Law Council
OF AUSTRALIA

11 June 2024

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Dear Ms Linke

Australia–Vietnam 2024 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 again in DFAT's Civil Society Consultation ahead of the 19th Australia–Vietnam Human Rights Dialogue. The Law Council has previously provided submissions as part of similar DFAT Civil Society Consultations in 2015, 2016, 2017, 2018, 2020 and 2021.

The Law Council of Australia represents the Australian legal profession at the national level and advises governments, courts and federal agencies on the improvement of the law and justice system for the benefit of the community. Through its Constituent Bodies, the Law Council represents more than 104,000 Australian lawyers.

The Law Council also represents the Australian legal profession internationally, and maintains relationships with national, regional, and global legal professional associations. It maintains special consultative status with the United Nations Economic and Social Council (**ECOSOC**).

From 1 July 2023, the Law Council became host of the Secretariat of LAWASIA—the Law Association for Asia and the Pacific. The Vietnam Bar Federation (**VBF**) is a Member Organisation of LAWASIA, and representatives of the VBF sit on LAWASIA's Council.[1]

The Law Council limits its comments in this submission to the independence of Vietnam's judiciary and legal profession, the imposition of the death penalty, Vietnam's engagement with UN Human Rights Council mechanisms, and draws attention to the particular case of community lawyer and human rights defender Mr Đặng Đình Bách.

[1] See LAWASIA Constitution. See also 2023-2024 LAWASIA Councillors.

Independence of the Judiciary and Legal Profession

The right, in full equality, to a fair and public hearing by an independent and impartial tribunal is enshrined both in the Universal Declaration of Human Rights (**UDHR**) and the International Covenant on Civil and Political Rights (**ICCPR**), which Vietnam has ratified.[2]

According to the United Nations Human Rights Committee, the requirement of independence and impartiality under Article 14(1) of the ICCPR is an absolute right, and refers to procedures for appointment as well as the actual independence of the judiciary from political interference by the executive branch.[3]

The Law Council of Australia maintains its concerns in relation to the independence of Vietnam's judiciary. While independence of the judiciary is guaranteed by statute[4] and the Vietnamese Constitution,[5] the appointment of judges is directly influenced by the Communist Party of Vietnam (**CPV**). A member of the Communist Party's Central Committee is appointed to the position of Chief Justice of the Supreme People's Court, and Judges of the Supreme People's Courts are nominated by the CPV.[6] Judges are screened by the CPV and local officials during the appointment process with a view to assessing their suitability for the bench. Party officials also review their suitability for reappointment.[7]

The VBF and local bar associations also lack independence. All leaders of these legal professional associations must be CPV members, and their appointments must be agreed to by CPV leaders.[8] The Law Council has previously noted reports that lawyers risk harassment, expulsion from the bar and imprisonment for defending their clients.[9]

Although the United Nations *Basic Principles on the Role of Lawyers* and the *Basic Principles on the Independence of the Judiciary* do not constitute binding international law obligations, they have been formulated to assist United Nations Member States in their task of securing and promoting the independence of the judiciary and promoting and ensuring the proper role of lawyers.

The *Basic Principles on the Independence of the Judiciary* provide guarantees for the independence of the judiciary in law, the fairness of judicial proceeding, and the integrity of judicial appointments, including safeguarding from discrimination on the basis of political or other opinion. Principles of particular relevance to Vietnam include paragraphs 2, 6, and 10.

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[2] *Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, UN Doc A/810 (10 December 1948) Article 10.
[3] Human Rights Committee, *General Comment No.32 Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) 5.
[4] See for example, Law on the Organization of People's Courts, The National Assembly (Vietnam) Order No 62/2014/QH133, 24 November 2014, art 9.
[5] *The Constitution of the Socialist Republic of Vietnam* (Vietnam) art 103.
[6] Human Rights Council, *Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/WG.6/46/VNM/2 (27 February 2024) 4.
[7] With the exception of the Chief Justice of the Supreme Court, the initial term for judges in Vietnam is 5 years. For judges who are reappointed, the subsequent term of office is 10 years. See Law on the Organization of People's Courts, articles 26, 74.
[8] Börje Ljunggren, *Vietnam – the scope and limits of transition* (2024) 7.
[9] 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/3 (7 November 2013) 32. ('HRC NGO submission'); See also, Lawyers for Lawyers, 'Vietnamese lawyers Dang Dinh Manh, Dao Kim Lan and Nguyen Van Mieng forced to flee their country (27 September 2023) https://lawyersforlawyers.org/en/vietnamese-lawyers-dang-dinh-manh-dao-kim-lan-and-nguyen-van-mieng-forced-to-flee-their-country/

The *Basic Principles on the Role of Lawyers* provide guarantees for the functioning of lawyers, including their ability to perform all of their professional functions without intimidation, harassment or improper interference, as well as lawyers' rights to freedom of expression and association, and to form self-governing and independent professional associations. Principles of particular relevance to Vietnam include paragraphs 7, 8, 16 and 23.

The Law Council urges the Australian Government to encourage Vietnam to comply with both the *Basic Principles on the Independence of Judges* and the *Basic Principles on the Role of Lawyers*.

Australia and Vietnam's Joint Statement on the elevation of the bilateral relationship to a comprehensive strategic partnership provides acknowledgement of the close justice ties between both countries and the shared determination to abide by international law.[10] The Law Council urges the Australian Government to consider how Australia may increase its assistance to justice institutions in Vietnam in accordance with this statement of shared political will.

The recent launch of the Fostering Advancement of Inclusive and Rights-based (**FAIR**) Justice Program in the Philippines provides an illustrative example of assistance and collaboration between the Australian Government and the justice sector in Southeast Asia which might be adapted to Vietnam.[11] The Mekong Australia Partnership provides another avenue for Australia to provide direct assistance through strengthening institutions and capacity building.

Death Penalty

Vietnam continues to maintain the death penalty for 18 offences, including offences which do not meet the threshold of the 'most serious crimes' under Article 6(2) of the ICCPR, such as drug-related offences.[12] At the end of 2022, it was estimated that there were more than 1200 people known to be under sentence of death in Vietnam.[13] Comprehensive data on the number of persons executed or on death row in Vietnam is unavailable, as data on capital punishment is considered a state secret.[14]

Under Vietnam's Constitution, the President has the power to grant pardons and proclaim amnesties.[15] This power was further institutionalised through the 2018 Amnesty Law and has been utilised by the President to commute the death penalty to life imprisonment. Notably the President utilised his power to grant clemency to two Australians in 2023.[16]

While the Law Council welcomes commutations of the death penalty to life imprisonment and clemency for individuals, it should be noted that pardons, like amnesties are fundamentally political instruments and are often used to enhance the political power of

[10] Prime Minister and Cabinet, 'Joint statement on the elevation to a comprehensive strategic partnership between Vietnam and Australia' (7 March 2024).
[11] Supreme Court of the Philippines, 'SC, Australian Government Launch Fair Justice Program (Media Release, 12 April 2024).
[12] According to Amnesty International's Global Death Report, in 2022, 80% of all recorded death sentences in Vietnam were imposed for drug-related offences. Regarding the 'most serious crimes' classification, see Human Rights Committee *General Comment 36 – Article 6: right to life*, UN Doc CCPR/C/GC/36 (3 September 2019) [35].
[13] Amnesty International, 'Global Death Penalty Report: Death Sentences and Executions 2022' (16 May 2023) 22.
[14] Human Rights Council, *Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights* (n 6) 2.
[15] *The Constitution of the Socialist Republic of Vietnam* (Vietnam) art 88(3).
[16] Sarah Ferguson and Marina Freri, 'Two Australians who faced the death penalty granted clemency in Vietnam, says Albanese' *ABC* (online, 4 June 2023).

executive government.[17] The selective granting of clemency to foreign nationals (or to locals in response to significant international pressure) can be seen as a means to obtain greater international legitimacy, notwithstanding a government's authoritarian characteristics in the domestic setting.[18] Pardons may serve to reinforce the same political and juridical structure for the denial of rights that led to a person being classed as a 'public enemy' in the first place.[19]

The Law Council has a long-standing policy against the death penalty in all circumstances for all people.[20] The Law Council believes that, because all States are bound by customary international law on the subject and some States are bound by specific treaty obligations, the imposition and execution of the death penalty by any State is a legitimate subject of scrutiny and comment by individuals and agencies within and outside the State and indeed by other States.

The Law Council reiterates the recommendation made in previous Civil Society Consultations that the Australian Government use the Australia–Vietnam Human Rights Dialogue as an opportunity to advocate for increased transparency and regular reporting regarding the imposition and execution of the death penalty in Vietnam. We also encourage the Australian Government to continue to appeal to the Vietnamese Government to amend legislation to ensure the use of the death penalty fully complies with Vietnam's obligations under the ICCPR and establish a de facto moratorium on the death penalty, with a view towards formal abolition.

The Law Council notes that Australia made a recommendation in similar terms during the Universal Periodic Review (**UPR**) of Vietnam in 2019.[21] However, during the most recent UPR cycle for Vietnam, Australia merely recommended that Vietnam reduce crimes punishable by death, including drug offences, that do not meet the threshold of 'most serious crimes' under the ICCPR.[22]

Engagement with UN Human Rights Council special procedures

The Law Council notes that Special Rapporteur on the right to development visited Vietnam in November 2023 at the invitation of the Government.[23] However, we understand that Vietnam has not extended a standing invitation to the special procedures of the United Nations Human Rights Council and that several requests for country visits remain pending.[24]

[17] Reneé Jeffery, *Amnesties, Accountability, and Human Rights* (University of Pennsylvania Press, 2014) 31; See also, Louis Joinet, *Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,* UN Doc E/CN.4/Sub.2/1985/16/Rev.1 (21 June 1985).
[18] Daniel Pascoe, *Clemency in Southeast Asian Death Penalty Cases* (2014) *Centre for Indonesian Law, Islam and Society* 9.
[19] Nick Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (Cambridge University Press, 2015) 128.
[20] Law Council of Australia, *Law Council Policy Statement on the Death Penalty* (October 2021).
[21] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Viet Nam*, UN Doc. A/HRC/41/7 (28 March 2019).
[22] Department of Foreign Affairs and Trade 'Universal Periodic Review of Vietnam, Statement by Australia' (7 May 2024).
[23] Human Rights Council, *National report submitted pursuant to Human Rights Council resolutions 5/1 and 16/21*, UN Doc. A/HRC/WG.6/46/VNM/1 (22 February 2024) 17.
[24] Human Rights Council, *Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/WG.6/46/VNM/2 (27 February 2024) 1.

The Law Council recommends that Australia encourage Vietnam to join Australia and 127 other UN Member States to issue a standing invitation to the special procedures of the Human Rights Council, noting that specific dates for visits must still be mutually agreed upon.

Particular cases of concern

In addition to the issues raised above, the Law Council expresses particular concern for the welfare of Vietnamese community lawyer and human rights defender Mr Đặng Đình Bách. It was reported in February 2024 that Mr Bách began a third hunger strike to protest his detention conditions.[25]

Prior to his arrest, Mr Bách ran the Law and Policy of Sustainable Development Research Centre, a non-profit focused on civil society participation and monitoring the effectiveness and enforcement of the legal policy framework of sustainable development in Vietnam and its clean energy transition. Mr Bách has been subject to multiple fair trial violations which fall short of international fair trial standards.[26] Following his arrest, Mr Bách was held incommunicado from July 2021 until August 2022.[27] He was consistently denied access to his lawyer, and the court reportedly refused to hear his defence during a closed trial on 24 January 2022.[28] In 2023, the United Nations Working Group on Arbitrary Detention found that Mr Bách's deprivation of liberty was arbitrary and in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11 and 19 of the UDHR and articles 2, 9, 14, 15, 16, 19 and 26 of the ICCPR.[29]

The Law Council encourages the Australian Government to make representations in the case of Mr Bách and to advocate against the continued repression of human rights defenders both through the violation of free trial standards and differentiated treatment in detention.

If you wish to discuss this submission or have any questions or comments, please do not hesitate to contact Dominic Harvey-Taylor, Policy Lawyer [redacted].

Yours sincerely



Juliana Warner
President-elect

[25] Office of the High Commissioner for Human Rights, 'Viet Nam: End convictions and deplorable detention conditions for human rights defenders, UN experts say' (Media Release, 14 February 2024)
[26] Human Rights Council, *Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March – 5 April 2023*, UN Doc. A/HRC.WGAD/2023/22 (26 May 2023) 3.
[27] Ibid 2.
[28] Ibid 2–7.
[29] Ibid.