



Department of the Senate

Senate Scrutiny of Bills Committee

NEWS

14 August 2015 (drawing on material in the committee's *Alert Digest No. 7 of 2015* and *Seventh Report of 2015*)

Introduction

This newsletter highlights key aspects of the Senate Scrutiny of Bills Committee's work, with a particular focus on information that may be useful when bills are debated and to raise awareness about scrutiny principles (see Senate Standing Order 24).

For more detail and discussion of these matters and comments on additional bills look to the committee's [Alert Digests](#) and [Reports](#). An index to all committee comments is available [here](#).

Key scrutiny issues

- **Australian Citizenship Amendment (Allegiance to Australia) Bill 2015** ([Alert Digest No. 7 of 2015](#))
 - ❖ Trespass on personal rights and liberties—loss of citizenship without appropriate judicial process: The bill provides for the 'automatic' cessation of the Australian citizenship of dual nationals if they engage in certain conduct. Although the specified conduct is defined by reference to offences in the *Criminal Code* it is unclear how, if at all, qualifications built into such offences (such as knowledge, intention or recklessness elements of an offence) will apply. In addition, it is significant that a broad range of conduct is specified in the bill. The committee expressed concern that a person will lose their citizenship on the basis of alleged or suspected criminal conduct in circumstances where:
 - it is unclear whether or how protections associated with particular offences (such as the fault elements of offences) will be applicable; and
 - the usual protections associated with the criminal judicial process have not been afforded.

The committee has sought a detailed justification from the Minister in light of these concerns, including a detailed and particularised explanation as to why all of the specified conduct is considered an appropriate basis for the loss of citizenship (especially noting that the loss is 'automatic').
 - ❖ Trespass on personal rights and liberties—breadth and proportionality of provision relating to loss of citizenship following conviction: In addition to providing for the 'automatic' cessation of citizenship by conduct (discussed above), the bill also provides for 'automatic' cessation of the Australian citizenship of dual nationals if they are convicted of a specified offence. The committee noted that from a scrutiny perspective the breadth of offences that trigger loss of citizenship is a matter of significant concern, particularly because not all of the offences relate directly to terrorist activities. For example, one of the listed offences relates to intentionally destroying or damaging Commonwealth property. The maximum custodial penalty for the offences ranges from five years imprisonment to life. The committee noted that the explanatory memorandum does not offer a particularised justification for the inclusion of the specified offences. The committee is therefore seeking a detailed and particularised explanation as to why conviction for each of the specified offences justifies the loss of citizenship.
 - ❖ Trespass on personal rights and liberties and delegation of legislative power—breadth and proportionality of provision relating to loss of citizenship in the service of a declared terrorist organisation: The bill also provides for the 'automatic' cessation of the Australian citizenship of dual

nationals if they act in the service of a declared terrorist organisation outside Australia. The committee noted two scrutiny concerns in relation to this provision specifically:

- The operation of the provision relies upon a ministerial declaration of a terrorist organisation that is not a legislative instrument. The committee is therefore seeking an explanation from the Minister in relation to making loss of citizenship reliant upon a ministerial declaration that is not subject to disallowance by the Parliament.
 - The provision extends not only to a person who fights for a declared terrorist organisation, but also to one who 'is in the service of' such an organisation. The provision therefore has a wide application and may capture conduct such as the provision of medical or other aid. The committee is therefore seeking an explanation from the Minister which explains why the broad application of this provision is appropriate.
- ❖ Exclusion of the right to be heard: The bill is structured so that it includes provisions that are said to be 'self-executing' or 'automatic' (to the extent that they are deemed to operate without requiring an official decision that establishes the loss of citizenship). This means that a person may be deemed to have lost their citizenship without having been given any prior opportunity to contest the basis of this conclusion, though whether or not a person has engaged in the conduct required to trigger the operation of the provisions may be questions about which there is genuine dispute. This exclusion of the right to a fair hearing and lack of procedural fairness is a significant scrutiny concern. The committee has therefore requested further justification from the Minister.
- ❖ Exclusion of natural justice, limitation of judicial review, merits review—Minister's power to exempt a person from the operation of the cessation provisions: Provisions in the bill give the Minister a personal (i.e. non-delegable) discretionary power to exempt a person from the effect of the cessation of citizenship provisions. However, the Minister does not have a duty to consider whether to exercise the power, and the bill also expressly excludes the rules of natural justice under this provision. The explanatory memorandum simply repeats the terms of the provision without providing further explanation and a justification for the proposed approach. The committee has sought the Minister's advice which addresses the justification for the exclusion of the fair hearing rule and the rule against actual and ostensible bias.
- While on the face of it the powers to exempt a person from the effect of the cessation clauses can provide a mechanism to counteract the breadth of the cessation provisions, the effect of the 'no duty to consider' provisions is that standard judicial review remedies have no utility and there are, in fact, no meaningful jurisdictional limits to the exercise of the cessation powers. This is a significant scrutiny concern and the committee has sought the Minister's justification for the procedural fairness of this approach and why a mechanism for merits review in relation to the exemption power has not been included in the bill.
- ❖ Trespass on personal rights and liberties—uncertain operation of the law: One of the core elements of the rule of law is that the content of the law should be stated with clarity. Where the rights and interests affected are of great significance the importance of knowing how a law might affect the right is magnified. In this context, from a scrutiny perspective, the proposition that a person may lose their citizenship through operation of law – in the absence of a decision that applies the law to their circumstances or even requires them to be notified of the result, requires a comprehensive justification. The bill does also not deal with circumstances in which a conviction may be set aside on appeal or a person is later acquitted of relevant charges. The committee has sought the Minister's advice as to the rationale for the proposed approach and whether legislative guidance can be provided to address the circumstances outlined above.

- **Appropriation Bill (No. 4) 2014-2015** ([Seventh Report of 2015](#))
 - ❖ Delegation of legislative power (scrutiny of payments to the States and Territories): The committee thanks the Minister for Finance for further advice in relation to the nature of determinations made under clause 14 (relating to grants of financial assistance to the States and Territories). The committee has requested that additional explanatory material be included in the explanatory memoranda for future even-numbered appropriation bills. The committee also followed up about information sought from the Treasurer in relation to the parliamentary (and public) scrutiny mechanisms available in relation to payments to the States and Territories made under standing appropriations.
- **Criminal Code Amendment (Animal Protection) Bill 2015** ([Seventh Report of 2015](#))
 - ❖ Various (reversal of burden of proof, absolute liability, offences and penalties): The committee sought advice from the Senator about a number of scrutiny issues and received a comprehensive reply addressing them. The committee requested that key information be included in the explanatory memorandum and left these matters to the Senate.
- **Passports Legislation Amendment (Integrity) Bill 2015** ([Seventh Report of 2015](#))
 - ❖ Broad discretionary power and merits review: The committee sought advice from the Minister in relation to a provision that confers a broad discretionary power on the Minister to refuse any name or signature of a person that the Minister considers to be unacceptable, inappropriate or offensive. The Minister advised that consideration was given to including a non-exhaustive list of examples on the face of the legislation, however this information was included in the explanatory memorandum instead. The Minister also confirmed that an amendment to the bill would be proposed to add a merits review right for this provision. The committee welcomed the proposed inclusion of merits review rights, however the committee noted that it would still prefer to see a list of examples included in the primary legislation itself as an aid to statutory interpretation. The committee left the question of whether the proposed approach is appropriate to the Senate as a whole.

Other bills for which advice is being sought from the Minister or proposer ([Alert Digest No. 7 of 2015](#))

The Senate Scrutiny of Bills Committee is also seeking advice from the relevant Minister or proposer in relation to provisions of other bills (responses will be considered and tabled in the committee's future *Reports*), including:

- **Australian Defence Force Cover Bill 2015** (delegation of legislative power—standing appropriation);
- **Australian Defence Force Superannuation Bill 2015** (delegation of legislative power—Henry VIII clause);
- **Medical Research Future Fund Bill 2015** (delegation of legislative power—exemption from disallowance); and
- **Migration Amendment (Regional Processing Arrangements) Bill 2015** (trespass on personal rights and liberties—retrospectivity).

Other responses received ([Seventh Report of 2015](#))

- **Airports Amendment Bill 2015** (delegation of legislative power—Sydney West Airport plan);
- **Customs Amendment (Australian Trusted Trader Programme) Bill 2015** (delegation of legislative power—use of framework legislation);
- **Export Charges (Collection) Bill 2015 and Imported Food Charges (Collection) Bill 2015** (delegation of legislative power—fees to be prescribed by regulations and trespass on personal rights and liberties—protection from civil proceedings);
- **Migration Amendment (Strengthening Biometrics Integrity) Bill 2015** (broad discretionary power to provide for 'another way' for the collection of personal identifiers and the collection of personal identifiers from minors and incapable persons); and

- **Private Health Insurance (Prudential Supervision) Bill 2015** (broad discretionary power; reversal of the onus of proof; delegation of legislative power—incorporation of instruments from time to time; delegation of administrative power).

This document contains a very brief summary of some recent comments made by the Senate Scrutiny of Bills Committee (Chair: Senator Helen Polley and Deputy Chair: Senator John Williams).

For any comments or questions, please contact:

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