

Attorney-General's Department Submission

Inquiry into the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011 and the Assisting Victim of Overseas Terrorism Bill 2012

Between November 2009 and 21 February 2011 the Opposition introduced three Bills proposing financial assistance of up to \$75,000 for victims of overseas terrorism.

On 24 March 2011, the Government introduced the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011 (the Government Bill). Like the Opposition Bills, the Government Bill would enable victims of overseas terrorism to claim up to \$75,000 financial assistance.

On 1 March 2012, Senator Brandis introduced the Assisting Victims of Overseas Terrorism Bill 2012 (the Private Senator's Bill), which is in similar terms to the earlier Opposition Bills.

The Government Bill

The Government recognises that terrorism is primarily an offence against government and that Australians are sometimes targeted in overseas terrorist acts, not as individuals, but because they are Australians (either specifically or because they are westerners). That is why the Government states that it is acting on the collective responsibility of the Australian community to help Australians and their families to recover from overseas terrorist acts.

The Government Bill was intended to promote a bipartisan approach to the very important issue of supporting victims of terrorism by addressing additional issues not spelled out in the other Bills.

By amending the *Social Security Act 1991* (the Social Security Act), the Government Bill adopts a range of relevant definitions, processes for making payments, time limits for making decisions, review and appeal processes, and cost recovery mechanisms that can be utilised in the event a fraudulent claim has been lodged. It also adopts relevant provisions of the *Social Security (Administration) Act 1999*, such as provisions that allow flexibility to make payments by instalment if that is appropriate, and other longstanding administrative arrangements tested in the context of that Act. In addition, the Government Bill provides a specific activation process, qualification and eligibility criteria for making claims, and time limits for making claims. The Bill also deals with important matters, such as how financial assistance under the proposed scheme will interact with other payments and benefits.

Activation

Section 35B of the Government Bill provides that the proposed scheme will be activated by the Prime Minister declaring that an event is a "declared overseas terrorist act". There are no restrictions on what the Prime Minister can take into consideration when deciding whether to make a declaration. This is designed to provide clarity for potential claimants as to whether a particular overseas incident is one to which the proposed scheme applies. Opening the criteria up to all terrorist incidents would extend the scheme to events that have no connection to Australia and would be inconsistent with the policy rationale.

Eligibility

Subsection 1061PAA(1) of the Government Bill provides that Australian residents harmed as a direct result of the incident (primary victims) and close family members of Australian residents who

die as a direct result of the incident (secondary victims) are qualified to claim financial assistance under the proposed scheme. Subsections 1061PAA(2) and (3) provide further guidance on the eligibility of primary and secondary victims.

A primary victim can only claim financial assistance under the proposed scheme if he or she was in the place where the terrorist act occurred (paragraph 1061PAA(2)(a)), and the harm was a “direct result” of the terrorist act (paragraph 1061PAA(2)(b)). These provisions are designed to ensure that persons are not eligible to claim assistance where the harm was only remotely connected to the terrorist act. A primary victim can only claim financial assistance under the proposed scheme if he or she was harmed within the meaning of the *Criminal Code Act 1995* (the Criminal Code) (paragraph 1061PAA(2)(b)). The Criminal Code makes it clear that harm includes both physical harm and harm to a person’s mental health, whether temporary or permanent.

Similarly, secondary victims can only claim financial assistance under the proposed scheme if the deceased was in the place where the terrorist act occurred (paragraph 1061PAA(3)(a)), and if the death was a “direct result” of the terrorist act (paragraph 1061PAA(3)(b)). These provisions are designed to ensure that persons are not eligible to claim assistance where the death was only remotely connected to the terrorist act. The close family members who can claim assistance as a secondary victim are limited to the deceased’s immediate family (subsection 1061PAA(4)). This is designed to prevent distant relatives from receiving assistance and unreasonably increasing the cost of the scheme.

The maximum payment that can be made to a primary victim under the proposed scheme is \$75,000 (section 1061PAD). Similarly, the maximum payment that can be made to a secondary victim under the proposed scheme is \$75,000 (section 1061PAE). Where a person is harmed and also loses a close family member, that person can claim up to \$75,000 as a primary victim and another \$75,000 as a secondary victim – up to a total amount of assistance of \$150,000. This is designed to recognise the additional pain and suffering that could be experienced by such a person. However, there are no other instances in which a person can receive more than \$75,000 under the proposed scheme.

Subsection 1061PAB(1) provides that a person can only receive one payment of up to \$75,000 as a primary victim. This ensures that a person who sustains multiple injuries cannot claim financial assistance in relation to each of those injuries. Further, although a person could make claims in relation to more than one close family member, that person can only receive a total of up to \$75,000. For example, the two children of two parents who tragically die in a declared overseas terrorism act would each receive \$37,500 in relation to each parent – up to a total of \$75,000 each. These rules are designed to ensure fairness in the distribution of funds and a degree of reasonableness about the costs associated with the payments under the proposed scheme for each declared terrorist act.

Subparagraph 1061PAA(1)(c)(i) of the Government Bill provides that, for a person to qualify for financial assistance, they must be an Australian resident on the day the terrorist act occurred. Australian resident is defined in subsection 7(2) of the Social Security Act as a person who resides in Australia and is either an Australian citizen, the holder of a permanent visa or a special category visa holder who is a ‘protected SCV holder’. The definition of protected SCV holder is in subsection 7(2A) of the Social Security Act.

The Government Bill also acknowledges that there may be circumstances in which the conduct of the primary victim or the deceased may mean he or she should not be eligible for financial assistance or should be eligible for a reduced amount of assistance. Paragraph 1061PAA(1)(b) of

the Government Bill provides that a person who was involved in the terrorist act is not qualified to receive a payment. This is consistent with the policy that those who commit crimes should not benefit from them. In addition, subsection 1061PAF(2) allows for the reduction of a payment in certain circumstances, including where the person injured or killed went to the place where the terrorist attack occurred contrary to a direction by a relevant government official.

The Government Bill provides guidance for decision makers in assessing individual claims. In particular, subsections 1061PAF(2) and (3) list matters that may be taken into account when determining the amount of financial assistance a primary victim will receive or the portion of a payment a secondary victim will receive. For example, subparagraphs 1061PAF(2)(a)(i), (ii) and (ii) identify the nature, duration and impact of the injury or disease as factors that may be taken into account when determining the amount of a payment for a primary victim.

Subparagraphs 1061PAF(2)(a)(i) and (ii) identify the dependency and relationship between the secondary victim and the deceased as relevant to determining the portion of the payment a particular secondary victim will receive. Further, to ensure victims do not receive more than one payment in relation to the same terrorist incident, subparagraph 1061PAF(2)(c)(ii) allows payments received from the Commonwealth, a State, a Territory, or a foreign country in relation to the same terrorist incident to be taken into account when determining a payment (section 1061PAF). This is a fiscally responsible way of ensuring tax payers money is not used to cover costs that have already been met in relation to the same incident.

Timeframe for making and paying claims

The Government Bill sets out time limits for lodging claims (section 27B). In particular, primary victims must make a claim within two years of the date of the Prime Minister's declaration. Secondary victims are required to make their claims within 12 months of the death of the deceased (which must occur within two years of the date of the terrorist act). This ensures claimants have the opportunity to determine the extent to which an injury will modify the person's lifestyle over time. The full impact of an injury does not always immediately become apparent.

The Government Bill places the onus of identifying potential secondary victims of on the Secretary (section 35A). This is designed to ensure all potential claimants have the opportunity to make claims and reduce the number of appeals.

In addition, section 39 of the Social Security Act, the decision maker must make a decision within 13 weeks of receiving the claim. This is designed to ensure claimants receive the financial assistance within a reasonable timeframe, once they make a decision to claim.

Interaction with other benefits and payments

The Government Bill provides that a payment under the scheme will not be treated as damages or compensation and that recipients are not required to repay or deduct Medicare or other benefits from any payment received under the scheme.

In addition, the amendment to the *Income Tax Amendment Act 1997* made on 21 March 2012 will ensure payments under the scheme are not subject to income tax.

This ensures the scheme is simple and fair, and that fewer resources are diverted to administration costs.

Principles

Like the Private Senator's Bill, the Government Bill requires the Minister to consult with interested individuals and groups in order to develop Principles to support the scheme. However, the Government Bill requires consultation to occur before the Principles are determined and each year thereafter (section 1061PAG). As a safeguard in the event those consultations are not completed within the timeframes set out in the Government Bill, section 1061PAG(3) will ensure a failure to undertake that consultation will not invalidate the Principles or any payments made under them.

Implementation

It is anticipated the decision making function on quantum under the Government Bill will be delegated to Department of Human Services (DHS) officers, consistent with the powers conferred on the Secretary to make other payments under the Social Security Act. The Department has been working closely with DHS on this issue due to their experience and expertise in assessing claims for payment under Social Security legislation (for example AGDRP).

The Private Senator's Bill

The Private Senator's Bill provides for financial assistance of up to \$75,000 for those affected by overseas terrorism (section 11). The Private Senator's Bill provides for the development of Guidelines for the operation of the proposed framework by the Minister (the Attorney-General) (sections 6 to 8), and provides that the Secretary (of the Attorney-General's Department) will be responsible for administering the proposed framework (section 10). However, the Bill does not spell out many aspects about implementation.

Activation

The Private Senator's Bill does not provide guidance on the specific events or the types of events to which the proposed framework applies. The guidance concerns some of the most critical issues and directly impacts on the administration and cost of the scheme.

Eligibility

The Private Senator's Bill does not provide clear guidance on who is eligible for assistance under the proposed framework.

It is not clear whether eligibility for financial assistance is limited to persons who "suffered injury requiring hospitalisation" (section 7), or covers all "persons who suffer injury" (section 3) where hospitalisation is required. Limiting eligibility to those who require hospitalisation could result in deserving individuals being ineligible for assistance. For example, individuals who are severely affected by the terrorist attack and suffer significant psychological harm as a direct result of the incident may not require hospitalisation. Further, it is not clear whether the injury sustained must be permanent, or whether a person who sustains a temporary injury will be eligible for assistance. It is unclear whether the Bill is intended to exclude such individuals.

It is also unclear whether eligibility is limited to the "next of kin" of the person killed (sections 3 and 7) or extends to both the "Australians who are killed" and "their next of kin" (section 5). Further, as the Private Senator's Bill does not define "next of kin", it is unclear who is intended to be captured. For example, would the parents of a suicide bomber be eligible for financial assistance under the proposed framework?

Section 11 of the Private Senator's Bill provides that a payment will not exceed \$75,000. However, it is not clear whether a person could receive multiple payments. For example, could a person who suffers multiple severe injuries claim payments of \$75,000 for each of those injuries? Similarly, could the next of kin make claims in relation to more than one deceased relative? Further, could more than one next of kin each receive \$75,000 in relation to the death of that relative? The cost of the proposed framework, if it allows for multiple payments of \$75,000 to each injured person or multiple payments of \$75,000 in relation to each deceased person would be prohibitive.

The nexus of the terrorist act to the injury or death is also unclear. For example, while section 3 refers to providing assistance to persons who suffer injury "as a consequence" of a terrorist act, sections 5 and 7 refer to providing assistance to those killed or injured "as a result of" a terrorist act. In any case, it is unclear how close the nexus must be between the terrorist act and the injury or death. For example, would a person who attempts suicide on learning that his child has been killed in a terrorist bombing overseas be eligible for financial assistance for his self inflicted injuries?

Further, while sections 3 and 5 refer to "Australian", the Private Senator's Bill does not provide guidance on who is an Australian for the purposes of the proposed framework. For example, to be qualified for financial assistance, is it necessary for the person to be an Australian citizen or is permanent or temporary residency sufficient? Further, can a person become eligible by becoming an Australian citizen or resident following the terrorist act?

It would be desirable for the Private Senator's Bill to provide greater clarity on eligibility for assistance.

Timeframe for making and paying claims

The Private Senator's Bill does not specify when a claim for payment under the proposed framework must be made, nor how long the decision maker has to consider the claim. This could lead to payments being received many years after the incident, creating significant difficulties in determining important matters, such as whether the alleged injuries were in fact sustained as a result of the terrorist act.

The Private Senator's Bill does not place any obligation for identifying the next of kin on decision makers. This could have the unfortunate result that one next of kin applies for, and receives \$75,000 in financial assistance without the knowledge of other potentially eligible – and more deserving – next of kin.

Interaction with other benefits and payments

The Private Senator's Bill does not clarify how a payment under the proposed framework will interact with other benefits and payments received by an injured person or the next of kin or a person killed.

For example, medicare expenses for a person who has suffered serious injury in a terrorist attack can be quite steep; the Bill is silent on whether the victim would be expected to repay Medicare for these expenses once an AVTOP payment has been made. Similarly, receipt of a payment of up to \$75,000 could impact on a person's eligibility for social security payments, or other forms of compensation or damages. Similarly, the Private Senator's Bill does not specify whether a payment under the proposed framework is subject to income tax.

Guidelines

Important details of the proposed framework are left to be included in guidelines, which the Private Senator's Bill indicates are to be developed by the Minister. This means the proposed framework setting out how the public money would be spent may not be subject to adequate parliamentary scrutiny.

The Private Senator's Bill requires the Minister to consult with representatives of victims and their families, community or welfare organisations, health professionals, international humanitarian agencies and any other relevant bodies in both the development of the guidelines and every six months thereafter. Consultation every six months is an onerous and costly requirement. It is not clear whether a failure to undertake that consultation would invalidate the proposed framework or payments made under it.