



AUSTRALIANS FOR WAR POWERS REFORM

Committee Secretary

Joint Standing Committee on Foreign Affairs, Defence and Trade

Parliament House

Canberra ACT 2600

Via email jscfadt@aph.gov.au

23 December 2022

Dear Committee Secretary

Please find attached a supplementary submission to the current inquiry into international armed conflict decision making.

At the public hearing on 9 December, we were invited to make this submission by the committee Chair Mr Julian Hill MP.

We appreciate the opportunity to add this information for consideration by the committee.

Yours sincerely

Dr Alison Broinowski AM

President

Australians for War Powers Reform

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**SUPPLEMENTARY SUBMISSION TO THE INQUIRY INTO INTERNATIONAL ARMED CONFLICT
DECISION MAKING – Australians for War Powers Reform (AWPR)**

At the invitation of the Chair, AWPR is pleased to provide a supplementary submission.

We note that an overwhelming majority of the 111 submissions supported the need for reform of the way Australia goes to war. Most recommended less non-essential secrecy and more consultation with the people's parliamentary representatives. Even the Department of Defence mentioned its 'longstanding commitment to operating transparently and with accountability'. We note also that the need for better transparency and accountability was among the issues on which the successful Independents campaigned at the May 2022 election.

Our supplementary submission considers eleven matters arising from other submissions and from the public hearing on 9 December. All prove the need for reform. As AWPR's contribution to a constructive outcome, we offer our comments on these matters:

1. **Avoidable wars.** Australia has entered a series of inconclusive or disastrous wars with our US ally, in Korea, Vietnam, Afghanistan and Iraq. In each, ADF personnel were endangered, and lives were lost in what Defence calls 'otherwise avoidable situations'. It is therefore curious that the Defence Department and others argue that war powers reform could unnecessarily place ADF troops in harm's way. Rather, it is the sending of troops to fight in ill-considered wars in the first place that needlessly places them in harm's way, and which could be avoided if political and popular opposition were accepted. This matter is discussed further below, in relation to the submission from the Defence Department.
2. **False intelligence.** Decisions to deploy Australian forces were made at least three times by prime ministers on the basis of misleading intelligence. A legislated requirement to put the case for war to Parliament in advance enables intelligence to be publicly tested. Doing so does not compromise Australia's response to a genuine emergency nor the protection of classified sources. Revealing those, or the details of military strategy, is not necessary for the matter to be publicly discussed and understood.
3. **Codifying conventions.** We have conventions for debate of a motion to deploy the ADF or the Reserve Army. These could be codified, taking explicitly into account Australia's undertakings under the UN Charter, the ANZUS Treaty, and the Treaty of Amity and Cooperation in Southeast Asia, against the threat or use of force. Codification could

include the 'Gillard precedents', including an annual report and regular statements by the defence minister to Parliament about an ongoing war. Codification could take the form of a convention for annual hearings on a war to be held by the JSCFADT. A convention could be based on the Committee's 2018 'Contestability and Consensus' report. Codification could add a convention requiring the legality of a war to be sought and provided to Parliament in advance of an ADF deployment. All are acceptable, but they fall short of what's necessary.

4. ***Bypassing conventions.*** Even if they are codified, conventions are nothing more than that. Codification leaves open the possibility of a government ignoring a convention, or establishing a contrary one in its place. Examples include Prime Minister Howard's unilateral attempt to expand ANZUS with his decision for 'war against terror' after 11 September 2001, and his resolution on the Iraq war tabled the day after the SAS invasion.
5. ***Gradualist approach to reform.*** Some members of the Sub-Committee seem inclined to favour step-by-step changes in how Australia goes to war. This appears to conflict with their concern about urgent deployments. Such a process would take years, even if it were not derailed by a future government.
6. ***Legislation is required.*** Consultation with the Governor-General is not a convention but a Constitutional obligation, which has been ignored preceding recent deployments. The proper use of s61 and s68 of the Constitution, and of s8 of the Defence Act should be clarified by law, not by convention. Failing that, such use should be tested in the High Court.
7. ***No more status quo.*** Without legislative change, the current practice after more than a century remains in place. An amendment to the Defence Act (s8) will enable deficiencies to be addressed in future decision-making for war. To be effective, that amendment should require not just scrutiny of a proposal for war, and debate, but a parliamentary vote in both Houses. The matter should be the responsibility of all MPs and Senators, not just those in select committees or in the Executive.
8. ***The Alliance.*** Australia has entered all recent wars as an ally of the United States, whether at our government's initiative or in response to an American request. All were expeditionary wars of choice and were hence aggressive and illegal. None was a response to a direct threat to Australia. None was successful. A future proposal for an American-initiated war should explain *why* Australia should fight it and enable the Parliament to debate and vote on that, and its legality.

9. ***New forms of warfare.*** Wars are no longer declared, nor ended. War is now conducted in the grey zone, in space, and cyber-space, by remotely targeted drones, and by artificial intelligence. International limitations on these new ways of war have yet to be agreed. As always, war also involves disinformation and propaganda. All are now enabled by new technologies, in whose development and hostile use Australia is as complicit as other countries. We recommend specialised consideration by Australia of these complex issues, including international efforts to regulate them. A very complex environment makes the need for greater rigour about the likely consequences of military action overseas much more important, not less.
10. ***Welfare of ADF Personnel.*** AWPR wishes to emphasise that the welfare of ADF troops is of the utmost importance to our organisation. In addition to the risks of suffering death or physical or mental harm from ill-considered deployments, there are very real practical implications if there is a failure to obtain proper legal authority for a deployment to war. This has been [outlined by Cameron Moore](#) as follows: *'Members of the ADF have a duty to obey lawful orders [and to disobey unlawful orders] ... An order from the Governor-General to the ADF invoking the war prerogative would make it a duty for ADF members to kill or capture the enemy, and destroy enemy property, where it's lawful to do so under the law of armed conflict ... Despite a general power of direction, no minister has command over any member of the ADF. Therefore there's no defence of lawful orders available to a member of the ADF for following an NSC direction. This isn't a hypothetical issue. The prosecution of two commandos before a court martial in 2011 raised the important question of what the authority was for them to be using force in Afghanistan'*. The requirement for military action to be lawful, in both domestic and international law, is an additional reason for the legal basis of ADF deployments to war to be open to scrutiny
11. ***Department of Defence submission.*** AWPR wishes to comment further on the submission of the Department of Defence, which contained some very serious omissions. The Department appeared to overlook the ample evidence of the disastrous wars which Australia has joined, showing that the current system is not fit for purpose. Astonishingly, the Department mentions the 2003 invasion of Iraq not once. That war was widely condemned at the time, was widely believed at the time to be illegal, caused hundreds of thousands of civilian deaths and destabilised the Middle East region, and yet the Department does not consider it worthy of consideration in the context of how Australia gets into wars. The UK has at least had the Chilcot inquiry; Australia has had

nothing, and our defence bureaucracy appears to have learned nothing from the Iraq War and the process by which Australia became involved. In relation to the Afghanistan War, another disaster, the Department's only mention is to applaud how quickly we got out of the war – nothing about how we got into it. The disastrous Vietnam War is further evidence that the Defence Department ignores. Half a century on, many Australians still pay a very heavy price for the decision to send conscripts to fight, not to mention the death and devastation that the war brought for millions of Vietnamese in their own land. Australia's own veterans at least deserve rigorous official scrutiny of a process that ruined the lives of so many.

Other arguments raised by the Department in favour of the status quo:

- The 'practicalities of the time required to call Parliament and then debate the issue'. Parliament was recently recalled to discuss energy matters. To argue that it is not practical to recall parliament to discuss going to war is baseless. In any event, electronic communications can enable immediate discussions even at long distance.
- The straw man argument against 'requiring Parliamentary approval to respond to each and every development that arises in the course of a deployment'. No-one is arguing for this, as even a cursory reading of the war powers reform bills that have been brought to parliament would indicate.

AWPR thanks the Sub-Committee for its consideration of these matters, and again strongly recommends against any compromise which perpetuates the status quo.

Dr Alison Broinowski AM

President

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