

Submission by the  
Commonwealth Ombudsman

**AUSTRALIAN LAW REFORM  
COMMISSION  
INQUIRY INTO  
FAMILY VIOLENCE AND  
COMMONWEALTH LAWS**

EMPLOYMENT AND SUPERANNUATION  
ISSUES PAPER 36  
FEBRUARY 2011

## INTRODUCTION

The ALRC has invited submissions in response to its Issues Paper, *Family Violence—Employment and Superannuation Law* (IP 36), which deals with the treatment of family violence in Commonwealth employment, occupational health and safety, and superannuation law.

The Ombudsman supports an amendment to the *Superannuation Industry (Supervision) Regulations 1994*, which would apply less stringent criteria to enable a person to access their superannuation early on the grounds of 'severe financial hardship'. The current requirement that an applicant provide written evidence that shows they have continuously received income support payments for 26 weeks in order to establish they are in 'severe financial hardship', can deny certain Centrelink customers the opportunity to access early release of superannuation.

The suggested amendment would mean that a more consistent and sensitive approach is taken to assist people, including those subject to family violence, to gain early access to their superannuation funds. The Ombudsman considers that the competing interest of preserving retirement savings could be achieved through an appropriate restriction on the amount of superannuation that a person is able to access prior to retirement.

Although I strongly support the proposed change to the severe financial hardship criteria, I note that it would not assist people leaving situations of family violence - who have an immediate need -where they have not previously been in receipt of income support payments. A new compassionate criterion may well assist this group. Should this option be taken up, I would recommend careful consideration of the types of information applicants might reasonably be required to provide to the regulator in support of their application.

We welcome this opportunity to contribute to the Issues Paper and hope that our submission may usefully inform the ALRC's response to government.

## BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- achieving improvement in policy, process and procedural practice arising from administrative deficiencies or systemic failure, as identified through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies.

The Commonwealth Ombudsman holds a unique position in the Australian administrative law landscape of being able to highlight problems with government administration, as a result of information gained through undertaking individual investigations and analysis of complaints. Over time the Ombudsman's office is able to build up a detailed picture of an agency's operations, which can help identify unintended consequences of legislation.

The Ombudsman office has received complaints from members of the public who are dissatisfied with the process they are required to follow to access early release of superannuation. The investigation of this type of complaint provides an insight into the problems certain groups within the community can experience, which has assisted the Ombudsman in making this submission.

## **RESPONSE TO ISSUES PAPER**

The *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations) provide for two broad grounds on which a person may obtain an early release of their superannuation funds: severe financial hardship, the requirements of which are set out in regulation 6.01(5) and compassionate grounds as set out in regulation 6.19A.

My office has received complaints from people who have experienced difficulty either obtaining the necessary written evidence to establish that they meet the severe financial hardship criterion or in providing sufficient evidence to the regulator (currently the Australian Prudential Regulation Authority) to satisfy it that they meet one of the existing compassionate criteria. Our comments in relation to the compassionate grounds relate primarily to potential administrative challenges rather than the central policy consideration of whether a new ground relating to family violence would be appropriate. Other organisations will be better placed to provide comment on that issue.

### **Severe Financial Hardship**

#### ***ALRC IP 36 - question 30***

*Should the Superannuation Industry (Supervision) Regulations 1994 (Cth) be amended to require that an applicant, as part of satisfying the ground of 'severe financial hardship', has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks (or some other period)?*

Regulation 6.01(5) of the SIS Regulations provides that a person may be taken to be in severe financial hardship if the trustee of a superannuation fund is satisfied that:

- the person has written evidence from a Commonwealth agency (usually Centrelink) that they have received Commonwealth income support payments for a continuous period of 26 weeks; and
- the person was still in receipt of those payments at the date of the written evidence (which must not be more than 21 days prior to the application); and
- the person is unable to meet reasonable and immediate family living expenses.

A Commonwealth income support payment is defined in section 23(1) of the *Social Security Act 1991*; however, under the SIS Regulations, Austudy and Abstudy payments and Youth Allowance are excluded from this definition.

'Continuous' means the customer must have actually been entitled to and received that payment for each fortnight.<sup>1</sup>

In short, the legislation requires that the person must have received a specific form of income support for a defined period in the past; is still receiving that payment at the time they apply; and can demonstrate that they are unable to meet reasonable living costs.

Centrelink, as the agency responsible for administering Commonwealth income support payments, is often asked to provide the evidence that shows that a customer has received Commonwealth income support payments for a continuous period of 26 weeks. Centrelink provides this evidence in the form of a letter that it calls a 'Q230 letter', which they can usually generate immediately for a customer, if their system shows that the customer has been in continuous receipt of an income support payment for the previous 26 weeks. As noted above, the Q230 letter is only valid for 21 days after it has been issued.

It is understood that where a Centrelink customer has not been in continuous receipt of an income support payment for 26 weeks, Centrelink is unable to issue a Q230 letter.

There are several reasons why a person may not receive a payment in a certain week (or in a number of weeks). In most cases, it will be that a change in the particular circumstances of the person (income, assets, residence status, family arrangements etc.) has affected their qualification to receive the payment.

Another situation is where a person may be subject to a punitive non-payment period imposed due to failure to comply with participation or activity requirements. At times there may be a reasonable excuse for a compliance failure, of which Centrelink might be unaware in the absence of a request for review by the customer. There are many reasons why people do not exercise their right to have decisions reviewed at the time they are made. Ombudsman officers have observed that people who appear to experience poor psychological health or are otherwise vulnerable may fall into this group.

A complicating factor is that the implications of a non-payment period on a future application for early release of superannuation may not be immediately apparent to a customer at the time the non-payment period is imposed. In this context a person seeking access to their superannuation to assist removing themselves from a situation of family violence, may have their application impeded by a non-payment period incurred some months prior to their application.

### ***Breaks in continuity of payments due to non-payment periods***

In 2008, my office received 19 complaints from Centrelink customers who had been in receipt of a Commonwealth income support payment, but fell short of the 26 week requirement and thus did not meet the criteria under 'serious financial hardship'.

The policy regarding non-payment periods, and the available support during non-payment periods, has changed on a number of occasions. This has affected the reliability of the 26 week continuous receipt of income support test as an indicator of financial hardship.

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<sup>1</sup> Centrelink e reference instruction 108.05540 - Early release of superannuation

The following case study from 2008 illustrates this problem.

**Case study – punitive non-payment period**

**Mr A complained that Centrelink would not provide him with a Q230 letter to demonstrate that he had received continuous income support from the Commonwealth for the last 26 weeks.**

**He advised us that it could not provide the letter because he had been subject to a non-payment period. He also advised us that this decision was the subject of a current appeal to the AAT. If the appeal succeeded, Mr A would be reimbursed. Further, Mr A did not agree that he did not receive an income support payment during the non-payment period, as he had been referred to financial case management during this time which resulted in him receiving money from the Commonwealth.**

In Mr A's case, my office accepted that Centrelink's decision not to issue the letter was technically correct as the non-payment period had not yet been overturned and the money paid under the financial management scheme was not classified as a Commonwealth income support payment. However, the policy intent of the SIS Regulation is to require evidence of a person's dependence on welfare payments for the purpose of supporting their claim of severe financial hardship. Given Mr A was in no better position than people who had been in receipt of benefits throughout the 26 week period, my office was concerned that the intent of the policy had not been achieved.

My predecessor concluded that this situation actually frustrated the underlying purpose of reliance upon the objective criteria of the written evidence from Centrelink in determining whether the grounds for severe financial hardship were met. Accordingly, in late 2008, my predecessor wrote to the then Treasurer to outline the problem. He also raised the issue in a submission to the inquiry into the Employment Services Reform Bill undertaken by the Senate Standing Committee on Education, Employment and Workplace Relations.<sup>2</sup>

On 1 July 2009, the Welfare to Work Compliance Framework was replaced by the Activity Test Compliance Model. The new model introduced a more sensitive regime which promoted participation in the workforce and lessened the focus on punitive measures such as non-payment periods. Although non-payment periods are still imposed, if a customer undertakes to participate in a type of compliance activity, a non-payment period may be waived.

In 2009, the number of complaints we received from people who were not able to be issued with a Q230 letter by Centrelink because of an interruption in their income support payments decreased to just 12, but in 2010 complaints increased to 22.

Although the number of complaints to our office is relatively low, the actual number of people affected may well be much higher. In any event, these people are often in a more impecunious situation than those who are able to obtain evidence of 26 weeks continuous receipt of payments, because the former group may have gone without income for part of that period.

**Breaks in continuity of payment due to sporadic employment income**

As noted above, short breaks in continuity of payment can occur for a number of reasons, not all of which demonstrate the absence of severe financial hardship.

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<sup>2</sup> A copy of that submission can be found on our website at <http://www.ombudsman.gov.au/pages/publications-and-media/submissions/>

The case study below demonstrates this in the context of sporadic income from employment.

**Case study – earned income and rate of payment was reduced to nil**

**Ms B was employed and also received a Parenting Payment Single from Centrelink. The rate of her payment was affected by her fluctuating employment income – in some weeks she did not receive any payment although she remained qualified to receive it.**

**In 2009 she lost her job and the bills began to mount up. She applied to have some of her superannuation released on the grounds of serious financial hardship and requested a Q230 letter from Centrelink. However in the preceding 26 weeks, she had not received continuous payments, therefore Centrelink could not issue the Q230.**

This case illustrates a further inequity in using the 26 week continuous receipt of income support payment criteria to demonstrate severe financial hardship. If Ms B had not been employed, or if the level of her employment was consistently low so as to not reduce her payment rate to nil in any particular week, then she would have satisfied the 26 week continuous payment requirement. As it was, the test did not have the flexibility to take into account the fact that, if averaged over the period, Ms B's fluctuating income was low enough to receive a payment.

Similarly, a person who accepts a short term work opportunity, which results in the reduction of their payment to nil for one payment period, will need to wait a further 26 weeks to meet the requirements for early release. This would seem to be a disincentive to accepting such short term opportunities, where a person anticipates they may need to make an application for early release of superannuation in the near future.

In the case of a person seeking to remove themselves from a situation of family violence, their continuous receipt of payment may also have been affected by the income of a former partner, to which they may have no access.

Given the above examples, the current test for severe financial hardship does not assist people seeking to remove themselves from situations of family violence to gain early access to their superannuation. Even where the person may have been a long term recipient of social security payments, complaints to our office show that many factors can cause gaps in the continuous receipt of that payment. Consequently, I would support a proposal that introduced some flexibility into the requirement for continuous receipt, such as receipt for 26 out of 40 weeks as proposed.

In saying this, I recognise the public interest in the policy intention of preservation of superannuation to fund retirement and believe that this may be accommodated through an appropriate restriction on the amount a person can access.

The proposed change to severe financial hardship criterion will only assist people who are already in receipt of social security payments to gain early access to part of their superannuation. I note that the ALRC is also seeking comment on the option of creating a new compassionate circumstance in SIS Regulation 6.19A for the purpose of accommodation or other re-establishment costs in consequence of family violence.

## **Compassionate grounds**

### **ALRC IP 36 - question 31**

*Should the Superannuation Industry (Supervision) Regulations 1994 (Cth) be amended to provide a specific 'compassionate ground' to enable the early release of superannuation benefits to a victim of family violence?*

While others may be better placed to comment on the policy value of this proposal, should the ALRC be minded to recommend a new compassionate circumstance, this would better accommodate people with an immediate financial need for assistance in removing themselves from circumstances of family violence than would the financial hardship provisions. This is because it would not be necessary to accrue 26 weeks in receipt of social security payments before making an application. Alternatively, unlike the financial hardship criterion, it would be necessary for the applicant to disclose the family violence in making their application.

Our experience in handling complaints about access to early release under the other compassionate grounds would indicate the need for careful consideration of what evidence should be accepted by the regulator in satisfaction of any new ground. This should take into account the difficulties that people experiencing family violence may have in disclosing this fact and the types of evidence that might realistically be available to them in this situation. Consideration will also need to be given to the suitability of aspects of the application process, staff training and any cashing restriction.

## **CONCLUSION**

In conclusion, on the basis of complaints to this office, I support greater flexibility in the criteria for establishing severe financial hardship for the purpose of gaining early access to superannuation. This is because there are genuine reasons why a person could be in severe financial hardship, despite not continuously receiving an income support payment for a period of 26 weeks. For this reason allowing a person to demonstrate that they have received income support from the Commonwealth for 26 weeks during a longer period has merit. As noted above, however, this will not assist those with an immediate need, who have not previously been in receipt of an income support payment.

Should the ALRC recommend a new compassionate criterion on the basis of family violence, I would recommend careful consideration be given to the nature and likely availability of the evidence a person would be required to provide in order to satisfy the regulator that the ground is met.