



Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011

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Glossary

Abbreviation	Definition
FAA.....	<i>A New Tax System (Family Assistance) Act 1999</i>
AVOT 2010	Assisting Victims of Overseas Terrorism Bill 2010
AVOT 2010 No. 2	Assisting the Victims of Overseas Terrorism Bill 2010
AGDRP.....	Australian Government Disaster Relief Payment
AVTO Payment	Australian Victim of Terrorism Overseas Payment
AVIT 2009	Assisting the Victims of International Terrorism Bill 2009
CCA	<i>Criminal Code Act 1995</i>
FIS.....	Financial Impact Statement
ITAA.....	<i>Income Tax Assessment Act 1997</i>
PC.....	Productivity Commission
SSA.....	<i>Social Security Act 1991</i>
SSAA	<i>Social Security (Administration) Act 1999</i>
TRIA	<i>Terrorism Risk Insurance Act 2002</i>
VEA	<i>Veterans' Entitlements Act 1986</i>

Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011

Date introduced: 24 March 2011

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 3 and anything else in the Bill not covered in the Table in Clause 2 of the Bill are to commence from the date of Royal Assent. Schedule 1 of the Bill is to commence on a day fixed by Proclamation. If any provision does not commence within the period of 6 months beginning on the date of Royal Assent, it commences on the day after the end of that period.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011 (the Bill) is to establish a legal mechanism to provide financial assistance to:

- Australians who are injured as a result of an overseas terrorist act, and
- close family members of Australians who are killed, or who die within two years of suffering injuries, as a result of an overseas terrorist act.

The new payment is to be called the Australian Victim of Terrorism Overseas Payment (the AVTO Payment).

Background

On 24 March 2011, the Attorney-General, Robert McClelland, announced the creation of a scheme to provide compensation to Australian victims of terrorism which occurs overseas.¹

1. R McClelland (Attorney-General), *Compensation for victims of terrorism*, media release, Canberra, 24 March 2011, viewed 7 April 2011, http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_FirstQuarter_24March2011-Compensationforvictimsofterrorism

This Bill was introduced into the House of Representatives on the same day.²

The main legislation this Bill proposes to amend is the *Social Security Act 1991 (SSA)*. The basic elements of the proposed AVTO Payment scheme are:

- the Prime Minister will be empowered to make a declaration regarding a terrorist act which occurs overseas for the purposes of providing financial assistance to victims
- victims liable to receive financial assistance will be those who are an Australia resident
- financial assistance can be paid to a person who was at the site of the terrorist act and was injured and also to a person who is a close family member of a person, who was at the site of the terrorist act and died within two years of the act, as a result of the act
- the amount of financial assistance payable will be up to \$75 000, and
- only one payment will be made to a person for the one act of overseas terrorism.

Previous proposed legislation

2009 Bill

This Bill follows on from Assisting the Victims of International Terrorism Bill 2009 (AVIT 2009), which was tabled by the then Shadow Minister for Families, Community Services and Indigenous Affairs, Tony Abbott as a Private Member's Bill in the House of Representatives on 16 November 2009, during the 42nd Parliament.³ There was no Explanatory Memorandum accompanying the AVIT 2009. The main elements of the AVIT 2009 were:

- the Attorney-General was to set out, in writing, guidelines for the delivery of assistance to victims of terrorism
- the persons who were eligible for financial assistance were those who suffered an injury requiring hospitalisation as a result of an overseas terrorism act, or the next of kin of a person who was killed as a result of an overseas terrorism act, and
- payment of up to \$75 000 was to be provided.

At the introduction of the AVIT 2009 Mr Abbott said:

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2. R McClelland (Attorney-General), 'Second reading speech: Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011', House of Representatives, *Debates*, 24 March 2011, pp. 13–15, viewed 7 April 2011, <http://www.aph.gov.au/hansard/rep/dailys/dr240311.pdf>
 3. T Abbott, 'First Reading Speech: Assisting the Victims of International Terrorism Bill 2009', House of Representatives, *Debates*, 16 November 2009, pp. 11815–11816, viewed 12 April 2011, <http://www.aph.gov.au/hansard/rep/dailys/dr161109.pdf>

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The Australians killed or injured in these terrorist outrages are civilian casualties of the war on terror, and that is why they deserve assistance and help from the Australian government representing Australian society.⁴

The purpose of the Bill was to recognise that acts of terrorism are an act against the state and therefore the state should provide a response to the victims of the war on terrorism.

The AVIT 2009 was referred to the House of Representatives Main Committee on the day that it was introduced and debate on the Bill occurred in the Committee on the 23 November 2009.⁵ The AVIT 2009 lapsed when the 42nd Parliament was prorogued on 19 July 2010 for the August 2010 federal election.

Consideration by the Productivity Commission

When the AVIT 2009 was being debated in the Main Committee on 23 November 2009, the Member for Newcastle, Sharon Grierson, stated that on the same day the then Prime Minister, Kevin Rudd, announced that the Productivity Commission (PC) would be asked to examine a long-term care and support scheme for people with a disability.⁶ Mr Rudd said:

That's why I am pleased to announce today that the Australian Government will engage the Productivity Commission to carry out an Inquiry into a National Long-term Care and Support Scheme. Starting early next year, the Commission will look into the costs, benefits and feasibility of approaches which provide essential care and support—on an entitlement basis—for eligible people with a severe or profound disability. It will look at a no-fault social insurance model reflecting the shared risk of disability across the population—strongly supported by many of you here tonight—as well as other options for long-term care and support, building on international best practice. It will also consider the complex but critical interactions with other schemes and systems—income support, aged care, and state based compensation schemes.⁷

4. Ibid.

5. Main Committee, 'Second Reading Speech: Assisting the Victims of International Terrorism Bill 2009', House of Representatives, *Debates*, 23 November 2009, pp. 12577–12582, viewed 12 April 2011, http://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;query=BillId_Phrase%3A%22r4243%22%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22;rec=0

6. S Grierson, 'Second Reading Speech: Assisting the Victims of International Terrorism Bill 2009', House of Representatives, *Debates*, 23 November 2009, p. 12578, viewed 12 April 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-23%2F0250%22>

7. K Rudd (then Prime Minister), *Address to the National Disability Awards Ceremony*, Canberra, 23 November 2009, viewed 12 April 2011, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/NGAV6/upload_binary/ngav60.pdf;fileType=application/pdf#search=%22care%20and%20support%22

So, in part, the consideration of the AVIT 2009 lapsed pending the results of the PC report. The draft report of the PC was released on 28 February 2011.⁸ Notably, the draft PC report does not address the issue of compensation for victims of terrorism.

2010 Bill

A second Private Member's Bill was introduced into the Senate on 26 November 2010. That Bill was called the Assisting Victims of Overseas Terrorism Bill 2010 (AVOT 2010).⁹ In presenting the Bill, Senator Brandis said:

If there is any responsibility of the federal government, it is surely to protect and look after Australians who get into trouble abroad. That should include those Australian who are victims of terrorism.¹⁰

The Explanatory Memorandum accompanying AVOT 2010 said:

There is no need to extend the read of the Act to those killed or injured as a result of domestic terrorism because State and Territory victims of crime legislation will apply.¹¹

With some minor drafting differences, the elements of AVOT 2010 were the same as those of AVIT 2009 which had been introduced the year before.

Second 2010 Bill

A third Private Member's Bill—Assisting the Victims of Overseas Terrorism Bill 2010 (AVOT 2010 No. 2)—was introduced into the Parliament on 21 February 2011 by Mr Abbott.¹² This third Bill was debated in the House of Representatives on 28 February 2011 and debate was adjourned.¹³ The

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8. Productivity Commission, *'Disability care and support'*, Draft report, Commonwealth of Australia, Melbourne, February 2011, viewed 12 April 2011, <http://www.pc.gov.au/projects/inquiry/disability-support/draft>
 9. The Bill homepage can be viewed at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs816%22>
 10. G Brandis, 'Second reading speech: Assisting Victims of Overseas Terrorism Bill 2010', Senate, *Debates*, 26 November 2010, p. 1, viewed 3 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2010-11-26%2F0010%22>
 11. Explanatory Memorandum, Assisting Victims of Overseas Terrorism Bill 2010, p. 1, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fs816_ems_45ed8932-448a-4693-8c82-47a80bc7c989%22
 12. The Bill homepage can be viewed at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4502%22>
 13. Assisting the Victims of Overseas Terrorism Bill 2010, House of Representatives, *Debates*, 28 February 2011, pp.1663–1675, viewed 12 April 2011, <http://www.aph.gov.au/hansard/rep/dailys/dr280211.pdf>

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main elements of AVOT 2010 No. 2 were the same as those contained in the two preceding Bills. The AVOT 2010 No. 2 was discharged from the notice paper on 24 March 2011, being the same day that this Bill was tabled as a government Bill in the Parliament.

Committee consideration

On 25 March 2011, the Senate Selection of Bills Committee resolved that the Bill not be referred to the Committee.¹⁴

Overseas models for assistance to victims of terrorism

Several other countries have financial assistance arrangements for victims of terrorism. The main schemes of note are in Israel, the United States (US) and also in Northern Ireland. This is probably not surprising given the history and contact with acts of terrorism these countries have experienced. Most of these arrangements for victims of terrorism are a part of other compensation arrangements they have for victims of crime.

Israel

Israel pays compensation to victims of terrorist acts. That assistance is financed by the National Insurance Scheme. All Israeli residents (with some exceptions) aged 18 and older must, under law, be covered with the National Insurance Institute and pay insurance contributions. Payment of national and health insurance contributions is calculated in accordance with level of work and non-work income of the insured, and also in accordance with the status of the insured, be they:

- a salaried worker
- self-employed worker, or
- unemployed

The compensation entitlement is provided under the *Benefits for Victims of Hostilities Law, 5730 - 1970*.

Victims of hostilities, and their families, are entitled by law to monetary assistance and various benefits that are designed to assist and support them in their recovery.¹⁵ Compensation can include monthly benefits, rehabilitation, annual grants and lump-sum grants. Eligible acts of hostility refer

14. Senate Selection of Bills Committee, Report no. 4 of 2011, 25 March 2011, viewed 19 April 2011, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2011/rep0411.pdf

15. National Insurance Institute of Israel, Benefits, *Victims of Hostilities*, viewed 13 April 2011, <http://www.btl.gov.il/English%20Homepage/Benefits/Benefits%20for%20Victims%20of%20Hostilities/Pages/default.aspx>

to an injury which arises from the Israeli-Arab conflict or was committed by a terrorist organization. Payments can cover:

- reimbursement of expenses
- payment during medical treatment
- medical treatment
- psychological treatment
- disability benefits, and
- benefits to a person with a disability residing overseas

Comment

The Israeli assistance is targeted at injuries suffered as a result of acts committed in the context of the Israeli-Arab conflict. Compared to the scheme proposed by this Bill, it does not provide for assistance in regards to other terrorism acts overseas (that is outside the Israeli-Arab conflict areas).

Northern Ireland

The Northern Ireland Criminal Injuries Tariff Compensation Scheme (2009) applies to all incidents occurring on or after 1 April 2009. To qualify for payment the person must be all of the following:

- a victim of a crime of violence (including arson or act of poisoning), or injured in some other way covered by the Scheme
- physically and/or mentally injured as a result, and
- in Northern Ireland at the time when the injury was sustained, and
 - injured seriously enough to qualify for at least the minimum award available under the Scheme (the tariff levels are set out in the Scheme), or
 - a dependant or relative of a victim of a crime of violence who has since died, or who has had a close relationship of love and affection with the victim.¹⁶

Compensation can include prescribed lump-sum amounts for personal injury based on the Scheme's schedule of maims amounts. This can include compensation:

- for mental injury
- for loss of earnings
- for special expenses like aids for a disability
- to a relative for death and for bereavement support, or
- payment of a lump-sum award in the alternative form of a tax free annuity.

16. Department of Justice, Northern Ireland Government, *Guide to the Northern Ireland Compensation Scheme 2009*, viewed 13 April 2011, http://www.compensationni.gov.uk/index/criminal_injuries_from_april_09/content-newpage-4.htm

Award payments are linked to the injury/disability suffered by the person and can range from £1000 up to £250 000.

The Northern Ireland scheme is essentially a part of their criminal injuries compensation arrangements. An act of terrorism would be considered a criminal act in that country; and compensation arises under their criminal injuries compensation scheme arrangements.

Comment

The Northern Ireland assistance applies to persons injured in Northern Ireland. So, like the Israeli assistance it refers to local acts of terrorism and, unlike this Bill, does not cover other acts of terrorism overseas (that is outside Northern Ireland).

However, in common with the Israeli scheme, the assistance payable is compensation and covers such things as loss of earnings, payments for medical treatment and lump sum payments.

United States

The *Terrorism Risk Insurance Act 2002* (TRIA) was passed by Congress on November 19, 2002 and signed into law on 26 November 2002. The TRIA provides a federal backstop for certain acts of terrorism via a temporary federal program that distributes the risk of loss from foreign terrorist attacks between the federal government and the insurance industry. This federal backstop program is designed to protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk.¹⁷

The TRIA covers terrorism events that are 'certified' by the Secretary of the Treasury, in concurrence with the Secretary of State, and the Attorney-General of the US. In order to qualify for certification, a terrorism event must meet the following criteria:

- the act must be a violent act or an act that is dangerous to human life, property or infrastructure
- the act must have resulted in damage within the US or outside of the US in the case of some air carriers, US flag vessels (or vessels based principally in the US, on which US income taxes is paid and whose insurance coverage s subject to regulation in the US, and at the premises of any US mission
- the act must have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the US Government by coercion, and
- the act results in property and casualty insurance losses that exceed \$5 000 000 in the aggregate.

17. Office of Consumer Affairs and Business Regulation, United States Government, *Terrorism Risk Insurance Act 2002 – Frequently Asked Questions*, viewed 13 April 2011, http://www.mass.gov/?pageID=ocaterminal&L=5&LO=Home&L1=Business&L2=Insurance&L3=Commercial+Buyers&L4=Terrorism+Coverage&sid=Eoca&b=terminalcontent&f=doi_Commercial_Comm_Terr_RiskIns&csid=Eoca

No act will be certified as an act of terrorism if the act is committed as part of the course of a war declared by the Congress, except in the case of any coverage that applies to workers' compensation insurance.

The TRIA essentially underwrites personal risk insurance undertaken by individuals for commercial property and casualty insurance policies, including worker's compensation policies. Under the TRIA all insurers are required to participate in the program. Any existing insurance policy which excluded coverage for an act of terrorism is overwritten so that the policy includes coverage for such acts. Insurers can charge an additional premium for that expanded coverage.

Where a person chooses not pay the extra premium, the policy reverts to the original coverage for claims arising out of a terrorism event. If a policy has a terrorism exclusion, and the person does not purchase the federal coverage, then the terms of the terrorism exclusion are reinstated. However, if upon renewal/reissue of a policy, a person does not purchase the federal coverage, they will not be covered at all for any damage arising out of a 'certified' terrorism event.

President George W. Bush signed the *Terrorism Risk Insurance Program Reauthorization Act 2007* on the 26 December 2007. This amended the TRIA and also extended the coverage of the TRIA to the end of 2014.

The Victims of Crime Act 1984 established the Crime Victim Fund. As an additional measure, to the TRIA, the USA Patriot Act, Subtitle B, 2.4 deals with the Victims of Crime Act to provide for compensation and assistance to victims of terrorism or mass violence. It is rather novel in that it also allows private entities or individuals to give donations, gifts or bequests into the Fund.¹⁸

Comment

The US insurance arrangements are different to the Israeli and Northern Ireland assistance arrangements. Coverage is not provided by a Government scheme; rather it requires private insurance companies to offer policies which may include coverage for acts of terrorism. An individual can elect to accept (and pay) for the extra coverage or not. There can be coverage for an overseas act of terrorism (that is outside the US), but only where it is closely connected to US activity or interests.

State and territory schemes for victims of crime

The *Criminal Code Act 1995* (Criminal Code) defines the term '**terrorist act**' and provides that a person commits a criminal offence if the person engages in a terrorist act.¹⁹ All the states have

18. Cornell University Law School, § 10603b. Compensation and assistance to victims of terrorism or mass violence, viewed 8 May 2011, http://www.law.cornell.edu/uscode/42/usc_sec_42_00010603---b000-.html

19. **Item 8** of Part 1 of the Bill provides that the definition of '**terrorist act**' in the Bill will be the same as that which is contained in the CCA.

passed referring legislation under section 51(xxxvii) of the Commonwealth of Australia Constitution Act.²⁰ The Commonwealth can make laws about the Territories, including the self-governing territories, by virtue of its plenary power in section 122 of the Constitution. This means that the Commonwealth has the jurisdiction in these matters.

In the context of compensation for victims of crime, each state and territory government has passed legislation to support victims of crime. However, these statutes are directed towards victims of criminal acts occurring in a state or territory respectively. None of the statutes provides any victim with compensation for acts (criminal or terrorist) that occurred outside their state/territory. The relevant statutes are:

- Queensland: *Victims of Crime Assistance Act 2009*²¹
- New South Wales: *Victims Rights Act 1996*²²
- Victoria: *Victims' Charter Act 2006*²³
- Tasmania: *Victims of Crime Assistance Act 1976*²⁴
- South Australia: *Victims of Crime Act 2001*²⁵
- Western Australia: *Criminal Injuries Compensation Act 2003*²⁶
- Australian Capital Territory: *Victims of Crime (Financial Assistance) Act 1983*²⁷
- Northern Territory: *Victims of Crime Assistance Act*.²⁸

20. See Note 11, Commonwealth of Australia Constitution Act

21. The text of the *Victims of Crime Assistance Act 2009* can be viewed at:

http://www.austlii.edu.au/au/legis/qld/consol_act/vocaa2009271/ Further information about the Queensland scheme can be viewed at: <http://www.justice.qld.gov.au/justice-services/victims-of-crime/victim-assist-queensland/financial-assistance>

22. The text of the *Victims Rights Act 1996* can be viewed at:

http://www.austlii.edu.au/au/legis/nsw/consol_act/vra1996184/ Further information about the New South Wales scheme can be viewed at: http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_victimrightscharter

23. The text of the *Victims' Charter Act 2006* can be viewed at:

http://www.austlii.edu.au/au/legis/vic/consol_act/vca2006175/ Further information about the Victorian scheme can be viewed at: <http://www.justice.vic.gov.au/wps/wcm/connect/vsa/voc/Home/Going+to+court/Compensation+and+expenses/VO C+-+Compensation+and+expenses+-+Home>

24. The text of the *Victims of Crime Assistance Act 1976* can be viewed at:

http://www.austlii.edu.au/au/legis/tas/consol_act/vocaa1976271/ Further information about the Tasmanian scheme can be viewed at: <http://www.justice.tas.gov.au/victims/financialassistance>

25. The text of the *Victims of Crime Act 2001* can be viewed at: Further information about the South Australian scheme can be viewed at: <http://www.voc.sa.gov.au/Publications/Booklet/Victims%20of%20Crime%20for%20WEB.pdf>

26. The text of the *Criminal Injuries Compensation Act 2003* can be viewed at:

http://www.austlii.edu.au/au/legis/wa/consol_act/cica2003321/ Further information about the Western Australian scheme can be viewed at: <http://www.courts.dotag.wa.gov.au/C/compensation.aspx>

27. The text of the *Victims of Crime (Financial Assistance) Act 1983* can be viewed at:

http://www.austlii.edu.au/au/legis/act/consol_act/vocaa1983331/ Further information about the Australian Capital Territory scheme can be viewed at: <http://www.victimsupport.act.gov.au/category.php?id=33>

It is interesting to note that these state/territory victims of crime arrangements also have a cap of \$75 000.

Federal government assistance for overseas disasters

In the past, the Federal government has provided 'disaster assistance' for Australian residents who were in another country when disaster struck in that country. In terms of this Bill, it is likely that some of these 'disasters' would be described as an act of overseas terrorism. A brief synopsis of past assistance is set out below.²⁹

Initially the disaster assistance was by way of using the discretionary ex-gratia payment arrangements. The authority to make ex gratia payments comes from the executive power of the Commonwealth under section 61 of the Constitution. The Prime Minister and/or Cabinet decide, on a case-by-case basis, whether an ex gratia payment is to be made. The ex-gratia payment methodology does allow flexibility and does not have pre-set criteria in the same way as other discretionary schemes and is applied only used after full consideration of all the other available schemes.

Where appropriate, it is the role of an agency to advise its portfolio minister of issues that come to the agency's attention, which may give rise to the need for an ex-gratia payment. The portfolio minister can then raise the issue with the Prime Minister and/or Cabinet for consideration. Such requests are subject to the Budget Process Operational Rules. Agencies then administer payment of approved ex-gratia payments.³⁰

There are no real limits on the amounts and purposes for which payments can be made under the ex-gratia payment arrangements. This methodology has been used for almost all the Government assistance provided under previous overseas disaster situations.

Bali bombing of 12 October 2002

The Australian government provided access to rehabilitation services from the Commonwealth Rehabilitation Service and financial coverage for out-of-pocket medical expenses.

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28. The text of the *Victims of Crime Assistance Act* can be viewed at: http://www.austlii.edu.au/au/legis/nt/consol_act/vocaa271/ Further information about the Northern Territory scheme can be viewed at: <http://www.nt.gov.au/justice/solicitor/cvsu/index.shtml>
 29. Australian Government, Disaster Relief Website, *Information about recovery assistance following a disaster*, viewed 19 April 2011, <http://www.disasterassist.gov.au/www/disasterassist/disasterassist.nsf/Page/Home>
 30. Department of Finance and Deregulation, Finance Circular No 2009/09, *Discretionary Compensation and Waiver of Debt Mechanisms*, Canberra, 2009, viewed 19 April 2011, <http://www.finance.gov.au/publications/finance-circulars/2009/docs/FC-2009-09.pdf>

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London bombing of 7 July 2005

The Australian government paid disaster assistance in the form of:

... reasonable costs not covered by insurance associated with the serious injury of an Australian as a result of the London bombings. This will also include out of pocket medical costs (including counselling) on their return to Australia, and reasonable costs of counselling and psychological care for the close family of Australian survivors and for close relatives of deceased non-Australians.³¹

In addition the Australian government paid for return travel to London to attend the commemorations, in July 2006 and an allowance to cover the costs of accommodation and incidentals.

Bali bombing of 1 October 2005

The Australian government provided medical evacuation of all injured people of any nationality.

In addition, the government met the reasonable travel costs for any Australians in Indonesia to return to Australia, where they had no other means to pay for their travel, and medical costs including:

- all reasonable out of pocket health care expenses for Australians (and foreign nationals evacuated to Australia whilst in Australia) who were injured in the bombings
- reasonable costs of counselling and psychological care for the families of Australian victims, and
- reasonable costs of counselling and psychological care for Australians who have lost non-Australian family members.

Funeral costs for immediate family members or next of kin, covering the funeral and any related costs within Australia where, at the time the claim is made, the costs are not being met by a third party.³²

Egypt Bombing Assistance 24 April 2006

The Australian government assistance package included:

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31. K Patterson (former Minister for Family and Community Services), *Support for Australians following the London bombings*, media release, 10 July 2005, viewed 20 April 2011, http://www.formerministers.fahcsia.gov.au/kaypatterson/mediareleases/2005/Pages/support_london.aspx
 32. K Patterson (former Minister for Family and Community Services), *Support for Australians affected by the Bali bombings*, media release, 2 October 2005, viewed 20 April 2011, http://www.formerministers.fahcsia.gov.au/kaypatterson/mediareleases/2005/Pages/bali_2oct2005.aspx

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- out-of-pocket travel costs for the return to Australia where they have no other means to pay for such travel
- support person travel and accommodation costs to Egypt
- support to seriously injured person whilst in hospital in Australia
- personal assistance, and
- assistance with out of pocket health care costs.

The assistance was not available where an applicant has received similar assistance through their insurance company or by other means.³³

Middle East Crisis 2006

The Middle East Crisis in 2006 was a 33 day military conflict between Hezbollah paramilitary forces and Israeli military. The conflict started on 12 July 2006 and took place in Lebanon and northern Israel. The Australian Government provided support for Australians seeking to leave Lebanon—including evacuation, consular assistance, crisis management, personal support and reception assistance.³⁴

Australian Government Disaster Recovery Payment

The Australian Government Disaster Recovery Payment (AGDRP) was introduced in the 2006–07 Budget.³⁵ The Government replaced the use of ex-gratia payments in disaster situations with the introduction of the AGDRP. From 1 December 2006, where a disaster occurred, the Prime Minister, in consultation with the Minister for Family, Community Services and Indigenous Affairs, could determine if the AGDRP was to apply. AGDRP provides a one-off payment of \$1000 per adult and \$400 per child and is administered by Centrelink.

Mumbai crisis 2008

The Australian Government provided support to Australians adversely affected by the terrorist attacks in Mumbai, India through the AGDRP.³⁶

33. Disaster Assist website, viewed 20 April 2011, <http://www.disasterassist.gov.au/www/disasterassist/disasterassist.nsf/Page/RWP3A0D52DFA058F700CA2577E500F1F29>

34. Disaster Assist website, viewed 20 April 2011, <http://www.disasterassist.gov.au/www/disasterassist/disasterassist.nsf/Page/RWPF9D59D892AE30B7CA2577E50003EF8D>

35. Australian Government, *Budget measures: budget paper no. 2: 2006–07*, Commonwealth of Australia, 2006 p. 208, viewed 19 April 2011, <http://www.budget.gov.au/2006-07/bp2/html/index.htm>

36. AGDRP is a one-off payment provided to Australian residents adversely affected by a major disaster. A major disaster can be a natural or man-made disaster (such as a terrorist attack) that occurs either in Australia or offshore.

Funeral/memorial and related costs assistance was available to immediate family member of an Australian who had died as a result of the Mumbai terrorist attacks. This assistance covered a funeral or memorial and related costs up to \$5000 to the person who paid for the funeral/memorial and related costs (where, at the time the claim is made, the costs were not met by a third party such as an insurance company).

Financial assistance was also available for eligible Australians for out-of-pocket health expenses. Out-of-pocket expenses included those expenses for health care services and goods to treat conditions arising directly from the Mumbai terrorist attacks, which were not covered by Medicare or other government programs (including those provided by states and territories) or private travel or health insurance—for example, hospital costs, pharmaceuticals, dressings, lotions and ointments and therapy consultations.³⁷

Comment

Over the last decade the Australian government has provided a range of assistance to Australian residents who are directly affected by overseas terrorist acts. The extent of that assistance has varied depending in all the circumstances on the level and urgency of need. However, the introduction of the Australian Government Disaster Recovery Payment, which was administered by Centrelink, set out the minimum that a person requiring disaster assistance would be paid. This Bill is a further evolution of that process and is a step towards formalising what governments of either political persuasion are already doing to assist Australian residents who are harmed by an overseas terrorist act.

Financial implications

The Financial Impact Statement (FIS) in the Explanatory Memorandum attached to the Bill does not provide a hard figure as to the projected cost of the compensation payouts as allowed by the Bill.³⁸ The FIS just says that as it is unknown how many acts of terrorism might occur and the nature of these acts leading to the number of victims and their potential loss or injury. This therefore is impossible to cost.

37. Disaster Assist website, viewed 20 April 2011, <http://www.disasterassist.gov.au/www/disasterassist/disasterassist.nsf/Page/RWP37B86D9E08990C34CA2577E50003E848>

38. Explanatory Memorandum, p. 3, viewed 13 April 2011, <HTTP://PARLINFO.APH.GOV.AU/PARLINFO/SEARCH/DISPLAY/DISPLAY.W3P;ADV=YES;ORDERBY=CUSTOMRANK;PAGE=0;QUERY=CONTENT%3ATERRORISM%20DATASET%3ABILLSCURBEF,BILLSCURNOTBEF;REC=1;RESCOUNT=DEFAULT>

Key provisions

Part 1—main amendments

Social Security Act 1991

Items 1–8 amend section 23(1) of the SSA to insert new definitions relevant to the AVTO Payment. In particular, definitions of **'declared overseas terrorist act'** and a **'terrorist act'** are provided.

There is no internationally accepted definition of **'terrorism'**. Not even the United Nations has been able to achieve consensus on this contentious issue. The old adage that 'one man's freedom fighter is another man's terrorist' goes to the root of the ongoing debate and ultimately definition. Individual states, therefore, have been compelled to develop their own definitions for the purposes of enacting legislation to counter the threat.

Currently, in Australia, what constitutes an act of terrorism is defined in Commonwealth legislation. Section 100.1 of the Criminal Code defines a **terrorist act** as an action or threat of action where the action is done or the threat is made:

- with the intention of advancing a political, religious or ideological cause, and
- with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a state, territory or foreign country, or of part of a state, territory or foreign country, or intimidating the public or a section of the public.

Subsections 100.1(2) and (3) of the Criminal Code set out certain actions which fall within the definition. This Bill uses that definition.

However, the Bill does not define what will be considered an **'overseas terrorist act'** for the purposes of AVTO Payments. It will be up to the Prime Minister to declare, in a legislative instrument, what conduct or event is an 'overseas terrorist act' before financial assistance will be provided under this Bill.

This leaves it very open ended for the Prime Minister to declare, or not to declare, an overseas terrorist act under **proposed section 35B** which is inserted by **item 9** of Part 1 of the Bill. This provision ensures that the Government is not bound to conduct or events for the purposes of future assistance under this Bill. The only check on this broad power is the capacity of the Parliament to disallow the relevant legislative instrument under the *Legislative Instruments Act 2003*.³⁹

39. For information about the operation of the *Legislative Instruments Act 2003* see M Coombs, *Legislative Instruments Bill 2003*, Bills Digest, no. 26 2003–04, Parliamentary Library, Canberra, 18 September 2003, viewed 13 April 2011, <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd026.htm#Contact>

According to the Explanatory Memorandum this will ensure that ‘remote events’ are not drawn into the scheme. What is considered a ‘remote event’ is not explained.⁴⁰ There is also no restriction in this Bill as to what event the Prime Minister can declare as an overseas terrorist act. This means that it would be open to the Prime Minister to make a declaration about an event which occurred before the provisions of this Bill commence.

In this regard, it has been reported that Mr Abbott:

... has written to Prime Minister Julia Gillard urging her to ensure victims of terror attacks such as 9/11 and the Bali bombings get compensation from Canberra in line with a private member's bill he has championed since 2009 ... [and that] he will move to amend looming government legislation if the payments to victims are not retrospective.⁴¹

Item 9 also deems that any declaration by the Prime Minister that an act is a ‘**declared overseas terrorist act**’ is automatically a ‘major disaster’ for the purposes of subsection 36(1) of the SSA. Section 36(1) allows the Attorney-General to declare an event a ‘major disaster’ for the purposes of the SSA. This is the trigger for payment of AGDRP.

Item 11 inserts into the SSA **new Part 2.24AA** which contains **new sections 1061PAA–1061PAG** to provide for the payment of Australian Victim of Terrorism Overseas Payment (AVTOP). Consistent with the existing structure of the SSA, the new provisions set out the qualifications for AVTO Payment, and the conditions which govern its payment.

Proposed new subsection 1061PAA(1) provides that a person qualifies for an AVTO Payment if all of the following are satisfied:

- the person is a ‘**primary victim**’ or a ‘**secondary victim**’ of a declared overseas terrorist act
- the person and the person’s ‘**close family members**’ were not involved in the commission of the terrorist act
- the person is an ‘**Australian resident**’ on the day the terrorist act occurred, or is covered by a determination under subsection 1061PAA(6).

The term ‘**primary victim**’ refers to a person who was in the place where the act occurred and was harmed as a direct result of the terrorist act. A ‘**secondary victim**’ is a close family member of a person who was in the place where the terrorist act occurred and that person died within two years of the date of the terrorist act as a result of the terrorist act. A secondary victim is a ‘**close family member**’ of a deceased person who was a primary victim and refers to a partner, child, parent, sibling, or guardian of the deceased person.⁴² A person will not be qualified for an AVTO Payment if the person or the person’s close family members were involved in the commission of the terrorist act.

40. Explanatory Memorandum, p. 4, op. cit.

41. K Murphy, ‘Abbott to dig heels over terror compo’, *The Age*, 4 May 2011, p. 3, viewed 4 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F738364%22>

The Bill does not insert into the SSA a new definition of **'Australian resident'**. This means that where the term is used in the Bill it has the same meaning as the current definition in section 7(2) of the SSA. Under that definition, an Australian resident is a person who: (a) resides in Australia, and (b) is an Australian citizen or the holder of a permanent visa, or the holder of certain special category visas. The effect of using the existing definition is that a person who is either an Australian citizen or has permanent resident status, but is residing overseas, will not be qualified for the AVTO Payment—unless the person is one of a class of persons about whom the Minister has made a determination by legislative instrument under **proposed subsection 1061PAA(6)**.

Proposed new section 1061PAD provides for the Secretary to determine the amount payable to a primary victim which must not exceed \$75 000.

Proposed new section 1061PAE sets out the amounts for secondary victims, which are also to be determined by the Secretary and to not exceed \$75 000. Where, for one primary victim, there are more than one secondary victims, the sum of the amounts paid to all of the secondary victims is not to exceed \$75 000. For example, where a single parent of three children is a person who was in the place where the terrorist act occurred and that person died within two years of the date of the terrorist act as a result of the terrorist act, each of those three children may make a claim as a secondary victim. However, the total amount payable in respect of the three claims is \$75 000.

Likewise, where a person is a secondary victim to more than one primary victim, the amount payable must not exceed \$75 000. For example, where both parents of three children are persons who were in the place where the terrorist act occurred and they died within two years of the date of the terrorist act as a result of the terrorist act, each of those three children may make a claim as a secondary victim. However, the total amount payable in respect of the three claims is \$75 000. It is not \$75 000 per parent.

While there is provision to provide up to \$75 000 to an individual, there is no requirement that the maximum amount is payable and the Secretary can decide on a lesser amount. However, with the Bill prescribing a maximum amount, it may prove difficult to prescribe a lesser amount in a disaster situation. In some cases, to prescribe a lesser amount may be seen as being parsimonious.

As with all other decisions made by the Secretary under the SSA, any decision about who is qualified for an AVTO Payment and how much is to be paid would be appealable. There is no provision in this Bill to exclude the Secretary's determination about an AVTO Payment from the existing review and appeal mechanisms.

Proposed new section 1061PAF requires the Minister to set out in a legislative instrument, the **'AVTO Payment Principles'** which are to be applied in determining the amount of AVTO Payment to be paid for a declared overseas terrorist act. The legislative instrument will be subject to disallowance by the Parliament in accordance with the *Legislative Instruments Act 2003*.

42. Those terms are defined separately in the SSA.

New subsection 1061PAF(2) sets out various matters which **may** be included in the '**AVTO Payment Principles**'. For primary victims the matters mainly refer to the particular injury, or disease, the person has suffered as a result of the declared overseas terrorist act. For secondary victims the matters are different, taking into account their dependency on, and relationship with, the primary victim and whether there are other secondary victims. While these factors are listed in the Bill, it is up to the Minister whether all or just some of them will be included in the AVTO Payment Principles.

Whilst the Minister is authorised to determine the content of the AVTO Payment Principles, the decision maker is the Secretary. It is unclear from the terms of **proposed subsection 1061PAF(2)** whether each of the possible AVTO Payment Principles is to be given equal weight. Of concern then, is that one of the factors to be taken into account is whether a person was directed by an Australian official, or by a foreign country, not to go to a place where the terrorist act occurred. This element was also referred to in the Minister's second reading speech⁴³ when tabling the Bill and there is further description in the Explanatory Memorandum.⁴⁴ The intention is that the amount of payment may be affected where a person wilfully or recklessly placed themselves in a position of risk (contributory negligence). The intention is not to exclude a payment but the amount of the payment may be reduced considering this element.⁴⁵ The same applies for payments to secondary victims.

New section 1061PAG sets out consultation requirements for the Minister in setting AVTO Payment Principles. While **new section 1061PAG** lists the bodies and persons to be consulted, the Minister is not bound to accept their advice and urgings. However, according to **new subsection 1061PAG(3)**, a failure to consult as required will not affect the validity of the AVTO Payment Principles.

Social Security (Administration) Act 1999

Items 12–14 propose amendments to the *Social Security (Administration) Act 1999* (SSAA). **Item 12** inserts a **new Subdivision FB** into Division 1 of Part 3 of the SSAA. In particular, **new section 27B** provides time limits for claims for AVTO Payment, being two years after the declared overseas terrorist act for a primary victim, and for a secondary victim, one year after the death of the primary victim. **New subsection 27B(3)** provides for the Secretary to exercise discretion to accept claims outside these periods. This is most likely to occur where it is not immediately apparent that the primary victim died as a result of the harm suffered in the overseas terrorist act.

Item 13 inserts **new section 35B** to require the Secretary, having received a secondary victim claim from one person, to make 'reasonable inquiries' about whether there are other potential secondary victim claimants. This is quite unusual in that it is not common for Commonwealth legislation to

43. R McClelland, 'Second reading speech: Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011', op. cit.

44. Explanatory Memorandum, p. 11, op. cit.

45. Ibid.

require the seeking out of potential claimants for assistance. It is unclear how the Secretary will fulfil this obligation.⁴⁶

Importantly, where the Secretary considers there are potential claimants, the Secretary must give those persons a written notice advising of the right to make a claim for AVTO Payment and that any such claim must be made before the '*claim due day*'. The claim due day must be at least 30 days after the day that the notice is given. If the potential claimant does not make a claim for AVTO Payment by the claim due day, the payment will **not be payable** to that person.

Item 14 inserts **new subsection 36(3)** into the SSAA to require that the Secretary determine all the claims by a secondary victim for AVTO Payment in respect of the same primary victim, at the same time.

Part 2—other amendments

Part 2 of Schedule 1 presents amendments to various other Acts.

Item 15 amends the *A New Tax System (Family Assistance) Act 1999* (FAA) to ensure AVTO Payments are not income for assessing entitlements paid under the FAA like Family Tax Benefit and Child Care Benefit. **Item 16** amends the *Health and Other Services (Compensation) Act 1975* so that AVTO Payment is not regarded as compensation to recover from Medicare payments and services that have been provided. **Item 17** likewise amends the *Income Tax Assessment Act 1997* (ITAA) to provide that AVTO Payment is not taxable income. **Item 18** amends the list in the ITAA that contains the payments provided under the SSA that are not taxable income to add in AVTO Payment to the list.

Items 20 and 21 amend the SSA firstly, to exclude AVTO Payments from the liquid assets test definitions of assets and also, to exclude the AVTO Payment as an asset in the context of the carer financial hardship (carer payment) test.

It should be noted there are no proposed amendments in this Bill to exclude AVTO Payment from the definitions of income in section 8 of the SSA or as an asset in section 9 of the SSA. This means AVTO Payments will be regarded as income under the income test and also as an asset under the assets test in the SSA.

Likewise there are no corresponding amendments in the Bill to the *Veterans' Entitlements Act 1986* (VEA) to exclude AVTO Payments from the income and asset test definitions and applications in the VEA.

46. When the executor of an estate makes an application to the Court for a grant of probate on a Will he or she will be required to provide evidence of an advertisement calling on anyone who has a claim against the estate, as creditor, beneficiary or otherwise to give particulars of the claim to the executor at the address in the advertisement. It may be that the Secretary will arrange for advertisements to be placed in national or regional newspapers to satisfy this requirement.

Concluding comments

The scheme for the qualification for, and payment to, victims of overseas terrorism acts as presented in this Bill is substantially different from the payment schemes which operate elsewhere internationally. Those payments are in the form of formal compensation or a right to insure against the risk of being the victim of a terrorist act. The AVTO Payment scheme created by this Bill is, however, similar to the schemes set up by the states and territories to assist victims of crime.

The assistance that has been provided by the Australian Government to victims of previous acts of terrorism overseas have included financial assistance to help pay for expenses, and assistance has also included personal support needs and counselling, out-of-pocket travel and accommodation costs, out-of-pocket health costs, funeral costs. Generally this past assistance has not been given in respect of costs that were otherwise covered by the person's own insurance policies. However, the provision of assistance has been ad hoc, with a system of assistance evolving as Australian residents have increasingly found themselves caught up in disasters overseas.

While this Bill does allow the provision of up to \$75 000 to an individual, there is no requirement to always provide that maximum amount, and the Secretary can provide a lesser amount.

While a payment of a lump-sum amount of up to \$75 000 will be of use to victims of an act of terrorism, the Bill and the Explanatory Memorandum do not make clear whether this amount is intended to meet the costs to the victim of an overseas terrorist act of matters such as health care, transport, accommodation and personal support—or whether it is an additional amount.

It may be possible for an Australian victim of terrorism overseas, to make application for additional assistance, by way of 'act of grace' payments. However these are discretionary and generally thought of as an avenue of last resort when there is no other viable avenue to provide redress. They may be paid where a decision maker is satisfied that:

- the action or inaction of the Australian Government has directly resulted in a loss
- the application of Commonwealth legislation or policy has caused an unintentional or inequitable outcome, or
- there is some other relevant anomaly or moral imperative.

It is not possible to predict what the needs of all Australian victims of overseas terrorism may be. The AVTO Payment will go some way to meeting them but the capped maximum amount payable to secondary victims and the discretion of the Secretary to pay all or only part of the capped amount may cause difficulties in the future—particularly if questions about the amounts payable are considered in the course of an appeals process.

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