

## **Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam**

### **Introduction**

- 4.1 This chapter considers the *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam* which was tabled in the Commonwealth Parliament on 2 December 2014.

### **Overview and national interest summary**

- 4.2 The NIA defines mutual assistance as a formal process whereby the Government of one country (the Requesting Party) requests assistance from the Government of another country (the Requested Party) in relation to a criminal investigation or prosecution. Assistance may extend to locating, restraining and forfeiting the proceeds of criminal activity in the Requested Party's jurisdiction in relation to criminal activity that took place in the Requesting Party.<sup>1</sup>
- 4.3 Australia is currently party to 29 mutual assistance treaties. Such treaties establish a framework of practical arrangements based on mutual obligation enabling Australia to request and provide information and evidence for investigating or prosecuting serious crimes. According to the

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1 National Interest Analysis [2014] ATNIA 20 with attachments on consultation *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam*, done at Sydney, 2 July 2014, [2014] ATNIF 22 (hereafter referred to as 'NIA'), para 3.

NIA it is in Australia's interests to be able to provide and request the widest possible assistance in criminal matters, so that criminals cannot evade justice where evidence of their criminal conduct is located in a foreign jurisdiction. This requires a responsive and streamlined mutual assistance framework.<sup>2</sup>

- 4.4 The Attorney-General's Department reiterated the importance of these type of treaties in developing and strengthening international crime cooperation relationships:

Treaties on mutual assistance are vitally important in enabling Australia to work effectively with countries in the fight against transnational crime.<sup>3</sup>

- 4.5 Australia does not currently have a bilateral agreement with Vietnam to facilitate mutual assistance. Australia and Vietnam are parties to multilateral conventions that contain mutual assistance obligations and can also provide the other country with assistance on the basis of reciprocity. The Attorney-General's Department emphasised the strength of the current relationship and the high level of cooperation that exists between the two countries:

Vietnam and Australia already have a close and supportive bilateral relationship, with a good strong record of cooperation between our law enforcement agencies and our justice agencies. The strength of this partnership is demonstrated by the fact that Vietnam and Australia have existing treaties ... on extradition and international transfer of prisoners. The strength of the relationship is also underlined by the AFP's relationship with its counterparts in Vietnam.<sup>4</sup>

- 4.6 However, the NIA cautions that in situations where no multilateral convention applies, there is no obligation on either country to consider a request for assistance from the other country. Therefore, this Agreement could provide a more comprehensive framework to govern bilateral mutual legal assistance between Australia and Vietnam as well as clarity and certainty about the procedures and processes to be used in making and executing mutual assistance requests.<sup>5</sup>

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2 NIA, para 4.

3 Ms Catherine Hawkins, Acting First Assistant Secretary, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, Canberra, 2 March 2015, p. 12.

4 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 2 March 2015, p. 12.

5 NIA, para 5.

4.7 The NIA suggests that the Agreement will add to Australia's existing network of bilateral mutual assistance treaties and its mutual assistance obligations under a number of multilateral conventions. The NIA states that the safeguards and protections in the Agreement are consistent with those contained in the *Mutual Assistance in Criminal Matters Act 1987* and that it can be implemented by regulation under Australia's existing domestic legislative framework for mutual assistance.<sup>6</sup>

## Reasons for Australia to take the proposed treaty action

4.8 The NIA states that Vietnam is an important partner in Southeast Asia for the Australian Government's efforts to combat transnational crime and the Agreement will ensure that Australia can provide, request and receive assistance to and from Vietnam in accordance with clearly defined and mutually agreed terms.<sup>7</sup>

4.9 Currently Australia and Vietnam have mutual assistance laws which enable assistance to be requested and provided in the absence of a treaty. However, the NIA maintains that the Agreement has a range of benefits over the current arrangement. The NIA proposes that the Agreement will provide certainty, impose obligations at international law and institute practical arrangements for requesting and providing assistance. The NIA places particular importance on the Agreement obliging Vietnam to consider Australian requests for assistance where the requirements set out in the Agreement are met. In the absence of a treaty, the NIA suggests that there are no assurances that Australia's requests will be considered.<sup>8</sup>

4.10 The NIA identifies a number of important safeguards and human rights protections in the Agreement, including the ability to refuse to provide assistance in cases where there is a risk that the death penalty may be imposed or carried out, the request has been made for the purpose of prosecuting someone on discriminatory grounds, or where double jeopardy<sup>9</sup> or dual criminality<sup>10</sup> considerations apply.<sup>11</sup>

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6 NIA, para 6.

7 NIA, paras 7 and 8.

8 NIA, para 9.

9 'Double jeopardy' describes a situation where a person is tried twice for the same offence.

10 'Dual criminality' means that the conduct in question would be an offence in both Australia and Vietnam.

11 NIA, para 10.

## Obligations

- 4.11 The Agreement will oblige Australia and Vietnam (the Parties) to grant one another's requests for assistance in criminal investigations and related proceedings in accordance with their respective laws and the provisions of the Treaty (**Article 1(1)**). The assistance to be provided may include:
- taking evidence and obtaining statements of persons, including the execution of letters rogatory (**Article 1(3)(a)**);
  - providing documents, records and evidence (**Article 1(3)(b)**);
  - locating and identifying persons (**Article 1(3)(c)**);
  - executing requests for search and seizure (**Article 1(3)(d)**);
  - locating, restraining and forfeiting proceeds and/or instruments of crime (**Article 1(3)(e)**);
  - seeking the consent of persons in custody and others to give evidence or to assist in investigations (**Article 1(3)(f)**);
  - serving documents (**Article 1(3)(g)**);
  - collecting forensic material (**Article 1(3)(h)**);
  - exchanging information (**Article 1(3)(i)**); and
  - other assistance consistent with the objects of the Treaty, which is not inconsistent with the laws of the Requested Party (**Article 1(3)(j)**).<sup>12</sup>
- 4.12 Mutual assistance under the Agreement does not include extradition, the execution of criminal judgments or the transfer of prisoners (**Article 1(4)**). Australia has existing treaties with Vietnam covering extradition<sup>13</sup> and the transfer of prisoners.<sup>14</sup>
- 4.13 **Article 2** specifies that the Agreement will not affect the obligations of the Parties arising from any other instrument to which both are parties, or otherwise. This would include situations where a Party has a specific obligation to refuse mutual assistance under an international treaty outside of the present Agreement.<sup>15</sup>
- 4.14 The obligation to provide assistance in **Article 1** is subject to a number of internationally accepted mandatory and discretionary grounds for refusal which largely reflect the existing grounds contained in the Mutual Assistance Act. Under **Article 4(1)**, the Requested Party must refuse to provide assistance in any of the following circumstances:

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12 NIA, para 11.

13 *Treaty between Australia and the Socialist Republic of Viet Nam on Extradition*, (Canberra, 10 April 2012), [2014] ATS 7.

14 *Agreement between the Government of Australia and the Socialist Republic of Viet Nam concerning the Transfer of Sentenced Persons* (Canberra, 13 October 2008), [2009] ATS 27.

15 NIA, para 13.

- where execution of the request would prejudice the Requested Party's sovereignty, security, national interest or other essential interests (**Article 4(1)(a)**, which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(e) of the Mutual Assistance Act);
- where execution of the request would be contrary to the fundamental principles of its domestic laws and international agreements to which it is a party (**Article 4(1)(a)**);
- where the person to whom the request relates 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, the Requesting Party or another country in respect of the same act or omission (**Article 4(1)(b)**, which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(c) of the Mutual Assistance Act);
- where a lapse of time has meant that the person to whom the request relates has become immune from prosecution under the laws of the Requested Party (**Article 4(1)(c)**);
- the request relates to an offence which is not criminalised in both countries (dual criminality requirement) (**Article 4(1)(d)**, which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(a) of the Mutual Assistance Act);
- the request relates to an offence which the Requested Party considers as being of a political character (**Article 4(1)(e)**, which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(a) of the Mutual Assistance Act);
- the request relates to an offence that is regarded by the Requested Party as an offence under its military law but not also an offence under its ordinary criminal law (**Article 4(1)(f)**, which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(d) of the Mutual Assistance Act);
- the Requested Party considers that there are substantial grounds for believing the request has been made for the purpose of investigating, prosecuting or punishing a person on account of race, sex, sexual orientation, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons (**Article 4(1)(g)**, which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(c) of the Mutual Assistance Act); or
- the Requested Party considers that there are substantial grounds for believing that if the request was granted, any person would be in danger of being subjected to torture (**Article 4(1)(h)**, which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(ca) of the Mutual Assistance Act.<sup>16</sup>

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16 NIA, para 14.

- 4.15 **Article 4(2)** sets out discretionary grounds for refusal. Parties may refuse assistance if provision of the assistance:
- could prejudice an investigation or proceeding in the Requested Party (**Article 4(2)(a)(i)**, which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(d) of the Mutual Assistance Act);
  - would, or would be likely to, prejudice the safety of any person (**Article 4(2)(a)(ii)**, which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(e) of the Mutual Assistance Act); or
  - would impose an excessive burden on resources (**Article 4(2)(a)(iii)**, which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(f) of the Mutual Assistance Act).<sup>17</sup>
- 4.16 Vietnam retains the death penalty for serious crimes including drug offences. Australia has a long-standing policy of opposition to the death penalty. The provision in **Article 4(2)(b)** relating to the death penalty reflects Australia's policy position and domestic legal requirements. Under the Agreement, Parties may refuse assistance if the request relates to an offence punishable by the death penalty unless the Requesting Party undertakes that the death penalty will not be imposed or, if imposed, will not be carried out (**Article 4(2)(b)**, which operates consistently with the existing provisions in subsections 8(1A) and 8(1B) of the Mutual Assistance Act).<sup>18</sup>
- 4.17 The Committee questioned the strength of the treaty to compel Vietnam to abide by an undertaking not to impose or carry out the death penalty. The Attorney-General's Department explained that such undertakings are considered quite strong in international law and it is unlikely that it would not be honoured:
- It would be a very big deal for the ongoing bilateral international crime cooperation relationship if a country did actually breach an undertaking.<sup>19</sup>
- 4.18 Further, the Agreement acts concurrently with the Mutual Assistance Act, providing a general discretion for the relevant Minister to take into account all relevant considerations:
- Section 8 of the Mutual Assistance in Criminal Matters Act draws a distinction between whether or not a person has been charged, arrested, detained or convicted. For one part, it is where a request

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17 NIA, para 15.

18 NIA, para 16.

19 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, Canberra, 2 March 2015, pp. 13–14.

is received in circumstances where no person has been charged, arrested, detained or convicted of an offence that could result in the death penalty – in the early investigatory stages is effectively what that is. There is a general discretion to refuse assistance. In determining whether to provide that assistance the Attorney or the minister as the decision maker takes into account a range of interests of international co-operation, as well as the likelihood of the death penalty being imposed as a result of the assistance.<sup>20</sup>

4.19 The Committee asked if the decision would rest with the Attorney-General if the case was being dealt with by the Australian Federal Police (AFP) or other agencies. The Mutual Assistance Act only refers to formal government-to-government mutual assistance requests. Informal requests between other agencies is governed by AFP guidelines:

... in terms of agency-to-agency requests, the circumstances in which the AFP would provide assistance are governed by AFP national guidelines on death penalty assistance. So that is a separate consideration. In terms of decisions about mutual assistance, it is actually the Attorney or the Minister for Justice – in practice, it is usually the Minister for Justice – who makes the decision about mutual assistance.<sup>21</sup>

4.20 **Article 4(4)** provides that, prior to refusing assistance, the Requested Party must consider whether assistance could be granted subject to any necessary conditions. If the Requesting Party accepts conditional assistance, it must comply with the conditions.<sup>22</sup>

4.21 **Article 5** outlines the content of mutual assistance requests. **Article 5(1)** lists the information that is to be included in a request, including:

- a description of the assistance sought, including the purpose (**Article 5(1)(a)**);
- contact details of the competent authority (**Article 5(1)(b)**);
- a summary of the case (**Article 5(1)(c)**);
- a description of the alleged offence (**Article 5(1)(d)**);
- in asset recovery matters: the order of the competent authority (**Article 5(1)(e)**);
- details of any particular procedures or requirements to be followed (**Article 5(1)(f)**);
- any requirements for confidentiality or limitations on the use of the information (**Article 5(1)(g)**); and

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20 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, 2 March 2015, p. 14.

21 Ms Hawkins, Attorney-General's Department, *Committee Hansard*, 2 March 2015, p. 14.

22 NIA, para 17.

- any time limits for compliance with the request (**Article 5(1)(h)**).<sup>23</sup>
- 4.22 **Article 5(2)** lists other information that may facilitate execution of the request and should also be included, where possible.<sup>24</sup>
- 4.23 **Article 6** requires each Party to execute requests for assistance in accordance with its laws, and to the extent those laws permit, in the manner requested (**Article 6(1)**). If the Requested Party becomes aware of circumstances likely to cause significant delay in responding to the request for assistance, it must promptly inform the Requesting Party (**Article 6(3)**). The Requested Party must also promptly inform the Requesting Party if it is unable to comply, in whole or in part, with a request for assistance and, to the extent possible, the reasons for that non-compliance (**Article 6(4)**).<sup>25</sup>
- 4.24 **Article 7** provides for all material provided under the Agreement to be returned to the Requested Party once it is no longer needed.<sup>26</sup>
- 4.25 **Article 8** provides that the Requesting Party may require that an application for assistance and the granting of assistance be kept confidential (**Article 8(1)**). The Requested Party may also require that information and evidence it provides be kept confidential, except to the extent that the information and evidence is needed for the investigation or proceeding to which the request relates (**Article 8(3)**). The information and evidence obtained may not be used or disclosed by the Requesting Party for purposes other than those stated in the request without prior consent of the Requested Party (**Article 8(4)**).<sup>27</sup>
- 4.26 **Articles 9 to 18** set out specific requirements for the various forms of assistance available. This includes:
- service of documents (**Article 9**);
  - taking of evidence (**Article 10**);
  - obtaining voluntary statements of persons (**Article 11**);
  - the availability of persons in custody to give evidence or to assist investigations (**Article 12**);
  - the availability of other persons to give evidence or assist investigations (**Article 13**);
  - the guarantee of safe conduct of any person who is in the Requesting Party in order to give evidence or assist in investigations, pursuant to a request made by the Requesting Party (**Article 14**);
  - provision of publicly available and official documents (**Article 15**);

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23 NIA, para 18.

24 NIA, para 19.

25 NIA, para 20.

26 NIA, para 21.

27 NIA, para 22.



- certification and authentication requirements for documents, records or objects provided through a request for assistance (**Article 16**);
  - search and seizure (**Article 17**); and
  - requests relating to proceeds and instruments of crime (**Article 18**).<sup>28</sup>
- 4.27 **Article 19** provides that the Parties may enter into subsidiary arrangements consistent with the purposes of the Agreement and with the laws of both Parties.<sup>29</sup>
- 4.28 **Article 20(1)** provides that the Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance, and shall otherwise represent the interests of the Requesting Party.<sup>30</sup>
- 4.29 **Article 21** provides for the Parties to consult with each other promptly concerning the interpretation, application or carrying out of the Agreement.<sup>31</sup>
- 4.30 Under **Article 22(3)** either Party may terminate the Agreement by written notice at any time.<sup>32</sup>

## Implementation

- 4.31 The NIA proposes that the Agreement will be implemented through making regulations under section 44 of the Mutual Assistance Act consistent with the implementation of other mutual assistance treaties entered into by Australia. Section 7 of the Mutual Assistance Act allows regulations to provide that the Act applies to a specified foreign country subject to any mutual assistance treaty between that country and Australia that is set out in the regulations. This is the mechanism through which mutual assistance treaties are given effect in Australia's domestic law.<sup>33</sup>

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28 NIA, para 23.

29 NIA, para 24.

30 NIA, para 25.

31 NIA, para 26.

32 NIA, para 32.

33 NIA, para 29.

## Costs

- 4.32 **Article 20(2)** of the Agreement provides that the Requested Party shall meet the ordinary costs of fulfilling the request for assistance, and the Requesting Party shall bear the travel expenses of any person travelling to or from the Requested Party in connection with a mutual assistance request, including custodial or escorting officers. Where expenses are of a substantial or extraordinary nature the Parties shall consult to determine the terms and conditions upon which the request shall be executed and the manner in which costs shall be allocated (**Article 20(3)**).<sup>34</sup>
- 4.33 The NIA states that, in accordance with the usual practice for mutual assistance requests, expenses incurred by Australia when making or responding to mutual assistance requests under the Agreement will be met from existing budgets, principally those of the Commonwealth Attorney-General's Department and the Australian Federal Police (who execute the majority of requests) in relation to Vietnamese requests, and by the Australian investigative and prosecutorial agencies seeking assistance in relation to Australian requests.<sup>35</sup>

## Conclusion

- 4.34 The Committee recognises the contribution that mutual assistance treaties make to developing and strengthening Australia's international crime cooperation relationships and that this particular Agreement will strengthen Australia's international crime-fighting capacity in the region.
- 4.35 The Committee acknowledges the Attorney-General's Department's evidence that undertakings given regarding the imposition of the death penalty by Vietnam can be expected to be honoured and that the Attorney-General has sufficient discretion to refuse a request if concerns arise.

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34 NIA, para 27.

35 NIA, para 28.

4.36 The Committee supports Australia's ratification of the Agreement and recommends that binding treaty action be taken.

### **Recommendation 3**

4.37 **The Committee supports the *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam* and recommends that binding treaty action be taken.**

Mr Wyatt Roy MP  
Chair

