

Victim Support Service

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

Dear Sir/Madam,

Re: Review of Superannuation and Victims of Crime Compensation

Thank you for the opportunity to provide a submission in response to the Australian Government's proposed changes to the release of superannuation for the purpose of compensating victims of crime.

As the peak body in South Australia for Victims of Crime, we submit our response for your consideration.

We would be delighted to provide further information or clarification if required.

Yours sincerely,



Caroline Holmstrom
Executive Operations Manager

1. Introduction

1.1 Victim Support Service current programs and services provide for victims whether or not there has been a criminal conviction and include domestic violence and persons affected by institutional child sexual abuse. In working closely with Victims of Crime in South Australia for many years, we provide services which recognise the traumatic impacts of crime. These may include physical injury, psychological or emotional harm and pecuniary loss.

1.2 Victims of crime may be required to cover the costs of counselling, psychological or medical care. During this period they may be required to take leave from employment and lose income and other entitlements. In some cases additional costs, such as relocation or improved security measures may be required. In the context of domestic violence, a person leaving an abusive relationship will need access to money to relocate, to cover the costs of accommodation, damaged or forfeited property and loss or change of employment. Where there are dependent children, these costs may extend to enrolment in new schools, and associated expenses. For serious physical and psychological harms, there may be opportunity costs associated with loss of capacity to engage in life in the manner that the person would have, "but for" the injuries sustained.

1.3 Compensation can provide validation to victims of crime, especially where an offender has not received a conviction for the alleged offence. Our experience suggests that some victims of crime prefer compensation from perpetrators where those victims place value on what reparations might be made for the offending.

1.4 An order for compensation may be made by the Court subject to the *Sentencing Act 2017 (SA)* *in personam* against the perpetrator. South Australian legislation provides that a victim shall have access to information about how to apply for compensation or restitution. Where a prosecutor 'is empowered to make an application for restitution or compensation', there is a requirement that the victim be informed and an application made on the victim's behalf if the victim requests.¹ The primary disadvantage of requiring criminal convictions is that often that those assets are likely to have been spent, transferred or hidden. In practice compensation orders made by courts in the context of sentencing offenders are rare. Fines and other penalties are far more common. In addition, the enforcement of compensation orders is also problematic. Many offenders simply do not comply with the compensation order made by the sentencing court.

1.5 A victim of crime in this State may also make a civil claim for compensation or seek financial assistance pursuant to the *Victims of Crime Act 2001 (SA)*. Claims for compensation pursuant to the *Victims of Crime Act 2001 (SA)* require the offending to be proven beyond a reasonable doubt. Private civil actions require the claim to be proven on the balance of probabilities which is a lower standard of proof.

1.5 Currently in South Australia, any money or asset held by a perpetrator in a superannuation fund will not be considered "property of" the offender, and therefore is outside the scope of that which can be taken into account by the Court in awarding compensation where a victim brings a civil action against a perpetrator. With this in mind, perpetrators may move their money or assets into a fund.

1.6 For a victim of a crime to obtain compensation from a perpetrator, they are normally only able to do so if that person is employed or holds assets, and in a position to fulfil an amount awarded against him or her. Frequently perpetrators are able to avoid such obligations by ensuring that no assets are held in their name, any money hidden such that it cannot be accessed by the victim of the crime. A victim of crime may therefore pursue a private civil action and ultimately succeed in obtaining a judgement in their favour only to find the perpetrator has no capacity to satisfy the order against them. Under these circumstances the victim can be left with a significant legal bill for representation without the ability to recover costs from the perpetrator.

¹ Victims of Crime Act 2001 (SA) s 12(2).

1.7 Victim Support Service broadly supports the proposed amendments of the current federal government to explore with the Commonwealth any potential ways to give victims a means of access to the superannuation entitlements of perpetrators.

1.8 These proposed changes have the significant potential to address existing barriers to victims of crime in obtaining compensation from their perpetrators, where that perpetrators assets are held in a superannuation fund. Currently the only way a victim of a crime can obtain compensation from a perpetrator who has a superannuation fund is to wait until the offender is eligible to access the fund. Even then this does not guarantee success.

1.9 Victim Support Service notes that due to the timeframe for responses that a broader analysis of the impact of the proposed amendments would assist with identifying any unintended outcomes affecting women and children, both as victims of crime and as interested parties where they may have a shared interest in the superannuation of the perpetrator.

1.10 We believe that the proposed changes will provide for victims of crime to have fair access to compensation from perpetrators where it will be available from either their assets, or income, and will include that person's superannuation.

2. Responses to the Draft Proposals

Victim Support Service has considered the two draft proposals in the Consultation Paper that are proposed by the Australian Government, to provide victims of crime with access to a perpetrator's superannuation in certain circumstances.

As we understand it, these are:

2.1 The introduction of a claw-back mechanism for "out of character" superannuation contributions made by perpetrators to shield their assets from use in compensating victims of crime; and

2.2 Permitting victims of serious, violent crimes to be able to access a perpetrator's superannuation as compensation, where other assets have been exhausted, subject to appropriate limits and thresholds.

To this effect, Victim Support Service offers the following responses.

2.1 Preventing the Use of Superannuation Contributions to shield assets from Victims of Crime

2.1.1 Limits and Thresholds

2.1.1.1 Victim Support Service recognises that the principle of preservation is of paramount importance with regard to any question of access to superannuation and that when making an exception for access for compensation orders then it will be important to recognise that any change that risks public confidence in superannuation may have far reaching effects.

2.1.1.2 However we contend that it will be appropriate for a victim of crime to access a perpetrator's superannuation where they have made "out of character" contributions. Where there are exceptional contributions or a holding above an amount prescribed in legislation as proposed, that it shall be appropriate in those circumstances to permit release of superannuation for victims of crime.

2.1.1.3 Given that this first proposal is only to apply to "out of character contributions" where a matter does not involve serious violence, Victim Support Service supports the view that the amount of contribution that may be released not be capped.

2.1.1.4 However, we note that it may be appropriate to access the remaining superannuation balance, as proposed at 2.2, where there is serious violence which results in a harm to the victim that requires appropriate compensation.

2.1.2 Visibility of Assets

2.1.2.1 Victim Support Service supports the proposal that disclosure of a perpetrator's superannuation contributions to the victim should originate from a criminal or civil court proceeding, "in order to balance efficacy of proceedings with appropriate oversight and privacy implications."

2.1.2.2 We see no issue arising from the proposal that this be done in conjunction with the Australian Taxation Office.

2.1.2.3 We appreciate the need for the trustee not to be required to comply with this process if the perpetrator member "is subject to any 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."

2.1.3 Determining whether contributions are "out of character"

2.1.3.1 Victim Support Service believes that all voluntary contributions within a certain period should be deemed to be out of character. That period could encompass either a longer or shorter period, dependent on the nature of the offending and when the perpetrator became aware of any investigation into that offending.

2.1.3.2 An appropriate time frame for assessment could be determined by the Court based upon the nature of the offending. Particularly where the offences are against children, it may be that the offences are historical and the offender may have had a significant period of time to contemplate ways in which to avoid compensating any victim of that offending.

2.1.3.3 As such, Victim Support considers that any and all "out of character" contributions made in anticipation of an eventual compensation order should be within the scope of an order that could be made by a Court.

2.1.3.4 Victim Support Service would caution however that any “out of character” contributions by a perpetrator that were vested in interest benefits for dependents may displace an accusation of intent to defeat the interests of the victim of crime. As such this would need to be clearly articulated in any law reform that was contemplated that “out of character” contributions shall be scrutinised for intention to defeat such an interest, and where such an intention could be established, those contributions will be void.²

2.1.3.5 We note that section 128B & 128C of the Bankruptcy Act 1966 provide for Superannuation contributions made to defeat creditors where the contributor is a person who later becomes a bankrupt or where the contributor is a third party. Under s 588FE(5) of the *Corporations Act 2001* (Cth), any transfer for that purpose would also be voidable. Similarly any transfer of property to defeat creditors, pursuant to s 86 of the *Law of Property Act 1936* (SA) will be void. These types of provisions might be considered for other legislative instruments to provide for Victims of Crime at both the Federal and State level.

2.1.4 Process for Recovering Money

Victim Support Service would recommend that both a lump sum payment and ongoing payment from an income stream be available to meet the needs of the victim.

We support the contention that any “out of character” or “voluntary” contributions to the perpetrator’s account by any person, or any contributions ‘gifted’ by the perpetrator to another person’s account be capable of being captured.

2.1.5 Taxation Rates applied to Compensation

Victim Support Service supports the view that where the Court determines “out of character” transactions, and they are void transactions, there should be no tax implications for the perpetrator.

Any compensation released should be tax-free for the victim of crime.

² As with the *Bankruptcy Act 1966* (Cth) amended by the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007* (Cth)

2.2 Allowing uncompensated or partially compensated victims of crime broader access to the perpetrator's superannuation balance

It is noted that the requirement proposed here requires:

- 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.

2.2.1 Burden of proof

2.2.1.1 Victim Support Service does not support the proposal that access to the balance of the perpetrator's superannuation should be limited to cases where a criminal conviction has been determined, but we would in principle support a finding by the State that the offence occurred "beyond reasonable doubt". We would highlight that there may be disadvantage where compensation is tied to a criminal conviction and that conviction is overturned on appeal, or the defendant dies while an appeal is pending.

2.2.1.3 We welcome this opportunity to raise the difficulties frequently encountered in gaining a conviction, especially where there is an offence against a vulnerable person who may have a disability, or against a child.

2.2.1.4 There are often failures to establish a conviction in rape and child sexual assault cases, so it concerns us that a failure to convict may result in a lack of access to compensation which may be available to others.

2.2.1.5 An example would be where a victim of child sexual abuse seeks to obtain compensation as an adult. Criminal jurisdiction may provide compensation for victims who were abused as children where the perpetrator is convicted or enters a guilty plea. However compensation may not be available in the civil jurisdiction which has a three year statutory limitation.³ While there may be an extension of time on the limitation date granted by the Court there is currently limited precedent.

As a criminal offence, that conduct will also fall within the jurisdiction of the *Victims of Crime Act 2001 (SA)*. Where the perpetrator is acquitted, or the State finds there is insufficient evidence to prosecute the offence, a claim for victims of crime compensation will only be available where the State accepts that the offending occurred "beyond reasonable doubt." In some cases a claim for compensation may be pursued in the absence of a conviction as an *ex gratia* application made to the Attorney General pursuant to the provisions of the *Victims of Crime Act 2001 (SA)*. This type of application is relatively rare leaving many victims without recourse where the offending has not been proved beyond a reasonable doubt.

2.2.1.6 We believe that victims of domestic and family violence and abuse will also be negatively impacted by a requirement of a conviction. It is well understood that in this context evidence of the conduct may be difficult to establish and may not be sufficient to achieve a conviction. In many cases where offending is established it only represents the 'tip of a very large iceberg' with multiple incidents of domestic violence remaining unproven. In these circumstances the victim's rights are generally limited to the physical and psychological impact arising from the offending which has been proven.

2.2.1.7 Where a perpetrator is sheltering assets through their superannuation, this may also be captured under the *Criminal Assets Confiscation Act 2005 (SA)*. While we recognise that the Victims of Crime legislation in South Australia requires this criminal standard of proof is met, other legislative

³ We note that the South Australian Government's response to the Royal Commission into Institutional Child Sexual Abuse Recommendations that will amend the statutory limitation in due course.

instruments, such as this enactment, do not require this standard. We believe that it may be appropriate to consider the civil standard, pursuant to that legislation.

2.2.1.8 Given these considerations, where a serious crime involving violence results in a harm, we contend that the State should be able to pay compensation, and recover from the perpetrator's superannuation. Similarly we believe that where a successful civil action is brought in relation to a serious crime involving violence, access to superannuation should be able to be released early for compensation. This would provide in some measure for the trauma and real cost that affects victims of crime. Every opportunity to enforce a debt to a victim of a serious violent crime should be pursued.

2.2.2 What crimes should be covered?

2.2.2.1 Victim Support Service has no objection per se to the draft proposal 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. However we believe that this requires clarification.

2.2.2.2 We understand that various state and territory victims of crime compensation schemes generally apply to acts involving violence.

2.2.2.3 For example, under the NSW *Victims' Rights and Support Act 2013* (NSW), a victim of an act of violence occurring in NSW is entitled to make an application for financial assistance or a recognition payment through the Victims Support Scheme. This scheme includes cases involving sexual assault and domestic violence.

2.2.2.4 However Victim Support Service remains of the view that the requirement of obtaining a conviction is too onerous and should be considered in light of the comments at 2.2.1. An option might be to refer to "indictable" offences rather than requiring a conviction. That way a person who was harmed in the course of an indictable offence might still have access to compensation irrespective of whether a conviction was made.

2.2.2.4 Victims Support Service would also suggest that the proposed amendments provide for retrospective effect. A perpetrator of serious violence should not be able to avoid liability for compensating a victim where that person also holds significant superannuation assets.

2.2.3 What victims should be eligible?

2.2.3.1 Victim Support Service does not support the draft proposal that access to a perpetrator's superannuation should only be made available to primary victims.

2.2.3.2 Victim Support Service contends that where the primary victim dies as a result of the act of violence, a related victim (broadly defined as a person who, at the time the primary victim dies, is a close family member or a financial dependent) should be able to access funds held in the perpetrator's superannuation account.

2.2.3.3 Where the primary victim pre-deceases settlement of a claim for compensation we believe that the compensation should also be available to those close family members or financial dependents. This should be irrespective of whether or not the death is as a result of the violence, as serious crimes are likely to result in trauma which may indirectly contribute to the death of a victim.

2.2.3.4 In addition, secondary victims should also have access superannuation funds where the primary victim was under the age of 18 years when the offending occurred. For example the parents

of sexual abuse victims who have suffered psychological and financial impact arising from the offending should have an entitlement to access superannuation monies.

2.2.4 Types of unpaid compensation orders covered

2.2.4.1 In South Australia, as in other states, there are two ways in which victims of crime can seek a compensation order. At the end of the criminal trial a victim of crime may seek a Restitution or Compensation Order under the *Sentencing Act 2017 (SA)*. Alternatively, they can make a civil claim for compensation through the civil jurisdiction of South Australian courts.

2.2.4.2 Victim Support Service endorses the proposal that both types of orders would be covered, bearing in mind the statute of limitations considerations.

2.2.4.3 As such it is our view that both types of orders should be covered where they are unpaid.

2.2.5 How to ensure that superannuation is the last resort

2.2.5.1 Victim Support Service agrees that superannuation should be available only as a last resort and that superannuation should only be accessed where a compensation order remains unpaid after other assets have been exhausted, to ensure that claiming these funds will not create such significant financial insecurity that the State assumes responsibility for the perpetrator at a later stage.

2.2.6 Balancing the Rights of the Victim with the rights of the Perpetrator's Dependents

2.2.6.1 Section 120 of the *Sentencing Act 2017 (SA)* requires that any pecuniary sum should not unduly prejudice the welfare of dependents of the perpetrator. This is appropriate and any process for access to superannuation should be made with this in mind.

2.2.6.2 We note that superannuation will generally be released to a perpetrator at an age when the needs of dependent children will not be relevant, although there will be exceptions, and this should be considered on a case by case basis. Where there are no dependents, the perpetrator's entire superannuation balance should be available to victims. Any assessment of the amount should contemplate the needs of the perpetrator, and balances those with the needs of the victim.

2.2.6.3 We support the proposal that any recovery from a perpetrator's superannuation by a victim of crime should be from the perpetrator's share only.

2.2.6.4 We recommend that where co-existing claims exist, family law matters should be resolved first to ensure that any claims from the victim affect the perpetrator only and not their partner or spouse. There may need to be exceptions where family law matters are drawn out for extended periods of time.

2.2.6.5 The Courts should also have regard to whether there is any intentional division of assets for the purpose of undermining the claim of any victim of crime. The Family Court is capable, as it does in bankruptcy proceedings, of dealing with any unusual transactions which are identified as intended to defeat the claim of a victim of crime.

2.2.6.6 As such, we support the second option, which provides that there be “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”.

2.2.6.7 The balancing of the rights of the victim with the rights of dependents becomes increasingly complex where the victim may also be a financial dependent or has been in a domestic relationship with the perpetrator.

2.2.6.8 In those cases *prima facie* it would seem to be most appropriate for the a family law property (including superannuation) settlement order proceedings to be completed prior or in lieu of a victim of crime compensation order being enforced via superannuation.

2.2.6.9 Although it is acknowledged that the purpose of the *Family Law Act 1975* (Cth) is not to compensate one party for the conduct of the other, domestic and family violence and abuse is well understood to have long term impacts on victims, which result from both physical and psychological trauma.

2.2.6.10 While it may be argued that family violence is best left to Criminal and Civil Courts with principles of redress for harms, in reality few such claims are made due to emotional factors, litigation fatigue following Family Court hearings, cost and difficulties which arise from statute of limitation considerations. Empirical data collected since the 1990s shows that parties who experience serious violence often receive substantially less in property settlement, due to factors such as control and coercion which compromise a victim in property negotiations.

2.2.6.11 Given that such trauma may impact in the capacity of a victim to contribute to the relationship and on the future needs of that person as assessed in ss79(4) and 75(2) of the *Family Law Act 1975* (Cth), we contend that there is scope within the existing legislation to provide for harms arising from such conduct. Furthermore, since the decision of the High Court in 2012 in the matter of *Stanford & Stanford* which elevated the status of s79(2), further developed in *Bevan & Bevan* in 2013, the overarching objective of the broad judicial discretion shall be that,

“[t]he court shall not make an order under this section unless it is satisfied that, in all circumstances, it is just and equitable to make the order”.

2.2.6.12 To date, the area of law regarding property distribution where a party is able to show harms resulting from domestic and family violence and abuse remains unsettled, even where it has resulted in serious physical or psychological injury or death. As such, it may be appropriate that further reform to the *Family Law Act 1975* (Cth) is contemplated to address harms to the victim, in much the same way as civil law provides for tortious wrongs resulting in harm.

2.2.6.13 Where a family law property settlement occurs after a victim has been compensated for harm resulting from domestic and family violence and abuse, there is a risk that 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. This too should require that any compensation order against a perpetrator be excluded from property settlement considerations.

2.2.6.14 We would also take this opportunity to comment on the recent proposal to permit early release to victims of family and domestic violence and abuse up to ten thousand dollars (\$10,000) from their superannuation. We consider that a transfer of funds from the perpetrator's superannuation fund to that of the victim should be considered. We note that *Victims of Crime Act*

2009 (SA) permits the State to recover financial assistance for an act of violence from a person who is convicted of a relevant offence for the act.

2.2.7 Application of the draft proposal to pre-existing convictions and unpaid compensation orders

2.2.7.1 Victim Support Service agrees that “it seems reasonable to allow existing unpaid judgement debts arising from criminal compensation orders to be available for broader compensation through superannuation.” As stated at 2.2.4, a perpetrator of serious violence should not be able to avoid liability for compensating a victim where that person also holds significant superannuation assets.

2.2.7.2 We agree that access to superannuation should be available for historical offences and existing eligible unpaid compensation orders.

2.2.7.3 We also note that a recent NSW case highlights that some victims may have denied compensation by perpetrators deliberately “hiding” money and assets, using superannuation. Such conduct is outside the purpose of the superannuation and gives it a similar effect as offshore accounts and trusts for such purposes. We believe that various instruments, including taxation and superannuation legislation should explicitly make reference to “out of character” contributions made with such an intention as expressly available to victims of crime, where such an intention can be proved. At the very least, a contribution to superannuation with the intent to defeat a claim by a victim of crime should be void.

2.2.8 Recovery of costs by state and territory compensation schemes

2.2.8.1 Victim Support Service notes that under current South Australian legislation, the State the Victims of Crime Scheme is able to recover payments made to a victim to create accountability for perpetrators and could potentially provide for recovery from perpetrator superannuation funds.

2.2.8.2 We understand that this would broaden the scope of what is proposed here.

2.2.8.3 However, we would encourage further consideration of how the schemes might interact. We note that the Victims of Crime Act in each jurisdiction could be utilised by the State to assist victims to pursue any form of compensation that is the subject of their claim on the victim’s behalf from a perpetrator’s superannuation. Where a State did act on behalf of a victim, any costs or expenses could be paid back into that jurisdiction’s fund and then the victim of crime compensated with the balance.

2.2.9 Tax rate applied to compensation

We support the taxations proposal, which appear to give full effect to the intention of these proposed amendments.

3. Concluding comments

Victim Support Service endorses both proposals and commends the Federal Government for taking this initiative to ensure that where a Victim of Crime seeks compensation as part of the restorative process, that the perpetrator may not use their superannuation fund to prevent rightful access to money and assets that would otherwise be available for distribution.

We do note that our preference would be for further consideration of the merits of State schemes being better utilised to support victims of crime, and that it would be worthwhile engaging further on this issue with each scheme to discuss how this might operate in a separate consultation.