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Dear Secretary of Review,

By way of brief introduction, his Excellency the Governor for South Australia appointed me as Commissioner for Victims’ Rights. I am an independent statutory officer who role is likened to a crime-victim ombudsperson, although my functions are more varied than conventionally associated with an ombudsperson.

Please accept this letter as my submission to the review of superannuation and victims of crime compensation. The views expressed are mine and do not represent those of the Government of South Australia.

**Background**

Confiscating the assets of criminals is one of the legal responses for combating organised crime, especially money laundering, and financing of terrorism, for example, politically motivated mass violence. Confiscation is a sanction for criminal activities. Confiscating assets (such as the proceeds of crime) reduces the wealth available to offenders to fund future crime.

The authority to confiscate criminal assets and proceeds of crime can be either conviction-based (which requires the crime be proven beyond a reasonable doubt) or civil based (which requires the crime be proven on balance of probabilities). Furthermore, recent unexplained wealth law shifts the onus of proof from the prosecutor to the person accused of living beyond their apparent means. They must justify the legitimacy of their financial circumstances.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines,

*"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.*

*A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.*

The Declaration continues importantly,

*Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.*

*Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.*

Furthermore,

*When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:*

 *(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;*

 *(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.*

The Declaration urges governments to establish, strengthen and expand of national funds for compensation to victims. Where appropriate, other funds (to which I add sources of funds) should also be established to compensate the victim for the harm.

**Discussion on proposals 1 and 2**

Mindful of the existing laws on confiscation of assets and victims’ rights, I rhetorically ask, ‘Why do we allow those who perpetrate domestic or family violence to keep the assets they have acquired during their reign of terror? Why should they not pay for the harm done? Why are the victims of domestic or family violence left to bear the burden of perpetrators’ crimes?'

Several example cases illustrate how ‘restraining’ then ‘confiscating’ offenders’ assets can address the harm done and alleviate the plight of victims:

• A husband/father unlawfully killed his spouse/mother and a young child survived. The deceased’s parents (retired people) assumed responsibility for the child. The accused killer attempted to use the family’s assets to fund legal counsel. As Commissioner, I instructed legal counsel to ‘freeze’ the assets to secure the child’s hereditary entitlements, which happened. Fortunately, I was able to pay the legal fees and associated costs that the grandparents could not afford. I acted because it seems to me that perpetrators of domestic or family violence should not only be subject of criminal sanctions but also be required to pay for the ramifications of their crimes.

• A male adult had sex with several women knowing that he had a sexually transmittable disease. One of the women contracted that disease, which profoundly affected her. While serving a term of imprisonment, the convicted offender was injured and successfully sued the corrections department. The sum paid as ‘damages’ was quarantined, so I instructed legal counsel to take steps to advance the unwell victim’s interest by attaining an order requiring the quarantined sum be paid as compensation to her, which happened.

• A male adult sexually abused a child. Many years later that adult while serving a term of imprisonment successfully sued the corrections agency for failing in its duty of care. The sum paid as ‘damages’ was quarantined, so I instructed legal counsel to take steps to attain an order requiring the quarantined sum be paid to the victim of the sexual abuse, which happened. The sum paid to the victim, however, was limited to that remaining after the costs of treating the prisoner were paid.

Consistent with laws on confiscating offenders’ assets and the case examples, I assert:

**Proposal 1** -- that an offender’s superannuation should be treated as an asset that can be restrained, so that the victim of that offender’s crime can “claw back” out-of-character contributions. Furthermore, that courts should be empowered to make “claw back” orders that require trustees to pay amounts into a quarantine fund.

It is important that the cost of restraining the out-of-character contributions is not borne by the victim. The prospect of legal fees might deter victims.

The law should provide for a civil burden of proof, which would be consistent with the law on anti-violence (intervention) orders.

Regarding the public interest, there is merit in limiting the “claw back” to proposed contributions because stripping offenders of their entire superannuation would in the long-term shift the financial burden for offenders’ life in retirement on to the public purse. The public already pays a heavy toll for domestic and family violence.

**Proposal 2** -- that if a criminal court has made a restitution order requiring an offender to pay monetary compensation to the victim of the offender’s crime and the offender fails to pay the compensation, the victim should be entitled to access the offender’s superannuation if other assets have been exhausted.

In South Australia, the victim can via their victim impact statement and/or submission by the prosecutor, request a court exercising criminal jurisdiction to make a restitution order as the sentence or as a component of the sentence. The law requires such court to give priority to restitution over a fine but also to take into account the offender’s capacity to pay.

A restitution order falls within the ambit of a pecuniary order. The Fines Recovery and Enforcement Unit is tasked with recovery of pecuniary orders and that unit must give priority to collecting restitution, which is done at no cost to the victim.

It is important that the victim does not carry the burden of recovery or the cost of such.

It is also important that there are safeguards to protect the interests of dependants of offenders.

**Additional proposal to facilitate the operation of the draft proposals**

In the 1990s the Victoria Law Reform Commission recommended that during the sentencing phase the offender should be required to produce a statement of their assets to assist the court in determining the offender’s capacity to pay restitution. As Commissioner I have several times suggested this reform. I urge consideration be given to placing the onus on the offender to reveal their assets but also suggest as a safeguard that courts should be empowered either at their discretion or on application of prosecuting authorities (including the victim in civil proceedings) be entitled to require a statement of finances.

**Concluding comment**

Both proposals are meritorious (with safeguards). Amending legislation might state the objectives as:

• To remedy the harm done to victims and alleviate the impact of perpetrators’ acts or omissions;

• To deter those who contemplate violence or other criminal activity;

• To hold those accountable for violence or other serious criminal activity by providing access to their superannuation;

• To prevent perpetrators from using superannuation to shield assets from victims of crime;

• To protect the interests of dependants of perpetrators.

I have deliberately used the word ‘perpetrator’ because I have recommended a civil burden of proof apply at least in domestic and family violence cases.

Yours faithfully,



Michael O’Connell APM

Commissioner for Victims’ Rights