

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 187, 2015**

Issued by the authority of the Minister for Justice

*Mutual Assistance in Criminal Matters Act 1987*

*Mutual Assistance in Criminal Matters (Vietnam) Regulation 2015*

Section 44 of the *Mutual Assistance in Criminal Matters Act 1987* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Section 7 of the Act provides that the Act applies to all foreign countries, however regulations may provide that the Act applies to a foreign country subject to any mutual assistance treaty between that country and Australia referred to in the regulations. Where that treaty wholly relates to mutual assistance, the Act applies subject to the limitations, conditions, exceptions or qualifications that are necessary to give effect to the treaty.

The purpose of the *Mutual Assistance in Criminal Matters (Vietnam) Regulation 2015* is to give effect in Australian domestic law to the *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam*, done at Sydney on 2 July 2014 (the Treaty). The Treaty was the subject of a public hearing by the Joint Standing Committee on Treaties (JSCOT). In Report 147, tabled 26 March 2015, JSCOT recommended that binding treaty action be taken to implement the Treaty.

Vietnam and Australia may already consider mutual assistance requests from each other on the basis of reciprocity or in respect of offences that feature in multilateral conventions to which we are both parties. The Treaty establishes a formal bilateral framework for Vietnam and Australia to make and receive mutual assistance requests in criminal matters to and from each other. The Treaty also provides certainty, imposes obligations at international law and institutes practical arrangements for requesting and providing assistance. The Regulation provides that the Act applies to Vietnam subject to the Treaty. Therefore, requests for mutual assistance between Vietnam and Australia are considered on the basis of the bilateral framework established by the Treaty, subject to the limitations, conditions, exceptions or qualifications necessary to give effect to the Treaty. A copy of the Treaty is set out in Schedule 1 of the Regulation.

The Regulation is consistent with the Act. The Treaty contains a range of internationally accepted human rights safeguards, including mandatory and discretionary grounds of refusal of a request, which largely reflect the existing grounds of refusal in the Act. For example, the Requested Party must refuse a request for assistance where the request is made for the purpose of investigating, prosecuting or punishing a person on account of that person's race, sex, sexual orientation, religion, nationality or political opinion. The Requested Party also has the discretion to refuse the request on a number of other grounds, for example, where the request would be likely to prejudice an investigation or the safety of any person.

The Treaty enables Australia to refuse assistance in death penalty matters. Vietnam retains the death penalty for serious crimes including drug offences. Australia has a long-standing policy of opposition to the death penalty. Under the Treaty, Parties may refuse assistance if the request relates to an offence punishable by the death penalty unless the Requesting Party gives an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out. This operates consistently with the existing provisions of the Act and reflects Australia's policy position and domestic legal requirements.

Consultation was not undertaken outside of the Australian Government for this legislative instrument, as it relates to criminal justice and law enforcement matters. The instrument does not have direct, or substantial indirect, effects on business, nor does it restrict competition.

The Regulation commences on the day on which the Treaty enters in to force. Article 22 of the Treaty provides that the Treaty will enter into force 30 days after the date on which parties have notified each other that their domestic processes for the implementation of the Treaty have been completed.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not necessary for this Regulation.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth).

Details of the Regulation are set out in the [Attachment](#).

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Mutual Assistance in Criminal Matters (Vietnam) Regulation 2015**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

2. The *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Act) provides the legislative basis for mutual assistance in Australia. Mutual assistance is the process by which countries provide formal government to government assistance in the investigation and prosecution of criminal offences, and related proceedings. Mutual assistance is a key tool in international crime cooperation and is used where evidence or information relating to a criminal investigation, prosecution or related proceeding is located in a foreign country.

3. Under the Act, Australia is able to make and receive requests for assistance to and from any country. The Act allows regulations to be made to provide that the Act applies to a foreign country subject to the terms of a bilateral or multilateral treaty.

4. The Mutual Assistance in Criminal Matters (Vietnam) Regulation 2015 (the Regulation) will give effect in Australian domestic law to Australia's mutual assistance obligations under the *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam*, done at Sydney on 2 July 2014 (the Treaty). The Regulation will provide that the Act applies to Vietnam subject to the Treaty.

5. The effect of the Regulation is to facilitate Australia making and receiving mutual assistance requests to and from Vietnam in criminal matters.

#### **Human Rights Implications**

6. Australia's mutual legal assistance regime contains a number of human rights safeguards that strike an appropriate balance between Australia's law enforcement objectives, whilst ensuring the rights of individuals are protected, and Australia complies with its international obligations.

7. When a request for mutual assistance is received, the general obligation to provide assistance under Article 1 of the Treaty is subject to a number of internationally accepted grounds of refusal contained within Article 4. These grounds of refusal reflect Australia's domestic requirements and international human rights obligations. The Regulation does not alter any of the human rights safeguards that are already contained in the Act. These human

rights protections, as outlined below, will apply to any request for mutual assistance between Vietnam and Australia.

8. This legislative instrument implements Australia's obligations under the Treaty and engages the following human rights with reasonable and appropriate limitations, where necessary:

- The right to life

Article 4(2)(b) of the Treaty provides a discretionary ground of refusal in cases where the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or executed, unless Vietnam provides an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out.

- This is consistent with the right to life under Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR) and the *Second Optional Protocol to the ICCPR*.

- Minimum guarantees in criminal proceedings

Under Article 4 (1)(b) of the Treaty mutual assistance shall be refused where the person to whom the request relates would be exposed to double jeopardy.

- This ground positively accords with the minimum guarantees in criminal proceedings contained within Article 14(7) of the ICCPR.

- Prohibition against torture and cruel, inhumane or degrading treatment and punishment

Article 4 (1)(h) of the Treaty provides that assistance shall be refused where there are substantial grounds for believing that any person would be in danger of being subjected to torture if the request was actioned.

- This ground is consistent with the prohibition on torture and cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR and under the *Convention against Torture and other Cruel, Inhumane or degrading treatment and punishment* (CAT). It is also consistent with Australia's obligations under Article 3 of the CAT not to return a person to another State where there are substantial grounds for believing the person would be in danger of being subjected to torture.

Article 4 (2)(a)(ii) provides that assistance may also be refused if the provision of assistance would or would be likely to prejudice the safety of any person. This provides a discretionary mechanism for Australia to refuse requests for assistance in cases of cruel, inhuman or degrading treatment or punishment resulting in unsafe conditions, such as corporal punishment or inhuman or degrading conditions of detention.

- The rights of equality and non-discrimination

Mutual assistance shall be refused where the request is made for the purpose of investigating, prosecuting or punishing a person on account of that person's race, sex, sexual orientation, religion, nationality or political opinion under Article 4 (1)(g) of the Treaty.

- This ground positively accords with the rights of equality and non-discrimination under Article 2(1) and 26 of the ICCPR.

Mutual assistance shall also be refused where the offence is a political offence;

- This ground is consistent with the right of freedom of opinion and expression (Articles 19 and 20 ICCPR), the right to freedom of assembly and association (Articles 21, 22 ICCPR) and the right to take part in public affairs and elections (Article 25, ICCPR).

- The right to privacy

Article 8 of the Treaty accords with the right to privacy provided in article 17 of the ICCPR. It provides that requested countries will keep the application, contents of request and supporting documentation confidential, not using or disclosing information for any purpose outside of the request, without prior consent from the other country. If a request cannot be carried out without breaching confidentiality, the requested country shall be informed.

10. The Regulation ensures that requests received by Australia for mutual assistance to Vietnam can be actioned in compliance with both the Act and the Treaty. If the Regulation was not in force, Australia would still be able to make and receive requests for assistance to and from Vietnam.

## **Conclusion**

While Australia's mutual assistance regime, and the Regulation in applying this regime to requests for assistance to and from Vietnam, engages with some human rights, it does so in a reasonable and proportionate way and does not operate to limit or restrict those rights. As such, the Regulation is compatible with human rights.

**Michael Keenan**

**Minister for Justice**

**Details of the proposed *Mutual Assistance in Criminal Matters (Vietnam) Regulation 2015***

**Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Mutual Assistance in Criminal Matters (Vietnam) Regulation 2015*.

**Section 2 – Commencement**

This section provides for the Regulation to commence on the day on which the *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam*, done at Sydney in Australia on 2 July 2014, enters into force.

**Section 3 – Authority**

This section provides that the Regulation is made under the *Mutual Assistance in Criminal Matters Act 1987*.

**Section 4 – Definitions**

This section defines terms used in the Regulation. In this regulation:

1. references to the word *Act* are interpreted as being references to the *Mutual Assistance in Criminal Matters Act 1987*; and
2. references to the word *Vietnam* are interpreted as meaning the Socialist Republic of Viet Nam.

**Section 5 – Application of the Act**

The *Mutual Assistance in Criminal Matters Act 1987* provides the legal framework for consideration of mutual assistance requests to and from Australia. Section 7 of the Act provides that the Act applies to all foreign countries; however, regulations may provide that the Act applies to a foreign country subject to any mutual assistance treaty between that country and Australia referred to in the regulations.

This section provides that the Act applies to Vietnam subject to the *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam*. The effect of this section is that mutual assistance requests between Australia and Vietnam are considered in accordance with the Treaty. Therefore, the Act applies subject to the limitations, conditions, exceptions or qualifications necessary to give effect to the Treaty.

**Schedule 1 – Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam, done at Sydney in Australia on 2 July 2014**

This schedule contains the text of the Treaty.