STUDY TOUR OF DELEGATION FROM VIETNAMESE PROCURACY
19-25 September 2004

On behalf of the Danish Aid Agency, Danida, CDI designed and organised a study tour of Australia and New Zealand for a senior delegation from the Supreme People’s Procuracy (SPP) of Vietnam, led by the Deputy General Procurator Dr Khuat Van Nga. The main theme of the visit was to learn how the adversarial system of criminal justice worked in a common law jurisdiction. The Australian program was conducted in Melbourne and Sydney and concentrated on the work of prosecutors and defence lawyers. The delegation identified a number of interesting ideas which they will be following up.

The delegation comprised:
1. Dr. Khuat Van Nga - Deputy Procurator General of SPP - head of delegation
2. Mr. Duong Xuan Khinh - Head of Personnel Department of SPP
3. Mr. Ngo Quang Lien - Director of Institute for Procuratorial Science of SPP
4. Mr. Nguyen Huy Phuong - Deputy Chief Procurator of Vinh Phuc's Procuracy
5. Mr. Pham Van Cuong - Deputy Chief Procurator of Thanh Hoa's Procuracy
6. Mr. Pham Van Gon - Deputy Chief Procurator of Ho Chi Minh City’s Procuracy
7. Mr. Le Tien - Legal expert, Institute for Procuratorial Science of SPP, interpreter.

Attached is the program for the visit to Melbourne and Sydney during which the delegation was accompanied by Mr Roland Rich, Director, CDI.

According to official Vietnamese descriptions, “the Supreme People's Procuracy supervises and controls obedience to the law by Ministries, organs of ministerial rank, other organs under the Government, local organs of power, economic bodies, social organizations, people's and armed units and citizens. It exercises the right to initiate public prosecutions, ensures a serious and uniform implementation of the law.” This combines an inquisitorial as well as a prosecutorial function in a system without strong separation of powers in the legal field.

The SPP is a large organisation with 1,000 staff members. It practices its functions in the 670 district courts, the 64 provincial courts and the Supreme People’s Court at the national level. The recently amended Criminal Procedure Code allows defence lawyers more status in court proceedings and this has led the SPP to conduct its study of the adversarial system of criminal justice.
The program began with a briefing on the Australian system of law and government focusing particular attention on the Australian system of separation of powers, the division of powers according to the Constitution and the role of the High Court in the interpretation of the Constitution. This was followed by a description of the sources of law in Australia including statute law, common law and international law. The briefing concluded with a description of the court system in Australia including the hierarchy of courts, the concept of precedent and the appeal mechanisms.

The first morning was spent with the Melbourne office of the Commonwealth Director of Public Prosecution. Mark Pedley and Carolyn Davy, senior officials of the Melbourne office, provided an excellent briefing based on the attached paper and the guidelines on prosecution policy, which emphasised the distinction between the investigative powers of the police and the independent prosecuting powers of the DPP.

There was considerable interest in the development in Australia of legislation to seize the proceeds of crime. Concepts of interest included reversing the onus of proof in some cases where property is held without a clear link to earnings. Forfeiture provisions linked to criminal conduct but not necessarily to a single criminal act were also of interest. These provisions are intended to deal primarily with organised crime. The Vietnamese delegation commented that this is now also a feature of crime fighting in Vietnam but that Vietnamese legislation was limited to seizure of property employed in a criminal endeavour. This is a far narrower category of seizures and not as effective as the Australian practice. After examining a specific drug case where property was seized, the Vietnamese side was very keen to deepen their understanding of this aspect of Australian law.

The balance of the visit to Melbourne was devoted to discussion and planning for future legal training for Vietnamese SPP officials at Monash University and at the Adult Multicultural Education Services in Melbourne.

The main part of the program in Sydney was expertly organised by the Learning and Development Branch of the NSW Office of the Director of Public Prosecutions with a series of presentations from the DPP, Mr Nick Cowdery QC, Senior Crown Prosecutor Mark Tedeschi QC, Deputy Senior Crown Prosecutor Dr Patrick Power SC as well as other senior officials Johanna Pheils, Laura Wells and Donna Woodburn. The program also included briefings from Legal Aid lawyers Paul Hayes and Lester Fernandez and a briefing in the form of a police case study from Detective Sergeants Stuart Thomson, Natalie Antaw and Luc Nguyen.

Key issues emerging from the briefing included the tradition of independence of the DPP that all incumbents protected vigorously. The independence of the prosecutor had to be defended against any attempt to influence it for political purposes and it also had to be defended from media influence and even public influence. Decisions had to be taken in accordance with the law based on the evidence in the case and the likelihood of success in any prosecution. The DPP’s accountability was to the parliament and was discharged
through detailed reports while its accountability to the public was discharged through the transparency of its decision-making based on publicly available prosecution guidelines.

Various presentations emphasised the corner stones of the criminal justice system had to be based on the presumption of innocence and the right to silence. This put the burden squarely on the prosecution to make its case beyond reasonable doubt. Vietnamese law had similar provisions about presumption of innocence and the right to silence as well as the need to prove a case beyond reasonable doubt, yet in informal discussion, the comparison of conviction rates in the two countries was instructive. While in Australia perhaps one in ten accused were not convicted, the figure in Vietnam was closer to one in a hundred. The difference may therefore be in the more robust adversarial system practiced in Australia.

There was also considerable discussion on practical aspects of the working processes of the two systems including such issues as the relationship between the prosecutor and the police, the need for the prosecution to disclose all evidence, the obligation of the police to collect all evidence and not to concentrate on evidence of guilt but also to look at exculpatory evidence.

The police presentation was based on a murder case in which exhaustive interviews led to a witness statement which led to the identification of a person of interest who, when questioned volunteered self-incriminatory statements and when arrested, matched fingerprints and DNA taken from the crime scene. The need to conduct the investigation with the prosecution in mind and the need to have or receive advice on the law at various points were emphasised.

The growing role of the victim in the NSW criminal justice system was a subject of particular interest. Whereas in Vietnam the victim had a right to provide evidence and to be present at the trial, under the Victim Rights Act of NSW there was provision for the victim to play a role in restorative justice processes including confronting juvenile offenders and putting a human face on the crime they had committed. Victims also have the right to place a statement on the court record though this does not constitute evidence as such.

There was also detailed discussion on the use of expert witnesses with both sides agreeing that one could not assume that experts always got it right! The basic preliminary questions to ask were; was this field of expertise in a recognised and relevant discipline and was the individual a credible expert in that discipline. The case of Lindy Chamberlin had shown Australia the problems inherent in simply accepting expert testimony as conclusive.

In discussions on the role of defence lawyers, the point was made that a duty was owed to the client as well as to the court and both duties needed to be discharged. Complicated ethical issues might arise and a difficult choice may have to be taken to stop representing a certain client. Difficult issues of privilege may also arise. Often the work of the defence lawyer is to attack the prosecution case and the evidence provided including the source of
that evidence and whether it was legally obtained. This led to an interesting comparison between the two countries in that in Vietnam it was expected of the defendant to put up some sort of case if pleading not guilty, not simply to attack the prosecution case.

The discussion on sentencing also demonstrated a number of differences in the two systems. Vietnam did not have the same degree of flexibility in custodial sentences as there was no system of periodic detention, nor was there a concept of home detention (a punishment which the delegation found hard to appreciate). Other differences included the Australian idea of deferral of sentences until rehabilitation had been attempted, dismissal of charges for certain first offenders even when the facts were proven and ordering the payment of compensation to victims. This led to some discussion that Vietnamese sentencing practices could benefit from a greater range of choices, particularly periodic detention. At present, Vietnamese sentencing needed to take into account issues such as who is the main breadwinner in a family when deciding on custodial sentences.

The visit to the Law Society of NSW was very instructive. Mark Richardson, Charles Cawley and Ray Collins explained how the legal profession regulated itself based on statutory delegations. This entailed continuing education for lawyers, a system to licence lawyers after skills and ethics tests were passed and a system to investigate complaints against lawyers. In addition the Law Society ran the fidelity fund to which all private practitioners contributed and from which clients who were defrauded by lawyers could be compensated. Given the Law Society of NSW was 120 years old and had proven its worth, the vast majority of lawyers in NSW had chosen to remain as members even though it was no longer compulsory to do so.

The final call was on the Judicial Commission of NSW where CEO Ernie Schmatt provided a thorough briefing on the work of the Commission. Of particular interest to the delegation was the operation of the Judicial Information Research System (JIRS). This is an online source of primary, secondary and statistical reference material for judicial officers, the courts, the legal profession and government agencies that play a role in the justice system. Developed by the Commission, JIRS contains case law, legislation, principles of sentencing, sentencing statistics and other information. JIRS ensures that the courts are kept up to date with the latest developments in law and practice. The primary legal reference material contained on JIRS includes the full text of judgments from the NSW Court of Criminal Appeal, Supreme Court, Court of Appeal, Land and Environment Court, and Industrial Relations Commission, as well as selected High Court cases. It also includes the full text of New South Wales and Commonwealth Acts and Regulations. The secondary legal reference material includes case summaries, commentary on the principles and practice of sentencing, and on-line publications, such as the Judicial Officers’ Bulletin. Quantitative reference material is available in the form of comprehensive and dynamic sentencing statistics, which can be located by reference to the sections of relevant legislation. The delegation considered a powerful IT tool such as this would be a great benefit to Vietnam.
After an exhaustive week of calls and discussions, the delegation was rewarded with a boat tour of Sydney Harbour before going to New Zealand to continue their study of the adversarial system of criminal justice.


Supreme People’s Procuracy of Vietnam
Study Tour to Australia and New Zealand
Legal Reform Project
19 – 30 September 2004

Australian Program
19-24 September 2004

Sunday 19 September - Melbourne

17.00-18.30  Briefing of delegation on Australian legal system
Roland Rich Director Centre for Democratic Institutions
Will meet delegates in the foyer of Quest on William Apartments

Monday 20 September

9.30 – 12.30  Commonwealth Director of Public Prosecutions (DPP)
Mark Pedley, Deputy Director and Carolyn Davy,
Senior Assistant Director
Level 15, 460 Lonsdale Street, Melbourne

Lunch    DPP lunch – with prosecutors

14.30 – 16.00  Monash University – Law School
Professor H P Lee, Deputy Dean, Faculty of Law
Professor Marilyn Pittard, Associate Dean (Postgraduate Studies)
Mr Leighton Morris, Director, International Studies
Mr Van Son Nguyen, PhD Student, Faculty of Law
Wellington Road
Clayton Campus
Prof. H P Lee

Tuesday 21 September – Melbourne/Sydney

9.30  Adult Multicultural Education Services
Margot Tucker
Director Marketing for Vietnamese Students
255 William Street (between Lonsdale and Little Lonsdale)
Melbourne

Sydney

9.30 –12.30  NSW Office of the Director of Public Prosecution (ODPP)
Level 8
265 Castlereagh Street, Sydney
9.30 – 9.45 Welcome Director of Public Prosecutions or a Deputy Director

9.30 – 10.45 Overview of Criminal Justice System in NSW
Adversarial, Parties and Process (Investigation, Prosecution, Defence, Judiciary, Juries)
Johanna Pheils
A/Deputy Solicitor for PP (Legal)

14.00 – 17.00 Resume Program with NSW DPP

10.45 – 11.05 Morning Tea

11.05 – 13.00 The NSW Police Service Investigation processes leading up to a decision to charge, and inter-relationships during preparation and prosecution of a matter (whether Police Prosecutors or DPP)
NSW Police - Detective Sergeants
Stuart Thomson, Natalie Antaw and Luc Nguyen
Detective Training Unit
NSW Police Service

13.00 – 14.00 Lunch – free time

Patick Power SC
Deputy Senior Crown Prosecutor

15.20 – 15.40 Afternoon tea

15.40 – 17.00 The Defence process - Legal Aid and Public Defenders. When are private sector defence solicitors and barristers involved?
Legal Aid/Public Defender
Paul Hayes & Lester Fernandez
Accredited Crime Specialists
NSW Legal Aid Commission

9.30 -9.35 Arrive at ODPP - Morning session on Criminal Justice System Issues

9.35 – 10.15 The rights of the accused (when in custody & when in court)
Legal Aid/Public Defender
Paul Hayes & Lester Fernandez
Accredited Crime Specialists
NSW Legal Aid Commission
10.15 - 11.00  Victims and vulnerable witnesses - role, rights, and
associated ODPP services
Laura Wells - Crown Prosecutor

11.00 - 11.20  Morning Tea

11.20 – 11.50  Expert witnesses
Mark Tedeschi QC
Senior Crown Prosecutor

11.50 – 12.20  Sentencing process and options in NSW – how are the decisions
made?
Donna Woodburne - Crown Prosecutor

12.20 – 12.30  Close – end session with ODPP

12.30 – 14.00  Lunch – free time

14.00 – 15.30  Law Society of NSW
Mark Richardson, CEO
Charles Cawley, Director (Statutory Responsibilities)
Council Room Level 2
Law Society Building
170 Phillip Street, Sydney

15.30  Free Time

Friday 24 September

10.00  Briefing from NSW Judicial Commission
at the Judicial Commission
Ernie Schmatt
Level 5, Thakral House
301 George Street, Sydney

12.30  Lunch – free time

Following lunch Free for writing up
Background

Australia has 3 levels of Government

- Local Government
- States and Territory Governments
- Commonwealth/Federal Government [located in Canberra, Australian Capital Territory – see attached map]

Each level of Government has different responsibilities. They overlap some times.

The division of responsibilities between the States/Territories and the Commonwealth arises because of the Constitution 1901.

In 1901 the States agreed to adopt a federal level of Government. The federal level was to handle national responsibilities eg defence.

The Constitution states that the power to raise taxes on income was a Commonwealth responsibility.

This led to the Commonwealth being in a stronger financial situation than the States/Territories.

More responsibilities are now regarded as being national matters rather than State/Territory matters.

Since the 1980’s there have been a large number of international treaties that Australia has signed. In general the Commonwealth/Federal Government is able to regulate by legislation issues on which Australia has agreed to an international treaty on.

So over time the Commonwealth Government’s areas of responsibilities have expanded.

Commonwealth Director of Public Prosecutions

Independent Commonwealth prosecution body:

Before 1984 Commonwealth prosecutions were conducted by a part of Commonwealth Attorney-General’s Department.

Independent prosecutors a national and international trend.

National body – office in every State and Territory.

Staff of around 500 in total.

About half lawyers about half support staff.

Our Director is Damian Bugg QC.

Our Director is appointed by Governor-General on the recommendation of the cabinet [the most senior members of the governing party in the Commonwealth Parliament].

Director is appointed for a number of years. Current Director was appointed for 5 years in 1999 and was reappointed for a further 3 years in 2004.

The Director is independent of Government in terms of decision making on prosecutions.

Our funding comes from the Commonwealth Government budget.

The Commonwealth Attorney-General can give a direction to the CDPP but it must be tabled in Parliament. A direction cannot relate to the handling of a particular case.

**Role of Commonwealth Director of Public Prosecutions**

To prosecute offences against Commonwealth law and to recover the proceeds of crime.

The CDPP does not generally prosecute street crimes (eg murder, rape, assault) – these are the responsibility of the States and Territories.

What types of offences are against Commonwealth law goes back to the division of responsibilities between the Commonwealth and States set out in the Constitution.

Main Commonwealth offences include:

- Drug importation
- Fraud on the Commonwealth (tax fraud, welfare fraud, medifraud)
- People smuggling
- Money laundering
- Offences against Corporations Act
- Terrorism
- Child sex tourism
- Sexual servitude

- The CDPP is not an investigatory agency. Investigators are separate to prosecutors. CDPP can only prosecute when a matter has been investigated by an investigation agency eg Australian Federal Police, Australian Crime Commission.

- Investigators have powers given by legislation to investigate with limitations and oversight by judicial officers – for example warrants to search. These are issued by a judicial officer.

- The CDPP can give legal advice to an investigative agency during an investigation ie before a charge is laid.

**Making a decision to prosecute**

- All decisions in the prosecution process are regulated by guidelines set out in the Prosecution Policy of the Commonwealth.

- The Prosecution Policy is a public document tabled in Commonwealth Parliament.

- The most important issue is whether a charge or charges should be laid or continued against the alleged offender. Under the Prosecution Policy two things must be satisfied:
  - There must be sufficient evidence to prosecute the case, that is a reasonable prospect of the charge being proved beyond reasonable doubt.
  - The prosecution must be in the public interest. For example it must not be trivial.

**Courts in which the CDPP prosecutes**

Both the States/Territories and the Commonwealth have created courts.

The Commonwealth uses the State courts to hear prosecutions. The final appeal court in our system is the High Court of Australia. The High Court is a Commonwealth court created by Commonwealth legislation.

Simplified the Courts hierarchy for criminal matters is as follows:

1. **Magistrates' Court (State Court)**
   - less serious offences are heard in the Magistrates' Court
   - the presiding officer is a Magistrate
   - the Magistrate determines whether guilt is established and decides on the penalty
- the maximum sentence that can be passed by a Magistrate is 5 years imprisonment.

2. **County/District Court (State Court) or Supreme Court (State Court)**

- main trial courts
- more serious offences are heard in the County/District court and Supreme Court
- the presiding officer is a Judge
- the maximum sentence that can be imposed is life imprisonment
- in a Commonwealth prosecution if a defendant pleads not guilty a jury, not the Judge, must decide if the offence is proved beyond reasonable doubt. This comes from section 80 of the Constitution. If found guilty the Judge decides the sentence or penalty.

3. **Court of Criminal Appeal (State Court)**

- Appeals Court
- appeals can challenge conviction and/or sentence
- 3 Judges sit as the Court
- CDPP can challenge the adequacy of sentence.

4. **High Court (Federal Court)**

- ultimate appeal court.

**Sentencing**

- No death penalty in Australia.
- Maximum penalty is life imprisonment.
- Sentencing options range from:
  - an undertaking by the defendant not to commit another offence for a particular period
  - a fine
  - an order for community work
  - imprisonment

**Taking action to confiscate the proceeds of crime**

- Confiscation legislation was first introduced in Australia in the mid 1980’s in response to the recognized need to tackle the financial base of organized crime.
- Each State and Territory and the Commonwealth have now enacted proceeds of crime legislation directed at depriving offenders of the benefits derived from their crimes
and certain property used in connection with those crimes. Complementary Money laundering offence provisions and financial transaction reporting obligations were also introduced.

- The Commonwealth introduced the Proceeds of Crime Act 2002 to enhance the existing conviction-based scheme and to permit action to be taken against persons and property independently of any criminal proceedings.

- The Act enables the Commonwealth DPP to seize and restrain property for forfeiture (representing proceeds of criminal activity, or an instrument in limited circumstances), or to satisfy a pecuniary penalty order, (representing benefits derived from criminal activity).

- The Act contains many reverse onus provisions which require the owner of the property to prove that their property, once restrained, is not the proceeds of any unlawful activity to avoid forfeiture. In this way, the forfeiture is capable of extending to property derived from earlier criminal activity.

- Special investigative powers have also been created to enable investigators to identify and locate property. Investigators also rely upon information sourced from AUSTRAC, the Australian Transaction Reports and Analysis Centre, repository of financial reporting information and intelligence, and where the investigation has international aspects, from mutual assistance obtained from many other countries.

**Case Study – where prosecution and confiscation action taken**

- The Defendant, Mr Chee Ming NG was arrested in connection with the importation into Australia of a commercial quantity of heroin. The heroin had been secreted in frames shipped to Australia. At the time of his arrest, police seized almost $600,000 cash from his home, together with cars in which the heroin had been transported. They also identified that NG had recently purchased an expensive house in the name of a company which he controlled.

- The drug offence was a “serious offence” under the Proceeds of Crime Act 1987, which enabled the Commonwealth DPP to restrain all property of NG, including the property under his effective control.

- The scheme of the Proceeds of Crime Act 1987 provided that all of the restrained property of NG would be forfeited 6 months after his conviction, unless he could satisfy the court that his property was not derived from, nor used in connection with any unlawful activity.

- Mr NG was convicted of the drug importation offence following a jury trial. A large amount of property was also forfeited under these provisions.