



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

Discussion paper

January 2023

## Help and support

Child sexual abuse is a traumatic issue. Reading this document may bring up strong feelings for some people. Please take care of yourself as you read this discussion paper and ask for help if you need it. You might want to talk to your family and friends, counsellor, doctor, or Aboriginal Medical Service. The following services can also give you help and support.

### Crisis and suicide prevention

If you or someone else is in immediate danger, call Triple Zero: **000**

Lifeline: **13 11 14** or [lifeline.org.au](https://www.lifeline.org.au)

### Child sexual abuse support and advice

Blue Knot Foundation: **1300 657 380** or [blueknot.org.au](https://www.blueknot.org.au)

Bravehearts: **1800 272 831** or [bravehearts.org.au](https://www.bravehearts.org.au)

Care Leavers Australasia Network (CLAN): **1800 008 774** or [clan.org.au](https://www.clan.org.au)

National Redress Scheme: **1800 737 377** or [nationalredress.gov.au](https://www.nationalredress.gov.au)

Survivors & Mates Support Network (SAMSN): **1800 472 676** or [samsn.org.au](https://www.samsn.org.au)

### Family, domestic and sexual violence support

National Sexual Assault, Domestic and Family Violence Counselling Service – 1800RESPECT:  
**1800 737 732** or [1800respect.org.au](https://www.1800respect.org.au)

### Mental health support and advice

Kids Helpline: **1800 55 1800** or [kidshelpline.com.au](https://www.kidshelpline.com.au)

Beyond Blue: **1300 22 4636** or [beyondblue.org.au](https://www.beyondblue.org.au)

QLife: **1800 184 527** or [qlife.org.au](https://www qlife.org.au)

You can find links and contact details for these organisations and for national, state and territory government services on the National Office for Child Safety website: [childsafety.gov.au](https://www.childsafety.gov.au)

## Terminology

This paper's use of the term 'victims and survivors' refers to people who have been sexually abused as children or young people and aims to consider the experiences of as many individuals as possible. We recognise that there are those that prefer the term 'survivor' and its association with resilience and empowerment. We also recognise many have lost their lives as a direct result of abuse, or do not feel they have 'survived' the abuse and its impacts. In these cases, the term 'victim' may be more appropriate. We recognise that some people do not identify with either of these terms.

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# Consultation process

## Request for feedback and comments

Interested parties are invited to comment on the issues raised in this paper. Any comments received will feed into the development and consideration of potential options to enable victims and survivors of child sexual abuse to access offenders’ superannuation contributions for unpaid compensation orders.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982* (Cth), may affect the confidentiality of your submission.

View Treasury’s [Submission Guidelines](#) for further information.

### Closing date for submissions: 16 February 2023

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# Background

## Purpose of this paper

The purpose of this discussion paper is to seek views on two complementary proposals that would provide for the release of an offender's superannuation for the purposes of satisfying unpaid compensation orders. These mechanisms would be available exclusively to victims and survivors of child sexual abuse in criminal or civil compensation proceedings. Responses to this discussion paper will help inform the Government's consideration of options to prevent child sexual abuse offenders from shielding their assets in the superannuation system.

Currently, there are three avenues through which a victim or survivor of crime can seek compensation:

- state and territory compensation schemes – where the state or territory, rather than the offender, pays compensation directly to a victim or survivor of crime,
- compensation or reparation orders handed down as part of, or subsequent to, the sentencing process in a criminal proceeding – requiring the offender to pay the victim or survivor, and
- civil action pursued by the victim or survivor against an offender or alleged offender for damages – requiring the offender to pay the victim or survivor.

Across all the avenues outlined above, the offender's superannuation assets are not available to the victim or survivor. Superannuation trustees are unable to pay preserved benefits except in specified situations (including paying out the proceeds of crime) under Division 6.3 of the *Superannuation Industry (Supervision) Regulations 1994*. Consequently, offenders subject to criminal or civil proceedings relating to child sexual abuse, or those anticipating such proceedings, may be incentivised to voluntarily make large personal contributions to their or their spouse's superannuation accounts to shield assets from potential compensation orders. Such contributions will be referred to as 'additional' contributions for the purposes of this discussion paper.

The Government is particularly concerned that, where they are personally liable for a compensation order, offenders have an incentive under the existing framework to shield assets in the superannuation system and deny victims and survivors access to redress in doing so. In recent years, there have been a number of high-profile reports of convicted child sexual abuse offenders deliberately hiding millions of dollars' worth of assets in superannuation accounts to defeat compensation claims. This can delay or prevent victims' and survivors' access to compensation and further add to their emotional distress. This paper's proposals aim to canvass reforms that directly address such practices.

## Proposals

The first proposal aims to prevent convicted child sexual abuse offenders from using superannuation to shield assets from victims and survivors where the offender is personally liable for the payment of court-ordered compensation. This proposal would provide for a court-ordered early release mechanism facilitated by the Australian Taxation Office (ATO).

By applying to the appropriate court, victims and survivors of child sexual abuse could be awarded an amount from their offender's 'additional' contributions for the purposes of satisfying unpaid

compensation orders. Under the proposal, victims and survivors would receive payment from the offender's 'additional' contributions to ensure superannuation cannot be used to avoid paying compensation.

The second proposal aims to improve transparency and reduce the cost and complexity of pursuing compensation by providing visibility of offenders' 'additional' contribution balances. Under the proposal, victims or survivors would be able to 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. This disclosure could then inform the victim's or survivor's decision to pursue further proceedings.

The Government invites stakeholder views on these two proposals. This paper's consultation questions cover policy design considerations including the:

- scope of eligible child sexual abuse offences,
- nature of 'additional' contributions,
- treatment of defined benefits schemes,
- visibility of an offender's and their spouse's superannuation assets, and
- tax treatment of released superannuation.

The paper also outlines some anticipated implementation challenges requiring careful consideration. This includes the interaction of the compensatory proceedings with existing procedures for bankruptcy and family law proceedings.

The consultation questions in this paper are intended to act as prompts or suggestions that guide stakeholder feedback. We welcome any additional feedback stakeholders wish to provide on topics not covered above.

This discussion paper seeks feedback by **16 February 2023**.

## Proposal one: Accessing superannuation for unpaid compensation orders

### Outline of proposal one

Under the proposed approach, where a child sexual abuse victim or survivor has an unpaid or partially paid compensation order from a court, they would be able to apply for an order requiring the release of monies from the offender's or their spouse's superannuation. Those amounts could be drawn from one or more of the offender's or their spouse's superannuation funds.

Upon receipt of the order, the ATO – via the Commissioner of Taxation – would issue one or more release authorities to the relevant superannuation fund(s) to facilitate the release of monies from the offender's or their spouse's superannuation account(s). To appropriately target circumstances where the offender is deliberately seeking to shield assets, 'additional' superannuation contributions would be made eligible for release. Recognising the importance of determining what falls within the definition of an 'additional' contribution, this concept will need to be carefully defined in the law.

We propose that 'additional' contributions be identified by an objective test. All personal contributions made in the period starting (either six or 12 months) before the day the offender was charged, up to the day the court grants the victim or survivor payment from the offender's relevant superannuation interests, would be deemed 'additional'. For clarity, this period will be referred to as the 'deeming period'.

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. No limit would be set on the amount of superannuation that can be released from the offender's account beyond the lesser of the total value of compensation owed to the victim or survivor and the total value of the offender's contributions deemed 'additional'.

The proposal's intention is to disincentivise 'additional' contributions made by offenders into superannuation. Where such contributions are made, the proposal will provide for the release of the appropriate sum to be paid to the victim or survivor, rather than to unwind the relevant superannuation contributions as occurs under the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) in relation to contributions deemed to be 'out of character'.

The superannuation release and compensation procedures outlined above would apply to two types of compensation orders: those awarded to the victim or survivor by a criminal court as part of sentencing or post-conviction and those awarded in a civil proceeding where a criminal conviction or recognisance release order has also been handed down for the same conduct. We note that, while rare for child sexual abuse cases, recognisance release orders still find the offence proven and should therefore be accounted for in the context of victim compensation.

The requirement for a criminal conviction or recognisance release order reflects the position that the conduct should have been proven to the criminal standard – beyond reasonable doubt. Given that strict rules apply to ensure that superannuation is preserved for its intended purpose of providing income in retirement, this approach seeks to ensure that an offender's superannuation can only be accessed in circumstances where no reasonable doubt exists as to their guilt in committing an offence.

It is not envisaged that state and territory compensation schemes would be able to access an offender's superannuation to recover costs for payments they have made to victims and survivors. As these schemes allow compensation to be paid in the absence of a criminal conviction, this proposed approach aligns with the intent of ensuring an offender's superannuation is only accessible where a criminal conviction or recognisance release order has been handed down.

We expect that the proposal will apply retrospectively, both in terms of the historical offences that are eligible and personal superannuation contributions that could contribute to the final compensation sum available to the victim or survivor. The proposal is not currently proposed to apply to compensation debts that have already been extinguished by finalised bankruptcy proceedings. The full extent of the proposal's retrospectivity is yet to be determined and subject to consultation.

While the Government is firmly committed to providing the best possible outcomes for victims and survivors of child sexual abuse, including those that are currently pursuing their offenders and alleged offenders, any retrospective cut-off date would be at least partly informed by the relevant agencies' limitations in regard to historical superannuation contributions and offence records, as well as other factors including limitation legislation.



# Proposal one: Issues for discussion

## Scope of eligible child sexual abuse offences

The Government's intent is that the proposals outlined in this paper would apply exclusively to victims and survivors of child sexual abuse, who 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.

Each state and territory has its own laws, processes, penalty regimes, arrangements for administering justice and definitions in relation to child sexual abuse crimes. Any enabling legislation will need to ensure the relevant offences captured by this proposal are broadly consistent across jurisdictions.

The differences between Australia's jurisdictions represent a challenge to futureproofing the proposal against the likely prospect of new child sexual abuse offences being legislated, amendments to existing offences being passed, and new modalities of offending. Accordingly, we propose that the superannuation access mechanism is targeted to specific classes of offending that can account for differences between jurisdictions. The relevant classes have been outlined directly below.

Firstly, section 3 of the *Crimes Act 1914* (Cth) (the Crimes Act) defines a 'child sexual abuse offence' as:

- a) a Commonwealth child sex offence; or
- b) an offence against section 273.5, 471.16, 471.17, 474.19 or 474.20 of the *Criminal Code* as in force at any time before the commencement of *Schedule 7 to the Combatting Child Sexual Exploitation Legislation Amendment Act 2019*; or
- c) an offence against Part IIIA of this Act as in force at any time before the commencement of *Schedule 1 to the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*; or
- d) a State or Territory registrable child sex offence.

Secondly, Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) comprehensively criminalise slavery, slavery-like offences (including servitude, forced labour, deceptive recruiting, forced marriage and debt bondage) and trafficking in persons. The conduct of these offences may involve the sexual exploitation of a child but would not always be captured by the Crimes Act definition of 'child sexual abuse offence'.

In certain circumstances, an offender may be convicted of a slavery, slavery-like or trafficking-in-persons offence that involves sexual exploitation (or intended sexual exploitation) of a child, but not also convicted of an offence captured in the Crimes Act definition.

Jointly, the above offence classes would appropriately target the application of the proposal to the most relevant criminal conduct. A benefit of adopting this approach over alternatives like maximum custodial sentence thresholds or manually listing offences is that any future relevant legislative reform is likely to be automatically captured. This minimises the need for consequential legislative changes in the future.

We submit that the state, territory, and Commonwealth offences to which the proposal would apply should be limited by the definition of 'child sexual abuse offence' outlined at section 3 of the Crimes Act, and the offences in Division 270 and 271 of the Criminal Code in circumstances where the victim or survivor was a child and the exploitation or intended exploitation is sexual in nature.

### Consultation question(s)

We invite stakeholder feedback on whether the proposed definition of child sexual abuse offence is appropriate. If not, we are interested in stakeholders' views on whether there are any alternative definitions that should be considered.

Stakeholders are also invited to provide suggestions on how to best futureproof the proposal's treatment of which offences should apply. In particular, we are interested in any suggestions that would address the likely prospect of new offences being legislated, reforms to existing offences, and new modalities of offending.

## 'Additional' contributions and other eligible monies

Reflecting the policy intent to preclude convicted child sexual abuse offenders from deliberately shielding their assets in the superannuation system, we propose that an amount equivalent to the offender's 'additional' contributions may be paid to the victim or survivor for the purposes of unpaid compensation. For clarity, employer superannuation guarantee contributions would not be in scope.

This is designed to provide similar disincentives to other legislation that prevents amounts from being contributed to superannuation to avoid outstanding debts (such as legislation relating to bankruptcy).

Feedback is sought on the period that applies to the deeming of 'additional' contributions via an objective test, also known as the 'deeming period' (as noted above). Under the test, all personal contributions made in the period starting either six 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'.

In principle, we aim to ensure that contributions made in anticipation of a compensation debt should be in scope. Given the potentially lengthy nature of criminal investigations and prosecutions, six months represents the minimum period that can satisfy that aim.

### *'Additional' contributions to a spouse's account*

Proposal one includes 'additional' contributions made to the offender's spouse's superannuation account. However, payment of an outstanding compensation order from a spouse's superannuation account would only be permitted where that person meets the definition of 'spouse' outlined in section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) at the time the contribution was made and it is shown that the offender transferred monies to that person's account during the 'deeming period'.

In the event that a victim's or survivor's compensation claim can be settled by eligible funds in the offender's superannuation account, access would not be permitted to the spouse's superannuation account. It is the intention that the offender will always be the first person liable to meet the compensation order. We note that further caveats to this aspect of the proposal are covered below in the 'Family law proceedings' section.

### *Unclaimed superannuation monies*

An offender's unclaimed superannuation monies (USM) held by the ATO will also be available to a victim or survivor under proposal one. This is necessary to preclude offenders from potentially allowing USM be transferred to the ATO to shield it from victims and survivors.

### Consultation question(s)

We invite stakeholder feedback on which of the two proposed periods, six or 12 months prior to an offender being charged, is preferred for the deeming of 'additional' contributions. Alternative approaches to defining the period to which the objective test should apply are also welcome.

Stakeholder views are also welcome regarding whether courts should be given discretion to deem 'additional' contributions over a period longer than six or 12 months prior to an offender being charged. This may be appropriate in certain circumstances, including where there is a long investigation prior to charges being laid.

As outlined above, the two types of superannuation accounts currently in scope for the release of 'additional' contributions under proposal one are those of the offender and their spouse. We are interested in stakeholder views as to whether in-scope superannuation account holders should be limited to include only the offender or broadened to include other entities related to the offender such as children and parents in addition to spouses.

What challenges do stakeholders see in potentially:

- limiting the scope to only include the perpetrator's accounts, or
- expanding the scope to include the above parties?

## Treatment of defined benefit schemes

At this stage, we are not minded to specifically include defined benefits schemes in the proposal, either in the retirement or accumulation phase. Under these schemes, employees are typically required to contribute a certain percentage of their salary (up to a maximum cap) and employers may also make contributions on behalf of employees. The retirement benefit under a defined benefit interest is calculated based on a range of factors, including the employee's rate of contributions, years of service and final salary on retirement. Approximately 10 per cent of Australians are members of defined benefit schemes (with this proportion set to decline).

Given employee contributions to defined benefit schemes are generally limited to those mandated by their employer, the balance of these funds is unlikely to include significant personal superannuation contributions that could be deemed 'additional' and therefore be available to a victim or survivor. Extending the proposal to include defined benefit schemes could result in the proposed objective test capturing contributions intended to provide for retirement income, rather than to shield an offender's assets from compensation orders.

We note that in the event that an offender makes an 'additional' contribution to a defined benefit scheme, many trustees offer members a secondary account-based fund or scheme exclusively for personal contributions. In those cases, the victim or survivor would already be able to access the funds via the default policy settings, making additional provisions unnecessary.

### Consultation question(s)

We welcome feedback on the proposed treatment of defined benefit members as outlined above.

## Bankruptcy proceedings

Bankruptcy proceedings may currently allow victims and survivors to 'claw-back' superannuation contributions that an offender has made to avoid compensation orders and other creditors. However,

requiring victims and survivors to pursue compensation through bankruptcy proceedings creates additional legal costs, splits the assets among other creditors, and may expose victims and survivors to further trauma.

Once an offender declares bankruptcy, the Bankruptcy Act generally dictates that all recovery action must cease and creditors must provide proof of their debt to the trustee of the bankrupt estate to be paid a dividend. The Bankruptcy Act also dictates the order of priority in which payments out of the bankrupt estate must be made. Bankruptcy proceedings operate on the premise that almost all unsecured debts rank equally. Creditors share in whatever is recovered by the trustee of the bankrupt estate on a prorated basis.

Even if a victim or survivor successfully proves their debt as a creditor of the bankrupt estate, they may receive very little return on the debt. In all bankruptcy administrations during the 2020-21 Financial Year, creditors only received an average of 1.63 cents per dollar owed. Whether or not any dividend is paid to the victim or survivor, the compensation debt is extinguished on the offender's discharge from bankruptcy.

#### *Potential changes to the Bankruptcy Act*

Allowing victims and survivors access to their offender's superannuation could be complemented by targeted changes to the Bankruptcy Act which prevent bankruptcy being used by offenders to extinguish compensation orders. An amendment could be made to the Bankruptcy Act to allow victims and survivors to take part in bankruptcy proceedings and be paid a dividend (if one is payable in the administration) while continuing to be able to pursue the balance of the compensation debt against the offender after their discharge from bankruptcy. This would include the right to bankrupt the offender again.

Under proposal one, if they receive a release order from the ATO, the offender's superannuation fund trustee would be required to check the National Personal Insolvency Index (NPII) to determine whether the relevant member is bankrupt or has had bankruptcy proceedings commenced against them. If so, the superannuation fund trustee would be prohibited from complying with release orders made by a court until the offender's parallel bankruptcy is finalised. This would effectively mean that the process to obtain an early release order cannot commence until the bankruptcy is discharged or annulled. These provisions would ensure that the offender's 'out of character' contributions could be used to satisfy the bankruptcy creditors (including the victim or survivor) on an equitable basis in accordance with the Bankruptcy Act.

Once the offender's bankruptcy ends, the proposed amendments to the Bankruptcy Act would allow the victim's compensation debt to survive. Debt that survives bankruptcy can be enforced after discharge or annulment and proceedings could begin again on the amount owing. The proposal has no specific limit on the period in which the victim or survivor can reinstitute bankruptcy proceedings via new compensatory proceedings after the original bankruptcy is discharged, beyond those already provided for in the relevant bankruptcy legislation. We note that subsection 41(3) of the Bankruptcy Act currently prohibits a bankruptcy notice from being issued on a judgement or order that is older than six years.

#### **Consultation question(s)**

We invite stakeholder feedback on the proposal to allow compensation debt to survive bankruptcy and the potential interactions between bankruptcy proceedings and this discussion paper's proposals. Specifically, we are seeking views on the following:

- Is it feasible and/or appropriate to allow compensation debts to survive bankruptcy?

- Is it appropriate to require superannuation funds to confirm whether the relevant member is subject to a bankruptcy proceeding via the NPII?
- If it is found through a search of the NPII that the offender is bankrupt, is it feasible to prohibit superannuation fund trustees from complying with a release order until the bankruptcy is finalised? Is there an alternative that preserves an equitable outcome for all creditors in an offenders' bankruptcy?
- Is it appropriate to allow a bankruptcy notice to be issued against an offender if a compensation order was made against them more than six years prior?

## Family law proceedings

As is the case with bankruptcy proceedings, we consider that concurrent family law property settlement proceedings (which often involve superannuation assets) should always be completed prior to a victim's application for superannuation access being heard by another court.

During the 2018 consultation period, stakeholders generally supported prioritising the finalisation of family law processes over access to superannuation by victims and survivors of child sexual abuse. It was argued that family law processes should be completed first so that victims and survivors are compensated by the offender, not their former spouse or dependants.

It is important that family law property settlements provide financial certainty for separated couples and their dependants. Section 81 of the *Family Law Act 1975* (Cth) (the Family Law Act) requires the court to finally determine the financial relationships between the parties to the relationship and avoid further proceedings between them when making family law property settlement orders.

This is consistent with the position under paragraphs 116(2)(q) and (r) and sub-paragraphs 116(2)(d)(iva) and (vii) of the Bankruptcy Act, which treat the following as 'exempt property', that is, property that is not divisible among creditors:

- *any property that, under an order under Part VIII of the Family Law Act, the trustee is required to transfer to the spouse, or a former spouse, of the bankrupt*
- *any property that, under an order under Part VIIIAB of the Family Law Act, the trustee is required to transfer to a former de facto partner of the bankrupt*
- *a payment to the bankrupt under a payment split under Part VIII B or VIII C of the Family Law Act 1975 where:*
  - *(A) the eligible superannuation plan involved is a fund or scheme covered by subparagraph (iii); and*
  - *(B) the splittable payment involved is not a pension within the meaning of the Superannuation Industry (Supervision) Act 1993;*
- *a payment to the bankrupt under a payment split under Part VIII B or VIII C of the Family Law Act 1975 where:*
  - *(A) the eligible superannuation plan involved is an RSA; and*
  - *(B) the splittable payment involved is not a pension or annuity within the meaning of the Retirement Savings Accounts Act 1997;*

As such, the default position for the first proposal is to exclude superannuation funds subject to family law proceedings from compensatory proceedings until the relevant family law matter is finalised.

In cases where a family law property settlement occurs after a victim or survivor has been compensated from an offender's superannuation, the released superannuation could not be reclaimed from the victim or survivor. However, the total value of the unpaid compensation order could be taken into consideration by the court as it determines the property allocation between an offender and former partner, if the court considers that it is just and equitable to do so.

#### *Interaction with family law proceedings that conclude prior to compensatory proceedings*

We note that the total value of an offender's 'additional' contributions would not be affected by a superannuation split as a result of family law property settlement immediately prior to a court issuing a release order to satisfy compensation debt. That is, where an offender is deemed to have made \$100,000 worth of 'additional' contributions over the 'deeming period', that would not be halved to \$50,000 in the event of a 50/50 superannuation split in a family law decision.

Finally, victims and survivors would not be eligible to be paid from an offender's former spouse's account after the finalisation of family law property proceedings, even if that account was paid contributions that were later deemed to be 'additional' per the definition under proposal one. To preserve the 'clean break' of finances intended by family law proceedings, it would not be appropriate to allow access to a former spouse's superannuation interests on the basis of an offender's liability after a family law settlement.

#### **Consultation question(s)**

We invite feedback on the above policy positions pertaining to proposal one's interactions with family law proceedings, including the proposal to limit victims' and survivors' ability to access 'additional' payments made by an offender to their former spouse after the finalisation of family law property proceedings.

We also invite feedback on the following family law questions:

- Are there any situations in which superannuation monies an offender receives from a recent family law settlement should be considered 'additional' for the purposes of satisfying outstanding compensation debt?
- Are there any other potential interactions with family law property proceedings that we should be conscious of in progressing this proposal?

## **Tax treatment of released superannuation**

To provide the greatest possible likelihood of the full value of the compensation order being paid, the intention is to make compensation amounts tax-free on release, in the hands of the victim or survivor and to the greatest extent possible before that point.

In order to achieve this objective, released amounts would be treated as non-assessable, non-exempt (NANE) income when paid to the victim or survivor. We also consider it preferable to apply the same tax-free treatment at the point of release from the offender's or spouse's superannuation account(s).

As a preliminary position, we note that releasing an offender's superannuation for the purpose of compensation under proposal one can be distinguished from other existing early release mechanisms which can attract taxation. This is due to the proposal releasing funds for the benefit of a third party – the victim or survivor – rather than the benefit of the superannuation account holder – ostensibly the offender or their spouse.

It is important to note that the release of the relevant funds from the offender's superannuation account should not be considered an 'unwinding' of a contribution. Rather, the aim is to enable an amount equivalent to the deemed 'additional' contributions to be released from the offender's superannuation to allow compensation to be paid.

The alternative to nil tax treatment for the initial release would be to require the offender to pay standard tax rates. Ordinarily, money released from superannuation accounts prior to the applicant reaching preservation age is taxed at the lower of either the marginal rate of the recipient or 22 per cent. In cases where the payment comes from an untaxed source, the tax rate on the released amount may increase to 32 per cent.

#### *Treatment of concessional contributions*

While an offender's non-concessional (after-tax) personal superannuation contributions would contribute in full to the calculation of the compensation accessible by the victim or survivor, we anticipate that personal contributions that are taxed at the fund level will contribute on a post-tax basis. That is, where an offender has made a personal contribution that is later deemed 'additional', and that personal contribution was taxed at the fund level (by virtue of it being, for example, a contribution for which a deduction was claimed) only the post-tax value of the 'additional' contributions would count toward the sum the victim or survivor could be paid from the offender's superannuation account.

In practice, this means that where an offender makes a contribution of \$100,000 to their superannuation account that is later deemed to be an 'additional' contribution, the amount available to the victim or survivor should they pursue compensation from the offender under this proposal would be \$85,000 (\$100,000 less contributions tax of 15 per cent).

#### *Offsetting of debts*

We are cognisant that existing early release mechanisms are often subject to the offsetting rules that apply for debts to the Commonwealth found at Division 3 of Part IIB of the *Tax Administration Act 1953* (TAA). These rules ensure that where a person applies for the early release of their superannuation, the released funds are first used to settle any existing Commonwealth debts associated with that person.

Depending on the approach the proposal takes in paying the victim or survivor the funds released from the offender's superannuation account, these rules may apply by default and would need to be switched off for amounts released under this policy to ensure maximum compensation flows through to the victim.

#### **Consultation question(s)**

We invite feedback from stakeholders on:

- whether the NANE taxation outcome proposed by this paper is appropriate, or if standard tax rates should instead apply to released amounts in the hands of victims and survivors,
- the approach we have taken to personal, concessional superannuation contributions wherein the post-tax value becomes available to the victim or survivor, and
- the suggestion that early release offsetting rules may need to be disabled to ensure compensation to the victim or survivor is maximised in the greatest number of circumstances.

## Other issues for consideration

### *Other parallel court proceedings*

An offender may simultaneously be the subject of other court proceedings that potentially concern a claim to their superannuation. For example, a child sexual abuse offender may have engaged in separate or related conduct that is subject to action under the *Proceeds of Crime Act 2002* (Cth).

At this stage, much like the interaction with family law, it is expected that the first proposal would not override the usual practice of not allowing claims to be brought forward where the relevant assets are already the subject of ongoing court proceedings. Therefore, the relevant superannuation accounts cannot be drawn from to enable victims and survivors of child sexual abuse to satisfy unpaid compensation orders until any parallel proceedings are finalised.

### **Consultation question(s)**

We invite stakeholder feedback on the proposed approach to parallel court proceedings, including the proposal that compensatory proceedings should not be allowed to commence while other proceedings are on foot (as outlined earlier for bankruptcy and family law proceedings).

### *General feedback*

We are interested in stakeholder feedback on the additional questions and issues outlined below.

### **Consultation question(s)**

- What are stakeholders' views on the optimal method for paying the released superannuation to the victim or survivor? That is, once the appropriate sum is released from the offender's superannuation, how should the money be transferred from the superannuation fund to the victim or survivor?
- Stakeholders are invited to provide feedback on the proposal's retrospective application.

## Proposal two: Providing visibility of superannuation accounts

### Outline of proposal two

Under proposal one, once a compensation order awarded to a child sexual abuse victim or survivor has remained unpaid for 12 months, the victim or survivor could commence legal proceedings to access compensation. The compensation available to the victim or survivor would be based on the value of the offender's 'additional' superannuation contributions made to their own superannuation account and that of their spouse.

Under proposal two, before undertaking to obtain access to the offender's superannuation, victims and survivors would have the option of submitting a superannuation information request form to the relevant court. That request could ascertain the total value of 'additional' superannuation contributions made by the offender in the 'deeming period' established in proposal one.

If the above request is granted, the court would submit a request to the ATO seeking the relevant information. After receiving the ATO's response, the court would provide the information to the



parties to the proceedings (or, where relevant, advise that the ATO was unable to source the requested information). In situations where the spouse's superannuation account falls within scope due to 'additional' contributions made by the offender, we envisage that the spouse would be joined to the proceedings and notified that information about their superannuation is being sought.

The proposed mechanism is expected to operate similarly to the existing visibility of superannuation tool used in family law proceedings but apply to a broader list of courts. As of 1 April 2022, parties to permitted family law property proceedings are allowed to access superannuation information from the ATO through the Federal Circuit and Family Court of Australia and Family Court of Western Australia.

Outside of bankruptcy and proceeds of crime proceedings, the judicial system currently has limited investigative and forensic powers to obtain visibility of an offender's non-superannuation assets; this would likely also apply to superannuation.

To enable victims and survivors to make an informed choice in pursuing compensation via superannuation, this proposal would provide victims and survivors a degree of upfront visibility of the potential pool of superannuation assets they may be able to access in fulfilling their unpaid compensation order. Without a visibility mechanism, victims and survivors that pursue unpaid compensation orders in court cannot reasonably know the value of the offender's 'additional' contributions, nor the reasonable prospects of fulfilling their compensation order.

We note that any information obtained under this proposal would constitute 'protected information' and require a new exception under the TAA to allow it to be shared with the relevant parties.

## Proposal two: Issues for discussion

### Visibility of superannuation assets

We are proposing that the ATO provide, upon request by a court, information about the 'additional' superannuation contributions made by the offender during the 'deeming period'. This would include 'additional' superannuation contributions made to the offender's superannuation account(s), or their spouse's superannuation account(s) where relevant and feasible.

As with the family law visibility of superannuation measure, the ATO will be able to provide point-in-time visibility of the offender's superannuation information. However, rather than the whole balance being visible, it is proposed that visibility would be limited to the value of the offender's 'additional' contributions. We note that any superannuation information that may be provided under this proposal would be subject to the lag associated with statutory reporting requirements to the ATO.

As such, the visibility measure is intended to help the victim or survivor decide whether the total value of an offender's 'additional' contributions is sufficient to justify proceeding in line with proposal one rather than to provide exact, real-time figures or contribution information. We are cognisant of the possibility that superannuation funds may need to be contacted directly in order to collect contribution information that is not immediately accessible to the ATO or the court.

#### Consultation question(s)

We invite stakeholder feedback on the feasibility and/or appropriateness of establishing a mechanism to provide transparency to victims and survivors of 'additional' contributions made by an offender to their own or their spouse's superannuation accounts through the courts. This can include feedback on

the proposal's potential utility to victims and survivors in deciding whether to pursue compensation orders by accessing offenders' superannuation assets.