

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

International Organisations (Privileges and Immunities) Act 1963

International Organisations (Privileges and Immunities — Organisation for the Prohibition of Chemical Weapons) Regulation 2016

Section 13 of *International Organisations (Privileges and Immunities) Act 1963* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 5 of the Act provides that the regulations may declare an organisation of which Australia and other countries are members to be an international organisation to which the Act applies.

Section 6 provides that the regulations may confer privileges and immunities on international organisations to which the Act applies and persons connected therewith.

Australia is a State Party to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (also known as the Chemical Weapons Convention (CWC)). As such, Australia is also a member of the Organisation for the Prohibition of Chemical Weapons (OPCW) which was established at entry into force of the CWC on 29 April 1997. The OPCW's mission is to implement the provisions of the CWC.

The *International Organisations (Privileges and Immunities — Organisation for the Prohibition of Chemical Weapons) Regulation 2016* (the Regulation) and existing regulations under the *Chemical Weapons (Prohibition) Act 1994* will together give effect to Australia's obligations pursuant to paragraphs 48 and 49 of Article VIII(E) of the CWC. In particular, Part 4 of the *Chemical Weapons (Prohibition) Regulations 1997*, affords privileges and immunities to OPCW inspectors and inspection observers while the Regulation affords these to the OPCW and other categories of persons.

The purposes of the Regulation are to:

- declare the OPCW as an organisation to which the Act applies and to confer on it juridical personality and legal capacity; and
- confer privileges and immunities that are necessary or desirable for the effective conduct of activities in Australia by the OPCW, its high officers, officers, representatives from other countries attending OPCW conferences and other persons performing technical missions.

As a consequence of the Regulation:

- (i) the **OPCW** enjoys inviolability for its communications, property, assets, premises and archives, and immunity from suit and other legal process. It is also exempt from currency and exchange restrictions, duties and restrictions on import or export of goods, and from any liability to collect or pay taxes and indirect taxes on imports and exports of certain articles;
- (ii) **high officers** of the OPCW enjoy certain diplomatic privileges and immunities;

- (iii) **officers** of the OPCW (i.e., staff who have been appointed by the Director-General of the OPCW) enjoy immunity from suit or legal process in respect of acts and things done in an official capacity, and exemption from taxation on salary and emoluments received from the OPCW, including protection such as repatriation facility and importation rights for furniture and effects free of duties. Officers of the OPCW are also exempt from any immigration laws, obligations to perform national service and currency or exchange restrictions;
- (iv) **representatives** of the OPCW, including those from other countries attending OPCW conferences, enjoy inviolability of papers and documents and immunity from personal arrest or detention, suit and other legal process. OPCW representatives are also exempt from any immigration laws, obligations to perform national service and currency or exchange restrictions; and
- (v) **persons serving on a committee or performing missions** on behalf of the OPCW enjoy inviolability of papers and documents, exemption from currency or exchange restrictions and immunity from personal arrest or detention, suit and other legal process. This will include consultants or contractors who are hired by the OPCW under the terms of a Special Service Agreement.

The Regulations limit privileges and immunities to immunity from suit and other legal process for an Australian citizen or a permanent resident of Australia who holds or performs the duty of high office in the OPCW, is an officer of the OPCW or is a person that serves or participates in the work or performs a mission on behalf of the OPCW. In regards to paragraph (iii), officers of the OPCW who are Australian residents for taxation purposes are only exempt from taxation on salary and emoluments received by the OPCW if coming to Australia solely for the purpose of performing duties of the office in the OPCW held by the person.

The Department of Treasury and the Attorney General's Department were consulted in the preparation of the Regulation.

The Office of Best Practice Regulation (OBPR) advised (reference number 20106) that a Regulatory Impact Statement is not required as the Regulation will not result in any additional regulatory requirements or costs for businesses, community organisations or individuals. No public consultation was undertaken in relation to the Regulation.

The Regulation has been assessed to be compatible with human rights for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility is set out below.

The Regulations commenced on the day after registration and is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Statement of Compatibility with Human Rights

Prepared in accordance with subsection 9(1) and 9(2) of the *Human Rights (Parliamentary Scrutiny) Act 2011*

International Organisations (Privileges and Immunities — Organisation for the Prohibition of Chemical Weapons) Regulation 2016

Overview

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The *International Organisations (Privileges and Immunities — Organisation for the Prohibition of Chemical Weapons) Regulation 2016* (the Regulation) is an instrument made under the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (the Act).

The Regulation will confer such privileges and immunities to the Organisation for the Prohibition of Chemical Weapons (the OPCW) and specified categories of persons (such as high officers, officers, representatives from other countries attending OPCW conferences and other persons performing technical missions) as are required to give effect to Australia's obligations pursuant to paragraphs 48 and 49 of Article VIII(E) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the CWC).

The main mission of the OPCW includes implementation of the provisions of the CWC; to ensure a credible, transparent regime to verify the destruction of chemical weapons and to provide assistance and protection against the use of chemical weapons. In order to achieve this, the OPCW and its representatives must be granted the same privileges and immunities that Australian officials are afforded when performing official functions overseas.

Privileges and immunities conferred by the Regulation are only those that are necessary or desirable for the effective conduct of activities in Australia by the OPCW, for example in connection with attendance at conferences or for the performance of specific technical missions. Privileges and immunities related to Australia's obligations under the CWC to facilitate the inspection of chemical facilities, are already afforded to Organisation inspectors and inspection observers through the *Chemical Weapons (Prohibition) Regulations 1997*.

In summary, the Regulation provides that the OPCW:

- is an international organisation to which the Act applies;
- has juridical personality and legal capacities; and
- is entitled to certain privileges and immunities under the Act, being those in items of the First Schedule of the Act (except item 8); the Second Schedule to the Act; the Third Schedule to the Act; the Fourth Schedule to the Act and the Fifth Schedule to the Act.

The privileges and immunities conferred upon the OPCW and its officers may provide exemptions from taxation on salaries and emoluments received from the OPCW; duties on the importation or exportation of goods for official use and publications; currency and exchange restrictions; the liability to pay or collect taxes other than duties for the importation or exportation of goods and of the income, property, assets and transactions of the OPCW from

such taxes; and from the application of laws relating to immigration, the registration of aliens and the obligation to perform national service. In addition, the OPCW and certain agents of the OPCW may enjoy immunity from arrest, detention and civil suit. The OPCW may choose to waive any privileges or immunities to which it is entitled.

Human rights implications

The privileges and immunities conferred upon the OPCW in the Regulation are customised and limited to what is necessary for the OPCW and its agents to perform their functions independently. They relate predominantly to exemptions on duties and the payment and collection of taxes, which should not have implications for human rights.

The Regulation limits complete immunity from suit and other legal process to the OPCW and its high officers. Such immunity could, in principle, limit the right to an effective remedy for breaches of human rights and therefore the operation of Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR). This Article provides that any person “whose rights or freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” Article 2(3)(c) requires State Parties to the ICCPR to ensure that the competent authorities enforce such remedies when granted.

However, regular officers and persons seeking immunity under Schedule 5 of the Act will only be afforded “functional immunity”, that is, immunity from suit and legal process in connection to acts performed in their official capacity. These provisions are proportionate, limit the risk of breaching Article 2(3) of the ICCPR, and are necessary in allowing the OPCW to perform its functions.

The need to grant privileges and immunities to foreign representatives working in Australia reflects more than a mere compliance with international obligations. Privileges and immunities are conferred reciprocally between countries and international organisations, to ensure that international representatives are able to: perform their work independently; report freely; and to fulfil their official duties. The privileges and immunities conferred are not only essential in allowing Organisation representatives to perform their functions, but also as part of a wider and reciprocal legal framework that protects Australian representatives overseas in the performance of their duties without fear of local pressures, harassment, intimidation, attack and arbitrary detention.

Conclusion

In light of Australia’s treaty obligations under the CWC, and the international legal framework of reciprocal privileges and immunities that allow foreign representatives to impartially perform their duties overseas, this Regulation has been drafted with the greatest compliance possible to Australia’s human rights obligations. The Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to what is necessary in order to allow the OPCW to perform its functions.