

General Scheme of Diplomatic Relations (Miscellaneous Provisions) Bill
Regulatory Impact Analysis

1. Summary RIA

| Summary of Regulatory Impact Analysis (RIA) | | | | | | | | |
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| Department/Office: Department of Foreign Affairs and Trade | | Title of Legislation: Diplomatic Relations (Miscellaneous Provisions) Bill 2016 | | | | | | |
| Stage: General Scheme | | Date: July 2016 | | | | | | |
| Related Publications: General Scheme of Bill | | | | | | | | |
| Available to view or download at: The text of the Bill will be made available on the Department's website (www.dfa.ie) when it has been published. | | | | | | | | |
| Contact for enquiries: Legal Division | Telephone: 01 408 2890 | | | | | | | |
| What policy objectives have been pursued? More efficient procedures to give effect to the State's international obligations in respect of diplomatic privileges and immunities; enhanced safeguards for domestic workers in diplomatic missions and diplomatic households; clearer citizenship and immigration rules in respect of staff of diplomatic missions and associated persons; bringing State into line with predominant EU Member State practice in respect of the status of working family members of foreign government employees. | | | | | | | | |
| What policy options have been considered? Please summarise the costs, benefits and impacts relating to each of the options below and indicate whether a preferred option has been identified. <ol style="list-style-type: none"> 1. Do nothing. 2. Introduce legislation to improve existing arrangements. Preferred Option: Introduce legislation. | | | | | | | | |
| OPTIONS | | | | | | | | |
| | COSTS | BENEFITS | IMPACTS | | | | | |
| 1. | No direct costs, but continuing inefficiencies and shortcomings of current arrangements. | None. | Continued inefficiencies by virtue of necessity for primary legislation instead of secondary legislation in respect of privileges and immunities; State at risk of not honouring international obligations; lower standards of protection for domestic workers increase risk of abuse; lack of clarity in immigration and citizenship law creates uncertainty for | | | | | |

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| | | | individuals concerned and exposes State to possible litigation; State isolated in respect of EU practice concerning status of working family members of foreign government employees. |
| 2. | No direct costs. | More efficient procedures; improved protection for domestic workers; clearer immigration and citizenship rules. | State's capacity to adhere to international obligations enhanced; more efficient use of human resources in relevant Government Departments; greater certainty on immigration rules and State less exposed to litigation; State brought into line with predominant EU practice concerning status of working family members of foreign government employees. |

2. Policy Context and Objectives

The General Scheme will:

- Remove the requirement of Government approval for Irish citizens to be appointed to international organisations serving in Ireland in line with contemporary international practice.
- Revise the statutory provisions enabling the making of a Government order affording privileges and immunities to bodies or individuals, so as to improve the efficacy of the procedure.
- Expand the category of bodies in relation to which an evidentiary certificate confirming entitlement to privileges and immunities can be issued (currently limited to courts).
- Provide that a period of residence in the State as a member of staff of a diplomatic mission or family member of such a member of staff is not reckonable for the purposes of naturalisation as an Irish citizen, and clarify the rules concerning entitlement to citizenship by birth.
- Clarify the immigration status of staff of diplomatic missions, including family members, and thereby strengthen safeguards for the protection of domestic workers in foreign missions and diplomatic households.
- Permit certain family members of foreign government employees to access the labour market in the State while retaining their status under the Vienna Convention on Diplomatic Relations.

Irish citizens serving with international organisations in the State

The General Scheme proposes the repeal of section 49 of the Diplomatic Relations and Immunities Act 1967. Section 49 provides that the 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.

There are only a very small number of Irish nationals serving in the State with international organisations covered by the Act of 1967. Furthermore, privileges and immunities enjoyed by officials of international organisations are generally of a lesser, more functional nature in comparison to the wide ranging privileges and immunities that apply to diplomats attached to foreign embassies.

Government orders

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.

Amendments were introduced by the Diplomatic Relations and Immunities (Amendment) Act 2006 to Part VIII to set down parameters on the Government's order-making power, by providing that any 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 the most appropriate model, as an international organisation is quite a different entity to a diplomatic mission.

The General Scheme provides for an adjustment of the parameters of the order-making power of Government under Part VIII of the Act of 1967, specifically by permitting 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.

Further, the General Scheme proposes an amendment to permit the making of a Government Order in respect of arrangements with international bodies that do not as a matter of law constitute international agreements.

It is also proposed to extend the Order making power under the Act of 1967 to permit 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 expected that the Government will enter into a "status agreement" with the ICRC in the near future. A key feature of such agreements is providing robust protection for the confidentiality of ICRC communications. Such a robust confidentiality clause is considered crucial for the ICRC in light of its unique role and mandate.

Evidentiary certificates

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).

The General Scheme provides for an amendment to 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.

Citizenship, immigration and employment matters

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 General Scheme proposes to introduce such an exception, to provide 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.

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. The General Scheme aims to clarify 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.

The General Scheme also provides for an amendment to the Immigration Act 2004 in order to achieve clear coherence between that Act and the 1956 Act. The amendment explicitly lists specific categories of individuals who are exempt from the terms of the Act, and who are therefore exempt from mainstream immigration controls. Of particular significance is the fact that family members of domestic workers in diplomatic missions or diplomatic households 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. This change is considered important in the first instance in order to respect such workers' right to a family life. There is also some concern that the lack of a family support network may increase a staff member's risk of exposure to isolation, exploitation and abuse. A number of alleged instances of abuse of domestic staff in diplomatic missions and households have arisen over the years, which has led to the recent adoption of procedures and guidelines for missions by the Minister for Foreign Affairs and Trade. Facilitating the residence of family members of these workers would complement the safeguards introduced by these procedures and guidelines.

Finally, the General Scheme provides for an amendment to the Employment Permits Act 2003. Under existing provisions of that Act, the Minister for Foreign Affairs and Trade may 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. Such arrangements, commonly known as "working dependants agreements" are considered important in terms of the State's relationship with foreign diplomatic missions in Ireland, as well as in terms of supporting the families of Irish officials serving overseas.

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. The difficulty with the prevailing arrangements in Ireland, however, which has been raised by a number of European partners, is

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. The General Scheme aims to regularise the position of such persons.

3. Identification and Description of Options

The following options were considered:

1. Do nothing.
2. Introduce legislation to improve existing arrangements

4. Analysis of Costs, Benefits and Impacts for ALL Options

Option 1. Do nothing

To do nothing would see the shortcomings in the present arrangements remain unaddressed. While there are no specifically identifiable direct costs in pursuing this option, it would mean a continuation of the inefficiencies and shortcomings of existing arrangements. There are no obvious benefits to retaining these existing arrangements over reform.

Not legislating would mean continued inefficiencies by requiring in certain instances primary legislation instead of secondary legislation in order to provide for routine privileges and immunities. The State would be at risk of not honouring its international obligations, at least insofar as there could be delays in giving effect to privileges and immunities obligations. There would be lower standards of protection for domestic workers by not clearly entitling the family members of such workers to join them in the State for the duration of their posting, thereby increasing the risk of abuse. A lack of clarity in immigration and citizenship law would create uncertainty for individuals affected and could expose the State to possible further litigation. The State would be isolated in respect of EU practice concerning the status of working family members of foreign government employees.

Option 2. Introduce legislation to improve existing arrangements

The issues addressed by this General Scheme are ones that have been identified as requiring a legislative solution. There are no specifically identifiable direct costs to legislating. Benefits of introducing the legislation include more efficient procedures for legislating in respect of privileges and immunities, improved protections for domestic workers and clearer immigration and citizenship rules.

It is envisaged that the legislation will enhance the State's capacity to adhere to international obligations and transpose privileges and immunities provisions into national legislation more efficiently. This in turn will mean less pressure on human resources in Government Departments. The legislation will introduce greater certainty into immigration and citizenship laws and should mean that the State is less exposed to litigation on the discrete matters addressed by the legislation. Finally, the legislation will bring the State into line with predominant EU state practice as regards the status of working family members of foreign government employees.

5. Consultation

The General Scheme has been drawn up following consultation with the Department of Justice and Equality, the Department of Jobs, Enterprise and Innovation, and the Office of the Attorney General.

6. Enforcement and compliance

It is envisaged that the changes to be introduced by the General Scheme can be implemented through straightforward, minor adjustments in the administrative practices of relevant Government Departments.

7. Review

The new provisions will be kept under ongoing review as to their practicality and workability as a matter of course.

8. Publication

The Regulatory Impact Analysis will be made available on the Department's website (www.dfa.ie) when the Bill is published.

July 2016