As part of its program of cooperation with the Supreme People’s Court of Vietnam, CDI invited a delegation of senior Vietnamese judges to visit Australia in May 2002 to study the judicial process. As on previous activities under this program, the Federal Court of Australia participated actively in the planning and delivery of the study tour.

Delegation Members

The delegation was led by Dr Phuong, the Deputy President of the Supreme People’s Court who has particular responsibility for all aspects of judicial training in Vietnam. It thus provided Dr Phuong with the opportunity to study many aspects of the Australian judicial system. The delegation comprised:

- Dr. Dang Quang Phuong, Deputy Chief Justice of the Supreme People's Court, Head of the Delegation;
- Mr. Tran Man, Chief Judge of Appellate Division of the Supreme People's Court in Danang City;
- Mr. To Chanh Trung, Justice of the Supreme People's Court, member;
- Mrs. Nguyen Thi Chinh, Justice of the Supreme People's Court, member;
- Mr. Ngo Xuan Thanh, Deputy Chief Judge of the People's Court of Nghe An province, member;
- Mrs. Nguyen Thi Thanh Thuy, Chief of Unit, the Institute for Judicial Science of the Supreme People's Court, member;
- Mr. Chu Trung Dung, Legal Expert, the Institute for Judicial Science of the Supreme People's Court, member and interpreter.

Program

The program was designed to allow the delegation to build an understanding of the workings of the Australian legal and judicial systems. This was achieved by a process of discussion, observation and networking preceded by a presentation on specific aspects of the Australian system including the impact of the common law, federalism in Australia and the place of the judiciary in Australian society.
The delegation was able to observe a very broad range of courts and meet many Australian judges and magistrates. The delegation was very honoured to be hosted for lunch by the Chief Justice of Australia, The Hon Murray Gleeson AC, at which all seven Justices of the High Court participated. Justice Bryan Beaumont, Senior Justice of the Federal Court of Australia in Sydney along with all his Sydney based colleagues also hosted the delegation for lunch as did the Hon Justice Reg Blanch, Chief Judge of the District Court of NSW, and members of his bench.

The delegation was thus able to observe many court cases, both civil and criminal, including in:

- The High Court of Australia
- The Federal Court of Australia
- The Family Court of Australia
- The Supreme Court of the Australian Capital Territory
- The District Court of New South Wales
- The ACT Magistrates Court

In addition, the delegation called on the Australian Director of Public Prosecutions to learn about the prosecutor’s responsibilities before the court. The delegation also received a briefing from the NSW Judicial Commission, the body charged with assisting judges in NSW through innovative and technologically advanced means while also having the obligation to investigate complaints against judges in that state.

The full program of the visit is below.

The substantive discussions and observations can be divided into three general categories:
1. Aspects of Australian law and practice different from Vietnam’s law and practice
2. Issues of law and practice faced in both jurisdictions
3. Case studies.

The reading materials (listed below) prepared for the study tour dealt with a number of both the differences and similarities.

**Differing law and practice**

The two countries’ legal systems have very different histories and influences. Australia draws on the long traditions of British Common Law and is bolstered by a very strong legal profession, which feeds the Australian judiciary. Vietnam originally drew its legal concepts from long standing Chinese practice. Vietnam was then subject to influence by colonial French legal concepts and fraternal Soviet communist concepts before embarking on its own course of reform and renewal. One would therefore anticipate significant differences in legal processes.

In the course of the visit there were several aspects of Australian practice that were novel to the Vietnamese delegation and which were the subject of considerable discussion and comparisons:
Jury trials

The delegation witnessed a jury being empanelled and observed the process of both prosecution and defence counsel challenging certain putative jurors without any obvious cause. The delegation also heard counsels’ opening addresses to the jury in two criminal cases and in those cases also heard a number of directions to the jury from the bench explaining aspects of the law and the conduct of the trial. There was considerable discussion on procedural aspects of jury trials and on the costs of conducting them. It was also noted that certain trials could be held before a judge alone if requested by the accused and consented to by the prosecution.

Adversarial proceedings

The adversarial nature of the Australian legal system was strongly in evidence throughout the visit. Senior Counsel arguing a commercial law case before the High Court were subjected to close questioning by the bench. This also occurred in other commercial proceedings observed in the Federal Court and the ACT Supreme Court. The various criminal trials observed by the delegation also featured robust adversarial proceedings but without the histrionics of American courtroom TV dramas. Of particular note to the delegation was the onerous duty on the prosecution to prove its case beyond a reasonable doubt.

Alternative Dispute Resolution

This is a growing feature of Australian judicial practice and is being given greater emphasis in the work of the courts. The judge sometimes conducts the mediation process but trained Registrars and Masters are increasingly doing so. The Family Court of Australia places particular emphasis on mediation to resolve property and custody disputes. Indeed only 5% of the cases coming before the Family Court end up being argued before a judge.

Native Title

Native Title was a particular area of the law in Australia flowing from the Mabo Case and the subsequent Native Title legislation. The Federal Court has particular responsibility for hearing cases under the legislation and the Court has accordingly developed considerable expertise and has refined its procedures. One problem with Native Title cases is that they require evidence of a connection to land by Australian Aboriginal and Torres Strait Islander people. Yet some native people do not feel comfortable in the august and intimidating court surroundings. The Federal Court therefore often hears cases in the bush and has had to develop the technology to maintain its high procedural standards in remote areas.

NSW Judicial Commission

The work of the Judicial Commission of New South Wales is very well regarded by both the judiciary and the public. It provides services to the judiciary in terms of compilation of statistics and comparisons of sentencing. It also provides a means whereby complaints about judges can be dealt with in a coherent and practical way without the possibility of politicising the process through a decision of the Attorney
General and without going to the often inappropriate extent of bringing the matter before parliament.

Comparing Judicial Practice

Many aspects of the judicial process remain very similar even though they evolved in differing ways. Some similarities flow from the nature of the judicial process and others emerge through the process of international and regional standard setting.

International and Regional Norms

Among the reading materials is an essay by Julie Debeljak listing the international norms and statements in support of judicial independence including;

- The Independence of the Judiciary in the LAWASIA Region: Principles and Conclusions, known as the Tokyo Principles 1982, both of which culminated in;
- The Universal Declaration on the Independence of the Judiciary, known as the Montreal Declaration, 1983
- Domestic Application of International Human Rights Norms, known as the Bangalore Principles, 1988
- Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995

Added to this impressive list are some specific Australian standard setting documents;

- The Australian Bar Association Statement on The Independence of the Judiciary, 1990
- Declaration of Principles on Judicial Independence, issued by the Chief Justices of the Australian States and Territories, 1997
- Guide to Judicial Conduct by the Australian Institute of Judicial Administration, 2002

Sentencing

This is a critical feature of the judicial role and considerable discussion on the processes of and limits to sentencing was conducted throughout the course of the study tour. Judges from both countries considered it important to retain a certain measure of discretion in the sentencing process as each case presented its own particularities. One interesting comparison is that in Vietnam the total sentence cannot exceed 30 years while in Australian, life imprisonment can mean just that and could well exceed 30 years. Another important difference was that Vietnam retained and exercised the death penalty while Australia, by having ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, which does not have a denunciation possibility, has abolished capital punishment in all Australian jurisdictions for ever more.
Administrative Law

Reviewing bureaucratic decisions is becoming an important part of the work of judiciaries and this is particularly relevant to the work of the Federal Court. The relationship between review tribunals and judicial reviews was carefully explained. When administrative cases came before judiciaries, they had to take their decisions on the basis of law and natural justice. Courts cannot look at the political implications of their decisions or whether the executive branch would be displeased with the decision.

Case Studies

The Vietnamese delegation observed a number of cases while on the study tour. Of particular interest were the following cases:

Commercial Law

The case before the High Court concerned the interpretation of Sec 46 of the Trade Practices Act concerning the concept of market power and its illegal exercise. This was a good example of 'capitalist' law as it showed the role of regulation by the government to try to maintain competition in the market.

Before the Federal Court, the delegation saw part of the case concerning unfair advertising and viewed the 'energy rabbit' television advertisement to make up their own minds.

Criminal Law

Cases witnessed concerned manslaughter, rape and drug offences. In each case defence counsel conducted a vigorous defence while the prosecution built its case methodically. One interesting feature of the criminal case was the way the jury was the centre of counsel’s attention, not the bench.

The delegation also saw cases of minor offences coming before the magistrate’s court in the Australian Capital Territory.

Native Title - Directions hearing

The interesting aspect of the case before the Federal Court was that the judge sat in Sydney while the counsel for the parties were in Perth and the ‘directions hearing’ was conducted by web cam technology.

Other cases

Other cases observed by the delegation concerned defamation, bankruptcy and fraud.

Conclusions

The Study tour provided an excellent opportunity for the Vietnamese judges to examine the Australian system while at the same time comparing it to the Vietnamese
processes. Many of the aspects of the Australian judiciary observed by the delegation were not relevant to Vietnam. Australia’s Federal structure creates a certain level of complication in terms of jurisdictional divisions and overlaps that can be baffling to outsiders. Clearly this aspect was not seen as a model for Vietnam. But other aspects concerning the integrity, probity and high learning of Australia judges provides an excellent model for any other jurisdiction.

Further discussions will be held with Dr Phuong to discuss ways in which the Centre for Democratic Institutions can continue to assist the development of the Vietnamese judiciary.
PROGRAM FOR VISIT OF THE JUDICIAL DELEGATION OF THE SUPREME PEOPLE’S COURT OF VIETNAM

Monday 20 May
09.30 Introduction to the Australian Legal System - Roland Rich

Tuesday 21 May
09.30 Call on Chief Justice Miles of the ACT Supreme Court
Tour of the court, observation of cases
Briefing on operation of the Court
12.30 Lunch with Chief Justice Murray Gleeson & Justices of the High Court
14.30 Call on Mr Chris Doogan, Chief Executive Officer of the High Court of Australia.
Briefing on operation of the Court.

Wednesday 22 May
09.30 Briefing from Chief Magistrate Ron Cahill
Observation of ACT Magistrates Court
13.00 Lunch with Judges Higgins and Crispin and Master Connolly and Chief Magistrate Ron Cahill from the ACT

Thursday 23 May
09.30 Call on Director of Public Prosecutions
Briefing on work of DPP Office
14.00 Call on a Justice Faulks of the Family Court of Australia
Observation of Family Court
Briefing on operation of the Court

Friday 24 May
13.00 Tidbinbila Nature Reserve

Monday 27 May
08.30 Call on Chief Judge of the District Court of NSW, Justice Blanch
Observation of criminal proceedings in District Courts
12.30 Lunch with Justice Blanch & members of the District Court

Tuesday- 28 May
09.30 Welcome to Federal Court by Justice Bryan Beaumont
09.45 Introduction to the work of the Federal Court in the context of the Australian Legal System – Justice Michael Moore
11.00 The Federal Court’s role in the fields of Intellectual Property and Trade Practices – Justice Brian Tamberlin
11.45 Observation of cases before the Federal Court
14.30 Inspection of Court Registry

Wednesday 29 May
09.30 Outline of the Federal Court’s role in the fields of Administrative Law generally (including migration law) and Bankruptcy Law – Justices Moore and Tamberlin
10.15 Observation of cases
11.15 More detailed discussion of Administrative Law generally (including migration law) and Bankruptcy Law.
12.30 Lunch with Judges of Federal Court hosted by Justice Beaumont
14.45 Discussion of Native Title Law
16.30 Observation of video directions hearing in Native Title matter
19.00  Sydney Symphony Orchestra “A Brahms Double Act” Opera House

Thursday 30 May
09.30  Research in the Federal Court. The use of Information Technology by the Federal Court and the e-Court – presentation by Judges followed by an inspection of the IT and research facilities in the Court
12.00  Closing presentation

Friday 31 May
10.00  Briefing from the Judicial Commission of NSW – CEO Mr Ernie Schmatt
12.30  Lunch with the Judicial Commission of NSW
Reading List

Then Chief Justice Sir Gerard Brennan on the role and independence of courts in upholding the rule of law – ANU 2 November 1996

The Hon Kevin Ryan on Courts and the separation of power – ANU 2 November 1996

Professor Tom Campbell on the role of the judiciary in a democracy – 8 November 1997

Then Chief Justice of New South Wales, Murray Gleeson (now Chief Justice of Australia) on courts and modern democracies – 8 November 1997

R.W. Gotterson QC on the appointment of judges – 6 November 1998

Michael Gawler on the Legal Profession and the Courts – 6 November 1998

Justice J.A. Dowsett on judicial education – 6 November 1998

Damien Bugg QC on the role of the Director of Public Prosecutions – 12 November 1999

Murray Gleeson, Chief Justice of Australia on the changing nature of the judiciary – 7 April 2001

Justice Michael Kirby, on Australian law after 11 September 2001 – 11 October 2001

Julie Debeljak on materials on judicial independence – April 2001

Dr. Tom Altobelli, Resolving parenting disputes in the Family Court of Australia, and other family law papers on
http://www.gu.edu.au/centre/flru/

Court Websites