

## **Submission by Leigh Toomey, Former Chairperson and Member of the United Nations Working Group on Arbitrary Detention**

### **The Wrongful Detention of Australian Citizens Overseas**

#### **Background**

1. I thank the Senate Foreign Affairs, Defence and Trade References Committee for the invitation to make a submission to this inquiry. I make this submission in my personal capacity based on my experience as a former Chairperson and member of the United Nations Working Group on Arbitrary Detention (WGAD) from 2015-2022. I am a qualified lawyer in Australia and England and Wales with 25 years of experience working on rule of law and human rights programs in the international development sector.
2. The purpose of this submission is to inform the Committee of the WGAD's recent practice in considering cases of arbitrary detention for diplomatic leverage. The submission responds primarily to paragraphs (a) and (c) of the Inquiry Terms of Reference, namely how Australia can improve its policy framework to deter the practice of arbitrary detention for diplomatic leverage and increase public awareness of regimes which engage in the practice, and the categorisation of cases of 'wrongful detention'.
3. In addition to the information provided below, I refer the Committee to a journal article that I recently published on [The Declaration Against Arbitrary Detention in State-to-State Relations: A New Means of Addressing Discrimination Against Foreign and Dual Nationals?](#) (2022) 35 Harvard Human Rights Journal 233.

#### **The Working Group on Arbitrary Detention**

4. The WGAD is a Special Procedures mandate of the UN Human Rights Council.<sup>1</sup> It was established by the former Commission on Human Rights in 1991 to investigate cases of deprivation of liberty imposed arbitrarily or inconsistently with international human rights standards.<sup>2</sup> The WGAD receives submissions from the legal representatives of detainees, civil society organisations, governments and others in relation to situations of alleged arbitrary detention worldwide. After examining the submission and any response from the state concerned, the WGAD adopts an opinion setting out its findings on whether the detention is arbitrary.<sup>3</sup> The findings are often used by human rights advocates to draw attention to non-compliance by states with their international human rights obligations. A summary of the findings is also published in the WGAD's annual reports to the Human Rights Council.

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<sup>1</sup> The WGAD's mandate was most recently extended by Human Rights Council Resolution 51/8 of 6 October 2022 for a further three-year period.

<sup>2</sup> As a UN Charter-based body, the WGAD can consider submissions involving any UN Member State, regardless of whether the state is party to any particular treaty.

<sup>3</sup> See Opinions adopted by the WGAD <<https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention/opinions-adopted-working-group-arbitrary-detention>> accessed 15 July 2024.

## Applicable International Standards

5. In considering allegations of arbitrary detention for diplomatic leverage, the WGAD applies the principles set out in several international instruments, including:
  - **Universal Declaration of Human Rights, Article 9:** No one shall be subjected to arbitrary arrest, detention or exile.
  - **International Covenant on Civil and Political Rights, Article 9(1):** No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law.
  - **Vienna Convention on Consular Relations (VCCR):** Article 36 sets out the right of the state of nationality to contact its nationals when they are detained. It also sets out the obligations of the detaining state to inform the state of nationality when its nationals are detained and to inform the detainee of their rights under this provision.
  - **Declaration Against Arbitrary Detention in State-to-State Relations and the Partnership Action Plan:** The Declaration is an initiative of the Canadian Government that was launched in February 2021. It sets out the principles applicable to arbitrary detention for diplomatic leverage. As of 15 July 2024, 78 states had endorsed the Declaration,<sup>4</sup> including Australia, in keeping with its commitment to the rules-based international order. The WGAD has welcomed the Declaration and is committed, within the terms of its mandate, to supporting the Partnership Action Plan.<sup>5</sup>

## Improving the Policy Framework

6. There are several matters that the Australian Government may wish to take into account in improving its policy framework to deter arbitrary detention for diplomatic leverage.
7. **Terminology:** In order to generate a shared whole-of-government understanding of this form of detention, it would be helpful to adopt consistent terminology in the policy framework by referring to arbitrary detention, rather than wrongful, illegal or unlawful detention. Arbitrary detention is the term used in international human rights law and by the WGAD. The practice of exercising leverage is often referred to as arbitrary detention for diplomatic leverage or arbitrary detention in state-to-state relations.<sup>6</sup>
8. **Exercising Leverage:** It is important for the policy framework to clearly state what type of conduct can amount to arbitrary detention for diplomatic leverage. A state may be

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<sup>4</sup> The Declaration Against Arbitrary Detention in State-to-State Relations, Partnership Action Plan and details of endorsing states are available at: <[https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/human\\_rights-droits\\_homme/arbitrary\\_detention-detention\\_arbitraire.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/arbitrary_detention-detention_arbitraire.aspx?lang=eng)> accessed 15 July 2024.

<sup>5</sup> Report of the Working Group on Arbitrary Detention (6 August 2021) A/HRC/48/55, paras 61-63, 72.

<sup>6</sup> However, see UK House of Commons Foreign Affairs Committee, 'Stolen years: combatting state hostage diplomacy' (4 April 2023) (referring to this form of detention as 'state hostage-taking'). Hostage-taking falls outside the WGAD's mandate and this submission does not take a position on it.

seeking to exercise leverage when it detains a foreign or dual national in order to obtain a diplomatic, political, economic or other concession from another state. The release of the detainee is made contingent upon certain conditions being fulfilled by the other state. In several cases considered by the WGAD, detainees were reportedly released following prisoner swaps<sup>7</sup> and the settlement of bilateral disputes.<sup>8</sup> Other concessions may include agreement to extradition requests, release of frozen assets, payment of outstanding debts, removal of sanctions, or other benefits for the detaining state.<sup>9</sup> The Committee may be aware that the WGAD recently considered a case in which a state detained an Australian national in order to exercise leverage over a commercial entity.<sup>10</sup> Cases involving the exercise of leverage should be distinguished from other situations of arbitrary detention that do not involve a political or diplomatic motive.

9. **Risk of Detention:** The policy framework should clarify that it is not only Australian citizens (with sole Australian nationality) who are at risk. In cases brought to the WGAD, foreign and dual nationals, as well as individuals who have been granted permanent residency,<sup>11</sup> have been arbitrarily detained for leverage purposes. Thus, Australian citizens with dual nationality<sup>12</sup> and individuals who have been granted permanent residency in Australia are also vulnerable to this form of detention. Recent cases brought to the WGAD suggest that arbitrary detention for diplomatic leverage has been on an upward trajectory in the last 5-10 years.<sup>13</sup> This represents an ongoing and significant risk for Australians who travel, study and work abroad. The Australian Government may wish to reflect this high level of risk in travel advisories, including specific warning about the risk of arbitrary detention in terms that are easily understood by different audiences.<sup>14</sup>
10. **Forms of Support:** While the Inquiry Terms of Reference rightly preference the deterrence of arbitrary detention for diplomatic leverage, this may not always be possible given that this practice is increasingly being utilised by some states. The policy framework should therefore make reference to ways in which the Australian Government can provide support to mitigate the effects of this form of detention while other efforts to resolve the situation are ongoing. This might include support by Australian consular

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<sup>7</sup> For example, WGAD Opinion No. 52/2018 (Xiyue Wang); Opinion No. 37/2023 (Olivier Vandecasteele).

<sup>8</sup> For example, WGAD Opinion No. 44/2015 (Jason Rezaian); Opinion No. 28/2016 (Nazanin Zaghari-Ratcliffe).

<sup>9</sup> Thomson Reuters Foundation, 'Held Hostage? A Legal Report on Hostage-Taking by States in Peacetime and the Victim Protection Gap' (2018) 8.

<sup>10</sup> See WGAD Opinion No. 70/2021 (Robert Pether and Khalid Radwan), para 88 (finding that two individuals, one of whom is an Australian national, were detained to exercise leverage over their employer in a commercial transaction). Though this case does not involve state-to-state leverage, it may prove to be an emerging form of detention for leverage and has reportedly required extensive engagement from the Australian Government.

<sup>11</sup> For example, WGAD Opinion No. 92/2017 (Ahmadreza Djalali); Opinion No. 32/2019 (Saeed Malekpour); Opinion No. 51/2019 (Nizar Zakka).

<sup>12</sup> If an Australian citizen has dual nationality with a state other than the detaining state (for example, dual Australian/UK nationality), this may present an opportunity for Australia to cooperate with the other state of nationality in seeking to resolve the situation.

<sup>13</sup> For example, WGAD Opinion No. 37/2023, para 75; Opinion No. 11/2024 (Evan Gershkovich), para 87.

<sup>14</sup> The Smartraveller website briefly warns about arbitrary detention in some, though not all, relevant countries. It may be worth adding countries that have sought to exercise leverage over Australia or its international partners.

authorities to promote the health, safety and wellbeing of detainees and the provision of assistance to their family members. The WGAD has considered cases in which the conditions of detention negatively affected the detainee's ability to participate in proceedings against them.<sup>15</sup> It is important for the Australian Government to seek to resolve each situation and to ensure that the welfare of each detainee is closely monitored.

11. **Deterrence:** The policy framework should clarify what specific actions and results would be regarded as sufficient to 'deter the practice of arbitrary detention for diplomatic leverage'. For example, actions taken to deter this form of detention might involve: (a) providing effective consular assistance, including facilitating access by detainees to other services (legal representation, interpretation); (b) introducing policy or legislative changes; (c) cooperating with international partners<sup>16</sup> under the Partnership Action Plan; or (d) securing a finding by an international body, such as the WGAD, that the detention is arbitrary and was undertaken for diplomatic leverage. The policy framework should indicate what results would be regarded as a success in deterring this practice, such as fewer cases involving Australian citizens, dual nationals and individuals with permanent residency; faster assessment and resolution of cases; or effective resolution of cases through the release of the detainee and provision of reparations by the detaining state.
  
12. **Consular Assistance:** The WGAD has determined that effective access to consular officials is an essential means of securing a fair trial for foreign and dual nationals and persons with permanent residency, particularly those who may be unfamiliar with the local laws, customs and language. Regular and unrestricted consular access may constitute the only avenue for the detainee to be informed about their rights and how to exercise them, to access a lawyer and interpretation services, to obtain exculpatory evidence, to minimise the detainee's exposure to solitary confinement, ill-treatment and torture, to benefit from trial monitoring by consular officials, and to ensure the provision of evidence on past good character at sentencing.<sup>17</sup> Consular assistance is also a key means of providing psychological support for detainees. It is important for the policy framework to prioritise strong consular support (either through Australian consulates or those of like-minded nations) to mitigate and address arbitrary detention for diplomatic leverage. There may be a need for regular training of consular staff in recognising, assessing and responding to emerging trends in this form of detention.

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<sup>15</sup> For example, WGAD Opinion No. 85/2021 (Anoosheh Ashoori), para. 90.

<sup>16</sup> Cooperation might include negotiating agreements between states to support each other in consular assistance and trial monitoring; sharing intelligence and best practice in identifying and addressing cases; engaging the peace and security architecture of regional and international organisations to impose sanctions or other counter-measures; and strengthening the legal framework on state-sponsored hostage-taking: Carla Ferstman, *Conceptualising Arbitrary Detention: Power, Punishment and Control* (Bristol University Press 2024) 243-44.

<sup>17</sup> Report of the Working Group on Arbitrary Detention (2 July 2018) A/HRC/39/45, paras 50-58.

13. When a state denies or curtails access to consular assistance, the WGAD may find a violation of the detainee's fair trial rights.<sup>18</sup> In these cases, the WGAD considers whether the detaining state informed the detainee of their rights under the VCCR, whether the detaining state notified the state of nationality that its national was in detention, and whether the state of nationality has had prompt, unrestricted and confidential consular access to the detainee.

### **Increasing Transparency and Awareness**

14. There are steps that the Australian Government can take to increase awareness of regimes which engage in arbitrary detention for diplomatic leverage.
15. **Use of WGAD Opinions and Other Materials:** The WGAD's opinions, annual reports, urgent appeals and other communications with states are a valuable source of information on arbitrary detention in general, as well as arbitrary detention for diplomatic leverage. These materials, particularly the opinions, may serve as a resource for Australia when its citizens and permanent residents are subjected to this form of detention. The WGAD's independent determination that a person is arbitrarily detained can be used by petitioners, governments, civil society, national human rights institutions and others to support advocacy that the person should be released, as well as to generate awareness of particular issues such as the exercise of leverage in state-to-state relations.
16. The UK House of Commons Foreign Affairs Committee recommended that when the WGAD has determined that the detention of a UK citizen is arbitrary, the Foreign, Commonwealth and Development Office should assume that the case will not be judged in the detaining state in accordance with international standards and should respond accordingly.<sup>19</sup> It also found that the UK Government should as a matter of practice promote public acceptance of the WGAD opinion.<sup>20</sup> The Australian Government may wish to apply similar principles when there is a WGAD opinion that an Australian national, dual national or permanent resident has been arbitrarily detained for leverage.<sup>21</sup>
17. **Maintaining Data:** It will be important for the Australian Government and partner governments to develop and maintain a central repository for data on the scale of arbitrary detention for diplomatic leverage worldwide.<sup>22</sup> At present, there does not appear to be readily available data on the prevalence of this form of detention, including who is most at risk, that could be used to inform policy development and raise awareness of the problem. Datasets could include: (a) the number of people who have been identified as

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<sup>18</sup> Leigh T Toomey, 'The Declaration Against Arbitrary Detention in State-to-State Relations: A New Means of Addressing Discrimination Against Foreign and Dual Nationals?' (2022) 35 Harv Hum Rts J 233, 245-47.

<sup>19</sup> House of Commons Foreign Affairs Committee (n 6), para 17.

<sup>20</sup> *ibid.*

<sup>21</sup> For example, WGAD Opinion No. 70/2021. See also Opinion No. 13/2022 (Chau Van Kham) (regarding an Australian national who was detained arbitrarily, though not for leverage. He has since been released).

<sup>22</sup> House of Commons Foreign Affairs Committee (n 6), submission by Rachel Briggs OBE.

being arbitrarily detained for leverage; (b) their nationality (or nationalities in the case of dual citizens); (c) the detaining state; (d) the reason given for the detention, if any; (e) the length of detention; (f) whether any attempt to seek concessions has been made, and if so, the nature of those concessions; (g) whether the matter has been submitted to the WGAD or other international mechanism and the outcome; and (h) how cases are resolved. While the WGAD's database could be one source of data,<sup>23</sup> it would not be an exhaustive source because not every situation of detention for leverage is brought to the WGAD. Data from civil society, universities, think tanks, governments and others would need to be included. It may be necessary to inform and obtain the consent of the detainee (if possible) or family members to the keeping and release of this information given potential concerns about reprisals and harming the situation of detainees.

18. **Lessons Learned:** It may be useful for the Australian Government and its partner governments to convene discussions with families, former detainees and others who have been, or continue to be, affected by arbitrary detention for diplomatic leverage. It seems that relatively little is known about effective means of providing assistance in this area and important lessons could be derived from such engagement. Equally, this may be an avenue for families and former detainees to tell their stories and be heard. I have attended similar discussions, which can be held in a hybrid in-person and virtual format, to share the WGAD's perspective. The discussions were useful. A similar sharing of experiences on successes and failures of policies and legislation at the intergovernmental level might also be undertaken, as envisaged in the Partnership Action Plan, to gather information on the approach of other states to arbitrary detention for diplomatic leverage.
19. **Risk Management:** It may be useful for the Australian Government to develop a risk management framework to identify what exposes certain Australians to risk of arbitrary detention for diplomatic leverage and how that risk can be better managed. This may help to determine what measures serve as an effective deterrent.<sup>24</sup>
20. **International Commission of Inquiry:** One option for increasing transparency and awareness of arbitrary detention for diplomatic leverage and the states which engage in the practice would be to establish a Commission of Inquiry (COI) through the UN Human Rights Council. An international COI could be mandated to examine arbitrary detention for diplomatic leverage and to make recommendations on the topic, undertake studies in the area, and consider broader policy options for intervention. Membership of such a COI could incorporate multidisciplinary expertise on international human rights law, arbitrary detention, political economy assessment, policy development, consular operations, hostage-taking and security analysis, logistics, and psychosocial support. Investing such

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<sup>23</sup> See WGAD Database <<https://wgad-opinions.ohchr.org/>> accessed 15 July 2024. The database contains the WGAD's opinions, annual reports and country visit reports.

<sup>24</sup> House of Commons Foreign Affairs Committee (n 6), submission by Professor Carla Ferstman and Dr. Marina Sharpe.

authority in an independent COI may avoid ‘megaphone diplomacy’ and address state reluctance to be seen as interfering in another state’s sovereign judicial system.

21. There have been several COIs established in recent years, in part because they can be established faster than a Special Procedures mandate, and have a more specific and manageable workload than bodies such as the WGAD. While most COIs investigate alleged violations in specific countries, there is precedent for thematic investigations, such as the current Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement.<sup>25</sup> Governments that have endorsed the Declaration Against Arbitrary Detention in State-to-State Relations might be willing to support a COI.

### **Categorising Cases of Arbitrary Detention for Diplomatic Leverage**

22. There are measures that the Australian Government can implement to improve its current processes for categorising cases of arbitrary detention for diplomatic leverage.
23. **Criteria for Assessing Arbitrary Detention for Diplomatic Leverage:** In order for the Australian Government to respond quickly to cases of arbitrary detention for diplomatic leverage, it would be helpful to develop criteria to assess whether another state is attempting to engage in this practice. This can be difficult to determine as states that seek to exercise leverage often do not, at least initially, articulate any specific demands and will often claim that a national or permanent resident of another state is being detained because they committed a criminal or national security offence.
24. The WGAD considers several factors which may not be conclusive on their own and are weighed against all available evidence.<sup>26</sup> These include whether:
  - (i) the WGAD, other Special Procedures mandate holders or UN Treaty Bodies have identified a similar pattern of arbitrary detention for leverage in the state concerned;
  - (ii) there is evidence to suggest that the detainee was involved in a criminal offence;<sup>27</sup>
  - (iii) the nature of any sentence imposed in criminal proceedings is disproportionately heavy, which may suggest that the detainee has been targeted;
  - (iv) the detainee’s employment places them at risk, which may be the case for journalists, academics or those with access to an international audience;

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<sup>25</sup> See Office of the UN High Commissioner for Human Rights, ‘International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations’ <<https://www.ohchr.org/en/hr-bodies/hrc/co-is>> accessed 15 July 2024.

<sup>26</sup> For a more detailed explanation, see Toomey (n 18) 242-45.

<sup>27</sup> This includes assessing whether there were legitimate reasons for the detainee being present in the state (for example, research, visiting family members, travel), whether they have a criminal record, and whether they have previously been present in the state without incident.

- (v) there have been public statements made by the authorities in relation to the detainee and how the detainee has been portrayed in the media;
  - (vi) the treatment of the detainee during arrest and detention suggests that they were targeted for reasons relating to their nationality.
25. Section 2 of the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act in the United States sets out an open-ended checklist of criteria that can be used to determine whether each case involves leverage.<sup>28</sup> A submission to the UK House of Commons Foreign Affairs Committee Inquiry identified other indicia of arbitrary detention for diplomatic leverage including: (a) the detaining state's executive is involving in seeking the detention or exploiting it; (b) lack of independence of the prosecutorial service and judiciary; (c) timing and demands made by the detaining state; (d) statements made by the authorities tying the resolution of a case to a foreign policy objective; (e) difficulty invoking a clear legal basis for the detention; (f) excessive delays in the trial proceedings; and (g) refusal by the detaining state to comply with the VCCR.<sup>29</sup>
26. The Senate Committee may consider taking a similar position to the UK House of Commons Foreign Affairs Committee. The UK Committee recommended the publication of guidance outlining the criteria for determining whether the detention of its nationals by a foreign state is at risk of being used for diplomatic leverage.<sup>30</sup> In addition, the UK Committee recommended that a review be carried out of all nationals detained overseas according to the established criteria, in consultation with the detainees' families.<sup>31</sup> When a case does not meet the criteria, it should be subject to ongoing assessment with the involvement of families.<sup>32</sup>
27. While this submission addresses arbitrary detention for diplomatic leverage, it is important to keep in mind that there are many other cases of arbitrary detention that do not involve attempts to seek a concession from another state. As the UK House of Commons Foreign Affairs Committee pointed out, all arbitrary detentions are unacceptable and action must be taken in working toward their immediate resolution.<sup>33</sup>

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<sup>28</sup> See <<https://www.congress.gov/bill/116th-congress/senate-bill/712/text>> accessed 15 July 2024. These factors include whether independent non-governmental organisations have raised legitimate questions about the innocence of the detainee, and whether the individual is detained in a country where the Department of State has determined in its annual human rights reports that the judicial system is not independent or impartial.

<sup>29</sup> House of Commons Foreign Affairs Committee (n 6), submission by Professor Frédéric Mégret.

<sup>30</sup> House of Commons Foreign Affairs Committee (n 6) para 14. Australia could publish such guidance on the DFAT website.

<sup>31</sup> House of Commons Foreign Affairs Committee (n 6) para 14.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid* para 13.