

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

Submission to The Treasury

15 February 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input on The Treasury's consultation on access to offenders' superannuation for victims and survivors of child sexual abuse, namely on the two proposals outlined in the consultation's discussion paper ('the Discussion Paper').
2. The ALA acknowledges that The Treasury's intention behind these proposals is to support victims and survivors of child sexual abuse.
3. However, the ALA believes the proposed reforms detailed in the Discussion Paper must be treated as starting points, and that they require further clarification and amendment (as detailed in this submission).
4. ALA Members represent thousands of abuse victims and survivors across Australia, and based on that experience, ALA Members contend the proposals as they stand would only impact a handful of abuse victims and survivors, if any, and involve great costs in the process to those victims and survivors.
5. The ALA will thus propose in this submission important amendments to the proposals outlined in the Discussion Paper and, in doing so, we will respond to the questions outlined throughout the Discussion Paper thematically.
6. Our submission focuses on the following:
 - access to justice for victims and survivors, including three case studies from an ALA Member firm;
 - that these proposals are limited to criminal matters, victims and survivors of child sexual abuse, and "additional" superannuation contributions;
 - the proposal to access to the superannuation of a perpetrator's spouse or other family member;
 - the retrospective application of these proposed reforms; and
 - the proposed visibility mechanism.

Access to justice

7. Victims and survivors of abuse face difficult decisions and significant challenges when pursuing litigation against their perpetrator, including if compensation is sought.
8. The following case studies demonstrate why so many victims and survivors never pursue litigation, especially when the perpetrator appears to have few or no assets. Those victims and survivors are currently locked out of accessing the justice they deserve.

Case Study 1: Client T

Client T was sexually abused by his cousin, S, on a monthly basis when he was between the ages of 7-10 years. S was in his 20s at the time. His cousin told him that he would hurt his younger sister if he ever told anybody, so Client T didn't for many years.

When he was about 15 years old, Client T went to the police station and made a statement. To his knowledge, nothing ever came of it.

Client T sought legal assistance in December 2022 when he was 46 years old. He had a drug addiction and had been in and out of jail for armed robbery. He had attended several detox and rehabilitation programs, and had undergone psychiatric treatment after a diagnosis of PTSD due to the abuse.

Client T does not believe S, now in his mid-60s, has any property assets but believes he owns a car. After the process of making a civil claim generally and the challenges of making a civil claim where the Defendant is uninsured and does not have any assets were explained to Client T, Client T decided not to proceed. Client T did not want to go through the stress and costs of legal proceedings when it was unlikely he would ever recover compensation.

Case Study 2: Client N

Client N was abused by her uncle, G, when she was aged approximately 4 years. When Client N was staying at her grandparents' house while her parents were at work, G would force her to give him oral sex.

When she was around 30 years old, Client N went to the police. G was criminally convicted. He was released after 6 months in prison.

Client N has been diagnosed with depression, anxiety and complex post-traumatic stress disorder. She takes psychiatric medications and attends counselling. Client N has been in and out of employment her entire adult life. She finds it very hard to work with men. She has been disowned by the family since she reported the abuse to the police.

Client N sought further legal advice about a civil claim in November 2022 when she was 35 years old. She advised that G works as a labourer and lives with his parents. He does not own any property.

As Client N was advised that there would unlikely be any funds to discharge a settlement or compensation order, Client N did not pursue a civil claim.

Case Study 3: Client B

Client B was abused multiple times by her uncle, D, when she was aged 6 years. She also believes she was likely drugged and that photos were taken of her.

Since then, Client B's mental health has been incredibly poor, and she has been hospitalised on several occasions. She has done some hospitality work but finds she struggles being around people. She prefers to stay at home by herself.

When she was about 25, Client B found out that her cousin was also abused by D. Not long after this, she reported the abuse to the police.

However, Client B found the experience so harrowing that she later withdrew her statement.

Client B sought legal assistance to understand whether she could make a compensation claim. She wants to admit herself into a private psychiatric facility but could not afford it.

Client B believes that D has assets including an acreage property, a caravan and a motorbike.

After the process of making a civil claim and what would need to be done in order to recover compensation from D – including the risk of relying on the perpetrator's assets, as sometimes by the end of the claim it proves difficult to recover compensation to discharge the settlement – were explained to Client B, she decided not to proceed. Client B didn't feel she was well enough to go through with a claim if she wasn't certain she would recover compensation for what happened.

Limitation to criminal matters

9. The superannuation release and compensation procedures outlined in The Treasury's proposals are limited to "those awarded to the victim or survivor by a criminal court as part of sentencing or post-conviction and those awarded in a civil proceeding where a criminal conviction or recognisance release order has also been handed down for the same conduct".²
10. The ALA notes that not all victims and survivors of abuse initiate a criminal complaint, for a variety of reasons. Not all victims and survivors seek monetary compensation/redress, again for a variety of reasons. Some victims and survivors never speak up 'publicly' and make the decision not to pursue litigation or compensation, as the above case studies demonstrate. Some victims and survivors will seek both a criminal conviction and monetary compensation.
11. Necessarily there is a higher standard of proof (*beyond reasonable doubt*) in criminal proceedings as opposed to civil proceedings (*on the balance of probabilities*), ostensibly because of the penal sanctions and reputational damage a criminal conviction brings.³
12. The first proposal in its present form in the Discussion Paper is problematic for the cohort of victims and survivors who wish to either 'only' seek monetary compensation/redress, or the cohort of victims and survivors who wish to pursue a conviction and seek compensation.
13. It would unwittingly result in the victim or survivor having to prosecute two legal actions and, in reality, back-to-back with the initial criminal proceedings. This is because a perpetrator first has their right to a fair criminal trial (unless they elect to plead guilty).
14. So, a victim or survivor who seeks civil damages directly from a perpetrator is at risk of not only having to pursue two lots of litigation, but the risk also of the offender 'not having much if anything at all' by way of additional superannuation.
15. The victim or survivor achieves nothing other than a pyrrhic victory.
16. Whilst it is common for a victim or survivor to seek civil damages directly from the responsible institution, there are occasions where:

² The Treasury, *Access to offenders' superannuation for victims and survivors of child sexual abuse* (Discussion Paper, January 2023) 7. ('Discussion Paper')

³ We note there can, of course, be reputational damage in having to defend a civil proceeding and having an adverse finding made.

- the institution will join the perpetrator to the civil proceeding, and seek an indemnity and/or a contribution from them;⁴ or
- there is no institution who can be held legally liable for the criminal conduct of the offender – i.e. the offender was a direct relative, a neighbour and/or a trusted family friend.

17. It is entirely possible a perpetrator might be acquitted following a criminal prosecution (or not be prosecuted at all), yet as a defendant be found to have committed a wrongful and intentional tort on the victim or survivor.⁵ **The ALA contends that further clarification is required to understand whether, in that scenario, the victim or survivor would be able to access the perpetrator’s superannuation.**

18. Under the proposal as it stands, many victims and survivors would find themselves unable to access any of the perpetrator’s “additional” superannuation (assuming there even are available ‘funds’) and they would now need to seek a criminal conviction as well, with all the costs (both financial and emotional) involved in those processes.⁶ As the above three case studies demonstrate, victims and survivors can very understandably be reluctant to pursue one avenue of litigation, let alone two or more.

19. The case of *Brockhurst v Rawlings* [2021] QSC 217 also illustrates problems that arise for victims and survivors, which would unfortunately not be solved by The Treasury’s proposals:

Brockhurst v Rawlings [2021] QSC 21

A judgment was delivered on 27 August 2021 in the Supreme Court at Brisbane. The plaintiff was a boarding student in Year 8. The defendant was his teacher. The Court held that the defendant groomed and sexually abused the plaintiff and caused him personal injury. Judgment was delivered on behalf of the plaintiff in the sum of \$1,443,459.06. The Court scrutinised the evidence in the matter and accepted that the plaintiff was sexually abused by the defendant, as the plaintiff alleged.

The Court noted that the plaintiff chose not to pursue the defendant through the criminal courts and that she had therefore suffered no penal sanction for her conduct.

⁴ See *Brockhurst v Rawlings* [2021] QSC 217.

⁵ Ibid [339]; see also Ibid [9]–[13].

⁶ See Ibid [10].

The Court considered it appropriate to make an additional award for exemplary damages to convey the Court's denunciation of the defendant's abusive conduct and to ensure that the plaintiff was adequately compensated. As Her Honour Justice Ryan set out: *"The defendant's utterly selfish conduct included her sexual pursuit of the plaintiff, even after she had been warned to keep away from him. Her conduct took from him the opportunity to develop, in his own time, as a mature, sexual adult"*.

Since judgment was delivered, the defendant has filed for bankruptcy. The plaintiff has not been paid any of the judgment monies, nor his legal costs. The bankruptcy proceedings are complex and ongoing. At this point, the plaintiff has not made a criminal complaint.

20. Despite going through extensive litigation, including in the Supreme Court, The Treasury's proposed reforms would not allow the plaintiff in the above case to recover any of the judgment sum through his perpetrator's superannuation. Even though the plaintiff has been through the process of giving evidence in a civil trial, including being cross-examined.
21. **The ALA thus recommends that Treasurer review the narrow scope of this reform due to the above concerns about how it affects victims and survivors of abuse accessing justice.**

Limiting these proposals to victims and survivors of child sexual abuse

22. The proposals detailed in the Discussion Paper relate specifically to victims and survivors of child sexual abuse.
23. ALA Members report that victims and survivors of abuse – regardless of the age/s the victim or survivor was at the time of the abuse, and regardless of where it took place – are greatly affected by those experiences for the rest of their lives.
24. The reality is that many abuse victims and survivors (including but not limited to victims and survivors of child sexual abuse) suffer from ongoing psychiatric symptomatology, resulting in unemployment, ongoing treatment needs (often unfulfilled due to cost), homelessness and addiction.
25. **As such, the ALA contends that these proposed changes regarding accessing perpetrators' superannuation for the fulfilment of compensation orders should be available to all victims and survivors of abuse.**

“Additional” superannuation contributions

26. As per the Discussion Paper, it is proposed that victims and survivors of child sexual abuse would only be able to access “additional” contributions from the offender’s superannuation account to satisfy a compensation order.⁷
27. The intent of the proposal thus seems to centre on precluding child sexual abuse offenders from deliberately shielding their assets in the superannuation system, not on ensuring victims of child sexual abuse are properly compensated by their abuser for the lifelong pain and loss they have endured.
28. Therefore, the ALA submits that this is inadequate for the following reasons.
29. Only a very small number of victim survivors would benefit from such proposed changes as they stand, if any. In the experience of ALA Members and their firms, a very small number of perpetrators (when viewed as a full cohort) are, for instance, selling assets and hiding their proceeds in their superannuation funds. Any perpetrators currently engaging in such activities – who generally fit a specific profile – will likely find another way to dispose of or hide their assets if The Treasury’s proposals were to come into effect, thus rendering the new laws largely obsolete.
30. The ALA contends that these proposals might ultimately serve as a deterrent to perpetrators hiding their assets in superannuation accounts but would not ultimately provide anything by way of monetary compensation for victims and survivors, nor would there be a punitive consequence for such perpetrators.
31. For victims and survivors of abuse, the importance of having their compensation orders fulfilled cannot be underestimated. They require financial support to fund basic living expenses, as well as to fund health and treatment services.
32. Victims and survivors who were abused in an institutional setting generally have access to the National Redress Scheme or can make a claim for compensation via the applicable state civil compensation scheme against the institution.
33. However, victims and survivors who were abused in more private situations (i.e. not in an institutional setting) by individual perpetrators currently have no real avenue for recompense.

⁷ Discussion Paper 9.

These victims and survivors are unable to participate in the National Redress Scheme and, in most cases, find it is unviable to pursue civil litigation, as the perpetrator has limited assets and there are limited chances of there being any funds available at the culmination of the claim. These victims and survivors are often relying on Centrelink benefits and public housing to survive. It is these victims and survivors who could greatly benefit from laws enabling them access to their perpetrator's superannuation to fulfil a compensation order or agreed settlement.

34. **On that basis, the ALA submits that The Treasury should re-examine the proposals outlined in the Discussion Paper, including reviewing the purpose of introducing such laws, the needs of victims and survivors, and the outcomes hoping to be achieved.**
35. **Further, the ALA proposes that a portion of the perpetrator's full superannuation pool should be accessible to their victims and survivors to satisfy a compensation order or agreed settlement, not merely the perpetrator's "additional" contributions. This portion of the perpetrator's full superannuation pool could be defined by a percentage or a maximum cap on how much is accessible for fulfilling a compensation order.** It could also contain a stipulation as to the minimum amount that must remain in the superannuation pool to fund a basic retirement, once the compensation order/settlement has been paid to the victim or survivor.
36. **We urge The Treasury to consider this alternative model prior to any decisions being made on the current proposals.** The ALA believes that this will enable victims and survivors to receive proper recompense for what happened to them (and in turn relieves the financial burden off the Federal Government for their full living and medical costs in the process).

Access to the superannuation of a perpetrator's spouse or other family member

37. The ALA contends that significant issues are raised by the proposal to access the superannuation of a perpetrator's spouse or another family member.
38. It is problematic if the spouse or family member is also a victim of any form of violence or abuse at the hands of the perpetrator in question, and/or if the spouse or family member is innocent of any involvement in the abuse suffered by the victim or survivor such that the

spouse or family member may only even be finding out about the abuse once criminal litigation is commenced. In those contexts, the ALA is concerned that accessing that spouse/other family member's superannuation is tantamount to punitive action against an innocent party.

39. If the ALA's proposal regarding an alternative model at paragraphs 35 of this submission is accepted (i.e. that a victim or survivor should be able to access a perpetrator's full superannuation, beyond "additional" contributions), **then we do not believe the superannuation of the perpetrator's spouse or other family member should be accessed.**

40. However, if our proposal at paragraph 35 of this submission is not progressed (i.e. only "additional" contributions will be available to a victim or survivor under the new laws), **then a victim or survivor should be able to access the perpetrator's spouse or family member's superannuation only if it is very clear that:**

- the funds were deposited into the perpetrator's spouse or family member's superannuation as part of the perpetrator disposing of the perpetrator's assets; and/or
- a perpetrator's spouse or other family member/s were in any way involved in the abuse of the victim or survivor (for which culpability would need to be formally determined, no doubt through additional litigation).

41. If the reform to access the superannuation of the perpetrator's spouse or family members does proceed, the ALA strongly contends that safeguards must be in place regarding whose superannuation will be accessed in addition to the perpetrator's superannuation, especially in instances where:

- there is a situation of domestic/family violence involving the perpetrator and their spouse/other family member; and/or
- the perpetrator is also the employer of their spouse/other family member, as this dynamic would confuse whether superannuation payments in the spouse/other family member's superannuation account are treated as employer contributions or as "additional" contributions for the purposes of determining what contributions are accessible to the victim or survivor under the current proposals (if they proceed without amendment).

Retrospective application

42. The ALA welcomes the retrospective application of the proposals detailed in the Discussion Paper, both in terms of applying to cases of historical abuse and also applying to contributions the perpetrator made *before* that perpetrator was charged.⁸
43. **The ALA contends that these proposals should be applied as broadly as possible, in order to help the largest number of abuse victims and survivors, including victims and survivors of historical abuse offences.**
44. Retrospectivity applies to all other sources for damages and the ALA thus supports retrospectivity applying in determining which what superannuation contributions made by the perpetrator would be available to the victim or survivor of that perpetrator’s abuse.

The proposed visibility mechanism

45. The second proposal, as detailed in the Discussion Paper, envisages a process whereby victims and survivors submit a superannuation information request form to a court in order to ascertain the total value of the perpetrator’s “additional” superannuation contribution.⁹
46. If that request is granted, the court will request that information from the Australian Taxation Office (ATO) and, once the court receives the requested information from the ATO, the court will provide that information to the parties to the proceedings.¹⁰
47. The ALA wishes to raise two points about this proposed visibility mechanism, the first regarding visibility for the victim or survivor over the full superannuation pool, and the second regarding the additional costs incurred by victims and survivors in the process of activating the visibility mechanism.

⁸ Ibid 7.

⁹ Ibid 15.

¹⁰ Ibid 15–16.

Visibility over the full superannuation pool

48. As outlined at paragraph 35 of this submission, the ALA strongly believes that perpetrators' full superannuation pool should be available for fulfilling unpaid compensation orders to victims and survivors.
49. **Consequently, the ALA contends that this proposed visibility mechanism should be amended such that victims and survivors would be able to apply to the court (and the court then applies to the ATO) to receive visibility over the full superannuation pool, rather than merely the "additional" contributions.**

Additional costs for victims and survivors

50. The ALA acknowledges that the intention behind The Treasury's proposed reform is to provide victims and survivors with information which will inform whether they undertake future proceedings.¹¹
51. The ALA is concerned, however, that this will be another costly process for victims and survivors. Victims and survivors incur costs when making requests for information through a court and also appearing before a court, including needing to engage legal representation.
52. In some jurisdictions, there are pre-court procedures which may also need to be undertaken before the victim or survivor could then even initiate proceedings to make an application through a court to have visibility over the perpetrator's superannuation account.
53. The ALA is concerned that this visibility mechanism could become a costly venture for victims and survivors, especially if the result is anything short of visibility over a perpetrator's full superannuation pool.
54. **The ALA would be grateful to receive further clarification from The Treasury on the matter of what costs victims and survivors can expect to incur via this visibility mechanism and also who would bear those costs.**

¹¹ Ibid 16.

Conclusion

55. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into The Treasury's consultation on access to offenders' superannuation for victims and survivors of child sexual abuse.

56. The ALA is available to provide further assistance to The Treasury on the issues raised in this submission.

A handwritten signature in black ink, appearing to read 'Genevieve Henderson', written in a cursive style.

Genevieve Henderson

National President,

Australian Lawyers Alliance