



Ms Jenny Wilkinson
Division Head
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKS ACT 2600
E: superannuation@treasury.gov.au

CC: Mr Shane Rattenbury MLA,
Minister for Justice
ACT Legislative Assembly
E: Rattenbury@act.gov.au

Dear Ms Wilkinson

Re: Treasury Consultation Paper: Early Release of Superannuation Benefits

Thank you for the opportunity to provide our comments in response to the Treasury consultation paper on Early Release of Superannuation Benefits relating to compassionate and financial hardship grounds and for victims of crime compensation.

The role of the ACT Human Rights Commission is to promote rights and resolve complaints. The Commission encompasses a number of Commissioners with distinct statutory functions, including the Human Rights Commissioner and the ACT Victims of Crime Commissioner who is the agency head of Victim Support ACT and the decision maker for the Victims of Crime Financial Assistance Scheme in the ACT.

Our comments are focused on the issue of early release of an offender's superannuation benefits for the purposes of compensation for victims of crime, and take into consideration both the rights of victims of crime and also the rights of offenders and others who may be affected by this proposal.

Proposal to release offenders' superannuation for victims of crime compensation

The Commission welcomes the increased attention being given to the rights of victims of crime, reflected in this Consultation Paper and in the Victorian Law Reform Commission's 2016 review of the Role of Victims of Crime in the Criminal Trial Process.

It is clear that the impact of crime on victims can be devastating and long term, and that crime (especially violent crimes) can lead to harm including physical and psychological injury and ongoing financial loss. It is important that offenders are held accountable for their actions and contribute, where possible, to the reparation of loss suffered by their victims.

We support the consideration of ways to improve enforcement of compensation and recovery orders, particularly in circumstances where an offender has taken steps to deliberately hide or shield substantial assets to avoid paying compensation to a victim, or to meet a recovery order for compensation paid by a statutory scheme such as the ACT Victims of Crime Financial Assistance Scheme.

Nevertheless, we do have concerns about impacts of a proposal to allow early access to an offender's superannuation benefits on the ability of an offender to support themselves and their families adequately in retirement, where they do not have other significant assets. This proposal raises issues of compatibility with human rights.

Human Rights issues

Although regulation of superannuation is a federal matter, to the extent that early release of an offender's superannuation may be considered to meet compensation orders made in ACT civil or criminal proceedings, or recovery orders issued by the ACT Victims of Crime Financial Assistance Scheme, this will engage human rights protected under the *Human Rights Act 2004* (ACT) (HRACT).

The HR Act requires in s 40B that actions of public authorities be consistent with human rights, and that public authorities give proper consideration to relevant human rights in decision making.

We consider that the proposal to seek early release of offenders' superannuation benefits for victims' compensation has a legitimate purpose, in allowing victims of crime to recover compensation for losses incurred as the result of a crime, that might not otherwise be recoverable. To the extent that access is sought to recover moneys paid by the State to victims (such as payments under the Financial Assistance Scheme), this would not directly benefit victims, but would hold offenders accountable for the costs of their actions, and could help to ensure the ongoing viability of statutory schemes.

However, the proposal would potentially limit the human rights of offenders and their dependants protected under the HR Act including the right to privacy (s 12), the right to protection of family and children (s 11), fair trial (s 21) and possibly the right to protection from cruel, inhuman and degrading treatment (s 10) if an offender is left with no way to support themselves and dependents in retirement.

It is not clear whether superannuation funds accessed to pay compensation would be subject to the higher rate of taxation usually imposed by the Commonwealth on benefits withdrawn before retirement age which would in effect impose a further penalty on offenders and their families. This proposal for involuntary early access to superannuation raises different issues from voluntary access, where an applicant accepts the financial disadvantages of their decision to access superannuation before retirement age.

The HR Act provides in s 28 that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. In our view, a scheme that allowed unfettered access to an offender's superannuation benefits to pay compensation to victims, or to recompense the State for payments provided to victims, would impose limits on human rights that may not be reasonable and proportionate.

Options to ensure human rights compliance

Issues of human rights compatibility could potentially be mitigated through the development of specific legislative safeguards in the ACT that would limit the circumstances in which involuntary access to an offender's superannuation could be sought to enforce a civil or criminal compensation order, or an order for recovery of financial assistance in the ACT.

In relation to the recovery of financial assistance, an amendment could be made to the *Victims of Crime (Financial Assistance) Act 2016* (ACT) to regulate applications for early access to offender superannuation. This would require an assessment of the situation of an individual offender and their dependents to determine whether such access was reasonable, and include a right of the offender to seek an independent review of any decision regarding early access to superannuation.

However, there may be some complexity in the interaction between ACT and Commonwealth decision-makers over access to superannuation benefits, including the lack of visibility of superannuation assets to ACT decision makers.

Involuntary early access to offenders' superannuation for victims' compensation would be more likely to be considered reasonable and proportionate if it was limited to situations where an offender has considerable assets, but could be shown to have taken deliberate steps to shelter their assets in superannuation to frustrate a compensation claim. We would support involuntary access to offenders' superannuation in this situation.

Thank you for considering our views. We would be happy to discuss these issues further with you. The contact officers for this matter are Kylie Woodward and Gabrielle McKinnon who can be reached on 6205 2222

Yours sincerely,



Dr Helen Watchirs OAM
President and Human Rights Commissioner
A/g Victims of Crime Commissioner

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