



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:CBcd100223

10 February 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

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

Thank you for inviting the Law Society of NSW to provide input for a possible submission to the Treasury regarding its Discussion Paper, 'Access to offenders' superannuation for victims and survivors of child sexual abuse' (**Discussion Paper**). The Law Society's Criminal Law Committee contributed to this submission.

The Law Society welcomes appropriate measures to support victims and survivors of child sexual abuse (**CSA**) and supports the policy intent behind the reforms proposed in the Discussion Paper, namely, to stop convicted child sexual abuse offenders from hiding assets in their superannuation to defeat compensation claims made by victims and survivors.

However, the Law Society is concerned that the proposals in their current form may create unintended consequences. We suggest that the proposals be reconsidered to achieve the policy intent more precisely, taking into account the issues raised below.

Scope of eligible CSA offences

We acknowledge the policy intent of the proposal is to provide the best possible outcomes for victims and survivors of CSA, and note the particular vulnerability of this group. In this regard, we understand the rationale for defining the scope of eligible CSA offences broadly.

However, we note that the proposed scope of eligible CSA offences to be covered by the reform would also include offences that would not be relevant to the reform, such as possession of child abuse material¹ and possession of child-like sex dolls² offences, which are both Commonwealth child sex offences under section 3 of the *Crimes Act 1914* (Cth). The Law Society suggests that the scope of eligible offences be more closely considered and revised to include only those offences relevant to the reforms.

¹ *Criminal Code Act 1995*, Div. 273.

² *Criminal Code Act 1995*, Div. 273A.

'Additional' contributions

The Law Society considers the approach of the proposed objective test for recoverable 'additional' contributions problematic. Creating a set timeframe wherein any additional contributions made by a convicted offender to superannuation are deemed recoverable for compensation goes beyond the policy intent of targeting offenders who deliberately shield their assets in superannuation. In our view, the objective test may unfairly capture a broader set of offenders than intended, including those who continued to make genuine, regular additional contributions into superannuation during the deeming period.

Further, while we acknowledge that offenders may seek to shield assets in the superannuation accounts of family members, we are also concerned that the objective test as currently proposed may unjustly affect other in-scope superannuation account holders, including spouses or children who are innocent recipients of regular additional contributions made by convicted offenders during the deeming period.

To remedy these issues, instead of a blanket deeming approach, we suggest that the Government may consider empowering courts, in determining these applications, to make factual findings on the balance of probabilities about whether an offender deliberately hid assets in superannuation accounts to avoid paying compensation to victims and survivors, including whether those assets were hidden in the accounts of other account holders. It is possible that this approach may have workload implications for courts; however, it would avoid the unintended consequences of injustice, particularly for innocent account holders.

Retrospectivity

We note the view in the Discussion Paper (p.7) that the Government expects that the proposal will apply retrospectively, in terms of the historical offences that are eligible as well as the personal superannuation contributions that could be accessed. We note also that the Discussion Paper states that this aspect of the proposal will be subject to further consultation.

As a rule of law issue, the Law Society generally opposes retrospective application of proposed reforms, and we are concerned about the unintended consequences that may result if this proposal is introduced with retrospective effect. We acknowledge that there may be instances where it would be in the interests of justice for the scheme to apply retrospectively, however, and would be grateful for the opportunity to provide further feedback on any proposed retrospective element of the reform.

If you have any questions in relation to this letter, please contact Claudia Daly, Policy Lawyer on (02) 9926 0233 or by email: claudia.daly@lawsociety.com.au.

Yours sincerely,



Cassandra Banks
President