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

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Email: superannuation@treasury.gov.au

Dear Manager

#### Review of superannuation and victims of crime compensation

IOOF Investment Management Limited (ABN 53 006 695 021 AFS Licence No. 230524) welcomes the opportunity to provide feedback on Treasury’s considerations in relation to helping victims benefit from compensation

As a first principle, IOOF believes that the primary purpose of superannuation should be for retirement purposes. However we do acknowledge that superannuation should not be used as a vehicle to hide assets that would otherwise have been made available to victims, where the member has wronged others.

We have addressed the issues raised in the consultation paper in the attached submission.

Yours sincerely



Frank Lombardo

**General Manager – Client & Process**

# Submission to Treasury: Review of early release of superannuation and victims of crime compensation

This submission has been prepared in response to the review of superannuation and victims of crime compensation draft proposal paper released 28 May 2018.

We appreciate the opportunity to provide feedback on Treasury’s considerations in relation to helping victims benefit from compensation.

As a first principle, IOOF believes that the primary purpose of superannuation should be for retirement purposes. That said, superannuation should not be used as a vehicle to hide assets that would otherwise have been made available to victims, where the member has wronged others. This is consistent with current rules for bankruptcy.

We have addressed the issues raised in the consultation paper below.

1. Claw back of contributions

***Limits and thresholds***

We suggest that no cap (outside the amount of unpaid compensation) should be applied for clawing back of ‘out of character’ contributions, as the assessment of contributions will provide a natural cap and in many cases will exclude the majority of super capital for many perpetrators.

***Visibility of assets***

Given the issues around privacy and potential for fraud, we suggest that a third party, such as the ATO, be responsible for determining the amount of any contributions that can be accessed. The request for a determination should originate from a court proceeding and be managed by the ATO, given the level and currency of contribution information they will be receiving through the Member Account Transaction Service (MATS). The ATO is already set up to determine and process payments such as those under the First Home Super Saver Scheme and on compassionate grounds.

This would reduce the privacy issues involved with the release process without disadvantaging the victim.

***Determining contributions as being ‘out of character’***

As a starting point, we consider the ‘voluntary’ contribution option more appropriate. Assessing all voluntary contributions as being ‘out of character’ not only simplifies the assessment process but provides for a balance between the needs of the victim (assessed through court-ordered compensation) and the perpetrator (needing to provide for their dependants through employer-supported contributions). However we would suggest excluding any personal injury contributions from being included, as these contributions reflect an amount which has been determined or settled upon as reflecting compensation for personal injury and is likely required to support the perpetrator for their lifetime.

In relation to the timeframe for contributions to be considered, we believe contributions made after the crime itself is committed should be available. If only contributions from the time charges are laid are available, this would provide the perpetrator with a window between when the crime is committed and the charges are brought for them to successfully isolate contributions in super.

Further to closing potential loopholes, the clawback rules may need to consider contributions made by relatives or dependants of the perpetrator to ensure individuals who would likely benefit from the support of the perpetrator are not able to successfully isolate contributions from the clawback by say contributing amounts in the name of the spouse. We acknowledge that a tighter definition of ‘out of character’ contributions would be required as part of this wider assessment as simply making available all voluntary contributions of not only the perpetrator but their spouse or family would likely be exceeding the intended reach of this measure. A definition of out of character contributions similar to that used in bankruptcy, with an additional nexus for linking the contribution to the perpetrator could be used for this wider assessment.

***Process for recovering money***

Our strong preference is to use existing mechanisms such as the ‘release authority’ process from the ATO. These do not create any separate concerns under superannuation law in relation to providing benefits to someone other than the member, and can be implemented in a simple manner relative to establishing a new, separate payment class for benefits to be paid into court, subject to presumably a court order. Once the funds have been released to the ATO, the funds could then be forwarded to the relevant court for distribution or could be distributed at the direction of the court directly.

A potential complication is for non-account based interests, such as defined benefit funds. The existing release authority process allows a trustee to advise the ATO if benefits are not currently available for release or if the total amount requested cannot be paid for other reasons, such as the current member interest available being less than the amount requested.

Under current rules, only specific types of amounts such as Division 293 tax payments are able to create a deferral of payment where super interests are not able to be accessed immediately. Our view is where accessible funds exist these should be accessed first, however where a perpetrator only has a defined benefit interest the release process should create a debt, similar to the Division 293 deferred debt rules. This would help ensure equal treatment for different types of accumulation interests and provide a mechanism for victims to be compensated at the earliest available opportunity, rather than not at all.

***Tax rate applied to compensation***

We agree any payment under this scheme should be free of tax consequences for both perpetrator and victim. This ensures the victim is in the same tax position regardless as to where compensation is sourced and given the perpetrator is already having their super benefits reduced it would be unfair to tax them on the released amount. This application should include ensuring the Untaxed Plan Cap is not impacted for a victim who receives a benefit from an untaxed scheme.

1. Access to capital

***Burden of proof***

When it comes to accessing any person’s capital in super, beyond voluntary contributions made after a criminal offence has been committed, a high level of care and diligence should be undertaken. As such any access to capital should be held to the criminal conviction threshold. Additionally, we propose only allowing access to super capital for compensation resulting from a criminal conviction process but not from a civil claim.

***Coverage of crimes***

There is clearly a strong need to balance the needs of the victim and the longer-term needs of the perpetrator and those who may be dependent on them as well as the perceived purpose of super. The crimes covered under this measure will be critical to this.

As a starting point, our position is that ‘crimes against the person’ as defined by the Crime Statistics Agency should be the category of crimes covered under this system. Non-violent, non-personal crime can still have a significant impact on their victim’s lives however allowing access to a perpetrator’s superannuation system could create a significant burden on the court and superannuation trustee processes and could be counter-productive for victims of crime where violence has been a factor.

***What victims should be eligible***

Our position is that any victim who is expected to benefit from a court-ordered compensation order under a criminal conviction should be eligible to access the capital of a perpetrator’s superannuation should the debt remain unpaid. Limiting or otherwise defining eligibility to a set of victims may create situations where a victim has a debt they cannot recover from the perpetrator due to definitional issues. Given we propose to only allow debts unpaid from, and resulting because of, specific types of criminal conviction to access the scheme, this sufficiently defines the range of victims who should benefit from this measure.

***Types of unpaid compensation orders covered***

Given the seriousness of accessing another person’s super – even as a result of a crime committed by that person – clear rules and guidance should limit the amount of a perpetrator’s superannuation that is accessible on the basis of compensating the victim, or trying to put them back as close as possible to the position they would be in ‘but for’ the offence. On this basis our position is that compensation should not be extended to civil suits, and instead limited to compensation or restitution orders in jurisdictions where the court has the ability to order such amounts.

As noted above civil claims could claw back ‘out of character’ contributions as these funds would have otherwise been available to meet any debt resulting from civil action but for the act of making a voluntary contribution to super.

***How to ensure superannuation is accessed as a last resort***

We agree with the proposal to have an independent third party verify that the perpetrator is unable to meet the debt through non-superannuation assets. This could form part of the release process, where a victim with an unpaid compensation order can request access to a perpetrator’s super would do so through the courts or a sheriff’s office. This entity could confirm that other non-super options have been exhausted and liaise with the ATO to arrange for a release from the perpetrator’s super balance, using the existing release authority process. This could also include a ‘deferred debt’ type arrangement for interests which are currently unable to pay a lump sum benefit.

***Balancing rights of the victim with the rights of the perpetrator’s dependants***

We appreciate there is a significant balancing act in managing the rights of the victim and that of the perpetrator’s dependants. Overall in a case where a conflict exists, we propose leaning towards the rights of the victim over that of the dependants of the perpetrator, particularly in the case of serious crimes against the person.

The rationale behind this is that a victim, as a result of the crime being committed against them, may not be in a position to maintain a standard of living on their own. A former spouse however would not be necessarily be unable to generate a living on their own but for the breakdown of the relationship. Put another way, a compensation order or restitution order is an attempt to put the victim back in the position but for the crime occurring, whilst a family law splitting order has a purpose of dividing assets fairly on the breakdown of a relationship. However special circumstances could arise which would perhaps change the outcome of the default rules.

On this basis, we propose that in the case of a concurrent claim between a former spouse and a victim, the victim’s rights be preferred. We further agree with the proposal that a subsequent family law split would not be entitled to claw back funds from the victim. We further propose that no limits (outside the unpaid compensation order) be placed on the amount the victim can access from the perpetrator’s superannuation balance. This approach would also remove the possibility of a couple instigating a family law split to ‘protect’ assets without a true intention of dissolving the relationship.

In addition to the above, we would propose a ‘special circumstances’ power where a court or tribunal could consider prioritising the rights of the dependant(s) over the rights of the victim. Such a decision would necessarily need to consider the specifics of the crime and its impact on the victim, and the circumstances of the dependants and how the perpetrator’s superannuation would be used to assist those dependants over the shorter to medium term. If special circumstances are made out, a decision could be made to prioritise the dependant over the victim, or proportion the benefit between them.

Allowing a fixed percentage of the balance may not be appropriate in many cases particularly where a perpetrator is younger as their existing balance may be minimal and their ability to recover from the impact of any compensation claim paid from their superannuation balance is greater. Allowing a family law split to interrupt a compensation claim also introduces a potential loophole couples could exploit to defeat such a claim.

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

We agree with the proposal for existing unpaid compensation or restitution orders to benefit from the ability to access a perpetrator’s superannuation. We do not consider there to be any undue issues from our position.

***Recovery of costs by State and Territory compensation schemes***

We agree with the proposal that State and Territory schemes are not able to recover costs through this measure, and the rationale put forward. Although ideally perpetrators would be able to reimburse the public for the totality of the costs they have created, on a practical level this does not appear appropriate.

***Tax rate applied to compensation***

In line with the clawback of contributions, we agree with the position the payments should be made free of tax consequences.

1. Additional considerations

We have highlighted below a number of additional considerations we believe Treasury may consider as part of this review that were not directly raised in the paper.

***Additional compassionate grounds condition of release***

We suggest Treasury consider an additional specified compassionate ground to allow victims of crime against the person to access their own super to meet certain costs related to their recovery. Some of these costs may be covered under existing heads, such as medical expenses, however not all expenses are covered. Additionally the process for obtaining a compensation order is contingent on a guilty verdict which could take years from the commitment of the offence to the completion of the trial. In the interim additional support may be required by victims which cannot be met by the existing State-based compensation schemes. As compassionate grounds are overseen by a third-party regulator we would see this as the most appropriate avenue for providing access in these cases as this would remove divergent views from different trustees providing different outcomes to victims.

***Process for overturned convictions***

A key consideration in implementing the proposed reforms is the ability to unwind a payment if a conviction is overturned. It would appear manifestly unjust for the victim to be responsible for repayment of the debt (assuming the occurrence of the crime is not in question), however it would also be unjust for the perpetrator to not be reimbursed for amounts withdrawn based on a crime they did not commit. Superannuation law should provide some mechanism to return funds withdrawn mistakenly without impacting the contribution caps of the individual receiving this amount. States may also need to consider the funding mechanism for providing restitution to the individual who was wrongfully convicted.

***Prioritisation of multiple victims***

Consideration should also be had for circumstances where there are multiple victims of a crime, and insufficient capital available to fund all victim’s entitlements. In such a scenario we would propose that victims would receive a pro-rated entitlement based on the capital available to me