



Director
Tax and Compliance Unit
Treasury
By email: superannuation@treasury.gov.au

14 February 2023

Submission to Discussion Paper:

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

Dear Director

Beyond Abuse thanks the government for the discussion paper and congratulates the victim / survivors and advocates who have championed this important law reform.

About Beyond Abuse

Beyond Abuse is a registered charity providing support and advocacy for survivors of child abuse since 2005. This includes: delivering direct support to survivors; assisting survivors to access appropriate health care and other support services; working with Governments to develop legislation and policy; working with organisations to improve child safety practices; giving evidence and submissions to Royal Commissions and Commissions of Inquiry; and communicating with media about child protection and victims' rights matters.

Support for reforms

Beyond Abuse supports law reforms which provide appropriate care and support for victim / survivors and which hold perpetrators properly accountable for their offending and the harm they cause and laws which enable Court Order to be fully enforced.

Superannuation legislation should be changed, *to whatever extent necessary*, to ensure that victims of child sexual abuse are able to access fair reparations from the perpetrator. This includes ensuring perpetrators are not able to hide assets.

Beyond Abuse recommends:

- that the reforms apply equally to perpetrators where there is a criminal conviction 'beyond reasonable doubt' or where there is a civil court judgement 'on the balance of probabilities';
- that all of a perpetrator's assets be available to meet an unfulfilled compensation order. The reform should not be restricted to "additional" contributions or to a time period;
- The process for increased visibility and for accessing superannuation should be able to be achieved simply and inexpensively. It should not be cumbersome, legalistic, protracted or expensive for the survivor applicant.

Specific observations

Financial interest of the Commonwealth

It is in the best interest of the Commonwealth that victims be able to fulfil compensation orders from perpetrator assets. Questions have been made about the reforms causing a perpetrator to become dependent upon welfare at the tax-payers' expense.

This outcome should be examined in the full context:

- Often, victims of child abuse are on welfare, or increased health care (Medicare, NDIS) due to the impact of the abuse on their health, education and employment status;
- Data from the Royal Commission into Institutional Responses to Child Sexual Abuse and from the Australian Bureau of Criminal Intelligence confirm that offenders often have multiple victims;
- Offenders are usually 20 years or more older than their victims.

If the assets of the perpetrator are shifted to the victim / survivor, the victim / survivor can then achieve housing security, access private health insurance and undertake remedial education leading to improved employment all of which are positive for the tax base.

If that asset redistribution results in the older perpetrator becoming dependent on social welfare, then that cost is a lighter burden for the Commonwealth than a younger victim or multiple younger victims being on welfare.

From a purely fiscal perspective, it is better value for the Commonwealth to be liable for one 60 year old perpetrator (representing maybe 20 welfare years) than to be liable for multiple 40 year old adult survivors (each representing 40 welfare years).

Community expectations

As well as the fiscal consideration above, there is the moral dimension.

If one person in the equation has to be welfare dependent as a consequence of the perpetrator's actions, it is more appropriate morally that it be the perpetrator, and not the victim / survivor.

Freezing orders

Beyond Abuse recommends that the Government consider the role of freezing orders to be implemented automatically with the visibility order, for obvious reasons, to prevent the perpetrator moving funds.

Minimising the legalistic nature of proceedings

Rather than requiring the victim / survivor wait 12 months for the perpetrator to not comply with a compensation order, and then place the burden on the victim / survivor to commence further legal proceedings to enforce the order, which will be stressful and expensive and create further delay to the victim / survivors' resolution of the matter, Beyond Abuse recommends that the visibility orders and even the ATO authority for superannuation funds be 'built-in' to the Court's initial compensation orders at the time of issuing the compensation order.

This will make it apparent to the perpetrator that they will not benefit from delaying compliance with the compensation order.

For a similar reason, the period for compliance with the compensation order should be reduced from 12 months to 28 days, perhaps with room for such other time by agreement between the parties. Again, this is to prevent the perpetrator seeking to benefit from non-compliance, and to prevent ongoing unjust trauma and poverty to the victim / survivor.

A risk of the process as described in the discussion paper, while well intentioned, is that any process that involves more legal steps simply in reality means more lawyers and more expense for victim / survivors. It is conceivable, from the processes described in the discussion paper, that the legal costs of enforcement could rapidly exceed the value of the compensation order, or unpaid component being sought.

It is sadly a common feature of perpetrator psychology that they manipulate legal processes in order to wield power of the victim / survivor and to inflict further suffering. This is the psychopathology of perpetrators where the only weapon they have left is to misuse the process through delay, legalism, etc. Therefore the process should be designed to not allow this.

Accordingly, there should be no appeal mechanism to a visibility order or a payment order, noting that the natural justice steps relevant to the perpetrator have already occurred at trial proper, sentencing and costs hearings. By definition any steps being taken in the processes described are in relation to a perpetrator who is refusing to comply with a court order.

Imprisonment should be an option for any perpetrator who fails to comply with a court order without reasonable excuse and who continues to be in Contempt of Court.

Accessing superannuation consist with other laws and policies

Previous government changes to superannuation

During the SARS-Cov-2 pandemic, the Australian Government made changes to the superannuation system to allow account holders to access superannuation funds to meet living expenses.

That was deemed an acceptable purpose to modify the tenet of superannuation being untouchable until retirement.

If the Government position is that an account holder can access superannuation to meet their financial life-style costs, then it surely is consistent with community expectations that a victim / survivor of the perpetrator's crimes should be able to access that perpetrator's superannuation to meet their costs, such as health care, housing and education to resolve issues that were caused by the abuse.

Law changes to trusts

It had been a long standing financial and legal position that funds in trust could only be used for specified purposes and trustees were barred from releasing trust funds outside the purpose of the trust.

This long-standing rule of the financial and legal system was turned on its head following the Royal Commission into Institutional Responses to Child Sexual Abuse with the law changes across Australia, in every state and territory jurisdiction, allowing trusts to be sued to meet the obligations of institutions.

This is the same principle as the proposed reforms.

If an institution's trust can be sued to meet the institution's obligation to a victim / survivor then so too, an individual's trust (eg superannuation) should be able to be accessed to meet that obligation.

Proposals do not go far enough

'Charges laid' is incorrect commencement point

There are many steps in a criminal investigation long before charges are laid, any one of which may likely alert a perpetrator to financial exposure risk. These include: the victim emotionally confronting the perpetrator about the abuse; family members talking about the abuse to the perpetrator (with or without the victim's knowledge); police interviewing the perpetrator or executing warrants or speaking to witnesses; etc. A perpetrator may become aware of pending financial risk long before charges are laid, in which case the proposed definition in the discussion paper is not fit for purpose.

This can be resolved very simply by not having a commencement time period, and allowing contributions occurring "at any time" to be accessible.

'Criminal conviction' threshold is too narrow

While Beyond Abuse acknowledges the government's caution to ensure that these measures only apply in cases which are properly proven, it is a fact that a civil court, having heard a civil trial, with examination and cross-examination of witnesses and evidence, resulting in a formal judgement from a District Court Judge or a Supreme Court Justice is a sufficient standard of proof to be sure that the offences occurred.

It would be extraordinary for the discussion paper's position to prevail, as it is tantamount to stating that the Australian Government has no confidence in the operation of the Civil Courts and refuses to recognise properly constituted Courts and refuses to recognise as factual the judgements of sitting District Court Judges and Supreme Court Justices on the civil circuit.

This would be an extraordinary position for the Government to hold, potentially causative of scandal.

Also, it is well established that only a small percentage of crimes result in criminal conviction.

Therefore, by adopting the threshold proposed, the policy would apply in the smallest number of cases. The approach proposed by the discussion paper risks making the entire policy redundant.

As well, that threshold could fuel more perpetrators to plead not guilty and shy away from 'plea deals' which is currently policy of most Department of Public Prosecutions to try to achieve. If the perpetrator knows that conviction (including by way of guilty plea) will expose assets to recovery, however defending and avoiding conviction will protect those assets, then this may create substantial burden on Court lists and victim / survivors as more matters are defended.

However, if that concern is taken off the table, by way of the assets being exposed to recovery regardless of criminal conviction, then it is removed as a factor for the perpetrator, who will be left to continue to focus on consideration of other factors such as sentencing considerations, which is the current dynamic of plea deals.

If a victim has filed civil proceedings, and the evidence has been tested by a Court, including the examination of evidence, the cross examination of the victim and witness, the interrogation of expert witness, etc and as a result of that process a judgment is made by the Court with an order to pay reparations, then that should be sufficient grounds for superannuation to be accessible to meet that Court Order.

It creates an absurd anomaly to state that the Civil Court's compensation order is good enough to order a perpetrator to hand over the contents of their bank account, and their house or property or share investments, but somehow the Civil Court's judgement cannot be trusted when it comes to one asset class, superannuation, which really is just a managed fund with legislated tax-relief?

A civil judgement should be adequate standard for the purpose of activating the proposed policy.

Whole of asset not only “additional”

Beyond Abuse respectfully disagrees with restricting the accessible funds to “additional contributions” and disagrees with the defined time period of just 6 to 12 months prior to commencement of proceedings. This is because of the medical evidence and formal findings of the Royal Commission into Institutional Responses to Child Sexual Abuse which found that victim / survivors may take 22 years to report the crimes. By contrast the offender knows they are at risk of being reported at any time all of this time and may commence hiding their assets long before the victim / survivor has commenced the formal proceedings described in the discussion paper.

Beyond Abuse recommends that *all* the assets in the account should be accessible (why not?) or in the alternative, that “additional” contributions should be defined as “any contribution exceeding the compulsory contribution, occurring *at any time*” (or similar wording to achieve that outcome).

If the perpetrator’s house can be seized, the whole property is seized, not only any extensions or renovations they contracted after becoming aware of court proceedings. The same logic should apply to accessing superannuation to comply with a Court Order.

Consultation Questions

Scope of offences

Beyond Abuse acknowledges the government’s restriction to child sexual abuse offences.

The complexity of ensuring that the reform encompasses the multitude of offences across all Australian jurisdictions is acknowledged. Beyond Abuse is satisfied the government’s proposed approach is reasonable, particularly noting the broad definition of “a State or Territory registrable child sex offence”.

Beyond Abuse welcomes input from other advocacy groups and particularly any survivor with lived experience of specific offending not covered by the proposed definition to ensure appropriate offences are included in the reform to meet the intention of the policy.

Bankruptcy

Beyond Abuse supports laws that achieve the following:

- fulfilling a Court ordered compensation to a survivor of child sexual abuse is a ‘*priority creditor*’ with priority over all other creditors;
- Payment / partial payment of Compensation Order does not extinguish the claim / order.

The Government need to be mindful that an offender can have their family members (spouse, children) or related entities (trusts or business entities) position themselves as ‘creditors’ having the effect of massively diluting the distribution of funds paid to the victim / survivor if all creditors were treated as equal. Such an outcome being the intended outcome of the offenders’ actions.

Therefore Beyond Abuse supports changes to bankruptcy laws and procedures that would make satisfaction of a Compensation Order for child sexual abuse a priority creditor over all other creditors.

“Additional” contributions

Beyond Abuse supports that there should be no restriction to only “additional” contributions. Any asset class should be available to satisfy a Court order. The starting position is that a Court has properly assessed the evidence and made an Order. The liability has been properly determined by the Court. Any asset of the offender should be available to meet that liability.

Beyond Abuse supports that there should not be a prescribed deeming period. If the available assets are to be restricted to “additional” contributions then it should be additional contributions occurring “*at any time*”. This removes the need for any party or a Court to be required to identify whether or not a payment was made with the intent to shield. Also, “*at any time*” properly reflects the real world facts that a perpetrator knows for a long time that they are living under the ‘risk’ of legal consequences for their offending once the victim reaches the point of being able to report the abuse. So the offender could be shielding their assets in anticipation for twenty years.

As a minimum, if the government does not adopt the above standards, and if the government insists on narrowly defining a “deeming period” then Beyond Abuse would support that the deeming period should be more reflective of reality and be much longer than ‘12 months’; for example it should be 3 years and should also include extension provision back to any date where the offender became aware of the risk of legal proceedings. For example if the victim confronted the perpetrator at some point but did not have the capacity to report to police until much later. The offender may have been ‘on notice’ when they were confronted and commenced asset shielding activity at that time. Also in some cases a parent may confront the offender without the victims’ knowledge, and the victim takes further years to independently achieve capacity to report to police. These are all reasons why the time period should be “*at any time*”.

Noting that applications to a Court to extend the deeming period risks being yet another barrier to victim / survivors. Such court proceedings are: expensive, time consuming, distressing, uncertain. What if a victim loses the application? Do they then have to pay costs to the perpetrator? That would be a scandal and a failure of this reform. Yet it may be a reality unless the time period “*at any time*” is adopted as policy. That is why Beyond Abuse strongly recommends “*at any time*”, ie no ‘deeming period’ of any duration.

Family Law

Beyond Abuse acknowledges the complexity of this field of law and its interaction with the proposed policy objectives. Beyond Abuse supports the principle that the offender should be the primary responsible entity for satisfying a Compensation Order. However, Beyond Abuse does not believe it is appropriate that family law matters necessarily in all instances be resolved prior to satisfaction of a Court Ordered compensation order. This is because:

- It is common that a spouse may separate from an offender upon learning of the offending and so this interaction may occur commonly causing assets that should be available to meet a Court order to become diminished;
- Alternatively, an offender and spouse may collude to feign a separation in order to shield the assets from the victim / survivor, There have been multiple perverse instances, including in supposedly upstanding families, of spouses standing by their partner and colluding with their partner despite knowing of their sexual crimes against children;

- If the principle of the family law is that the departing spouse is entitled to a portion of the former spouse's (the offender) assets, then Beyond Abuse's position is that any amount owed by the offender to the victim / survivor under a Compensation Order of a Court is *not* part of the former spouse / offender's assets for the purpose of disbursement under family law. For example, if the offender paid the compensation order properly and fully up front at the time of the order, the offender's assets would be diminished at that time, and if, ten years later, their spouse separated, the spouse would only be able to claim a portion of the diminished assets. This is normal and unremarkable operation of the law. Therefore a family law matter should not have precedence over satisfaction of the compensation order, simply because the family law matter happens to be running contemporaneous to the compensation order;
- Family law matters have a tendency to be protracted and can drag out many years. They can be complicated by disputes unrelated to the distribution of assets, for example custody of children. By the time of a Court imposing a compensation order on an offender, the victim / survivor has already been through years of court proceedings, criminal or civil. They deserve resolution, not more years of protracted proceedings with no resolution. A survivor of abuse should not have to wait for the perpetrator's family court proceedings to conclude before having the benefit of compliance with a Court order enforced – particularly noting the perpetrator may intentionally delay resolution of family law proceedings (which they frequently do due to toxic personalities);
- If a Court has imposed a compensation order it means a Court has ruled in the matter and made an order. That should be respected. That compensation is not an arbitrary quantum; it is an amount which the Court has assessed is needed urgently by the victim / survivor to access health care, housing security, remedial education or return to employment options. There should be no further delay to that Court order being satisfied while the offender and their ex-spouse battle out their differences;
- In the interaction described in the discussion paper, between the Compensation Order and an unresolved family law matter, the competition is between an existing Court Order that has already been made versus a dispute that is ongoing and for which no court order has yet been made / some future imagined court order. Beyond Abuse supports that the existing Order of the Court should have precedence of an unresolved matter of unknown duration in which no order from any court has yet been determined.

The existing compensation order should be respected, it should be given priority and precedence over all other matters.

Beyond Abuse does not support the proposal that victim / survivors would not be eligible to satisfy a Compensation Order from the offender's spouse's account after finalisation of family court proceedings, for the reasons set out above; mainly that the 'separation' may be orchestrated to shield assets; and that allowing funds that are owed to the victim, to be given to the spouse under family law, is effecting the shielding of the asset, when the spouse's claim to the offender's assets should be a claim upon the 'assets minus any amount owed to a victim'. The proposal in the discussion paper runs contrary to that principle.

Tax Treatment of released superannuation

Beyond Abuse supports the tax treatment proposed (NANE) and this is consistent with the tax treatment of compensation payments under existing provisions (for example court ordered judgements or settlements under personal injuries legislation).

Amounts released from a superannuation account should *not* be reduced by any tax amount that reduces the amount available to the victim / survivor particularly where the tax component reduction may have the effect of reducing the total amount available to be less than full satisfaction of the compensation order, ie resulting in only partial payment of the compensation order.

The goal of the policy should be prioritising full satisfaction of the compensation order above all other considerations.

While it is acknowledged that the tax base (or the tax payer) is a stakeholder as they would be losing the taxation amount, Beyond Abuse considers it acceptable and reasonable because:

- The asymmetry of positions of the victim / survivor versus the entire Australian tax base. The compensation order is an instrument intended to compensate an injured and impecunious individual to restore them to the financial position they would have been but for the abuse, to access health care, housing and educational and employment stability. The Australian tax base is a massive entity that can absorb the absence of the small numbers that would be involved in this policy. It would be cruel, and inconsistent with the intent of this policy, to deprive a victim / survivor of \$15 000 out of every \$100 000 owed to them, by Order of a Court, so the amount could go be a drop in the tax base ocean.
- It is consistent with treatment of judgements and settlements under personal injury legislation, where compensation paid for lost earnings does not include payment by the liability party to the tax base or ATO of the amount equivalent to lost tax over the victim / survivor's life. Under existing law and practice, the defendant pays to the victim the amount they would have earned (reduced by tax *they* would have paid) but the defendant does not then pay that tax amount to the ATO. This is accepted as universally normal by the government, the ATO, all lawyers and accountants even though it technically means the tax base as a stakeholder is missing out. So *not* taxing superannuation used to compensation a victim / survivor would simply be consistent with existing established practice elsewhere outside the realm of superannuation.

Other parallel court proceedings

Again, consistent with our position above, Beyond Abuse does not support the proposal that satisfaction of a compensation order from superannuation is paused pending resolution of 'other proceedings'. This is for the reasons provided above, noting this could be never ending for the tragic victim / survivor at the centre of these theorised processes.

A finalised Court Order should be given priority to unresolved proceedings that are dragging on.

Also, in the scenario provided in the discussion paper – proceeds of crime proceedings – the party to those proceedings would be the government. Therefore the position proposed by the discussion paper is to allow the Federal Government to be co-claimant to the offender’s assets in competition with actual victim / survivors. This is not a sound policy approach and not good optics. One can envisage the headlines if the Government were to be causative of preventing a child abuse victim of enforcing a Court Order while the Government recovered money from the perpetrator, leaving nothing for the impecunious victim.

The victim / survivor should be priority claimant status, and have their court order satisfied in full, then the government can pursue recovery of remaining assets under proceeds of crime provisions. That would more likely meet with community expectations.

Also, it is unclear how often proceeds of crime provisions would be applicable in direct battery offending, noting income would be required to be made from the offending to enliven proceeds of crime provisions. Perhaps trafficking offences, production of child exploitation material that is then sold (rather than the usual practice where perpetrators share it or ‘trade’ it), etc may involve an element of proceeds of crime. Certainly in such instances Beyond Abuse fully supports pursuit of proceeds of crime recovery, *after* any victim / survivor has been fully compensated.

A more likely scenario of parallel proceedings we envisage, which does not appear to be directly mentioned in the discussion paper, is one where there are multiple victim / survivors of the one perpetrator. In that situation Beyond Abuse would welcome discussion among advocacy and survivor stakeholders about the competing interests of:

- On the one hand, ensuring all victim / survivors have an appropriate equal opportunity to have their claims assessed and receive evidence-based reparations from the offender’s assets, rather than the first victim / survivor to conclude their proceedings receiving compensation in full while others receive no compensation;
- On the other hand, how long must the first victim / survivor reasonably be expected to wait for other victim / survivors to come forward and commence and then conclude their proceedings?

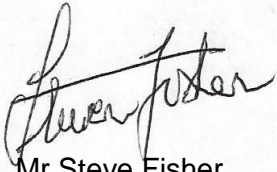
This is a complex issue. On the face of it, Beyond Abuse would support the position that:

- All victim / survivors (as confirmed by completed court proceedings, whether criminal or civil) have equal status / ‘creditor’ status to each other in terms of right of recovery of their respective compensation orders from an offender’s assets;
- All victim / survivors (as confirmed by court proceedings, whether criminal or civil) have priority status / ‘priority creditor’ status over any non-child sexual abuse claimant to the offender’s assets: eg spouse, dependents, the government / tax base, other creditors or debt collectors of any kind.
- It may be reasonable that finalisation of satisfying a compensation order from an offender’s superannuation to a particular victim / survivor be paused awaiting completion of an *existing commenced* court process involving another victim / survivor of the same offender. (But not pausing for any other reason, eg family law or proceeds of crime where the proposed recipient is not another victim of child sexual abuse by the perpetrator).

Thank you

Beyond Abuse thanks the government for seeking to grapple with this complex issue and seeking to produce a policy that delivers greater justice to particularly vulnerable victims of crime and seeks to hold offenders properly to account for their crimes.

Beyond Abuse CEO Mr Steve Fisher is available to answer questions or provide further statement to any inquiry, review, working group or individual about this important reform.

A handwritten signature in black ink, appearing to read "Steve Fisher". The signature is written in a cursive style with a horizontal line crossing through the middle of the letters.

Mr Steve Fisher
CEO
Beyond Abuse