Law Council
OF AUSTRALIA

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

The Treasury

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

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The Law Council is grateful for the contributions of the following Constituent Bodies in the preparation of this submission:

- The Law Institute of Victoria
- The Law Society of the Australian Capital Territory
- The Law Society of New South Wales
- The Law Society of South Australia
- The Queensland Law Society
- The Victorian Bar

The Law Council also thanks its Family Law Section and its Legal Practice Section's Superannuation Committee for their input to this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Treasury in relation to its January 2023 discussion paper, *Access to offenders' superannuation for victims and survivors of child sexual abuse* (**Discussion Paper**).

2. Compulsory superannuation was introduced in Australia for the purpose of delivering 'private income to enhance the living standards of retired Australians'[1] and reducing the financial burden on government by providing individuals with an 'adequate social security safety net.'[2] Since its introduction, superannuation has developed into a critical asset for working Australians, safeguarding the ability to maintain a comfortable standard of living in retirement by delivering financial security, independence and dignity.

3. For this reason, strict regulations apply to compulsory superannuation contributions to ensure that accumulated funds are preserved for the intended purpose of providing retirement income. The law allows for superannuation funds to be accessed prior to retirement in a very limited number of circumstances and subject to strict criteria, including, for example, for reasons of demonstrable financial hardship.

4. The Law Council notes that the Australian Government is presently consulting on two proposals that would allow victims and survivors (**victim-survivors**) of child sexual abuse to access the superannuation of a convicted offender for the purpose of receiving unpaid compensation orders. The first proposal permits the release of 'additional' contributions to an offender or their spouse's superannuation to satisfy an unpaid compensation order. The second relates to improving transparency by providing visibility of superannuation accounts to determine the value of such 'additional' contributions.

5. The Law Council welcomes appropriate measures to support victim-survivors of child sexual abuse. It supports the policy intent behind the reforms proposed in the Discussion Paper, namely, to prevent convicted perpetrators of child sexual abuse from hiding assets in their superannuation to defeat compensation claims made by victim-survivors. It also notes that the proposals are carefully limited to ensure that the fundamental purpose of superannuation is not undermined or compromised.

6. However, as a membership-based organisation, the Law Council has an obligation to consult with its Constituent Bodies, Sections and expert committees on matters of policy. The limited consultation period has constrained the Law Council's ability to engage at a detailed level with the proposals and questions in the Discussion Paper. In the consultation timeframe provided, some members of the Law Council's Constituent Bodies have expressed concerns about the proposals and were not supportive of the reforms. Other members, while supportive of the proposals, were concerned they may create unintended consequences in their current form and have indicated a need for more nuance and clarity for some aspects of the proposals.

7. These are clearly matters where reasonable minds across the legal profession differ, given they engage multiple and complex aspects of legal practice, including criminal, civil litigation, family, taxation and bankruptcy. Many of the topics included in the Discussion Paper will require a separate and intensive consultation with experts in the relevant area of law. Nonetheless, a consistent theme in the feedback received is

[1] Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System, Final Report (Part One, 2010) <https://treasury.gov.au/sites/default/files/2019-03/R2009-001_Final_Report_Part_1_Consolidated.pdf> 15-16.
[2] Ibid.

that the proposals be reconsidered to achieve the policy intent more precisely and to mitigate any unintended consequences.

8. Due to the range of views received and the limited consultation timeframe provided, there has been insufficient opportunity for the Law Council to establish consensus positions in relation to many of the questions posed in the Discussion Paper. The Law Council's views in this submission should therefore be considered preliminary. Where a range of positions have been provided and the Law Council has not had an opportunity to formulate a preliminary position, the range of views of its respective Constituent Bodies and Section committees have been provided.

9. The Law Council encourages further consultation which comprehensively considers the varied and complex topics in the Discussion Paper, and looks forward to continuing to engage with the Treasury as consideration of this significant reform progresses.

Proposal One: Accessing superannuation for unpaid compensation orders

Scope of eligible child sexual abuse offences

Definition of 'child sex abuse offence'

10. The Law Council acknowledges the policy intent of the proposal is to provide the best possible outcomes for victim-survivors of child sexual abuse and notes the particular vulnerabilities of such group. In this regard, the Law Council understands the rationale for defining the scope of eligible child sex abuse offences broadly, by applying to:

- offences falling within the definition of 'child sexual abuse offence' outlined in section 3 of the *Crimes Act 1914* (Cth); and
- offences in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) in circumstances where the victim-survivor was a child and the exploitation (or intended exploitation) was sexual in nature.

11. However, the Law Council is of the view that more nuance in the definition of 'child sex abuse offence' would be appropriate. It notes that the proposed scope of eligible offences would include offences for which there is no victim-survivor to receive compensation, such as possession of child-like sex dolls,[3] which falls under section 3 of the Crimes Act. The Law Council therefore suggests that the scope of eligible offences be more closely considered and revised to only include those offences of relevance to the policy intent of the proposed reforms.

12. More broadly, the Law Council suggests more details are required on the policy intent behind focussing only on child sexual abuse offences, noting that there may be other offences, including modern slavery offences, that justify similar consideration.

[3] *Criminal Code Act 1995* (Cth) div 273A.

‘Additional’ contributions and other eligible monies

13. The Law Council considers that the definition of ‘additional’ contributions is particularly important, as it is central to the capacity of the scheme to achieve its objectives. Under the proposed 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-survivor access to the offender’s relevant superannuation interest, would be deemed to be ‘additional’.[4]

Scope

14. The rationale for the proposed new recovery mechanism appears to be based on the assumption that a convicted offender has engaged in two separate kinds of conduct that negatively affect the interests of the victim-survivor. First, the offender has committed the underlying offence, typically causing severe personal harm. Secondly, the offender is deemed to have placed assets beyond the reach of the victim-survivor, causing financial harm. The proposed mechanism is limited to recovery of assets affected by the second kind of conduct.

15. The Discussion Paper makes clear that this is because the principal concern of the proposal is to counteract offenders who place their assets beyond reach because the offenders perceive that there may be a later claim for compensation.[5]

16. The Law Society of South Australia (**LSSA**) is of the view that there are potential justifications for casting a wider net than proposed, including that:

- it might be said that the first category of conduct (the underlying offence) provides a greater moral justification for the abrogation of the usual rule that superannuation savings are protected until retirement, irrespective of whether there is any connection between the conduct and the asset; and
- there is clearly a benefit to victim-survivors in increasing the scope to include all superannuation assets, or additional contributions plus any monies above a certain threshold.

17. Conversely, the Law Institute of Victoria (**LIV**) recommends a narrower scope for recovery, given that there are many legitimate reasons why people make additional voluntary personal contributions to their superannuation and/or to their spouse’s superannuation accounts and it arguably should not be the purpose of the scheme to enable victim-survivors to access such contributions. The LIV further suggests that considering people in custody generally experience financial and social hardship upon their release, any proposed claim on a person’s superannuation should be assessed in order to show that the additional voluntary contributions were made with the purpose of minimising the offender’s assets to avoid the payment of compensation.

18. In this regard, consideration should be given to affording offenders and their spouses the capacity to put forward a case as to the legitimacy of certain voluntary contributions where appropriate: that is, an opportunity to rebut the presumption that the contribution was intended to defeat the potential claim of the victim-survivor.

[4] The Treasury, Access to offenders’ superannuation for victims and survivors of child sexual abuse (Discussion Paper January 2023) 9.
[5] Ibid 5.

19. A further area of consideration is how contributions that have been relied upon by a spouse, for example through an early access to superannuation scheme, would be impacted should a conviction be successfully appealed or compensation order altered in any way.

Transfer balance cap

20. The Law Council notes that the total amount of superannuation a person can transfer into a tax-free retirement account is capped. At present, the general transfer balance cap is $1.7 million.[6]

21. The Discussion Paper does not address circumstances where an offender has reached the transfer balance cap. In this regard, the Law Council suggests that any superannuation monies an offender receives that would increase their super balance above the general transfer balance could be considered 'additional' for the purpose of this scheme.

Technical considerations

22. The Law Council considers that the characterisation of 'personal contributions' made to a member's account which count as 'additional' contributions will require some precision, and will need to match reporting obligations of trustees and employers.

23. The Law Council notes that the Discussion Paper does not propose a definition of 'personal contributions'. However, the policy intent appears to be that only voluntary contributions are intended to be caught. This would include:

    (i) salary sacrifice contributions (i.e., contributions that the member elects to make by way of salary sacrifice);

    (ii) post-tax contributions remitted by the member's employer (which the employer should report as personal contributions of the member); and

    (iii) contributions made by the member, whether or not a tax deduction is claimed, and contributions made for the member by their spouse (or any person other than their employer).

24. In each of the above cases, contributions that fund rules prescribe are to be made by the employer or the member would be excluded.

25. The Law Council notes that it should be feasible to make this characterisation of contributions from current requirements for data that employers are required to report to trustees, and that trustees are required to report to the Australian Taxation Office (**ATO**). Employer reporting to trustees should identify contributions (i) and (ii) above; the trustees record data supplied by members for (iii); and trustee reporting to the ATO should then transmit this data.

26. However, as contribution data that trustees report to the ATO is substantially sourced from data supplied by employers and members when the contributions are made, the accuracy of contribution data that the ATO holds will be heavily dependent on the accuracy of data that was supplied to trustees by employers and members.

[6] Australian Taxation Office, Transfer balance cap (Web Page, August 2022) <https://www.ato.gov.au/individuals/super/withdrawing-and-using-your-super/transfer-balance-cap/>.

27. The Law Council therefore considers that there may be some challenges in correctly identifying contributions that are properly classified as 'additional contributions', even if the legislated definition is clear.

Which of the two proposed periods, six or 12 months prior to an offender being charged, is preferred for the deeming of 'additional' contributions?

Should courts be given discretion to deem 'additional' contributions over a period longer than six or 12 months prior to an offender being charged?

Preferred period

28. While the Law Council does not yet have a settled position on this matter, several of its Constituent Bodies have raised concerns about the approach of the proposed objective test, or 'deeming period', for recoverable additional contributions:

- The LIV, LSSA and Queensland Law Society (**QLS**) consider that the nominated period of six to 12 months is insufficient and arbitrary, given that investigations in abuse cases tend to be protracted, particularly in historical abuse cases where there are often multiple occurrences and multiple victim-survivors. As such, the formal charge may not occur until years after the first interview of the offender, and the nominated period must be long enough to take into account additional contributions made during this significant length of time.
- Further, the LSNSW is of the view that creating a set timeframe wherein any additional contributions made by a convicted offender to superannuation are deemed recoverable for compensation goes beyond the policy intent of targeting offenders who deliberately shield their assets in superannuation.

29. If a defined period of either six or 12 months is ultimately adopted, an exception would likely be required if the offending took place more than six or 12 months before the charge was laid. Consideration should be given to other potentially appropriate exceptions to what would otherwise be recoverable additional contributions, such as:

- inheritances;
- sale of businesses;
- contributions that can be shown to have been made according to a long-standing practice or financial plan; and
- pending retirement-driven transactions.

30. Consideration will also need to be given to:

- whether the amount of additional contributions should be adjusted for investment gains or losses between the date of contribution and the date of any payout; and
- ensuring that the legislation does not leave unintended 'gaps' in the deeming period, for instance, that there is no scope for a person who is subject to a compensation order to make additional contributions to a superannuation fund *after* the compensation order has been made.

Court discretion

31. The Law Council considers that a discretion for the Court to deem 'additional' contributions over a period longer than six or 12 months would be warranted, where the Court is satisfied that the main purpose of the contribution was to prevent the amount of the contribution from becoming available for a compensation order.

32. The grounds on which a Court might be satisfied could be adapted from section 128B of the *Bankruptcy Act 1966* (Cth), regarding superannuation contributions made to defeat creditors, for example:

- the person's main purpose is taken to be the proscribed purpose if it can reasonably be inferred from the circumstances that, at the time of the contribution, the person might become subject to a compensation order;
- in determining whether the person's main purpose in making the contribution was the proscribed purpose, regard is to be had to:
  - whether, during any period ending before the contribution, the person had established a pattern of making contributions to one or more superannuation funds; and
  - if so, whether the contribution, when considered in light of that pattern, is out of character.

Alternative approaches to defining the period to which an objective test should apply are also welcome.

33. In line with the concerns expressed by some Constituent Bodies of the Law Council, that the proposed deeming period is unjustifiably narrow and arbitrary (see above), the following alternative deeming periods could be considered:

- from the date of the offence(s) to the day the court grants the victim-survivor access to the offender's relevant superannuation interest;
- from the date the offender is formally notified of the allegation/investigation, which is generally at the first police interview, to the day the court grants the victim-survivor access to the offender's relevant superannuation interest; or
- from either six or 12 months from the date on which the offender is first formally noticed of the allegation.

Such approaches would appear to overcome the need for the courts to be given discretion to deem 'additional' contributions.

34. Conversely, consideration could be given to increasing the courts' discretion and possibly removing the deeming period altogether to require the relevant court to assess the full facts of contributions once a claim against an offender's superannuation is made. However, it is unclear from the Discussion Paper where these claims will ultimately be heard.

35. Separately, and as noted above, the apparent rationale of the proposed new mechanism is to make available assets of the offender that have been placed beyond the reach of the victim-survivor. The underlying concept is the same as the framework pursuant to section 128B of the Bankruptcy Act for unwinding 'out of character' superannuation contributions which are intended to be placed beyond the reach of creditors.

36. The reason for not adopting the more nuanced 'out of character' standard (and instead proposing a time-based deeming period for payments) is not apparent from the Discussion Paper. While the Discussion Paper addresses the Bankruptcy Act regime, this is only in respect of the ultimate distribution, without advancing any clear reason why the seemingly arbitrary objective time-based test should apply.

Should in-scope superannuation account holders 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?

Spouses

37. The proposed scheme may give a victim an entitlement to payment from any 'additional contributions' made to the superannuation entitlements of the spouse of an offender. The Discussion Paper references the possibility that payments to victim-survivors may be made from a spouse's superannuation 'if it is shown that the offender transferred monies' to the spouse's account during the deeming period.[7] The Law Council seeks greater clarity about how this will be determined in practice, and emphasises that the scheme should never capture contributions made by a spouse to their own superannuation account, subject to the comments below in this section.

38. Reporting of non-employer contributions by superannuation trustees depends on the data provided by the member for whom the contribution was made. The Law Council understands that many couples have a practice of mixing their post-tax income (for a variety of reasons, including management of expenses) and assessing their respective voluntary superannuation contributions based on factors such as the allocation of tax deductions between them and the availability of a rebate for eligible spouse contributions, having regard to their respective levels of income.

39. The information that is provided to the superannuation trustee about non-employer contributions made for a spouse of an offender could legitimately identify the contribution as an eligible spouse contribution (made by the offender for their spouse for which a rebate is claimed) or as a personal contribution made by the spouse (either as a non-concessional contribution or for which a tax deduction will be claimed).

40. Where there is a practice of mixing income, the question arises as to how the 'source' of the contribution is identified, for instance:

- a contribution identified as an eligible spouse contribution (made by the offender for their spouse) could have been funded from income that should fairly be treated as income originally earned by the spouse; or
- conversely, a contribution identified as a personal contribution made by the spouse could have been funded from income that should fairly be treated as income originally earned by the offender.

41. The Law Council is of the preliminary view that some form of recourse to contributions made for an offender's spouse would be warranted to avoid offenders escaping the contribution recovery regime by funding contributions for their spouse. However, the basis for recovering contributions made for a spouse will need consideration to ensure equity for offenders' spouses.

[7] The Treasury, Access to offenders' superannuation for victims and survivors of child sexual abuse (Discussion Paper January 2023) 9.

42. Formulating a fair and reasonable mechanism for appropriately identifying the 'source' of the funding for a non-employer contribution made for the spouse of an offender will present challenges.

43. A possible approach, suggested by the Law Council's Superannuation Committee, is for the legislation to require that, before the Court makes an order affecting a spouse's contribution, in addition to the requirement that there are insufficient assets of the person subject to the compensation order, the Court is also satisfied that the main purpose of the contribution was to prevent the amount of the contribution from becoming available for a compensation order against the offender.

44. If the Court is to enquire into the legitimacy of additional contributions made to a spouse's superannuation account, consideration could be given to the legislative 'out of character' test to determine such legitimacy within section 128B of the Bankruptcy Act.

45. As with additional contributions to an offender's own superannuation account, the LIV suggests that the Court should have discretion to exempt additional contributions made by an offender to their spouse's superannuation accounts in certain limited circumstances—for example, where there is evidence of a long-standing pattern of additional contributions to the spouse's account, tending to indicate their legitimacy.

46. Further, the Law Council suggests that any proposed reform in this area should carefully consider the availability of exceptions for additional contributions made to a spouse's account from a joint bank account or from the proceeds of a jointly owned property.

Other parties

47. The Law Council is aware of concerns that the proposals carry with them the potential for family members, including dependants, of the perpetrator to carry the financial consequences of that person's offending.

48. The Law Council's Superannuation Committee is of the view that superannuation contributions for the benefit of a person's parents, children or other relatives would be highly unusual in the normal course, and would not be flagged in superannuation trustee reporting. Such contributions would be recorded as personal contributions of the parent or child. Therefore, the contributions reporting regime will not identify such contributions as contributions made by the offender.

49. The Superannuation Committee suggests that an alternative regime for accessing any such contributions may be appropriate—for example, a regime for voiding the contribution similar to section 128B of the Bankruptcy Act. Similarly, the LSNSW suggests that the Government may consider empowering courts, in determining these applications, to make factual findings on the balance of probabilities about whether an offender deliberately hid assets in superannuation accounts to avoid paying compensation to victim-survivors, including whether those assets were hidden in the accounts of others.

50. Alternatively, if it is deemed necessary to limit access to contributions made by the offender to other parties, the QLS suggests that the court 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.

51. While it is possible that the above approaches may have workload implications for the courts, it would assist in mitigating the unintended consequences of injustice,

particularly for innocent superannuation account holders, noting that in some cases, an offender's spouse and/or children may also be victim-survivors of sexual abuse.

Treatment of defined benefit schemes

52. The Law Council notes that the Government is not currently minded to specifically include defined benefits schemes in this proposal, either in the retirement or accumulation phase.[8]

53. The Discussion Paper advises that the default settings should adequately cover defined benefits on the grounds that employee contributions to defined benefit schemes are generally limited to those mandated by their employer or the fund rules, and any additional contributions are likely to be credited to a secondary account-based arrangement for personal contributions which would be subject to the standard rules for 'additional' contributions.[9]

54. While the Law Council agrees that this is the likely position for most defined benefit funds, it strongly suggests that an analysis of Commonwealth, State and Territory public sector schemes should be undertaken to identify any arrangements that might not align with these assumptions. It is feasible that a defined benefit scheme could provide a mechanism for a member to 'purchase' an increased defined benefit accrual by making a higher level of contributions.

Bankruptcy proceedings

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

Feasibility

55. Prior to the entry of judgment or any agreement for payment of compensation, a claim by a victim-survivor of sexual abuse will usually be unliquidated and therefore not provable in the bankruptcy of the perpetrator.[10] Claims that are not provable will survive bankruptcy.

56. A sexual abuse claim is liquidated (i.e., ceases to be unliquidated) if, and when, it becomes the subject of a judgment or order, or agreement between the victim-survivor and the perpetrator. If the claim is liquidated before bankruptcy occurs, then the claim is a provable debt. Generally, a debt that is provable in bankruptcy does not survive bankruptcy. Bankruptcy usually causes a provable debt to be converted into a 'right to prove' in the bankruptcy, and such a debt is released upon discharge from bankruptcy.

57. However, subsection 153(2) of the Bankruptcy Act sets out various debts which survive bankruptcy. Those categories include:

- a debt incurred by means of fraud or a fraudulent breach of trust;[11] and
- liabilities under a maintenance agreement or maintenance order.[12]

[8] Ibid 10.
[9] Ibid.
[10] See *Bankruptcy Act 1966* (Cth) s 82(2). There may be exceptions to this, for example, where the conduct constitutes a breach of contract.
[11] Ibid para 153(2)(b).
[12] Ibid para 153(2)(c).

58. In 2022, the Court of Appeal of the Supreme Court of Victoria explained that debts incurred by means of fraud may both be provable in bankruptcy and survive bankruptcy.[13]

59. The Law Council accordingly considers that section 153 of the Bankruptcy Act could feasibly be amended to allow provable debts that relate to child sexual abuse claims to survive bankruptcy. A victim-survivor could elect to split the debt into two, and seek to recover part of the debt by proving the debt in the bankruptcy, and seek to recover the balance by enforcing the compensation debt against the offender or bankrupt person.[14]

Appropriateness

60. The Law Council notes that bankruptcy affects all creditors of a bankrupt person. Careful consideration should therefore be given as to whether compensation debts should survive. In this respect, it may be more appropriate to incorporate the special treatment of compensation debts within the bankruptcy regime so that the fundamental concept (and protections) of bankruptcy—a fresh slate—is not diluted.

61. In any event, the Law Council considers that the likelihood of the offender accumulating significant assets post-bankruptcy is low, noting that they may be incarcerated. Further, an offender is unlikely to attempt to accumulate assets where they are aware that a compensation order is lingering. For these reasons, ensuring the survival of a compensation order post-bankruptcy will most likely deliver no tangible benefit.

Is it appropriate to require superannuation funds to confirm whether the relevant member is subject to a bankruptcy proceeding via the National Personal Insolvency Index (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?

62. While the Law Council considers that these requirements are likely to be feasible, there will be costs and implementation implications. The legislative provisions that require superannuation funds to:

- confirm whether a member for whom the fund has received a compensation order is subject to a bankruptcy proceeding; and
- retain funds that are subject to a release order until a bankruptcy is finalised

will introduce additional administrative obligations that superannuation trustees will need to factor into their systems. The systems will also need to be upgraded to set up compliance measures.

63. Accordingly, the Law Council suggests that further engagement with the superannuation industry will be needed for this measure, to allow for a realistic implementation period for systems upgrades.

[13] *Barodawala v Perinparajah* [2022] VSCA 198 [93]-[99] (Kyrou, Sifris and Walker JJA).
[14] See, however, *Limitation of Actions Act 1958* (Vic) s 5(4) which imposes a 15 year limitation from the date of judgment for an 'action on a judgment'. Leave may be required to issue execution: See, for example, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 68.02(1)(a).

64. The interest of a bankrupt person in a regulated superannuation fund and a payment made from such a fund is not property divisible amongst creditors in the bankrupt's bankruptcy:[15]

> *The policy … is to encourage thrift and induce a man to provide for his own, so that they may not become a burden on the State, and the protection of the fund from creditors is the inducement offered and a necessary incident of the transaction.*[16]

Accordingly, such interests are not generally available to creditors through the bankruptcy process.

65. An alternative approach for protecting compensation orders in an offender's bankruptcy, if this is the preferred policy position, could be to simply exclude from property divisible among a bankrupt person's creditors any amount paid from the member's superannuation fund under a release order. This would avoid the need for superannuation trustees to implement procedures for checking bankruptcy records.

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?

66. Sub-paragraph 41(3)(c)(i) of the Bankruptcy Act prohibits the issue of a bankruptcy notice in respect of a judgment or order more than six years old.[17]

67. Like many other limitation periods, the policy intent underpinning this requirement likely includes providing certainty for the debtor and other persons who might deal with the debtor. It is desirable for those people to be able to arrange their affairs and utilise their resources on the basis that a bankruptcy notice cannot be issued in relation to those debts after the expiry of six years.

68. In Victoria, the relevant rules of the court governing the issue of execution of a judgment provide that forms of enforcement and execution may be issued at any time within six years from the date of the judgment. After that time, the creditor usually must apply to the court for leave to issue execution.[18] Leave may be granted if a creditor is able to sufficiently explain its delay in seeking to enforce a judgment.[19] The court will also consider any prejudice to the defendant.

69. There do not appear to be any debts or liabilities that are excepted from the requirement in sub-paragraph 41(3)(c)(i) of the Bankruptcy Act. The debts that are not released by bankruptcy, such as debts incurred by means of fraud and liabilities under a maintenance agreement or maintenance order, are not excepted from the requirement.[20]

70. The Law Council notes that other sections of the Bankruptcy Act restrict a creditor from issuing a bankruptcy notice in respect of a judgment or order, where the enforcement of which has been stayed.[21] However, it appears that the relevant provisions do not prevent a creditor from relying on a judgment, the enforcement of

[15] *Bankruptcy Act 1966* (Cth) sub-paras 116(2)(d)(iii) and (iv).
[16] *Estate of Adams (Deceased*) (1895) 5 NSWBC 38, 43 (Manning J).
[17] This requirement was introduced by paragraph 24(1)(b) of the *Bankruptcy Amendment Act 1980* (Cth).
[18] See, for example, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 68.02(1)(a).
[19] *Dennehy v Reasonable Endeavours Pty Ltd* [2001] VSC 447 [11] (Pagone J).
[20] *Bankruptcy Act 1966* (Cth) paras 153(2)(b) and (c).
[21] Ibid ss 40(1)(g), 41(3)(b).

which has been statute-barred, rather than stayed, by an order of a court exercising control over its own process by staying the execution of one of its judgments.[22]

Family law proceedings

71. The Discussion Paper suggests that, under the scheme, a spouse's entitlements would be out of reach to a victim-survivor where family law proceedings are ongoing, or after the finalisation of family law property proceedings to preserve the intention of a 'clean break' in finances.[23]

72. The Law Council does not have a settled position in relation to the questions in the Discussion Paper relating to family law proceedings. It notes the comments in the Discussion Paper regarding the previous consultation in 2018 and the prevailing view that family law proceedings should be completed prior to victim-survivors being able to access offenders' superannuation funds. However, this could result in victim-survivors waiting a significant time to access funds.

73. On the other hand, the deferral of family law proceedings may allow a property settlement to be structured such that it defeats, or materially reduces, a victim-survivor's claim. It may also close the door to any additional contributions made to a spouse's superannuation. There is also a need to have regard to the potential for separations that are not bona fide.

74. The Law Council notes that the *Family Law Act 1975* (Cth) requires parties to advise or declare if the proposed property settlement may affect the interests of creditors and compensation payments. If a settlement has had the effect of defeating a claim of a third party, it may be challenged and set aside.[24]

75. Accordingly, the Law Council seeks greater clarity on whether the protection of the entitlements of spouses or former spouses of offenders will apply where no superannuation splitting orders are made or required in family law property proceedings, such as where parties each retain their existing superannuation (including any additional contributions) or where a Superannuation Agreement is made under the Family Law Act.

76. Family law practitioners are well aware of the intricacies involved in requiring superannuation funds to release monies. Members of the Law Council's Constituent Bodies have highlighted that, as a large proportion of superannuation is held in commercial funds, it will be necessary to consult with the 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.

77. 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 override a superannuation trust deed. The Law Council notes that many family law settlements occur by consent through the application for consent order process, and others are finalised via a binding financial agreement. In each instance, whether the

[22] *Dennehy v Reasonable Endeavours Pty Ltd* (2003) 130 FCR 494 [4] (Finkelstein J, Madgwick J agreeing at [1], Dowsett J agreeing at [21].
[23] The Treasury, Access to offenders' superannuation for victims and survivors of child sexual abuse (Discussion Paper January 2023) 13.
[24] See, for example, *Family Law Act 1975* (Cth) s 79(10), which provides for persons whose interests would be affected by the making of the order to apply to become a party to proceedings.

payment or splitting of superannuation funds to the offender's spouse was intended to defeat the claim of a creditor will need to be assessed.[25]

Tax treatment of released superannuation

78. The Law Council supports the proposal in the Discussion Paper to treat released compensation amounts as non-assessable, non-exempt income when paid to the victim-survivor, and agrees this will provide the greatest possible likelihood of the full value of the compensation order being paid.[26]

79. The Law Council also supports the proposal that the post-tax value of a concessional contribution is the amount available for a compensation order.[27]

Other issues for consideration

Parallel court proceedings

80. The Law Council notes that an offender may simultaneously be the subject of other court proceedings that potentially concern a claim to their superannuation, and that the Discussion Paper invited stakeholder views on the proposal that compensatory proceedings should not be allowed to commence while other proceedings are on foot.[28]

81. While noting that it seems logical for other proceedings to conclude, the Law Council considers that substantial delays may also result from allowing this to occur.

Balancing competing interests in superannuation

82. While an offender faces criminal consequences, the Law Council notes that the offender's family may be subjected to the ongoing social and financial impact of the offender's conduct, including the loss of any income provided or child support payable by the offender while they are incarcerated.

83. The Law Council accordingly recommends that, where superannuation is the primary asset of an offender with dependent children, the Court be required to consider the impact that any order to pay compensation from additional contributions will have on parties with an accumulated or secondary interest in the superannuation, such as the offender's children.

Notification to spouse

84. The Law Council would support an opportunity for an offender's spouse to be heard before the Court in relation to any additional contributions made to their accounts in the relative deeming period.

85. Any process to notify a spouse of an order under the scheme should ensure that the spouse receives the notification as early as practicable, understands the consequences of the scheme, and is provided an opportunity to challenge the order or acknowledge that they have no further claim to the relevant amount of additional contributions.

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[25] *Family Law Act 1975* (Cth) s 106B(4AA).
[26] The Treasury, Access to offenders' superannuation for victims and survivors of child sexual abuse (Discussion Paper January 2023) 13.
[27] Ibid 14.
[28] Ibid 15.

86. The notification is of particular importance where parties to a family law matter have reached a financial agreement or property settlement, and the spouse may not otherwise be aware of a victim-survivor's intention to access the scheme. The Law Council notes that this would create resourcing questions, such as whether the spouse would be eligible for legal assistance in such circumstances if required.

Timeframe for payment of compensation order

87. The Law Council notes that the Discussion Paper provides that:

> *… 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.*[29]

88. However, compensation orders generally specify that payment is required within 28 days. As such, the Law Council queries why a significantly longer period is being proposed before compensation is considered to be unpaid.

Record of superannuation withdrawals for the purpose of compensation

89. The Law Council queries how the withdrawal of additional contributions for the purposes of compensation under the scheme will be recorded by the relevant superannuation fund, including in any member statements.

90. It is unclear from the Discussion Paper whether an offender's spouse may be made aware through disclosure or notice that a withdrawal from the offender's superannuation account was for the purposes of compensation under the scheme.

91. The Law Council cautions that the ability to obtain full financial disclosure in family law proceedings must be balanced against any right an offender might have to withhold, or not disclose, such information.

Retrospectivity

92. The Law Council notes that the Government expects that Proposal One will apply retrospectively, in terms of the historical offences that are eligible, as well as the personal superannuation contributions that could be accessed.[30]

93. As a rule of law issue, the Law Council opposes retrospective application of proposed reforms and it is concerned about the unintended consequences that may result if Proposal One is introduced with retrospective effect. Nonetheless, the Law Council acknowledges that there may be instances where it would be in the interests of justice for the scheme to apply retrospectively.

94. The Law Council notes that the full extent of Proposal One's retrospectivity is yet to be determined and subject to further consultation,[31] and it would therefore be grateful for the opportunity to provide further feedback on any proposed retrospective element of the reform once consideration of the proposed options are more advanced.

Access to justice and equity for victim-survivors of other serious crimes

95. The Law Council notes that victim-survivors will need to obtain a conviction via criminal proceedings in the first instance to be able to benefit from this proposal.[32]

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[29] Ibid 7.
[30] Ibid.
[31] Ibid.
[32] Ibid.

The proportion of victim-survivors who would elect to go through such process, which can be retraumatising, is uncertain. Further, some members of the Law Council's Constituent Bodies are of the view that consideration should be given to whether a lesser standard of proof than 'beyond reasonable doubt' should apply.

96. Further, the Law Council considers that the proposals would likely have a disproportionate effect, since a victim-survivor who is pursuing a wealthy offender would be more likely to secure compensation, where those pursuing a less-financially secure offender would be unlikely to recover a substantial sum.

97. The Law Council notes that this proposal applies exclusively to victim-survivors of child sexual abuse in criminal or civil compensation proceedings and acknowledges that there are differing views regarding whether the proposal ought to be broadened to promote equity for victim-survivors of other serious crimes. For instance, the LSSA has suggested that careful consideration should be given to expanding the proposal to victim-survivors of other serious crimes with common characteristics to child sexual abuse, such as:

- the vulnerability of the victim-survivors;
- the lasting nature of the harm caused; and
- the nature of the offence, given that it is committed for personal gratification.

98. The LIV has expressed the need for caution when extending similar schemes to other offenders, given the critical safety-net that superannuation provides. In this respect, the Law Council emphasises that an appropriate level of consultation should occur before any such proposals take shape.

Proposal Two: Providing visibility of superannuation accounts

99. In relation to Proposal Two, the Law Council supports the development of a mechanism to provide transparency to victim-survivors of 'additional' contributions which are made by an offender to their own or their spouse's superannuation accounts through the courts.

100. It appears feasible upon, or after, a criminal conviction to make available information regarding the offender's superannuation that may be available to meet an award of compensation.

101. The Law Council notes that the proposed mechanism for accessing information about an offender's superannuation, once a compensation order is made, is a process for submitting an information request form through the relevant court, which would then be lodged with the ATO. The Discussion Paper provides 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.'[33]

102. The process for obtaining access to superannuation information, as set out in the Discussion Paper, appears sensible, and is similar to the process currently available for superannuation requests through the Federal Circuit and Family Court of Australia.[34] The Law Council accordingly supports leveraging existing visibility

[33] Ibid 16.
[34] See Federal Circuit and Family Court of Australia, Family Law and Superannuation (Web Page, 2022) <https://www.fcfcoa.gov.au/fl/pubs/superannuation>.

mechanisms for accessing superannuation information for the purposes of both proposals.

103. As noted for Proposal One, the Law Council notes that the policy intent appears to be that *voluntary* contributions are intended to be caught. This would include:

- salary sacrifice contributions (i.e., contributions that the member elects to make by way of salary sacrifice);
- post-tax contributions remitted by the member's employer (which the employer should report as personal contributions of the member); and
- contributions made by the member, whether or not a tax deduction is claimed, and contributions made for the member by their spouse (or any person other than their employer).

In each of the above cases, contributions that fund rules prescribe are to be made by the employer or the member would be excluded.

104. The Law Council understands that this characterisation of contributions should be feasible from current reporting obligations of employers and trustees, but reiterates that the accuracy of data is dependent, to some extent, on data sourced from employers and members, and that trustees and the ATO will not necessarily be aware of errors in that data.

105. As flagged in the Discussion Paper, information provided to the ATO will have a 'lag' period,[35] and it is noted that up-to-date contribution information may need to be sought from trustees. It may therefore be appropriate to consider whether the relevant information can be reasonably obtained from the relevant superannuation fund(s) and not the ATO, thereby avoiding the data being out of date due to delays associated with statutory reporting requirements to the ATO.

106. The Law Council suggests that the legislation would need to include a prescribed process for information requests submitted to trustees, and trustees will need time to implement upgrades to their systems to meet such requests. Notably, the information that will need to be provided is different to family law requests (which require information about the value of the superannuation benefit), and trustees will need to collate contribution data to identify the contributions that meet the definition of 'additional contributions'.

107. The Law Council also suggests that the legislation should specify that trustees do not have liability for errors in data provided, or that they are only required to extract information from specified fields used for their ATO reporting.

108. The Law Council accordingly considers that it may be necessary for a victim-survivor to be provided with more information than merely that relating to additional contributions, noting that:

- data that the ATO holds about contributions may not readily or accurately identify 'additional' contributions;[36] and
- it may be relevant to understand withdrawals, splits, investment earnings, losses and the like, to have sufficient appreciation as to what funds might be available.

109. As noted above for Proposal One, the Law Council emphasises that it is standard practice within civil proceedings for damages to be paid within 28 days. It is not clear

[35] The Treasury, Access to offenders' superannuation for victims and survivors of child sexual abuse (Discussion Paper January 2023) 16.
[36] See above, paras [22]-[23].

from the Discussion Paper why a significantly longer period of 12 months is being proposed.[37] Accordingly, some members of the LIV and QLS do not support a requirement for victim-survivors to wait a minimum of 12 months from the date of a civil order to commence the visibility process, and request that a rationale be provided for the inclusion of this requirement. As an alternative, those members would prefer that a victim-survivor could, under any implemented scheme, commence the visibility process if compensation has not been paid within the standard 28-day time period.

110. Finally, in relation to the family law proceedings, the Law Council queries whether an offender's spouse will receive notice when a request is made for visibility of an offender's superannuation, and whether this position would change if there were family law proceedings on foot.

[37] The Treasury, Access to offenders' superannuation for victims and survivors of child sexual abuse (Discussion Paper January 2023) 16.