

7 February 2023

Director, Tax and Compliance Unit
Retirement, Advice and Investment Division
The Treasury

By email: superannuation@treasury.gov.au

Dear Director

Access to offenders' superannuation for victims and survivors of child sexual abuse – comments on Discussion Paper

Relationships Australia National Office welcomes the opportunity to comment on Treasury's Discussion Paper released in January 2023.

We support implementation of the first and second proposals described in this paper, subject to the comments below.

The work of Relationships Australia

We are an Australian federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choices, cultural background or economic circumstances. Relationships Australia provides a range of services, including counselling, dispute resolution, children's services, services for victims and perpetrators of violence and abuse (including, but not limited to, domestic and family violence, child abuse and abuse and neglect of older people), as well as relationship and professional education. Relationships Australia is committed to:

- ensuring that social and financial disadvantage is not a barrier to accessing services
- working in rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres
- collaborating with other local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with older people, men, women, non-binary people, young people and children. We recognise that a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services, gambling services, and public housing) is often needed by people engaging with our services, and
- contributing our practice insights and skills to better inform research, policy development, and service provision.

Framing principles of this submission

Principle 1 - Commitment to human rights

Relationships Australia contextualises its services, research and advocacy within imperatives to strengthen connections between people, scaffolded by a robust commitment to human rights.

Relationships Australia recognises the indivisibility and universality of human rights and the inherent and equal freedom and dignity of all.

Principle 2 – Poverty is a cause, consequence and characteristic of a range of experiences, circumstances and positionalities, including domestic and family violence

Poverty co-occurs with a range of experiences, circumstances and positionalities, including longstanding health restrictions, intimate partner violence, abuse or neglect of older people, poor mental health, housing insecurity and instability, employment precarity, misuse of alcohol and other drugs, and harmful gambling. Causation is often multi-factorial and multi-directional and, once individuals, families and communities are caught by it, our social, economic, political and legal systems operate in concert to exacerbate poverty, while actively hindering escape from it.

Principle 3 - Preventing poverty is key to women's economic empowerment, as well as to a thriving nation

Governments should prioritise measures to ensure that experiences of episodic poverty, including those following relationship separation and those related to trauma, do not deteriorate into entrenched, and potentially intergenerational, poverty that will not only harm the individuals experiencing it, but will hinder long-term economic, social and cultural success for Australia.

Principle 4 – Victim survivors of domestic and family violence, including elder abuse, face particular financial and economic challenges

In its *National Plan to End Violence Against Women and Children 2022-2032* (the National Plan), the Government recognises that women face particular challenges in enjoying financial independence throughout the lifecycle, including:

- the gender pay gap
- interruptions to employment experienced by many women to undertake childbearing, child care and gendered carers' roles in our society, and without which our economic, cultural, social and political lives would crumble¹
- family separation and relationship breakdown
- experience of domestic and family violence, which itself is strongly gendered,² and
- for women who experience domestic and family violence as older women, and who separate - additional burdens of ageism in participating in the paid workforce or seeking other means to preserve financial independence – and even to afford housing.

¹ See, eg, Evaluate (2022).

² See, eg, Cortis & Bullen (2015); Cortis & Bullen (2016); Broadway et al, 2022; de Vaus et al, 2007; de Vaus et al 2015; Easteal et al, 2018; Fehlberg & Millward, 2014; Gray et al, 2010, Smyth & Weston, 2000.

Principle 5 – Wrongdoers who impair another’s capacity to acquire and maintain financial security should not be permitted to defeat a compensation order or other judgment debt through legal artifice

Where a person would not have superannuation, or would have more superannuation, but for the wrongdoing, then the taxpayer should not have to make up the shortfall through social security payment when a wrongdoer has sought to avoid financial consequences for their acts.

Principles underpinning early release of superannuation

This submission has been framed having regard to the principles underpinning early release as articulated in the paper released by Treasury in December 2017,³ which remain salient to the issues traversed in the 2023 paper:

- preservation – that superannuation should generally be preserved to provide income in retirement to substitute or supplement the Age Pension
- genuine hardship – that early release should be available only where the benefits of early access to superannuation will exceed the benefits of preserving balances until retirement
- last resort – that early release is not an appropriate replacement for existing health and income support policies
- that rules relating to early release be fair and effective.

Recommendations

Recommendation 1 That Government implement proposals one and two in the 2023 paper, subject to the following recommendations.

Recommendation 2 That Government publish principles or guidelines identifying how it will determine categories of wrongdoing in respect of which early release is available. This is in accordance with the principle that rules relating to early release should be ‘fair and effective’.

Recommendation 3 In accordance with the Government’s recognition, in the National Plan, of the long-term financial effects of domestic and family violence, the Government should allow victim survivors of domestic and family violence offences to:

- a. be awarded an amount from their perpetrator’s ‘additional’ contributions for the purposes of satisfying unpaid compensation orders, as proposed in relation to victim survivors of child sexual abuse in Treasury’s 2023 paper,⁴ and
- b. submit a superannuation information request to the appropriate court which could then request that the ATO disclose specific information regarding the offender’s or their spouse’s superannuation accounts

³ Treasury, 2017, p vi.

⁴ Treasury, 2023, *Access to offenders’ superannuation for victims and survivors of child sexual abuse*, available at <https://treasury.gov.au/consultation/c2022-353970> [accessed 27 January 2023]

Recommendation 4 That Government broaden the first proposal to encompass all offences envisaged by the draft proposals put forward in Treasury's May 2018 paper.

Recommendation 5 That Government broaden the first proposal to also include victim survivors who have proven their case in a civil court, and been awarded compensation in consequence.

Proposal one - overarching comments on scope

Defining which victim survivors have standing – application of fairness principle

We note that early release of superannuation to compensate victims of crime has been under consideration by Australian Governments for some time. The scope has progressively narrowed to now include only certain child sexual abuse offences. It is unclear why this is the case, beyond the statement that victim survivors of such offences are

... among the most vulnerable people to interact with the criminal justice system. By improving their experiences in the criminal justice system, we seek to minimise the likelihood of additional trauma and improve access to redress.⁵

Further, Treasury's 2018 paper reported that

In discussions with stakeholders following the December consultation paper, there was strong support for the proposition that superannuation should not be used deliberately to shield assets from victims of crime and deny them compensation.⁶

It is unclear what principles have been applied to determine that the experiences of this group of victim survivors are so distinct in degree and kind of trauma and harm endured by child and adult victim survivors of other kinds of offences to justify exclusion of the latter from accessing compensation by the means proposed. It is unclear why other victim survivors should not have similar recourse against perpetrators who would exploit legal artifices to shelter against compensatory orders. For example, a child who is left totally and permanently disabled after being thrown down a flight of stairs, set alight, or receiving multiple head traumas will also be particularly vulnerable in the criminal justice system. It should be borne in mind, too, that children are increasingly recognised as primary victim survivors of domestic and family violence, rather than as secondary victims or simply witnesses.

Adult victim survivors of domestic and family violence are also well-documented as being vulnerable in that system and, as noted in extensive research literature, are more likely to be dependent on social security including income supports, disability payments and other taxpayer-funded resources. From a budget policy perspective, and a distributive justice perspective, it would be preferable for 'additional' contributions to be recoverable by victim

⁵ Treasury, 2023, p 8.

⁶ At p 6.

survivors from perpetrators than for victim survivors to otherwise be forced to rely on social security.

Categories of wrongdoing in respect of which early release is available should be identified in accordance with published principles and guidelines. One possible principle to be applied in identifying offences captured by the proposal could draw on the financial and economic impact suffered by victim survivors. For example, did the relevant conduct by the perpetrator affect the ability of the victim survivor to accumulate and maintain superannuation? No doubt other principles could be developed, as perhaps was envisaged in the earlier development of these proposals.

A principle-based approach would align with the principle of fairness, required of arrangements for early release, and also support the goal of future-proofing the intended scheme (see 2023 paper, p 9).

Including victim survivors of domestic and family violence (including elder abuse) offences would fortify other Government policies

Supporting the recovery of victim survivors

In a range of other policy and portfolio areas, Government is recognising the critical need to support the recovery of women and children affected by domestic and family violence; see, for example, the National Plan⁷ and its responses to ALRC Report 135 and the Joint Select Committee inquiry into the family law system. Financial empowerment is a substantial enabler of recovery, and access to early release of a perpetrator's superannuation clearly would promote that.

The need for maximising funds available to compensate victim survivors of domestic and family violence

Analysis of the Journeys Home survey, based on 2011 Centrelink data, demonstrated that

Women affected by violence had similar average incomes to those not affected, and were no more or less likely to participate in paid work. However, women affected by violence fared much worse on indicators of financial hardship and stress. The economic penalty associated with violence persisted across the six waves of the survey:

- By Wave 6, women affected by violence in Wave 1 still had more difficulty paying bills, and carried higher average levels of debt.
- By Wave 6, women affected by violence in Wave 1 were more likely than other women to go without food when they were hungry due to shortage of money.
- In Wave 6, women who had reported violence in any wave of the study had lower levels of financial satisfaction than those not affected by violence.

⁷ At pp 86-88.

Women affected by violence in Wave 1 were more likely to ask for material assistance from welfare agencies in Wave 6. Further, economic outcomes in Wave 6 were worse for women exposed to prolonged or repeated violence in the survey period.⁸

Cortis & Bullen (2016) observed that

Even where economic abuse is not a tactic of violence, physical and psychological abuse can disrupt women's economic participation, and generate unfair costs borne by individual women and children, and the service systems that seek to support them. Although this economic disadvantage is experienced in different ways by women in different circumstances, it influences when and how women can avoid or escape violence, and how they can participate in employment and society, ultimately undermining women's status, independence and wellbeing over the life course.⁹

Exclusion of victim survivors of domestic and family violence risks further institutional entrenchment of the financial disadvantage and poverty that extensive research and analysis has found to be concurrent, characteristic and consequential upon domestic and family violence.¹⁰

Defining the class

We submit that the range of domestic and violence offences to which the arrangements should apply would be capable of sufficiently precise identification in liaison with the Attorney-General's Department. Those offences should also include elder abuse offences, in jurisdictions where these exist.

Addressing systems abuse in domestic and family violence

It is the view of Relationships Australia that making 'additional contributions', as defined in the Treasury paper, can be characterised as a form of systems abuse, which is gaining increased recognition as conduct in which a coercive controlling abuser will engage.

The risk of inadvertently disadvantaging some victim survivors of child sexual abuse - the standard of proof issue

The 2023 proposals are confined to circumstances in which a conviction has been secured, apparently on the basis that the higher standard of proof required in the criminal courts will more precisely capture the cohort whom this proposal is intended to benefit. We submit, however, that the impact of the proposal will be unnecessarily diminished and undermined by this restriction - including for its intended beneficiaries. There is a range of reasons for this.

As acknowledged by the 2023 paper, the criminal justice system is potentially harsh and traumatising for victim survivors who, for a range of reasons, may be deterred from engagement

⁸ Cortis & Bullen, 2016, p 7.

⁹ Cortis & Bullen, 2016, p 10.

¹⁰ See, eg, Cortis & Bullen (2015); Cortis & Bullen (2016); Broadway et al, 2022; de Vaus et al, 2007; de Vaus et al 2015; Eastal et al, 2018; Fehlberg & Millward, 2014; Gray et al, 2010, Smyth & Weston, 2000.

with it, and even counselled to avoid it by their legal advisers. First, recent and emerging reforms to how evidence-in-chief is taken, and to the scope and manner of cross-examination, still allow for what may be perceived by victim survivors as extensive, vicious and public attacks on their credibility and character. Second, evidentiary and procedural difficulties arise, such as availability of timely, good quality forensic evidence, and the complexities of jury deliberations and conduct. The prosecution may fail to secure a conviction for many reasons other than the quality of the evidence. Third, it is unclear from the 2023 paper whether victim survivors will be required to wait for the exhaustion of all possible appeals before taking action under the proposal. This may take several years. Further, appeals – like trials - may succeed, or succeed only in part, for reasons unrelated to the quality of the evidence.

For these and other reasons, victim survivors may be advised by their lawyers against pursuing a prosecution, taking into account the rigours and uncertainties outlined above as well as the circumstances of the individual. In such cases, lawyers may advise pursuit of a civil action, instead. Such advice does not necessarily speak to the quality of the evidence against the accused or necessarily mean that a conviction could not have been secured.

Finally, the higher standard of proof required by the criminal courts recognises the graver consequences for the liberty of the accused if an offence is made out. ‘Balance of probabilities’ is not a second class or slipshod standard; indeed, substantial consequences follow civil cases that satisfy this standard, applied in accordance with the *Briginshaw* principle.¹¹ For example, governments and commercial ventures are frequently held legally and financially accountable for their actions, or hold others legally and financially accountable, on the basis of evidence that meets the balance of probabilities standard of proof.

Consultation questions

Deeming period

A 12 month period prior to an offender being charged is preferable to a six month period. Investigations into child sexual abuse offences are often complex and time-consuming. The risk is high that a potential accused may be alerted to a potential charge and have ample time to hide assets. If the provisions are extended to other offences, alternative deeming periods would be more suitable. For example, if they were to be extended to civil matters, then appropriate deeming periods could be framed around the time at which a putative defendant had actual or constructive notice of any matter that could give rise to liability. This would align with established practices, such as in insurance law.

Regardless of the scope of the finalised arrangements, we support courts being given discretion to deem ‘additional’ contributions over longer periods.

Which account holders should be included?

Subject to the operation of the *Family Law Act 1975* (Cth), we support operation of the scheme in relation to spouses, parents, children and related entities. Again, this would be analogous to

¹¹ See *Briginshaw v Briginshaw* (1938) 60 CLR 336, per Dixon J

other legislative schemes, such as bankruptcy law. Indeed, if any of these potential account holders are excluded, then offenders will inevitably exploit these loopholes to the detriment of victim survivors. We do not consider that this would punish innocent parties because, the proposals do not concern early release of, or access to, ‘in character’ contributions that are made genuinely to lay a secure foundation for retirement. These proposals are confined to out of character contributions made as part of a legal artifice to avoid paying compensation to a victim survivor of unlawful conduct; analogous to arrangements made with the intent of defeating creditors. This is money that does not belong in the offender’s, or anyone else’s, superannuation in the first place.

Alternatively, courts could have a discretion, in respect of a particular offender, to extend the scheme’s operation to the accounts of spouses, parents, children and related entities.

Proposed treatment of defined benefit schemes

We agree with the proposed treatment of defined benefit schemes.

Bankruptcy

This is a complex question the resolution of which requires balancing of respective rights of, on the one hand, victim survivors of heinous abuse and, on the other, of creditors such as vendors of goods and services and employees, who have acted *bona fides* in their dealings with the perpetrator. In determining where the balance lies, and whether victim survivors should have priority over such creditors, it would be sound and prudent policy to articulate a principled basis on which this determination is made.

Family law proceedings

Relationships Australia supports the policy intent underlying the ‘clean break’ principle reflected in the *Family Law Act 1975* (Cth). In considering the questions posed in the paper, we have had regard to the extensive research literature finding associations between family separation and poverty, especially for women and children, and especially for victim survivors of domestic and family violence.¹²

It is appropriate to limit victim survivors’ access to ‘additional’ payments made by an offender to their former spouse after the finalisation of family law property proceedings; this is a just and equitable balance of the relative interests of victim survivors and former spouses. Limiting the scope of proposal one to ‘additional’ payments is just and proportionate because there is a real and substantive nexus to payments made with the purpose of defeating the interests of victim survivors (that nexus being the commission of the relevant offence/s). Expansion of scope to other payments would risk unjust and disproportionate infringement of the property rights and interests of the former spouse, in the absence of such a nexus.

The existence (or otherwise) of a nexus between the payments and the commission of offences should be the governing principle for determining whether payments received by an offender

¹² Cortis & Bullen (2015); Cortis & Bullen (2016); Broadway et al, 2022; de Vaus et al, 2007; de Vaus et al 2015; Easteal et al, 2018; Fehlberg & Millward, 2014; Gray et al, 2010, Smyth & Weston, 2000.

are within scope. Perhaps it would be appropriate for such matters to be subject to a residual discretion to be exercised by a court.

Tax treatment of released superannuation

Relationships Australia supports the proposal. The need for clear, fair and effective retrospective application is particularly important in the context of child sexual abuse offences, in light of our understanding of the factors that lead to non-disclosure of offences for many years. Effective mechanisms to support retrospective operation align with trauma-informed practices. The retrospective application described at p 7 of the paper appears to offer a balance between, on the one hand, the policy intent of maximising compensation payable to victim survivors from offenders' 'additional' contributions and, on the other, the orthodox operation of statutes of limitation and practical considerations around record keeping.

Proposal two

Victim survivors of child sexual abuse, like victim survivors of domestic and family violence, need and deserve affordable, accessible, transparent and straightforward mechanisms to support them in asserting their rights and their agency. The proposed superannuation information request seems to be an appropriate mechanism, and the limitation to 'additional' contributions is reasonable and proportionate, since it is only these funds that victim survivors could access under proposal one. Relationships Australia suggests that, to simplify the transaction between the ATO and the courts, consideration should be given to extending the recently established system set up between the ATO and the Federal Circuit and Family Court.

Conclusion

Thank you for the opportunity to make this submission. Should you wish to discuss any aspect of this submission further, please do not hesitate to contact me at ntebbey@relationships.org.au, or our National Policy Officer, Dr Susan Cochrane, at scochrane@relationships.org.au. Alternatively, you can contact us by telephone at 02 6162 9300.

Kind regards



Nick Tebbey
National Executive Officer

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