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The Treasury

Via portal: <https://consult.treasury.gov.au/c2026-737656/consultation>

## Access to super for victims of child sexual abuse - draft legislation

The Super Members Council (SMC) thanks Treasury for the opportunity to make a submission to this consultation. SMC strongly supports the policy intent of the proposed reforms. The measures target the injustice that arises when offenders use the super system to frustrate or defeat court-ordered compensation owed to victim-survivors of child sexual abuse. By focusing on additional, voluntary contributions made after the offending conduct commences, the proposal is carefully calibrated to address and deter the deliberate shifting of assets into super while preserving the core retirement income purpose of compulsory super.

The Exposure Draft establishes a staged framework that enables victim-survivors of child sexual abuse to obtain visibility of a perpetrator's super, and have the Commissioner facilitate payment of unpaid court-ordered compensation. The focus of the legislation appropriately targets deliberate asset-shielding behaviour while preserving the core retirement-income purpose of compulsory super.

SMC strongly supports the treatment of these payments as non-assessable, non-exempt income, the protection of released amounts from set-off against tax and child support debts, and the important reform that ensures relevant compensation debts survive bankruptcy, all of which enhance the practical enforceability and integrity of victim-survivors' compensation rights.

SMC agrees with the emphasis on creating a practical enforcement pathway for victim-survivors. This includes improved transparency through access to ATO-held super information and the treatment of these compensation debts as surviving bankruptcy, so that perpetrators cannot extinguish these obligations while victim-survivors continue to bear the consequences of the abuse.

Perpetrators should not be able to benefit from their victim's super and the legal "loopholes" allowing abusers to profit from abuse must be closed. The draft regime's core aim to stop offenders from using super to shield assets from compensation directly reflects that principle.

SMC recommends Treasury:

1. Clarify the treatment of defined benefit interests under the proposed regime. If defined benefit components are to be included within the scope of a release authority, the legislation should impose a mandatory obligation on trustees to comply, rather than leaving it to their discretion. This obligation should be supported by appropriate mechanisms and safeguards to enable trustees to comply within their legal and actuarial frameworks.
2. Ensure operational timeframes reflect real-world complexity.
3. Strengthen ATO systems to support effective administration.
4. Provide clear prioritisation rules for competing claims.
5. Reduce the likelihood of disputes over the eligible period by using existing convictions or court findings.
6. Defer notification to perpetrators to prevent asset dissipation.



## About the Super Members Council

We are a strong voice advocating for the interests of 12 million Australians with over \$1.6 trillion in retirement savings managed by profit-to-member super funds. Our purpose is to protect and advance the interests of those millions of super fund members throughout their lives, advocating on their behalf to ensure super policy is stable, effective, and equitable. We produce rigorous research and analysis and work with Parliamentarians and policy makers across the full breadth of Parliament.

## Defined benefits

The legislation and explanatory memorandum (EM) establish that once the Federal Circuit and Family Court makes an order under new section 139-50, the Commissioner “must issue one or more release authorities to one or more superannuation providers that hold superannuation interests for the perpetrator”. Each release authority states an amount, and the provider that receives it must, within 10 business days (or longer if allowed), pay to the Commissioner the lesser of the stated amount and the sum of the maximum available release amounts for the relevant interests (excluding defined benefit interests).

The draft then introduces a parallel rule in section 131-402(3) that: a provider “may, within 10 business days after the release authority is issued ... pay to the Commissioner the lesser of (a) the amount stated in the release authority and (b) the sum of the maximum available release amounts for each defined benefit interest held ... for the perpetrator”.

The proposed legislation indicates that super fund providers are not required, but may choose, to comply with a release authority in relation to a defined benefit interest.

SMC acknowledges the policy and technical rationale for distinguishing defined benefit interests from accumulation interests in the proposed framework. The nature of defined benefit arrangements presents significant structural and legal barriers to their inclusion in this regime. In many defined benefit schemes, members do not hold an individual account balance but instead have a conditional right to a future benefit from a pooled fund, contingent on specified conditions of release being met. In practice, those conditions may never be satisfied (for example, where the member leaves the relevant employment, including to serve a custodial sentence, and consequently does not accrue or crystallise a benefit).

In these circumstances, the trustee cannot lawfully make a payment if no benefit has vested and the trust deed does not authorise such a payment. It is difficult to see how a trustee could properly exercise a “discretion” to act contrary to the deed unless the legislation explicitly empowers or requires it to do so. Further, because there is no true individual account (only an actuarial estimate of entitlement if and when conditions of release are satisfied) it may be difficult to determine a precise, releasable amount at a particular point in time. This leaves significant uncertainty about how, and in what circumstances, any such discretion would be exercised. This creates a material risk of inequitable outcomes, whereby access to compensation could depend on the particular super fund, product design or trustee policy rather than the merits of the case or the quantum of additional contributions made by the perpetrator.

Victim-survivors who have already proved their case and obtained a court order deserve a system of release authorities that operates reliably and consistently, not one where their access to justice turns on the chance of which fund their perpetrator happens to be in. Leaving defined benefit release to fund discretion, and without clear indication on the Commissioner’s role, cuts against the scheme’s core aim of consistency, and equity. It risks arbitrary outcomes, which is difficult to justify where victims have already met a high threshold (criminal conviction and unpaid court-ordered compensation). It also places trustees in a difficult position, requiring them to navigate complex legal, actuarial, and reputational considerations in the absence of a clear legislative mandate.

If, on balance, the policy view is that defined benefit interests are too complex and uncertain to be brought within this framework in a principled and administratively workable way, SMC considers that the legislation should make this exclusion explicit. As the EM notes, the operation of defined benefit schemes is “not congruous” with a mechanism that is designed to identify and release discrete additional contributions made during an eligible period. An explicit exclusion would provide certainty for trustees and victims alike and avoid the risk of inconsistent or arbitrary outcomes.



Alternatively, if defined benefit components or ancillary accumulation components sit alongside a defined benefit component, the Commissioner must issue a release authority in relation to that accumulation component or interest. The relevant superannuation provider should be required to comply with that release authority in accordance with the general rules applying to non-defined benefit interests. A shift to requiring defined benefit components to be paid under release authorities would represent a major change to the current policy architecture and operational expectations for funds. If such a change were to be pursued, it would be critical that Government and regulators undertake further detailed engagement with affected funds and administrators before finalising the measure. This would need to include careful consideration of system design and build requirements, changes to product and benefit administration rules, and the development of clear, consistent operational guidance to support uniform application across funds. Given the complexity and heterogeneity of defined benefit arrangements, sustained consultation would be essential to ensure that any new obligations are workable in practice, can be implemented in a staged and cost-effective manner, and do not create unintended inequities or inconsistencies for victim-survivors.

In support of the above recommendations, we highlight the broader policy implications of retaining trustee discretion in relation to defined benefit interests.

### Why certainty in this regime matters

- Victims in otherwise identical positions could be treated differently depending solely on their perpetrator’s fund and how that fund chooses to exercise discretion over defined benefit interests.
- The regime otherwise gives victims a reasonably clear pathway: additional contributions are identified, a maximum releasable amount is set, and accumulation-style interests must comply; introducing defined benefit discretion re-injects uncertainty at the end of that process.
- Neither victims nor perpetrators will be able to predict, at the point of seeking or defending a court order, whether any value can practically be extracted from a defined benefit interest, which complicates legal strategy, settlement discussions and expectations around enforcement.
- Trustees will need to develop fund-specific policies on if and when to exercise discretion, but those policies may evolve over time or differ across funds, further reducing consistency and risking disputes about fairness and trustee duties.
- Defined benefit schemes are formula-based and collectively funded; ad hoc decisions to comply or not comply could create internal inequities between members and tension with existing trust deed promises and actuarial funding assumptions.

These inequities in the treatment of different super interests must be addressed to ensure that the regime delivers on its promise of fair, effective access to compensation for victim-survivors.

### Scope, amount and timing of release authorities

SMC also recommends a number of practical considerations on scope, management and timing of release authorities to strengthen the integrity of the system.

**Pension payments:** The exposure draft does not expressly state whether the new regime applies specifically to pension payments. Instead, it consistently refers to “superannuation interests” and “superannuation plans” of the perpetrator, and to the “total superannuation balance” known to the Commissioner, without distinguishing between accumulation and pension phase interests.

As a result, it is unclear whether the proposed Bill is intended to apply to pension payments. In the spirit of the legislation, SMC considers that it would be appropriate that it does and that this should be clearly articulated.

**Conflicting orders:** While the proposed 10 business day timeframe is broadly consistent with existing release authority requirements, the processes under this regime may, in practice, require trustees to identify and consider potentially conflicting court orders or proceedings affecting the relevant super interest. In such circumstances, this additional layer of complexity may make it difficult for super providers to assess their obligations and notify the Commissioner within the prescribed timeframe.

The ATO should extend the existing Electronic Messaging System (EMS) in SuperStream to accommodate the new release authority for victims of crime, including functionality for follow-up responses between the ATO and funds. This enhancement would enable the ATO to provide clear, timely directions to trustees where an account is subject to other court orders or proceedings,



including guidance on the priority to be afforded to the perpetrator contributions release authority in those circumstances.

### **Trustee decision-making where multiple claims or release authorities apply**

Clearer guidance is required on how trustees should respond to, and prioritise, competing requests in circumstances where multiple claims or release mechanisms apply concurrently. This includes situations where different forms of early release or benefit alteration are in play at the same time, such as severe financial hardship, compassionate grounds, family law payment splits, and Victims of Crime payments.

Further, guidance is also needed on the appropriate prioritisation of multiple release authorities issued in respect of the same perpetrator, particularly where there are multiple victims and separate orders are made. It may be unclear which release authority should be complied with first, and how trustees should sequence payments where available benefits are insufficient to satisfy all claims in full. Clear, consistent direction from Government and regulators on prioritisation principles is essential to support lawful, fair and administratively workable trustee decision-making in these complex scenarios.

### **Risk management in eligible period determination and early notification**

There are important risk management considerations that warrant further attention to ensure the regime operates as intended, particularly in relation to the determination of the eligible period and the timing of notifications to perpetrators.

**Eligible period:** the current requirement for applicants to nominate a specific start date for the offending may create a pathway for perpetrators to challenge the nominated date, thereby disputing the eligible period, delaying the making of orders and causing additional distress to victims. Consideration should be given to relying, wherever possible, on existing convictions or court findings as the primary basis for establishing the eligible period, rather than effectively re-litigating the start date of offending through the application process. To promote certainty and reduce scope for dispute, these matters should be addressed as clearly as possible in the primary legislation, or, if that is not feasible, through detailed ATO guidance on the application process and the determination of the eligible period.

**Early notification to perpetrators** following ATO disclosure of super information may enable the withdrawal or transfer of super benefits before a court order can be sought or made. Consistent with the approach taken to information-sharing restrictions in the family law context, notification to perpetrators should be deferred until an application for a court order is filed, or an equivalent procedural milestone is reached. This would help to preserve the integrity of the compensation process and reduce the risk that perpetrators frustrate the operation of the regime by moving or depleting superannuation assets in anticipation of an order.

### **Implementation dependencies on the ATO - Administrative issues**

There are several matters relating to ATO-administered information, processes and outcomes that require further clarification in the context of the draft legislation. Key issues include:

#### **Data reliability**

It is unclear whether the ATO's superannuation contribution and balance data will be sufficiently current for the purposes of informing applications and court orders. Where data may be incomplete, out of date or subject to reporting delays, clear caveats or disclaimers should accompany information provided to applicants and the courts, so that expectations are managed and the evidentiary status of ATO-provided information is transparent.

#### **Exception management**

Detailed ATO guidance is required on exception management, including how disputes, calculation errors or challenges raised by perpetrators in relation to contribution totals or eligible periods will be handled, both before and after payment of amounts under a release authority.

Clarification is needed on the respective roles and responsibilities of the ATO, funds, victims and perpetrators in resolving such issues, to ensure the regime is administratively workable and does not expose victims or trustees to undue uncertainty or delay.



### **Tax treatment**

There is uncertainty regarding the tax treatment of amounts released and paid to victims, particularly where those amounts comprise, or include, non-concessional contributions. While the exposure draft proposes to treat certain refunds as neither assessable nor exempt income, further explanation and, if necessary, additional legislative clarification should be provided to confirm the intended tax outcomes for victims across different contribution types and benefit components.

SMC would welcome the opportunity to work with Treasury on refining the implementation details so the framework is robust, administratively workable and applied consistently across the super system.