



DEPARTMENT OF THE SENATE

PROCEDURAL INFORMATION BULLETIN

No. 309

11 November 2016

For the sitting period 7 to 10 November 2016

CASUAL VACANCIES

Having announced that he intended to resign to attend to his business difficulties (see [Bulletin No. 308](#)), Senator Day then indicated that he would be continuing on as a senator before unexpectedly submitting his resignation to the President on 1 November. When informing the Senate of the resignation on 7 November, the President advised senators that, while he had notified the Governor of South Australia of a vacancy in the representation of that state, he was unable to inform the Governor that it was a vacancy to which section 15 of the Constitution applied and would need to put the matter before the Senate (see below).

Senator Kitching was sworn in on 7 November having been chosen by the Parliament of Victoria to fill the vacancy caused by the resignation of Senator Conroy (see [Bulletin No. 308](#)).

QUALIFICATION OF SENATORS

Section 44 of the Constitution provides numerous grounds on which persons may be ineligible to stand for election or to continue to sit in either House. These include being an undischarged bankrupt or insolvent, owing allegiance to a foreign power, being convicted and under sentence, or awaiting sentence, for an offence carrying a penalty of imprisonment of one year or longer, holding an office of profit under the Crown or having a direct or indirect pecuniary interest in an agreement with the public service of the Commonwealth (except in specified circumstances). The purpose of these provisions is to ensure that people elected to Parliament are beholden to no-one but the electors as a whole and may therefore perform their duties free from undue external influence, including from the executive government, foreign governments and commercial pressures.

In an extraordinary turn of events, the Senate on 7 November referred two sets of questions to the High Court sitting as the Court of Disputed Returns, under the relevant provisions of the *Commonwealth Electoral Act 1918* (CEA), based on information received by the President that two senators were potentially ineligible to have been chosen at the election on 2 July 2016.

Early in the day, the President informed the Senate that these two matters regarding the qualification of senators had been brought to his attention, one relating to former Senator Day and the other concerning Senator Culleton. He then tabled correspondence from the Special Minister of State (Senator Ryan), with numerous attachments, and emails from Senator Day, providing information about a possible breach of section 44(v) by former Senator Day (direct or indirect pecuniary interest in relation to the lease for his electorate office), and from the Attorney-General (Senator Brandis) and Senator Culleton about a possible breach of section 44(ii) (convicted and awaiting sentence for a relevant offence).

Later in the day, motions to refer both matters to the Court of Disputed Returns pursuant to section 376 of the CEA were moved by leave, debated and agreed to. Further documents were

tabled during the course of the debates, including a copy of advice by the Solicitor-General which the Attorney had provided to Senator Culleton (tabled by Senator Culleton). Had either matter made it onto the Notice Paper as a notice of motion or order of the day, it would have been characterised as business of the Senate under standing order 58.

Under section 377 of the CEA, the President is required to transmit to the Court the questions for determination “together with any proceedings, papers, reports, or documents relating to the question in the possession of the House in which the question arises”. On 9 November, the President tabled his covering letters to the Principal Registrar in both matters, describing the questions and the material transmitted (which included all the tabled documents, the relevant *Journals*, copies of certificates of election attached to the returned writs, and extracts from the debates). The President informed the Senate that these had been delivered to the Court by the Usher of the Black Rod. The President also tabled in the Senate on 10 November notices of directions hearings in both matters to be held by the Court of Disputed Returns on 21 November.

During question time on several days, the Opposition continued to probe ministers about what they knew of former Senator Day’s electorate office arrangements and when they knew it. Various notices of motion were also given in relation to former Senator Day. An order for production of legal advice provided to the Government by David Jackson QC was agreed to on 9 November but had not been tabled by the end of the sitting week. When the motion was moved, the duty minister referred to the long-standing practice that governments do not disclose the content of legal advice, citing a former ALP Senate minister in 2011, but neglected to mention another expression of the practice in 2008 to the effect that governments table legal advice when they consider it is in their interests to do so.

LEGISLATION

Numerous bills were passed during the week, including the main appropriation bills which will now provide funds for the ordinary annual services of the Government, other services and the parliamentary departments for the rest of the financial year.

The Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 was the subject of a forensic committee of the whole debate on 9 November during which senators asked detailed questions and received detailed answers from the Attorney-General before the bill (a Senate bill) was passed with only the Government amendment agreed to. The amendment addressed concerns raised by the Parliamentary Joint Committee on Intelligence and Security about legal representation of young people in control order proceedings and was widely welcomed. Other amendments moved by Senator Hanson and Senator Leyonhjelm were not agreed to.

Other bills or packages of bills which have attracted much attention in recent weeks were introduced into the Senate. These included bills to replace the troubled former VET FEE HELP scheme and to implement the so-called backpacker tax changes. The simultaneous dissolution trigger bills to re-establish the Australian Building and Construction Commission and to provide for further regulation of registered organisations were also re-introduced, having again passed the House of Representatives following the election. If the bills

are negated again by the Senate or amended in terms unacceptable to the House of Representatives, then the conditions for a joint sitting of the Houses under section 57 of the Constitution may be established. Given the section 44 matters referred to above, however, there was some speculation that the bills would not be brought on for debate this year, or while those issues remained unresolved.

A private senator's bill, the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2016 (also referred to as "Carly's law" after a 14 year old victim of a much older paedophile who had groomed her online), was debated during the time for private senators' bills on 10 November while the victim's mother observed from the public gallery. While there was broad sympathy for the idea, a note of caution was expressed about the complexities of applying the law without unintended consequences and the second reading debate had not concluded before the available time expired.

The Narcotic Drugs Legislation Amendment Bill 2016 and an associated bill, which complete the legislative measures necessary to regulate use of medicinal cannabis, passed as non-controversial measures on 10 November. During the debate, Senator Macdonald drew attention to the work of the Legal and Constitutional Affairs Legislation Committee in reviewing a private senator's bill on the subject which was the basis of the government's scheme. The private senator's bill was introduced by Senator Di Natale and also sponsored by Senators Macdonald, Leyonhjelm and Urquhart, indicating the cross-party support for the measure.

Finally, the much-publicised Plebiscite (Same-Sex Marriage) Bill 2016 was introduced on 7 November and defeated at second reading later that evening.

DISALLOWANCE

A motion to disallow the Classification Amendment (CHC Domain Scores) Principles 2016 (made under the *Aged Care Act 1997*) was unsuccessful on 9 November.

The report of the Legal and Constitutional Affairs References Committee on the controversial Legal Services Amendment (Solicitor-General Opinions) Direction 2016, made under the *Judiciary Act 1903*, presented on 8 November, was divided along party lines and was vigorously debated. The direction was the subject of a disallowance motion moved by the Leader of the Opposition in the Senate, Senator Wong, on 10 November but the issue was not resolved when Senator Wong sought leave to continue her remarks, which had the effect of adjourning the debate. In the meantime, earlier on 10 November, the Attorney-General made and registered a new direction, repealing the original direction. The repealing direction had as its commencement date the day of registration. Subsection 12(1) of the *Legislation Act 2003* provides that an instrument commences on the day after the day it is registered unless the instrument provides otherwise, suggesting that the provision of an earlier commencement day in the repealing direction may have been related to the pending disallowance notice.

In what may be argued as comparable circumstances, the Senate has proceeded with a disallowance motion even where the instrument in question had already been disallowed by the House of Representatives (in unusual circumstances – OASP, 13th ed., p. 423), ensuring

that the Senate's consent would be required to remake an instrument the same in substance as the disallowed instrument.

The next sitting day is the last day for resolving Senator Leyonhjelm's disallowance motion in relation to the Customs (Prohibited Imports) Amendment (Shotguns and Shotgun Magazines) Regulation 2016. To forestall any difficulties in resolving the matter, the Government gave notice of a motion on 10 November to provide for the matter to be called on by a certain time on the next sitting day and for the question to be put before the deemed disallowance provisions take effect.

HOUSEKEEPING

An order setting the days of meeting for 2017 and the schedule of estimates hearings was agreed on 8 November.

On the same day, the Senate adopted the recommendations of the Procedure Committee in its *First report of 2016*. The right of senators to move a motion to take note of a ministerial statement is now in standing order 169 while standing order 175 was amended to add to the exception allowing senators to breastfeed in the chamber. Senators caring for infants may bring them into the chamber for brief periods at the discretion of the President, provided business is not disrupted. In speaking to the report, the Deputy President indicated that she expected practice to develop with common sense but that some guidance for temporary chairs would be considered.

As foreshadowed (see [Bulletin No. 308](#)), the order rescinding restrictions on photography was amended to come into effect on 7 November. The President tabled the revised media rules on 10 November.

ORDERS FOR PRODUCTION OF DOCUMENTS

Apart from the matters noted above, new orders were agreed to as follows:

- modelling referred to in the United Nations Framework on the Convention on Climate Change session SB145(2016) (agreed 7 November) – due 1 December;
- all information used to compile a report entitled *Cashless Debit Card Trial Progress Report* by the Department of Social Services (agreed 9 November) – due 16 November;
- the Design and Mobilisation contract between the Commonwealth and DCNS (agreed 9 November) – due 24 November.

The responsible minister responded to an order for documents relating to the Student Builder Pilot Program run by the North East Vocational College (agreed 8 November) by tabling several documents but withholding others on a range of grounds including deliberative documents provided in confidence (whose disclosure could prejudice unspecified trust and provision of future information), that documents had been subject to Cabinet consideration or that they contained commercially sensitive information that could harm the business interests of third parties. The public interest claim was minimally articulated.

The Australian Competition and Consumer Commission complies assiduously with an ongoing order for production of an annual report on anti-competitive practices in the private health insurance industry, initiated many years ago by Senator Harradine. The report for the 2014-15 financial year was tabled on 7 November.

RELATED RESOURCES

The [Dynamic Red](#) records proceedings in the Senate as they happen each day.

The [Senate Daily Summary](#) provides more detailed information on Senate proceedings, including progress of legislation, committee reports and other documents tabled and major actions by the Senate.

Like this bulletin, these documents can be found on the [Senate website](#).

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