



15 June 2018

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

Email: superannuation@treasury.gov.au

Dear Sir / Madam,

Review of superannuation and victims of crime compensation

Thank you for the opportunity to comment on the draft proposals that seek to provide victims of crime with access to a perpetrator's superannuation in certain circumstances.

In our [submission to Treasury on early release](#), we provided qualified support to the proposal for victims of crime to be given access to a perpetrator's superannuation on a limited basis. We also said that state-based compensation regimes should be adequately funded because they are the most appropriate mechanism for victims to access compensation. Our submission also detailed our support for the 'claw-back' proposal.

We conditionally support the 'claw-back' proposal outlined in the discussion paper because:

- It maintains the integrity of the superannuation sector by ensuring it is only used for the purpose for which it was designed – retirement.
- A framework for clawing back money already exists in the *Bankruptcy Act 1966*. Having a framework to build on is essential because allowing access to another person's superannuation is a fundamental departure from the way the super system currently operates.
- It is consistent with our position that access to another person's superannuation should only occur in clearly defined circumstances, because of the potential adverse outcomes that can arise when monies are released early, such as diminishing retirement adequacy.

We do not support the proposal for victims to be given 'broader access' to a perpetrators superannuation because of the complexity, cost, inefficiencies and difficulty associated with implementing and administering such a scheme.

Response to option one: claw-back proposal

As detailed above, the superannuation system should not be used to shield assets from victims of crime. If a perpetrator has deliberately manipulated the system to hide assets and prevent a victim accessing compensation, then those contributions should be 'rolled back' and made available to victims.

We make the following additional comments regarding this proposal:

Monetary limits

AIST agrees that the claw-back mechanism should only apply to voluntary contributions (both concessional and non-concessional) that are inconsistent with a perpetrator's contribution behaviour. The maximum amount to be clawed back should be limited to these contributions and exclude any superannuation guarantee (SG) amounts. It is advantageous to limit access to additional contributions because it:

- Is easy to determine which contributions are additional and which are SG.
- Preserves SG, which means that once a perpetrator's custodial sentence is complete (if applicable), they can use their superannuation in retirement and not be solely reliant on the government Age Pension.

We seek clarification on the proposed treatment of interest and investment earnings on the principal.

Furthermore, while we agree that access to a perpetrator's superannuation should be conditional on that individual being convicted of an indictable offence, we seek clarity on whether this includes indictable offences that are tried summarily.

Contribution visibility

It is important to accurately identify contributions that can be clawed back. While trustees have visibility of a member's contribution history, we believe that the judicial system should be responsible for seeking access to a member's contribution history. As outlined below, the court should also determine if contributions are 'out of character'.

These functions are best left to the courts, rather than the trustee, because the courts have investigative and forensic powers and are experienced in balancing competing rights and interests. For example, the perpetrator's right to privacy with the competing rights of the victim.

Determining out of character contributions

We do not support the proposal to deem all voluntary superannuation contributions within a specified time frame as being 'out of character' and therefore able to be clawed back. While

deeming brings with it administrative efficiency, it also carries a real risk that large amounts of money could be clawed back, despite the possibility that those monies were contributed on a legitimate basis. Furthermore, a deeming would effectively 'reverse' the onus of proof and make the perpetrator demonstrate how those contributions were not made to shield assets.

We believe that the court should conduct a subjective assessment, with regard to criteria set out in legislation, as to whether the contribution was out of character and therefore able to be clawed back.

The timeframe for the court's assessment, that is, how far back the court goes in examining contributions, must be clearly defined. We believe that the relevant examination period should start on the date on which a reasonable person would have first become aware that their criminal conduct would result in a criminal charge being made against them.

Recovery process

The consultation paper proposes that the trustee be required to release funds either directly into the court system, or via a centralised mechanism.

It is unclear how a centralised mechanism would support the assessment of competing claims from victims, as this matter would be best handled by the courts.

We do not support these proposals and believe that the trustee should release the monies directly to the victim(s) in accordance with a court order or a direction from the Australian Taxation Office (ATO). The court would ordinarily be expected to assess competing claims of multiple victims and determine the amount to be released to each party and issue an order to either the ATO, or the trustee, to that effect.

The court order, or the ATO direction, should carry with it an indemnification against further action against the trustee.

This approach is preferable because:

- The trustee has established facilities for managing and distributing monies.
- The ATO has visibility of concessions and is best placed to resolve taxation issues associated with this measure (outlined below).
- It prevents the 'double handling' of money because the trustee directly pays the victims in accordance with a court order or ATO direction. This reduces administrative complexity and additional cost. It is unclear how the proposal for the trustee to pay into the court or another body, and then for that other body to pay into the victim(s) accounts would be efficient and expedient.

Taxation

The tax treatment for contributions to be clawed back is an area of concern, and we request clarification about the tax treatment of the following:

- Investment earnings
- Investment earnings in the retirement phase
- Non-concessional contributions
- Concessional contributions, which are normally related as income in the hands of the trustee.

We also question whether ATO release authorities can be used to address taxation issues.

Further, we request clarity on whether penalty interest rates are being considered when a perpetrator has made a concessional contribution that is subsequently clawed back.

Retirement income streams

The proposals focus on the accumulation stage; however we believe it is important to assess how retirement income streams are treated. For example, a perpetrator may make voluntary contributions into an accumulation account and with those contributions, open a retirement income stream product.

We therefore request clarity on how these proposals relate to post-retirement products, and the associated taxation treatment.

Retrospective application of proposal

Because of the issues detailed above (particularly those relating to tax), it would be difficult to administer the proposal for any current or past unpaid compensation orders. Therefore, the measures should only apply to compensation orders made on, or after, the day on which the provisions in the legislative provisions are come into effect.

Response to option two: broader access proposal

We do not support the proposal to allow victims to access a perpetrator's superannuation on a broad basis.

Amount to be released

In contrast to the claw back proposal, it is difficult to determine how much of a perpetrator's superannuation should be able to be accessed. There is a risk that if too much superannuation is released to victim(s) the perpetrator, in retirement, will be more reliant on the Age Pension. This

would be a cost that would be borne by Australian taxpayers and it seems inappropriate that they would be called on to fund the retirement of a perpetrator when they otherwise would have relied on their superannuation savings.

Another consideration is the impact that access will have on retirement adequacy, and the difficulty associated with balancing the interests of the victim and wider community with those of the perpetrator.

Therefore, we do not support the measure because of the difficulty associated with setting a maximum claim limit.

Crimes and victim covered

We are concerned that if this proposal is adopted, there is a real possibility that the scheme will be inequitable because criminal provisions differ depending on the state or territory in which the perpetrator is tried.

The discussion paper anticipates a perpetrator's super can be accessed if they are convicted of an offence that carries a custodial sentence exceeding 10 years. The state-based nature of crimes legislation means that a victim in one state may not be entitled to access compensation whereas a victim in a different state may be able to, even though the offending is similar.

For example, in Victoria under section 88 of the *Crimes Act 1958 (Vic)* the offence of handling stolen goods carries a maximum sentence of 15 years, whereas a similar offence under section 417 the *West Australian Criminal Code Compilation Act 1913 (WA)* carries a maximum sentence of 7 years. This illustrates the difficulty with identifying an appropriate threshold of offending and a lack of universality, which can result in inequitable outcomes for victims.

This is clearly an undesirable outcome and as a result we do not support the proposal.

We also seek clarification on why 10 years was selected as being the determinant of whether the scheme applies or not.

Impact of appeals

The proposal anticipates individuals being able to access a perpetrators superannuation upon that individual receiving a conviction. While we agree that it is essential for a criminal conviction being pre-condition, it is unclear what happens if an individual appeals their conviction and it overturned or quashed. We request additional clarity on this issue.

We restate our position that allowing individuals to access a perpetrator's superannuation should only occur in limited circumstances, and allowing access should not be used as a convenient way to address structural or systemic issues in other areas of society.

We support victims being able to claw back out character contributions, but our support is qualified on the concerns outlined above being addressed. We oppose access being granted on a broad basis, for several reasons, including potential adverse outcomes for victims due to limited universality of the measure.

For further information regarding our submission, please contact Jake Sims, Policy & Regulatory Analyst at 03 8677 3835 or at jsims@aist.asn.au.

Yours sincerely,



Eva Scheerlinck
Chief Executive Officer

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$1.2 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.