

24 May 2019

Manager
Retirement Benefits Unit
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: superannuation@treasury.gov.au

Dear Sir/Madam

Superannuation binding death benefit nominations and kinship structures

The Law Council welcomes the opportunity to provide preliminary comments to the Treasury regarding its *Discussion Paper on Superannuation binding death benefit nominations and kinship structures* (**Discussion Paper**).

The Law Council is grateful for the assistance of its Indigenous Legal Issues Committee (**ILIC**), Elder Law and Succession Law Committee (**ELSLC**), Superannuation Committee of the Legal Practice Section, the Law Society of South Australia (**LSSA**) and the Law Society of New South Wales (**LSNSW**) in the preparation of this letter.

Overarching Comments

The Law Council considers the issue of superannuation death benefits in connection with kinship structures to be important and worthy of exploration in greater detail.

The Law Council understands that current approaches may negatively and unfairly impact Aboriginal and Torres Strait Islander people and communities, and suggests broader consultation with Aboriginal and Torres Strait Islander peoples would be appropriate to determine whether changes are needed, and the nature of those changes. The Law Council notes that there is scope to locate and explore other case studies beyond the experience of the Lockhart River community addressed through the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**). At this stage, the Law Council appreciates the opportunity to make some broad observations and comments for consideration by the Treasury in the course of its deliberations. The Law Council does not make any formal recommendations at this time but would be pleased to further assist the Treasury in any future consultations conducted and with more detailed submissions in regard to any proposed legislative amendments concerning death benefit nominations. The Law Council would be grateful for the opportunity to provide early written input regarding options for reform.

Preliminary observations

The Royal Commission was made aware of the current death benefits issue through evidence heard about the Lockhart River community, and the difficulties that some Aboriginal and Torres Strait Islander people faced when accessing their superannuation entitlements due to complexities associated with Indigenous kinship structures.

The Law Council is similarly informed by the LSSA, itself drawing on the expertise of its Aboriginal Issues Committee, that superannuation can be a vexed issue for Aboriginal and Torres Strait Islander people, including for the following reasons.

- Due to social and health inequalities, many Aboriginal and Torres Strait Islander people do not live long enough to draw their super.
- Aboriginal and Torres Strait Islander people may not know that they have superannuation, and even if they do, may not realise that they have been paying for debt and disability insurance from their fund(s). Multiple, unconsolidated funds are often completely depleted by these insurance premium withdrawals and administration fees.
- The nominations referred to in the Discussion Paper include binding death benefit nomination; reversionary beneficiary; non-binding death benefit nomination; and non-lapsing binding death benefit nomination. As observed by the Treasury,¹ trustees are required to deal with death benefit distributions according to the governing rules of the superannuation entity, but are not required by law to offer any of these death benefit nominations to their members. Consequently, these four nominations are not always available and can vary across superannuation funds.
- Many Aboriginal and Torres Strait Islander people do not make any of the nominations referred to in the Discussion Paper, and often die intestate. Superannuation funds will not always disclose to the families of the deceased whether the deceased had funds with them, unless they have detail of the membership and an interdependent relationship. Superannuation funds have been known to claim that privacy provisions prevent this disclosure to kinship members who may have a potential claim.
- Where the existence of a fund is known, there are often family disputes between a surviving spouse, ex-spouse, estranged spouse and children from an extended/non-nuclear family, especially where the trustee has exercised their discretion to pay a death benefit to one interdependent over another. Superannuation funds tend not to become involved such disputes, and unless the parties can agree a settlement, matters can continue for a very long time.
- The Superannuation Guarantee means that for many families there are actually substantial funds and/or death benefits that the deceased accumulated. As such, there are likely to be large amounts of superannuation funds that remain unclaimed.

¹ Treasury Department, *Superannuation binding death benefit nominations and kinship structures* (Discussion Paper, March 2019) 4 <<https://treasury.gov.au/sites/default/files/2019-03/c2019-t371937-discussion-paper.pdf>>

As noted in the Discussion Paper, nominations can be made in respect of a person with whom the nominator has an 'interdependency relationship', under the *Superannuation Industry (Supervision) Act 1993* (Cth).² In light of the observations above, the LSSA considers that reform of the 'interdependency relationship' test is necessary to ensure greater flexibility with regard to dependency relationships, so as to accommodate kinship structures. A broader test may be more appropriate to cover the kinship field.

The Discussion Paper points to other areas of law where kinship considerations have been addressed, including in family law and workplace law. It notes that kinship is an explicit consideration under the *Family Law Act 1975* (Cth) when resolving parenting matters.³ It also identifies findings of the Australian Law Reform Commission's *Review of the Family Law System*, which recommended in its Final Report that:

*Section 4(1AB) of the Family Law Act 1975 (Cth) should be amended to provide a definition of member of the family that is inclusive of any Aboriginal and Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.*⁴

The Law Council further notes a relevant report by the Family Law Council entitled *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*.⁵ This report considered the accommodation of kinship structures within the family law system in detail and may provide a useful resource for the Treasury.

The Discussion Paper subsequently discusses section 106B of the *Fair Work Act 2009* (Cth) (**the FWA**) which references Aboriginal and Torres Strait Islander kinship rules regarding when an employee may take unpaid family violence and domestic leave.⁶

The LSSA considers that the criteria for eligible beneficiaries could be reviewed and potentially broadened in a similar manner to the ALRC's proposal, or similar to the approach taken in section 106B of the FWA.

Other considerations raised through the Royal Commission

The Lockhart River community case study highlights the barriers faced by many Aboriginal and Torres Strait Islander people navigating the superannuation system. The Law Council notes that Ms Orr QC, Counsel Assisting, highlighted the following 'key themes' in evidence to the Royal Commission:

...first, there are a number of obstacles that are faced by some Aboriginal and Torres Strait Islander people living in remote communities which are common across their

² *Superannuation Industry (Supervision) Act 1993* (Cth) s 10; Treasury Department, *Superannuation binding death benefit nominations and kinship structures* (Discussion Paper, March 2019) 4 <<https://treasury.gov.au/sites/default/files/2019-03/c2019-t371937-discussion-paper.pdf>>.

³ *Family Law Act 1975* (Cth) s 61F requires the court to have regard to any kinship obligations of a child's Aboriginal and Torres Strait Islander culture when identifying persons who may exercise parental responsibility.

⁴ Australian Law Reform Commission, *Review of the Family Law System* (Final Report no 135, April 2019) 183.

⁵ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (February 2012) <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>>.

⁶ Treasury Department, *Superannuation binding death benefit nominations and kinship structures* (Discussion Paper, March 2019) 9.

*dealings with different types of financial services entities. ... second, a number of these general difficulties manifest in particular ways in the superannuation context.*⁷

Subsequent evidence to the Royal Commission detailed difficulties associated with remoteness, limited access to technology, language barriers, difficulties accessing identity documents, difficulties filling out forms and a lack of knowledge about the relevant law and entitlements.⁸

The evidence also identified helpful initiatives which have been developed in recent years to address some of the problems associated with superannuation in Aboriginal and Torres Strait Islander communities:

*These include the establishment of the Indigenous Superannuation Working Group, the release by AUSTRAC of updated guidance in relation to the customer identification of people of Aboriginal and Torres Strait Islander background, and an event known as the Big Super Day Out.*⁹

A positive example of work conducted by Queensland Super was explored. Queensland Super has an estimated 5648 Aboriginal and Torres Strait Islander members. As a result of its proactive, flexible and intensive approach undertaken in Lockhart River, 80 people were reconnected with lost super totalling over \$2 million and 17 estates were paid out valued at \$1.7 million.¹⁰

The Law Council notes that the importance of access to legal assistance services, interpreters, cultural liaison officers and disability advocates cannot be underestimated in this context. Appropriate training for staff working in the superannuation industry, diverse hiring practices and industry guidelines promoting culturally safe and responsive approaches, are equally essential. Although this may be outside of the scope of the Discussion Paper, the Law Council considers that legislative and policy reform alone will not suffice to ensure that Aboriginal and Torres Strait Islander people have access to necessary support required to overcome the structural barriers to navigating the superannuation system and associated laws. The Law Council's [Justice Project](#) explored these barriers and effective approaches towards addressing them, in the broader context of access to justice and justice system reform.¹¹ In particular, it highlighted that chronically underfunded legal assistance services, particularly Aboriginal and Torres Strait Islander Legal Services, are unable to provide vital civil law advice.¹²

The Law Council also observes that while the issue of superannuation binding death benefit nominations raises complex considerations for Aboriginal and Torres Strait Islander peoples, a number of aspects raised in the Discussion Paper are similarly relevant to the wider population. As such, while acknowledging that reform is required, and appreciating the Treasury's attention to the issue, reform with respect to the distribution of superannuation death benefits could usefully be considered well beyond the reference scope of the current consultation. It may be preferable to address this issue as part of a

⁷ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Transcript of proceedings 13 August 2018 (2018) 4705.

⁸ *Ibid*, see generally 4705- 4729.

⁹ *Ibid* 4707.

¹⁰ *Ibid* 4719.

¹¹ See in particular, Law Council of Australia, *Justice Project: Aboriginal and Torres Strait Islander Peoples* (August 2018); Law Council of Australia, *Justice Project: Legal Services* (August 2018); Law Council of Australia, *Justice Project: Critical Support Services* (August 2018).

¹² See Law Council of Australia, *Justice Project: Aboriginal and Torres Strait Islander Peoples* (August 2018); Law Council of Australia, *Justice Project: Legal Services* (August 2018).

global reform to superannuation death benefits, rather than reviewing matters of relevance to Aboriginal and Torres Strait Islander people in isolation.

The Law Council notes the recommendation of the ALRC's report *Elder Abuse – A Legal National Response*¹³ that because of the uncertainty and ambiguity concerning binding death benefit nominations of superannuation funds,¹⁴ the structure and drafting of the provisions relating to death benefit nominations in sections 58 and 59 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be reviewed.¹⁵

The Law Council is presently considering broader proposals to reform death benefit nominations, with a focus on how these could be simplified and made less subject to dispute, taking into account the ALRC recommendations. In this context, there is a risk that a potential outcome from the Treasury consultation could be that the payment of superannuation death benefits becomes more complex (for example, with respect to the potential widening of the interdependency relationship), whereas there is an overall need for the process to be simplified. The Law Council is currently preparing a submission with suggestions for law reform options in this area, which will be sent to the Treasury in due course.

Thank you for the opportunity to provide these observations. Should you wish to discuss any of the above, please do not hesitate to contact Ms Sarah Sacher, Policy Lawyer, on 02 6246 3724 or at Sarah.Sacher@lawcouncil.asn.au.



Yours sincerely

Arthur Moses SC
President

¹³ Australian Law Reform Commission, *Elder Abuse- A National Legal Response* (Final Report no 131, June 2017) 183.

¹⁴ Ibid. The Australian Law Reform Commission's report states that 'uncertainty is undesirable', and is 'a peculiarity that needs resolution'.

¹⁵ Ibid, Recommendation 7-01.