



AUSTRALIANS FOR WAR POWERS REFORM

6 October 2021

**Senate Foreign Affairs, Defence, and Trade Legislation Committee
October 2021**

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020

Thank you for the invitation to make a submission to this important Inquiry.

The members of Australians for War Powers Reform (AWPR) are Australian citizens with an interest in how, why, and with what results Australia goes to war. Our members have long experience in government, defence, higher education, law, and medicine. The group has produced several publications in consultation with the public, conducted public opinion surveys, provided the results to MPs and Senators, and briefed them on our work.

Originating as the Iraq War Inquiry Group in 2012, we became the Campaign for an Iraq War Inquiry in 2014, and have continued our efforts as AWPR from 2015. Our President, Paul Barratt AO called on Federal politicians for a full, open and independent investigation (along the lines of the UK's Chilcot Inquiry) of how Australia entered the wars in Afghanistan, Iraq, and Syria, and their consequences. Two inquiries focussed on the performance of the intelligence agencies for the Afghanistan and Iraq deployments (Jull 2004 and Flood 2007) but they did not analyse or account for the legal, military, and political decisions that were made, nor inquire into the results. Australia lags behind our US, UK, and NATO coalition partners in this regard.

The Government has never recognised the disastrous human and economic impacts of those three wars. We also draw to your attention that in all of them, the US objective was to replace the governing regime with one which would comply with American interests. Those impacts, and those objectives, were not necessarily in Australia's interests.

No inquiry has been conducted in relation to the deployment of Australians to Iraq in 2014 and 2015, or to Syria in 2015 and 2016. Voters and taxpayers should be enabled fully to understand what is being done in their name, and why Australian service personnel were sent on such missions and with what result. The Australian people

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are entitled to see that the government is spending appropriations wisely, appropriately, and in a manner that delivers measurable benefit, and does not cause widespread human suffering.

Such accountability is essential when a government sends forces into any form of international armed conflict. Fiduciary responsibility is required procedure in most modern democracies, yet Australia has never practised it by holding inquiries into the cost, conduct, and consequences of wars it has become involved with.

All our deployments since Vietnam (except Iraq War 1, the Multilateral Force of Observers in Sinai, East Timor, and RAMSI) were illegal. Another possible exception is Afghanistan, for which a post-invasion resolution was issued by the UN Security Council (UNSC). None of the conflicts in Afghanistan, Iraq, or Syria was a declared war, and none was in response to a direct threat to Australia, or to a prior request from the government of the country concerned, or in accordance with a prior resolution of the UNSC. In more recent conflicts (Iraq Wars II 2003, and III 2014) those legitimising conditions did not exist. All three were at the behest of the United States.

Our group is particularly concerned that since Iraq War I (1990-1), it has evidently become the Government's practice to send troops to war using an administrative provision of the Defence Act (s.8), thereby bypassing the Governor-General's authorisation. The Governor-General is the only person with the formal power under our Constitution to authorise the deployment of the ADF into international armed conflict.

Australian Government actions must conform to the Constitution and international law; the Governor-General should be consulted in advance, individually and/or as the Governor-General in Council. The Governor-General is constitutionally obliged to receive legal certification from the Attorney-General, and must, as Commander-in-Chief, be assured that members of the ADF are legally deployed.

As a result of recent wars, Australia faces **four forms of responsibility**.

First, for Australian troops in Syria and Iraq - including those placed under foreign command - for our highest echelon ADF commanders and our relevant Ministers, legality of the deployment itself was a significant consideration. If it was illegal, it could lead to indictments before the ICC. Defence against such charges becomes extremely problematic if the ADF members or others cannot demonstrate that the relevant ADF elements were lawfully in the theatre, on the basis of authorisation by the Governor-General.

Second, in Syria, Australia appeared to be in breach of the very international law whose observance we expect of all participants in the conflict. To justify bombing Syria on the grounds that our enemies (or those of the US-led coalition) did not respect national boundaries was not legally acceptable. Unilaterally diluting the 'red card' provision that protects Australian aircrews from committing war crimes (as the Prime Minister reportedly

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did in July 2016) may have no bearing on our US ally, which steadfastly refuses to recognise the jurisdiction of the International Criminal Court (ICC). Australian personnel are not exempted, however.

Third, Australia's responsibility also extends to the conduct of our troops in Syria, Iraq, and Afghanistan. If charges of committing war crimes are brought against any of them, and are not fully adjudicated in Australia, their commanders, and the Ministers who authorised their deployment, could equally be indicted before the ICC.

Fourth, Australia must share in responsibility for the humanitarian harm caused by wars in which we have been an active participant. This means accepting our share in the reparations which should follow every conflict.

A rational rebalancing of Australia's priorities, regional with global, military and paramilitary with diplomatic and developmental, should be a core objective of our foreign and defence policies.

We consider that in advance of the dispatch of Australian troops to war, Parliament should be required to debate and vote on the Government's proposal, as is now the UK convention, and is required by the Constitutions of many democracies. Legislative changes to give effect to this are urgently needed. It is for the Parliament to consider such changes in detail, including a possible provision for Government to make decisions quickly in response to an emergency. The historical record since 1942 gives us confidence that such a contingency is unlikely, and that in most cases there would be ample time for consideration and debate. As well, military action in self-defence against an attack on Australia is permitted in international law and by the UN Charter. We do not accept that the need for an immediate response to an emergency would justify bypassing a standard and customary Parliamentary process.

We are familiar with the arguments that are raised against Parliamentary involvement in decisions to deploy the ADF into international armed conflict. We do not accept that Australia's mature and sophisticated polity is incapable of drafting legislation that would give effect to our proposals, which reflect practice that is the norm in other modern countries, which have dealt with the same arguments.

Recommendations

To ensure that future Australian troop deployments (invasions of another country) are made in conformity with the Constitution, international law, and Australia's national interests, and to guard against the repetition of disastrous invasions like that of Iraq in 2003, we *specifically recommend* that legislation be introduced to ensure that:

- The recent practice of dispatching Australian forces under a provision of the Defence Act should not continue;

- In advance of the deployment of Australian forces, the matter should be considered by a security-cleared Parliamentary Committee, and be debated and voted on by both houses of Parliament;
- The Government should set out clearly the political and strategic considerations involved in any deployment of troops, its legal basis, purpose, likely duration and estimated costs, including the likely humanitarian impacts, plans for addressing them, and for post-war rehabilitation;
- If a proposal for armed deployment is carried, the Governor-General should be asked to consider it and have the opportunity to seek more information before commanding the Government to act on it;
- The Government should be required to report to the Parliament at regular intervals on the progress of a conflict, including its human costs;
- At a specified time, a further debate and vote in the Parliament should determine whether the deployment should continue or not;
- After the conflict, an independent inquiry should present a full, public report, including recommendations to guide Governments in future deployments.

We also make two *general recommendations*. We urge the Minister for Foreign Affairs to:

- Review the ANZUS Treaty and ensure that its application does not extend beyond the obligation for the Parties to consult in the event of a threat to any of them in the Pacific, each in accordance with their Constitutional processes. The Treaty does not oblige the United States to defend Australia (or New Zealand), nor does its provision for parties to act to meet [a] common danger oblige Australia to defend the United States or its interests. No Australian minister should interpret it or represent it as doing so.
- Ensure that the AUKUS agreement of September 2021 does not oblige Australia to contribute forces or weapons to a war which is illegal or contrary to Australia's interests.
- Establish a full and independent inquiry into Australia's deployment of armed force to Afghanistan from 2001 to 2021, the activities of the ADF there, their departure, and the costs and consequences of that deployment for Australia's foreign policy.

Lastly, we draw the Committee's attention to the rapidly changing political dimension of this matter. AWPR commissioned polling in 2020 revealed 83 percent of the population favour reforming war powers. That percentage has since grown to 87 percent.

Signed:

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