

17. Diplomatic and Consular Immunities

The immunities granted to diplomatic and consular staff, and their families, are set out in the Vienna Convention on Diplomatic Relations 1961 (VCDR) and the Vienna Convention on Consular Relations 1963 (VCCR) to which New Zealand is a party. The relevant provisions of the Conventions have been incorporated into New Zealand law by the Diplomatic Privileges and Immunities Act 1968 and the Consular Privileges and Immunities Act 1971.

Diplomatic and consular immunity is a long-standing principle of international law which enables diplomats and foreign representatives to perform their duties with freedom, independence and security.

17.1 Qualifying for Immunities

Diplomatic and consular immunity in New Zealand is conferred on all entitled members of a foreign mission (and entitled family members forming part of their household, provided they are not New Zealand citizens) who have been notified to, and accepted by, MFAT as officially accredited to New Zealand and performing a diplomatic or consular function. Immunity is dependent on rank, and ranges from immunity from criminal, civil and administrative jurisdiction to immunity for official acts only. All questions concerning whether a person has diplomatic/consular immunity must be referred to the Protocol Division of MFAT.

Foreign representatives have a duty under Article 41(1) of the VCDR and Article 55(1) of the VCCR to respect the laws and regulations of New Zealand. It is the expectation of the Government of New Zealand that foreign representatives and their accredited family members will comply with New Zealand laws and regulations, and that such persons, whether entitled to full or functional immunity, will be responsible for any violation of those laws and regulations.

17.2 New Zealand Citizens and Permanent Residents

Members of the staff of a Diplomatic Mission or Consular Post who are New Zealand citizens or permanent residents shall be accorded immunity from jurisdiction and inviolability only in respect of official acts performed in the exercise of their functions. Refer Chapter 3.

17.3 Representatives of the Cook Islands and Niue

Because of the special relationships between New Zealand and the Cook Islands and Niue, and the fact that their representatives are New Zealand citizens, special regulations confer privileges and immunities on their diplomatic and consular staff.

17.4 Summary of Immunities

The following is a summary of immunities pertaining to diplomatic and consular staff. It is intended as a quick guide only. The application of immunity will sometimes depend on the circumstances of the offence. Missions and posts should consult Protocol Division on individual cases.

17.4.1 Diplomatic

Diplomat

May be arrested or detained	No
Residences may be entered subject to ordinary procedures	No
May be issued a traffic infringement notice	Yes
May be subpoenaed as a witness	No
May be prosecuted	No
Status of recognised family member	Same as diplomat

Administrative and Technical Staff Member

May be arrested or detained	No
Residences may be entered subject to ordinary procedures	No
May be issued a traffic infringement notice	Yes
May be subpoenaed as a witness	No
May be prosecuted	No, except for civil or administrative prosecutions relating to non-official acts
Status of recognised family member	Same as Administrative and Technical staff member

Service Staff

May be arrested or detained	Yes
Residences may be entered subject to ordinary procedures	Yes
May be issued a traffic infringement notice	Yes
May be subpoenaed as a witness	Yes
May be prosecuted	Yes, except for official acts
Status of recognised family member	No immunity

17.4.2 Consular

Career Consular Officer

May be arrested or detained	Yes, but only for a grave crime
Residences may be entered subject to ordinary procedures	Not for consulate office, otherwise yes
May be issued a traffic infringement notice	Yes
May be subpoenaed as a witness	Yes, except for official acts
May be prosecuted	Yes, except for official acts
Status of recognised family member	No immunity and inviolability

Consular Employee

May be arrested or detained	Yes
Residences may be entered subject to ordinary procedures	Yes
May be issued a traffic infringement notice	Yes
May be subpoenaed as a witness	Yes, except for official acts
May be prosecuted	Yes, except for official acts
Status of recognised family member	No immunity and inviolability

Service Staff

May be arrested or detained	Yes
Residences may be entered subject to ordinary procedures	Yes
May be issued a traffic infringement notice	Yes
May be subpoenaed as a witness	Yes, except for official acts
May be prosecuted	Yes
Status of recognised family member	No immunity and inviolability

Honorary Consular Officer

May be arrested or detained	Yes
Residences may be entered subject to ordinary procedures	Yes
May be issued a traffic infringement notice	Yes
May be subpoenaed as a witness	Yes, except for official acts
May be prosecuted	Yes
Status of recognised family member	No immunity and inviolability

With the exception of those on temporary assignment in New Zealand, all the persons listed above will be in possession of an identity card issued by MFAT with their status defined as above. (Refer to Chapter 10.) Those officers on temporary assignment in New Zealand who have been given diplomatic/consular visas will enjoy the immunity applicable to their status. They will not be issued with an identity card.

MFAT reserves the right to review the continued entitlement of an officer enjoying diplomatic and consular immunities who has been living for a substantial period in New Zealand.

17.5 Waiver of Immunity

17.5.1 Serious Criminal Offences

Consistent with the duty to respect local laws and regulations, the New Zealand Government will expect the sending State to waive the immunity of a foreign representative or accredited family member where a serious crime is alleged to have been committed in order to allow legal proceedings against the individual to be commenced. This expectation is based on recognition that the New Zealand justice system is open, fair and responsible.

For all serious crimes where the New Zealand Police determines in accordance with the Solicitor General's Prosecution Guidelines that a prosecution is warranted and in the public interest and where the alleged offender enjoys immunity from criminal jurisdiction, the Protocol Division of MFAT will request a waiver of immunity from the relevant authority of the sending State (through the Head of Mission) to allow the accused individual to appear in a New Zealand Court and to be sentenced in the event that the individual is found guilty.

Where a serious crime is alleged to have been committed, MFAT may also seek a waiver of immunity from the sending State to enable an individual who holds immunity to be interviewed to determine whether a prosecution should be brought against that individual or to enable that individual to give evidence against another person who is alleged to have committed a serious crime.

For the purposes of these guidelines, a "serious crime" is an offence for which the penalty is a term of imprisonment of 12 months or more. Serious crimes therefore include offences against persons such as murder, manslaughter, sexual offences, and common assault; certain driving offences such as dangerous driving causing injury; and certain property offences including theft of more than \$500.

An individual who is immune from local jurisdiction may not waive his or her own immunity. Immunity belongs to the sending State, not to the individual, and must be waived by the sending State. Foreign missions are to seek instructions from their sending State before the immunity of any member of a mission is waived. A waiver by the Head of Mission or any person for the time being performing this function shall be deemed to be a waiver by that State.

MFAT will make all efforts to obtain a waiver of immunity where a serious crime has been committed and it is in the public interest to prosecute. However, if a waiver of immunity is refused by the sending State, MFAT will request in writing that the individual be withdrawn by the sending State. The sending State should expect that if the representative is not withdrawn, the individual will be made *persona non grata* and expelled from the country.

Where a serious crime has been committed by a foreign representative or accredited family member and the individual leaves New Zealand, a request may also be made to the sending State to prosecute the individual on his or her return to the sending State. This is consistent with the understanding that in the case of serious crimes it is in the interests of justice for the alleged offender to be brought before the court, either in New Zealand or in his or her home country.

Even where a foreign representative is withdrawn from New Zealand, the New Zealand Police may continue an investigation and lay charges against the foreign representative concerned. Charges may be laid and the case stayed pending any return of the foreign representative to New Zealand. Extradition proceedings may also be instituted.

17.5.2 Non-Serious Crimes

Where a crime, which does not meet the threshold of a serious crime, is alleged to have been committed, and where the New Zealand Police considers that prosecution is warranted, MFAT, in consultation with the Police, may also seek a waiver of immunity from the sending State to allow legal proceedings against the individual to be commenced. This may in particular apply where:

- (a) the offence relates to domestic violence;
- (b) the penalty for the offence is the mandatory disqualification of the individual's driving licence; or
- (c) there is a pattern of behaviour committed by the individual which threatens public safety.

17.5.3 Non-Criminal Incidents

Foreign representatives enjoying diplomatic/consular immunity may need to consider waiving their immunity in non-criminal circumstances, including in order to issue or respond to civil legal proceedings in New Zealand, or when asked by the New Zealand authorities to assist in their investigation or prosecution as a witness. In such circumstances, missions and posts should notify MFAT's Protocol Division of their government's decision to waive immunity.

17.6 Sovereign Immunity

Sovereign immunity is intended to protect sovereign countries from prosecution. However, the concept of sovereign immunity is unlikely to be upheld in respect of acts of a commercial nature or activities other than in the exercise of sovereign authority.

In New Zealand, diplomatic immunity is governed by Statute Law (Acts of Parliament) whereas sovereign immunity is governed by Common Law. If necessary, missions and posts should seek legal advice on this issue to establish how the New Zealand courts have treated questions of sovereign immunity in the past.

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