

EXPLANATORY STATEMENT

Issued by authority of the Prime Minister

Social Security Act 1991

Social Security (Declared Overseas Terrorist Act—Nairobi 2019) Declaration 2019

The *Social Security (Declared Overseas Terrorist Act—Nairobi 2019) Declaration 2019* (the Declaration) is made under subsection 35B(1) of the *Social Security Act 1991* (the Act) by the Prime Minister.

Background

Part 2.24AA of the Act provides a scheme for financial assistance to Australian residents who are victims of a declared overseas terrorist act.

The Act authorises the Prime Minister to declare a ‘terrorist act’ within the meaning of section 100.1 of the *Criminal Code Act 1995* (the Criminal Code) to be a ‘declared overseas terrorist act’ for the purposes of the Australian Victim of Terrorism Overseas Payment (AVTOP) scheme.

A ‘terrorist act’ is relevantly defined by the Criminal Code to be:

- action that causes serious physical harm to a person or a person’s death
- done with the intention of advancing a political, religious or ideological cause, and
- with the intention of intimidating the public or a section of the public.

In considering whether to declare an overseas terrorist act to be a declared overseas terrorist act for the purposes of the AVTOP scheme, the Prime Minister has regard to the factors outlined in the *Australian Victim of Terrorism Overseas Payment Declaration Criteria* (the Declaration Criteria). The factors that may support the Prime Minister making a declaration are:

- whether the terrorist act targeted Australia or Australian interests or had a direct or indirect impact on Australia or Australians (including incidents that target Western interests more broadly)
- whether a terrorist organisation or member of a terrorist organisation has claimed responsibility for the terrorist act, particularly where the organisation is listed under the Criminal Code or a United Nations Security Council Resolution
- the nature or extent to which the terrorist act attracted broad media coverage and is of national significance, and

- whether the Australian Security Intelligence Organisation or a foreign security or intelligence agency has assessed that a terrorist organisation is responsible for the incident.

Other factors that do not support a declaration being made are also outlined in the Declaration Criteria.

Australian residents who are harmed as a direct result of a declared overseas terrorist act or whose close family member dies as a direct result of a declared overseas terrorist act can apply for financial assistance of up to \$75,000 under the AVTOP scheme.

Purpose

The Declaration triggers the application of the AVTOP scheme to the overseas terrorist act specified in the Declaration.

Explanation and effect of provisions

Section 1 – Name of Declaration

Section 1 sets out the title of the Declaration as the *Social Security (Declared Overseas Terrorist Act—Nairobi 2019) Declaration 2019*.

Section 2 – Commencement

Section 2 provides that the Declaration commences on the day after this instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the Declaration is made under subsection 35B(1) of the Act.

Section 4 – Definitions

Subsection 4(1) sets out the interpretive provisions that are relevant to the Declaration as follows:

- *Act* means the *Social Security Act 1991*.
- *terrorist act* has the meaning given by subsection 100.1(1) of the Criminal Code.

Subsection 4(2) provides that the references to date and time in the Determination are expressed in terms of Eastern African Time. This was the local time at the time and location of the terrorist act declared in section 5.

Section 5 – Declared overseas terrorist act

Section 5 of the Declaration provides that the terrorist act being the complex attack at the DusitD2 hotel complex in Nairobi, Kenya, from approximately 2.30 pm on 15 January 2019 to approximately 10 am on 16 January 2019 is a declared overseas terrorist act for the purposes of subsection 35B(1) of the Act.

As a result of this section, payments under the AVTOP scheme are made available to persons who are victims of this terrorist act under Part 2.24AA of the Act.

Consultation

Consultation on this Declaration was undertaken with key stakeholders. In particular, the Department of Home Affairs consulted with:

- the Australian Security Intelligence Organisation
- the Department of Foreign Affairs and Trade
- the Department of Human Services, and
- the Department of the Prime Minister and Cabinet.

The consultation agencies were supportive of the Declaration being made.

The Declaration is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Declaration is compatible with the human rights and freedoms for the purpose of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A statement of compatibility with human rights is included in the **Attachment**.

ATTACHMENT

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Social Security (Declared Overseas Terrorist Act—Nairobi 2019) Declaration 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

Part 2.24AA of the *Social Security Act 1991* (the Act) provides a scheme for financial assistance to Australian residents who are victims of an overseas terrorist act.

The Australian Victim of Terrorism Overseas Payment (AVTOP) scheme only applies to overseas terrorist acts which are the subject of a declaration by the Prime Minister. The Act authorises the Prime Minister to declare a ‘terrorist act’ under section 100.1 of the *Criminal Code Act 1995* (the Criminal Code) to be a ‘declared overseas terrorist act’ for the purposes of the AVTOP scheme.

In considering whether to declare a terrorist act to be a declared overseas terrorist act for the purposes of the AVTOP scheme, the Prime Minister has regard to the factors outlined in the *Australian Victim of Terrorism Overseas Payment Declaration Criteria*. The factors that may support the Prime Minister making a declaration are:

- the terrorist act targeted Australia or Australian interests or had a direct or indirect impact on Australia or Australians (including incidents that target Western interests more broadly)
- a terrorist organisation or member of a terrorist organisation has claimed responsibility for the terrorist act, particularly where the terrorist organisation is listed under the Criminal Code or a United Nations Security Council Resolution
- the nature or extent of the terrorist act attracted broad media coverage and is of national significance, and
- the Australian Security Intelligence Organisation or a foreign security or intelligence agency has assessed that a terrorist organisation is responsible for the incident.

Australian residents who are harmed as a direct result of a declared overseas terrorist act or whose close family member dies as a direct result of a declared overseas terrorist act are able to apply for financial assistance of up to \$75,000 under the AVTOP scheme.

Human rights implications

The Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Declaration activates the AVTOP scheme to apply to Australian resident victims of the terrorist attack listed in section 5 of the Declaration.

Terrorist attacks impose a heavy burden on those harmed by the attack as well as the family members of those harmed or killed. In some cases, the burden on both the person and the person's family will endure for life.

Primary victims of declared overseas terrorist acts are individuals who are harmed as a direct result of the act. Such persons may:

- require medical treatment
- require ongoing domestic care and assistance
- lose some or all of their capacity to work and earn income, and
- experience mental health problems.

Secondary victims of declared overseas terrorist acts are individuals whose close family member died as a direct result of the act. Such persons may:

- lose one or more family members, and
- experience a loss of support that they received from their now deceased family member.

The Declaration takes steps to promote the economic and social rights of victims of terrorism and members of their families, specifically:

- the right to social security (Article 9, International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 26, Convention on the Rights of the Child (CRC))
- the right to family life (Article 10, ICESCR)
- the right to an adequate standard of living (Article 11, ICESCR and Article 27, CRC)
- the right to health (Article 12, ICESCR and Article 24, CRC), and
- the rights of persons with a disability under the Convention on the Rights of Persons with Disabilities (CRPD), particularly:
 - Article 25 – the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability, and

- Article 26 – effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.

Right to social security in Article 9 of the ICESCR

Article 9 of ICESCR and Article 26 of the CRC require States to recognise the right of everyone to social security, including social insurance, including establishing a social security system and, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The Declaration promotes the rights of people, including children, who are primary and secondary victims of the declared overseas terrorist acts in a number of ways, including in acknowledging a victim's right to social security.

Under the AVTOP scheme, financial assistance to Australian residents who are harmed as a direct result of the terrorist act is awarded on a sliding scale, with larger payments being available to victims who experience physical or psychological harm that is severe and enduring. The maximum amount payable to a person in relation to the harm they suffer is \$75 000.

A maximum amount of \$75 000 is payable to the close family members of a person who is killed as a direct result of the terrorist acts, where those family members were resident in Australia at the time of the incident. The amount is apportioned between family members using rules modelled on succession laws.

The financial assistance provided does not replace other forms of welfare that might be available to the person. Rather, it is designed to facilitate the person's access to necessary goods and services, including, but not limited to, health care.

The financial assistance provided to Australian residents harmed in the declared overseas terrorist acts or whose close family member dies as a result of the terrorist acts is not compensation or damages.

On this basis, the Declaration promotes the right to social security.

Right to family life in Article 10 of the ICESCR

Article 10(1) of the ICESCR requires States to recognise the widest possible protection and assistance to the family as the fundamental and natural unit of society, requiring the full protection of the state. Article 10(3) also recognises that States must take special measures to protect and assist children and young persons without discrimination for reasons of parentage and other conditions.

The AVTOP scheme enables financial assistance to be provided to close family members of a person who died as a direct result of an overseas terrorist act. The AVTOP scheme gives

priority of payment to a deceased person's partner and child or children, followed by their parent or parents, and finally the person's sibling or siblings.

On this basis, the Declaration promotes the right of protection of, and assistance to, the family.

Right to an adequate standard of living in Article 11 of the ICESCR

Article 11(1) of the ICESCR and Article 27 of the CRC require States to recognise and adopt measures to realise an individual and his or her family's right to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions.

The AVTOP scheme provides financial assistance for Australian residents, including children, who have been injured or whose close family relatives died as a direct result of a terrorist act. The AVTOP scheme acknowledges the economic impact of an injury on a primary or secondary victim's lifestyle.

Financial assistance provided under the AVTOP scheme could be used by an individual or a family for the purposes of improving their overall living conditions, particularly where they have suffered physical or mental harm or trauma as a direct result of an overseas terrorist act.

On this basis, the Declaration promotes the right to an adequate standard of living.

Right to health in Article 12 of the ICESCR

Article 12(1) of ICESCR and Article 24 of the CRC provide for the right to the enjoyment of the highest attainable standard of physical and mental health.

The AVTOP scheme provides for a higher amount of financial assistance to be provided to victims, including children, who suffer greater harm as a direct result of the terrorist act. This includes physical injuries and emotional trauma that could require extensive and ongoing treatment, as well as domestic care and assistance. The AVTOP scheme also provides for financial assistance to be paid to secondary victims of a deceased person giving priority to the deceased person's partner and child, followed by their parent, then sibling. The financial assistance available under the AVTOP scheme supplements other Government benefits for which the person may be eligible.

This Instrument promotes the right to the highest attainable standard of health by providing financial assistance to victims that they can use in any way, including for the purposes of medical and psychological treatment.

On this basis, the Declaration promotes the right to health.

Rights of persons with a disability in Articles 25 and 26 of the CRPD

The CRPD promotes, protects and ensures the full enjoyment of all human rights and fundamental freedoms, by all persons with disabilities.

Article 25 of the CRPD requires States to promote the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

Article 26(1) of the CRPD requires States to adopt effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.

The AVTOP scheme does not discriminate on the basis of disability, but provides financial assistance to all Australian residents harmed as a direct result of an overseas terrorist attack or whose close family member dies as a direct result of such an attack. The financial assistance provided takes account of a person who may be harmed or disabled by physical and psychological injuries.

The AVTOP scheme does not prescribe the manner in which funds received by a victim should be used. The financial assistance may be used by the victim to enable that person to attain maximum independence, inclusion and participation in all aspects of life, following their injury sustained as a direct result of a terrorist act. The financial assistance does not replace other forms of assistance that a person with a disability may also have access to.

On this basis, the Declaration promotes the rights of persons with a disability.

Conclusion

The Declaration is compatible with human rights and specifically promotes those human rights outlined above.