

**Submission to Treasury Review of
Superannuation and Victims of Crime
Compensation**

Prepared by Women's Legal Service Victoria

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About Women’s Legal Service Victoria

Women’s Legal Service Victoria (WLSV), established in 1981, is a state-wide not for profit organisation providing free and confidential legal information, advice, referral and representation to women across Victoria. Our principal areas of work are family law, child protection, family violence intervention orders and victims of crime compensation.

In addition to providing legal services to women, WLSV also ensures that clients’ experiences inform the development of policy and legislation. Our client group consists of women from a range of different cultural, ethnic and religious backgrounds. The majority of women we represent are family violence victim- survivors and financially disadvantaged.

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Executive Summary

In December 2017, WLSV participated in the review into early release of superannuation on severe financial hardship and compassionate grounds through the Women's Legal Services Association (WLSA) submission. WLSA's submission sets out the views of all member services around Australia on the early release of superannuation.

WLSV welcomes the opportunity to respond to the consultation paper into the review of superannuation and victims of crime compensation.

We support the proposition that superannuation should not be used deliberately to shield assets from victims of crime and deny them compensation.

The majority of clients we represent, many of whom have experienced family violence, face significant barriers in accessing the justice system, including being financially disadvantaged. Compensation is usually sought from the state through the victims of crime compensation scheme and other state assistance schemes e.g. flexible support packages, which are available in Victoria for family violence victims/survivors. Generally speaking, our clients rarely seek reparation directly from the perpetrator either by seeking a restitution or compensation order under the Sentencing Act (1991) (Victoria) or by lodging a civil law claim for compensation through the civil jurisdiction of Victoria's courts. The lack of certainty in pursuing compensation from the perpetrator, the lack of capacity of offenders to pay restitution or compensation to victims, coupled with the need to recover from the trauma caused by the family violence, often directs clients towards a reliance on state compensation and financial assistance. Even then, family violence victims often view perpetrator notification as a deterrent to accessing the victims of crime compensation scheme. The VLRC consultation paper into the Review of Victims of Crimes Assistance Act (2017) detailed the substantial evidence of this problem from reports made by WLSV, the Magistrates' Court, the Children's Court and the Royal Commission into Family Violence¹. For these reasons and others, WLSV, in collaboration with Domestic Violence Victoria have been working to improve the accessibility of the victims of crime compensation scheme for family violence victims through the Victorian Law Reform Commission.²

¹ <http://www.lawreform.vic.gov.au/content/victims-crime-assistance-act-supplementary-consultation-paper-html>

² www.lawreform.vic.gov.au/sites/default/files/Submission_29_WLSV_and_DVVic.pdf

WLSV represents financially disadvantaged women in the family law system after relationship breakdown and is therefore able to comment on how the family law should interact with the draft proposals outlined in the consultation paper. One of the main barriers that our clients face in accessing their fair financial entitlements in the family law system is accessing the perpetrator's superannuation fund information, despite the existence of mandatory disclosure laws that mandate this disclosure. In March this year WLSV launched its' Small Claims, Large Battles report³, which documented the findings and recommendations to address the barriers to financially disadvantaged women accessing their small claims entitlements, including superannuation, in the family law system. The report includes fifteen recommendations for reform, including recommendations around improving visibility of financial information, in particular the visibility of superannuation information. We refer to the report throughout the submission.

We strongly support the review's proposal to create a new mechanism, administered by the ATO, to enable victims of crime, through the courts, to obtain visibility of the perpetrator's superannuation assets and contributions. We recommend that this also be extended to victims of family violence seeking their property entitlements in the family law system. Our proposal to obtain visibility of the perpetrator's superannuation fund account details has been receiving widespread support. We note that the Federal Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence, recommended that the Australian Government implement a similar proposal, in its final report.⁴

In this submission we focus on two main issues in responding to the two draft proposals outlined in the paper. The first issue relates to the visibility of assets and the role that the ATO should play in disclosing financial information to the courts. In discussing this issue we argue for the extension of the proposal outlined to the family law system in line with the small claims, large battles recommendations. The second issue relates to ensuring spouses/partners of perpetrators are not denied their fair share of the property pool in the family law system, if victims of crime are able to access a perpetrator's superannuation fund.

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³ Women's Legal Service Victoria, Small Claims, Large Battles: Achieving economic equality in the family law system (2018) Small Claims, Large Battles report. A copy of the report can be found here: <http://womenslegal.org.au/creating-change/small-claims%2c-large-battles.html>

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https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report

Draft proposal 1: Preventing use of superannuation contributions to shield assets from victims of crime

As stated above we support the proposition that superannuation should not be used deliberately to shield assets from victims of crime and deny them compensation.

Our comments on this proposal are limited to the question as to how a victim of crime can obtain visibility in relation to a perpetrator's superannuation contributions. WLSV has been exploring this question in relation to obtaining visibility of a perpetrator's superannuation fund(s) in the family law system. We agree with Treasury's conclusion that current legislative provisions are inadequate and that "a new mechanism is therefore required to enable a victim of crime to obtain visibility of the perpetrator's superannuation assets and contributions."⁵

The Treasury review proposes that:

"...the process for disclosure of a perpetrator's assets should originate from a criminal or civil court proceeding, to balance efficacy of proceedings with appropriate oversight and privacy implications. This could be done in conjunction with the ATO building a new, secure electronic system to give courts visibility of superannuation information held by the ATO in appropriate circumstances. This system would need to be developed in consultation with the superannuation industry, the courts and other stakeholders. It would also require changes to taxpayer confidentiality legislation."⁶

We support this proposal which will enable the ATO to play a more central role in building a new, secure electronic system to give courts visibility of superannuation information and that the superannuation industry, the courts and other stakeholders be involved in developing the system. WLSV included a similar recommendation in its Small Claims, Large Battles report as follows:

"The Australian Government provide an administrative mechanism for the release of information about the identity of a former partner's superannuation fund and its value"⁷.

⁵ Treasury Consultation paper p.8

⁶ *ibid*

⁷ Women's Legal Service Victoria, Small Claims, Large Battles: Achieving economic equality in the family law system (2018) Small Claims, Large Battles report: Recommendation 5. A copy of the report can be found here: <http://womenslegal.org.au/creating-change/small-claims%2c-large-battles.html>

The proposal is timely because the ATO has been investing in centralising superannuation member data online through an ATO portal. While this has been primarily focused on enabling members to find lost superannuation balances, it can also enable retrieval of member balances in an easily accessible format. The ATO can provide this information easily and cost effectively when requested by a court order.

The review should also consider what amendments need to be made to the Family Law Act (FLA) to ensure that spouses and partners of perpetrators are not denied their fair and full property entitlements under family law, as a result of the actions of their spouses/partners and the claims to unpaid compensation that victims of crime may have.

We note that s.79B of the FLA requires a party applying for a property order to disclose to the court and the registry any relevant proceeds of crime orders that may apply to the property in question. This is despite the fact that resources of the perpetrator (including superannuation) may under family law orders be settled in favour of their spouse/partner. There is a requirement under s.79C of the FLA requiring that the court stay property proceedings affected by proceeds of crime orders. The Office of the Public Prosecutor (OPP) may apply for those orders where it considers there are proceeds of crime implications for matters under consideration. A proceeds of crime order may, among other things, include a consideration of restitution in favour of the victim, from the resources of the perpetrator. In our experience proceeds of crime has been interpreted broadly by the OPP and does not necessarily mean that a causal connection needs to exist between the assets in question and the criminal activities involved. The following case studies illustrate this point.

Maria's story:

Maria had a child from her marriage to Simon, a factory worker. Simon was convicted of several counts of rape. Around this time the parties separated, with the family home sold because Maria was unable to meet payments on her own. Simon was convicted and imprisoned. The relevant proceeds of crime legislation provided that assets can be frozen for restitution. The OPP applied for an order freezing the house sale proceeds to ensure that a potential restitution order could be paid. As provided for under the FLA, the assets remained frozen until the OPP withdrew its proceeds of crime application. Through advocacy for Maria, WLSV was able to negotiate for the OPP to hold an amount in trust for her while the matter was finalised to protect the entitlement she could have gained through property law proceedings. The problem for Maria was that she would have ended up paying for her former partner's crime.

Uma's story:

Uma had six children. Her husband Abel committed incest against the two elder girls, and was imprisoned for his crimes. Uma was extremely isolated socially, and financially illiterate. The Office of Public Prosecutions (OPP) applied for a proceeds of crime order on properties acquired over the course of the marriage, for the purpose of meeting a potential order for restitution. The OPP estimated the affected girls were entitled to receive compensation of \$200,000 each, ordered as an ancillary order to a sentencing order under criminal proceedings, to be paid from the sale of the properties. Under s.79C(2) of the FLA the court must stay property proceedings if the property of the parties to the marriage is covered by a proceeds of crime order. WLSV had applied under the FLA for family law orders for property settlement. After examining the circumstances, WLSV formed the view that Uma would likely be granted 80% of the asset pool under those orders. The OPP successfully objected to the family law orders being made while there was an existing proceeds of crime application in favour of Uma's daughters, who continued to live at home with Uma. This process set up a competition for assets from the perpetrator within an already traumatised family. The family law process has been delayed which has made it difficult for the family to recover both financially and emotionally from the harm caused.

We urge the review to consider necessary legislative amendments to the FLA to address this inequity. There are unintended unjust consequences, outlined in the case studies that result from the priority given to restitution and compensation orders, ahead of family law matters, particularly where victims of crime and victims of family violence rely on the same asset pool which includes superannuation. The review should consider proposals to amend provisions of the FLA to ensure they do not counteract the intention to prioritise the family law process and are able to interrupt a victims claim to ensure fair distribution of assets in the family law system.

Draft proposal 2: Allowing uncompensated or partially compensated victims of crime broader access to the perpetrator's superannuation balance

Whether family violence victims should be pursuing their abusers for compensation is a live issue. Such a strategy relies on the financial resources of the perpetrator to be sufficient to enable financial recovery and can be self-defeating if a family law property order has also been applied for.

As noted above, in our experience, our clients do not possess the financial means to pursue compensation in the civil courts and instead rely heavily of state assistance through the victims of crime compensation scheme and financial assistance packages provided by family violence services.

Burden of proof and crimes covered:

Survivors of family violence experience a web of concurrent and overlapping criminal and non-criminal tactics of power and abuse over time that cause cumulative harm and injury to them. Requiring victims to distil the violence perpetrated against them into a discrete criminal offence can invalidate the overall experience of survivors, and reinforce the attitude that some experiences of family violence are more 'valid' than others.

One of the main barriers our clients face is the trauma involved in pursuing their perpetrator through the court system. This has often translated into clients who have experienced family violence simply walking away from the court system and also from the perpetrator in order to allow themselves the space and time to recover from the violence. Our clients often under report and are reluctant to take any action to ensure the conviction of their offender for a range of reasons. This can be misconstrued as non-cooperation with the police.

The following case study illustrates the problems that victims can face dealing directly with their perpetrator:

Lanfen's story:

Lanfen was married to Zhang for a few years before she contacted police out of fear of Zhang's escalating perpetration of violence towards her. Over the final year of the marriage, Zhang repeatedly physically assaulted Lanfen. Zhang also refused to provide Lanfen with access to a phone, transportation and money.

Lanfen did not want police to press charges against Zhang as she was under family and community pressure not to support criminal charges. Her family told her she should not leave the relationship and was wrong to keep a father from his children. Lanfen felt that the community shamed her for leaving the relationship, and seeking outside help from police. She decided not to support the police application for a family violence intervention order to protect herself and the children.

As a result of Zhang's chronic abuse Lanfen suffers from depression and post-traumatic anxiety. This is exacerbated by her physical exhaustion, having to travel a long distance between her two jobs to provide primary care for her children.

When Lanfen was ready to make a Victims of Crime Assistance application she documented the countless physical assaults she endured from Zhang. The Tribunal sought to exercise its discretion and notify Zhang, despite objections made to oppose the notification.

Further to this, the Tribunal member hearing objections to perpetrator notification was also of the opinion that under s52(a)(ii) of the Act, Lanfen would not be entitled to any VOCAT assistance because she did not press charges, and requested submissions otherwise.

The review may therefore need to explore whether consideration should be given to victims who are unable, for various reasons, to pursue criminal proceedings and compensation from the perpetrator.

Balancing the rights of the victim with the rights of the perpetrator's dependants

WLSV reiterates the submission made herein in relation to why spouses/partners of perpetrator's should not be financially disadvantaged by the actions of the perpetrator.

Further WLSV strongly supports the primacy of the family law process over access by victims of crime. Family law processes should be completed first so that victims are compensated by the perpetrator - and not their dependants. WLSV agrees with the statement in the paper that,

“any concurrent family law property (including superannuation) settlement order proceedings should always be completed prior to a victim of crime compensation order being enforced via superannuation. In cases where a family law property settlement occurs after a victim has been compensated from a perpetrator's superannuation, the released superannuation could not be clawed back from the victim. However, the amount of the compensation order could be taken into consideration by the court as it determines the property allocation between a perpetrator and former partner, if the court considers that it is just and equitable to do so.”⁸

The review should consider the amendments that will need to be made to the FLA to implement these proposals and to ensure that a perpetrator's spouse does not have to compensate a victim of crime compensation order that should not be liable for in any way.

⁸ Consultation paper p.13

Should there be limits on the proportion of a perpetrator’s account that can be accessed?

WLSV supports the view expressed in the paper as follows:

“that family law proceedings can deal with the rights of dependants and, provided that these proceedings have priority to ‘interrupt’ a victim’s claim to ensure fair distribution, the impact on dependants could be minimised. Under this scenario, there may be no need for an explicit monetary limit on access to superannuation for victim compensation.”⁹

However, as noted this largely depends on family law proceedings being initiated. The question then remains, how should the entitlements of dependants be preserved? The two options outlined in the paper are both problematic. The first option may lead to inequities as the amount a victim can access will largely depend on the value of the perpetrator’s superannuation balance which will vary depending on income. We also note the inequity of a system where compensation outcomes for victims could depend on the financial viability of the perpetrator. The second option depends on family law proceedings being initiated which will force dependants to initiate proceedings in order to preserve their entitlements. We recommend that other options be considered to ensure that dependants are not financially disadvantaged by the actions of the perpetrator.

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⁹ Ibid