

Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons

Background

- 2.1 It is proposed that Australia ratify the *Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons* (the Agreement).
- 2.2 The Agreement permits Australians imprisoned in Vietnam, and Vietnamese nationals imprisoned in Australia, to apply to serve the remainder of their sentences in their home country.¹
- 2.3 The Agreement is part of the Government's International Transfer of Prisoners (ITP) Scheme which has been in place since 2002. A representative from the Attorney General's (AG's) Department informed the Committee of the purpose of the scheme:

The purpose of the scheme is to reintegrate prisoners into society by allowing them to apply to serve their sentences in their home country, without the language and cultural barriers which can reduce their prospects of rehabilitation. Once transferred, prisoners continue to be punished, as far as possible, in accordance with their original sentence.²

1 National Interest Analysis (NIA), para 4.

2 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 1.

- 2.4 The Agreement would be implemented through regulations made under the *International Transfer of Prisoners Act 1997*.³

Obligations

- 2.5 The Agreement creates obligations relating to the eligibility of prisoners to transfer, the origin of the request for transfer, the consent to transfer, financial costs and the jurisdiction over convictions.
- 2.6 Article 4 outlines a range of criteria that determine the eligibility of prisoners to be transferred under the Agreement:
- the prisoner must be either a Vietnamese or Australian national, or otherwise have community ties with Australia and be permitted to reside in Australia indefinitely;
 - the prisoner must have a final conviction that is not subject to appeal; and
 - the prisoner must have at least one year of their sentence remaining.⁴
- 2.7 Prisoners are also required to have been imprisoned for an act which is classified as a criminal offence in both countries, although this requirement may be waived by agreement between the two Parties if permitted by their domestic laws.⁵
- 2.8 Article 5 provides that requests for transfer can be initiated by the prisoner, the Australian Government or the Vietnamese Government.⁶
- 2.9 Article 4(f) requires that the Australian Government, Vietnamese Government and the prisoner must all consent to the transfer taking place. Where a prisoner is sentenced under the laws of, or would be transferred to a correctional facility run by, an Australian State or Territory, the State or Territory must also provide consent.⁷
- 2.10 Article 7 states that the transferring Party⁸ retains jurisdiction for the review, modification or cancellation of the prisoner's sentence.⁹
- 2.11 Article 8 provides that the receiving Party¹⁰ shall enforce the sentence as originally imposed, or as modified, by the transferring Party.

3 NIA, para 23; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

4 NIA, paras 16 and 17; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

5 NIA, para 17.

6 NIA, para 16.

7 NIA, paras 18 and 20; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

8 'transferring Party' refers to the Party from whose jurisdiction the prisoner is transferred

9 NIA, paras 22; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

Where a sentence is by its nature or duration incompatible with the law of the receiving Party, the receiving Party may adapt the sentence in accordance with a sentence prescribed by its own law for a similar offence. However, the adapted sentence is not permitted to be harsher than the original sentence imposed.¹¹

- 2.12 The AG's Department told the Committee that the Agreement permits the receiving Party to grant conditional release to prisoners at the end of their non-parole period.¹²
- 2.13 Article 12 states that the transferring Party will bear the expense of the domestic travel within their country. The receiving Party will bear the expense of the international travel, the domestic travel within their country and the continued enforcement of the sentence after transfer. The receiving Party may request reimbursement of the costs of travel from the prisoner.¹³

Reasons for Australia to take treaty action

- 2.14 The AG's Department submitted that the proposed Agreement would afford humanitarian and rehabilitative support to prisoners, while ensuring that the original custodial sentence of a transferred prisoner is enforced.¹⁴
- 2.15 The Committee was informed that some rehabilitation programs are not available to foreign prisoners due to language barriers or the risk that they might flee the country. The AG's Department considered that the proposed Agreement would enable prisoners to transfer to their home country in order to participate in such programs, which in turn would improve the prospects of prisoners being successfully reintegrated into society. The AG's Department submitted that the rehabilitative benefits for prisoners transferred to Australia may include family support, access to rehabilitation, education, training and employment programs, work release, parole supervision, and offender registration and supervision.¹⁵

10 'receiving Party' refers to the Party to whose jurisdiction the prisoner is transferred

11 NIA, para 22; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

12 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

13 NIA, paras 27 and 29; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

14 NIA, para 9.

15 NIA, paras 5 and 9; NIA, para 9; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

- 2.16 The AG's Department also told the Committee that the Agreement would benefit the relatives of Australians currently imprisoned in Vietnam:

The agreement is expected to reduce the financial and emotional burden on Australians who have family members imprisoned in Vietnam. This is more so because letters and phone calls to and from Australians detained in Vietnam must be in Vietnamese. This is a significant hardship for those who only speak English. Transfers under this agreement will allow prisoners to retain direct family contact during their incarceration thereby reducing the costs of visiting and corresponding.¹⁶

- 2.17 Australia has concluded similar Agreements with Cambodia, China, Hong Kong and Thailand. It also has a multilateral agreement with 64 other countries under the *Council of Europe Convention on the Transfer of Sentenced Persons*. The AG's Department told the Committee that there is no substantive difference between these other Agreements and the proposed Agreement with Vietnam, and that the proposed Agreement is consistent with the requirements of the *International Transfer of Prisoners Act 1997*.¹⁷
- 2.18 The Committee was informed that ITP Agreements are forming an increasingly important part of international cooperation in the administration of criminal justice. The AG's Department submitted that without the entry into force of the proposed Agreement, Australia would have no mechanism with which to facilitate prisoner transfers with Vietnam.¹⁸
- 2.19 The Committee was informed that the proposed Agreement with Vietnam has been a priority for the Australian Government for a number of years. A number of recent high-profile overseas imprisonments have made the conclusion of ITP Agreements an important goal for the Government.¹⁹
- 2.20 The AG's Department considered that the Agreement may result in cost savings for Australia, both by reducing the burden on Australia's consular staff in Vietnam, and by potentially reducing the number of Vietnamese nationals serving prison sentences in Australia.²⁰

16 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

17 NIA, para 11; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 2, 7.

18 NIA, paras 10 and 14; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

19 NIA, para 13; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

20 NIA, para 15; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

- 2.21 The AG's Department stated that, on a broader level, the proposed Agreement would strengthen Australia's bilateral relationship with Vietnam and would demonstrate Australia's commitment to law enforcement cooperation in the region.²¹

Costs

- 2.22 There would be costs to Australia associated with the transport of prisoners, and the maintenance of prisoners transferred to Australia. It has been agreed that the Commonwealth would meet the administrative costs of the transfer, while States and Territories would meet the costs of the transport and maintenance of prisoners. However, Governments are permitted to request reimbursement of the costs of travel from the prisoner.²²
- 2.23 A submission to the inquiry from the Foreign Prisoner Support Service argued that there is an emerging pattern at the State and Territory level whereby prisoners undergoing financial hardship are denied transfers due to an inability to reimburse governments for travel costs. The submission argued that this could occur under the proposed Agreement.²³
- 2.24 The AG's Department acknowledged that the cost of prisoner transfers is a significant issue for State and Territory Governments, especially in the case of New South Wales (NSW). The AG's Department informed the Committee that this issue had been raised at the Ministerial level, and that NSW had been asked to reconsider its position on recovering the costs of prisoner transfers.²⁴
- 2.25 Nonetheless, the AG's Department considered that the decision to recover costs for prisoner transfers is ultimately a concern for State and Territory Governments. The Committee was also told that a number of offenders imprisoned overseas do have substantial financial resources at their disposal and may in fact be in a position to reimburse the cost of their transfer.²⁵

21 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

22 NIA, paras 27 to 29.

23 Foreign Prisoner Support Service, *Submission No. 2*, pp. 1-2.

24 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 4.

25 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 3-4.

Criminality and adaptation of sentences

- 2.26 The Committee queried if there are likely to be any issues arising from the transfer of prisoners where their offence is not classified as criminal by the receiving Party.
- 2.27 The AG's Department told the Committee that this is unlikely to occur in prisoner transfers between Australia and Vietnam, as the majority of current prisoners to which the Agreement would apply are serving sentences for offences which are classified as criminal in both countries.²⁶
- 2.28 However, the AG's Department considered that if such a case did arise, the requirement could be waived by agreement between the Australian and Vietnamese Governments, and an adapted sentence could be negotiated between the two Governments. Following agreement on the adapted sentence by the two Governments, the prisoner could then consider whether to give their consent to the transfer and the adapted sentence.²⁷

Number of prisoners to be affected

- 2.29 The AG's Department informed the Committee that there are currently 28 Australians known to be imprisoned in Vietnam, five of whom are still waiting trial. The Committee was told that the majority of these prisoners are serving long sentences of 20 years to life imprisonment for drug related offences.²⁸
- 2.30 The AG's Department stated that there are currently 684 prisoners in Australia who claim to have been born in Vietnam, and thus may be eligible to transfer to Vietnam under the Agreement.²⁹
- 2.31 The AG's Department informed the Committee that nine prisoners have transferred to Australia under Australia's other ITP Agreements, and that no prisoners have transferred from Australia under these other Agreements. Thus a small number of prisoners are likely to be directly affected by the proposed Agreement with Vietnam.³⁰

26 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 4-5.

27 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 4-6.

28 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

29 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

30 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 8.

Implementation

- 2.32 Australia would need to make regulations under the *International Transfer of Prisoners Act 1997* in order to give effect to the Agreement.³¹
- 2.33 The operation of the Agreement would be supported by complementary legislation and administrative arrangements with all States and Territories.³²

Future treaty action

- 2.34 The Agreement can be amended by consensus between the two Parties. Parties may terminate the Agreement after six months notice, however the provisions of the Agreement would still apply to already-transferred prisoners.³³

Consultation

- 2.35 Relevant Commonwealth Ministers and agencies, and State and Territory Governments, were notified of Australia's proposed ratification of the Convention. Responses supported ratification of the Agreement.³⁴

Conclusions and recommendation

- 2.36 The Committee is of the view that the Agreement will provide humanitarian and rehabilitative support to Australian and Vietnamese prisoners, while ensuring that convicted persons serve their original custodial sentence. The Committee considers that the Agreement will strengthen Australia's bilateral relationship with Vietnam and will demonstrate Australia's commitment to law enforcement cooperation in the region.

31 NIA, para 23.

32 NIA, paras 24 to 26.

33 NIA, paras 31 and 32.

34 NIA, Attachment on Consultation, paras 33 to 36.

Recommendation 1

The Committee supports the *Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons* and recommends that binding treaty action be taken.