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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ACCESS TO SUPERANNUATION FOR VICTIMS OF CHILD SEXUAL ABUSE
CRIMES

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of Contents

Glossary	iii
Chapter 1: Access to superannuation for victims of child sexual abuse crimes	5

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<i>Abbreviation</i>	<i>Definition</i>
APRA	Australian Prudential Regulation Authority
ATO	Australian Taxation Office
Bankruptcy Act	<i>Bankruptcy Act 1966</i>
Commissioner	Commissioner of Taxation
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
NANE	non-assessable, non-exempt
RSA	retirement savings account
RSA Act	<i>Retirement Savings Account Act 1997</i>
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>
SMSF	self managed superannuation fund
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1: Access to superannuation for victims of child sexual abuse crimes

Table of Contents:

Outline of chapter	5
Context of amendments.....	6
Summary of new law.....	6
Detailed explanation of new law	7
Victims and survivors – application criteria.....	7
Applying for visibility of certain superannuation information	8
Perpetrator contributions release order	13
Commissioner required to issue release authority to superannuation providers	21
Effect of paying victim and treatment of released superannuation monies.....	26
Compensation debts survive bankruptcy.....	27
Consequential amendments	27
Commencement, application, and transitional provisions	28

Outline of chapter

- 1.1 Schedule 1 creates a framework enabling victims and survivors of child sexual abuse and other similar offences to seek visibility and release of certain amounts from a perpetrator’s superannuation to satisfy unpaid compensation orders derived from criminal or civil proceedings. This aims to prevent superannuation being used to shield a perpetrator’s assets from compensation.
- 1.2 The Schedule also allows compensation debts to survive perpetrators’ bankruptcies, improving the chances for victims and survivors seeking to enforce such debts.

Context of amendments

- 1.3 Currently, perpetrators subject to criminal or civil proceedings (or those anticipating such proceedings), may be incentivised to make large additional contributions to their superannuation accounts to shield assets from potential compensations orders. Generally, superannuation assets are not available to a victim or survivor for compensation.
- 1.4 In recent years, there have been a number of high-profile reports of convicted child sexual abuse perpetrators deliberately hiding millions of dollars' worth of assets in superannuation accounts to defeat compensation claims. This can delay or prevent victims' and survivors' access to compensation and further add to their emotional distress.
- 1.5 On 19 January 2023, the Government released a discussion paper which canvassed policy options to address such issues for victims and survivors of child sexual abuse, who are among the most vulnerable people to interact with the criminal justice system.

Summary of new law

- 1.6 This Schedule creates a mechanism enabling the release of certain amounts from a perpetrator's superannuation interests to satisfy compensation orders which have remained unpaid for 12 months or more, where the perpetrator has been convicted or found guilty of certain offences to a criminal standard.
- 1.7 To initiate the release process, victims and survivors that meet the application criteria must apply to the Commissioner to obtain the perpetrator's superannuation information. Receipt of this information enables them to apply for a court order for the Commissioner to facilitate the release of monies from a perpetrator's superannuation interests (a perpetrator contributions release order). This Schedule sets out the grounds available to the perpetrator to challenge the making of this court order.
- 1.8 Pursuant to the perpetrator contributions release order and these amendments, the Commissioner is required to issue one or more release authorities to relevant superannuation providers after the order is given to the Commissioner to secure the release of monies from a perpetrator's superannuation interests and pay this to the victim. Generally, this aspect of the amendments utilises the existing release authority framework in Schedule 1 to the TAA 1953. However, various adaptions have been made to ensure the rules are fit for purpose.
- 1.9 The amendments include a range of rules designed to manage interactions with other proceedings and matters, such as those involving bankruptcy, proceeds of

crime, family law and certain corruption offences, as these may involve conflicting claims on a perpetrator's superannuation interest.

1.10 The Schedule also amends the Bankruptcy Act to allow compensation debts to survive perpetrators' bankruptcies.

Detailed explanation of new law

1.11 In order to access the mechanism for releasing superannuation monies introduced by these amendments, victims or survivors must obtain certain superannuation information from the Commissioner. Receipt of this information enables them to apply for a court order for the Commissioner to facilitate the release of monies from a perpetrator's superannuation interests (a perpetrator contributions release order).

Victims and survivors – application criteria

1.12 A person may apply to the Commissioner to gain access to information regarding the superannuation interests of the perpetrator of an offence where the person believes on reasonable grounds that they satisfy the application criteria for the court order, which are that:

- the perpetrator has been convicted of, or where there is no conviction recorded, found guilty of a specified child sexual abuse offence to a criminal standard. This includes circumstances where a recognisance release order or similar has been made;
- a court has made an order requiring the perpetrator to pay compensation to the victim for injury, loss or damage suffered by the victim as a direct result of a specified child sexual abuse offence. This is regardless of whether the order was made before or after the conviction or finding of guilt and whether the order was made in the same court which convicted the perpetrator of the offence or a different court in civil proceedings;
- the amount has been due and payable for at least 12 months;
- the perpetrator has not paid the full amount of compensation specified in the order; and
- the period within which recovery of the amount may be pursued in a court in the jurisdiction where the order was made has not expired.

[Schedule 1, item 23, paragraphs 139-45(1)(a) to (e) and subsection 139-10(1) of Schedule 1 to the TAA 1953]

1.13 The amendments introduce the meaning of specified child sexual abuse offence. A *specified child sexual abuse offence* is defined as having the same meaning as *child sexual abuse offence* within subsection 3(1) of the *Crimes*

Act 1914 or as an offence under Divisions 270 and 271 of the *Criminal Code* where the victim or survivor is under 18 years of age, excluding:

- trafficking under sections, 271.2 and 271.3;
- domestic trafficking under sections 271.5 and 271.6;
- organ trafficking under sections 271.7B and 271.7C;
- domestic organ trafficking under sections 271.7D and 271.7E; or
- harbouring a victim under section 271.7F.

1.14 The listed trafficking offences are excluded as Division 271 provides a separate trafficking offence for trafficking in children under section 271.4. This is the same for domestic trafficking offences under section 271.7. Similarly, there is a separate aggravated offence equivalent to the offence of harbouring a victim under section 271.7F which is applicable when the victim is under the age of 18. *[Schedule 1, item 23, section 139-15 of Schedule 1 to the TAA 1953]*

Applying for visibility of certain superannuation information

1.15 A victim that believes on reasonable grounds that they meet the application criteria for a court order (or certain persons acting on their behalf) can apply to the Commissioner for visibility of certain information relating to the perpetrator's superannuation interests. *[Schedule 1, item 23, section 139-10 of Schedule 1 to the TAA 1953]*

1.16 The information will assist them in assessing whether it is worthwhile pursuing a perpetrator contributions release order. This leverages information held by the ATO to improve the transparency and reduce the uncertainty of pursuing compensation. This approach also ensures that applicants do not need any prior knowledge of a perpetrator's superannuation interests and are not required to undertake a more costly exercise, such as issuing subpoenas to superannuation providers, in order to pursue enforcement of outstanding compensation debts through this mechanism.

1.17 Accessing this information is a precondition to seeking a perpetrator contributions release order and will inform the amount that can be released which will be specified in the order. *[Schedule 1, item 23, paragraph 139-45(1)(f) of Schedule 1 to the TAA 1953]*

1.18 The application to the Commissioner to provide information about the superannuation interests of the perpetrator may also be made by certain other persons on behalf of the victim. This is limited to the victim's legal representative, legal personal representative, registered tax agent, or financial counsellor. Where the victim is a child under 18, their parent or person who

has been granted guardianship of the child under a law of the Commonwealth or of a State or Territory may make an application on their behalf. This is an exhaustive list which ensures that the interests of the victims are appropriately represented. *[Schedule 1, item 23, subsection 139-10(2) of Schedule 1 to the TAA 1953]*

- 1.19 The application must include a copy of the compensation order, evidence of conviction, if applicable, state the start date on which the victim alleges that the conduct constituting the offence occurred and be in the approved form (within the meaning given by section 388-50 of Schedule 1 to the TAA 1953). The approved form may set out requirements including supporting documentation required for the application to be complete. *[Schedule 1, item 23, paragraphs 139-20(a), (c), (d) and (e) of Schedule 1 to the TAA 1953]*
- 1.20 The applicant must also sign a statutory declaration that states:
 - the applicant believes on reasonable grounds that the circumstances outlined in the application criteria exist;
 - the applicant understands that they may be liable for an offence under section 11 of the *Statutory Declarations Act 1959* for making a false statement in a statutory declaration;
 - the applicant understands that on-disclosure of the information (other than for the purposes of seeking a perpetrator contributions release order or otherwise during a proceeding for such an order) may result in liability for tax secrecy offences. *[Schedule 1, item 23, paragraph 139-20(b) of Schedule 1 to the TAA 1953]*
- 1.21 Where a person provides information in the approved form, they will also be required to declare that any information provided is true and correct (see section 388-60 of Schedule 1 to the TAA 1953).
- 1.22 At this preliminary stage of the process relating to the release of information, the criteria are designed to ensure only genuine applications are made and that the applicant understands the potential consequences that may arise under the law in such situations.
- 1.23 If, following the release of a perpetrator's information, an applicant chooses to proceed with seeking a perpetrator contributions release order from the court, the applicant must satisfy the court that the application criteria have been satisfied. The perpetrator will be provided with the opportunity to dispute whether the application criteria have been met at this later stage, as this later stage is overseen by a court (being a body well-suited to adjudicate on matters and evidence of this nature) and governed by court process.
- 1.24 The corollary to this is that the Commissioner is not expected to independently verify the application or assess whether the application criteria have been met. Where an application is complete, in the approved form and the applicant has attested to the relevant matters, the Commissioner is required to disclose certain information. The Commissioner has no discretion regarding the

disclosure as the amendments require that the disclosure must be made.
[Schedule 1, item 23, subsection 139-25(1) of Schedule 1 to the TAA 1953]

1.25 Merits review has not been made available for the Commissioner's decision to release information. Due to the Commissioner's decision pertaining only to the completeness of the application, it is a statutory obligation that is imposed on the Commissioner to act in a certain way upon the occurrence of a specified set of circumstances that does not require an evaluative judgement. Therefore, not providing for merits review of the Commissioner's preliminary mandatory decision is appropriate and consistent with the Administrative Review Council's guide on *What decisions should be subject to merit review*.

Information to be disclosed

1.26 The Commissioner must disclose:

- voluntary contributions (or additional contributions) made within the eligible period to the perpetrator's superannuation interests from the 2002-03 financial year onwards, including specifying the relevant eligible period (refer below); and
- the perpetrator's 'total superannuation balance' (refer section 307-230 of the ITAA 1997), where the perpetrator's total superannuation balance is lower than the amount of relevant additional contributions identified.
[Schedule 1, item 23, section 139-30 and subsection 139-25(3) of Schedule 1 to the TAA 1953]

1.27 The Commissioner is not permitted to disclose other information, such as the name of the perpetrator's superannuation fund or other details about their superannuation interests. The amendments only permit and require the disclosure of very limited information, which is the minimum level necessary to assist an applicant with assessing whether it is worthwhile investing further resources in seeking a perpetrator contributions release order.

Additional contributions made during the eligible period

1.28 The total amount of additional contributions made during the eligible period is relevant to the maximum amount of superannuation that can be released. Additional contributions are made for the benefit of the perpetrator, and include:

- a member contribution (within the meaning of Part 5 of the SIS Regulations);
- a reportable employer superannuation contribution made in relation to the financial year beginning on 1 July 2009 or a later financial year; or
- an employer contribution made in relation to the financial year beginning on 1 July 2008 or an earlier financial year that is not a mandated employer

contribution (within the meaning of Part 5 of the SIS Regulations)
[Schedule 1, item 23, paragraph 139-30(1)(a) of Schedule 1 to the TAA 1953]

1.29 Broadly, the amount of additional contributions do not include contributions an employer is mandated to pay, whether paid at the legislated minimum (i.e. superannuation guarantee contributions) or at a higher rate as negotiated as part of an industrial agreement or award. This is because the intention is to prevent misuse of superannuation to shield the assets of perpetrators from their victims or survivors. Certain other types of contributions are specifically excluded from eligibility to ensure that only amounts that are made to deliberately shield assets from compensation are eligible, including contributions that are:

- made in respect of a defined benefit interest;
- part of a Government co-contribution;
- transferred from a KiwiSaver scheme to a complying superannuation fund that is either an Australian sourced amount or a New Zealand sourced amount;
- contributions-splitting benefit (as defined in either the RSA Regulations or SIS Regulations); or
- made prior to 1 July 2002 due to limitations with identifying the nature of contributions prior to that time. *[Schedule 1, item 23, subsection 139-30(4) of Schedule 1 to the TAA 1953]*

1.30 When determining the amount of contributions made during the eligible period, any concessional contributions that are identified are to be multiplied by 0.85 to take account of the 15 per cent tax paid by the superannuation fund upon those contributions being made. *[Schedule 1, item 23, subsection 139-30(3) of Schedule 1 to the TAA 1953]*

1.31 The eligible period starts from the day the victim alleges the conduct constituting the eligible offence first occurred and ends on the day an application for visibility of a perpetrator's superannuation interests is given to the Commissioner. *[Schedule 1, item 23, subsection 139-30(2) of Schedule 1 to the TAA 1953]*

1.32 This means that if the specific date of first offending cannot be identified, the eligible period will start from the earliest date the offending conduct is alleged to have occurred by the victim. For example, if an offence was committed during 2009 but no specific date can be identified, the eligible period could be said to have begun on 1 January 2009.

1.33 For historic offences or persistent offending across a time span, uncertainty about dates is not uncommon, particularly where the victim was a child at the time. Whilst in these circumstances, the victim may provide a start date in these circumstances to resolve the uncertainty, the perpetrator will have the opportunity to challenge the date assumption if the matter proceeds to court

and the date assumption has an impact on the quantum of additional contributions identified.

- 1.34 The parameters for the eligible period are designed to encapsulate the period where a perpetrator may have deliberately shielded their assets in the superannuation system to avoid paying compensation orders or in anticipation of compensation orders. As such, the amendments have some retrospective application, as they apply to existing court-ordered compensation. Further, the superannuation contributions in scope are those made during the eligible period, which is linked to the offending conduct, which may have begun for a particular perpetrator before these amendments commence.
- 1.35 This possible retrospective application is appropriate given the policy objective of preventing perpetrators from misusing superannuation to shield assets from compensation and providing recourse to victims where a perpetrator has already done so. This is further justified given the nature of the relevant offences, which involve children, and in many cases, may have involved conduct from many years back. The amendments only apply where a perpetrator has been convicted or found guilty of a relevant offence. In addition, as explained above, the in-scope contributions are those that were voluntarily made by the perpetrator during the eligible period.

Total superannuation balance

- 1.36 Whilst additional contributions may have been made in relation to a perpetrator's superannuation interests, these subsequently may have been withdrawn from the superannuation system. The perpetrator's total superannuation balance (defined in section 307-230 of the ITAA 1997) provides a more recent indication of whether there are superannuation monies available to be released.
- 1.37 Where the Commissioner is required to disclose total superannuation balance information, it will be based on the most recent information available to the Commissioner. *[Schedule 1, item 23, paragraph 139-30(1)(b) of Schedule 1 to the TAA 1953]*
- 1.38 However, the total superannuation balance is not determinative of superannuation monies being available to be released. For example, availability may be impacted because relevant superannuation providers are not required to comply with a release authority or the balance information is out of date. See below for further information on the obligations of superannuation providers.
- 1.39 For privacy reasons, the amendments do not require the disclosure of the perpetrator's total superannuation balance in every case. The exact balance will be disclosed only where the balance is lower than the amount of additional contributions identified, as this will assist an applicant in assessing whether it is worthwhile seeking a perpetrator contributions release order.

Protection for taxation officers and others on-disclosing information

1.40 These amendments fit within the existing tax framework in Division 355 of Schedule 1 to the TAA 1953 on disclosing information to ensure taxation officers and others on-disclosing the information are not liable for tax secrecy offences. Others on-disclosing the information, such as the applicant and their legal representatives, must only on-disclose for the purpose of making an application for a perpetrator contributions release order or in proceedings for a perpetrator contributions release order. *[Schedule 1, item 23, subsection 139-25(2) of Schedule 1 to the TAA 1953]*

Commissioner must notify the perpetrator of the disclosure

1.41 The Commissioner must notify the perpetrator of the disclosure when (or as soon as practicable after) the Commissioner provides the applicant with the superannuation information. *[Schedule 1, item 23, subsections 139-35(1) and (2) of Schedule 1 to the TAA 1953]*

1.42 The notification should specify that the Commissioner has received an application and must include a copy of the information disclosed. The notice must not state the name of the person who made the information request, nor the name of the victim. However, the Commissioner is not required to ensure that the identity of the victim cannot be discerned, as this may not be possible, for example, where there is only one victim owed compensation from a perpetrator. *[Schedule 1, item 23, subsection 139-35(3) of Schedule 1 to the TAA 1953]*

1.43 While the perpetrator cannot object to the disclosure of the information, it is appropriate they are notified that their personal information has been shared and the reason for the disclosure.

Perpetrator contributions release order

1.44 These amendments allow a victim (or certain persons acting on their behalf) to apply for a court order enabling the Commissioner to facilitate the release of monies from a perpetrator's superannuation interests (a perpetrator contributions release order).

1.45 A perpetrator contributions release order would authorise the Commissioner to issue release authorities to superannuation providers in relation to a perpetrator's superannuation interests up until an amount specified in the court order has been released. The amount specified must be equal to or lower than:

- the total contributions disclosed by the Commissioner (being the concessional contributions made during the eligible period reduced by the tax paid); or
- the remaining amount of compensation that is owed to the victim as outlined in a previous court compensation order. *[Schedule 1, item 23, subsections 139-50(1) and (2) of Schedule 1 to the TAA 1953]*

1.46 The order would also require the applicant to nominate an account into which the Commissioner is to pay any amounts released. This nomination must be in the approved form. *[Schedule 1, item 23, subsection 139-50(3) of Schedule 1 to the TAA 1953]*

1.47 Serving the court order enlivens a statutory duty for the Commissioner to keep issuing release authorities until the earlier of the following:

- the total amount released by superannuation providers reaches the amount specified in the court order; or
- all superannuation providers holding superannuation interests for the perpetrator known to the Commissioner have been issued with at least one release authority and all have either responded to the Commissioner by paying an amount or advising that they are not required to comply and the Commissioner is satisfied that there are no further superannuation interests which may be able to release monies. *[Schedule 1, item 5, subsections 131-15(6), (7) and (8) of Schedule 1 to the TAA 1953]*

1.48 To make the order, a court must be satisfied that the application criteria are satisfied (as outlined above). The applicant must also have obtained superannuation information from the Commissioner in order to apply for the court order.

1.49 The Schedule sets out the grounds available to a perpetrator to challenge the making of the order (further information is provided below). The court will not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that the perpetrator is a bankrupt, a restraining order is in force in relation to their superannuation interests or certain other proceedings are ongoing.

Applying for a court order

1.50 Once an applicant has received evidence from the Commissioner confirming that the perpetrator has additional contributions, the applicant may apply for a court order to be served on the Commissioner to facilitate the release of additional contributions from the perpetrator's superannuation interests.

1.51 Applications for perpetrator contributions release orders must be filed in Division 2 of the Federal Circuit and Family Court of Australia. Division 2 of the Federal Circuit and Family Court of Australia will have jurisdiction to hear the application (refer section 15C of the *Acts Interpretation Act 1901*) and the

Federal Court of Australia will have jurisdiction to hear and determine any appeals (refer paragraph 24(1)(d) of the *Federal Court of Australia Act 1976*). **[Schedule 1, item 23, subsection 139-45(1) of Schedule 1 to the TAA 1953]**

- 1.52 The application must state that a court order has been made requiring a convicted perpetrator, or a perpetrator found guilty, of a specified child sexual abuse offence to compensate the victim of that offence. It must also state the compensation amount the perpetrator must pay to the victim, how much they have paid of that amount already (if any), that the Commissioner has disclosed information to the applicant, and the date on which the victim alleges the specified child sexual abuse offense first occurred. **[Schedule 1, item 23, subsection 139-45(2) of Schedule 1 to the TAA 1953]**
- 1.53 The application must also be accompanied by the court order mentioned and a copy of the information disclosed to the applicant, while naming the Commissioner and perpetrator as respondents to the application. **[Schedule 1, item 23, paragraphs 139-45(2)(b) and (c) of Schedule 1 to the TAA 1953]**
- 1.54 The applicant must start proceedings in the Federal Circuit and Family Court of Australia (Division 2). Part 8 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2025* sets out the rules relating to originating applications in the relevant court. This includes requirements for service of the originating documents on the respondents.

Circumstances when court cannot make order

- 1.55 Service of the application triggers obligations of the perpetrator to notify the court of relevant concurrent proceedings and other processes. Such notification obligations support the operation of rules which prevent the court from making a perpetrator contributions release order if certain other proceedings have begun or other conflicting processes are in train.
- 1.56 The court will not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that certain other proceedings have begun, such as bankruptcy, proceeds of crime, family law and certain corruption proceedings, as these may involve conflicting claims on a perpetrator's superannuation interests. This ensures that the proceedings can be stayed until other such proceedings, which take precedence, can be finally determined. Similarly, to manage conflicting processes, the court is not permitted to make an order where the court is made aware by a party to the proceeding that the perpetrator is a bankrupt or that a restraining order is in force in relation to their superannuation interests. **[Schedule 1, item 23, subsections 139-50(1), (4), (5) (6) and (7) of Schedule 1 to the TAA 1953]**

Bankruptcy proceedings and period of bankruptcy

- 1.57 The court will not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that an application for an

order under the Bankruptcy Act has been made but has not been finally determined. The application must relate to the bankruptcy of the perpetrator or to the perpetrator's capacity as a debtor subject to a personal insolvency agreement or debt agreement. *[Schedule 1, item 23, paragraphs 139-50(1)(b) and 139-50(4)(a) of Schedule 1 to the TAA 1953]*

- 1.58 The court will also not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that the perpetrator is a bankrupt in respect of a bankruptcy from which the person has not been discharged under the Bankruptcy Act. The court would still be able to make an order in relation to a perpetrator who has executed a personal insolvency agreement or a debt agreement. *[Schedule 1, item 23, paragraph 139-50(1)(c) of Schedule 1 to the TAA 1953]*
- 1.59 There is potential for superannuation to be clawed back by creditors during a perpetrator's bankruptcy (which is generally a 3-year period). As such, if made aware by a party to the proceeding of such circumstances, the court may stay the proceedings until the perpetrator is discharged from the bankruptcy to avoid any conflicting claims on a perpetrator's superannuation interests. *[Schedule 1, item 23, subsection 139-50(6) of Schedule 1 to the TAA 1953]*
- 1.60 Any outstanding compensation debts owed by the perpetrator to an applicant will survive a perpetrator's bankruptcy. This ensures that if an applicant is still owed money after the bankruptcy has ended, the proceedings may be continued. Further explanation is below in the amendments to the Bankruptcy Act.

Family law proceedings

- 1.61 The court will not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that an application for certain orders under the *Family Law Act 1975* or *Family Law Act 1997* (WA) has been made but has not been finally determined. *[Schedule 1, item 23, paragraphs 139-50(1)(b), 139-50(4)(b) and (c) of Schedule 1 to the TAA 1953]*
- 1.62 Family law proceedings that involve property splitting can include superannuation splitting. It is possible that there may be circumstances where, following a relationship breakdown (de facto relationship or marriage), a perpetrator's superannuation balance may be subject to competing claims from their former partner and a victim of crime. In these situations, the family law proceedings must be resolved first.

Proceeds of crime proceedings and in force restraining orders

- 1.63 The court will not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that an application for forfeiture in relation to the perpetrator's superannuation interest has been made but has not been finally determined. The application for forfeiture order must

be mentioned in subregulation 5.08(1A) of the SIS Regulations. *[Schedule 1, item 23, paragraphs 139-50(1)(b) and 139-50(4)(d) of Schedule 1 to the TAA 1953]*

- 1.64 Proceeds of crime proceedings may involve an order forfeiting part or all of a person's superannuation benefits in order to comply with the relevant order. Therefore, there is potential for there to be conflicting claims on the perpetrator's superannuation interest between a proceeds of crime proceedings and proceedings for a perpetrator contributions release order. It is intended that the proceeds of crime proceedings be resolved first.
- 1.65 Similarly, a restraining order within the meaning given by subsection 5(1) of the Bankruptcy Act must be resolved before a proceeding for a perpetrator contributions release order can continue. Restraining orders are often used as a precursor to a forfeiture order. Where there is a proceeding for a restraining order, there is potential for this to cover part or all of the perpetrator's superannuation interests. *[Schedule 1, item 23, paragraphs 139-50(1)(b) and 139-50(4)(f) of Schedule 1 to the TAA 1953]*
- 1.66 The court will also not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that a restraining order is in force in relation to the perpetrator's superannuation interest. Whilst a restraining order is in force, it would prevent any dealings with the superannuation interest (which would prevent superannuation providers from releasing amounts to the Commissioner later in the process). Staying the proceedings if there is an in-force restraining order also ensures that any statutory forfeiture under section 92 of the *Proceeds of Crime Act 2002* is able to take effect before a perpetrator contributions release order can be made. *[Schedule 1 item 23, paragraph 139-50(1)(d) and subsection 139-50(7) of Schedule 1 to the TAA 1953]*

Other proceedings related to a corruption offence

- 1.67 The court will not be permitted to make an order in circumstances where the court is made aware by a party to the proceeding that an application for the recovery of mandatory employer super contributions where a Commonwealth employee has been convicted of a corruption offence has been made but has not been finally determined. *[Schedule 1, item 23, paragraphs 139-50(1)(b) and 139-50(4)(e) of Schedule 1 to the TAA 1953]*
- 1.68 While mandatory employer super contributions will not be eligible for release under a perpetrator contributions release order, such a proceeding could impact the balance of superannuation available and as such should be resolved first.

Meaning of 'finally determined'

- 1.69 The court may stay a proceeding for a perpetrator contributions release order until the proceedings mentioned above have been finally determined.

1.70 Without limiting when an application is considered to have been finally determined, the amendments clarify circumstances when an application is taken to have been finally determined. This includes accounting for when the application for the order is withdrawn or dismissed, relevant appeals and appeal periods. *[Schedule 1, item 23, subsection 139-50(8) of Schedule 1 to the TAA 1953]*

Perpetrator required to notify of concurrent proceedings, bankruptcy and in force restraining orders

1.71 To facilitate the operation of the rules managing the interactions with other proceedings, a perpetrator's bankruptcy period and in force restraining orders, the perpetrator must notify the court of relevant bankruptcy, proceeds of crime, corruption offence, or family law proceedings, bankruptcy periods or restraining orders that are on foot or in force (which would give rise to a stay of the proceedings and temporarily prevent the court from making the order). *[Schedule 1, item 23, subsections 139-60(1) and (2), 139-65(1) and (2), 139-70(1) and (2), 139-75(1) and (2) of Schedule 1 to the TAA 1953]*

1.72 Once the perpetrator has been served with the originating application for the perpetrator contributions release order, the perpetrator is required to notify the court as soon as practicable afterwards. If at any time during the proceedings for a perpetrator contributions release order, other proceedings commence or the perpetrator becomes a bankrupt, or a restraining order is in force in relation to their superannuation interests, then the perpetrator is also required to notify the court.

1.73 The perpetrator is also required to notify the court when those proceedings have been finally determined or when they are discharged from their bankruptcy or when a restraining order is no longer in force, to allow the proceedings for a perpetrator contributions release order to recommence. *[Schedule 1, item 23, subsections 139-60(3), 139-65(3), 139-70(3) and 139-75(3) of Schedule 1 to the TAA 1953]*

1.74 Generally, these proceedings are known to the perpetrator. However, restraining orders may be sought ex parte, generally as a precursor to a forfeiture application being sought. As such, these rules only require the perpetrator to notify the court of proceedings involving a restraining order where they are aware that such an application has been made. *[Schedule 1, item 23, subsections 139-65(1) and (2) of Schedule 1 to the TAA 1953]*

1.75 Subsection 33(1) of the *Proceeds of Crime Act 2002* ensures that the perpetrator is required to be notified of a restraining order covering their property. As such, the perpetrator should be aware if a restraining order is in force in relation to their superannuation interests.

1.76 A failure to notify in accordance with these rules is an offence, punishable, on conviction, by a fine not exceeding 50 penalty units. The 50 penalty unit fine is

a reasonable amount that is in proportion to the policy intent to deter perpetrators from omitting relevant details. The amount of the penalty unit is consistent with existing penalties for failure to notify. *[Schedule 1, item 23, subsections 139-60(4), 139-65(4), 139-70(4) and 139-75(4) of Schedule 1 to the TAA 1953]*

Maximum superannuation release amount to be specified in order

- 1.77 The perpetrator contributions release court order must specify the total amount to be released across a perpetrator's superannuation interests. The total amount that can be released from a perpetrator's superannuation should not exceed the lesser of:
 - the additional contributions (refer above) made by or on behalf of the perpetrator in respect of all their superannuation interests during the eligible period; and
 - the amount of any outstanding relevant compensation debt. *[Schedule 1, item 23, subsection 139-50(2) of Schedule 1 to the TAA 1953]*
- 1.78 The total additional contributions made during the eligible period are only relevant insofar as they determine the amount that can be released from an individual's superannuation interests. There is no requirement that the contributions be traced and released from the same superannuation interests that the contributions were made to.
- 1.79 It is expected that the applicant will be able to use the information received from the Commissioner as sufficient evidence of a perpetrator's additional contributions, which is relevant to the total amount that can be released across a perpetrator's superannuation interests. See below for further information on the rules providing that the perpetrator has the legal burden of proving that the amount of additional contributions is incorrect.

Perpetrator can challenge a perpetrator contributions release order

- 1.80 Before making the order, a court must be satisfied that the application criteria are satisfied. See above for further information.
- 1.81 The perpetrator may challenge the application on the following grounds:
 - the application criteria have not been met;
 - the amount of additional contributions identified as available in the perpetrator's superannuation interests is incorrect;

- the date on which the victim alleges the specified child sexual abuse offence first occurred is incorrect and this affects the total of contributions identified;
- any of the matters stated in the application are incorrect; or
- any other matter to which the court grants the perpetrator leave to challenge the application. *[Schedule 1, item 23, subsection 139-55(1) of Schedule 1 to the TAA 1953]*

1.82 As these amendments introduce a novel cause of action, it is appropriate to give the court discretion to allow the perpetrator to challenge the application in other circumstances. This is intended to allow the court to deal with unforeseen circumstances and ensure natural justice is afforded. It is not intended that this discretion be used to allow a perpetrator to re-litigate the original compensation order or debt or raise other matters which should have been raised in earlier proceedings, such as financial hardship concerns.

Legal burden in relation to amount of relevant additional contributions

1.83 In the case that the perpetrator's challenge relates to the amount of additional contributions, the perpetrator has the legal burden of proving that the amount of additional contributions is incorrect. *[Schedule 1, item 23, paragraph 139-55(1)(b) and subsection 139-55(2) of Schedule 1 to the TAA 1953]*

1.84 It is intended that the applicant can use the information obtained from the Commissioner about the perpetrator's superannuation interests as *prima facie* evidence, sufficient to apply for an order. The legal burden will be on the perpetrator to correct the information if this is required. It would not be sufficient for the perpetrator to merely raise doubt that the information is incorrect, the perpetrator would need to prove that it is incorrect. This reflects the fact that the perpetrator is best placed to know or find out this information.

1.85 The perpetrator may also challenge the date assumptions used to work out the eligible period if this also affects the amount of additional contributions identified. Given that the eligible period starts from the day the victim alleges the conduct constituting the specified abuse offence first occurred, a specific first date of offending may not be able to be identified. The perpetrator will have the legal burden of proving that the date of offending was a different date to that alleged by the victim and that this affects the quantum of contributions identified. This reflects the fact that the perpetrator is best placed to know or find out this information. *[Schedule 1, item 23, paragraph 139-55(1)(c) and subsection 139-55(3) of Schedule 1 to the TAA 1953]*

Commissioner required to issue release authority to superannuation providers

1.86 Once the court makes a perpetrator contributions release order, the applicant is required to serve this order to the Commissioner, enabling the Commissioner to issue one or more release authorities to relevant superannuation providers. The release authority cannot be issued to an RSA provider that is not a constitutional corporation or to a trustee of a superannuation fund that is not regulated superannuation fund. *[Schedule 1, items 5 and 23, subsection 131-15(9) and section 139-80 to Schedule 1 of the TAA 1953]*

1.87 The release authority must specify the amount to be released, identify the kind of release authority and contain any other information the Commissioner considers relevant. If multiple superannuation providers hold superannuation interests for the perpetrator, the Commissioner may issue separate release authorities to the superannuation providers, specifying the relevant amount to be released by each. If there are multiple release authorities issued, the total amount released in accordance with the release authorities should not exceed the amount specified by the court in the perpetrator contributions release order. To ensure the correct amount is released across a perpetrator's superannuation interests, the Commissioner may need to account for amounts stated in earlier release authorities which will not be paid by a superannuation provider. *[Schedule 1, items 7 and 8, paragraph 131-25(ca) and subsections 131-20(3) and (4) of Schedule 1 to the TAA 1953]*

1.88 In contrast to an approach where the applicant would need to approach the perpetrator's superannuation providers directly, this approach involves the Commissioner interacting with the superannuation providers, collecting the monies and remitting the released monies to the applicant. This approach mitigates against risks that an applicant may need to repeatedly return to the court for issuance of new court orders, leading to additional time, expense and frustration. For example, the Commissioner has greater visibility of all of a perpetrator's superannuation interests and can more flexibly re-issue release authorities to different superannuation providers in situations where a perpetrator deliberately moved monies between superannuation accounts to evade a court order.

1.89 This approach also ensures there is no need for an applicant to liaise directly with a perpetrator in their capacity as trustee of an SMSF or director of a corporate trustee of an SMSF, and supports the rules introduced by these amendments designed to ensure compliance where an SMSF is involved.

1.90 To ensure maximum flexibility, the amendments also clarify that the Commissioner may revoke or vary a release authority at any time before the Commissioner is notified that the superannuation provider has made the payment or that they are not required to comply with the release authority. *[Schedule 1, item 9, subsection 131-30(5A) of Schedule 1 to the TAA 1953]*

Obligations of superannuation provider

1.91 Generally, a superannuation provider issued with a release authority must comply with the release authority 10 business days after the release authority is issued by paying the Commissioner the lesser of the amount stated in the release authority and the maximum available release amounts for each superannuation interest held by the superannuation provider for the perpetrator in superannuation plans and notify the Commissioner of the payment.
[Schedule 1, item 11, subsection 131-35(3) of Schedule 1 to the TAA 1953]

1.92 Consistent with the existing release authority framework, failure to comply with the release authority may result in an administrative penalty. Additional consequences will apply for non-compliance involving an SMSF.

1.93 In a range of circumstances, such as where there are conflicting court orders, the superannuation provider has not completed the process for giving effect to a family law payment split or there is an insufficient superannuation balance, the superannuation provider will not be required to comply, provided that the extent of non-compliance is notified to the Commissioner before the end of 10 business days after the release authority is issued (i.e. before the payment is due). *[Schedule 1, items 11 and 16, subsections 131-35(5), 131-35(6) and 131-50(4) of Schedule 1 to the TAA 1953]*

1.94 Specifically, a superannuation provider is not required to comply with the release authority:

- to the extent that doing so would be inconsistent with certain other court orders (namely, proceeds of crime orders such as forfeiture orders and restraining orders and superannuation orders relating to Commonwealth employee corruption offences);
- if the superannuation interest has become subject to a payment split and the process under the SIS Regulations 1994 for the superannuation provider to give effect to that split has not been completed yet; or
- if a payment flag for family law purposes is operating on the superannuation interest. *[Schedule 1, item 11, subsections 131-35(5), (6) and (7) of Schedule 1 to the TAA 1953]*

1.95 These rules ensure superannuation providers have clear direction on how to reconcile different directives affecting the perpetrator's superannuation interest. A superannuation provider will still have to comply with the release authority to the extent that they can. For example, a proceeds of crime order may only cover part of the perpetrator's superannuation interest.

1.96 Any proceeds of crime orders take precedence over any release authorities. Where a court has found that a person's superannuation is the proceeds of crime, forfeiture orders allow the Commonwealth or State to confiscate the property. Restraining orders prevent superannuation providers from disposing

of or dealing with superannuation interests and are often precursors to forfeiture orders being sought.

1.97 Any superannuation orders made under Part 2 of the *Crimes (Superannuation Benefits) Act 1989* or Division 2 of Part VA of the *Australian Federal Police Act 1979* take precedence over any release authorities. Part 2 of the *Crimes (Superannuation Benefits) Act 1989* and Division 2 of Part VA of the *Australian Federal Police Act 1979* allow a court to make a superannuation order for the recovery of mandatory employer super contributions where a Commonwealth employee has been convicted of a corruption offence.

1.98 Family law provisions provide a pathway under which a person's superannuation interest or benefits can be transferred to another person. In circumstances where there has been a marriage or de facto relationship breakdown, a perpetrator's superannuation balance may be subject to competing claims from their former partner and a victim of a specified sexual abuse offence.

1.99 Under these amendments, family law processes also take precedence over any release authorities. This includes where a payment flag is operating on the superannuation interest, which would prohibit the superannuation provider from making any splittable payments to any person in respect of the interest. The amendments also ensure that the superannuation provider is not required to comply with the release authority if the superannuation interest has become subject to a payment split and the process under the SIS Regulations for the superannuation provider to give effect to that split has not been completed yet. *[Schedule 1, item 11, paragraphs 131-35(6)(a), (b) and (c) and subsection 131-35(7) of Schedule 1 to the TAA 1953]*

1.100 A superannuation provider that is not required to comply with a release authority, in whole or in part, is required to notify the Commissioner of the extent of their compliance and provide a reason for that non-compliance. If the non-compliance is a result of the superannuation provider needing to complete the process under the SIS Regulations 1994 for giving effect to a payment split, the superannuation provider must notify of the expected date the process is to be completed. *[Schedule 1, item 16, subsection 131-50(4) of Schedule 1 to the TAA 1953]*

1.101 Where a superannuation provider advises the Commissioner that they are not required to comply with the release authority within the 10 business days for compliance, this would not preclude the Commissioner from issuing another release authority to the superannuation provider at a later time. For example, the Commissioner could issue a release authority to the superannuation provider at a point where it is expected that the superannuation provider would have completed the process for giving effect to a payment split.

Voluntary compliance for defined benefit interests

- 1.102 A superannuation provider is not required to comply with the release authority in relation to a defined benefit interest. However, the superannuation provider may choose to comply. The operation of a defined benefit scheme is generally not congruous with the operation of these amendments. *[Schedule 1, items 11 and 14, subsections 131-35(4), 131-40(3) and (4) of Schedule 1 to the TAA 1953]*
- 1.103 The term ‘defined benefit interest’ is defined by section 291-175 of the ITAA 1997 and relates to an interest in respect of which an individual’s entitlement to superannuation benefits is determined by reference to their salary over a period of time or some specified amount. The benefits are generally not readily accessible.
- 1.104 Such schemes generally also offer members ancillary accounts for the types of contributions that would be covered under these amendments. It is expected that the Commissioner would issue release authorities in relation to a perpetrator’s other superannuation interests, such as ancillary accounts (including accumulation interest or components that are superannuation interest and not defined benefit interests) of this type.

Additional consequences for non-compliance involving an SMSF

- 1.105 Generally, a failure to comply with the release authority may result in an administrative penalty of 20 penalty units. However, additional rules are required to ensure compliance with the release authority, where an SMSF is involved.
- 1.106 An SMSF is a superannuation fund where the members are also the trustees (or directors of a corporate trustee) who are directly responsible for ensuring compliance with relevant laws, including compliance with a release authority. The amendments introduced by this Schedule are targeted at perpetrators who have purposefully evaded compensation orders by contributing money to superannuation. Where the perpetrator is a trustee of the SMSF or director of a corporate trustee of the SMSF there is a real possibility that the perpetrator’s evasive behaviour will continue following the issue of a release authority.
- 1.107 These amendments provide that if a superannuation provider that is a SMSF fails to comply with a release authority in accordance with these rules, all the trustees of the SMSF and all the directors of a corporate trustee of the SMSF will be disqualified persons under the SIS Act. *[Schedule 1, item 29, paragraph 120(1)(d) of the SIS Act 1993]*
- 1.108 Under section 126K of the SIS Act, it is an offence for a disqualified person to be or act as a trustee of a superannuation entity or to be or act as a responsible officer (which includes being a director) of a body corporate that is a trustee of a superannuation entity. This offence attracts a penalty of two years

imprisonment and/or 60 penalty units, which will provide greater deterrence against non-compliance.

- 1.109 These amendments ensure that where there is non-compliance, disqualification will occur by operation of the law, without requiring the Commissioner to make a decision or exercise any discretion. As such, the disqualification is not subject to merits review, as there is no room for merits review to operate in this circumstance.
- 1.110 In circumstances where persons are disqualified under this rule, the SMSF will need to be dissolved and the relevant superannuation interest transferred to independent management, either by rolling over the interest into an APRA-regulated fund, or ceding trustee duties to an independent trustee and converting the SMSF into a small APRA fund. In such circumstances, the Commissioner will have the power to vary or revoke the release authority and reissue the release authority to the new superannuation provider responsible for the management of the perpetrator's superannuation interest.

Protection for superannuation providers

- 1.111 The amendments ensure that a superannuation provider is not liable for any actions taken to comply with the release authority.
- 1.112 Generally, under the superannuation laws, superannuation benefits are required to be preserved in the superannuation system. However, benefits can be released where a condition of release is met.
- 1.113 One condition of release involves the Commissioner giving a superannuation provider a release authority under Division 131 in Schedule 1 to the TAA (refer to items 111A and 208A of the tables in Schedule 1 to the SIS Regulations).
- 1.114 Accordingly, superannuation providers may release benefits without breaching preservation rules in response to a release authority, including the type of release authority introduced by these amendments.

Commissioner required to notify perpetrator and applicant at end of release authority process

- 1.115 The Commissioner is required to notify both the perpetrator and victim as soon as practicable after the Commissioner considers they are no longer required to keep issuing release authorities. The notification must be in writing state how much of the amount in the court order was paid and advise that the Commissioner will not issue further release authorities. For notification being provided to the perpetrator, the notification must also identify the superannuation providers. *[Schedule 1, item 19, subsections 131-55(3), (4) and (5) of Schedule 1 to the TAA 1953]*

Effect of paying victim and treatment of released superannuation monies

- 1.116 The Commissioner is required to pay the released amounts to the account nominated by the victim after receiving the released monies. *[Schedule 1, item 22, subsection 131-71(1) of Schedule 1 to the TAA 1953]*
- 1.117 The Commissioner's payment of the released amounts to the victim's nominated account offsets the perpetrators liability to compensate the victim under the requisite court order, to the extent of the payment. *[Schedule 1, item 22, subsection 131-71(2) of Schedule 1 to the TAA 1953]*
- 1.118 This ensures that money may only be removed from the perpetrator's superannuation interests if it is to be used to satisfy a pre-existing debt of the offender.
- 1.119 The released amounts give rise to a 'credit' under the TAA 1953 in relation to the perpetrator. However, immediately after the credit arises, the perpetrator is disentitled and the victim is entitled to a credit equal to that amount. The amendments ensure that the released amounts cannot be used to offset tax debts or child support debts of the perpetrator or victim before the victim is paid. The amounts are protected from being subject to offsetting tax debts, garnishee orders or notices from other parties and the Child Support Registrar cannot require the Commissioner to pay the amount to them, to offset against the outstanding child support debt. This ensures that the maximum compensation flows through to the victim. *[Schedule 1, items 1, 2, 3, 21, 22 and 25, paragraph 8AAZA(c) of the TAA 1953, subsections 8AAZL(5) and 8AAZLF(3A) of the TAA 1953, subsections 131-71(3) and 131-65(5) of Schedule 1 to the TAA 1953 and subsection 72(4) of the Child Support (Registration and Collection) Act 1988]*

Tax treatment of released amounts

- 1.120 The payment of an amount to the victim's nominated account from the superannuation interest of the perpetrator is not subject to any income tax implications for the perpetrator or victim. For the perpetrator, the tax treatment of the credit is a superannuation benefit and is NANE income as provided for under section 303-15 of the ITAA 1997 as that section deals with payments from release authorities.
- 1.121 These amendments also ensure that the amounts paid to the victim's nominated account are treated as NANE income, regardless of the nature of the compensation order which would otherwise determine the tax treatment of the payment. *[Schedule 1, item 27, section 59-110 of the ITAA 1997]*

Compensation debts survive bankruptcy

- 1.122 Perpetrators must comply with their compensation obligations, regardless of whether they have filed for bankruptcy or have been discharged from a bankruptcy. This ensures that outstanding compensation debts owed by the perpetrator to an applicant cannot be extinguished by the perpetrator being discharged from a bankruptcy.
- 1.123 The type of compensation debts that are covered are an unpaid enforceable debt owed by the perpetrator to the victim, where the amount was awarded by a court as compensation for injury, loss or damage suffered by the victim as a direct result of a specified child sexual abuse offence.
- 1.124 The amount owed to the applicant must have been awarded by a criminal court as part of sentencing or post-conviction for a specified child sexual abuse offence, or awarded in a civil proceeding in relation to conduct that constituted a specified child sexual abuse offence of which the perpetrator was convicted or found guilty. Accordingly, the perpetrator must have a criminal conviction or have been found guilty of a specified child sexual abuse offence for the compensation debts to survive. *[Schedule 1, item 24, paragraph 153(2)(ba) of the Bankruptcy Act]*
- 1.125 The amendments apply for any court-ordered child abuse compensation debt that is enforceable if the bankruptcy proceeding was not finalised by the commencement date for the Bankruptcy Act amendments. It is not intended to apply to compensation debts which have already been extinguished by finalised bankruptcy proceedings as of the commencement date. The amendments may be considered to apply retrospectively in the sense that they may apply to existing compensation debts and in respect of convictions or findings of guilt made prior to commencement. To the extent that the amendments are considered to have retrospective application, this is necessary and proportionate to the policy objective of improving victims' prospects of enforcing compensation debts owed to them.

Consequential amendments

- 1.126 The amendments insert a range of guidance materials, headings, definitions and updates to table of contents to assist readers of the legislation. *[Schedule 1, items 4, 17, 23, 26 and 28, sections 131-1, 131-55(1), 139-1, 139-5 and 139-40 and Division 139 of Schedule 1 to the TAA 1953, section 11-55 of the ITAA 1997 and subsection 995-1(1) of the ITAA 1997]*
- 1.127 The amendments also ensure the release authority provisions continue to operate in the same way for existing release authorities. *[Schedule 1, items 6, 10, 12, 13, 15, 18 and 20, subsections 131-20(1), 131-35(1), 131-40(1) and (2), 131-50(3), 131-55(1) and 131-65(1) of Schedule 1 to the TAA 1953]*

Commencement, application, and transitional provisions

- 1.128 All amendments in the Schedule commence the day after Royal Assent.
- 1.129 As described above, the amendments to the Bankruptcy Act may apply to an enforceable compensation debt if the bankruptcy proceeding was not finalised by this date.
- 1.130 A person may apply to the Commissioner to gain access to information regarding the superannuation interests of the perpetrator of an offence from a start date to be determined. Upon receiving this information from the Commissioner, a person may commence an application for a perpetrator contributions release order. *[Schedule 1, item 23, subsection 139-10(1) of Schedule 1 to the TAA 1953]*
- 1.131 The application provision clarifies that a person may apply to the Commissioner for information about a period before the amendments come into operation and that the Commissioner may disclose information about such a period. *[Schedule 1, item 31]*