

Submission to the Australian Senate Inquiry on Wrongful Detentions

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August 27, 2024

Thank you for the opportunity to provide this submission. My name is Jason Poblete, and I am an attorney in the United States specializing in international and national security law. I am licensed to practice law in the Commonwealth of Virginia and the District of Columbia.

I have been involved in unlawful detention cases involving various nations, including Cuba, Nicaragua, Iran, China, and others. I have also advised U.S. congressional lawmakers, staff, and civil society groups on these matters, and I currently serve on the *CSIS Commission on Hostage Taking and Wrongful Detention* in Washington, DC.

Drawing on these and other experiences, this submission highlights lessons from the American approach, including contemporary legal frameworks such as the *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act*, signed into law in 2020. While the U.S. experience remains a work in progress, it may offer valuable insights into Australia's efforts to address wrongful detentions.

The U.S. faced its first significant foreign policy challenges centuries ago with the Barbary pirates, leading to foundational shifts in handling international hostage crises. *The Hostage Act of 1868*, enacted in response to the Fenian Raids, marked an early legal framework for dealing with these cases.

Between the passage of the Hostage Act and the *International Convention on the Taking of Hostages* in 1979, the U.S. has developed a comprehensive approach, including the assertion of extraterritorial jurisdiction, international treaties, and legislation such as the *Lindbergh Law of 1932* (of a domestic nature), the *Hostage Taking Act of 1984*, and many others, including centuries of consular work.

These legal measures, combined with diplomatic and military responses, have helped lay the groundwork for the modern international framework against hostage-taking, culminating in the nation's role in the Cold War-era *International Convention* and the later *Levinson law*. The laws take you only so far. In my experience, political will and moral courage, or lack thereof, make or break these cases. Yet we need a legal and political North Star and red lines to build an effective end hostage diplomacy program.

The Levinson law, in particular, represents a significant update to U.S. policy by attempting to formalize processes for international unjust detentions, hostage recovery, and accountability for hostage-takers. However, I remain skeptical about the law's effectiveness, but Congress has spoken, and that is what we have for now. It needs improvement.

While the law has provided some transparency and information to families, advocates, and policymakers, the free world should focus on an international system with a lower-profile, high-impact approach. In the U.S., we have a Special Presidential Envoy for Hostage Affairs (SPEHA). This position should be filled by someone who can operate discreetly, getting into and out of challenging situations without drawing unnecessary public attention or compromising broader foreign policy issues and legal considerations that impact these cases. The SPEHA role would allow for more flexibility and effectiveness in securing the release of hostages, ensuring that these efforts do not inadvertently create a market for hostage-taking or undermine other critical diplomatic initiatives.

Hostage-taking, a centuries-old practice, has evolved into a sophisticated enterprise in modern times. Hostage-takers and governments that unjustly detain foreign nationals are now facing pressure from a broader range of sources. Families, empowered by social media, are increasingly pivotal in raising awareness and applying public pressure on governments.

Additionally, these cases often need to be reconciled with other foreign policy issues, making them more complex and challenging to resolve. The growing global awareness of such practices further complicates the landscape as international scrutiny increases and new actors enter the field. This evolution underscores the need for adaptable and

robust legal frameworks that can address the multifaceted nature of contemporary hostage situations.

In addition to national efforts, multilateral initiatives like Canada's Declaration Against Arbitrary Detention in State-to-State Relations represent a possible step in the right direction, but there is no doubt it is not a substitute for resolute national unilateral action in defense of their nationals. All instruments of state power must be brought to bear on these cases.

The Canadian initiative, which has garnered support from over 70 countries and the European Union, emphasizes the importance of a coordinated international response to wrongful detentions. It should dovetail more with the existing international systems, such as the U.N. Working Group on Arbitrary Detention (WGAD).

Canada's partnership action plan, which includes measures to broaden the scope of this initiative, focuses on legislative and policy changes, enhanced consular access, and improved support for victims and their families. Such efforts highlight the critical importance of international collaboration in combating arbitrary detentions, offering valuable models for Australia to consider in its policy development.

Whatever Australia decides should be fiercely focused on what is best for Australia and its citizens. The priority must be on actions that bring Australians home faster, raise awareness, and send a strong deterrent message. Australia should avoid creating new layers of bureaucracy that could slow down national responses. Instead, the approach should aim to prevent the creation of a hostage-taking and wrongful detention market, ensuring that these practices become increasingly rare and eventually nonexistent. Pragmatic solutions that serve Australia's national interest and the well-being of its citizens are more important than creating more posts and departments.

Drawing from the U.S. experience, it is evident that a clear statutory framework is essential. Australia's lack of a clear definition for wrongful detention complicates case management, similar to the challenges the U.S. faced before the Levinson Act. Strengthening legal and diplomatic tools, such as creating a high-impact, low-profile post outside the consular space can help avoid creating a hostage market while

ensuring direct reporting to the Prime Minister. Additionally, multilateral efforts, such as those within the Five Eyes community, should be enhanced, learning from the U.S.'s strategic alliances.

Supporting families, raising public awareness, and ensuring prompt action are crucial in creating a robust policy framework. The proactive development and adaptation of laws offer valuable lessons for Australia as it seeks to fortify its responses to similar crises.

Australia should consider a lean government structure focusing on low-profile but high-impact actions rather than expanding bureaucracy. Direct, high-level oversight by the Prime Minister or a designated senior official can ensure swift and decisive action, avoiding the pitfalls of excessive bureaucracy. Furthermore, Australia can enhance its response capabilities by strategically allocating resources and leveraging public-private partnerships while minimizing government burden. This approach aligns with the need for less government intervention but ensures maximum effectiveness when action is required.

Finally, while accountability for wrongful detention is essential, it must never come at the expense of securing the immediate release of nationals who are unjustly detained or held hostage. The primary focus should always be on bringing these individuals home safely, with accountability measures carefully balanced to ensure they do not hinder ongoing efforts to secure their freedom.

As the U.S. experience has demonstrated, a comprehensive policy framework combining national and international strategies is crucial for combating wrongful detentions effectively. By learning from these precedents and implementing robust, clear, enforceable policies, Australia can help create global standards for addressing this grave issue. This submission urges the Australian government to act decisively to protect its citizens and fortify its position in the worldwide effort against wrongful detentions.