

**GENERAL SCHEME OF A DIPLOMATIC RELATIONS (MISCELLANEOUS
PROVISIONS) BILL 2016**

ARRANGEMENT OF HEADS

PART 1

Preliminary and General

Head

1. Short title
2. Definition
3. Repeal

PART 2

Amendment of the Diplomatic Relations and Immunities Act 1967

4. Government orders
5. Evidence of privileges and immunities

PART 3

Citizenship, Immigration and Employment Matters

6. Amendment of the Irish Nationality and Citizenship Act 1956
7. Amendment of the Immigration Act 2004
8. Amendment of the Employment Permits Act 2003

Long title

Provide a long title for the Bill.

AN ACT TO AMEND THE DIPLOMATIC RELATIONS AND IMMUNITIES ACT 1967, THE IRISH NATIONALITY AND CITIZENSHIP ACT 1956, THE IMMIGRATION ACT 2004 AND THE EMPLOYMENT PERMITS ACT 2003.

Explanatory note

The long title of the Bill will be considered further in consultation with the Office of the Parliamentary Counsel.

Head 1 – Short title

Provide along the following lines –

This Act may be cited as the Diplomatic Relations (Miscellaneous Provisions) Act 2016.

Explanatory note

This is a standard provision relating to the short title of the Bill.

Head 2 – Definition

Provide along the following lines –

In this Act “Act of 1967” means the Diplomatic Relations and Immunities Act 1967.

Explanatory note

This Head defines the term “Act of 1967”, which is used throughout the Bill.

Head 3 – Repeal

Provide along the following lines –

Section 49 of the Act of 1967 is repealed.

Explanatory note

This Head provides for the repeal of section 49 of the Act of 1967. Section 49 requires that the Irish Government's consent should be obtained before an Irish citizen can be appointed to serve in the State with an international organisation covered by the Act. A provision of this nature is not in line with standard practice in contemporary international relations. Another concern with section 49 is that it may be construed as interfering with an international organisation's right to freely appoint its own staff.

Head 4 – Government orders

Provide along the following lines –

The Act of 1967 is amended:

(a) in section 39, by inserting the following definitions:

‘Convention on the Privileges and Immunities of the United Nations’ means the General Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on the 13th day of February, 1946, as set out in the Third Schedule to this Act;

‘Convention on the Privileges and Immunities of the Specialised Agencies’ means the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations adopted by the General Assembly of the United Nations on the 21st day of November, 1947, and the Annexes thereto, as set out in the Fourth Schedule to this Act and any annex thereto standing specified in an order under section 17 of this Act.

(b) in section 40(1), section 42A(1) and section 43(1), by substituting “equivalent or analogous to those conferred upon, or afforded in relation to, sending states, missions or international organisations under the Vienna Convention, the Convention on the Privileges and Immunities of the United Nations, or the Convention on the Privileges and Immunities of the Specialised Agencies or any other international agreement scheduled to this Act,” for “(other than inviolability, exemptions, facilities, immunities, privileges or rights not conferred upon, or afforded in relation to, sending states or missions under the Vienna Convention)”.

(c) in section 42A(1)(b), by inserting “or arrangement” after “an international agreement”.

(d) in section 42A, by inserting the following subsection after subsection (1):

(1A) (i) The Government may by order make provision to enable the International Committee of the Red Cross to enjoy in the State confidentiality of its communications, where provided for by an international agreement or arrangement to which the State or the Government is or intends to become a party.

(ii) The confidentiality of communications provided for in an order made pursuant to subparagraph (i) shall apply notwithstanding any provision of the Freedom of Information Act 2014, the Data Protection Act 1988 or any other enactment.

(e) by inserting the following section after section 50:

51. — Every order under this Part in force immediately before the passing of the Diplomatic Relations (Miscellaneous Provisions) Act 2016 and to which section 50 does not apply shall have statutory effect as if it were an Act of the Oireachtas.

Explanatory note

Under powers set out in Part VIII of the Act of 1967, the Government may make orders extending privileges and immunities to an organisation, body or individual. Such a procedure is considered desirable in order to extend privileges and immunities as required to give effect to the State's international obligations, and to do so expeditiously, without the need for primary legislation. Without an efficient procedure for extending privileges and immunities by way of secondary legislation, delays would inevitably arise for the State in ratifying certain international agreements and joining certain international organisations or bodies.

In 2006, amendments were introduced to Part VIII to clarify the parameters within which the Government may make an order. The Diplomatic Relations and Immunities (Amendment) Act 2006 set down parameters, by providing that any Government order made under Part VIII may not extend privileges and immunities not afforded to diplomatic missions under the Vienna Convention on Diplomatic Relations.

In practice, it has become apparent that in seeking to afford privileges and immunities to an international organisation, the Vienna Convention does not always provide an appropriate model, as an international organisation is quite a different entity to a diplomatic mission.

Accordingly, paragraph (b) adjusts the parameters of the order-making power of Government under Part VIII of the Act of 1967. Specifically, it permits the Government by order to afford privileges and immunities *equivalent or analogous to* those contained in the Vienna Convention on Diplomatic Relations *or* the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations (the latter two conventions being better models for addressing the needs of international organisations), or any other international agreement scheduled to the Act of 1967. It is intended that any such amendment would provide the flexibility required under the Government order procedure, while respecting constitutional limitations regarding the separation of powers.

Paragraph (a) provides two self-explanatory definitions, which are drawn from sections 7 and 16 of the Act of 1967.

Paragraph (c) is designed to permit the making of a Government Order under section 42A of the Act in respect of arrangements with international bodies that do not as a matter of law constitute international agreements, for example because the body is not an intergovernmental organisation.

Paragraph (d) permits the Government to make an order to enable the International Committee of the Red Cross to enjoy in the State confidentiality of its communications, where provided for by an international agreement or arrangement. It is intended that the Government will enter into a “status arrangement” with the ICRC in the near future. A key feature of such arrangements is providing robust protection for the confidentiality of ICRC communications. As presently worded, an order made under section 42A could not provide for a confidentiality clause of this nature, as no such privilege is contained in the Vienna Convention on Diplomatic Relations. Such a robust confidentiality clause is considered crucial for the ICRC in light of its unique role and mandate.

Paragraph (e) contains a saver clause designed to ensure the validity of any orders made under Part VIII to date, and is modelled on section 50 of the Act of 1967.

Head 5 – Evidence of privileges and immunities

Provide along the following lines –

Section 47 of the Act of 1967 is amended by inserting “, tribunal or other adjudicatory body or administrative authority,” after “In proceedings in any court”.

Explanatory note

Section 47 of the Act of 1967 provides for the issuing of certificates under the seal of the Minister for Foreign Affairs and Trade to provide evidence of an individual’s or entity’s entitlement to privileges and immunities in the context of court proceedings. Since the enactment of the Act in 1967, there has been a significant increase in the number of tribunals, quasi-judicial, administrative and other dispute resolution bodies and authorities. As a matter of domestic and international law, such bodies are obliged to respect diplomatic privileges and immunities. Where the Department of Foreign Affairs and Trade has been called upon to confirm entitlement to privileges and immunities in the context of proceedings before such bodies, the Department has not been able to issue a formal certificate due to the fact that section 47 is confined to court proceedings (the practice in such cases has generally been to issue a letter instead).

This Head amends section 47 to expand the category of bodies in relation to which an evidential certificate confirming entitlement to privileges and immunities can be issued, to reflect the full range of bodies in respect of which the need for such a certificate may arise.

From a policy perspective it should be noted that the purpose of a section 47 certificate is not to usurp the judicial or adjudicatory functions of such bodies. It is merely to provide clarity to a body whether as a matter of fact an individual or entity is for example an accredited diplomat or an organisation to whom the Act of 1967 applies. With this information to hand it remains for the body concerned to determine whether immunity applies as a matter of law. In essence, the purpose of section 47 is to safeguard against individuals or other entities claiming to be entitled to immunities that they are not entitled to, such as where a person fraudulently poses as a diplomat in an attempt to evade prosecution.

Head 6 – Amendment of the Irish Nationality and Citizenship Act 1956

Provide along the following lines –

The Irish Nationality and Citizenship Act 1956 is amended:

- (a) In section 6 and section 6A, by substituting “a person referred to in section 2(1) or section 2(1A) of the Immigration Act 2004” for “entitled to diplomatic immunity in the State”.
- (b) in section 16A, by inserting the following subsection after subsection (3):
 - (4) (a) A period of residence in the State shall not be reckoned when calculating a period of residence for the purposes of granting a certificate of naturalisation if it consists of a period during which section 2(1) or section 2(1A) of the Immigration Act 2004 applied to that person.
 - (b) This subsection shall not apply in respect of any period of residence preceding the passing of the Diplomatic Relations (Miscellaneous Provisions) Act 2016.

Explanatory note

The State’s longstanding policy in respect of staff attached to diplomatic missions has been to exclude them from mainstream immigration and citizenship arrangements. Unlike non-nationals generally, mission personnel are exempt from immigration registration requirements and do not require permission from the Minister for Justice and Equality to reside in the State. Time spent in the State as a member of a diplomatic mission has not been deemed reckonable for citizenship or long term residency purposes, and a child born in the State to a member of a mission is not considered eligible for Irish citizenship through birth. Such arrangements reflect common (although not universal) international practice.

However, in a judgment of 24 June 2016 in the case of *Rodis and Tolentino v Minister for Justice and Equality* (2013/653JR, 2013/654JR), the High Court (Humphreys J) determined that two members of staff of diplomatic missions were entitled to have their residence in the State deemed reckonable for the purposes of naturalisation. The Court noted that a specific statutory exception would be necessary to provide otherwise.

The first limb of paragraph (b) is aimed at providing that a period of time spent in the State during which a person is exempt from immigration controls is not reckonable for the purposes of naturalisation. The second limb of paragraph (b) makes it clear that the amendment will apply prospectively only and will not prejudice any period of residence that would have been deemed reckonable for naturalisation purposes prior to the passing of the present Act.

In relation to citizenship by birth, the Irish Nationality and Citizenship Act 1956 precludes a child born in the State from acquiring Irish citizenship by birth where at least one of the child's parents "was at that time entitled to diplomatic immunity in the State". The term "diplomatic immunity" is undefined. Paragraph (a) is aimed at clarifying matters, by removing the reference to "diplomatic immunity" and instead referring to the categories of persons exempt from immigration controls under the Immigration Act 2004.

Head 7 – Amendment of the Immigration Act 2004

Provide along the following lines –

Section 2 of the Immigration Act 2004 is amended by inserting the following subsection after subsection (1):

(1A) Without prejudice to the generality of subsection (1), the persons to whom the Act shall not apply include:

- (a) a “member of the mission” as defined in Article 1 of the Vienna Convention on Diplomatic Relations done at Vienna on the 18th day of April, 1961, as set out in the First Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of such a member,
- (b) a “private servant” as defined in Article 1 of the Vienna Convention on Diplomatic Relations done at Vienna on the 18th day of April, 1961, as set out in the First Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of a private servant,
- (c) a “member of the consular post” where that post is headed by a career consular officer, as defined in Article 1 of the Vienna Convention on Consular Relations done at Vienna on the 24th day of April, 1963, as set out in the Second Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of such a member,
- (d) a “member of the private staff” as defined in Article 1 of the Vienna Convention on Consular Relations done at Vienna on the 24th day of April, 1963, as set out in the Second Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of such a member,
- (e) a “preclearance officer” as defined in section 1 of the Aviation (Preclearance) Act 2009 and the dependant of a preclearance officer,
- (f) an official of an international organisation, community or body assigned to official duty in the State and a person who is a member of the family and forms part of the household of such an official,

where that person has been duly notified to, and that notification has not been objected to by, the Minister for Foreign Affairs and Trade.

Explanatory note

This Head complements Head 6 by clarifying the relationship between immigration and citizenship legislation.

This Head inserts a new provision into the Immigration Act 2004 listing specific categories of individuals who are exempt from the terms of the Act. Of particular significance is the fact that family members of domestic workers in diplomatic missions or diplomatic households (known as “service staff”, “private servants” and “private staff” under the Vienna Conventions) will be expressly exempt from immigration controls for the first time. This means that those domestic workers will be permitted to be accompanied by their immediate family members for the duration of their posting in the State.

The specific reference to preclearance officers, officers of international bodies and their dependants in paragraph (e) and (f) is designed to clarify such individuals’ exemption from immigration controls.

Head 8 – Amendment of the Employment Permits Act 2003

Provide along the following lines –

Section 2 of the Employment Permits Act 2003 is amended in subsection (10B):

(a) in paragraph (b), by substituting “, or” for “.”,

(b) by the insertion of the following paragraph after paragraph (b):

(c) where the Minister for Foreign Affairs and Trade has certified in writing that the foreign national referred to in paragraph (a) is a member of the family of an assigned person, forming part of his or her household, and that the assigned person is a national of another Member State of the European Union, a state in the European Economic Area or Switzerland.

Explanatory note

Section 2(10B-10C) of the Employment Permits Act 2003 permits the Minister for Foreign Affairs and Trade to issue a certificate to permit a foreign national family member of a foreign government employee on posting to the State, who falls within the terms of a bilateral arrangement entered into with another government, to access the labour market without the need for an employment permit.

Working dependants agreements are not typically entered into between EU/EEA/Swiss states however, because they are seen as inappropriate in the context of freedom of movement rules. This means that a non-EU/EEA/Swiss family member of an EU/EEA/Swiss diplomat in Ireland must apply for a mainstream immigration permission in order to avail of the right to work under European freedom of movement rules. In doing so, that family member effectively relinquishes their status as a family member under the Vienna Convention on Diplomatic Relations.

This Head aims to regularise this situation, by permitting such family members to retain their status under the Vienna Convention, including their exemption from mainstream immigration controls, but to be able to work through the issuing of a certificate by the Minister for Foreign Affairs and Trade.

Any certificate issued under this statutory provision is valid only for the duration of the foreign official’s posting in Ireland (typically 3 or 4 years). Under the Vienna Convention any immunities enjoyed by family members from civil and administrative jurisdiction do not apply in respect of employment outside of a diplomatic mission.