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| **Early release of superannuation benefits**  Victims Services, Department of Justice, NSW  Commissioner of Victims Rights | | |
|  | **Area of discussion** | **Victims Services Response** |
| ***Principles underpinning early release*** | **Question 0.1** Do these proposed principles provide an appropriate guide to determine the grounds for early release under compassionate and financial hardship grounds, and for victims of crime compensation? If not, what should these principles be? | Victims Services supports the proposed principles outlined in the consultation paper. The principle of ‘genuine hardship’ should be acknowledged to include hardship for victims of crime. In some circumstances the benefits of early access to an offender’s superannuation to provide compensation for victims will outweigh the benefits of preservation. The ‘fair and effective’ principle should not just be about the objectivity of the rules but should also mean ensuring the rules will fairly uphold the rights of affected parties. This includes recognising the harm done to the victim, and balancing their right to compensation with the offender’s right for support in retirement. |
| ***Part 1: Compassionate grounds*** | **Question 1.21** Are there situations outside of the current compassionate grounds which may justify inclusion in the early release of superannuation provisions, balanced against the need to preserve superannuation benefits to provide income in retirement? | Providing early access to an offender’s superannuation to compensate victims could be considered as ‘compassionate grounds’. While recognizing the principle of last resort, victims of crime are entitled to fair and effective justice, and should receive compensation from the perpetrator, either directly or through the restitution mechanism. |
| **Question 1.22** Should access to superannuation benefits be available to assist victims of domestic violence? Why / why not? If yes, under what particular grounds (for example, financial hardship, homelessness, victims of crime), which expenses should be included, and what evidence should be required? | Victims Services supports victims of domestic and family violence having early access to superannuation on compassionate grounds. Early access to superannuation may exacerbate the gender gap in the financial security available in retirement and so this option should be a last resort to prevent homelessness or significant ongoing harm.  Consideration would need to be given to how quickly superannuation could be released, as often victims who are fleeing DFV need to do so as a matter of urgency. Quick access to superannuation would provide support for paying for removalist expenses, which is currently a significant gap in NSW DFV brokerage services. |
| ***Part 3: Victims of crime compensation*** | **Question 3.2** Should access to superannuation be limited to cases where a criminal conviction has been made? | Victims Services believe that early access to an offender’s superannuation for restitution should be limited to cases where a criminal conviction has been made.  Under the *VictimsRights and Support Act 2013* restitution action can only be taken where an offender has been convicted:   1. of an offence arising from substantially the same facts as those constituting the act of violence in respect of which an award of statutory compensation was made or; 2. any other offence if an offence referred to in paragraph (a) was taken into account under Division 3 of Part 3 of the Crimes (Sentencing Procedure) Act 1999.   However, if there has been a successful civil action related to a relevant crime, superannuation should be able to be released early to pay the judgment debt. Not only the physical trauma but the emotional trauma for victims of crime is significant and the cost is real. Every opportunity to enforce a debt to a victim of a violent crime should be pursued – in this case the early release of superannuation. |
| ***Part 3: Victims of crime compensation*** | **Question 3.3** Should access to a perpetrator’s superannuation be available for compensation or restitution arising from all crimes, just violent crimes, or another threshold (such as the maximum penalty for offence)? | Under the *Victims Rights and Support Act 2013*, a victim of an act of violence occurring in NSW is entitled to make anapplication for financial assistance or a recognition payment through the Victims Support Scheme. Under this legislation, an act of violence means an act or series of related acts, whether committed by one or more persons:  (a)  that has apparently occurred in the course of the commission of an offence, and  (b)  that has involved violent conduct against one or more persons, and  (c)  that has resulted in injury or death to one or more of those persons.  Violent conduct includes sexual assault and domestic violence.  Victims Services can only provide funding to victims of violent crime and so will only claim restitution from the offender in these circumstances. If legislation was changed to allow us to claim restitution from an offender’s superannuation, we would only do so for matters that relate to violent crime.  However, the Victims Support Scheme eligibility guidelines should not limit **all** victims of crimes from seeking compensation from other avenues, such as through the civil and criminal court.  Consideration should also be given to accessing superannuation in significant fraud cases. |
|  | **Question 3.4** Should access to a perpetrator’s superannuation only be available if the perpetrator made irregular or out of character contributions to superannuation to shelter assets? | Victims Services supports access to a perpetrator’s superannuation being available when the perpetrator has made irregular or out of character contributions to superannuation to shelter assets. However, access to a perpetrator’s superannuation should not be limited to these circumstances. Access to an offender’s superannuation should be made available for victim’s compensation if all other sources of financial support have been exhausted.  If an offender is sheltering assets through their superannuation, this may also be captured under the *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*. Under this legislation, the Crime Commission has the power to confiscate wealth from suspected criminals, or their families and associates, if they cannot prove that they obtained the assets legitimately. Fifty per cent of the proceeds obtained under this Act are directed into the Victims Support Fund. |
|  | **Question 3.5** How would a victim’s right to a perpetrator’s superannuation be enforced? How would the victim gain visibility over the perpetrator’s superannuation assets? | The *Victims Rights and Support Act 2013* establishes the Victims Support Scheme and provides a mechanism for recovery of victims support payments from offenders. If a person has been convicted of the offence that led to the victim's injury, restitution action may be taken by Victims Services to recover that money from the offender. The convicted offender may be ordered to pay back all or some of the victims support payments paid by the Fund to the victim.  If the offender fails to make a payment, their debt can be transferred to the Revenue NSW (RNSW) for collection. It would then be RNSW’s role to access the offender’s Superannuation or use any other means for collection of the debt. |
|  | **Question 3.7** Should access to a perpetrator’s superannuation be in the form of a lump sum, portions of income stream payments or both? How should defined benefit products and annuities that have not yet commenced payments be treated? | Victims Services recommends that both a lump sum payment and ongoing payment from an income stream should be available options to meet the needs of the victim within the means of the offender. |
|  | **Question 3.8** Should contributions into superannuation after a compensation order has been made count towards the amount that can be accessed? | The focus should be on the balance of the Superannuation fund at the time of the debt collection. Part payment can then be made by arrangement. |
|  | **Question 3.9** Where a criminal conviction has been made, should victims be able to access a perpetrator’s superannuation to pay either outstanding compensation or restitution orders?  \*NB: it is not obvious from the question alone,but the context of the question suggests that this is about convictions that have already been made and whether the law should have retrospective effect for these cases. See pages 22-23. | Guidelines on victim’s access to the perpetrator’s superannuation should be consistent with the provisions of the *Victims Rights and Support Act 2013*. When a victim is given financial assistance or a recognition payment through the Victims Support Scheme, Victims Services should be responsible for accessing the perpetrator’s superannuation to claim payment for restitution orders.  Appropriate access to superannuation to pay any compensation claimed outside of the Victims Support Scheme would be determined by the courts.  Victims Services recognises the impact of giving new laws retrospective effect. However, in this matter the law does not relate to criminal responsibility but a mechanism for receiving compensation. Giving the law retrospective effect would allow victims a new avenue for claiming compensation which they would normally have been able to claim were it not for the offender’s circumstances. It would also ensure that offenders are not able to avoid liability for victims’compensation while maintaining excessive superannuation assets. Consequently, retrospective application is supported. |
| **Question 3.10** Should State and Territory compensation schemes be able to recover their payments to victims from the perpetrator’s superannuation? | Yes, having access to the perpetrator’s superannuation as a means to recover compensation from the offender will help strengthen the Victims Support Fund, which will enable it to provide more support to victims of crime. However, recovering funds from an offender’s superannuation should only occur as a last resort and only in situations where the offender has higher than a minimum set level of funds available in their superannuation. This is to ensure that claiming these funds will not create such significant financial insecurity that the State is later responsible for supporting the offender. Recovery of compensation funds from offenders superannuation should also not occur in situations where doing so would significantly harm their dependents. |
| **Question 3.11** In circumstances where there are concurrent family law and victim of crime compensation proceedings, how should these matters be addressed and prioritised?What other issues might arise? | Victims Services would suggest that where concurrent claims are made family law matters should be resolved first to ensure that claims from the victim affect the offender only and not their partner or spouse. Exceptions may need to be made in family law matters that are especially prolonged. Consideration should also be given to the honesty of the family law matter and whether there is any evidence that the offender is intentionally using family law to divide assets in order to impair access to funds for victims. |