



Law Council  
OF AUSTRALIA

Office of the President

1 July 2021

Director  
Tax and Compliance Unit  
Retirement Income Policy Division  
Treasury  
1 Langton Cres  
PARKES ACT 2600

By email: [superannuation@treasury.gov.au](mailto:superannuation@treasury.gov.au)

Dear Director

### Improving the visibility of superannuation in family law proceedings

The Law Council of Australia appreciates the opportunity to contribute to the Treasury's consultation in relation to measures to improve the visibility of superannuation in family law proceedings.

Comments are limited to the exposure draft legislation and explanatory material that seeks to amend the *Taxation Administration Act 1953* (Cth) (**Taxation Administration Act**) and *Family Law Act 1975* (Cth) (**Family Law Act**) to facilitate the identification of superannuation assets by parties to family law proceedings, leveraging information held by the Australian Taxation Office.

### Background to reform measures

It is noted that the proposed measures appear to be aligned with the recommendations from reports from the following bodies:

- the House of Representatives Standing Committee on Social Policy and Legal Affairs' 2017 report titled *A better family law system to support and protect those affected by family violence*;<sup>1</sup> and
- Women's Legal Service Victoria's 2018 report titled *Small Claims, Large Battles*.<sup>2</sup>

The Law Council further acknowledges that the Australian Law Reform Commission (**ALRC**), in its Discussion Paper as part of the *Review of the Family Law System* had proposed the development of a tool, with appropriate safeguards, to identify the

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<sup>1</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (December 2017), recommendation 15.

<sup>2</sup> Women's Legal Service Victoria, *Small claims, large battles: achieving economic equality in the family law system* (March 2018), recommendation 5.

superannuation accounts held by a former partner from Australian Tax Office records, with necessary amendments to the taxation law to support this.<sup>3</sup>

This ALRC proposal was supported by the Law Council at the time, however the ALRC did not make a specific recommendation in its Final Report.<sup>4</sup> Instead, the ALRC identified in its Final Report that on 20 November 2018, the Australian Government had announced the Women's Economic Security Package which included funds to develop an electronic information sharing mechanism between the ATO and the family courts to allow the superannuation assets held by relevant parties during family law proceedings to be identified swiftly and more accurately.<sup>5</sup>

Measures to reduce delay and complexity in the framework for identifying superannuation in property settlement proceedings are welcome. In recommending that there be an administrative mechanism for the release of information about the identity of a former partner's superannuation fund and its value, Women's Legal Service Victoria notes that:

*The phenomenon of people with multiple superannuation accounts further complicates the exercise of obtaining an accurate picture of someone's superannuation. The ATO reports that at 30 June 2017 approximately 40% of people with superannuation accounts have more than one account.<sup>60</sup> With voluntary disclosure as the only means of locating superannuation, it is impossible to know if all of the accounts in a party's name have in fact been disclosed.<sup>6</sup>*

The Law Council continues to support measures that will assist to simplify the process for obtaining superannuation splitting orders, including addressing the challenges with identifying a fund of a former partner in the absence of voluntary disclosure. Subject to the suggestions made below, the Law Council supports the progress of the reform measures.

### **Summary of reform measures**

Section 355-1 of the Taxation Administration Act currently states:

*The disclosure of information about the tax affairs of a particular entity is prohibited, except in certain specified circumstances.*

*Those exceptions are designed having regard to the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity's privacy.*

The exposure draft legislation seeks to include an additional exception to this prohibition that would allow for a senior registry official of the Federal Circuit and Family Court of Australia (once established), or the Family Court of Western Australia (**the Family Courts**) to request superannuation information held by the Commissioner of Taxation in relation to a property settlement proceeding.

The exposure draft legislation sets out the process for a party to apply to the Family Courts for a request for superannuation information to be made to the Commissioner for Taxation,

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<sup>3</sup> Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper* (October 2018), proposal 3-17.

<sup>4</sup> Law Council of Australia, 'Submission to the Review of the Family Law System: Discussion paper' (16 November 2018) 21.

<sup>5</sup> Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System* (March 2019), 235.

<sup>6</sup> Women's Legal Service Victoria, *Small claims, large battles: achieving economic equality in the family law system* (March 2018), 26.

and clarifies that where a disclosure is made, that information may be disclosed to the applicant and their lawyer, as well as the other party to proceedings and their lawyer.

## **Comments on the proposed measures**

### Approved form

In order to initiate such a request, a party to property settlement proceedings must apply in the approved form to a senior registry official of the Family Courts. The Law Council notes that the accessibility of the proposed scheme will depend largely on the approved form and submits that it is critical that this form is user-friendly and does not require information beyond what is required for an application to be made to the Commissioner for Taxation.

The explanatory materials to the exposure draft legislation further suggests that the approved form may require the party making the application to identify the last known residential address of the other party.

The Law Council recommends that family violence issues be considered in the development of this form and the requirement for an address of the other party to be provided.

The Law Council identifies that family violence matters often result in one party not disclosing a residential address for safety concerns. If there is a requirement for an address to be provided, this could prevent applications from being considered for failure to complete the required information on the approved form.

To ensure the approved form is fit-for-purpose, the Law Council encourages the family Courts to work closely with key stakeholders, especially the legal assistance sector, in the development of this form.

### On-disclosure

The exposure draft explanatory materials notes that a party who uses the information for any other purpose than permitted family law proceedings may be committing an offence under either the Taxation Administration Act or section 121 of the Family Law Act. It further notes that the approved form may state what penalties apply and is likely to require the applicant to acknowledge the penalties for misuse of the information.

The Law Council is supportive of such a notice to be included in the application stage, and also suggests that clear instructions on how information can and cannot be used should also be provided to parties at the point in time when the superannuation information is communicated.

Ensuring that any limitations on on-disclosure are consistent with the rule in *Harman*<sup>7</sup> may also be a helpful approach.

### Discretion to lodge an application

The exposure draft legislation does not require the Family Courts to request a disclosure of superannuation information when a request has been made in the approved form, instead it states that such a request 'may' be made. However, the exposure draft explanatory materials clarifies that 'in practice, the registries will not exercise a discretion as to whether or not to make the request'.<sup>8</sup>

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<sup>7</sup> *Harman v Secretary of State for the Home Department* [1983] 1 AC 28.

<sup>8</sup> Exposure Draft Explanatory Materials: Treasury Laws Amendment (Measures for Consultation) Bill 2021: Superannuation information for family law proceedings, [1.34].

It is unclear why the exposure draft legislation does not create an obligation on the Family Courts to make an application when a valid request has been made, and the Law Council suggests that consideration should be given to making this a requirement, rather than a discretion. Alternately, and if a discretion is to be retained, then the parameters within which it is to be considered appropriate for a request not to be forwarded to the Commissioner for Taxation ought to be identified.

Please contact Dr Natasha Molt, Director of Policy at [natasha.molt@lawcouncil.asn.au](mailto:natasha.molt@lawcouncil.asn.au), or on (02) 6246 3754 in the first instance if you require further information or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jacoba Brasch QC'.

**Dr Jacoba Brasch QC**  
**President**