

SUBMISSION

Submission to Treasury —
*Access to offenders’
superannuation for
victims and survivors of
child sexual abuse*

16 February 2023

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The Treasury
Director
Tax and Compliance Unit
Retirement, Advice and Investment Division
Langton Cres
Parkes ACT 2600

Via email: superannuation@treasury.gov.au

16 February 2023

Dear Sir/Madam

Access to offenders' superannuation for victims and survivors of child sexual abuse

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Treasury's consultation on the Discussion Paper *Access to offenders' superannuation for victims and survivors of child sexual abuse* (Discussion Paper).

About ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.3 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

General comments in relation to the proposals

Member organisations have advised that they support the proposal to allow victims and survivors of child sexual abuse access to offender's superannuation to satisfy unpaid compensation orders, as they consider that they achieve the right balance between competing public policy interests. We recognise this is a relatively narrow condition of release and potentially could be expanded to other similar circumstances in the future.

Specific comments

1. Scope of eligible child sexual abuse offences

Member organisations are supportive of the proposed scope of eligible child sexual abuse offences.

2. 'Additional contributions'

2.1 Scope

The Discussion Paper asks the question as to whether in-scope superannuation account holders should be limited to include only the offender / spouse or broadened to include other entities related to the offender such as children and parents in addition to spouses.

We recommend that the scope of additional contributions should not be limited to those made to the account of the offender or their spouse.

It would be possible for an offender to fund a contribution to the superannuation account of a third person, such as a family member or friend, with an understanding that when that person becomes eligible for a benefit they will remit a portion of their superannuation benefit to the offender.

Given this, we recommend that any contributions financed by the offender, or their spouse, directly or indirectly, should be considered, irrespective of the superannuation account into which they are made. While there may be practical difficulties in establishing that the offender or their spouse has funded such contributions, should there be evidence of this before the Court these contributions should not be excluded by virtue of the operation of law but instead should be able to be taken into account by the Court. Consideration could be given as to whether other anti-avoidance measures may be appropriate.

Recommendation 1

Definition of 'Additional contributions'

Any contributions financed by the offender, or their spouse, directly or indirectly, should be considered, irrespective of the superannuation account into which they are made.

2.2 Definition

Member organisations have suggested that clarity will be required as to which contributions made to a superannuation fund, other than Superannuation Guarantee (SG) contributions, will be considered to be 'additional contributions' for the purposes of this proposed scheme.

Other than 'personal'/non concessional contributions there are a number of different types of non-SG contributions, such as

- personal contributions for which a tax deduction has been claimed (rendering them concessional)
- contributions made under a 'salary sacrifice' arrangement
- employer voluntary contributions (in excess of the amount necessary to meet SG obligations)
- downsizer contributions
- spouse contributions
- contributions made on behalf of a child
- other third-party contributions.

In particular, member organisations have identified a potential complexity with respect to employer voluntary contributions reported to the ATO.

While these amounts may represent actual voluntary contributions made by an employer at the request of an employee/member, on occasions these amounts may also cover employer-paid insurance premium contributions, where there is an agreement for the employer to fund some or all of the insurance premiums paid from their members' accounts. There may be some challenges in the ATO being able to make the distinction between these different types of contributions, and may be an example of where, if raised by the offender, the ATO may need to liaise with the fund for further information.

It is not clear from the proposal paper whether ‘additional contributions’ is intended to be limited to personal contributions or would also include employer contributions made over and above SG obligations including salary sacrifice contributions.

2.3 Deeming Period

Member organisations have indicated that it should be a 12 month look back as an absolute minimum, but ideally should be a longer period.

An offender may well be aware of the possibility that the victim survivor may report the crime, and they may be charged with an offence, significantly earlier than six months prior to charges being laid. With child sexual abuse in particular it can be some time, even years, before the crime is reported, and it can then take a considerable period of time to investigate and lay charges.

In addition, we would support the courts being given a discretion to deem ‘additional contributions’ over a period longer than the statutory ‘deeming period’ prior to an offender being charged, including in circumstances where there has been a delay in reporting the crime and/or a lengthy investigation prior to charges being laid.

2.4 Determining amount to be released

As APRA-regulated funds are required to report to the ATO details with respect to contributions within five days of receipt, the ATO generally should hold sufficient information to determine any ‘additional contributions’ that may be eligible for release. The ATO’s ability to determine the amount of additional contributions may be affected by whether the contributions have been recorded, and reported, as a spouse or third party contribution.

With respect to Self-Managed Super Funds (SMSFs) there will be a lag in reporting. Given that, with an SMSF, generally the offender and /or their spouse will be one of the trustees, and so there may be a challenge in obtaining information from the trustee.

Consideration could be given to augmenting the amount of ‘additional contributions’ with an amount of ‘notional earnings’, potentially determined by reference to a statutory formula.

3. Defined Benefit Schemes

In the event that an offender makes one or more ‘additional’ contribution to a defined benefit scheme, we support the victim or survivor being able to access those funds.

4. Bankruptcy and checking the National Personal Insolvency Index

Under proposal one it is suggested that, if a fund receives a release authority from the ATO, the fund would be required to check the National Personal Insolvency Index (NPII) to determine whether the member is bankrupt or has had bankruptcy proceedings commenced against them. If so, the fund would be prohibited from complying with a release order made by a court until the offender’s parallel bankruptcy is finalised.

Member organisations have queried how this would work and have suggested that the ATO may be better equipped to do this, as opposed to imposing this obligation upon the super fund. It may be more appropriate and efficient for the ATO, via the mechanism of intra-agency sharing of information, to perform the NPII check before the ATO contacts a super fund for further information and/or provides the fund with a Release Authority.

5. Tax treatment of released superannuation

Member organisations are supportive of the stated intention to make super compensation benefits tax-free on release.

Not only is this considered to be appropriate from a policy perspective but it is consistent with the tax treatment of other types of ATO Release Authority benefits, where released amounts are treated as Non Assessable Non Exempt income.

Member organisations have identified that the law may need to be amended to clarify whether the proportioning rule is required to be applied to amounts released. The proportioning rule does not apply to other types of Release Authorities and a consistent approach would assist in minimising the implementation cost for funds.

6. Amount should be payable from a pension account

Member organisations have recommended that, to maintain equity in the scheme and mitigate the risk of avoidance, an amount should be payable from a pension account.

Recommendation 2

Pension accounts

Member organisations have recommended that an amount should be payable from a pension account.

7. Conviction overturned

Consideration may need to be given to the circumstance where a conviction subsequently is overturned on appeal, generally only in circumstances where new evidence has been found.

Presumably in this rare circumstance the amounts released would be treated as a final benefit payment and would not be expected to be 'clawed back' and returned to the member's superannuation fund.

8. Administrative / operational considerations

8.1 Overall Administration

Member organisations have recommended that the existing Release Authority process with the ATO should be utilised, with the ATO acting as an intermediary between the Court / third parties involved in the claim and superannuation funds.

As the ATO would hold the data:

- with respect to contributions reported by all superannuation funds
- pertaining to the offender

it would be a less complex and lower risk for the ATO to provide information with respect to contributions to the Court / third parties in response to an information request.

Should there be a request for additional information by the Court / third party the ATO could act as the intermediary and communicate with the superannuation fund.

Given the complexity of some definitions of contributions, the ATO may need to request additional information from superannuation funds on contributions received made or other matters pertaining to the member and their account, such as rollovers (e.g. if an offender were to perform multiple rollovers to attempt to 'cloud' the details of contributions) or where there has been contribution-splitting.

Recommendation 3

Scheme should utilise existing Release Authority processes

The existing Release Authority process with the ATO should be utilised, with the ATO acting as an intermediary between the Court / third parties involved in the claim and superannuation funds.

8.2 Early Release Mechanism – Court ordered and ATO facilitated

Member organisations have made the following observations and suggestions with respect to the operationalisation / administration of the proposed measure.

8.2.1 Release Authorities should be paper-based

Member organisations have recommended that, give the anticipated volumes, the design of the scheme should utilise the existing paper-based Release Authority process used for some forms and not be incorporated into SuperStream, in the short term at least.

To incorporate this new Release Authority into SuperStream from the outset would necessitate another version of the rollovers functionality and would prove to be extremely costly for the industry to build - disproportionate to the relatively small number of releases that are expected. Over the longer term, consideration could be given to incorporating release authorities into SuperStream at such time as the SuperStream functionality is updated again.

Recommendation 4

Existing paper-based Release Authority process should be used

The design of the scheme should utilise the existing paper-based Release Authority process.

8.2.2 Payment to victim survivor should be made by the ATO

Member organisations have recommended that amounts released by superannuation funds under the Release Authority should be paid to the ATO, for the ATO to make the payment to the victim survivor, as opposed to the superannuation fund making the payment directly.

Superannuation fund only holds the personal details of the member, not of the victim survivor.

To protect the privacy of the victim survivor, especially significant given the sensitive nature of the claim, and to reduce data security risks, the scheme should look to limit the amount of data that would need to be shared with superannuation funds. Instead, it would be more appropriate, and efficient, if the ATO were to make the payment to the victim.

This is similar to the Release Authority process that is employed for amounts released under the First Home Super Saver Scheme.

This would also serve to ensure that where a superannuation fund is unable to release the full amount requested in the Release Authority (e.g. where the amount requested is more than the account balance) the ATO can issue a Release Authority to another superannuation fund as appropriate.

Recommendation 5

Amounts should be paid to the ATO, for the ATO to make the payment to the victim survivor

Amounts released by superannuation funds under the Release Authority should be paid to the ATO, for the ATO to make the payment to the victim survivor.

8.2.3 There should be no need for fund validation

Member organisations have recommended that, when a fund receives a Release Authority, it should not be expected to validate the value to be released against the fund's received 'Additional Contributions' but instead will action as they do with current ATO Release Authorities – either by releasing the funds to the ATO or reporting why they were unable to action the authority. In particular, a member may rollover between funds, so the final fund may not have a record of all contributions made.

As a result of superannuation fund reporting to the ATO, it both holds data with respect to the contributions made to all of a member's accounts and is able to identify where a benefit has been rolled over to another fund. Given this, rather than restricting the Release Authority to be actioned by the fund to which the additional contributions have been made, the Release Authority could be actioned by any active fund held by the individual.

Again, this process is similar to the Release Authority process for the First Home Super Savers Scheme. Allowing a Release Authority to be paid from any account of the member assists in mitigating the risk of the offender attempting to evade payment.

Should you have any queries with respect to our submission, please contact me on 0431 490 240 or fgalbraith@superannuation.asn.au.

Yours sincerely

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