



Consular Privileges and Immunities Amendment Bill 2005

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Law and Bills Digest Section

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Consular Privileges and Immunities Amendment Bill 2005

Date Introduced: 16 March 2005

House: The Senate

Portfolio: Foreign Affairs

Commencement: Day of Royal Assent

Purpose

This Bill seeks to amend the *Consular Privileges and Immunities Act 1972* so as to set in place ‘a framework within which Australia can negotiate, on a country by country basis, enhanced protections for persons performing consular duties on behalf of the Australian Government overseas.’¹ In response, says the government, ‘Australia will offer reciprocal treatment to consular officials from overseas countries undertaking consular functions in Australia.’²

Background

Diplomatic and Consular immunity

Diplomatic and consular officers have long been granted certain privileges and immunities. It should be noted that this Bill relates only to *consular* privileges and immunities, and not to *diplomatic* privileges and immunities. The distinction between consular and diplomatic functions is, broadly speaking, that the former are primarily technical whilst the latter are political or representative. Some of the functions overlap.³ The multilateral sources of privileges and immunities granted to diplomatic and consular officers are the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (see below). The privileges and immunities granted under the respective conventions differ substantially. Diplomats are accorded immunities considerably broader in scope than those accorded to consular officials. Diplomats enjoy, for example, immunity from the criminal jurisdiction of the receiving state, subject only to waiver by the sending state, whilst consular officials have only limited immunity from criminal jurisdiction.⁴ Similarly, diplomats are not obliged to give evidence in legal proceedings, whilst consular officials may be compelled to give evidence, subject to a few limitations.⁵ There is, therefore, greater scope to negotiate enhanced protections for consular staff than there is for diplomatic staff. That consideration may explain the lack of any Bill to amend the *Diplomatic Privileges and Immunities Act 1967* in a similar manner.

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Theoretical basis

Three theories underpin the practice of granting privileges and immunities to diplomatic and consular staff – personal representation; extrterritoriality and functional necessity.⁶ The latter is the dominant theory today but the others still have some relevance, if mainly historical. Personal representation is the theory that deference is given to officers out of respect for the sovereign that they represent. The representative is treated as though dealing with the foreign sovereign in person, so as to convey the respect held for the sovereign. Extrterritoriality is the idea that the offices, residences and even the persons of diplomats are to be treated as though they are part of the sending state and not the receiving one.⁷ This theory has been largely discarded but forms the original basis of some ideas still recognised in customary international law and treaties such as the ability to seek asylum in an embassy.⁸

According to the predominant theory – functional necessity – diplomatic and consular privileges are necessary to enable diplomatic and consular officials to perform their duties effectively.⁹ This justification is cited in the preambles to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. It is there asserted that the ‘purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.’ In the United Kingdom the House of Commons Foreign Affairs Committee has put the case this way:

Diplomatic immunity is thus part of diplomatic law, and is an exception to the general international law rule of territorial jurisdiction. Its purpose is to allow diplomats to be able to carry out their functions within the framework of necessary security and confidentiality. It also acknowledges the representative character of a diplomatic mission. This does not grant diplomats freedom to flout local law. They are still required to obey it, but will in many cases be immune from local jurisdiction to enforce such laws. A mission is not “extra-territorial” in the sense that it is territory belonging to the sending state; but it is given the protection of inviolability within the receiving state. Both inviolability of premises and the diplomatic bag, and the privileges and immunities of diplomats, are all directed towards facilitating the performance of the diplomatic function.¹⁰

The rules relating to diplomatic and consular immunities and privileges were long contained within the body of principles that make up customary international law. In the 1960s the rules were codified in two multilateral treaties – the Vienna Convention on Diplomatic Relations (which entered into force on 24 April 1961) and the Vienna Convention on Consular Relations (which entered into force on 19 March 1967). Australia ratified the former on 26 January 1968 and the latter on 12 February 1973. The substantive provisions of those treaties were given force in Australian domestic law via the Diplomatic Privileges and Immunities Act and the Consular Privileges and Immunities Act.

The Vienna conventions on diplomatic and consular relations both set out a range of privileges and immunities applicable to diplomatic and consular officers and their

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families. Both conventions also envisage that bilateral agreements may be made supplementing, extending or amplifying the provisions of the conventions.¹¹ Because the conventions contemplate that bilateral agreements may be made extending their provisions, it may be that the current Bill is not strictly necessary, but the intention is to put the issue beyond doubt and to ensure that the ability to negotiate bilateral agreements is recognised and reflected in domestic law via the Consular Privileges and Immunities Act.¹²

Issues

Abuse of immunity and privileges

Although this Bill does not of itself grant privileges or immunities, the framework it establishes is clearly expansive in nature – it is likely to lead to the winning of enhanced immunity for Australia's consular staff overseas and conversely, to the enhancement of immunities granted to other countries' consular staff in Australia. In that context it is relevant to note that the granting of diplomatic and consular immunity has given rise, over the years, to some controversy. On a number of occasions such privileges have been abused.

A famous incident involving the abuse of immunity occurred in London on 17 April 1984. During a demonstration outside the Libyan People's Bureau in St James' Square shots, apparently fired from within the Bureau, struck and killed a 25 year-old police officer, Yvonne Fletcher, and injured ten demonstrators. The British authorities pressured the Libyan Government to waive immunity in respect of the perpetrators but the latter refused to do so. On 22 April the UK terminated diplomatic relations with Libya and the people's Bureau was evacuated on 27 April. No occupants of the Bureau were charged.

Concern about the extent of diplomatic immunities before and after the Libyan People's Bureau incident resulted in an inquiry into the subject by the House of Commons Foreign Affairs Committee. In the Committee's report of 12 December 1984 it was noted that, during the period from 1974 to mid-1984, there were 546 instances in which members of the diplomatic, administrative or technical staff of foreign missions, or members of their families, had escaped prosecution for serious offences.¹³

In 1988 a similar event occurred, though with less tragic consequences, at the Yugoslavian Consulate in Sydney when a security guard shot and wounded Joseph Tokic, who had been protesting outside. On 30 November 1988 Gareth Evans, then Minister for Foreign Affairs, told the Senate that no question of diplomatic or consular immunity for the security guard had been raised by the Yugoslav authorities.¹⁴ The guard was, however, to escape prosecution. On 5 December Senator Evans explained to the Senate that, whilst the guard did not have immunity per se, he achieved de facto immunity by remaining in the shelter of consular premises, which made impossible his practical arrest, until, arguably, such time as he moved out or the status of the consulate changed.¹⁵ The Australian Government then ordered the closure of the consulate, with the effect, explained Senator

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Evans, that the government was ‘committed by the terms of article 26 of the Vienna Convention on Consular Relations to ensure safe passage of all the staff and dependants of the consulate out of the country.’¹⁶

Bilateral as opposed to multilateral framework

The Vienna Convention on Consular Relations represents a multilateral framework which prescribes privileges and immunities on a non-discriminatory basis. This Bill seems to reflect a policy decision by the Government to move to a more bilateral system for the establishment of applicable privileges and immunities. That is confirmed by the statement in the second reading speech ‘In line with growing international practice in this field, the granting of privileges or immunities will be negotiated bilaterally on a reciprocal basis.’¹⁷ One effect of this is that the immunities enjoyed by other countries’ consular officers in Australia could vary significantly – officers from one country might enjoy, for example, immunity from criminal prosecution, whilst officers from another country might not.

Main Provisions

Schedule 1 item 1 inserts into the Consular Privileges and Immunities Act a new section – 10AA, headed ‘Additional privileges or immunities granted by agreement, arrangement or understanding’. The Minister is given power to determine, by legislative instrument, that certain countries are countries to which s.10AA applies (s.10AA(2)). Where such a determination is in place, and a written agreement, arrangement or understanding is made between Australia and another country to grant privileges or immunities supplementing or extending those in the Vienna Convention to consular officers of both countries, such agreement shall be given effect so long as the Minister’s determination in relation to the relevant country remains in place. The Minister also has power to revoke the determination.

The fact that the Minister’s determinations are to be made by legislative instrument brings into play the provisions of the *Legislative Instruments Act 2003*. This means that there will be scope for parliamentary scrutiny of the Minister’s determinations under Part 5 of that Act, including the possibility that the instrument could be disallowed by a resolution to that effect in either house.¹⁸

Concluding Comments

This Bill is directed at clarifying, for the purposes of domestic law, Australia’s right to negotiate bilaterally for enhanced privileges and immunities for its consular staff overseas. Any enhanced privileges or immunities negotiated will require a corresponding grant by Australia of enhanced privileges or immunities to the other country’s consular staff in

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Australia. This potential for the expansion of immunity granted to consular staff in Australia may give rise to some concern given past controversies here and internationally regarding abuse of privileges and immunity. The Bill also raises the question of the equity of treating consular staff differently depending on the country from which they originate and its status in terms of bilateral agreements with Australia.

Endnotes

- ¹ Senator Chris Ellison, 'Second reading speech: Consular Privileges and Immunities Bill 2005', Senate, *Debates*, 16 March 2005, p. 1.
- ² *ibid.*
- ³ The functions of each are outlined in Article 3 of the Vienna Convention on Diplomatic Relations and Article 5 of the Vienna Convention on Consular Relations.
- ⁴ See articles 31 of the Vienna Convention on Diplomatic Relations and articles 41 and 42 of the Vienna Convention on Consular Relations.
- ⁵ See articles 41 of the Vienna Convention on Diplomatic Relations and 44 of the Vienna Convention on Consular Relations.
- ⁶ Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, Hurst and Co. London, 1989, p. 28.
- ⁷ *ibid.*, p. 30.
- ⁸ *ibid.*, p. 32.
- ⁹ *ibid.*
- ¹⁰ UK House of Commons, First Report from the Foreign Affairs Committee, 'The Abuse of Diplomatic Immunities and Privileges,' 12 December 1984, p. 8.
- ¹¹ Convention on Diplomatic Relations, art. 47(2)(b); Convention on Consular Relations, art. 73(2).
- ¹² Department of Foreign Affairs and Trade, in conversation with the author, 11 April 2005.
- ¹³ 'The Abuse of Diplomatic Immunities and Privileges,' *op. cit.*, p. 15.
- ¹⁴ Senate, *Debates*, 30 November 1988, p. 3167.
- ¹⁵ Senate, *Debates*, 5 December 1988, p. 3433.
- ¹⁶ *ibid.*
- ¹⁷ Second reading speech, *op. cit.*, p. 2.
- ¹⁸ Legislative Instruments Act 2003, s. 42.

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