HOSTAGE INTERNATIONAL SUBMISSION TO SENATE COMMITTEE ENQUIRY ON WRONGFUL DETENTION OF AUSTRALIAN CITIZENS OVERSEAS

August 2024

About Hostage International - our charity's expertise:

Hostage International **https://www.hostageinternational.org** is a unique charity delivering essential emotional and practical support, information and access to specialist services to those affected by the kidnap or arbitrary state detention of a loved one outside their home country, and to hostages and detainees after their release.

Our dedicated team, which includes caseworkers and representatives in Australia, offers free, independent, confidential, and open-ended support to those individuals who reach out to us for help.

Hostage International's expertise is in helping those affected to make sense of what is happening. We are not involved in the resolution of these incidents, but fill a much-needed gap in helping people cope with the day-to-day difficulties they present, including a need for information and understanding.

We facilitate access to free professional services and advice, to include legal, media, trauma therapy, medical and dental care and we aim to diminish the weight of administrative tasks and financial or employment worries.

We work discreetly to encourage governments and employers to improve understanding around the plight of hostages' families and returning hostages and deliver training in best practice in family and hostage support, including to DFAT.

We have supported a number of families and released hostages in Australia affected by both kidnapping and arbitrary detention in the last ten years. We are continuously seeking ways to improve and tailor our services and to share our knowledge of these cases with other stakeholders.

In response to the following areas of interest highlighted by the Senate enquiry, we can comment as follows:

a) how Australia can improve its policy framework to deter the practice of arbitrary detention for diplomatic leverage ('hostage diplomacy') and increase transparency and public awareness of the regimes which engage in the practice;

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Hostage International does not get involved in deterrence of arbitrary detentions. Our work is purely focused on the impact on the detainee and their loved ones after the detention has occurred, throughout its duration and for as long as needed after its termination.

b) Australia's foreign policy responses to regimes that wrongfully detain Australian citizens;

Hostage International cannot comment on the foreign policy practices of different states. We recognise the enormous pressure on governments when their nationals are detained on fabricated charges with the primary aim of seeking a concession from, or exerting leverage on, the home government. We recognise the need of governments to consider sometimes contradictory requirements set out in international law when determining their response and that they also must juggle competing priorities. We understand that the resolution of these cases is highly sensitive and that negotiations and diplomacy cannot usually begin until the legal process, however flawed, has run its course. Because we understand all of these complexities and more, we are able to rationalise and make sense of what is happening and we can share some of this understanding with the families. However, as addressed in d) below, these complexities should also be communicated clearly by governments to the families of those detained.

c) Australia's current processes for categorising and declaring cases of wrongful detention;

Hostage International recognises that international law requires governments to respect each other's internal law enforcement and judicial systems and that consequently, when a foreign national is detained in a country, the foreign national's government must tread carefully before stating privately to that detaining state, as well as publicly, that their national is being illegally or wrongfully detained. The principle of non-intervention, as embodied in international law, encourages foreign governments to make an initial assumption that the detaining state has grounds for the detention, and time must be allowed for those grounds to be stated and for the domestic legal process to proceed. This is deemed necessary even where the detaining state is known to detain foreign or dual nationals for diplomatic leverage as a common practice. However, the subsequent delay in categorising or declaring cases as wrongful detentions (especially where there is a clear absence of access by the detainee to independent legal advice and consular support, and/or where the length of detention without charges is significant and interrogations are accompanied by torture), is extremely difficult for both the detainee and their family to endure. Where the right to consular access under the Vienna Convention is being denied by the detaining state and there is suspicion of a breach of the detainee's human rights, a more robust and swift response by the detainee's home government is warranted, particularly in terms of categorising the detention as wrongful.

Categorising a detention as wrongful is different from declaring it publicly as such. Categorisation is an internal matter whereas a declaration is usually public. A government's categorisation of the case must precede any declaration, but categorisation does not necessarily mean that a public declaration should then follow. Governments may decide it is not in their interests and/or the interests of resolution of the detention for them to declare that they have categorised a case as a wrongful detention. This is a matter of tactics as well as competing priorities. For example, the home government may wish to allow the detaining state to save face internationally in order to enable the release. Alternatively, they may not wish to make a declaration which will impact on their bilateral economic relations with the detaining state. Whatever the position, any reluctance to publicly declare a detention as wrongful should not impede the categorisation of the case which is necessary before the government can properly start to implement its approach. This categorisation often appears to take too long and valuable time is lost in the process, with significant consequences for the detainee and their loved one.

The US example of devising criteria to categorise a wrongful detention under the Levinson Act is an example of how governments can be more systematic, swift and transparent about their categorisation of a particular case. The Levinson Act criteria provides much greater clarity and reassurance to the detainee and their family than the seemingly ad hoc, inconsistent and largely opaque categorisation practices of other governments. Detainees who are being wrongfully detained know very well that they are innocent and being held in contravention to human rights laws and as part of a political strategy of the detaining state, but the slow and invisible processes of their home government often mean they feel they are subjected to a degree of gaslighting. This delay and the lack of acknowledgement of their position has enormous mental health repercussions for them.

The categorisation of a case as an arbitrary detention is not only a matter for the home government. Many families may choose to seek an opinion from the UN Working Group on Arbitrary Detentions as to whether their loved one's detention is arbitrary (a broad term which includes any detentions which do not comply with international or human rights laws). This is another tangible action that is open to families, and if the UN declares the detention is arbitrary, it validates the family's and the detainee's position. The value families attach to this validation should not be underestimated by home governments. It removes the feeling of gaslighting which so many of them experience, and it highlights the ways in which the detention has failed to comply with international and human rights laws. The UN opinion carries much weight for the family and detainee long after the latter is released, especially if the detaining state does not officially close the case. However, some home governments have been reluctant to discuss the process or provide any guidance to families wishing to go down this route, and when the UN opinion has been published, they refrain from acknowledging or making any reference to it. Given the importance many families and detainees attach to the UN opinion, such a response from the home government is unhelpful and frustrating. While the Australian government has been identified by the UN working group as having arbitrarily detained indiviudals on its own soil, this should not stop DFAT from acknowledging the value of the UN opinion to families in cases of wrongfully detained Australian citizens abroad and from engaging in open discussions about how the family might use the UN opinion in its own media engagements. If DFAT does not wish to reference the UN opinion in its own statements or for the family to publicise DFAT's own categorisation of the detention as wrongful, they can still support the family's wish to reference the UN opinion (which is already in the public domain) in any public statement or media engagement the family may make in the course of a case.

d) the management of cases of wrongful detention by the Department of Foreign Affairs and Trade;

Hostage International cannot comment on the internal management of wrongful detention cases by governments, but our experience highlights the fact that these management processes, like the categorisation of cases, are often unclear and confusing to families. For example, famiies may not understand which part of DFAT they are in contact with, what the role of the ambassador to the detaining country is, and whether DFAT has any input on the selection of lawyers or translators. The lack of understanding of foreign policy responses and management of cases can be deeply distressing and frustrating for families and detainees alike.

Whatever a government's response or processes, we highly recommend that this is clearly and compassionately communicated to those most affected by these cases and that in formulating their response, governments not lose sight of the human impact of these cases.

e) communications with and support for families of Australians being wrongfully detained overseas;

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Through its considerable caseload of wrongful detentions, Hostage International has witnessed both good and poor communications and support by governments where the families are concerned. We have seen examples of both by DFAT.

DFAT's communication with and support for families (as that of all governments), is influenced by the personalities chosen to be the point of contact, the culture set by the unit's head, and the overall policies in place for family liaison. Where the point of contact has shown empathy, accessibility, responsiveness as well as pro-active behaviour, and has maintained regular and timely contact, the communication with families has been positive and productive. Care should be taken to ensure that the right people are chosen for this role (with good listening skills and the ability to show empathy) and that they are well supported by their managers.

The culture of communication with and support for families is often dictated by the head of the team and can change significantly when the senior members of the Consular and Crisis Management Division move on. DFAT's interactions with families have been affected by a high frequency of change in government personnel in the last few years which is very destabilising for the families. More continuity with DFAT contacts for families would be beneficial and having a more permanent senior official for these cases (as the US and Canada now have) could be helpful.

Hostage International has recently seen DFAT move towards a culture of being more accessible, willing to share information, offer support with practical issues created by the detention, and arrange more frequent meetings with senior ministers or other key players in government. These gestures make a huge difference to families and hopefully also make the job of DFAT personnel more rewarding. It is important to capture best practice principles of family engagement in DFAT policy (which should be written and approved), so that these benefits and practices are not lost when the members of the team move on. Handovers from the departing team members to the newcomers should be comprehensive, with a good lead in time and a chance for the families to get to know the replacement contact before the former one leaves.

Governments find some topics more difficult to discuss with families and internal policies restrict what they can share. This often leads to a sense that there is little action, with government personnel repeating the same phrase at each family meeting: 'we are doing everything we can'. This leaves families feeling frustrated and lacking in confidence in their government's ability or desire to find a resolution. Sharing information about processes, foreign policy complexities (including conflicting elements of international law) and geopolitics should always be possible, and is strongly encouraged as it can help families to understand why the resolution of such cases can take a long time.

One key area of communication and support, which many governments handle less well (and DFAT is not exempt), is around media engagement. Media is more likely to become a prominent theme where families of detainees feel their government is not doing enough. Going to the media may make them feel empowered and able to have some influence over resolution. The family's wish to engage with media should be acknowledged by DFAT as soon as possible and it should be discussed openly at every family meeting. The family's aims around media engagement should be listened to and a discussion about the pros and cons of that engagement should ensue. Hostage International recognises that there are some risks to engaging with the media, including public-facing social media, and that the focus and timing of any media engagement needs to be considered very carefully. There will be times when it might have some benefits (though this is difficult to verify), or at least be benign, and other times when it could be detrimental. As those leading on resolution, DFAT will be best placed to make a judgement about the timing and utility of media engagements. However, if governments take a blanket approach to families and media engagements, declaring any media to be high-risk and best avoided, families will feel that their hands are being tied and that the government is placing its

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own reputation above the needs of the detainee and their family. Many families are under pressure by the detainee or friends and family members to go to the media, so they are caught between government warnings and their feeling of duty to their loved ones. Ultimately, many families end up going to the media without further discussion with their government, and the relationship then also suffers. A better approach, practised by some governments, is to speak to families openly about media engagement and, if it is something they are keen to pursue, provide them with guidance and support about when and how to do this as safely as possible, while also making it clear that there will be times when they will request the family to cease media engagements in order to protect particularly sensitive points of the diplomatic process. With this approach, families will feel their discussions about media with their government are based on trust and respect, and they will be less inclined to go it alone and more receptive to disengaging from media when it really matters.

Cases involving dual nationals, where the Australian citizen's other nationality is that of the detaining state, pose additional difficulties. However, while it is important to explain those difficulties to families, dual nationality should never be used as an excuse by DFAT to do less and it is also unhelpful after the fact to make comments such as, 'your loved visited that country against our travel advice'. Such comments neither move the case forward nor foster good relations with the family.

Over the last nine to ten months, DFAT has shown an overall desire to adopt best practice principles in its approach to families. It has engaged Hostage International for training and consultancy and we have seen a genuine change in practices for the better which we hope will continue and will be embedded in policy.

Of particular note, families whose loved ones are wrongfully detained often face years of financial hardship, which can be complicated if all the assets are in the detainee's name and there is no lasting power of attorney that can be used in their absence. The Australian state laws around families applying for guardianship in these situations are restricted to assisting families of missing persons, so that once it is known where the detainee is imprisoned, there is no such option for a detainee's family. And yet, the detainee is rarely allowed by the detaining state to sign documents or send instructions to allow their family to manage their assets, placing the family in very difficult circumstances. Hostage International is seeking to work with Australian lawyers to bring about legislative changes in Australian state laws around guardianship applications so that they are available to the families of detainees. However, in the meantime, it is imperative for DFAT to step in to do what it can to help on a case by case basis. We have seen DFAT more recently help families (alongside Hostage International) by speaking to banks or other institutions and encouraging flexibility around financial or property arrangements. This type of support makes a real difference to families and should be continued and included in any family support policy.

f) communications with and support for Australians who have been released from wrongful detention; and

Broadly speaking, individuals released from wrongful detention will have certain needs that must be prioritised on their return: their physical health, their mental health and their practical circumstances. Hostage International recognises that the job of foreign ministries is generally to get their citizens back home, and that the aftercare often falls outside of their usual remit. This is in part why Hostage International exists to fill the gaps. Nonetheless, governments should take some initial steps to provide immediate support on release:

1. Repatriation: DFAT has been known to expect some returnees, but not others, to reimburse or pay for their own repatriation costs. The policy appears to be applied inconsistently and without taking into account the financial situation of the individual concerned. Released

detainees are often hugely traumatised and they cannot be expected to sign agreements within hours of their release which oblige them to reimburse their repatriation costs. Equally, some families are left destitute by the detention of their loved one and cannot afford to pay for the flights themselves. If DFAT cannot commit to paying for repatriation in all wrongful detention cases, a conversation with the family about the repatriation costs and the application of a policy based on a detainee's means rather than profile would be appropriate.

2. Physical health: Before boarding a flight to return home, the detainee should be given a physical examination to ensure they are fit to fly. We believe DFAT have ensured this happens in most cases. Once back in Australia, however, the detainee will need a much more thorough examination, which will likely include blood tests, scans, dental and optometrist consultations. It is unusual for governments to arrange this follow-on medical care, but they should encourage all detainees to see their doctor as soon as possible (and signpost to those organisations best able to support them in the process).
3. Mental health: All those returning from wrongful detention will have undergone some form of trauma. They will return to Australia experiencing a plethora of mixed and often conflicting emotions which can be overwhelming. In the first 24 hours after release, it is always helpful for detainees to have a conversation with a psychologist who can explain and validate these feelings and also brief them on what to expect in the coming days and weeks. While not all governments have a psychologist on hand to carry out this trauma briefing, Hostage International strongly recommends that DFAT include such a briefing in their repatriation plans. DFAT will often be the only entity in touch with the returnee at this critical point and so is best placed to organise it.
4. Practical issues and signposting: As with other post-release needs, DFAT may not be best placed to provide support for practical issues faced by returnees, such as administrative matters around tax forms, credit ratings, social media or benefits applications. However, they should endeavour to provide supporting letters and know where to signpost the returnees for ongoing support in these areas, as well as for physical and mental health (including trauma counselling). Hostage International is able to assist returnees in all of these areas on a long-term basis and DFAT has in many cases signposted returnees to the charity. However, some of those returnees have either not been referred or not understood the referral and have lost out on the opportunity of seeking the charity's support. We recommend that DFAT has a more consistent and clear approach to signposting returnees to relevant organisations.

g) any other related matters

Information sharing: One of the difficulties faced by governments, not least of all DFAT, is that wrongful detentions are infrequent enough that any one government does not have a vast amount of knowledge about how these cases evolve and how consular challenges might best be overcome in a given country. The fast turnover of government personnel also means that any past experience is soon lost. Sharing experience and lessons learned among allied governments appears to happen infrequently and only in formal forums. Where an Australian is wrongfully detained in country x, Hostage International encourages DFAT to reach out to its allies who have had wrongful detentions in that country (whether amongst the Five Eyes, or amongst signatories of the Canadian Declaration Against Arbitrary Detention) and to learn what they can from their allies' experience and existing contacts.

Civil society is another repository of broader knowledge and experience that DFAT can tap into. Unlike governments, international organisations such as Hostage International have exposure to the wrongful detention of many nationals in a variety of different countries, and can monitor patterns and issues in a way that a single government does not. This knowledge can be valuable to DFAT and should be considered when seeking to develop a strategy for resolution as well as support for the detainee and their family.