

**Documents tabled on 13 May 2009:**

**National Interest Analysis [2009] ATNIA 10**

**with attachment on consultation**

**AGREEMENT BETWEEN AUSTRALIA AND THE SOCIALIST REPUBLIC  
OF VIETNAM CONCERNING TRANSFER OF SENTENCED PERSONS,  
DONE AT CANBERRA ON 13 OCTOBER 2008**

**[2008] ATNIF 17**



## NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

### SUMMARY PAGE

#### **Agreement between Australia and the Socialist Republic of Vietnam concerning the Transfer of Sentenced Persons, done at Canberra on 13 October 2008, [2008] ATNIF 17**

#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is ratification of a bilateral agreement, entitled *Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons* (the Agreement).
2. The Agreement was signed on 13 October 2008 at Canberra.
3. Article 16(1) of the Agreement provides that the Agreement will enter into force 30 days after the Parties have notified each other in writing that their respective domestic requirements for the Agreement's entry into force have been complied with.

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

4. The Agreement will allow Australians imprisoned in Vietnam, and Vietnamese nationals imprisoned in Australia, to apply to serve the remainder of their sentences in their home country. The Agreement will enable both Governments to exchange information about a prisoner's sentence, determine a prisoner's eligibility for transfer and agree upon terms of sentence enforcement following a prisoner's transfer.
5. The repatriation of Australians incarcerated in Vietnam will have a number of benefits for Australia. It will:
  - relieve the hardship and burden on the relatives of the prisoner,
  - enhance the prospects of the prisoner being successfully rehabilitated into Australian society, and
  - reduce the burden on Australian consular officials in Vietnam.
6. There are a number of conditions to be met before a prisoner transfer can take place. Importantly, the prisoner, the Vietnamese Government and the Australian Government must all consent to the transfer. Following repatriation, the sentence must be enforced, as far as possible, in accordance with the original custodial sentence, and the transferring country retains jurisdiction for the cancellation or modification of the prisoner's conviction and sentence. The receiving party bears the costs of transferring the prisoner, except those costs incurred exclusively in the territory of the transferring party.
7. To bring the Agreement into force in Australia, the Australian Government must pass regulations under the *International Transfer of Prisoners Act 1997* (ITP Act).

## **Reasons for Australia to take the proposed treaty action**

8. Australia has an international transfer of prisoners (ITP) scheme in place to facilitate the transfer of prisoners between Australia and foreign countries. Australia's ITP framework comprises domestic legislation—described below in paragraphs 23 to 26—and international arrangements entered into by Australia.

9. Australia's ITP scheme reflects the humanitarian, rehabilitative and social objectives of prisoner transfers while ensuring, as far as possible, that the original custodial sentence of a transferred prisoner is enforced. The rehabilitative benefits of transfer for Australian prisoners may include family support, access to rehabilitation, education, training and employment programs, work release, parole supervision, and offender registration and supervision. Transfers would also benefit Vietnamese prisoners, by enabling them to be considered for any rehabilitation or conditional release programs in Vietnam that might not be available to non-citizens in Australia, due to language barriers or the risk that they might flee the country.

10. ITP is forming an increasingly important part of international cooperation in the administration of criminal justice. Most developed countries participate in ITP schemes and have done so for some time. These countries include the United Kingdom, the United States of America, Canada and most European countries.

11. Australia has concluded similar bilateral prisoner transfer agreements with Cambodia [2009] ATS 4, Thailand [2002] ATS 22 and Hong Kong [2006] ATS 13, and is a party to the Council of Europe *Convention on the Transfer of Sentenced Persons* [2003] ATS 6 (Council of Europe Convention), which facilitates the transfer of prisoners between Australia and 64 other countries. Australia has also concluded an arrangement with the United States for the transfer of prisoners sentenced by military commissions. These agreements have been brought into force in Australia by regulations made under the ITP Act. Once an agreement with another country has been implemented by regulations, the ITP Act applies to Australia's prisoner transfer relationship with that country subject to the provisions of the agreement.

12. From the advent of the ITP scheme in September 2002 to 17 March 2009, there have been 56 prisoners transferred from Australia to countries including Canada, Greece, the Netherlands, the USA, France, Israel, Spain, Germany, Italy and the UK, and nine prisoners transferred to Australia from countries including Thailand, Spain, Hong Kong, the UK and the USA. As at 17 March 2009 Australia was processing an additional 75 requests for transfer out of Australia and 23 requests for transfer to Australia. These applications have been made under both the Council of Europe Convention and Australia's ITP agreements with Thailand and Hong Kong.

13. Over recent years there has been growing public pressure for Australia to capitalise on its well-established ITP scheme by concluding bilateral ITP agreements with more of its regional neighbours. This pressure has come from a wide range of individuals and groups, including parliamentarians, media commentators, senior academics, human rights organisations, prisoner support groups, friends and families of prisoners, and prisoners themselves. The conclusion of an ITP treaty with Vietnam has been a priority for the Australian Government.

14. The proposed agreement with Vietnam would provide a mechanism for Australia to transfer prisoners to and from Vietnam, in accordance with both Australian and Vietnamese domestic law. The Australian Government is not aware of any multilateral or bilateral agreement that Vietnam is a party to, other than the proposed Agreement, that may enable Australia to facilitate prisoner transfers with Vietnam. We are aware that Vietnam has one other bilateral ITP treaty with the UK, which is not yet in force, and mutual legal assistance treaties with Belarus and Poland, which contain clauses allowing for the transfer of prisoners.

15. The number of prisoners likely to benefit from the Agreement, if it enters into force, will depend on the number of Australians sentenced in Vietnam (and the number of Vietnamese sentenced in Australia) from time to time, as well as prisoners' personal interest in transfers. The transfer of prisoners under the Agreement is likely to lead to an overall reduction in the number of Australians serving prison sentences in Vietnam. In addition to humanitarian and rehabilitative benefits, this would reduce the resource burdens placed on Australia's consular staff in Vietnam. Consular staff from the Department of Foreign Affairs and Trade visit Australian prisoners incarcerated overseas on a regular basis and provide a range of resource-intensive consular services. There would also be cost savings for Australia in the likely reduction of Vietnamese nationals serving prison sentences in Australia, although this would be mitigated by costs associated with the maintenance of prisoners transferred to Australia under the Agreement

### **Obligations**

16. The Agreement would not oblige Australia to agree to the transfer of a prisoner, and provides considerable flexibility in determining prisoner transfers. Under Article 4(c) of the Agreement, prisoners are eligible to apply for transfer from Vietnam to Australia provided that they are Australian nationals, or are otherwise permitted by Australian law to travel to, enter and remain indefinitely in Australia, and have community ties with a State or Territory in Australia. Only prisoners who are Vietnamese nationals are eligible to apply for transfer to Vietnam (Article 4(b)). Requests for transfer can be initiated either by the prisoner (Article 5(2)(a)) or the Australian or Vietnamese Governments (Article 5(2)(b)).

17. The prisoner's conviction must be final and not subject to appeal (Article 4(e)). Unless otherwise agreed between Vietnam and Australia, there must be at least one year of the prisoner's sentence remaining to be served when the transfer request is made (Article 4(d)), and conduct giving rise to the offence for which the person is imprisoned must be a criminal offence in both countries (Article 4(a)).

18. A prisoner transfer can only take place with the consent of the Australian Government, the Vietnamese Government, and the prisoner (Article 4(f)). Australia would be obliged to ensure that any prisoner requesting transfer to Vietnam consents to the transfer voluntarily and with full knowledge of the legal consequences (Article 6(1)), including that the prisoner may be required to pay for the costs of the physical transfer (Article 12(2)). Under Article 6(2), Australia would have to afford Vietnam an opportunity, prior to a transfer, to verify that the prisoner has provided informed consent to the transfer.

19. Australia must endeavour to inform prisoners of the substance of the Agreement (Article 5(1)), and to inform Vietnamese authorities of any request for transfer (Article 5(2)(a)). If a prisoner seeks to transfer to Australia, the Australian Government must inform the prisoner of any costs associated with the transfer, and that Australia may seek to recover these costs from the prisoner (Article 4(i)). Australia would also be obliged to provide relevant information to Vietnam, upon request, before requesting a transfer or deciding whether or not to agree to a transfer (Article 5(5)).

20. The consensual nature of the ITP scheme also ensures that States and Territories are involved in any transfers affecting them. Under the Agreement, if a sentenced person being transferred to Vietnam was sentenced under the laws of a State or Territory, the State or Territory Government enforcing the sentence must consent to the transfer (Article 4(g)). As there are no federal prisons, the relevant State or Territory Government receiving sentenced persons from Vietnam must also consent to the transfer (Article 4(h)).

21. In the case of outward transfers of federal prisoners, the approval of the State or Territory Government enforcing the sentence is not required. However, each State or Territory will assist in processing transfers of federal offenders, by providing reports on the prisoner's behaviour and progress through the prison system. The Australian Government works closely with States and Territories to process all applications under the ITP scheme.

22. The receiving country must enforce the sentence as originally imposed (Article 8(1)), and would have to provide information to the transferring country concerning the enforcement of the sentence (Article 9). However, if the sentence is by its nature or duration incompatible with the receiving country's domestic law, it could be adapted in accordance with the sentence prescribed under that country's domestic law for a similar offence (Article 8(3)). In all cases the transferring country retains jurisdiction for the review, revision, modification or cancellation, pardon, amnesty or commutation of the conviction and sentence (Article 7). If the transferring country makes a decision which affects the prisoner's conviction or sentence, the receiving country would be obliged to modify the sentence accordingly (Article 8(5)).

## **Implementation**

23. Regulations will be required under section 8 of the ITP Act to enable Australia to give effect to the Agreement. Australia will then notify Vietnam in writing that its domestic requirements have been fulfilled, with a view to bringing the treaty into force (Article 16(1)).

24. The ITP Act provides the legislative framework for Australia's ITP scheme, and was developed through extensive consultation and co-operation with State and Territory authorities. The provisions in the ITP Act can be enabled by either multilateral treaties, bilateral treaties, or an arrangement of less than treaty status.

25. Many prisoners eligible to apply for transfer to Vietnam will have been sentenced for State and Territory offences. The States and the Northern Territory have passed

complementary ITP legislation, and all States and Territories in which there are active ITP cases currently assist the Australian Government in processing applications.

26. The ITP Act provides for the Commonwealth to conclude Administrative Arrangements with the States and Territories setting out the administrative protocols for the transfer out of foreign prisoners held as State or Federal offenders, and the transfer in (as federal prisoners) of Australians imprisoned overseas. Administrative Arrangements have now been concluded with all States and Territories.

### **Costs**

27. The cost of the continued enforcement of the sentence after transfer is to be borne by the receiving party (Article 12(1)(b)). Each prisoner transferred from Australia to Vietnam will represent a cost saving of over A\$79,000 for each year the prisoner would otherwise have spent in an Australian State or Territory prison. This figure is the approximate annual cost of maintaining a person in prison in Australia according to the Productivity Commission's 2006 Report on Government Service Provision.

28. In relation to incoming prisoners, it has been agreed between the Commonwealth, the States and the Territories that:

- the Commonwealth will meet all general administrative costs involved in the processing of transfers;
- the State or Territory to which a prisoner wishes to return will be responsible for meeting the costs of transporting the prisoner to Australia from the international point of departure, and for maintaining the prisoner in prison; and
- if the State or Territory Minister considers that an incoming prisoner is in a position to pay the costs associated with their transfer to Australia, they may seek reimbursement by the prisoner of such costs as a condition of the transfer.

29. In relation to outgoing prisoners from Australia, Vietnam will bear the expenses of the transfer, except those expenses incurred exclusively in Australian territory (Article 12(1)(a)). The States and Territories have agreed that the costs of moving a prisoner within Australia to the international point of departure will be borne by the State or Territory in which the prisoner is held before transfer.

### **Regulation Impact Statement**

30. A self assessment of the regulatory impact has been conducted as required by the Office of Regulation Review (Productivity Commission) and it confirms that a Regulation Impact Statement is not required.

### **Future treaty action**

31. The Agreement is silent as to amendment. In the absence of an amendment provision, Article 39 of the *Vienna Convention on the Law of Treaties 1969* [1974] ATS 2 would apply to allow amendment by agreement between the Parties. Any amendment to the Agreement would be effected in accordance with Australia's domestic treaty process requirements.

### **Withdrawal or denunciation**

32. Either party may terminate the Agreement by written notice at any time. The Agreement will cease to have effect six months from the date upon which notice is received (Article 16(3)). Termination of the Agreement will not affect the sentence enforcement of any prisoners who have already transferred under the Agreement. Any withdrawal from the Agreement by the Australian Government would be effected in accordance with Australia's domestic treaty process requirements.

### **Contact details**

International Assistance and Treaties Branch  
International Crime Cooperation Division  
Attorney-General's Department.

## ATTACHMENT ON CONSULTATION

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#### **CONSULTATION**

33. The ITP scheme, since its inception in Australia in 2002, has received broad public support. With a number of high-profile Australians currently imprisoned abroad, the Australian public has become increasingly aware and expectant that ITP agreements can be negotiated to repatriate Australians to Australian gaols.

34. On 22 July 2005, Senator the Hon Christopher Ellison (then Minister for Justice and Customs) wrote to all State and Territory ministers with portfolio responsibility for implementation of the ITP scheme. Copies of these letters were provided to members of the Commonwealth-State/Territory (Officials') Standing Committee on Treaties (SCOT) in each jurisdiction. The letters asked for comments on the proposed treaty action.

35. Responses were received from the Hon Tony Kelly MLC, then New South Wales Minister for Justice, the Hon John D'Orazio MLC, then Western Australian Minister for Justice and Small Business and the Hon Judy Jackson, then Tasmanian Attorney-General. Ms Jackson and Mr Kelly supported the proposed treaty action. Mr D'Orazio thanked the Australian Government for the opportunity to comment.

36. A treaty schedule was provided to SCOT at its meeting on 15 October 2008. The schedule listed the treaty as being agreed at officials' level. There was no comment from the Committee at its meeting about this treaty. The treaty was also listed in previous treaty schedules for SCOT meetings in 2006 and 2007.