



Australian Government

**Australian Government response to the
Joint Standing Committee on Foreign Affairs, Defence and Trade
Inquiry into international armed conflict decision making**

August 2023

Introduction

The Australian Government welcomes the final report by the Joint Standing Committee on Foreign Affairs, Defence and Trade's Defence Sub-committee (JSCFADT Sub-committee) on its inquiry into international armed conflict decision making. The report follows the referral of the matter for inquiry by the Deputy Prime Minister and Minister for Defence in September 2022.

The inquiry was a timely opportunity to examine a matter of considerable public and parliamentary interest. During the conduct of its inquiry, the JSCFADT Sub-committee engaged with diverse perspectives on this matter of importance. The Government appreciates the constructive and considered approach taken by the JSCFADT Sub-committee to weighing the importance of open and accountable decision-making by the Executive with the unique national security considerations that necessarily arise when deploying Australian personnel into international armed conflict.

The Government considers the defence of Australia, its people, and its interests to be its most important responsibility. In fulfilling this responsibility, one of the most consequential options available to government is the deployment of Australian service personnel into international armed conflict – including all major war-like and peacekeeping operations by the Australian Defence Force (ADF). The gravity of such decisions cannot be overstated – an assessment clearly shared and affirmed over the course of the inquiry by all participants.

The decision to commit the ADF to armed conflict has long been a prerogative of the Executive, with this authority exercised in practice by the Prime Minister and the National Security Committee of Cabinet. The existing arrangements support timely and flexible decision making as well as the security of highly-classified information that is necessary for governments to make critical decisions. This enables the ADF to effectively and efficiently deploy into contested environments while also affording the highest possible protection to its members.

The Government acknowledges, however, that this should not detract from the important role of the Parliament in debating matters of national importance and holding the Executive to account for the decisions it has taken. An appropriate balance must be achieved that maintains the capacity of the Executive of the day to respond in a timely and effective manner to challenges to our national interests and national security whilst also providing the Parliament – and through it, the Australian people – with effective mechanisms to examine and debate the decisions taken by government. Maintaining an appropriate balance between these considerations serves to strengthen the openness and accountability that is fundamental to our democracy.

In response to the inquiry's final report, the Government reaffirms its commitment to improving openness and accountability, including with respect to decisions to commit Australian service personnel to international armed conflict.

The Government welcomes and supports the principal finding that decisions regarding armed conflict are fundamentally a prerogative of the Executive. The Government broadly agrees with the inquiry's findings on the importance of clarifying the processes by which such decisions are made as well as codifying practices relating to informing the Parliament about such decisions.

The Government notes, in particular, the recommendations relating to the establishment of a new Joint Statutory Committee on Defence. The Government supports the establishment of such a committee and agrees that there would be substantial benefit in a mechanism for the proposed committee to receive classified information. The Government notes that this would be a significant step in improving parliamentary oversight and a substantial change to existing arrangements. The Government notes, therefore, that further work will be required to determine the precise scope, powers and functions of the proposed committee, particularly to avoid the potential for duplication and/or overlapping responsibilities with existing committees. The Government is committed to taking this work forward in a timely manner.

The Government thanks the JSCFADT Sub-Committee members for their work in delivering the report and its recommendations, including considering 113 submissions and conducting a public hearing.

Response to the report recommendations

Recommendation 1

The Committee recommends that in implementing these recommendations the Government reaffirm that decisions regarding armed conflict including war or warlike operations are fundamentally a prerogative of the Executive, while acknowledging the key role of parliament in considering such decisions, and the value of improving the transparency and accountability of such decision making and the conduct of operations.

Response:

The Government agrees with this recommendation.

The Government welcomes the reaffirmation by the JSFADT Sub-committee that decisions regarding armed conflict, including war or war-like operations, are fundamentally a prerogative of the Executive.

The Government acknowledges the key role of the Parliament in giving voice to the views of the Australian people on matters of national importance, including with regard to Australia's involvement in international armed conflict, and in holding the Executive to account for the decisions it has taken.

Recommendation 2

The Committee recommends that the Cabinet Handbook be amended to clarify that:

- *Executive power in relation to armed conflict and the deployment of military force flows from section 61 of the Constitution*
- *In the modern era, Executive power is in practice exercised collectively via the National Security Committee of the Cabinet, whose decisions can be given effect via section 8 of the Defence Act or by advice to the Governor-General as Commander in Chief under section 68 of the Constitution*
- *In the event of war or warlike operations:*
 - *It is preferable that section 68 of the Constitution be utilised, particularly in relation to conflicts that are not supported by resolution by the United Nations Security Council, or an invitation of a sovereign nation given that complex matters of legality in public international law may arise in respect of an overseas commitment of that nature*
 - *A written Statement be published and tabled in the Parliament setting out the objectives of such major military operations, the orders made and its legal basis*

Response:

The Government agrees in-principle that there is a need for greater clarity and transparency about the way that the Executive makes decisions in relation to Australia becoming a party to armed conflict.

The decision to deploy ADF forces into international armed conflict is among the most significant decisions that can be made by the Executive. Such decisions are an exercise of prerogative power under section 61 of the Constitution. In the Australian system of responsible and representative government this is a decision for the elected Government and not the Governor-General.

The Government thus supports codifying these practices to clarify that:

1. the executive power in relation to armed conflict and the deployment of military forces flows from section 61 of the Constitution;
2. the executive power is in practice exercised collectively via the National Security Committee of Cabinet; and
3. when the ADF is engaged in major military operations as a party to an armed conflict, a written statement should be published and tabled in Parliament setting out the objectives of those major military operations, the orders made and its legal basis.

The Government reserves its right to determine the appropriateness of disclosures with respect to questions of international law and advice on questions of legality.

The Government does not agree that the Cabinet Handbook is the appropriate mechanism for codifying these practices. However, the Government will publish on the Department of the Prime Minister and Cabinet's website, alongside the Cabinet Handbook, a Statement on international armed conflict decision making, to codify these practices

Recommendation 3

The Committee recommends the Government include a new section in the Cabinet Handbook outlining expectations for practices to be followed in the event of a decision to engage in major international armed conflict including war or warlike operations. This should include:

- A requirement that the Parliament be recalled as soon as possible to be advised, unless this was not possible due to extenuating and appropriate circumstances (e.g., it was unsafe for the Parliament to meet due to conflict)***
- A requirement that the Executive facilitate a debate in both Houses of Parliament at the earliest opportunity, either prior to deployment of the Australian Defence Force or within thirty (30) days of deployment. Debate should occur after a formal ministerial statement is made which explains the reasons for the operation, based on the 2010 Gillard model, as well as a statement of compliance with international law and advice as to the legality of the operation***

These practices should contain the caveat that the Governor-General is able to approve deferral of any of these requirements in specific circumstances, such as high risks to national security or imminent threat to Australian territories or civilian lives.

Response:

The Government broadly agrees that there would be a benefit in outlining the practices to be followed in the event of a decision to deploy the ADF to major military operations as a party to an armed conflict.

The Government agrees that a Ministerial statement to inform a timely debate in both Houses of Parliament is an important mechanism to improve transparency and public debate in relation to a decision of the Executive to engage in major military operations as a party to an armed conflict and this should include the legal basis for the resort to armed force. The Government further agrees that this should occur at the earliest opportunity and not later than 30 days from the deployment of the ADF, subject to any considerations of national security or imminent threat to Australian territories or civilian lives.

The Government reserves its right to determine the appropriateness of disclosures with respect to questions of international law and advice on questions of legality.

As noted in Recommendation 2, the Government will publish a Statement on international armed conflict decision making, to codify these practices.

Recommendation 4

The Committee recommends the Government introduce standing resolutions of both Houses of Parliament to establish Parliament's expectations in relation to accountability for decisions in relation to international armed conflict, providing for sensible exemptions to enable timely and flexible national security responses and requiring at a minimum that, when war or warlike operations are occurring:

- ***a Statement to both Houses of Parliament be made at least annually from the Prime Minister and Government Senate Leader and debate facilitated***
- ***an Update to both Houses of Parliament be provided at other times during the year (at least twice) from the Minister for Defence and Minister representing the Minister for Defence in the other Chamber and debate facilitated***

These practices should be replicated in the Cabinet Handbook

Response:

The Government agrees with this recommendation.

The Government supports steps to improve openness, accountability and public discussion on Australia's involvement in international armed conflict. The Government will implement this recommendation, noting the statements and updates will include unclassified information only.

The Government will codify these practices in a Statement on international armed conflict decision making, to be published on the Department of the Prime Minister and Cabinet's website.

Recommendation 5

The Committee recommends the Government:

- ***Revert to a traditional approach whereby Defence white papers and national security or strategy updates should be tabled in both Houses of Parliament within 30 days of their presentation to the Minister***
- ***consider and apply mechanisms to codify this practice, such as embedding them in the Cabinet Handbook or by Standing Resolutions of both Houses of Parliament***

Response:

The Government agrees with this recommendation.

The Government supports the tabling of publicly-released Defence strategy documents in both Houses of Parliament within 30 days of their publication. These Defence strategy documents encompass those that are broad in nature, significant to Australia's national defence and contain unclassified information only, such as Defence white papers and Defence strategic reviews.

These practices will be in codified in a Statement on international armed conflict decision making.

Recommendation 6

The Committee recommends the Government introduce legislation to establish a Joint Statutory Committee on Defence to supersede and enhance the Defence related functions currently undertaken by the Joint Standing Committee of Foreign Affairs, Defence and Trade. This committee should have its powers set out in legislation, including oversight and accountability functions in relation to the Australian Defence Force, the Department of Defence and specified portfolio agencies including:

- ***scrutiny of Defence portfolio annual reports***
- ***consideration of white papers, strategy, planning and contingencies***
- ***scrutiny of Defence capability development, acquisitions, and sustainment***
- ***consideration of matters relating to Defence personnel and veterans' affairs***
- ***inquiry into matters referred by the Minister for Defence or either House of Parliament***
- ***general parliamentary oversight of war or warlike operations, including ongoing conflicts and involvement in significant non-conflict-related operations domestically and internationally***

The proposed committee should be explicitly permitted to request and receive classified information and general intelligence briefings while also being subject to clear legislative constraints to its mandate, including restrictions on access to:

- ***individual domestic intelligence reports***
- ***intelligence sourced from foreign intelligence bodies where such provision would breach international agreements***
- ***detail regarding operational matters or information regarding highly sensitive capabilities or protected identities, except where specifically authorised by the Minister for Defence***

Statutory restrictions should be placed on members, their staff (one of whom should be able to obtain a security clearance at minimum NV2 level) and secretariat staff regarding the disclosure or publication of classified information with appropriate penalties including imprisonment for breaches.

Notwithstanding the proposed committee's powers and ability to receive and request classified briefings, the legislation should also provide that the Minister for Defence should have an overarching power to veto the provision of any classified information to the committee whenever the Minister considers that the provision of the classified information in question would compromise national security.

The committee's membership should be appointed by the Prime Minister, and, in consultation with the Leader of the Opposition, constituted by:

- ***Six Government members and five non-Government members, with a minimum of:***
 - ***One Government Member of the House and one Government Senator***
 - ***One Opposition Member of the House and one Opposition Senator***
- ***One Government Member as committee chair***

The Prime Minister and Minister for Defence should be provided with the ability to authorise specified members of Parliament (Ministers or senior Opposition Shadow Ministers) to be part of particular meetings, briefings or activities of the committee, during which they would not be considered members of the committee but would be able to participate subject to the same statutory restrictions regarding the disclosure or publication of classified information as committee members.

Response:

The Government agrees with this recommendation.

The Government notes that this would be a significant change to existing arrangements and, therefore, that further work will be required to determine the precise scope, powers and functions of the proposed committee, particularly to avoid the potential for duplication and/or overlapping responsibilities with existing committees.

The Government will conduct further work in a timely manner to determine the scope of the proposed committee and its appropriate powers and functions.

Recommendation 7

The Committee recommends that, subject to Recommendation 6, the Cabinet Handbook codify an expectation that the Prime Minister or Minister for Defence will facilitate appropriate briefings of the Defence Committee regarding the conduct of significant military operations, subject to ongoing national security considerations as determined by the Prime Minister and Minister for Defence. This would include necessary authorisations to enable Ministers or senior Opposition Shadow Ministers to participate in such meetings.

Response:

The Government agrees in-principle to this recommendation, subject to the further work described in the response to Recommendation 6 and noting that the Government will codify these practices in a Statement on international armed conflict decision making.

Response to Australian Greens additional comments

Recommendation: *Parliament should pass Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020 requiring a joint sitting of parliament to approve Australian Defence Force deployments overseas.*

Response:

The Government does not agree with this recommendation.

The Government notes that the inquiry examined the matter of how Australian service personnel are deployed into international armed conflict in detail. The Government further notes that the majority report of the inquiry reaffirmed the importance to Australia's national security of the longstanding principle that decisions regarding armed conflict, including war or war-like operations, are fundamentally a prerogative of the Executive.

The Government also notes the named legislation has not been amended since its original tabling in 2020. As previously noted in the 2021 inquiry on the legislation, it was found by the then Committee to have substantial evidentiary issues, which contributed to the recommendation it not proceed.

Recommendation: *The Defence Act of 1903 should be amended to explicitly limit Ministerial Power from unilaterally deciding on offensive troop deployments*

Response:

The Government does not agree with this recommendation.

The Government notes that the inquiry examined the matter of how Australian service personnel are deployed into international armed conflict in detail. The Government further notes that the majority report of the inquiry reaffirmed the importance to Australia's national security of the longstanding principle that decisions regarding armed conflict, including war or war-like operations, are fundamentally a prerogative of the Executive.

Recommendation: *Legal Advice given to the Howard Government and Cabinet, the Governor-General and Federal Executive Council should be made publicly available so that Australians can determine for themselves what was understood about entering Iraq*

Response:

The Government does not agree with this recommendation.

As a matter of convention, the government of the day does not publicly disclose the confidential deliberations (including advice provided to inform cabinet decision making) of a former government. This is a longstanding and fundamental practice in the Westminster system.

Recommendation: *Any and all legal advice the government has or has sought on its interpretation of Section 8 of the Defence Act as an alternative to Section 68 of the Australian Constitution should be made publicly available*

Response:

The Government does not agree with this recommendation.

As with the previous additional recommendation, as a matter of convention, the government of the day does not publically disclose the confidential deliberations (including advice provided to inform cabinet decision making) of a former government. This is a longstanding and fundamental practice in the Westminster system.

