

Submission to the Australian Parliament's Senate Inquiry on the wrongful detention of Australian citizens overseas

Author: Daren Nair

Introduction

Daren Nair is a former Director on the Board of Amnesty International UK. His work on hostage diplomacy has been cited in reports published by the UK Parliament's Foreign Affairs Committee and the US Congressional-Executive Commission on China.

Daren has spent the last nine years campaigning with the families of individuals held hostage by countries such as Iran, Russia, Venezuela and China. Daren hosts the Pod Hostage Diplomacy podcast that works to free hostages and the unjustly detained around the world. Together with their families, Daren shares their stories and lets the public know what they can do to bring them home.

Since 2022, Daren has been campaigning with the family of Australian citizen, Robert Pether who has been imprisoned in Iraq since 7 April 2021. The United Nations Working Group on Arbitrary Detention [1] has stated that Robert is arbitrarily detained and has called for his immediate release.

Recommendations:

(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;

1. Ensure the Government's definition of a hostage includes individuals taken captive by both state and non-state actors.
2. Define the criteria to determine whether an Australian citizen or permanent resident detained abroad is wrongfully detained. Use Section 2 Subsection (a) of the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act [2] which has been signed into US law, as an example.
3. Declare hostage diplomacy as a national emergency similar to US President Biden's Executive Order on Bolstering Efforts to Bring Hostages and Wrongfully Detained United States Nationals Home [3].
4. Pass a law that makes it mandatory for the Australian government to use every resource available to secure the release of Australian citizens and permanent residents wrongfully detained abroad. Use the Levinson Act [2] previously mentioned as an example.
5. An Australian Senate Committee should provide independent oversight to ensure the Government is doing everything possible to secure the release of Australians wrongfully detained abroad.
6. A senior diplomatic role e.g. Special Ambassador for Australians Detained Abroad should be appointed to lead the efforts to free Australians wrongfully detained abroad. This is similar to the US Special Presidential Envoy for Hostage Affairs (SPEHA) [4] role in the US State Department.
7. Create a multi-agency team (law enforcement, intelligence, DFAT, Defence, Justice, Treasury) within the Australian government to coordinate efforts to bring Australians wrongfully detained home. Use the US Hostage Recovery Fusion Cell [5] as an example.
8. Provide better training and resources to in-country consular services teams so they can quickly identify and react to potential wrongful detention cases of Australians.

9. Continuously raise awareness of hostage diplomacy cases worldwide working with news outlets, academic institutions, businesses, NGOs and sports teams so Australian citizens do not travel to countries that practice hostage diplomacy.
10. Improve the quality of travel advisories and publish them frequently on multiple platforms including social media, TV and radio. Every time people come across a travel advertisement, there should be a warning similar to those you see on cigarette packets. When people buy tickets to countries that practice hostage diplomacy, they must be required to sign acknowledging they have read and understood the travel advisory for that country. This should happen prior to departure at airports, ferry terminals, train and bus stations too.
11. Employees, athletes and journalists should have the right to take legal action against their employers for not warning them against travelling to countries that practice hostage diplomacy, if they are travelling for work.
12. The Australian government supporting the Canadian Declaration Against Arbitrary Detention in State-to-State Relations was a good step. Now, Australia should work with like-minded countries to secure a legally-binding international agreement on state hostage-taking that ensures perpetrators are held accountable.
13. The Australian government should recognise and work with international institutions that work to uphold human rights e.g. the United Nations, the UN Working Group on Arbitrary Detention and International Court of Justice to hold countries that practice hostage diplomacy accountable.
14. Ensure consular access and protection is a legal right for all Australian citizens.

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

1. Use intermediaries such as third party specialists who have experience in country and can be deployed immediately when an Australian is detained. In cases where the detainee was not targeted, there is a short window at the beginning of the detention where a third party specialist can quietly negotiate their release.
2. Be flexible and willing to change strategies. Quiet diplomacy may be the best option at the beginning but if it does not produce results, the Government will need to change their strategy and keep the families informed.
3. Insist on the wrongful detainee's rights as an Australian citizen to consular access and protection as well as access to legal counsel and medical care. Insist on a representative from the Australian Embassy being present every time the detainee is taken to court.
4. The Australian government should negotiate with hostage-taking states to secure the release of their citizens or permanent residents. There is no conclusive data that shows giving up concessions e.g. prisoner exchanges or sanctions relief to free your citizen held hostage by another country incentivises more hostage-taking.
5. Use signing of international treaties and trade deals as leverage to get Australians wrongfully detained freed.
6. The Australian government should punish the hostage-takers within the hostage-taking state by ensuring there is a publicly known cost for their behaviour e.g. targeted Magnitsky sanctions, asset seizures, travel bans.
7. When punishing the hostage-takers, never opt for collective punishment e.g. economic sanctions, blanket travel bans for all citizens, bans on student visas, foreign aid etc. It is important to use all leverage but punishing the many who are innocent because of the actions of the guilty few will create a backlash that will endanger Australians in the country.
8. Negotiations for the release of an Australian wrongfully detained in a country need to be ongoing without long pauses in between as hostage-taking states change their mind often and leverage changes on both sides with time.

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

1. As stated in point (a), the Australian government must define the criteria to determine whether an Australian citizen or permanent resident detained abroad is wrongfully detained. This criteria should be made public so family members of Australians detained abroad, their lawyers and NGOs can gather evidence and make a submission to DFAT requesting the detainee be designated as 'wrongfully detained'. DFAT must review this submission, make a decision and provide a response for each submission. DFAT's response in each case should be audited by an independent oversight committee.
2. 'Wrongful detention' designations should be made based on facts supported by evidence that can be audited by an independent oversight committee, not based on other policy objectives, whether the detainee is a celebrity or is well-connected.
3. Decisions made by the United Nations Working Group on Arbitrary Detention on whether the detention of an Australian citizen abroad amounts to an arbitrary detention must be respected and acknowledged, as in the case of Australian citizen Robert Pether currently imprisoned in Iraq [1].

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

1. DFAT must use every opportunity possible to push for a medical release in cases where the wrongfully detained Australian has serious medical conditions. This is a good way for the hostage-taking state to save face with their domestic audience and appear "compassionate".
2. All public-facing DFAT staff especially senior officials including the Foreign Minister should be briefed regularly on wrongful detention cases with accurate up to date information. In 2017, British Foreign Secretary Boris Johnson made an inaccurate statement to a parliamentary committee [6] on the reason British citizen Nazanin Zaghari-Ratcliffe who was wrongfully detained in Iran at the time, was in the country. These comments were then used by the Iranian regime to accuse her of being engaged in "propaganda against the regime" which could have led to a new trial and a longer sentence in prison for a crime she did not commit.
3. It will likely be harder to secure the release of Australian dual nationals wrongfully detained abroad but DFAT must not deprioritise their cases.
4. DFAT must scrap the need for Australians imprisoned abroad to first sign a privacy waiver before briefing their family members of their case. Some countries that practice hostage diplomacy intentionally prevent detainees from interacting with the outside world during the early stages of their detention to isolate them psychologically so they confess to something they did not do.
5. Adequate counselling for Australians wrongfully detained abroad must be provided. Referring them to crisis support organisations such as Lifeline is not sufficient.
6. When talking about the detention of an Australian abroad to the media, DFAT must not repeat the false accusations of the hostage-taking state as this will cause them more harm.
7. Effective succession planning procedures must be in place at DFAT to ensure continuity of support for Australians wrongfully detained abroad and their families when there is a change in leadership and/or personnel within DFAT. If new staff need to get up to speed, they should use the families as a good source of information.
8. DFAT staff should be made aware of the effects of secondary trauma and provided with appropriate support, if required.

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

1. Families of Australians wrongfully detained abroad should be allocated a dedicated case worker who knows their case, is knowledgeable in hostage diplomacy and has the empathy to communicate with people going through the worst period of their lives.
2. Have regular update meetings with the families e.g. at least once a week. Be honest with families about what you can share with them and what you cannot. Update them on the case and let them update you with what they know.
3. Families do not want to hear platitudes. They want to see results. This is important to remember when Government officials make statements in the media and to the families.
4. The Government must accept that families will likely go public with their case if they do not see results after a few weeks or months. It is important to note that there are many reasons families go public. Some want to protect the reputation of their loved one who has been accused of false charges by a hostage-taking state. Some families will want to show their loved one and the rest of their family that they did everything they could to free their loved one.
5. When an Australian is wrongfully detained abroad, their family will need to continue paying the bills and this will be difficult if everything is in the detainee's name. The Government should help the families with power of attorney especially if no one can get access to the detainee in prison to get the required documents signed.
6. Families should be provided with financial and healthcare support, where required. Other forms of support can include providing the families with a list of pro bono lawyers, media consultants or NGOs that can help them.
7. The Government should not charge fees for helping families transfer money to their wrongfully detained loved one in prison.
8. Australians wrongfully detained abroad should not be penalised for being unable to pay taxes while in prison.
9. Be mindful of the constant state of trauma families are in when setting up meetings with them. Be clear what this meeting is about so the families do not end up dwelling on whether this is good or bad news.

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

1. In the United States, newly released wrongful detainees go through a post-isolation support activities (PISA) programme [7]. It is a programme developed by the military to address the physical and psychological needs of people who have been detained or held hostage. The activities include medical checks and repeated counselling sessions to help the detainee return to civilian life. A similar programme should be in place for newly released Australians who have been wrongfully detained.
2. Australians who have been released from wrongful detention will need access to physical and mental health support for the rest of their lives. These same individuals may have lost their homes, their marriages and will need the financial support to rebuild their lives. The Government should provide a level of support to these Australians and also refer them to NGOs that can also provide assistance.
3. The Government should help these former wrongfully detained Australians clear their name. They should help invalidate any false charges imposed on them by the hostage-taking state.

4. The Government can help these former wrongfully detained Australians get justice by providing assistance if the former detainee takes legal action against the hostage-taking state.
5. Use former wrongful detainees as advisors. Their experience will provide valuable insight into how hostage diplomacy works in that hostage-taking state and what can be done to stop this practice.

(g) Any other related matters.

1. Lead by example. It gives the Australian government more credibility when building coalitions and negotiating with other countries around the world.

References

[1] Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–22 November 2021 - Opinion No. 70/2021 concerning Robert Pether and Khalid Radwan (Iraq)*
16 March 2022

<https://www.ohchr.org/sites/default/files/2022-03/A-HRC-WGAD-2021-70-Iraq-AEV.pdf>

[2] Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act

<https://www.congress.gov/bill/116th-congress/senate-bill/712>

[3] Executive Order on Bolstering Efforts to Bring Hostages and Wrongfully Detained United States Nationals Home

19 July 2022

<https://www.whitehouse.gov/briefing-room/presidential-actions/2022/07/19/executive-order-on-bolstering-efforts-to-bring-hostages-and-wrongfully-detained-united-states-nationals-home/>

[4] Office of the Special Presidential Envoy for Hostage Affairs

<https://www.state.gov/bureaus-offices/secretary-of-state/special-presidential-envoy-for-hostage-affairs/>

[5] Hostage Recovery Fusion Cell (HRFC)

<https://www.state.gov/your-u-s-government-team/>

[6] The Guardian: Boris Johnson ‘mistake’ could harm case for Nazanin Zaghari-Ratcliffe, say family - 6 November 2017

<https://www.theguardian.com/politics/2017/nov/06/boris-johnson-mistake-could-harm-case-for-nazanin-zaghari-ratcliffe-say-family>

[7] The Washington Post: Where Brittney Griner spent the week: A military program for ex-hostages - 16 December 2022

<https://www.washingtonpost.com/nation/2022/12/16/brittney-griner-military-program-ex-hostages/>