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Dear Ms Wilkinson

**Public Submission to The Treasury, Australian Government, on the Early Release of Superannuation Benefits to Victims of Crime**

Thank you for the opportunity to respond to the consultation paper 'Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation' dated December 2017 (the 'Consultation Paper').

1. The Consultation Paper outlines two existing ways through which superannuation savings may be made available to victims of crime or other persons, on compassionate grounds or for severe financial hardship, and presents for discussion a third option for victims, early access to superannuation for compensatory purposes following a criminal offence.
2. This third option presents an opportunity for law reform to better support victims of crime. The intention is that victims will be able to access superannuation savings in addition to or following the exhausting of compensation funds available at the state or (where relevant) federal level. Ordinarily, victims would

be expected to have ongoing costs and expenses that are unmet by traditional sources of victim's compensation, and following the exhausting of alternative funds, such as that available through the social security system.

3. Whether early access to superannuation ought to be made available with or without any requirement that a victim return or attempt to return to paid work, where this is indeed relevant, possible or appropriate, must also be considered.
4. The Consultation Paper indicates that victims' early access to superannuation is suggested across two categories – victim's access their own superannuation savings and/or, perhaps most controversially, victim's access the offender or alleged offender's superannuation savings.
5. The proposed changes to allow for early access to superannuation for victims of crime presents a number of complex issues for consideration by Treasury, in particular, because it involves two areas that are traditionally considered separately, essentially fiscal/superannuation considerations with criminal justice policy.
6. The guiding principle upon which this submission turns is that superannuation is not compensation and was never designed to provide for a shortfall in victim's compensation. However, there may be narrow policy grounds upon which early release may be justified.
7. These grounds are overwhelmingly based on developing appropriate and compassionate social policy responses to best support victims of crime. Any proposed change must, however, be balanced against the need to avoid greater hardship now or in retirement for either victim or offender.
8. This submission will address the grounds upon which early release of superannuation funds ought to be made available to victims.
9. This submission will outline a number of issues and concerns with the proposed changes and reforms.

### **Equity and Parity**

10. Not all victims or offenders will have superannuation savings or savings of an adequate level to supplement ordinary sources of compensation and social security.
11. This means that access will be inherently uneven between victims.

### **Existing Arrangements May be Satisfactory**

12. There may be grounds upon which victims may already access their own superannuation savings, where they meet existing criteria on compassionate grounds or for severe financial hardship. Thresholds for either existing grounds

are stringent, and evidence must be presented to a generally high level before a superannuation trustee releases funds. The guiding principle is that superannuation funds provide for retirement, and thus should only be released where an individual presents with extreme circumstances.

13. Certain victims may be able to access their own superannuation savings where they meet the existing thresholds of compassionate grounds and/or for severe financial hardship.
14. This existing arrangement may already provide the desirable balance, and would only require further policy articulation and/or appropriate public dissemination of such information in order to inform victim's facing extreme hardship that such funds may be accessed.

### **Victims and Retirement**

15. Where Treasury is considering allowing a victim to access their own superannuation above and beyond any existing entitlement, that is, broadening the basis upon which early access may be made available, including the relaxing of thresholds or tests for the release of funds, it is feasible to suggest that fewer victims will have higher levels of savings in retirement.
16. Early release of superannuation may therefore offset hardship for victims until later years or exacerbate harm to victims in their retirement years. Increased social supports will thus be required where funds are exhausted out of early access.

### **Victims and Ongoing Abuse**

17. Where victims seek to maintain a relationship that may involve financial abuse, providing early access to their retirement savings may open up the possibility that an abusing person, spouse or family member may pressure a victim to access their superannuation early.
18. The consequences may be that the victim gains little immediate advantage and longer-term disadvantage through transfer of funds to persons not deserving or indeed occasioning harm to the victim.

### **Institutional Arrangements**

19. Some consideration must be given to the person or party responsible for assessing applications for early release. Providing statutory compensation authorities with the ability to pay victims and then seek restitution from the superannuation trustee may provide a suitable means through which to administer early access, minimising the victim's need for multiple applications through multiple state/federal authorities. Importantly, given the thresholds and tests (see paragraphs 28-29) required to maintain the integrity of the

superannuation system and especially where access to the offender's superannuation is sought, this is a function that should not be exercisable by the superannuation trustee alone, on direct application by the victim.

### **Victim's Access to Personal Superannuation**

20. This submission sees no significant issue other than those outlined at 15-19 above with a victim accessing their own superannuation savings. Sufficient evidence and a decision-making authority other than the trustee capable of exercising some oversight of claims may be required in order to ensure against false or fraudulent claims.

### **Victim's Access to the Offender's Superannuation**

21. The most controversial aspect of the proposed change is to allow victim's access to the superannuation savings of the offender.
22. Superannuation savings are currently protected even from creditors in bankruptcy applications and allowing early access to a third party other than a dependent is unprecedented.
23. Where a victim presents with needs that cannot be met through existing compensation schemes or through social security, and perhaps where return to work is not suitable nor appropriate, an offender's superannuation may be accessed. However, out of recognition that superannuation is not compensation, was never designed to provide as a source of compensation, and out of not wanting to disrupt an offender's rehabilitation back into the community, now or into retirement, several thresholds must be considered in order to preserve application for only those victims most in need.
24. The offender's need to reintegrate into society following an offence is an important principle of criminal justice. It is a principle through which our present system of sentencing and punishment is organised, and defines the civilised character through which our criminal justice system operates. It is a principle that should not be interfered with without substantial and express need.
25. It is in the interest of all victims and society generally that offenders are not faced with hardship, financial or otherwise, above and beyond the difficulties they already face. Compensation is not designed to punish the offender and in most cases and jurisdictions, does not form part of the sentence of the offender. This is so even where victims may fairly expect reparation following crime.
26. Including early release of superannuation to victims in the same category as victim's compensation risks obfuscating punishment, compensation and early access to superannuation, and may create an inappropriate expectation that superannuation ought to be readily available to victims as part of their engagement with the criminal justice system and/or the need to punish offenders proportionate to the harm caused.

27. However, these important considerations notwithstanding, there may be limited and exceptional circumstances where it is appropriate for a victim to access the superannuation of an offender. Importantly, access to an offender's superannuation should be seen as an exception, and not an ordinary or anticipated supplement to victim's compensation.
28. Where relevant, access to an offender's superannuation ought to be protected by stringent thresholds set by statute.
29. These thresholds may include, in accordance with the exceptional nature of a claim by a victim: the convicted status of the offender beyond reasonable doubt; a minimum protected superannuation balance of the offender; particular prescribed harms and injuries to the victim (see paragraphs 32-35 as to the need to extend the conventional definition of harm for domestic violence victims); the requirement that these harms and injuries be satisfactorily evidenced by conventional sources (medical or other); that the victim be in financial need; and with evidence that all other sources of compensation and/or social security (including possibly, return to work) be exhausted.
30. Each of these thresholds would need to be investigated in turn, and it is beyond this submission to provide recommended substantive tests.
31. Complex issues arise where family victims seek early access in homicide cases, although such victims may already be able to access the victim's compensation to pay for funeral expenses. This may be fairly extended to access to the offender's superannuation where threshold amounts are in place.
32. Pursuant to paragraph 19, a statutory authority would be required in order to assess evidence and to make sufficient checks in order to recommend early release of funds. Superannuation trustees alone should not perform this function.

### **Domestic Violence**

33. Domestic violence is insidious and the consequences of it are often long-term and hidden from the public gaze. There may be immediate and primary victims but whole families can suffer.
34. Injuries consequent on domestic violence offending may be serious, and these injuries can kill the victim. Victims may also be severely injured, and/or develop diagnosable psychiatric injury including PTSD, sometimes years after leaving an abusive relationship. However, other victims, including secondary or family victims witnessing violence, may not develop diagnosable psychiatric conditions. They may however be so significantly traumatised that their lives are substantially disrupted, such that traditional sources of compensation and social security ill affords them the chance of recovery.
35. The nature of domestic violence harms necessitates reconsideration of the types of harm or injuries that might inform a threshold test for early release of superannuation.

36. Care should be taken not to widen the definition of harm too far from conventional and diagnosable injuries, including psychiatric injuries, except where known types of criminal offending, including domestic violence offending, is identified. Sexual abuse, sexual assault and rape may be another area of offending where victims may suffer ongoing systemic harm not prone to ready diagnosis, but which greatly affects the quality of the life of the victim. The recent work of the Royal Commission into Institutional Responses to Child Abuse reminds us of the way harm for certain classes of victim are not easily diagnosed but which can manifest into the life of the victim in an especially debilitating way.
37. However, care must be exercised as to the evidence that founds a claim for early release for superannuation, especially from the account of the offender. A police report without other significant corroborating evidence should be insufficient, although a history of such, as well as ongoing trauma and expenses unable to be met elsewhere as brought about by that trauma, may be sufficient. A conviction, especially for high level and serious harm, would bolster that sufficiency.
38. Increasingly, state-based victim's compensation recognise out of pocket expenses and provide for immediate payments for domestic violence victims. This may include immediate payment for change of locks, for reasonable expenses incurred with relocation and for change of address. However, costs of repeated harassment connected to an original claim may support a valid basis for accessing the superannuation of the offender, where original available assistance is exhausted. These costs should be prescribed and may include compensation for reoccurring relocation and change of address, for legal counsel for repeated ADVO applications and court appearances, for change of employment/workplace, and for the expected psychological trauma that results from the inability to settle one's life. Such victims may also be able to claim on compassionate or severe financial hardship grounds where justified.

### **Raising (and Dashing) Victim's Expectations**

39. Where policy shifts to allow early access to a victim or offender's superannuation care must be taken not to raise the expectations of victims where the thresholds presented are so high that it is unlikely that early access to superannuation will become a routine supplement to traditional sources of compensation.
40. If routine supplementation is not envisaged, and it arguably should not be, victims should be informed about their likelihood of making a successful claim in a clear and direct way so as not to raise expectations that early access to superannuation is ordinarily possible.

Yours sincerely

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