

File: 2018/18

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

via email: [superannuation@treasury.gov.au](mailto:superannuation@treasury.gov.au)

18 June 2018

Dear Sir \ Madam,

**Review of superannuation and victims of crime compensation  
Further consultation and draft proposals**

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission in response to the consultation on the *Review of superannuation and victims of crime compensation* (Draft Proposals).

ASFA is a non-profit, non-political 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 \$2.6 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 over 90 per cent of the 14.8 million Australians with superannuation.

**A. General comments**

Where a victim of crime has an unpaid compensation order ASFA supports that the perpetrator's superannuation should be made available to meet that order, subject to certain observations made below.

**B. Observations about the Draft Proposals**

We make the following general observations about the Draft Proposals.

**1. First draft proposal – preventing 'out of character' contributions being used to shield assets**

This aims to prevent criminals from using superannuation to shield assets from victims of crime. It would allow victims of crime to claw back 'out of character' contributions. This would be achieved by amending the current early release provisions to require trustees to pay amounts into court in response to a claw-back order.

### *Issue 2: Visibility of assets*

We agree with the proposal 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. We support this being done in conjunction with the ATO, who would build a new, secure, electronic system to give courts visibility of superannuation information held by it. This system should be developed in consultation with the superannuation industry, the courts and other stakeholders.

### *Issue 3: Determining whether contributions are 'out of character'*

- *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.

With respect to option one – while this would be appropriate to be performed by a court, exercising judicial discretion and judgment in all of the evidence and circumstances before it, there would be significant legal and practical issues if a superannuation trustee were to attempt this.

Not only would this conflict with the trustee's duty to act in the best interest of their member's, from a practical perspective the trustee only has visibility over contributions made to their fund, not to other superannuation funds. In circumstances where a successor fund transfer has taken place, the 'successor' trustee is unlikely have records with respect to the contributions made each year to the previous fund. Further, the trustee does not have access to any of the member's other financial information, and so it will be difficult to ascertain whether there is any pattern to the contributions that may, for example, correlate with income.

With respect to option two – while deeming all voluntary superannuation contributions within a certain time period as a proxy for out of character contributions would be administratively simpler, this may not be equitable in circumstances where the perpetrator had an established pattern of making voluntary contributions before the relevant period when the crime occurred. In such circumstances it would be difficult to argue, as a matter of principle, that the contributions were made for the purpose of shielding assets or defeating the compensation of crime order. There is an argument that, if a person has a pre-existing pattern of contributing to superannuation it would be rational for them to continue making such contributions, notwithstanding they may be the subject of a criminal investigation or proceeding. As acknowledged in the Draft Proposals paper, this is especially the case with self-employed persons who do not receive superannuation guarantee contributions.

If deeming all voluntary superannuation contributions within a certain time period as a proxy for out of character contributions were to be introduced care would need to be taken as to how 'voluntary contributions' were defined for this purpose.

With respect to the appropriate timeframe for this assessment – consideration could be given to dating the time-frame from the commission of the crime, as opposed to when the perpetrator was charged.

*Issue 4: Process for recovering money*

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.

ASFA does not have a strong view as to which mechanism is preferable, especially as the second mechanism is yet to be designed. We support the proposal that the requirement for the trustee to release the relevant funds should only be in response to the receipt of either an order from a court (first mechanism) or something akin to a release authority from the ATO (second mechanism). If the anticipated volumes were to be significant it may be easier for funds to comply with a ‘special purpose’ release authority from the ATO through SuperStream, whereas if there were expected to be relatively low it may be preferable for fund to respond to an order from a court.

**2. Second draft proposal – entire superannuation balance**

This draft proposal would allow victims of serious crimes with unpaid compensation orders to access a perpetrator’s entire superannuation balance where other assets have been exhausted. This draft proposal is based on the principle that the interests of uncompensated or partially compensated victims of crime should be prioritised over the retirement income needs of the perpetrator. This draft proposal also includes safeguards to protect the interests of dependants of a perpetrator.

ASFA support this proposal, subject to the following observations:

*Issue 1: Burden of proof*

We agree that a criminal conviction should be required.

*Issue 2: What crimes should be covered?*

We agree that a serious criminal offence should be defined as one involving violence against an individual, with a maximum custodial sentence above 10 years.

*Issue 3: What victims should be eligible?*

We agree that only victims themselves (i.e. primary victims) should be able to make such a claim.

In the event where the primary victim dies as a result of the act of violence, there is an argument that only a financial dependant should be able to access funds held in the perpetrator’s superannuation account.

*Issue 4: Types of unpaid compensation orders covered*

To accommodate differences in state and territory legal systems, we agree that both types of Victorian orders would be covered, as those made through the civil jurisdiction of Victoria’s courts are an alternative to those made under the *Sentencing Act (1991) (Victoria)*.

*Issue 5: How to ensure that access to superannuation is a last resort*

The proposal is that 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).

ASFA has some concerns with this proposal. In line with the first proposal, we strongly submit that the trustee should only be required to release relevant funds as a result of receiving an order from a court or something akin to a release authority from the ATO. Accordingly, it is the making of the court order or the issuing of the release authority that should be subject to certification from a state sheriff’s office or similar that other assets of the perpetrator have been exhausted, or that the compensation order remains unpaid after 12 months.

*Issue 6: Balancing the rights of the victim with the rights of the perpetrator’s dependants*

We support the primacy of the family law process over access by victims of crime.

*Issue 7: Application of the draft proposal to pre-existing convictions and unpaid compensation orders*

We agree with allowing existing eligible unpaid judgement debts arising from criminal compensation orders to be available for broader compensation through superannuation.

*Issue 8: Recovery of costs by state and territory compensation schemes*

In our view state and territory compensation schemes should not be able to recover the costs of their payments from the perpetrator’s superannuation balance.

*Issue 9: Tax rate applied to compensation*

We agree that no tax should be applied.

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Should you have any queries or wish to discuss any aspect, please do not hesitate to contact me on (03) 9225 – 4021 or via fgalbraith@superannuation.asn.au.

Yours sincerely

Fiona Galbraith  
Director, Policy