



# Submission in response to Treasury Discussion Paper: Superannuation binding death benefit nominations and kinship structures

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## **About Financial Counselling Australia and Financial Counselling**

Financial counsellors provide advice to people with money and debt issues. Working in community organisations, their services are free, confidential and independent.

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. FCA's members are the State and Territory financial counselling associations.

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## 1 Introduction

Financial Counselling Australia (FCA) welcomes the review by Treasury of superannuation binding death benefit nominations and kinship structures.

Financial counsellors regularly provide advice and assistance to people dealing with a range of superannuation issues. There are also a number of financial counsellors who work predominantly with Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people do have a range of problems engaging with their superannuation. Some of those issues regarding death benefits have led to this discussion paper.

We strongly support reform to address the issues relating to death benefit nominations and kinship structures. This submission strongly recommends that kinship is included as a specific category included in the legislation as an option for a binding nomination or nomination. The superannuation system in Australia needs to work for everybody in Australia to ensure that death benefit nominations recognise kinship structures and extended family.

This submission has answered the specific questions in each section of the discussion paper and suggests a number of additional changes.

## 2 Superannuation death benefits

As acknowledged in the discussion paper, “the distribution following a member’s death is a relatively complex area of the superannuation system”. We would go further, and argue that it is almost incomprehensible. There are very few people in Australia that understand how binding death nominations work. This is a serious and urgent problem to resolve. People cannot make sound financial decisions when they do not understand (and realistically cannot be expected to understand) an opaque death benefit process. The current system undermines financial literacy.

We acknowledge that there is a public policy reason behind prioritising dependants for the payment of superannuation death benefits. This public policy reason also accords with the wishes of the vast majority of Australians to support their family. However, the public policy intention and the decision-making role of the Trustee means that many people will have no effective control over who gets their super.

The widespread misunderstanding by the public is comprehensive and covers the following:

- Many people still believe that they can nominate who will get their super just by nominating the beneficiaries when they apply for super. This is incorrect as the beneficiaries are decided based on who are their “dependants” as defined by the Trustee.
- People do not know or understand the role of binding death nominations.
- Even if people do use a binding nomination, they have to keep up with three yearly renewals when people do not review their will as often.
- Binding death benefit nominations may be invalid if over three years old, the nominated person(s) dies, if they are not correctly witnessed or signed and/or the person is not a dependant.

- People still believe when they make their will (DIY) that super is included in their Estate.
- If they make a binding nomination, they can nominate anyone. This is incorrect as they must be a dependant.
- Many people consider their adult children are beneficiaries but fail to understand that they are not dependants (as defined) and will not get the super if there is a spouse (for example). This can lead to very unfair outcomes if the super is the main asset. Adult children complaints about super death benefits are very common.<sup>1</sup> This indicates a serious misunderstanding of the system.

The above list not only reflects the complexity of the system, it shows that most people do not understand or completely misunderstand the system. From a financial literacy perspective there are two options: simplify/change the system and/or educate the public. The second option is unachievable due to the complexity of the system.

This issue is directly relevant to the discussion paper because if there are changes to include kinship, the effect of those changes is likely to have limited benefit due to the problems with the current system. Those problems are exacerbated for Aboriginal and Torres Strait Islander people (as outlined at point 3 below). A review is needed to simplify the current system so people can use it to ensure their wishes on death are followed as intended (wherever possible).

### Recommendations

The superannuation binding death nominations system is too complex. It needs to be reviewed to ensure that people using it are able to understand it and make informed decisions that will be carried out.

#### Suggested changes to simplify the system

One option is to change super so it is part of a person's Estate and is governed by their will. Any dependant left out of the will would have rights to challenge that through the existing laws relating to family provision. This would simplify the system and make

If the above option was not pursued, then changes that should be considered immediately are:

1. There must be only one type of nomination and that nomination must be binding. The confusion regarding multiple options should end. People should be able to express their intention and have certainty that it will happen.
2. Trustees should be required by law to offer a binding nomination which does not lapse. The justification that a binding nomination needs to be regularly reviewed is not a sufficient justification to let nominations lapse. If wills lapsed people would die intestate far more often. It is far more efficient to remind people to review an existing nomination. It

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<sup>1</sup> See for example, information on death benefits from the Superannuation Complaints Tribunal that states "The Tribunal has consistently affirmed decisions of trustees to pay a death benefit to a spouse or minor children in preference to financially independent adult children of the member." Available at <https://www.sct.gov.au/media/documents/Death%20Brochure%20Web.pdf>. AFCA also states the same in its approach document at <https://www.afca.org.au/public/download.jsp?id=7246>.

is also noted that a binding nomination becomes invalid if the person nominated is no longer a dependant. This offers an important protection. If there is a decision to keep the three-year term then the super fund must notify the member when it lapses so it can be renewed.

3. Change the definition of dependant to simplify it and provide certainty (discussed further below).
4. Superannuation companies to provide standardised plain language information about death nominations to people when they first open their super account and send regular reminders. The standardised nominations must be in English and a significant range of other languages.
5. Fund accessible and free advice for people about super.

#### **Recommendations**

Include consideration of the above recommendations as part of a review to simplify death benefit nominations.

### **3 Superannuation death benefits and Aboriginal and Torres Strait Islander people**

Aboriginal and Torres Strait Islander people are often in a more difficult position trying to work out death benefit nominations. Those problems are exacerbated for Aboriginal and Torres Strait Islander people living in regional and remote areas. Factors that contribute to those difficulties include:

- Low numeracy and literacy levels – many Aboriginal and Torres Strait Islander people do not understand how super works and cannot interact with the super system without assistance.
- There are problems proving identity because of a lack of identity documents, different spellings on different identity documents, using skin/clan name rather than the name on their birth certificate, identity documents kept with a matriarch in a different community and lack of access to services due to living in remote communities. The identity problems cause difficulties for people to establish their identity as a possible beneficiary of a death benefit.
- Aboriginal and Torres Strait Islander people are unlikely to be notified that they may have a claim on a death benefit if they live remotely and the Trustee is unable to find them.
- Many Aboriginal and Torres Strait Islander people do not have a will. This can make it difficult to identify dependants. It also means there is no guidance for how the money should be paid if there are no dependants.
- It is very difficult for relatives and kin to find out if there is super or life insurance when a person dies. There is no streamlined way to make an inquiry.

This means that even a conversation about death benefit nominations can be almost impossible when combining the complexity of the system, language barriers, literacy levels, identity and complex kinship arrangements. The definition of dependant (including interdependant) is already complex and expert legal advice is required to navigate the concept and combine this with kinship

arrangements. It is very difficult to provide sufficient evidence to prove interdependency. This expert legal advice is usually not accessible and it should not be required. Even with expert legal advice the current definition will lead to disputes on what relationships are covered and which are not.

Death benefit nominations need to be flexible enough to cover kinship arrangements and provide certainty that the wishes of an Aboriginal or Torres Strait Islander person will be carried out. Even with a clarification of the meaning of dependant to include the broader kinship structures in Aboriginal and Torres Strait Islander culture, some Aboriginal and Torres Strait Islander people will still have enormous difficulty accessing and using binding death nominations.

As stated above at point 2, there is an urgent need to simplify the system for binding death nominations. FCA has also recommended in previous submissions<sup>2</sup> that superannuation companies need to provide culturally appropriate services.

Approaches which are culturally sensitive are based on an understanding of the relevant aspects of First Nations culture, such as broader family relationships (kinship obligations), that money and assets are seen as shared resources, that men and women may have specific responsibilities (for example in relation to the safe keeping of documents on behalf of others), that “sorry business” around funerals and grieving are of enormous significance and can take many weeks and that people may have cultural obligations that mean they may not be contactable for periods of time.

First Nations people living in regional and remote areas also face a number of barriers when it comes to accessing superannuation and other financial services that are important to understand. These include distance, language and identification. These are touched on later in this submission.

Our previous submissions have therefore recommended that superannuation companies do the following:

- Ask people if they identify as Aboriginal and Torres Strait Islander when first joining a fund. It is impossible for superannuation companies to provide appropriate services to their First Nations customers if they don't know who they are;
- Reduce barriers and streamlining identification processes particularly to assist with combining superannuation accounts;
- Comply with the AUSTRAC flexible approach for identification for Aboriginal and/or Torres Strait Islander people<sup>3</sup>;
- Provide a culturally sensitive and dedicated phone number for Aboriginal and Torres Strait Islander people or their representatives;
- Offer interpreters when possible;
- Refer to financial counsellors and financial capability workers when assistance is required;
- Provide culturally sensitive and tailored disclosure materials.

In addition to the list above, we would also add the following:

- Standardised information on death benefit nominations in multiple Aboriginal and Torres Strait Islander languages. The standardised form should be independently user tested. Using pictures and diagrams would be helpful.

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<sup>2</sup> FCA submission, Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018 available at <https://www.financialcounselingaustralia.org.au/docs/submission-on-treasure-laws-amendment-protect-your-superannuation-package-bill-package-bill/>

<sup>3</sup> Available at <http://www.austrac.gov.au/aboriginal-andor-torres-strait-islander-people>

- A death certificate should be sufficient evidence to be able to access information from the ATO to establish whether Super exists. This reform has been flagged by the Australian Taxation Office but not implemented<sup>4</sup>. A similar approach should apply to Super funds.
- Access to free specialist legal advice and financial counselling on super (including specifically on kinship and death benefits).
- Trustees must have a rigorous and effective process of identifying possible dependants, interdependants and kin tailored for Aboriginal and Torres Strait Islander people.
- The time limits for making a claim as a dependant/interdependant or kin needs to be extended for people who live in rural and remote communities. We recommend consultation on extending the time frames.

### Recommendations

The Government needs to acknowledge that Super death benefit nominations are almost impossible to use for Aboriginal and Torres Strait Islander people. Significant changes are needed including (as outlined above): simplification, access to advice, standardised information in their language, dedicated phone number, dealing with identification problems, access to interpreters, extended timeframes and access to free specialised advice.

## 4 Kinship structures

### Aboriginal and Torres Strait Islander people

We agree with the information provided in the discussion paper on kinship structures. We do want to mention another aspect of kinship structure in Aboriginal and Torres Strait Islander communities that was not mentioned. Compared to mainstream money norms, the way money is understood and used for Aboriginal and Torres Strait Islander people is very different. Money and other assets are a shared resource. It can also be distributed and/or held by a respected and trusted person (an Elder, for example). This part of kinship needs to be acknowledged in death benefit nominations.

This means that an Aboriginal and Torres Strait Islander person may want their brother (using example 1 on page 7 of the discussion paper) as their binding nominated beneficiary as s/he knows that his/her brother will take care of the money and take account of his/her kinship relationships. If the money was in a will, then this type of arrangement could be set up and explained in this process. The same rights should be available when setting up a death benefit nomination.

### Extended families and other cultures

There is no doubt that other families also have extended kinship structures. This type of structure can arise through a particular culture or simply because the family has set up a structure that involves people who may or may not be defined as dependant or interdependent. Although a nuclear family may be common in Australia there are also a range of different family structures that should have the same rights as the nuclear family type structure.

<sup>4</sup> See <https://www.ato.gov.au/Super/Self-managed-super-funds/In-detail/SMSF-resources/Speeches-and-presentations/Journey-through-reform-for-ATO-and-APRA-superannuation-funds/>

## Recommendations

Kinship and extended family structures appear in both Aboriginal and Torres Strait Islander communities and in other families across Australia. These structures should be recognised in the definitions for death benefit nominations.

## 5 Discussion questions

### 1. How do kinship structures and Aboriginal and Torres Strait Islander communities influence the preferred distribution of superannuation death benefits by these people?

Kinship structures will have an impact on the preferred distribution of superannuation death benefits, so that a broader group of people than those recognised currently under existing policies, could be recipients of a person's superannuation.

These structures may also have an impact because Aboriginal and Torres Strait Islander people can choose people as beneficiaries who are kin and they trust to ensure the money is distributed the way they want. With kinship relationships, flexibility is needed to structure the payments.

### 2. How do superannuation funds currently deal with kinship relationships?

Super funds apply the legal principles for dependants and interdependent relationships as set out in existing policies. This means that generally Aboriginal and Torres Strait Islander people are not able to appropriately choose who will receive their superannuation if they die, because their kinship relationships are not recognised.

Challenging a decision by a trustee about who should receive superannuation is therefore difficult. It would be up to the Aboriginal and Torres Strait Islander person to run a complicated legal argument that the kinship relationship meets the criteria for interdependence.

This leads to the other problem for Aboriginal and Torres Strait Islander people (and also anyone else who cannot access specialist legal advice) in that raising a dispute can be difficult and full of technical arguments. To be able to run an argument about a kinship arrangement the following is needed:

- You need to know there might be an argument. When the trustee says it is the law the person will just believe it.
- Even if you think it is unfair you then need to meet strict timelines to dispute the decision. The time limits are very strict with only 28 days from the Trustee decision to lodge in the Australian Financial Complaints Authority (AFCA).<sup>5</sup>
- Getting advice and assistance with running a dispute is very difficult. It is a technical argument requiring evidence to meet the criteria.

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<sup>5</sup> See AFCA FAQ available at <https://www.afca.org.au/public/download.jsp?id=7360>

We believe that the majority of Aboriginal and Torres Strait Islander people do not realise that they could run a dispute about the distribution of superannuation, but even if they do realise this is an option, would not be able to do because it is too difficult and costly and the arguments are too technical.

### **Recommendations**

If the strict time limits remain, then funding is required for free advice and representation to challenge a death benefit nomination. This recommendation is still required even if the definitions are changed to include kinship relationships.

### **3. Are there case studies or examples where kinship structures are not appropriately considered by superannuation trustees when they are distributing superannuation death benefits?**

#### **Case study**

A financial counsellor in the Northern Territory was approached by a young Aboriginal woman, Kirra (a pseudonym for this case study) for assistance. Kirra's mum had recently died and she wanted to get access to her mum's super death benefit. Her mum died without a will or a binding nomination. The financial counsellor asked if her mum was married at the time of her death? Kirra said that she was not married. Kirra does have two brothers. The financial counsellor asked Kirra if her brothers knew about her applying and would agree to her getting the money? Kirra explained that her brothers understood that she should get the money and then it will be shared in accordance with kinship laws.

The financial counsellor explained that black fella laws are different to Balanda (white) laws. The Trustee would look at who the dependants were and then send letters about making a claim. Her brothers and her would need to make it clear in writing that the brothers wanted the money paid to Kirra. Kirra received all the money and shared it in accordance with kinship laws.

The above case study exemplifies how assistance (and explanation) is needed to get an outcome consistent with kinship. If one of the brothers had been difficult to locate, the outcome could have been different which may have caused problems with sharing. It is preferable to have a clear way to get this type of arrangement set up as a binding nomination before death.

#### **Case study**

Joe (a pseudonym) is a Tiwi man who is in his 50s. Joe went to see a financial counsellor in the Northern Territory for assistance with claim on a death benefit. Joe cared for his cousin brother for a number of years. He lived with him, made sure had food, paid for clothing and made sure his needs were met. Joe travelled with his cousin brother to Darwin for medical treatments.

Joe's cousin brother had two brothers and a sister who were all alive and had little contact.

Joe believed he should be able to claim on his cousin brother's super. The super fund told him that he had no rights to claim. The financial counsellor also explained that their service was unable to assist with a death benefit claim as it was not one of the services they offered.

Joe was very angry at the system.

The above case study is a concern since it would appear that Joe did have a claim as an interdependant. If he could have accessed specialist free advice, he would have been able to pursue that claim.

**4. Do kinship structures of Aboriginal and Torres Strait Islander communities mean these people have dependants that the current superannuation law does not recognise as dependants?**

Yes, there are people in a kinship structures that are not dependants as defined under the law for superannuation. The difficulties with the current definition are:

- It does not recognise the shared money in Aboriginal and Torres Strait Islander communities which is linked with kinship structures. The dependant definition focuses completely on financial dependence or interdependence.
- The focus is on where people live and remain living together. This is not consistent with how people (including children) are an integral and immoveable part of a kinship relationship, but live in a different place.
- That there are people who are trusted kin (but may not be a dependant) that would make sure that money is distributed according to kinship structures.

**5. How could the law that applies to superannuation death benefits take into account the kinship structures of Aboriginal and Torres Strait Islander communities?**

The law should specifically acknowledge that there are Aboriginal and Torres Strait Islander kinship structures and extended family structures that involve a close personal relationship and a wide range of support.

Kinship and extended family relationships should be added as a new category for people to use to make binding nominations. We do not recommend adding kinship to the definition of dependant as it would cause confusion because:

- there are already many precedent decisions on the meaning of dependant and this should remain settled at law; and
- kinship and extended family relationships may or may not be dependants as currently defined; and

A new category makes it clear that this is a separate type of relationship. The new extra definition for kinship and extended families would need further consultation on the specific drafting. It would need to acknowledge:

- kinship and the sharing of resources (including money) as a social norm in Aboriginal and Torres Strait Islander communities.
- that kinship relationships may fall outside traditional definitions of dependant.
- That other cultures and families may also have these types of relationships

In addition to changes to the law, as set out above, there needs to be changes to disclosure. People need to be told about the changes in plain language.

#### **Recommendations**

Kinship and extended family structures should be recognised as a separate recognised nomination category under the superannuation laws. We recommend adding a new s.10B for kinship and extended family relationships in the *Superannuation Industry (Supervision) Act 1993*.

#### **6. Do Aboriginal and Torres Strait Islander people have any difficulty accurately identifying relationships for the purpose of superannuation death benefit distributions?**

No. Aboriginal and Torres Strait Islander people are very clear about their kinship relationships.

The issue is not accurately identifying the relationships, it is working out how those relationships should fit in with their death benefit nomination and their will. If the law changes, then Aboriginal and Torres Strait Islander people need guidance on how to manage the death benefit nomination given their kinship structures and the law. Aboriginal and Torres Strait Islander people still need to be told about changes to the law and then may need advice on how to structure their affairs.

#### **Recommendations**

Aboriginal and Torres Strait Islander people have kinship structures and should have access to plain language information and free advice on how to make binding death benefit nominations in their circumstances.

#### **7. Are there differences in the barriers faced by Aboriginal and Torres Strait Islander women and men in making binding death benefit nominations?**

None that we are aware of.