



Australians Detained Abroad

Australians Detained Abroad

**Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO BOX 6100
Parliament House
Canberra ACT 2600**

By email:

fadt.sen@aph.gov.au

30 August 2024

SUBMISSION

WRONGFUL DETENTION OF AUSTRALIAN CITIZENS OVERSEAS

INTRODUCTION

Australians Detained Abroad (ADA)

ADA serves as a resource for Australian families dealing with the detention of a loved one overseas. ADA aims to assist families by providing essential information, advocacy, and connections to a network of experts in diplomatic, legal, and academic sectors, as well as assisting with in-country referrals where possible.

ADA has assisted numerous Australians over the past 10 years, by responding to country-specific enquiries about detention, referrals to legal advisors, advocacy and support. ADA relies on its professional networks, and in-country knowledge to assist families in navigating the detention of their family member.

SUBMISSION

ADA welcomes the Committee's scrutiny of the Australian Government's (**the Government**) responses to the wrongful detention of its citizens.

Fundamentally, ADA believes that the Government must extend its assistance to all its citizens and permanent residents, regardless of whether there is a social or political perception of the detention being 'wrongful.' We have not addressed how the Government ought to categorise cases of 'wrongful' detention, as ADA considers that all overseas detainee's human rights must be protected including fundamental fair trial rights¹.

ADA makes submissions to a limited number of the terms of reference outlined by the Committee.

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

ADA's main concern is that Australia's foreign policy responses are opaque, ad hoc, and potentially based on prevailing public concerns or interest instead of established principles.

We are aware and applaud the role of DFAT in assisting all Australians that are detained overseas, however it appears that the level of *ongoing* support and advocacy from a political level is arbitrary.

For example, public advocacy by Ministers or 'at level' negotiations between political counterparts appears to be dependent on the public interest in a person's detention.

However, many Australians "wrongfully" accused of serious crimes overseas such as allegations involving drug trafficking, harm to children, sexual abuse, homicide or physical violence are not receiving ongoing departmental support at a high political level, or at all.

Viewing such allegations from an Australian legal lens, we would consider all persons accused of crimes with a presumption of innocence. In short - there appears to be a correlation between the unsavoury nature of the criminal allegations and the relatively limited level of public and governmental support received.

It is hoped that one of the outcomes of this inquiry is a set of principles which will underpin Australia's foreign policy in the relationship with countries that "wrongfully" detain Australians. Establishing these foundational principles should guide Australia's diplomacy with these countries on a constant basis and not only

¹ As per Article 14 and Article 15 especially <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

when a particular egregious case makes its way into the headlines. This will permit Australia's foreign policies to be proactive in this area upholding its principles and not reacting to particular cases.

g) Related matter: Expend the Commonwealth legal financial assistance to explicitly include Australians detained by countries in which there is a risk of arbitrary or wrongful detention.

One common issue that affects all Australians detained overseas is access to legal representation. Legal advisors often need to be engaged by family members, and this often come at a high upfront financial cost. Many systems do not have a legal aid system whereby initial advice is easily available, so Australian detainees rely significantly on consular lists that recommend legal advice, and information sourced by their family members². Financial assistance from the government is tightly guarded for only the most serious and exceptional cases. The process to obtain legal financial assistance can take months to apply and get approved. Unfortunately, these first months is when the need for legal advice is most necessary.

Currently, the Australia government provides financial assistance under two schemes "Scheme for Overseas Criminal Matters involving the Death Penalty"³ and "Special Circumstances Scheme"⁴.

The scheme involving the death penalty has been adopted as, at a national policy level, Australia is opposed to the death penalty. This scheme is based on the possible punishment an Australian is facing overseas which is easily understood and applied.

The "Special Circumstance Scheme" is less clear on who is eligible for such assistance while listing three categories eligible, this list is not limiting. The scheme may provide financial assistance where an individual is being or will be prosecuted for a criminal offence punishable for a term of imprisonment equal to or longer than 20 years.⁵ Furthermore, the current scheme does appear to provide some flexibility on providing support in cases which might encompass an individual who is being arbitrarily or wrongfully detained⁶, it is recommend that the definition be expanded to include, "Where an individual is at risk of arbitrary or wrongful detention" as a separate category for which financial assistance can be provided regardless of potential punishment. This will provide a clear statement of national policy against such acts as well as providing Australians the resources to challenge such acts.

² <https://www.smarttraveller.gov.au/consular-services/consular-services-charter>

³ <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/scheme-overseas-criminal-matters-involving-death-penalty>

⁴ <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/special-circumstances-scheme>

⁵ Commonwealth Guidelines for Legal Financial Assistance 2012, 3.10 special circumstances scheme.

⁶ It is well known that some Australians detained overseas have been the victims of fraud, set-up for extortion claims, or have been unwitting scapegoats in the criminal activities of others (for example, the high profile case of Yoshi Taylor).

Currently, the Australian government already determines which countries pose a risk of imposing arbitrary detention or harsh enforcement of local laws and publicises this determination through the smart traveller website.⁷ The effect is that Australians who are detained by those countries which have been predetermined as at risk of imposing arbitrary or wrongful detention will qualify for legal financial assistance regardless of the potential punishment.

ADA calls on the government to expand their legal financial guidelines to assist more Australians facing arbitrary or wrongful detention.

Conclusion

ADA recognises that the detention (wrongful or not) of Australians overseas is an emotional, stressful and challenging circumstance that requires sensitive approaches.

We welcome the opportunity to speak to the committee further in relation to the matters raised in the current inquiry.

This submission was drafted by Dan Mori, Astrid Haban-Beer and Maya Arguello Gomez. As well as the ADA contact details above, we may be directly contacted on the below details:

Michael (Dan) Mori, LtCol USMC (Retired), Founder ADA

Astrid Haban-Beer, Barrister, Victorian Bar

Maya Arguello Gomez, Lecturer in Law, Swinburne Law School

⁷ <https://www.smarttraveller.gov.au/destinations/asia/china>