

9 February 2023

Our ref: [HS:ACTL/FL]

**Confidential**

Dr James Popple  
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By email: [REDACTED]

Dear Dr Popple

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

Thank you for the opportunity to provide feedback on the Treasury's discussion paper 'Access to offenders' superannuation for victims and survivors of sexual abuse'. The Queensland Law Society (QLS) appreciates being consulted on this important issue.

Members of our Accident Compensation and Tort Law Committee and Family Law Committee have reviewed the discussion paper and provided the following comments.

At the outset, we note that while the logic behind restricting use of the criminal standard is understandable, the proposed changes will only benefit a relatively small number of survivors, both because of that threshold issue and because the proposed scheme is restricted to 'additional' super contributions made by the offender.

**Proposal 1**

On the whole, we consider the process described under the heading 'Outline of Proposal 1' (page 6 of the discussion paper) appropriate and workable. Providing for a court to make an order that is then provided to the ATO and the ATO then issuing release authorities to superannuation funds is appropriate.

While there is not a specific consultation question on this issue, we note that the discussion paper states "Under the proposal, any compensation order awarded by a Commonwealth, state, or territory court for which an offender is liable would be considered 'unpaid' after 12 months" (page 7). Compensation orders generally specify that payment is required within 28 days and QLS queries why a much longer period is being proposed.

Regarding the consultation question on page 9, we consider that the definition of *child sexual abuse offence* is appropriate and support the inclusion of exploitation/intended exploitation offences.

The definition of 'additional' contributions is important as it is central to the capacity of the scheme to achieve its objectives. In terms of the questions about 'additional' contributions on page 10, we query whether defining 'additional' contributions by reference to a set period of time will achieve the scheme's objective.

The discussion paper states on page 9: "all personal contributions made in the period starting either 6 or 12 months before the day the offender was charged to the day the court grants the victim or survivor access to the offender's relevant superannuation interest, would be deemed to be 'additional'".

Investigations in abuse cases tend to be protracted, particularly in historical abuse cases where there are often multiple victims. The formal charge may therefore not come until years after the first interview of the offender. The nominated period needs to be long enough to take into account additional contributions made during this time.

We therefore recommend that the period should be expressed as from when the offender is first formally notified of the subject allegation (which is generally the first police interview).

If a defined period is necessary, it is critical that courts have the ability to hear submissions on the period and have the discretion to deem contributions over a longer period of time 'additional', where the interests of justice require it.

Similarly, if it is necessary to limit access to contributions made by the offender to other parties, the court should have discretion to extend this to superannuation accounts held by persons other than the offender's 'spouse', if the court believes those accounts have been used for the purposes of receiving 'additional' contributions.

### *Family law proceedings*

We note the comments in the discussion paper regarding the previous consultation and the view that family law processes should be completed prior to victims being able to access offenders' superannuation funds. However, this could result in victim-survivors waiting a very long time to access funds.

The same outcome (protecting the interest of the offender's former spouse) could be achieved even if the victim-survivor commences their application and gets an order before the family law proceedings have finished. The value of the superannuation assets awarded to the victim could be notionally added back to the pool of assets available for division between the parties. The notionally added back amount would then be included in the value of the offender's share of assets and superannuation awarded by the court. While the court as a general rule does not like 'add-backs' it may be appropriate to make an exception in this circumstance.

Our members consider that this option would be consistent with the requirement of s81 of the *Family Law Act 1975 (Cth)* to bring finality to the financial relationship between the parties and that it would not offend the definition of 'exempt property'.

We agree with the position that in the event that family law proceedings occur after a victim has been compensated, the total value of the unpaid compensation order should be addressed by



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using the notionally adding back the amount of the compensation order. This same amount is then included as part of the value of the assets and superannuation to be divided between the offender and their former spouse, forming part of the offender's share of property and superannuation.

Regarding circumstances where the offender has transferred their additional super payments to their former spouse and family law proceedings have been finalised, we query whether there is scope for the victim survivor to still recover from the offender's superannuation if the offender has a balance above the \$1.6m balance transfer cap, which is a sufficient sum to ensure that they do not become a burden on the public purse.

Regarding the first dot point question on page 13, we suggest that any superannuation moneys an offender receives that would increase their super balance above \$1.6m could be considered to be 'additional' for the purpose of this scheme.

In terms of the second dot point, family law practitioners are well aware of the intricacies involved in requiring superannuation funds to release funds. As such our members have highlighted that, as a lot of superannuation is held in commercial funds, it will be necessary to consult with trustees of these funds to ascertain what changes in legislation will be required in order to facilitate the payment to victim-survivors. A release authority from the ATO may not be sufficient without legislative amendment. Further, where there is a self-managed superannuation fund, there is the trust deed to contend with. Any legislation to implement this proposal would need to be able to over-ride a superannuation trust deed.

### *Tax treatment*

We support the proposal to make the payment to the victim survivor tax free.

### **Proposal 2**

Regarding the questions on pages 16 and 17, QLS supports the development of a mechanism to provide transparency to victim-survivors of 'additional' contributions made by an offender to superannuation accounts through the courts.

The process for obtaining access to superannuation information, as described at the bottom of page 15 seems sensible.

However, it does not seem necessary that a victim-survivor be required to wait 12 months from the date of the civil order to commence the visibility process. As noted in the response to Proposal 1, it is standard practice that damages are due to be paid within 28 days. A survivor ought to be able to commence the visibility proceedings if the payment has not been made in that time period.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED]

Yours faithfully,

[REDACTED]  
Chloé Kopilović  
**President**