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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**SOCIAL SECURITY AMENDMENT (SUPPORTING AUSTRALIAN VICTIMS OF  
TERRORISM OVERSEAS) BILL 2011**

REVISED EXPLANATORY MEMORANDUM

THIS MEMORANDUM ADDRESSES RECOMMENDATIONS 2, 3 AND 5 OF THE  
10 MAY 2012 REPORT OF THE SENATE LEGAL AND  
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

THIS MEMORANDUM ALSO TAKES ACCOUNT OF AMENDMENTS MADE BY  
THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

(Circulated by authority of the Attorney-General,  
the Honourable Nicola Roxon MP)

# **SOCIAL SECURITY AMENDMENT (SUPPORTING AUSTRALIAN VICTIMS OF TERRORISM OVERSEAS) BILL 2011**

## **GENERAL OUTLINE**

The Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill will establish a framework for the provision of financial assistance for Australians who are injured overseas as a result of terrorist acts and for close family members of Australians who are killed overseas as a result of terrorist acts.

The scheme acknowledges the special and tragic nature of terrorism by establishing a comprehensive financial assistance framework for the provision of assistance by amending the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, and the *Income Tax Assessment Act 1997*.

In particular, the Bill will:

- enable Australians who are victims of a declared overseas terrorist incident to claim financial support of up to \$75,000;
- enable the Prime Minister to declare that a relevant overseas terrorist incident is one to which the Scheme applies;
- establish eligibility criteria so that payments can be made to either long-term Australian residents who are victims of a relevant overseas terrorist act, or in the event of the death of a victim, close family members;
- ensure that payments will not adversely affect a person's entitlement to compensation or damages under another Commonwealth law;
- ensure that victims are not required to repay or deduct Medicare or other benefits from any payment received under the Scheme;
- enable the Secretary to extend the period for assessing claims and making payments; and
- enable the enactment of legislative instruments to provide further guidance on the amount of assistance that each victim, or close family member, should receive.

How the Government assists and supports victims of terrorism overseas is an important matter. In the past, Australia has provided targeted assistance to Australians adversely affected by terrorist acts overseas. This has been achieved using both statutory and ex gratia response measures, enabling the Government's response to tragedies such as the Mumbai bombings in 2008 to be flexible and tailored. 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). The provision of additional financial assistance under the proposed scheme will supplement those existing measures.

The Bill proposes two categories of eligible individuals: primary victims and secondary victims. A primary victim will be a person who is harmed as a result of a declared overseas terrorist act. A secondary victim will be a close family member of a person who dies as a result of a declared overseas terrorist act.

Payments will be capped at \$75,000 for both primary and secondary victims. In some circumstances, the amount of Australian Victim of Terrorism Overseas Payment may be nil.

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. The payment for secondary victims may be apportioned between eligible close family members.

The Bill was introduced into the House of Representatives on 24 March 2011. On 22 March 2012, the Senate jointly referred the Bill and the Assisting Victims of Overseas Terrorism Bill 2012, a private senator's bill introduced into the Senate on 1 March 2012, to the Senate Legal and Constitutional Affairs Committee (the Committee) for inquiry. The Committee received 23 submissions and conducted a public hearing on 19 April 2012. The Committee's Report of 10 May 2012 contains seven recommendations, including three recommendations to clarify certain matters in a Revised Explanatory Memorandum (Recommendations 2, 3 and 5). This Revised Explanatory Memorandum addresses those Recommendations.

In addition, on 21 June 2012, the House of Representatives agreed to minor amendments to the Bill. This Revised Explanatory Memorandum includes information outlining how those amendments will operate.

### **FINANCIAL IMPACT STATEMENT**

Over the past decade (since 11 September 2001), over 300 Australians have been killed or injured in acts of terrorism overseas.

However, acts of terrorism are unexpected and unpredictable. As a result, it is likely that the cost of this scheme will vary over time. It is likely that there will be no payments made some years but a significant number of payments made in other years.

Determination of the level of payment will be mainly made on the basis of functional impairment. A maximum of \$75,000 will apply in relation to any person who is injured or dies as a direct result of a declared overseas terrorist act.

The financial impact is negligible, but proposed Item 25A could have some financial impact. If the Secretary extends the period for the processing of claims, some claims that would have been deemed refused under the current statutory 13 week time limit could subsequently be paid under the extended timeframe, effectively increasing the amount of money paid out.

## NOTES ON CLAUSES

### Clause 1 Short Title

This amendment provides that the Bill, once enacted, may be referred to as the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2011.

### Clause 2 Commencement

This clause provides for the commencement of the provisions in the Bill. It sets out a table in relation to commencement information.

#### Subclause (1)

Subclause (1) provides that each provision of the Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Item 1 of the table specifies that Sections 1 to 3 and anything in this Act not elsewhere covered by this table commence on the day this Act receives the Royal Assent.

Item 2 of the table specifies that Schedule 1 commences on a single day to be fixed by Proclamation. However, it provides further that if any of the provision(s) do not commence within the period of 6 months beginning on the day the Act receives the Royal Assent, they commence on the day after the end of that period.

The later commencement of Schedule 1 is to allow for the Australian Victims of Terrorism Overseas Payment Principles to be in place before the Act commences operation.

An explanatory note is provided at the end of the table to state that the table relates only to the provisions of the Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

#### Subclause (2)

Subclause (2) provides that any information in column 3 of the table is not part of this Act. It states that information may be inserted in this column, or information in it may be edited, in any published version of this Act.

### Clause 3 Schedule(s)

This clause provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

#### **Schedule 1 – Amendments**

##### **Part 1 – Main amendments**

##### ***Social Security Act 1991***

##### **Item 1 – Subsection 23(1)**

Item 1 inserts into the definitions, the *Australian Victim of Terrorism Overseas Payment* or *AVTOP* and specifies that this means a payment under Part 2.24AA. This has been done to simplify the drafting.

##### **Item 2 – Subsection 23(1)**

Item 2 inserts into the definitions, the *AVTOP*, which has the same meaning as Australian Victim of Terrorism Overseas Payment, specified in Item 1.

### **Item 3 – Subsection 23(1)**

Item 1 inserts into the definitions, the *AVTOP Principles*, and specifies that this means the AVTOP Principles made by the Minister under section 1061PAF. That section provides that the Minister must, by legislative instrument, determine which principles are to be applied for the purpose of determining the Australian Victim of Terrorism Overseas Payment amount payable to a person. Section 1061PAF further provides a list of factors that can be taken into account when determining the amount of the payment.

### **Item 4 – Subsection 23(1)**

Item 4 inserts the definition of *close family member*. This has the meaning given by subsection 1061PAA(4), which provides that close family member includes the person's partner, child, parent, sibling or legal guardian.

### **Item 5 – Subsection 23(1)**

Item 5 inserts the definition of *declared overseas terrorist act*. It makes clear that this is a terrorist act in respect of which there is a declaration made by the Prime Minister under subsection 35B(1).

### **Item 6 – Subsection 23(1)**

Item 6 inserts the definition of *primary victim* of a declared overseas terrorist act. This has the meaning given by subsection 1061PAA(2). This 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.

### **Item 7 – Subsection 23(1)**

Item 7 inserts the definition of *secondary victim* of a declared overseas terrorist act. This has the meaning given by subsection 1061PAA(3). This provides a person is a secondary victim of a declared overseas terrorist act if the person is a close family member of a person who in a place where the terrorist act occurred and died as a direct result of the terrorist attack.

### **Item 8 – Subsection 23(1)**

Item 8 provides that the definition of a *terrorist act* has the same meaning as in section 100.1 of the *Criminal Code Act 1995*. This provides that a terrorist act means an action or threat is done or made with the intention of advancing a political, religious or ideological cause and they are done or made with the intention of coercing or influencing by intimidation the Commonwealth, a State, Territory or foreign country or intimidating the public.

### **Item 9 – After section 35A**

Item 9 inserts new Section 35B after section 35A. This new section describes the procedures for an act to be a declared overseas terrorist act.

## **Section 35B – Declared overseas terrorist act**

### Subsection (1)

Subsection (1) provides that the Prime Minister may declare in writing that a terrorist act that occurs outside Australia is a declared overseas terrorist act. This is effected by legislative instrument.

Not every terrorist act that occurs overseas will result in a declaration activating the Australian Victim of Terrorism Overseas Payment scheme. The act must be declared in writing by the Prime Minister as a 'declared overseas terrorist act'. That declaration will then be lodged as a legislative instrument. Opening the scheme 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. This activation mechanism will ensure remote events are not drawn into the scheme.

The absence of a legislative activation measure could result in those injured in incidents that in no way target Australia, Australian interests or those of our allies – as well as incidents that are not even capable of being construed as “terrorist acts” – making claims. This would result in the diversion of resources to the increased administration costs associated with deciding in each and every case whether the incident the subject of the claim should be one to which the scheme applies. The requirement for a declaration assists the decision-maker to efficiently identify eligible claims and helps ensure resources are used for payments to victims.

The inclusion of a declaration provision is consistent with existing Commonwealth legislation that provides for Ministers, including the Prime Minister, to make declarations in relation to related matters. For example, the Minister for Emergency Management may make a determination that an event is a major disaster for the purposes of the Australian Government Disaster Recovery Payment (AGDRP). Similarly, the Prime Minister may make a declaration that an emergency or disaster has occurred for the purposes of the *Privacy Act 1988*.

The Bill does not specify activation criteria for the making of a declaration. This provides discretion and ensures the Prime Minister is not limited in making a declaration in circumstances where he or she determines the proposed scheme should apply. It also ensures unforeseen and unforeseeable events are not inadvertently excluded from the scheme.

While the legislation does not specify the activation criteria, the Prime Minister, in deciding whether to activate the scheme, may consult with relevant Ministers.

In addition, without limiting the matters to which the Minister may have regard when considering whether to make a declaration, the Prime Minister may have regard to:

- the nature or extent of the terrorist act;
- the direct or indirect impact of the terrorist act on Australia or Australians;
- whether the terrorist act is of national significance;
- the extent to which the terrorist act targeted Australia or Australian interests;
- whether the event is of such a kind that it is appropriate in the circumstances for the scheme to apply; and
- any other matter.

#### Subsection (2)

Subsection (2) states that if the Prime Minister makes a declaration under subsection (1), then the Minister is taken to have made a determination under subsection 36(1) that the terrorist act is a major disaster. 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.

#### **Item 10 – At the end of subsection 36(1)**

Item 10 provides for a note to be added at the end of subsection 36(1).

The note states that if the Prime Minister makes a declaration under section 35B that a terrorist act is a declared overseas terrorist act, the Minister is taken to have made a determination under subsection (1) of this section that the terrorist act is a major disaster.

#### **Item 11 – After Part 2.24**

##### **Part 2.24AA–Australian Victim of Terrorism Overseas Payment**

Item 11 amends the *Social Security Act 1991* by inserting a new Part 2.24AA ‘Australian Victim of Terrorism Overseas Payment’ after Part 2.24 of the *Social Security Act 1991*.

Part 2.24 provides for the Australian Government Disaster Recovery Payment (AGDRP), which provides immediate benefits to Australians adversely affected by a major disaster where this is determined by the responsible Minister (the Attorney-General). AGDRP has been paid to assist victims of overseas terrorist acts (or in the event of death to their next of kin). This most recently occurred in response to the bombings in Mumbai in 2008.

### **Division 1—Qualification for Australian Victim of Terrorism Overseas Payment**

Division 1 provides qualification criteria for payment of an Australian Victim of Terrorism Overseas Payment.

### **1061PAA – Qualification for Australian Victim of Terrorism Overseas Payment**

New Section 1061PAA sets out the qualification requirements.

#### Subsection (1)

Subsection (1) sets out the general criteria that a person must satisfy to qualify for an Australian Victim of Terrorism Overseas Payment.

#### *Paragraph (1)(a)*

Paragraph (1)(a) specifies that a person must be either the primary or secondary victim of a declared overseas terrorist act. Primary and secondary victims are defined in section 23. The act must also be a ‘declared overseas terrorist act’ as defined in section 35B.

Not all overseas terrorist acts will attract the application of the scheme. The scheme will only apply to acts the subject of a declaration by the Prime Minister.

#### *Paragraph (1)(b)*

Paragraph (1)(b) makes clear that a person who was involved in the commission of the terrorist act will not be eligible for assistance under the scheme. In addition, the person’s close family members must not be involved in the commission of the terrorist act.

A terrorist act is an offence under the *Criminal Code Act 1995*. It is a clear policy intention that those who are responsible for these events should not profit from the incident. This is consistent with the *Proceeds of Crime Act 2002*, which prevents criminals from receiving financial advantage as a result of their criminal activities.

The intention of this provision is to ensure the close family members of a person who was involved in the commission of the terrorist act are ineligible for assistance under the scheme.

#### *Paragraph (1)(c)*

Paragraph (1)(c) provides that a person who is a resident on the day the terrorist act occurred may be eligible. Paragraph (1)(c) also provides that the Minister can provide that a class of persons who do not satisfy the residency test can be eligible for assistance under a determination.

#### *Subparagraph (1)(c)(i)*

The purpose of subparagraph (1)(c)(i) is to establish that for a person to qualify for an Australian Victim of Terrorism Overseas Payment they must have a relationship with Australia. For the purposes of this scheme, this is established through residency. Subparagraph (1)(c)(i) makes it clear that the person qualifies if they are an Australian resident on the day that the terrorist act occurred.

Australian resident is defined in subsection 7(2) of the *Social Security Act 1991* 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 1991*.

### *Subparagraph (1)(c)(ii)*

Subparagraph (1)(c)(ii) provides that a class of persons otherwise eligible under proposed subsection 1061PAA(1), but who do not meet the residency criteria, may be eligible for assistance under the scheme if they are covered by a determination under subsection 1061PAA(6).

### *Notes*

At the end of Subsection (1), there is a Note, which links *declared overseas terrorist act* with section 35B.

### Subsection (2)

Subsection (2) 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.

### *Paragraph (2)(a)*

Paragraph (2)(a) provides that the person must be in the place where the terrorist act occurred. The intention of paragraph (2)(a) is to disqualify persons who have watched or heard of the event through any form of public media from making a claim. Although they may be distressed by observing or hearing of the event, this is not enough to qualify for benefits.

The person must be physically ‘in a place’ where the overseas terrorist act occurs. This could be in the hotel foyer, an adjacent car park or across the road. However there must be close proximity to the overseas terrorist act.

### *Paragraph (2)(b)*

Paragraph (2)(b) provides a second requirement that the person must be harmed (this can be physical or psychological harm). The intention is to ensure that only those who sustain some form of injury receive payment. Financial assistance should be available for people who suffer harm. People whose injuries are not permanent or serious should be eligible. However, they may receive a lower quantum than a person whose injuries are permanent or more serious.

### Subsection (3)

Subsection (3) provides the definition of a **secondary victim** if the person is a close family member of a person who was in a place where the terrorist act occurred and who died as a direct result of the terrorist attack, provided that person died within two years of the day the terrorist act occurred.

### *Paragraph (3)(a)*

Paragraph (3)(a) 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 who died as a direct result of the terrorist attack.

### *Paragraph (3)(b)*

Paragraph (3)(b) provides that to be a secondary victim, the deceased must die before the end of two years starting on the day the terrorist act occurred. The intention is to also provide a benefit for secondary victims even where the victim does not die immediately at the time of the overseas terrorist act, provided the cause of death is a direct result of the overseas terrorist act.

The question of whether this is a ‘direct result’ is a question of fact. This should be determined by medical evidence. If the injuries sustained during the terrorist attack are a significant contributing cause of death this would suffice.



#### Subsection (4)

Subsection (4) clarifies that the expression *close family member* means:

- the person's partner; or
- the person's child; or
- the person's parent; or
- the person's sibling; or
- the person's legal guardian.

There may be a number of close family members who qualify for payment as secondary victims under this scheme.

This definition of close family member is different from the definition of "*immediate family member*" which can be found in section 23 of the *Social Security Act 1991* and means an individual who is a parent, step-parent, grandparent, sibling or legal guardian of the person. In contrast to the definition of close family member for the purposes of this scheme, the definition of immediate family member includes grandparent but does not include child.

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, half-sisters, adoptive brothers and adoptive sisters.

#### Subsection (5)

Subsection (5) clarifies what is meant by a person who was *involved* in the commission of a declared overseas terrorist act. This 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.

The intention is to include persons who engage in activities that could contribute to the overseas terrorist act.

#### Subsection (6)

Subsection (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 in subsection (1).

This subsection is intended provide the Minister with flexibility to enable a class of persons to qualify where they may otherwise be ineligible on the basis of residency but a payment is considered appropriate. There may be cases where a class of persons have good reasons for not satisfying the residency test but still have a sufficient nexus with Australia to receive an Australian Victim of Terrorism Overseas Payment.

For example, Australian Government employees such as Australian consular officials, police officers, including Australian Federal Police officers, and Australian Defence Force personnel working overseas may not meet the criteria in subsection 7(2) of the *Social Security Act 1991*, and may therefore not automatically qualify for a payment under the proposed scheme. Subsection (6) allows the Minister to determine that such a class of persons, who do not satisfy the residency test,

can qualify. A determination in relation to Australian officials working overseas would ensure that such persons are not excluded from financial assistance under the scheme if they are injured or if their close family member is killed in a declared overseas terrorist act.

There may be a class or classes of persons other than Commonwealth employees who do not satisfy the residency test, but have a strong nexus with Australia. The Minister can make a determination in relation to that class of persons where he or she is satisfied that those persons should qualify for an Australian Victim of Terrorism Overseas Payment where they are injured or their close family member dies as a direct result of an overseas terrorist act.

### **1061PAB Whether a person can be qualified for more than one AVTOP in relation to the same terrorist act**

This section provides some reasonable limitations on the number of claims that can be made to ensure that the legislation does not create inequities.

#### Subsection (1)

Subsection (1) provides that a person cannot be qualified as a primary victim for more than one Australian Victim of Terrorism Overseas Payment in relation to the same declared overseas terrorist act.

The intention here is that the primary victim will only be able to submit one claim for one overseas terrorist act, even if the person has multiple injuries. The maximum amount payable is \$75,000 in relation to any declared overseas terrorist act.

#### Subsection (2)

Subsection (2) provides that a person cannot be qualified as a secondary victim for more than one Australian Victim of Terrorism Overseas Payment in relation to the same close family member who has died as a direct result of the declared overseas terrorist act.

#### Subsection (3)

Subsection (3) provides that a person can be qualified for more than one Australian Victim of Terrorism Overseas Payment in relation to the same declared overseas terrorist act. A victim could qualify as both a primary victim if the person was injured, and also as a secondary victim if a close family member died in the same terrorist act. Alternatively, a person could claim in relation to two or more close family members who died in the same terrorist act.

#### *Paragraph 3(a)*

Paragraph 3(a) provides that a person may qualify for more than one Australian Victim of Terrorism Overseas Payment if he or she is both a primary victim and a secondary victim of the terrorist act. This would include a situation where he or she is injured and is also the close family member of a person (or more than one person) who dies as a result of the same declared overseas terrorist act. The maximum such a person could claim would be \$150,000.

Paragraph 3(a) also makes clear that a person may qualify for more than one Australian Victim of Terrorism Overseas Payment if that person is a secondary victim in relation to more than one close family member. This would include a situation where a person is the close family member of more than one person who dies as a result of the same declared overseas terrorist act. The maximum such a person could claim would be \$75,000.

#### *Paragraph 3(b)*

Paragraph 3(b) clarifies that a person may qualify for more than one Australian Victim of Terrorism Overseas Payment if the person is a secondary victim in relation to more than one close family member. The maximum such a person could claim would be \$75,000.

## **Division 2—Payability of Australian Victim of Terrorism Overseas Payment to secondary victims**

Division 2 sets out criteria for how secondary victims may receive the Australian Victim of Terrorism Overseas Payment.

### **Section 1061PAC When AVTOP for secondary victims is not payable**

Section 1061PAC provides that an Australian Victim of Terrorism Overseas Payment will not be payable to a secondary victim in relation to a close family member who has died as a direct result of a declared overseas terrorist attack, where an Australian Victim of Terrorism Overseas Payment has already been granted in relation to the close family member, or where the Secretary has notified the person of their entitlement to claim an Australian Victim of Terrorism Overseas Payment and the person failed to lodge a claim within the specified timeframe.

## **Division 3—Amount of Australian Victim of Terrorism Overseas Payment**

Division 3 specifies the maximum amount of the Australian Victim of Terrorism Overseas Payment payable.

### **Section 1061PAD Amount of AVTOP for primary victim**

Section 1061PAD provides that the payment to a primary victim as a primary victim is not to exceed \$75,000. This amount is comparable to Queensland and Western Australian victims of crime schemes that provide for maximum payments of up to \$75,000.

#### Subsection (1)

Subsection (1) provides that the Secretary must determine the amount payable to a person who is a primary victim of a declared overseas terrorist act.

Under section 37 of the *Social Security (Administration) Act 1999*, the Secretary has responsibility for determining claims (this includes the amount of the payment). In this case, the responsible Secretary is the Secretary of the Attorney-General's Department. He or she is able to delegate his or her powers (including the function to determine claims) under section 234 of the *Social Security (Administration) Act 1999*.

#### Subsection (2)

Subsection (2) provides that the Secretary must make the determination on the basis of the AVTOP Principles to be made under section 1061PAF.

#### Subsection (3)

Subsection (3) provides that the amount that can be paid to a primary victim as a primary victim must not exceed \$75,000.

### **Section 1061PAE Amount of AVTOP for Secondary Victim**

Section 1061PAE provides that the payment to a secondary victim as a secondary victim is not to exceed \$75,000.

#### Subsection (1)

Subsection (1) provides that the Secretary must determine the amount of an Australian Victim of Terrorism Overseas Payment payable to a person who is a secondary victim in relation to a close family member who has died as a direct result of a declared overseas terrorist act.

Under section 37 of the *Social Security (Administration) Act 1999*, the Secretary has responsibility for determining claims (this includes the amount of the payment). In this case, the responsible Secretary is the Secretary of the Attorney-General's Department. He or she is able to delegate his

or her powers (including the function to determine claims) under section 234 of the *Social Security (Administration) Act 1999*.

#### Subsection (2)

Subsection (2) provides that the Secretary must make the determination on the basis of the AVTOP Principles to be made under section 1061PAF.

#### Subsection (3)

Subsection (3) provides that the amount payable to a secondary victim as a secondary victim must not exceed \$75,000.

#### Subsection (4)

Subsection (4) requires the Secretary, in determining the amount of the relevant Australian Victim of Terrorism Overseas Payment, to ensure that where the person is not the only secondary victim who has made a claim in relation to a specific close family member, the total sum of Australian Victim of Terrorism Overseas Payments paid in relation to that close family member does not exceed \$75,000.

#### Subsection (5)

The purpose of this subsection is to ensure that where a person is a secondary victim in relation to more than one close family member, and an Australian Victim of Terrorism Overseas Payment is payable in relation to each of those close family members, the sum of Australian Victim of Terrorism Overseas Payments paid to any one person must not exceed \$75,000.

The intention is to cap amounts payable to one secondary victim. Historically, acts of terrorism have occurred in public places where whole families may be present. As such, it is possible that a child could lose both parents in the one overseas terrorist act or a person could lose both their spouse and a child or children. Although a secondary victim may claim for more than one close family member, payments made to one person are capped at \$75,000.

This does not prevent another family member claiming a payment (as a secondary victim) in respect of the same overseas terrorist act for a related close family member. For example, an only child may make claims in relation to each of his or her parents, who died as a direct result of the terrorist act. However, the child could not receive more than \$75,000 as a secondary victim.

### **Section 1061PAF AVTOP Principles**

Section 1061PAF provides for the Principles that will assist in determining the amount of Australian Victim of Terrorism Overseas Payment payable in any particular circumstance to any particular claimant. Financial assistance under the scheme does not replace existing forms of assistance such as Disaster Health Care Assistance Schemes and the Australian Government Disaster Recovery Payments (AGDRP).

#### Subsection (1)

Subsection (1) provides that the Minister must determine the principles to be applied to determine the amount of an Australian Victim of Terrorism Overseas Payment.

These principles, known as the 'AVTOP Principles', are to be applied for the purposes of determining the amount of Australian Victim of Terrorism Overseas Payment payable to a person in relation to a declared overseas terrorist act. They must be determined by the Minister and made by legislative instrument.

#### Subsection (2)

Subsection (2) states that the AVTOP Principles may provide for certain factors to be taken into account when determining the amount of the payment. These are different for primary and

secondary victims. The factors listed in subsection (2) are not intended to limit the operation of subsection (1). Certain factors, such as the conduct of the person injured or killed, could result in the claimant receiving a lower payment. Other factors, such as the seriousness of a person's injuries, could result in the claimant receiving a higher payment.

*Paragraph 2(a)*

For a primary victim, the factors that may be taken into consideration when determining the amount of the payment include:

- i. the nature of the injury or disease suffered as a direct result of the terrorist act;
- ii. the duration of the injury or disease;
- iii. the impact of the injury or disease on the person's bodily and mental functions;
- iv. the impact of the injury or disease on the person's life;
- v. the likelihood of the person suffering future loss, injury or disease as a direct result of the terrorist act;
- vi. the circumstances in which the injury or disease was incurred; and
- vii. 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.

In relation to subparagraphs 2(a)(i) to (a)(iv), the nature of the injuries, whether they were a direct result of the terrorist act, their duration and impact are factors that can be taken into account in the assessment process.

In relation to subparagraph 2(a)(v), the likelihood of future loss is an important consideration to be taken into account when making an assessment. As a primary victim may only submit one claim, it is important that this claim reflects the true loss or harm from the terrorist act. Victims may wish to lodge a claim quite quickly following the terrorist act due to financial pressures. However, if the victim's injuries have not yet stabilised or there is delayed psychological injury, the assessed quantum may not fully realise the extent of their future loss.

The intention of this provision is to allow for future loss when making the determination. The victim should obtain medical advice in order to provide a correct prognosis of future loss. This would cover a situation for example, where a person receives injuries to his back and breaks his leg as a result of a terrorist attack. An assessment based on the cost of his present medical expenses and injuries is \$30,000. However, the person develops severe arthritis twelve months later which is ongoing. The person is no longer able to work and is in continual pain. It would not be possible for the person to submit a further claim because it would create unnecessary ongoing administrative expenses, and there needs to be an incentive to delay claims until all injuries are apparent. Accordingly, it is appropriate that possible future injuries be taken into consideration when determining quantum.

Subparagraph 2(a)(vi) is designed to allow any other relevant circumstances to be taken into consideration.

The effect of subparagraph 2(a)(vii) is that determination of a payment may be affected by whether the person was directed not to go to the place where the act occurred. The intention is that Australian Victim of Terrorism Overseas Payments should not be made (or should be limited) in cases where a person has wilfully or recklessly placed themselves in a position of risk by ignoring warnings not to travel to that foreign country. This is a factor for consideration in determining the amount of benefits. It does not necessarily exclude a person from benefits altogether. The reason is that there may be mitigating factors (e.g., entering the foreign country prior to the official

notification warning against travel, inaccessibility to the internet or travelling to visit a dying relative).

*Paragraph (2)(b)*

For a secondary victim in relation to a close family member who has died the factors that may be taken into consideration when determining the amount of the payment include:

- i. whether the person was dependant on the close family member;
- ii. the nature of the relationship between the person and the close family member;
- iii. the circumstances in which the close family member died;
- iv. 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;
- v. whether there are other persons who have made a claim for an Australian Victim of Terrorism Overseas Payment as a secondary victim in relation to the close family member;
- vi. if there are such other secondary victims and the person and each of the other secondary victims agree on the amount of an Australian Victim of Terrorism Overseas Payment that each should be paid—that agreement; and
- vii. if there are such other secondary victims and the person and each of the other secondary victims have not agreed on the amount of an Australian Victim of Terrorism Overseas Payment that each should be paid—whether the person has also made a claim as a secondary victim in relation to another close family member.

Subparagraphs 2(b)(i) and (ii) recognise that dependency and relationship considerations are important in the assessment process.

Subparagraph (2)(b)(i) provides that the circumstances in which the close family died in the declared overseas terrorist act may be taken into consideration when determining the amount of the payment.

The effect of subparagraph 2(b)(iv) is that determination of a payment may be affected by whether the close family member who died was directed not to go to the place where the act occurred. The intention is that Australian Victim of Terrorism Overseas Payments should not be made (or should be limited) in cases where a person has wilfully or recklessly placed themselves in a position of risk by ignoring warnings not to travel to that foreign country. This is a factor for consideration in determining the amount of benefits. It does not necessarily exclude a person from benefits altogether. The reason is that there may be mitigating factors (e.g., entering the foreign country prior to the official notification warning against travel, inaccessibility to the internet or travelling to visit a dying relative).

Subparagraphs 2(b)(v), (vi) and (vii) address complex interrelationship issues which will differ in each family situation. These need to be assessed on an individual basis.

*Paragraph (2)(c)*

Paragraph (2)(c) lists factors that may be relevant to determining the amount of the payment to a primary or a secondary victim.

*Paragraph (2)(c)(i)*

Paragraph (2)(c)(i) states that where there was travel advice on an Australian Government website advising against travelling to that place, that can be taken into account when determining the amount of the payment. However, there may be circumstances where a person acts contrary to those directions, choosing to place themselves at risk because they have strong personal reasons (entering a bomb site in order to rescue a close family member). It may not be appropriate to

disqualify a person from benefits in these circumstances, although it may still be a factor in determining quantum payable.

#### *Subparagraph (2)(c)(ii)*

Subparagraph (2)(c)(ii) recognises that there may be situations where a person has been paid or is likely to be paid amounts by the Commonwealth, a State, a Territory or a foreign country or another person or entity in relation to the terrorist act.

The Principles will provide the opportunity to ensure such financial assistance can be taken into account when determining the amount of assistance victims receive under this scheme. The consultation provided by section 1061PAG will ensure there are opportunities for interested individuals and groups to make representations about the content of those Principles.

#### Subsection (3)

Subsection (3) provides that the Australian Victim of Terrorism Overseas Payment Principles may specify the circumstances in which the amount of Australian Victim of Terrorism Overseas Payment is nil.

#### **Division 4—Other**

Division 4 provides for consultation when determining the AVTOP Principles, and also provides that a payment under the proposed scheme is not to be treated as compensation or damages under Commonwealth law.

#### **Section 1061PAG Consultation on the AVTOP Principles**

Section 1061PAG provides for the Minister to undertake consultation when determining the AVTOP Principles under section 1061PAF.

#### Subsection (1)

Subsection (1) lists the groups to be consulted, or *consultation* groups, for the purposes of determining the AVTOP Principles.

#### Subsection (2)

Subsection (2) provides for ongoing consultation by the Minister each year, following the commencement of the AVTOP Principles.

#### Subsection (3)

Subsection (3) provides that a failure to consult will not affect the validity of the AVTOP Principles.

#### **Section 1061PAH AVTOP is not compensation or damages**

Section 1061PAH provides that the proposed Australian Victim of Terrorism Overseas Payment is not to be treated as compensation or damages under any Commonwealth law. The effect of this amendment is to specifically exclude payments under the proposed scheme from the definition of ‘compensation’ or ‘damages’ for the purposes of any Commonwealth law so that benefits received under the proposed scheme will not have to be repaid under other regimes or schemes under Commonwealth law. This includes, but is not limited to, compensation and damages under the *Safety, Rehabilitation and Compensation Act 1988*, the *Seafarers Rehabilitation and Compensation Act 1992* and the *Health and Other Services (Compensation) Act 1995*.

Section 1061PAH also ensures that the receipt of an Australian Victim of Terrorism Overseas Payment does not adversely impact on the receipt of compensation or damages under any Commonwealth law that is subsequently enacted unless that law specifically provides otherwise.

## ***Social Security (Administration) Act 1999***

### **Items 12 to 14**

Items 12 to 14 make changes to the *Social Security (Administration) Act 1999*.

### **Item 12 – After Subdivision FA of Division 1 of Part 3**

Item 12 inserts new Subdivision FB ‘Time limit for claims for AVTOP’ after Subdivision FA of Division 1 of Part 3 of the *Social Security (Administration) Act 1999*.

### **Subdivision FB—Time limit for claims for AVTOP**

#### **Section 27B Time limit for claims for AVTOP**

New Section 27B provides a time limit for making a claim for an Australian Victim of Terrorism Overseas Payment.

#### Subsection (1)

Subsection (1) provides that a claim for an Australian Victim of Terrorism Overseas Payment by a primary victim of a declared overseas terrorist act must be lodged within 2 years after the day the declaration is made under section 35B of the *Social Security Act 1991*.

As only one claim may be lodged by the primary victim for injuries incurred as a direct result of the declared overseas terrorist act, the intention is to provide a reasonable time frame for the primary victim to lodge a claim. The two year period is considered sufficient time for the injuries to stabilise. The financial principles will also provide for future prognosis of injury to be considered at the time of determination of the assessment.

A limitation period is necessary to enable effective administration of claims and to enable closure. A limitation period is consistent with common law claims and also State and Territory victims of crime compensation schemes.

#### Subsection (2)

Subsection (2) provides that a claim for an Australian Victim of Terrorism Overseas Payment by a secondary victim of a declared overseas terrorist act must be lodged within 12 months after the day the close family member to whom the claim relates died.

The purpose of this provision is to allow for a secondary victim to lodge a claim in respect of a close family member after the death of that member. The requirement is that the claim must be lodged within 12 months after the day of death of that close family member. As subsection 1061PAA(3) provides that a secondary victim is entitled to make a claim provided the relevant close family member died within two years of the day the terrorist act occurred, in practice, a secondary victim will have up to three years in which to make a claim. The intention is to allow sufficient time for a grieving relative to submit a claim, while also providing a reasonable closure period.

#### Subsection (3)

Subsection (3) enables a primary or secondary victim to make a claim after the period referred to in subsection (1) or (2) has expired if the Secretary is satisfied that there are special circumstances applying to the person’s claim that justify a late lodgement and the claim is lodged within a reasonable period having regard to those circumstances.

The intention is to provide the Secretary with a discretion to allow a late lodgement where special circumstances apply. Whether these special circumstances apply is a matter for the Secretary.



### **Item 13 – At the end of Subdivision J of Division 1 of Part 3**

Item 13 inserts new Section 35B into the *Social Security (Administration) Act 1999* in relation to potential claims by secondary victims for assistance under the scheme.

#### **35B Secondary victim claims for AVTOP**

##### Subsection (1)

Subsection (1) provides that if a person makes a claim for an Australian Victim of Terrorism Overseas Payment as a secondary victim in relation to a close family member who has died, the Secretary must make reasonable inquiries as to whether there are other persons who may also qualify for an Australian Victim of Terrorism Overseas Payment as a secondary victim in relation to the same close family member.

A secondary victim can only claim for one Australian Victim of Terrorism Overseas Payment in relation to a person who has died. However, more than one secondary victim can make a claim in relation to the same close family member. Accordingly, there may be a number of qualifying secondary victims. It is important that the most deserving close family member or close family members are given opportunity to make a claim. The purpose of this section is to place an obligation on the Secretary, in so far as is reasonable, to make inquiries as to whether there are other qualifying close family members.

##### Subsection (2)

Subsection (2) provides that if the Secretary considers there are other persons who may wish to make a claim as a secondary victim, the Secretary must notify each of those persons of certain things. The purpose of subsection (2) is to ensure that, so far as possible, all close family members are notified in writing of relevant matters.

##### *Paragraph (2)(a)*

Paragraph (2)(a) requires the Secretary to notify each potential claimant in writing that he or she may make a claim for an Australian Victim of Terrorism Overseas Payment as a secondary victim in relation to the close family member.

##### *Paragraph (2)(b)*

Paragraph (2)(b) requires the Secretary to notify each potential claimant in writing that he or she must make a claim before the day specified in the notice.

##### *Paragraph (2)(c)*

Paragraph (2)(c) requires the Secretary to notify each potential claimant in writing that if he or she fails to make a claim by that day, an Australian Victim of Terrorism Overseas Payment in relation to the close family member will not be payable to the person.

##### Subsection (3)

Subsection (3) requires the Secretary to allow for at least 30 days for secondary victims to make claims after the notice is given.

##### Subsection (4)

Subsection (4) allows the Secretary to provide for a longer notice period if satisfied it is appropriate to do so.

##### Subsection (5)

Subsection (5) provides further guidance in the event the claim due day is changed.

*Paragraph (5)(a)*

In the event the Secretary extends the claim due day under subsection (4), the Secretary is required under paragraph (5)(a) to change the claim due day for each of the potential claimants to the new claim day.

*Paragraph (5)(b)*

In addition, paragraph (5)(b) requires the Secretary to give each of the potential claimants a written notice of the new claim due day.

*Paragraph (5)(c)*

Paragraph (5)(c) clarifies that, if the claim due day is extended, that extended date is the relevant specified timeframe for the purposes of section 1061PAC(b)(ii) of the *Social Security Act 1991*.

**Item 14 – At the end of section 36**

Item 14 adds new subsection (3) at the end of section 36. New subsection (3) provides that if more than one person makes a claim for an Australian Victim of Terrorism Overseas Payment as a secondary victim of a declared overseas terrorist act in relation to the same close family member, the Secretary must determine the claims at the same time.

The purpose is to ensure that all close family members have equal and fair opportunity for their claims to be considered.

## **Part 2—Other amendments**

This Part makes consequential amendments to other legislation.

### ***Income Tax Assessment Act 1997***

#### **Item 17 – After Subsection 52-10(1J)**

Item 17 makes a consequential amendment to the *Income Tax Assessment Act 1997* by inserting new subsection 52-10(1K) after subsection 52-10(1J), providing that Australian Victim of Terrorism Overseas Payments will be exempt from income tax.

#### **Item 18 – Section 52-40 (after table item 2AA)**

Item 18 makes a consequential amendment to the *Income Tax Assessment Act 1997*. It inserts the Australian Victim of Terrorism Overseas Payment as 2AB to a table which lists the provisions of the *Social Security Act 1991* under which social security payments are made that are wholly or partly exempt from income tax under subdivision 52A of the *Income Tax Assessment Act 1997*.

### ***Social Security Act 1991***

Items 20 to 22 make consequential amendments to the *Social Security Act 1991*.

#### **Item 20 – Subsection 14A(1) (after paragraph (da) of the definition of *liquid assets*)**

Item 20 amends subsection 14A(1) of the *Social Security Act 1991*.

Section 14A of the *Social Security Act 1991* provides the social security benefit liquid assets test definitions. Existing subsection (1) provides a definition of ‘liquid assets’ in relation to a person’s cash and readily realisable assets and includes a list of specified financial assets. Existing paragraph (1)(d) excludes certain payments from this definition.

The proposed amendment inserts new paragraph (db) after paragraph (da). Paragraph (db) lists the Australian Victim of Terrorism Overseas Payment as an excluded payment. There is also a proviso that the Secretary should be satisfied that the length of time since receiving the payment is still reasonable in the circumstances.

The effect is to specifically exclude an Australian Victim of Terrorism Overseas Payment from the definition of liquid assets for the purposes of assessment for social security benefits under the *Social Security Act 1991*.

#### **Item 21 – Subsection 19B (after paragraph (g) of the definition of *liquid assets*)**

Item 21 amends subsection 19B of the *Social Security Act 1991*.

Section 19B of the *Social Security Act 1991* provides the ‘Financial hardship (Carer payment) liquid assets test’ definition. It specifically excludes certain financial assets from this definition.

The proposed amendment inserts paragraph (h) after paragraph (g) of the definition. Paragraph (h) adds the Australian Victim of Terrorism Overseas Payment to this excluded list. There is also a proviso that Secretary should be satisfied that the length of time since receiving the payment is still reasonable in the circumstances.

The effect is to specifically exclude the Australian Victim of Terrorism Overseas Payment from the definition of liquid assets for the purposes of assessing Financial hardship (Carer payment) benefits.

#### **Item 22 – Subsection 23(1)**

Item 22 inserts the definition of *involved* in the commission of a declared overseas terrorist act. This has the meaning given by subsection 1061PAA(5), specified above.

## ***Social Security (Administration) Act 1999***

Items 23 to 27 make consequential changes to the *Social Security (Administration) Act 1999*.

### **Item 23 - At the end of subsection 16(6)**

Item 23 inserts new subparagraph (6)(c) at the end of subsection 16(6) of the *Social Security (Administration) Act 1999*.

Section 16 of the *Social Security (Administration) Act 1999* outlines the procedures to be followed in making a social security payment. Subsection 16(6) provides that the Secretary may approve a place outside Australia for the lodgement of certain claims. New subparagraph (6)(c) adds the words ‘claims for AVTOP’.

The effect of this new item is to enable the Secretary to approve a place outside Australia for the lodgement of Australian Victim of Terrorism Overseas Payment claims.

### **Item 24 – After subsection 31(1)**

Item 24 inserts new subsection (1A) after subsection 31(1) of the *Social Security (Administration) Act 1999*.

Section 31 of the *Social Security (Administration) Act 1999* provides for the exclusion of certain claims from the requirements of section 29. Section 29 sets out the general rule in relation to residence requirements for claimants.

New subsection 31(1A) of the *Social Security (Administration) Act 1999* states that section 29 does not apply to a claim for an Australian Victim of Terrorism Overseas Payment.

The intention is to exclude an Australian Victim of Terrorism Overseas Payment claim from the general residency requirement provided for in the *Social Security (Administration) Act 1999*.

### **Item 25 – Subsection 36(1)**

Item 25 makes a technical amendment by omitting the reference to “subsection (2)” and substituting it with a reference to “this section”.

### **Item 25A – at the end of section 39**

Item 25A inserts three new subsections at the end of section 39 of the *Social Security (Administration) Act 1999*.

Existing section 39 of the *Social Security (Administration) Act 1999* provides that, where the Secretary does not make a determination regarding a claim within the period of 13 weeks after the day on which the claim was made, the Secretary is deemed to have rejected the claim.

#### Subsection (6)

Subsection (6) enables the Secretary to determine a specified period that is longer than 13 weeks as applying for the processing of claims for an Australian Victim of Terrorism Overseas Payment in relation to a declared overseas terrorist act. This recognises that a longer period of time may be needed to assess claims under the proposed scheme, particularly in circumstances where there are a large number of victims.

#### Subsection (7)

Subsection (7) provides that, if the Secretary has determined a longer period in accordance with subsection (6), and the Secretary does not make a determination within the longer period so specified, the Secretary is deemed to have made, at the end of that longer period, a determination rejecting the claim in accordance with subsection (1). In addition, subsection (7) provides that, where a person who makes a claim for an Australian Victim of Terrorism Overseas Payment is not qualified for the Australian Victim of Terrorism Overseas Payment on the date on which the claim

is made, but becomes qualified within the longer period determined by the Secretary, the claim is taken to have been made on the day on which the person becomes qualified.

These amendments could have an increased financial impact. This is because, if the Secretary determines that a longer period should apply for the processing of claims, there is a possibility that some claims that would have been deemed refused under the normal 13 week period could be paid under the extended timeframe, effectively increasing the amount of money paid out.

However, the inclusion of a provision allowing the Secretary to extend the period for determining claims, and thereby reduce the number of deemed refusals, should also reduce the number of avoidable appeals, particularly following an incident with a large number of victims where there are insufficient resources to consider all claims within the normal 13 week period. The costs associated with appeals and reviews can be high, and it is desirable to avoid unnecessary appeals and reviews.

#### Subsection (8)

Subsection (8) provides that a determination made by the Secretary under subsection (6) is not a legislative instrument. This provision is included to assist readers. It is merely declaratory of the law and not an exemption. The declaration is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

#### **Item 26 – After section 46A**

Item 26 inserts new Section 46B entitled ‘Payment of AVTOP’ after section 46A.

#### **Section 46B Payment of AVTOP**

Section 46B provides further guidance on when and how a person’s Australian Victim of Terrorism Overseas Payment is to be paid.

#### Subsection (1)

Subsection (1) provides guidance on the date on which a person’s Australian Victim of Terrorism Overseas Payment is to be paid.

#### *Paragraph (1)(a)*

Paragraph (1)(a) provides that, unless the Secretary has made a determination that a person’s Australian Victim of Terrorism Overseas Payment should be paid by instalment in accordance with subsection (2), the payment is to be paid as a lump sum payment (in accordance with section 47).

#### *Paragraph (1)(b)*

Paragraph (1)(b) provides that, unless the Secretary has made a determination that a person’s Australian Victim of Terrorism Overseas Payment should be paid by instalment in accordance with subsection (2), the payment is to be paid on the date that is determined by the Secretary as being the earliest date on which it is reasonably practicable for the payment to be made.

#### Subsection (2)

Subsection (2) enables the Secretary to determine that the person’s Australian Victim of Terrorism Overseas Payment is to be paid by instalments if the Secretary considers that this is appropriate. This is consistent with the AGDRP.

#### **Item 27 – Subsection 47(1) (after paragraph (aaa) of the definition of lump sum benefit)**

Item 27 inserts new subparagraph (aaa) after paragraph (aa) of the definition of lump sum benefit. Subsection (1) provides a definition of ‘lump sum benefit’ in the *Social Security (Administration) Act 1999*. New paragraph (aaa) inserts the Australian Victim of Terrorism Overseas Payment into the list of definitions, except where the Secretary has made a determination under subsection 46B(2).