

REPUBLIC OF SOUTH AFRICA

DIPLOMATIC IMMUNITIES AND PRIVILEGES AMENDMENT BILL

(As amended by the Portfolio Committee on Foreign Affairs (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF FOREIGN AFFAIRS)

[B 55B—2008]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Diplomatic Immunities and Privileges Act, 2001, so as to amend the definition of “member of a family”; to provide that the Minister must make the list of all the names on the register of persons entitled to immunities or privileges publicly available; and to provide that a certificate by the Director-General stating a fact relating to any question as to whether or not a person enjoys immunity or privilege in terms of the said Act is *prima facie* evidence of that fact; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 2 of Act 37 of 2001

1. Section 2 of the Diplomatic Immunities and Privileges Act, 2001 (hereinafter referred to as the principal Act), is hereby amended by the substitution in subsection (2) 5 for paragraph (b) of the following paragraph:

“(b) ‘**member of a family**’ means—

- (i) the spouse;
- (ii) any **[unmarried]** dependant child under the age of **[21]** 18 years;
- (iii) any **[unmarried child between the ages of 21 and 23 years who is** 10 **undertaking full-time studies at an educational institution]** other dependant family member, officially recognised as such by the sending State or the United Nations, a specialised agency or an international organisation; and
- (iv) **[any other unmarried child or other family member officially** 15 **recognised as a dependant member of the family by the government of the sending State, the United Nations, a specialised agency or organisation]** the life partner, officially recognised as such by the sending State or the United Nations, a specialised agency or an 20 international organisation,

and **[who is issued with a diplomatic or official passport]**, if applicable, ‘spouses and relatives dependant’ has the same meaning.”.

Amendment of section 9 of Act 37 of 2001

2. Section 9 of the principal Act is hereby amended by the substitution for subsections (2) and (3) of the following subsections, respectively:

(2) The Minister must cause a complete list of all persons on the register to be published **[at least once a year in the *Gazette*]** on the Website of the Department of Foreign Affairs, and must cause the list to be updated as frequently as may be necessary, and made publicly available. 5

(3) If **[in any proceedings in a court of law]** any question arises as to whether or not any person enjoys any immunity or privilege under this Act or the Conventions, a certificate under the hand or issued under the authority of the Director-General stating any fact relating to that question, is *prima facie* evidence of that fact.”. 10

Short title and commencement

3. This Act is called the Diplomatic Immunities and Privileges Amendment Act, 2008, and takes effect on a date to be determined by the President by proclamation in the *Gazette*. 15

MEMORANDUM ON THE OBJECTS OF THE DIPLOMATIC IMMUNITIES AND PRIVILEGES AMENDMENT BILL, 2008

1. BACKGROUND

1.1 The Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001) (the Act), was adopted in order to accommodate the administrative implications arising from the growth of the diplomatic community in South Africa, and to give effect to Republic's ratification of certain international conventions on immunities and privileges.

1.2 The Department of Foreign Affairs (DFA) has realised through subsequent practice that there is a need to effect certain amendments to the Act in order to remain abreast of current domestic and international practices. Through a series of consultations with stakeholders the sections that have been identified for amendments are section 2(2)(b) (definition of "members of a family"), section 9(2) (the maintenance and publication of a register of the diplomatic corps) and section 9(3) (confirmation by the Department of Foreign Affairs of immunities and privileges).

2. OBJECTS OF BILL

2.1.1 Section 2(2)(b) of the Act defines "member of a family" for the purposes of the Conventions that have the force of law in the Republic in terms of section 2(1) of the Act. The members of a family that are recognised are stipulated in the definition, but there is an additional requirement that all those persons must be issued with a diplomatic or official passport. This poses a problem in practice since many States (particularly African States) and international organisations do not issue members of a family with diplomatic or official passports, although they are recognised by both the sending State or international organisation and the receiving State (South Africa) as being members of a family. The Bill therefore seeks to amend the definition so that the key criteria become dependency on the diplomat for support, and not the particular travel document the members of the family are using.

2.1.2 In addition, many States are now also recognising life-time partners as members of a family (South Africa also follows this practice). Life-time partners are not specifically recognised as one of the categories of members of a family and are at present regulated under the generic provision in subsection 2(2)(b), namely "other members of the family". The amendment to the definition also seeks to recognise life partners.

2.2 In terms of section 9(2) of the Act, the Minister of Foreign Affairs must cause a complete list of all persons on the register of persons entitled to immunities and privileges to be published at least once a year in the *Gazette*. This is a cumbersome and expensive process and the list becomes outdated almost as soon as it is published. It is therefore proposed to amend the Act in order to allow for the list to be made publicly available (for example, maintained on the Department's website).

2.3 Section 9(3) of the Act provides that if "in any proceedings in a court of law any question arises as to whether or not any person enjoys any immunity or privilege under . . . (the) Act or the Conventions, a certificate under the hand or issued under the authority of the Director-General (of the DFA) stating any fact relating to that question is *prima facie* evidence of that fact". In terms of section 9(3), the Director-General can only issue a certificate if there is a dispute in a court of law. The DFA increasingly experiences that the question as to who enjoys immunity arises even before the dispute progresses to court. Empowering the Director-General to issue such a certificate even if the matter has not progressed to court would ensure consistency in the manner in which the DFA verifies diplomatic status to affected parties. It should be noted that such a certificate is only *prima facie* evidence and does not prevent any member of the public from raising the matter in a court of law as well. The amendment proposed seeks to delete the reference to "any proceedings in a court of law" and is intended to assist members of the public in the event that a dispute in respect of diplomatic status arises.

3. FINANCIAL IMPLICATIONS

The financial implications are limited and no additional financial resources are required. A savings of R100 000 per annum is realised on publication in the *Government Gazette*. The only implication is that the members of the family recognised under the Act enjoy customs exemptions for goods imported for their private use. This is a long-standing arrangement under the Act and is based both on South Africa's international

obligations and reciprocal treatment for South African diplomats. The South African Revenue Service has been consulted on the amendments and are aware of the intentions and implications thereof.

4. CONSULTATION

The following governmental stakeholders who interact with the diplomatic community on a regular basis were consulted:

- The Department of Safety and Security.
- Tshwane Metro Police.
- The Department of Home Affairs.
- The Department of Justice and Constitutional Development.
- The South African Revenue Service.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Foreign Affairs are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.