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Mr Craig Chittick
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South-East Asia Mainland & Regional Division
Department of Foreign Affairs and Trade
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By email: humanrights@dfat.gov.au

Dear Mr Chittick

Australia-Vietnam 2015 Human Rights Dialogue: Civil Society Consultation

The Law Council of Australia thanks the Department of Foreign Affairs and Trade (**DFAT**) for the opportunity to engage in the Civil Society Consultation on 29 July 2015, and to provide a written submission ahead of the Australia-Vietnam Dialogue on 14 July 2015. The Law Council considers that such opportunities allow the Government to seek valuable feedback from civil society, and hopes that its concerns, and those of other organisations, are raised at the Australia-Vietnam Dialogue and through the Australian Government's ongoing human rights discussions with the Government of the Socialist Republic of Vietnam.

The Law Council of Australia represents the Australian legal profession on national issues and promotes the administration of justice, access to justice and general improvement of the law. The Law Council was established in 1933, and acts on behalf of 16 Australian state and territory law societies and bar associations and Law Firms Australia. Through its constituent bodies the Law Council represents over 60,000 lawyers across Australia.

A principal activity of the Law Council is to promote and defend the Rule of Law, particularly in the Asia-Pacific region, including in Vietnam. This responsibility is reflected in the Law Council's Rule of Law Principles.¹ The Law Council also promotes and defends the interests of the legal profession internationally.

The Law Council is concerned by reports from the United Nations, the US State Department, the UK Foreign and Commonwealth Office and international non-government organisations of human rights violations that continue to take place in Vietnam. The Law Council believes that these violations are in contravention of rule of law principles and Vietnam's voluntarily assumed international human rights law obligations.

The Law Council's comments in this submission will be limited to the legal framework in Vietnam, the legal profession, the death penalty and the international obligations of both Australia and Vietnam.

Vietnam's Legal Framework

The Law Council acknowledges that since 2009, 25 key laws have been enacted or amended with a view to better compliance with, and exercise of, human rights and 41 national socioeconomic development strategies and programmes have been approved

¹ Law Council of Australia, Policy Statement: Rule of Law Principles, 19 March 2011, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf> ('LCA Rule of Law Principles').

and implemented.² It also acknowledges that the Vietnamese Government is in the process of preparing laws relating to human rights for approval by the National Assembly in 2016, including an amended Penal Code, Law on the Press, Law on Association, Law on Demonstrations and Law on Information Access.³

However, the Law Council considers there is a real risk that these changes to the legal framework may further infringe upon human rights, particularly in respect of existing crimes related to national security, such as Article 258 of the Penal Code.⁴

The Law Council acknowledges the broad consensus among the international community that the current legal framework is characterised by a lack of independence of the judiciary; low levels of access to justice; and alleged corruption in the public sector that undermines the rule of law and human rights, curtails access to services, and erodes trust in institutions.⁵ Further, concerns have also been raised about the lack of a juvenile justice system.⁶

It has also been observed that trials of human rights activists routinely fall short of international standards of fairness for various reasons, including that the presumption of innocence is not enforced; there is a lack of effective defence; there is limited opportunity to call witnesses; attempts by defendants to make statements in court are often cut short; judgments can be decided before defendants appear in court; trials commonly last only a few hours;⁷ the law does not specifically provide for a right to remain silent;⁸ and bureaucratic delays may be used to deny the legal right of detainees to counsel.⁹

While some of these trial rights are protected under law, such as Article 31(1) of the Constitution which provides for the presumption of innocence, the Law Council is concerned that in general terms, trial rights are not enforced in Vietnam.

In respect of politically linked trials, it has been observed that public and family members cannot attend these trials and attendance by media and diplomatic observers is often restricted or banned.¹⁰ Further, defendants are often held with virtually no contact during pre-trial detention and often beyond legal limits, and lack access to legal counsel.¹¹

The Law Council also notes that investigations into national security cases may be extended by law, with access to counsel denied for up to 20 months.¹² For crimes infringing on national security and other exceptionally serious offences, courts may

² Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Viet Nam' UN Doc A/HRC/26/6, 26th sess, 2 April 2014, [8] ('HRC Report').

³ *Ibid.*, [59].

⁴ Article 258 is a crime infringing upon administrative management orders which, in serious circumstances, can lead to sentences of between two to four years imprisonment for: 'Those who abuse the rights to freedom of speech, freedom of press, freedom of belief, religion, assembly, association and other democratic freedoms to infringe upon the interests of the State, the legitimate rights and interests of organizations and/or citizens.'

⁵ For example, see: Human Rights Council, 'Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21' UN Doc A/HRC/WG.6/18/VNM/2, 18th sess, 7 November 2013, [46]-[48] ('HRC UN Report'). These concerns were noted by the Committee Against Torture.

⁶ *Ibid.*, [49]-[50]. These concerns were noted by the Committee on the Rights of the Child.

⁷ Human Rights Council, 'Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21' UN Doc A/HRC/WG.6/18/VNM/3, 18th sess, 4 November 2013, [32]-[33] ('HRC NGO submission').

⁸ Bureau of Democracy, Human Rights and Labor, U.S. Department of State, *Country Reports on Human Rights Practices for 2014*, 'Vietnam', available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> ('US Government Report'), 13. The Law Council notes that the burden of proof does rest on the State.

⁹ *Ibid.*, 7-8.

¹⁰ HRC NGO submission, [33].

¹¹ *Ibid.*

¹² US Government Report, 7-8.

impose probation or administrative detention on people for one to five years following the completion of their sentence.¹³

Based upon feedback received at the Consultation, the Law Council is aware that the Attorney-General's Department is working with its Vietnamese counterparts on the development of certain laws in Vietnam. The Law Council urges the Australian Government to ensure that the rule of law and human rights are protected under these amended laws, as well as Vietnam's legal framework more broadly. For example, it notes that the rule of law requires that the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law,¹⁴ and the law must be readily known, available, certain and clear.¹⁵

The Legal Profession

In respect of the legal profession in Vietnam, the Law Council notes reports that counsel risk harassment, expulsion from the bar and their own imprisonment when 'sincerely' defending their clients.¹⁶ In particular, lawyers who represented human rights defenders or communities affected by human rights violations had been harassed and disbarred from their Bar Associations.¹⁷ Further, it has been observed that the Vietnam Bar Federation and the local Bar Associations are not independent of Government. For example, if a lawyer criticises the Communist Party of Vietnam or the Government, the local Bar Association can expel the member on that basis.¹⁸

The Law Council also notes that legislation applying to lawyers may also offend the rule of law and human rights principles, in that the laws are drafted so broadly that they could capture a wide range of benign conduct¹⁹ and that the laws may limit freedom of expression unnecessarily.²⁰ For example, Article 9(g) of the Law on Lawyers (No. 65/2006/QH11) prohibits lawyers from:

Abusing law practice or the lawyer's title to cause harms to national security, social order or safety, infringing upon the State's interests, public interests or legitimate rights and interests of agencies, organizations or individuals.

Article 89 of the Law on Lawyers provides that lawyers who violate the law, including Article 9(g), may be disciplined, administratively handled or examined for penal liability and may be required to pay compensation. Pursuant to this Law, lawyers may therefore be subject to Article 27 of the Ordinance on Handling of Administrative Violations (No. 44/2002/PL-UBTVQH10 of July 2, 2002), concerning administrative probation.²¹ The administrative probation time limits range from six months to two years, but do not apply to persons under 18.²²

Further, lawyers contravening Article 9(g) on the Law on Lawyers may also be charged under Chapter XI of the Penal Code concerning crimes relating to national security.

¹³ Ibid.

¹⁴ LCA Rule of Law Principles, Principle 5.

¹⁵ Ibid, Principle 1.

¹⁶ HRC NGO submission, [32].

¹⁷ Ibid, [21].

¹⁸ Ibid, [34]. This was also detailed in the US Government Report, which states that: 'There continued to be a shortage of well-trained and experienced lawyers and judges. The Vietnam Bar Federation is a member organization of the CPV's VFF [Vietnam Fatherland Front, an umbrella group that oversees the country's government-sponsored social organizations] and is closely coordinated with the Ministry of Justice and the Vietnam Lawyers Association', at p 12.

¹⁹ LCA Rule of Law Principles, Principle 1.

²⁰ Article 19, United Nations, International Covenant on Civil and Political Rights, 16 December 1996, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

²¹ The Article provides: 'The administrative probation applicable to persons who have committed acts of law offense detrimental to the national security but not to the extent of being examined for penal liability shall be decided by the provincial-level People's Committee presidents. Persons put under administrative probation must reside, work and earn their living in certain localities and be subject to the management and education by the local administration and people'.

²² CERD has expressed its concern with this Ordinance – see: HRC UN Report, [13].

One of those crimes appears at Article 88 of the Penal Code, in relation to conducting propaganda against the Socialist Republic of Vietnam.²³ The Law Council therefore considers that lawyers, in acting for activists such as bloggers who speak out against the State, could be both civilly or criminally liable where it is considered that their involvement in a national security matter is itself a threat to national security.

The Law Council urges the Australian Government to make representations to ensure that the rule of law and human rights are upheld in respect of lawyers in Vietnam.

Death Penalty

The Law Council notes that there has been a reduction in the number of crimes subject to the death penalty in the *Penal Code*²⁴ and that Vietnam has stated that it would continue to work to reduce the number of crimes subject to that punishment by 2016, particularly during the amending process for the *Penal Code*.²⁵ This is a welcome development.

Despite such positive steps, international organisations still have concerns over the use of the death penalty, noting that it remains for offences such as murder, drug offences, treason and crimes against humanity.²⁶ In 2014/2015 three executions by lethal injection were reported and more than 650 people are on death row. The Vietnam Government does not provide accurate statistics on the use of the death penalty and the real statistics remain a state secret.²⁷

Based upon feedback received at the Consultation, the Law Council understands that DFAT makes representations to the Vietnam Government on the death penalty. The Law Council has a long standing policy against the death penalty²⁸ and encourages DFAT to continue to make representations, including working with like-minded countries, in advocating for the abolition of the death penalty in Vietnam.

International Law Obligations

The Law Council considers that, in accordance with the rule of law, States must comply with their international legal obligations whether created by treaty or arising under customary international law.²⁹ This includes that States must avoid inconsistencies between their international legal obligations and their domestic laws and policies. Furthermore, States may not invoke the provisions of its internal laws as justification for failure to perform a treaty.³⁰

Vietnam has ratified or acceded to seven of the ten core international human rights treaties.³¹ As Australia is party all of these treaties it is obligated to ensure that Vietnam acts in accordance with its obligations under the same treaties. The Law Council urges DFAT to utilise these treaties as a part of its ongoing human rights advocacy towards Vietnam, as well as a means to fulfil its international law obligations.

²³ Article 88(1) provides that certain acts, such as 'Making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam' can result in a term of imprisonment between three and twelve years. Pursuant to Article 88(2), less serious crimes invite a sentence of between ten and twenty years of imprisonment.

²⁴ HRC Report, [59].

²⁵ Ibid.

²⁶ Amnesty International, *Amnesty International Report 2014/2015: Vietnam*, 2015. Available at: <https://www.amnesty.org/en/countries/asia-and-the-pacific/viet-nam/report-viet-nam/>.

²⁷ Ibid.

²⁸ Law Council of Australia, *Policy Statement: The Death Penalty*, September 2007. Available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCA_death_penalty.pdf

²⁹ LCA Rule of Law Principles, Principle 8.

³⁰ United Nations, Vienna Convention on the Law of Treaties, Article 27, 23 May 1969, available at: <http://www.refworld.org/docid/3ae6b3a10.html>.

³¹ This includes; *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, *Convention on the Elimination of All Forms of Discrimination against Women*, *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Rights of the Child*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and *Convention on the Rights of Persons with Disabilities*.

Adopting such methods can assist in minimising perceived parochialism on the part of foreign governments with different legal, political, social and economic systems.

Based upon feedback received at the Consultation, the Law Council is aware that DFAT makes representations to Vietnam in respect of the benefits of ratifying the *Convention relating to the Status of Refugees* (**the Refugee Convention**) and encourages such engagement as a means by which to establish a regional solution to combat people smuggling and address the irregular flow of asylum seekers. The Law Council welcomes this advocacy and encourages DFAT to continue its efforts to persuade Vietnam to ratify the Refugee Convention.

Further, although not a binding international law obligation on Vietnam, the Law Council also observes that the United Nations *Basic Principles on the Role of Lawyers*³² (**the Basic Principles**) have been formulated to assist United Nations Member States in their task of promoting and ensuring the proper role of lawyers. They are to be respected and taken into account by Governments within the framework of their national legislation and practice.

The Basic Principles protect the freedom of expression and association of lawyers, guarantee the functions of lawyers, and protects the self-governing and independence aspects of professional associations. Articles of particular relevance to Vietnam, include; 7³³, 16³⁴ and 23.³⁵ The Law Council recommends the Australian Government encourage Vietnam to comply with the Basic Principles.

Please let me know if I can provide any further information.

Yours faithfully



MARTYN HAGAN
SECRETARY-GENERAL

³² United Nations, Basic Principles on the Role of Lawyers, 7 September 1990, available at: <http://www.refworld.org/docid/3ddb9f034.html>.

³³ The Article provides that:

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

³⁴ The Article provides that:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

³⁵ This Article provides that:

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.