
Supporting Australian Victims of Terrorism Overseas Bills

Senate Committee on Legal and Constitutional Affairs

12 April 2012

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Acknowledgement

The Law Council of Australia acknowledges the assistance of the Law Society of the Australian Capital Territory in the preparation of this submission.

Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Senate Committee on Legal and Constitutional Affairs in response to its inquiry into the *Assisting Victims of Overseas Terrorism Bill 2012* and the provisions of the *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011*.
2. The *Social Security Amendment (Supporting Australian Victims of Terrorism) Bill 2011* (the Government Bill) was introduced into Parliament on 24 March 2011 by the former Attorney General, the Hon Robert McClelland MP. It seeks to establish a set of procedures for the provision of financial assistance for Australians who are injured overseas as a result of certain terrorist acts and for close family members of Australians who are killed overseas as a result of certain terrorist acts. The Government Bill amends the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Income Tax Assessment Act 1997*, the *A New Tax System (Family Assistance) Act 1999*, and the *Health and Other Services (Compensation) Act 1995*. On 15 March 2012 the Government moved a series of minor amendments to the Government Bill.¹
3. On 1 March 2012 Senator the Hon George Brandis SC introduced the *Assisting Victims of Overseas Terrorism Bill 2012* (the Brandis Bill) into the Senate. This private members Bill also seeks to establish a framework to provide financial assistance to persons or their next of kin who are injured or killed as a result of an international terrorist act. Under the Brandis Bill, the framework is to be administered by the Attorney-General's Department and is to provide for eligibility criteria for claimants for financial assistance.
4. On 22 March 2012 the Senate jointly referred both Bills to this Committee for inquiry and report.
5. The Law Council acknowledges the ongoing trauma, pain and suffering which are often experienced by victims of overseas terrorism and their families and supports measures designed to ensure that they have access to appropriate support and compensation. However, the Law Council wishes to highlight some concerns it holds about the both of the Bills.
6. The Law Council is concerned that by limiting the scheme to Australian victims of overseas terrorism, both Bills make an unjustified distinction between victims of overseas terrorism and other groups or individuals who are harmed as a result of violent criminal acts abroad. The Council is also of the view that the narrow focus of the schemes proposed in both Bills highlight the absence of a broader, comprehensive scheme to compensate victims of Commonwealth crimes committed either at home or abroad.
7. The Law Council also holds particular concerns with the Government Bill, which relate to the way in which the Bill empowers the Prime Minister to declare a terrorist act an 'overseas terrorist act' to activate the compensation scheme. The Law Council is also concerned that the proposed eligibility criteria in the Government Bill appear to exclude a harmed individual who was uninvolved in the relevant terrorist act if his or her close family member was involved.

¹ These amendments seek to clarify that payments made under the scheme are not compensation or damages, and extend the period for deemed refusal of claim. The full text of these amendments is available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r4561_amend_d8e59656-de4d-48a1-a943-185b767fdaa1/upload_pdf/B11BL204.pdf;fileType=application%2Fpdf

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8. The Law Council also has concerns about the approach adopted in the Brandis Bill which leaves important details relating to the scheme, such as the criteria to be applied when determining whether a person is eligible for compensation and the definition of the term 'terrorist act' to the regulations. While this approach has the potential to avoid some of the Law Council's concerns described above in respect of the Government Bill, by leaving important detail to the regulations, the Brandis Bill fails to allow Parliament and the community sufficient opportunity to assess whether the scheme will operate fairly, efficiently and transparently.
 9. These concerns are discussed in detail below.
 10. The Law Council notes that it has a history of advocacy in relation to the Government Bill and wrote to then Attorney General, the Hon Robert McClelland in April 2011 raising its concerns.² A response was received from the former Attorney-General in August 2011. This correspondence was copied to Senator Brandis and to Senator Brown, the Leader of the Australian Greens.

Key Differences between the Bills

11. As noted above, both Bills aim to establish a framework to facilitate financial compensation for Australians killed or injured as a result of international terrorist acts.
12. As noted in the Explanatory Memorandum to the Government Bill, in the past, Australia has provided targeted assistance to Australians adversely affected by terrorist acts overseas by using both statutory and ex gratia response measures.³ Past forms of assistance have included Disaster Health Care Assistance Schemes, ex gratia assistance, consular and repatriation assistance, and immediate short term financial assistance through the Australian Government Disaster Recovery Payment (AGDRP).⁴ The provision of additional financial assistance under the proposed scheme in both Bills is designed to supplement those existing measures.
13. Both Bills set out a compensation framework and give power to the Minister⁵ and his or her Department to determine the details of how this framework will operate in practice. Both Bills also require the Minister to engage in a process of ongoing consultation when determining these details, and when giving effect to the scheme.⁶

² On 18 April 2011 the then Law Council President, Mr Alexander Ward, wrote to the then Attorney General, the Hon Robert McClelland MP, raising its concerns with the Government Bill. A copy of this letter was also sent to Senator the Hon George Brandis SC and Senator the Hon Bob Brown. A response was received from the Attorney General on 2 August 2011, which was also copied to Senators Brandis and Brown. A further letter was then sent to Senator Brown on 9 September 2011 in respect of the Government Bill and the response received from the Attorney General, and copied to the Hon Robert Oakshott MP.

³ Explanatory Memorandum to the Government Bill p. 1

⁴ Ibid

⁵ Proposed section 4 of the Brandis Bill specifically refers to the Attorney General as the Minister responsible for administering the scheme, in conjunction with the Attorney General's Department. The Government Bill refers to the Minister and his or her Department in the context of proposed amendments to the *Social Security Act 1991*, which generally refers to the Minister for Human Services or the Minister for Families, Community Services and Indigenous Affairs, and the Department of Human Services or the Department of Families, Housing, Community Services and Indigenous Affairs, see for example section 23 of the *Social Security Act 1991*. However, the Law Council notes that the Explanatory Memorandum to the Government Bill refers to the Minister as the Attorney General.

⁶ For example, proposed section 8 of the Brandis Bill provides that when administering the framework and developing and implementing it, the Attorney-General's Department must regularly consult with representatives of victims and their families, community or welfare organisations, health professionals,

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14. Under the Brandis Bill, only broad guidance on eligibility criteria and how claims are to be determined is contained in the Bill itself. It does not seek to amend existing legislation.
 15. In contrast, the Government's Bill provides details regarding: the meaning of key terms (such as 'terrorist act', 'primary' and 'secondary victim'), eligibility criteria and the principles to be applied when determining claims. As noted above, the Government amends the *Social Security Act 1991* (Cth) (the Social Security Act) and also makes a range of consequential amendments to other legislation, which aim to ensure that the scheme operates effectively within the context of other social security measures.

Eligibility Criteria

16. Under proposed section 6 of the Brandis Bill, the Attorney-General must, by legislative instrument, determine guidelines for the operation of the framework. These guidelines are to contain details on the eligibility requirements to be satisfied before a recommendation may be made to the Attorney for the disbursement of financial assistance to a person under the framework. Proposed section 7 of the Bill provides that such guidelines must give priority to persons who suffer injuries requiring hospitalisation as a result of an overseas terrorist act or to the next of kin of persons who suffered death as a result of such an act. No time frames for making claims are included in the Brandis Bill.
17. In contrast, the Government Bill proposes two categories of individuals eligible for an Australian Victim of Terrorism Overseas Payment (AVTOP): primary victims and secondary victims. A primary victim will be a person who is harmed as a result of a declared overseas terrorist act.⁷ A secondary victim will be a close family member of a person who dies as a result of a declared overseas terrorist act.⁸
18. Under the Government Bill, the 'declared terrorist act' must meet the definition of 'terrorist act' under section 100.1 of the *Criminal Code Act 1995* (the Criminal Code),⁹ and be declared to be a such an act by the Prime Minister. This declaration may be made at the Prime Minister's discretion and will be given effect through a legislative instrument.¹⁰ This feature of the Government Bill is discussed in detail below.

international humanitarian agencies and any other relevant bodies. A similar requirement is included in Item 11 of the Government Bill, which proposes a new section 1061PAG of the *Social Security Act 1991*.

⁷ Item 6 of the Government Bill inserts the definition of *primary victim* of a declared overseas terrorist act. This term has the meaning given by subsection 1061PAA(2). This sub-section provides that a person is a primary victim of a declared overseas terrorist act if that person was in a place where the terrorist act occurred and was harmed as a direct result of the terrorist act.

⁸ Item 7 of the Government Bill inserts the definition of secondary victim of a declared overseas terrorist act. This term has the meaning given by subsection 1061PAA(3). This sub-section provides that a person is a secondary victim of a declared overseas terrorist act if the person is a close family member of a person who was in a place where the terrorist act occurred and died within 2 years as a direct result of the terrorist attack

⁹ Item 8 provides that 'terrorist act' has the same meaning as in the Criminal Code.. Under the Code, "terrorist act" means an action or threat of action which is done or made with the intention of advancing a political, religious or ideological cause and which is done or made with the intention of coercing or influencing by intimidation the Commonwealth, a State, Territory or foreign country or intimidating the public (see s100.1 *Criminal Code Act 1995* (Cth))

¹⁰ The procedure for declaring an act to be a terrorist act is outlined in Items 9 and 10 of the Government Bill. The Government Bill also provides that if the Prime Minister makes a declaration about a terrorist act under this proposed provision, he or she is also taken to have made a determination under subsection 36(1) of the *Social Security Act 1991* that the terrorist act is a major disaster. The Explanatory Memorandum explains that the purpose of this subsection is to deem the major disaster declaration to have been made, avoiding the requirement for the Minister to also make a declaration

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19. In addition to these criteria, proposed section 1061PAA of the Social Security Act set out the general qualification requirements that will need to be satisfied for an AVTOP to be made. It provides that to be eligible, the person must:
- (a) not be 'involved' in the commission of the terrorist act;¹¹
 - (b) not have close family members involved in the commission of the terrorist act ('close family members' are defined in proposed subsection 1016PAA(4) as the person's partner, child, parent, sibling or legal guardian)¹² and
 - (c) be a resident of Australia on the day the terrorist act occurred (however, the Minister can provide that a class of persons who do not satisfy the residency test can be eligible for assistance under a determination).¹³
20. In addition, proposed subsection 1016PAA (6) provides that the Minister may make a determination by legislative instrument in relation to a specified class of persons for the purposes of qualification for a payment.¹⁴
21. Under the Government Bill, a claim for an AVTOP by a primary victim must be made within two years of the declaration being made by the Prime Minister that the terrorist act was a declared terrorist act.¹⁵ Secondary victims must make their claims within 12 months after the day the close family member to whom the claim relates died.¹⁶ However, the Bill also provides the Secretary of the relevant Department with the discretion to allow a late lodgement where special circumstances apply.¹⁷

Principles

22. Under the Brandis Bill, many details of the framework are left to the guidelines to be developed by the Attorney General. However, proposed section 12 contains 'principles of administration', which include that:
- payments are only to be recommended in accordance with the guidelines;
 - information about the framework is to be made available to the public; and
 - procedures and practices relating to the operation of the framework "help to minimise abuses of the framework and are broadly commensurate with the procedures and practices established under State and Territory victims of crime compensation schemes".

¹¹ Proposed subsection 1061PAA (5) (Item 11 of the Government Bill) clarifies what is meant by a person who was 'involved' in the commission of a declared overseas terrorist act. This 'involvement' includes a situation where the person has aided, abetted, counselled or procured the terrorist act; or induced the terrorist act, whether through threats or promises or otherwise; or was in any way (directly or indirectly) knowingly concerned in, or a party to, the terrorist act; or conspired with others to effect the terrorist act.

¹² The Explanatory Memorandum to the Government Bill explains that this definition of close family member includes "partner" as provided in section 4, "child" and "parent" in section 5, and "sibling" in section 23, of the *Social Security Act 1991*. "Sibling" includes half brothers and sisters, and adoptive brothers and sisters are also included. See also Item 11 of the Government Bill.

¹³ See proposed subsection 1061PAA (1)(c) at Item 11 of the Government Bill.

¹⁴ See Explanatory Memorandum to Government Bill p. 8.

¹⁵ Government Bill Items 12-14, proposing new section 27B of the Social Security Act

¹⁶ Ibid

¹⁷ Ibid. The amendments proposed by the Government on 13 March 2012 are also relevant to this matter, see at http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r4561_amend_d8e59656-de4d-48a1-a943-185b767fdaa1/upload_pdf/B11BL204.pdf;fileType=application%2Fpdf

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23. The Government Bill also empowers the Minister to determine the principles under which AVTOPs are made, however it includes further details regarding the factors to be taken into account when determining the amount of the payment, and these differ between primary and secondary victims.¹⁸
24. For a primary victim, these factors include:
- the nature of the injury or disease suffered as a direct result of the terrorist act;
 - the duration of the injury or disease;
 - the impact of the injury or disease on the person's bodily and mental functions;
 - the impact of the injury or disease on the person's life;
 - the likelihood of the person suffering future loss, injury or disease as a direct result of the terrorist act;
 - the circumstances in which the injury or disease was incurred, and
 - whether the person was directed by an official of Australia or a foreign country not to go to the place where the terrorist act occurred.¹⁹
25. For a secondary victim, in relation to a close family member who has died, the factors that may be taken into consideration include:
- whether the person was dependant on the close family member;
 - the nature of the relationship between the person and the close family member;
 - the circumstances in which the close family member died;
 - whether the close family member was directed by an official of Australia or a foreign country not to go to the place where the terrorist act occurred; and
 - whether there are other persons who have made a claim for an AVTOP as a secondary victim in relation to the close family member.²⁰

Payments

26. Under both Bills, individual payments are capped at \$75,000,²¹ however, under the Government Bill, it may be possible for a victim to make multiple claims arising from the same incident (for example as both a primary and secondary victim). For example, under the Government Bill, a person who is injured in a declared overseas terrorist act and whose close family member also dies in the same declared overseas terrorist act may claim as both a primary and a secondary victim and may receive payments of up to \$75,000 in relation to each claim.²² A person could also

¹⁸ See Government Bill Item 11, which proposes a new Part 2.24AA to the *Social Security Act 1991*.

¹⁹ Explanatory Memorandum to Government Bill p. 11

²⁰ Ibid, p. 12

²¹ For example, Government Bill proposed section 1061PAD of the *Social Security Act 1991* provides that the payment to a primary victim is not to exceed \$75,000.

²² See Government Bill Item 11, which proposes a new section 1061PAB of the *Social Security Act 1991*, see also Explanatory Memorandum to Government Bill p. 8

claim in relation to two or more close family members who died in the same terrorist act.²³

27. The Government Bill also provides that the payment for secondary victims may be apportioned between eligible close family members, and also contains provisions designed to ensure that the most deserving close family member or close family members are given an opportunity to make a claim.²⁴ Limits on payments in relation to secondary victims are provided in proposed sections 1061PAC and 1061PAE of the Social Security Act..
28. Under the Government Bill, the Secretary under the Social Security Act²⁵ (or his or her delegate) will be responsible for determining AVTOP claims and the amounts to be received by each victim.²⁶ The Government Bill also enables the enactment of legislative instruments to provide further guidance on the amount of assistance that each victim, or close family member, should receive.
29. The Government Bill also ensures that victims are not required to repay or deduct Medicare or other benefits from any payment received under the Scheme.²⁷ Amendments proposed by the Government also clarify that AVTOPs are not to be treated as compensation or damages for the purposes of any law of the Commonwealth.²⁸

Law Council's Concerns

Concerns Common to Both Bills

30. The Law Council is concerned that by limiting the scheme to Australian victims of overseas terrorism, both Bills make an unjustified distinction between victims of overseas terrorism and other groups or individuals who are harmed as a result of violent criminal acts abroad. The Council is also of the view that the narrow focus of the schemes proposed in both Bills highlights the absence of a consistent and comprehensive scheme to compensate victims of Commonwealth crimes committed either at home or abroad.

Unjustified differentiation between victims of terrorism and victims of other violent crimes occurring overseas

31. As noted above, the Law Council supports measures designed to ensure that victims of overseas terrorism and their families have access to appropriate support and compensation. However, the Law Council is concerned that by limiting the scheme to Australian victims of overseas terrorism, both Bills make an unjustified

²³ Ibid

²⁴ See Government Bill Item 13, see also Explanatory Memorandum to Government Bill p. 14

²⁵ 'Secretary' is defined in section 23 of the *Social Security Act 1991*, and refers to the 'Secretary of the Department', which is the Department of Families, Housing, Community Services and Indigenous Affairs. The Law Council notes that page 9 of the Explanatory Memorandum to the Government Bill refers to the Secretary of the Attorney General's Department, however the Government Bill does not appear to amend the existing definition of 'Secretary' in the Social Security Act.

²⁶ Government Bill Item 11, which proposes a new section 1061PAD of the Social Security Act. The amendments proposed by the Government on 13 March 2012 are also relevant to this matter, and are available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r4561_amend_d8e59656-de4d-48a1-a943-185b767fdaa1/upload_pdf/B11BL204.pdf;fileType=application%2Fpdf

²⁷ Government Bill Part 2.

²⁸ These amendments were introduced on 13 March 2012 and are available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r4561_amend_d8e59656-de4d-48a1-a943-185b767fdaa1/upload_pdf/B11BL204.pdf;fileType=application%2Fpdf.

distinction between victims of overseas terrorism and other groups or individuals who are harmed as a result of violent criminal acts abroad.

32. This distinction is particularly stark due to the absence of a comprehensive compensation scheme for Australian victims of violence or crime while overseas. For example, the following victims would be unlikely to be covered by the scheme proposed in both Bills:

- (a) a group of Australians killed or severely injured in a mass shooting in the United States, in which the perpetrator was motivated by family breakdown rather than political causes; or
- (b) a Australian citizen killed or injured overseas as a result of an attack by a perpetrator suffering depression or another mental incapacity; or
- (c) an Australian targeted in a physical attack overseas due to his or her sexual orientation, gender, race or nationality.

33. The Law Council notes that in the second reading speech for the Government Bill, the then Attorney General, the Hon Robert McClelland, commented that when:

Australians fall victims to attacks with a political or ideological motive, rather than a personal one..... it is only fair that the burden of the attack be borne in part by the state, and not by the individual victim... The government supports the rights of Australians to continue to explore the world, to continue to discover new places and to represent us abroad, secure in the knowledge that the Australian community, and its parliament, will continue to support them, their families and the Australian way of life.

34. The Law Council suggests that if one of the aims of the Government Bill is for Australia to take an international stand by supporting the victims of acts which threaten “the Australian way of life”, it may be argued that the right to live free from persecution on the basis of attributes such as sexual orientation, gender or race, for example, should be similarly upheld as a fundamental Australian freedom.

35. The Law Council raised these concerns with the Attorney- General in April 2011. In his response, the then Attorney-General explained that terrorism is distinguished by its “special and tragic nature”, under which individuals are targeted because of their relationship with the nation State and the values and culture that it espouses. However, the Law Council is unconvinced by this distinction. It considers that it is equally important to uphold Australian values and freedoms in other contexts – for example, where a person is victimised because of his or her beliefs or personal attributes.

36. In his response, the then Attorney-General also noted that individuals affected by crimes other than terrorism may be eligible to apply for assistance under relevant overseas schemes. The Law Council is concerned that this leaves to chance a person’s ability to access support to overcome personal loss or injuries which are no less debilitating than if they had been incurred through terrorist acts.

37. The Law Council’s concerns regarding parity between victims of overseas terrorism and victims of other violent crimes occurring overseas apply equally to the Brandis Bill, which includes an objects clause which appears to limit compensation to Australians who are killed or injured overseas as a result of terrorist acts or to their next of kin.

Absence of a comprehensive scheme to compensate victims of Commonwealth crimes committed either at home or abroad

38. The Law Council notes that both Bills intend to address a gap in which victims of terrorism have no redress to State and Territory compensation schemes because the terrorist act occurred overseas. However, neither Bill acknowledges that there is currently no comprehensive Commonwealth victims' compensation scheme for victims of Commonwealth offences whether committed at home or abroad.
39. While some victims of Commonwealth crimes committed overseas may be able to claim compensation under State and Territory schemes where there is a sufficient nexus to the relevant State or Territory, this nexus will not always exist.
40. Many Commonwealth crimes envisage victims being harmed overseas. These crimes include the people trafficking offences and the child sex tourism offences contained in Divisions 271 and 272 of the Criminal Code (respectively). The potential victims of these offences, who could be Australian or of another nationality, include highly vulnerable children.
41. Where State and Territory schemes can be accessed, there are issues of parity for victims of Commonwealth offences due to the differences between such schemes. These differences are likely to result in varying outcomes for victims of identical crimes, depending on the nexus to a particular jurisdiction. For example: different caps on the maximum compensation payable apply;²⁹ and different timeframes apply in which to bring a claim³⁰ and the availability of compensation for pain and suffering also differs.
42. There are also other practical limitations upon the ability of certain victims of Commonwealth offences to obtain compensation through State and Territory schemes.³¹ For example, in the context of people trafficking offences these limitations could include: lack of knowledge of the victim of the availability and means of accessing awards of compensation or mistrust of the victim in the process and fear of confronting the offender in circumstances where the tribunal or court may elect to seek evidence from or concerning the offender.³²
43. In its January 2012 submission in relation to the Exposure Draft *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (the People Trafficking Submission), the Law Council noted the importance of victims of people trafficking having access to funds to support their rehabilitation and noted the particular benefits of statutory victims compensation scheme for victims of people trafficking offences.³³ The need for victims to be able to access compensation was further reinforced by the UN Special Rapporteur in Trafficking in Persons especially

²⁹ For example, the maximum cap for a primary victim in Victoria is \$60,000 while in NSW it is \$50,000

³⁰ In NSW this is 2 years (although late applications can be accepted where the delay is reasonable). In South Australia it is 3 years (although again extensions may be available): see

<http://www.lawhandbook.sa.gov.au/ch36s01s06.php>

³¹ F. McLeod, Submission to the Attorney-General's Department's *Consultation on the Criminal Justice response to Slavery and people trafficking: Reparation and Vulnerable Witness Protections*, March 2011.

³² Law Council Submission to Attorney General's Department, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, 20 January 2012 available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F824861E-F961-E5B9-B626-510645D3D66A&siteName=lca

³³ Law Council Submission to Attorney General's Department, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, 20 January 2012 available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F824861E-F961-E5B9-B626-510645D3D66A&siteName=lca

Women and Children on her fact-finding mission to Australia from 17 to 30 November 2011.³⁴

44. The Law Council notes that there are support programs in place for victims of people trafficking which provide assistance to meet the basic needs of people trafficking victims and to assist in their reintegration into the community.³⁵ However, when these programs are compared to the approach to victims compensation proposed by the current Bills, the Law Council queries the justification for the distinction between categories of victims which will mean that victims of terrorism overseas receive up to \$75,000 in compensation while trafficking victims receive alternative forms of service-based support if they cannot access a State or Territory compensation scheme or other remedy.
45. The lack of a consistent approach to compensating victims of Commonwealth offences occurring either within or outside of Australia, which takes into account the situation of all victims of Commonwealth crimes, increases the possibility that only certain groups in the community may benefit from the changes proposed in these Bills.
46. Given these issues, the Law Council is of the view that consideration of a single Commonwealth victims' compensation scheme is necessary.³⁶
47. The Law Council has a history of advocacy in this area, including most recently in the context of the People Trafficking Submission³⁷ and notes that the Commonwealth Government has also previously shown interest in reforming the current ad hoc approach to compensating victims of Commonwealth offences. For example, former Minister for Home Affairs, the Hon Bob Debus MP, was reported in 2008 as announcing that the Australian Government would introduce a Commonwealth victims' compensation scheme, as part of a broader victims' charter of rights. However, this commitment has not been progressed.
48. If a single Commonwealth victims' compensation scheme is not pursued, the Law Council considers that there is a need to review how effectively and consistently existing State and Territory compensation schemes operate in relation to victims of Commonwealth crimes.
49. The Law Council is aware that, pursuant to a November 2009 agreement by the then Standing Committee of Attorneys-General, work is currently underway to develop a national approach to victims' rights, including harmonising the existing State and Territory victims of crime schemes. While the Law Council is pleased to learn that this work is continuing, it is concerned that there appears to be no

³⁴ UN Special Rapporteur in Trafficking in Persons, especially Women and Children, End of Mission Statement, 30 November 2011, available from

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11664&LangID=E>

³⁵ See for example the Support for Victims of People Trafficking Program administered by the Red Cross and funded by the Commonwealth Government, for further details see

<http://www.ag.gov.au/Peoplettrafficking/Pages/default.aspx>

³⁶ The ACT Law Society, who provided specific comments on other aspects of the Bills, wishes not to comment on the particular issue of a single compensation scheme for Commonwealth crimes.

³⁷ For example see Law Council Submission to Attorney General's Department, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, (20 January 2012) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F824861E-F961-E5B9-B626-510645D3D66A&siteName=lca; Law Council Submission to Attorney General's Department, Consultation on the Criminal Justice Response to Slavery and People Trafficking; Reparation and Vulnerable Witness Protections (3 March 2011) available at

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=930511F9-994A-380C-0D55-62C871B803F7&siteName=lca

timetable for reform and no firm commitment to addressing the gaps and inconsistencies which are raised above.

50. The Law Council also notes that on 11 August 2011 the New South Wales (NSW) Attorney General announced an independent assessment of the NSW Victims Compensation Scheme with a view to delivering faster and more effective financial support to victims of violent crime.³⁸
51. The Law Council urges this Committee to recommend a review of how all of the State and Territory schemes could operate more effectively for victims of Commonwealth crimes.

Consideration of broader protections for victims' rights at the Commonwealth level

52. The Law Council further submits that these Bills may provide an opportunity for this Committee to consider the broader issue of victims' rights in the Commonwealth context.
53. As the Law Council noted in its People Trafficking Submission, there have been calls for principles to be articulated at the federal level on how to protect the rights of victims of crimes which are at a minimum consistent with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.³⁹ Other jurisdictions in Australia have either incorporated victims' rights in legislation or adopted a charter of victims' rights or statement of principles for the minimum standards for the treatment of victims.⁴⁰
54. In June 1993, the then Standing Committee of Attorneys-General (SCAG) endorsed a National Charter for Victims' Rights in Australia. However, this was never enacted.⁴¹
55. The Law Council suggests that this Committee recommend that the Commonwealth Government re-invigorate past and existing efforts to provide appropriate and equitable protection for the rights of all victims of crime in Australia.

Particular Concerns with the Government Bill

56. The Law Council's particular concerns with the Government Bill relate to the way in which the Bill approaches the definition of 'terrorist act', and the related provision of discretion to the Prime Minister to 'declare' an overseas terrorist act so as to activate

³⁸ An Issues Paper was released on 22 March 2012 calling for submissions by 30 April 2012. The Issues Paper is available at [http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/vwFiles/IssuesPaper-VicsCompReview.pdf/\\$file/IssuesPaper-VicsCompReview.pdf](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/vwFiles/IssuesPaper-VicsCompReview.pdf/$file/IssuesPaper-VicsCompReview.pdf).

³⁹ Anti-Slavery Project, *Submission to the National Consultation on Human Rights*, 15 June 2009, available at www.humanrightsconsultation.gov.au

⁴⁰ *Victims of Crime Assistance Act 1996*(Vic) and *Victims Charter Act 2006*(Vic); *Victims Rights Act 1996*(NSW) and *Victims Support and Rehabilitation Act 1996*(NSW); *Victims of Crime Act 1994* (ACT) and *Victims of Crime (Financial Assistance) Act 1983*(ACT); *Victims of Crime Act 1994* (WA); *Victims of Crime Rights and Services Act 2006*(NT) and *Victims of Crime Assistance Act 2006* (NT); *Criminal Offence Victims Act 1995*(Qld); *Victims of Crime Assistance Act 2009* (SA); *Victims of Crime Assistance Act 1976*(Tas) and *Victims of Crime Compensation Act 1994*(Tas)

⁴¹ It is noted however that in May 2010 SCAG endorsed model provisions on suppression and non-publication orders, and that these are sought to be implemented in the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* which is currently before parliament. In addition, the Commonwealth Director of Public Prosecutions has established a *Victims of Crime Policy*, which implements certain measures for victims of Commonwealth offences: see Attorney General's Department, *Consultation on the Criminal Justice Response to Slavery and People Trafficking; Reparation and Vulnerable Witness Protections* (3 March 2011) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=930511F9-994A-380C-0D55-62C871B803F7&siteName=lca page 26.

the compensation scheme. The Law Council is also concerned by the way the proposed eligibility criteria appear to leave open the possibility that a harmed individual (or primary victim) who was uninvolved in the relevant terrorist act may be ineligible for a payment because his or her close family member was involved.

Discretion to declare an overseas terrorist act

57. As noted above, the Government Bill sets out criteria for accessing the AVTOP scheme that depends upon the particular terrorist act that has been experienced by the victim or his or her next of kin being a 'declared terrorist act' under the new provisions.
58. Under clause 8 of the Government Bill, the definition of 'terrorist act' contained in subsection 100.1(1) the Criminal Code provides the initial basis for determining which acts fall within the scope of the Government Bill. However, clause 9 provides that compensation will only be payable if the Prime Minister declares by legislative instrument that a terrorist act which occurs overseas is a declared overseas terrorist act. The Government Bill does not include criteria to which the Prime Minister must refer in making such a declaration.
59. The discretion provided to the Prime Minister to declare a terrorist act for the Bill's purposes is so broad that key questions about the Bill's intended operation are left unanswered. For example, neither the Criminal Code definition nor the Bill requires that a terrorist act must be particularly aimed at Australian or western interests. However, the Bill's Explanatory Memorandum states that the Prime Minister's discretion is provided to 'ensure remote events are not drawn into the scheme'.⁴²
60. This discretion raises concerns that the Bill may be unfair and inconsistent in its operation. For example, it is possible that payments will only be made when acts are deemed sufficiently 'anti-Australian' or 'anti-western', based on popular assumptions of these concepts and of 'terrorist acts'. There is a risk that the characteristics of the victims, or the nature of the political motivation of the terrorist act, will determine whether a terrorist act falls within the scheme. For example, it appears highly likely that a group of Caucasian Australians injured by extreme Islamist bombers in a popular overseas resort would result in a declaration that activates the scheme. It may be less certain in the case of a single Australian of Indian background injured in Delhi in a militant train bombing, or an Australian family of Chinese origin injured in a church bombing in Java.
61. For the Law Council, the scope of the term 'terrorist act', which has very significant legal consequences and invokes particularly strong political and community responses, should always be prescribed by statute, and not be left to be determined by the exercise of individual discretion, even in the context of victims compensation schemes.
62. When the Law Council raised these concerns in its April 2011 letter to the Attorney General, the then Attorney responded that the requirement for a Prime Ministerial declaration ensures that remote events or incidents at risky locations are not drawn into the proposed scheme, such as incidents affecting only operational military personnel in a war zone. The Law Council notes that this reference to excluding 'remote events' maintains the Government Bill's current lack of clarity. For example, it remains unclear whether the level of remoteness is to be determined by geographic location, the numbers of Australian victims involved, or the extent to which an incident is directed at Australian or western interests.

⁴² Explanatory Memorandum to the Government Bill, p. 4.

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63. To address this uncertainty, and to ensure fair and consistent results, the Law Council submits that this this Committee should recommend that the Government Bill be amended to set out the criteria by which a declaration under the Government Bill will be made, if necessary excluding specific situations such as military warzone incidents. This amendment would reduce the possibility that the Bill would operate with unfair and inconsistent results.

Refusing compensation if close family members are involved

64. Another feature of the Government Bill's eligibility criteria also raises concerns for the Council. As noted above, the new section 1061PAA of the *Social Security Act 1991* proposed by the Government Bill states that a primary or secondary victim will *not* be eligible for a AVTOP if the victim's 'close family members' have been 'involved' in the commission of the terrorist act'. 'Close family members' are defined as the person's partner, child, parent, sibling or legal guardian.⁴³
65. This wording seems to leave open the possibility that a harmed individual (or primary victim) who was uninvolved in the terrorist act may be ineligible for a payment because his or her relative was involved. This possibility could render an injured child harmed in a terrorist act ineligible for compensation due to the involvement of his or her parent, or an elderly parent ineligible for compensation for the death of a child, due to the involvement of another child.
66. While it is understandable that if a person is involved in the terrorist act they should be unable to claim compensation for the injury caused, it is less understandable that if a person was injured as a result of the actions of a close family member with which they had no involvement they should be precluded from claiming compensation under the scheme. The Law Council is of the view that the entitlement of every individual should be determined according to his or her own actions, and not his or her relationships.
67. In addition, while the definition of 'involvement' draws on terminology such as 'aids, abets, counsels and procures', it remains imprecise and open to broad interpretation. For example, a person is considered to be 'involved' in a terrorist act if he or she was in 'any way (directly or indirectly) knowingly concerned in, or a party to, the terrorist act'.⁴⁴
68. Such a definition fails to ensure that only individuals who are criminally responsible for the terrorist act (including for any ancillary offence) are ineligible for a payment. By way of comparison, sub-section 24(3) of the *Victims Support and Rehabilitation Act 1996* (NSW) provides that a person is not eligible to receive statutory compensation in respect of an act of violence if it occurred while the person was engaged in behaviour constituting an offence.
69. When the Law Council raised these concerns in April 2011, the Attorney suggested that this approach of excluding an injured person from the scheme if the person's close family member was involved in the commission of the terrorist act was consistent with State and Territory schemes and consistent with the Commonwealth policy position that a person who commits a criminal offence should not profit from that crime. The Attorney referred to the *Proceeds of Crime Act 2002* (Cth) which

⁴³ See Government Bill Item 11, which proposes new subsection 1016PAA(4) of the *Social Security Act 1991*. The Explanatory Memorandum to the Government Bill explains that this definition of close family member includes "partner" as provided in section 4, "child" and "parent" in section 5, and "sibling" in section 23, of the *Social Security Act 1991*. "Sibling" includes half brothers and sisters, and adoptive brothers and sisters are also included.

⁴⁴ See Government Bill Item 11, which proposes new subsection 1016PAA(5) of the *Social Security Act*.

was said to reflect this principle by preventing criminals from gaining a financial advantage as a result of their criminal activities.

70. The Law Council considers that it is appropriate that under the *Proceeds of Crime Act*, individuals are unable to keep the proceeds of crimes which are committed by their family members. However, this situation, which focuses on profits, differs greatly from that envisaged in the Government Bill, which provides for compensation to victims who have experienced harm. Generally, the purpose of compensation is to recompense a victim to help him or her overcome his personal injuries. The Law Council is concerned that as a result of the Bill, people who are injured through no fault of their own may be ineligible for compensation under the Bill.
71. The Law Council urges this Committee to recommend that Item 11 of the Government Bill be amended to delete proposed subparagraph 1061PAA(1)(b) of the *Social Security Act 1991* that removes eligibility for person's whose 'close family members' have been involved in the commission of the terrorist act.
72. Alternatively, if the above preferred approach is not adopted, the Law Council recommends that the proposed provision be amended to provide that a person is only excluded from eligibility if the person's close family members were engaged in behaviour constituting a criminal offence.

Particular Concerns with the Brandis Bill

73. As noted above, the Brandis Bill takes a different approach to establishing a framework to provide compensation to victims injured or killed as a result of terrorist acts overseas and to their close family members.
74. The Brandis Bill generally leaves the administration of the framework to the Secretary of the Attorney General's Department, and the details relating to eligibility requirements to the Attorney General to determine by way of legislative instrument. Some guidance is provided by proposed section 7, which requires that priority be given to victims who have been hospitalised or suffered death, and proposed section 12, which requires the guidelines to be made public and that they 'minimise abuses of the framework and are broadly commensurate with the procedures and practices established under State and Territory victims of crime compensation schemes'. However there is no attempt in the Brandis Bill to define key terms (such as 'terrorist act') or to articulate which victims will be eligible for compensation, or to provide any guidance to decision makers tasked with determining claims and making payments. Nor does the Bill include any time frames for making and determining claims.
75. This approach has the potential to avoid some of the Law Council's concerns described above in respect of the Government Bill. For example, under the Brandis Bill, the detailed eligibility criteria and guidance for decision makers could clearly prescribe a definition of 'terrorist act' that is more inclusive than the Criminal Code definition and does not depend on the exercise of ministerial discretion. The guidelines could also ensure that all individuals harmed are eligible for compensation regardless of any involvement of their close family members.
76. However, the Brandis Bill could also authorise an approach that invests a broad discretion in a minister or other executive officer to determine what constitutes a terrorist act and could require a significant nexus with Australia's political interests. The Brandis Bill could also include eligibility criteria that exclude individuals who have been harmed in a terrorist act on the basis of their relationships or on the length of

time they have spent away from Australia, and authorise a process that is complex and time consuming for potential claimants to access.

77. The reference to 'next of kin' in the objects clause of the Brandis Bill, which is undefined, also suggests that the type of family members eligible for compensation as a result of an Australian killed in an overseas terrorist act could be more limited than under the Government Bill, which uses the term 'close family members' and includes siblings, parents and children.
78. By leaving all of the important detail to the regulations the Brandis Bill fails to allow Parliament and the community sufficient opportunity to assess whether it will ensure that compensation will be awarded efficiently, fairly and transparently. It may also offend against rule of law principles.
79. For example, rule of law principles require executive powers to be carefully defined by law, and not leave the Executive to determine for itself what powers it has and when and how they may be used.⁴⁵ In particular, where legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision.
80. The Law Council has no objection in principle to legislation which establishes a framework for compensation for victims of terrorism overseas to be administered by the Attorney General's Department, particularly if it is able to deliver responsive, timely compensation to victims in need.
81. The Law Council's primary concern with the Brandis Bill is that it fails to establish clear parameters for the types of acts that will give rise to compensation or the types of victims that will be eligible to apply. In both cases, the Brandis Bill has the potential to invest broad discretion in executive officers without adequate parliamentary supervision. The Brandis Bill also fails to outline the key factors a decision maker should consider when determining a claim, whether a claimant will be able to make multiple claims and be awarded multiple payments, and how this compensation scheme will fit with existing social security benefits.
82. The Law Council notes that while the Brandis Bill includes provision for regular consultation between the Attorney General and the community on the guidelines, the Law Council is of the view that this is no substitute for the more rigorous parliamentary scrutiny that is involved in the legislative process relating to bills and that would be applied to the scheme if more of its details were prescribed in legislation. While regulations may be subject to parliamentary debate and disallowance, such processes appear to occur less frequently than in relation to bills.
83. Similarly, although section 12 of the Brandis Bill seeks to ensure broad consistency with the processes and procedures of State and Territory victims of crime compensation schemes, this broad reference to comparable schemes fails to ensure the fairness and accessibility of any processes and procedures developed under the Bill, particularly given the disparate nature of these schemes.

⁴⁵ Law Council of Australia *Policy Statement on Rule of Law Principles* (March 2011), in particular Principle 6. This document seeks to articulate some of those key principles. It is intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice. <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/rule-of-law.cfm>

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84. The Law Council appreciates that there may be some value in adopting an approach to compensating victims of terrorism overseas that provides for a level of responsiveness and flexibility. However, in the view of the Law Council, the Brandis Bill puts too much emphasis on flexibility. Further detail relating to how the scheme will operate in practice, and in particular, the types of acts that will give rise to compensation, and the types of victims that will be eligible to apply, must be included in the Bill itself to ensure that the Parliament and the community are provided with sufficient opportunity to assess whether the scheme will operate fairly.

Conclusion and Recommendations

85. The Law Council understands and agrees with the compassionate motivation behind the both Bills. However, the Law Council remains concerned about the potential for the both Bills to entrench inequities between different groups of people who are eligible for victims' compensation. It may be argued that such potential already exists, given that Government already exercises its discretion over when Australians may access ex gratia assistance in the case of international emergencies. However, given that both Bills appear to be intended to provide greater clarity, consistency and fairness in such situations, the Law Council urges this Committee to address these issues to ensure that the motivation behind the Bills is best achieved.
86. The Law Council's particular concerns with the Government Bill, which it has previously raised with the former Attorney-General, relate to the broad discretion provided to the Prime Minister to declare an overseas terrorist act, and to the way in which the Government Bill excludes individuals harmed in terrorist acts overseas on the basis of the involvement of their close family members.
87. The Law Council also holds concerns in relation to the Brandis Bill, which it considers lacks the necessary detail to allow the Parliament and the community sufficient opportunity to assess whether the scheme it establishes will operate fairly and efficiently.
88. In order to address these concerns, the Law Council urges this Committee to recommend that:
- (a) the Commonwealth Government consider the development of a single Commonwealth victims' compensation scheme; and/or initiate a comprehensive review of how the State and Territory schemes could operate more effectively for victims of Commonwealth crimes, including terrorism.
 - (b) In respect of the Government Bill, that:
 - (i) Item 8 be amended to include criteria by which a declaration of an overseas terrorist act will be made, if necessary excluding specific situations such as military warzone incidents;
 - (ii) Item 11 be amended to delete proposed subsection 1061PAA(1)(b) of the *Social Security Act 1991* that removes eligibility for persons whose close family members have been involved in the commission of the terrorist act, or
 - (iii) that the proposed sub-section be amended to provide that a person is only excluded from eligibility if the person's close family members were engaged in behaviour constituting a criminal offence.

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- (c) In respect of the Brandis Bill, that further detail relating to the operation of the scheme be included in the Bill itself, such as: the types of terrorist acts that will give rise to compensation; which victims will be eligible to apply; the general criteria for eligibility; and the minimum safeguards for fairness in decision making processes.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.