



13 June 2018

Manager, Early release of superannuation
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuation@treasury.gov.au

Dear Sir/Madam,

Review of superannuation and victims of crime compensation

The Financial Planning Association (FPA) welcomes the opportunity to provide feedback on the consultation paper: *Review of superannuation and victims of crime compensation*.

As per our previous submission on this matter, the FPA supports the early release of a perpetrators superannuation for the purposes of compensating victims of crime as there is a moral obligation to support the victims of crime over the objectives of the superannuation system and the preservation of the perpetrator's retirement savings.

The FPA supports the intent of Treasury's draft proposals to prevent the use of superannuation contributions to shield assets from victims of crime, and to allow uncompensated or partially compensated victims of crime broader access to the perpetrator's superannuation balance. However we do not support limiting access to a perpetrator's superannuation as per the draft proposals.

A perpetrator's superannuation, which may include the proceeds of their crime, should not be allowed to grow with tax benefits for them to potentially access later in life, with little regard to their victims' suffering.

Victims of crime may suffer from trauma as a direct result of the crime, regardless of the nature of the crime, which could affect their capacity to earn an income (or sustain an income to the pre-crime level), impacting their current financial situation and their own superannuation balance and retirement savings.

The two-pronged approach to addressing this issue risks creating a complicated system that will be difficult and costly to administer, and discriminate some victims against others based on the legal definition of the crime they were subjected to, rather than the impact and trauma the crime has inflicted. The issues raised in the position paper highlight the potential complexity created by a two-pronged approach to allowing the early release of a perpetrator's superannuation for the purposes of compensating victims of crime.

The FPA suggest one single system is needed for the early release of a perpetrator's superannuation for the purposes of compensating victims of crime. This could be achieved by amending the rules governing early release of superannuation to require superannuation trustees to release funds to uncompensated or partially compensated victims, under the following conditions:



- Court order - A compensation amount should be set and awarded by court order first. The early release request must be made by court order.
- Last resort - A statutory order should be included in the law which lists (in order) where victim compensation is to be accessed from. For example, a perpetrator's cash holdings; liquidating shares, managed funds, property and business holdings; with superannuation being the last resort.
- Disclosable asset - The perpetrator's superannuation should be a disclosable asset during compensation hearings, and prior to bankruptcy being declared. (See response to visibility of assets below.)
- Criminal conviction - Access to superannuation should be limited to cases where a criminal conviction has been made. This should not be restricted to perpetrators who are subject to imprisonment of 10 years or more, or to violent crimes, as proposed. Allowing access to a perpetrator's superannuation for compensation or restitution arising from a select type of criminal behaviour or activity, applies unfair judgement about the impact of the crime upon the victim. It also ignores the different types and severity of impact all criminal behaviour can have on victims. For example, limiting access to just violent crimes, as per draft proposal 2, ignores the devastation and irreparable damage victims suffer as a result of fraud, misconduct, negligence, or professional or white collar crimes. Such crimes most commonly involve financial gain for the perpetrator and are conducted over a lengthy period of time. Hence there should be no restrictions on access to a perpetrator's assets in compensating victims of such criminal behaviour. Access to a perpetrator's superannuation should be available for compensation or restitution arising from all crimes where a criminal conviction has been made. It would be inappropriate and against the principle of fairness to impose a threshold based on the type or violence of criminal activity. Requiring a compensation amount to be set and awarded by court order first, with superannuation only used as a last resort to compensate victims of crime, should overcome the issues raised in the position paper.
- Access to superannuation balance - The entirety of a perpetrator's superannuation should be available to compensate victims of crime where a criminal conviction has been made. This should not be split into 'out of character' contributions and other contributions, as per the two-pronged approach proposed in the position paper. This will be too costly and inefficient to administer, and does not take into account the fact that the criminal behaviour may have taken place over a long period of time with the perpetrator making seemingly regular or 'in character' contributions for the purpose of shielding their assets. Allowing access to the entirety of the perpetrator's superannuation balance as a last resort based on the early release request made by court order, removes the issue of how to determine whether a contribution is 'out of character'. It also places the victim's needs above the superannuation system.
- Spouse superannuation – consideration should be given to assets shielded via a spouse's superannuation account. As suggested in the position paper, to further avoid the perpetrator not paying victims, any mechanism to cover compensation from a perpetrator's superannuation would also need to apply to voluntary contributions to the perpetrator's account by any person, or any contributions 'gifted' (i.e. a spouse split or spouse contribution) by the perpetrator to another person's account.
- Dependents - The interests of any dependants of the perpetrator should be taken into consideration. The FPA supports option 2 in the position paper in addressing this issue (see below).



- Tax treatment – As proposed in the position paper, the lump sum compensation payment should be tax-free in the hands of the victim.

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

The Government has proposed the use of claw-back provisions, similar to those in the Bankruptcy Act (Part VI, Division 3, Subdivision B), to allow a victim of crime with an unpaid compensation order against a perpetrator to apply to a court for an order for the release of 'out of character' contributions made to the perpetrator's account in the period starting six months prior to the perpetrator being charged to the time the order is granted. This proposal applies to any indictable offence (not summary offences).

As discussed above, the FPA questions the need to limit claw-back provisions to 'out of character' contributions and only to such contributions made in the period starting six months prior to the perpetrator being charged. A single system with the parameters described above would remove the need for such discriminatory limits that would only serve to unfairly restrict a victim's access to a perpetrator's superannuation assets.

- Six month period – the FPA opposes the imposition of a time period being applied to the superannuation contributions.
- Limits and thresholds – There should not be any caps imposed on the access to the perpetrator's superannuation. The only cap should be the outstanding amount of compensation due to the victim as determined by the court order.
- Visibility of assets – The FPA supports the proposal to improve the visibility of superannuation assets for the purposes of awarding compensation to victims of crime. The FPA agrees that the legal framework under the Bankruptcy Act is insufficient and inappropriate for this purpose as the responsibility for determining whether there is sufficient evidence to warrant an action or claim is placed on the trustee, not the court. While the powers and procedures that give police visibility to assets under the *Proceeds of Crime Act 2002* would be appropriate for these circumstances, we note the complexities in extending these provisions to apply to victims of crime compensation.
- Determining whether contributions are 'out of character' – The position paper clearly articulates the flaws and risks with imposing a system based on 'out of character contributions'. The paper states: "*it will be very difficult to determine whether or not a contribution is 'out of character'*"; "*it could be a contentious decision and may be subject to challenge*"; and "*it is questionable whether trustees of superannuation funds are well placed to make this assessment, given it may conflict with their duties to act in their members' best interests (which may conflict with the interests of the victim)*". A test for 'out of character contributions' would be subjective and open to legal challenge to the detriment of the victim and further gain for the perpetrator. A subjective assessment, as proposed in Option 1, can often be applied inconsistently in practice resulting in unfair judgements that will only serve to disadvantage victims. Imposing a time period of contributions also ignores the potential criminal intent of a perpetrator who may plan ahead to hide their assets over an extended period. Should the Government proceed with the two-pronged approach, this element of the proposal should also apply to voluntary contributions to the perpetrator's account by any person, or any contributions 'gifted' by the perpetrator to another person's account.
- Process for recovering money – The FPA does not have a view as to the most efficient and cost effective process for the actual transfer of a perpetrator's superannuation for the purpose of



compensating a victim of crime. However the FPA suggest any mechanism should be void of charges to ensure the perpetrator's superannuation assets are available for the purpose of victim compensation and not eroded by transfer fees. We agree that any mechanism to access a perpetrator's superannuation to compensate victims of crime should also apply to voluntary contributions to the perpetrator's account by any person, or any contributions 'gifted' by the perpetrator to another person's account.

- Taxation rate applied to compensation - The FPA agrees that money released should also be tax-free in the hands of the victim.

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

The Government has proposed that victims of **serious crimes** whose compensation orders have not been paid, in full or in part, should be able to access funds held in the perpetrator's superannuation account (not just 'out of character' contributions). This proposal would apply where there has been a criminal conviction against the perpetrator for a **serious crime involving violence** against an individual that has a maximum custodial sentence of 10 years or greater, and the perpetrator's other assets are exhausted, or the compensation order remains unpaid after twelve months. If the member has no dependants, the full balance would be available to the victim. If the member has dependants, a proportion of the balance would be available.

As stated above, the FPA opposes limiting access to the perpetrator's superannuation in this way. All victims of crime where a criminal conviction has been made should be permitted access to the perpetrator's superannuation, as a last resort, for payment of compensation awarded under a court order.

- Burden of proof – The FPA supports access to a perpetrator's superannuation, limited to cases where a criminal conviction has been made.
- What crimes should be covered? – As stated in our previous submission, allowing access to a perpetrator's superannuation for compensation or restitution arising from a select type of criminal behaviour or activity, implies unfair judgement about the impact of the crime upon the victim. All victims of any crime where a criminal conviction has been made should have access to a perpetrator's superannuation, under a court order and as a last resort to cover unpaid compensation. As stated above, the intent of perpetrators of fraud, misconduct, negligence, or professional or white collar crimes are purely motivated by financial gain and are commonly conducted over a lengthy period of time. There should be no restrictions on access to a perpetrators assets in compensating victims of such criminal behaviour.
- What victims should be eligible? – All primary victims of any crime where a criminal conviction has been made, should have access to a perpetrator's superannuation, under a court order and as a last resort to cover unpaid compensation. In the event where the primary victim dies prior to the transfer of awarded funds, a related victim (a close family member or a financial dependant) should be able to access funds held in the perpetrator's superannuation account as per the previously awarded court order.
- The types of unpaid compensation orders to which the draft proposal would apply – The FPA supports the proposal that both types of orders should be covered.



- How to ensure that access to superannuation is a last resort – The FPA supports the proposal that access to a perpetrator’s superannuation for the purposes of compensating victims of crime, be used as a last resort. We do not have a view on the best means of ensuring this outcome.
- How to safeguard the interests of dependants of a perpetrator – This is a very challenging issue, with no ideal solution. The FPA supports proposed *Option 2*: do not have an explicit limit but ensure family law proceedings can ‘interrupt’ claims to allow potential family law splitting prior to any payment to the court.
- Application of the draft proposal to pre-existing convictions and compensation orders – The FPA supports the proposal that access should be available for past crimes and existing eligible unpaid compensation orders issued by a court for crimes where a criminal conviction has been made.
- Recovery of costs by state and territory compensation schemes - The FPA agrees that any compensation either paid directly to a victim or recovered by an authority, must only be in relation to a case where a criminal conviction has been made.
- Taxation of compensation – The FPA supports the proposal that no tax be applied to the release of funds from the perpetrator’s superannuation account to pay compensation to a victim.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

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Policy Manager

Financial Planning Association of Australia¹

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The Financial Planning Association (FPA) has more than 13,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first “policy pillar” is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 27 member countries and the 170,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or working toward, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.