

The Senate

Foreign Affairs, Defence and Trade
Legislation Committee

Defence Amendment (Parliamentary Approval of
Overseas Service) Bill 2008 [No. 2]

February 2010

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Chapter 1

Introduction

Background

1.1 On 17 September 2008, Senator Scott Ludlam introduced in the Senate the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2]. On 20 August 2009, the Senate referred the bill to the Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 19 November 2009. On 17 November, the Senate granted the committee an extension to its reporting date to 25 February 2010.¹

Purpose of the Bill

1.2 The stated purpose of the bill is 'to ensure that, as far as is constitutionally and practically possible, Australian Defence Force (ADF) personnel are not sent overseas to engage in warlike actions without the approval of both Houses of Parliament'.² Its main provision stipulates clearly that members of the Defence Force may not serve beyond the territorial limits of Australia except in accordance with a resolution authorising the service. This resolution must be agreed to by both the Senate and the House of Representatives. By proclamation, the Governor-General may declare that an emergency exists requiring such service. The bill makes provisions for both Houses to meet after such a proclamation is made.

Submissions

1.3 The committee advertised the inquiry on its website and in *The Australian* on 22 September and on subsequent occasions. The committee wrote to the Minister for Defence and the Attorney-General inviting them or their departments or related agencies to make a submission. A number of other organisations, commentators, academics were also contacted and invited to make submissions to the inquiry.

1.4 The committee received 31 submissions, which are listed in Appendix 1.

Scope and structure of inquiry

1.5 The proposal that Australian Defence Force personnel cannot serve overseas in warlike service unless both Houses of Parliament have approved the deployment is not new. Over the past half century, bills designed to confer on the Parliament this authority have been presented to the Senate. The matter has been debated in the chamber at least twice and on each occasion both major parties rejected the proposal.

1.6 The bill before the committee shows that it has not yet addressed the problems identified with earlier versions of the legislation. Further, after close consideration of the submissions supporting the bill, the committee is of the view that they repeat the

1 *Journals of the Senate*, 17 November 2009, p. 2736.

2 *Explanatory Memorandum*, Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2], p. 2.

opinions and arguments put forward previously and bring nothing new to the debate. With that in mind, the committee decided that little would be gained from holding public hearings that would rework old ground. Instead, in this report, the committee provides an account of the consideration given to the previous proposals; the concerns and objections raised over the years; and the efforts made to rectify the identified problems. It hopes that by doing so, it will focus on the major concerns impeding progress with this type of legislation and contribute to moving the debate forward.

Scrutiny of Bills Committee

1.7 The Senate Standing Committee for the Scrutiny of Bills considered the bill but had no comments to make.³

Acknowledgements

1.8 The committee thanks those who assisted with the inquiry, especially the many people who made submissions. The committee appreciates their contribution.

3 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no.1 of 2009, 4 February 2009, p. 17.

Chapter 2

The proposal for parliamentary approval

2.1 Australian legal experts generally acknowledge that while the power to declare war and deploy troops overseas is not specified in the Constitution, it currently forms part of the executive power under section 61 of the Constitution.¹ Professor Geoffrey Lindell noted, however, that under the Westminster system of government, Parliament may legislate to regulate or limit the exercise of prerogative powers. He concluded:

...it is likely that the Australian parliament possesses such power under, for example, the power to make laws with respect to defence under s51(vi) of the Constitution.²

2.2 In this chapter, the committee considers a private senator's bill that is intended to confer on the Australian Parliament the authority to curb the power of the executive to send members of the Defence Force to serve outside Australian territories. The committee starts by tracing the history of this bill.

Defence Amendment Bill 1985

2.3 For decades now, a group of Australian citizens and politicians have actively canvassed the possibility of Parliament having a say in the decision to commit ADF personnel to an overseas conflict. In April 1985, Senator Colin Mason, Australian Democrats, took the first major step toward achieving this objective by introducing the Defence Amendment Bill 1985. This bill stipulated that members of the Defence Force 'may not be required to serve beyond the territorial limits of Australia except in accordance with a resolution agreed to by each House of the Parliament authorizing the service'. He explained:

The purpose of this Bill is to place the responsibility for the decision to send Australian troops overseas with both Houses of Federal Parliament subject to exceptions covering the movement of personnel in the normal course of their peacetime activities and the need to take swift action in an emergency.³

1 See for example, Geoffrey Lindell, 'Authority for war', *About the House*, May–June 2003, p. 23. George Williams, 'Comments', 'The Power to go to war: Australia in Iraq', editor Fiona Wheeler, *PLR*, vol. 15, no. 5, 2004, p. 5 and 'Now to say, never again', *Canberra Times*, 7 June 2008.

2 Geoffrey Lindell, 'Authority for war', *About the House*, May–June 2003, p. 23. See also Charles Sampford and Margaret Palmer, 'The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq', *Griffith Law Review*, vol. 18, no. 2, 2009, p. 350.

3 Senator Colin Mason, *Senate Hansard*, 18 April 1985, p. 1186.

2.4 In his view, the legislation if enacted would ensure that both Houses of Parliament would have the opportunity to debate fully any move to involve ADF personnel in a war-like situation. He contended that this debate, followed by a vote of all elected federal representatives, would result in 'a more reasoned basis for sending defence force personnel overseas'.⁴ Debate on the bill was held in 1986 but was adjourned.

2.5 Senator Paul McLean, Australian Democrats, introduced the same bill in the Senate in 1988. In his second reading speech, he repeated, in many cases word-for-word, the purpose of, and reasons for, passing the proposed legislation.⁵ It was restored at the second reading stage to the Notice Paper in 1993 and 1996.

2.6 On 27 March 2003, similar legislation, the 'Defence Amendment (Parliamentary approval for Australian involvement in overseas conflicts) Bill 2003', was introduced jointly by Senator Andrew Bartlett and Senator Natasha Stott Despoja (Australian Democrats). It was restored to the Notice Paper on 17 November 2004 and debated in the Senate on 10 February 2005. The arguments in favour of, and in opposition to, the legislation built on those of 1986. A number of senators participated in the debate which was then adjourned.

2.7 On 13 February 2008, Senator Bartlett presented the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008. The same bill was introduced in the Senate by Senator Scott Ludlam (Australian Greens) on 17 September 2008.

Purpose of the Bill and core provision

2.8 Almost a quarter of a century has elapsed since a bill was introduced in the Senate similar in content to the one now before the committee. The core provision of the proposed legislation remains unaltered (with minor word changes) from the 1985 and 2003 versions of the bill. The current bill stipulates that members of the Defence Force may serve within the territorial limits of Australia but may not serve beyond these limits except in accordance with a resolution, which is in effect and agreed to by each House of the Parliament, authorising this service.⁶

2.9 Throughout the history of this legislation, those engaged in debate on its provisions have acknowledged the seriousness of the decision to commit Australian forces overseas. Although agreeing on the gravity of the decision, they have very different views on who should make this decision.

4 Senator Colin Mason, *Senate Hansard*, 18 April 1985, p. 1186.

5 *Senate Hansard*, 22 February 1988, p. 387.

6 Subsections 50C(1) and (2), Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008.

2.10 In 1986, Senator Don Chipp, Australian Democrats, supported the 1985 bill designed to strengthen the authority of Parliament over the exercise of the executive's prerogative power to deploy Australian troops abroad. He expressed concern that the executive—the Prime Minister and Cabinet—could commit Australia to 'a disastrous course of action without Parliament and Australian people knowing what the arguments for and against were, and what the potential hazards might be'. He argued that an important measure would be to require 'a full and free debate in both Houses of Parliament'.⁷

2.11 When introducing the 2003 bill, Senator Bartlett reinforced this view about the need to obtain parliamentary approval before Australian ADF personnel could serve abroad. He explained:

The Executive should not be able to involve Australian troops in an overseas conflict if they have not been able to successfully make their case at least to the Parliament. What the Democrats are seeking is for the Parliament, as the voice of the people, to have some control over the situation.⁸

2.12 During debate on the bill in 2005, he noted the legislation would create:

...a simple mechanism to provide the check that would require the government to make to the parliament the case for sending Australian men and women in the Defence Force to put their lives on the line. To suggest that the parliament should have no role in such a fundamental decision is an approach that does not recognise the fundamental importance of the parliament.⁹

2.13 At this time, those in support of the bill cited the government's decision to send troops to Iraq as an example of why the legislation was needed. Senator Lyn Allison stated:

Being accountable to the will of the people through the parliament will restrain democratic leaders and help prevent them from initiating foolhardy and risky wars. Committing the lives of citizens to an overseas conflict is no small decision. It requires that leaders be particularly cautious both when starting wars and in joining coalition with others. They must be able to persuade others by the strength of the argument and by the evidence.¹⁰

2.14 When presenting this bill to the Senate in 2008, Senator Ludlam argued that 'the responsibility of sending Australian men and women into danger and quite possibly to their deaths should not be solely on the shoulders of a handful of leaders'. In his view, the lack of proper mechanisms 'saw the Australian Prime Minister rapidly

7 Senator Don Chipp, *Senate Hansard*, 17 April 1986, p. 1916.

8 *Senate Hansard*, 27 March 2003, p. 10320.

9 See Senator Andrew Bartlett, *Senate Hansard*, 10 February 2005, p. 126.

10 *Senate Hansard*, 10 February 2005, p. 106.

deploy troops to an illegal war in Iraq in 2003 without consulting the people's representatives in Parliament'. He said:

A lesson can and must be learned from this kind of mistake, which is more easily made when a handful of people take closed and secret decisions on behalf of a nation without due consultation or participation. The Howard government was the first government in Australia's history to go to war without the support of both houses of Parliament. This bill provides an opportunity to ensure this never happens again.¹¹

2.15 He also noted that there were appropriate exemptions made in the bill that would not interfere with the non-warlike overseas service in which Australian troops engage.¹²

2.16 In advancing their argument, those supporting the proposed legislation cited countries where parliamentary consent for military personnel to serve in war was needed or where countries were considering introducing such a requirement. For example, Senator Ludlam informed the Senate that the bill would bring Australia into conformity with principles and practices used in democracies such as Denmark, Finland, Germany, Ireland, Slovakia, South Korea, Spain, Sweden, Switzerland and Turkey.¹³

2.17 The majority of the 31 submissions to the committee's inquiry were in favour of the bill. Unequivocally, they endorsed the principle that the executive should not be able to make such an important decision without reference to, or endorsement by, the Australian Parliament: that such a decision should 'not be left in the hands of one person or a select few'.¹⁴ In general, they held that the proposal to require parliamentary approval for an overseas deployment was a positive move that would strengthen Australian democracy by improving the transparency and accountability of important decisions by the executive government. It would promote an open system of decision-making and parliamentary involvement and confer 'more credibility and political force' on the decision.¹⁵ For example, Mr Robert O'Neill wrote:

A wider Parliamentary debate could lead to wider national consultation, resulting in much better decisions on war and peace.¹⁶

11 *Senate Hansard*, 17 September 2008, p. 4982.

12 *Senate Hansard*, 17 September 2008, p. 4982.

13 *Senate Hansard*, 17 September 2008, p. 4982.

14 See for example, *Submission 14*. See also *Submissions 3, 4, 5, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27 and 30*.

15 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 2. See also *Submission 3 and 23*. The Civil Liberties Association argued that 'the current system does not provide an effective level of accountability and scrutiny necessary for the significant decision to send troops', p. 6.

16 Robert O'Neill, *Submission 5*, p. 3.

2.18 The Women's International League for Peace and Freedom (Australian Section) believed that:

...it is important that Australia's parliament should have oversight of any decision to commit our country's troops to a war. Without such parliamentary oversight, the possibility exists for an Executive (or indeed for an influential leader acting virtually alone) to make a rash or overzealous decision that has little or no backing from the electorate.¹⁷

2.19 Many suggested that the current arrangements were outdated, 'an anachronism and an anomaly'.¹⁸

2.20 Unfortunately, while many of the submissions supporting the bill gave their strong in-principle support for the legislation, they did not refer to the provisions of the bill. This meant that they did not assist the committee in its analysis of the practical application of the provisions and their implications for the safety and success of operations. Their opinions expressed in submissions were at the level of broad principle without close considerations of the consequences should specific provisions of the bill be enacted.

2.21 During the 2005 date, those in favour of the executive retaining the authority to deploy troops, referred to the long standing Westminster convention that the executive government has the discretion to commit forces to operations overseas.¹⁹ Some cited the Commonwealth Constitution as the legal basis or authority to validate the legitimacy of this prerogative.²⁰ They argued that the executive branch of government is elected by the people to make hard decisions and is answerable to the people for those decisions.²¹ Senator Sandy Macdonald asserted that 'Governments are elected to govern, and it would be a gross act of irresponsibility to abandon that responsibility'.²²

17 *Submission 13*, p. [2]. The Human Rights Council of Australia was of the view that: 'A decision of such seriousness perforce deserves and requires a decision-making process equal to the most serious that our constitutional system provides and that is a decision of the Parliament'.

Submission 10, pp. 1–2. Just Peace found 'it incomprehensible that there is not a strict parliamentary process in place underpinned by law such as that proposed in the Bill, so as to prevent the Government of the day from committing the country to war without parliamentary debate and approval', *Submission 15*, p. 2.

18 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 1.

19 See Senator Linda Kirk and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 118, 130.

20 See Senator Linda Kirk, Senator Sandy Macdonald and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 118, 122, 130. See also Senator Alan Ferguson and Senator John Hogg, *Senate Hansard*, 10 February 2005, pp. 109, 113.

21 See Senator Marise Payne, *Senate Hansard*, 10 February 2005, p. 130. Also see Senator Sandy Macdonald, *Senate Hansard*, 10 February 2005, p. 122.

22 See Senator Sandy Macdonald, *Senate Hansard*, 10 February 2005, p. 122.

2.22 In response to concerns about the lack of accountability, those rejecting the bill argued that parliamentary processes already exist that allow for debate and scrutiny—media, question time, parliamentary committees and ultimately by the Australian people at the ballot box.²³ For example, the Minister for Defence, Senator the Hon John Faulkner, recently noted that the opportunities for debate are not limited to ministerial statements. He cited 'matters of public importance, urgency motions, general business—all of which provide senators with the opportunity to debate important issues'. He then referred to Australia's engagement in Afghanistan which has:

...been canvassed in detail during the Chief of the Defence Force's opening statements at Senate estimates. Here the CDF, the secretary of defence and other departmental and ADF representatives are ready, willing and available to answer any questions about the issue from senators.²⁴

2.23 In response to the examples of countries that require prior parliamentary approval for deployments, Senator John Hogg and Senator Marise Payne listed the countries in 2005 where such approval was not necessary. They included Canada, Belgium, France, Poland, Portugal and the United Kingdom.²⁵ In this regard, Senator Payne noted that 'different parliamentary systems, different parliamentary chambers, make different arrangements'.

2.24 A House of Commons Research Paper also highlighted the difficulty dividing countries into two distinct categories because of their unique political histories and constitutional frameworks. Furthermore, it showed that approval has different meanings or applications in various countries. For example, it noted that in some cases parliamentary approval may be needed to declare war but not to deploy troops and certain military service may not require approval.²⁶ The debates in the UK reflect the complexities in legislating for parliamentary approval. Although supporting the principle of such approval, the UK Government recognised that the main challenge was to formulate a process that would be 'sufficiently adaptable to be able to respond quickly and flexibly to the variety of situations that could arise'. It pointed to difficult issues that needed to be resolved such as allowing for exceptional circumstances, the need for urgent deployment, potential dangers of a retrospective approval process,

23 Senator John Hogg, *Senate Hansard*, 10 February 2005, p. 113. See also Senator Alan Ferguson, Senator Sandy Macdonald and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 109, 122, 130.

24 *Senate Hansard*, 2 February 2010, pp. 2–3.

25 *Senate Hansard*, 10 February 2005, pp. 113, 130.

26 Claire Taylor and Richard Kelly, *Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues*, House of Commons Library, Research Paper 08/88, 27 November 2008, p. 41–55.

security implications from the release of information, the timing of the vote and definitional issues such as 'armed conflict'.²⁷

Committee view

2.25 The committee accepts that the authority of the government to make decisions regarding the commitment of Australian forces overseas follows a long established convention. It understands, however, as noted by Professor Lindell, that if the parliament so wished it could impose limitations on the executive's prerogative to deploy troops. The committee also notes that some countries, to varying degrees, require parliamentary approval before their military forces can be deployed.

2.26 The main question before the committee, however, is not about the principle of parliamentary debate or approval but whether the bill before it provides an effective and credible alternative to the current practice. The committee is concerned with how the provisions of this bill would operate in practice.

2.27 In the following section, the committee considers the provisions of the bill; key issues that have arisen during debates in relation to these provisions; and the extent to which the drafters of the legislation have responded to matters raised during these debates.

Provisions of the Bill

2.28 During the two debates on predecessor bills, senators have had the opportunity to place on the public record their support for, or opposition to, the proposed legislation and to explain their reasons. As early as 1986, and through to the present day, some senators have identified what they believe are serious deficiencies in the proposed legislation. Their concerns have centred on the disclosure of classified material, the constraints that the bill may impose on Defence activities, unclear, misunderstood or inappropriate definitions and the scope of the bill.

Informed decision making; use of classified material

2.29 In 1986, Senator Mason told the Senate that if passed the bill would ensure a full debate in both Houses on sending Australian forces overseas. The then Minister for Resources and Energy, Senator Gareth Evans, sympathised with the underlying philosophy of the proposed legislation but raised a number of problems with its practical implementation. He expressed concerns about the disclosure of intelligence, noting:

27 *Government response to the report of the Public Administration Select Committee on the Draft Constitutional Renewal Bill*, Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty the Queen, July 2009, pp.11–12 and *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty the Queen, July 2009, pp. 46–47.

...situations may develop where there is a need to determine measures to be taken without the publicity associated with debate in the Parliament; situations where public knowledge could limit our strategic options and indeed put our forces at risk.²⁸

2.30 Senator David MacGibbon also identified a problem with the use of classified material. He argued that a decision to commit troops could be made 'only in the full knowledge of all the circumstances—knowing the diplomatic circumstances that are involved, the strategic involvement and all the military and economic factors'. In his view, these must, 'be weighed up in the light of a careful assessment of all the options that are open to the government of the day. That simply cannot be done in open debate in any chamber of this parliament'.²⁹

2.31 Nearly two decades later, senators opposing the 2003 version of the bill raised similar concerns. Representing both major parties, they argued that the executive is the only body that has 'full and proper knowledge of military and strategic decisions and the one-on-one contact with Australian allies' to be able to make a considered and well informed decision.³⁰ In their view, Parliament does not have access to all available intelligence and the complete range of advice from the Public Service.³¹ Thus, they concluded that the usefulness of public debate would be limited because information critical to making a sound decision is only within the province of the executive.³²

2.32 These senators similarly rejected the alternative of providing Parliament with all available intelligence to enable a fully informed debate. In their assessment, such an arrangement would be both impractical and detrimental to security. In particular, they were concerned that the disclosure of classified material, such as specific details on a deployment or intelligence advice given to governments on a confidential basis, would compromise the safety and security of an operation. Senator Linda Kirk explained:

There will often be cases where information simply cannot be made public. If it were to be made public it could very much undermine our strategic position when we are about to embark on a war. This could not even be overcome by holding a secret session of parliament, or something of the like, because that is contrary to our system of government and it would not be the proper manner in which to do this.³³

28 *Senate Hansard*, 17 April 1986, p. 1912.

29 Senator MacGibbon, *Senate Hansard*, 17 April 1986, p. 1913.

30 See Senator Kirk, Senator Sandy Macdonald and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 118, 122, 130.

31 Senator Alan Ferguson, *Senate Hansard*, 10 February 2005, p. 109.

32 See for example, Senator Sandy Macdonald, *Senate Hansard*, 10 February 2005, p. 122.

33 Senator Linda Kirk, *Senate Hansard*, 10 February 2005, p. 118. See also Senator Payne, p. 130.

For the major parties, the problems were serious—the inability of Parliament to have access to all the information needed to make critical decisions concerning the deployment of Australian ADF members or disclosing information that could jeopardise the safety and success of a military operation.

2.33 While the 2008 proposed legislation resembles closely its predecessor bills, it does include additions that relate directly to the release of information. Subsection 50C(5) requires the publication of the Governor-General's proclamation within 24 hours after it is made with the accompanying advice from the Prime Minister that explains the circumstances of emergency which rendered it inexpedient to seek a resolution from the Parliament. Subsection 50C(6) stipulates that the Governor-General's proclamation be laid before each House of the Parliament within two days after it is made together with a report setting out:

- (a) the Prime Minister's advice to the Governor-General as noted above;
- (b) the reasons for the proposed deployment;
- (c) the legal authority for the proposed deployment;
- (d) the expected geographical extent of the proposed deployment;
- (e) the expected duration of the proposed deployment; and
- (f) the number of members of the Defence Force proposed to be deployed.

2.34 The bill would also impose reporting obligations for the duration of the deployment.³⁴ This regular written report to both Houses of Parliament is to include information on:

- (a) the status of each such deployment, including its legality, scope and anticipated duration;
- (b) what efforts have been, are being, or are to be, made to resolve the circumstances which required such deployment; and
- (c) whether there is any reason why the Parliament should not resolve to terminate such deployment.

2.35 In a submission to the inquiry, Paul Barratt AO, Andrew Farran and Garry Woodard rejected the contention that sensitive information which is known to the Government could not be disclosed to the Parliament. They argued:

...there has been a long tradition in this country, and other countries governed under a Westminster system, of briefing the Leader of the Opposition at times of national peril. If the Prime Minister were unable to convince the Leader of the Opposition of the merits of a proposed

34 The report is to be made on the first sitting day of that House after the commencement of each of the months of February, April, June, August, October and December. The Minister is to commence reporting within 2 months after the deployment.

deployment, then we would submit that the need for the proposed deployment would be by definition less than compelling.³⁵

2.36 They did not mention how classified information would then be conveyed to all parliamentarians including independents and members of minor parties and then discussed publicly without increasing the risk of some form of disclosure of security sensitive material.

2.37 The Australian Anti-Bases Campaign Coalition noted that:

To argue that the prime minister and cabinet are likely to be closer to, and have greater insight into, a given international situation is to admit that the government has failed to keep parliament and the public adequately informed.³⁶

2.38 Mr Tim Wright wanted to go further with the reporting provisions. He suggested that the executive be required to provide information additional to that stipulated. For example, he cited estimates of the likely number of Australian troops to be killed and seriously injured in the conflict and the same information for the citizens of the invaded country as a result of Australia's participation.³⁷

2.39 Interestingly, although only two submissions expressed reservations about the use of classified material, both were in a position to have sound knowledge about the nature and extent of such information and the likely security implications should it be disclosed. The Submarine Institute of Australia explained:

The submarine's greatest strength is its ability to operate undetected in sea areas controlled by a potential adversary. It goes without saying, therefore, that the success of submarine operations relies on strict security—disclosure of submarine operational plans negates the submarines primary advantage, potentially putting the submarine at greater risk and leading to a deterioration in strategic circumstances.³⁸

2.40 It recommended that the bill be amended to make provision for the Prime Minister to determine that covert operations be excluded from the requirement to have parliamentary approval. The Navy League of Australia also drew attention to the possibility that advice provided by the Prime Minister to the Governor-General 'may contain classified material'. It therefore suggested that subsection 50C(6) may have to be altered.³⁹

35 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 5.

36 *Submission 26*, p. [3].

37 *Submission 25*, p. 2.

38 *Submission 6*, p. 1.

39 *Submission 12*, p. [2].

2.41 The committee's inquiry into peacekeeping operations looked closely at the decision-making process before Australia commits personnel to an overseas operation. It became aware of the high level and extensive discussion and consultation that takes place within and between the Department of Defence, the Australian Federal Police, the Department of Foreign Affairs, the Attorney-General's Department, the Department of Prime Minister and Cabinet and other agencies such as the Office of National Assessments. Other agencies would be included in this process as required until the National Security Committee of Cabinet considers all submissions and makes a final decision. Generally such a decision would be taken after close consultation with other countries. Much of the information under consideration would be classified, for example risks to personnel, Defence or AFP assets, their strength and location, their force readiness, as well as the level of commitment and capabilities of likely allies, and the compatibility and complementarity of their forces. Clearly much of this information could not be disclosed and, if so, would have the potential to compromise the safety and security of any proposed operation or adversely affect diplomatic relations with potential allies.⁴⁰

Committee view

2.42 The concern about the disclosure of sensitive or classified information was raised in 1986 and again in 2005 and 2009. Based on observations made during debates and by submitters, the committee is not yet convinced that the bill fully appreciates security implications and the need to take account of the appropriate and secure use of classified material. The committee also believes that without a full understanding and appreciation of the complex and interrelated security, strategic and diplomatic circumstances, members of parliament would lack the institutional ability to make important decisions on Australia's engagement in overseas conflicts.

Constraints on deployment

2.43 In 1986, Senator MacGibbon feared that if enacted, the legislation would affect the effective mobilisation of Australia's Defence Forces.⁴¹ It should be noted, however, that the bill contemplated situations requiring an immediate or prompt response. It provides for the Governor-General by proclamation to declare that an emergency exists that requires overseas service. The bill did not define 'emergency'.

2.44 It also made provision for situations when the Parliament was not in session or either House was adjourned for a period of time. At the time of the Governor-General's proclamation, if the Parliament were not in session, it was to be summoned to meet within two days after the making of the proclamation. Similarly, when a House was adjourned, it was to be summoned to meet within two days after the

40 The committee devoted a number of chapters to the decision-making process. See chapters 3–8, Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's involvement in peacekeeping operations*, August 2008.

41 *Senate Hansard*, 17 April 1986, p. 1913.

proclamation. In 2005, Senator Hogg, however, noted practical difficulties when Parliament was not in session:

It implies that everyone is close at hand and able to be summoned to participate in the debate within two days. Meanwhile, very strategic issues are passing us by, and that might not be in our interest. There are no grounds for the delay under such circumstances.⁴²

2.45 Again those joining Senator Hogg in opposing the bill on this issue represented both the major parties. They referred to the importance of the government and ADF having the flexibility to respond to an emergency. Both Senator Payne and Senator Sandy Macdonald noted that currently the government has the ability to respond to emerging threats quickly and decisively, an approach that has served Australia well in the past.⁴³ Senator Kirk was of the view that the bill would restrict the option of a government to deploy ADF personnel overseas at short notice which could 'very much disadvantage the position of our troops and also disadvantage Australia strategically'.⁴⁴ Both she and Senator Hogg cited Solomon Islands and the shooting of Adam Dunning as instances requiring a prompt response.⁴⁵ Senator Kirk stated:

If this legislation had been in force, parliament would have been required to be recalled before troops could be despatched to the Solomon Islands. That would have been most difficult and inconvenient. Similarly, when troops were deployed to Aceh, following the Boxing Day tsunami, the provisions of this relief assistance would also have required the approval of the parliament.⁴⁶

2.46 In this regard, Lieutenant General Ken Gillespie told the committee during its inquiry into peacekeeping that the situation in Timor Leste in May 2006 required an immediate response. He said action 'also necessitated a significant number of meetings at various levels...to work out the dynamics and the response that was required from a number of agencies'.⁴⁷ Indeed, the committee's report into Australia's

42 *Senate Hansard*, 10 February 2005, p. 113.

43 See Senator Sandy Macdonald and Senator Marise Payne and, *Senate Hansard*, 10 February 2005, pp. 122, 130.

44 See Senator Kirk, *Senate Hansard*, 10 February 2005, p. 118.

45 On 22 December 2004, Australian Federal Police Protective Service Officer Adam Dunning, was shot and killed in Solomon Islands, while performing a routine patrol in Honiara, protecting the residences of the Prime Minister and Governor General. AFP Media release, 'Police Arrest James Tatau in relation to the murder of Adam Dunning and the attempted murder of another three PPF Officers in Solomon Islands', 11 January 2005, http://www.afp.gov.au/_data/assets/pdf_file/1971/mr110105arresttatau.pdf and 'AFP remembers one its fallen', 22 December 2005, http://www.afp.gov.au/_data/assets/pdf_file/1970/mr_05122_dunninganniversary.pdf

46 *Senate Hansard*, 10 February 2005, p. 118.

47 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's involvement in peacekeeping operations*, August 2008.

involvement in peacekeeping provided some insight into the complexities of peacekeeping and the speed with which circumstances of an operation could change markedly and unexpectedly. For example, it found that Australia's experience in peacekeeping operations that respond to intra-state conflicts such as those in East Timor and Solomon Islands 'demonstrated the spectrum of security responses required'. It referred to the essential need for the ADF and AFP to be able to move 'in and out of different security levels'.⁴⁸ It also highlighted decisions needed to be made on the ground dealing with self defence and the emerging military doctrine including responsibility to protect.

2.47 During the committee's current inquiry, a number of submissions elaborated further on the response needed when time is critical. Some were of the view that the bill does not remove the power that may be needed in an emergency.⁴⁹ Paul Barratt AO, Andrew Farran and Garry Woodard stated their belief that:

...it will in almost all circumstances be the fact that there is no pressure of time such as to prevent adequate consultation with and debate within the Parliament, and we believe that the provisions of the draft Bill are adequate to deal with situations of genuine emergency where the need for a response is instant, overwhelming and leaving no choice of means.⁵⁰

The Australian Anti-Bases Campaign Coalition supported this argument, stating that the bill:

...mitigates any concerns about the possible impracticality of seeking parliamentary resolutions by providing for deployment in genuine emergency circumstances without prior parliamentary authority.⁵¹

2.48 To ensure that this provision was not misused, Civil Liberties Australia wanted to limit the situations in which an exemption for urgent deployment could be used. It suggested that the explanatory memorandum provide additional guidance as to what constitutes an emergency.⁵² As noted earlier, the bill offers no definition whatsoever of an emergency.

2.49 As in 2005, a number of those opposing the proposed legislation in 2008 were concerned not only with defining the meaning of emergency but, from an operational point of view, the practical application of the provisions of the bill.

2.50 The Australian Association for Maritime Affairs noted that modern military operations tend to reflect escalating or de-escalating political developments as evident

48 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's involvement in peacekeeping operations*, August 2008.

49 Marrickville Peace Group, *Submissions 19*, p. 1 and also *Submissions 21* and *26*.

50 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 5.

51 The Australian Anti-Bases Campaign Coalition, *Submission 26*, p. [3].

52 *Submission 23*, p. 7.

in maritime operations, 'where a routine peacetime deployment to a geographic region may change from being an opportunity to exercise with friendly (and potentially friendly) forces to:

- an operation to evacuate Australian citizens, with or without the cooperation of whatever local government may exist; to
- the interdiction of weapons deliveries either to the local government or to its internal opponents; to
- strikes, or threats, against selected targets; to
- the insertion of Australian or allied land forces; and
- operations in defence of Australian trade, resources, facilities or even homeland which may flow from the initial incident.⁵³

The Association explained:

...in the real world, depending on the aims and calculations of the foreign forces involved, incidents can escalate to the brink of all-out hostilities, and then may de-escalate again in a matter of hours. This Bill...seeks to insert a parliamentary approval process requiring up to two days notice, or perhaps not at all if Parliament has been prorogued, into an already complex diplomatic and operational environment.⁵⁴

2.51 Brigadier (retired) Adrian D'Hage supported the proposal requiring parliamentary approval before 'committing the country to war'. But he also recognised the need in some instances for quick and decisive action to deploy troops overseas. He stated:

For smaller deployments such as company size groups to the Solomon Islands, the Fiji crises et al, decisions need to be made in a timely and effective manner, and will often be made by the security committee of Cabinet, or the full Cabinet itself, without the need for debate in parliament. That flexibility is essential to meet situations which arise with little or no warning, are relatively small in nature, and do not involve the country in a major war (the definition of which and in itself is not easy).⁵⁵

2.52 The Navy League of Australia raised a number of related pertinent matters such as whether the proclamation would have retrospective effect. It noted the possibility of situations arising where 'actions intended to be covered by the Bill would have occurred before either the Governor-General, Prime Minister or the Parliament could act'.⁵⁶ The Australian Association for Maritime Affairs noted that

53 *Submission 8*, pp. 3–4.

54 *Submission 8*, p. 4.

55 Arian D'Hage to Ian Maguire, 20 December 2007, additional information from Mr Maguire *submission 31*.

56 *Submission 12*, p. [2].

the bill fails 'to address the legal or military practicalities if Parliament is *not* recalled, or if Parliament does not approve the deployment'.⁵⁷

Committee view

2.53 The committee recognises that extensive consultation with a range of organisations and agencies and robust analysis by defence, foreign affairs, and related strategic experts is required before making a decision to deploy Australian forces overseas. Inevitably, this process will involve classified material and continuing access to advice and intelligence from a range of government departments. At times, it may require intense and clearly focused consideration of matters followed by quick and decisive action.

2.54 The committee recognises that in many cases there would be ample opportunity for the Parliament to debate overseas developments likely to draw Australia into military action. On such occasions, the committee fully endorses the involvement of Parliament in debates about possible Australian deployment. It is of the view, however, that in some cases, engaging the two Houses of Parliament in the decision making process may well deny the government and its defence and security organisations the flexibility and adaptability needed to undertake operations safely and effectively. The bill should allow for these rare occurrences. In this regard, the committee notes that while the bill provides for emergency situations it does not define what is meant by the term emergency.

2.55 Finally, there are unanswered questions about situations where Parliament may not approve, or delay approval of, a deployment when ADF personnel, because of the need for urgent action, have already deployed. In the committee's view, the bill does not adequately address problems associated with the disclosure of classified material, the definition of emergency situations and the ability to respond quickly and effectively to emerging threats.

Definitions and scope of the legislation

2.56 During its inquiry into peacekeeping, the committee found that today's international environment is not only very different from that experienced after the Second World War, but is also more fluid. Traditional boundaries between military and civilian roles have blurred as the scope of operations have expanded to include, for example, a focus on helping to create long term stability in fragile states.

2.57 Thus, one of the main challenges in formulating a bill governing war-like service is defining activities that would come under the legislation. The 1985 bill did so by specifying service that would be exempt from the provisions, which meant service:

57 *Submission 8*, p. 1.

- pursuant to their temporary attachment to the forces of another country as provided by section 116B of the *Defence Act 1903*; or
- as part of an Australian diplomatic or consular mission; or
- on an Australian vessel or aircraft not engaged in hostilities or in operations during which hostilities are likely to occur; or
- for the purpose of their education or training; or
- for the purposes related to the procurement of equipment or stores.⁵⁸

2.58 In 1986, Senator Evans noted that at the time Australia faced no identifiable military threat. He informed the Senate that:

It is lower level challenges to our sovereignty such as harassment, sabotage and small scale raids that are regarded as most credible.⁵⁹

2.59 In his view, such threats 'would develop, at least initially, in the maritime environment and in the northern approaches to Australia'. He stated further that to require the proclamation of a state of emergency and the recall of Parliament to enable effective countering of low level threats would not be 'a practical basis for defence planning'.⁶⁰

2.60 Furthermore, he argued that, if passed, the bill would severely hamper Defence in the protection of the country and in carrying out normal duties across a range of activities. He was concerned that the legislation would not exempt such activities and would:

- preclude defensive activity such as protection of Australian shipping;
- severely constrain the operational effectiveness of the Defence Force in such routine circumstances as hot pursuit in the Australian fishing zone beyond territorial limits;
- complicate arrangements for the employment of Defence Force personnel in other countries under the defence co-operation program; and
- in other instances where the Australian defence forces may be involved in providing humanitarian or disaster relief assistance.

2.61 He accepted that even though the exemptions could be expanded, 'it would be difficult to arrive at a list in the legislation which is both comprehensive and clear in its coverage of routine peacetime activities'. Senator Evans also observed the

58 Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2], ss 50C(11).

59 *Senate Hansard*, 17 April 1986, p. 1912.

60 *Senate Hansard*, 17 April 1986, p. 1912.

difficulty, even after hostilities have begun, of deciding, 'in advance, the limits of required deployments'.⁶¹

2.62 In 2005, a number of senators were also troubled by what they saw as definitional ambiguities and problems associated with possible interpretations of Defence activities that would be covered by the requirement for approval. For example, Senator Kirk noted that the vague definitions 'make it most unclear how the legislation would operate'.⁶² Senator Hogg argued that 'when one talks about overseas conflicts one needs to be very careful about what one means'. He said:

One needs to be careful about the word 'war'. We had a role in East Timor. There was clearly an overseas conflict; there was clearly a war taking place in East Timor between some dissident forces and those people who ultimately achieved their personal freedom. In my view, the same could be said to have been the case in the Solomons. There are other cases as well: Bougainville, Sudan, Rwanda and so on. In that sense, it is very important to see what the definitions actually are.⁶³

2.63 The confusion created by inconsistencies between the explanatory memorandum, the second reading speech and the wording of the bill add another layer of uncertainty about the exact meaning and intention of the proposed legislation.

Warlike and non-warlike operations

2.64 As far back as 1985, those supporting the bill conveyed the impression that the movement of personnel in the normal course of their peacetime activities would be exempt from the requirement for parliamentary approval. They relied on the provision listing exemptions to provide that assurance. This assertion was repeated in 1988, 2003 and 2005. Furthermore, the language used by the sponsors of the proposed legislation suggested that the bill applied to warlike service and that 'classifying service into warlike and non-warlike service is straightforward'. For example, Senator Bartlett told the Senate in February 2005:

This bill simply says that, if Australia is going to send our men and women to engage in a war overseas, it should get the support of both houses of parliament before doing so. That is all it says.⁶⁴

2.65 But the debates in 1986 and 2005 show that the list of exemptions was far from adequate. This failure was not rectified by the 2008 bill. Indeed, despite the criticism levelled at the potential for routine military activities to be captured by the approval requirement, the provision exempting specific service remained unaltered.

61 *Senate Hansard*, 17 April 1986, p. 1912.

62 *Senate Hansard*, 10 February 2005, p. 118.

63 *Senate Hansard*, 10 February 2005, p.113.

64 *Senate Hansard*, 10 February 2005, p. 126.

The exemptions are listed in subsection 50C(11) of the bill and are identical to those given in 1985.

2.66 Today, many of those supporting the bill continue to assert that non-warlike activity would not be subject to the approval process. The explanatory memorandum to the 2008 legislation states clearly that the service of members of the ADF 'beyond the territorial limits of Australia in warlike actions would require the approval of both Houses of the Parliament'. It also explains that the bill provides that the requirement for parliamentary approval of overseas deployment of forces does not apply to normal, non-warlike overseas service. Likewise, when introducing the bill, Senator Ludlam maintained that the exemptions were appropriate and would not interfere with the non-warlike overseas service of Australian troops.⁶⁵

2.67 A number of submitters picked up on these statements and assumed that the bill required that only war or 'warlike service' would need Parliament's approval. For example, the Women's International League for Peace and Freedom was pleased that the bill 'does not apply to normal, non-warlike overseas service':

Thus,...appropriate exemptions would exist to ensure that no impediments would interfere with overseas service for Australian troops in such missions as a peacekeeping operation, and emergency deployment or disaster relief.⁶⁶

2.68 The Australian Anti-Bases Campaign Coalition understood that overseas deployments that 'come under the rubric of "peacekeeping"; and deployments that are part of humanitarian and disaster relief efforts' were exempted from the bill.⁶⁷

2.69 The committee notes that although the explanatory memorandum refers to warlike actions, the bill does not. Indeed, the words 'war' or 'warlike' do not appear in the proposed legislation. As discussed previously, the bill relies on subsection 50C(11) to determine what is and is not covered by the proposed legislation. Thus parliamentary approval is needed unless the service outside Australian territory is part of a temporary attachment of an ADF member to the forces of another country; part of an Australian diplomatic or consular mission; on an Australian vessel or aircraft not engaged, or unlikely to be engaged, in hostilities; or for the purposes of their education, training or procuring equipment or stores.⁶⁸

2.70 For some submitters the exemptions were too narrow. The Australian Association for Maritime Affairs noted that Australia's seaborne trade interests extend

65 *Senate Hansard*, 17 September 2008, p. 4982.

66 *Submission 13*, p. [2].

67 *Submission 26*, p. [3]. For further examples see also, Campaign for International Co-operation and Disarmament, *Submission 14*; Shelley Booth, *Submission 16*; Stop the War Coalition, *Submission 20*, p. 2; and Bill Fisher and Miriam Tonkin, *Submission 30*, p. [1].

68 Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008, subsection 50C(11).

well beyond Australia's territorial limits and 'may require the assistance of Australian defence assets or by other friendly nations'. In its submission, it posed a range of queries about the classification of Defence activities and used the current anti-piracy operations off Somalia to illustrate its concerns. For example, it asked whether participation in the international anti-piracy operation was considered 'service' under the terms of the bill meaning that:

...RAN units could not even be committed to such an operation without a resolution of the Parliament or could be committed but only with the proviso that they might be unilaterally withdrawn 48 hours later?⁶⁹

2.71 The Navy League of Australia voiced similar concerns about what is considered warlike. It noted that recently two RAN ships in transit to the United States and Europe were unexpectedly called on to deal with Somali pirates. It asked the same question—'was the RAN ships' action a *warlike act*?' It contended that it would be undesirable to have commanders of Australian ships in doubt as to the legality of their actions: that ADF members must have clarity as to what may be done legally.⁷⁰

2.72 Although Australia is a maritime country with an extensive exclusive economic zone and relies heavily on sea routes for its trade, concerns about defining military action were not confined to maritime operations. The Australian Association for Maritime Affairs referred to the use of the 'vague term "service" in the bill'. It stated:

There are many fairly precisely defined forms of 'service' undertaken by ADF personnel—war service, war-like service, hazardous service, etc—forming a spectrum of 'service' which require specific determinations by the Minister. At which level of defined 'service' does the Bill apply?⁷¹

2.73 According to General (retired) Peter Gratton, there 'are plenty of non-warlike deployments beyond the territorial limits' other than those excluded in subsection 50C(11). As examples, he cited—official visits, attendances at conferences and the like, rescue or extraction of Australian citizens from threatening situations overseas, peace keeping under UN and combined exercises with the forces of other countries.⁷² Although he supported the principle of obtaining parliamentary approval for non-routine deployment of Australian forces into armed conflict or situations likely to result in armed conflict, he was of the view that the bill as drafted was unsatisfactory. He explained:

The primary operative clause should address what the Bill actually aims at—Parliamentary approval of participation in foreign wars. There are major issues of national security involved, and drafting would need careful

69 *Submission 8*, p. 4.

70 *Submission 12*, p. [1].

71 *Submission 8*, p. 2.

72 Peter Gratton to Ian Maguire, 15 February 2008, additional information from Mr Maguire *submission 31*.

consideration and consultation, not only with interest groups and retired people like me, but with the ADF and Departments who would be involved in implementation.⁷³

2.74 Ms Melissa Parke MP noted that the bill should also provide for 'service in United Nations missions to be included in the definition of "normal, non-warlike overseas service"'.⁷⁴ People for Nuclear Disarmament (Western Australia) noted the importance of ensuring that the ADF's humanitarian roles in responding to disasters such as earthquakes and tsunamis were not impaired.⁷⁵

2.75 In his submission, Mr Ian Maguire, who has long been interested in the legislation, proposed a redrafted and expanded subsection 50C(11). In his list of 8 exemptions, he included service 'as part of United Nations-sponsored peacekeeping activities which have not changed their predominant character to that of peace-enforcement and/or open warfare between or among States'. He also included 'the rescue and/or extraction of Australian citizens and dependent and non-combatant persons associated with them from disasters and threats from civil strife overseas'.⁷⁶

2.76 General Gration has commented on the difficulties drafting this subsection. He noted 'the potential to impose unnecessary administrative restraints on the ADF in going about its day-to-day non-warlike business'.⁷⁷

Territorial limits of Australia

2.77 The committee also notes another problem associated with definitions in the bill. The Australian Association for Maritime Affairs sought clarification on the meaning of 'the territorial limits of Australia' as used in the proposed legislation. It asked does it mean the 12 nautical mile Territorial Sea limit, or the 200 nautical mile Exclusive Economic Zone, or even the vaster area of seabed resources claimed by Australia. It stated further:

If it is only the Territorial Sea limit, then the Bill may be perceived as inhibiting the power of the Government to take immediate and decisive action to protect Australian interests...

If the Bill is intended to cover the full geographic range of Australia's maritime *interests* then considerable clarification appears to be needed.⁷⁸

73 Peter Gration to Ian Maguire, 21 February 2008, additional information from Mr Maguire *submission 31*.

74 *Submission 11*, p. 2.

75 *Submission 22*, p. [2].

76 *Submission 31*.

77 Peter Gration to Ian and Claire Maguire, 7 October 2009, additional information to *Submission 31*.

78 *Submission 8*, p. 2.

2.78 According to the Association, the difficulties do not stop with determining the sea boundary. It explained that under international law Australian warships as well as 'public vessels' enjoy sovereignty and 'represent an extension of the sovereignty of the state to which they belong'. Thus, the Association informed the committee that:

Arguably the 'territorial limits of Australia' include the actual vessels themselves and therefore such vessels, and their personnel serving onboard, take the 'territorial limits of Australia' with them wherever they go and no matter what operations they undertake.⁷⁹

2.79 In its overall assessment, the legislation 'suggests a lack of appreciation of the realities of modern military operations and, particularly, the flexibility provided by maritime power, as well as the needs of the defence of Australia's worldwide maritime interests'.⁸⁰

2.80 General Gration also referred to the meaning attached to the 'territorial limits of Australia'. He presumed that this term was intended to allow use of Australian forces in defence of Australia without the approval of Parliament. In his view, however, any defence of Australia would 'almost certainly involve the deployment of forces beyond the territorial limits—mainly naval and air, but possibly land as well'. He concluded:

It would also weaken the deterrent value of forces such as our F111s and submarines if a potential enemy knew that they could not be used without the fanfare of Parliamentary debate.⁸¹

Imposing conditions or requirements

2.81 By 2005, concern about the scope of the bill had expanded considerably beyond definitions of warlike to include matters such as the extent to which Parliament's approval would involve details of, or impose conditions on, a deployment. Senators opposing the legislation raised questions such as would the resolution of the Parliament go as far as including the rules of engagement. These rules are concerned with the laws of armed conflict and prescribe the types of force that may be used by a deployment in different circumstances. Although the rules must be consistent with international law and Australian domestic law, their adequacy and appropriateness is related to the main objectives of the operation and the level of force protection deemed necessary. They are extremely important to those engaged in any military operation. Senator Payne said:

I have a greater regard and respect for the Australian Defence Force doing those things with professionals, expertise and a regard for operational

79 *Submission 8*, p. 3.

80 *Submission 8*, p. 5.

81 Peter Gration to Ian Maguire, 15 February 2008, additional information to *Submission 31*.

security than to even contemplate that that should be part of the process of the parliament.⁸²

2.82 Senator Hogg also asked whether the resolution by both Houses would go to issues such as rules of engagement which in his view were 'most important':

If they are left at the beck and call of a parliament which might not be fully informed or have at its disposal all the information, then our forces may well be adversely affected by a resolution of the parliament as to their engagement. Would such a resolution include the strategy to be involved in such an engagement. Would it have time limits. What time limits would there be? What other conditions might apply?⁸³

2.83 Clearly, the proposed legislation should be clear on the extent to which Parliament's resolution to approve the deployment of troops is able to impose circumstances or conditions on that deployment.

Committee view

2.84 The committee has identified a number of shortcomings in the proposed legislation that date back to 1986. These deficiencies relate to the uncertainty and confusion around the use and application of terms such as war and non-warlike service and assumptions made about their application. The committee is also concerned about the nature of the resolution to be agreed to by both Houses of the Parliament and the extent to which it could impose conditions on the deployment.

2.85 Before completing its consideration of the bill, however, the committee touches briefly on a number of procedural or technical questions. The committee will not provide a detailed discussion on these matters as it has already identified serious deficiencies in the bill.⁸⁴

Other concerns—position of Governor-General, summoning parliament, joint sitting and consequential amendments

2.86 In 1986, Senator Evans referred to more technical difficulties with the bill but did not elaborate except for citing the operation of the amendment when Parliament has been dissolved. In 2005, some senators also noted possible procedural impracticalities with summoning parliament.⁸⁵

82 *Senate Hansard*, 10 February 2005, p. 130.

83 *Senate Hansard*, 10 February 2005, p. 113.

84 Senator Evans, *Senate Hansard*, 17 April 1986, p. 1912 and Senator Hogg, *Senate Hansard*, 10 February 2005, p. 113.

85 Senator Evans, *Senate Hansard*, 17 April 1986, p. 1912, Senator Hogg, *Senate Hansard*, 10 February 2005, p. 113.

2.87 Additional provisions were inserted in the 2008 bill dealing with possible procedural matters associated with summoning the Houses of Parliament.

2.88 New subsections (8) and (9) take account of circumstances when the Parliament is not in session at the time the Governor-General makes a proclamation about an emergency requiring the deployment of members of the ADF. Under the proposed legislation, when the Parliament is not in session or has been prorogued within 7 days after the proclamation, the proclamation shall cease to have effect 7 days after it was made. Furthermore no proclamation, the same in substance, shall be made until the day on which the Parliament next meets. The legislation also allows for situations where the House of Representatives has been dissolved or has expired and the day for the return of writs for the general election has not occurred or the House has expired within 7 days after the making of the proclamation. In such cases, the Governor-General's proclamation shall cease to have effect at the expiration of 7 days after the day appointed for the return of the writs for the general election.

2.89 The former Clerk of the Senate, Mr Harry Evans, informed the committee that the main constitutional problem sought to be overcome was 'the ability of the Parliament to statutorily regulate the constitutional power of the Governor-General to prorogue and summon the two Houses'. He was of the view that 'the attempt by the bill to deal with this and related problems is reasonably clear'.⁸⁶

2.90 In 2005, a number of senators expressed concerns about the position of the Governor-General and whether he was to act on the advice of the executive government or whether he or she was to 'take counsel from other parliamentary representatives'. As noted earlier, subsection 50C(4) stipulates that the Governor-General's proclamation declaring that an emergency exists 'shall not be made except on the written advice of the Prime Minister to the Governor-General'.

2.91 Some senators were very concerned about the political consequences for the office of the Governor-General. Senator Payne and Senator Macdonald argued that the proposal 'would place the Governor-General in an unacceptable position'. They suggested that the office of the Governor-General could be politicised' and that the bill runs counter to the fundamental premises of our constitutional system of government.⁸⁷

2.92 On another matter, Professor George Williams said that the bill should not be enacted in its current form. He favoured a joint sitting of Parliament as opposed to separate sittings by each House.⁸⁸ Just Peace had also entertained the notion of a joint sitting.⁸⁹

86 Mr Harry Evans to Chair of Foreign Affairs, Defence and Trade Legislation Committee, 24 August 2009.

87 *Senate Hansard*, 10 February 2005, pp. 122 and 130.

88 *Submission 1*, p. 1.

89 *Submission 15*, p. 4.

2.93 Finally, the Australian Association for Maritime Affairs drew attention to the need for consequential amendments to the Navy, Army and Air Force Acts.⁹⁰ For example section 33 of the *Naval Defence Act 1910* states that 'Members of the Navy may be required to serve either within or beyond the territorial limits of Australia'. Section 4F of the *Air Force Act 1923* has a similar provision which states 'Members of the Air Force may be required to render air-force service on land or sea or in the air, and either within or beyond the territorial limits of Australia'.⁹¹ This need for consequential amendments could be easily rectified.

Long standing government policy

2.94 The Department of Defence did not make a submission to the inquiry. The Minister for Defence, the Hon John Faulkner, however, recently made clear that the government is opposed to any such legislation and that 'committing troops to war should remain the prerogative of the Prime Minister and Cabinet'. A spokesperson for the Minister stated, 'the Government maintains—as have governments past of both political persuasions—that the power to deploy the Australian Defence Forces beyond Australian territorial limits is a matter for the executive branch of government'.⁹²

Conclusion

2.95 Those involved in the 1986 and 2005 debates or in making submissions to this inquiry recognised the seriousness of the decision to send members of the Defence Force abroad on warlike service. Those supporting the bill believed that any such decision required debate and approval by Parliament. While also acknowledging the critical importance of parliamentary debate, most opponents of the bill stopped short in accepting the requirement for both Houses of the Parliament to approve the deployment of Australian troops. They held misgivings about the practical application of some provisions.

2.96 Since 1986, when the Defence Amendment Bill 1985 was debated, a number of shortcomings in the proposed legislation have been raised consistently. Aside from revising the provisions governing procedures when Parliament is not in session, the bill before the committee shows little evidence that it has addressed deficiencies that were apparent in earlier versions of the legislation. They include issues around the treatment of classified material; constraints on the ability of Defence, in some cases, to mobilise its forces safely and effectively; and serious problems with definitions.

Classified material, informed decision-making

2.97 The committee is of the view that the disclosure of classified or sensitive intelligence may well compromise an operation and the safety of Australian forces or

90 *Submission 8*, p. 2.

91 See section 33, *Naval Defence Act 1910*, and section 4F, *Air Force Act 1923*.

92 Quote taken from the *Age*, 'Labor MP says Parliament should approve war', 23 December 2009.

those of their allies. On the other hand, the committee contends that if such information were necessarily withheld from the Parliament, then those required under the proposed legislation to make critical decisions about the deployment of forces would not be fully informed—an equally concerning situation for the security of the nation and its forces. The committee finds that the legislation does not address these concerns adequately.

Requirement for flexibility and adaptability

2.98 Although the proposed legislation allows for emergency situations, the committee is concerned that the process of seeking Parliamentary approval may, in some circumstances, cause difficulties for the effective and safe deployment of Australian forces. The committee is concerned about the possible delay especially should debate in Parliament become prolonged. It also has concerns about possible unintended consequences that may arise including implications for the Defence Force should approval not be forthcoming after forces have been dispatched in response to an emergency.

Scope of bill— extent of parliament's involvement in deployment, military activities over which parliament exercises authority, and the definition of territorial limits

2.99 The committee believes that a major flaw in the proposed legislation is its failure to take account of military service such as peacekeeping, capacity building in other countries, humanitarian assistance, anti piracy, responses to maritime incidents such as harassment, sabotage, small scale raids and illegal fishing and covert operations such as those involving submarines. This list is not exhaustive. Furthermore, the committee notes an inconsistency between the explanatory memorandum with its use of the words non-warlike overseas service and subsection 50C(11) which makes no reference to peacekeeping or humanitarian or disaster relief operations.

2.100 In this regard, the committee is of the view that critical terms should not be used in the explanatory memorandum without reference and clear definition in the bill. The committee is of the view that subsection 50C(11) as currently drafted is unsatisfactory and requires thorough revision, after exhaustive consultation with Defence and, if required, the AFP.

Complex legislation

2.101 The committee suggests that any proposal to limit or remove the power of the executive to decide on the commitment of Australian troops to overseas service needs to be examined carefully by the Department of Defence, Attorney-General's and relevant security agencies. They must be an integral part of any consideration to change the current process for committing troops to overseas service. Such agencies are best placed to understand and advise on matters such as the disclosure of classified material and of the contents of diplomatic consultations, of the complexities of formulating rules of engagement and the safety and operational implications associated with public debate on such matters. Defence have a sound understanding of

the complexities in pre-deployment preparation and readiness, the location and strength of Australia's military assets, the strategic importance of covert actions, responding to incidents such as piracy, and the complicated and changing nature of peacekeeping operations. This list indicates some of the complex circumstances that any legislation dealing with the deployment of troops must recognise. Clearly, those most knowledgeable about such matters need to be involved in the formulation and drafting of legislation governing the commitment of Australian forces to overseas service.

Overall assessment

2.102 The committee is not in any way against the involvement of both Houses of Parliament in open and public debates about the deployment of Australian service personnel to warlike operations or potential hostilities. It agrees with the views of most submitters that the Australian people, through their elected representatives, have a right to be informed and heard on these important matters. But, while wholeheartedly supporting debate in Parliament on any anticipated, proposed or actual deployment to overseas warlike operations, the committee cannot endorse this proposed legislation. It is of the view that the bill leaves too many critical questions unanswered to be considered a credible piece of legislation. It believes that, while well intended, the bill may have unforeseen and unfortunate consequences that need to be identified and resolved before further consideration could be given to proposed legislation.

Recommendation

2.103 The committee recommends that the bill not proceed.

SENATOR MARK BISHOP
CHAIR

Australian Greens - Dissenting Report

The debate on who should be empowered to send Australian men and women to war is, as the Committee's report attests, an enduring and persistent one. While underway 'for decades now', each decade has brought lessons and experiences to inform and deepen this debate. The sequence of unfortunate decisions leading Australian Defence Force personnel to be engaged in an illegal war in Iraq has prompted a renewed sense of its urgency and relevance.

The most serious flaw in the committee's majority report is the assumption that having all dimensions of security and diplomatic intelligence at its disposal, the executive arm of government alone should be entrusted with sending Australians into war.

If even the comprehensive debacle of the invasion of Iraq is insufficient to shake this unfounded faith, it is hard to conceive of what it will take to do so.

The Committee notes that a considerable proportion of submissions were devoted to the principle in question rather than the detail. This is surely due to the fact that the major parties have not yet conceded the principle that democratic debate by those who represent Australians is appropriate in sending troops to war.

Both of the major parties are united in their refusal to even discuss the principle, let alone the details. Should the major parties begin to give more value to democratic principles of consultation, transparency and accountability, detailed attention can be paid to clarifying and refining the various thresholds and definitions that will be required for this principle to be more practically grounded. The majority report does an excellent job of identifying these problem areas and threshold questions, and a dismal job of proposing the obvious ways forward.

The relative maturity of the debate in the UK on the war power has resulted in several thorough inquiries and a new convention whereby the executive commits to trigger a debate leading to a resolution of the parliament before a deployment is undertaken.

In stark contrast, the immaturity of the debate in Australia has seen this Committee decline to even conduct a hearing into this Bill. That is, an inquiry into the merits of democratic debate was unable to hear the evidence of former senior ADF personnel, defence secretaries, UN peacekeepers, ambassadors and advocates, who apparently could "bring nothing new to the debate".

The Australian Greens disagreed that these experts had nothing to offer and therefore organised a forum bringing together those with divergent views, the transcript of which is provided as an addendum to this dissenting report.

This dissent answers the key arguments raised in the majority report, addressing appeals to 'tradition', the disclosure of sensitive information into the public domain, and the ability to maintain flexibility and rapidity of deployment.

Westminster tradition

Those opposed to enhancing the accountability and transparency of government in sending troops to kill and die often cite 'long standing Westminster conventions' as argument. Ironically, the Iraq debacle has actually prompted Westminster to revisit the 'war power'.

Rather than blindly maintaining tradition in maintaining the prerogative only in the hands of the Executive, the government in Westminster recognised the limitations and pitfalls of this tradition. It also recognised that democratic institutions evolve and modernise over time as lessons are learned. Not all 'long standing Westminster conventions' have merit and many have changed: to reverse the bigotry inherent in conventions that, for example, did not recognise women or people of colour as human beings with democratic rights and responsibilities.

The expertise offered by Professor Colin Warbrick was particularly insightful on the debate in Westminster as he served as an adviser to the House of Lords Committee on the Constitution. Professor Warbrick detailed many of the unanticipated complexities encountered by the UK Committee, including the progress made on some of the issues raised in the Committee's report, regarding appropriate exemptions and the definitions of terms like 'emergency' and 'war-fighting capacities.'

The Professor made an important point about the decision-making processes used in the Security Council wherein the concept of operations, mandate and regular reporting is a routine part of the UN's peacekeeping function.

"...there are standard features of these arrangements which states do comply with. There is an identifiable mandate, there is a reporting obligation and there is the possibility of time limited deployment. If we can manage that for the Security Council, I fail to see why there is a principled objection, there may be pragmatic ones, but why you can't do this domestically as well. "

Disclosure of sensitive information into the public domain

An argument made by opponents of the Bill is repeated in the Committee's report implying that a parliamentary debate necessarily involves the disclosure of classified military and strategic information. Proponents of this argument miss the point that it is not a military decision to go to war, it is a political decision. This Bill calls for the government of the day to make the case as to why peaceful diplomatic efforts are exhausted and force is the only option. This is a political debate, not a military one. Arguments, clear goals, a risk and cost benefit analysis is envisaged, not the disclosure of classified military information about the placement of military assets or personnel that would compromise the country's security.

Professor Helen Ware spoke from her considerable experience in war zones as a government official and as someone who now teaches peacekeepers and members of the ADF. She relayed the incredulity she noted in rural Australia at the democracy deficit inherent in Prime Minister Howard's unilateral decision to enter Iraq,

"I was in Armidale at the time when it was announced that we would join the coalition of the willing in Iraq and I can remember one of the most common reactions on the street was some amazement that the Prime Minister could just do this without having to go and consult the parliament...Because if something as important as warfare in which Australians are at risk and indeed are killed overseas is not a matter for consideration by the parliament on a regular basis, it becomes rather an interesting kind of democracy. If we think about it, we might be quite shocked for example say if one of our northern neighbours, perhaps I'd better not name one, went to war and their parliament was not in anyway involved, we would probably say their president was a dictator."

Flexibility and rapid deployment

Submissions made to the Committee and participants in the forum reflected on the need for flexibility and rapid deployment of troops. The Bill does provide for exemptions and procedures for emergency deployment, aspects of which will be strengthened and further elaborated in amendments informed by this inquiry. Insights were provided by military experts regarding the occasional need for haste in deploying troops in peacekeeper capacities to prevent the onset, escalation or renewal of violence.

Opponents of the Bill who utilise the East Timor example as their strongest case in point were rebutted by both Brigadier (retired) Adrian D'Hage and former Defence Secretary Paul Barrett AO, both of whom had senior responsibilities for Australia's engagement in East Timor. Brigadier D'Hage:

"...planning for major deployments like Iraq and even East Timor involves a lot of logistics, you need a lot of time to do that, and there is ample time within that military gearing up, when you put forces on alert, for the debate to take place."

Paul Barrett AO concurred,

" an example with which I have first hand knowledge, ...is the decision to prepare troops for deployment to Timor. The timescale of that was that in the National Security Committee of Cabinet, following the then Prime Minister 19 December 1998 letter to President Habibbi of Indonesia and his response. Admiral Barry and I recommended to National Security Council of Cabinet in February that before the year was out the government might find it desirable to have raised another brigade group to 28 days readiness. That means given 28 days notice to deploy they would be able to deploy. Now, it took us about 6 months and between two and three hundred million dollars to achieve that effect of having another brigade group ready to deploy out 28 days notice. And when there was decided to deploy troops to East Timor there was another 28 days to get them on their way. So for most of 1999, between February and September 1999 there was an opportunity to debate the issue in parliament. There were sensitivities involved in that because the Department of Foreign Affairs was understandably concerned about what signal all of this training of military forces was sending to Indonesia when we were in a sensitive situation. So it's not necessarily a debate you would have wanted to have had had in March 1999, but as you can see when that was evolving, we were in discussions with the Indonesians and the UN about whether our troops could deploy. There was plenty of time to have a debate in parliament about what we were doing and why, but to actually get the approval of parliament not simply to inform the parliament."

Conclusion

The Committee cites Minister John Faulkner as listing various opportunities for parliament to debate the war like situations in which Australia is involved, such as Matters of Public Importance, urgency motions, questions and general business. However, every time a motion is used to raise concerns about a foreign policy issue, the government provides a bland and condescending admonition about the inappropriateness of using such instruments to discuss delicate and complex foreign affairs matters. Similarly, MPIs and ministerial statements on conflicts with which we are engaged offer little opportunity for a debate or exchange, rather they are a one way communication with no recourse for input to actual decision making.

The Committee's report notes that various sections of the Bill, 'require thorough revision after exhaustive consultation with Defence, and if required, the AFP'. The Committee also suggests that 'any proposal to limit or remove the power of the executive to decide on the commitment of Australian troops to overseas service needs to be examined carefully by the Department of Defence, Attorney General's and relevant security agencies'.

The Committee states that 'Clearly those most knowledgeable about such matters need to be involved in the formulation and drafting of legislation governing the commitment of Australian forces to overseas service'. Given the Committee has identified the utility of consultation and engagement with relevant agencies, the Greens recommend that the Committee continue to engage with this issue by organising off the record briefings, round tables and forums on the matter.

The Committee's report notes that the unequivocal support for the principle that the Executive should not be able to make such an important decision without reference to or endorsement by the Australian parliament. Through such statements, it appears the Committee agrees with the spirit of the Bill and should therefore engage more thoroughly in the process of refining its provisions.

The virtues of living in a democracy extend beyond delegating responsibility to government through the act of voting once every three years. Democracy is an evolving art and our democratic practices and institutions like the parliament should also evolve to support an ever more engaged and empowered citizenship.

As other democracies have evolved, subjecting the war power to a democratic process has become routine. As one of this Bill's strongest and most prominent advocates recently said of this Bill, "Its chances may appear to be slim at present, but its time will come!"

SENATOR SCOTT LUDLAM
AUSTRALIAN GREENS

Addendum to dissenting report

Forum on the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008
Friday 12 February 2010
Room 1S5, Parliament House, Canberra

NOTE: This is not a strict verbatim transcript but rather tries to capture the main points of participants

Senator Ludlam opened the meeting at 9.06 am.

Senator Ludlam: I would like to welcome you all. I'm just going to do some very brief formalities. I'm aware that it is very late in London where the Professor has had the good grace to stay up to join us. Professor, in welcoming you to this forum today, I need to remind you that this is not an official parliamentary meeting; you are therefore not protected by parliamentary privilege. I'm emphasising this point to you now and to everyone that has joined us this morning that we are fully responsible for anything we say here, and the normal rules of defamation apply. So this meeting is not being conducted by the normal rules of parliamentary hearings. If that is clear can I ask each of the participants in the room to very briefly introduce themselves, so you know who you are talking to, and then I'll ask you to make an opening statement.

The following participants introduced themselves:

Neil James, Executive Director, Australia Defence Association

Ruth Corrigan, representative, Women's International League for Peace and Freedom, Australian Section

Professor Helen Ware, Professor University of New England in Armidale, teaches peace studies

Dr. Sue Wareham, Immediate Past President, MAPW, Australian affiliate of IPPNW

Dr. Kris Klugman, President of Civil Liberties Australia

Bill Rowlings, CEO, Civil Liberties Australia

Nick Deane, Marrickville Peace Group

Jo Eirie, Marrickville Peace Group

Andrew Barlett (former senator)

Felicity Hill (transcribing)

Secretariat, Senate Standing Committee on Foreign Affairs Defence and Trade

Senator Ludlam: Professor I'll give you the floor to make an opening statement and then if you are willing, to take questions.

Professor Colin Warbrick: Sure. My involvement in this process was because I was the adviser to the House of Lords Committee on the Constitution, which looked at what turned out to be the power prerogative to deploy troops abroad. This was part of several initiatives; mainly it has to be said, driven by the decision to go to war in Iraq, which have sought to find some way of calling to account the otherwise unaccountable powers over the prerogative of the government to decide effectively when to go to war. I think it was fair to say that the Committee found it a far more complex question than they expected. There was legislation proposed on more than one occasion to deal with this matter, some of it I have to say I thought was quite sound. But the Committee in the end decided that they would recommend an instant parliamentary convention, that there ought to be a statement by the government about what it was going to do in the future

whenever it sought to deploy troops abroad in, I will put it very generally, war-fighting capacities. We have to come back to some of these questions as we go on.

There was some resistance I think it is fair to say, by the government. It was still Tony Blair's government then when this report was issued. But when Gordon Brown became Prime Minister, practically the first initiative he took was to propose quite an elaborate programme of constitutional reform very broadly based to try to make, that was willing to make, the Executive more accountable to parliament and the people through various acts of power, including the war power. There was a consultation about what should be done and as a result of that, the government produced a Green Paper in which it effectively accepted in principle, as its preferred position, something close to the proposal of the House of Lords Committee, that there should be an instant convention, a parliamentary statement, a House of Commons statement which would regulate future decision to go to war.

I will say two things about this. First of all, that the proposal of the government is so weak and under the control of the Executive that it hardly amounts in my view to an advance at all. The second thing is that the way in which the matter has been handled has been partly effected, there is no question, by the subsequent Inquiry into Iraq by the Chilcott Committee. Claims of one kind or another, that either the matters ought to be left completely alone, or there is some kind of ex post facto accountability for these kinds of decision is the right way to proceed. But not that you make crucial decisions about war and peace subject to parliamentary and still less judicial control.

I will just make one final point, when the House of Lords Committee was dealing with the question the government said consistently that there would never be another recourse to war without consultation and approval by the House of Commons. At that time and since, the government has a new, entirely new deployment, has upped the deployment of troops to Afghanistan, as though they made no such commitment, it has adopted its powers and policies under the existing provisions, which effectively have left it free to decide when it will send troops, how many troops it will send, and so on.

Senator Ludlam: Thank you very much for that. I should acknowledge that I was very remiss in not introducing former Senator Andrew Bartlett who is on the phone and was the initiator of the Bill we are discussing today.

Andrew Bartlett: I am remiss in not being with you, apologies to everyone. Thank you for all of your participation today.

Senator Ludlam: Professor, can you describe for us the process of consultation the Green Paper went through? Who did you speak to?

Professor Colin Warbrick: It was published on the web. Certain people were contacted directly by the justice department which was responsible for this. It was a very broad consultation on more than the war power, and I was very surprised at how very few people did in fact reply on the war power question. The most amazing thing of all was the question about whether the Union Jack should be flown in public places obtained ten times as many responses as the power to go to war. There was quite useful and relatively wide ranging responses, and of course there

was House of Lords Committee material to go on, and other Committees had been looking at this question in greater or lesser detail, so there was quite a bit of information on which the government could rely.

Senator Ludlam: Can you sketch for us the different models then that were put forward?

Professor Colin Warbrick: The first proposal was that there should be legislation. And there were models already available, because there were private members bills which had successively distilled what was required if there was to be legislation. There was room for argument about what a legislative scheme should contain. One of the big questions that you might want to consider is what overseas deployments should be included? Is it the case that every time an Australian soldier crosses the Australian and international border there should be a debate in parliament? It needs some threshold decisions and standard settings. The House of Lords Committee were reluctant to accept that for two reasons I think. One was that they thought it was politically difficult to accomplish, and secondly, and this will always be a problem, there was concern about judicialising the war decision, and turning what was essentially seen by some people as essentially a political decision into a judicial one.

The second proposal was that there should be this parliamentary statement, a House of Commons statement, effectively it means in the UK that it is the House of Commons we are talking about. There should be a statement by the government, or adopted by the House of Commons which would say that for a future deployment the government would bring a proposal to the House of Commons on a substantive motion which would be a condition for deployment of troops and with that statement there would be certain information. That is partly why the difficulties arise because many people think that it's the information question, at least in relation to Iraq which is the crucial question, rather than the fact of the consultation itself, because parliament did vote on the decision to go to war in Iraq - the question is what was the authenticity of the information which was provided to it. And thirdly there was the suggestion that we stay as we are, I mean what was there wrong with the constitutional arrangements that we have in place, they had served us well enough and should continue.

Senator Ludlam: Thanks very much, I would like to open up the floor to others who might wish to ask a question.

Neil James: I have one question. It's not so much the matter of principle of whether parliament should have this power or not but the practicality of how it will be exercised. I understand that the British service chiefs, the retired British Service chiefs now sitting in the House of Lords had a lot to say on this matter and I would be interested in your views on the matter of practicality of how the legislation would be written.

Professor Colin Warbrick: Well they did, and I think one of the striking things about it was that they were not at all agreed about what the right solution would be. There were actually some very conservative views that anything that got in the way of Executive decision making in matters of war and peace was to be deprecated. I think something has changed, and what that is, is recognition that decisions about going to war may involve the individual responsibility at least of senior members of the armed services and that they need to be assured that there is a sound legal basis for the action they are taking. That is quite separate of anything that might go on in the

conflict, whether lawful or unlawful. The rules of war will apply and I am perfectly aware of that. But this was a different question; it was a question, to put it bluntly, if this was a war of aggression, if the deployment was a war of aggression, what would be the consequences for the commanders who ordered their troops to war in those circumstances?

If, as it is in the UK, the decision to deploy the troops is purely a prerogative power, there are no legal standards to apply to the decision to use force. The only standards are international legal standards, and those standards are relatively, relatively clear. If the decision to go to war, if the war is in self defence, and there is an overwhelming necessity to act, no body suggests that whatever legislative scheme or other scheme is adopted, that there should not be an emergency power in the government and the armed forces to respond.

But many deployments of force these days are of course wars of choice. They are in support of the United Nations, they are humanitarian interventions, and there is time for reflection about matters, it is necessary to get troops together to deploy them all around the world. It's not instant responses of self defence today. And so, the Service Chiefs, or some of them, recognised that there was a gap, a time gap when it would be possible if we wanted to obtain parliamentary authorisation, and there was a feeling that this would increase the legitimacy, and that the armed forces would feel better if they knew that this was a considered decision that has the support of the people's representatives. That seems to me to be quite a powerful argument in a democracy.

Bill Rowlings: When you looked at the War Powers in Britain, did you look at Australia's powers at all? Did you do any comparison with other countries?

Professor Colin Warbrick: Yes, we did, because you were at the same time having problems and were considering whether to send troops to Afghanistan, or whether to increase rather, you were considering to increase the troop deployments there. The mechanism in Australia were very similar to the ones in the UK, and what perhaps was interesting is that we did look at other states as well. In Canada, for instance, which is in constitutional terms Australia and the UK have similar identities there was a requirement of parliamentary support, and it took the government quite a good deal of effort before that support was gained. And it may now be, we will have to see the events in Canada, that parliament will assert again about the continuing participation of Canada in the conflicts in Afghanistan, either its overall commitment, or what it is the troops are entitled to do.

My view is that comparative constitution investigation is of rather limited value, because the constitutional and political differences between states mean that you can't really transplant one model from one jurisdiction to another. It can give you some ideas; it can give you some of the kinds of questions you ought to ask. And I would say that the two great questions are the question of the threshold and the question of what information government should be obliged to supply. How those questions are to be managed, what the relationship should be between say the Executive and Parliamentary I think depends on the constitutional traditions and expectations of each polity itself.

Kris Klugman: Thank you for your contribution I am finding it extremely interesting. In the legislative model that you outlined, was there any requirement that there be reporting back to parliament on the progress of the war?

Professor Colin Warbrick: Yes there was and I think that is an important consideration. Something I have not mentioned, it is difficult to deal with, is what in United Nations terms is called mandate drift, where the operation takes on almost a life of its own and the surge in Afghanistan of course is a very typical example of it. An operation gets started with certain limited parameters and limited commitment, troops have maybe a clear legal base, and then as time goes on these decisions change, more troops are sent, the rules of engagement are changed, the mandate of the operation is changed, in Afghanistan the question of whether there should be action across the Pakistan/ Afghanistan border for instance. In these circumstances you can imagine a government that wants to do this will argue that this is the same deployment, it's just operational decisions and not the big decision about war and peace itself. But if there is a regular reporting process then the government will have to give an account of what is going on. And there is a case for saying, and I'm not utterly convinced of it, that the decision to go to war should need to be renewed every 12 months or so, you can fix your own date for this, rather than saying that the operation should go on, but parliament ought to address the question again and give the Executive a renewed authorisation. Now you can imagine this didn't go down very well with the military. But I do think that some kind of continuing overview is a crucial part of the operation. I don't think this is quite as bad sometimes as some of the military spokespersons might suggest. Because if forces participating in a UN authorised operations, like Afghanistan, there are standard features of these arrangements which states do comply with. There is an identifiable mandate, there is a reporting obligation and there is the possibility of time limited deployment. If we can manage that for the Security Council, I fail to see why there is a principled objection, there may be pragmatic ones, but why you can't do this domestically as well.

Senator Ludlam: There is time perhaps for one last question.

Neil James: I am interested in your views on whether it should be both houses of parliament or just one. The situation in Britain and Canada and NZ is a bit different to Australia, because Britain and Canada have an appointed upper house and NZ doesn't have one at all. I'd just be interested in your views on if Parliamentary approval would be required in both Houses and if this would matter if the house is elected or appointed?

Professor Colin Warbrick: Well, I think it does matter; absolutely it matters if the house is elected or appointed. As things stand in the UK at the moment where we have had an appointed house, even the House of Lords itself, the Committee that I sat on was House of Lords Committee, did not suggest that the House of Lords should be part of the decision making process in the sense that its positive support would be required for a lawful or legal deployment. They would leave that to the Commons. The question was whether there should be any part for the House of Lords. And people were concerned that there is in the House of Lords very considerable expertise of a political and military and legal kind, which would be relevant to any decision to deploy the troops abroad. And what was suggested by the Committee and which has accepted by the Committee on the Constitutional Bill, is that there should be a House of Lords debate but without a vote. So theirs would be a deliberative process, the results of that deliberation, if time allowed, would be fed in to any decision that the Commons took. But it would be Commons's decision, either in this convention system that has been proposed, or if we had legislation, which would be the crucial instrument. And although there is this democratic legitimacy problem of the upper house, I think this is the right thing to do.

Senator Ludlam: We need to leave it there. On behalf of us all I would like to thank you for staying up and lending us your expertise. I think it has been a really great jumping off point and place for us to begin and thanks for joining us.

Professor Colin Warbrick: I am pleased to help. Thank you. Goodnight.

Senator Ludlam: I might now go through some of the formalities and make some remarks. The proximate cause of meeting is the discussion of a Bill which I've had most recent carriage of, but I am going to ask Andrew to provide some context in a short while. It's a bill that amends the Defence Act 1903, to provide for parliamentary approval for deployment which is one way of opening up the conversation about the war power, who decides and what recent history can tell us about who should. The bill has been around in various iterations for a very long time, certainly since long before I was around, there is currently in Australia a bi-partisan consensus against this proposal or any proposal like it. I get the sense that the debate in Australia, certainly what we have heard this morning, is relatively immature compared to the state of the debate in other parts of the world. The Bill is currently under consideration by the Senate Standing Committee on Foreign Affairs, Defence and Trade, Legislation Committee which chose not to hold a hearing, which is the reason why I thought it would be worth convening this meeting. The views that are expressed will be submitted in transcript as a Minority report to that Committee's deliberation. I believe we are still on schedule for reporting on the 25th of February.

I encourage all of you to test the opinions of each of the people we have here today, there is a lot of expertise in the room and coming in on the phone. We deliberately did not invite only people who would agree with each other or the proposal – it wouldn't be a very interesting morning if we had. I am encouraging people to think, "If not this bill, then what?", if we can look for creative solutions and proposals. It is a really complex proposition that we are putting. So I hope that we can move the debate forward in some way and set ourselves up for the next stage so we are actually making a contribution to the public debate. Andrew, do you want to offer some brief comments on the history of the Bill?

Andrew Bartlett: Yes, sure. Basically as you said it goes back in various forms a long way. The Bill that you are looking at now is fairly similar to a Bill that I put in, in the previous Senate after the last election. It was re-tabling a bill I'd had before, but that one in turn had built on previous Bills by previous Democrats Senators. In tracing it back as far as I could tell, it really first appeared in the early 1980s, former NSW Senator Colin Mason, one of the first two Democrats elected, moved a similar sort of thing, the same principle anyway, as amendments from time to time as a Defence Act Amendment Bill would come through the Senate he would move this amendment. So it was amending a Bill going through rather than a bill in its own right. That was obviously not ever supported by any of the major parties, but it did mean there was some debate in the Hansard in the Committee stages of those various debates. After a while it did get formalised into a Private Senator's Bill. I know the earlier version of mine was, in the second reading stage, debated on the General business session on a Thursday afternoon; it's a time when non-government bills get debated. It never came to a vote but there was some speeches on the record, from other senators apart from myself, again both major parties not supporting it.

I suppose the only other thing I'd say in context, as the Professor said, what seems in principle a very simple idea, that Parliament should approve sending troops overseas rather than the Executive on its own, how you actually do that has always been a bone of contention. But even leaving the technicalities aside there has never been agreement, or even it's been hard to detect a lot of support of individuals from time to time in the major parties have supported the idea in principle, but the parties themselves at Cabinet, or Shadow Cabinet or Ministerial, Shadow Ministerial level have always been pretty cool on it, and I guess that's probably as a significant a thing, rather than the fine print, the principle has been supported.

The only other two contextual things I will say, as far as I can tell from when it was put forward by Democrats Senators in the early 1980s, it wasn't in response to a particular situation, it wasn't in response to use of troops or anything like that, I think it was part of a broader range of measures that Democrats coming into the Senate at the time were pushing, that tried to give more of a role of the parliament on key decisions. Another issue that was pushed in the 1980s was to give parliament, or the Senate or both houses was to give them more of a role in approving Treaties for example, as happens in the US Senate. That obviously was never agreed to either, although we do have the Joint Standing Committee in Treaties, which gives the parliament a role in scrutinising treaties, without having a say over whether or not they get agreed to. And that is perhaps the other aspect to put in, listening to the professor again is that issue of a mechanism for parliament to scrutinise the progress or what is happening beyond Estimates Committees and those sorts of things. I would think to some extent in the politics of the situation, if you did actually have today the Senate passed a motion saying Australian troops should be withdrawn from Afghanistan, for example, that would create a lot of political pressure. The government may or may not respond to it, but there are no mechanisms for encouraging the parliament to continue look at these things. That to me that is sometimes surprising, that we have as something as significant as Australian troops in conflict as we do in Afghanistan, and have had for a number of years and there is really not a lot of debate about it. To some extent, that underlying principle, whether or not the parliament has the power to approve is one thing but it's also how much extra role should there be in parliament to have to scrutinise and express opinions and those sorts of things, because that doesn't happen much either.

Senator Ludlam: Thanks very much for that background. Some of those propositions have been put in a number of submissions, both formal and informal, to the Committee. I will now introduce Professor Helen Ware. Helen is a former diplomat, she was an Australian High Commissioner to Zambia in the last 1980s when this role involved being the unofficial Ambassador to the Southern Africa Liberation Movements. She was formerly Director of Projects to the Human Rights Commissioner and she was a senior official with AusAID for many years. Currently she is a Professor of Peace Studies at the University of New England in Armidale, where she researches peace building and post conflict studies by distance education across the world including to members of the ADF. So welcome Helen if you want to offer some opening statements.

Professor Helen Ware: Thank you very much. My interest in this area comes from two sets of interests. One is pretty obviously in the whole area of war and particularly peacekeeping. I suppose I have something of a split personality. I don't want Australian to go to war but I do want Australian troops to be involved in peacekeeping. Obviously it's not possible to draw a simple line between the two activities. I think also there are major questions involved as to the kind of

democracy that we think Australia should be. The model which says that the Prime Minister of the day can effectively decide whether Australia is going to war or not, seems to be a model that says you have an election and 51% of the population or 53% or whatever votes in the government and then you just let them do whatever they like. Because if something as important as warfare in which Australians are at risk and indeed are killed overseas is not a matter for consideration by the parliament on a regular basis, it becomes rather an interesting kind of democracy. If we think about it, for example we might be quite shocked for example say if one of our northern neighbours, perhaps I'd better not name one, went to war and their parliament was not in anyway involved, we would probably say their president was a dictator.

So I also in passing raise the interesting issue, if at some future date Australia gets an elected president, a popularly elected President, and he/she is against a war that the government of the day promotes, that would raise some interesting issues I think. In thinking about this I find myself even thinking that we are all familiar with the slogan 'no taxation without representation', what about 'no war without representation', or without a greater democratic involvement than there is currently.

That, as I say, there are we have already talked or referred to some of the technical issues about how you actually define war as opposed to being in the UN peacekeeping efforts, and I might note for example that in America there is a standing provision under the legislation that Americans can commit up to 1000 troops to a peacekeeping operation without further referral to Congress. We might think of a smaller number in the Australian context, but that might be one way of dealing with that particular issue as opposed to a major exercise such as involvement in Iraq or Afghanistan.

I was in Armidale at the time when it was announced that we would join the coalition of the willing in Iraq and I can remember one of the most common reactions on the street was some amazement that the Prime Minister could just do this without having to go and consult the parliament. When I say amazement I don't mean just among what you might call the ordinary objectors, the people who are well known for prior objection to military involvement, just talking to the ordinary farmers and retired soldiers on the streets of Armadale, it was quite clear that they were quite surprised that it didn't require anything more under the Australian Constitution which of course doesn't say anything about how we decide whether we are going to war or not, its not a provision of the Constitution. It just morally shocks me that if you are going to have democracy, and I spend a lot of my time teaching about democracy in developing countries, one of the things democracy must be regarded as having a central role in is indeed the question about whether the country becomes involved in war. Fortunately these days we can assume wars will be overseas, we're going to go and fight in someone else's country, and the question of what that country thinks about us going and joining in is another question about democracy. Are we prepared to invade other democracies? History would suggest that that is actually one constraint by and large that does operate. It always interests me when you are discussing any aspects of human rights in Australia that people are quite reluctant to look at what the precedents are overseas. The Canadian one has been referred to, in this case, it is necessary for parliament to approve deployments overseas in war like situations. Again, as has been referred to, there are some quite interesting debates you can have about the actual terminology and this again is quite important in thinking about the differences in being involved in peacekeeping or peace enforcement as opposed to a situation such as Iraq and Afghanistan where

it is quite clear that what is involved is actual war fighting from the start. There is a requirement in Canada, and it is difficult to see that Canada is so different from Australia that we couldn't adapt something to what they already have.

On the issue of whether we actually need legislation, I think if we could get agreement, a convention as now appears to be the case in the UK, that would be performed, it isn't that there is an absolute necessity that you would need legislation to go to war, it is more that it should be a clear convention that it is necessary to consult in particular with the House of Representatives, also to consult, but I assume that given the reality of the politics of the Senate, not necessarily to secure the agreement of the Senate, otherwise we might become a pacifist country as of tomorrow.

So I think that the details are something we can look at and indeed would need to be looked at, but I think the principle that a democracy needs to have a much greater oversight than the Australian government and parliament in particular currently has of sending off troops. Let us imagine that as has already been indicated you get mission creep from Afghanistan into one of Afghanistan's neighbours. I think any Australian involvement in that neighbour should, and I think that the ordinary person on the street in rural Australia would also agree if actually asked the question, that this should be a matter for parliamentary debate before it went ahead.

Senator Ludlam: I really enjoyed reading your submission. I have two quick questions. The first one is you do go into in some detail the process that has been followed in the UK in the recent past. Why do you think the debate there is so much more mature, or happening at all, than it is in Australia?

Professor Helen Ware: I think obviously part of this relates to what happened in Iraq, the controversy in the UK about whether indeed the UK should be involved at all and on what terms. Sadly, I think it is actually related to the number of deaths overseas. We were extraordinary lucky in Iraq in terms of being very fortunate that our troops did not sustain major casualties. Had they not done so I think that the public debate would not have been through the roof, but that is what has happened in the UK.

Senator Ludlam: My second question, and I suppose I have a bit of an interest in this being in the Senate at the moment in shared balance of power, so I want to pick you up on your point that any such vote should only be submitted to the House of Representatives, which is effectively controlled unilaterally by the Executive in Australian politics, where the structure of the party system is much more disciplined than it is in the UK. To pass a vote in the Senate the government or the Executive would have to persuade not just the balance of power Senators, but more than half, so obviously the main opposition parties and the swing senators. What is your hesitance and reluctance to put a vote to the Senate which isn't dominated by the governing party?

To pass a vote in the Senate, the balance of power only comes into play if the opposition is against deployment. Your point in your submission is that you don't necessarily want this decision to come down to one random individual, when in fact for that individual's vote to be brought into play, then the opposition party has to be opposing as well.

Professor Helen Ware: Yes, I can see that. One of the other thought experiments I ask people to try is to imagine where it really became a question of the government saying that we have to go into this conflict because the Americans have asked us and if we are going to keep them on side, we have to go. I think you might be able to envisage a situation where one political party says no, then it is not a valid argument.

Senator Ludlam: To my view that is parliament's role and prerogative in saying no, we are not going there.

Bill Rowlings: The professor was commenting on an unelected upper house, whereas we have an elected Upper House, which changes the view, I think, on whether an Upper House should have a vote.

Professor Helen Ware: With both houses, another issue is whether it would be a conscience vote. You could envisage a situation where you had a significant number of senators who vote on conscience grounds.

Senator Ludlam: Which was I suppose the most recent experience in the UK where the parties fractured. Any other questions?

Neil James: A couple of quick points I'd make. The first one is simply that the Canadian example is an interesting one because it an appointed upper house. But you can't understand how Canada debates war until you understand the Québécois. Canada is unique in the Westminster system in that it has a large minority that did not support Canada being involved in WW1 or WWII, and that actually affects the Canadian debate and the way the Canadians approach these things. I agree with Helen that it's important to look at the role of democracies. The last war between democracies was the war of 1812 and neither were perfect democracies at the time. But there are some very interesting things when we start talking about who we have approval, either or both houses of parliament, because one of the problems that we have at the moment that out of 226 parliamentarians, only 1 who has been in a war, 1 other who has been on a peacekeeping mission and only 12 others who have any kind of military services, and a lot of that is a long time ago in the army reserves in the 1960s for example. Unlike the British Upper House or the American Senate, we don't have a lot of military expertise in our parliament and this has a big role in the debate and we see this just by reading Hansard because a lot of the debate is not terribly well informed about what is involved in warfare and military and diplomatic action. We only have two ex diplomats in parliament too. It's always important in discussing this to recognise that we are almost unique in the western world with a parliament with virtually no experience in military or diplomatic matters.

Bill Rowlings: The number of politicians with military experience, I would say that that is disproportionately representational to the military people we have in our community. So they appear to be overrepresented from my viewpoint. The other issue, a point of principle, is that it is not a military decision to go to war, it is a political decision. The military can advise on tactics and strategy and equipment but they have no special expertise in the political decision.

Neil James: I resent the fact that you make that insinuation. I wasn't saying that it was a military decision. I was saying is that if the parliament is to have a proper deliberative role, it helps to have expertise in the question in person. Please do not put words in my mouth.

Bill Rowlings: I did not put words in your mouth. I interpreted what you said, I think it is clear what the inference you were trying to suggest.

Professor Helen Ware: If the parliament is debating fish quarantine, I think there is a problem if there isn't expertise available on for that particular topic, there is a problem. When I was talking to some of my students, one of the issues they wanted to have raised, which isn't exactly about how we have commitment, but it is about in relation to the training of defence personnel. If we are going to commit them, for example, to UN peacekeeping exercises there should be more appropriate training as well.

Dr. Sue Wareham: If I could add a comment. The issue that has been raised of expertise in the parliament, perhaps that is an additional reason why the decision to go to war shouldn't be taken by the Executive, or even worse, a single person who in recent instances hasn't had personal experiences of war.

Senator Ludlam: You make a really interesting point in your paper which I want to draw out a bit more, that former major colonial powers that were at war incessantly in that period of time didn't have parliamentary oversight, but also that former colonies, of which Australia is obviously one, were more likely to be asked at short notice to participate in wars at the behest of the colonial power, which is one reflection historically of the different degrees to which parliaments have oversight in different countries of the world. Has that been formally studied and if we moved this bill, where would that put us in the range of degrees of power over deployment?

Professor Helen Ware: Then we would be one of the stronger control countries. An increasing number, as quite frequently happens in the case of Australia, we are slowly catching up with a trend that has developed elsewhere, particularly in Europe. Obviously there were issues following WWII particularly in Europe for people who had reason to think very seriously about the question of how war comes about. I'm quite sure that in the Australian case, the reason why there is nothing about it in our constitution, is that there was an assumption that we would go with the mother country

Senator Ludlam: The other example I can think of, actually in the other direction is Japan where in the Constitution under Article 9 they cannot go to war at all. Obviously that was put there for them, but it is an enormously popular article of the Constitution.

Professor Helen Ware: There is I am very sad to say a movement in Japan to amend the constitution on that point. I was at an Asian peace studies conference late last in Taiwan when that was one of the issues we were discussing.

Senator Ludlam: One thing we could do is to introduce an article 9 into the constitution of Australia to give them a bit of back up. One of the issues or complexities or grey areas is the environment in which we have deployed peacekeepers into a place that becomes a conflict zone. Do you want to speak more about how we might resolve those types of concerns?

Professor Helen Ware: If you had a situation where our peacekeepers were being significantly attacked, whatever government of the day would have to make an immediate decision about what to do about it, clearly whether to withdraw, to change the rules of engagement or whatever else. In the short term you would have to make an immediate response. Then if you had a system where there was an agreement or a convention as in the UK, that it had to be debated by parliament then you would have a parliamentary debate I think, but you couldn't leave the troops there without a clear mandate and in an impossible position.

Kris Klugman: The point being that there should be a parliamentary debate about this question, not an executive decision about it.

Senator Ludlam: But retrospectively in that case, were they forced into a situation that wasn't envisaged?

Prof Helen Ware: Well again I think it should be at least a Cabinet decision, not a purely Prime Ministerial one, and hopefully a Parliamentary decision. It's possible to make Parliamentary decisions in a short space of time.

Ruth Corrigan: Helen, you touched on training for our defence personnel if they are going to be deployed as peacekeepers. Would you see that as a statutory requirement that they do have training before they are deployed? I know there is some training and there is controversy about gender issues, the way peacekeepers actually involve the community that they go to, not just in a military way but maybe in capacity building that sort of thing?

Professor Helen Ware: I should start by saying that I think that Australia peacekeepers have a very good reputation overseas. I have been on both sides of watching that, I was indeed in Rwanda to see. There is an extreme example. I saw Australian troops out of Townsville on duty, burying 3000 bodies a day. These were very young men who have never seen a corpse before. That is very difficult for anybody. I don't think you need legislation but if there was more parliamentary debate about what we do in these areas then I think one of the things that would come up would be a debate about the doctrine of training for war and adapting for peace. In the case of the defence forces, I know the argument that you have to train people for war, because if they are ever going to do that they have to be trained for that but I do think that there needs to be far more looking at what Australian troops actually do in the field, and train people to do what they spend 90% of their time doing.

Neil James: I have served overseas in several peacekeeping operations and in a past life I was the author of the defence forces training manual in peacekeeping. The defence force has some of the most extensive experience in the world on peacekeeping; we have been in some thirty-five missions over the years. You really have to look at what peacekeeping involves. Peacekeeping is not necessarily peaceful. It does require the application of armed force on many occasions; we have had 7 people killed in peacekeeping missions since the 1960s. It's actually more than that if you count the Federal Police, they have lost two too. It is a particularly difficult thing to do, our soldiers, and generally it's done by soldiers, but our service people are very, very good at it, as can be seen as our reasonable amount of success in this regard. But the problem you have in the area of peacekeeping is that the situation can change quite dramatically, and as Helen points out, the case of Rwanda is a good case. There are some long term implications. Three out of every

four soldiers at the Kabaya refugee camp in Rwanda had post traumatic stress disorder, it's something you have to consider very seriously about because there are long term implications. We need to avoid the delusion that peacekeeping is always peaceful, because often it's not. You actually have to apply force sometimes to restore peace. It's a difficult moral and operational dilemma.

Senator Ludlam: I think we will be discussing this further as the day continues. Thank you, Professor Ware for you very much. I will now introduce our next speaker. Brigadier Adrian D'Hage served as a platoon commander in Vietnam where he was awarded the Military Cross. His service in the Australian Army included command of an infantry battalion, Director of Joint Operations and Head of Defence Public Relations. In 1994 he was made a Member of the Order of Australia for services to communications. In his last appointment as a Brigadier, he worked with Commissioner Peter Ryan and the NSW Police, heading the Defence team that planned the counter terrorism security strategy for the Sydney Olympics, including security against chemical, biological and nuclear threats. Brigadier, before we get underway, I need to remind you that this forum is not a parliamentary meeting, so comments and questions are not protected by parliamentary privilege today. We are all fully responsible for what we say today.

Brigadier Adrian D'Hage: Good morning Senator. I will try to not be too defamatory! I base my comments I guess on some 37 years military service and at the outset I would acknowledge the problems in drafting legislation, and I think this Bill is as fraught with difficulty as any other. But it doesn't excuse us from debating the issue and I welcome your initiative. As a principle having seen combat at first hand, I think the country should only be committed to a major war when all other avenues have been exhausted and unfortunately over the last decade or so, that has not always been the case. It goes without saying that it is the most serious decision any government can take not least because the lives of some of our finest young people are put on the line, the young men and women who serve in our defence forces. I note that the Australian constitution is silent on who can declare war for Australia and in practice it's left to the Prime Minister and Cabinet of the day and that follows from the Westminster system. But I also note that Gordon Brown is, as a result of the Iraq War, perhaps proposing an amendment where the UK can only go to war after it's been voted on with a binding vote in parliament.

The discussions in Cabinet are obviously withheld from the public and there are good reasons for that, but it is incumbent in my view on any government to provide honest and open reasons for committing this country to a major war. I'll get onto the minor issues later and I think that's probably the biggest sticking point from my perspective in defining what a major war is, but there is now little doubt that the American, British and Australian people were people who were deceived as to the basis of the war in Iraq, and I guess the Chilcott Inquiry will be watched in the UK with some interest both over there and in this country. But I think the Iraq war provides some salient lessons which we ignore at our peril. Some of them we learned in Vietnam and had to learn again in Iraq and I note that we probably in some quarters still haven't learned the lessons from the Iraq war. One of your colleagues, I was in a little village in Austria a couple of weeks ago when an Austrian asked me why an Australian minister was suggesting that we bomb Iran. Now leaving aside the international media's inability to get the designation right, one of your colleagues indeed suggested, I think, on the Lateline programme that airpower be used to take out nuclear facilities. Well, only after all other diplomatic negotiations have been exhausted. Iran had until recently two declared nuclear facilities, one at Isfahan which converts yellowcake into

uranium hexafluoride, the other at Natanz which has the high speed centrifuges but deep inside a mountain complex near the ancient city of Qom they have now admitted to a third, but that is under solid rock, and no amount of airpower which seems to be lost on the Senator in question, would remove that. They have also successfully tested a number of missiles, particularly those with a range of 2000 km, and any attempt to invade Iran and open a third front in the Middle East in my view would be disastrous. That is the sort of international commitment that most certainly needs a debate and a binding vote in parliament.

Now I think I saw an email from Neil James which addressed the issues of the upper and lower houses. I tend to take the side of Prof. George Williams that such an important vote ought to be taken by a joint sitting of both houses of parliament after a debate by the people's representatives. But if you had a situation where perhaps Sarah Palin for example was the next President of the US, and we took the view that we should bomb Iran, 87% of the world's oil supplies flow through the straights of Hermoz. They have the missile capability to hit any American military base in that area. Ultimately we might overwhelm them as we did in Iraq but that would further destabilise the Middle East, so I think this is a very, very important issue, leaving aside the appalling military planning that was the hallmark of Iraq, it's some 430,000 square km, I think, yet we expected to overcome a country 4/5 the size of France with only 144,000 troops. I won't go into the plethora of errors on the part of politicians, some politicians and some generals involved in this disaster, but it has destabilised the Middle East for years to come. One of the unintended consequences is that it has promoted a Shiite crescent of power and one of George Bush's Ambassadors claimed that George Bush just before we went into Iraq, where our foreign policy was indistinguishable from that of the United States, had little idea that there was a difference between Sunnis and Shiites. We now have a Shiite power block in Iraq, admittedly the Iranians are Persians not Arabs, but they are overwhelmingly Shiite, as is Hezbollah, and that crescent of power has not gone unnoticed in the overwhelming Sunni dominated Arab states. So we waded into this complex area of the Middle East without parliamentary debate at our peril. Senator, I think I'll leave it there.

Senator Ludlam: Thanks so much for those comments. We will use your expertise at actually having spent time at the sharp end of things. In your experience, can you tell us the speed at which these deployments, at least in modern history, are planned and executed? How much salience is there to the argument that military planners don't have time to put these questions to parliament?

Brigadier Adrian D'Hage: Well, I think that we get onto this very important point of a major international war with very high consequences for Australia, versus deployments to places like Fiji. During the Fiji Crisis in the late 80s when Rambuka stormed into the parliament, I was the director of joint operations and I was responsible with my staff obviously for putting the plans together that would essentially be able to evacuate 5000 Australians off 3000 odd islands. Now when a country erupts like that with no warning, and we had no warning, you do have to operate very quickly and you don't have time for a lengthy parliamentary debate. That can be left in my view to the Prime Minister and Cabinet, and the Security Committee of Cabinet with advice from the Service Chiefs and it has to be done very quickly. From memory I think we put those plans together within 48-72 hours. We had basic plans for the evacuation of citizens around the world and we applied those to Fiji although I think one of the lighter moments was the fact that we didn't have any Fiji maps, Fiji not being high on our list of areas of concern. When I briefed the

then Minister Kim Beasley and his then wife, we used a travel map from the travel agency down the road. So these things are done on a very quick basis, but planning for major deployments like Iraq and even East Timor involves a lot of logistics, you need a lot of time to do that, and there is ample time within that military gearing up, when you put forces on alert, for the debate to take place.

Senator Ludlam: Can you take us back to 1991, I believe at the time you were the head of Defence Public Relations. The parliament was recalled by the Hawke government to debate the first Gulf War where Australians were sent into Kuwait, and the majority of parliament in that case supported the decision to commit troops to the first Gulf War. Can you talk us back through the reasoning and the significance for the government and for the people deployed that the government sought and received the support of the parliament at the time?

Brigadier Adrian D'Hage: To the defence force, I think we have an unfortunate history here and I'm going a little further back to the Vietnam years. Soldiers, sailors, airmen and women got blamed or targeted by section of the media and other interest groups whereas the decision was taken by government without the normal declaration of war. That had a horrendous effect on returning Vietnam veterans. In the case of the First Gulf War and I was brought in to run public relations for that, it did make a difference that the public support was there. I was at pains in various interviews to just make the point quietly that regardless of the outcome of the conflict, the nation must never again go through what we went through in Vietnam and the nation must always be behind their service men and women because they have no say in this decision. So yes is the shorter answer to your question. It did make a difference and again, there was adequate warning for that particular involvement that there was public support, as there was indeed for the war in Afghanistan. Unfortunately the political capital has been eliminated by the subsequent deployment to Iraq.

Dr. Sue Wareham: Can I comment on question that you've just raised about 1991 on the first Gulf War and the Brigadier's comments. I believe in 1991 Prime Minister Hawke had already sent Australian vessels to the Gulf before this matter was considered in parliament and it was more or less presented as a fait accompli. Now in that situation a parliament would be highly unlikely to vote against that sending of ships or personnel because it would be seen as disloyal to our troops. No parliament would do that. Similarly the Australian public, there was a significant degree of resistance to the 1991 Gulf War but again, a lot of the public feel that once a decision has been made to send troops, we don't want to be disloyal, we don't want a repeat of the experience of the Vietnam veterans, which was an awful experience for them, very destructive for them psychologically. I think this emphasises the importance of debating before a decision to send troops or vessels is taken, rather than after. Once the decision is taken, any vote or debate against that is seen as being disloyal to the troops.

Brigadier Adrian D'Hage: I think that is right, and in fact in the Iraq war they got around this with a pre-deployment and the then Prime Minister of the day, Prime Minister Howard brought on a debate in parliament but only after some troops had been deployed. I think those comments also highlight this issue of major and minor conflicts. In cases like the Solomons or Bougainville or Fiji, to a lesser extent Timor, it is notoriously difficult for legislators to define what sort of conflict ought to be decided on quickly without a lengthy debate. You could say anything above 1500 troops requires mandatory debate but that would in my view not work in my view because

then you have a cap on the military planers and they start cutting things according to a parliamentary dictate. That is not the way military planning ought to work. In my view, if you go into a major or minor skirmish you go in with a sledgehammer to crack a walnut. I might get some criticism for that analogy, but ultimately it shortens the length of the conflict and it saves lives. But politicians of all hues are often very wary of what the public will tolerate in terms of troop numbers. I think a parliament debate for a major deployment would remove a lot of that squeamishness because by the time you commit to a major conflict, that ought not be subject to public opinion. When General Eric Shinseki went into see Rumsfeld, and said going to war in Iraq is a very bad idea for a whole range of reasons that have now unfortunately unfolded, he said he would need 500,000 troops to do it. Rumsfeld promptly sacked him. These things are emotionally charged but I think trying to define a major or minor conflict is probably one of the most difficult parts of this legislation. But it must do that because you can't hamstring military planners when they are trying to rescue Australian citizens that might be in peril because Suva is going up in flames, or whatever the circumstances might be.

Neil James: Back in 1991, I was the head of Intelligence Plans at headquarters ADF, and if I could just correct something Sue said then. We actually deployed the frigates to enforce the UN sanctions, we didn't deploy the frigates to fight a war, and as the situation deteriorated the rules of engagement changed. The other way of looking at it is, the Iraqi invasion of Kuwait in July 1990 is the only example since the UN Charter was signed in 1945 that one UN member attacking, conquering and purporting to attack another UN Member. So it is actually unique in international law terms and in fact every signatory of the UN Charter was required to send in troops to liberate Kuwait. That is why one third of all UN members did. And so I think we have got to be really careful here of just assuming that the ships were sent off to fight a war, when in fact they weren't, they were sent off originally to help the UN impose trade sanctions, and only as Iraq refused to withdraw from Kuwait were they actually used to apply more force.

Adrian D'Hage: Yes, that is very true. Again it highlights the difficulty of actually getting this legislation written so that it is workable from both the point of view of the defence planners, and you were a part of that system, and from the point of view of public support. I have to say that I think the Australian government of the day was very stubborn on the second Iraq invasion because unprecedented numbers of Australians demonstrated in the streets, hundreds of thousands of them. I think a letter from 43 Australians, certainly far more distinguished than I, wrote to the government and pointed out all of these issues that a second deployment to Iraq, would arise and they were brushed aside as daiquiri drinking doddery diplomats, and I mean they had hundreds of years of experience between them. So we ignore this problem, the Middle East is very complex, but we ignore this problem of leaving it to the Prime Minister and Cabinet of the day at our peril, because I don't think the Middle East is going get any less complex any time soon.

Dr. Sue Wareham: Perhaps if I could just comment on that particular issue again which Neil James about the transition of the role of the Australian vessels in 1990/1991 from enforcing sanctions to actually executing war, and that is the mission creep or mandate creep, which I think reinforces again the need for debate in parliament and review of our war like actions, perhaps more frequently than annually, because annually in that instance everything was dead and over by then.

Senator Ludlam: Perhaps if I could turn that into a question. How well do you think the Bill as its drafted at the moment strikes a balance between the accountability we are trying to achieve and also the flexibility the sometimes ADF will need in terms of small deployments or rapid changes of circumstances.

Brigadier Adrian D'Hage: To be honest I was overseas until a couple of days ago. I have perused the latest emails of Mr. Maguire. Unless things have changed I don't think it strikes the right balance. Certainly it would have my strongest support for deployments of international significance, United Nations involvement of a war like nature such as the invasion of Iraq, even Afghanistan, with all tis international support, and the one that I flagged where some people see a third front being opened up in Iran. But where it doesn't give enough flexibility I think is for the defence planners and the intelligence staff and all of the staff in defence for these minor deployments. They must be able to operative very quickly where Australian lives are a risk. You cannot lay it down on the length of deployment, because that's very difficult to lay down. You can't lay it down on troop numbers. I think the only way that you can do that is on a statement of principle. The legislators would somehow have to define what a major warlike operation which has significance would be, and I'm using words that people have different interpretation of, but significant impact for Australian foreign policy and standing in the world, versus things like the Solomons, Bougainville where we are doing peacekeeping operations or extraction operation. It's a minefield. I think unless that can be tightened up to the satisfaction of the Defence Force Chief and service chiefs. They and their staff have to be involved and give their imprimatur I believe. If you are going to ask them to deploy, you can't tie one hand behind their back. So it has to be tightened up to the point where Defence can live with it.

Senator Ludlam: On behalf of us all, I thank you for sharing your views with us.

Brigadier Adrian D'Hage: My pleasure Senator, and thank you for the interest you are taking in this Bill because I think it is a very, very important Bill that is the most serious decision a government can take and I wish you all the best with it.

Senator Ludlam: Thank you very much. We have three people up now speaking from a variety of groups. Seeing as he has been mentioned and we are having this transcribed, I am just going to say that Ian Maguire, who I am sure we have all had contact with, is probably the staunchest advocate in the country on this bill, is not able to be here because he cannot travel, but thought I would put that on the record.

Dr Sue Wareham first became involved in MAPW over 20 years ago out of a "horror at the destructive capacity of a single nuclear weapon." Sue notes that "millions of innocent people are still threatened by these weapons". Sue believes that her work with MAPW is fundamental to her commitment to the protection of human life and the improvement of human well-being. In 2007 Dr Wareham co-authored a MAPW report on the use of cluster munitions in Lebanon. She has been awarded the Order of Australia Medal for her work for peace.

Joining you will be Nick Deane, a public servant, working for the Australian Taxation Office and has a degree in Sociology and Economics from Southampton University (UK), where he graduated in 1969. He also has a Postgraduate Diploma in Environmental Studies from Macquarie University. In 2002, in the lead up to the invasion of Iraq, he became active in the

peace movement and has remained active since then, playing a key role within the Marrickville Peace Group, which is composed of a small number of extremely moderate individuals from one of Sydney's inner Western suburbs.

Also Ruth Corrigan has been a member of the Women's International League for Peace and Freedom for 15 years and has represented the organisation at a number of occasions.

Dr. Sue Wareham: MAPW appreciates the opportunity to present this submission in favour of this Bill, and I'd like to present MAPW's reasons for supporting it today. As we have heard no decision for a nation carries with it greater responsibility than the decision to go to war, and for governments there can be no greater burden than dispatchment of the nations troops, some of whom will most certainly will die and many more of whom will be maimed, physically and psychologically, often for life. In modern warfare the number of civilians killed – children, women and men - generally far outweigh military deaths. Even larger numbers of civilians are maimed, often in circumstances where there is no aid available for them. Now whether or not the civilians are Australian, their lives cannot be regarded as dispensable if Australia's reasons for going to war are to be honourable.

Economically the decision to go to war has profound implications, with economic resources diverted from essential civilian programmes at home. It is estimated that Australia's participation in the war in Afghanistan alone has cost us well over 2 billion dollars. I just want to say a little more about the health costs paid by Australian service personnel. The obvious health costs are of course death and physical injury. In the Vietnam War nearly 500 Australian soldiers died, and about 2500 were wounded. And this conflict Australia helped perpetuate without initial debate in parliament killed well over a million people and maimed many more. The most obvious costs, except to the families of the veterans, are the psychological costs of warfare which are often crippling. In the Australian government's Vietnam veterans health study, released in 1998, 41% Vietnam veterans reported anxiety and 45% depression. Even more alarming was the suicide rate among the children of veterans which was about 3 times the expected rate. These affects pale by comparison to the toll taken on the communities where our recent wars have actually been conducted. In both cases, for the Australians involved and for those who live in war zones, the effects continue for generations, long after most of us have by and large forgotten the war and its victims.

The environmental impacts of warfare may be even more long lasting and severe. This subject is vast in itself. One example, the Vietnamese people are still paying the price of the 80 million litres of Agent Orange that was sprayed on their land during the war there, with the Australian government support for that bombing. As the environmental crisis humanity faces slowly registered on our decision makers, the effects of warfare should no longer be dismissed as the concerns of a few green extremists. They are important to our security and survival as a species. The environmental impacts of warfare are unlikely to be a decisive factor in a decision regarding warfare under current circumstances, but they should nevertheless be part of the debate, a debate which is the responsibility of our parliament.

Politically and strategically warfare carries many unknowns, its outcome can never be known with certainty, and the wisdom or folly of engaging Australia in a particular war must take into account many factors, perspectives and areas of expertise. Neither of the current wars in Iraq or

Afghanistan is proceeding according to original expectations, and they show no sign of being concluded with their goals being achieved, and even the nature of the goals is unclear. Parliament can best provide this diversity of perspectives that's needed. It is unlikely that a rushed decision or a decision made by small number of cabinet ministers, or worse a single Prime Minister will be a good decision.

It is theoretically possible that there could be where a swift declaration of war appears warranted, namely if Australia came under sudden military attack. However this hypothetical situation is not that which has confronted us in recent times and nor is it likely, as confirmed in the 2009 Defence White paper. The recent wars to which Australians have been sent have presented no such urgency that precluded deliberation by our parliament. The only sense of urgency has been created by our leaders. And we should remember that if a decision regarding warfare is made in haste, then the consequences will be just as long lasting, continuing for decades and longer.

The best recent example for the need for this Bill is Australia's response to the terrorist attacks of 11 September 2001. On that occasion Prime Minister Howard abrogated his responsibility as our Prime Minister. Within days of the attack he stated that Australia would be involved in any military action that US President Bush chose to order. Australia would contribute whatever we could. He didn't qualify this offer and he set no limits to it. In other words, Australia would not consider our response, we would simply follow our ally. Howard played out the role not of the leader of a sovereign nation but of a servant to another nation. As long as the possibility of another such Prime Minister remains, Australians are entitled to have matters as weighty as a decision to go to war carefully considered and debated, rather than authorised by a man who will never know the terrible cost to be paid by others for his decision. The proper place for that debate is our parliament with the expectation that parliaments will be attuned to public feeling either for or against warfare.

A decision to go to war should also fulfil Australia's international legal obligating, in particular our obligation to uphold the United Nations Charter. The primary purpose of the UN as set out in the Charter is to save succeeding generations from the scourge of war. The gravity of this responsibility demands the serious deliberations of both houses of our Parliament. There have been few military actions in recent years that were more damaging to the rule of law, and therefore to our own security, than the violation of the Charter by the 2003 invasion of Iraq by the US and its allies, including Australia. Had Australia's participation in this war required approval by both houses of parliament, our support for this catastrophic exercise could have been avoided.

The Australian parliament considers a wealth of issues, it considers internet broadband access, how our old folk are look after, tourism, sport, child care, work place relations, and a long list goes on. These are all very important issues, but it's extraordinary that we allow a decision with such far reaching consequences as to whether or not our country is at war to rest with possibly just one person or a Cabinet, a small number of people whose judgement or motives may or may not be sound.

Regarding the provision in the Bill that a decision to go to war should be approved by not only the House but also the Senate, a vote in the House is likely to be controlled by the government, with the possibility of fundamentally important questions remaining unanswered. A declaration

of war stands out as one matter where approval from both house and bipartisan support should be imperative. If bipartisan support is lacking, it is very likely that support of a significant proportion of the population is lacking also. This is an iniquitous situation in which to place Australian troops. It is also likely in that situation that there are serious concerns about that war in question.

An overwhelming and sound case for war would not be threatened by the need for approval by both houses. On the contrary, the case would be self evident. In addition, governments come and go and a war can be inherited by a government that opposed it while in opposition. Again, this is an iniquitous situation for Australia's troops if a change of government means that their role is suddenly questioned. If parliamentary approval by both houses had been a prerequisite for participation in war before now, Australia may well have avoided conflicts which have since been widely acknowledged to have been wrong, conflicts in which many hundreds of our soldiers have died, along with countless other combatants and civilians. In no recent situation, nor any foreseeable situation can one reasonably argue that such approval would have hampered our military response by causing delay. Such approval would have hampered our response by causing delay. On the contrary, Australia could have been an agent for peace in such situations rather than an agent for war.

Nick Deane: I would like to endorse what Dr. Wareham has been saying. Our view is that the decision to commit the nation to armed conflict is an extremely serious one, I contend it is the most serious decision a nation can make. As the Brigadier pointed out, the ramifications of war reverberate for a very long time after hostilities cease.

We have heard John Howard quoted as describing the decision as one that goes to the heart of the nation. Our own local member, Mr. Anthony Albanese has been reported as saying there is no more important a decision. I believe there is a consensus any decision of committing troops to armed conflict overseas is a matter of the gravest concerns and it is truly a monumental one. With most matters of grave concern it is considered prudent to allow all of the arguments for and against the decision to be put forward, we encourage this process, we call it debate, and it's fundamental to our system of democratic government. The very building we are in is devoted to that democratic process.

So I was left totally bewildered at the time of the invasion of Iraq about a question to which I still have no reasonable answer. The question goes something like this. If democracy is something that we truly value and rely upon to bring us good governance, why in the name of democracy, is the decision to go to war taken without democratic debate? From my point of view the hypocrisy of deciding to wage war without raising the idea in parliament while simultaneously espousing democratic ideals is utterly breathtaking, hence our group's submission to your Bill. The essence of which is that the decision of the weight of war must be subject to debate and this which is why we found your bills so very sensible and its proposition so obvious.

I want to raise another area attached to the reasons for your bill being so important. I believe we should look at it in the context of unfolding global events. In particular I would ask us to consider it in the light of environmental problems: climate change, peak oil, rising sea levels, retreating glaciers, expanding populations with expanding aspirations to greater wealth. We know

that for every person on earth to live at the standard of living we all enjoy would require several planets, an utterly absurd and impossible proposition.

Faced with this, I believe that we are entering an era of increasing instability. I'm taking care not to argue that war is an inevitable consequence of the constraints I'm talking about but unfortunately humankind has a poor reputation, and history has some vivid examples of civilisations that have outstripped the environments capacity to support them that have collapsed into violence. While war is not inevitable I see it as a strong possibility that the environmental problems we see may be the source of the sort of political instability that can lead to violence and war.

In that context it becomes even more important that level headed decisions are made so even more important that decisions are only made after proper debate. We need to push the prospect of going to war far way from us. We need to think long and hard before taking up arms. I put it to you that in a world that is becoming less stable, as the natural environment comes under more and more stress globally, the need to deliberate before deciding to go to war becomes more and more pressing. We teach our children to restrain themselves and think before they lash out in violence. If there was ever a time for nations to do the same, it is now. If your bill can take us a step on that path, then that's the very best direction for us to follow.

Ruth Corrigan: I endorse what has been said by Sue and Nick. The Women's International League for Peace and Freedom (WILPF) has as its core aim to study and make known the causes of war and to work to bring into the world a more just and equitable society. One of the issues that I think goes to the heart of this question is that, as the Brigadier said, war should only be embarked upon as an absolute last result after all avenues have failed. The avenues that could be brought about are the debate and discussion the dialogue that is sure, long term but it is something that has to be a continual process that happens not as consequence of threat but something that is an ongoing thing. In an environment where that is a continual process, war is much less likely, a country would be much less likely to take its citizens to that decision.

This Bill gives us time to think, before we make a choice, in the parliament, there has to have been a long process of dialogue, discussion, debate and diplomacy in a whole range of ways. You highlight the climatic changes, the threat of instability in food and water security across the world and we can't say that nations impoverished, starving, with health problems that we can't imagine in this country due to our great overwhelming greed in a way, are not going to somehow work to destabilise the world and we are contributing to it by our own way of looking at things.

Our group definitely endorses this Bill and encourages the parliament to think about it seriously, to maybe look again at the issues raised by various people about how safe it is to get people quickly out of situations where they need to be taken away quickly. Those things are something that you could build into the bill that that would be able to happen easily.

Senator Ludlam: Thank you to all of you for those thoughts. We were drawn into Iraq by two countries where votes were taken in parliament or Congress, either through convention or the Constitution, and it didn't stop the flight to war.

I'm wondering, compared to the strengthen of an Article 9 that says we don't do overseas aggression, to a War Powers bill that does put a vote to parliament, how important is this instrument really when our two key allies did have such an instrument in place?

Bill Rowlings: I would suggest to you that anything that causes Australians to think and follow like sheep the USA or the UK is a very good thing. A Bill of this nature would force us to go through a regulated process that would ensure that we had independent thinking and input. That wasn't the case in recent situations where there was a follow the leader, where we were committed by a PM who spoke publicly before any debate had occurred.

Dr. Sue Wareham: To address that issue Senator, I think debate in the Australian parliament in 2002-2003 could have made a difference. It certainly wouldn't have been a foregone conclusion that Australia would join the invasion of Iraq had that debate occurred. I think there was a reasonable chance that Australia would not have joined the invasion, that Australia in that instance would not have followed the United States and the United Kingdom. There has been talk that Australia's contribution has been of marginal significance anyway, militarily and in Australia we would probably be deflated if we realised how small the military contribution we have made as seen through the eyes of the US military. Nevertheless I think an Australian decision to not join the invasion would have decreased the legitimacy of the war, and that would have been extremely significant internationally. It would have preserved the reputation of Australia being a law abiding international citizen. That in itself is valuable. I think that the example of a democracy saying we will not join the invasion because it is illegal would have reduced the legitimacy and that would have been of great value.

Nick Deane: Had there been parliamentary debate before the invasion of Iraq, I think as you suggest that it was quite possible the decision would have gone with embarking on the invasion. Nevertheless I would still see value in having those arguments presented in the parliament had being recorded for us.

Ruth Corrigan: I think there are actually large cultural difference between us and the US and UK. I believe that if that debate had have happened, and we know from the public disagreement with the decision, that it was quite evident that many, many Australians disagreed, and I think that could have carried through in the parliament.

I think there are very big cultural differences, although we like to think of ourselves as similar to the US and the UK, I think we would have voted against it. It certainly would have given us time to have that debate publicly the issues put before us. That is part of the issue. We shouldn't be pushed into a situation without adequate information. Governments shouldn't be able to hide behind "in the national interest" phrases; they should be required to put some information at least into the public arena.

Senator Ludlam: There was one vote against the war in the US Congress as I recall, a woman named Barbara Lee from California.

Neil James: I would just caution us to be a little bit careful about conflating the interventions in Iraq and Afghanistan because they have different legal basis. The intervention in Afghanistan was authorised by the United Nations right from the start, and in fact it was a graduated series of

steps where the UN said to the Taliban regime controlling part of Afghanistan that they were required to hand people over for international trial, and when the Taliban refused to do that the UN then authorised the intervention to capture and arrest those people. It's an entirely different legal case to the intervention in Iraq where the jury is still out whether that was illegal or not.

The bulk of international lawyers think that it was illegal; a substantial minority of international lawyers think that it was covered by Iraq's violation of United Nations Security Council resolutions governing the end of Iraq's attack on Kuwait. I don't think we are ever going to ever resolve this issue. Howard in his statements in Washington about backing the United States over the Afghanistan issue, need to be looked at from the point of view that he was backing a UN endorsed operation. When he made that statement the UN Security Council had already met and passed the first resolution. It's a different kettle of fish, I agree, with the argument over Iraq.

The other thing I would point out, particularly in this group, was that the opinion polling at the time of the intervention in Afghanistan showed overwhelming support, and continued to do so until very recently. The Iraq intervention also enjoyed majority popular support too at the time. It was only later that popular opinion swung. Whether this would have had much of an affect on parliamentary debate would be an interesting one. We have to be careful when we used historical examples. Sue said there was no debate on the Vietnam commitment in parliament when in fact there was extensive debate and a national election fought on that issue.

Dr. Sue Wareham: Not before the troops were committed.

Neil James: Menzies made a statement in parliament in 1965 and there was an extensive debate in parliament. It is actually one of the reasons why Gough Whitlam replaced Arthur Caldwell, because the ALP at the time reckoned Caldwell had made the wrong call on the issue.

Professor Helen Ware: Another issue about having a debate would focus attention on what the objective is. In the old days, we want to win the war. In Afghanistan exactly what would that entail, what does it mean? I think a very important thing is to have a public debate which would then raise the whole question of whether it is a good idea to go there at all, about what the objective is, what we would be trying to achieve. Particularly as statistically the great majority of wars are civil and internal wars; it is not Country A versus Country B. When it is groups fighting each other within a country, the whole thing becomes much more messy and much more difficult to define what a victory would entail.

Kris Kulgman: Australia is a sovereign country, we are a democracy and despite what the US or the UK do, it is for our own moral integrity that there should be a public debate on such a crucial questions as to whether we should go to war or not.

Senator Ludlam: Can I throw one more cat among the pigeons. The three NGOs are effectively pro-peace, you are anti war groups or have peace in your name. That is your mandate. And presumably you are not likely to support any arguments for going to war. What would parliamentary approval do?

I was one of the people organising rallies against the deployment to Afghanistan many years ago, and if that vote had been put to parliament, I think Neil is right; there would have been bipartisan

support for deployment to Afghanistan. What does that do to the peace movement? What if the parliament lends it legitimacy, where do the peace movement or these groups stand in that case?

Dr. Sue Wareham: I think the legitimacy is key there Senator. If parliament has at least addressed an issue, if there has been debate and a vote, a democratic decision is made, then yes groups can accept that is what parliament has provided. I think it's the lack of democracy, the lack of debate has been the major problem and obviously the reason for this bill, so I think the issue of legitimacy is key there.

To address the matter you raise that we three represent peace groups. Yes we do. Speaking for MAPW, MAPW is not a pacifist group, we haven't canvassed our members on this, but we do not hold pacifist principles. What we do state is that war has changed over the course of the last century. War is a different exercise than from the sort of exercise it was say 100 years ago, even a shorter period than that. I think that's one of the reasons that this Bill is so important. Seriously addressing the issues surrounding war fare is even more imperative than it was 100 years ago.

The human and civilian impacts are far, far greater than they were 50 or 100 years ago. The environmental impacts are a relatively new dimension to warfare which really seriously needs to be addressed; this wasn't around at the time of the forming of our constitution. The changing nature of warfare is something that deserves the scrutiny that parliament can give it, and the legitimacy of a parliamentary vote at least addresses the democratic needs.

Ruth Corrigan: Our group began during WWI as a response to the situation in Europe at the time. Women there could see the great devastation that was going to occur and was already occurring not only to the population but to the environment; already there were environmental issues that have continued from there to this day. The women at the time saw the issue at the time to bring people to the table of consultation, to discuss rather than to use arms to solve things. That doesn't mean there are not instances and situations where sometimes that is not the last resort.

Nick Deane: If there were a decision that was legitimate we would have to accept that of course. It would just put us in the position of being a minority group out there in the wilderness waving the flag of peace.

Neil James: There are very few groups in society that are not actually for peace. We are merely squabbling in most cases about the best way of getting it. The ADA is an organisation inherently interested in peace, but we have a different idea of how we get there than some of the groups represented at the table. If I can add personally, and I'm not speaking for the ADA here, I'm an historian by academic training, by training I'm a soldier and by profession I'm a strategist.

Sue's point about civilian deaths is an interesting one, because in effect it is cyclical. Basically the wars until the Peace of Westphalia of 1648 killed enormous civilian casualties, far more than soldiers. The wars from Westphalia to WWI killed more soldiers than civilians. And the wars from WWII onwards, the cycle has swung the other way. This is the unfortunate nature of war and weapons and politics. War is not different, it is still the extension by politics by other means, it occurs when there is a failing of the human condition. We are unlikely to ever successfully eradicate it.

We are going through a phrase where intrastate war and interstate wars that involved intrastate wars are far more common than interstate wars. We really have to look at this in a very broad historical canvas. I'll add one more point. Since the UN Charter was signed in 1945, no one has legally declared war.

There is no such thing as declared and undeclared wars and there hasn't been under international law since 1945. One of the problems about how this issue is talked about in public is that people talk of declared and undeclared war. Under international law, war exists as a material fact, and this means that if someone like George Bush says its not a war, and someone says it's not, IHL kicks in automatically as it starts, so everyone is protected by the Geneva and Hague Conventions, even though someone on either side of the war may say it is or is not a war. That war is a material fact is often missed in some of the debate.

Professor Helen Ware: The nuclear argument clearly that is something new and different. I grew up at a time when that was the cloud over even children in school, we worried about nuclear war. But the argument that current wars are much more likely to affect civilians than previous wars, as Neil has already said, it changes from time to time. Also the question of who is a civilian and who is not is difficult. As someone who has been involved, at least peripherally, and has studied many of the civil wars in Africa, the question of who is a civilian and who is not really doesn't have a great deal of meaning in many of those contexts. You have women coopted as soldiers in Sierra Leone, or something like that, it probably isn't a very helpful distinction, a death is a death to some extent.

Dr. Sue Wareham: I think it would be true to say that war now is different from war 100 years ago looking particularly at WWI, and it's been documented that the percentage of the victims of WWI that were civilians was small, compared to modern war when it is very large. The impact of modern warfare on civilian society, the effect of aerial bombing drones, the destructiveness on civilian society is far greater than the effects of a war such as WWI even though that was terribly destructive in terms of soldiers lives lost.

Nick Deane: We are all in favour of peace, I share that with you. My question is why if we all favour peace, why do we constantly prepare for war? We don't seem to be preparing for peace; we always seem to be prepared for war. You say that it's part of the human condition. I have to call that into question otherwise what my group does would be pointless. I believe particularly with the modern technology which is so much more destructive than it's ever been before, we have to get past the idea of it being part of the human condition. We have to start looking at ways of controlling the technology and putting it to peaceful purposes.

Neil James: I suppose the answer to your argument Nick is that we don't prepare for war, we prepare for the possibility of war to make sure we don't have one. And I agree it's an interesting esoteric example and getting back to Scott's Bill this is one of the problems.

The example of the 1997 deployment to Kuwait, where Saddam Hussein was going through another period of disobeying the UN resolutions on WMD, I was actually a UN weapons inspector in Iraq and I can assure you there were WMD. That preliminary deployment stopped the war breaking out. Because Saddam Hussein backed down and the inspectors went back in and continued the inspections and the disarmament of Iraq; if we hadn't done the preliminary

deployment, there may have indeed been a war. The difficulty of a bill like this that is if you have a debate that says we won't have a deployment because we might have mission creep and a war might break out. Yes, that's quite a valid argument in one half. The other half of the argument is that the deployment did stop the war breaking out because it forced Sadaam Hussein go back and comply with international law. It's a really nuanced area and that's the problem with the Bill.

Senator Ludlam: I just got the sense that this is a conversation that is hundreds and hundreds of years old. Mr. James, can we hear from you now please.

Neil James: [Mr James spoke to a powerpoint presentation which is available on request from the ADA; verbal transcript only is included here].

If I can just start off by saying, the Defence Association isn't against the bill in principle. We have some concerns with the practicalities of how it might work in practice. As we said in our article in Defender, in Spring 2007, which means it was published in September, we said we shouldn't rush into this, obviously if we're going to do this there should be a Parliamentary inquiry and it needs to be vigorously debated, because its not quite as simple as it first looks.

I thought I'd start by quickly rushing through where we've come from to get where we are. Most of you don't know what the Defence Association is. I won't read it out because people read five times faster than they listen. I'll just point out we don't only handle defence matters but also intelligence and security agencies, and we aim for informed public debate.

We have three golden rules, the first one is independence. We're very careful who we take money from, and if you sell weapons to the defence force we don't accept money from you more than \$5000 a year, it doesn't matter who you are. Most of our money in fact comes from our individual members, spread around Australia. We don't take any government consultancies or grants funding, which makes us unique in the defence arena; all the other think tanks do.

Our second golden rule is we're genuinely apolitical, we always have been. Right from the beginning we've had equal numbers of senators and former MPs from both sides of parliament, and we still do. Our council of elders of course has lots of retired diplomats and military people and judges, and those type of people too.

Lastly, we have a community base. We're not an ex-services organisation, we're not the military's trade union. Historically, nine out of ten of our members have never served in the military. It's been creeping up since the East Timorese intervention since the defence debate's picked up again. At the moment seven out of ten of our members have never served in the military, or ASIO or ASIS or the Federal Police or anything like that. They're Australians who think defence is important.

We publish two publications, a quarterly national journal and a defence brief, we also have a comprehensive website. The best way to look at us is to say, there are five public interest guardian organisations in the country; Taxpayers Australia for tax; the Consumers Association for consuming; the Conservation Foundation for the environment, the National Trust for heritage and us for national security. We're the five independent public interest guardians. However there are plenty of votes in taxes, trees and shopping but few votes in defence, or there are no votes in defence until it is too late. Our politicians ignore or neglect our defence because we let them, and

we can prove our independence by our poverty.

I'll start off with an indignation health warning: this presentation is ideology free. If you disagree with me, please disagree with me on the facts, and not an interpretation of them.

We'll add a bit of levity here. These are the rules of world wars: you can't have a world war unless you follow these rules. The democracies are always unprepared at the start, the British and commonwealth forces have a few disasters up front... which is always good, because it means our enemies have them at the end. France always needs help. Someone invades Russia. Italy and Japan change sides – as Churchill said when Italy changed sides in world war two; it's only fair, we had them last time. Chinese on the winning side but does them no good; Americans come in half way through and believe they did everything and tell everyone that forever. Germany always loses. And Australia captures Damascus. Which is going to be much harder next time than it was in 1917 and 1941.

When you look at this problem, you've really got to look at the why before you discuss the how, you have the mechanism. You've got to discuss why you have it, and the who mechanism. We're talking about a change to the constitutional separation of the war making powers. Whenever you discuss a change to the constitutional separation of powers, you've got to sit back and suck the air through your teeth and say, are we really sure we want to do this? And there are some interesting lessons from history in this regard. Both in terms of Australian defence, why we organise our defence the way we do, and in case studies of how we fought our previous wars and chose to go to war in the first place, and there are some lessons in that experience. We probably won't get any time here, but I've got a couple of slides on 'just war' theory, and the international law that comes from it, which has an effect on this debate.

We can't debate how we should go to war without studying why we do. We also can't debate how we should go to war without studying who is involved in making these decisions. Wavell gave a series of lectures, Field Marshall Lord Wavell was a British commander in chief in the Middle East, and he gave a series of lectures at Cambridge in 1939, a reasonably famous lecture series. He said the knowledge of the mechanics of war and not the principles of strategy is what distinguishes a good leader from a bad one. It gets back to a point that both Helen and Sue made earlier, that the goals that you go into a war with are inevitably different to the goals that you end up fighting the war for. If everyone marched off in 1916 thinking it was all going to be over in six weeks, and if war always ended like you thought it would when you decided to go into one, we'd probably have a lot more wars, because there's just a natural tendency for politicians and people to be overconfident about what a war can achieve. War is fluid and dynamic by nature, and it changes over time, and the reasons you go into a war are often quite different to the reasons you persist with it, and the reasons that you choose to end it one way or another.

All wars are a contest of will. All wars end when one side gives up, and people forget that when they're discussing the actual moral mechanics of warfare. At the moment we have the separation of the war making powers. It's a crown prerogative; it wouldn't matter if we were a republic, it would still be an executive prerogative, the same as it is in the United States.

The executive decides to resort to war, but its' governed by international law quite strongly, in particular the United Nations charter, and it basically stems from section 2 and 61 of the constitution, which are known as the express powers.

The legislature controls the revenues and expenditure for the war, and in fact ultimately controls the prosecution of the war. Going back to the 14th century, Parliament must approve a treaty that ends a war, it's a convention of our system that we inherited from the British, and all of these things are based in sections 51 and 119 which are the incidental powers. There's also section 114 too, but they basically say that only the Federal Government can maintain the military; unless it allows the states to do so. The Federal Government must defend every state equally, in other words you can't give up Queensland to the Indonesians, say, or the Chinese, and section 51 is the legislative basis for how Parliament makes laws to do with defence and the defence force. There's seven hundred years worth of evolution in our constitutional system that's got us to this stage. So when we start to tinker, we have to be really careful with how we tinker because there's often there's unseen implications in some of the things that we intend doing with an act such as this.

Now why have we gone to war? Since before Federation there's always been two schools of thought about how you defend Australia. And ironically, both sides of politics in Australia have embraced either theory at different times in their history, so it's not a left versus right thing, this is just the way it works.

There's the homeland defence school, which basically says we should avoid foreign entanglements, and they tend to see the seas around Australia as a moat, and if we retreat behind our moat and ignore the rest of the world, all our problems will go away.

The alliance defence school tends to see the seas around us as a highway, in other words it's a two flow highway, and they tend to see Australia as part of a global system, not least because 99.5% of all our exports are seaborne trade, and we only have the ability to export because the sea lanes are secure, because there's an international system that keeps them secure, there's a system of international law that makes international commerce work, and if we didn't have any of these things we'd have the living standards of Fiji or probably Bangladesh. People in the Alliance Defence school tend to think of Australia as having global responsibilities of some type, be they political, legal or moral, in other words you either contribute to peace keeping or you don't.

Now when you look at how we fought our past wars, there's three ways you can look at this. The first is a war chronology view, which looks at the wars we fought since well before Federation. It's an interesting number – I remember when I first served in the United Nations, one of the Norwegians sitting around the dinner table one night on the ceasefire line in Kashmir, and he said to me, how come such a young country has fought so many wars? And I said, to an extent it's in our history. And what I didn't realise was he was baiting all the Swedes who with us, in saying well I think it's wonderful that you came across the world to liberate Poland and Norway, whereas countries much closer sat back and did nothing to fight the Nazis. That was an interesting experience to sit through.

The second way to look at our past is to look at our strategic policy. Why is Australia like it is? And we've been through several periods of how we've chosen to defend Australia, and since, basically East Timor in 1999, we've actually changed our strategy, with a reasonable bipartisan consensus. The defence of Australia, a dogma that was championed by Labor for instance in the 1980s and 1990s, you won't find too much support for that now except on the more extremist fringes of Labor. Essentially because of the East Timorese deployment, in which we almost had a war with Indonesia by accident. It blew up very suddenly, with two weeks notice. ACOSS, the

Australian Council for Social Services, called for cuts to the supposedly massive defence budget, and for more money spent on social services, two weeks later called for unilateral intervention in Timor and war with Indonesia. My predecessor went to ACOSS at the time and said, fellas, there's a bit of a disconnect here, you can't... and the then leadership of ACOSS accepted that.

East Timor taught us some very important lessons, because we actually were on our own. The Americans wouldn't help us, much, although they did provide some significant support finally. Even though most people in Indonesia, most people in Australia didn't want war, we almost had one by accident because force was necessary to liberate East Timor. The last way of looking at it, is the Alliance view of how we defend Australia. We had a British Empire period, a wartime US alliance, the ANZUS treaty, the defence of Australia phase, and now a maritime strategy like we have at present.

There's a uniquely Australian way of structuring our defence and war making, and it comes from our geostrategic position. Effectively, the development of Australia for the first hundred and fifty years of our existence was sustained by British strategic sea power. Two thirds of all foreign investment in the entire British Empire in the 19th century was in Australia.

What factors contribute to how we defend Australia and how we choose to, or choose not to fight wars? The best way of bringing this out, and I'll be a little bit provocative here, is ask what are the two most significant battles in Australia's strategic history? Any ideas? Why did neither of them involve any Australian forces? Why were they so significant?

It's largely because we're an island continent girt by sea. We're the world's only island continent, the only continent occupied entirely by one country, and one nation. We're located in the Asia Pacific region but our national institutions and cultural traditions have more European than Asian roots. Our ethnic composition is largely not Asian, our worldview is just Asian, it is Asian to a fair extent compared to New Zealand, who see themselves as a South Pacific country. Many, probably most Asians, don't regard us as Asian, or as Asian as them.

So we actually have a very interesting place in the world geostrategically. We have a near total dependency on ship-borne trade, our standard of living is largely dependent on it. Secure sea lanes means there's got to be an international system that works, and this is largely why we went to war in World War 1. It wasn't to do anything with jingoism or the British Empire, it was to protect our strategic position. We would have been very vulnerable if Germany had have won World War 1, and 10% of the earth's surface is some form of Australian responsibility, in terms of defence, international law, or humanitarian law. A fair bit of that is our search and rescue responsibility. But just in economic terms we have a significant part of the earth's surface. This makes us reasonably unique. We're a maritime country but saddled with a continental mindset; we all live on the beach, we all look outwards, but we ignore the fact that we're completely dependent on maritime trade for our wellbeing and survival.

So one of the two most important battles in Australia's strategic history was the battle of Trafalgar. It was fought when Australia was very young, it was fought in the Atlantic Ocean off south-west Spain, and it was the Royal Navy versus the Spanish and French navies. The second one was Midway; early June 1942, fought in the central Pacific; the US Navy versus the Imperial Japanese Navy. These are the two most important battles in Australia's strategic history. They

allowed Australia to have the enormous periods of peace that it's had after each battle. Trafalgar was important because it meant British sea power was not seriously challenged for a hundred years, British maritime supremacy was on a global scale, and they were able to settle and develop Australia essentially unchallenged. As opposed to how the British and French fought over North America and India. Two thirds of all investment by the British Empire in the 19th century was in Australia, people forget that. Why were they able to do that? Essentially, because there was never any serious threat for someone to take Australia off the British in the 19th century – Melbourne was the single richest point on earth for about 20 years.

Midway, was only one month after Coral Sea, which stopped the invasion of southern New Guinea, and the Doolittle raid on Tokyo six months after Pearl Harbour. Nimitz defeated the Japanese combined fleet, four out of the six Japanese fleet carriers were sunk. Japan never recovered. After Midway the Japanese were no longer capable of winning World War 2. It was just then an attritional war, getting back to that contest of wills point I made earlier about all wars end when one side gives up, or can be convinced to give up. The Japanese forces in the South Pacific were withering on the vine after that, because they just didn't have the capability to prosecute a war across the vast distances of the Pacific ocean. Midway meant that the US had maritime supremacy in the south Pacific for the following 75 years. It's largely why Australia is like it is today. The sea lanes have been secure, we've been able to export, and our standard of living reflects that. If we couldn't export, we'd be in reasonably serious trouble.

However it has introduced an element of complacency in Australian political discourse. Our strategic security has been underwritten by the alliance with the USA since the 1951 ANZUS treaty. Both major political parties have always supported the US alliance, not just for all these intrinsic strategic reasons but potentially because, if we didn't have the US alliance, on the most conservative estimate we'd have to increase the defence budget by 60%, and most studies have said we'd have to triple it. And that would mean less money to spend on lots of other things. So any politician is always keen on the US alliance, because it allows them to spend money elsewhere.

Now if you look at some of our case studies of why we've gone to war, we originally went to war because it was a German violation of Belgian neutrality. There's a bit of an interesting case in World War 1 where people look at things through the perspective of the present and think, jeez they were all naive fools then and they were swept up by jingoism. It's actually a very dangerous thing to say the people of 1914 were dumber than the people of today, they actually saw their place in the world just as accurately as we see our place now. Most Australians at the time knew it wasn't in Australia's interests for Germany to win World War 1, and essentially from 1915 onwards, no Australian convoy sailing for the Middle East or Europe required a naval escort in the Indian Ocean, because the Australian navy at the time was big enough to in effect, chase the German Pacific squadron out of the Pacific and it was later destroyed in the battle of the Falkland Islands in early 1915. One of the reasons for this of course, was Japan was on our side in World War 1. If you look at World War 2, the reason we went to war was Germany's invasion of Poland; what would have happened to Australia if Germany or Japan had won World War 2? What would have happened to the international system if they had won World War 2, and why were nuclear weapons used against Japan and not Germany? The simple answer to this, is it was the first test didn't occur until after Germany had surrendered.

But you've got to be real careful when you look at hampering the war making power, if you don't take a reasonably objective look at Australian history. And were there viable alternatives to the nuclear strikes on Hiroshima and Nagasaki, I won't get into this area because it's an exceptionally controversial one. But there's been a couple of great books published just recently, one by a Jesuit theologian who explores both sides of it, and we reviewed it in one of the recent Defenders.

Korean war, North Korea invaded South Korea, it was the first test of the UN charter. It only worked because the Russians had temporarily ceased cooperating with the Security Council so they couldn't veto it. What would have happened to Australia if South Korea had been conquered? Probably not much to begin with, but what would have happened to the international system if the communist powers had won in Korea? It was the classic example of the democracies fighting dictatorships.

Iraq is an interesting example, because as I mentioned before it was the first unequivocally total violation of the UN charter, it was unique. The Soviet invasion of Czechoslovakia in 1968, was a violation of the UN charter but not as unequivocal; this is a stand out case of where Iraq was so totally in the wrong legally under international law it wasn't funny. That's why one third of the UN membership contributed forces; in fact the real question about the liberation of Kuwait was how the other two thirds of UN members got away with not contributing when the UN charter says they had to. The principle of collective security is, if any member attacks another member, all the other members go to help the member who was attacked. And yet you had people who argued that they weren't going to send forces to defend Kuwait.

From 1991 to 2002 we had a series of UN sanctions and the failure of containment. And I'm going to be very quickly a tad controversial here. As an ex UN weapons inspector in Iraq I get very angry when I hear people say that there were no WMD. The place was full of it. The UN disarmed a substantial part of Iraq's chemical, biological, nuclear and missile capabilities for many, many years. The only mystery is what happened between the last UN inspection in 1997, and the invasion in 2003. But always beware of people who claim that there were no WMD, because there certainly were, and Iraq was in constant, flagrant violation of international law over that period.

So in 2003 we had a US-led multinational intervention which we chose to join, and with no separate UN security council resolution, and as I mentioned before the international law jury is still out whether that was illegal or not. Most international lawyers consider it was of doubtful legality, but a substantial minority, about a third, of the world's academic international lawyers believe it could be justified under the earlier UN resolutions, going back from 1991 to 2002.

Afghanistan, its important to notice that the intervention in Afghanistan was fully endorsed by the UN from the start, and how would this affect our discourse here in Australia? There have been a series of continuous UN resolutions going on in Afghanistan into the present day, and indeed the UN's goals in Afghanistan have changed. We get to these questions in the end: what could happen to Australia if the UN endorsed coalition fails in Afghanistan, and what could happen to the international system if we fail in Afghanistan. These are the types of questions that need to be explored in a lot of the debates about whether we should be there in the first place, and unfortunately I would argue, they're not.

Back in 1983, the US national conference of Roman Catholic Bishops updated the 'just war' theory, and this gets back to some of the points that were raised earlier this morning, about when

a nation chooses to go to war, there are certain things that have to be fulfilled. The war must confront a real and certain danger, it must be a last resort, it must be properly authorised by someone, you just can't decide to go to war yourself. It must be a just cause, it must be a last resort and there must be a probability of success, and it must be proportional to the damage done – unless it's a war fought in self defence. Modern 'just war' theory is essentially based on the resolutions of this conference, but it goes back to the 8th century if you follow the history of the 'just war' theory.

International law is derived from 'just war' theory, and there's two aspects to it. The international theory governing the right or resort to war, and the international law governing how you fight a war.

When you start talking about how the Australian Government goes to war, *jusit bellum* is very, very important because it's not a unilateral decision by Australia; even though it's executive prerogative it's still within the framework of international law. The key parts of the international law here, are the charter of the United Nations, the Hague Convention and the Geneva Convention. Under the UN charter there's only two grounds for going to war; self defence under Article 51, or if the UN authorises it under Chapter 7. All wars, essentially, fought since the UN charter was signed, or all wars fought by the democracies, have been argued for, perhaps illegitimately, perhaps legitimately, under one of those two grounds.

The reason I raise these things is that practicality comes into it, and if we were to say for instance that a vote in Parliament was required before we could send the defence force off, there's any number of practical problems that would occur, and I raise the problem before of preliminary deployments having a deterrent value. The real problem is, in a lot of the debates in which we're discussing changing the war making power, we don't think of the effect on the other side. We only think about it from our point of view, and the defence association's main concern with the legislation as it's currently framed, is that it doesn't take into account the other side, the person that you may have to fight or the person you're seeking to deter. If we're not very careful, we could actually encourage them to go to war, rather than discourage or deter them. We need to be very, very careful in how we tackle this. Our thinking at the moment is probably that if you were to have a vote in Parliament, it would need to be a joint vote, of both houses together. It wouldn't probably work if it were a vote separately of the separate houses, because both of the main political parties would just band together. It would need to probably be a conscience vote, and you have to ask really serious questions like Scott's raised before, about would it really change anything. I think it's that last question, that even Nick raised earlier: if we had this power, or this vote in 1991 and 2001 and 2003, and in 1999 over East Timor, would much have actually changed. I suspect, from looking at Australian history, that we probably still would have done what we've done. Which then begs the question that maybe there's a better way of tackling this problem, than legislation. It might actually require some degree of constitutional change.

The last point I'd raise is, there's any number of practical problems about how you'd decide what was a war and what wasn't; what was a peacekeeping mission and what wasn't; what was a humanitarian problem and what wasn't. There's the problem of what we call the three block war, where we have the ADF providing disaster relief in one block; and a block down the road in a city, peacekeeping and a block further on maybe fighting a war. It's very hard to come up with prescriptive legislation that covers the flexibility required to do this kind of thing.

So our only appeal in this whole question is that the debate be informed, and not as it so often is unfortunately in this country compromised by ideology.

Senator Ludlam: Thankyou very much for that. We're left with not so much time for questions; I'm going to throw one quick one at you which is the converse of the question I put to the others before. If it's good enough for our two major allies, the United States and the United Kingdom to have recourse to Parliament, why not Australia?

Neil James: That's a very good argument, and it's probably one of the reasons we are not against it in principle, except the US situation is more nuanced. No American president has ever recognised the War Powers Act which purports to limit the President's war making power. It has never been tested in the US Supreme court. Every US President chooses to make the appropriate notification to Congress and the Senate. But each President, Democratic and Republican, since the War Powers Act was passed in 1971, none of them has ever recognised the War Powers Act as limiting their actual discretion. So Americans are going through many of the constitutional dilemmas arguments that we are. I think we will learn a lot more from watching the British example because it is much closer to us in practical and constitutional terms. The compromise the British seem to be inching towards is a vote in the House of Commons and a deliberative debate. In the US there will one day have to be a test case in the Supreme Court and most people think that the War Powers Act will be struck down.

Professor Helen Ware: Can I say following on from that that in fact Reagan kept troops in Lebanon after Congress had said that they should be withdrawn, so in fact the President went against Congress and nothing happened to him.

Neil James: The War Powers Act has never been constitutionally tested.

Dr. Sue Wareham: Could I come back to your early slide that was about the distinction between democracies and dictatorships. How would others outside Australia see a decision by a Prime Minister such as Howard for Australia to go to war, how could that be distinguished from a decision by a dictator to go to war when there has been no debate in parliament?

Neil James: I can't speak for how people perceive Australia. To some extent there will always be a propaganda advantage; some of the dictatorships we fight will always say that no matter which way we do. But the essential argument between democracies and dictatorship goes back to how the UN runs into trouble trying to improve the war and save the world from the scourge of war. Since 1961 democracies have been a minority in the General Assembly. The reason the UN has gone off the rails since the 1950s is because of the self interest in the dictatorships in the GA. They do not want to see international law expand and allow the UN to intervene in their internal affairs because they are going to lose out. I don't think we are going to see much improvement until democratised are the majority in the GA, and that will eventually occur, but it will take a long time. It's rarely a unilaterally decision by one person. Wars are ultimately a contest of will, they are not just fought by troops on the ground, they are fought by arguments and diplomacy in international forums, by public opinion, and it's a complicated area. The big problem democracies have is fighting a war is that they can only do it successfully when the public backs the troops, or backs the concept of going to war in the first place. It is getting increasingly harder for liberal democracies to fight wars particularly in the era of the internet.

Andrew Bartlett: Thanks for your evidence. I am interested in asking two questions, firstly towards the end of your statement you said something along the lines of because of the complexity of doing it by legislation perhaps another mechanism could be deployed because you are not opposed to the idea in principle. Can you expand on this a bit? Secondly, perhaps partly related to that, I spoke at the start this morning about the role of the Joint Standing Committee on Treaties which was instituted in 96/97 which didn't go all the way of giving parliament veto power over treaties but at least allowed proper scrutiny and in depth examination. I wonder if you think that parliament does give enough scrutiny to the issue going tow but also what comes next, how the battle is going, how the engagement is going and other issues like troops coming home. If you think parliament doesn't, do you think that mechanisms could be put in place that would at least encourage more parliaments to explore these issues and get greater accountability from the government?

Neil James: The problem is we often forget how much power parliament has over defence and war making. Parliament controls the revenues and expenditure. If the parliament doesn't think the war is worth pursuing they can turn off the money taps off. That is essentially what happened in Congress in the Vietnam War in 1971 and 1972. It's never actually happened in Australia's case, but there is no reason to think why it couldn't happen. The bottom line is that in Australian history we have never fought a war that the two major parties in the main haven't supported. The Labor party actually split over this in WW1 and to some extent split over it in WW2. While you continue to have a substantial majority in parliament believing in the war in question, it makes it very hard for parliament to exercise the power of the purse string. The problem with the legislative solution is essentially that it's almost impossible to write the legislation so that it will handle every single situation, because the nature of diplomacy, the nature of strategy, the nature of war is so dynamic; it is very, very hard to write legislation that will cover every contingency. You therefore run into the problem of when a contingency came up that the legislation didn't cover, the government is likely to send the troops anyway, and you are back to square one in the argument. We think it probably needs to be looked at at a constitutional point of view than a legislative one. The legislative solution has so many difficulties it is going to be very difficult in moving forward.

Bill Rowlings: The Civil Liberty Association's position on this is clear in our submission. We believe there should be four principles. First, that we support our troops, we think out troops and police are the greatest defenders of civil liberties; that's their job and so we are certainly not against them. We support the emergency provision that a decision can be taken to go to war in an emergency by Cabinet. But we think that Australia should go to war only if it is endorsed by the people of Australia, so an emergency decision, in one of our four principles, would have to be endorsed within 30 days by the vote of parliament.

Secondly, all relevant facts about the war must be disclosed to the Australian people at the earliest opportunity, fully and frankly, whether deemed positive or negative. There would be the retention of security type information, we understand that. But in a general sense, our criticism is unlike in the UK and US, wars fought by our military are almost in secrecy and silence, we are very poorly informed about what our troops are doing and partly because there is no formal requirement for public reporting.

The third point is that at regular intervals, not longer than 120 days or three times a year, those primarily responsible for conducting the war must provide a full report to the Australian people. Such reports would be in the parliament normally, or could be in a public forum outside of parliament if the circumstances dictate. At the moment we get no such reporting, we get no formal reporting on the war, have had no reporting at all on Iraq or Afghanistan, in a public statement sense, in a full parliamentary report that happens in other countries. We think that is a very important thing to keep the people informed about what is happening.

Just in passing, one of the things has been referred to is peacekeeping and peacekeeping is important. When we say war, we mean a war like situation, which involves peacekeeping obviously. Do you know that we have had people in Cyprus for 45 years, that we have a peacekeeping operation there, which has never been publicly reported on in a major sense parliament, I have no idea of the justification, forty plus years later of keeping a police group in Cyprus. It just slips by, it just gets forgotten that that operation is just sitting there.

The fourth principle is that at regular intervals, not longer than 365 days, a separate budget allocation for continued conduct of the war, including, at least a 2 year forward projection, shall be put forward to the parliament for endorsement by both houses. This goes to the point of the continuing support of parliament, that once you have agreed to a war then it needs to be reviewed on a regular basis. They are the main positions that we take.

We also support the right of Prime Minister and Cabinet to make emergency decisions. But we note that in Iraq, we have been told that there was no decision of Cabinet, Cabinet was informed, there was no decision, Cabinet was simply told what would happen, there was no Cabinet debate whatsoever, that is our understanding, on Australia going to war in Iraq. In fact I will go further and say that it may be that Australia had troops at war, carrying out hostile operations in Iraq before war was formally declared by anybody. SAS troops were alleged to be in the western desert and operating.

We see there are two options to take this forward. One is a decision by the parliament through new legislation. It's too important to be left for a political debate, this is a statesman issues, we want parliamentarians to act as statesmen. The idea of Brigadier D'Hage of a joint sitting, would cut across party lines, would at least be different enough to be taken seriously. There is another way of taking this forward in another way and there are some people who argue that the constitution is crystal clear on it. Mr. James for one dismissed those who believe the constitution is crystal clear on the fact that Australians cannot go to war except in the defence of Australia. I have a legal opinion from an eminent legal person that the former Prime Minister John Howard could in fact be charged with having a case to answer in a trial before a criminal court on an allegation in respect to the invasion of Iraq he was guilty of subversion of the Commonwealth of Australia Act 1900, and no fresh act passed after this time can avoid the existing constitutional provision that limits war making by the Clth, s.51.6. That provision did not and does not legitimise our attack on Iraq in 2003. In lay terms that provision says the deployment of troops can only be deployed for the military defence of Australia. If you want to go into the historical argument there is a very good argument for that. At the time of the formation of the constitution, the defence of Australia was always going to be looked after by Britain, so there are all sorts of historical issues.

The real problem here is not so much the war powers, although that needs to be fixed, the real problem that we are trying to deal with is that Executive power has become too dominant in the Australian political system. We are finding, particularly the rise of centralised non accountable decision making, particularly things like COAG, the Council of Australian Governments, the Standing Committee of Attorneys General and there are 41 other Ministerial councils comprising federal and state ministers, sometimes including NZ, sitting together and making decisions that are then forced through parliaments without parliaments being able to review them. Backbenchers have been emasculated by this process. The war making powers being taken over by the Executive is only a recent thing. It dates from well after the WW2 I would suggest. It is habit. It is a centralisation power of habit that the parliament needs to address in whatever way. There is more than one way, one is a Bill, and the other is to abide by our existing constitution.

Senator Ludlam: Your point about the legal advice which obviously the rest of us have not seen, is that not consistent with Neil's point when he said that sixty percent of international lawyers question the legality of the invasion of Iraq.

Bill Rowlings: Here I'm talking about the Australian constitution, not the invasion of Iraq. The government is empowered to deploy troops for the military defence of Australia, not for adventures in Iraq. We cannot wage war; we are not permitted to wage aggressive wars by our own constitution. That is what is overlooked. It's never been tested in the court.

Nick Deane: In what way was the invasion of Iraq in defence of Australia?

Bill Rowlings: Exactly my point.

Neil James: The problem is that the defence power in s. 51.6 has to be interpreted in terms of how the Constitution is involved, not the least the High Court Dams case, which says that in effect when you are interpreting the Constitution in Australian legislation, you have to take into account the Commonwealth government powers to sign international treaties. Since we signed the United Nations Charter 45 years after the Constitution was effectively approved, this has had a major effect to how defence is defined. As I pointed out, there are only two grounds under international law to go to war, self defence and in a UN Security Council endorsed action under Chapter 7 of the Charter. I would be happy for this to be tested in a court, but I suspect a court is not going to change the majority legal opinion that a government of a country is entitled to use for defence of the country, or under the UN charter, which are in effect for the defence of the country because in effect the UN is a collective security organisation, where every member agrees to go to war in defence of any other member if they are attacked.

Bill Rowlings: Quite so. We agree with that. But Iraq was not Afghanistan; Iraq a different situation, there was no UN mandate to go there. It was an illegal war, it is was illegal as contended by serious constitutional scholars for our Prime Minister to take Aust into a war that was not for the military defence of Australia which is what the constitution calls for. This debate is to try to work out how to go forward, one way is a Bill, and the other is to challenge that through a court. It is highly unlikely that the case would very quickly get to the High Court and a decision would be made. And a decision on this is vital, because it basically scopes our constitution. There is a great deal of difference if we have the type of nation that goes off to war

at fairly quick pace, or a type nation that is bound by a constitution that says you can only deploy your troops for the defence of Australia.

The Bill we think is good in intention but needs a great deal of work to be practical and we agree with Mr. James on many of the things that are said about it. It's a very difficult thing going to war. If you go to a principle and then get people to work on refining the best bill, people from all ideologies, you're better to go with principles. It can't be just by the National Security Committee. Who is on that Committee?

Neil James: The Prime Minister, Deputy Prime Minister, the Attorney General, Foreign Minister, Minister of Defence, Minister for Finance, and other Ministers are called as they are invited, and the Treasurer. When the Cabinet Committee makes a decision advisers are not in the room.

Bill Rowlings: Practically that is the Committee. If you are going to send Australia's mothers sons to war in the nation's name, then at least you would expect there would be a number of females in that Committee. Until Julia Gillard became Deputy Prime Minister we have never had a woman in the National Security Committee. So you have taken out the female part of Australia, it's very heavily dominated by men. I would suggest that this puts a bias on the thing immediately. I would suggest there is a military or a uniform bias if you have the heads of the defence, police chiefs, ASIO type people, there are no civil libertarians sitting there.

Senator Ludlam: The rumour, in the lead up to the Iraq conflict, is that the intelligence and defence communities were strongly split if not strongly opposed to the deployment, and that in fact it was politics in the end that pushed it over the line. But you had organisations like the ONA and secretaries of various branches of the defence force, orange light, if not red.

Bill Rowlings: The point I was making is that the decision was not even taken by the Committee or the Cabinet. On that occasion that process broke down. We agree that a Cabinet decision is correct, but in Iraq we understand the Cabinet was told what would happen.

Neil James: In the British and the Australian cases, it was the service chiefs who requested a legal opinion from the Attorney General that war was legal before they would acquiesce to conducting it. I actually think that was admirable. They have a direct interest to making sure that the people they command don't end up in The Hague.

Bill Rowlings: The truth is we know far less about what our troops are doing about policy and strategy than the US and UK who have a much more open system. In our submission we said that the Australian parliament should call a referendum to ask the Australian people whether they want the ongoing power to conduct a binding referendum vote on the continuation of a war every three years. We are saying that after three years of a war, there would be a vote, a referendum. But before that system is in place, there would be a referendum to see if people want that system, if they want that right to decide after three years whether a war is justified. However, our first proposal is to go to the existing constitution and have that section tested because it's never been done.

Senator Ludlam: From the point of view of a civil liberties organisation, why is there only this many of us in the room? Where is the debate in Australia?

Bill Rowlings: There isn't any debate in Australia, but that's true on a lot of issues. The point is that Australians are not very active politically. It is only a few who will take an active position. They will eventually get active, you saw that over the Vietnam War, but it took a long while, you saw that it on Hicks, but with Hicks it took five years for people to come out and start to get active and speak out.

Kris Klugman: I think the point that Helen made is appropriate here. The people in the street are quite surprised when they realise that war is not decided by the parliament. I think people are really quite astonished when that becomes clear to them, they say why not?

Neil James: I think it is worth noting that the biggest single critic in Australia about the lack of information about how we are fighting the war in Afghanistan is us, the Defence Association. We are continually criticising this government and the previous government about this. We are arguable the single biggest critic of how we are prosecuting the Afghanistan war. As we have said in our publications many times, we should not be in any war that we intend to win. If we don't intend to win we should not be there in the first place. At the moment the government is vacillating, they are putting in just enough effort to keep the American alliance going, but not enough effort to win the war and bring the troops home. We have been very critical of them in that regard.

Dr. Sue Wareham: In response to your question Senator, I think people feel disenfranchised when they see things happening as they did in 2002/2003, where a Prime Minister can take the country to war. They think, 'what is the point of me being engaged in a debate when there is no debate, I might as well use my time going to the footy.' That is all the more reason for this Bill, because important debates are seen to happen in parliament, then people might feel more engaged.

Senator Ludlam: Thanks for that. What do you make of the reports that the current Defence Minister has been making to the Senate, where for 20 minute he does provide a pretty gruesome warts and all account of what is happening, to the parliament?

Bill Rowlings: It's a great step forward.

Andrew Bartlett: Picking up on what Neil was saying about the Australian Defence Association being among the most critical in how the Afghan war has been approached, which isn't necessarily saying that you are against the troops being there I realise. It raises for me again, would you think that parliament is not paying enough attention, or that parliament could pay more attention if they felt like it and it's really just up to them, or is there some mechanism beyond relying on the commitment of the minister of the time to get more debate and more examination of these issues?

Neil James: There is not enough information flowing for people to get interested. Secondly, lots of people just don't have an interest, their interests lie in other areas, and that includes our politicians. Third at least some of the debate that occurs in parliament isn't terribly well informed

anyway because people often don't have enough grasp of the issues to get on top of it. Now we have seen Senate Estimates improve dramatically in the last two years following the change in government and hopefully that trend will continue.

Senator Ludlam: Bill, in your submission you seek additional guidance on what constitutes an emergency. What should be the elements of that guidance? What does an emergency consist of?

Bill Rowlings: I think you have to leave that undefined. I don't think you could put a boundary around that because emergencies could be so variable. An emergency could be to rescue people from Fiji, I have no problems with that, and that would be vastly different than going to Afghanistan, so there is a fair spectrum there. I don't think you could define an emergency; that needs to be left to the good common sense of the Prime Minister and Cabinet.

Neil James: The situation in Fiji is an interesting one because some of the evacuations you are going to conduct, you are not actually going to be required shoot people, you are just providing an aircraft, going to be able to bluff people out interfering with the evacuation or they are not going to do so in the first place. So you are providing equipment and aircraft because insurance will not allow the use of civilian aircraft. The problem we had in Fiji, we didn't know if we would have to shoot to get the people out or not. It was a particularly difficult operation to plan. At one stage some bright spark in the Department of Defence said that we wouldn't be able to touch our machine guns because it would have been provocative. It is very difficult to write legislation because often you don't know what the situation will be until you are there on the ground and it happens, and that is the real difficulty in this area.

Senator Ludlam: Unless there are any other questions, I am going to close the meeting for a short lunch break.

Senator Ludlam closed the meeting at 12.30 pm and reopened at 1.15 pm.

Senator Ludlam: This is our last session before we wrap up. Welcome gentlemen, we have had a really interesting morning. I'll open by saying that this is not an official parliamentary meeting; you are therefore not protected by parliamentary privilege. I'm emphasising this point to you now that we are fully responsible for anything we say here, the normal rules of defamation apply. So this meeting has the status of being a gathering of interesting human beings.

Paul Barrett: I will make an opening statement and maybe Garry will follow. Myself, Garry Woodard and Andrew Farran put in a joint submission in relation to the Bill. Put very succinctly we applaud the purposes of the Bill. Our interest in it is that we have all had a defence or foreign policy background. We applaud the purpose of the bill. I think it's a practical bill in two respects. It make the sorts of exclusions you would hope to see, such as attaching military staff to diplomatic missions, training, procurement, the sorts of ordinary business for which Australian military personnel go overseas, they are excluded from the operation of the Bill. It's a practical measure. In the second sense we find it very hard to conceive of circumstances in which the requirement to consult the parliament would prevent timely military action. The time scales for organising and deploying troops will ordinarily outrun the timescale required for consulting the parliament. We further applaud the purpose of the Bill because we think the requirement to have a disciplined debate in parliament about why we are deploying, the purpose of the deployment,

the expected time scale over which the deployment would take place and what is the outcome we are seeking, would add greatly to the quality of the decisions in these matters. We think we would be in good company if we move in this direction. We think that it is an overdue measure.

Senator Ludlam: Thank you. Garry would you like to make some opening remarks?

Garry Woodard: Well, everything Paul said I thoroughly endorse. We have discussed this matter for a long time. In fact I put a paper up on the Melbourne University Press website in connection with my e-book there which is in relation to my book about how we got involved in the Vietnam War in 2007, and Paul has put it on his website Australian Observer as well. In that I make various recommendations, including on strengthening parliamentary oversight generally, and also specifically giving parliament the right to participate in any declarations involving troops into warlike situations. That's been on the record for three years and Paul and I have discussed it on many occasions. This is not a position we have come to recently, but we welcome the opportunity now to ask a wider public to consider it. Thank you.

Senator Ludlam: I might kick off with a question we have put to a few folks this morning who have experience of the institutions in which these decisions are made. You go into this in a bit of detail in your submission, about the speed with which these decisions are made, in modern military history anyway. What is involved, and at what speed are these decisions made, and is providing recourse to parliament, would it slow things down to a point where the situation was dangerous?

Paul Barrett: Could I address that through an example with which I have first hand knowledge, which is the decision to prepare troops for deployment to Timor. The timescale of that was around the National Security Committee of Cabinet, following the then Prime Minister, 19 December 1998 letter to President Habibbi of Indonesia and his response. Admiral Barry and I recommended to NSCC in February that before the year was out the government might find it desirable to have raised another brigade group to 28 days readiness. That means given 28 days notice to deploy they would be able to deploy. Now, it took us about 6 months, and between two and three hundred million dollars to achieve that effect of having another brigade group ready to deploy at 28 days notice. And when it was decided to deploy troops to East Timor there was another 28 days to get them on their way. So for most of 1999, between February and September 1999 there was an opportunity to debate the issue in parliament. There were sensitivities involved in that because the Department of Foreign Affairs was understandably concerned about what signal all of this training of military forces was sending to Indonesia when we were in a sensitive situation. So it's not necessarily a debate you would have wanted to have had had in March 1999, but as you can see when that was evolving, we were in discussions with the Indonesians and the UN about whether our troops could deploy. There was plenty of time to have a debate in parliament about what we were doing and why, but to actually get the approval of parliament not simply to inform the parliament.

Garry Woodard: I can't speak from the same operational experience as Paul, but my study of how we went to war in Vietnam showed that the decision was taken in principle in mid December of 1964, four and a half months before it was announced in parliament. Actual planning didn't commence until a few weeks before the announcement because we were waiting on military staff talks with the US. And then it took a couple of months before in real haste we

got the battalion off to Vietnam. There was plenty of time to consult parliament well before the announcement was made in April and if the government had been willing to acknowledge that they had taken the decision in principle, there were three or four months, although parliament was in recess a good deal of that time.

Senator Ludlam: If Neil James was sitting here, he might say that subjecting those build ups to parliamentary debates could tip off your enemy or tie your hands behind your back strategically.

Paul Barrett: I just don't agree. There comes a point at which in all of these occasions where there is an announcement made to parliament. What we are talking about is whether parliament has the authority and standing to make a decision. That's the change that we think is necessary. Our troops don't just disappear in the direction of a deployment in the dead of night and nobody knows they are gone. The deployment of troops to East Timor did not come as a surprise to anyone when it finally happened.

Senator Ludlam: Can we go back to 1991 and the parliamentary debate on the decision to go to the first Gulf War. How significant do you think it was for the government to do that at the time for the military and also for the public, that parliament was in the process?

Paul Barrett: I think it's important. I think it's important that people who are being put in harms way to know how the parliament stands, and I think it is important for the public to have it explained to them too, and to have explanations that hold water, in other words that are subject to parliamentary questioning and debate

Garry Woodard: My recollection of 1991 is that there was considerable disquiet in Australia until there was some sort of UN coverage and that took quite some time to obtain.

Dr. Sue Wareham: Could I ask how heavily influenced in this you have been by the Iraq invasion of 2003, has that been a big factor in your support for this Bill, or is it one of many instances?

Paul Barrett: It is a very important factor, but it's the principle that is important. As we noted in our submission, this prerogative of the executive government is a legacy of the power of the sovereign to declare war. It's a little quaint that people who profess themselves to be of a republican persuasion wish to cling to this particular attribute of sovereignty, of kingship, sovereignty in the sense of kingship. We think the power to declare war should flow from the people to the executive government through the parliament, rather than flowing the other way. I think there would be an important change in the dynamic of how this happens. When the Prime Minister in effect has presidential power to say we are on our way and to lead the National Security Committee in that direction and then you just inform the party room that is what we have decided, and then the parliament gets informed, just about everyone who is an elected representative of the people has a chance to hide and say it has already been decided. When it is to be put to a vote in the parliament on a matter as important as this every single member of every party room is going to say, "how do I want history to record where I stood on sending these people to war?" I reckon it's pretty important to flush that out, and you might be surprised at some of the results. So I think there is a substance to the parliamentary process. To go back to the question Sue asked me. I think each of the three legislatures was misled by its Executive

government on the nature of our knowledge, the purpose of our deployment and how much we knew. When a government or a government leader says we know that Iraq has weapons of mass destruction that is suggesting there is not a shadow of a doubt. The words 'we know' suggest a degree of certainty that clearly wasn't there. The Right Honourable Tony Blair was pushed pretty hard on this by Sir Lawrence Friedman in the Chilcott Inquiry and he retreated into saying well that is what I believed at the time because Friedman drew a gap between, he said well Prime Minister, earlier you've said the intelligence was patchy and inconclusive and vague and what have you, but you had come to this great certainty. He said that is what I believed at the time. Well, I think we have to do better than that.

Kris Klugman: There was one other point, the question about when a dispute becomes a major or a minor dispute. The point was made by Neil James earlier that often they morph into a conflict to peacekeeping and back again. How could we ensure that the Australian public and the parliament is engaged in the in the face of that sort of situation?

Paul Barrett: I don't think these things happen overnight, and I would say that the leaders of all political parties are very responsive to national security questions, and if you have a situation in parliament where the executive government can't take the parliament with it, they have a substantive problem. Its not just problem of parliamentary procedure, I think it's a real problem.

Bill Rowling: That is why we have a proposal that every 120 days there is a report back to parliament so it can be reviewed, so that as things change the parliament and the people are kept aware of changes.

Senator Ludlam: Mostly we have been discussing the role of parliament in getting us into conflicts. Do you have any strong views about the parliament's role in getting the country out of deployments?

Paul Barrett: I think it is more difficult. Because as a lot of people are finding out to their cost, it is a lot easier to get yourself into a war than it is to get yourself out of one. For parliament to say you must withdraw I think that can get problematic. I'm not saying it's beyond the wit of man to solve, but it's more tricky than having a say about whether or not to get into it in the first place.

Senator Ludlam: Someone was saying earlier that the parliament already has the possibility of blocking the budget and cutting off supply not to an individual deployment but to the military itself.

Paul Barrett: That comes to wielding a blunt instrument of not funding the people in the field. I don't think anyone would sign up for actually doing that.

Bill Rowling: That is why our proposal that the particular deployments be funded outside the budget and it is not a one line item, because that gives you that financial control, and if the parliament decides the war can be wound back, it can be wound back by that fiscal mechanism.

Paul Barrett: I think that is probably going to be a fact of life. Once you've decided that we can deploy, it's going to be difficult for the parliament to have much decision making power about the nature of the involvement, apart from deciding about major escalation, where you are going from

peace keeping to peace enforcement, or something like that. I think where I am coming is that we need a trigger mechanism so that the parliament is adequately consulted, and if the task is adequately defined and the reasons why we are doing this is adequately defined.

Bill Rowlings: Have there been any occasions when we have decided not to get into war in your experience?

Garry Woodard: Can I say something about that from an historical point of view? In the 1940s, Chifley refused a recommendation from his own Foreign Minister to send troops to Indonesia in 1946 in a peacekeeping type operation, in 1948 he refused a request from the British government to send forces to Hong Kong. In the early 1950s the Australian government was extremely reluctant to send a battalion to Malaysia as the British were pressing and it was only really when the insurgency was running down when we had an obligation to put forces in the area as part of a forward defence in support of SEATO. This was concluded in 1954, and we put a battalion into Malaysia, although it had a role in anti-terrorism operations its primary role was support of our regional security commitments. In 1963 we were asked by the British to put troops into Borneo in support of the British Malaysian opposition to Indonesian confrontation. We delayed doing that for two years while we went down the diplomatic track on behalf of the British and American governments with strong support from the US for that tactic. Those are a few occasions. I think the government on the whole, until Vietnam, shows a record of being extremely cautious about moving into war type situations in the post war era

Bill Rowlings: The point is made then by you that in all those occasions delay was to Australia's advantage. They didn't rush into it in other words.

Garry Woodard: I don't think they rushed into war until Vietnam.

Professor Helen Ware: From your practical experience, if you had to explain what we are doing in Afghanistan how difficult would you find that?

Paul Barratt: Extremely difficult. Again, Afghanistan is the classic case of mission creep which has partly been able to happen because the mission wasn't clearly defined, but the mission was said to be, the way it was presented, I'm talking about the American position, was, "hey hey Taliban government, hand over Osama Bin Laden or we are going to come in and get him." It has now been fairly widely commented that the Taliban government were furious with Osama Bin Laden for getting them into this and were happy to hand him over, but the Americans were not prepared to take yes for an answer. Now they invaded Afghanistan, we went along for the ride, and who can say what the mission is in Afghanistan now. It is said to be to build an Afghan national army and let them take over. The question in my mind how you build an Afghan National Army that doesn't look like a Pashtun army of occupation of half the country, and all of those kinds of complexities. It is hard to say what we are doing in Afghanistan or what victory would look like, what success would look like.

Senator Ludlam: In the institutions you have both worked in, what arguments carry clout and weight on these issues? What do people listen to in the political and intelligence communities?

Paul Barratt: The intelligence agencies would certainly like the intelligence assessment to be an important part of the decision-making process, and I think that in Australia, the US and UK there

has been evidence that it wasn't. Military people like a clearly defined objective, so what effect do we want to achieve. In the three jurisdictions, the military is under civilian control, they do what the elected government asks them to do but they want to know what is the end state that is to be achieved. I don't think the language of the Bill about defining where we are going and why and what resources to be used is alien language at all.

Garry Woodard: You may have seen a long letter from Robert Barton, he was a scientist on the Blix team, who is arguing at some length for a Chilcott type inquiry here about how we got into the war in Iraq. Certainly the study I made in 2006 and again in 2007 of what was available from open sources in the UK and the US still looks pretty accurate about the hypotheses of what Australian decisions were taken, or what Australia was doing and I think there is quite strong case for getting all the facts out into the public arena by some sort of inquiry. I know this is not an Iraq inquiry but perhaps it will lead to one.

Sue Wareham: My feeling is that there would be a lot of support for a Chilcott type inquiry in Australia. I suspect a lot of people here are thinking why is that not happening here? Can't believe it, they are doing it in the UK. Even though this Bill does not have the prominence of the Chilcott Inquiry, or if we had a similar one in Australia, would tie very neatly to the issues in this Bill because it raises the issues of accountability. I would have thought any pushing along of the idea of an inquiry into the decision to go to Iraq would be really helpful and would support this Bill.

Senator Ludlam: The more I learn about the debate in the UK, the sadder I become about the debate we are not having here in Australia. I suspect getting such an inquiry up and running would be just as difficult as passing this Bill. The question that is following me around as we have been thinking about this today is where we want this debate to be the next time its for real, when we are contemplating a deployment somewhere new, or an expansion of where we are. This is not on the front page of any of the dailies today but one day it will be. Where do we want this debate to be then? I hope we have planted some seeds today.

Senator Ludlam closed the meeting at 1.45.

Appendix 1

Public submissions

- 1 Professor George Williams, Gilbert + Tobin Centre of Public Law,
The University of NSW, Faculty of Law
- 2 Professor Geoffrey Lindell
- 3 Urban Seed
- 4 Mr James Staples
- 5 Mr Robert O'Neill
- 6 Submarine Institute of Australia Inc
- 7 Australians for Constitutional Monarchy
- 8 Australian Association for Maritime Affairs
- 9 Pax Christi Victoria
- 10 The Human Rights Council of Australia
- 11 Melissa Parke MP
- 12 Navy League of Australia
- 13 Women's International
- 14 Campaign for International Co-operation and Disarmament (CICD)
- 15 Ms Annette Brownlie
- 16 Shelley Booth
- 17 Australian Quaker Peace & Legislation Committee
- 18 Medical Association for Prevention of War
- 19 Marrickville Peace Group
- 20 Stop the War Coalition Sydney
- 21 Mr Paul Barratt AO et al
- 22 People for Nuclear Disarmament (Western Australia)
- 23 Civil Liberties Australia Inc
- 24 Professor Helen Ware
- 25 Mr Tim Wright
- 26 Australian Anti-Bases Campaign Coalition
- 27 Anti-Nuclear Alliance of W.A.
- 28 Australian Peacekeeper & Peacemaker Veterans' Association
- 29 Captain Wayne McInnes
- 30 Bill Fisher and Miriam Tonkin
- 31 Mr Ian Maguire