# Review of superannuation and victims of crime compensation - Further consultation and draft proposals

# Victims Services comments

## Overview

Victims Services supports the majority of the proposals in this consultation paper. Overall, the proposals in this paper demonstrate that consideration has been given to feedback previously provided by Victims Services.

However, Victims Services seeks further consideration of the following points in relation to draft proposal 2:

* Issue 2:‘Serious criminal offences’ should be defined as serious indictable offences. A serious indictable offence is defined in the *Crimes Act 1900* (NSW) as an indictable offence that is punishable by imprisonment for life or for a term of five years or more.
* Issue 3: Family victims of a primary homicide victim should also have access to the offender’s superannuation for the purposes of compensation.

**Interaction with the NSW Victim Support Scheme**

In NSW, if a victim receives a criminal court compensation order, they may be ineligible to make an application for victims support.

Section 25(1) of the *Victims Rights and Support Act 2013* (NSW) states that a person is not eligible to receive victims support in respect of an act of violence if the person has been paid, or is entitled to be paid, compensation awarded by a court in respect of that Act under Part 6 or if the person’s application for such compensation is pending.

Section 95(2) provides that a court cannot issue a direction for compensation for injury if financial support under the Victims Support Scheme has already been given in respect of the injury to or for the benefit of the ‘aggrieved person’. This means that if a person is issued with a compensation order by a court, and then the convicted person has insufficient funds or refuses to pay, the victim may be ineligible to receive victims support.

**The review should consider a process for the disclosure of a perpetrator’s superannuation before a court compensation order is made.** There does not appear to be a proposed process for the victim to obtain information about a superannuation or asset balance prior to a court compensation order being made. In NSW, this creates a risk that legal advocates and others may persuade victims to pursue a criminal compensation order with the expectation that they will be able to receive payment because they expect the offender to have superannuation available. However, many offenders have little to no superannuation and the victim would then be ineligible to apply for financial support under the Victim Support Scheme.

The proposal may require an amendment to Section 25(1) of the *Victims Rights and Support Act 2013* (NSW) to mitigate the risk of victims being left without any means of support.

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

| **Topic** | **Content for feedback** | **Comments** |
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| **Issue 1: Limits and thresholds**  The draft proposal only applies to ‘out of character’ contributions to shield assets from victims. The draft proposal would apply broadly to compensation orders that have not been paid in full, flowing from any indictable offence. | It is proposed not to cap the amount of contributions that can potentially be released under this mechanism. The only cap would be the outstanding amount of compensation due. | Supported. Victims should have full access to out of character contributions as they would have access to these funds were they not diverted into superannuation. |
| **Issue 2: Visibility of assets**  The question arises as to how the victim of crime can obtain visibility in relation to a perpetrator’s superannuation contributions. | The Review proposes that the process for disclosure of a perpetrator’s assets should originate from a criminal or civil court proceeding, to balance efficacy of proceedings with appropriate oversight and privacy implications. This could be done in conjunction with the ATO building a new, secure electronic system to give courts visibility of superannuation information held by the ATO in appropriate circumstances. This system would need to be developed in consultation with the superannuation industry, the courts and other stakeholders. It would also require changes to taxpayer confidentiality legislation. | Supported in principle. Victims Services supports this approach with the understanding that further appropriate consultation will be undertaken with relevant stakeholders regarding the development of a secure electronic system and proposed changes to the taxpayer confidentiality legislation.  The level of Commonwealth to State collaboration to create an electronic database that could achieve this would be a significant undertaking in terms of cost and time for what would likely be a small pool of money. |
| A trustee would not be required to comply with this process if the member is subject to an active bankruptcy proceeding, or a discharged bankruptcy administered during the relevant period where bankruptcy claw-back provisions have been exercised, a family law proceeding, or if the funds are the subject of a proceeds of crime forfeiture order, until those matters have been dealt with. |  |
| **Issue 3: Determining whether contributions are ‘out of character’**  Without a substantial legal framework like bankruptcy with a Trustee in Bankruptcy and court procedures to interrogate financial records and assess purpose, it will be very difficult to determine whether or not a contribution is ‘out of character’. | The Review seeks feedback on the following options:  **Option 1:** a court or a superannuation trustee applies a subjective assessment of whether contributions were ‘out of character’ and therefore available for compensation; or  **Option 2:** all voluntary contributions by or on behalf of the member are deemed to be ‘out of character’ and therefore available for compensation. | Victims Services supports option 1. This option would ensure that a fair decision can be made on whether the superannuation contributions are out of character. The assessment does not need to be entirely subjective. Appropriate guidelines and decision making criteria should be established to ensure that there is an objective basis to guide the determination of whether contributions should be considered out of character. |
| The Review also seeks feedback on the appropriate timeframe for this assessment. In principle, contributions made in anticipation of an eventual compensation order should be in scope. That period of time might begin several months ahead of the perpetrator actually being charged. In particular, should contributions that are made from, for example, six months prior to being charged until the date of the order be within scope? Alternatively, would a shorter or longer period be more appropriate? | Victims Service suggests that the appropriate timeframe should be based on the average length of criminal investigations as a proxy for when the investigation for the offence is likely to have begun. This approach aims to capture any warning the alleged offender may have may have that criminal or civil proceedings are pending. Victims Services has requested data on the average length of investigations in NSW and will provide this if it becomes available. If an agreement on the average length of an investigation is not able to be established, the timeframe should be based on the time since the offence was committed. In the event of a recent offence (five years or less), out of character contributions since the time of the offence should be taken into consideration. In the event of historical offences (for example, five years or more), out of character contributions made five years prior to the compensation order should be taken into consideration. The review should also consider how this would apply to juvenile offenders. Victims Services does not support any proposal to access the superannuation of offenders who committed the relevant offence when they were a juvenile. |
| **Issue 4: Process for recovering money**  Given there may be multiple compensation orders or other debts attributed to a perpetrator, it would not be appropriate for all the relevant contributions to be paid directly to an uncompensated or partially compensated victim with a compensation order. Further, trustees may be uncomfortable with any requirement to pay someone other than the member or the contributor. | It is proposed that the trustee would be required to release relevant funds either:   * by paying them into court, which distributes the funds according to its usual processes; or * by releasing them through some mechanism to centralise and streamline release and payment. For example, there are existing processes in place to facilitate release of amounts from superannuation, which might be built upon to facilitate releases for victims of crime. | Victims Service supports either mechanism for distributing the relevant funds to victims. Both options suggested here are viable.  Where the offender has multiple claims against them, the process for payment should ensure that the available funds are fairly distributed between victims so that one victim does not receive payment before another and funds are exhausted early. |
| To further avoid the perpetrator not paying victims, any claw-back mechanism would also need to apply to voluntary contributions to the perpetrator’s account by any person, or any contributions ‘gifted’ by the perpetrator to another person’s account. | Supported. |
| **Issue 5: Taxation rate applied to compensation**  Where the court determines that particular contributions were ‘out of character’, the effect of this draft proposal would be to void those transactions, releasing the contributions out of the superannuation account. As a result the money would not be treated as superannuation | The Review considers that the ‘released’ amount should not incur additional tax liabilities for the superannuation account holder. Any tax concession associated with the contribution (e.g. in the case of a personal deductible contribution) should be unwound, to the extent practicable, with the voiding of the transaction. | Supported. |
| Money released should also be tax-free in the hands of the victim. | Supported. Tax should be applied in the same way as it currently is to a compensation order or victims support, the money changes form once it is paid into the Court and then paid out as compensation.  Victims Services is of the understanding that these compensation payments are generally not taxable income. |

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

| **Topic** | **Content** | **Comments** |
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| **Issue 1: Burden of proof** | The draft proposal would only apply to unpaid compensation orders relating to conduct for which a criminal conviction has been obtained. This reflects a view that the act should have been proven to the criminal standard – beyond reasonable doubt. It would not apply to unpaid civil compensation claims in the absence of a prior criminal conviction. | Supported. |
| **Issue 2: What crimes should be covered?** | The current draft proposal is that access to a perpetrator’s entire superannuation balance should be possible only in respect of unpaid compensation orders relating to serious criminal offences involving violence against an individual. | Supported in principle. Victims Services would like to be consulted on the ‘serious criminal offences involving violence’ that would be included under this proposal. As addressed in issue 6 below, the entire superannuation balance should only be available where the offender has no dependents. |
| It is also proposed that a serious criminal offence should be defined as one with a maximum custodial sentence above 10 years. | Not supported. ‘Serious criminal offences’ should be defined as serious indictable offences. A serious indictable offence is defined in the *Crimes Act 1900* (NSW) as an indictable offence that is punishable by imprisonment for life or for a term of five 5 years or more. If this is not accepted then the definition should be modified to include offences where the maximum custodial sentence is 10 years rather than only applying to those above 10 years, as under the *Crimes Act 1900* (NSW), many of the serious offences carry a penalty of 10 years. For example, section 61M provides that aggravated indecent assault against a person under the age of 16 is liable to imprisonment for 10 years. |
| **Issue 3: What victims should be eligible?** | The draft proposal is that access to a perpetrator’s superannuation should only be made available to primary victims. | Not supported. Victims Services supports the inclusion of family victims in this proposal. Family victims are defined under s22 of the *Victims Rights and Support Act 2013* (NSW): *“*A ***family victim*** of an act of violence is a person who is, at the time that act is committed, a member of the immediate family of a primary victim of that act who has died as a direct result of that act”. |
| In the event where the primary victim dies as a result of the act of violence, the Review seeks feedback on whether a related victim (broadly defined as a person who, at the time the primary victims dies, is a close family member or a financial dependant) should be able to access funds held in the perpetrator’s superannuation account. | Supported. As outlined above, family victims of homicide should be able to access funds held in the perpetrator’s superannuation account. |
| **Issue 4: Types of unpaid compensation orders covered**  In considering what types of orders should be covered, it is important to accommodate differences in state and territory legal systems.  The Victorian Law Reform Commission’s (VLRC) recent report on the Role of Victims of Crime in the Criminal Trial Process shows how victims of crime in that state can seek reparation directly from the perpetrator in two ways. At the end of the criminal trial they can seek a restitution or compensation order under the Sentencing Act (1991) (Victoria). Alternatively, they can make a civil law claim for compensation through the civil jurisdiction of Victoria’s courts. | Under this draft proposal, both types of orders would be covered. However, we welcome views on whether the draft proposal should be confined to Sentencing Act-style orders and not orders made pursuant to subsequent civil actions. | Victims Services supports both types of orders being covered by this proposal. In NSW under s25 of the *Victims Rights and Support Act 2013 “*A person is not eligible to receive victims support in respect of an act of violence if the person has been paid, or is entitled to be paid, compensation awarded by a court in respect of that act under Part 6 or if the person’s application for such compensation is pending”. This restriction would need to be considered in determining compensation options available to victims. |
| **Issue 5: How to ensure that access to superannuation is a last resort**  The aim of the draft proposal is that superannuation should be available as a last resort. It should only be accessed where a compensation order remains unpaid after other assets have been exhausted. This principle was broadly supported by stakeholders. | To achieve this outcome, Commonwealth legislation could potentially provide that a trustee can only release its member’s funds if a state sheriff’s office or similar certifies that other assets of the perpetrator have been exhausted (or that the compensation order remains unpaid after 12 months). | Supported. |
| **Issue 6: Balancing the rights of the victim with the rights of the perpetrator’s dependants**  In responding to the consultation paper, many stakeholders cautioned about the potential impact on dependants of allowing victims of crime access to a perpetrator’s superannuation. | **Interaction with family law**  The Review proposes that any concurrent family law property (including superannuation) settlement order proceedings should always be completed prior to a victim of crime compensation order being enforced via superannuation.  In cases where a family law property settlement occurs after a victim has been compensated from a perpetrator’s superannuation, the released superannuation could not be clawed back from the victim. However, the amount of the compensation order could be taken into consideration by the court as it determines the property allocation between a perpetrator and former partner, if the court considers that it is just and equitable to do so. | Supported. |
| **Should there be limits on the proportion of a perpetrator’s account that can be accessed?**  In cases where the perpetrator does have dependants, the Review seeks feedback on the following two options.   * 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.   Where there are no dependants, the perpetrator’s entire superannuation balance should be available to victims. | Victims Services supports option 2 in principle. However, it may be harmful to victims to have their compensation payment delayed by a prolonged family law case. Exceptions may need to be made in family law matters that are especially prolonged or where there is doubt as to the legitimacy of the family law matter. In such cases, the victims should be able to make an application that their compensation payment be made and the amount of the compensation order could then be taken into consideration by the family law court as it determines the property allocation. |
| **Issue 7: Application of the draft proposal to pre-existing convictions and unpaid compensation orders**  Another issue for consideration is whether the draft proposal should apply to pre-existing compensation orders in relation to prior criminal convictions. | It seems reasonable to allow existing unpaid judgement debts arising from criminal compensation orders to be available for broader compensation through superannuation. The person would already have committed the serious crime and already had a court determine the appropriate compensation they should pay the victim.  The Review proposes that access should be available for past crimes and existing eligible unpaid compensation orders. | Supported. A retrospective application would be complex but it is the fairest option for victims where a very serious crime has already been committed. This will interact with issues 2 and 3. |
| **Issue 8: Recovery of costs by state and territory compensation schemes**  The most significant issue with allowing state and territory compensation schemes to recover their costs from a perpetrator’s superannuation is that these schemes are much broader in scope. They allow compensation to be paid to a wide range of individuals in the absence of a criminal conviction. | The Review considers that state and territory compensation schemes should not be able to recover the costs of their payments from the perpetrator’s superannuation balance as this would substantially broaden the scope of the draft proposal. | Supported. Victims Services recognises that it is of greater importance that the victim(s), rather than the State, have access to an offender’s superannuation for the purposes of compensation. |
| **Issue 9: Tax rate applied to compensation** | The Review proposes that no tax be applied to the release of funds from the perpetrator’s superannuation account to pay compensation to a victim. This is because the benefits of concessional tax treatment of superannuation contributions would not accrue to the perpetrator on the released funds. It also avoids the complexity of situations where a balance would need to be applied to both a tax debt and the victim’s compensation, allowing the full balance to be available to the victim if necessary. | Supported. |
| Consistent with the existing treatment of court-ordered compensation, the Review considers that money released to the victim should not be assessable for tax purposes. | Supported. |