

DISQUALIFYING DOMESTIC VIOLENCE PERPETRATORS FROM THE SUPERANNUATION OF THEIR VICTIMS

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This article critically examines the distribution of superannuation death benefits in Australia, focusing on whether perpetrators of domestic violence should be disentitled from receiving the superannuation of their victims. The Australian superannuation system has complex succession rules that do not always align with general principles of estate distribution. This article highlights the potential for unfair outcomes, particularly when a domestic abuser benefits from the superannuation of a deceased partner. We argue for legislative reform to prevent such outcomes, suggesting that the law should explicitly disqualify domestic abusers from receiving superannuation benefits. This would ensure that those who inflict harm are not unjustly rewarded. Reforms should disallow the distribution of superannuation benefits to perpetrators based on the balance of probabilities, rather than requiring a criminal conviction, to address the challenges inherent in the prosecution of domestic violence cases.

I INTRODUCTION

The distribution of superannuation death benefits in Australia is a critical aspect of financial planning, often forming a substantial part of an individual's estate. However, unlike most other assets, superannuation entitlements do not automatically become part of a deceased person's estate, and their distribution is governed by a distinct and complex legal framework. This framework is a hybrid of trust law and specific legislative provisions, which can sometimes lead to outcomes that conflict with general principles of succession law. Given that superannuation is often a person's most significant financial asset after their home,¹ the rules governing its distribution can have profound implications for the

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1 Roger Wilkins et al, Melbourne Institute of Applied Economic and Social Research, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 22* (Annual Statistical Report, 2024) 85. See also 'Australian National Accounts: Finance and Wealth', *Australian Bureau of Statistics* (Web Page, 27 March 2025) <<https://www.abs.gov.au/statistics/economy/national-accounts/australian-national-accounts-finance-and-wealth/dec-2024>>, with a reference period of

financial security of relatives and beneficiaries, and it is important that they apply in a coherent and fair manner.

Recently, this issue arose in the context of a domestic abuser who received the superannuation of his partner following her suicide.² This prompted the former Shadow Minister for Women, Tanya Plibersek, to flag potential law reform to prevent such abusers being entitled to the victim's superannuation.³ The case sparked public debate and highlighted potential shortcomings in the current legal framework.

The central question this article addresses is whether the law should explicitly disqualify domestic abusers from receiving superannuation benefits from their deceased partners. This issue highlights some key failings associated with the current law relating to the distribution of superannuation death benefits.

Part II of this article outlines the current legal framework governing superannuation death benefits, including the rules related to binding death benefit nominations ('BDBNs') and the discretion exercised by superannuation trustees in the absence of a valid BDBN.

Part III highlights the suboptimal outcomes that can arise under the current law, particularly when trustees must navigate complex family dynamics or when domestic violence is a factor. This analysis relates to problems with the law in general concerning superannuation death benefits as a backdrop to the main theme of this article: the manner in which this law does and should apply to the superannuation entitlements of domestic violence victims.

Part IV explores the desirability of law reform. It argues that domestic violence should be grounds for disqualification from receiving superannuation benefits, aligning the law with broader societal and legal values such as the concept of trust and the need to condemn and deter violence. The discussion includes a comparison with the operation of normatively grounded principles in similar legal contexts such as the forfeiture rule, which prevents individuals who unlawfully kill another from benefiting from their victim's estate.

Part V presents specific proposals for reform, suggesting that disqualification should be based on the balance of probabilities rather than requiring a criminal conviction. This approach acknowledges the challenges in prosecuting domestic violence cases. Moreover, the nature and extent of the disqualification should be commensurate with the nature and duration of the domestic violence in order to give effect to the principle of proportionality. The key reform proposals are summarised in the concluding remarks.

December 2024. The data from the Australian Bureau of Statistics indicates that 'land and dwellings' are the largest 'household balance sheet' item, followed by 'superannuation reserves', meaning that for those not owning an investment property, superannuation will typically be their second largest asset.

2 Stephen Rice, 'Tanya Plibersek Urges Action on Domestic Violence Suicides after Payout to Abuser', *The Australian* (online, 7 July 2024) <<https://www.theaustralian.com.au/nation/plibersek-urges-action-on-domestic-violence-suicides-after-payout-to-abuser/news-story/14b42080034efb86236fc839ff4c2068>> ('Tanya Plibersek Urges Action'). This case is discussed in greater detail in Part III(D) of this article.

3 Ibid.

II CURRENT LAW

Most non-superannuation assets are typically distributed in accordance with the deceased's intentions as set out in their will, if they made one.⁴ If they died intestate, the law provides rules for distribution of assets.⁵ However, in the case of superannuation, the relevant law differs substantially. The laws governing superannuation are at times complex. As Fryberg J of the Supreme Court of Queensland remarked: 'The legislation governing superannuation in Australia is notoriously convoluted and is reminiscent of the legendary oomidoodle bird.'⁶ The complexity of the superannuation law affecting the distribution of benefits upon the member's death is predominantly due to the fact that superannuation funds are managed within a trust structure. However, in essence, the law covers two situations: where the deceased had a BDBN, and where they did not.

A BDBNs

Generally, a BDBN is the best way to ensure that one's superannuation balance is distributed in accordance with one's wishes.⁷ There are several requirements for a valid BDBN.⁸ The regulations applying to most superannuation fund members state that the BDBN must be signed by the superannuation member as well as two disinterested witnesses.⁹ Further, in the normal course of events, a BDBN will only be effective for up to three years.¹⁰ The member might choose to name only one party in their BDBN, or ascribe percentages of their superannuation interests to several parties.¹¹

In the case of a self-managed superannuation fund ('SMSF'), the law is more flexible and allows the terms of the trust deed to dictate the formalities of a BDBN.¹² They might, for instance, specify that only one witness signature is required.

For all superannuation funds, the most important factor limiting the validity of a BDBN is that the named parties must be one of the dependants or the Legal Personal Representative ('LPR') of the member.¹³ In this context, 'LPR' is a

4 See, eg, *Succession Act 2006* (NSW) pt 2.3 ('*NSW Succession Act*'); *Succession Act 1981* (Qld) div 5 ('*Qld Succession Act*'); *Wills Act 1997* (Vic) pt 4 ('*Vic Wills Act*').

5 See, eg, *NSW Succession Act* (n 4) ch 4; *Qld Succession Act* (n 4) pt 3; *Administration and Probate Act 1958* (Vic) pt 1A.

6 *Donovan v Donovan* [2009] QSC 26, 11.

7 *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A) ('*SISA*').

8 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A ('*SISR*').

9 *Ibid* sub-reg (6).

10 *Ibid* sub-reg (7). However, some superannuation funds offer a non-lapsing BDBN: Cassandra Hurley, Daniel Butler and William Fettes, 'BDBNs: What to Look Out for and What to Avoid' (2022) 57(3) *Taxation in Australia* 170, 170. The power of funds to offer a non-lapsing BDBN is based on *SISA* (n 7) s 59(1)(a), which allows, where the trustee has given consent, for the governing rules of a superannuation fund to be exercised by a non-trustee. This consequently means that the formalities in *SISR* (n 8) reg 6.17A are inapplicable.

11 *SISR* (n 8) reg 6.17A(4).

12 *Munro v Munro* (2015) 306 FLR 93, 99–100 [35]–[39] (Mullins J).

13 *SISA* (n 7) s 59(1A).

reference to the executor or administrator of a person's will.¹⁴ To the degree a BDBN attempts to leave a superannuation death benefit interest directly to a non-dependant, it will be deemed invalid.¹⁵

The precise legislative definition of 'dependant' includes a spouse (including de facto relationships), children, and a person with whom one is in a relationship involving interdependency.¹⁶ An 'interdependency' relationship is one that involves two persons and contains the following elements:

- a close personal relationship;
- who live together;
- one or both provides the other with financial support; and
- one or both provides the other with domestic support and personal care.¹⁷

The principle of an interdependency relationship can potentially apply to a variety of relationships which fulfil the above requirements, including some situations where children live with their parents to look after them.¹⁸

Further, as the definition of dependant is inclusive, it would include someone financially dependent, as they are regarded as a dependant under common law.¹⁹ Financial dependency, as interpreted by the courts, applies beyond situations where someone requires the financial assistance of another to meet essential day-to-day living expenses.²⁰

Consequently, due to the constraints imposed by the relevant law discussed above, if a superannuation account holder wishes to ensure that someone who is not a dependant – such as a parent – receives any portion of the account holder's superannuation interest, they must complete a two-step process. First, they must execute a valid BDBN which names the LPR as being entitled to the stated portion of their (the member's) superannuation interest. Second, they must name the non-dependant person in their will as the beneficiary entitled to that portion of their superannuation funds.

B Lack of BDBNs

Where the deceased does not have a valid BDBN, the superannuation fund's trustee will exercise their discretion so as to determine which person/s are to receive the superannuation member's interests.²¹ However, the trustee can generally only distribute such amounts either to the member's dependants or to their LPR.²² To

14 Ibid s 10.

15 *Re Narumon Pty Ltd* [2019] 2 Qd R 247, 263 [50] (Bowskill J) ('*Re Narumon*').

16 *SISA* (n 7) s 10(1) (definition of 'dependant').

17 Ibid s 10A(1).

18 See generally Miranda Stewart, "'Are You Two Interdependent?'" Family, Property and Same-Sex Couples in Australia's Superannuation Regime' (2006) 28(3) *Sydney Law Review* 437 regarding the background to the introduction of the concept of an interdependency relationship.

19 *Harris v Trustee Commonwealth Superannuation Scheme* (2006) 151 FCR 169.

20 See Stewart (n 18) 446–51 for a discussion on the law regarding financial dependency.

21 *SISA* (n 7) s 59(1) provides that for a non-SMSF, a discretion of the governing rules of the trust must generally be exercised by the trustee. This is subject to section 59(1A), which provides an exception for BDBNs.

22 *SISR* (n 8) reg 6.22.

the degree an amount is distributed to the LPR, it is distributed according to estate law, which depends on whether the deceased had a will.²³ However, if the trustee is unable to locate any dependants or an LPR, they can distribute such amounts to other persons.²⁴

Although the relevant regulations are silent on this issue, some decision-makers are of the view that if the deceased has dependants and an LPR, the dependants should receive first priority.²⁵

Where a person is dissatisfied with a decision concerning their entitlement to an interest of a deceased's superannuation, it is recommended that their first avenue of redress is to write to the superannuation trustee.²⁶ If the initial decision is not altered, they can appeal to the Australian Financial Complaints Authority ('AFCA').²⁷ The AFCA has the same powers and discretions as the superannuation trustee, and so can potentially alter the trustee's initial decision.²⁸ However, their powers are limited, in that if the initial trustee decision is regarded as 'fair and reasonable', AFCA cannot overturn it.²⁹ It is worth noting that prior to November 2018, the relevant body of appeal was the Superannuation Complaints Tribunal.³⁰

III SHORTCOMINGS OF THE EXISTING LAW

This Part explains the key shortcomings of the existing law regarding superannuation death benefits in a variety of situations. The first of these to be discussed is where the deceased did not have a BDBN to ensure that their intentions are to be followed. The discussion then turns to specific difficulties potentially faced by SMSFs in such a scenario, and then briefly explains that even where there is a BDBN, the current law can at times produce unsatisfactory outcomes. The commentary then turns to the primary focus of this article: the issue of domestic abusers whose victims die after being subjected to domestic violence, and the perpetrator nevertheless receiving the superannuation death benefit.

23 See, eg, *NSW Succession Act* (n 4); *Qld Succession Act* (n 4); *Vic Wills Act* (n 4); *Administration and Probate Act 1958* (Vic).

24 *SISR* (n 8) reg 6.22(3).

25 See, eg, *D10-11\039* (Superannuation Complaints Tribunal, Presiding Member Anderson, Member Ellis and Member Christie, 7 December 2010) [54] ('*D10-11\039*').

26 The Australian Financial Complaints Authority ('AFCA') recommends this avenue before making a formal complaint to the AFCA: 'Before You Complain to Us', *Australian Financial Complaints Authority* (Web Page) <<https://www.afca.org.au/make-a-complaint/complain>>. In contrast, when the Superannuation Complaints Tribunal was in charge of the process, this was a mandatory first step: *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 14, as repealed by *Treasury Laws Amendment (Putting Consumers First: Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) sch 3 pt 1 ('*Superannuation (Resolution of Complaints) Act*').

27 *Corporations Act 2001* (Cth) s 1053.

28 *Ibid* s 1055(1).

29 *Ibid* ss 1055(2)–(3).

30 *Superannuation (Resolution of Complaints) Act* (n 26).

A Where the Deceased Did Not Have a Valid BDBN

The circumstances in which a deceased did not have a valid BDBN can vary considerably in terms of the people who may have interest in the entitlements. The key variables include the number of competing dependants of the deceased, their individual needs, and their relationship to the beneficiary.

In a case widely reported by the media, the deceased, Ashleigh Petrie, a 23-year-old court clerk, was engaged to 68-year-old Magistrate Rodney Higgins.³¹ Ms Petrie tragically suicided, at which time they had lived together for four months.³² There was no evidence of abuse in the relationship. The deceased had nominated her mother as the beneficiary of her superannuation.³³ However, as her mother was not a dependant but her partner was, the superannuation trustee decided that all of the \$180,000 benefit should be awarded to Magistrate Higgins.³⁴ Media attention reported on the mother's distress and anger, especially given the relative short time that the deceased and her partner had lived together, and the fact that the mother was in a much more financially disadvantageous position than Magistrate Higgins.³⁵ Ultimately, the issue was settled privately between the parties and the outcome was not made public.³⁶

Such a situation, typified by a party having a strong moral and relational claim to the superannuation but a weak legal claim due to not being a 'dependant', is one scenario where a lack of BDBN can lead to an unfair outcome. Another is where multiple dependants make competing complaints. Many decisions of the now-defunct Superannuation Complaints Tribunal involved disputes where more than one dependant challenged the distribution of the superannuation death benefit made by the trustee.³⁷ Particular cases in which courts have been involved relate to situations where the executor or administrator of an estate personally makes a death benefit claim on their own behalf to the superannuation fund trustee. Here, there is potentially a conflict of interest: the executor or administrator has a

31 Melissa Fyfe, 'The 23-Year-Old Court Clerk, the 68-Year-Old Magistrate Who Became Her Fiancé – and the Tragedy That Followed', *The Age* (online, 10 July 2021) <<https://www.theage.com.au/national/victoria/the-23-year-old-court-clerk-the-68-year-old-magistrate-who-became-her-fiance-and-the-tragedy-that-followed-20210623-p583oh.html>>.

32 Ibid.

33 Ibid.

34 Ibid.

35 Brittany Chain and Kevin Airs, 'Outraged Australians Demand Magistrate, 68, Who Shacked Up with a Law Clerk, 23, Be Stripped of Her \$180,000 Death Payout He Claimed as Her "Dependent" so Her Struggling Mother Can Get It Instead', *Daily Mail Australia* (online, 24 June 2021) <<https://www.dailymail.co.uk/news/article-9704985/Outraged-Australians-sign-petition-demanding-court-award-mother-court-clerk-180-000-super.html>>. See also Shannon Sexton, 'Return 23yo Ashleigh Petrie's Super from 68yo Partner to Her Bequeathed, Her Mother', *Change.org* (Web Page, 17 June 2021) <<https://www.change.org/p/return-23yo-ashleigh-petrie-s-super-from-68yo-partner-to-her-bequeathed-her-mother>> which is a petition that attracted over 16,000 signatures on the matter.

36 Alexis Daish and Roy Ward, 'Ex-magistrate Reaches Settlement with Ashleigh Petrie's Mother over Death Benefits', *The Age* (online, 9 December 2021) <<https://www.theage.com.au/national/victoria/ex-magistrate-reaches-settlement-with-ashleigh-petrie-s-mother-over-death-benefits-20211209-p59gd3.html>>.

37 See, eg, *D08-09\010* (Superannuation Complaints Tribunal, Acting Deputy Chairperson Adams, Member Hassell and Member Thomas, 21 August 2008); *D10-11\039* (n 25); *D13-14\040* (Superannuation Complaints Tribunal, Presiding Member de Rooy, Prof Malbon and Member Abbott, 31 August 2013).

fiduciary duty to act for the estate and can thus be required to request the trustee consider distributing the super death benefit to them in their capacity as executor of the estate, rather than to themselves personally.³⁸

Courts have come to various decisions in such situations, and in some circumstances have decided that the executor needs to hold their portion of the death benefit, awarded to them personally, on account of the estate.³⁹ However, the arbitrariness of the law on this issue is highlighted by the case of *Brine v Carter*,⁴⁰ where an estate had four executors. Here, the Supreme Court of South Australia decided that the one executor who made a personal claim for the superannuation to the fund trustee, and was subsequently awarded such an interest, did not have to account for the interest to the estate.⁴¹ Specifically, the Court held that although that particular executor had a duty to avoid a conflict of interest by refraining from claiming the superannuation personally, this was negated by the fact that the other three executors had submitted a competing claim with the superannuation trustee.⁴² The Court expressly stated that had no competing claims been submitted, it would have held that the executor receiving the personal entitlement would have been required to account for it on behalf of the estate.⁴³

B Issues with SMSFs

A SMSF can include up to six members,⁴⁴ and there is typically a full overlap with the members and the trustees of the fund.⁴⁵ However, in the case of a one-member SMSF utilising individual trustees, there will be two trustees, meaning that the second trustee will be an ‘outsider’.⁴⁶ In the case where a SMSF uses a corporate trustee, the full overlap is with the members and the directors of the corporate trustees.⁴⁷ However, as in the case of a one-person SMSF, the second director will be a non-member.⁴⁸ The law states that upon the death of a superannuation fund member, the fund can include the LPR of the estate as one of the SMSF trustees,⁴⁹ but importantly, there is no obligation to do so.⁵⁰

Legal disputes have arisen where the surviving members of a SMSF, in their power as trustees, or as directors of a corporate trustee, have decided to exercise their discretion by distributing the deceased’s superannuation interest to themselves and not to other parties who have a potential claim. There is case law indicating

38 Scott Hay-Bartlem and Clinton Jackson, ‘Estate Planning and Superannuation: Current Issues’ (2021) 55(10) *Taxation in Australia* 543, 546.

39 *McIntosh v McIntosh* [2014] QSC 99, [80] (Atkinson J).

40 [2015] SASC 205.

41 *Ibid.*

42 *Ibid* [166] (Blue J).

43 *Ibid.*

44 *SISA* (n 7) s 17A(1)(a).

45 *Ibid* ss 17A(1)–(2).

46 *Ibid* s 17A(2)(b).

47 *Ibid* ss 17A(1)–(2).

48 *Ibid* s 17A(2)(a).

49 *Ibid* s 17A(3)(a).

50 *Ioppolo v Conti* (2015) 293 FLR 412, 430 [71]–[73] (Martin CJ, Buss JA agreeing at 433 [85], Beech J agreeing at 433 [86]) (*‘Ioppolo Appeal’*).

that in such a scenario, where there is a clear breach of the trustees' duties as they have exercised bad faith and failed to avoid a conflict of interest, the court can interfere.⁵¹ However, that outcome is not universal, and it has also been decided in a similar scenario that the trustee has legally exercised their power.⁵² The fact that there can be contrasting outcomes with no substantive difference in facts illustrates the inconsistency and lack of clarity in the current law.

C Where There Is a BDBN

Although a BDBN can prevent many of the uncertainties that can arise in its absence, case law indicates that the presence of a recalcitrant trustee can lead to multi-year delays in the beneficiary acquiring their interest.⁵³

Also relevant is the fact that the formalities applying to a BDBN, including their limited duration, means that many of them lapse at the three-year mark, and that where a non-dependant has been directly named in a BDBN, parties might be under the impression that they have a valid BDBN when that is not necessarily the case.⁵⁴

D Domestic Abuse and Superannuation Interest

Recently, government frontbencher Tanya Plibersek stated that she had requested the Attorney-General to strongly consider laws that prevent domestic violence abusers from benefiting from their deceased partner's superannuation.⁵⁵ This was prompted by a letter from the mother of Molly Wilkes – Wilkes had

51 *Re Marsella [No 2]* [2019] VSC 65, [72]–[73] (McMillan J), affd *Wareham v Marsella* (2020) 61 VR 262, 291–2 (Tate, McLeish and Hargrave JJA).

52 *Ioppolo v Conti* [2013] WASC 389, [16]–[28] (Master Sanderson), affd *Ioppolo Appeal* (n 50) 432–3 (Martin CJ, Buss JA agreeing at 433 [85], Beech J agreeing at 433 [86]). See also *Katz v Grossman* [2005] NSWSC 934, [46]–[54], where Smart AJ held that the daughter of the deceased SMSF member could validly appoint her partner as co-trustee of the SMSF (they could then collectively decide who was entitled to the SMSF death benefit), notwithstanding objections by the deceased's son.

53 See *Wooster v Morris* [2013] VSC 594, where despite the presence of a valid BDBN, the eligible beneficiary still had to spend three-and-a-half years in legal proceedings as a result of the trustee's non-compliance with the BDBN.

54 See, eg, *Re Narumon* (n 15), where a BDBN was invalid to the degree it named a non-dependant as a beneficiary.

55 Rice, 'Tanya Plibersek Urges Action' (n 2). The issue is also discussed in the report by the Parliamentary Joint Committee on Corporations and Financial Services: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Financial Abuse: An Insidious Form of Domestic Violence* (Report, December 2024) 46–50 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000471/toc_pdf/Financialabuseaninsidiousformofdomesticviolence.pdf> ('*Financial Abuse Report*'). Recommendation 10 of the report suggested that a beneficiary who has perpetrated abuse or violence against a superannuation account holder who commits suicide could be precluded as a beneficiary of the superannuation funds: at 60. Details of the suggested reform were not provided. Another related issue which has been discussed recently is where a victim-survivor is not eligible for the abuser's superannuation benefits because they were not living together at the time of the abuser's death and so were not considered to be a 'dependant' under the *SISA* (n 7) provisions: see Daniel Herborn, 'How the Super System Fails Domestic and Family Violence Victim-Survivors', *Choice* (online, 24 October 2024) <<https://www.choice.com.au/money/financial-planning-and-investing/superannuation/articles/super-system-is-failing-victim-survivors>>. This issue is beyond the scope of this article and is not discussed further.

suicided subsequent to an abusive relationship with her husband.⁵⁶ Evidence of the abusive relationship included hundreds of degrading texts from the husband.⁵⁷ Her husband subsequently received her superannuation entitlement.⁵⁸ The superannuation fund informed the mother that it had no choice but to distribute the benefit to the husband, given that he was her dependant.⁵⁹ The fund did note that if the husband had been or was likely to be charged with murder, the outcome would be different, but in this instance the husband was never criminally charged with an offence.⁶⁰

These events were followed by a collective media release by three of the superannuation sector's representative bodies – the Association of Superannuation Funds of Australia ('ASFA'), the Super Members Council, and Women in Super – stating that they had written to key government ministers requesting law reform so that domestic abusers did not profit from such acts.⁶¹ Specifically, ASFA Chief Executive Officer ('CEO') Mary Delahunty said that '[t]he reforms we are calling for will be a critical step towards ensuring that people's superannuation is protected and not used as a financial reward for perpetrators'.⁶² Similarly, the CEO of Women in Super, Jo Kowalczyk, stated: 'The proposed reforms are not just about preventing financial gain for perpetrators; they are about sending a clear message that Australia will not tolerate abuse in any form.'⁶³

While the comments of Plibersek and others strike an intuitive chord with many people, the distribution of victims' entitlements to their abusers was in accordance with the current law. Where the deceased had no BDBN, the result of the application of the current laws discussed above is that in the presence of a marriage or marriage-like relationship, the superannuation death benefit is generally distributed to a partner, especially in the absence of other dependants such as children. Also as discussed above, where there is a BDBN, the superannuation benefit will be distributed in accordance with the deceased's stated wishes. There is little in the law to indicate that domestic violence in the relationship should affect the abuser's entitlement. The main exception is the common law forfeiture rule,

56 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 DV-related suicide.

57 Stephen Rice, 'Sickening Abuse, but Husband Collects Molly Wilkes's \$65,000 Super after Her Suicide', *The Australian* (online, 6 July 2024) <<https://www.theaustralian.com.au/nation/sickening-abuse-but-husband-collects-molly-wilkess-65000-super-after-her-suicide/news-story/876b054ccf81e343bc9f6e034edcf9e>>.

58 Adams, Meagher and Kortas (n 56) 1.

59 Ibid.

60 Rice, 'Tanya Plibersek Urges Action' (n 2).

61 Association of Superannuation Funds of Australia, Super Members Council and Women in Super, 'Super Sector Calls for Urgent Legal Reform to Stop Abusers Getting Victim's Super', (Media Release, Association of Superannuation Funds of Australia, 8 August 2024) <<https://www.superannuation.asn.au/media-release/super-sector-calls-for-urgent-legal-reform-to-stop-abusers-getting-victims-super/>>.

62 Ibid.

63 Ibid.

which prevents a perpetrator of homicide benefiting financially from their act.⁶⁴ This rule has been seen as one way to respond to society's expectations about the law's response to abuse.⁶⁵ Although it generally applies to the deceased's estate, it has also been applied to superannuation entitlements, even where the perpetrators were found not guilty due to insanity.⁶⁶ It has been suggested that in some cases, the forfeiture rule might be used to prevent the perpetrator from receiving their interest despite being named in a BDBN.⁶⁷

One other limited power that could potentially preclude abusers from benefiting from their acts is found in statutory will provisions in succession law.⁶⁸ Specifically, courts have used such powers to, in essence, write wills for victims of abuse who lack the capacity to do so.⁶⁹ However, those laws are limited in scope, as they could, in their current form, only be applied to wills of victims who are still alive.⁷⁰

The current law in this area does seem inappropriate. The suffering caused by domestic abuse is considerable and includes a heightened suicide risk.⁷¹ Thus, data cited by Plibersek indicates that domestic violence victims are ten times more likely to die at their own hand than through homicide committed by their abuser.⁷² Alarmingly, the Western Australian Ombudsman found that during 2017, 56% of female suicide

64 For an excellent overview of the development and operation of the forfeiture rule, see Victorian Law Reform Commission, *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> ('*Forfeiture Rule Consultation Paper*'). This rule is discussed in more detail in Part IV(A) of this article.

65 See Darryl Browne and Ruth Pollard, 'Where from and Where to with the Forfeiture Rule' [2018] (148) *Precedent* 14, 17, where the authors state that one of the advantages of codifying the forfeiture rule is that it could be expanded upon beyond homicides to cover abuse of the deceased. See also Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 21 <<https://doi.org/10.1177/147377950203100101>>, where it is noted that in general, legal systems in a variety of jurisdictions have been reluctant to expand the forfeiture rule to meet the changing expectations and needs of society.

66 *Re Fitter; Public Trustee (NSW) v Fitter* [2005] NSWSC 1188.

67 Michael Wise, 'Domestic Violence and Superannuation: Forfeiting Your Right' (2019) 93(7) *Law Institute Journal* 31, 32–3.

68 See Rosalind F Croucher, 'Statutory Wills and Testamentary Freedom: Imagining the Testator's Intention in Anglo-Australian Law' (2007) 7(2) *Oxford University Commonwealth Law Journal* 241, 257–62 <<https://doi.org/10.1080/14729342.2007.11421484>> ('Statutory Wills and Testamentary Freedom'), for a discussion of the application of statutory wills to testators who previously had testamentary capacity but no longer do.

69 See, eg, *De Gois v Korp* [2005] VSC 326, where the Supreme Court of Victoria, by order, made a new will on behalf of a woman who was in a vegetative state due to brain damage from an act of attempted murder on behalf of her husband. See also *Application by Peter Leslie Kelso* [2010] NSWSC 357, where the Supreme Court of New South Wales similarly made a new will on behalf of a domestic violence victim who was in a coma and dying.

70 G E Dal Pont, *Law of Succession* (LexisNexis, 3rd ed, 2021) 204–5.

71 J McLaughlin, RE O'Carroll and RC O'Connor, 'Intimate Partner Abuse and Suicidality: A Systematic Review' (2012) 32(8) *Clinical Psychology Review* 677, 685 <<https://doi.org/10.1016/j.cpr.2012.08.002>>. See also Julie M Kafka et al, 'Intimate Partner Violence Victimization and Perpetration as Precursors to Suicide' (2022) 18 *SSM: Population Health* 101079: 1–8, 7 <<https://doi.org/10.1016/j.ssmph.2022.101079>>, where the authors find that intimate partner violence is a precursor for 6.1% of suicides.

72 Stephen Rice, "'Don't Let DV Abusers Get Payout after Suicide': Super Funds", *The Weekend Australian* (online, 29 September 2024) <<https://www.theaustralian.com.au/nation/dont-let-dv-abusers-get-payout-after-suicide-super-funds/news-story/38b9480a6548b25bde235383fe23f3aa>>.

victims in that state were victims of domestic violence.⁷³ On top of the human toll, domestic violence also has substantial financial, medical⁷⁴ and non-medical costs.⁷⁵ Importantly, the evidence indicates that physical violence towards children is regularly present in families where there is domestic abuse aimed at a partner,⁷⁶ and that such children are at heightened risk of being future adult victims and perpetrators of domestic violence,⁷⁷ and of suffering from ongoing mental distress.⁷⁸

In the next Part, we examine whether the current legal approach to the entitlement of domestic violence perpetrators to receive the superannuation of their victims is in need of reform.

IV POLICY CONSIDERATIONS AND LAW REFORM PROPOSALS

A Rationales Favouring Superannuation Disqualification

A number of principles support the position that domestic violence perpetrators should be disqualified from the superannuation of their partners who have committed suicide or died in other circumstances after being subjected to domestic violence. Before discussing rationales in favour of reform of the existing law, it is important to note that the change proposed by Plibersek cannot be justified by simple analogy with the forfeiture rule. The reason is that the normative basis for the forfeiture rule does not always sit squarely with the proposed superannuation disqualification.

The rationale for the forfeiture rule can be traced back more than a century. *Riggs v Palmer* ('*Elmer's Case*')⁷⁹ is a seminal case in American inheritance law that illustrates the interplay between legal statutes and fundamental moral principles. The case arose when Elmer Palmer, a young man aged 16, murdered his grandfather, Francis Palmer, in order to secure his inheritance under the terms of his grandfather's will.⁸⁰ This act of murder and its subsequent legal fallout raised

73 Ombudsman Western Australia, *Investigation into Family and Domestic Violence and Suicide* (Report, October 2022) vol 1, 9.

74 Wendy Max et al, 'The Economic Toll of Intimate Partner Violence against Women in the United States' (2004) 19(3) *Violence and Victims* 259, 263–5 <<https://doi.org/10.1891/vivi.19.3.259.65767>>.

75 Thomas H Shepherd, 'It's the 21st Century ... Time for Probate Codes to Address Family Violence: A Proposal That Deals with the Realities of the Problem' (2001) 20(2) *Saint Louis University Public Law Review* 449, 455.

76 Ibid 458.

77 Naomi J Wheeler et al, 'Adverse Childhood Experiences as Predictors of Differences in Intimate Justice, Conflict, Control, and Power in Intimate Relationships' (2022) 37(4) *Journal of Family Violence* 707, 714–15 <<https://doi.org/10.1007/s10896-021-00288-z>>.

78 Valerie J Edwards et al, 'Relationship between Multiple Forms of Childhood Maltreatment and Adult Mental Health in Community Respondents: Results from the Adverse Childhood Experiences Study' (2003) 160(8) *American Journal of Psychiatry* 1453, 1458 <<https://doi.org/10.1176/appi.ajp.160.8.1453>>.

79 115 NY 506 (1889) ('*Elmer's Case*').

80 Ibid 508–9 (Earl J).

critical questions about the limits of legal formalism and the importance of moral reasoning in judicial decisions and in the development of legal principles.⁸¹

The central moral and legal norm violated in this case was the principle that one should not profit from their own wrongdoing – encapsulated in the maxim ‘no one should be allowed to benefit from their own wrong’ (*nemo ex suo delicto meliorem suam condicionem facere potest*).

In *Elmer’s Case*, Elmer’s actions flagrantly violated this principle. By murdering his grandfather, Elmer attempted to accelerate his inheritance (and prevent the possibility of his grandfather revoking his inheritance), thereby directly benefiting from his criminal act. The legal question before the New York Court of Appeals was whether the will, which legally entitled Elmer to inherit, should be enforced despite the circumstances of Francis Palmer’s death.⁸²

While the literal reading of the law supported Elmer’s claim – since the will clearly named him as a beneficiary – the Court recognised that adhering strictly to this legal formalism would result in an injustice. Earl J, writing for the majority, articulated the Court’s reasoning by emphasising that laws are not only a set of rigid rules but also instruments of justice designed to uphold societal values.⁸³ The Court held that the law must be interpreted in a way that prevents unjust outcomes, even if this requires deviating from the literal interpretation of legal texts.⁸⁴ The Court concluded (Gray J dissenting) that the intention of the legislature, and fundamental principles of justice, implicitly prohibit a murderer from inheriting from their victim.⁸⁵

Thus, the precise moral norm violated was the principle that no one should benefit from their own wrongdoing. The legal norm derived from this moral principle is that the law should not be used to facilitate or reward immoral actions. In this case, the Court’s decision underscored the principle that legal rules must be interpreted and applied in a manner consistent with core moral values to ensure that justice prevails over technical legalities. The decision in *Elmer’s Case* laid the groundwork for the forfeiture rule, which prevents individuals who unlawfully kill another from inheriting from their victim’s estate. This rule is an established common law legal principle in Australia and has been statutorily entrenched in a number of jurisdictions.⁸⁶ The rationale for the rule in Australia is based on the same reasoning as in *Elmer’s Case*:

The forfeiture rule is a common law rule of public policy. It is an expression of the fundamental principle that crime should not pay, and it conveys the community’s strongest disapproval of the act of homicide. The rule disentitles an offender from benefits that, in normal circumstances, they would have received on the deceased person’s death. It is not a punishment but it is a significant consequence that, in most

81 See William B Meyer, ‘The Background to *Riggs v Palmer*’ (2020) 60(1) *American Journal of Legal History* 48 <<https://doi.org/10.1093/ajlh/njz027>>.

82 *Elmer’s Case* (n 79) 509 (Earl J).

83 *Ibid* 511–12.

84 *Ibid* 509–12.

85 *Ibid* 513.

86 See, eg, *Forfeiture Act 1991* (ACT); *Forfeiture Act 1995* (NSW); *Forfeiture Act 2024* (SA). These Acts modify the application of the rule in certain instances, such as where the killer was mentally impaired.

cases, should not be disturbed. At common law, the rule is hard and fast. If the rule applies, it applies without regard to the features of the particular homicide.⁸⁷

The superannuation disqualification proposed in this article does not necessarily come within the scope of the forfeiture rule. This is because domestic violence perpetrators would often neither intend to kill their partner⁸⁸ nor in the case of the victim's suicide be the direct cause of the partner's death. However, in such cases – where there is no direct nexus between the actions of the perpetrator and the death of the partner – a number of other normative and jurisprudential considerations also support the reform proposed in this article. The first relates to the often-overlooked ideal of loyalty, which legally is underpinned by concept of trust.

1 *Loyalty and Breach of Trust*

Loyalty is a powerful sentiment. In revisiting philosopher Josiah Royce's work, Mathew Foust declared that 'life has sense and meaning only when it is characterized by loyalty'.⁸⁹ Loyalty is, admittedly, an imprecise concept. It seemingly involves an obligation or preference which one assumes towards a living object or a cause.⁹⁰ In terms of its influence on human behaviour and normative principles, loyalty is a very significant ideal. The philosopher John Kleinig has argued that 'a person who is completely devoid of loyalties would be deficient as a person understood inter alia as a moral agent'.⁹¹ For some people, loyalty is a powerful motivator or emotional driver in relation to conduct towards one's 'friend, family, organization, community, country or species' and 'it is likely that loyalties ground more of the principled, self-sacrificing, and other kinds of nonselfish behavior in which people engage' than other ideals.⁹²

87 Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) v. The forfeiture rule was first articulated by the High Court of Australia in *Helton v Allen* (1940) 63 CLR 691, 709 (citations omitted), where Dixon, Evatt and McTiernan JJ noted that it

is placed upon a principle of public policy, and it was said that no system of jurisprudence could with reason include amongst the rights which it enforces rights directly resulting to a person asserting them from the crime of that person. In *In the Estate of Hall* the doctrine was finally established and held to include not only murder but manslaughter. There Hamilton LJ said that the principle could only be expressed in the wide form: 'It is that a man shall not slay his benefactor and thereby take his bounty ...'

For recent consideration of the rule, see South Australia Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020).

88 See Jennifer Langhinrichsen-Rohling, Adrienne McCullars and Tiffany A Misra, 'Motivations for Men and Women's Intimate Partner Violence Perpetration: A Comprehensive Review' (2012) 3(4) *Partner Abuse* 429, 459 <<https://doi.org/10.1891/1946-6560.3.4.429>> for a discussion of research regarding the motivation of domestic abusers.

89 Mathew A Foust, *Loyalty to Loyalty: Josiah Royce and the Genuine Moral Life* (Fordham University Press, 2012) 3, quoted in John Snarey, 'Loyalty to Loyalty: Josiah Royce and the Genuine Moral Life' (2013) 42(2) *Journal of Moral Education* 260, 261 <<https://doi.org/10.1080/03057240.2013.782840>>

90 Ibid.

91 John Kleinig, 'Loyalty', *Stanford Encyclopedia of Philosophy* (Web Page, 22 March 2022) <<https://plato.stanford.edu/entries/loyalty/>>.

92 Andrew Oldenquist, 'Loyalties' (1982) 79(4) *Journal of Philosophy* 173, 173 <<https://doi.org/10.2307/2026219>>.

Thus, loyalty is a deeply ingrained moral principle, often regarded as one of the most important virtues in personal relationships, especially in marriage.⁹³ It holds relationships together through commitment and mutual trust, allowing individuals to thrive in partnerships built on care, respect, and shared goals. More fully, in the context of marriage or marriage-like relationships, loyalty is an expectation of unwavering support and commitment within a relationship. It binds individuals together in a shared journey of life, where each person's well-being is tied to the other. Loyalty goes beyond mere legal or contractual obligations; it is a moral expectation, implicitly agreed upon by both parties. It is the foundation upon which trust and emotional intimacy are built, ensuring that even in times of adversity, individuals remain committed to each other's welfare.⁹⁴

The normative virtue of loyalty finds legal expression in the concept of trust, which has been described as

a mechanism that reduces complexity and enables people to cope with the high levels of uncertainty and complexity of contemporary life. Trust makes uncertainty and complexity tolerable because it enables us to focus on only a few possible alternatives. Humans, if faced with a full range of alternatives, if forced to acknowledge and calculate all possible outcomes of all possible decision nodes, would freeze in uncertainty and indecision. In this state, we might never be able to act in situations that call for action and decisiveness ... trust expands people's capacity to relate successfully to a world whose complexity, in reality, is far greater than anything we are capable of taking in.⁹⁵

As noted by Philip Pettit, loyalty is one of the foundations of trust.⁹⁶ The concept of trust is so powerful that a 'breach of trust' is a discrete civil cause of action⁹⁷ and a powerful aggravating factor in sentencing for financial crimes and sexual

93 Of course, misplaced loyalty or the fanatical pursuit of loyalty can lead to morally unacceptable outcomes. Loyalty to an organised crime gang is undesirable. Loyalty even in the context of desirable contexts if taken too far can be harmful. The 'brotherhood syndrome', which exists in some police departments can lead to police members not reporting the illegal behaviour of their colleagues: Eithne Mills and Mirko Bagaric, 'Disloyalty and Divorce: Why (and When) the Traitor Should Pay' (2004) 18(1) *Australian Journal of Family Law* 69, 77. This does not mean that loyalty and morality are antagonistic. It is merely a reflection of the fact that no moral norm is absolute. Thus, it is permissible to kill in self-defence and lie to prevent a killer finding his victim.

94 *Ibid.*

95 Helen Nissenbaum, 'Securing Trust Online: Wisdom or Oxymoron?' (2001) 81(3) *Boston University Law Review* 635, 640.

96 See Philip Pettit, 'The Cunning of Trust' (1995) 24(3) *Philosophy and Public Affairs* 202, 211 <<https://doi.org/10.1111/j.1088-4963.1995.tb00029.x>>, where the author asserts: 'To be loyal or virtuous or even prudent is, in an obvious sense of the term, to be trustworthy. It is to be reliable under trust and to be reliable, in particular, because of possessing a desirable trait.'

97 For a good overview of this cause of action, see Charles Rickett, 'Understanding Remedies for Breach of Trust' (2008) 11(4) *Otago Law Review* 603. The concept of loyalty also underpins other legal doctrines, such as breach of fiduciary duty. In *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 213 [125] (citations omitted), Kirby J noted: 'The basis for fiduciary duties in all jurisdictions is explained in common terms by reference to obligations of loyalty to a person dependent on another who, to the knowledge of that other, is specially vulnerable.' Kirby J endorsed the view that 'the existence of a duty of loyalty that, reflecting "higher community standards or values", gives rise to a "legitimate expectation that the other party will act in the interests of the first party or at least in the joint interests of the parties and not solely self-interestedly": at 219 [136] (citations omitted). See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

offences in which the defendant has abused their position relative to the victim.⁹⁸ In our view, the breach of trust inherent in domestic abuse warrants imposing on perpetrators a legal penalty in the form of disqualification from superannuation entitlements. The existence of a relationship of trust that exists within a domestic relationship and the need for condemnation and even punishment that arises if this trust is violated by domestic violence towards a partner is already recognised in sentencing law. Thus, in *Shau v The Queen* where a husband seriously assaulted his pregnant wife, the Victorian Court of Appeal stated:

Compounding, to a significant degree, the seriousness of the offence is the fact that it occurred within the context of a family relationship. That fact had two relevant consequences. First, it meant that the offending arose in a relationship of trust. Lee was five months' pregnant and ought to have enjoyed protection and care from her husband. The breach of trust necessarily made the offending more serious.⁹⁹

In a similar vein, in *Gregson v Tasmania*, Martin AJ said:

Women in domestic circumstances are particularly vulnerable to the abuse of power and breach of trust by violent male partners ... Women who become victims in these circumstances, and other potential victims throughout the community, are entitled to such protection as the law is able to provide through the imposition of sentences that will act as both a personal and a general deterrent.¹⁰⁰

Partners make decisions based on their trust in each other, sometimes forgoing personal ambitions, financial opportunities or other pursuits for the benefit of the relationship. This becomes particularly relevant in cases of marriage or long-term relationships where partners' financial futures may be intricately connected.¹⁰¹ At minimum, trust involves an expectation of non-betrayal and mutual support towards one's partner. This expectation does not need to be expressly conferred; it is an intrinsic part of what it means to be in a relationship.

When domestic violence occurs, it constitutes a fundamental betrayal of trust. Domestic violence, whether physical, emotional or psychological, is not just a violation of a person's physical and emotional safety but also a breach of trust. It destroys or damages the mutual trust and commitment the relationship was built upon, replacing it with fear, coercion and domination. In this way, domestic violence is the ultimate breach of trust, undermining the very foundation of the relationship. All violence is repugnant. However, violence perpetrated by a loved one is especially bad because in addition to physical pain, it necessarily involves a deep betrayal and corresponding diminution of security and emotional well-

98 Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Lawbook, 9th ed, 2022) 309 [450.10600].

99 [2020] VSCA 252, [46] (Niall JA, Priest JA agreeing at [2]).

100 [2018] TASCRA 14, [37] (Blow CJ agreeing at [1], Geason J agreeing at [9]) (citations omitted). This passage was expressly approved in *Palmer v Tasmania* [2024] TASCRA 6, [40] (Porter AJ, Blow CJ agreeing at [1], Brett J agreeing at [2]).

101 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Financial Abuse: An Insidious Form of Domestic Violence* (Report, December 2024) 13–19 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000471/toc_pdf/Financialabuseaninsidiousformofdomesticviolence.pdf?>.

being,¹⁰² in circumstances where the victim has often sacrificed their plans and objectives to accommodate the projects and preferences of the abuser.

In the context of superannuation law, the concept of trust provides a powerful moral argument for disqualifying abusers from receiving their victims' benefits. The core reason that it is appropriate for a partner to benefit under their deceased partner's superannuation is the emotional bond they shared and the loyalty that unified their collective during the relationship. If the living partner's behaviour undercuts that ideal during the relationship, it fundamentally alters the way they should be treated afterwards, in the context of the former relationship.

Superannuation is a significant financial asset, often accumulated over the course of a long-term relationship. It is a form of deferred financial security, intended to support individuals and their loved ones after retirement, or in the event of death.¹⁰³

When a partner observes the concept of trust, they contribute to this shared future, either directly or indirectly. For example, one partner may work and contribute to the superannuation fund while the other supports the household in non-financial ways, such as through caregiving or domestic labour. In this sense, superannuation is not merely an individual asset but a product of joint efforts, reflecting the mutual trust and sacrifices made by both partners.

Domestic violence shatters this joint effort and the emotional ties that bind the relationship. To allow a domestic abuser to inherit their victim's superannuation is to ignore this fundamental betrayal. It is unjust for someone who has destroyed the trust within the relationship, often causing lasting emotional, psychological and financial harm, to benefit financially from the relationship after the victim's death.

2 Deterrence and the Educative Role of the Law

Several other subsidiary rationales have been advanced in favour of laws preventing domestic abusers financially benefiting from their actions. Specifically, it has been suggested that such a reform could act as a disincentive to domestic abuse.¹⁰⁴ From a criminological perspective, the deterrence effect of the severity of the punishment is not as important as the perceived risk of the punishment applying.¹⁰⁵ The certainty of punishment, rather than the severity of the possible sanction, is the most effective disincentive to inappropriate behaviour.¹⁰⁶ Thus, if

102 Ibid 13–15.

103 See *SISA* (n 7) s 62(1), which contains the 'sole purpose' test for superannuation, broadly indicating that a superannuation fund is to be carried on for the provision of retirement benefits for members, and/or the provision of funds, upon a member's death, to their dependants or LPR. See also Rami Hanegbi, 'Compulsory Superannuation Laws: Are Forced Retirement Savings Really for People's Own Good?' (2022) 37(1) *Australian Tax Forum* 147, 148 for a discussion of how superannuation is primarily aimed at the provision of individual retirement benefits rather than for a broader public benefit.

104 Ahyoung Song et al, 'Experience of Domestic Violence During Childhood, Intimate Partner Violence, and the Deterrent Effect of Awareness of Legal Consequences' (2017) 32(3) *Journal of Interpersonal Violence* 357, 360 <<https://doi.org/10.1177/0886260515586359>>.

105 Ibid.

106 Donald Ritchie, 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence' (Research Paper, Victorian Sentencing Advisory Council, April 2011) 14–17; Marta Nelson, Samuel Feineh and

a clear legal rule – one which established that domestic abusers were barred from receiving the superannuation of their partners – were established and promulgated, it may reduce the incidence of domestic violence.

Deterrence aside, there are other reasons to support such a law. Firstly, the law ‘teaches as it governs’,¹⁰⁷ and such a law sends a clear message regarding the moral and societal views of such behaviour. Moreover, the proposed reform would play a retributive function by effectively penalising abusers for their actions.

B Rationales against Superannuation Disqualification

The strongest argument against our proposal is that the victim while alive did not expressly take steps to prevent the abuser benefiting from the superannuation so the resulting distribution to the abuser should be left undisturbed, as the deceased’s wishes and autonomy should be respected. However, this argument is not compelling.

While one of the primary aims of succession law is to bring about the deceased’s intent,¹⁰⁸ this rationale is not absolute, either in the context of succession law or in related fields such as superannuation distributions. By way of background, one of the main policies underpinning the forfeiture rules and overseas counterparts relates to the deceased’s intentions for distribution of their assets.¹⁰⁹ That is, if, hypothetically, while alive, the deceased had known of the perpetrator’s actions, it is unlikely that they would intend the perpetrator to benefit financially.¹¹⁰ However, because domestic violence is often ongoing, this consideration does not necessarily apply in an identical manner in all cases. The reality is, as we have seen, that victims do in some cases have the means to ensure that someone other than the perpetrator will be entitled to their superannuation benefits. However, that is not a compelling policy reason to prevent disentitling abusers the superannuation benefits of their victims. There are two key reasons for this. First, a victim’s intentions are not the only, or even cardinal, consideration in determining appropriate asset division; and second, a victim’s intentions are often clouded due to the abuse. We now discuss these in turn.

Maris Mapolski, Vera Institute of Justice, *A New Paradigm for Sentencing in the United States* (Report, February 2023) 23 <<https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf>>.

107 Carla Spivack, ‘Let’s Get Serious: Spousal Abuse Should Bar Inheritance’ (2011) 90(1) *Oregon Law Review* 247, 259. This precise quote, citing an expressive principle of the law, originates from an unknown source but is sometimes attributable to John Locke’s writings that ‘[t]he *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions’: John Locke, ‘The Second Treatise of Government’ in Peter Laslett (ed), *Locke: Two Treatises of Government* (Cambridge University Press, 1988) 265, 271 (emphasis in original) <<https://doi.org/10.1017/CBO9780511810268>>.

108 See Croucher, ‘Statutory Wills and Testamentary Freedom’ (n 68) 243–50 for a background discussion regarding the importance of testamentary freedom, which is in essence respecting the testator’s intent regarding how their assets are to be distributed.

109 Michelle E Loakes, ‘Till Death Do Us Part ... but What about Our Property? Giving Abused Spouses Their Inheritance Rights Back’ (2017) 52(2) *Real Property, Trust and Estate Law Journal* 291, 320–1.

110 Ibid.

1 *Appropriate Division of Assets*

It is important to note that while respecting the intention of the deceased is one of the primary goals of succession law, it is not the only relevant principle.¹¹¹ For instance, non-superannuation succession law allows dependants, usually family members, to make a claim for an interest in an estate that is not consistent with the deceased's will.¹¹² This is the case even where there has been no duress or undue influence and the testator had full cognitive capacity and emotional freedom.¹¹³ Further, a blinkered focus on the deceased's stated (actual or imputed) intent does not take into account the fact that the victim might be unaware of the workings of the relevant law, or that they might not have turned their mind to the possibility of their death.¹¹⁴

2 *The Effect of the Abuse Itself*

To fully consider the intent of the deceased, it is necessary to take into account the fact that many abuse victims are in a state of chronic anxiety and consequently might not make the same decisions they would make if they were in a better mental state and had a better mindset.¹¹⁵ The reality is that abuse does often cause a loss of control and confidence,¹¹⁶ and victims will often try to please the abuser.¹¹⁷ Ultimately, abuse is often about control, and while victims in such relationships do at times try to resist coercive behaviors in some ways,¹¹⁸ this might not be in the form of actively ensuring that their abuser does not get their superannuation.

For a number of reasons including fear, many victims are unable to leave an abusive relationship,¹¹⁹ so it would be manifestly unfair to allow an abuser to benefit from this unfortunate reality. People stay in relationships for many reasons, despite being the victims of domestic abuse. Such reasons include financial dependency, which in certain instances is due to the financial control and abuse of their partner.¹²⁰

111 Spivack (n 107), 279–84.

112 See Ken Mackie and Elise Bennett Histed, *Principles of Australian Succession Law* (LexisNexis, 4th ed, 2023) ch 11 for a good explanation of the 'family provision' regime in Australian succession law, which allows family members to make a claim for assets even where they believe that inadequate provision has been made for them. But see Rosalind F Croucher, 'Conflicting Narratives in Succession Law: A Review of Recent Cases' (2007) 14(2) *Australian Property Law Journal* 179, 200, where the author is of the view that such provisions are potentially too generous in the case of adult children.

113 Mackie and Histed (n 112) ch 11.

114 Shepherd (n 75) 462–3.

115 Spivack (n 107) 286.

116 Shepherd (n 75) 458–9.

117 Aune Flinck, Eija Paavilainen and Päivi Åstedt-Kurki, 'Survival of Intimate Partner Violence as Experienced by Women' (2005) 14(3) *Journal of Clinical Nursing* 383, 387 <<https://doi.org/10.1111/j.1365-2702.2004.01073.x>>.

118 Spivack (n 107) 289.

119 Macie Alcoser, 'Spousal Abuse Disqualification Statute: It's Time to Protect Other Victims' (2020) 13(1) *Estate Planning and Community Property Law Journal* 269, 278. See also Anne Summers, 'The Choice: Violence or Poverty' (2022) 32(4) *Labour and Industry* 349 <<https://doi.org/10.1080/10301763.2023.2171685>>.

120 Rebecca L Heron, Maarten Eisma and Kevin Browne, 'Why do Female Domestic Violence Victims Remain in or Leave Abusive Relationships? A Qualitative Study' (2022) 31(5) *Journal of Aggression, Maltreatment and Trauma* 677, 684–5, 688. <<https://doi.org/10.1080/10926771.2021.2019154>>.

This can result in the victim's perception of having no other place to go.¹²¹ Another common reason is the victim's fear for their personal safety if they instigated a separation, as that could precipitate the abuser's threatened retaliation.¹²² This fear can unfortunately be well-grounded in reality, given that statistically, one of the most dangerous periods relating to an abusive domestic relationship is subsequent to the victim leaving the abuser.¹²³ Further, in certain instances, another disincentive to leaving lies in the prospect of future court proceedings involving the abuser – especially where the abuser is likely to contest the proceedings and attempts to intimidate the victim further *during* those proceedings, by, for example, staring or making other menacing body gestures.¹²⁴

Other factors leading people to stay in abusive relationships include religious considerations, which are sometimes fortified by religious leaders emphasising the importance of the sanctity of marriage,¹²⁵ and feelings of love and attachment towards the abuser.¹²⁶ Further, the presence of trauma caused by intimate partner violence is an all too common consequence of abusive relationships, leaving the victim with a feeling of helplessness that they have no choice but to stay.¹²⁷ Misplaced self-criticism is yet another strongly felt reason for staying in such a relationship; many victims fear that they will see themselves as failures for breaking up such a domestic relationship.¹²⁸ In the case of men who are the victims,¹²⁹ there is also an additional reluctance to leave due to their perception that male victims are not taken as seriously in these matters.¹³⁰

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- 121 Alisa J Velonis et al, 'Strategizing Safety: Theoretical Frameworks to Understand Women's Decision Making in the Face of Partner Violence and Social Inequities' (2017) 32(21) *Journal of Interpersonal Violence* 3321, 3338 <<https://doi.org/10.1177/0886260515598953>>.
- 122 Lisa C Dumond, 'The Undeserving Heir: Domestic Elder Abuser's Right to Inherit' (2010) 23(2) *Quinnipiac Probate Law Journal* 214, 218. This is discussed in context of elder abuse.
- 123 Alcoser (n 119) 279. See also Meghan S Stroshine and Amanda L Robinson, 'The Decision to End Abusive Relationships: The Role of Offender Characteristics' (2003) 30(1) *Criminal Justice and Behavior* 97, 110 <<https://doi.org/10.1177/0093854802239165>>, where the authors found that a victim was much more likely to attempt to leave where the perpetrator kept weapons at home.
- 124 Alcoser (n 119) 278.
- 125 Ibid 277.
- 126 Heron, Eisma and Browne (n 120) 685–6.
- 127 Solveig Lelaurain, Pierluigi Graziani, and Grégory Lo Monaco, 'Intimate Partner Violence and Help-Seeking: A Systematic Review and Social Psychological Tracks for Future Research' (2017) 22(4) *European Psychologist* 263, 273 <<https://doi.org/10.1027/1016-9040/a000304>>.
- 128 Jessica J Eckstein, 'Reasons for Staying in Intimately Violent Relationships: Comparisons of Men and Women and Messages Communicated to Self and Others' (2011) 26(1) *Journal of Family Violence* 21, 25 <<https://doi.org/10.1007/s10896-010-9338-0>>.
- 129 This is not the norm. Research indicates that males are responsible for approximately 75% to 80% of family and domestic violence offences and females are overwhelmingly the victims: Michael Flood et al, *Who Uses Domestic, Family, and Sexual Violence, How, and Why? The State of Knowledge Report on Violence Perpetration* (Research Report, 2022) 15 <https://eprints.qut.edu.au/239370/1/Who_uses_domestic_family_and_sexual_violence_how_and_why_The_State_of_Knowledge_Report_on_Violence_Perpetration_2023.pdf>.
- 130 Alyson L Huntley et al, 'Help-Seeking by Male Victims of Domestic Violence and Abuse (DVA): A Systematic Review and Qualitative Evidence Synthesis' (2019) 9(6) *BMJ Open* e021960:1–13, 7–8 <<https://doi.org/10.1136/bmjopen-2018-021960>>.

It is important to appreciate that, just as there are several reasons for victims to stay in such relationships, they might just as easily believe that these or other (similarly misguided) reasons justify their partner's entitlement to assets such as their superannuation. In light of this, the wishes of the domestic violence victims should not, by themselves, be determinative of the distribution of their superannuation assets.

V IMPLEMENTATION OF THE PROPOSAL: CONVICTION NOT NECESSARY, AND PROPORTIONATE DISENTITLEMENTS

We now discuss the structural parameters regarding implementation of our proposed reform. First, we should note that internationally, there is no direct equivalent to a law disqualifying a non-homicidal abuser from inheriting their partner's funds. However, there is a resembling principle in laws present in some jurisdictions in the United States ('US') that prevents those who commit elder abuse from subsequently inheriting the elder's estate. By way of background, in the US, where the equivalent of the forfeiture rule is termed the 'slayer rule', some states have widened the rule to include elder abuse.¹³¹ In some cases, elder abuse includes financial abuse, and in other cases it also includes other types of abuse such as physical abuse.¹³² There is also some variation among states regarding the threshold required for elder abuse to disqualify an inheritance; some states require a criminal conviction, and others set a lower burden of proof that requires only that there be convincing evidence of the abuse.¹³³ For instance, the Californian statute states that an inheritance is disallowed when the following conditions are fulfilled:

- (1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or financial abuse of the decedent, who was an elder or dependent adult.
- (2) The person is found to have acted in bad faith.
- (3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.
- (4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.¹³⁴

The wording of this Californian legislation potentially applies to a victim who is an elder or a 'dependent adult'. The relevant legislative definition of a 'dependent adult' is someone between the ages of 18 and 64 who is subject to 'physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights'.¹³⁵ Clearly, such a definition would cover most victims of domestic violence. Thus, a reform of the type advanced in this article is not without

131 Jennifer Piel, 'Expanding Slayer Statutes to Elder Abuse' (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369, 370–1.

132 Ibid 371.

133 Ibid.

134 Cal Prob Code § 259(a) (West 2012).

135 Cal Welf & Inst Code § 15610.23(a) (West 2019).

precedent internationally – although, as discussed below, our proposal is to focus the reform on domestic violence.

A Standard of Proof

One of the key considerations regarding any proposed law to bar abusers from benefiting from their deceased partner's superannuation is the appropriate standard of evidence. Specifically, should a conviction for domestic violence be required, or in the alternative, should the standard be the balance of probabilities on the available evidence?

By way of background, a conviction is not required under the Australian forfeiture rule; rather, its application is decided on the 'balance of probabilities'.¹³⁶ As discussed, as far as the abovementioned elder abuse legislation in the US is concerned, although most states do require a conviction, some only require convincing evidence of the abuse.¹³⁷ From a policy perspective, there are strong reasons not to require a criminal conviction or a criminal burden of proof for such a proposed law. First, the reality is that victims of abuse often do not report the abuse to authorities.¹³⁸ This is for a variety of reasons, including feelings of helplessness and fear of repercussion from the abuser.¹³⁹ Such feelings partly reflect the reality that such relationships are cyclical in nature, which often results in outsiders perceiving the relationship in a positive light,¹⁴⁰ and partly reflects the fact that in many cases, abusers are experts in hiding their acts, and are able to put on a façade of charm when the need requires.¹⁴¹ The cyclical nature of abusive relationships is often a strong impediment to a conviction because the victim will often change their mind about pressing charges against the abuser. Domestic violence prosecutions tend to have far lower conviction rates than other assault matters – one reason is that victims may decide to not give evidence, or change their evidence at court.¹⁴²

Legal coherency is cardinal to determining whether a conviction for an act of domestic violence is necessary to deny an abuser the receipt of their former partner's superannuation. There is no question that domestic violence is a criminal act, the scope of which has been expanded in most Australian jurisdictions to reflect that broad nature of such behaviour.¹⁴³ However, the fact that domestic violence is a crime does not necessarily mean that a conviction is necessary before legal action

136 *Forfeiture Rule Consultation Paper* (n 64) 29–30.

137 Piel (n 131) 371.

138 Spivack (n 107) 295; Shepherd (n 75) 453.

139 Marsha E Wolf et al, 'Barriers to Seeking Police Help for Intimate Partner Violence' (2003) 18(2) *Journal of Family Violence* 121, 124–7 <<https://doi.org/10.1023/A:1022893231951>>.

140 Spivack (n 107) 302.

141 Ibid 299.

142 Heather Douglas and Robin Fitzgerald, 'Prosecuting Strangulation Offences: Understanding Complainant Withdrawal Using a Social Entrapment Lens' (2025) 37(1) *Current Issues in Criminal Justice* 1 <<https://doi.org/10.1080/10345329.2024.2336717>>; Steve S Yeong and Suzanne Poynton, 'Can Pre-recorded Evidence Raise Conviction Rates in Cases of Domestic Violence?' (2023) 56(4) *Australian Economic Review* 487 <<https://doi.org/10.1111/1467-8462.12525>>; Christopher Dowling et al, 'Policing Domestic Violence: A Review of the Evidence' (Research Report No 13, Australian Institute of Criminology, 2018).

143 See, eg, *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW); *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld).

is taken against the perpetrator. In other areas of the law, criminal behaviour often underpins liability or is the substrate for an adjustment of legal rights and duties without the need for a conviction or finding of guilt.

Thus, a range of acts can make a person liable for civil damages underpinned by criminal behaviour. In torts law, there is no need for a criminal conviction for battery, assault or wrongful imprisonment in order for the victim to be awarded damages.¹⁴⁴ This is despite the fact that the elements for these torts are effectively the same as their criminal law analogues.¹⁴⁵ In contract law, in order for a party to vitiate a contract on the basis of illegality (such as theft or fraud), there is no need to base their claim on a criminal conviction.¹⁴⁶ So far as domestic violence is concerned, one of the few circumstances where an immigrant can be granted permanent residence in Australia on the basis of a partner visa, despite the relationship having terminated, is where the immigrant left the relationship due to domestic violence.¹⁴⁷ In order to establish that domestic violence was the reason for the separation, the law does not require the visa applicant to demonstrate that the partner was convicted of a crime relating to domestic violence.¹⁴⁸

Accordingly, it would be contrary to established jurisprudence to require a criminal domestic violence conviction as a precondition for prevention of an abusive person's receipt of their partner's superannuation. Rather, such a provision should be subject to proof on the balance of probabilities.

B Determining the Extent and Type of Domestic Violence Necessary to Disqualify an Abuser from Receiving Superannuation Benefits

A proposal to disqualify domestic violence perpetrators from receiving the superannuation benefits of their deceased partners raises complex questions about the extent and type of abuse that should trigger such a disqualification. The reality is that domestic violence can vary markedly in nature and degree. All domestic violence is repugnant. However, there are gradations of severity, as is the case with all forms of criminal behaviour. Whether a domestic violence perpetrator should be precluded from receiving entitlements is not a simple, binary matter. Instead, domestic violence at the more serious end of the spectrum should result in a total denial of superannuation benefits, while less serious forms should arguably result in a reduction of entitlements. Thus, while the principle that domestic abusers should not benefit financially from their actions is compelling, it is equally important to ensure that any legal reform in this area is just, proportionate, and reflective of the nuances inherent in domestic violence cases.

We now provide guidance on the considerations that should determine when domestic abuse should negate or reduce the entitlement to superannuation benefits.

144 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10th ed, 2011) 31–40 [2.60]–[2.80].

145 *Ibid.*

146 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 218 (Dawson and Toohey JJ), citing *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413 (Gibbs ACJ).

147 *Migration Regulations 1994* (Cth) r 1.23.

148 *Ibid.*

The key considerations, we propose, should be the length of the relationship, the frequency and severity of the abuse, and the principle of proportionality.

1 The Length of the Relationship

The length of the relationship between the abuser and the victim is a crucial factor in determining the appropriateness of disqualification. For long-term relationships, even if the abuse is infrequent, the cumulative effect of long-term control, manipulation or violence can be profoundly damaging and should be taken into account when considering disqualification.¹⁴⁹ However, it is also important to recognise that the duration of a relationship does not necessarily correlate with the severity of abuse. In some instances, short-term relationships may involve intense and severe abuse that justifies disqualification. Therefore, while the length of the relationship is a relevant consideration, it should not be determinative on its own.

Moreover, in some instances the length of the relationship can militate against a total disqualification of superannuation entitlements. A long-term relationship, particularly one spanning several years or decades, typically provides more opportunities for abusive behaviour to manifest and escalate but also greater scope for the demonstration and display of genuine remorse and emotional reparation. Thus, for example, an isolated instance of domestic harm in the context of an otherwise nurturing and supportive relationship which lasted for over a decade should be less determinative of a superannuation disqualification than the same event in the context of a short relationship of less than 12 months.

2 Frequency of Abuse

The frequency of abusive incidents is another key variable. A pattern of repeated abuse, even if each individual incident is on the less serious end of the spectrum, can create a pervasive atmosphere of fear, control and harm that justifies disqualification.¹⁵⁰ Courts should consider whether the abuse was part of an ongoing pattern of behaviour designed to dominate and control the victim. This could include physical violence, emotional abuse, financial control or psychological manipulation. In making this assessment, courts should consider the cumulative severity of less extreme but repeated forms of abuse. For example, a long-term pattern of verbal abuse, threats and intimidation that causes the victim to live in constant fear may be just as, or even more, damaging than a single incident of

149 See Natalie Pill, Andrew Day and Helen Mildred, 'Trauma Responses to Intimate Partner Violence: A Review of Current Knowledge' (2017) 34 *Aggression and Violent Behavior* 178, 181 <<https://doi.org/10.1016/j.avb.2017.01.014>>, where the authors discuss, in the context of domestic violence, that the cumulative effects of traumatic incidents over time, even in the presence of varying indicators like frequency, can contribute to complex PTSD symptoms.

150 Ibid. This does not contradict the fact that severity of abuse is also a factor in determining the harm caused by domestic violence: Sarah White et al, 'Examining the Measurement of Severity of Intimate Partner Violence and its Association to Mental Health Outcomes: A Narrative Synthesis' (2024) 12 *Frontiers in Public Health* 1450680:1–25, 20 <<https://doi.org/10.3389/fpubh.2024.1450680>>.

physical violence.¹⁵¹ In such cases, the totality of the abuse should be considered when determining whether disqualification is appropriate.

3 *Severity of Abuse*

Severity is arguably the most important factor in determining whether disqualification is appropriate. Severe abuse, even if it occurs only once, can have devastating consequences for the victim and should weigh heavily in favour of disqualification. The most severe instances of domestic violence would typically involve physical violence that causes injury. That said, it is important to recognise that the severity of abuse should not be measured solely by its physical manifestations.

Indeed, another key consideration is the effect of the violence on the victim's physical, financial and emotional health. Courts should consider whether the abuse caused the victim to lose employment opportunities, suffer from long-term psychological trauma, or otherwise experience diminished quality of life. The greater the impact, the more compelling the case for disqualification.

4 *The Principle of Proportionality*

In addition to the specific factors of length, frequency and severity, the principle of proportionality is also relevant. Proportionality is a well-known sentencing principle which stipulates that courts should match the harshness of the penalty they impose to the gravity of the crime the defendant committed.¹⁵² However, it also has a much wider sphere of legal operation. As noted by Richard G Fox, the notion of proportionality has a deeply rooted normative basis which underpins the wider general system and is ingrained in respect for human rights:

During the late 1970s and 1980s, in reaction to the greater use in the USA of open-ended 'rehabilitative' or 'preventive' forms of sentence, academic writings there began to call for return to the classical notion that punishments had to bear a reasonably predictable relationship to the offender's criminal conduct. It was said that this was not merely good philosophy, but was part of our intuitive approach to fairness in the allocation of praise and blame. The principle seems to embody notions of justice:

People have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not ... if punishment is seen as an expression of blame for reprehensible conduct, then the quantum of punishment should depend on how reprehensible the conduct is.¹⁵³

151 See Concepción Blasco-Ros, Segunda Sánchez-Lorente and Manuela Martínez, 'Recovery from Depressive Symptoms, State Anxiety and Post-traumatic Stress Disorder in Women Exposed to Physical and Psychological, but Not to Psychological Intimate Partner Violence Alone: A Longitudinal Study' (2010) 10 *BMC Psychiatry* 98:1–12, 9 <<https://doi.org/10.1186/1471-244X-10-98>> where the authors found that in the context of domestic violence, psychological abuse alone resulted in mental health outcomes comparable to those experienced when psychological abuse was accompanied by physical abuse – and, notably, that recovery from psychological abuse alone was poorer than recovery from abuse that also included physical violence.

152 *Veen v The Queen* (1979) 143 CLR 458, 467–8 (Stephen J); *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ) ('*Veen [No 2]*').

153 Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 56–8 <<https://doi.org/10.1086/449204>>.

Certainly the idea that a response must be commensurate to the harm caused, or sought to be prevented, is to be found in many other areas of the law, both criminal and civil, such as the defences of provocation and self-defence and awards of compensatory damages for personal injury or death. Similarly, in fashioning equitable remedies, the courts require that the relief awarded be proportional to the detriment sought to be avoided. In administrative law, delegated legislation has been invalidated on the ground of ‘unreasonableness’. One of the tests of unreasonableness is whether the regulation is reasonably adapted to achieving the purpose of the enabling power, and this itself turns on the ‘reasonable proportionality test’. ... Proportionality can thus be seen as rooted in respect for the basic human rights of those before the court.¹⁵⁴

This principle should also be reflected in reforms relating to superannuation disqualification. From a normative standpoint, the law should aim to prevent abusers from profiting from their harmful actions. However, it is also important to ensure that the response is commensurate with the gravity of the wrongdoing. Total disqualification from receiving superannuation benefits is a significant legal consequence and should be reserved for cases where the abuse is sufficiently serious to warrant such a penalty.

One approach to ensuring proportionality is to establish a tiered system of disqualification. For example, in cases of extreme physical violence or severe psychological abuse, total disqualification may be appropriate. In cases of less severe but still harmful behaviour, courts could have discretion to impose partial disqualification, reducing the abuser’s entitlement to superannuation benefits based on the severity and nature of the abuse.

Courts should also consider the intentions of the deceased, as far as they can be ascertained. If there is evidence that the victim intended their abuser to receive their superannuation benefits – perhaps due to reconciliation – this should be a factor in the calculus. However, courts should also consider whether the victim’s intentions were influenced by the abusive dynamics of the relationship, such as fear or manipulation.

C Summary of Considerations Relevant to the Extent and Nature of the Disqualification

By way of the summary, we propose that the following factors are central to determining whether (and to what extent) an abuser should be disqualified from receiving superannuation benefits:

1. Length of relationship: Courts should consider the duration of the relationship, with longer relationships providing more context for understanding the nature and impact of the abuse.
2. Frequency of abuse: Courts should assess whether the abuse was a recurring pattern of behaviour or an isolated incident. Repeated abuse over time, even if less severe, may justify disqualification.
3. Severity of abuse: The severity of the abuse should be the primary factor in determining disqualification. Severe physical, psychological or emotional

¹⁵⁴ Richard G Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19(3) *Melbourne University Law Review* 489, 491–2.

- harm, even if occurring only once, should weigh heavily in favour of disqualification.
4. Proportionality: The legal consequence of disqualification should be proportionate to the severity and impact of the abuse. Courts should have discretion to impose partial or full disqualification based on the circumstances of the case.
 5. Intentions of the deceased: Courts should consider any evidence of the deceased's intentions regarding the distribution of their superannuation benefits, with a critical eye on whether these intentions were influenced by the abusive dynamics of the relationship.
 6. Impact on the victim's financial and emotional well-being: The greater the impact, the more compelling the case for disqualification.

These considerations are intended to provide courts with guidance rather than a rigid formula. Courts should retain an overarching discretion to consider the unique circumstances of each case, as is currently the case for awards of damages in civil torts cases and sanctions imposed in criminal matters.¹⁵⁵ Disqualifying domestic violence perpetrators from receiving the superannuation benefits of their victims is a complex issue that requires careful consideration of multiple factors. By focusing on the length of the relationship, the frequency and severity of the abuse, and broader considerations of justice and proportionality, courts can make informed decisions that balance the need to prevent unjust enrichment with the principles of fairness and justice. The above considerations offer a framework that can guide trustees, tribunals and courts making these difficult decisions,¹⁵⁶ ensuring that the legal system responds appropriately to the realities of domestic violence.

While a rigid formula cannot be determined in advance to govern all scenarios, illustrative examples can guide this discretion to facilitate consistency and fairness in outcomes. The starting point is that any form of domestic violence is unacceptable. There are degrees of domestic violence and total disqualification of an abuser's superannuation entitlements should occur for the most serious episodes of domestic violence.¹⁵⁷ A recent review of the literature suggests that there are several main typologies of domestic violence 'with differing causes, dynamics and impacts'.¹⁵⁸ Different forms of domestic violence include "intimate terrorism" or

155 In sentencing offenders, the reasoning methodology is termed the 'instinctive synthesis':

Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is pointless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination.

R v Williscroft [1975] VR 292, 300 (Adam, Starke and Crockett JJ). This is not a mechanical process and there is no single correct sentence: at 301.

156 To be clear, the domestic abuser disqualification should be triggered in the same manner as other objections to superannuation payments. Thus, the claimant, typically a relative of the victim as defined in *SISA* (n 7) s 10, would make the claim to the trustee of the superannuation fund, and if this were not successful, have standing to pursue the matter with the AFCA and then through the court system.

157 To this end, an analogy can be made with sentencing law. The maximum penalty for an offence is rarely imposed. Penalties approaching the maximum penalty are imposed only for the worst type of offending of the offence in question: *Veen [No 2]* (n 152) 478 (Mason CJ, Brennan, Dawson and Toohey JJ).

158 Flood et al (n 129) 43.

“coercive controlling violence” on the one hand, and “situational couple violence” on the other’.¹⁵⁹

Coercive controlling violence or intimate terrorism occurs when an abuser uses violence in addition to other coercive measures to take control over their partner.¹⁶⁰ The form of violence is often severe and usually escalates, often resulting in physical injuries.¹⁶¹ Abusers who commit this form of violence which results in physical injuries should be disqualified from receiving 60% to 100% of the victim’s superannuation entitlements.

Situational couple violence involves escalating conflicts between partners that result in violence.¹⁶² This type of violence is not as severe: ‘[I]t is expressive (emotional) in meaning, it tends not to escalate over time and injuries are rare’.¹⁶³ Abusers who commit this form of violence for at least one year should be disqualified from receiving 30% to 60% of their victim’s superannuation.

VI CONCLUSION

Distribution of superannuation death benefits in the context of domestic violence is a complex and morally charged issue that demands pressing legal reform. The current legal framework allows for situations where a domestic abuser can receive the superannuation benefits of their victim, often leading to outcomes that are not only unjust but also distressing for the victim’s surviving family members. A primary aim of succession law is to honour the testamentary intentions of the deceased, but in cases involving domestic violence, this principle must be balanced against the need to prevent perpetrators from profiting from their harmful actions.

One of the central arguments for reform is the need to align superannuation law with the broader principles of morality and deterrence. Allowing a domestic abuser to inherit the superannuation benefits of their victim not only rewards reprehensible behaviour but also sends a troubling message about the acceptance of domestic violence rather than its blanket repudiation. Such outcomes are contrary to the virtue of loyalty. Moreover, the retributive aspect of law, which seeks to punish wrongdoing, is undermined when abusers are allowed to gain financially from their actions.

In addition to these considerations, the practical realities of domestic violence must be acknowledged. Victims of domestic abuse often remain in harmful relationships due to fear, financial dependency, and emotional manipulation. These dynamics can prevent them from taking steps to protect their superannuation benefits, such as making BDBNs that exclude their abuser. The law should recognise these challenges and provide protections that do not rely solely on the actions of the victim, who may be too vulnerable or unaware to secure their financial assets effectively.

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid.

163 Ibid.

The proposed legal reform focuses on creating a clear disqualification for people who, on the balance of probabilities, have been shown to have engaged in domestic abuse against their partners. The disqualification may be full or partial depending on numerous considerations, including the severity and frequency of abuse. This balance of probabilities is the appropriate evidential standard because it recognises the difficulty of obtaining criminal convictions in domestic violence cases at the higher standard – beyond reasonable doubt – where victims may be unwilling or unable to pursue legal action against their abuser. The lesser burden of proof, as used in civil law, would make the law more accessible and effective in protecting the rights and assets of victims.

Further, the reform would send a clear societal message, reinforcing the notion that domestic abuse is a grave moral transgression that carries significant consequences, including financial repercussions. It would also contribute to a broader cultural shift, where the legal system actively works to deter domestic abusers and impose adverse consequences on them.

The current legal framework governing superannuation death benefits is inadequate in addressing the unique and troubling context of domestic violence. Legislative reform is necessary to disqualify domestic abusers from receiving superannuation benefits, ensuring that the law upholds a person's right to live in security and the virtue of loyalty, and protects the financial interests of victims. By adopting a standard based on the balance of probabilities, the legal system can better address the complexities of domestic violence, providing a more just and equitable outcome for all parties involved.