



Law Council
OF AUSTRALIA

Martyn Hagan
Acting Secretary-General

1 March 2013

Mr Geoff McDonald
First Assistant Secretary
National Security Law and Policy Division
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: AVTOP.Principles@ag.gov.au

Dear Mr McDonald

AUSTRALIAN VICTIMS OF TERRORISM OVERSEAS PAYMENT PRINCIPLE 2012

Thank you for your letter of 11 December 2012 inviting the Law Council to comment on the *Social Security (Australian Victim of Terrorism Overseas Payment) Principle 2012* (the Principle). I also thank you for the extension of time obtained from your department on 17 January 2013 for the Law Council's comments.

The Law Council has consulted with its constituent bodies and has received comments from the Law Society of South Australia (LSSA) which may be of assistance in finalising the Principle. These comments are detailed below.

As you know, the *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* (Cth) (the Act) establishes a scheme for financial assistance for Australians injured overseas as a result of terrorist acts and for close family members of Australians killed through such acts. The assistance takes the form of an Australian Victim of Overseas Terrorism Payment (AVTOP) by the Government.

The Act provides that the Secretary of the Attorney-General's Department (the AGD Secretary) determines the amount of an AVTOP in accordance with AVTOP Principles made by the Attorney-General. Accordingly, the Principle is being made pursuant to section 1061PAF of the *Social Security Act 1991* (Cth) (the 1991 Act).

The Principle contains criteria for the determination of the amounts of AVTOPs for primary and secondary victims. Primary victims are people harmed as a result of a declared terrorist act. Secondary victims are family members of people who die as a result of such an act within two years of the day the terrorist act occurred. The amount of an AVTOP for

a primary or secondary victim must not exceed \$75,000 and the sum of all AVTOPs for secondary victims must not exceed \$75,000.

The criteria for primary victims include:

- The nature of the injury as determined in accordance with a list of injuries and corresponding amounts;
- The impact of the terrorist act on the victim's life as determined in accordance with ratings of impacts and corresponding amounts; and
- Any reduction applied because of other financial assistance received from a foreign country or because of circumstances, such as the victim travelling to a foreign country despite an Australian Government travel warning not to do so.

The criteria for secondary victims include:

- The relationship between the secondary victim and the deceased;
- The number of secondary victims (who must share the maximum AVTOP of \$75,000); and
- Any reduction applied because of: other financial assistance from a foreign country; any AVTOP made to the deceased as a primary victim and relevant circumstances such as the close family member travelling to a foreign country despite an Australian Government travel warning.

The Act provides that a primary victim must claim financial assistance within two years of the declaration by the Prime Minister of a terrorist act as a 'declared overseas terrorist act' under the 1991 Act. A secondary victim must claim within 12 months of the death of the close family member. The AGD Secretary may accept late claims in defined circumstances.

The Law Society of South Australia (LSSA) notes that there appears to be an inconsistency between the Act and the Explanatory Statement to the Principle, which refers at page 23 to the primary victim being required to make a claim within two years of the incident rather than within two years of the declaration of the terrorist act as provided in the Act.

The Principle provides that the Secretary must not take into account any expenses incurred by primary or secondary victims in determining the amount of the AVTOP. The Explanatory Statement notes that this reflects the fact that the financial assistance scheme is not designed to reimburse victims for any specific costs incurred and that this is consistent with state and territory victims of crime schemes.

The LSSA questions the fairness of these provisions in the Principle, as it notes that significant and substantial expenses are often incurred by primary victims and close family members for repatriation to Australia of injured primary victims or deceased close family members. While the Law Council acknowledges that the AVTOP scheme supplements other forms of assistance such as repatriation assistance and the Australian Government Disaster Recovery Payment scheme, which could cover repatriation costs, it queries the necessity for the exclusion of all incurred costs.

The Law Council also queries the assertion in the Explanatory Statement that the exclusion of incurred costs is consistent with state and territory victims of crime schemes. While some schemes such as the NSW scheme do not reimburse for costs where the victim can access a relevant service provided by the Government or where the victim can be reimbursed through other means such as insurance, most schemes allow claims for costs and losses, as well as compensation for injuries and pain and suffering, or relating to a death.¹

The Principle provides a schedule listing injuries suffered by primary victims and corresponding amounts. The Explanatory Statement notes that the scheme has been drafted to minimise the use of subjective tests and discretion and to ensure that the decision maker has clear guidance as to how a claim should be assessed. It also notes that this means that the scheme necessarily draws what may appear to be arbitrary lines. Even if this need for 'arbitrary lines' is accepted, the LSSA notes what appear to be a number of anomalies in the schedule of injuries for primary victims, which the Law Council suggests should be addressed before the Principle is finalised. These anomalies include:

- The failure to include toe amputations in the schedule other than big toes when amputations of all fingers have been included;
- The allocation of only double the amount for the loss of four or more front teeth than the amount for the loss of one front tooth and the allocation of only 50% more for fracture of two or more ribs than the amount for one fractured rib.

Section 1061PAF of the Act also states that the AVTOP Principles may provide that certain factors can be taken into account in determining the amount of an AVTOP. These factors include: the circumstances of the relevant injury or death; whether the primary victim or the close family member was directed by an official of Australia or a foreign country not to go to the place where the terrorist act occurred; and whether there was travel advice on an Australian Government website advising against travelling to the country, region or place where the terrorist act occurred.

The Principle provides that the Secretary may reduce the amount of an AVTOP in such circumstances by defined percentages according to whether the primary victim or the close family member:

- Failed to take reasonable steps to avoid harm or acted recklessly when the terrorist act occurred (10%);
- Travelled to the relevant place despite travel advice on an Australian government website advising people to reconsider the need to travel there because of the high risk of a terrorist act (15%);
- Travelled to the relevant place despite travel advice on an Australian government website advising against travel there because of a high risk of a terrorist act (20%);
- Was directed by an official of Australia or a foreign country to leave or not go to the relevant place because of a high risk of a terrorist act (50%).

¹ See *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victim Support and Rehabilitation Act 1996* (NSW); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Assistance Act 2006* (NT); and *Victims of Crime Assistance Act 1976* (Tas).

The Principle also provides that the Secretary must not reduce the amount if the primary victim or the deceased person was in the place for a humanitarian purpose, or on official government business, or if the Secretary considers it appropriate in the particular case not to reduce the amount.

The LSSA notes that it may be difficult for primary victims or close family members to access advice on Australian government websites if they are travelling in remote areas. While the Law Council acknowledges that the Secretary's general discretion not to reduce the amount would be able to be exercised in these circumstances, it also suggests that the relevant provisions in the Principle could be amended to provide that the reduction only applies if the primary victim or the close family member was able to access the relevant advice and still travelled to the relevant place.

I trust that these matters are of assistance to the Attorney-General's Department in finalising the Principle. Thank you again for providing the Law Council with the opportunity to comment.

These comments are made with the authority delegated to the Secretary-General by the Directors of the Law Council of Australia, but do not necessarily reflect the views of each Director.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Martyn Hagan', written in a cursive style.

Martyn Hagan
Acting Secretary-General