

Legislation (Deferral of Sunsetting—Passports Instruments) Certificate 2025

EXPLANATORY STATEMENT

Issued by the Attorney-General in compliance with
section 15G of the *Legislation Act 2003*

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Passports Instruments Certificate 2025* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (the Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The Certificate will be subjected to the disallowance provisions of the Legislation Act as the deferred sunsetting day specified in the Certificate is after the first anniversary of the originally scheduled sunsetting day, which means that subsection 51(4) of that Act (which provides an exemption from disallowance for deferrals of 12 months or less) does not apply.

OUTLINE

Sunsetting is the automatic repeal of legislative instruments after a fixed period.

The Australian Government's sunsetting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. Under paragraph 51(1)(c) of the Legislation Act the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of either 6, 12, 18 or 24 months.

The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day. This allows instruments to continue to be in force for a further but limited period of time after the date on which they would otherwise sunset. This removes the administrative burden of remaking instruments which would have a limited duration prior to their repeal and potential replacement, or where circumstances prevent the making of replacement instruments prior to the sunsetting day.

The Certificate defers the sunseting date of the following instruments by 24 months from 1 October 2025 to 1 October 2027 (together, the ‘Passports Instruments’):

- a) *Australian Passports (Application Fees) Determination 2015*
- b) *Australian Passports Determination 2015*
- c) *Foreign Passports (Law Enforcement and Security) Determination 2015*.

The ability to defer sunseting dates is an integral part of the sunseting framework. It provides the necessary flexibility to ensure the standard 10-year sunseting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. In this case, the Passports Instruments are expected to be remade within 24 months of the sunseting date as a result of a review by the Department of Foreign Affairs and Trade (DFAT). If the Certificate were to be disallowed, there would not be enough time to review and remake the Instruments prior to the sunseting day.

PROCESS BEFORE CERTIFICATE WAS MADE

Regulatory impact analysis

Certificates of deferral of sunseting are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Impact Analysis (OIA). The OIA reference for this standing exemption is ID19633.

Consultation before making

Before the Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The *Australian Passports (Application Fees) Determination 2015*, *Australian Passports Determination 2015*, and *Foreign Passports (Law Enforcement and Security) Determination 2015* are made under the *Australian Passports (Application Fees) Act 2005*, the *Australian Passports Act 2005*, and the *Foreign Passports (Law Enforcement and Security) Act 2005*, respectively.

The *Australian Passports Act 2005* (the Passports Act) provides for the issue and administration of Australian passports, to be used as evidence of identity and citizenship by Australian citizens who are travelling internationally. The *Australian Passports Determination 2015* (the Passports Determination) specifies matters provided in the Passports Act, such as the issue of travel-related documents, including non-citizen travel documents; special circumstances under which an Australian travel document may be issued to a child; circumstances in which the Minister may refuse to issue an Australian travel document related to law enforcement matters; maximum validity for passports and

travel-related documents, and when concurrent documents may be issued; circumstances in which travel documents cease to be valid; disclosure of information by and to the Minister; names to appear on travel documents; circumstances under which a fee may be waived or refunded; and delegations and reviewability of decisions.

The *Australian Passports (Application Fees) Act 2005* (the Fees Act) provides for the imposition of fees, as taxes, for applications for Australian travel documents. The *Australian Passports (Application Fees) Determination 2015* lists the fees to apply for Australian passports and the various travel-related documents administered by the Australian Passport Office (APO).

The *Foreign Passports (Law Enforcement and Security) Act 2005* (the Foreign Passports Act) provides powers for responding to law enforcement matters that involve foreign travel documents, including the ability to demand surrender of a foreign passport related to law enforcement, security, or potential for harmful conduct provisions. The *Foreign Passports (Law Enforcement and Security) Determination 2015* specifies certain persons as being ‘competent authorities’ for the purposes of various powers under the Foreign Passports Act.

DFAT is undertaking a review of primary passport legislation to ensure its continued effectiveness in the context of a changing society and modernisation. Any changes to primary passport legislation will be reflected in remade Passports Instruments.

Certificates of deferral are machinery in nature, and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. This will minimise the administrative burden on stakeholders associated with consultation on a deferral that will only have effect for a limited amount of time. Any replacement instruments will be subject to further consultation and parliamentary oversight, including oversight of whether adequate consultation occurred with persons likely to be affected by the replacement instruments.

A 24-month deferral will allow sufficient time for DFAT to conduct the review and will avoid the need to remake the Passports Instruments in their current form for the short period of time before they are repealed and replacement instruments are made. As such, given that deferral of the sunset date of the Passports Instruments is consistent with the policy intent of the sunset regime and does not significantly alter existing arrangements, appropriate consultation has occurred for the purposes of section 17 of the Legislation Act.

Statutory preconditions relevant to the Certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunseting day can be deferred for 6, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the Legislation Act requires:

- a) the responsible rule-maker to apply to the Attorney-General in writing, and
- b) the Attorney-General to be satisfied that:
 - (i) the instrument would (apart from the operation of the sunseting provisions) be likely to cease to be in force within 24 months after its sunseting day
 - (ii) the proposed replacement instrument will not be able to be completed before the sunseting day for reasons that the rule-maker could not have foreseen and avoided
 - (iii) the dissolution or expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed, or
 - (iv) the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
- c) the Attorney-General to issue a certificate. The explanatory statement for the certificate must include a statement of reasons for the issue of the certificate.

The rule-maker for the Passports Instruments, the Minister for Foreign Affairs, Senator the Hon Penny Wong, provided a written application to the Attorney-General seeking a certificate of deferral of sunseting for the Passports Instruments. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Passports Instruments would, apart from the operation of Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months after their sunseting day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

Statement of Reasons for issuing of the Certificate

For the purposes of subsection 51(5) of the Legislation Act this section sets out the statement of reasons for issuing the Certificate.

The Certificate defers the sunseting date of the Passports Instruments by 24 months to 1 October 2027 to enable the DFAT to conduct a review of primary passport legislation to ensure its continued effectiveness in the context of a changing society and modernisation.

DFAT has commenced this review of primary passport legislation, which has involved engaging an independent consultancy firm to undertake a First Principles and Thematic Review (the Review) of the Australian Passport Office (APO) administered legislation. The Review identified 21 themes with

the final report identifying 13 key areas within existing legislation that impact the effective operation of the passport system and directly impact the APO's modernisation agenda.

The independent consultants have provided a selection of options against each of the 13 areas and have recommended that DFAT undertake additional analysis, investigation, and consultation. DFAT will, therefore, undertake further investigation and consultation, in line with the review recommendations, before preparing amending legislation.

A deferral of sunseting will provide sufficient time to undertake this additional work and prepare for amendments to passport legislation. It is anticipated amendments to primary legislation will result in the need to remake the existing legislative instruments.

Accordingly, the Passports Instruments will likely cease to be in force in their current form within 24 months of their original sunseting date.

More information

Further details on the provisions of the Certificate are provided in [Attachment A](#).

The Passports Instruments which are subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, are available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of the Certificate, and from the Department of Foreign Affairs and Trade about the Instruments to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting—Passports Instruments) Certificate 2025* (the Certificate) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

Overview of the Certificate

The Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*. Under that paragraph the Attorney-General can issue a certificate to defer the sunseting day of an instrument for a period of either 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the Certificate instead of the originally scheduled sunseting day. The Instruments specified in the Certificate are (together, the 'Passport Instruments'):

- a) *Australian Passports (Application Fees) Determination 2015*
- b) *Australian Passports Determination 2015*
- c) *Foreign Passports (Law Enforcement and Security) Determination 2015.*

The Passport Instruments are expected to be repealed and replaced within 24 months of their scheduled sunset day as part of the review of the legislative framework.

The Certificate allows the Passport Instruments to continue to be in force for a further, but limited, period of time when they would otherwise sunset. This removes the administrative burden of remaking the Instruments which would have a limited duration prior to their expected repeal and replacement, or where circumstances prevent the making of a replacement instrument prior to the sunset day.

Human Rights Implications

A certificate of deferral of sunset extends the operation of the instrument but does not change or affect the rights engaged under the original instrument.

The Passports Instruments engage certain rights and freedoms declared by the international instruments set out in section 3 of the Human Rights Act.

The Passports Instruments engage the following rights and freedoms as set out in section 3 of the Human Rights Act:

The Right to Freedom of Movement

Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone be free to leave any country, including their own. Article 12(4) provides that none shall be arbitrarily deprived of the right to enter their own country. Division 1 of Part 2 of the *Australian Passports Determination 2015* (Passports Determination), which sets out the type of travel-related documents the Minister may issue under sections 8 and 9 of the *Australian Passports Act 2005* (Passports Act), engages this right. The provisions under this Division promote the right of freedom of movement, by allowing the Minister to provide travel-related documents to persons who might not otherwise have access to them. Where the Minister decides to not issue a travel document, the right to freedom of movement is limited. However, this decision to limit the right will not be made unless the restriction is necessary, reasonable and proportionate, as outlined below.

Sections 6 and 7 allow the Minister to issue travel-related documents to non-citizen refugees

(convention travel documents) and to non-citizens who are about to leave Australia and are stateless or unable to obtain travel documents from the country of which they claim to be a national (certificates of identity). These sections implement Australia's international obligations under Article 28 of the Convention Relating to the Status of Refugees and Article 28 of the Convention relation to the Status of Stateless Persons, which relate to the issuing of travel documents. These provisions promote the right in Article 12(2) of any person to be free to leave any country, by allowing the Minister to provide travel-related documents to persons who might not otherwise have access to them.

The Minister's powers under the Division are discretionary. This is appropriate as there is no entitlement under the Passports Act for a person to be issued a travel-related document. There are sound reasons why the Minister should be able to refuse the grant of a travel-related document to non-citizens and to Australian citizens who are unable to obtain a passport.

The International Civil Aviation Organization (ICAO) standards require Contracting States to issue their citizens a travel document, in most cases it is appropriate that a person apply to their own country of citizenship for a travel document. In the case of a person who is not an Australia citizen, is not a refugee or stateless, and no other compelling reasons apply, the Minister may refuse to issue an Australian travel document if the person has not attempted to obtain a document from their country of citizenship.

The *Australian Passports (Application Fees) Act 2005* (Fees Act) and *Australian Passports (Application Fees) Determination 2015* (Fees Determination) engage the right to freedom of movement because the imposition of fees to obtain an Australian travel document could limit the freedom of an Australian citizen or resident to leave Australia, as found in Article 12(2) of the ICCPR. However, section 5 of the Fees Act caps the fees to be imposed in a financial year, subject to indexation. These amounts, particularly when viewed in the context of the costs of overseas travel are generally unlikely to restrict the freedom to leave one's own country protected by Article 12(2). In addition, sections 27 and 28 of the Determination provide for the waiver and refund of fees in certain circumstances.

Section 12 of the Passports Act, with section 11 of the Passports Determination, sets out circumstances in which the Minister may refuse to issue an Australian travel document to a person for reasons relating to law enforcement. Any restrictions on movement are necessary, reasonable and proportionate to achieving the objective of supporting law enforcement measures.

Part 2 of the *Foreign Passports (Law Enforcement and Security) Act 2005* (Foreign Passports Act)

sets out the circumstances in which a competent authority may request the Minister to order the surrender of a person's foreign travel documents (Division 1) and enforcement officers may demand the surrender of foreign travel documents if authorised by the Minister (Division 2).

Article 12(3) of the ICCPR, expressly provides that the right in Article 12(2) may be subject to restrictions which are provided for by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and are consistent with the other rights recognised in the ICCPR. These sections of the Passports Act, Passports Determination, Foreign Passports Act and *Foreign Passports (Law Enforcement and Security) Determination 2015* (Foreign Passports Determination) are a permissible limitation on the rights protected by Article 12 of the ICCPR. The restrictions are provided by law, and are necessary to facilitate law enforcement, to protect public order and Australia's national security.

Section 12 of the Passports Act, with section 11 of the Passports Determination, and Section 13 of the Foreign Passports Act, with section 6 of the Foreign Passports Determination, ensure any restrictions on movement are necessary, reasonable and proportionate to achieving the objective of supporting Australian law enforcement measures. They only apply where a 'competent authority' believes on reasonable grounds that a person is the subject of an Australian arrest warrant for an indictable offence or is prevented from travelling internationally by reason of an Australian court order, parole or bail condition, or a law of the Commonwealth or an order or direction made under such a law (subsection 13(1) of the Foreign Passports Act).

Section 14 of the Foreign Passports Act, combined with section 7 of the Foreign Passports Determination, ensures any restrictions on movement are necessary, reasonable and proportionate to achieving the objective of supporting international law enforcement cooperation. They will only apply where a 'competent authority' believes on reasonable grounds that a person is the subject of a foreign arrest warrant for a serious offence or is prevented from travelling internationally by reason of a foreign court order, parole or bail condition, or a law of a foreign country, or an order or direction made under such a law (subsection 14(1) of the Foreign Passports Act).

The Rights of the Child

According to Article 3 of the Convention on the Rights of the Child (CRC), in all actions concerning children, the best interests of a child shall be a primary consideration. State Parties must ensure the child such protection and care as is necessary for their well-being. Article 5 of the CRC expects State Parties to respect the responsibilities, rights, and duties of parents while Article 10 protects the right of a child to enter or leave a State Party for the purpose of family reunification. Article 18 states the

principle that parents or legal guardians have the primary responsibility for the upbringing and development of the child.

The Passports Determination engages the rights of the child contained in Articles 3, 5, 10 and 18 of the CRC. Section 10 of the Determination engages these rights by providing special circumstances under which the Minister may issue a passport to a child without the consent of all persons who have parental responsibility for that child or an Australian court order that permits issue of an Australian travel document or international travel. In doing so, it could limit the rights and responsibilities of persons who have parental responsibility for a child who have not consented to the child being issued a passport (non-consenting person). However, the circumstances are limited to those where it would be reasonable or necessary to limit these rights and responsibilities, and, in those circumstances, promote the child's right to freedom of movement. For example, the provisions promote the child's right to freedom of movement in circumstances where the non-consenting person was not contactable or was incapable of providing consent, or where a family violence order has been issued against the non-consenting person.

The provisions also promote and protect the rights of the child by providing discretion to issue an Australian travel document without full consent to ensure the protection and care necessary for a child's wellbeing.

There are also important safeguards in place. The provision does not apply if there are court proceedings pending that may affect the child's right to travel or who has parental responsibility for the child. Further, the Minister retains a discretion in relation to the issue of the passport and would not normally exercise powers under this section if it was inappropriate to do so. To the extent that section 10 limits the rights of non-consenting persons with parental responsibility, these are applied in a reasonable and proportionate manner to promote the rights of the child.

The Right to Privacy

Article 17 of the ICCPR provides the right not to be subjected to arbitrary or unlawful interferences with privacy. It also provides that everyone has the right to the protection of the law against such interference or attacks.

The Passports Determination engages the right to privacy contained in Article 17 of the ICCPR. Sections 20 to 23 of the Passports Determination specify the circumstances in which personal information may be disclosed to and by the Minister for the purposes of Division 1 of Part 5 of the Passports Act. DFAT's disclosure and information collection activities are necessary, reasonable, and

proportionate. They are provided for by law (sections 45 and 46 of the Passports Act) and are consistent with the *Privacy Act 1988* and the Australian Privacy Principles.

Section 24 of the Passports Determination further prescribes methods that may be used for confirming identity. This provision protects the integrity of the Australian passports system by helping to detect fraudulent travel document applications of persons who seek to have travel documents issued in multiple or false identities.

Section 53(3) of the Passports Act specifies the name that must appear on a person's Australian travel document. Section 25 of the Passports Determination specifies circumstances in which another name can be used. Section 25 promotes the right to privacy by increasing the choices available to a person in relation to the name by which they are identified on their Australian travel document while maintaining the integrity of the Australia passport system (including through preventing identity fraud).

Therefore, overall, the Passports Instruments Certificate is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act as, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate purpose. Any proposal to make a replacement instrument will be subject to parliamentary oversight and scrutiny unless exempt.

Before issuing the Certificate, the Attorney-General was satisfied that the Passports Instruments would, apart from the operation of the sunset provisions, cease to be in force within 24 months of their sunset date. Issuing a certificate of deferral therefore avoids the need to replace the Instruments in their current form for a short period of time before they are expected to be repealed and replaced.

Instruments that are replaced will be subject to parliamentary scrutiny and oversight through the disallowance processes unless otherwise exempt. The human rights impact of the remade Passports Instruments will be assessed at the time they are made, including through the requirement to prepare a Statement of Compatibility with Human Rights.

Conclusion

This Certificate is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act, because it promotes the protection of human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary, and proportionate.

NOTES ON THE CERTIFICATE

Section 1 Name

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Passports Instruments) Certificate 2025*. The Certificate may be cited by this name.

Section 2 Commencement

This section provides for the Certificate to commence on the day after it is registered.

Section 3 Authority

This section provides that the Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*.

Section 4 Deferral of sunseting

This section provides that the following instruments, for which the sunseting day is 1 October 2025, are repealed by section 51 of the *Legislation Act 2003* on 1 October 2027:

- a) *Australian Passports (Application Fees) Determination 2015*;
- b) *Australian Passports Determination 2015*;
- c) *Foreign Passports (Law Enforcement and Security) Determination 2015*.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 October 2027.