



Our **Mission** is to prevent child sexual assault in our society.
Our **Vision** is to make Australia the safest place in the world to raise a child.

13th June 2018

Manager, Early release of superannuation
Retirement Income Policy Division
The Treasury
Langton Crescent
Parkes, ACT 2600
Email: superannuation@treasury.gov.au

To Whom It May Concern:

As an agency that works with, and advocates for, survivors of child sexual assault, we are pleased to provide this submission in relation to the current *Review of superannuation and victims of crime compensation*.

Bravehearts, and specifically our Founder Hetty Johnston, has been vocal around the need to prevent and inhibit offenders' capacity to shield financial and other assets to stop victims from accessing these under victims of crime compensation. We congratulate the Australian government, in particular the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer, for acknowledging the harm impacted on victims of serious crimes, including child sexual assault and exploitation, and for proactively pursuing changes to the legislation to enable access to offenders' superannuation for purposes of compensating victims.

Bravehearts has supported victims of child sexual assault across the country, and in relation to this current consultation those victims of convicted child sex offender Maurice Van Ryn. We acknowledge that it is their fight for compensation which has been the impetus of this review. We are pleased to provide our support for establishing mechanisms to impede offenders' ability to shield financial from recovery under victims of crime compensation.

We offer the following comments in relation to the issues raised in the consultation paper.

Draft Proposal 1: Preventing use of superannuation contributions to shield assets from victims of crime

We note that Draft Proposal 1 broadly applies to compensation orders, related to any indictable offence, that have not been paid in full. In addition, this proposal is in direct response to concerns around offenders making 'out of character' voluntary contributions potentially made to hide financial assets either to the person's own superannuation account or to another person's superannuation, and that it is these voluntary contributions that would be utilised to cover outstanding compensation for the offender' victim/s.

Bravehearts Foundation Ltd. bravehearts.org.au

National Office: (07) 5552 3000 | Fax: (07) 5552 3088 | Bravehearts Information & Support Line: 1800 272 831
Postal: PO Box 575, Arundel BC, QLD 4214 | Email: admin@bravehearts.org.au | ABN: 41 496 913 890 | ACN: 607 315 917

We would suggest that this proposal should work in conjunction with Draft Proposal 2, allowing access to the balance of the offender's superannuation fund for compensation purposes should the offender (a) not have made any voluntary 'out of character' contributions or (b) the personal contributions made do not cover the outstanding compensation amount awarded to the victim/s.

Issue 1: Limits and thresholds

We support the approach outlined in the consultation paper, noting that there will not be any cap on the voluntary contributions that can be released to cover compensation owing to the victim.

Issue 2: Visibility of assets

As a child protection agency, Bravehearts is not in a position to advise on the legal frameworks that needs to be reviewed or established to provide for a recovery process for personal contributions to superannuation funds.

We understand that any process put in place will need to have the appropriate oversight and privacy provisions, and support the proposal in the consultation paper that suggests a review of assets, including superannuation, should be instigated by a criminal or civil court proceeding on behalf of the victim/s, and in conjunction with the Australian Tax Office. We note that this process should be triggered by the court in matters where it is reasonably likely that an offender would have financial assets that could be hidden, including when victims raise such concerns.

Issue 3: Determining whether contributions are 'out of character'

Bravehearts acknowledges that processes for determining whether or not voluntary contributions are 'out of character' needs to be established within a legal framework.

Understanding the lengthy investigation processes that typically occur within child sexual assault and exploitation matters, we would propose that a review of superannuation contributions should go back for a minimum for 12 months prior to charges being laid or alternatively 6 months before the commencement of an investigation, with the option to go back further if a review of voluntary contributions indicates this may be necessary.

In relation to Option 2 (*all voluntary contributions by or on behalf of the member are deemed to be 'out of character' and therefore available for compensation*), we note the potential difficulty in determining 'out of character' contributions where the individual is self-employed and where all contributions may be considered voluntary. However, we also note that any sudden substantial increases in contributions or changes in patterns of contributions, could be considered 'out of character'.

In respect to Option 1 (*a court or superannuation trustee applies a subjective assessment of whether contributions were 'out of character' and therefore available for compensation*) we would propose to avoid any potential claims of conflict of interest, a court or an

Bravehearts Foundation Ltd. bravehearts.org.au

National Office: (07) 5552 3000 | Fax: (07) 5552 3088 | Bravehearts Information & Support Line: 1800 272 831
Postal: PO Box 575, Arundel BC, QLD 4214 | Email: admin@bravehearts.org.au | ABN: 41 496 913 890 | ACN: 607 315 917

independent financial appointee, rather than a superannuation trustee, should be responsible for making such a determination.

Issue 4: Process for recovering money

Of the two draft proposals put forward in the consultation paper, Bravehearts would suggest that requiring the release of relevant funds to the court, to distribute according to its usual processes, is preferable. It appears to be the most straight forward approach, acknowledging that it may not be appropriate for the funds to be released directly to the victim or multiple victims.

The second option is not untenable, however it would require establishing a new mechanism to centralise and streamline the release and payment and as the courts are already established, it makes sense to utilise those processes for recovering money and distributing to the victim/s.

Issue 5: Taxation rate applied to compensation

Bravehearts supports the proposal within the consultation paper that the voluntary contributions released from the superannuation fund, for purposes of providing for victims of crime compensation, should not incur any additional tax liabilities and any tax concessions associated with the voluntary contribution should be unwound as part of the process of voiding the contribution.

We fully support the proposal that any money released for victims of crime compensation should be tax-free for the victim.

Draft Proposal 2: Allowing uncompensated or partially compensated victims of crime broader access to the perpetrator's superannuation balance

As noted above, Bravehearts believes that the two draft proposals outlined in the consultation paper complement each other and would ensure that perpetrators are held accountable in relation to providing compensation to victims.

In addition to the mechanisms under Draft Proposal 1 that will inhibit an offender's ability to hide financial assets and avoid victims of crime compensation responsibilities, Draft Proposal 2 should ensure that any victim who has not been provided with full compensation will be able to recover unpaid amounts through the balance of the perpetrator's superannuation account.

We note that the proposed conditions of release of the balance of an offender's superannuation balance are:

- there has been a criminal conviction against the member;
- the crime is a serious crime, involving violence against an individual, that has a maximum custodial sentence of 10 years or greater;
- a compensation order has been made to a primary victim of that crime under State and Territory Sentencing Acts or in a civil claim following conviction; and

- the perpetrator's other assets are exhausted, or the compensation order remains unpaid after twelve months.

While we agree with the intention of the proposals made under Draft Proposal 2, we offer the following comment.

Issue 1: Burden of proof

Bravehearts acknowledges the difficulty in pursuing cases of child sexual assault or exploitation in the criminal justice system, and we note that due to this difficulty, in some instances compensation is the only mechanism through which victims can get a level of justice and hold offenders accountable.

However, in principal, we support the proposal to allow access to an offender's superannuation balance based on a burden of proof test that relies on a criminal conviction.

Issue 2: What crimes should be covered?

Bravehearts notes that the current consultation paper proposes that access to an offender's superannuation fund to cover unpaid compensation, should apply to: serious offences that involve violence against a victim, and offences with a maximum custodial sentence of ten years or greater.

As an agency that works specifically with victims of child sexual assault or exploitation offences, we seek to ensure that the definition of serious crime includes all sexual offences involving children, including those that may not be considered to involve what is typically defined as 'violence'. However, we would argue that any sexual offence against a child could be considered violent by its very intention. We note that the impacts inflicted on children who have been sexually harmed, irrespective of whether there was 'violence' involved, is horrendous.

There are a number of well researched and documented impacts of child sexual assault affecting adult survivors (which we would be happy to provide or speak to at greater length). Childhood trauma can impact on children's development across a range of domains including physical, emotional, social and cognitive. Child sexual assault has also been linked with long term poor mental health outcomes, with those who experienced child sexual assault at greater risk of mental health issues. Diagnoses of anxiety, depression and personality disorders are common in adults with a history of child sexual assault. Individuals with a history of child sexual assault are at an increased risk for:

- mental illness
- substance abuse
- homelessness
- suicidality
- revictimisation, including domestic violence and sexual assault
- parenting difficulties, and
- health issues.

Bravehearts Foundation Ltd. bravehearts.org.au

National Office: (07) 5552 3000 | Fax: (07) 5552 3088 | Bravehearts Information & Support Line: 1800 272 831
Postal: PO Box 575, Arundel BC, QLD 4214 | Email: admin@bravehearts.org.au | ABN: 41 496 913 890 | ACN: 607 315 917

We note that these impacts affect victims of child sexual assault no matter where along the continuum of abject seriousness the offence may sit. We would argue that rather than ‘involving violence against an individual’, the criteria should be that the crime is a ‘serious interpersonal crime’.

In relation to the clause that proposes that a serious crime should be one where the maximum custodial penalty is 10 years or greater, we note that while the majority of child sex offences attract a maximum custodial sentence of 10 years or more, there are some that may be considered serious in nature, but that attract lesser maximums. For example in jurisdictions where the offence exists, including the Commonwealth, there are maximum penalties of less than 10 years (more often around 7 or 8 years) for sexual offences against children 16-18 where the offender is in a position of special care. While we would like to see the maximum penalty lowered to 7 years, we understand the need to set a reasonable benchmark.

Given our concerns, we would advocate that the condition of applicability be changed to where “the crime is a serious interpersonal crime, that has a maximum custodial sentence of 7 years or greater”.

Issue 3: What victims should be eligible?

We agree that broadening the eligible claimants to include secondary victims may complicate the proposals and that primary victims are likely to have the greatest need.

We would however emphasise that where a victim is a child they should not be disadvantaged and that compensation should be able to be managed by a carer or trustee to ensure that the victims immediate needs are met.

In relation to cases where the primary victim may have passed away as a result of the criminal act, we would advocate that a related victim (including close family members, for example primary caregivers) should be able to access compensation through the offender’s superannuation.

Issue 4: Types of unpaid compensation orders covered

Bravehearts supports that both type of orders be included, that is that victims can seek compensation at the end of a criminal trial (Sentencing Act approach) and through making a claim through civil action.

The process must be flexible to meet the needs and timing of victims.

Issue 5: How to ensure that access to superannuation is a last resort

We support the proposal that the Commonwealth legislation should provide that an offender’s superannuation fund must only be accessed when the compensation order remains unpaid and after it has been certified that all other assets have been exhausted.

Issue 6: Balancing the rights of the victim with the rights of the perpetrator's dependants

Bravehearts acknowledges the caution needed around the potential impact on the perpetrator's dependants of the current proposal. We support the suggestion in Draft Proposal 2 that "any concurrent family law property (including superannuation) settlement order proceedings" should be completed before victims of crime compensation is sought via accessing the offender's superannuation fund.

In addition, we agree that if a victim has already been compensated via the offender's superannuation prior to any family law settlement, the released money cannot be recovered from the victim/s.

Although where an offender has no dependants, their entire superannuation balance would be available to victim/s, we note the options provided in the consultation paper for mitigating the impact on any dependants being:

- *Option 1:* allowing 50 per cent of the perpetrator's total superannuation balance up to \$1.6 million (plus any amount in excess of \$1.6 million) to be available as an aggregate limit for any compensation claims arising out of a conviction.
- *Option 2:* no explicit limits on access for compensation claims but ensuring family law proceedings can 'interrupt' claims to allow potential family law splitting prior to any payment to the court.

We would advocate for Option 1, as it would have a lesser impact on victim/s, whereas Option 2 would potentially increase the trauma felt by victim/s if the family law proceedings were to be over an extended period of time.

Issue 7: Application of the draft proposal to pre-existing convictions and unpaid compensation orders

Bravehearts believes that the Draft Proposal should be retrospective and applied to existing unpaid compensation orders.

Issue 8: Recovery of costs by state and territory compensation schemes

We note the concerns raised in the consultation paper around extending the proposal to allow state and territory victim compensation schemes to access offenders' superannuation funds. Specifically that these victim compensation schemes, for example the Victims Assist Queensland scheme, are broader in scope, reaching a wider range of victims and including matters where there has not been a criminal conviction. We understand the need to ensure a level of proof in recovering compensation from an offender and as such support the recommendation in the consultation paper that state and territory compensation schemes should not be able to recover the costs of their payments through accessing offenders' superannuation funds.

However, we will state that on principal we have no objection to these schemes being able to recover funds through accessing offender's superannuation. As noted under 'Issue 1 Burden of Proof', we note that often it can be difficult to obtain criminal convictions for child

sexual offences and believe that in some instances compensation is the only mechanism through which offenders can be held accountable and victims can get a level of justice.

Issue 9: Tax rate applied to compensation

We agree that money recovered through superannuation accounts should not have tax applied.

Finally, we once again applaud the Commonwealth government for undertaking to correct this gap in the legislation. We believe it is utterly critical to ensure that offenders (and from our view specifically child sex offenders) are prevented from being able to shield their financial assets in their or another's superannuation fund, and that victims of serious crimes are not prevented from being able to access offender's financial assets to receive compensation for harm perpetrated against them.

For many of the victims we support, being able to hold the offender accountable for the harm they caused is an incredibly important aspect of their own healing process. Ensuring that offenders are responsible for compensating victims is one important step in assisting with this.

We thank you for the opportunity to provide this submission. Please contact us on research@bravehearts.org.au if any further information is required.

Kind Regards,

Hetty Johnston AM	Carol Ronken
Founder & Executive Chair	Director of Research