When Jason contacted Financial Rights, he was in need of an expensive specialist surgery that he could not access through the public health system. He wanted to access his superannuation early so as to fund the surgery. However, Jason could not afford the fee to see a specialist in order to get the letter required to have early release approved on medical grounds. This meant that he could not complete his application for early release.

*Source: Financial Rights Legal Centre*

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## **Recommendations**

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7. Financial Rights supports draft proposals 4 and 5.
8. Exceptions to the necessity for sign-off from a patient’s regular treating practitioner should be explicitly outlined.
9. Treasury should consider ways to address conflicts of interest in medical providers practice including
  - banning the practice of drafting people’s application forms,
  - banning any reference to early release of superannuation in advertisements for the service, and
  - ensuring all applicants speak to an independent financial counsellor.

10. ATO must collect data relating to early release on medical grounds so as to inform government funding and policy reform.

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## Dental Treatment

### *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.”***

Accessing one’s superannuation should not be a permanent or sustainable solution for the dental health crisis.

As of 2018, 30% of Australians delayed or avoided a visit to the dentist due to cost, 25% of non-Indigenous adults and 57% of Indigenous adults aged 15 and over had untreated tooth decay and, those aged 15 and over have on average 12.8 decayed, missing or filled teeth.<sup>6</sup> \$10.2 billion was spent on dental services in 2016-17.<sup>7</sup> Poor oral health is also linked to poor general health, including major chronic diseases and disability.<sup>8</sup>

It is clear that poor oral health is a serious problem for Australians and that more accessible dental treatment is necessary. Minor dental problems can become significant problems when left untreated; significant problems necessitating expensive interventions requiring, in some cases, access to superannuation to fund. If dental care were covered under Medicare, the numbers of people requiring early access to superannuation to fund expensive interventions into serious dental health problems would drastically reduce.

As noted in the discussion paper, the Regulator already approves applications for dental treatment where it is determined that such a release is ‘consistent with’ other grounds of release. Given this, Financial Rights supports clarification that treatment for a life threatening condition, or acute or chronic pain includes dental treatment, and the proper regulation of instances in which superannuation is released for this purpose.

The explicit inclusion of dental treatment within medical grounds for early access to superannuation should be seen as recognition that early release of superannuation is already being approved for dental care purposes, and should therefore be explicitly addressed in the regulations.

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<sup>6</sup> Australian Institute of Health and Welfare, *Oral health and dental care in Australia 2018*, AIHW, <https://www.aihw.gov.au/reports/dental-oral-health/oral-health-and-dental-care-in-australia/contents/healthy-teeth>

<sup>7</sup> Australian Institute of Health and Welfare, *Oral health and dental care in Australia 2015*, AIHW, <https://www.aihw.gov.au/reports/dental-oral-health/oral-health-and-dental-care-in-australia-2015/contents/oral-health-in-australia>

<sup>8</sup> Links between oral health and general health: the case for action, 2011, Dental Health Services Australia, [https://www.dhsv.org.au/\\_data/assets/pdf\\_file/0013/2515/links-between-oral-health-and-general-health-the-case-for-action.pdf](https://www.dhsv.org.au/_data/assets/pdf_file/0013/2515/links-between-oral-health-and-general-health-the-case-for-action.pdf)

### *Conflicts of interest*

Including dental treatment as grounds for early release of superannuation raises similar concerns as those raised by the inclusion of all medical care: doctor-shopping and conflicts of interest.

Financial Rights is again aware of at least one dental practice that has its own in-house team to manage and lodge patients' online applications for them. As with release on medical grounds, Treasury should consider ways to minimise poor outcomes from such practices.

### *Data*

As with mental illness and medical treatments, the ATO should collect data with respect to dental treatments releases of superannuation to be used assist in government policy development to appropriately fund and resource services.

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## Recommendations

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11. Financial Rights supports draft proposal 6.
12. Treasury should consider ways to address conflicts of interest in dental providers practice including
  - banning the practice of drafting people's application forms,
  - banning any reference to early release of superannuation in advertisements for the service, and
  - ensuring all applicants speak to an independent financial counsellor.
13. ATO must collect data relating to early release for dental treatment so as to inform government funding and policy reform.

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## Victims of family and domestic violence

### *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.”***

Financial Rights' previous submission supported the notion of domestic violence victims accessing their superannuation benefits on the basis that the grounds for this access be carefully drafted so as to not create further opportunities for financial abuse, or lead to unnecessary long term financial detriment to the individual.

We note that in drafting its proposal Treasury acknowledges the challenges in this area. That is:

*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.*

But that

*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."*

The balancing act and line drawing required here is a difficult and complex task.

Financial Rights acknowledges the necessity for victims to access flexible funds in a timely manner in order to escape violence, however holds reservations as to whether the proposal will meet this aim and not fall into the trap of acting as a substitute for adequate government support.

Firstly, it is not clear why – when services such as the Victorian Government funded Family Violence Flexible Support Packages as referenced by the consultation paper exist – these services are not expanded with support from state and Federal Governments, to address the problem. It seems incongruent to base the amount an individual can draw from their own superannuation off of a government funded service model. Prima facie the proposal looks like an explicit shift of taxpayer-funded government resources on to vulnerable individuals.

It is also not clear why, when these services do exist, that an inability to access such services is not included as an evidentiary requirement. If this proposal is adopted, while not wishing to place an additional burden on already vulnerable domestic and family violence victims to seek such funding before being able to apply, accessing superannuation must be a genuine last resort where there are no other options.

If this proposal is adopted, in cases where there are no funds available elsewhere and a victim of domestic violence is forced to call upon their superannuation, there should also be some mechanism to allow these victims to recoup that significant loss to their superannuation savings, through a government assistance program or policy. As Financial Rights and other groups have made clear it is profoundly unfair to further financially disadvantage a victim of domestic or financial abuse in the long term. This is especially the case for younger victims. \$10,000 withdrawn by a woman in her twenties or thirties – the demographic for which intimate partner violence is the most common cause of injury or death – has a significantly increased detrimental impact on her financial security upon retirement than \$10,000 withdrawn later in life, closer to retirement.

We recommend that the proposal should not be implemented without a Federal Government commitment to additional funding of specialist women's and sexual assault and domestic and family violence services, specialist homelessness services, and other services, in order to address the problems identified by the need to access superannuation.

This is particularly required given specialist domestic and family violence services such as shelters and the 1800 RESPECT line, along with community legal services and more, have been defunded, threatened with defunding, or otherwise inadequately resourced in recent years.

We would note that Victorian Family Violence Flexible Support Package commenced in December 2015 and has since been evaluated as extremely successful.<sup>9</sup> Federal Government support for a national rollout and expansion of the Family Violence Flexible Support Package Initiative should be considered.

If the proposal to expand early access to superannuation on compassionate grounds to situations of family and domestic violence is pursued, several further protections must be introduced.

Financial Rights supports the application of Draft Proposal 3 regarding the provision of information of alternative support options, with the additional requirement that there needs to be evidence provided that the applicant is not able to access the required funds through other services due to lack of availability of funds.

Consideration should be given to developing mechanism to allow these victims to recoup the loss of their superannuation savings, through a government assistance program or policy.

In order to avoid the potential for perpetrators of domestic and family violence to access the money themselves, there should be an option made available for larger payments to be made directly from the super fund to third parties to pay for bonds, rent, removalists, furniture, cars, or security systems. This should remain an option and not be mandatory.

Further, the application process for those applying for early release on domestic or family violence grounds must be handled by appropriately trauma-informed staff. The Regulator must hire or train specialists for this purpose if this additional ground is adopted. Staff must have an understanding of the ways in which trauma impacts victim-survivors' cognition, decision-making, needs and safety.

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## Recommendations

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14. Draft proposal 7 should not be implemented without a Federal Government commitment to additional funding of specialist women's and sexual assault and domestic and family violence services, specialist homelessness services and other services.

15. If the draft proposal 7 is adopted:

- evidence needs to be provided that the applicant is not able to access the required funds through other services due to lack of availability of funds;

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<sup>9</sup> Family Safety Victoria, *Family Violence Flexible Support Package Initiative: Summary and Next Steps*, Victoria State Government 2017.

- a mechanism should be introduced to allow victims to recoup the loss of their superannuation savings, through a government assistance program or policy.
  - there should be an option for larger payments to be made directly from the super fund to a third party;
  - funds should be made available in an expedient fashion; and
  - the Regulator should train or engage specialist trauma-informed staff to handle applications on domestic or family grounds.
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## Housing grounds

### *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.”***

Financial Rights supports this proposal on the basis that it can help provide safeguards against the continued drawing down on superannuation in order to make payments on a mortgage that is unaffordable for the consumer. We support section A of the proposal that releases may only be permitted once in a 24 month period per person, rather than once in a 12 month period, and with the specific cap on the amount to be released.

In section B of the proposal, Financial Rights supports the extension of the evidentiary requirements to require a letter to show that the mortgage provider believes the mortgage is serviceable by the person once the arrears are rectified. We however propose a further extension of this proposal.

In most cases of financial hardship, the most appropriate avenue is to establish a hardship arrangement with one’s credit provider. This occurs when the mortgage provider can state with confidence that they believe once the arrears are cleared, the mortgage will be serviceable.

However, in some cases, hardship arrangements are not possible or are not in the consumer’s interest. For some, a hardship arrangement may mean an unreasonable extension of the term of an individual’s mortgage. In such cases, early access to superannuation may be appropriate if it can be shown that both the mortgage will be serviceable once the arrears are cleared, and that a hardship variation would not be appropriate or favourable to the consumer.

Consequently Financial Rights proposes an amendment to section B, to read:

***“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; and that*
- *they have considered the option of a hardship variation and this option has been deemed unfavourable for the person.”*

Further, to ensure that in all cases where a hardship variation is an appropriate way forward, this option is taken, the Regulator as part of their proposed obligations under draft proposal 3 should be obliged to give individuals applying for early access to their superannuation on housing grounds information relating to their right to seek a hardship variation from their lender.

Finally, it is important that while evidentiary requirements should remain tight so as to protect financial interests of consumers, for those whose applications meet the requirements, funds should be released as early as possible. Delays can lead to excessive court fees, financial and emotional stress, and to other adverse consequences.

The regulations should enable flexibility, in some circumstances Financial Rights advises clients to place the property on the market and continue negotiating with the lender to obtain a hardship variation or early access to superannuation. We have experienced delays or a refusal on the grounds the property is listed.

#### Case study – Molly’s story

Molly is self-employed and ran a business from home in regional NSW. She contacted Financial Rights regarding a Notice to Vacate her home.

Molly had missed the payments because her grandson was unwell and she needed to assist her daughter which resulted in a sustained period where she had less income from her business. Molly had arrears of approximately \$15,000.

Financial Rights assisted Molly to lodge a dispute in EDR asking them to recommend her lender cease enforcement against the client, withdraw the Notice to Vacate and enter into a payment arrangement. This was rejected by the lender, however, the lender indicated that if Molly cleared the arrears within two weeks, the lender would give time to refinance the loan.

Molly applied for the release of \$18,000 of her superannuation to clear the arrears, but it became clear this would not happen in time.

The day before the eviction was due to take place, Financial Rights assisted her to obtain an urgent stay from the NSW Supreme Court until the following week. To assist with the stay, Molly listed the property for sale as an option to seek time for the sale.

In the days following, Molly sought approval for her superannuation to be released, however it was too late as the arrears now exceeded the amount available for

superannuation due to the legal fees and the property was already listed for sale.

*Source: Financial Rights Legal Centre*

### ***Early release of superannuation for strata and council rates***

In our earlier submission, Financial Rights argued that if superannuation is made available for early release on housing grounds, then it should be made available to make payments towards strata and council rates. The consultation paper does not discuss this matter nor put forward proposals. We continue to believe that this is a matter of importance and believe consideration should be given to the inclusion of these grounds for early release of superannuation.

Strata committees have the power to bankrupt a homeowner after they have accrued over \$5,000 in arrears. The bankruptcy trustee can then force the sale of the home for the benefit of creditors. Allowing homeowners to access their superannuation to pay for strata and council fees therefore can prevent the loss of a home. A home is an asset that can provide significant benefit in retirement: the protection of this asset sets strata debt apart from other debts where creditors also pose bankruptcy threats.

Financial Rights supports the addition of strata and council fees under housing grounds for the early release of superannuation, under the conditions that:

- the individual provides evidence such as that they are three months in arrears, have over \$5,000 in arrears and have applied for financial hardship from a lender (such as their mortgage provider);
- the individual can show that accessing their superannuation is a last resort, including that they are unable to access a hardship arrangement from a lender; and
- the individual can show that they have a plan to service their strata and council fees going forward.

These safeguards can ensure that the principles of 'preservation' and 'last resort' are upheld.

Financial Rights does not support the requirement that the strata committee would need to issue a default notice or commence proceedings before the person can access their superannuation benefits. We are concerned that by the time a strata committee has issued a default notice there would not be enough time to access benefits before significant enforcement expenses are incurred or the person is made bankrupt. We believe the above evidentiary requirements are tight enough to sufficiently protect the financial interests of consumers.

For those whose applications meet the requirements, funds should be released as early as possible in order to avoid court fees and other financial stress.

### Case study – Lauren’s story

Lauren had a judgement debt on her strata fees, and applied for early release of superannuation in order to pay these fees.

However, Lauren had not yet been provided written evidence from the strata body that they were going to repossess the house if the fees were not paid, and so early release was denied. It was unclear to Lauren and to the financial counsellor assisting her what level of evidence would be sufficient to prove that her home was under direct threat and thus she was in need of early access to superannuation.

*Source: Financial Rights Legal Centre*

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## Recommendations

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16. Financial Rights supports proposal 8 with the following amendment to Section 1 as follows:

*“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; and that*
- *they have considered the option of a hardship variation and this option has been deemed unfavourable or inappropriate for the person.”*

17. The Regulator should be specifically obliged to inform individuals seeking early release of superannuation on housing grounds of their right to seek a hardship arrangement with their lender.

18. Strata and council fees should be included as grounds for early release of superannuation, under the conditions that:

- the individual provides evidence such as that they are three months in arrears, have over \$5,000 in arrears, and have applied for financial hardship from a lender;
  - the individual can show that accessing their superannuation is a last resort, including that they are unable to access a hardship arrangement from a lender; and
  - the individual can show that they have a plan to service their strata and council fees going forward.
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## Funeral grounds

We note that the further consultation paper states

*“the Review considers that applying the current threshold of financial dependency appropriately limits the early release of superannuation to applicants on funeral expenses grounds”*

In general, Financial Rights support the position of not extending the grounds upon which people can withdraw superannuation for funeral expenses beyond those of financial dependents. However, as we set out in our previous submission, we support the expansion of the “dependency relationship” definition to include Aboriginal kinship relationships as proposed by Legal Aid NSW in their 2018 submission.

Aboriginal communities can often have more complex relationship structures than the very narrow financial dependency nuclear family relationships with respect to which most laws are written. As Legal Aid NSW has set out, several other statutory frameworks recognize Aboriginal kinship relationships, including s.13 of the *Children and Young Persons (Care and Protection) Act 1998*, and part 4.4 of the *Succession Act 2006*.

Part 4.4 of the *Succession Act 2006* has explicit provisions for persons other than immediate family members of a deceased Indigenous person to share in that deceased person’s estate in accordance with the laws, customs, traditions and practices of the Indigenous community or group to which the deceased belonged. Similar recognition should be granted of Aboriginal kinship relationships for the purposes of regulating the early release of super on funeral grounds.

### *Capping*

In our previous submission we recommended capping the amount for early release of superannuation on funeral grounds. We continue to hold this position however we wish to note that in some areas there are few funeral providers offering services and are therefore able to charge higher than average prices. For many Aboriginal people, being buried on Country is imperative, and as such their family and community are given no choice but to pay the exorbitant costs charged by funeral and burial services in that area. Some flexibility needs to be built in for these circumstances, while ensuring that these businesses do not exploit their market power.

### *Regulation of the funeral industry*

We also recommend consideration of ways in which the government can alleviate the pressure felt disproportionately by Aboriginal and Torres Strait Islander communities by the funeral industry’s often uncompetitive and non-transparent pricing. Funeral providers must be more tightly regulated in order to ensure they do not charge exploitative and exorbitant amounts.

### *Government provision of financial support for funeral purposes*

The NSW Aboriginal Land Council (NSWALC) provides funeral grants of up to \$5,000 to former members of the now-closed NSWALC Funeral Fund, and has determined that any NSW Aboriginal person who was not a member of the Insurance Funeral Fund is able to apply for a NSWALC funeral grant of up to \$1,000 to assist with covering funeral costs. While such a

program is certainly welcome, these funding amounts often go very little way to covering the full cost of funerals.

Funerals often have immense cultural significance for Aboriginal and Torres Strait Islander communities, and can be significant expenses, particularly for people, families and communities already facing financial hardship.

Existing financial assistance for funeral expenses are inadequate, and back many people into a corner of being forced to rely on early release of superannuation in order to fund adequate funeral and burial services.

We support expanding government programs to provide financial assistance to Aboriginal peoples for funeral costs.

Financial Rights supports the application of Draft Proposal 3 regarding the provision of information of alternative funding options for funerals to those seeking early release of superannuation for this purpose.

#### *Superannuation death benefit*

Finally, in some cases, upon the death of a super fund member, a superannuation death benefit can be paid to the dependents of the fund member or to the fund member's estate. We reiterate the recommendation made by Legal Aid NSW that consideration should be given to developing a mechanism for super funds to certify that a deceased person has a death benefit, and prioritise release to funeral directors for funeral costs in those cases. We also recommend tighter regulation of super funds and insurers to ensure that they release death benefits in a timely fashion.

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## Recommendations

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19. The definition of "dependency relationship" under the funeral grounds for early release of superannuation should be expanded to include Aboriginal kinship relationships.
20. Government financial assistance for Aboriginal peoples and communities for funeral and burial costs should be expanded.
21. Exploitation and monopoly behaviour in the funeral provider industry should be examined.
22. A mechanism for super funds to certify that a deceased person has a death benefit need to be developed, with release of these funds to funeral directors for funeral benefits in those cases prioritised.

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## Severe disability

### *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.”***

Financial Rights generally supports the clarification that release on severe disability grounds can include release for the purchase of disability aids or a modified vehicle for people who are otherwise unable to procure these necessary aids. As noted in the consultation paper, early release of superannuation is already approved by the Regulator on these grounds under the Regulator’s residual discretion and as such it makes sense to explicitly outline and regulate this.

We note however that there remains significant unmet demand under the NDIS. In wave 1 of the NDIS trial, 26% of NDIS participants accessed supports not funded through the NDIS, including 17% of all NDIS participants accessing aids and equipment not funded through the NDIS. In wave 2 this increased to 39% accessing supports, including 23% accessing aids and equipment. The most frequently reported method by which NDIS participants accessed non-NDIS funded supports was to rely on family members or to pay for the supports themselves.

In wave 1, unmet demand was reported by 32% of NDIS participants who were unable to access a support for which they had funding under the NDIS. 10% reported they could not access their supports because they were too expensive.<sup>10</sup> Early release of individuals’ superannuation cannot be a solution to systemic shortfalls in government service provision.

Enshrining early access to superannuation as a long-term fix to the failings of the NDIS is inappropriate. However, while these severe failings remain in the NDIS, in recognition of the significant quality of life increases that disability aids and modified vehicles can bring to people with disabilities, and as releases on such grounds are already approved, we support draft proposal 9.

The expansion of the severe disability grounds for early release of superannuation should only be a temporary measure in recognition of the existing inadequacies in the NDIS. As outlined in recommendation 3, all instances of early release of superannuation should be monitored and categorised, with data gathered by the Regulator used to inform a government policy development in this area.

The consultation paper states that there was general support for the view that individuals should approach the NDIS in the first instance before seeking early release on disability grounds. We support this however Treasury needs to work with the NDIS to ensure that they provide a reason for why the mobility aid or modified vehicle was not funded under the NDIS in a timely manner.

We do not agree with the position argued in the paper that this draft proposal can replace the residual discretion of the Regulator. We discuss this further below.

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<sup>10</sup> *Evaluation of the NDIS: Final Report*, 2018, National Institute of Labour Studies, Flinders University, Adelaide, Australia.

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## Recommendations

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23. Financial Rights supports draft proposal 9.
  24. The ATO must collect data relating to early release on disability grounds so as to inform government funding and policy changes with a view to providing adequate NDIS funding.
  25. Treasury should work with the NDIS to ensure that they provide a reason for why the mobility aid or modified vehicle was not funded under the NDIS in a timely manner.
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### Regulator's residual discretion

#### *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.”***

Financial Rights does not support draft proposal 10.

The Regulator’s residual discretion is an important element of the current system and avoids the need for a more prescriptive approach. Many vulnerable and marginalised people do not fit neatly within given boxes and frameworks, but nonetheless are in circumstances that fit with the principles for the early release of superannuation.

The residual discretion is regularly used in the case of outstanding council rates. The removal of the residual discretion without the acceptance of Financial Rights’ recommendation to include council and strata under the housing grounds for early release of superannuation would cut off many people in financial hardship from funding necessary to keep their house.

Even if council arrears are brought in under the housing grounds for early release of superannuation, this example illustrates that the residual discretion can function effectively to bring to the attention of the Regulator an area not covered by, but broadly consistent with the legislative intent of, the specific bases for release. This function has led organically to a useful legislative reform.

If the residual discretion were removed, such cases would not be brought before the Regulator outside of formal reviews, and the Regulator would lose the ability to easily identify areas where the system could be improved. It would also lose the ability in the interim between reviews to make good and lawful decisions on such matters, which if the residual discretion were removed would have to await time-consuming legislative or regulatory reform. Vulnerable people may fall through the cracks in the delay.

It is not possible to pre-empt every possible current and future reason for early release that might be consistent with the policy objectives for allowing early release.

Treasury have acknowledged in this consultation paper that there are significant challenges for policy makers in identifying the point at which the need for compassion outweighs the

broader objectives of the superannuation system. These complexities require evidence based policy development, the establishment of rules arising out of this policy development, ongoing consideration and review of these rules and their impact of Australians and, importantly, flexibility to capture issues raised that fall outside of prior experience.

The residual discretion allows for instances to be dealt with as they arise, and further give the Regulator the information and the experience to enable it to propose legislative reform as and when necessary. Maintaining a residual discretion is therefore a critical tool for policy development and to enable fairer outcomes for consumers on a case by case basis.

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## Recommendations

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26. Financial Rights recommends retaining the Regulator's residual discretion.

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## Early release on severe financial hardship grounds

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### *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.”***

Financial Rights supports the expansion of the current 26-week rule, however we believe that an appropriate expansion would be to 26 weeks out of the past 12 months, rather than out of the past 40 weeks.

As outlined in our initial submission, the 26-week rule may discourage individuals to attempt to return to work earlier or to accept casual work following a period of unemployment during the 26 week qualification period. An expansion to allow individuals who have received an eligible Centrelink payment for 26 weeks in the past year allows an appropriate amount of flexibility. This proposed expansion to 26 weeks within the past 40 weeks is a step in the right direction, however we stand by our initial proposal that 26 weeks within the past 12 months is the appropriate expansion.

We also reiterate our position that the receipt of qualifying Centrelink benefits should not be the only way of establishing that a person is in severe financial hardship. There are many vulnerable members of the community who are not eligible to receive Centrelink payments for a variety of reasons other than the application of the income and assets tests. These include foreign workers, refugees, those in a Centrelink preclusion period, and more. These people should not be entirely excluded from accessing their superannuation on financial hardship grounds.

We support the introduction of an additional definition for ‘severe financial hardship’ to include those who are not eligible to receive Centrelink payments, but who would otherwise meet the Centrelink income and asset tests. For example, the trustee may apply an income and asset test over the preceding 12 months, similar to the Centrelink income and asset tests. If an individual can show that based on these tests they would have been eligible for one of the qualifying Centrelink payments, this would indicate to the trustee that the individual is in financial hardship. An alternative measurement for financial hardship could be the Henderson Poverty Index for a period of time.

We support the amendment that multiple releases be permitted, over a 24-month period, up to the \$10,000 limit, for the reasons outlined in the consultation paper.

[Case study – James’ story](#)

James had been living on a sole income of Centrelink benefits for more than 26 weeks when he applied for early access to his superannuation on financial hardship grounds.

At one point during the 26 week period James had been moved from the Newstart payment to the Austudy payment and as such his application for early release of superannuation was rejected.

*Source: Financial Rights Legal Centre*

### Case study –Elizabeth’s story

Elizabeth had been on Newstart for over 12 months when she applied for early access to superannuation on financial hardship grounds. She had gone overseas for a few weeks in that time because of a family emergency, and during her period overseas her benefits had been stopped.

As a result of the temporary pause in Newstart payments, Elizabeth was denied early release of superannuation.

*Source: Financial Rights Legal Centre*

## Recommendations

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27. The Commonwealth income support payment test should be expanded to 26 weeks in the last 12 months.
  28. Eligibility for early release on financial hardship grounds should be expanded to those who are not eligible for Centrelink, but who can prove they are in severe financial hardship by way of an income test or reference to the Henderson Poverty Index.
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### ***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.”***

Financial Rights has previously raised the concern that superannuation funds have the discretion not to allow early access despite an individual meeting the criteria. This creates unfairness in the system, whereby two people in identical financial situations can have two

different outcomes from applying to their super funds for early access to their superannuation on financial hardship grounds, solely on the basis of which fund they are a member of.

Despite a statutory obligation to act in the best interests of their members, this does not always translate into acting in the best interests of individual members.

This conflict creates a natural incentive for trustees to refuse early release to a member despite that member fitting all criteria, where that fund has the discretion to do so. Further, the current situation creates incentive for members to roll their super into another fund that they believe will release their funds early, but which may have less favourable investment returns and fees. This can cause the individual significant financial loss in the long term.

It is not immediately clear from the consultation paper whether the transfer of the administrative function to the ATO would mean the ATO has the power to compel a fund to release superannuation under financial hardship grounds for an applicant who meets all requirements, or whether individual funds would retain the ability to refuse. We support the administrative shift regardless, but would like clarification as to whether this shift will remove the ability for funds to refuse release.

We also expect that this administrative shift can serve to streamline and speed up the process of early release of superannuation. While we support strict regulation and stringent requirements for early release of superannuation so as to avert the potential for unnecessary erosion of superannuation, we also understand that in cases where superannuation is the only available funding source, swift access to money can be of utmost importance. The transfer of the function of the severe financial hardship ground to the ATO such as to be consistent with the transfer of the compassionate grounds function should come alongside a consumer-oriented, swift and streamlined process.

### Case study – Mark’s story

Mark lost his job and had been on Newstart for over 26 weeks when he contacted Financial Rights.

Mark and his wife had a combined debt of \$35,000, between credit cards and personal loans with several banks. They were also in mortgage hardship, and had negotiated a hardship variation with their lender, which was due to finish in two months’ time.

Mark had a small amount of superannuation, which he had tried to access but had been rejected because the super fund he was with did not release superannuation early on financial hardship grounds. We advised him that in order to be able to access superannuation on financial hardship grounds he would have to transfer his super over to a different fund that does offer early release under financial hardship.

*Source: Financial Rights Legal Centre*

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## Recommendations

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29. Financial Rights Legal Centre supports draft proposal 12, with the expectation that this administrative shift will serve to streamline and speed up the process of early release of superannuation.

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## Data Collection and Future Review

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### *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.”***

Financial Rights supports draft proposal 13. It is vital that statistics collected by the ATO can be used to inform a further review of early release.

However, we would expand on this proposal: the information gathered by the ATO relating to early release of superannuation can be used to inform far more than just the next review of early release. This information can and must be used in the long-term to address service gaps and ensure appropriate alternative support is available such that individuals no longer have need to access their superannuation early. Data gathered by the Regulator relating to common trends in early access to superannuation can be a very useful tool to pursuing this goal.

The ATO should be tasked with collecting data on the patterns of early release of superannuation, which can be used to inform recommendations to government relating to targeted funding and policy change with a view to filling the gaps where currently people are forced to rely on gouging their own superannuation.

For instance, if patterns of early release applications and approval show a particular surgery being approved very regularly, this information can be used to recommend to government that interventions must be made to make this surgery more readily available through Medicare. Existing information suggests precisely this intervention must be taken with regard to bariatric surgery, for instance. Comprehensive information and data from ATO can be used to recommend geographic areas where greater numbers of surgeons should be funded to provide this surgery in the public health system. In future, data may reveal that those in a certain geographic area are disproportionately likely to withdraw their superannuation for a particular dental treatment, or for mental health reasons, pointing to the necessity for additional government funding to services and initiatives to address these in an appropriate and focused manner.

This data gathering and advisory work should underpin the work of the Regulator, such that instances of, and grounds for, early access to superannuation can be minimised over time rather than expanded.

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## Recommendations

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30. Financial Rights Legal Centre supports draft proposal 13.

31. The ATO should collect and use data relating to early access to superannuation to inform recommendations to government on appropriate funding allocations and policy changes to reduce reliance on early release of superannuation.

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## Debt Management Firms

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Financial Rights is concerned with the potential rise in exploitative entities that take advantage of vulnerable people by offering to assist people to access their superannuation early, for a fee, across various grounds for early release of superannuation.

Several such entities already exist, and a number of debt management firm types such as debt negotiators, credit repairers and budgeting services undertake fairly similar services. In our experience, the services provided by these entities are of little to no value to those that use them. We think it is a dangerous possibility that unscrupulous companies will expand into the market of assisting people to access their superannuation, and exploiting people further through this niche service.

If the application process for early release of superannuation is too complex for an individual to carry out alone, either the process must be simplified or adequate government resourcing should be provided to ATO staff or external independent services that assist people through their application process. There should be no need for a fee-based service to assist. Treasury should proactively examine ways to ensure fee-based services do not exploit people, including a potential ban on fee-based services with respect to accessing superannuation.

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## Recommendations

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**32. Treasury should examine ways to prevent exploitation of vulnerable consumers considering early access to their superannuation by Debt Management Firms.**

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## Concluding Remarks

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Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



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