

Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic

Background

- 4.1 The Agreement on Employment of Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic (the Agreement) provides a legal framework permitting the spouses and dependants of Australian diplomatic and consular personnel stationed in Portugal to engage in work for the duration of the official's posting. The Agreement extends a similar arrangement for the spouses and dependants of Portuguese personnel in Australia.¹
- 4.2 The Agreement is one of a series of bilateral employment agreements that Australia has concluded with countries in which the Australian Government has a diplomatic or consular presence.²
- 4.3 The Agreement authorises family members of an official household of the sending country to engage in gainful employment in the receiving country.³ The procedure authorising a request to engage in employment will be applied by the receiving country in a way that will permit family

1 National Interest Analysis (NIA), para 4.

2 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

3 NIA, para 11.

members to be employed as soon as possible. Any rights relating to work permits and any similar formalities are to be favourably applied.⁴

- 4.4 The Agreement will apply to families of Australian Embassy personnel in Lisbon, and for Portugal it will apply to the dependants of personnel of the Portuguese Embassy in Canberra and the Portuguese Consulate-General in Sydney.⁵

Reasons for the treaty action

- 4.5 The series of agreements of which this Agreement is part reflect the changing nature of Australian society and changing social mores of Australia's diplomatic community. Dual-income families are now an accepted part of Australian life and many spouses and dependants of Australian consular and diplomatic personnel have established careers.⁶
- 4.6 According to the Department of Foreign Affairs and Trade (DFAT), the lack of employment opportunities for family members of Australian diplomatic and consular personnel is a disincentive for officers to serve abroad.⁷ One of the issues on which potential consular and diplomatic personnel seek advice before applying for a posting is whether their spouse or children will be able to work in their country of choice. Anecdotal evidence suggests that the advice provided is a factor that affects their decision to apply for a posting or not.⁸
- 4.7 Consequently, this Agreement and its equivalents assist the Australian Government in recruiting and retaining high-quality employees with families willing to serve abroad.⁹
- 4.8 In order to encourage other countries to enter into agreements of this type, the Australian Government offers reciprocal opportunities to spouses and dependants of foreign personnel.¹⁰

4 NIA, para 12.

5 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

6 NIA, para 8; and Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

7 NIA, para 8.

8 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 3.

9 NIA, para 5; and Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

10 NIA, para 8.

Status of agreements relating to the employment of family members of consular and diplomatic officials

- 4.9 Bilateral employment agreements usually take the form of Arrangements or Memoranda of Understanding (MOU).¹¹ DFAT generally prefers that arrangements take the form of an instrument of less-than-treaty status because Australian law already permits dependants of diplomatic and consular personnel to work in Australia, and it is therefore not normally necessary for Australia to conclude an arrangement-of-treaty status.¹²
- 4.10 However the domestic legal regimes in some countries require an arrangement-of-treaty status, and this is the case for Portugal.¹³ Issues pertaining to taxation and social security regimes under Portuguese law go beyond the scope of an MOU.¹⁴
- 4.11 Negotiations for employment agreements are based on a standard text and this Agreement broadly follows that text.¹⁵
- 4.12 Australia has six treaty-level employment agreements and 31 less-than-treaty-status agreements. Negotiations are under way with seven countries to conclude similar agreements.¹⁶ Table 1 lists the employment agreements in place to date, and indicates whether the agreement is a treaty level agreement or an MOU.
- 4.13 In relation to the speed at which these agreements are being negotiated, DFAT believes that the families of staff of the Department should have the opportunity to work.¹⁷ However, other countries give greater or lesser priority to the issue because not all countries have the same social arrangements as Australia. While DFAT places a very high priority on enabling the spouses and dependants of consular and diplomatic personnel to find employment, the matter is not always given the same priority by other countries.¹⁸

11 NIA, para 9.

12 NIA, para 9.

13 NIA, para 9.

14 NIA, para 9; and Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

15 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

16 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 3.

17 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 3.

18 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

Table 1 Countries with agreements on the employment of spouses and dependants

Country	Type of arrangement
	<i>Memorandum of Understanding (MOU) or Treaty action</i>
Belgium	Treaty
Brazil	MOU
Canada	MOU
Chile	Treaty
Croatia	MOU
Cyprus	MOU
Denmark	MOU
Ecuador	MOU
Fiji	MOU
France	Treaty
Germany	MOU
Ghana	MOU
Greece	MOU
Hungary	MOU
India	MOU
Israel	MOU
Kenya	MOU
Malta	MOU
Mauritius	MOU
Mexico	MOU
Mongolia	MOU
Nepal	MOU
The Netherlands	Treaty
New Zealand	MOU
Pakistan	MOU
Poland	MOU
Samoa	MOU
Spain	Treaty
Sri Lanka	MOU
Sweden	MOU
Turkey	MOU
The United Kingdom	MOU
The United States of America	Treaty
Venezuela	MOU
Zimbabwe	MOU

Source Department of Foreign Affairs and Trade, Submission No. 4, p. 1.

- 4.14 In addition, as employment agreements of this sort are negotiated on a bilateral basis, the rate of progress in negotiating these agreements is not as quick as DFAT would like it to be.¹⁹

Operation of the Agreement

- 4.15 Spouses and dependants of Australian diplomatic and consular personnel can seek employment in most of the countries with which Australia maintains diplomatic relations. However, DFAT made it clear that it is preferable to have a formalised arrangement that removes the discretionary aspects of decisions on these issues.²⁰
- 4.16 Agreements of this sort also cover the general legal framework of employment, such as what happens to people's immunities and privileges in matters relating to employment.²¹
- 4.17 For example, the Agreement obliges the sending country to waive immunity from civil and administrative jurisdictions in relation to any matter arising out of the employment of spouses and dependants and falling within the civil and administrative law of the receiving country.²² In other words, spouses and dependants of Australian consular and diplomatic personnel working in Portugal will be subject to Portuguese civil and administrative jurisdiction relating to matters arising from their employment.
- 4.18 In relation to criminal matters arising from employment, the immunity of spouses or dependants will be waived except in special circumstances when such a waiver is contrary to the sending country's own interests.²³ Accordingly, the spouses and dependants of Australian consular and diplomatic personnel in Portugal will be subject to Portuguese criminal law relating to matters arising from their employment unless Australia considers the situation to be a special circumstance.
- 4.19 The Agreement further provides that the sending country shall give serious consideration to a request from the host country for a subsequent waiver of immunity with respect to the execution of any sentence.²⁴

19 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

20 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

21 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

22 NIA, para 13.

23 NIA, para 13.

24 NIA, para 14.

Definition of spouse and dependants

- 4.20 The definition of who is covered by the Agreement is contained in article 1. It defines a member of the family as a person whom the receiving country has accepted as such and who forms part of the official household. It includes:
- spouses;
 - unmarried dependant children under 21 years of age;
 - unmarried dependant children under 25 years of age who are in full-time attendance as students at a post-secondary educational institution; and
 - unmarried dependant children who are suffering from a physical or mental disability.²⁵
- 4.21 In practice, DFAT will determine who constitutes the official household of an Australian consular or diplomatic official and advise the Portuguese authorities accordingly. The Agreement will apply to those determined by Australia to be part of the official household. A similar process applies to the official households of Portuguese personnel based in Australia.²⁶
- 4.22 For Australian consular and diplomatic personnel the term 'spouse' includes same-sex partners and heterosexual de facto partners. For Portuguese consular and diplomatic officials, the term 'spouse' includes heterosexual de facto partners, but does not include same sex partners.²⁷

Limitations on the type of employment

- 4.23 DFAT recognises that, in certain circumstances, limitations should be placed on the type of employment spouses or dependants of a consular or diplomatic personnel can undertake.
- 4.24 There is one limitation in the Agreement itself, in article 2, paragraph 2, which prohibits a spouse or dependant from undertaking work that requires a security clearance or work that is reserved for nationals of the receiving country. For instance, a spouse or dependant of Portuguese

25 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

26 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

27 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

consular or diplomatic personnel could not work in the Australian Public Service.²⁸

- 4.25 DFAT cited another circumstance in which it had received a request for a family member of a consular or diplomatic official to open a child care centre in their home. The request was refused on the grounds that diplomatic premises are inviolable so that the premises could not be entered by people wanting to do inspections, by police or by emergency services.²⁹

Conclusion

- 4.26 The Committee is of the view that ratification of the Agreement would be in the interests of the families of Australia's diplomatic community.

Recommendation 4

The Committee supports the *Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic* and recommends that binding treaty action be taken.

Kelvin Thomson MP

Chair

28 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

29 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

