

DIPLOMATIC IMMUNITIES ACT 1952
(COMMONWEALTH)

The Commonwealth Diplomatic Immunities Act of 1952 accords to chief representatives (generally called High Commissioners) accredited by the Governments of member States of the British Commonwealth to the Queen in Australia, the same immunity from suit and legal process in the Australian courts as is afforded to envoys of foreign States in accordance with international law. Its key provision is s. 4, which provides that a chief representative is entitled to the immunity from suit and legal process, and to the inviolability of residence, official premises and official archives, to which he would be entitled if he were an envoy.¹

In reviewing the Act, it must be remembered that an envoy (Ambassador or Minister Plenipotentiary) is the personal representative of the head of his State; and to him flow, by international law, courtesies of treatment, including jurisdictional immunities, by reason of his capacity and recognition as head-of-State representative. A High Commissioner, on the other hand, is the official representative of his Government, not appointed by and not representing the head of State. He is without recognition in international law. Hence the need for specific legislation when it was decided to give High Commissioners immunities which had formerly attached only to the special superior status of Ambassador or Minister representing the head of a State.

The evolution of the office of High Commissioner has been entirely different to that of envoys of foreign States and to a great extent reflects the evolution of the Commonwealth itself from incipient Colonial/Dominion formation. Even the exchange of High Commissioners between the component parts of the Commonwealth has been haphazard on an unplanned and *ad hoc* basis of development which began with appointments concentrated only in London as the diplomatic and foreign policy centre of Commonwealth organisation. Reciprocity by the United Kingdom Government came much later, and while the first Australian High Commissioner was appointed to London in 1910, it was not until 1931, following the appointment of the first Australian Governor-General, that a temporary post of United Kingdom High Commissioner was set up in Canberra.² It was at a still later date that Canberra appointed High Commissioners to Commonwealth countries other than the United Kingdom.³

The Governor-General, in the earlier stages of development, had included in his functions all of the functions, except those relating to trade and commerce, which were subsequently transferred to High Commissioners. This transference may be regarded as having dated in its written form from a decision of the 1926 Imperial Conference.

¹ Diplomatic Immunities Act (Cwlth.) No. 67 of 1952. The immunity conferred extends to the family, staff and family of the official staff of the chief representative, but it is provided that a staff member who is an Australian citizen is only entitled to immunity for things done or omitted to be done in the course of performance of his duties as a member of the staff, and that the immunity does not extend to members of his family as such (s. 5). The Act applies to the United Kingdom, Canada, New Zealand, the Union of South Africa, India, Pakistan and Ceylon and provision is made for extension of its application to other parts of the Dominions by regulation (s. 2). Reciprocity of treatment is required from the countries to which the Act applies and it is provided that regulations may be made by the Governor-General withdrawing or modifying the application of the Act to a country failing to accord reciprocal treatment to the Commonwealth (s. 6). A certificate issued by the Minister (of External Affairs) certifying any fact relevant to the question whether or not a person is entitled to immunity under the Act shall be conclusive evidence of that fact. (Reception of diplomatic agents is within the Crown's prerogative. In the Dominions, the Crown acts on the advice of the Dominion Cabinet or Minister in charge of External Affairs. 6 Halsbury's *Laws of England* (2 ed. 1937) 503).

² See generally A. Berriedale Keith, *The Dominions as Sovereign States* (1938).

³ Canada, 1939; Ceylon (Commissioner, later High Commissioner) 1947; India, 1944; Ireland, 1946; New Zealand, 1943; South Africa, 1946; Pakistan, 1948.

In the family conception of British Commonwealth, the High Commissioners were regarded as being still at home. They were given a place of precedence after the Diplomatic Corps, on the view that in one's own home one does not take precedence over the guests. They were not members of the Diplomatic Corps and were given no jurisdictional immunities.

In London, the approach of the High Commissioners is to the Commonwealth Relations Office. They are envisaged rather as consultants and advisers on their section of inter-Commonwealth affairs and to maintain a unity of Commonwealth foreign policy. They are, therefore, given access to a widely selected body of reports, general, confidential and secret, including prints of reports to the Foreign Office from British heads of mission abroad. They are given statutory exemption from income tax⁴ and, as a matter of grace, exemption from customs duties. Prior to the decision of the Commonwealth Prime Ministers' Conference of 1948 assimilating the status of High Commissioners to that of Ambassadors, the High Commissioners formed a High Commissioners' Corps, with the High Commissioner for Canada always as Dean⁵; and if they had a joint representation to make on such a matter, for instance, as immunities it was made for them by the Canadian High Commissioner. It was not until about 1930 that the method used in the Diplomatic Corps of extending immunities to Official Secretaries was extended in London, after representation had been made to the Dominions Office. (Incidentally, the diplomatic service titles of Counsellor, First etc. Secretary, were not used in High Commissioners' Offices; but Official Secretary and, after him, the home rankings of officials as if they were not on external service. At present some members of the Commonwealth use the diplomatic form in their High Commissioners' Offices, some the old form.)⁶

The Australian practice from the beginning has been to give High Commissioners the same privileges as foreign diplomats⁷, but they were not members of the Diplomatic Corps, did not present Letters of Credence to the Governor General on taking office, as did foreign envoys⁸, and the precedence of High Commissioners was after the most junior in the Diplomatic Corps. It was decided at the Prime Ministers' Conference held in London in October, 1948, that High Commissioners be given the same status as Ambassadors and that they be given precedence according to the date of assumption of their office.⁹ An amendment was made accordingly in 1949 to the Australian Table of Precedence.¹⁰ High Commissioners are now members of the Diplomatic Corps in

⁴ By s. 19 of the Finance Act, 1923 (Eng.) 13 & 14 Geo. 5 c. 14 and s. 26 of the Finance Act, 1925 (Eng.) 15 & 16 Geo. 5 c. 36.

⁵ Not, in the usual order of Diplomatic Corps precedence, depending on the date of assumption of office in the capital of accreditation.

⁶ Canada, India and Pakistan use the Diplomatic form; Ceylon, New Zealand, the Union of South Africa and the United Kingdom the old form.

⁷ These include exemption from customs duties (Customs Tariff Item 373 (A) and (B)); excise duties (Excise Tariff Act 1921-1939 (Cwlth.) Item 10 (D)); of official salary from income tax (Income Tax Assessment Act 1936-1953 (Cwlth.) s. 23); from payment of sales tax in respect of purchases for official use (Sales Tax (Exemptions and Classifications) Act 1935-1952 (Cwlth.) 1st Schedule Item 72).

⁸ The Letter of Credence is addressed to the Head of the State from the Head of the State and so could not appropriately be presented by High Commissioners.

⁹ On 21 December, 1948, the following statement was issued by the Prime Minister of Australia:

At the recent meeting of the Prime Ministers in London consideration was given to the question of improving the status of High Commissioners and the following conclusions were reached:

High Commissioners would in future rank with foreign ambassadors in regard to precedence, the application of the principle being a matter for each Government of the British Commonwealth of Nations to determine. The practice of treating High Commissioners and Ambassadors as separate groups should be abandoned, it being left to each Government of the British Commonwealth of Nations to consider whether High Commissioners should be styled 'Excellency'.

Cabinet to-day adopted recommendations by a cabinet sub-committee which considered the conclusions of the Prime Ministers' Conference. In future, in Australia, High Commissioners will be placed in the same order of precedence as foreign ambassadors. The term 'Excellency' will be adopted.

¹⁰ *Commonwealth of Australia Gazette* No. 20 of 10 March, 1949.

Canberra. The most recent change in this gradual series of changes is to enable a High Commissioner to become Dean of the Diplomatic Corps. This was made in November, 1952, by administrative action of the Australian Department of External Affairs, as an extension of the structure of the Diplomatic Corps.¹¹

The Diplomatic Immunities Act, 1952, eliminated another distinction between the position of High Commissioners and envoys by according jurisdictional immunities to High Commissioners. Similar legislation has been enacted in the United Kingdom¹², New Zealand,¹³ and the Union of South Africa.¹⁴ Canada, Ceylon, India and Pakistan grant the immunities in practice but without statutory support.

The Australian Government is represented by its High Commissioners in Canada, Ceylon, India, New Zealand, Pakistan, the Union of South Africa and the United Kingdom. Diplomatic relations between the Australian and Irish Governments were instituted in 1948 by an exchange at High Commissioner level. Following the repeal in *Dail Eireann* of the Executive Authority (External Relations) Act¹⁵, by the Republic of Ireland Act¹⁶, and the coming into operation of the latter Act on 18 April, 1949, Ambassadors were appointed to Dublin by the United Kingdom and Canada, and Irish Ambassadors were appointed to London and Ottawa. India appointed an Ambassador to Ireland (not yet reciprocated by the appointment of an Irish Ambassador at New Delhi). Formal diplomatic relations have not been instituted between the Irish Government and the Governments of any other Commonwealth countries, with the exception of Australia. Following the action of Canada and the United Kingdom in exchanging embassies with the Republic of Ireland, an Australian Embassy was established in Dublin in November, 1950, and an Irish Ambassador to Australia presented credentials at the same time. Diplomatic relations between the Republic of Ireland and Commonwealth countries, where there are such, are since the Republic of Ireland Act on the same basis and governed by the same observances as diplomatic relations between foreign States. Letters of Credence are presented, being addressed by and to the Head of State, whose Title is determined by legislation (e.g., for Australia, The Royal Style and Titles Act 1953 (Cwlth.)).¹⁷ The Title of the Head of State in the Irish Constitution, Article 12, is 'President of Ireland'.¹⁸

India differs from the other members of the Commonwealth in having a separate Head of State, who is President of the Republic of India. It follows from this that Indian High Commissioners in Commonwealth countries differ from other High Commissioners, in presenting Letters of Credence from the Head of State to the Head of State. India's representatives are accredited in the name of the President of India and not of the Queen, although, unlike Ireland, India is a member of the Commonwealth. In other respects Indian diplomatic practices are identical with Australian practice, which is itself identical with the practice in the other Commonwealth countries.

EIBHLIN B. HODGSON—Fourth Year Student.

¹¹ This decision is reflected when Item 7 (a) of the recently issued Table of Precedence (printed in the *Commonwealth of Australia Gazette* No. 25 of 30 April, 1953) is compared with Item 4 (c) of the 1949 Table.

¹² 15 & 16 Geo. 6 and 1 Eliz. 2 c. 18. The Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952 (Eng.).

¹³ No. 78 of 1951. The Diplomatic Immunities Act 1952 (New Zealand).

¹⁴ No. 71 of 1951. The Diplomatic Privileges Act 1951 (South Africa).

¹⁵ No. 58 of 1936.

¹⁶ No. 22 of 1948.

¹⁷ No. 32 of 1953.

¹⁸ The appointment of Mr. P. M. McGuire as Australian Ambassador in Dublin did not take effect owing to difficulties arising out of the description of the Irish Head of State.