



Australian Government
The Treasury

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Review of superannuation and victims of crime compensation

Further consultation and draft proposals

May 2018

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Contents

Consultation process	4
Executive summary	5
Draft proposal 1: Preventing use of superannuation contributions to shield assets from victims of crime	6
Issue 1: Limits and thresholds	7
Issue 2: Visibility of assets	8
Issue 3: Determining whether contributions are ‘out of character’	8
Issue 4: Process for recovering money	9
Issue 5: Taxation rate applied to compensation	9
Draft proposal 2: Allowing uncompensated or partially compensated victims of crime broader access to the perpetrator’s superannuation balance	10
Issue 1: Burden of proof.....	11
Issue 2: What crimes should be covered?.....	11
Issue 3: What victims should be eligible?	11
Issue 4: Types of unpaid compensation orders.....	12
Issue 5: How to ensure that access to superannuation is a last resort.....	12
Issue 6: Balancing the rights of the victim with the rights of the perpetrator’s dependants.....	12
Issue 7: Application of the draft proposal to pre-existing convictions and unpaid compensation orders	14
Issue 8: Recovery of costs by state and territory compensation schemes	14

Consultation process

Request for feedback and comments

Treasury welcomes comments and feedback on the draft proposals. 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 are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Closing date for submissions: 15 June 2018

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Executive summary

In December 2017, the Government commenced a review into early release of superannuation on severe financial hardship and compassionate grounds. As part of this process it sought views on whether superannuation should be available to meet unpaid victims of crime compensation orders.

The Review received over sixty submissions in response to its initial consultation paper. It also held ten roundtables and conducted several bilateral meetings with stakeholders.

On 26 March 2018, the Minister for Revenue and Financial Services announced that the Government would legislate to ensure that victims of serious crimes will be able to access the perpetrator's superannuation. She indicated that the Government hoped to introduce relevant legislation by the end of this year.

This paper focuses on access to superannuation for victims of crime compensation. Broader issues relating to early release on compassionate and severe financial hardship grounds will be progressed through a separate process.

The purpose of this paper is to consult on two draft proposals that would provide victims of crime with access to a perpetrator's superannuation in certain circumstances. Responses to the paper will inform the development of legislation on this issue. The first draft proposal aims to prevent criminals from using superannuation to shield assets from victims of crime. It would allow victims of crime to claw back 'out of character' contributions. This would be achieved by amending the current early release provisions to require trustees to pay amounts into court in response to a claw-back order (either directly to court or through some mechanism to centralise and streamline release and payment). The first draft proposal would only apply to particular contributions rather than the perpetrator's entire superannuation balance.

The second draft proposal would allow victims of serious crimes with unpaid compensation orders to access a perpetrator's entire superannuation balance (not just particular contributions) where other assets have been exhausted. This draft proposal is based on the principle that the interests of uncompensated or partially compensated victims of crime should be prioritised over the retirement income needs of the perpetrator. This draft proposal also includes safeguards to protect the interests of dependants of a perpetrator.

The States and Territories will play an important role in ensuring the draft proposals can work within their current legislative and administrative frameworks for compensating victims of crime. It is important that any legal complexities, including in the interactions of Commonwealth and state and territory laws and procedures, do not undermine the principle of ensuring superannuation is available for compensating victims of crime in appropriate circumstances.

The Review seeks stakeholder feedback on the two draft proposals by **15 June 2018**.

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

Key points

- Perpetrators of crime should not be able to contribute assets to superannuation in order to shield them from victims seeking compensation.
- It is already possible under the *Bankruptcy Act 1966* (the Bankruptcy Act) for a Trustee in Bankruptcy to claw back out of character contributions to superannuation that are made with the intention of defeating creditors.
- The Review proposes that a victim of crime with an unpaid compensation order against a perpetrator should be able to apply to a court for an order that the trustee of the perpetrator's superannuation fund release 'out of character' contributions made to the perpetrator's account in the period starting six months prior to the perpetrator being charged to the time the order is granted.
- 'Out of character' contributions made over this period could be determined by:
 - *Option 1*: a court or a superannuation trustee, which applies a subjective assessment; or
 - *Option 2*: all voluntary contributions by or on behalf of the member, as a proxy for out of character contributions.
- This mechanism would be available to uncompensated or partially compensated victims of a person convicted of any indictable offence (not summary offences). This is distinct from the broader access to existing superannuation balances envisaged in draft proposal 2, which would be available only to victims of serious crimes.
- It would apply only to part of a perpetrator's superannuation balance; not to compulsory contributions made during the relevant period or prior contributions.
- Amounts would be paid into court, either directly from the superannuation fund or through some mechanism to centralise and streamline release and payment.
- The lump sum would be tax-free in the hands of the victim.
- This new mechanism could be used outside a bankruptcy proceeding.
- A trustee would not be required to comply with an order if the member is subject to an active bankruptcy proceeding, or a discharged bankruptcy administered during the relevant period where bankruptcy claw-back provisions have been exercised, or a family law proceeding, or if the funds cannot be shared as they are subject to an order under a proceeds of crime regime.

In discussions with stakeholders following the December consultation paper, there was strong support for the proposition that superannuation should not be used deliberately to shield assets from victims of crime and deny them compensation. This was evident even among those stakeholders who did not support broader access to superannuation by victims of crime and considered that the current arrangements should remain unchanged.

This draft proposal is based broadly on existing legislative provisions that allow 'claw back' of superannuation contributions that are made to defeat creditors in cases of bankruptcy or that come

from proceeds of crime. The draft proposal applies only to contributions deemed to be ‘tainted’, not the perpetrator’s entire superannuation balance.

Box 1: Bankruptcy proceedings and superannuation: How the ‘claw-back’ provisions work

The Bankruptcy Act provides provisions to claw back contributions made to superannuation that were made with the intention of defeating creditors.

Part VI, Division 3, Subdivision B allows the bankruptcy trustee to recover contributions made to superannuation that would otherwise have become part of the estate or available to creditors and were made for the purpose of defeating creditors. That purpose is determined by the trustee or court by having regard to established patterns of contributions and whether the contributions were out of character.

Superannuation contributions made by a person who later became bankrupt and contributions made to their superannuation by a third party are covered. The bankrupt contributing money to another person’s (e.g. a relative’s) superannuation is also covered, as one provision simply looks at contributions by the bankrupt to any eligible superannuation account. This also applies in cases where the money would have otherwise formed part of their estate or been available to creditors, and where the main purpose of the transfer was to defeat creditors.

The Australian Financial Security Authority has advised there were only around 150 bankruptcy administrations in the past six financial years that had at least one creditor whose debt was stated to have arisen from a victim of crime compensation order (out of a total of 116,574 new bankruptcies in the same period). This suggests that relatively few persons that are the subject of a victims of crime order enter bankruptcy proceedings. Accordingly, the claw-back provisions available in the Bankruptcy Act would rarely be able to be utilised to access out of character superannuation contributions by those persons.

We seek feedback on five issues in relation to the ‘claw-back’ proposal:

- appropriate limits and thresholds for release;
- how to obtain visibility of superannuation accounts and contributions;
- how to determine whether a contribution is ‘out of character’;
- how to recover the money; and
- what tax arrangements should apply to clawed back amounts.

Issue 1: Limits and thresholds

As the draft proposal only applies to ‘out of character’ contributions intended (or purported to intend) to shield assets from victims, not the perpetrator’s entire superannuation balance, this first draft proposal would apply broadly to compensation orders, that have not been paid in full, flowing from any indictable offence (in contrast to the second draft proposal in this paper, which would apply in narrower circumstances).

It is proposed not to cap the amount of contributions that can potentially be released under this mechanism. The only cap would be the outstanding amount of compensation due. In most cases, an individual can make up to \$300,000 in non-concessional contributions in a 12 month period and in future will be able to make up to \$125,000 in personal deductible contributions using the full flexibility of the concessional cap carry-forward rule plus whatever additional voluntary concessional contributions are possible within the \$25,000 annual cap.

Issue 2: Visibility of assets

In creating a new claw-back mechanism to allow uncompensated or partially compensated victims of crime to claw back out of character contributions, the question arises as to how the victim of crime can obtain visibility in relation to a perpetrator's superannuation contributions.

In the context of a bankruptcy proceeding, the legal framework empowers the trustee administering the bankruptcy to take full account of the bankrupt's assets and transaction history. The powers bestowed on the trustee under the Bankruptcy Act facilitate investigation into, and recovery of, superannuation contributions that are considered to have been made in order to defeat creditors (s128B or s128C of the Bankruptcy Act). The trustee is responsible for determining whether there is sufficient evidence to warrant an action or claim.

The *Proceeds of Crime Act 2002* uses examination orders, monitoring orders, production orders and notices to financial institutions and other powers to enable the police to gather information and achieve visibility over assets.

These frameworks cannot be simply extended to apply to victims of crime compensation. A new mechanism is therefore required to enable a victim of crime to obtain visibility of the perpetrator's superannuation assets and contributions.

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

A trustee would not be required to comply with this process if the member is subject to an active bankruptcy proceeding, or a discharged bankruptcy administered during the relevant period where bankruptcy claw-back provisions have been exercised, a family law proceeding, or if the funds are the subject of a proceeds of crime forfeiture order, until those matters have been dealt with.

Issue 3: Determining whether contributions are 'out of character'

Without a substantial legal framework like bankruptcy with a Trustee in Bankruptcy and court procedures to interrogate financial records and assess purpose, it will be very difficult to determine whether or not a contribution is 'out of character'.

There are two options for how to adjudicate this. One option is a subjective determination, which could be performed by either a court or a superannuation trustee. While it should be reasonably apparent in most circumstances when contributions are not in keeping with the perpetrator's pattern of contributions over previous years, this could be a contentious decision and may be subject to challenge. It is questionable whether trustees of superannuation funds are well placed to make this assessment, given it may conflict with their duties to act in their members' best interests (which may conflict with the interests of the victim).

An alternative to an explicit assessment could be to deem all voluntary superannuation contributions within a certain time period as a proxy for out of character contributions. In many cases it would not be rational for a person to make voluntary superannuation contributions while the subject of a criminal investigation or proceeding. However, it may be more rational in the case of self-employed persons who do not receive superannuation guarantee contributions and for whom all contributions are voluntary.

Accordingly, the Review seeks feedback on the following options:

- *Option 1:* a court or a superannuation trustee applies a subjective assessment of whether contributions were ‘out of character’ and therefore available for compensation; or
- *Option 2:* all voluntary contributions by or on behalf of the member are deemed to be ‘out of character’ and therefore available for compensation.

The Review also seeks feedback on the appropriate timeframe for this assessment. In principle, contributions made in anticipation of an eventual compensation order should be in scope. That period of time might begin several months ahead of the perpetrator actually being charged. In particular, should contributions that are made from, for example, six months prior to being charged until the date of the order be within scope? Alternatively, would a shorter or longer period be more appropriate?

Issue 4: Process for recovering money

In the context of a bankruptcy proceeding, there are two main ways for the trustee to recover superannuation contributions made to defeat creditors – via notices issued by the Official Receiver or by seeking various court orders to void transfers to a superannuation account, causing the money to be handed to the bankruptcy trustee. However, there is currently no such power available to victims of crime to get the money from a perpetrator’s superannuation to the victim(s).

Given there may be multiple compensation orders or other debts attributed to a perpetrator, it would not be appropriate for all the relevant contributions to be paid directly to an uncompensated or partially compensated victim with a compensation order. Further, trustees may be uncomfortable with any requirement to pay someone other than the member or the contributor.

To address this issue, it is proposed that the trustee would be required to release relevant funds either:

- by paying them into court, which distributes the funds according to its usual processes; or
- by releasing them through some mechanism to centralise and streamline release and payment. For example, there are existing processes in place to facilitate release of amounts from superannuation, which might be built upon to facilitate releases for victims of crime.

Views are sought on these two mechanisms.

To further avoid the perpetrator not paying victims, any claw-back mechanism would also need to apply to voluntary contributions to the perpetrator’s account by any person, or any contributions ‘gifted’ by the perpetrator to another person’s account.

Issue 5: Taxation rate applied to compensation

Where the court determines that particular contributions were ‘out of character’, the effect of this draft proposal would be to void those transactions, releasing the contributions out of the superannuation account. As a result the money would not be treated as superannuation, and the Review considers that the ‘released’ amount should not incur additional tax liabilities for the superannuation account holder. Any tax concession associated with the contribution (e.g. in the case of a personal deductible contribution) should be unwound, to the extent practicable, with the voiding of the transaction.

Money released should also be tax-free in the hands of the victim. This issue is discussed further in Draft proposal 2, Issue 9.

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

Key Points

- Victims of serious crimes whose compensation orders have not been paid, in full or in part, should be able to access funds held in the perpetrator's superannuation account (not just 'out of character' contributions).
- The Commonwealth Government should amend the rules governing early release of superannuation to require superannuation trustees to release funds to uncompensated or partially compensated victims of serious crimes.
- The rules should ensure superannuation does not become a first resort for compensation for alleged criminal activity that results in a civil claim for damages. The interests of any dependants of the perpetrator also need to be taken into consideration.
- The Review proposes that superannuation trustees should be required to release a member's funds to a court, as a lump sum, where an officer of the court certifies that:
 - there has been a criminal conviction against the member;
 - the crime is a serious crime, involving violence against an individual, that has a maximum custodial sentence of 10 years or greater;
 - a compensation order has been made to a primary victim of that crime under State and Territory Sentencing Acts or in a civil claim following conviction; and
 - the perpetrator's other assets are exhausted, or the compensation order remains unpaid after twelve months.
- If the member has no dependants, the full balance should be available to the victim. If the member has dependants, a proportion of the balance should be available.
 - *Option 1:* allow 50 per cent of the balance up to \$1.6 million (plus any amount in excess of \$1.6 million) to be available as an aggregate limit for any claims arising out of a conviction; or
 - *Option 2:* do not have an explicit limit but ensure family law proceedings can 'interrupt' claims to allow potential family law splitting prior to any payment to the court.
- The lump sum would be tax-free in the hands of the victim.
- Concurrent family law property (including superannuation) settlement order proceedings should always be completed prior to a victim of crime compensation order being enforced via superannuation.
- This draft proposal would apply in relation to existing eligible unpaid compensation orders in relation to past crimes.

This draft proposal reflects the view that the interests of uncompensated and partially compensated victims of serious crimes should override the interests of the perpetrator.

It goes further than preventing superannuation being used to shield assets from victims of crime. It would allow victims of crime who have not received full compensation to recover assets from the perpetrator's total superannuation account.

Stakeholders expressed divergent views on whether or not the Government should adopt this proposal, with strong views both for and against. However, there was more agreement on the mechanisms for implementing this type of proposal, should it proceed. In particular, there was broad agreement that access to a perpetrator's superannuation should be limited to exceptional cases.

We seek feedback on nine issues in relation to the draft proposal:

- burden of proof;
- what crimes should be covered;
- eligibility of victims;
- the types of unpaid compensation orders to which the draft proposal would apply;
- how to ensure that access to superannuation is a last resort;
- how to safeguard the interests of dependants of a perpetrator;
- application of the draft proposal to pre-existing convictions and compensation orders;
- interaction with state and territory compensation schemes; and
- taxation of compensation.

Issue 1: Burden of proof

The draft proposal would only apply to unpaid compensation orders relating to conduct for which a criminal conviction has been obtained. This reflects a view that the act should have been proven to the criminal standard – beyond reasonable doubt. It would not apply to unpaid civil compensation claims in the absence of a prior criminal conviction.

Consultation to date indicates strong support for the position that a criminal conviction be required.

Issue 2: What crimes should be covered?

We received a range of views on this issue. Some stakeholders argued that it should apply to all serious crimes while others proposed that it be restricted to crimes involving violence or permanent injury. One stakeholder suggested that it should be available in the case of other crimes such as fraud.

The current draft proposal is that access to a perpetrator's entire superannuation balance should be possible only in respect of unpaid compensation orders relating to serious criminal offences involving violence against an individual. We understand that state and territory victims of crime compensation schemes generally apply to acts involving violence. It is also proposed that a serious criminal offence should be defined as one with a maximum custodial sentence above 10 years.

Issue 3: What victims should be eligible?

There are significant differences in the definition of victims who are eligible to access state and territory compensation schemes. All schemes allow primary victims to claim but some also allow claims by secondary victims, relatives and witnesses.

This issue was not raised by many stakeholders, although one suggested that only victims themselves (i.e. primary victims) should be able to make such a claim.

This is a convincing argument. The primary victim is likely to have the greatest need. Accordingly, the draft proposal is that access to a perpetrator's superannuation should only be made available to primary victims.

In the event where the primary victim dies as a result of the act of violence, the Review seeks feedback on whether a related victim (broadly defined as a person who, at the time the primary victim dies, is a close family member or a financial dependant) should be able to access funds held in the perpetrator's superannuation account.

Issue 4: Types of unpaid compensation orders covered

In considering what types of orders should be covered, it is important to accommodate differences in state and territory legal systems.

The Victorian Law Reform Commission's (VLRC) recent report on the *Role of Victims of Crime in the Criminal Trial Process* shows how victims of crime in that state can seek reparation directly from the perpetrator in two ways. At the end of the criminal trial they can seek a restitution or compensation order under the *Sentencing Act (1991)* (Victoria). Alternatively, they can make a civil law claim for compensation through the civil jurisdiction of Victoria's courts.

Under this draft proposal, both types of orders would be covered. However, we welcome views on whether the draft proposal should be confined to Sentencing Act-style orders and not orders made pursuant to subsequent civil actions.

Issue 5: How to ensure that access to superannuation is a last resort

The aim of the draft proposal is that superannuation should be available as a last resort. It should only be accessed where a compensation order remains unpaid after other assets have been exhausted.

This principle was broadly supported by stakeholders.

To achieve this outcome, Commonwealth legislation could potentially provide that a trustee can only release its member's funds if a state sheriff's office or similar certifies that other assets of the perpetrator have been exhausted (or that the compensation order remains unpaid after 12 months).

Issue 6: Balancing the rights of the victim with the rights of the perpetrator's dependants

While superannuation is legally an individual asset, most people retire as couples. This is an important consideration for women, who typically have lower superannuation balances than men.

In responding to the consultation paper, many stakeholders cautioned about the potential impact on dependants of allowing victims of crime access to a perpetrator's superannuation.

Interaction with family law

Stakeholders generally supported the primacy of the family law process over access by victims of crime. It was argued that family law processes should be completed first so that victims are compensated by the perpetrator - and not their dependants.

Box 2: Family law and superannuation

The only way an individual can get broader access to someone else's superannuation is through family law property settlement under the *Family Law Act 1975* (Commonwealth) (Family Law Act).

The property splitting laws enable couples to split superannuation interests or payments as part of a family law property settlement on relationship breakdown. The Family Law Act will not make the superannuation immediately accessible to the recipient – it remains a superannuation interest limited by the relevant superannuation rules. Under the Family Law Act, equitable outcomes can be agreed between the parties or ordered by the courts.

One stakeholder suggested a single court process to determine precedence of dependants and victims. However, it is unlikely that all claims will be contemporaneous and the Review considers that this would be too difficult to implement in practice.

The Review proposes that any *concurrent* family law property (including superannuation) settlement order proceedings should always be completed prior to a victim of crime compensation order being enforced via superannuation.

In cases where a family law property settlement occurs *after* a victim has been compensated from a perpetrator's superannuation, the released superannuation could not be clawed back from the victim. However, the amount of the compensation order could be taken into consideration by the court as it determines the property allocation between a perpetrator and former partner, if the court considers that it is just and equitable to do so.

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

The impact of the draft proposal on dependants could be mitigated by limiting the proportion of a perpetrator's superannuation balance that can be accessed by an uncompensated or partially compensated victim of crime.

One option is to preserve 50 per cent of a perpetrator's balance where they have dependants. Of course, a criminal may have child dependants at the time of the crime but by the time they reach preservation age have no child dependants – this would mean 50 per cent of their superannuation would be preserved not for their child dependants but themselves (and possibly their partner).

Alternatively, it could be argued that family law proceedings can deal with the rights of dependants and, provided that these proceedings have priority to 'interrupt' a victim's claim to ensure fair distribution, the impact on dependants could be minimised. Under this scenario, there may be no need for an explicit monetary limit on access to superannuation for victim compensation. However, if no portion of perpetrators' balances are specifically preserved for dependants, it would provide a financial incentive for perpetrators' partners to initiate divorce proceedings or other family law actions.

Accordingly, in cases where the perpetrator does have dependants, the Review seeks feedback on the following two options.

- *Option 1:* allowing 50 per cent of the perpetrator's total superannuation balance up to \$1.6 million (plus any amount in excess of \$1.6 million) to be available as an aggregate limit for any compensation claims arising out of a conviction.
- *Option 2:* no explicit limits on access for compensation claims but ensuring family law proceedings can 'interrupt' claims to allow potential family law splitting prior to any payment to the court.

Where there are no dependants, the perpetrator's entire superannuation balance should be available to victims.

Issue 7: Application of the draft proposal to pre-existing convictions and unpaid compensation orders

Another issue for consideration is whether the draft proposal should apply to pre-existing compensation orders in relation to prior criminal convictions.

It seems reasonable to allow existing unpaid judgement debts arising from criminal compensation orders to be available for broader compensation through superannuation. The person would already have committed the serious crime and already had a court determine the appropriate compensation they should pay the victim.

Making superannuation available to meet unpaid compensation orders would not change the likelihood of conviction at the time or decrease the amount of compensation that would have been ordered. As such, there does not appear to be an obvious issue with applying the draft proposal to existing unpaid compensation orders. Therefore, the Review proposes that access should be available for past crimes and existing eligible unpaid compensation orders.

Issue 8: Recovery of costs by state and territory compensation schemes

Some state and territory compensation schemes pay victims directly and recover costs from the perpetrators. There were mixed views on whether such schemes should be permitted to access a perpetrator's superannuation to recover their costs— or a portion of their costs.

While not specifically raised by stakeholders, the most significant issue with allowing state and territory compensation schemes to recover their costs from a perpetrator's superannuation is that these schemes are much broader in scope. They allow compensation to be paid to a wide range of individuals in the absence of a criminal conviction.

On that basis, the Review considers that state and territory compensation schemes should not be able to recover the costs of their payments from the perpetrator's superannuation balance as this would substantially broaden the scope of the draft proposal.

Issue 9: Tax rate applied to compensation

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 increases to 32 per cent. This reflects the generally concessional tax treatment that superannuation contributions receive in order to support retirement incomes; in circumstances where the contributions are not going to support retirement incomes, it is generally appropriate that they be taxed less concessionaly.

However, the release of a perpetrator's superannuation to victims of crime under this draft proposal should be distinguished from the existing early release of superannuation regime, as the payment is made for the benefit of a third party – the victim – rather than the superannuation account holder. This is an exceptional arrangement for the superannuation system and, as a result, applying the existing tax settings could lead to unwanted outcomes. For example, in cases where a perpetrator's superannuation balance cannot cover both the tax liability and the amount awarded for compensation, the policy intent of victims' compensation would be stymied.

The Review proposes that no tax be applied to the release of funds from the perpetrator's superannuation account to pay compensation to a victim. This is because the benefits of concessional tax treatment of superannuation contributions would not accrue to the perpetrator on the released funds. It also avoids the complexity of situations where a balance would need to be

applied to both a tax debt and the victim's compensation, allowing the full balance to be available to the victim if necessary.

Further, consistent with the existing treatment of court-ordered compensation, the Review considers that money released to the victim should not be assessable for tax purposes.