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Committee Secretary
Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
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Canberra ACT 2600

Submission by Human Rights Watch to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Wrongful Detention of Australian Citizens Overseas

Human Rights Watch welcomes the opportunity to make a submission on the Australian government's responses to the wrongful detention of Australian citizens overseas.

Over the years, Human Rights Watch's Australia office has been in contact with Australians arbitrarily detained in Cambodia, China, Egypt, Iran, Morocco, Myanmar, Pakistan, Thailand, Vietnam, as well as family members, legal representatives, diplomats, and former government officials. We have interviewed people about their experiences post-detention. We write this submission drawing on these experiences and recognising every case is unique and there is no "one size fits all approach" to solving the problem of arbitrary detention of foreign citizens abroad.

Oppressive governments wrongfully or arbitrarily detain Australian citizens, both historically and currently. Foreign governments have detained Australians on fabricated or unsubstantiated charges, denied them due process rights, and used them as political bargaining chips. They have held them in poor conditions with limited access to visits from lawyers, family and friends, and limited consular representation. If, and when, they are released it is often after significant public campaigning and high-level Australian government intervention in their cases.

This submission looks at:

- classification as consular cases not political cases;
- the role of public and private diplomacy;
- the need for a centralised, consistent approach; and
- recommendations to the Australian government.

While this submission focuses on Australians detained overseas, the same oppressive governments often arbitrarily arrest and detain their own citizens. Their conditions can often be even worse as they do not have regular foreign government oversight in trying to defend their rights.

Consular versus political

Cases of wrongful detention should be treated differently from regular consular cases when an Australian citizen is detained on allegations of committing a common (non-political) crime. First, those wrongfully detained often do not get the support they need because either what they need is beyond the scope of consular services, or because their cases are not immediately identified as wrongful detention. Second, government advocacy becomes fragmented and the government risks missing opportunities to use political leverage.

Consular support

To date, the Australian government has largely treated instances of Australians wrongfully detained overseas as consular cases. The consular services charter sets out what the Australian government sees as its role when citizens are detained overseas. Specifically, it states if someone is arrested overseas, "[w]e [i.e. the Australian government] can't get you out of prison/detention or provide legal advice, but we can provide you with a range of information including contact details for local lawyers. We will do what we can to ensure you are treated in accordance with local law and process." The other service that the charter says it can provide is welfare checks on people detained overseas. While this is something, it is not nearly enough support for people who are wrongfully detained, nor their families.

The charter provides no specific guidance on how the Australian government defines or deals with wrongful or arbitrary detention. In many instances these are political cases, and the individuals involved are victims of "hostage diplomacy."

There is also no clear process within the Department of Foreign Affairs and Trade (DFAT) upon identification of a wrongful detention case, such as how to escalate the response within the government and how to provide the appropriate support for the detained person and their family.

Each case is different and varies according to country context, but DFAT staff should make a determination about whether a case may be arbitrary or wrongful detention, and as part of that, consult with human rights groups, United Nations staff, and others on the ground.

Political leverage

Hostage diplomacy is a serious enough global problem that in September 2020 Australia, Canada, and 33 other countries stated at the UN that they were "deeply disturbed by politically motivated arbitrary arrest, detention and sentencing of foreign nationals." In 2021 the Canadian government launched the Declaration Against Arbitrary Detention in State-to-State Relations, which the Australian government has supported.

This was a good start, but for UN statements and declarations to have real impact, they need to name the countries responsible, including powerful ones such as China. There also needs to be follow-up using the combined leverage of multiple governments.

Some cases can be resolved bilaterally. For example, on a number of occasions, the Chinese government has detained Australians on national security grounds with scant information about the crimes they are alleged to have committed. In August 2020 the Chinese government detained an Australian journalist, Cheng Lei. Cheng Lei had been employed as a business news anchor for a Chinese state media outlet and authorities detained her on suspicion of "endangering national security." In September 2023, ahead of Prime Minister Albanese's first official visit to China, Cheng Lei was released following concerted high-level political pressure from the Australian government.

Strong multilateral efforts by multiple governments secured the release of the two Canadians, Michael Kovrig and Michael Spavor—known as the "two Michaels"—from detention in China. Most recently, reports on US citizen Evan Gershovich's release from detention in Russia in August show the multilateral effort involved in securing his freedom. Standard bilateral diplomatic interventions to free citizens can sometimes be ineffective. In those cases, governments should stand together with other rights-respecting governments in defence of human rights, in particular arbitrary or wrongful detention.

Public versus private diplomacy

In communications that Human Rights Watch has had with the Australian government over the past decade, Australian government officials have often spoken about the importance of advocates and families keeping quiet about cases of wrongfully detained Australians. The government's stated concern is that public attention might jeopardise sensitive bilateral negotiations with the given country or actor.

When Human Rights Watch staff have spoken with the families of people detained, or former detainees on release, they confirmed that the Australian government has given them the same instructions not to speak publicly.

Every case is different and while some cases do require careful, quiet diplomacy, that should not be the automatic default setting. The government should recognize that in many cases it is precisely the public attention that has provided the impetus for release.

In November 2019 Thai authorities detained a recognised refugee and permanent resident in Australia, Hakeem al-Araibi, on a wrongful Interpol “red notice” seeking his return to Bahrain, where he had been tortured and feared for his life. Al-Araibi was eventually released from detention in Thailand in February 2020 following immense public pressure. His release showed the power of collective action by athletes, governments, nongovernmental organizations, UN agencies, players’ unions, and sports federations to address rights issues.

Al-Araibi’s case should serve as a practical model for the Australian government to speak up publicly and consistently for those who are arbitrarily detained. But after al-Araibi's case the Australian government has been more reticent to speak out publicly due to Thailand's threats of retaliation, but these have never been specified or substantiated. Furthermore, failing to engage robustly on human rights sends the wrong message to abusive governments in the region, like Cambodia, Myanmar, and China. It becomes easier to brush Australia off as not committed to rights, or only raising concerns when it suits a political agenda. And that emboldens abusive governments in this region when there is no cost associated with their actions.

Centralised consistent approach

In cases of wrongful or arbitrary detention overseas, the Australian government has neither a centralised nor consistent approach. Over the last decade Human Rights Watch has spoken to many relatives of people arbitrary detained, and to people who have been released. They consistently say that to their knowledge their case was often passed around between different desk officers within DFAT. They found that there was often no adequate hand over, and time was lost having to get consular officials up to speed on the case.

The level of government activity on a case seems to depend on who the desk officer is and their commitment to the case. There is no single person within DFAT who manages arbitrary or wrongful detention cases. When families ask for more information, DFAT says privacy and security are the reasons they cannot provide further information.

When a specific senior person has been given the role of negotiating an Australian’s release, these cases have had more success. However, in Australia, this only occurs on an ad hoc, case-by-case basis.

Other countries have demonstrated that having a specific high-level person responsible for cases of "hostage diplomacy" has had a positive impact. For example, the United States has a Special Presidential Envoy for Hostage Affairs. Based on conversations Human Rights Watch has had with officials in Washington, the special envoy's role has been a comfort to families and has allowed for coordination both at the highest levels of government and with families. The special envoy also coordinates rehabilitation and repatriation. The special envoy also represents the government in multilateral forums.

Recommendations to the Australian government:

1. Create a clear policy on wrongful detention, how to identify cases promptly and escalate the cases within government, and setting out a clear process for learning lessons within, and across, cases and contexts. The policy should also include a nuanced approach to public advocacy with the default position being that the Australian government speaks out publicly on cases unless there is good reason not to do so.
2. Provide adequate resourcing for a policy.
3. Create a senior role to deal with wrongful detention cases with a direct reporting line to the foreign minister or prime minister. This person should have specific expertise in hostage diplomacy. Their mandate should include engaging with all the wings of government, speaking to families, providing people with information on how to contact the detained person, coordinating rehabilitation and repatriation, as well as attending multilateral sessions on the issue.
4. Encourage families or lawyers to submit cases to the United Nations Working Group on Arbitrary Detention.
5. Use the existing sanctions regime to sanction officials and individuals who are serious offenders of arbitrary detention and hostage diplomacy.
6. Coordinate sanctions with other affected countries; or within relevant multilateral working groups.
7. Make clear when seeking the release of an arbitrarily or wrongfully detained Australian, that arbitrary detention of anyone, Australian citizen or not, is in violation of international law.