The Senate

Foreign Affairs, Defence and Trade References Committee

Wrongful detention of Australian citizens overseas

November 2024

ISBN 978-1-76093-751-5 (Printed version)

Printed by the Senate Printing Unit, Parliament House, Canberra

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PO Box 6100
Parliament House
Canberra ACT 2600
Australia

www.aph.gov.au/senate_fadt
Phone: +61 2 6277 3535
Email: fadt.sen@aph.gov.au

Terms of reference

The Australian Government's responses to the wrongful detention of Australian citizens overseas, with particular reference to:

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;

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

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

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

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

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

g) any other related matters.

Contents

Abbreviations

AS Act	*Autonomous Sanctions Act 2011*
AUSIRAN	Australian United Solidarity for Iran
AWADA	Australian Wrongful and Arbitrary Detention Alliance
CFICC	Counter Foreign Interference Coordination Centre
COTUNA	Charter of the United Nations Act 1945
DFAT	Department of Foreign Affairs and Trade
DPRK	Democratic People's Republic of Korea (North Korea)
EO	Executive Order
Home Affairs	Department of Home Affairs
HRFC	Hostage Recovery Fusion Cell
HRG	Hostage Response Group
IRGC	Islamic Revolutionary Guard Corp
IRI	Islamic Republic of Iran
NGO	non-government organisation
PRC	People's Republic of China
SOHA	Senior Official for Hostage Affairs
SPEHA	Special Presidential Envoy for Hostage Affairs
the Charter	Consular Services Charter
the committee	Senate Foreign Affairs, Defence and Trade Committee
the Declaration	Declaration Against Arbitrary Detention in State-to-State Relations
the Levinson Act	*Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act* (US)
UK	United Kingdom
UN	United Nations
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
US	United States of America
WGAD	Working Group on Arbitrary Detention

List of recommendations

Recommendation 1

3.128 The committee recommends that the Australian Government should adopt a clear, publicly available definition of wrongful detention and implement a framework which ensures cases of Australians being wrongfully detained overseas are identified, categorised and reported as being cases of wrongful detention.

3.129 The definition adopted by the Australian Government should allow for the identification and classification of a wrongful detention case as a case of hostage diplomacy (arbitrary detention for diplomatic leverage).

3.130 The definition should also be in alignment with definitions used by key partners, to allow for multilateral action when a citizen from Australia or our partners is wrongfully detained.

Recommendation 2

3.131 The committee recommends that the Australian Government should legislate to ensure that agencies have powers, tools and accountabilities to respond to and deter wrongful detention of Australians, including providing greater transparency and reporting on cases of wrongful detention.

Recommendation 3

3.132 The committee recommends that the Australian Government's framework acknowledge the unfortunate reality that some foreign regimes engage in the practice of hostage diplomacy because it has proven to be a successful tactic for securing prisoner swaps or obtaining leverage over the national government. Acknowledgement of this reality is a critical part of designing a framework which reduces the risk of the Australian Government being leveraged in this way, therefore reducing the risk of Australians being wrongfully detained for this purpose.

Recommendation 4

3.133 The committee recommends that the Australian Government collect data on the wrongful detention of Australian citizens, which should be regularly reported to the National Security Committee of Cabinet and the Minister for Foreign Affairs, and publicly disclosed in a deidentified manner.

Recommendation 5

3.134 The committee recommends that the Australian Government should take steps to increase public awareness in the Australian community about the

practice of foreign governments wrongfully detaining citizens for a variety of reasons, including establishing leverage over that citizen's national government.

Recommendation 6

3.135 The committee recommends that the Australian Government should increase the visibility of warnings to Australian travellers intending to visit countries where regimes are known to engage in wrongful detention.

Recommendation 7

4.123 The committee recommends that the Australian Government should establish an inter-agency, specialist team led by a Special Envoy for Wrongfully Detained Australians to lead the management of all cases of wrongful or arbitrary detention of Australians.

Recommendation 8

4.124 The committee recommends that the newly created Office of the Special Envoy should be resourced with the expertise (and ability to call on external expertise as required) to improve the Australian Government's ability to provide:

- **Specialised and dedicated case management of each case of wrongful detention, including dedicated family liaison contacts.**
- **Increased support for the families of Australians wrongfully detained during the period of detention.**
- **Coordination with victims, families and their legal representatives in regard to legal assistance.**
- **A greater level of ongoing support for victims of wrongful detention post-release, including medical support and counselling, and assistance navigating legal and administrative issues created by a wrongful conviction.**
- **Ensure there is a proper process for reintegrating and debriefing an Australian released from wrongful detention and providing ongoing advice as required.**

Recommendation 9

4.125 The committee recommends that Australians who have been deemed to be wrongfully detained overseas should be supported by the government with a clear acknowledgement that the person's detention was a wrongful detention, for example, by providing a government issued explanatory letter.

Recommendation 10

4.126 The committee recommends the Australian Government explore options for exempting consular cases from relevant privacy legislation, in order that the Department of Foreign Affairs and Trade is able to legally disclose information to a detainee's family in a prompt manner, even in circumstances when a detainee is unable to physically sign a privacy waiver form.

Recommendation 11

4.127 The committee recommends that the Department of Foreign Affairs and Trade employ specially trained case workers and family liaison officers to engage with detainees and their families. These personnel should be trained in trauma-informed practice and communication and not be subject to diplomatic rotation.

Recommendation 12

5.95 The committee recommends that the Australian Government recognise the deterrence of wrongful detention of Australians as a top priority of Australian foreign policy. The government should utilise all the tools available to it to increase this deterrence.

Recommendation 13

5.96 The committee recommends that the relevant agencies of Australia's counter-foreign interference framework acknowledge hostage diplomacy as a serious and egregious form of foreign interference and work closely with the Special Envoy on Wrongfully Detained Australians to counter this foreign interference threat.

Recommendation 14

5.97 The committee recommends that where regimes are known to engage in wrongful detention for diplomatic leverage or to secure prisoner exchanges, such as Russia and the Islamic Republic of Iran, the Australian Government should make clear to those regimes that they should expect severe diplomatic consequences and sanctions in response to this behaviour.

Recommendation 15

5.98 The committee recommends that the Australian Government should sanction senior officials responsible for the wrongful detention of Australians, including judges responsible for allowing or authorising wrongful detention and imprisonment.

Recommendation 16

5.99 The committee recommends that where a foreign regime is currently wrongfully or arbitrarily detaining an Australian, the Australian Government should exercise restraint in its public engagements with representatives of that regime.

Recommendation 17

5.100 The committee recommends that the current Department of Foreign Affairs and Trade travel advice that Australian travellers to the People's Republic of China, Afghanistan, North Korea, the Islamic Republic of Iran, Mali, Myanmar and Russia are at increased risk of arbitrary detention should be reflected in Australia's bilateral approach to engagement with those countries.

Recommendation 18

5.101 The committee recommends that the Australian Government should increase transparency and utilise public attribution wherever possible as a deterrent to regimes which seek to wrongfully detain Australians.

Chapter 1
Introduction

1.1 Australians can be wrongfully detained overseas for a variety of reasons. These can range from mistaken identity or entirely arbitrary arrests to genuine suspicion of having committed a crime, the involvement of corrupt interests, or politically motivated reasons.

1.2 Wrongful detention typically takes place in countries which lack the rule of law and a free and impartial judiciary — features common in authoritarian regimes. Regardless of their underlying cause, each detention generally breaches international standards because of wrongful conduct by the detaining state in arresting, prosecuting, sentencing, or imprisoning the individual.

1.3 Those who experience arbitrary or wrongful detention find themselves in a predicament subject to political circumstances beyond their control. Concerningly, the arbitrary detention of western citizens appears to be increasingly used by some foreign regimes for diplomatic and political leverage, a phenomenon described as 'hostage diplomacy'.

1.4 Hostage diplomacy is recognised by a vast number of international actors as an increasing threat to cordial state-to-state relations encompassing human rights, international law and international security dimensions, and which accordingly requires a strong multilateral response from like-minded countries.

1.5 The wrongful detention of its citizens overseas presents significant diplomatic, legal and humanitarian challenges to Australia, all of which require a robust, strategic and transparent policy response.

1.6 The Department of Foreign Affairs and Trade (DFAT) officials tasked with responding to the wrongful detention of Australian citizens have often done a commendable job in very difficult circumstances, and a number of wrongly detained individuals have been freed over the years as a result of their efforts.

1.7 Unfortunately, Australia does not currently have a clear framework for responding to and deterring cases of wrongful detention, both at an individual case management level and at the broader foreign policy level.

1.8 Indeed, Australia's lack of a formal definition and standardised process to identify cases of 'wrongful detention' means that the actual number of Australians affected remains unknown.[1]

1.9 The absence of a robust framework to address wrongful detention leaves Australia vulnerable to being a target for states that wish to engage in hostage

[1] Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 3.

diplomacy, putting at risk the safety of individual Australian citizens and the national security of the country more broadly.

1.10 Within this context, hostage diplomacy can be understood as a form of foreign interference which requires a strong stance from countries such as Australia and their like-minded partners to mitigate and deter the practice.

The human impact of wrongful detention

1.11 Those who are unfortunate enough to experience wrongful detention, either as an individual detained or as a family member or friend whose loved one is detained, suffer greatly. This fact must be acknowledged first and foremost in any exploration of issues relating to wrongful or arbitrary detention.

1.12 As witnesses to this inquiry have attested, to be wrongly detained is a terrifying, isolating and dehumanising experience. Individuals wrongly detained, often by authoritarian or corrupt regimes with no regard for international norms, suffer lengthy imprisonments frequently marked by inhumane treatment and human rights violations that deprive them not only of their liberty, but also their dignity. They are denied any semblance of justice, unable to access help, and cut off from their families and the rest of the world. They often face the hopeless prospect of indefinite detention and are totally reliant on the efforts of their government to secure their release. Through no fault of their own, some find themselves used as pawns and bargaining chips in geopolitical games, purely by virtue of their Australian citizenship.

1.13 If they are lucky enough to be freed, beyond the initial relief of release they face the daunting prospect of returning home to rebuild their lives, often with little to no psychological or practical support. They must mourn the loss of the time stolen from them, and grapple with the life-long consequences of their ordeal. Most are irrevocably changed by their experiences.

1.14 When an individual is wrongfully detained overseas, their families and friends also endure significant hardship. Without notice their lives are upended and they are plunged into a new and overwhelming world, characterised by meagre information and unpredictable factors outside their control. They must navigate confusing and opaque diplomatic and bureaucratic processes, often with little guidance, as they advocate tirelessly for their loved one's release. All of this is compounded by very real and ongoing fears for the welfare and safety of their loved one.

1.15 While many of the issues canvassed in this report relate to policy frameworks, legislative models and the operational processes of government, throughout the inquiry the committee has kept the devastating human impact of wrongful detention front of mind.

1.16 It strongly encourages the Australian Government to similarly not lose sight of this human element when considering this report and the committee's recommendations for reform.

Acknowledgement

1.17 The committee thanks all those individuals and organisations who engaged with the inquiry. In particular, the committee would like to acknowledge the contributions of those individuals and their families with firsthand experience of wrongful detention. Rehashing the trauma and distress of such an experience cannot be easy and the committee is grateful to them for sharing their valuable insights and suggestions.

Referral of the inquiry

1.18 On 25 June 2024, the Senate referred an inquiry into the wrongful detention of Australian citizens overseas to the Senate Foreign Affairs, Defence and Trade References Committee (the committee) for inquiry and report by 28 November 2024.[2]

1.19 The inquiry's terms of reference are as follows:

> The Australian Government's responses to the wrongful detention of Australian citizens overseas, with particular reference to:
>
> (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;
> (b) Australia's foreign policy responses to regimes that wrongfully detain Australian citizens;
> (c) Australia's current processes for categorising and declaring cases of wrongful detention;
> (d) the management of cases of wrongful detention by the Department of Foreign Affairs and Trade;
> (e) communications with and support for families of Australians being wrongfully detained overseas;
> (f) communications with and support for Australians who have been released from wrongful detention; and
> (g) any other related matters.[3]

[2] *Journals of the Senate,* No. 113—25 June 2024, p. 3479.

[3] *Journals of the Senate,* No. 113—25 June 2024, p. 3479.

Conduct of the inquiry

1.20 Details of the inquiry were made available on the committee's website.[4] The committee also contacted a number of organisations and individuals inviting written submissions by 30 August 2024.

1.21 The committee published 44 submissions, as listed at Appendix 1.

1.22 The committee held three public hearings in Canberra on 26 September 2024, 18 October 2024 and 28 October 2024. A list of witnesses who gave evidence is available at Appendix 2.

Structure of this report

1.23 This report contains five chapters:

- This chapter contains information about the referral and conduct of the inquiry, including a note on terminology.
- Chapter 2 provides background information on the international framework for understanding wrongful detention, the role of DFAT, and international comparisons with like-minded countries.
- Chapter 3 explores issues relating to the definition and identification of wrongful detention, including the problems arising from Australia's lack of a cohesive policy framework. It also considers the categorisation model used in the United States (US) and contains a brief discussion of the importance of public awareness.
- Chapter 4 canvasses the inadequacies of DFAT's current management of wrongful detention cases. It examines the standalone office model established in the US and outlines suggestions to improve the support for wrongly detained individuals and their families both during and after an experience of detention.
- Chapter 5 sets out matters relating to Australia's broader foreign policy response to wrongful detention, including the need for deterrence and punishment strategies (such as sanctions) to hold offending regimes to account.

Terminology used in this report

1.24 As will be canvassed later in this report, Australia currently has no formal or recognised definition of arbitrary detention, wrongful detention, nor the phenomenon of arbitrary detention for diplomatic leverage.

1.25 Throughout the inquiry, the terminology used to discuss the issues at hand varied. For example, 'wrongful detention', 'arbitrary detention', 'illegal

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4 Senate Foreign Affairs, Defence and Trade References Committee, *Wrongful detention of Australian citizens overseas*, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/WrongfulDetention47 (accessed 20 August 2024).

detention', 'unlawful detention', 'state hostage taking' and 'hostage diplomacy' were all used by different submitters, at times interchangeably.

1.26 The committee is aware that these terms can have specific, nuanced meanings depending on the context. For example, 'arbitrary detention' is the term used in international human rights law, and the United Nations Working Group on Arbitrary Detention refers to an arrest and detention that is contrary to international human rights law as 'arbitrary' as this is the term used in Article 9 of the International Covenant on Civil and Political Rights.[5] Alternatively, the policy response in the US refers to cases of 'wrongful detention'.[6]

1.27 The committee is also mindful that outside of the specific international legal definition, 'arbitrary detention' is often used colloquially by the community to refer to any detention that may be wrongful, unjust, unreasonable, illegal, politically-motivated or arbitrary in the sense of it being random or summary, and which therefore may warrant diplomatic intervention.

1.28 The committee acknowledges the complexities that surround the terminology, and further context and discussion on definitions can be found in Chapters 2 and 3.

1.29 For the purposes of this inquiry, and noting the terminology used in the terms of reference, the committee has chosen to refer to the practice of arbitrarily detaining an individual for diplomatic leverage as 'hostage diplomacy'.

1.30 It has chosen to use 'wrongful detention' as an umbrella term that encompasses not only instances of hostage diplomacy, but also any detention overseas by a state or non-state actor which breaches international standards and could be deemed arbitrary, unjust, illegal or politically-motivated, and therefore may warrant diplomatic intervention.

1.31 While a substantial amount of the evidence received to the inquiry focused on hostage diplomacy, the committee is aware that not all instances of wrongful detention involve attempts by foreign states to seek a concession from Australia. Although this report may focus to a degree on hostage diplomacy, for the avoidance of doubt, the committee considers all forms of wrongful or arbitrary detention to be unacceptable. They should be condemned as such and addressed as a matter of urgency.

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5 Ms Leigh Toomey, *Submission 1*, p. 2.

6 United States Government, *Submission 30,* p. [1].

Chapter 2
Background

2.1 The issue of arbitrary detention by states for diplomatic leverage — a practice referred to as 'hostage diplomacy' — is an increasingly prevalent global concern. Recent cases brought to the United Nations (UN) Working Group on Arbitrary Detention (WGAD) suggest that arbitrary detention for diplomatic leverage has been on an upward trajectory in the last five to ten years.[1]

2.2 While definitions of hostage diplomacy can vary slightly, broadly speaking the practice can be understood as a nation state arbitrarily detaining the citizen of another state in order to extract diplomatic, financial or other concessions in exchange for their release.[2]

2.3 As the submission from the Australian National University Law Reform and Social Justice Research Hub stated:

> Hostage diplomacy is a phenomenon loosely described as occurring where 'states detain foreign nationals as a means to coerce the foreign policy of another state'. The key feature distinguishing hostage diplomacy from arbitrary detention is 'the existence of a demand as a condition for release'. Detention of foreign nationals in times of peace, in the absence of international humanitarian law which usually only operates in war, is a 'way to gain leverage in the conduct of a country's foreign affairs'.[3]

2.4 The phenomenon of hostage diplomacy is recognised by a vast number of international actors as a threat to cordial state-to-state relations which encompasses human rights and international security dimensions and requires a robust multilateral response from like-minded countries.

2.5 This chapter provides information on:

- the international framework for understanding arbitrary detention and hostage diplomacy;
- the role of the Department of Foreign Affairs and Trade (DFAT) in assisting Australians detained overseas; and
- a brief overview of models for responding to hostage diplomacy from like-sminded countries.

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1 Ms Leigh Toomey, *Submission 1*, p. 3.

2 Dr John Coyne and Mr Justin Bassi, *Submission 32*, p. 1; Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 2.

3 Australian National University Law Reform and Social Justice Research Hub, *Submission 21*, p. 4.

The international framework for understanding wrongful detention

2.6 Any understanding of arbitrary detention, and by extension wrongful detention and hostage diplomacy, should be situated within accepted international legal and human rights frameworks. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Vienna Convention on Consular Rights.[4]

2.7 For example, in considering allegations of arbitrary detention, WGAD applies the principles set out in several international instruments, including:

- **Universal Declaration of Human Rights, Article 9**: No one shall be subjected to arbitrary arrest, detention or exile.
- **International Covenant on Civil and Political Rights, Article 9(1)**: No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law.
- **Vienna Convention on Consular Relations:** Article 36 sets out the right of the state of nationality to contact its nationals when they are detained. It also sets out the obligations of the detaining state to inform the state of nationality when its nationals are detained and to inform the detainee of their rights under this provision.[5]

2.8 A submission from the Canadian Government pointed out that there was still work to do in situating hostage diplomacy as 'a particular subset of arbitrary detention by states for political leverage over another state' within the international legal framework. It noted:

> Looking ahead, it is critical that we understand how this issue is situated within the international legal framework. While several international instruments prohibit arbitrary detention, the particular subset of arbitrary detention by states for political leverage over another state is not yet clearly defined in international law. As such, in January 2024, Canada established an Independent International Panel on Arbitrary Detention in State-to-State Relations ("the Panel"). Comprising seven eminent jurists from around the world, the Panel is conducting an 18-month study into this issue, including an examination of the relevant international legal frameworks. It will provide its assessment as well as recommendations on what can be done to address this practice in its final report, expected in June 2025.[6]

United Nations Working Group on Arbitrary Detention

2.9 WGAD has a mandate from the United Nations Human Rights Council (UNHRC) to investigate cases of deprivation of liberty imposed arbitrarily or inconsistently with the international standards set forth in the Universal

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4 Ms Leigh Toomey, *Submission 1*, p. 2.

5 Ms Leigh Toomey, *Submission 1*, p. 2.

6 Government of Canada, *Submission 28*, p. 3.

Declaration of Human Rights, or the international legal instruments accepted by the states concerned.[7]

2.10 It is composed of five independent experts from balanced geographical locations that together investigate individual cases and produce reports and opinions to fulfil the mandate.[8]

2.11 In carrying out its work, WGAD receives submissions from detainees, their legal representatives, civil society organisations, governments and others in relation to situations of alleged arbitrary detention worldwide. After examining the submission, the government of the alleged offending country is offered an opportunity to refute the claims. Once this has occurred, comments are sought from the person or organisation making the submission on the government response received by WGAD. Finally, WGAD adopts an opinion setting out its findings on whether the detention is arbitrary.[9]

2.12 The findings are often used by human rights advocates to draw attention to non-compliance by states with their international human rights obligations. A summary of the findings is also published in WGAD's annual reports to the UNHRC.[10]

2.13 WGAD has acknowledged that the question of what makes deprivation of liberty arbitrary is 'not clearly answered' in international instruments.[11]

2.14 In light of this, WGAD has adopted specific criteria applicable in the consideration of cases submitted to it, drawing on the relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[12]

2.15 According to WGAD, deprivation of liberty is arbitrary if a case falls into one of five categories:

- **Category I:** when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.

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7 United Nations Human Rights – Office of the High Commissioner, *Working Group on Arbitrary Detention: About the mandate* (accessed 16 November 2024).

8 United Nations Human Rights – Office of the High Commissioner, *Working Group on Arbitrary Detention: About the mandate* (accessed 16 November 2024).

9 United Nations Human Rights – Office of the High Commissioner, *Working Group on Arbitrary Detention: Fact Sheet No. 26, Rev. 1*, 2024, pp. 21–22.

10 Ms Leigh Toomey, *Submission 1*, p. 1.

11 United Nations Human Rights – Office of the High Commissioner, *Working Group on Arbitrary Detention: Fact Sheet No. 26, Rev. 1*, 2024, p. 11.

12 United Nations Human Rights – Office of the High Commissioner, *Working Group on Arbitrary Detention: Fact Sheet No. 26, Rev. 1*, 2024, pp. 11–12.

- **Category II:** when deprivation of liberty results from the exercise of the of the rights of freedoms guaranteed under articles 7, 13, 14, 18, 19, 20 or 21 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22, 25, 26 or 27 of the International Covenant on Civil and Political Rights. Cases under this category are those in which detention is used in response to the legitimate exercise of human rights
- **Category III:** the total or partial non-observance of the international norms relating to the right to a fair trial (as established in the Universal Declaration of Human Rights and relevant international instruments accepted by the state concerned).
- **Category IV:** asylum seekers, migrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.
- **Category V:** deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation or disability or other status, and is aimed at or can result in ignoring the equality of human rights.[13]

The Declaration Against Arbitrary Detention in State-to-State Relations

2.16 As noted at the beginning of this chapter, hostage diplomacy is an increasingly prevalent concern in the international arena, with many states and multilateral bodies keen to explore a collective response to mitigate the foreign policy and diplomatic challenges it presents.

2.17 In 2021, Canada launched the Initiative Against Arbitrary Detention in State-to-State Relations to address the practice of arbitrary detention by states for diplomatic leverage. The centrepiece of the initiative is the Declaration Against Arbitrary Detention in State-to-State Relations (the Declaration) and the Partnership Action Plan, a mechanism enabling states to demonstrate their commitment to addressing the issue. The Declaration sets out universal values, firmly grounded in international law, to protect citizens working, living and travelling abroad. It aims to do this through commitment to the core principles of human rights, consular relations, the rule of law and the independence of the judiciary. As of 15 July 2024, 78 states had endorsed the Declaration, including Australia.[14]

2.18 The Declaration calls on states to prevent:

- harsh conditions in detention;
- denial of access to legal counsel;

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13 United Nations Human Rights – Office of the High Commissioner, *Working Group on Arbitrary Detention: Fact Sheet No. 26, Rev. 1*, 2024, pp. 12–18.

14 Government of Canada, *Submission 28*, p. 2.

- torture; and
- other cruel, inhumane or degrading treatment or punishment.[15]

2.19 The Partnership Action Plan supplements the Declaration and includes voluntary measures states may wish to adopt in order to 'deter and sustain momentum against the practice of arbitrary arrest, detention or sentencing in state-to-state relations'.[16]

2.20 Areas of cooperation and engagement set out in the Partnership Action Plan are to:

- Advocate and raise awareness of the Declaration and its principles through existing regional and international mechanisms.
- Advance research and analysis on the prevalence of cases and use of arbitrary detention in state-to-state relations (including cases pertaining to dual citizens) to track and monitor the issue systematically.
- Voluntarily share information on cases of arbitrary detention in state-to-state relations, with a view to raise awareness of the circumstances of cases of this nature, and explore lessons learned in the management and resolution of cases with a view to enhance responses.
- Engage civil society, academics, think tanks and other organizations with relevant expertise, on the issues of arrest and detention, case management, international human rights law and international law more generally, to strengthen policy responses and collaboration, and to raise international awareness.
- Support targeted and effective media and social media campaigns, where appropriate, to strengthen international awareness to stop arbitrary detention in state-to-state relations.
- Meet periodically to consider issues pertaining to the Partnership Action Plan, assess its effectiveness and advance practical proposals.[17]

Role of the Department of Foreign Affairs and Trade

2.21 DFAT is responsible for promoting and protecting Australia's international interests to support the nation's security and prosperity. It works with international partners to tackle global challenges, protect international rules, ensure regional stability and help Australians overseas.[18]

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15 Government of Canada, *Initiative against arbitrary detention in state-to-state relations*, 15 July 2024 (accessed 9 September 2024).

16 Government of Canada, *Arbitrary detention in state-to-state relations – Partnership Acton Plan*, 3 May 2021 (accessed 9 September 2024).

17 Government of Canada, *Arbitrary detention in state-to-state relations – Partnership Acton Plan*, 3 May 2021 (accessed 9 September 2024).

18 Department of Foreign Affairs and Trade, *Department of Foreign Affairs and Trade* (accessed 16 September 2024).

Consular assistance and travel advice

2.22 Part of DFAT's role is to provide consular assistance to Australian citizens overseas. Consular services offered to Australians are guided by the Consular Services Charter (the Charter) which outlines the nature of assistance DFAT can and cannot provide and sets expectations for citizens.[19] The Charter states that Australians do not have a legal right to consular assistance when overseas and informs individuals that 'you shouldn't assume assistance will be provided'.[20]

2.23 DFAT also administers the Smartraveller website which provides travel warnings for countries around the world. Australians are advised to visit the Smartraveller website prior to travelling to ensure they are informed of the potential risks and dangers associated with travel to that country.[21]

2.24 Each country has a dedicated webpage with a country synopsis, an overview of safety precautions, health care and advice, local laws, travel arrangements within the country and local contacts (including where embassies and consulates are located). Where relevant, this synopsis may include a statement on whether there is a risk of a country arbitrarily detaining foreign citizens.[22]

2.25 Countries are allocated one of the following travel advice levels based on a risk assessment:

- exercise normal safety precautions;
- exercise a high degree of caution;
- reconsider your need to travel; or
- do not travel.[23]

2.26 The Smartraveller website also outlines what to do if a citizen is arrested or jailed oversea. It informs citizens that DFAT's ability to assist arrested and imprisoned Australians overseas is limited.[24]

2.27 In 2023, the Smartraveller website added employment-specific advice for journalists and academics to highlight the risk of arbitrary detention for these professions.[25]

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19 Department of Foreign Affairs and Trade, *Consular Services Charter*, July 2023, pp. 1–3 (accessed 23 September 2024).

20 Department of Foreign Affairs and Trade, *Consular Services Charter*, July 2023, p. 2 (accessed 23 September 2024).

21 Smartraveller, *Travel advice explained*, 28 May 2024 (accessed 23 September 2024).

22 Smartraveller, *Travel advice explained*, 28 May 2024 (accessed 17 November 2024).

23 Smartraveller, *Travel advice explained*, 28 May 2024 (accessed 17 November 2024).

24 Smartraveller, *Arrested or jailed overseas*, 30 May 2023 (accessed 17 November 2024).

25 Department of Foreign Affairs and Trade, *Submission 20*, p. 4.

2.28 Further discussion on DFAT travel advice is contained in Chapter 3 of this report.

Management of wrongful detention cases

2.29 DFAT is the first point of call for Australians who have been detained overseas.[26]

2.30 According to DFAT, it carefully assesses whether and when to use the term 'arbitrary detention' in relation to an Australian citizen detained overseas. Individual cases are judged on the circumstances of the case, including the charges laid, the nature of the legal process, detention conditions, the detainee's own wishes, the country in which a citizen has been detained, and applicable international law.[27]

2.31 Once DFAT designates a case as an arbitrary detention, it adopts a 'tailored approach to best support the welfare and interests of the client and their family'.[28]

2.32 DFAT classifies a person who has been arbitrarily detained as a 'complex case'. In 2023, DFAT established the inter-departmental Complex Case Committee which determines what diplomatic, legal, economic or other levers are available to resolve the case in an attempt to facilitate a coordinated and deliberate approach.[29]

2.33 For example, DFAT can utilise a number of representational approaches, including bilateral, regional and multilateral advocacy channels undertaken through Ministers, Heads of Mission and diplomatic staff, and other officials. In some cases, DFAT will appoint a special envoy whose 'specific knowledge and connections may enable them to achieve positive outcomes for clients'.[30]

2.34 DFAT assigns a case manager to the detainee's family to act as the main point of contact and pass on information regarding the case. This information may include:

- information on prison visits conducted by consular staff;
- what actions DFAT has taken and what options they are exploring to resolve the case; and
- discussions about why the case may be taking longer to resolve than expected.[31]

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26 Smartraveller, *Arrested or jailed overseas*, 30 May 2023 (accessed 17 November 2024).

27 Department of Foreign Affairs and Trade, *Submission 20,* p. 2.

28 Department of Foreign Affairs and Trade, *Submission 20,* p. 2.

29 Department of Foreign Affairs and Trade, *Submission 20,* p.3.

30 Department of Foreign Affairs and Trade, *Submission 20,* p. 2.

31 Department of Foreign Affairs and Trade, *Submission 20,* p. 3.

2.35 DFAT provides a limited amount of practical support to a detainee's family through referrals to service providers and support organisations to assist with counselling and connect the family to others with similar experiences. It also provides a modicum of support to former detainees upon repatriation.[32]

2.36 The committee received evidence indicating that DFAT's categorisation and management of wrongful detention cases is inadequate and in need of reform. These matters, including support for detainees and their families during and after a wrongful detention, are canvassed in detail in subsequent chapters of this report.

International comparison with like-minded countries

2.37 As noted earlier in this chapter, the practice of arbitrary detention for diplomatic leverage (that is, hostage diplomacy) is internationally acknowledged as a serious problem requiring a strong bilateral and multilateral response.

2.38 Several of Australia's like-minded partners have domestic frameworks or policies in place that set out how that country will respond to the wrongful detention of their citizens, both in terms of individual case resolution and a broader foreign policy response. Two such examples are discussed below.

United States

2.39 In 2014, four US hostages were executed by the Islamic State of Iraq and Syria, leading to an interagency review of the US hostage affairs enterprise. This review led to the June 2015 issue of Executive Order (EO) 13698 and Presidential Policy Directive (PPD) 30, which together mandated interagency coordination to recover US nationals taken hostage and wrongfully detained overseas.[33]

2.40 Specifically, the EO established:

- the Special Presidential Envoy for Hostage Affairs (SPEHA), housed at the Department of State;
- the Hostage Recovery Fusion Cell (HRFC), located at the Federal Bureau of Investigation; and
- the Hostage Response Group (HRG), which sits within the White House.[34]

2.41 SPEHA leads US diplomatic engagement on hostage policy, coordinates all diplomatic efforts in support of hostage recovery efforts in coordination with the HRFC and consistent with policy guidance communicated through the HRG, and coordinates US efforts to recover wrongfully detained US nationals.[35]

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32 Department of Foreign Affairs and Trade, *Submission 20,* p. 4.

33 United States Government, *Submission 30,* [p. 1].

34 United States Government, *Submission 30,* [p. 1].

35 United States Government, *Submission 30,* [p. 1].

2.42 In 2020, the *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act* (the Levinson Act) legislated much of PPD 30 and directs the Secretary of State to review cases of US nationals detained abroad to determine if their detentions are wrongful based on the totality of the circumstances and guided by discretionary criteria provided in the Act. The Levinson Act also requires an annual report to Congress and authorises the President to impose sanctions on those who direct or support hostage taking and wrongful detentions. Subsequently, EO 14078 vested the Secretary of State with the authority to impose those sanctions related to visa restrictions and the blocking of property.[36]

2.43 Further discussion on matters relating to the Levinson Act and the work of SPEHA is contained in Chapters 3 and 4 of this report respectively.

Canada

2.44 In addition to establishing the Declaration Against Arbitrary Detention in State-to-State Relations and the Partnership Action Plan, in November 2023 Canada bolstered its efforts to combat hostage diplomacy with the appointment of the Senior Official for Hostage Affairs (SOHA).

2.45 The SOHA's purpose is to lead concerted consular efforts and enhance Canada's capacity to respond to cases of hostage taking by both state and non-state actors. The SOHA responds to a range of complex hostage situations abroad and is supported by existing consular, advocacy and critical incident response tools and resources.[37]

2.46 A key aspect of the SOHA role is to raise awareness and facilitate international dialogue on hostage diplomacy, including highlighting its human rights and international security dimensions. The SOHA provides Canada with greater access to growing international networks working on hostage diplomacy, in turn strengthening advocacy efforts.[38]

2.47 Additionally, the SOHA enables Canada to better channel resources to respond to the complex needs of victims and their families, an area which the Canadian Government has recognised requires greater attention and resources.[39]

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36 United States Government, *Submission 30,* [p. 1].

37 Government of Canada, *Submission 28,* p. 3.

38 Government of Canada, *Submission 28,* pp. 3–4.

39 Government of Canda, *Submission 28,* p. 4.

Chapter 3
Defining and categorising wrongful detention

The absence of a robust policy framework

3.1 The wrongful detention of Australian citizens overseas presents significant diplomatic, legal and humanitarian challenges, all of which require a robust, strategic and transparent policy response. Unfortunately, Australia does not currently have a clear framework for responding to and deterring cases of wrongful detention, both at an individual case management level and at the broader foreign policy level.

3.2 In putting forward options to remedy this, there was strong consensus amongst inquiry participants that for any policy framework to be effective, one of the first points of call was to define the problem—that is, adopt a formal definition of wrongful detention—and create a standardised mechanism to identify instances of it.

3.3 This chapter explores issues regarding the definition and identification of wrongful detention cases.

3.4 It highlights that Australia does not have a definition of wrongful definition, nor does it have set criteria or a standardised process for categorising and declaring such cases. It illustrates that this has led to significant inconsistencies in the identification and management of cases by the Department of Foreign Affairs and Trade (DFAT), resulting in detrimental impacts on individuals wrongly detained and their families.

3.5 The chapter then sets out the calls from submitters for Australia to develop a more cohesive policy framework that encompasses a formal definition of wrongful detention and a standardised method for assessing and identifying such cases. In doing so it explores issues relating to the need to utilise the expertise of the United Nations (UN) Working Group on Arbitrary Detention (WGAD), and the complexities surrounding terminology.

3.6 It goes on to consider the work done by the United States (US) in adopting a formal definition of wrongful detention and developing a classification mechanism for determining which consular cases constitute wrongful detentions, and draws out lessons that Australia may wish to emulate.

3.7 The chapter examines DFAT's responses to evidence received during the inquiry and the calls for it to adopt a new approach to the management of wrongful detention cases.

3.8 It also considers the importance of public awareness and the need for more targeted information in campaigns to educate Australians about the risks of travelling to countries with a track record in engaging in hostage diplomacy.

3.9 Finally, the chapter concludes with the committee's views and recommendations.

The importance of a definition and categorisation process

3.10 Australia does not have a legal definition of wrongful or arbitrary detention.[1] It also does not have a standardised process for categorising and declaring cases of wrongful detention.[2]

3.11 The committee received compelling evidence that the lack of a clear definition of wrongful detention and criteria for assessing cases severely restricted DFAT's ability to properly identify and manage cases, as well as Australia's ability to respond to and deter hostage diplomacy more broadly.

Falling through the cracks

3.12 Submitters noted that the lack of definition and standardised criteria meant that wrongfully detained Australians were at risk of missing out on Australian Government assistance. They highlighted that inconsistencies in the way cases were categorised meant that legitimate cases were missed by DFAT and therefore not all detainees received equal advice and support from consular staff.

3.13 For example, the Australian Wrongful and Arbitrary Detention Alliance (AWADA) argued that in the absence of a definition, and by extension the absence of consistent criteria to determine whether a case constituted wrongful detention, Australian citizens wrongfully detained were at a high risk of 'falling through the cracks' and not receiving the attention and resources necessary to free them.[3]

3.14 It emphasised:

> Unfortunately, anecdotally at least, it appears that those cases whose advocates shout the loudest, and attract the most media coverage, tend to be prioritised over those less likely to arouse attention. This includes Australians of dual nationality who may have become naturalised citizens. Some wrongful detention cases fall entirely between the cracks, receiving limited if any assistance from Australian consular authorities.[4]

3.15 Human Rights Watch, an organisation that investigates human rights abuses globally, echoed this view. In evidence to the committee, Australian Director Ms Daniela Gavshon stated 'at the moment, the problem with the lack of

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1 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 3.

2 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 9.

3 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 9.

4 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 4.

definition is that cases fall through the cracks, so it requires someone to notice it for it to actually be flagged and then be taken on'.[5]

3.16 Expressing a similar sentiment, Heretic Law, a firm that provides legal assistance relating to human rights issues, observed that without an agreed definition, not all wrongfully detained Australians would be identified or receive the same government assistance and treatment.[6]

3.17 Dr Kay Danes OAM, an Australian who was arbitrarily detained with her husband in Laos in 2000 and went on to become a human rights advocate after her release, pointed out that some individuals were forced to advocate for themselves publicly just to secure DFAT attention and assistance. She explained:

> … there is no legal definition of 'Australians wrongfully detained' in the current policy framework. This lack of definition forces individuals and families to make their cases compelling to attract the level of government intervention needed to resolve their situations. Many Australians typically resort to seeking media coverage in their desperate attempts to be heard. This strategy may or may not work to their advantage.[7]

3.18 Other submitters also put forward this view.[8]

3.19 Mr Robert Pether, an Australian currently imprisoned in Iraq (whom WGAD considers to be arbitrarily detained), argued that the lack of criteria to determine whether a person has been wrongfully detained represented a missed opportunity to resolve cases in a more timely fashion:

> The current management of wrongful detention cases by DFAT is significantly lacking. There appears to be an absence of any solid plan to address a case of wrongful detention. Similarly, the secrecy that DFAT operates under means that they are missing multiple opportunities to resolve these cases in a far more expeditious manner.[9]

3.20 AWADA advised the committee that it was aware that there had been a view within DFAT that wrongful detention cases, in the words of a former DFAT official, 'emerge organically – you just know'. AWADA argued that while this may have been true in previous decades when the number of wrongful detentions was comparatively small and kidnappings and hostage-takings by non-state actors typically outnumbered hostage diplomacy and arbitrary detentions by state actors, this was no longer the case.[10]

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5 Ms Daniela Gavshon, Australian Director, Human Rights Watch, *Proof Committee Hansard,* 26 September 2024, p. 16.

6 Heretic Law, *Submission 2,* [p. 2].

7 Dr Kay Danes OAM, *Submission 10,* p. 12.

8 See for example: Professor Peter Greste, *Submission 38*, p. 2.

9 Mr Robert Pether, *Submission 6,* p. 3.

10 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 9.

3.21 It emphasised the dangers of relying on the subjective judgements of DFAT to determine whether a case constituted wrongful detention, stating:

> Given that state wrongful detentions are usually more difficult to identify and categorise, due to state actors' use of their judicial systems to apply a veneer of legitimacy to wrongful arrests, it no longer makes sense to rely on the ad hoc judgements of DFAT's consular team in determining cases.[11]

No clear picture

3.22 The committee also heard that the lack of definition and categorisation criteria hampered DFAT's ability to track the true number of Australians wrongfully detained overseas at any given time. As AWADA highlighted:

> At any one time, an unknown number of Australians face imprisonment abroad, having been wrongfully detained by foreign governments or kidnapped by armed groups, terrorist organisations or other non-state actors.
>
> Their number is unknown because there is no legal definition of wrongful detention in Australia. As such, it is very difficult for DFAT to determine which cases of Australians arrested abroad are prompted by misdemeanours or genuine suspicion of criminal activity, and which are motivated by other factors involving, for example, political activity, freedom of expression, journalistic or academic enquiry or even simply being in the wrong place at the wrong time.[12]

3.23 The committee was told that in a meeting in March 2024 with senior DFAT consular staff, AWADA members were advised that the current wrongful detention caseload was considered to be zero at that time.[13]

3.24 AWADA expressed concern with how this figure was determined and asserted that zero did not represent an accurate picture of a number of wrongful detentions it was aware of. It stated:

> Given the lack of any mechanism for categorising cases it is unclear how this figure was arrived at. As a result of this statement, AWADA is concerned that some publicly-reported cases of Australians detained abroad, and some which have not been made public, are not being treated as wrongful detentions. These cases include Dr Yang Hengjun (China), Robert Pether (Iraq), Gordon Ng (Hong Kong- China) and the aforementioned Australian citizen/s currently in prison in Iran.[14]

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11 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 9.

12 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 3.

13 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

14 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

3.25 DFAT informed the committee at a public hearing that there were no cases that it would currently give the label of 'arbitrary detention'.[15]

3.26 When asked whether DFAT collected data on the number of cases of 'arbitrary detention' of Australian citizens overseas, Ms Paula Ganly, First Assistant Secretary for the Consular and Crisis Management division at DFAT responded:

> As I indicated before, we have in the past—under the previous government—only used the term 'arbitrary detention' in relation to two of our cases. The Complex Case Unit maintains information on cases that we would deem complex for the purposes of it's not clear-cut but we haven't yet given them a clear definition as we work through … They keep details of the number of complex cases that we are managing or have managed.[16]

3.27 Additionally, in response to questioning from the committee DFAT advised that it was not aware of any cases in the past of Australian citizens being arrested and wrongly detained specifically for diplomatic leverage.[17]

DFAT's current categorisation process – 'complex cases'

3.28 As set out in Chapter 2, DFAT is the first point of call for Australians who have been detained overseas. Cases of wrongful detention are considered within a broad consular category of 'complex cases', which can encompass scenarios from orphaned children trapped overseas, to citizens requiring evacuation from warzones, to high profile Australians convicted of criminal offences abroad.[18]

3.29 DFAT noted it had 'probably around 800 cases a year' where Australian citizens were arrested overseas for small misdemeanours but released 'very quickly'. In contrast, there were 'probably about 200 a year that end up being imprisoned for slightly longer—so not a quick turnaround'.[19]

3.30 The committee asked DFAT to explain its definition of a 'complex case' in the context of an Australian detained overseas. Ms Ganly responded:

> A complex case is essentially one where it is not apparent that there has been clear due process, where it has been raised with us by family members or others that they have concerns about the case and where the case has run for a considerable period of time. They are ones that essentially require a lot more attention from our consular group than can be given by the case manager who would normally look after the case. The case manager will

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15 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, pp. 25–26.

16 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 26.

17 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, pp. 24–25.

18 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

19 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 26.

> still be involved in elements of it, but they will not be doing all the briefings. They're ones that we would be briefing up to the foreign minister and ones where we would potentially be recommending that the foreign minister engage through a letter to their counterpart or needs to draw it to their attention because it is taking much longer to resolve.[20]

3.31 DFAT provided the committee with an overview of how it approaches the categorisation of a 'complex case' involving detention:

> DFAT carefully assesses whether and when to use the term 'arbitrary detention' in relation to an Australian detained overseas. Each case is judged on its individual circumstances including the charges, the nature of the legal process, detention conditions, the detainee's own wishes, the country in which they are detained and relevant international law. [21]

3.32 The committee asked DFAT if there were any particular countries that triggered a 'red flag' and automatic escalation to the 'complex case' level when an Australian was detained there — for example, if that country had a track record of engaging in hostage diplomacy. Ms Ganly responded that DFAT did take that factor into consideration:

> I would say that any of them arising in countries where we have concerns or have identified those countries within our Smartraveller travel advice as well—countries for wrongful detention or arbitrary detention or even for harsh imposition of laws—we would look at very closely and immediately. The desks are often onto it very quickly as well. Our heads of mission in those countries would also draw it very quickly to the attention of the desk. So, yes, but it doesn't mean that they are the only ones on which we are focused.[22]

3.33 DFAT assured the committee that it applied the same 'lens' over all consular cases involving detention. Ms Ganly elaborated:

> I would say that we apply the same lens over our assessment of all cases when people are detained, including having our posts and our consular officers, if they have concerns about the process and how it is being conducted, draw that to our attention so that we can have a look at the matter more closely. [23]

3.34 When queried by the committee whether that 'lens' was publicly available, DFAT confirmed it was not. However, Ms Ganly reiterated that all cases were assessed on their merits, using the same policies:

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[20] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 26.

[21] Department of Foreign Affairs and Trade, *Submission 20,* p. 2.

[22] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 26.

[23] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 25.

> No [the lens is not public]; it's probably not a clear definition that's out there, but I would say that we look at each case on its merits, on the detention. I have heard people saying that multiple people go through consular, but we do use the same policies to assess cases and to look at them and then we discuss them across the department.[24]

3.35 The committee did not receive written copies of DFAT's policies, nor any further or specific detail as to what they contain, during the course of the inquiry.

Calls for change

3.36 A large number of submitters recommended, as a matter of priority and as the key starting point for a more cohesive framework, that Australia adopt a public definition and create a clear, standardised method for assessing and categorising cases of wrongful detention. The committee was told these were concrete measures that the Australian Government could implement to improve its ability to identify, resolve and deter cases of wrongful detention.[25]

3.37 Submitters informed the committee that having a clear and transparent framework would have two core benefits. Namely:

- It would expedite case handling and improve support for detainees and their families by ensuring all cases were identified and appropriately managed with equal priority.
- It would act as a form of deterrence by sending a strong signal internationally that Australia did not agree with hostage diplomacy and had a range of articulated strategies to deal with offenders.

3.38 AWADA recommended that Australia adopt a definition of wrongful detention (or other preferred term) and establish a set of criteria for determining which consular cases constituted wrongful detention.[26]

3.39 A number of other submitters endorsed AWADA's recommendation.[27] For example, Professor Greste, an Australian journalist wrongly detained in Egypt

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[24] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 25.

[25] See for example: Professor Peter Greste, *Submission 38*, p. 2; Ms Daniela Gavshon, Australia Director, Human Rights Watch, *Proof Committee Hansard*, 26 September 2024, p. 16; Mr Darren Nair, *Submission 18*, p. 3; Dr John Coyne and Mr Justin Bassie, *Submission 32*, pp. 2–3; Human Rights Watch, *Submission 15*, [p. 5]; Australian Human Rights Commission, *Submission 40*, p. 3; Heretic Law, *Submission 2*, p. [2]; Ms Lamisse Hamouda, *Submission 13*, p. [2]; Dr Rana Dadpour, Director, Australian United Solidarity for Iran, *Proof Committee Hansard*, 26 September 2024, p. 30.

[26] Australian Wrongful and Arbitrary Detention Alliance, *Submission 25*, p. 2.

[27] See for example: Australian Human Rights Commission, *Submission 40*, p. 2; Dr Kay Danes OAM, *Submission 10,* p. 4; Ms Lei Cheng, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 40; Mr Michael Kovrig, private capacity, *Proof Committee Hansard,* 28 October 2024, p. 2.

from 2013 to 2015, made the argument for a set of more coherent and consistent strategies:

> The way our government handles these cases is inevitably going to have broader implications for Australia's relations with those states, along with any others who are directly or indirectly involved. As my submission and others have made clear, we do recognise that every case is unique. I'm certainly not recommending a one-size-fits-all approach, but I and, as we've just been hearing, some of my colleagues who've been through similar experiences will attest, we all believe that a set of more coherent, coordinated and consistent strategies could help resolve those cases far faster and support the detainees and their families far more effectively than at present.[28]

3.40 Ms Leigh Toomey, a former WGAD member and chairperson who gave evidence in her private capacity, stated that for Australia to respond quickly to cases of wrongful detention, it would be helpful to develop specific criteria to assess each case. She noted this was pertinent as assessing a case could be difficult, given that states that seek to exercise leverage often did not, at least initially, articulate any specific demands and will often claim that a national or permanent resident of another state is being detained because they committed a criminal or national security offence. She provided the committee with a number of examples of criteria, including those used by WGAD and the US, and pointed out the United Kingdom (UK) House of Commons Foreign Affairs Committee had inquired into a similar matter and made recommendations for the development of a set of criteria.'[29]

3.41 Professor Carla Ferstman, a Professor at the University of Essex School of Law and Human Rights Centre and former director of REDRESS, suggested any categorisation process should include accessible criteria that would be applied in a timely manner:

> A categorisation process which identifies a set of open-ended, accessible criteria which can be considered within their context, will aid with transparency to families and the public, and with the speed of decision-making.[30]

3.42 She recommended the adoption of a 'transparent but open-ended categorisation system' which would help determine which cases required enhanced or urgent diplomatic action, but cautioned that it should not be overly narrow so as to inadvertently exclude 'deserving cases'.[31]

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28 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 30.

29 Ms Leigh Toomey, *Submission 1*, pp. 7–8.

30 Professor Carla Ferstman, *Submission 29,* p. 8.

31 Professor Carla Ferstman, *Submission 29,* p. 8.

The importance of categorisation

3.43 The committee heard that even if a government was reluctant to publicly declare a case as wrongful (for example, to protect diplomatic negotiations or trade interests), this was not a valid excuse to avoid making an internal categorisation.

3.44 For example, Hostage International observed that publicly declaring a case wrongful and internally categorising it as wrongful were not the same. It explained that an aversion to publicly declaring a wrongful detention case did not mean that the case could not be categorised as such:

> 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. [32]

3.45 It went on to conclude:

> 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.[33]

3.46 AWADA made the point that a set of criteria used to assess and categorise cases was imperative as it would allow the Australian Government to understand the extent of the problem, in turn allowing the more efficient allocation of resources. It recommended that DFAT be required to collect data on the wrongful detention of Australian citizens and disclose de-identified statistics to the Prime Minister and Minister for Foreign Affairs on a regular basis.[34]

3.47 Additionally, AWADA observed that an area of particular concern which might be remedied by the adoption of a clear definition and categorisation mechanism was the 'relative grey area occupied by cases of Australians arrested in authoritarian or highly corrupt countries for financial-related crimes'.[35]

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[32] Hostage International, *Submission 16*, p. 2.

[33] Hostage International, *Submission 16*, p. 2.

[34] Australian Wrongful and Arbitrary Detention Alliance, *Submission 25*, pp. 2–4.

[35] Australian Wrongful and Arbitrary Detention Alliance, *Submission 25*, p. 13.

3.48 It explained:

> Because Australians accused of, for example, fraud, bribery or other financial crimes related to their own business dealings or those of the companies they represent, do not immediately appear to be victims of politically-motivated or arbitrary detention they are typically not characterised as wrongfully detained by DFAT Consular. This is inherently problematic, particularly in countries which do not maintain the rule of law and in which the justice system is routinely used as a tool to pressure or gain unfair advantage over business rivals, seize a competitor's assets etc.[36]

3.49 AWADA suggested that having standardised criteria against which such 'grey zone' cases could be assessed would greatly assist the Australian Government in properly identifying cases and providing appropriate support. It detailed:

> An assessment of the charges and any available evidence might enable the Australian Government to make the determination that the citizen in question is likely innocent, and therefore wrongfully detained. Such a process exists in the US, which has in the past designated American citizens unjustly charged with both financial and drugs offences as wrongfully detained and has undertaken efforts to secure their release. In Australia, there appears to be an assumption that cases involving financial charges do not warrant diplomatic intervention beyond seeking assurances that the individual receives humane treatment in detention and that their trial is free and fair (which is impossible to guarantee in many attesting states).[37]

A form of deterrence

3.50 Professor Greste reiterated that a clear policy framework would have a deterrent effect:

> I think a clear policy framework, a clear envoy, as has been discussed, are all really important parts of not just strategies for dealing with detentions as and when they come up, but as a very clear message to foreign states that might be contemplating detaining an Australian that we have a robust strategy in mind.[38]

3.51 Dr Rana Dadpour, Director of Australian United Solidarity for Iran (AUSIRAN), submitted the absence of a robust policy framework could encourage known offenders such as the Islamic Republic of Iran (IRI) to continue to engage in hostage diplomacy. In relation to the IRI, she explained:

> I do think that, as long as there are no clear measures explaining exactly how and based on what values Australia is going to react to this kind of behaviour, the IRI regime and the IRGC [Islamic Revolutionary Guard Corp] will keep using this [hostage diplomacy]. They will realise that there are no consequences, or at least there are no specific frameworks to measure any consequence for those actions. They will think that they can get away

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36 Australian Wrongful and Arbitrary Detention Alliance, *Submission 25*, p. 13.

37 Australian Wrongful and Arbitrary Detention Alliance, *Submission 25*, p. 13.

38 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 30.

> with it, in some senses, and that will not deter future hostage taking by this regime. Not only will it not deter it but I think it will also encourage it. They will think that the Australian Government cannot or will not act in a strong, assertive manner against this type of behaviour, and therefore assumptions made by them will lead to more hostages being taken—Australian citizens and dual nationals as well.[39]

3.52 Dr John Coyne and Mr Justin Bassi submitted that a consistent approach to the application of the term 'arbitrary detention' was crucial to keeping states that engaged in hostage diplomacy accountable. They explained:

> While understandably highly complex when dealing with diplomatic relations, a consistent approach to the Australian government's application of the term 'arbitrary' in detention cases is best for individual Australian citizens, the national interest and international rule enforcement. Unfortunately, cases have often been marked by significant inconsistencies, which not only adds to our own public's confusion but can let authoritarian regimes off the hook and demonstrate that they can successfully get away with using the malign practice.[40]

3.53 Ms Toomey set out six key matters that the Australian Government may wish to take into account when creating a policy framework, noting that the cumulative aim of these was to deter arbitrary detention for diplomatic leverage. For example, she noted that it was important for the framework to:

- Clearly state what type of conduct amounted to arbitrary detention for diplomatic leverage, and that cases involving the exercise of leverage should be able to be distinguished from other situations or arbitrary detention that did not involve a political or diplomatic motive.[41]
- Clarify that it is not only Australian citizens with sole Australian nationality who are at risk, and recognise that Australian dual nationals and permanent residents are also vulnerable.[42]
- Prioritise the provision of strong consular support for detainees and their families, given that WGAD has determined that effective access to consular officials is an essential means of securing a fair and minimise the detainee's exposure to solitary confinement or other forms of torture or ill-treatment.[43]

3.54 Ms Toomey further noted that the framework should clarify what specific actions and results would be regarded as sufficient to deter the practice of arbitrary detention for diplomatic leverage, such as:

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39 Dr Rana Dadpour, Director, Australian United Solidarity for Iran, *Proof Committee Hansard*, 26 September 2024, p. 30.

40 Dr John Coyne and Mr Justin Bassi, *Submission 32*, p. 4.

41 Ms Leigh Toomey, *Submission 1*, pp. 2–3.

42 Ms Leigh Toomey, *Submission 1*, p. 3.

43 Ms Leigh Toomey, *Submission 1*, p. 4.

- providing effective consular assistance, including facilitating access by detainees to other services (legal representation, interpretation);
- introducing policy or legislative changes;
- cooperating with like-minded international partners;
- securing a finding by an international body, such as WGAD, that the detention is arbitrary and undertaken for diplomatic leverage.[44]

3.55 Additionally, she detailed that the framework should reference what type of results could be used to measure success in deterring hostage diplomacy. She explained:

> The policy framework should indicate what results would be regarded as a success in deterring this practice, such as fewer cases involving Australian citizens, dual nationals and individuals with permanent residency; faster assessment and resolution of cases; or effective resolution of cases through the release of the detainee and provision of reparations by the detaining state.[45]

Calls to proactively utilise the expertise of the United Nations Working Group on Arbitrary Detention

3.56 Inquiry participants drew the committee's attention to the valuable work done by WGAD on in providing internationally-recognised determinations on whether a detention is arbitrary. Submitters noted that WGAD processes and determinations could be useful to guide Australia as it worked to develop its own definition and criteria. Some argued that in the absence of a national framework, or in cases where a case was disputed, Australia should also make use of WGAD expertise.

3.57 As set out in Chapter 2 of this report, WGAD has a mandate from the UN Human Rights Council to investigate cases of deprivation of liberty imposed arbitrarily or inconsistently with the international standards set forth in the Universal Declaration of Human Rights, or the international legal instruments accepted by the states concerned.[46] It receives submissions from detainees, their legal representatives, civil society organisations and governments on cases of alleged arbitrary detention worldwide. Using specific criteria and a set process, WGAD eventually issues a determination setting out its opinion on whether a detention is arbitrary. A WGAD determination is often used by a detainee and their supporters to advocate for their release, or by

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44 Ms Leigh Toomey, *Submission 1*, p. 4.

45 Ms Leigh Toomey, *Submission 1*, p. 4.

46 United Nations Human Rights – Office of the High Commissioner, *Working Group on Arbitrary Detention: About the mandate* (accessed 16 November 2024).

human rights advocates to draw attention to non-compliance by states with their international human rights obligations. [47]

3.58 Professor Greste suggested that a WGAD opinion could be used as a stop-gap measure until Australia had developed a formal definition of wrongful detention. He explained:

> A clear method for assessing and categorising cases of detention to identify those which meet the definition of "wrongful" should be a matter of priority. In the absence of our own method, the UN Working Group on Arbitrary Detention could become a starting point. It would be a mistake to cede categorisation of cases to the WGAD alone, but it has a systematic method for assessing them and could form the basis of our own.[48]

3.59 Ms Toomey, former WGAD chairperson, strongly encouraged the Australian Government to make use of WGAD opinions and materials as valuable resources. She observed:

> The WGAD's independent determination that a person is arbitrarily detained can be used by petitioners, governments, civil society, national human rights institutions and others to support advocacy that the person should be released, as well as to generate awareness of particular issues such as the exercise of leverage in state-to-state relations.[49]

3.60 On this matter, Ms Toomey drew the committee's attention to a 2023 inquiry by the UK House of Commons Foreign Committee into hostage diplomacy.[50] The report contained the recommendation that, when WGAD had determined that the detention of a UK citizen is arbitrary, the Foreign, Commonwealth and Development Office should assume that the case will not be judged in the detaining state in accordance with international standards and respond accordingly. Additionally, the report also recommended that the UK Government should as a matter of practice promote public acceptance of the WGAD opinion.[51]

Concerns with DFAT's attitude towards WGAD

3.61 AWADA argued Australia should make more use of WGAD as an expert body, advising that nation states are able to apply for opinions on cases in the same way that lawyers or NGOs acting for a wrongly detained individual do. It explained:

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[47] United Nations Human Rights - Office of the High Commissioner, *Working Group on Arbitrary Detention: Fact Sheet No. 26, Rev. 1*, 2024, pp. 11–18, 21–22; Ms Leigh Toomey, *Submission 1*, p. 1.

[48] Professor Peter Greste, *Submission 38*, p. 2.

[49] Ms Leigh Toomey, *Submission 1*, p. 5.

[50] United Kingdom House of Commons Foreign Affairs Committee, *Stolen years: combatting state hostage diplomacy*, Sixth Report of Session 20223–23, 28 March 2023.

[51] Ms Leigh Toomey, *Submission 1*, p. 5.

> Australia should consider using the WGAD as a tool to highlight the plight of wrongfully imprisoned citizens and as a neutral body which can be applied to adjudicate complex cases which may be less clear-cut examples of wrongful detention….[52]

3.62 However, AWADA also raised significant concerns that DFAT was actively ignoring WGAD determinations on cases of wrongfully detained Australian citizens. It stated:

> AWADA is concerned that opinions issued by the WGAD are being ignored by DFAT in its current ad hoc decision-making around which Australians are and are not wrongfully detained.[53]

3.63 In particular, it highlighted the case of Australian citizen Mr Pether, who has been imprisoned in Iraq since 2021. It detailed:

> Mr Pether was found to be arbitrarily detained by the WGAD in 2022 however his family have been told by DFAT representatives that the government does not recognise this judgement. Greater transparency is clearly needed on this issue, as the discrepancy between the WGAD opinion and that of DFAT, for which no explanation has been provided, is a source of distress for Mr Pether and his family.[54]

3.64 Human Rights Watch held a similar view to AWADA regarding DFAT's acknowledgment of WGAD opinions. It emphasised that DFAT should consider where WGAD has made a determination on whether a person was arbitrarily detained and that this determination should then inform DFAT's classification of a case. It further contended that where DFAT's determination of a case differed from that of WGAD, an explanation should be given as to why.[55]

3.65 Ms Toomey noted that the Australian Government may wish to apply similar principles when there is a WGAD opinion that an Australian national, dual national or permanent resident has been arbitrarily detained for leverage.[56]

Terminology considerations and the need to align internationally

3.66 In arguing for the need for the Australian Government to adopt a formal definition, a number of submissions to the committee considered the complexities present in determining terminology and definitions. In doing so, submitters emphasised the need for consistency and alignment with existing international norms to facilitate effective multilateral responses.

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52 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 9.

53 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 9.

54 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 9. See also Mrs Desree Pether, *Submission 36*, pp. 2–3.

55 Ms Daniela Gavshon, Australian Director, Human Rights Watch, *Proof Committee Hansard*, 26 September 2024, p. 16.

56 Ms Leigh Toomey, *Submission 1*, p. 5.

3.67 For example, Ms Toomey highlighted the work of the WGAD in providing determinations. However, she made clear there still remained a need for Australia to develop its own criteria for assessing whether the detention of a citizen was detention for a legitimate purpose.[57]

3.68 Ms Toomey put forward the merits of using the term 'arbitrary detention', given that the terms 'wrongful', 'illegal' and 'unlawful' were already encompassed within the definition of 'arbitrary' under international human rights law which was employed by WGAD. However, she emphasised that in terms of an Australian framework, the priority should be for consistent terminology, as this would generate a shared whole-of-government understanding.[58] She explained:

> Ultimately, though, whatever terminology the committee chooses to adopt, it would be preferable to have one term used across government departments and diplomatic posts to avoid confusion and to ensure that a consistent approach is taken in identifying and reacting to leverage cases.[59]

3.69 Ms Sarah Teich, a Canadian international human rights lawyer who assisted in the drafting of a bill to combat hostage diplomacy currently before the Canadian Parliament, provided the committee with an overview of the different terms in use internationally. She observed that the wide variety and interchangeable nature of some did 'muddy the waters' of the issue to an extent. She recommended that Australia carefully consider which terminology to use and then define the chosen terms 'clearly and in a manner that is consistent with existing international instruments'.[60]

3.70 Dr Danielle Gilbert, Assistant Professor of Political Science at Northwestern University and member of the Bipartisan Commission on Hostage Taking and Wrongful Detention at the US Center for Strategic and International Studies, provided evidence to the committee. She emphasised that consistency in terminology between states, grounded within the processes of international law, was desirable given that a common understanding would be beneficial for international cooperation. She explained:

> I think agreeing on terminology, whether that is 'arbitrary detention' or 'hostage-taking' in state-to-state relations can be useful for the purpose of coordinating on the mechanisms of international deterrence. To appeal to international law about these violations, to establish agreed upon norms and to get other countries onboard with this processes, I think clarity in the definition is the most important. When I look at wrongful detention in the case of the United States's choice of that terminology, some of the cases probably would qualify as hostage-takings. Someone is held for the purpose

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57 Ms Leigh Toomey, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 36.

58 Ms Leigh Toomey, *Submission 1*, p. 2.

59 Ms Leigh Toomey, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 36.

60 Ms Sarah Teich, *Submission 14*, p. 6.

> of coercing the US government. But many of those cases might be an arbitrary detention but not a hostage-taking. So perhaps that umbrella category [of 'wrongful detention'] is useful so that cases can fall into one or another, but I think that that ambiguity undermines the ability of allies to coordinate.[61]

3.71 AWADA was not prescriptive about terminology in its calls for a formal definition and criteria, recommending simply the adoption of 'a definition of wrongful detention (or other preferred term)'.[62]

3.72 Mr Geoffery Robertson KC, a barrister and human rights advocate, gave evidence to the committee in his private capacity. He provided his thoughts on terminology, including the phrasing of the inquiry terms of reference and the overlap between types of detention:

> These submissions are sought initially on the iniquitous practice of "arbitrary detention for diplomatic leverage", but thereafter more broadly about "wrongful detention". There is obviously an overlap - some victims are arrested for the very purpose of holding them as hostages, but others may be arrested legitimately and only later, opportunistically used for a prisoner swap. Diplomatic leverage is just one reason for wrongful detention: others include detention after unfair trials or disproportionate sentencing.[63]

3.73 He opined that he did not think the term 'arbitrary detention' was useful, given the legal meaning of 'arbitrary' was 'quite different' to its colloquial meaning which connotes 'random', 'illogical' or 'unreasonable' detention.[64] He commented:

> International law on human rights, should be couched in language that is easily comprehensible both to victims and to violators. I prefer to relate these submissions to detentions that breach international standards because of wrongful conduct by authorities of the detaining state in arresting, trying, or sentencing of Australian citizens.[65]

Learnings from the US – the Levinson Act as an alternative model

3.74 A number of submitters drew the committee's attention to the framework in operation in the US, suggesting that it would be a reasonable starting point for Australia to assess what should be contained in its own policy framework.[66]

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61 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 15.

62 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 2.

63 Mr Geoffrey Robertson KC, *Submission 31*, [p. 1].

64 Mr Geoffrey Robertson KC, *Submission 31*, [p. 1].

65 Mr Geoffrey Robertson KC, *Submission 31*, [p. 1].

66 See for example: Ms Sarah Teich, *Submission 14*, p. 6; Mr Daren Nair, *Submission 18*, p. 1; Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard,* 18 October 2024, pp. 6–7; Dr Sean Turnell, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 28;

3.75 For example, AWADA strongly urged the Australian Government to follow the lead of the US in adopting a formal definition and developing a classification mechanism for determining which consular cases do and do not constitute wrongful detentions. It suggested that this would ideally be codified within legislation, akin to the US.[67]

3.76 Additionally, the Global Liberty Alliance stated:

> 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.[68]

3.77 Mr Michael Kovrig, a former Canadian diplomat who was wrongly detained in the People's Republic of China (PRC) in 2018 for over 1000 days, suggested that the US legislative model offered an 'excellent blueprint' for other states to consider.[69]

3.78 REDRESS, a UK-based non-government organisation (NGO) that pursues legal claims on behalf of torture survivors globally which has represented wrongful detainees, stated that in its experience, the US model of dealing with wrongful detention was the most advanced internationally:

> It's not perfect, but it's the most advanced, and if you're looking into a model that's capable of streamlining processes, acting effectively and bringing together different government departments, that's the most advanced version so far.[70]

3.79 Dr Gilbert, who consulted on the drafting of the codified US framework, submitted that the legislation was 'transformative' for the hostage recovery enterprise in the US. She noted that while the categorisation process was not perfect, it was still a step forward.[71]

3.80 As set out in Chapter 2, since 2015 the US has had a comprehensive framework to address the problem of US citizens being taken hostage and wrongfully detained overseas. The cornerstones of this framework are the Office of the Special Presidential Envoy for Hostage Affairs (SPEHA), the Hostage Recovery

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Ms Leigh Toomey, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 37; Mr Michael Kovrig, private capacity, *Proof Committee Hansard,* 28 October 2024, p. 4.

67 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, pp. 2, 9.

68 The Global Liberty Alliance, *Submission 12,* p. 3.

69 Mr Michael Kovrig, private capacity, *Proof Committee Hansard,* 28 October 2024, p. 4.

70 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 7.

71 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 17.

Fusion Cell, and the Hostage Response Group, as well as the *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act* (the Levinson Act).[72]

3.81 Passed in 2020, the Levinson Act legislated much of the framework that was initially set out in Executive Order 13698 and Presidential Policy Directive 30 in 2015. It directs the Secretary of State to review cases of US nationals detained abroad to determine if their detentions are wrongful based on 'the totality of the circumstances' and guided by discretionary criteria provided in the Act. The Levinson Act also requires an annual report to Congress and authorises the President to impose sanctions on those who direct or support hostage taking and wrongful detentions.[73]

3.82 One of the core functions of the Levinson Act is to set out 11 discretionary criteria to assess if a citizen has been unlawfully or wrongfully detained. The criteria are as follows:

> (a) Review. —The Secretary of State shall review the cases of United States nationals detained abroad to determine if there is credible information that they are being detained unlawfully or wrongfully, based on criteria which may include whether —
>
> (1) United States officials receive or possess credible information indicating innocence of the detained individual;
> (2) the individual is being detained solely or substantially because he or she is a United States national;
> (3) the individual is being detained solely or substantially to influence United States Government policy or to secure economic or political concessions from the United States Government;
> (4) the detention appears to be because the individual sought to obtain, exercise, defend, or promote freedom of the press, freedom of religion, or the right to peacefully assemble;
> (5) the individual is being detained in violation of the laws of the detaining country;
> (6) independent nongovernmental organizations or journalists have raised legitimate questions about the innocence of the detained individual;
> (7) the United States mission in the country where the individual is being detained has received credible reports that the detention is a pretext for an illegitimate purpose;
> (8) the individual is detained in a country where the Department of State has determined in its annual human rights reports that the judicial system is not independent or impartial, is susceptible to corruption, or is incapable of rendering just verdicts;
> (9) the individual is being detained in inhumane conditions;

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72 United States Government, *Submission 30,* [p. 1].

73 United States Government, *Submission 30,* [p. 1].

(10) due process of law has been sufficiently impaired so as to render the detention arbitrary; and
(11) United States diplomatic engagement is likely necessary to secure the release of the detained individual.[74]

3.83 The Levinson Act also specifies that upon a determination of wrongful detention by the Secretary of State, the Secretary shall transfer responsibility for the case from the Bureau of Consular Affairs of the Department of State to SPEHA. This transfer occurs regardless of whether the detention is by a foreign government or non-governmental actor. [75]

3.84 The committee heard from the current SPEHA, Ambassador Roger Carstens, who provided further explanation on the categorisation process set out in the Levinson Act as followed by his office:

> The Levinson Act gave us 11 discretionary criteria that may be considered in addressing whether a detention is possibly wrongful or not. My office works very close[ly] with the Bureau of Consular Affairs and many others in the Department of State, including our lawyers and department personnel, to review these cases and eventually make a recommendation to the Secretary of State. The factors might include whether an individual has been detained solely because he or she is a US national, whether there are credible reports that detention is being used for a legitimate purpose, and sometimes I can even say that person may not be necessarily pure as the driven snow; the case may actually have something where the person might have done something wrong, but we get a strong sense that they're being used as leverage against the United States. When that starts to happen, the case, in a way, starts moving a little closer towards the wrongful detention side of the house.
>
> But the bottom line is that the [S]ecretary [of State] makes the final determination based on the totality of the circumstances and grounded in the facts of the case.[76]

3.85 Ambassador Carstens continued:

> Maybe the simplest way to put it is: when someone is detained overseas, a consular officer is most likely tracking that case, and they'll look for those indicators of wrongfulness. If it seems wrong, they fire off a cable up to main state in Washington DC. We start reviewing the facts there. We start to really try to see if these facts might lead themselves towards a detention determination. But, to make it as simple as possible, we take the Levinson [A]ct criteria and lay it over the facts of the case to make that determination

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74 United States Government, *Submission 30,* [pp. 28–30].

75 United States Government, *Submission 30,* [p. 30].

76 Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 7.

> of whether it's wrongful or not. Again, it's discretionary, and the secretary of state makes that final determination.[77]

3.86 The committee heard that the time the categorisation process took varied depending on the individual circumstances and how difficult it was to gather the required information, but that in the past there had been cases that were categorised in as little as 11 days.[78]

3.87 In relation to the terminology complexity (as touched upon earlier in this chapter), Dr Gilbert noted that in the Levinson Act there were two central sources of ambiguity regarding the wrongful detention designation.[79]

3.88 The first related to the use of the terminology 'wrongful detention', which was 'closely related to but not fully consistent with' two existing violations of international law: arbitrary detention and hostage taking.[80] She explained:

> While arbitrary detention is the deprivation of liberty without legitimate reason or legal process, hostage-taking is detention in order to compel a third party as an explicit or implicit condition for the release of the hostage. While Levinson Act criterion 3 points explicitly to hostage-taking, many of the other criteria would be better understood as constituting arbitrary detention.[81]

3.89 In light of this, Dr Gilbert suggested that as countries combat hostage diplomacy, governments should adopt a consistent terminology and definitions of these violations. She noted that 'sharing concepts should only help allies in coordination, deterrence and legal recourse in appeals to international law'.[82]

3.90 Dr Gilbert submitted that the second source of ambiguity in the Levinson Act was the designation process itself. She observed that there was no deadline by which the Department of State must make a determination, at no point must it publicly disclose which of the 11 criteria had been met, and there were no criteria publicly marked as being necessary or sufficient to obtain the designation.[83]

3.91 Dr Gilbert remarked that she was ambivalent about this second ambiguity. She noted that the US Government may find such flexibility strategically or

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77 Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 7.

78 Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 7.

79 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 17.

80 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 14.

81 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 14.

82 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 17.

83 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, pp. 17–18.

politically useful in handling cases, even though families and advocates often 'yearn for clear benchmarks'.[84]

DFAT's response to calls for change

3.92 Compared to other submitters, DFAT was an outlier in its evidence to the committee, given that it expressed a view that Australia did not need a formal definition or criteria to identify and manage cases of wrongful detention. It repeatedly emphasised its preference for a 'flexible approach' to cases involving Australians detained overseas. It stated:

> DFAT adopts a tailored approach to each case to best support the welfare and interests of the client and their family. These are the primary considerations when considering what advocacy and support the government can provide to achieve a positive resolution of the case. This flexible approach has resulted in DFAT securing the release of several high-profile Australian detainees, as well as other less publicly known, in recent years.[85]

3.93 It reiterated that it did not see a need for Australia to change its current approach:

> While we recognise other models, including legislated criteria or permanent envoys, have been applied, DFAT assesses that our flexible approach provides the Department with the broadest range of options to secure positive outcomes.[86]

3.94 The US model was discussed with DFAT officials during their appearance at a public hearing. When asked specifically whether a codified response mechanism similar to the Levinson Act could be useful in the Australian context, DFAT stated that it did not think it was needed. Ms Ganly commented:

> Again, I think that we have sufficient flexibility, including sanctions, although we don't use them as our first point of call. That's probably the point of last resort. We will use other methods first in that regard. I think we have sufficient coverage under international law, the various international acts that we work to, to provide the coverage that we need. I don't feel that we need the act or law. Looking at the Levinson Act and the Canadian bill that's going forward, many of the things covered have already been covered within the Australian framework.[87]

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84 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 17.

85 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 22.

86 Department of Foreign Affairs and Trade, *Submission 20,* p. 3.

87 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 30.

3.95 Dr Kylie Moore-Gilbert, an Australian academic wrongly detained in Iran for over 800 days and current director of AWADA, disputed DFAT's claims on the efficacy of its 'flexible approach' She explained:

> This ad hoc approach is characterised by DFAT in a positive light as flexibility or an a la carte approach. However, what is clear is that not having a definition of a wrongful detention case and not having a distinct process to distinguish such cases has meant that many innocent Aussies have fallen between the cracks and have not enjoyed the resources that I did to bring them home.[88]

3.96 Dr Moore-Gilbert responded to DFAT's assertion that a more codified regime would undermine the 'flexibility' that DFAT believes is a worthy element of its current approach. She was firm in her view that DFAT's current approach was ineffective and in need of structural change, with the notion of flexibility too often used as cover for 'incoherence and subjectivity'. She detailed:

> Right now, our system isn't working. For every successful case that's been brought home, there are others who languish in prison—and I've named some of them earlier. Even those of us who are brought home could have been brought home earlier with a more expeditious response from the get-go following the wrongful arrest. Flexibility is too often cover for incoherence and subjectivity.[89]

Public awareness

3.97 Evidence to the committee indicated that one of the benefits of adopting a definition and criteria for identifying wrongful detention was that it would facilitate the collection of data that could in turn be used to increase public awareness of the problem. Submitters pointed out that DFAT could improve public awareness by better warning Australians about the risks of wrongful detention when travelling to certain countries, and that it could do so by publishing more specific, targeted Smartraveller advice.

3.98 As noted in Chapter 2, DFAT administers the Smartraveller website which provides travel warnings for countries around the world. Countries are designated at one the following travel advice levels based on a risk assessment:

- exercise normal safety precautions;
- exercise a high degree of caution;
- reconsider your need to travel; or
- do not travel.[90]

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88 Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 14.

89 Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 15.

90 Smartraveller, *Travel advice explained*, 28 May 2024 (accessed 17 November 2024).

3.99 Australians are advised to visit the Smartraveller website prior to travelling to ensure they are informed of the potential risks and dangers associated with travel to that country.[91] Each country has a dedicated webpage with a country synopsis, which where relevant may include a statement on whether there is a risk of a country arbitrarily detaining foreign citizens.[92]

3.100 DFAT advised that it seeks to increase public awareness of countries that engage in the practice of arbitrary detention through Smartraveller advice, and that a number of those countries are listed as 'do not travel' destinations.[93] It explained:

> The travel advice for Afghanistan, China, the DPRK [Democratic People's Republic of North Korea], Iran, Mali, Myanmar and Russia all contain clear warnings regarding the risk of arbitrary detention. The travel advice for Belarus, Macau and Hong Kong highlight the risks around the arbitrary or harsh enforcement of local laws.

3.101 In 2023, the DFAT created employment-specific advice for journalists and academics to highlight the risk of arbitrary detention amongst other risks associated with travel and these professions.[94]

3.102 The committee queried DFAT as to whether there were any countries in which Australia recognised hostage diplomacy as a serious travel risk for Australians. Ms Ganly responded that there were not. She explained:

> We do not for Australians. We haven't identified them as that. But we are well aware that arbitrary detention can quickly move from being arbitrary detention to arbitrary detention for other purposes.[95]

3.103 Ms Toomey highlighted that recent cases brought to the WGAD suggested that arbitrary detention for diplomatic leverage had been on an upward trajectory in the last five to ten years. She observed that this represented an ongoing and significant risk for Australians who travel, study and work abroad. In light of this, she suggested that the Australian Government may wish to reflect this high level of risk in travel advisories, including specific warning about the risk of arbitrary detention in terms that are easily understood by different audiences.[96]

3.104 A submission from Dr John Coyne and Mr Justin Bassi emphasised the importance of public awareness campaigns to educate Australians about the risks of travelling to countries with a history of arbitrary detention. However,

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91 Smartraveller, *Travel advice explained*, 28 May 2024 (accessed 17 November 2024).

92 Smartraveller, *Travel advice explained*, 28 May 2024 (accessed 17 November 2024).

93 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 22.

94 Department of Foreign Affairs and Trade, *Submission 20*, p. 4.

95 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 26.

96 Ms Leigh Toomey, *Submission 1*, p. 3.

they commented that such campaigns often did not fully convey the unpredictability and risks of interacting with opaque legal systems, leaving Australians vulnerable despite their best efforts to stay informed.[97]

3.105 Mr Jason Poblete, President and Counsel for the Global Liberty Alliance stressed that the current DFAT travel warnings needed to be more direct in order to properly convey to travellers the seriousness of the risk. He stated:

> We have travel warnings, but maybe they're not clear enough. That's a good example of a clear rule. If a country is stressing to a traveller, 'Do not travel here,' clearly explain what that means. Do not necessarily just say, 'Don't go there,' but provide people context for that.[98]

3.106 Mr Pether recommended that consideration be given to adjusting the Smartraveller website to indicate countries that have engaged in wrongful detention, particularly if those detentions related to business activities. He observed that the current website appeared to be largely aimed at infrequent travellers (e.g. tourists), rather than regular expatriate and business travellers. He contended that the latter group of travellers were more likely to take serious notice of warnings that specifically referenced unlawful detention linked to business activities.[99] To remedy this, Mr Pether suggested that the Smartraveller website be updated to provide specific examples of when a state had wrongfully detained foreign nationals, as well as a risk matrix to provide additional context and information for Australians to base their travel decisions upon.[100]

3.107 Mr Mohammed Munshi, an Australian who was imprisoned for 10 years in Mongolia and is still subject to a travel ban preventing him from returning home, also emphasised the importance of properly warning business travellers. He suggested DFAT should provide advice on which countries were safe to engage with for business, in a similar vein to its travel advice. He contended that DFAT should list instances of hostage diplomacy to warn Australians about working and investing in those countries.[101]

3.108 Safeguard Defenders, a human rights NGO specialising in China-related issues, recommended that DFAT include more specific information to the Smartraveller advice on the PRC to warn Australian citizens of the risk of hostage diplomacy:

> To their credit, the recently updated Australian government Smartraveller advice for China lists many of the risks associated with travel to the PRC [People's Republic of China]. However, we highly recommend adding or

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97 Dr John Coyne and Mr Justin Bassi, *Submission 32*, p. 9.

98 Mr Jason Poblete, President and Counsel, Global Liberty Alliance, *Proof Committee Hansard*, 26 September 2024, p. 2.

99 Mr Robert Pether, *Submission 6*, p. 1.

100 Mr Robert Pether, *Submission 6*, p. 1.

101 Mr Mohammed Munshi, *Submission 24*, pp. 2–3.

> highlighting information on the risks I just described, including the risk of hostage diplomacy, especially as the PRC seeks to attract foreign visitors through its visa waiver program. However, protecting citizens from the risks associated with travel to China doesn't or shouldn't end at travel advice risks. We recommend both an increased level of transparency and measures of accountability.[102]

3.109 When questioned by the committee as to whether the Smartraveler website could be more upfront about the risks of hostage diplomacy in the PRC, Ms Laura Harth, Campaign Director for Safeguard Defenders, suggested that the advice could be more direct. She stated:

> I do think there are issues that could be highlighted more. Compared to other countries, DFAT's advice is quite strong. However, I believe there are many issues that are not highlighted enough. The fact that there is not enough transparency in reporting what's happening to Australian citizens, as I mentioned, for example, through an annual report, may lead people to underestimate the risks.[103]

Committee view and recommendations

3.110 The committee acknowledges that many staff within DFAT have done commendable work in managing cases of wrongful detention and securing the release of Australian citizens.

3.111 However, the committee holds concerns that Australia's approach to dealing with cases of wrongful detention is inconsistent and inadequate. While recognising that government officials require some degree of flexibility to be able to negotiate the return of an Australian citizen, it is clear that there is a concerning lack of consistency and fairness in determining whether someone has been wrongfully detained, and therefore what level of consular support they receive.

3.112 Given the current system is not working, the committee is of the opinion that a structural overhaul is needed.

3.113 The committee has considered DFAT's assertion that the current approach is flexible and provides 'the broadest range of options to secure positive outcomes'.[104] However, based on the evidence received throughout the inquiry, the committee is minded to agree with the view put forward by former

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[102] Ms Laura Harth, Campaign Director, Safeguard Defenders, *Proof Committee Hansard*, 18 October 2024, pp. 47–48.

[103] Ms Laura Harth, Campaign Director, Safeguard Defenders, *Proof Committee Hansard*, 18 October 2024, p. 48.

[104] Department of Foreign Affairs and Trade, *Submission 20*, p. 3.

wrongfully detained individual Dr Moore-Gilbert that this flexibility is too often a 'cover for incoherence and subjectivity'.[105]

3.114 To this end, the committee considers it imperative that Australia implement a standardised, transparent policy framework to deal with cases of wrongful detention going forward.

3.115 The committee is also of the view that a robust framework would in itself act as a deterrence factor against Australian citizens being wrongly detained in the first instance. It considers that a clear and transparent framework would send a strong message to those states that choose to engage in hostage diplomacy and that Australia will not stand for that behaviour. It would signal that Australia does not condone its citizens being used as bargaining chips and has an articulated strategy to respond accordingly.

3.116 Internationally, the committee is cognisant that hostile regimes have successfully used the wrongful detention of foreign nationals to achieve prisoner swaps and gain diplomatic leverage over other countries. For example, in 2022 Russia used the detained US national Brittney Griner in a prisoner swap to force the release of notorious Russian arms dealer Victor Bout from a US prison.[106] In another well-known instance of hostage diplomacy, China wrongly detained Canadian citizens Michael Kovrig and Michael Spavor in direct retaliation for Canada's arrest of Chinese citizen Meng Wanzhou in the fulfillment of a US extradition request. The men were subject to human rights abuses and imprisoned for over 1000 days, and were ultimately released in 2021 on the same day that the US Department of Justice dropped the extradition request. Throughout the wrongful detention, China made it clear its demand for the release of its citizen in exchange for the freedom of the Canadian citizens.[107]

3.117 The committee is concerned that given the success of hostage diplomacy tactics such as these, offending regimes are likely to continue to attempt such practices in the future. Australia needs to be alert to this danger and create a policy framework which minimises the risk of the Australian Government being leveraged in this way.

3.118 The committee believes that establishing a policy framework, which involves a clear, public definition and criteria for determining wrongful detention, as well as a standalone office to coordinate responses, would ensure that no wrongfully detained Australian slips between the cracks and misses out on support.

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105 Dr Kylie Moore-Gilbert, *private capacity*, Proof Committee Hansard, 18 October 2024, p. 15.

106 Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 5.

107 Mr Michael Kovrig, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 2.

3.119 While acknowledging that the Levinson Act is not perfect and may continue to evolve over time, the committee considers that the US approach has merit and provides a suitable starting point for establishing an Australian framework.

3.120 The committee is of the view that a policy framework must involve four core elements:

(a) A clear definition of what constitutes wrongful detention
(b) An established set of criteria for determining which consular cases constitute wrongful detention
(c) A standalone office, headed by a senior official, responsible for all elements of Australia's response to wrongful detention.
(d) A clear focus on deterring foreign governments from wrongfully detaining Australians.

3.121 In regard to the first element, the committee highlights the need for the definition adopted by Australia to align with definitions and understandings of like-minded partners, in order to facilitate multilateral action to combat hostage diplomacy.

3.122 A detailed consideration of the third and fourth elements, along with the accompanying recommendations, can be found in the following chapters.

Public awareness

3.123 The committee is cognisant of the importance of public awareness as a preventative measure to minimise the risk of Australian travellers being wrongfully detained.

3.124 Invariably, foreign regimes do not wish to be identified within the international community as having wrongfully detained or taken as hostage for diplomatic leverage a foreign citizen. There are countless examples of regimes which have done so going to significant effort to concoct publicly justifiable excuses for wrongful detentions of foreign citizens. This demonstrates the potential for categorisation and public attribution of a wrongful detention to serve as a powerful deterrent towards wrongfully detaining an Australian citizen.

3.125 The committee is of the view that the Australian Government must be more upfront in making the public aware of hostage diplomacy and warning them about the countries that have a track record of this behaviour. The committee considers that having a formal definition and criteria for identifying cases would greatly assist in this mission.

3.126 While it commends DFAT on its Smartraveller website, the committee thinks that the travel warnings should include more specific, direct advice on the risk of wrongful detention and instances of hostage diplomacy in certain countries. In particular, the committee suggests that DFAT make sure the warnings are communicated in a way that is readily understood by all types of travellers and convey the gravity of the risk.

3.127 On this matter, the committee observes that while there is an obligation on the Australian Government to ensure citizens are fully aware of the regimes which undertake this practice, there is also an obligation on travellers to these countries to take into account the risks. This is because it is not always within the power of the government to secure the release of Australians and there may be circumstances where a foreign regime makes a demand which cannot be agreed to.

Recommendation 1

3.128 The committee recommends that the Australian Government should adopt a clear, publicly available definition of wrongful detention and implement a framework which ensures cases of Australians being wrongfully detained overseas are identified, categorised and reported as being cases of wrongful detention.

3.129 The definition adopted by the Australian Government should allow for the identification and classification of a wrongful detention case as a case of hostage diplomacy (arbitrary detention for diplomatic leverage).

3.130 The definition should also be in alignment with definitions used by key partners, to allow for multilateral action when a citizen from Australia or our partners is wrongfully detained.

Recommendation 2

3.131 The committee recommends that the Australian Government should legislate to ensure that agencies have powers, tools and accountabilities to respond to and deter wrongful detention of Australians, including providing greater transparency and reporting on cases of wrongful detention.

Recommendation 3

3.132 The committee recommends that the Australian Government's framework acknowledge the unfortunate reality that some foreign regimes engage in the practice of hostage diplomacy because it has proven to be a successful tactic for securing prisoner swaps or obtaining leverage over the national government. Acknowledgement of this reality is a critical part of designing a framework which reduces the risk of the Australian Government being leveraged in this way, therefore reducing the risk of Australians being wrongfully detained for this purpose.

Recommendation 4

3.133 The committee recommends that the Australian Government collect data on the wrongful detention of Australian citizens, which should be regularly

reported to the National Security Committee of Cabinet and the Minister for Foreign Affairs, and publicly disclosed in a deidentified manner.

Recommendation 5

3.134 The committee recommends that the Australian Government should take steps to increase public awareness in the Australian community about the practice of foreign governments wrongfully detaining citizens for a variety of reasons, including establishing leverage over that citizen's national government.

Recommendation 6

3.135 The committee recommends that the Australian Government should increase the visibility of warnings to Australian travellers intending to visit countries where regimes are known to engage in wrongful detention.

Chapter 4
Supporting detainees and their families

4.1 As set out in Chapter 2 of this report, the Department of Foreign Affairs and Trade (DFAT) is the first point of call for Australians who have been detained overseas. It is also responsible for maintaining communication channels between detained citizens and their families.

4.2 DFAT advised the committee that it places 'a very high priority' on supporting Australians and their families in cases of wrongful detention[1], with 'a clear focus on resolving the case and ensuring the detainee's welfare'.[2]

4.3 However, evidence to the inquiry, including evidence from current and former detainees and their families, indicated that there were significant shortcomings in DFAT's current management of wrongful detention cases.

4.4 In particular, submitters raised concerns with:

- DFAT's attitudes towards, communication with, and support for detainees and their families during detention; and
- the lack of adequate, ongoing support provided by DFAT for detainees and their families upon a detainee's release and return home to Australia.

4.5 The committee heard that given these shortcomings, there was considerable scope for DFAT to overhaul its operational model and strengthen institutional capacity to provide better support to detainees and their families both during and after an experience of wrongful detention.

4.6 This chapter deals with each of these concerns in turn and explores options to improve the government's processes. In particular, it sets out calls from submitters for the establishment of a standalone office to deal with wrongful detentions and looks at the Office of the Special Presidential Envoy for Hostage Affairs (SPEHA) in the United States (US) as a potential model for Australia to learn from.

Communication with and support for families during a wrongful detention

4.7 Submitters informed the committee that while individual DFAT officials often undertook commendable work, current departmental operational policies impeded case resolution and were not conducive to effective, compassionate communication with detainees and their families.

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1 Note: Throughout the inquiry, DFAT used the term 'arbitrary' detention in its evidence. This report uses 'wrongful' detention.

2 Department of Foreign Affairs and Trade, *Submission 20*, p. 2.

4.8 Current and former detainees and their families raised three specific concerns with DFAT's current processes, all of which are exacerbated by the high staff turnover characteristic of consular and diplomatic work:

(a) DFAT's reluctance to partner constructively with families that wish to engage with the media as part of a public campaign;
(b) ad hoc levels of communication (at times impeded by unintended consequences of Australian privacy legislation); and
(c) a lack of specialised, appropriately trained, trauma-informed staff.

DFAT attitudes towards media engagement

4.9 The Australian Wrongful and Arbitrary Detention Alliance (AWADA) advised that families should be seen as partners in the resolution of wrongful detention, rather than 'clients' or people who need to be managed.[3] In particular, submitters raised this in regard to family interactions with DFAT on the issue of media engagement.

4.10 Some submitters asserted that DFAT displayed a reluctance to consider a media or public advocacy campaign, or even engage on such matters with families. The committee heard that DFAT maintains, or at the very least is perceived to maintain, a 'largely blanket policy' of advising the families of wrongful detainees against speaking to the media.[4]

4.11 Professor Peter Greste, an Australian journalist wrongly detained in Egypt between December 2013 and February 2015, observed that DFAT's default appeared to be to advise the families of detainees to remain quiet and keep out of the media to let diplomats resolve the case. He reflected on his own experience:

> My family initially got the same advice as everyone else that DFAT typically gives, and that is: 'Please don't say anything. Let us deal with these negotiations quietly and without the noise from the media.'[5]

4.12 Mr Geoffrey Robertson KC, a barrister and human rights advocate with extensive international experience in seeking to free wrongly detained individuals, gave evidence to the committee in his private capacity. He argued

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3 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 15.

4 See for example: Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 16; Ms Lei Cheng, *Submission 33*, p. 1; Heretic Law, *Submission 2*, pp. 2–3; Human Rights Watch, *Submission 15*, [p. 3]; Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 33; Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 7; Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, pp. 19–20; Ms Leigh Toomey, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 39.

5 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 33.

that DFAT needed to stop reflexively discouraging detainees from going public to enlist media or NGO support. He stated:

> In my experience actually, most individuals who are falsely imprisoned in foreign countries have their case better advanced by an international media campaign than by our nervous DFAT consular officials, who can't do anything often to free them. But DFAT's knee-jerk reaction in every case is: 'Be quiet, leave it to us, we are the experts.' But they're not. They put pressure on the parents of detainees not to talk to the media or to protest, and I think this behaviour is actually unconscionable. It may serve to protect DFAT from public criticism when it's unable to obtain the release of wrongly detained Australians, but sometimes such criticism is deserved.[6]

4.13 Mr Robertson went on to describe how DFAT's 'kneejerk' aversion to public campaigns may limit the options available to secure a detainee's release:

> It's this idea of keeping quiet the visiting parents, who are often not familiar with international matters, who may be very humble people, and who are told: 'We're the experts. We know best. Your son or daughter must not complain about their treatment. We will get them out in time.' The time passes, and, of course, Australian diplomats have no power to get them out of places like Iran. [7]

4.14 Submitters recognised the complexities inherent in media engagement and that there could be no 'one size fits all' approach. However, even while acknowledging the risks, submitters emphasised that with appropriate care, media engagement could form part of the 'toolkit' to resolve a case and should be genuinely considered an option should that be the wishes of the detainee and their family. They pointed out that in some cases a public advocacy campaign through the media could be an effective strategy to aid in a detainee's release, or at the very least ensure better treatment while detained.[8]

4.15 For example, Professor Greste stated that in his opinion, media coverage should be considered as a legitimate option to be used where appropriate:

> I genuinely believe that media coverage is more helpful than it is a hindrance. I am not saying that robust media coverage must always be the strategy, but I think it must be considered more aggressively or forthrightly.[9]

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6 Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 2.

7 Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 8.

8 See for example: Ms Leigh Toomey, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 39; Heretic Law, *Submission 2*, p. 3; Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 34; Dr Sean Turnell, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 26; Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 50; Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 8; Professor Peter Greste, *Submission 38,* p. 3.

9 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 34. See also Professor Peter Greste, *Submission 38*, [p. 3].

4.16 He noted that his family felt that the media coverage was rarely, if ever, negative in his case, and that it added 'energy' to the discussions and debate. He also credited media coverage to helping him escape some of the worst excesses and abuses of the Egyptian prison system.[10]

4.17 Similarly, Dr Sean Turnell, an Australia academic who was wrongly detained in Myanmar, noted that in his case the publicity surrounding his detention was of great assistance:

> Actually I think it protected me, funnily enough, against abuse. I think the idea that you're very much under the focus of the media from your home country and so on makes the hostage-taking authorities a little bit more reticent about mistreating you and that even extends to how you might appear on television and so on. I think in that very basic way it has an impact.[11]

4.18 Hostage International, a non-government organisation (NGO) which provides specialist assistance to those affected by kidnappings and arbitrary detention worldwide, noted that it had seen benefits in using media exposure to ensure better living conditions for detainees:

> …one thing that families can do is to focus on the humanitarian conditions of the detainee and the treatment they're receiving: maybe they're in solitary confinement; maybe they're ill and haven't been seen by a doctor; maybe they're not getting proper food. These are things that can be highlighted in the media without too much risk, because that's not pointing a finger at any government. That's where governments can work well with families and, in a sense, use the media to try to improve the conditions of the detainee.[12]

4.19 Ms Natalia Kubesch, Legal Officer at REDRESS, responded to committee questioning on whether there was a risk that publicity about a wrongful detention could impede diplomatic efforts to resolve the case. She stated:

> Whilst it is normally the excuse being used in a lot of cases, actually the public pressure that comes from making the cases public has been more effective as is having engagement on the case and making sure action is being taken. I appreciate the concern in theory, but in practice we've seen that the public announcement has been more effective in resolving cases.[13]

4.20 DFAT informed the committee that while some of its advocacy and action is public, often it assesses that confidentiality is best placed to support a client's interests. DFAT further noted that while it offered advice on the potential benefits and risks associated with media engagement, ultimately it advised all

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10 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, pp. 33–34.

11 Dr Sean Turnell, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 26.

12 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 50.

13 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 6.

consular clients that the decision to engage with media was one for them and their family.[14]

4.21 Ms Paula Ganly, First Assistant Secretary of the Consular and Crisis Management Division, explained:

> We advise the family and the detainee that the decision on whether or not to engage with the media is one for them to make. However, there may be circumstances where we advise them of issues that we believe they will face if they do go to the media and the potential implications for work that we are doing to assist the detainee in country. We also, with a number of people, have put them in touch with our media area—our communications area—at the department, which has assisted them in producing a statement or something. Some people have gone out on their own.[15]

4.22 Hostage International observed that media engagement became more of a prominent theme when families of detainees felt their government was not doing enough to free their loved one. It explained that going to the media could make a family feel empowered and able to have some influence over the case resolution.[16] It observed:

> … 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 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.[17]

4.23 Dr Kylie Moore-Gilbert, an Australian academic wrongly detained in Iran for over 800 days who is now director of AWADA, spoke to the committee about her personal experience. She advised there was a danger in consular officials telling families not to go public as an automatic response, partly because this risked alienating a family and pushing them to go to the media on their own in such a way that undermined any diplomatic efforts also occurring.[18]

4.24 Professor Greste stated that in his view, DFAT's reluctance to engage with the media was 'counterproductive' and could lead to frustration on the part of families. He observed that a lot of the time families of detainees went to the

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[14] Department of Foreign Affairs and Trade, *Submission 20*, pp. 2–3.

[15] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 32.

[16] Hostage International, *Submission 16*, p. 4.

[17] Hostage International, *Submission 16*, pp. 4–5.

[18] Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 20.

media 'out of frustration, out of a sense of a lack of movement or activity from DFAT, that may or may not justified'.[19]

4.25 Submitters argued that DFAT needed to change its attitude and advice regarding the media to be more flexible and responsive to the concerns of families.

4.26 For example, AWADA pointed out that the fact the many families make the decision to 'go public', regardless of DFAT's advice, indicated that professional guidance on media engagement is necessary. AWADA argued that a blanket objection to media coverage was no longer appropriate or even feasible given the ubiquity of the internet and social media in the current media landscape.[20]

4.27 AWADA suggested that DFAT's media engagement team should instead make itself available to families to discuss their options for working in partnership to use the media as a tool for campaigning in a strategic and positive way that would not hamper behind-the-scenes diplomatic efforts. It further stated that, in cases where media engagement is inadvisable, DFAT staff should explain this to families in a clear and comprehensive fashion, noting that the decision could be revisited depending on developments in the detainee's situation.[21]

4.28 Dr Moore-Gilbert further explained that DFAT needed a more nuanced approach to media campaigns to facilitate a more constructive relationship with a family:

> It's much better to keep the family in the tent, work constructively with media engagement, make sure everyone is on the same page, singing from the same song sheet and not putting out messaging that might undermine the government's negotiating position with that foreign state. At the same time, we need to recognise that it could actually assist the government in negotiations depending on a case-by-case basis.[22]

4.29 Professor Greste also noted that speaking to the media was also a validating and empowering experience for families, which was itself important and should not be dismissed.[23]

4.30 He further noted that where there was a high risk that media engagement could be destructive to case resolution efforts, that should be addressed through careful coordination of messaging and communication with the families.[24]

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19 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 34.

20 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 16.

21 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 16.

22 Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 20.

23 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 34.

24 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 34.

4.31 Ms Lara Symons, Chief Executive of Hostage International, emphasised the mutual benefits of trust between consular officials and families, particularly when it came to navigating any media campaigns. She stressed that if a home government engaged openly and in good faith, a family was less likely to become frustrated and more amenable to advice to not go to the media if the circumstances became sensitive or risky.[25]

4.32 Hostage International argued that a better approach was for governments to speak openly with families about media engagement and provide them with tailored guidance. It stated that this approach would allow families to feel that their interactions with their government were based on trust and respect, meaning they would be less inclined to 'go it alone' and more receptive to disengaging from the media when necessary.[26]

4.33 Specifically, Hostage International suggested that DFAT acknowledge a family's wish to engage with media as soon as possible and the matter should be discussed openly at every family meeting. It noted that DFAT should genuinely listen to a family's aims around media engagement and initiate a good faith discussion about the pros and cons of engagement.[27]

Ad hoc communication with DFAT

4.34 Hostage International observed that dealing with consular and diplomatic processes could be confusing and overwhelming for families. It detailed:

> For example, families 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.[28]

4.35 Evidence received from families confirmed this.[29]

4.36 As a guiding principle, Hostage International recommended that regardless of a government's approach to case resolution, the processes should be clearly and

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25 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 51.

26 Hostage International, *Submission 16*, p. 5.

27 Hostage International, *Submission 16*, p. 5.

28 Hostage International, *Submission 16*, p. 3.

29 See for example: Dr Lisa Brandt, *Submission 11*, [p. 2]; Human Rights Watch, *Submission 15*, [p. 4]; Ms Lamisse Hamouda, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 33; Dr Kay Danes OAM, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 24.

compassionately communicated to those most affected by a case of wrongful detention.[30]

4.37 The committee heard that a common frustration amongst detainees and their families was DFAT citing 'privacy considerations' as a barrier to providing information to families with information about their loved one's situation.[31]

4.38 According to AWADA, DFAT is legally unable to disclose information to families without first having the detainee sign a privacy waiver form — a condition that can prove insurmountable when DFAT is unable to access the person in the first place, due to their having been disappeared, held incommunicado, or having consular access denied by the detaining authorities.[32]

4.39 AWADA noted that this issue was particularly pertinent for dual nationals arrested in their country of second nationality, as the detaining state will often prevent all access by Australian representatives on the grounds of not recognising their Australian citizenship.[33]

4.40 For example, Ms Lamisse Hamouda, whose father Mr Hazem Hamouda was wrongfully imprisoned in Egypt in 2018 for over a year, explained how DFAT was initially unable to share information about her father's welfare because they first required his signature, despite not being able to access him:

> One of the big things early on was the barrier of the Privacy Act. I understood why I couldn't get information because of the Privacy Act. But then, at the same time, the [Australian] consulate couldn't access Dad. He had already disappeared, and we found out he was in prison because he smuggled out a letter. I was like: 'If I can't access him and you can't access him, how do I get past this Privacy Act for us to be able to more clearly communicate?'.[34]

4.41 AWADA noted that Canada has developed a solution for this issue by inserting a clause into its relevant privacy legislation exempting consular cases. It further noted that the US may be considering amending similar privacy-related policies to enable the detainee to give verbal consent to waiving their right to privacy,

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30 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 51.

31 See for example: Ms Lei Cheng, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 41; Dr Lisa Brandt, *Submission 11*, [p. 2];

32 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 15.

33 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 15.

34 Ms Lamisse Hamouda, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 34.

so that families can be kept informed. AWADA encouraged Australia to follow these examples and explore creative solutions to the issue.[35]

Lack of consistent, specialised, trauma-informed staff

4.42 As set out earlier in this chapter, evidence before the committee set out concerns from detainees and their families about the high staff turnover within DFAT and the detrimental impact this had on communications and relationships with families. More specifically, the committee heard that DFAT staff were not specialists or trained in trauma-informed communication.

4.43 As AWADA noted in their submission:

> The vast majority of consular staff are good people with good intentions, who want to do the very best for the 'consular clients' (i.e. families) they are tasked with liaising with. However, most are not trained in trauma-informed communication strategies and some are lacking in the kinds of interpersonal skills necessary for performing the difficult task of maintaining a positive and collaborative relationship with families during a very challenging period for all involved.[36]

4.44 AWADA informed the committee that anecdotally, the former detainees and families that it had dealt with indicated that the predictor of success for the relationship between DFAT and a family was largely the personalities of the officials involved. It explained:

> It is the luck of the draw as to whether a case worker for example, is able to develop a positive and compassionate relationship with detainee families, or might instead end up alienating, frustrating or antagonising them. This is of course a two-way street- some detainee family members are understandably distressed and can be difficult to deal with.[37]

4.45 Additionally, AWADA stated that a number of family members from current and past cases had complained to it about the array of different consular staff members they were forced to retell their stories to again and again, and their frustration of starting from scratch each time as there appeared to be little knowledge transfer when personnel were replaced. It noted that one family member had informed them they had had twelve case workers in four years.[38]

4.46 Hostage International confirmed that DFAT's interactions with families had been negatively impacted by a high frequency of change in personnel, which was very destabilising for families.[39]

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35 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 16.

36 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, pp. 14–15.

37 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 15.

38 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

39 Hostage International, *Submission 16*, p. 4.

4.47 It informed the committee that it had seen examples of both good and poor communication with families from DFAT, and that the outcome was 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. It noted that where the point of contact had shown empathy, accessibility, responsiveness and proactive behaviour, the communication with families had been positive and productive.[40]

4.48 Ms Hamouda had first-hand experience dealing with DFAT when her father was wrongly detained in Egypt. She posited to the committee that DFAT's method of communication was not only ineffective, but also damaging to detained individuals and their families attempting to navigate the extreme challenges of wrongful detention.[41]

4.49 Ms Hamouda advocated for an overhaul of DFAT's handling of wrongful detention cases to provide more comprehensive support for families. She stated:

> Families and individuals cannot continue to be expected to navigate it all, from law to media, international relations to advocacy, policy to prison and their own personal lives.[42]

4.50 DFAT advised that staff are provided with 'regular training' in trauma counselling and dealing with people who are in difficult situations.[43] However, AWADA pointed out that the high staff turnover within DFAT's consular services diluted the efficacy of training provided. It posed the rhetorical question:

> Is there much point training career diplomats in family engagement when several months later they may be posted overseas to an entirely different role, and another staff member is rotated into their position?[44]

4.51 In light of the challenges inherent in the crucial role of communicating with families, AWADA strongly suggested that Australia would be best placed to adopt the US model of professionalising family liaison. It asserted that case workers specially trained for wrongful detention cases should be appointed on a permanent basis to a family liaison role.[45]

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40 Hostage International, *Submission 16*, p. 4.

41 Ms Lamisse Hamouda, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 33.

42 Ms Lamisse Hamouda, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 33.

43 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 27.

44 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 14.

45 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, pp. 14–15.

4.52 A number of other submitters agreed with AWADA's recommendation or endorsed this approach.[46]

4.53 Hostage International also suggested that more continuity with DFAT contacts, as well as a more permanent senior official (like the US and Canada) would be beneficial for families.[47] In light of the influence that personality and skill set played in the development of constructive family relationships, Hostage International also urged that care should be taken to ensure that DFAT staff with the right skill set (e.g. good listening skills and empathy) were chosen for such roles and well-supported by their managers.[48]

4.54 Ms Hamouda stressed the importance of DFAT providing trauma-informed communication to support detainees and their families throughout the process of case resolution, given the levels of distress that families experienced. She outlined:

> The experience of sustained distress compromises so much, from language and memory centres in the brain to an ongoing struggle to emotionally regulate, process complex information and engage in rational decision-making. As such, DFAT must be conscientious in enacting clear policy and communication. Staff must be trained in trauma informed practices and communication strategies.[49]

4.55 Hostage International noted that it had recently observed that DFAT was starting to 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.[50]

4.56 As a more general observation, Hostage International noted that governments found some topics more difficult to discuss with families and internal policies could also restrict what was able to be shared. This lack of information often led to families feeling frustrated by a perceived lack of action, and questioning the government's ability or desire to find a resolution. Hostage International suggested that sharing information about processes, foreign policy complexities and geopolitics should always be possible, and this would help families to retain confidence that a government was acting to resolve the case.[51]

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46 See for example: Australian Human Rights Commission, *Submission 40*, [p. 2]; Professor Peter Greste, *Submission 38*, [p. 2]; Capital Punishment Justice Project, *Submission 44;* Dr Lisa Brandt, *Submission 11*, [p. 2].

47 Hostage International, *Submission 16*, p. 4.

48 Hostage International, *Submission 16*, p. 4.

49 Ms Lamisse Hamouda, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 33.

50 Hostage International, *Submission 16*, p. 4.

51 Hostage International, *Submission 16*, p. 4.

Special Presidential Envoy for Hostage Affairs – the importance for a standalone office to support families

4.57 To address the concerns outlined above, inquiry participants recommended the Australian Government implement a more cohesive approach that would create a centralised office with responsibility for all aspects of case management, including family communication and support. Submitters drew the committee's attention specifically to the Office of the Special Presidential Envoy for Hostage Affairs (SPEHA) in the United States as a potential model to emulate.

4.58 SPEHA leads and partners with a coalition of government and private sector organisations to secure the freedom of US national hostages and wrongful detainees held abroad.[52] It has three key functions:

(1) Securing the release of US nationals wrongfully detained or held hostage abroad and helping them reintegrate upon return.
(2) Supporting families of wrongful detainees by providing case-specific information and access to US government resources.
(3) Leading and coordinating interagency multilateral and private sector strategy and efforts to deter and prevent hostage diplomacy.[53]

4.59 Special Presidential Envoy Roger Carstens leads the SPEHA office and holds the rank of Ambassador.[54] The SPEHA office also includes:

- a Deputy Special Presidential Envoy;
- a Chief of Staff who serves as senior advisor to SPEHA and as policy planner for the office, examining issues to include strategic goals and objectives and alignment of policy priorities and resources;
- a Regional Affairs Team, which leads the negotiations for individual cases in close coordination with the White House National Security Council and other agencies;
- a Deterrence Team focused on strengthening collective action to deter and prevent unjust detentions, including through engagement with multilateral bodies and the private sector; and
- an External Affairs Team, which handles family and detainee support, congressional affairs, and media and external engagement.[55]

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52 United States Government, *Submission 30*, [p. 1].

53 Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 6.

54 United States Government, *Submission 30*, [p. 2].

55 Unite States Government, *Submission 30*, [p. 2].

4.60 Ambassador Carstens characterised the work of SPEHA for the committee at a public hearing, emphasising the whole-of-government approach at the core of its work:

> To be effective, my office depends upon rapid, agile and coordinated actions to ensure all elements of national power are drawn upon for the recovery of US nationals who have been determined to be wrongfully detained abroad. The office collaborates with the Federal Bureau of Investigation, the departments of defense, state, justice and the treasury as well as the intelligence community. My office may directly negotiate for the release of a detained American or plan a recovery mission or work on sanctions against entities that engage in this practice, but we never do this alone. We bring a whole-of-government effort to this work that brings together all elements of national power.[56]

4.61 As detailed out in Chapter 3 of this report, SPEHA works very closely with the Bureau of Consular Affairs and others in the Department of State, including lawyers and department personnel, to review potential cases of wrongful detention and eventually make a recommendation to the Secretary of State as to whether a person has been wrongfully detained.[57]

4.62 Ambassador Carstens emphasised that working with families was a big part of SPEHA's role. He provided the committee with an overview of how SPEHA initially engaged with families once their case was taken on:

> At a certain point we explain why our office was created—essentially out of the failure of our government to do this job from 2012 to 2014—and then we start to turn it more into what we're going to do and how we're going to work with them, partner with them, to (1) take the burden of doing the work to free their loved one off their shoulders and put it on mine, and (2) find strategies to get their loved one home. As part of that, we try to give them a lot of information. We usually set up a call schedule for once a week but if a family member wants to talk to us every day, we'll do that. If they want to have us only talk to them when we have an update on the case, we'll do that. Usually it's a once-a-week update by phone or in person with the family in question. We tell them we have two members of the Office of the Director of National Intelligence who work part-time in my office whose main mission is to declassify information on their loved one's case so that we can brief them. We don't hide information or, if we're not making any progress, put the hand of the US government up and say, 'It's all secret; I can't tell you', because families smell that; they know when you're lying to them or whether you're not being fulsome in your explanation of the case. We want to go to the opposite side of the house and we want to embrace them, cry with them, give them information and be fully transparent to the extent that we can, and if we ever get to the point where we can't because the

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[56] Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 6.

[57] Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 6.

> negotiation is so sensitive or the information cannot be declassified we simply tell them that.[58]

4.63 Ambassador Carstens also highlighted that SPEHA provided families with psychological, medical and practical support even while their loved ones were in detention. He explained:

> That's important because, for the families, it's not even PTSD [Post Traumatic Stress Disorder]. It's not in the past; it's present emotional turmoil, and even financial turmoil, that's going on in their lives. So we try to provide them with that medical care that's paid for by the US government. We also provide them with a letter from my office saying that their loved one's been wrongfully detained. That can be used with creditors such as American Express, Visa, Citibank et cetera. It can also be used to keep their apartments from being emptied out by a landlord. So the letter's often been helpful in saving people from losing their houses and having their credit ratings attacked in any worse way than they've already been attacked. Also, we've worked with the IRS [Internal Revenue Service] and other government institutions so that the IRS not only doesn't go about penalising someone for not paying their taxes, because they're being held in a prison in Russia, but also doesn't fine them for not paying those taxes as well.[59]

Calls for a standalone office

4.64 AWADA argued that adopting the US SPEHA approach of a standalone office headed by one senior and long-serving individual, coupled with dedicated, appropriately trained case workers not subject to the churn of diplomatic postings would bring much needed 'continuity, compassion and depth of expertise' to the current system.[60]

4.65 As set out in Chapter 3, AWADA highlighted that Australia does not have an overarching policy framework in place for managing wrongful detention, nor a specific strategy for identifying, responding to and deterring cases of hostage diplomacy.[61] AWADA also pointed out to the committee that Australia's consular response to wrongful detention of citizens is not managed by a standalone office, unlike some of its like-minded partners. Instead, wrongful detentions are considered to fall within the broad DFAT category of 'complex consular cases'.[62]

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58 Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 9.

59 Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 9.

60 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 12.

61 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 4.

62 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 3. More detail on Complex Cases can be found in Chapters 2 and 3 of this report.

4.66 Accordingly, AWADA recommended the establishment of a standalone role specifically responsible for managing all elements of Australia's response of wrongful detention, including family support.[63] Specifically, it recommended:

> Establish a standalone role for a senior official responsible for wrongful detention. This role should be held by an individual of senior rank who is not subject to diplomatic rotation. The position should be empowered to negotiate a detainee's release and should report directly to the Foreign and Prime Ministers. This individual should act as Australia's representative in all multilateral fora and diplomatic consultations on this issue.[64]

4.67 It argued that the creation of this standalone role would:

- assist in the identification and resolution of individual cases;
- facilitate a more cohesive Australian foreign policy response to wrongful detention more broadly;
- allow Australia to engage more effectively in multilateral efforts with like-minded partners to deter and combat hostage diplomacy on the international stage.[65]

4.68 A number of other submitters supported AWADA's recommendation, or made a similar recommendation to establish a standalone role and office.[66]

4.69 AWADA argued that a standalone role and accompanying office would simplify and speed up case resolution by empowering the official responsible to takes steps to negotiate with the arresting party, particularly during the initial 'window of opportunity' before a detention is formalised via the arresting country's court system.[67] It detailed:

> Investing responsibility for case resolution in one senior official who is not beholden to consular bureaucracy once an individual is designated wrongfully detained, as in the US, would allow for both creative negotiation strategies and more expeditious case resolution. It would also ensure that 'the buck stops' on one person's desk…[68]

4.70 AWADA noted that one key learning from international allies such as the US and Canada was that the official responsible should be both senior in rank and

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63 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 2.

64 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 2.

65 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, pp. 2, 4, 8, 10, 14.

66 See for example: Australian Human Rights Commission, *Submission 40*, p. 2; Capital Punishment Justice Project, *Submission 44*, p. 1; Human Rights Watch, *Submission 15*, [p. 5]; Professor Peter Greste, *Submission 38*, [p. 3]; Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard,* 18 October 2024, p. 19; Dr Sean Turnell, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 24

67 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

68 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, pp. 10–11.

appointed to the position for a significant period of time. It explained that seniority was necessary to empower the official to make 'swift, independent and creative decisions' with immediate access to decision-makers, including the Prime Minister, Minister for Foreign Affairs and heads of Australia's intelligence agencies. It noted that requiring sign-off from a variety of stakeholders within the DFAT consular hierarchy would limit the ability of the official to act expeditiously and creatively. AWADA also argued it was of crucial importance that the position not be beholden to the high staff turnover characteristic of the diplomatic service. While recognising that the regular rotation of staff between diplomatic postings and areas was an understandable and useful feature of DFAT's operations, it emphasised that the regular churn of personnel involved in wrongful detention cases was repeatedly cited as a key challenge by family members, both in Australia and in similar countries such as the UK and Canada.[69]

4.71 AWADA further argued the lack of one individual or office within the Australian Government specifically responsible for wrongful detention had likely 'hamstrung' Australia's participation in multilateral efforts to combat arbitrary detention. It pointed out that DFAT had sent a different official to represent Australia at each multilateral meeting or event organised by Canada since 2021, given that these have been held in various countries and fora.[70]

4.72 AWADA pointed out that the US had recognised this need for seniority and long tenure by granting the Special Envoy the rank of ambassador and having the role report directly to the Secretary of State.[71]

4.73 Canada has also established a standalone model. In November 2023, Canada established a Senior Official for Hostage Affairs (SOHA) whose purpose is to lead concerted consular efforts and enhance Canada's capacity to respond to cases of hostage taking by both state and non-state actors. SOHA responds to a range of complex hostage situations abroad and is supported by existing consular, advocacy and critical incident response tools and resources.[72]

4.74 AWADA argued that if decision-making around freeing wrongful detainees was beholden to sign-off by a variety of stakeholders within the consular hierarchy, in addition to the highest level of political leadership, the chances that the person appointed to this role would be able to act expeditiously and embrace creative solutions are slim.[73]

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69 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

70 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 4.

71 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

72 Government of Canada, *Submission 28*, p. 3.

73 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 11.

4.75 Hostage International expressed support for a senior official and standalone office and nominated SPEHA as a good example of this senior official role. Additionally, it set out suggestions for how to best create the position:

> Appointing a senior official with responsibility and authority to lead on these cases would signal to families that the Australian government is taking the matter seriously and dedicating expert resources to the case. It's important that this official has longevity in the role; a team of experts behind them; direct access to the most senior levels of government; and, importantly, regular and direct contact with the family, which can be alongside the family liaison members of their team. They also need to have the right personality, with an ability to build rapport and show empathy.[74]

4.76 Hostage International highlighted the critical role that a home government played for families with a loved one in wrongful detention:

> During the period of detention, the family and detainee feel powerless. The one entity they need to rely on and want to trust is their home government, but many feel terribly let down; this disappointment lingers for years afterwards.[75]

4.77 To that end, it emphasised that the appointment of a senior official supported by a knowledgeable team that is accountable to families would help to improve the suffering experienced by a detainee's family.[76]

DFAT's views on a standalone office

4.78 As set out in Chapter 3, DFAT informed the committee that while it recognised other approaches, including legislated criteria and permanent envoys, it had assessed that its 'flexible approach' provided the broadest range of options to secure positive outcomes.[77]

4.79 DFAT also stated that given Australia does not often encounter cases of hostage diplomacy, the caseload it dealt with did not warrant the establishment of a permanent office similar to SPEHA.[78]

4.80 DFAT stated that, in its view, Australia did not need a codified response mechanism like the US model to deal with wrongful detention.

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74 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 46.

75 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 46.

76 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 46.

77 Department of Foreign Affairs and Trade, *Submission 20*, p. 3.

78 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 30.

Ms Ganly emphasised that DFAT's current operational model provided sufficient flexibility, as well as sufficient coverage under international law.[79]

4.81 Dr Moore-Gilbert rejected the notion that a change in operational model, such as to a standalone office, would decrease flexibility. She argued:

> Flexibility is too often cover for incoherence and subjectivity. Instituting a senior expert role not subject to diplomatic rotation, which is crucial in my view, to manage cases does not reduce flexibility. They could be provided with a full suite of flexible tools to tackle this phenomenon to be used in accordance with their own discretion and expertise, which is already what's happening in the Complex Cases Committee in DFAT.[80]

Post-release support

4.82 DFAT acknowledged that it could be very challenging for wrongful detainees to reintegrate back into life in Australia upon release. It summarised the support it provided to its 'clients' as follows:

> Upon return, DFAT connects the client directly with Services Australia, which can link them with established domestic service providers. Services available include medical, skin and dental checks, funded sessions with clinical psychologists, debriefs with the department and referrals to relevant support services for assistance with the difficult transition period.[81]

4.83 However, former detainees and their families informed the committee that the support received from DFAT was either inadequate or non-existent. In particular, submitters raised:

- the need for ongoing, specialised psychological support and other assistance to re-enter Australian life for all former detainees, with an onus on DFAT to successfully transfer its duty of care in that regard;
- the need to offer debriefings with DFAT and intelligence agencies to all returned detainees and their families;
- the need for DFAT assistance to address the long-term consequences of criminal records on international travel.

Psychological support and duty of care

4.84 The committee heard that wrongful detainees often experience enormous physical, mental and emotional strain throughout their period of imprisonment, the effects of which continue to greatly impact them even after their release.[82] As Professor Greste summarised:

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79 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 30.

80 Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 15.

81 Department of Foreign Affairs and Trade, *Submission 20*, p. 4.

82 See for example: Dr Kay Danes OAM, *Submission 10*, p. 14;

> Once released, they carry those burdens in a society that has virtually no understanding of what they have been through and therefore no capacity for empathising with their experience. That makes detainees often isolated and traumatised.[83]

4.85 For example, Hostage International highlighted the 'huge suffering' that families and detainees experience as a result of wrongful detention, with psychological, financial and practical repercussions that are significant and long-term.[84]

4.86 The committee received evidence that the level of support provided by DFAT to detainees upon their release was inadequate and often inconsistent in provision, with some individuals receiving no support at all.

4.87 For example, Dr Kylie Moore-Gilbert, released in 2020, received no psychological counselling and only received medical checks two weeks after release on her insistence.[85] She reflected:

> My experience was that I was deposited into Australia and basically told, 'You're free now. Go on your way. Go find your own GP.'[86]

4.88 AWADA commended DFAT for recognising that improvements were necessary and taking steps to integrate the provision of basic medical checks and psychological counselling sessions into the repatriation process. For example, Dr Sean Turnell (released in 2022) and Ms Lei Cheng (released in 2023) were offered four sessions with a DFAT psychologist upon their return to Australia, and had basic check-ups with a general practitioner.[87]

4.89 However, AWADA emphasised that more work was still needed in the space to provide adequate care and support.[88]

4.90 Additionally, AWADA highlighted that given that DFAT did not have a definition of wrongful detention, some repatriated Australians were offered no support at all upon their return to Australia, having not been recognised by DFAT as having been wrongfully detained. It provided the following example:

> AWADA member Luke Cook, for example, was exonerated in Thailand's Supreme Court and cleared of all charges in 2021, having spent several years on death row in the country in prison conditions that amounted to torture. In spite of Luke's being found innocent, and therefore having been

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83 Professor Peter Greste, *Submission 38*, [p. 3.]

84 Ms Lara Symons, Chief Executive Officer, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 46.

85 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 17.

86 Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 18.

87 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 17.

88 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 17.

> wrongfully detained, no support services were offered to him upon his return to Australia. On top of this, Luke faced being thousands of dollars in debt to the Australian government for his repatriation flights home, before the NGO Capital Punishment Justice Project stepped in to foot the bill on his behalf. This is but one example of many.[89]

4.91 AWADA argued that when a former hostage or wrongful detainee is repatriated, the Australian Government has a duty of care to ensure that the individual receives the medical and psychological support necessary to adapt and reintegrate back into society. It noted that discharging this duty was not without structural challenges, given that there was no formal mechanism for transferring this duty of care from DFAT to the relevant state or territory health system once a repatriated detainee landed in Australia. [90]

4.92 AWADA acknowledged that while the provision of four counselling sessions with a DFAT-employed psychologist was welcome, DFAT was quite rightly not in the business of providing medical and psychological care. As a result, AWADA argued there was a need for a mechanism for transferring the duty of care to more appropriate providers (e.g. state or territory health systems or trauma-informed NGOs that provide support services for survivors of torture and other human rights abuses) so that no former detainee fell through the cracks and missed out on medical and psychological support.[91]

4.93 In relation to this transfer of duty of care, Dr Moore-Gilbert emphasised to the committee that while it was not DFAT's role to provide psychological support, there was a role for it to play in referring former detainees to the appropriate services:

> There have been former Australian detainees who have been physically tortured in prison and have injuries as a result of their physical mistreatment. Such people should never be told to just go off on their own and figure it out for themselves. There's a real duty of care there when you bring someone home to ensure they have that specialist mental health and medical treatment available. There's a linkage and a connectivity issue there. It would be relatively easy to solve if agreements were drawn up with some of these specialised torture charities, for example, to provide that care, and DFAT would refer people to those.[92]

Debriefings

4.94 The committee was informed that DFAT did not appear to offer former detainees a post-release debriefing as a matter of course. AWADA stated that

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89 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 17.

90 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 17.

91 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 17.

92 Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 18.

according to testimony it had received from former detainees and their families, debriefings were offered on an ad hoc basis, if at all. For example, Dr Moore-Gilbert and Dr Turnell were not offered the opportunity to debrief about their experiences in prison following their repatriations in 2020 and 2022 respectively. Ms Cheng, repatriated in 2023 was offered a debrief, but other returned detainees reported receiving neither a DFAT debrief nor any meetings with Australian intelligence agencies, and efforts to proactively reach out to these were rebuffed.[93]

4.95 AWADA noted that this contradicted a DFAT response to a 2011 Senate inquiry into the kidnapping of Australian citizens overseas, where DFAT claimed that post-repatriation debriefs were part of its standard practice.[94]

4.96 AWADA emphasised that debriefings were important for two key reasons. Firstly, debriefings could be a valuable source of information for DFAT's internal case management processes, and secondly, they played an important role in the former detainee's recovery.[95] In regard to the latter, AWADA explained:

> ….most detainees are generally unaware of what was happening back in Australia during their detention. DFAT's willingness to answer their questions and help build a picture of why they were detained and what was done to bring them home can give the former detainee crucial context to understand what happened to them, and therefore move on from it.[96]

4.97 AWADA recommended that DFAT offer debriefings to all returned wrongful detainees and their families as part of standard operating procedures.[97] Several other submitters echoed this recommendation. For example, Dr Turnell noted that full and formal debriefings for all repatriated detainees would be very beneficial. [98]

4.98 Professor Greste also urged the Australian Government to be more transparent with former detainees about the process that occurred to achieve their freedom. He noted that in his experience, he found DFAT and ministerial staff to be extraordinarily diligent and professional and that it would therefore be

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93 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 19. See also for example: Dr Kay Danes OAM, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 27; Mr Luke Cook, *Submission 5,* [p. 1].

94 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 19.

95 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 19.

96 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, pp. 19–20.

97 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 2.

98 See for example: Dr Sean Turnell, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 26; Dr Kay Danes OAM, *Submission 21*, p. 5; Australian Human Rights Commission, *Submission 40,* p. 3; Ms Lei Cheng, *Submission 33,* [p. 2].

beneficial for former detainees and their families to gain a greater understanding of what went on behind the scenes to secure their release to help process the experience.[99]

Long-term consequences of criminal records

4.99 Submitters advised of the difficulties with international travel that wrongfully convicted Australian citizens must face, even after they have been released.[100] For example, Professor Greste pointed out that former detainees must declare that criminal record on official documents (such as visa applications) even when the Australian Government does not recognise the validity of the prosecution or conviction, and that this often resulted in visas being denied. He advised that this could have a 'crippling and unnecessary' impact, particularly on those who travel for business, have relatives overseas, or need to travel at short notice. [101]

4.100 DFAT noted that in addition to the difficulties getting visas, there was also the possibility that foreign governments may seek to reinstate charges against former detainees, carrying the potential threat of extradition or further periods of detention.[102]

4.101 Some submitters called for the Australian Government to consider some kind of official letter that could be used to help explain their situation.[103] For example, Professor Greste informed the committee that in 2023, on the fringes of the United Nations General Assembly, the Canadian Government hosted a meeting where they discussed the possibility of some kind of official note that former detainees could carry to assist their travel. The note would acknowledge the existence of a criminal record, explain the context and urge countries to ignore it for the purpose of travel.[104]

4.102 He noted that such a note or letter could be enormously helpful to former detainees in a practical sense, and that furthermore it would send a message to

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99 Professor Peter Greste, *Submission 38*, [p. 4.]

100 See for example: Dr Kay Danes OAM, private capacity, *Proof Committee Hansard*, 26 September 2024, p. 22–25; Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance. *Proof Committee Hansard*, 18 October 2024, p. 20–21; Department of Foreign Affairs and Trade, *Submission 20*, p. 4; Ms Cheng Lei, *Submission 33*, [p. 2].

101 Professor Peter Greste, *Submission 38*, [p. 4.]

102 Department of Foreign Affairs and Trade, *Submission 20*, p. 4.

103 See for example: Ms Lei Cheng, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 44; Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 20.

104 Professor Peter Greste, *Submission 38*, [p. 4.]

offending states that Australia and other like-minded countries did not recognise the validity of the prosecutions.[105] He explained:

> Symbolically, again, I think it is really important for the Australian government to underline that we aren't going to play these games, that we're not going to continue to acknowledge the consequences of these kinds of convictions. Symbolically, it also carries weight and significance.[106]

4.103 DFAT acknowledged the travel-related challenges that former detainees faced and informed the committee that discussions with like-minded partners had indicated it was a shared emerging issue with 'value in co-operating to mitigate this common problem'.[107] It advised that it had assisted former detainees by providing briefings on potential risks and mitigation strategies on planned travel, and had in the past provided notes on a case-by-case basis. However, due to the limitations of a note, DFAT expressed a preference to liaise directly with like-minded foreign governments to proactively manage the issues:

> Rather than give a letter, we have, to assist outreach, gone through our ambassadors in the countries to which these people have been travelling to get the assurance firsthand. We would not have confidence that a letter, necessarily, picked up by an official at the airport would hold the weight that we would want. Therefore we go at a higher level if asked to do so. Also, it is that difficult situation where every country has its relationships and laws, so we have to manage it on an individual country and case basis.[108]

The need for a structured reintegration program

4.104 To address the concerns issues outlined above, AWADA recommended a formal reintegration program for repatriated hostages and wrongful detainees, potentially incorporating the existing skills and expertise of the Australian Defence Force and torture victim NGOs.[109] It noted that the US already operated such a program that took place on a military base. It detailed that the program:

> …offers detainees the ability to reunite with family in private and away from media attention, easing them back into society over a number of days during which the detainee receives comprehensive medical and psychological checks. In accessing this program, American civilians are able

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105 Professor Peter Greste, *Submission 38*, [p. 4.]

106 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 32.

107 Department of Foreign Affairs and Trade, *Submission 20*, p 4.

108 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, pp. 31–32.

109 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 18.

> to take advantage of the considerable expertise and experience of the US Army.[110]

4.105 A number of submitters endorsed AWADA's recommendation or made similar suggestions.[111] For example, Hostage International advocated for DFAT to facilitate more comprehensive post-release care for detainees and their families and draw on the expertise and services of organisations like itself. As Ms Symons detailed:

> … crucially, where post-release care is concerned, a better understanding by DFAT of the needs of former detainees and what NGOs in Australia can offer is required. DFAT's submission mentions referring released detainees to Services Australia but makes no mention of Hostage International, for example, whose services are tailored to the trauma and practical issues specifically faced by hostages and detainees. The fact that DFAT have offered four trauma sessions to more recently released detainees may sound like an improvement, but delivering something half developed in four sessions is by no means enough. They may end up doing more harm than good. Trauma therapy and the broader rehabilitation program need to be consistent and continuous. Ideally, it should be signposted to those better able to deliver it.[112]

4.106 Hostage International provides support internationally, including in Australia, to former detainees and their families, with trained caseworkers and a network of service providers, including psychologists and lawyers.[113]

4.107 In evidence to the committee, DFAT recognised that its provision of post-release support was an 'evolving process' with room for improvement, and that it had been learning from the experiences of former detainees. Ms Ganly stated:

> Previously we brought them [detainees] back and maybe spoke to them, and they moved straight into the domestic situation. I acknowledge that Dr Moore-Gilbert returned at a very difficult time, right in the middle of COVID, and that she has made it clear that her experience with the department was less than ideal. We then moved on to try and give, through DFAT, initially when people come back, four sessions with a psychologist that our departmental psychologist helps identify as being appropriate for the situation the returnee has faced. After that, the detainees move into the domestic services that are provided through their GPs and other systems within Australia. I would say, especially in listening to Dr Turnell and Cheng Lei regarding this, we have not been as clear as we should have been

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110 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 18.

111 See for example: Australian Human Rights Commission, *Submission 40*, [p. 2]; Professor Peter Greste, *Submission 38*, [p. 4]; Capital Punishment Justice Project, *Submission 44*, pp. 3–4;

112 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 47.

113 Ms Lara Symons, Chief Executive, Hostage International, *Proof Committee Hansard*, 18 October 2024, p. 46.

> about the domestic services available. That is something that, from this process, we have already activated so that we can make sure anyone coming back knows what's available through Services Australia, medical teams and all the rest.[114]

4.108 DFAT also informed the committee that it had had discussions with counterparts in the US, Canada and the United Kingdon about the type of post-release support provided to their citizens to see if there were any applicable lessons for the Australian context.[115]

4.109 Ultimately, DFAT acknowledged that there was perhaps a need for a more structured support process:

> For us it's not necessarily a one size fits all, but we can certainly help people, and we have.…We have provided assistance on an ad hoc basis as people reach out to us. But maybe we need a more formalised process—and that's what we're looking at to see what would work and what we could do that would be easy to achieve—and others that we would have to consider on a case-by-case basis.[116]

Learnings from the US – post-release support

4.110 The committee heard that there was value in Australia looking to the US post-release support program as a model to draw lessons from.

4.111 Ambassador Carstens informed the committee that SPEHA provides a program of support to returned detainees and their families for five years after repatriation, paid for by the US Government. He explained:

> If someone comes home from Russia on 1 August, we're still going to spend five years giving them medical treatment, emotional support treatment and psychological treatment out of the US Government, while we're still working with their loved ones to reclaim their life and reintegrate into their family and society as well.[117]

4.112 He noted that SPEHA was continuously looking to improve the post-release program it provided to former detainees and their families, based on feedback from those receiving the support.[118] As an example, he outlined that SPEHA had recently begun ensuring that former detainees and their families were not

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[114] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 28.

[115] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 28.

[116] Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 28.

[117] Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 9.

[118] Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 9.

paying out of pocket to see a psychologist, and that instead appointments were covered by the US Government.[119]

4.113 Ambassador Carstens advised that SPEHA was still exploring the best solution to the long-term travel consequences of a criminal record, and that it currently worked with former detainees to resolve issues as they arose. He mentioned that in looking to solve the travel challenges, the US was engaging with Interpol, the International Criminal Police Organisation:

> We've worked with Interpol to come up with a list of people who might actually, I would say, hit when someone goes to a foreign country. It's our way of shorting the system to say, 'Look, we have about 70 or 80 people, and, if they hit, give us a call, because there's a story behind it and we'd like to give them the benefit of the doubt.' They've been very kind in working with us. We've still test-driving that. We've had a case where someone wants to travel to a country that seems like it could be a dangerous place for that person to travel, but business interests make them want to go, and we're trying to work with that person. You can almost never give someone a 'get out of jail free' card, but you can work with them in ways to ensure that we've gone above and beyond the call of duty to guarantee their safety when they go to a foreign country.[120]

4.114 When asked by the committee what solutions SPEHA implements to assist former detainees with explaining their wrongful criminal records when reintegrating into daily life (for example, when finding employment), Ambassador Carstens stated that the formal letter SPEHA provides went a long way to ensuring that a criminal record did not have adverse impacts. He explained:

> When you go to get a job and someone asks, 'Have you ever been arrested?" you have to answer yes, but, if you have a letter with my signature on the bottom, saying that you were declared by the US Secretary of State to be wrongfully detained, the letter has proven to be pretty powerful.[121]

Committee view and recommendations

4.115 The committee acknowledges the great distress endured by Australian citizens wrongly detained overseas and their families.

4.116 It recognises that although individual officials may do commendable work, at a structural level, DFAT's internal processes are not conducive to ensuring compassionate communication with detainees and their families.

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[119] Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 9.

[120] Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, pp. 9–10.

[121] Ambassador Mr Roger Carstens, Special Presidential Envoy for Hostage Affairs, United States Department of State, *Proof Committee Hansard*, 28 October 2024, p. 9.

4.117 The committee is also mindful that despite the recommendations of a 2011 Senate inquiry into Australia's response to kidnapping and hostage-takings, little appears to have changed in terms of how DFAT handles family engagement and support.

4.118 In light of the evidence received to the inquiry, the committee sees merit in the establishment of standalone special envoy, similar to the SPEHA, that would have responsibility for handling all aspects of wrongful detention cases, including support for detainees and their families both during and after detention.

4.119 Given the circumstances that generally surround a case of wrongful detention, the committee considers it wholly impractical that DFAT is unable to provide families with information on their loved one without first having the detainee sign a privacy waiver form. The committee is of the view that this situation needs to be remedied to ensure that families can ascertain the whereabouts, status and welfare of their loved one as promptly as possible.

4.120 The committee is also disappointed to hear that former wrongfully detained individuals and their families have not received adequate post-release support from DFAT.

4.121 Despite DFAT claiming it provides support, it is clear to the committee that either this is not happening consistently, or at the very least not operating with the effectiveness that DFAT believes. There appears to be a disconnect between what DFAT says it provides and what the former detainee and their family actually receive and experience. The committee is mindful that this could be in part due to the lack of a framework for defining and categorising cases of wrongful detention, a matter discussed extensively earlier in this report.

4.122 The committee is heartened that DFAT appears to acknowledge that there is room for improvement in its post-release support offerings. It strongly suggests that the Australian Government liaise with counterparts in Canada and the US to learn from their formal reintegration programs. The committee also suggests that government officials engage in good faith with AWADA and Hostage International to leverage their organisational expertise and first-hand experience in the space.

Recommendation 7

4.123 The committee recommends that the Australian Government should establish an inter-agency, specialist team led by a Special Envoy for Wrongfully Detained Australians to lead the management of all cases of wrongful or arbitrary detention of Australians.

Recommendation 8

4.124 The committee recommends that the newly created Office of the Special Envoy should be resourced with the expertise (and ability to call on external expertise as required) to improve the Australian Government's ability to provide:

- **Specialised and dedicated case management of each case of wrongful detention, including dedicated family liaison contacts.**
- **Increased support for the families of Australians wrongfully detained during the period of detention.**
- **Coordination with victims, families and their legal representatives in regard to legal assistance.**
- **A greater level of ongoing support for victims of wrongful detention post-release, including medical support and counselling, and assistance navigating legal and administrative issues created by a wrongful conviction.**
- **Ensure there is a proper process for reintegrating and debriefing an Australian released from wrongful detention and providing ongoing advice as required.**

Recommendation 9

4.125 The committee recommends that Australians who have been deemed to be wrongfully detained overseas should be supported by the government with a clear acknowledgement that the person's detention was a wrongful detention, for example, by providing a government issued explanatory letter.

Recommendation 10

4.126 The committee recommends the Australian Government explore options for exempting consular cases from relevant privacy legislation, in order that the Department of Foreign Affairs and Trade is able to legally disclose information to a detainee's family in a prompt manner, even in circumstances when a detainee is unable to physically sign a privacy waiver form.

Recommendation 11

4.127 The committee recommends that the Department of Foreign Affairs and Trade employ specially trained case workers and family liaison officers to engage with detainees and their families. These personnel should be trained in trauma-informed practice and communication and not be subject to diplomatic rotation.

Chapter 5
Australia's broader foreign policy response

5.1 As set out earlier in this report, the issue of arbitrary detention by states for diplomatic leverage – a practice referred to as 'hostage diplomacy' – is an increasingly prevalent global concern. Recent cases brought to the United Nations Working Group on Arbitrary Detention suggest that arbitrary detention for diplomatic leverage has been on an upward trajectory in the last five to ten years.[1]

5.2 As Dr Danielle Gilbert, a member of the Bipartisan Commission on Hostage Taking and Wrongful Detention at the United States Center for Strategic and International Studies, explained:

> Hostage diplomacy occurs when a state deploys its criminal justice system to detain a foreigner and then uses the foreigner for leverage in the pursuit of foreign policy objectives. It is pernicious precisely because it uses the tools of state sovereignty and the pretence of domestic criminal justice to carry out a hostage taking, forcibly detaining and holding someone to get a target government to change their behaviour. Hostage diplomacy is on the rise as countries like China, Iran and Russia hold the citizens of Western democracies for leverage.[2]

5.3 The ability of regimes which undertake this practice to secure outcomes such as prisoner exchanges or other desired results, together with a lack of consequences for doing so, make hostage diplomacy an attractive and powerful strategic lever that is increasingly utilised by states which wilfully ignore international law and use nefarious means to achieve their foreign policy aims and inflame geopolitical tensions.

5.4 Unfortunately, Australia's lack of a robust framework to address wrongful detention leaves it vulnerable to being a target for these states, putting at risk the safety of individual Australian citizens and the national security of the country more broadly.

5.5 Within this context, hostage diplomacy can be understood as a particularly egregious and dangerous form of foreign interference, through which foreign regimes may use the welfare of an Australian citizen in an attempt to constrain the Australian Government from taking actions that it would otherwise take. The evidence brought forward to this inquiry clearly indicates that there are regimes which use these tactics against Western democracies. Australia and

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1 Ms Leigh Toomey, *Submission 1,* p. 3.

2 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 14.

like-minded partners must therefore have strong frameworks and foreign policy responses to mitigate and deter the practice.

5.6 Australia does not have an overarching policy framework in place for identifying, responding to and deterring cases of wrongful detention. As explored in Chapters 3 and 4 of this report, this has a detrimental impact on several facets of Australia's ability to manage and resolve cases and provide adequate support to impacted individuals and their families.

5.7 Evidence to the inquiry also clearly illustrated that Australia requires a stronger and more cohesive foreign policy response to regimes that engage in wrongful detention to signal internationally that is unacceptable for Australian citizens to be used as bargaining chips for diplomatic leverage.

5.8 Submitters raised a number of issues relating to Australia's current foreign policy response, including:

- the role of transparency as a deterrence factor, including the importance of calling out serial offenders such as Iran, Russia and China;
- concerns with the government's apparent reluctance to use existing mechanisms (such as diplomatic relations and sanctions) to impose consequences on regimes that wrongfully detain Australian citizens; and
- the need to recognise hostage diplomacy as a form of foreign interference and respond appropriately.

5.9 This chapter will provide a brief look at some of the principles that should underpin a broader foreign policy response, before examining each of the above matters in turn. It concludes with the committee's views and recommendations.

Principles underpinning a broader policy response

5.10 The committee heard that a coherent foreign policy approach is needed to recognise that wrongful detention is a complex, difficult issue from both a policy and diplomatic perspective—a balancing act requiring a government to protect citizens abroad while concurrently navigating at times high-stakes diplomatic tensions.

5.11 The Australian Wrongful and Arbitrary Detention Alliance (AWADA) highlighted that wrongful detention typically took place in countries which lacked the rule of law and a free and impartial judiciary, many of which are authoritarian regimes, thus adding another layer of complexity to the foreign policy response required.[3]

5.12 Dr John Coyne and Mr Justin Bassi explained the importance of prioritising certain principles, such as the welfare of a detained citizen and the need to hold

[3] Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 7.

offending regimes to account, when considering a foreign policy approach to hostage diplomacy:

> The principles must focus on protecting the welfare of the detained citizen as well as holding to account the authoritarian regime as priorities over the short-term maintenance of tensionless diplomatic relations – Australia and other democracies must actually convince those authoritarian regimes that we can live with and manage tension as a means to protect our citizens lives, our national way of life and international laws. This means doing everything possible to have the detained citizen released as soon as possible but also, where appropriate, using internationally agreed mechanisms to hold nations and those individuals to account.[4]

5.13 However, submitters noted that Australia displayed a reluctance to openly refer to cases of wrongful detention, which apart from causing distress to families, could be unhelpful from a foreign policy perspective. As Dr Coyne and Mr Bassi observed:

> The government's reluctance to openly declare certain cases as wrongful or arbitrary, particularly in instances of hostage diplomacy, can be perceived as prioritising diplomatic relations over the rights and safety of detained citizens. This cautious stance may also undermine international efforts to combat such practices. Australia's muted response could signal a lack of resolve to other nations.[5]

5.14 Australia is not alone among democratic nations in taking an opaque, at times seemingly muddled, foreign policy approach. Evidence suggested that the response from many of the world's democratic governments to wrongful detention by authoritarian regimes is 'often muted'.[6]

5.15 Ms Sarah Teich, a Canadian international human rights lawyer explained:

> Negotiations may happen, but the public is not privy to it; families are not receiving consistent support; and existing pressure levers like targeted sanctions are seldom utilized. For instance, as part of a review of existing targeted sanctions regimes across the U.S., Canada, the U.K., and the E.U., and their use to combat wrongful detentions of journalists, U.K. Barrister Amal Clooney noted that there is an "apparent reticence among some policy-makers to use sanctions in response to cases of arbitrary detention or against judicial officers for such detention or unfair trials".[7]

5.16 When asked why this might be, Ms Teich posited that it could be related to governments being overly cautious in responding to individual cases to avoid further harm to the detainee:

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4 Dr John Coyne and Mr Justin Bassi, *Submission 32*, p. 1.

5 Dr John Coyne and Mr Justin Bassi, *Submission 32*, pp. 9–10.

6 Ms Sarah Teich, *Submission 14*, p. 4.

7 Ms Sarah Teich, *Submission 14*, p. 4.

> My suspicion is that, once you're dealing with a specific case—and, at least in Canada, this tends to be responded to on a case-by-case basis—it becomes highly sensitive to do anything at all that you worry may negatively impact the situation of a hostage or someone wrongly detained abroad.[8]

5.17 She noted that that was why an overarching foreign policy approach was important to guide government actions, as opposed to continually responding on an ad hoc, case-by-case basis. She stated:

> This is where I think it's important—and I'm glad that this committee is doing this—to take a step back and look at, overall, what kind of law and policy we need in general, not in a particular case.[9]

5.18 Dr Gilbert noted that deterrence was a form of coercion, and advised that in designing policy responses to hostage diplomacy, there were two desired outcomes:

- coercing perpetrators to stop taking hostages; and
- preventing other countries from getting into the hostage-taking business.

5.19 She stated:

> The overwhelming body of scholarly evidence suggests that the latter will be easier to accomplish than the former. Accordingly, it will be much easier to design policies to deter other countries from taking Australian citizens hostage than it would be to convince known perpetrators, such as Iran, to stop the practice.[10]

Importance of cohesive approach

5.20 Submitters informed the committee that foreign policy had an important role to play in deterring wrongful detentions and hostage diplomacy specifically. They raised concerns that Australia's foreign policy response was currently inadequate and piecemeal.[11]

5.21 For example, Australians Detained Abroad stated that its main concern was that:

> Australia's foreign policy responses are opaque, ad hoc, and potentially based on prevailing public concerns or interest instead of established principles.[12]

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8 Ms Sarah Teich, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 11.

9 Ms Sarah Teich, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 11.

10 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 14.

11 See for example: Australian United Solidarity for Iran, *Submission 26*, pp. 2–3; Dr Sean Turnell, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 28; Professor Peter Greste, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 30; Australian Wrongful and Arbitrary Detention Alliance, *Submission 35,* p. 4.

12 Australians Detained Abroad, *Submission 17*, p. 2.

5.22 AWADA commented that it did not appear that successive governments had devoted resources to developing standalone policies designed to prevent and deter wrongful detention and hostage diplomacy.[13]

Role of multilateralism

5.23 Submitters also emphasised the importance of international cooperation with like-minded partners to bolster multilateral responses and deterrence efforts.[14]

5.24 Professor Peter Greste, an Australian journalist wrongly detained in Egypt between December 2013 and February 2015, argued that Australia needed to use its foreign policy to work multilaterally to deter and respond to hostage diplomacy in a broader sense. He commented:

> Anybody arbitrarily and unjustly detained is only ever going to be released under one of two circumstances. Either the offending state achieves their aims when Australia bends to their will, or the cost of continuing to hold a detainee becomes higher than their value as a hostage. I believe there's great value in working with like-minded states to defray and limit the impact of arbitrary detentions.[15]

5.25 AWADA submitted that Australia needed to craft broader foreign policy approaches to deter wrongful detention that included both unilateral and multilateral measures.[16]

Transparency as deterrence – the need to call out offenders

5.26 Submitters highlighted to the committee the role of transparency as a deterrence factor, including the importance of calling out serial offenders such as the Islamic Republic of Iran and the People's Republic of China.[17]

5.27 AWADA expressed frustration at Australia's apparent desire to protect diplomatic relations at the expense of calling out offending regimes:

> In spite of the fact that the hostage-taking of innocent Australians by governments seeking leverage over Australia amounts to a direct assault on our bilateral relationship, the Australian government has been reluctant to allow such cases to impact broader diplomatic relations.[18]

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13 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 8.

14 See for example: Dr John Coyne and Mr Justin Bassi, *Submission 32*, pp. 8–8; Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 2; Ms Lei Cheng, *Submission 33*, p. 1.

15 Professor Peter Greste, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 30.

16 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 4.

17 See for example: Ms Laura Harth, Campaign Director, Safeguard Defenders, *Proof Committee Hansard*, 18 October 2024, pp. 47–48; Safeguard Defenders, *Submission 23*, p. 5; Mr Mohammed Munshi, *Submission 24*, pp. 2–3; Dr John Coyne & Mr Justin Bassi, *Submission 32*, p. 6.

18 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 6.

5.28 The committee pondered the question of whether publicly calling out a regime which uses hostage diplomacy was a measure that Western democracies could take to prevent the practice to start with.

5.29 REDRESS recommended that the Australian Government recognise arbitrary detention for diplomatic leverage as state hostage taking and call it out in 'the strongest possible terms' when it occurs. It explained:

> The importance of recognition cannot be overstated. It sends a clear message that such practices are unacceptable and that diplomatic formalities will be not placed above upholding the human rights of state nationals. It also serves to repudiate false accusations against the victims and ensures that hostage cases are dealt with appropriately.[19]

5.30 Related to the topic of publicly calling out regimes, DFAT expressed a reluctance to even use a term such as 'wrongful detention' when navigating the release of a detained Australian, in order to avoid upsetting particular countries. As the following exchange demonstrated, DFAT did not even wish to name countries during evidence to the committee.

> **CHAIR:** What are the countries that you're aware of where, if Australia were to use a term like 'wrongful detention' in relation to one of our citizens that had been detained overseas, it would have a—I think you used the expression 'negative impact'?
>
> **Ms Ganly:** It could impact on our ability to get the access that we are seeking in order to advocate for the detainee.
>
> **CHAIR:** What countries are they?
>
> **Ms Ganly:** I'm concerned that if I start naming some countries they will already be concerned about me using that term.[20]

Iran

5.31 AWADA pointed out that Iran was one of the more prolific state practitioners of wrongful detention and hostage diplomacy, including through targeting Australians. It detailed:

> Four Australian citizens are known to have been wrongfully imprisoned in Iran between 2018-2020, and at least one additional Australian remains behind bars in Iran at the time of writing. The Australian government was compelled to offer a prisoner exchange for three of them, and assisted the fourth to depart Iran under emergency circumstances.[21]

5.32 AWADA stated that given Iran's extensive record of targeting the citizens of a variety of democracies (including America, Canada, the United Kingdom,

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19 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, pp. 1, 5.

20 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 23.

21 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 6. Footnotes omitted.

Japan, New Zealand and European Union states), the scope for multilateral foreign policy responses was considerable.[22]

5.33 Australian United Solidarity for Iran (AUSIRAN) also drew the committee's attention to the pattern of behaviour in Iran's foreign policy, traceable to the 1979 Islamic Revolution and subsequent United States (US) Embassy hostage crisis, where the detention of foreign nationals became a tool for the regime to 'assert its sovereignty and challenge Western influence'. It outlined that over the years this tactic had evolved, with the regime increasingly targeting dual nationals, journalists, and academics under the pretext of countering espionage and foreign interference.[23]

China

5.34 AWADA informed the committee that China was also a known perpetrator of hostage diplomacy, flagging that China's practice of wrongfully detaining Australians should be viewed as part of a broader practice of coercive diplomacy. It observed that China's use of wrongful detention was distinct from the more transactional practice of countries like Iran, in that China rarely made specific demands of Australia in dealmaking to secure the person's release.[24]

5.35 Safeguard Defenders provided context on the judicial and law enforcement issues in China that made it a high-risk offender for instances of wrongful detention and hostage diplomacy. Ms Laura Harth, Campaign Director, outlined:

> I'd like to start by stressing the difficulty in assessing the wrongfulness of any detention in China, as its security and judicial apparatus are completely subservient to the Chinese Communist Party. Under Xi Jinping in particular there is no sector in society that is not deemed a national security interest, including the economy. Furthermore, the CCP does not shy away from detaining individuals and fabricating charges as a means of gaining leverage over other countries, companies and even individuals. This vastly expands the risk for foreign citizens travelling to or working in the PRC.
>
> This legal uncertainty stands in stark contrast to the certainty that any detainee or prisoner in the PRC will be subject to torture or other inhuman and degrading treatment, will stand no chance of having a fair and impartial trial, will see their counsel rights violated and will be at risk of enforced disappearance and the notorious residential surveillance at a designated location.[25]

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22 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 6.

23 Australian United Solidarity for Iran, *Submission 26*, p. 1.

24 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 7.

25 Ms Laura Harth, Campaign Director, Safeguard Defenders, Proof Committee Hansard, 18 October 2024, p. 47.

Russia

5.36 Submitters advised that Russia was also another known practitioner of wrongful detention and hostage diplomacy.[26]

5.37 For example, Dr Kylie Moore-Gilbert from AWADA emphasised that it was well-known that Russia used diplomatic hostages as means to secure demands. She stated:

> There's actually a relatively small number of countries that take diplomatic hostages. We all know who they are. When someone is taken in one of those countries, red lights should be flashing immediately before Australia is even across the details of the case. If it's a repeat perpetrator state such as Russia, Venezuela, China, North Korea or Iran—obviously—that should be a red flag from the very beginning.[27]

5.38 Mr Geoffrey Robertson KC drew the committee's attention to the case of US national Brittney Griner who was detained in Russia in 2022 and eventually used to demand a prisoner swap which forced the US to release an imprisoned Russian arms dealer. He explained:

> There is the famous case, of course, of Brittney Griner, the basketball star, who was arrested quite properly by the Russians for sneaking in cannabis oil. She was then given a horrendously lengthy sentence, at which point you think that someone in the Kremlin envisaged a different fate of Ms Griner than the law provided. Then, of course, it turns out that she's offered up as a popular substitute for Viktor Bout, who killed thousands by his arms deal and is a far more dangerous person to the world and to the United States. But it was the popular support for the basketball star that enabled her to be seen as a hostage who could be swapped for Bout and that is an example of the difficulty. I mean, there was no way America could protest when Griner was first arrested because she was properly arrested. She only became a subject of hostage diplomacy once she had been heavily sentenced some months later.[28]

Australia's sanctions framework

5.39 Sanctions are legal measures designed to achieve specific objectives by restricting a target's interactions with Australia. Sanctions are typically imposed in response to actions which threaten global security or to abuses of human rights, and do not involve the use of armed force. They span prohibition on trade in goods and services, arms embargoes, travel bans and asset freezing. Sanctions

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[26] See for example: Mr Geoffrey Robertson KC, *Submission 31*, p. 2; Dr Danielle Gilbert, *Submission 27*, p. 1; Ms Sarah Teich, *Submission 14*, p. 1.

[27] Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 17.

[28] Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 17.

may be imposed on an individual, entity, country, group or vessel and may take several forms, including:

- **targeted financial sanctions** prohibit designated persons or entities from accessing assets, and others from using their assets;
- **travel bans** prohibit designated persons from entering or transiting through Australia;
- **trade sanctions** prohibit the provision of specified goods or services to specified targets; and
- **commercial activity sanctions** prohibit certain kinds of commercial activities.[29]

5.40 Sanctions are an important foreign policy tool used to achieve a variety of objectives in line with Australia's geopolitical security interests and its broader commitment to global peace and human rights, including:

- **preventing, limiting or ending** the adverse impacts of a situation of international concern;
- **deterring or disrupting** those who may consider future destabilising or otherwise egregious actions; and
- **condemning behaviour and sending a wider message** about Australia's values, principles, norms and what we consider appropriate behaviour or conduct.[30]

5.41 The stronger the existing links between Australia and the person or entity targeted by sanctions, the greater the effect of sanctions. Measuring effectiveness is complex, however, and depends heavily on the objectives and intended impact in each individual sanctions listing. The impact sanctions have is both international and domestic, because foreign individuals, entities and governments are targeted by regulating both activity within Australia and the overseas activity of Australians and Australian entities.

Legislative framework

5.42 Australia applies two kinds of sanctions, each supported by a legislative framework. The two frameworks are complementary and mutually reinforcing.

(1) Sanctions decided by the United Nations Security Council (UNSC) and its sanctions committees. All United Nations (UN) member states must implement UNSC sanctions. Australia does so through the *Charter of the United Nations Act 1945* (COTUNA) and its Regulations.

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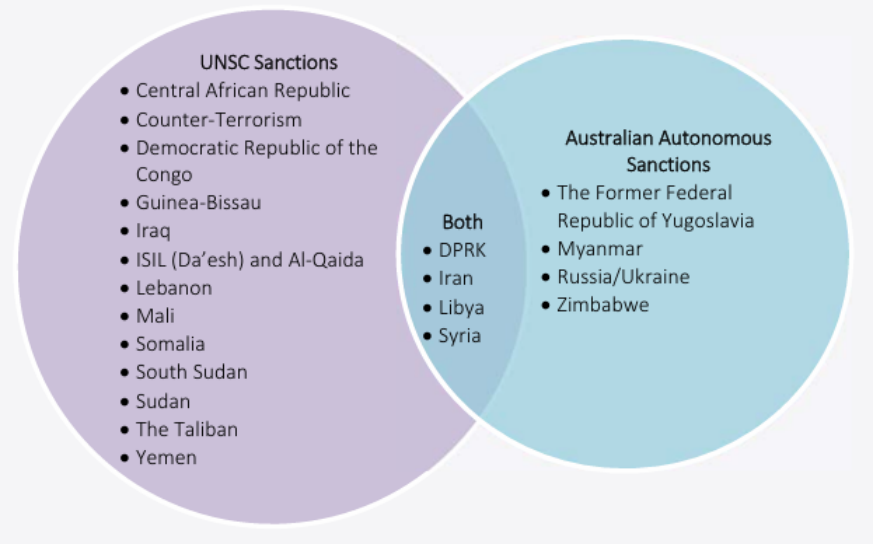
[29] Department of Foreign Affairs and Trade, Senate Foreign Affairs, Defence and Trade References Committee inquiry into Australia's sanctions regime, *Submission 9*, p. 3.

[30] Department of Foreign Affairs and Trade, Senate Foreign Affairs, Defence and Trade References Committee inquiry into Australia's sanctions regime Department of Foreign Affairs and Trade, *Submission 9*, p. 3.

(2) Autonomous sanctions imposed by the Foreign Minister as a matter of Australian foreign policy, a capability established by the *Autonomous Sanctions Act 2011* (AS Act) and its Regulations. Amendments in 2021 allow the Foreign Minister to impose thematic sanctions which are not tied to a specific geographic location.[31]

5.43 In response to a specific situation, the UNSC and/or Australia may impose what is referred to as 'a sanctions regime'. These regimes are usually described with reference to a particular country or groups.[32]

5.44 The diagram below illustrates overlap between the autonomous and UNSC-derived sanctions Australia currently has in place.[33]



5.45 Sanctions relating to corruption and human rights are a category of thematic sanctions allowed under the 2021 amendment to the AS Act and referred to as 'Magnitsky' sanctions.[34]

5.46 Magnitsky-style sanctions were the sanctions referred to most often in submissions to this inquiry.

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31 Department of Foreign Affairs and Trade, Senate Foreign Affairs, Defence and Trade References Committee inquiry into Australia's sanctions regime Department of Foreign Affairs and Trade Department of Foreign Affairs and Trade, *Submission 9*, p. 3.

32 Department of Foreign Affairs and Trade, Senate Foreign Affairs, Defence and Trade References Committee inquiry into Australia's sanctions regime Department of Foreign Affairs and Trade Department of Foreign Affairs and Trade, *Submission 9*, p. 3.

33 Department of Foreign Affairs and Trade, *Sanctions regimes* (accessed 12 November 2024).

34 Department of Foreign Affairs and Trade, *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021* 21 December 2021 (accessed 18 November 2024).

Calls for sanctions

5.47 Submitters made a strong case for utilising Australia's existing sanctions regime as a basis for a foreign policy approach that clearly articulated the consequences for wrongfully detaining Australian citizens and acted as a deterrent to hostage diplomacy.

5.48 A considerable number of submissions to the inquiry pointed out that Australia's existing sanctions laws offer a powerful, yet underutilised, framework and tool for both deterrence and response. Submitters raised concerns that Australia displayed a reluctance to use sanctions to respond to wrongful detention and called for this to change.[35]

5.49 Dr Gilbert emphasised that effective deterrence policies needed to rely on punishments such a sanctions that 'promised such severe consequences for hostage taking that no rational actor would take hostages in the first place'. She explained:

> Deterrence might include sanctions, extradition, prosecution and other processes in line with international law. Such punishment strategies would be dramatically strengthened through coordination among like-minded targets, particularly Canada, the United Kingdom and the United States.[36]

5.50 AWADA characterised Magnitsky-style sanctions as 'legislative and policy levers which are already in place' that could be imposed on foreign officials and other individuals behind attempts at hostage diplomacy using Australian citizens. [37]

5.51 It highlighted that to date the Australian Government had not sanctioned any individuals in any country specifically for the wrongful detention or state hostage-taking of Australian citizens. [38]

5.52 AWADA argued that the imposition of Magnitsky-style sanctions on officials and entities would be an important 'first step' in establishing deterrence against hostage diplomacy. It made clear that Australia should be willing to employ its sanctions regime and 'other creative foreign policy levers' in direct and explicit

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35 See for example: Mr Robert Pether, *Submission 6*, p. 2; Mr Daren Nair, *Submission 18*, p. 2; Mr Luke Cook, *Submission 5,* [p. 2]; Ms Lamisse Hamouda, *Submission 13,* [p. 3]; Ms Sarah Teich, *Submission 14,* [p. 6]; Human Rights Watch, *Submission 15,* [p. 5]; REDRESS, *Submission 19,* p. 8; Australian National University Law Reform and Social Justice Hub, *Submission 21,* p. 3; Australian United Solidarity for Iran, *Submission 26,* p. 2; Dr Danielle Gilbert, *Submission 27,* p.4; Dr Sean Turnell, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 28; Ms Leigh Toomey, private capacity, *Proof Committee Hansard,* 18 October 2024, pp. 38–39; Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 2.

36 Dr Danielle Gilbert, private capacity, *Proof Committee Hansard*, 28 October 2024, p. 14.

37 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 5.

38 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 5.

response to states wrongfully detaining Australian citizens and engaging in hostage diplomacy.[39]

5.53 REDRESS, a non-government organisation that pursues legal claims on behalf of survivors of torture worldwide, submitted that Magnitsky-style sanctions were a critical mechanism within a government's foreign policy toolkit. It explained that the sanctions had the potential to:

(a) Identify specific individuals or entities which should be held accountable for specific actions – making it more difficult to ignore involvement in conduct contrary to international law.
(b) Be reinforced by other governments who have similar targeted sanctions legislation, demonstrating a collective condemnation of the act which the designation seeks to address.
(c) Be visible to external stakeholders, therefore increasing public scrutiny of the designee's actions.
(d) Increase national and international public attention to the conduct allegedly perpetrated by the designated person.
(e) Provide a deterrent and trigger behavioural change in the perpetrator.
(f) Provide a measure of accountability by keeping perpetrators and their ill-gotten wealth out of key financial markets.[40]

5.54 REDRESS noted that while sanctions alone could not ensure full accountability, when coupled with other tools and collective international action, their impact could be enhanced. It further noted that for survivors of human rights violations (such as individuals subjected to wrongful detention), the knowledge that their suffering was recognised by the sanctioning government could provide 'relief and hope for justice'.[41]

5.55 Dr Coyne and Mr Bassi called for targeted sanctions to be deployed to exert pressure and punish those responsible for wrongful detention of Australian citizens, but added the caveat that sanctions may have 'limited practical impact' if not supported by a broader international coalition.[42]

Case study – Iran

5.56 The committee received evidence calling for the imposition of sanctions on Iran, given it was a frequent perpetrator of hostage diplomacy.

5.57 For example, AUSIRAN recommended that Australia should consider implementing targeted sanctions against high-ranking officials and entities

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39 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, pp. 5–6.

40 REDRESS, *Submission 19*, pp. 7–8.

41 REDRESS, *Submission 19*, pp. 7–8.

42 Dr John Coyne and Mr Justin Bassi, *Submission 32*, pp. 8–9.

within the Islamic Republic of Iran and Islamic Revolutionary Guard Corps responsible for orchestrating and facilitating wrongful detentions. It detailed:

> These sanctions could include asset freezes, travel bans, and restrictions on financial transactions. By targeting individuals and organisations directly involved in these practices, Australia can send a strong message that such actions will have direct and personal consequences for those responsible.[43]

5.58 REDRESS provided commentary on the impact of sanctions on hostile states such as Iran. It stated:

> …evidence shows that sanctions have a powerful public accountability impact through the identification of the alleged perpetrators and acknowledgment by the international community of abuses committed by the Iranian regime.[44]

5.59 AWADA and REDRESS both advised the committee that they had already formally lodged material with Department of Foreign Affairs and Trade and the Minister for Foreign Affairs recommending Magnitsky-style sanctions be imposed on particular individuals directly implicated in Iran's hostage diplomacy activities

5.60 REDRESS outlined the information it had provided to the Australian Government:

> More recently, in collaboration with survivors of state hostage taking in Iran, REDRESS has submitted two dossiers to sanctions authorities in the UK, US, EU, Canada and Australia, asking them to impose Magnitsky sanctions on 20 Iranian officials involved in Iran's hostage-taking practices. The submissions are based on testimony from victims, including former hostages and the families of current hostages, and expose the deliberate, systemic and escalating nature of Iran's hostage-taking practices, amounting to torture and other violations of international law.[45]

5.61 AWADA provided further information on the provision of material:

> The UK-based NGO REDRESS submitted a report, based on comprehensive research with victim-survivors of Iranian hostage diplomacy, to the Foreign Minister's office and DFAT in December 2022 recommending Magnitsky sanctions on an initial tranche of 10 individuals directly implicated in Iran's hostage-taking business model. Kylie Moore-Gilbert has also submitted a list of known Iranian officials who played a direct role in her wrongful detention to the offices of former Foreign Minister Marise Payne and current Foreign Minister Penny Wong, requesting that sanctions be considered.[46]

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43 Australian United Solidarity for Iran, *Submission 26*, p. 7. See also Dr Rana Dadpour, Director, Australian United Solidarity for Iran, *Proof Committee Hansard*, 26 September 2024, p. 30.

44 REDRESS, *Submission 19*, pp. 7–8.

45 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 1.

46 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 5.

5.62 The Iranian individuals implicated ranged from low, mid to high-ranking officials and a judge, and had been identified based on an extensive evidence-gathering exercise. However, despite being in receipt of the information and the strength of the evidence, the committee was informed that the Australian Government had not even responded or engaged in any follow-up, let alone imposed any sanctions.[47]

5.63 REDRESS advised that all it had received from the Government was an automated response to an email. It outlined:

> We received an automated response. I also know that Kylie Moore-Gilbert has previously advocated for the imposition of sanctions in response to a file where we've not had any further engagement. And those are two very detailed dossiers. We are talking about 90 pages for one and 70 pages for the other. Each identifies 10 individuals, which makes it 20 individuals in total.[48]

5.64 REDRESS expressed frustration that the Australian Government had not moved to impose any sanctions, given 'that they are sitting on the evidence that we have provided'.[49]

5.65 It stated:

> We submitted both files to the Australian government, and we didn't receive any response or follow-up engagement, despite some of the evidence being contributed by Australian victims of hostage taking. This level of engagement not only has been extraordinarily frustrating but also undermines accountability processes. From the perspective of victims, it has compounded feelings of powerlessness and helplessness, as it shows a complete lack of interest. Two sanctions were imposed last year against two media officials by the Australian Government. In a welcome development, those designations did refer to their involvement in harassing dual nationals and being involved in the broadcasting of forced confessions. But we would like to see much more action, given that they are sitting on the evidence that we have provided.[50]

5.66 Dr Moore-Gilbert, who was wrongly detained for two years and three months in Iran between 2018 and 2020, also expressed her disappointment that the Government had not engaged with her or REDRESS on their recommendations for Magnitsky-style sanctions. She reiterated that Australia had not sanctioned anybody for the hostage-taking of Australian citizens, pointing out that the Iranian judge who had sentenced her to a 10 year prison sentence had also targeted other Australian citizens. She detailed:

> Geoffrey Robertson made the very powerful case earlier for Abolqasem Salavati, the IRGC [Islamic Revolutionary Guard Corp] judge who

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47 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 4.

48 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 4.

49 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 4.

50 Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 4.

> sentenced me—but not just me. At least three or four other Australians have been sentenced wrongfully by this judge, including Jolie King and Mark Firkin, the two backpackers; Meimanat Hosseini Chavoshi, the ANU [Australian National University] researcher; and an Australian citizen who was convicted only a few months ago by that same judge in Iran and is in prison today as we speak. This guy has been targeting Australian citizens relentlessly, yet we don't even sanction him, unlike our allies and partners abroad. [51]

5.67 Mr Robertson expressed frustration with the Australian Government's reluctance to impose sanctions. He posited that this reluctance was perhaps to avoid upsetting particular regimes, or perhaps due to DFAT's wilful blindness to the effectiveness of sanctions as a tool of justice and human rights.[52]

5.68 He provided commentary on the effectiveness of sanctioning judges:

> If you look at the background to the Magnitsky laws, and I have written a book about them, you will see that they come about because there are certain officials who are hand-in-glove or are part of an oppressive state who have been the direct perpetrators of, in this case, wrongful imprisonment. Now, judges were the first to be sanctioned in the original 2012 Magnitsky laws that came to pass in America, because judges and prosecutors do the work. They do the dirty work of the state against their own ethics in cases where they are bound to be independent and are meant to be objective, and they're also, of course, quite wealthy. They go abroad, they want to send their families abroad to study at other universities, so they're good targets. They are worried by incurring Magnitsky sanctions yet they don't get sanctioned.[53]

5.69 Mr Robertson drew the committee's attention to Judge Abolqasem Salavati, the Iranian judge who wrongly sentenced Dr Moore-Gilbert and other arbitrarily detained Australians. He argued that this judge would be the ideal candidate for the Australian Government to sanction, and yet despite the evidence of his direct implication in hostage diplomacy, this had not happened. He explained:

> I use the example of the judge, Judge Salavati…who passes all the death sentences in Tehran. He was the monster who found Kylie Moore-Gilbert, who was palpably innocent, guilty and jailed her for 10 years. He jailed a couple of obviously innocent Australian backpackers. So he'd be the first to be sanctioned if DFAT had any real understanding of what Magnitsky laws are about. But they quite openly—brazenly, in my view—say, 'Oh, they're merely a tool of our foreign policy.' They're not a tool of justice, and of human rights, which they should be and which they've always been busy as being. So in answer to your question, I do think there is that danger if they

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51 Dr Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, p. 15.

52 Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 5.

53 Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 5.

> are seen as a tool of foreign policy, merely that they cease to be a tool of justice.[54]

Hostage diplomacy as a form of foreign interference

5.70 The committee explored with submitters the question of whether hostage diplomacy could be categorised as a form of foreign interference. Submitters argued that given the foreign policy implications, it should be understood as such.[55]

5.71 For example, in response to the committee's direct question of whether hostage diplomacy amounted to foreign interference, Mr Robertson agreed emphatically that it did. He stated:

> Very much so. I believe it's a crime against humanity, and it breaches all sorts of rules of the Vienna convention and conventions we have about diplomatic behaviour. It's wrong to call it diplomatic hostage taking. It's got nothing to do with diplomacy as properly defined.[56]

5.72 In response to the same question, Dr Moore-Gilbert also strongly argued that hostage diplomacy constituted foreign interference. She responded:

> Yes, it's pretty obvious that it is. We're seeing an increase in foreign interference and transnational repression throughout the Western world. … It's a very insidious, grey area form of foreign interference, but it absolutely is and it works. …. There are no attempts to punish these malign actors who are repeatedly targeting Australia. It is a form of foreign interference.[57]

5.73 Dr Moore-Gilbert also made clear that the Australian Government not acknowledging this and responding to the phenomenon as such only risked increasing cases and encouraging more overt forms of foreign interference. She explained:

> Us not sending that signal that we're not going to stand for it and that we're going to pay that price again and again and essentially capitulate again and again, in my view is actually encouraging it to happen further. That might spill over into more overt forms of foreign interference, too. In not tackling foreign interference broadly as a phenomenon, it probably will lead to more

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54 Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, p. 5.

55 See for example: Ms Natalia Kubesch, Legal Officer, REDRESS, *Proof Committee Hansard*, 18 October 2024, p. 9; Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard,* 28 October 2024, p. 24; Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard,* 18 October 2024, p. 9.

56 Mr Geoffrey Robertson KC, private capacity, *Proof Committee Hansard*, 18 October 2024, pp. 2, 9.

57 Ms Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, pp. 17–18.

> hostage taking as well as one tool in the toolkit of such malign actors' behaviour.[58]

5.74 AWADA reiterated in its written submission that hostage diplomacy is a 'very effective' means of shaping or curtailing Australian's foreign policy. It explained:

> These cases highlight that there are real and significant foreign policy ramifications when countries wrongfully detain Australian citizens for diplomatic leverage. Ramifications which extend well beyond the devastating impact such detentions have on the lives of the individuals involved and their families. Hostage diplomacy is a very effective means of shaping, or curtailing, Australia's foreign policy in ways which might be entirely unrelated to the relatively niche issue of the imprisonment of individual Australian citizens.[59]

Government views

5.75 The Department of Home Affairs (Home Affairs) took a more conservative view on the matter. It gave the opinion that hostage diplomacy could be a form of foreign interference if the legislated definition was met; although it noted that decisions on whether an act met the thresholds of foreign interference would 'more naturally sit' in the Attorney General's Department.[60] Mr David Chick, Acting First Assistant Secretary for Counter Foreign Interference Coordination Centre (CFICC) within the department, stated that he was not aware of particular cases where the threshold for foreign interference had been met. [61]

5.76 Home Affairs provided an explanation of foreign interference, noting that the legislated definition did 'not normally extend' to the wrongful detention of Australians abroad except in particular circumstances:

> Foreign interference occurs when a foreign government attempts to harm Australia to advance their strategic, political, military, social or economic goals. Foreign interference includes conduct by or on behalf of a foreign government that is covert, deceptive or threatening and is intended to do one of the following things: to influence a political or government process, influence the exercise of an individual's political rights, support foreign intelligence activities or prejudice Australia's national security. The legislated definition of 'foreign interference' would not normally extend to the arbitrary detention of Australian citizens overseas unless the intent of

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58 Ms Kylie Moore-Gilbert, Director, Australian Wrongful and Arbitrary Detention Alliance, *Proof Committee Hansard*, 18 October 2024, pp. 17–18.

59 Australian Wrongful and Arbitrary Detention Alliance, *Submission 35*, p. 7.

60 Mr David Chick, Acting First Assistant Secretary, Counter Foreign Interference Coordination Centre, National Security and Resilience Group, Department of Home Affairs, *Proof Committee Hansard*, 28 October 2024, p. 19.

61 Mr David Chick, Acting First Assistant Secretary, Counter Foreign Interference Coordination Centre, National Security and Resilience Group, Department of Home Affairs, *Proof Committee Hansard*, 28 October 2024, p. 18.

> the detention was to limit the exercise of an individual's rights in Australia or influence a political or government process.[62]

5.77 Evidence to the committee appeared to indicate that the CFICC did not have any engagement in the management of policy or operational responses to instances of wrongful detention. For example, Mr Chick confirmed that Home Affairs had 'no leadership role' in developing or managing Australia's framework to deter and respond to cases of wrongful detention, advising that it would take advice from DFAT on such matters. He also confirmed that the CFICC had not been involved in any cases of wrongful detention. Mr Chick additionally confirmed that Home Affairs had not provided advice to the government on the practice of foreign regimes using hostage diplomacy to pressure, or attempt to pressure, Australia into a particular policy or diplomatic stance.[63]

5.78 DFAT told the committee that if when managing the case of a wrongly detained Australian it encountered any behaviour from the detaining government that 'clearly stepped over any line', it would engage with Home Affairs and the Attorney-General's Department.[64]

5.79 The committee questioned DFAT in an attempt to gain clarity on how DFAT would deal with a foreign government making a demand in exchange for the release of a detained Australian — that is, in a situation of hostage diplomacy. Ms Ganly advised that she was aware of cases where DFAT had undertaken negotiations, rather than dealt with demands.[65]

5.80 The committee asked DFAT whether there had been any 'clear-cut' examples of a foreign government detaining an Australian citizen and seeking a particular policy outcome or position from our government as a condition of release. In particular, the committee referenced the case of Mr Michael Kovrig, a former Canadian diplomat who was arbitrarily detained in China for over 1000 days, where the Chinese Government made a very explicit demand in exchange for his release – an act internationally recognised as hostage diplomacy. DFAT advised that Australia had not had any 'similar situations' to Mr Kovrig's case.[66]

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62 Mr David Chick, Acting First Assistant Secretary, Counter Foreign Interference Coordination Centre, National Security and Resilience Group, Department of Home Affairs, *Proof Committee Hansard*, 28 October 2024, p. 18.

63 Mr David Chick, Acting First Assistant Secretary, Counter Foreign Interference Coordination Centre, National Security and Resilience Group, Department of Home Affairs, *Proof Committee Hansard*, 28 October 2024, p. 19.

64 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, p. 24.

65 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, pp. 24–25.

66 Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division, Department of Foreign Affairs and Trade, *Proof Committee Hansard*, 28 October 2024, pp. 24–25.

Committee view and recommendations

5.81 The committee is of the view that hostage diplomacy constitutes a form of foreign interference. It considers that hostage diplomacy must be understood as a global trend of coercive diplomacy and foreign interference which warrants a broader foreign policy response, not just dealt with on an ad-hoc, individual case-by-case basis.

5.82 The committee heard from numerous witnesses that the wrongful detention of a citizen by a foreign regime which then seeks to make demands or apply pressure to the Australian Government regarding a government decision or action should be considered a form of foreign interference.

5.83 Evidence from the Department of Home Affairs specified that foreign interference includes conduct that is threatening, and is intended to influence a government process or prejudice Australia's national security, and that the wrongful detention of an Australian can therefore meet the legislated definition.

5.84 However, the committee is of the view that, considering the clear evidence that there are a number of foreign regimes which do undertake hostage diplomacy specifically for the purpose of obtaining leverage over another government, it is not sufficient for the Australian Government to consider foreign interference only in the context of whether a foreign interference offence can be made out in relation to a particular case.

5.85 The committee notes DFAT's apparent assertion that there have been no instances of foreign governments taking an Australian citizen and seeking a particular policy outcome or position for their release. In contrast, the committee notes the strong evidence presented to the inquiry by a range of witnesses that the practice is increasingly common, and that there are indications that Australians have been wrongfully detained for diplomatic leverage. The committee is disappointed in the vague nature of DFAT's evidence on this and similar matters throughout the inquiry. However, the committee acknowledges that this may be reflective of the fact that Australia does not have a clear framework and a formal definition and categorisation process for identifying cases of wrongful detention.

5.86 The committee strongly believes that a foreign regime seeking a certain outcome from the Australian Government in exchange for the release of a wrongly detained individual is a very serious matter. Regardless of whether the requested outcome is couched in terms of a negotiation or demand, and regardless of whether such behaviour by a foreign regime or official is likely to be able to be prosecuted as a foreign interference offence, such behaviour is cause for great concern and should be flagged by the responsible agencies and met with a whole of government response.

5.87 As such, the committee would like to see greater awareness, strategic thinking and coordination by DFAT, the Department of Home Affairs and intelligence

agencies to address hostage diplomacy as a form of foreign interference. This, in addition to the recommendations in chapters 3 and 4, will allow Australia to create a comprehensive policy framework to combat hostage diplomacy and the threats it poses.

5.88 To the committee's mind it is unacceptable that some states should try to use the wrongful detention of Australian citizens for diplomatic leverage. Australia must utilise both unilateral and multilateral responses to combat this reprehensible practice which threatens individual citizens, Australia's national security, and the stability of the global order at large.

5.89 The act of taking an Australian hostage to secure diplomatic leverage, or seeking to secure a strategic or policy outcome by leveraging the welfare of a wrongfully detained Australian, should be regarded by the Australian Government as an egregious breach of a diplomatic relationship and responded to accordingly.

5.90 The committee considers that Australia needs to formulate a cohesive foreign policy response to more effectively deter and punish those states that engage in hostage diplomacy through the wrongful detention of Australian citizens.

5.91 The committee is disappointed that the Australian Government appears reluctant to use Magnitsky-style sanctions to punish perpetrators of hostage diplomacy, particularly given the policy levers are already in place for this mechanism.

5.92 Additionally, the committee is dismayed to hear that despite being presented with reputable evidence from REDRESS and Dr Kylie Moore-Gilbert naming 20 Iranian officials with direct responsibility for the wrongful detention of Australian citizens, the Australian Government has not even acknowledged these requests and evidence, let alone taken action and imposed sanctions.

5.93 Australia must not be afraid to call out and punish cases of hostage diplomacy, particularly those perpetrated by known, serial offenders such as Iran, China and Russia. The Australian Government must not prioritise the public appearance of constructive diplomatic relations at the expense of strong action that protects Australian citizens and holds offending regimes to account. The committee is of the view that the Government must not stand for these countries using Australian citizens as bargaining chips.

5.94 Australia has recognised that wrongful detention is an issue that requires an international response, having endorsed the Canadian-led Declaration Against Arbitrary Detention in State-to-State relations. However, the committee considers that the Australian Government must take a stronger position in its efforts to deter and respond to wrongful detention. A symbolic stance is not enough and must be backed by concrete actions.

Recommendation 12

5.95 The committee recommends that the Australian Government recognise the deterrence of wrongful detention of Australians as a top priority of Australian foreign policy. The government should utilise all the tools available to it to increase this deterrence.

Recommendation 13

5.96 The committee recommends that the relevant agencies of Australia's counter-foreign interference framework acknowledge hostage diplomacy as a serious and egregious form of foreign interference and work closely with the Special Envoy on Wrongfully Detained Australians to counter this foreign interference threat.

Recommendation 14

5.97 The committee recommends that where regimes are known to engage in wrongful detention for diplomatic leverage or to secure prisoner exchanges, such as Russia and the Islamic Republic of Iran, the Australian Government should make clear to those regimes that they should expect severe diplomatic consequences and sanctions in response to this behaviour.

Recommendation 15

5.98 The committee recommends that the Australian Government should sanction senior officials responsible for the wrongful detention of Australians, including judges responsible for allowing or authorising wrongful detention and imprisonment.

Recommendation 16

5.99 The committee recommends that where a foreign regime is currently wrongfully or arbitrarily detaining an Australian, the Australian Government should exercise restraint in its public engagements with representatives of that regime.

Recommendation 17

5.100 The committee recommends that the current Department of Foreign Affairs and Trade travel advice that Australian travellers to the People's Republic of China, Afghanistan, North Korea, the Islamic Republic of Iran, Mali, Myanmar and Russia are at increased risk of arbitrary detention should be reflected in Australia's bilateral approach to engagement with those countries.

Recommendation 18

5.101 The committee recommends that the Australian Government should increase transparency and utilise public attribution wherever possible as a deterrent to regimes which seek to wrongfully detain Australians.

Senator Claire Chandler
Chair
Liberal Senator for Tasmania

Additional comments from Australian Labor Party senators

1.1 Labor senators are grateful for the opportunity this inquiry has provided to closely examine the issue of wrongful detention of Australians overseas and the scourge of arbitrary detention for diplomatic leverage.

1.2 We are also grateful to those who made submissions and gave evidence to this inquiry, which has broadened public understanding of the practice, the challenges faced by victims, families and governments, and the tools available to respond.

1.3 As with all members of the Committee, we acknowledge how individuals wrongfully detained often face terrifying, isolating, and inhumane treatment at the hands of their captors and the frustration and hopelessness they must feel when not able to achieve a measure of fairness nor justice.

1.4 Labor senators join the Committee in acknowledging the contributions of these individuals and family members in sharing their insights, which would have been distressing to relive.

1.5 Labor senators also acknowledge the tremendous burden faced by the family and loved ones of those wrongfully detained and the difficulties they face during the often lengthy periods of incarceration, which this report importantly details.

1.6 We recognise the significant diplomatic, legal and humanitarian challenges that all governments face when responding to instances of wrongful detention.

1.7 We commend the work of the Department of Foreign Affairs and Trade (DFAT), as well as other Australian Government agencies, in responding to these cases, which has resulted in the return of a number of Australians detained in complex circumstances overseas, particularly in recent years. We recognise this work was highlighted in some submissions.

1.8 We note DFAT's willingness to refine its capabilities in recent years, including as a result of engagement with former detainees and other stakeholders.

1.9 Labor senators acknowledge the high priority the Australian Government places on supporting Australians and their families in cases of wrongful or arbitrary detention and the clear focus they have on resolving the case and ensuring the detainee's welfare.

1.10 We also acknowledge, alongside other members of the Committee, the importance of international multilateral efforts to deter the unacceptable practice of arbitrary detention for diplomatic leverage and Australia's participation in these efforts.

1.11 We expect that there will be much from this inquiry that can be drawn from to further improve the Government's capabilities to support Australians wrongfully detained overseas and their family and loved ones at home.

1.12 While Labor senators appreciate many of the ideas and proposals put forward in the report, we do not accept the wholesale assessment that the 'current system is not working' and that, as a consequence, a structural overhaul is required. We would welcome further information as to the evidence for such a wholesale assessment and therefore have questions about the recommendations which flow from it.

1.13 We note the Albanese Government has reviewed its approach to supporting Australians detained in complex circumstances overseas. The improvements made followed consultation with partners, stakeholders and former detainees to ensure the Government's methods are fit for purpose. In particular, we welcome the return home of Cheng Lei, Sean Turnell, Chau Van Kham, Ken Elliott, Julian Assange and others not publicly known.

1.14 We are concerned that the report does not adequately account for the context in which the Australian Government operates, including the scale of the problem, the ability that current arrangements allow for the Government to flexibly deploy resources at its disposal, and the motivations of those responsible for detaining Australians, when comparing to systems and approaches in other countries which face distinct circumstances. For example, many recommendations seek to emulate arrangements that exist in the United States of America (US) despite the fact that the challenges the US faces are structurally different to those of Australia, particularly with respect to the nature and volume of cases it deals with.

1.15 We are also concerned that the recommendations do not adequately account for the Government's primary focus in these situations – the welfare of the Australian wrongfully detained overseas. If actioned, it is likely that some of the recommendations of the report may have unintended or negative consequences for those wrongfully detained and may also reduce the capacity of the Government to respond effectively.

1.16 There is little recognition in the report of DFAT's commitment to assisting Australians wrongfully detained overseas, the success of its approach in recent years, and the tools at its disposal which have been enhanced and deployed to good effect. Labor senators note the recognition in submissions of improvements in the Government's approach in recent years, which are not reflected in the report.

1.17 Labor senators further note that some of the report's recommendations suggest changes which are already in place. In one case, the report recommends exploring privacy exemptions in certain instances, a policy option already exists.

1.18 Other recommendations fail to clearly articulate their purpose. For example, one recommendation is for the Australian Government to legislate changes but it is not immediately clear what that legislation should seek to achieve or that many of the tools and powers already exist.

1.19 Nonetheless, Labor senators acknowledge that there will always be more that can be done to improve the way those who are wrongfully detained, as well as their families and loved ones, are supported throughout their ordeal, and following its conclusion. We support DFAT's continued engagement with former detainees to this end and look forward to future improvements and initiatives.

1.20 Once again, Labor senators thank those who have contributed to the Committee's inquiry.

Senator Raff Ciccone
Deputy Chair

Additional comments from the Australian Greens

1.1 The Australian Greens thank all the community members and organisations who have made submissions to the Foreign Affairs, Defence and Trade committee during this inquiry. We also thank the secretariat for their hard work during this inquiry.

1.2 This inquiry came about because of the tireless work of so many advocates and organisations, particularly the Australian Arbitrary and Wrongful Detention Alliance, who have turned their own traumatic cases of wrongful detention into a campaign for positive change in Australia's response to these cases.

1.3 There have been several high-profile cases of Australians wrongfully detained overseas in recent years, bringing the issue into the national spotlight. The Greens have pressured the government to take decisive action, and have pushed for change in the government process of responding to these.

1.4 This inquiry has publicised many of the issues that we have been made aware of in the last years, and have made a number of recommendations that align with Greens policy.

1.5 Firstly, the lack of a working definition for arbitrary and/or wrongful detention has resulted in failures of the government to get Australians home in a timely and minimally traumatic manner. In the past, it has taken months or even years for the government to classify people as being subject to arbitrary or wrongful detention and in some cases it never occurred, and people have either returned home or remained in indefinite detention overseas with no acknowledgement from their government that it is an unjust and potentially dangerous situation. The Greens welcome the Committee's recommendation for the government to adopt a clear, publicly available definition of wrongful detention and to implement a framework for applying this definition.

1.6 Secondly, there is a lack of clear leadership responsibility in the Australian Government's approach to wrongful and arbitrary detention that results in uncoordinated action across government. The Committee heard that there are many different aspects to securing the freedom of an arbitrarily detained person, from multilateral action to supporting the family. Appointing a Special Envoy to lead government action in this area, supported by staff who aren't subject to diplomatic rotation, would ensure coordinated, focused action by Australia. The Greens welcome the Committee's recommendation to establish the position of a Special Envoy.

1.7 Thirdly, providing support to families of victims of wrongful detention as well as providing aftercare support to the victims once they are home is a critical part of the response. During the inquiry, we heard from many formerly wrongfully detained people that their loved ones back home often had very little

communication from DFAT about the situation, and were not adequately supported to assist in the campaign for release. Additionally, we heard that there was very little care, whether it be medical, psychological, or other, provided by the government after release. The experience of being wrongfully imprisoned overseas is incredibly traumatic, and the government should be providing mental health and other support in recognition of this fact. The Greens welcome the inclusion of ongoing support and reintegration in the role of the Special Envoy recommended by the Committee.

1.8 Finally, there is a role for effective application of sanctions in dealing with cases of wrongful detention. Practicing hostage diplomacy is a violation of international law and should be treated as such. The Greens welcome the Committee's recommendation for the government to apply sanctions in response to deliberate wrongful detention, and we stress that any application of sanctions must be targeted, human-rights aligned, and consistent between cases.

1.9 The Greens are pleased with the recommendations of this inquiry, and we implore the Government to urgently implement them. There are Australians who are still in wrongful detention overseas, such as Robert Pether in Iraq, who must be urgently returned home. Implementing the recommendations of this inquiry will provide a greatly improved framework for bringing them home.

Senator Jordon Steele-John
Greens Senator for Western Australia

Appendix 1
Submissions and additional information

Submissions

1 Ms Leigh Toomey
2 Heretic Law
3 Mr Michael Kovrig
4 Name Withheld
5 Mr Luke Cook
6 Mr Robert Pether
7 VOICE Australia
8 Mr Thomas Simpson
9 Mr Peter Humphrey
10 Dr Kay Danes OAM
11 Mrs Lisa Brandt
12 The Global Liberty Alliance
13 Ms Lamisse Hamouda
14 Ms Sarah Teich
15 Human Rights Watch
16 Hostage International
17 Australians Detained Abroad
18 Mr Daren Nair
19 REDRESS
20 Department of Foreign Affairs and Trade
21 Australian National University Law Reform and Social Justice Research Hub
22 Alliance Against Political Prosecutions
23 Safeguard Defenders
24 Mr Mohammed Munshi
25 Medical Association for Prevention of War
26 Australian United Solidarity for Iran (AUSIRAN)
27 Dr Danielle Gilbert
28 Government of Canada
29 Professor Carla Ferstman
30 United States Government
31 Mr Geoffrey Robertson KC
32 Dr John Coyne & Mr Justin Bassi
33 Ms Lei Cheng
34 Amnesty International Australia
35 Australian Wrongful and Arbitrary Detention Alliance
36 Mrs Desree Pether
37 Name Withheld
38 Professor Peter Greste

39 Mrs Zehra Mehdi
40 Australian Human Rights Commission
41 Mr James Ricketson
42 Professor Jibra'il Omar
43 Australian Signals Directorate
44 Capital Punishment Justice Project Inc

Answers to question on notice

1 Australian National University Law Reform and Social Justice Research Hub, answers to questions taken on notice at a public hearing on 26 September 2024 (received 14 October 2024)
2 Ms Lamisse Hamouda, answers to questions taken on notice at a public hearing on 26 September 2024 (received 16 October 2024)
3 Mr Peter Humphrey, answers to questions taken on notice at a public hearing on 26 September 2024 (received 9 October 2024)
4 Human Rights Watch, answers to questions taken on notice at a public hearing on 26 September 2024 (received 18 October 2024)
5 Ms Sarah Teich, answer to question taken on notice at a public hearing on 18 October 2024 (received 31 October 2024)
6 Department of Home Affairs, answers to questions taken on notice at a public hearing on 28 October 2024 (received 8 November 2024)

Appendix 2
Public hearings and witnesses

Thursday 26 September 2024
Committee Room 2S1
Australian Parliament House
Canberra

The Global Liberty Alliance (via videoconference)
- Mr Jason Poblete, President and Counsel

Australian National University Law Reform and Social Justice Research Hub
- Mr Janindu Chithmina 'Chith' Weliamuna, Student Researcher

Human Rights Watch (via videoconference)
- Ms Daniela Gavshon, Australian Director

Dr Kay Danes OAM (via videoconference), private capacity

Australian United Solidarity for Iran (via videoconference)
- Dr Rana Dadpour, Director

Ms Lamisse Hamouda (via videoconference), private capacity

Mr Peter Humphrey (via videoconference), private capacity

Friday 18 October 2024
Committee Room 2S3
Australian Parliament House
Canberra

REDRESS (via videoconference)
- Ms Natalia Kubesch, Legal Officer

Mr Geoffrey Robertson KC (via videoconference), private capacity

Ms Sarah Teich (via videoconference), private capacity

Australian Wrongful and Arbitrary Detention Alliance (via videoconference)
- Dr Kylie Moore-Gilbert, Director

Professor Sean Turnell (via videoconference), private capacity

Professor Peter Greste, private capacity

Ms Leigh Toomey (via videoconference), private capacity

Ms Lei Cheng (via videoconference), private capacity

Hostage International (via videoconference)

- Ms Lara Symons, Chief Executive Officer

Safeguard Defenders (via videoconference)

- Ms Laura Harth, Campaign Director

Monday 28 October 2024

Committee Room 2S1
Australian Parliament House
Canberra

Mr Michael Kovrig (via videoconference), private capacity

United States Government (via videoconference)

- Ambassador Roger Carstens, Special Presidential Envoy for Hostage Affairs

Dr Danielle Gilbert (via videoconference), private capacity

Department of Home Affairs - Counter Foreign Interference

- Mr David Chick, Acting First Assistant Secretary, Counter Foreign Interference Coordination Centre, National Security and Resilience Group

Department of Foreign Affairs and Trade

- Ms Bronte Moules, Ambassador for Human Rights
- Ms Paula Ganly, First Assistant Secretary, Consular and Crisis Management Division
- Mr Marc Innes-Brown, First Assistant Secretary, Middle East and Africa Division
- Dr Kate Mitchell, Acting Assistant Secretary, International Law Branch I, Legal Division
- Mr Justin Wyatt, Acting First Assistant Secretary, Office of Southeast Asia, Southeast Asia Regional and Mainland Division
- Ms Victoria Young, Assistant Secretary, East Asia Branch
- Mr Geoff Bowan, Assistant Secretary, Eastern and South-East Europe Branch