The Law Society
OF NEW SOUTH WALES

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Dear Dr Popple,

TREASURY CONSULTATION ON PREVENTING PERPETRATORS FROM ACCESSING VICTIMS' SUPER DEATH BENEFITS

Thank you for the opportunity to provide input to a Law Council submission in response to the Treasury Consultation Paper, *Preventing perpetrators from accessing victims' super death benefits*.[1] The Law Society's Business Law, Elder Law, Capacity and Succession, Family Law and In-House Corporate Lawyers Committees have contributed to this submission.

General comments

The Law Society commends the Government's commitment to improve safety and close financial abuse loopholes, including under superannuation law. We support reform to prevent perpetrators of family and domestic violence (**FDV**) from accessing their victim's superannuation death benefits, including the setting aside of a person as an eligible beneficiary, setting aside of a member's binding death benefit nomination (**BDBN**), or departing from an allocation otherwise required under the governing rules of a superannuation fund.

Broader reform

The Law Society acknowledges the Law Council's proposed ongoing advocacy for broader superannuation law reform to require that all death benefits, other than those subject of a valid BDBN, form part of the estate of a deceased person. Under this proposal, the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) would be amended to mandate that, where a valid BDBN does not apply, death benefits are to be dealt with according to the laws of succession.[2] We understand this broader proposal does not expressly contemplate the

[1] The Treasury, online, https://storage.googleapis.com/files-au-treasury/treasury/p/prj3b42a1371486c06c27d39/page/c2026_747658cp.pdf.
[2] We note the Law Council has previously expressed this proposal to be conditional on the inclusion of a mechanism that ensures the death benefit is "ring-fenced" within a person's estate to avoid it being subject to estate debts. See Law Council submission, *Proposed reform to superannuation death benefits*, 12 January 2024, online, https://lawcouncil.au/publicassets/3de90659-83fb-ee11-9498-005056be13b5/4477%20-%20S%20-%20Proposed%20reform%20to%20superannuation%20death%20benefits-1.pdf.

treatment of estate assets where the deceased has been a victim of FDV at the hands of a potential beneficiary of the estate. Nor does it account for the interaction with the notional estate regime under NSW legislation.[3]

We suggest any proposal for broader reform to Commonwealth laws and systems should address, in a consistent way, the legal loophole allowing perpetrators of FDV to receive their victim's death benefits as well as the potential conflict with NSW succession laws, and any other relevant State and Territory laws. However, in the absence of broader reform taking place, our comments in respect of each option below are provided within the context of the current superannuation death benefits legislative framework.

Self-managed superannuation funds (**SMSFs**)

We note the Consultation Paper focuses on APRA-regulated retail funds. Consideration of the unique issues related to SMSFs, particularly the risk that an SMSF trustee may also be a perpetrator of FDV, are out of scope of the current consultation. The Treasury states that additional consultation is required in relation to SMSFs and notes that "Government is considering its response to the Financial Abuse Inquiry Report, which recommends "a review of the intersection between financial abuse and the superannuation system, particularly in relation to [SMSF]".[4] Accordingly, our comments in this submission do not extend to issues relating to SMSFs.

The Treasury Consultation Paper - proposed targeted reform options

The Consultation Paper proposes a series of options designed to give effect to the Government's stated core objectives to protect the superannuation interests of deceased victims of FDV, uphold fairness by supporting equitable and just distributions of death benefits, and support the timely distribution of death benefits.[5] We provide feedback on each of these options in turn below.

1. Establishing a forfeiture-like rule for superannuation death benefit

Under this option, it is proposed to legislate a set of rules in relation to superannuation death benefits that would have a similar effect to the common law forfeiture rule. The forfeiture rule is a rule of public policy that a perpetrator of an unlawful killing cannot inherit from the victim's estate or otherwise benefit financially from their act.[6] It applies where the court is satisfied, to the civil standard, that the killing was unlawful.[7] We note NSW, South Australia and the Australian Capital Territory are the only jurisdictions in Australia that have legislative schemes permitting the courts to modify the forfeiture rule where satisfied that it is required in the interests of justice.[8] Under the proposed Commonwealth forfeiture-like rule, trustees would be required to set aside a beneficiary, regardless of any death benefit nomination or governing rules of a superannuation fund, where that person has been "found by a court to have committed prescribed offences, or types of offences".[9]

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[3] *Succession Act 2006* (NSW), Ch 3, Pt 3.3, Div 2, provides that the relevant court may designate superannuation death benefits as "notional estate" if a family provision order is made and the actual estate cannot cover the provision. See Law Society of NSW Letter to the Law Council, *Approach to superannuation death benefit complaints*, 25 October 2024, online, https://www.lawsociety.com.au/sites/default/files/2025-06/Ltr%20to%20LCA%20-%20AFCA%20Consultation%20paper%20-%20Approach%20to%20superannuation%20death%20benefit%20complaints%20-%2025.10.24.pdf.
[4] N1, 11.
[5] Ibid, 4.
[6] Victorian Law Reform Commission (VLRC), *The Forfeiture Rule* (Consultation Paper, March 2014) Chs 2–3, https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/The_Forfeiture_Rule_consultation_paper_for_web.pdf, in Hanegbi, Rami and Bagaric, Mirko --- "Disqualifying Domestic Violence Perpetrators from the Superannuation of Their Victims" [2025] UNSWLawJl 31; (2025) 48(3) UNSW Law Journal 978, online, https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UNSWLawJl/2025/31.html#fn66.
[7] VLRC, ibid, 2 [1.3].
[8] *Forfeiture Act 1995* (NSW), s 5; *Forfeiture Act 2024* (SA), s 9; *Forfeiture Act 1991* (ACT), s 3.
[9] N1,12.

The Law Society acknowledges that the application of the common law forfeiture rule to superannuation in Australia is currently unclear, complex, and in need of reform.[10] In particular, it is uncertain how the rule applies when a beneficiary is responsible for FDV which indirectly contributes to the death of the fund member. This largely stems from a fragmented legal environment with differing approaches to state legislation and inconsistent court decisions.[11]

The introduction of a Commonwealth forfeiture-like rule has the potential to reduce existing uncertainty in the superannuation death benefits context by providing a bright-line test for trustees. Shifting the burden of determining moral culpability from the judiciary to the legislature, ensures that the disqualification of a perpetrator is based on a clear public interest mandate. However, we suggest the proposed amendment to the SIS Act also creates a risk of inconsistent outcomes in different jurisdictions that should be considered in developing law reform. For example, a perpetrator of FDV may be disqualified from receiving the deceased's death benefits, having committed a prescribed offence under the proposed Commonwealth rule, while simultaneously retaining their entitlement to the real and personal property of the deceased's residual estate under state succession laws.

2. Policy options

The Consultation Paper explores three further options for preventing death benefits of victims being paid to perpetrators which could be implemented as complementary reforms to the introduction of the forfeiture-like rule. We note these options sit along a continuum, ranging from reforms that confer broad trustee discretion, to models characterised by greater judicial oversight. While there was some diversity in the views expressed by our members, on balance, we favour a model that prioritises judicial certainty, within the existing legislative scheme for administering superannuation death benefits, rather than one based on broad administrative discretion for trustees, or where a subset of superannuation death benefits are dealt with in a different jurisdiction.

<u>Option 1 - Broad trustee discretion</u>

This option would amend the SIS Act to allow a trustee to set aside an eligible beneficiary, a BDBN, or depart from an allocation required under the governing rules where the trustee believes, on a fair and reasonable basis, that the beneficiary has been a perpetrator of FDV against the deceased member. There may be some initial benefit to this option in avoiding the prohibitive expense of litigation that may be associated with the operation of Option 3, as well as the additional strain on court resources. We note that trustees are already fiduciaries bound by the SIS Act and that AFCA provides an avenue for reviewing whether a trustee's decision was "fair and reasonable" on questions of law and fact.[12]

However, the prevailing view of our members is that Option 1 may require trustees to undertake forensic investigation functions for which they are neither trained nor equipped, and which extend beyond the scope of their core functions.[13] Further, unlike a court, a trustee cannot test the veracity of competing claims through cross-examination nor compel the production of evidence to verify claims, and may accordingly, be constrained in resolving contested factual matters.

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[10] Browne, Darryl; Pollard, Ruth --- "Where from and Where to with the Forfeiture Rule" [2018] PrecedentAULA 55; (2018) 148 Precedent 14, online, https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/PrecedentAULA/2018/55.html#:~:text=The%20forfeiture%20rule%20is%20like,to%20penalise%20that%20social%20ill.

[11] By way of example, while the *Forfeiture Act 1995* (NSW) provides a rigid statutory baseline that excludes murder from any modification by the Court (section 4(2)), other jurisdictions, such as Victoria in *Edwards v State Trustees Limited* [2016] VSCA 28 have maintained an evaluative approach based on moral culpability.

[12] AFCA, *How AFCA makes decisions*, https://www.afca.org.au/what-to-expect/how-we-make-decisions#:~:text=may%20refer%20a%20question%20of,and%20substitute%20their%20own%20decision.

[13] SIS Act, s 52, outlines the core duties of trustees as focused on the commercial and fiduciary management of fund assets. This is to be compared with the proposed role of trustees under Option 1 which would require the exercise of quasi-judicial functions including fact-finding regarding personal conduct and weighing criminal or quasi-criminal evidence.

This limited evidentiary rigour also heightens the risk of misinterpreting complex relationship dynamics and overriding express testamentary intent. For example, we suggest there may be greater potential under this option for death benefit disqualifications contrary to the wishes of the deceased. This may occur in circumstances where an apparent history of FDV by a beneficiary perpetrated against the deceased is relied upon, notwithstanding that there may have been a genuine reconciliation and a deliberate and informed choice by the deceased to maintain a BDBN. In our view, the inherent forensic limitations of an administrative process make it ill-suited to the determination of allegations of FDV in complex matters involving family conflict and may, in contested matters, lead to increased litigation risk and further trauma for the deceased's family and loved ones.

The Law Society also notes that the Consultation Paper presents a view that Option 1 would allow for a more flexible, trauma-informed consideration of evidence, whereas the judicial process associated with Option 3, is characterised as carrying risks of re-traumatisation.[14] However, we note that certain features associated with court processes, such as adhering to the rules of evidence, are a necessary function of a sound and fair fact-finding process. We note also that the judiciary is guided by the specialised frameworks and institutional expertise of independent judicial commissions and professional associations. These institutions aim to provide education and resources equipping judicial officers to integrate therapeutic jurisprudence in the decision-making process.[15] In our view, the judiciary is functionally structured and professionally qualified to deliver sophisticated, trauma-informed and equitable decisions.

<u>Option 2 - Prescribed approach</u>

a) *Narrowed discretion - allow the trustee to exercise discretion to set aside an eligible beneficiary, a BDBN, or depart from an allocation required under the governing rules where a court has made a finding that the beneficiary perpetrated FDV against the deceased member; or*

b) *Automatic disentitlement - mandate that a trustee set aside an eligible beneficiary, a BDBN, or depart from an allocation required under the governing rules if a prescribed court finding exists.*

The Law Society supports the approach taken in sub-option 2(b), and suggests some modification to address those instances where there are allegations or evidence of FDV not supported by prescribed court findings. Our preference is for a model grounded in the clarity and certainty of tested evidence, as reflected in judicial determinations and consistent with core rule of law principles that the law be readily known, available, certain and clear.[16]

In our view, adoption of an automatic disentitlement approach as proposed under option 2(b) will ensure a trustee's decision to set aside the property right vested in an eligible beneficiary is underpinned by the procedural safeguards of the court system. This protects the integrity of the death benefit distribution against the risk of arbitrary and inconsistent administrative decision making. It also facilitates legal finality, ensuring a trustee's decision to set aside an eligible beneficiary, a BDBN, or to depart from an allocation required under the governing rules is legally robust and resistant to being overturned on appeal, which is in the best interests of the deceased victims' family and loved ones.

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[14] N1, 14 and 21.

[15] For eg, see The Australasian Institute of Judicial Administration Ltd, *National Domestic and Family Violence Bench Book*, 2025, online, https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/; Judicial Commission of NSW, Chapter 12, Trauma-informed courts, *Equality before the Law Bench Book*, online, https://www.judcom.nsw.gov.au/publications/benchbks/equality/section12.html, accessed March 2026; National Judicial College of Australia, Symposium 2026 - *Memory, Trauma and Evidence and the Courts*, online https://www.njca.com.au/Judicial-Education-Programs/njca-symposium-memory-trauma-and-evidence/.

[16] Law Council, Policy Agenda, *Rule of Law*, online, https://lawcouncil.au/policy-agenda/international-law/rule-of-law#:~:text=The%20Law%20Council%27s%20key%20objectives%20include%20maintaining,the%20inherent%20dignity%20of%20every%20human%20being**, accessed March 2026.

As discussed in the Consultation Paper, Option 2(b) may only offer a partial solution as it does not account for unreported FDV and FDV that does not meet the threshold of prescribed court findings, and that this may be perceived as implicitly condoning egregious conduct against victims that face the greatest barriers to reporting FDV.[17] We also appreciate that this option is not, on its own, nuanced enough to recognise the cumulative impact of non-physical abuse that may have contributed to a victim's death (for example, through declining health or suicide[18]).

To offset these deficiencies, we would support sub-option 2(b) in combination with a mechanism for referral to an appropriate independent fact-finding forum (such as a court) where the trustee has formed a reasonable suspicion that the potential beneficiary was a perpetrator of family and domestic violence against the deceased member.[19] We also suggest that trustees should be provided with legislative guidance on factors to consider in determining whether a referral is made. This approach provides the independence, evidentiary rigour and legal finality which in our view is necessary to protect the interests of all parties. It also provides a more comprehensive approach by implementing an automatic disentitlement trigger where prescribed court findings apply, while utilising an independent forum as a neutral, expert arbiter for unreported FDV or FDV that does not meet the prescribed offence threshold. If this approach is adopted, the relevant fact-finding forum should be appropriately resourced to meet this new caseload.

Option 3 - Referral to deceased estate or a court

We note Option 3 is consistent with the Law Council proposal for broader reform to treat death benefits as part of the deceased estate and refer to our previous remarks under "General comments". However, in the absence of that broader reform taking place, we would be concerned about piecemeal and inconsistent treatment of one subset of superannuation death benefits, if a referral was made to the deceased estate. In addition, we would be concerned about supporting Option 3 in the absence of mechanisms to address the following issues:

- The potential exposure of the death benefit to creditors of the deceased.[20]
- The potential adverse taxation implications for beneficiaries paid through the estate rather than directly from the superannuation trustee.[21]
- The impost on court resources.

If you have any queries about the items above, or would like further information, please contact Sonja Hewison, Policy Lawyer, on 02 9926 0219 or sonja.hewison@lawsociety.com.au.

Yours sincerely,

Ronan MacSweeney
President

[17] N1, 17-18.
[18] See Julie Adams, Tom Meagher and Pamela Kortas, Submission No 104 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Financial Services Regulatory Framework in Relation to Financial Abuse* (6 June 2024). Julie Adams is the mother of Molly Wilkes, a victim of FDV-related suicide, online, file:///C:/Users/shewison/Downloads/104.%20Ms%20Julie%20Adams.pdf
[19] The formation of a reasonable suspicion is the threshold applied under Option 3, n1, 20.
[20] See n2.
[21] See Law Society of NSW, Superannuation death benefits FAQs, September 2020, online, https://www.lawsociety.com.au/sites/default/files/2020-10/Superannuation%20death%20benefit%20FAQs%20-%20September%202020.pdf, 7.