Passports Legislation Amendment (Integrity) Bill 2015

Mary Anne Neilsen
Law and Bills Digest Section

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Date introduced: 4 June 2015
House: House of Representatives
Portfolio: Foreign Affairs

Commencement: Schedule 1 commences 28 days after Royal Assent with the exception of item 121 (a consequential amendment) which commences immediately after section 99 of the Biosecurity Act 2015. Schedule 2 commences the day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
**Purpose of the Bill**

The Passports Legislation Amendment (Integrity) Bill 2015 (the Bill) is the result of a review of the passports legislation ten years after it was enacted.

In particular, the Bill amends the Australian Passports Act 2005 to:

- provide that a travel-related document may be issued to a person on the Minister’s own initiative, to facilitate a lawful extradition, deportation, removal or prisoner transfer
- align the definition of ‘parental responsibility’ more closely to that in the Family Law Act 1975 to provide more certainty as to who is required to consent to a child having an Australian travel document
- provide that the Minister may refuse to process a passport application if there are reasonable grounds to suspect fraud or dishonesty in the application and
- make minor amendments to existing offence provisions and create a new offence criminalising the making or providing of false Australian travel documents.

The Bill also makes minor amendments to the Foreign Passports (Law Enforcement and Security) Act 2005 (Foreign Passports Act) and consequential amendments to a number of other Acts. It also repeals the Australian Passports (Transitional and Consequential) Act 2005.

**Structure of the Bill**

The Bill consists of two Schedules. Part 1 of Schedule 1 sets out the substantive amendments to the Australian Passports Act and the Foreign Passports Act. Parts 2 and 3 of Schedule 1 contain consequential amendments to a number of other Acts. Schedule 2 repeals the Australian Passports (Transitional and Consequentials) Act 2005.¹

**Background**

The Passports Act sets out the regime for the issue and administration of Australian travel documents to be used as evidence of identity and citizenship by Australian citizens who are travelling internationally. The last major overhaul of passports legislation occurred in 2005 when the previous Passports Act 1938 was split into two separate Acts—one setting out the regime for Australian passports and the other dealing with foreign passports. The new Passports Act as enacted in 2005 contained provisions creating new offences, widening the scope of old offences, and significantly increasing penalties for those offences. The new Foreign Passports Act included provisions to empower a ‘competent authority’ such as an Australian law enforcement agency to demand, confiscate and seize foreign passports. It also created offences for foreign travel documents.² The 2005 legislative changes were part of the Government’s stance on national security and law enforcement, particularly the need to prevent identity fraud.³

The Explanatory Memorandum states that the Bill follows a routine review of the passports legislation ten years after it was enacted.⁴

**Committee consideration**

At the time of writing, the Bill had not been referred to a parliamentary committee.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills Committee (Scrutiny of Bills Committee) has considered the Bill, commenting on a number of provisions and requesting a further response from the Minister in relation

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¹. The Australian Passports (Transitional and Consequentials) Act 2005 was part of the 2005 amendments referred to in the Background section of this Bills Digest. Amongst other things, this Bill removed reference to Australian passports from the Passports Act and renamed that Act as the Foreign Passports (Law Enforcement and Security) Act 2005. Being transitional and consequential it may now be repealed.

². For further information on the 2005 changes see: M Donaldson, Australian Passports Bill 2004, Bills digest, 75-77, 2004-05, Parliamentary Library, Canberra, 2004 and J Norberry, Anti-terrorism Bill (No. 2) 2004, Bills digest, 6, 2004-05, Parliamentary Library, Canberra, 2004, both accessed 4 August 2015. There was also a third Act, the Australian Passports (Application Fees) Bill 2005. Its purpose was to provide for the Minister for Foreign Affairs to make a determination in relation to application fees.


to one provision to do with the Minister’s broad discretionary power. Further information is provided below in the Key issues and provisions section.

Policy position of non-government parties/independents
The Australian Labor Party supports the Bill. The Shadow Minister for Foreign Affairs, Tanya Plibersek, in her second reading speech supporting the Bill, noted that the security and efficiency of Australia’s passport regime depends on continually reviewing and keeping legislation up to date with both international obligations and domestic laws. At the time of writing this Bills Digest the position of the Australian Greens and independents is not known.

Position of major interest groups
To date there has been no reported comment on the Bill.

Financial implications
The Explanatory Memorandum states that passage of Bill will not result in any additional cost, either to the Commonwealth or to applicants applying for passports or travel-related documents.

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Parliamentary Joint Committee on Human Rights
The Committee considers that the Bill does not require additional comment.

Key issues and provisions
Terminology
At the outset it is useful to clarify the meaning of some of the terms used in the Passports Act.

- ‘Australian passport’ means a passport issued under the Passports Act and issued only to Australian citizens
- ‘travel-related document’ means a document issued under section 9, and issued to non Australians (for example refugees and stateless persons) and to Australian citizens when it is unnecessary or undesirable to issue an Australian passport and
- ‘Australian travel document’ means either an ‘Australian passport’ or a ‘travel-related document’.

The Bill contains a number of amendments to the Passports Act that replace the term ‘Australian passport’ with the broader term ‘Australian travel document’ in order to encompass all documents issued for travel—that is, both Australian passports and travel-related documents.

Issue of travel-related documents by the Minister
Section 9 of the Passports Act deals with the issue of travel-related documents by the Minister for Foreign Affairs (the Minister). It provides that the Minister may issue a travel-related document to a person on application by or on behalf of that person.

Item 4 amends section 9 to provide that in addition, the Minister may issue a travel document on his/her own initiative provided certain circumstances apply. These circumstances, set out in proposed subparagraphs 9A(b)(i) to 9A(b)(iv) are to:

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8. The Statement of Compatibility with Human Rights (Statement of Compatibility) can be found at pages 29–38 of the Explanatory Memorandum to the Bill.
• remove, deport or extradite the person from Australia
• facilitate the deportation of the person to Australia
• extradite the person to Australia or
• effect an international prison transfer.

The rationale for this amendment is that a person should not be able to delay or obstruct a lawful expulsion to or from Australia by refusing consent to the issue of a travel document. The Explanatory Memorandum provides examples of where the provision would be needed.

In the case of a lawful extradition, the person being extradited is usually a fugitive with motivation to avoid being returned to Australia to face criminal allegations. Their extradition should not be frustrated by their refusal to consent to the issue of a travel-related document for the purposes of facilitating that travel.

In addition, there are a small number of cases each year where non-citizens are unable to obtain travel documents from their country of origin to facilitate their lawful removal from Australia. In these cases the Minister may, under the new subsection 9(1A), decide to issue these people with an Australian travel-related document to facilitate their removal. 11

A decision by the Minister to initiate travel documents to facilitate a lawful extradition, deportation, removal or prisoner transfer is not reviewable (item 52). The Statement of Compatibility argues that merits review would be inappropriate on the basis that the decisions are procedural and that the underlying decisions (that is, a decision that a person be extradited or deported et cetera) are reviewable decisions. 12

The Scrutiny of Bills Committee noted this lack of review rights. However in light of the detailed explanation provided in the Statement of Compatibility, the Committee chose to leave the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole. 13

Parental consent and the issue of passports

Section 11 of the Passports Act deals with issuing passports to children. It currently provides that the Minister must not issue an Australian passport to a child unless each person who has parental responsibility for the child consents to the child travelling internationally or there is an Australian court order that permits the child to travel internationally. 14 Currently under subsection 11(5) a person has ‘parental responsibility’ for a child if:

• the person is the child’s parent and has not had their parental responsibility removed by a court
• under a parenting order issued under the Family Law Act:
  – the child is to live with the person
  – the child is to spend time with the person, or
  – the person is responsible for the child’s long-term or day-to-day care, welfare and development or
• the person is entitled to guardianship or custody of, or access to, the child under Australian law.

Items 6 to 11 amend section 11 in several ways, the most significant of those amendments being:

• to replace the words ‘Australian passport’ with ‘Australian travel document’ (items 6, 7, 9 and 10). This amendment is to clarify that the provision deals with any Australian travel document issued to a child
• to remove references to ‘consents to the child travelling overseas’ and replace it with references to ‘consents to the child having an Australian travel document’ (items 6, 8). ‘Consent to travel overseas’ is an inaccurate term, as permission to travel overseas is dealt with under the Family Law Act and not under the Passports Act. Items 6 and 8 will clarify the Department of Foreign Affairs and Trade’s role in issuing travel documents

11. Explanatory Memorandum, op cit., p. 5.
14. Consent for a child to travel internationally includes permission for the child to have an Australian passport (subsection 11(4)). A court order permitting a child to travel internationally includes a reference to an order permitting the issue of an Australian passport to the child, or contact outside Australia between the child and another person.
so that the consent relates to a child having a travel document, rather than the consent being for a child to travel internationally and

- to change the meaning of ‘parental responsibility’ so that it is more closely aligned with the meaning of the definition contained in the Family Law Act (items 14–16).\(^1\)

As a result of these amendments, new section 11 would provide:

The Minister must not issue an Australian travel document to a child unless:

- each person who has parental responsibility for the child consents to the child having an Australian travel document or
- there is an Australian court order that permits:
  - the child to have an Australian travel document, or
  - the child to travel internationally, or
  - to live or spend time with another person who is outside Australia.

Under amended subsection 11(5) a person would have ‘parental responsibility’ for a child if:

- the person is the child’s parent and has not had their parental responsibility removed by a court or
- under a parenting order\(^16\) issued under the Family Law Act:
  - the child is to live with the person or
  - the person has parental responsibility for the child or
- the person has guardianship or custody of, or has parental responsibility for the child under Australian law.

The effect of this amended definition of ‘parental responsibility’ will be that those persons who have a court order to ‘spend time with’ or enable ‘access to’ a child but who do not have parental responsibility, will no longer be required to consent to a child having Australian travel documents such as a passport. The Explanatory Memorandum explains that the practical implementation of the current provision has been confusing and problematic for a small number of applicants each year. This includes, for example, applicants with sole parental responsibility under a court order who are currently required to seek consent from persons who ‘spend time with’ or have ‘access to’ a child, but who do not otherwise have parental responsibility.\(^17\)

It is of note that these amendments apply only in relation to consent for obtaining travel documents for a child. They do not remove the requirement contained in the Family Law Act for a person seeking to take a child overseas to obtain the consent in writing of all persons in whose favour a court order is made in relation to the child, or all other parties to proceedings for the making of a parenting order in relation to the child.\(^18\) In other words, these amendments do not remove the legal requirement for a person travelling overseas with a child to seek consent to the child’s travel from all persons who have court-awarded ‘access to’ or ‘spend time with’ orders for the child.

**Fraudulent travel documents**

It is an offence under the Passports Act to provide false or misleading information, statements or documents in relation to an application for an Australian travel document (sections 29, 30 and 31).

Item 34 inserts new section 19A and provides that the Minister may refuse to process an application for an Australian travel document if there are reasonable grounds to suspect there is false or misleading information in

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\(^1\) The concept of ‘parental responsibility’ was introduced in the Family Law Act in 1995 and is dealt with in Division 2 of Part VII. It is defined in section 61B to mean all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. Each parent has parental responsibility (subject to court orders) for a child under 18, and marital status, divorce or separation in the parental relationship has no impact on this responsibility (section 61). Ordinary parental responsibility rules can be altered, and even wholly displaced, by a parenting order made by a court.

\(^16\) Parenting orders, defined in section 64B of the Family Law Act, are court orders that may cover such matters as: who a child will live with, the time a child is to spend with a person; the allocation of parental responsibility, the form of consultation to be had on the exercise of shared parental responsibility; and communications that a child is to have with another person (including parents, grandparents or relatives). A parenting order may be applied for by either or both of the child’s parents, the child, a grandparent of the child, or any other person concerned with the care, welfare or development of the child (section 65C).

\(^17\) Explanatory Memorandum. op. cit., p. 9.

\(^18\) Ibid.
statements, documents or information given in relation to the application. This would be a reviewable decision (item 58). If the Minister refuses to process the application on these grounds this does not preclude a person making a fresh application for a travel document, providing all the eligibility requirements are met (proposed subsection 19A(3)). Nor does this provision limit the offences in sections 29, 30 and 31 to do with false and misleading statements and documents (proposed subsection 19A(4)). In other words, this new provision may be used instead of or in addition to, a criminal prosecution for these offences.

Offences

The Australian Passports Act includes a number of offences relating to fraud, both in the travel document application process and the subsequent use of Australian travel documents. These offences include:

- making or giving false statements in an Australian travel document application (sections 29 and 30)
- presenting false or misleading documents in an Australian travel document application (section 31)
- improperly using or possessing an Australian travel document (section 32)
- selling, damaging, altering or dishonestly obtaining an Australian travel document (sections 33 to 35) and
- failing to report a lost or stolen Australian travel document (section 41).

Items 41 to 48 make a number of minor amendments to improve the clarity and drafting of these offence provisions. Amendments include:

- re-numbering some provisions and
- clarifying that some offence provisions apply to the Australian travel documents themselves as well as to applications for Australian travel documents (items 41-46).

Item 49 is a more substantive amendment. It repeals section 36 and replaces it with a new section 36 making it an offence to make or provide false Australian travel documents with the intent that these documents will be used as though they were genuine.20 The maximum penalty for these offences is imprisonment for 10 years or 1,000 penalty units, or both.20 There is a defence of reasonable excuse in relation to an offence of providing false Australian travel documents and a note in the Bill confirms that the defendant would bear an evidential burden in relation to proving such a defence.21

The Explanatory Memorandum explains that there are no circumstances in which the making, creation or production of a false Australian travel document could be reasonably excused. However, the provision of a false travel document by one person to another person is subject to a reasonable excuse exception, as it is foreseeable that a person may not realise that the document in their possession is false.22 The reversal of the burden of proof is justified on the grounds that the reasonable excuse that must be proven is particularly within the knowledge of the person concerned.23

The Scrutiny of Bills Committee in general considers that the defence of reasonable excuse is too open-ended and that this will often make it inappropriate to require a defendant to prove a set of circumstances considered to establish the reasonableness of their actions. However in this particular case, in light of the explanation provided in the Explanatory Memorandum and the Statement of Compatibility, the Committee has chosen to leave it to the Senate as a whole to decide whether the evidential burden is appropriate.24

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19. Existing section 36 (possessing false Australian travel documents) is repealed and reinserted as section 32A (item 47).
20. The penalty is consistent with other offences in the Passports Act.
21. Generally, where a burden of proof is placed on a defendant it is an evidential burden only. An evidential burden requires the defendant to adduce or point to evidence that suggests a reasonable possibility that the matter either does exist or does not exist. If the defendant discharges an evidential burden, the prosecution must then disprove the relevant matters beyond reasonable doubt. A legal burden (the burden of proving the existence of the matter) requires a higher standard of proof and the Code provides that a defendant will have a legal burden of proof only if the law creating the offence so provides (subsection 13.4 of the Criminal Code).
22. Explanatory Memorandum, op. cit., p. 16.
Names on travel documents

Section 53 of the Passports Act deals with the form of Australian travel documents and includes requirements relating to the name that must appear on the particular travel document. Item 61 inserts new subsection 53(4)) allowing the Minister (or delegate) to refuse any name or signature of a person that would appear on the person’s Australian travel document, on the basis that the Minister considers the name to be unacceptable, inappropriate or offensive. Such a decision is reviewable (items 59). The Explanatory Memorandum provides a long list of examples of unacceptable, inappropriate or offensive names. The justification given in the statement of compatibility for this power of refusal is:

Given that passports are documents which are presented to officials in other countries as evidence of a person’s identity and citizenship, a restriction on the use of unacceptable or offensive names and signatures is reasonable and necessary. Examples of unacceptable names include names which are or contain: an expletive; a racial or ethnic slur or implication; an obscene or offensive term; a political statement or slogan; the name of, or reference to, a public institution or public office; a term that could mislead people into believing that the bearer has been awarded or conferred a title, award or decoration; or a string of words that would not commonly be recognised as a name.

The Scrutiny of Bills Committee has questioned this provision, stating that it confers a broad discretionary power on the Minister. Although the rationale for the power may be accepted, the Committee argues that the exercise of the power could mean that a person may not use their lawful name for travel purposes. The Committee has therefore sought the Minister’s advice as to whether consideration has been given to drafting the power so that it is more constrained by, for example, including a non-exhaustive list of examples of what may constitute an unacceptable, inappropriate or offensive name or signature in the legislation itself. The Committee has also asked whether the exercise of this power will be subject to merits review by the Administrative Appeals Tribunal.

Other provisions

Part 2 of Schedule 1 to the Bill contains consequential amendments to a number of other pieces of legislation. The main amendment is to replace the term ‘passport’ with the more expansive term ‘Australian travel document’.

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