

## Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012

### Introduction

- 3.1 On 11 September 2012, the *Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012* ('the Treaty') was tabled in the Commonwealth Parliament.

### Background

- 3.2 Vietnam and Australia work closely in a range of areas and both countries' education, business and travel relationships continue to grow. Two-way trade between Australia and Vietnam now amounts to over A\$6 billion. Australia is a leading destination for Vietnamese students, with more than 23,000 student enrolments in Australian education institutions. After the United States of America, Australia is the second most common destination for Vietnamese migrants. People born in Vietnam represent the sixth largest migrant community in Australia. Given Australia's developing ties with Vietnam, it is timely to strengthen our bilateral international cooperation arrangements.<sup>1</sup>
- 3.3 The proposed Treaty is indicative of Australia's commitment to developing and improving Australia's international legal cooperation relationships in order to combat transnational crime. Vietnam is an important regional partner in the fight against transnational crime. Having an effective extradition relationship with Vietnam is key to

---

<sup>1</sup> Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 9.

ensuring that criminals who cross our respective borders are not impervious to prosecution.<sup>2</sup>

## Overview

3.4 The Treaty provides effective extradition arrangements between Australia and Vietnam. The Attorney-General's Department explained that Australia does not have bilateral arrangements with Vietnam to facilitate extradition. The Department explained:

Currently, there is no bilateral framework in place, which means that we can only consider requests from Vietnam under multilateral conventions to which we are both parties, such as the UN [United Nations] Convention Against Corruption or the UN Convention Against Transnational Organized Crime. Those multilateral treaties to which we are both parties do contain extradition obligations, but there is no existing bilateral framework which would apply to all offenses.<sup>3</sup>

...there have not been any extraditions under the multilateral conventions... no person has been brought before the courts pursuant to an extradition request from Vietnam.<sup>4</sup>

3.5 The Treaty will enable Australia to cooperate with Vietnam to request or grant extradition for any offences punishable under the laws of both countries by imprisonment for a maximum period of at least one year or by a more severe penalty.<sup>5</sup>

3.6 The Treaty is consistent with other Australian bilateral extradition treaties and is able to be implemented under Australia's existing domestic legislative framework for extradition. The Treaty adds to Australia's existing network of 38 other modern bilateral extradition treaties and to our extradition obligations under a number of multilateral agreements.

---

2 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 9.

3 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 10.

4 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 10.

5 National Interest Analysis [2012] ATNIA 20 with attachment on consultation *Treaty between Australia and the Socialist Republic of Vietnam on Extradition (Canberra, 10 April 2012)* [2012] ATNIF 4, (Hereafter referred to as 'NIA'), para 4.

The safeguards and protections in the proposed Treaty are consistent with those in the *Extradition Act 1988*.<sup>6</sup>

## Reasons for Australia to take the proposed treaty action

- 3.7 The following summary of the proposed treaty action and its claimed benefits is taken from the National Interest Analysis (NIA).
- 3.8 It is in Australia's interests that criminals cannot evade justice simply by crossing borders. The Treaty will oblige Vietnam to consider Australian requests for extradition and to grant extradition where the requirements set out in the Treaty are met. Whilst Australia can request extradition of any country in the absence of a treaty, there are no assurances that the other country will consider such a request.<sup>7</sup>
- 3.9 Implementation will enable Australia to receive extradition requests from Vietnam and oblige Australia to consider them. The *Extradition Act 1988* only allows Australia to receive extradition requests from countries declared to be an 'extradition country' in regulations, although Australia can currently consider extradition requests for offences covered by multilateral instruments to which both countries are parties.<sup>8</sup>
- 3.10 The Treaty contains a number of important safeguards and human rights protections, including mandatory grounds for refusal of extradition where a person would be subject to the death penalty or torture.<sup>9</sup> The Attorney-General's Department noted:
- ...there are certain serious offences which do still carry the death penalty under the Vietnamese penal code, including murder, treason and terrorism offences. Statistics on the use of the death penalty in Vietnam are classified and have not been released by the Vietnamese government. ... [However] Amnesty International has reported that at least five executions were carried out in 2011.<sup>10</sup>

---

6 NIA, para 5. For the text of that Act, see '*Extradition Act 1988*'.  
<[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ea1988149/](http://www.austlii.edu.au/au/legis/cth/consol_act/ea1988149/)>, accessed 21 September 2012.

7 NIA, paras 3 and 7.

8 NIA, para 8. Prior to bringing the proposed Treaty into force, regulations will be made under the *Extradition Act 1988* declaring Vietnam to be an extradition country, and stating that the *Extradition Act 1988* applies in relation to Vietnam subject to the proposed Treaty.

9 NIA, para 9.

10 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 10.

- 3.11 An undertaking not to impose the death penalty is done by the issuance of a formal, written document that is communicated through official channels.<sup>11</sup>
- 3.12 The Treaty adopts the 'no evidence' standard for extradition requests. The 'no evidence' standard is included in the UN Model Extradition Treaty. Australia has over 30 bilateral extradition treaties which adopt this standard. The term 'no evidence' does not mean 'no information'. Rather, it means that an extradition request needs to be supported by a statement of the conduct alleged against the person in respect of each offence for which extradition is sought, instead of evidence sufficient to prove each alleged offence under the laws of the requested country.<sup>12</sup>

## Obligations

- 3.13 The Treaty will oblige Australia and Vietnam to consider one another's requests for the extradition of persons who are wanted for prosecution, or for the imposition or enforcement of a sentence for an extraditable offence.<sup>13</sup>
- 3.14 The Treaty provides that an extraditable offence is an offence which, at the time of the request, is punishable under the laws of both Parties by imprisonment for a maximum period of at least one year or by a more severe penalty. Where extradition is sought to enforce a sentence of imprisonment for such an offence, extradition shall be granted only if at least six months of the sentence remains to be served.<sup>14</sup>
- 3.15 The obligation to extradite is qualified by a number of internationally accepted mandatory and discretionary grounds for refusal which reflect grounds contained in the *Extradition Act 1988*. The Requested Party is obliged to refuse an extradition request in any of the following circumstances:
- where there are substantial grounds for believing that the extradition request 'has been made for the purpose of prosecuting or punishing a person on account of that person's race, ethnic origin, gender, language, religion, nationality, political opinion or other status, or that that person's position may be prejudiced for any of those reasons';

---

11 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 11.

12 NIA, para 10.

13 NIA, para 11.

14 NIA, para 12.

⇒ Sexual orientation has also been added to the *Extradition Act 1988* as a ground for refusal and it applies to this Treaty. The Treaty itself includes a ground of refusal in relation to 'other status' and this can include sexual orientation.<sup>15</sup>

- where the person whose extradition is requested would be exposed to 'double jeopardy': that is, where that person has already been acquitted, pardoned, or punished under the laws of the Requested Party or another country in respect of the offence for which extradition is sought;
- where a lapse of time has meant that the person whose extradition is requested has become immune from prosecution or punishment under the laws of the Requesting Party;
- if the offence for which extradition is requested, or any other offence for which the person may be detained or prosecuted under the proposed Treaty, carries the death penalty, and the Requesting Party has not provided an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out; or
- where there are substantial grounds for believing that the person would be subject to torture in the Requesting Party's territory.<sup>16</sup>

3.16 The Minister cannot surrender a person to another country for an offence punishable by death unless the requesting country first gives an undertaking that the person will not, one way or another, be put to death.<sup>17</sup>

3.17 Extradition may be refused where:

- the Requested Party regards the offence for which extradition is sought as a political offence or an offence under military law but not under the ordinary criminal law of the Requested Party;
- the offence for which extradition is requested is considered by the Requested Party as having been committed within its own jurisdiction;
- a prosecution in respect of the offence for which extradition is requested is already pending for the relevant individual in the Requested Party;
- the authorities of the Requested Party have decided not to prosecute the person for the offence in respect of which extradition is requested;

---

15 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 12.

16 NIA, para 13.

17 NIA, para 14.

- the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced by an extraordinary or *ad hoc* court or tribunal in the Requesting Party; or
  - the Requested Party considers that the extradition of the person would be 'unjust or oppressive, or, in exceptional cases, because of the personal circumstances of the person sought, the extradition would be incompatible with humanitarian considerations'.<sup>18</sup>
- 3.18 The Treaty provides that either Party may refuse extradition of its own nationals. If such an extradition is not granted, the Requesting Party may ask the Requested Party to prosecute that person in lieu of extradition. If such a request is made and the laws of the Requested Party allow it, the Requested Party must submit the case to its authorities to determine whether a prosecution may be undertaken.<sup>19</sup>
- 3.19 The Treaty will not affect the Parties' obligations arising from any other multilateral instrument. This would include situations where a Party is obliged to refuse extradition under specific international treaty obligations outside of the Treaty.<sup>20</sup>
- 3.20 Particular information and documentation must be provided in support of an extradition request.<sup>21</sup> The Treaty provides extradition may still be granted, even if all of the relevant requirements have not been met, provided that the person consents to be extradited.<sup>22</sup>
- 3.21 In urgent cases a Party may request the provisional arrest of the person sought to be extradited before the extradition request is presented. The request for provisional arrest must be accompanied by the information listed in Article 10(2) (including a statement of the existence of an arrest warrant or conviction against the person sought).<sup>23</sup>
- 3.22 Article 12 deals with the situation where an extradition request is received for the same person from two different countries. It sets out six factors that must be considered by the Requested Party in deciding to which country the person is to be extradited, including the relative seriousness of the offences for which extradition is sought if the requests relate to different offences.<sup>24</sup>
- 

18 NIA, para 15.

19 NIA, para 16.

20 NIA, para 17.

21 NIA, para 18. Para 18 provides a further detailed list of the requisite information and documentation.

22 NIA, para 19.

23 NIA, para 20.

24 NIA, para 21.

- 3.23 Article 13 sets out the procedure for surrendering the person to the Requesting Party once a decision to extradite has been made. For instance, it requires that the Requesting Party remove the person from the territory of the Requested Party within such reasonable period as the Requested Party may specify.<sup>25</sup>
- 3.24 Article 14 makes provision for the surrender, upon request, of all property found in the Requested Party's territory that has been acquired as a result of the offence for which extradition is requested, or may be required as evidence. Surrender of such property is subject to the law of the Requested Party and the rights of third parties.<sup>26</sup>
- 3.25 Article 15 allows extradition to be postponed to allow the Requested Party to prosecute or enforce a sentence against the person for an offence other than an offence constituted by conduct for which extradition is sought.<sup>27</sup>
- 3.26 Article 16 sets out the rule of speciality, which prohibits the Requesting Party from prosecuting or punishing an extradited person for any offence other than an offence for which extradition was granted, or any other extraditable offence provable on the same facts and punishable by the same or lesser penalty, unless the Requested Party consents.<sup>28</sup>
- 3.27 Where a person has been extradited under the proposed Treaty, the Requesting Party must not then extradite the person to a third country for any offence committed prior to the person's extradition.<sup>29</sup>
- 3.28 A person can be extradited to a Party from a third country through the territory of the other Party. In these circumstances, the Party seeking the person's extradition must request permission for transit from the other Party.<sup>30</sup>
- 3.29 The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for extradition, and shall otherwise represent the interests of the Requesting Party.<sup>31</sup>

---

25 NIA, para 22.

26 NIA, para 23.

27 NIA, para 24.

28 NIA, para 25. Speciality only applies to offences committed before the person was surrendered, and does not apply if the person fails to leave the Requesting Party's territory within 45 days of being free to do so or voluntarily returns to the Requesting Party's territory after leaving it.

29 NIA, para 26. This applies unless the Requested Party consents, or the person fails to leave the Requesting Party's territory within 45 days of being free to do so or voluntarily returns to the Requesting Party's territory after leaving it.

30 NIA, para 27.

31 NIA, para 28.

## Implementation

- 3.30 The Treaty is expected to be implemented by way of regulations made under the *Extradition Act 1988*. Section 11 of the Act allows regulations to be made subject to a bilateral extradition treaty between that country and Australia. This is how extradition treaties are given effect in Australia's domestic law.<sup>32</sup>

## Costs

- 3.31 The Requesting Party must bear the expenses incurred in conveying the person from the Requested Party's territory. The Requested Party agrees to pay all other expenses incurred in its territory in connection with extradition proceedings arising out of an extradition request. Expenses incurred in relation to extradition requests received or made by Australia will be met from existing budgets.<sup>33</sup>

## Other issues

### Human rights

- 3.32 When seeking to establish extradition agreements, a country's human rights record is examined through an extensive consultation process, including with Australian diplomatic posts.<sup>34</sup>
- 3.33 Although Vietnam is signatory to the main human rights convention – the International Covenant on Civil and Political Rights – and the Vietnamese Government has also indicated a commitment to acceding to the Convention against Torture, Vietnam's human rights record is questionable. The Department of Foreign Affairs and Trade observed:

We have noted over the longer term that there has been an improvement overall in its human rights observance. However, we would also assess that Vietnam has lost ground in some human rights areas – specifically, in the area of the protection of civil and political rights in the last couple of years. It continues to make some incremental progress in terms of economic and social rights – the two broad strands of human rights. The things that we are most seized by in terms of human rights in Vietnam is the

---

32 NIA, para 29.

33 NIA, paras 30-31.

34 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 12.



imprisonment of individuals for the peaceful expression of their political and religious beliefs.<sup>35</sup>

- 3.34 The treaty does provide numerous grounds of refusal in relation to human rights protection. If the Australian Government is concerned about human rights safeguards, then those concerns can be taken into account and, in appropriate cases, extradition refused.<sup>36</sup>

## Monitoring

- 3.35 In the past, the Committee has made recommendations that the Australian Government monitor those individuals extradited to those countries with whom Australia has signed extradition treaties, with regard to the United Arab Emirates and India in JSCOT Reports 91<sup>37</sup> and 110<sup>38</sup> respectively. This included Australian and non-Australian nationals. In response, the Committee heard that:

The government did respond in the context of both the India and the United Arab Emirates reports in relation to the committee's recommendations. Extra measures have been put in place in relation to those. In the context of the committee's report on the proposed treaty with India, the government accepted the recommendation that all Australians who are subject to extradition should receive a face-to-face meeting with an Australian consular official – unless that person, of course, objects – and their welfare would continue to be monitored by our consular arrangements. In relation to non-nationals, as was outlined in the government's response to the committee's reports, there is no legal framework under the Vienna convention on consular relations, which we can use to monitor non-nationals. However, in response to the committee's concerns, the government has asked us to undertake additional measures so that, where a foreign national is extradited from Australia, the government would formally advise that

---

35 Mr Arthur Milton Spyrou, Director, Vietnam, Burma, Laos Section, Department of Foreign Affairs and Trade, *Committee Hansard*, 29 October 2012, p. 12.

36 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 12.

37 *Treaty on Extradition between Australia and the State of the United Arab Emirates*, Chapter 2, JSCOT Report 91.

38 *Extradition Treaty between Australia and the Republic of India*, Chapter 6, JSCOT Report 110.

person's country of citizenship, subject to the person's consent, and that country of citizenship would monitor that person's welfare.<sup>39</sup>

- 3.36 Notwithstanding the Australian Government's welcome reforms in response to the Committee's concerns, the Committee re-iterates its recommendation that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the status of extradited persons.

## **Recommendation 2**

**The Committee recommends that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.**

## **Conclusion**

- 3.37 Australia and Vietnam have a growing relationship. The Committee notes that Australia is the second most common destination for Vietnamese migrants and that people born in Vietnam represent the sixth largest migrant community in Australia. Given Australia's developing ties with Vietnam, the Committee agrees that it is timely to strengthen our bilateral international cooperation arrangements.
- 3.38 The Committee agrees that it is in Australia's interests that criminals cannot evade justice simply by crossing borders and this Treaty provides for an effective extradition relationship with Vietnam. It is key to ensuring that criminals who cross our respective borders are not impervious to prosecution.
- 3.39 The Committee also notes the provisions for refusal, including protections against the use of the death penalty, and punishing a person on account of that person's race, ethnic origin, gender, language, religion, nationality, political opinion or sexual orientation.
- 3.40 Given this balance, the Committee supports the Treaty and recommends that binding treaty action be taken.

---

39 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 11.

### **Recommendation 3**

**The Committee supports the *Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012* and recommends that binding treaty action be taken.**

