



Law Council
OF AUSTRALIA

Legal Practice Section

15 June 2018

Manager, Early Release of Superannuation
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: superannuation@treasury.gov.au

Dear Sir/Madam

REVIEW OF SUPERANNUATION & VICTIMS OF CRIME COMPENSATION

1. This submission has been prepared by the Law Council of Australia's Superannuation Committee (**the Committee**),¹ which is a committee of the Legal Practice Section of the Law Council of Australia.
2. The Committee is grateful for the opportunity to provide comments to the Treasury regarding the Review of Superannuation & Victims of Crime Compensation Consultation Paper (**the Consultation Paper**).

Background

3. The Committee notes the policy intent behind the proposed new measures to extend access to the superannuation of perpetrators of serious crime for victims to recover unpaid crime compensation orders.
4. In particular, comment has been sought on two draft proposals for such access to 'inform the development of legislation on this issue'.
5. The comments are directed to the specific issues raised for consultation and are as follows.

Proposal 1: Preventing use of Superannuation contributions to shield assets from victims of crime

6. The Committee notes that, as indicated in the paper, the new measures are directed at introducing a 'claw-back' facility, akin to that applying for recovery by a Trustee in Bankruptcy of 'out of character' contributions to superannuation made by a Bankrupt for the purpose of avoiding creditors.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

7. It is noted that this measure is only to apply to identified 'out of character' contributions intended (or purported to intend) to shield a perpetrator's assets from their victims' recovery of Court compensation orders made in respect of indictable offences.
8. From a legislative perspective, the proposed facility should, in the Committee's view, reflect the following principles:
 - certainty of application by a third-party trustee, without requiring exercise of any subjective consideration;
 - ease of administration for superannuation fund trustees and their fund administrators working within existing or similar administrative mechanism as currently exist for Bankruptcy or Family Law splitting provisions;
 - express modification of the superannuation legislative provisions (*Superannuation Industry (Supervision) Act 1993* and Regulations) that would otherwise conflict or constrain or prohibit the Trustee from the actions contemplated; and
 - remittance of contributions to a Court or designated collection authority to then attend to the application of the monies for the authorised payment purposes and Orders.

Issue 1: Limits and thresholds

9. No cap on the amount that may be subject to 'claw-back' is proposed. This is a policy issue on which the Committee does not comment.
10. From an administrative convenience perspective, the Committee suggests:
 - consideration be given to a minimum threshold amount which could be subject to recovery under this facility; and
 - express authority for a trustee to deduct reasonable administrative costs from the perpetrator's account in connection with compliance with such orders.

Issue 2: Visibility of assets

11. In order for the new measures to be invoked, there needs to be a mechanism for the statutory authority administering the implementation of the Compensation Orders to gather information, including information about contributions to superannuation by or to the benefit of a perpetrator which may potentially be subject to recovery under the claw-back provisions.
12. The Committee notes that one proposal is to extend authority for the Australian Taxation Office (**ATO**) to provide that information from its records.
13. A supplementary measure may be for the statutory administering authority to be permitted to issue a 'Request for Information' to trustees of superannuation funds identified to hold a perpetrator's superannuation for details on contributions received over a past specified number of months. This measure could follow a similar statutory framework to that pertaining to Family Law Requests for Information.
14. The Committee also notes that it is suggested that a superannuation fund trustee may not be required to comply with the new measure where a relevant bankruptcy claw-

back proceeding, Family Law proceeding or crime forfeiture orders are underway. The Committee queries the purpose of excluding Family Law proceedings in this case, given that these proceedings may otherwise be engineered to delay or frustrate application and recovery of contributions in the intended circumstances.

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

15. Two options are suggested. The Committee suggests, applying the principles referred to above, that a reasonable proxy for 'out of character' (or perhaps better described as non-mandated/Superannuation Guarantee) contributions be all voluntary contributions made by or on behalf of a member – any employer contributions (for sake of administrative simplicity) ought to be excluded, other than where they may be identifiable as 'salary sacrifice' rather than Superannuation Guarantee contributions.

Issue 4: Process for recovering money

16. The Committee agrees that either of the measures proposed would be workable, with the preference, perhaps, to utilise the ATO's extended facility to notify required release of benefits and to pay the proceeds involved to the nominated distribution authority.

Issue 5: Taxation

17. This is a policy matter on which the Committee does not comment.

Proposal 2: Allowing uncompensated or partially compensated victims of crime broader access to the perpetrator's Superannuation balance

18. The Committee notes that the policy proposed here met with a strong divergence of views both for and against in the initial consultation process.
19. The current consultation is restricted to the possible mechanisms for implementing the proposal should it proceed.
20. Most of the issues raised for comment in this round of consultation are outside the expertise of the Committee – rather they give rise to considerations of criminal law, practice and procedure.
21. The only issue for which the Committee provide comment is on *Issue 6 – Balancing the rights of the victim with the rights of the perpetrator's dependants*.
22. This issue gives rise to considerations of interaction of the new proposal with Family Law and the current Family Law superannuation splitting regime. A concern is providing primacy/priority of Family Law proceedings over any proceedings under the new proposal, in that such proceedings may be engineered/contrived to frustrate or delay access to a perpetrator's superannuation benefits (as a matter of 'last resort' to meet serious crime victim compensation orders) that may otherwise occur.
23. Given that Family Law superannuation splits, more often than not, are made through consent orders or private agreement between the spousal parties, there would be scope for these measures to be framed to place the perpetrator's superannuation assets beyond the reach of the victim, contrary to the intended policy.

24. In that context, it may be more appropriate that the reverse position apply – any Family Law split proceedings are suspended/in abeyance pending resolution of any crime compensation recovery orders against the perpetrator’s account. If that approach were to be followed, Option 1² may be preferable to apply as providing a reasonably clear and fair balance between legitimate expectation of a perpetrator’s dependants and that of the victim of the perpetrator’s serious crime.

Contacts

25. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

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Yours sincerely



Jonathan Smithers
Chief Executive Officer

² Noting Option 1 would allow up to 50 per cent of a perpetrator’s total superannuation balance up to the pension cap (currently \$1.6m) and any excess above that cap to be available.