

## WAR POWERS REFORM:

### *why it's needed and why now*

Under present arrangements, committing the Australian Defence Force to international armed conflict is far too easy for such a grave and far-reaching matter.

The power to commit the ADF to international armed conflict is the prerogative of the Executive. This is usually taken to mean Cabinet in the Australian constitutional context, but Cabinet has neither constitutional status nor legal power. Cabinet is simply an informal grouping of senior Ministers convened and chaired by the Prime Minister, so a decision of "the Executive" can be a decision of Cabinet, or a smaller group of Ministers, or simply the Prime Minister him/herself.

As each member of Cabinet is nominated by the Prime Minister and serves at the Prime Minister's pleasure, history shows that a strong Prime Minister will always get his/her way on any matter of importance.

We don't declare war any more, and successive Prime Ministers have taken the view that formal authorisation by the Governor-General to deploy the ADF is no longer required. As matters now stand, for a Prime Minister prepared to ignore the traditional role of the Governor-General, the legal requirement for the ADF to be deployed into international armed conflict is no more than a written direction from the Minister for Defence to the Chief of the Defence Force (CDF). Such a direction would require no more behind it than a request from the Prime Minister to the Defence Minister. In effect the "War Powers" are in the hands of just two people, one of whom is beholden to the other for his or her position.

Unfortunately what can be decided so easily and informally can be decided without due care, and there is no evidence that our commitments to the conflicts in Vietnam or Afghanistan, or the multiple deployments to Iraq, were preceded by Cabinet deliberations of the care that might be expected by Australian voters in relation to such grave decisions, or indeed by any Cabinet deliberations at all.

Having the war powers effectively in the hands of the Prime Minister is also a licence to engage in "mission creep" at will. In August-September 2014, within a matter of weeks, a humanitarian mission to drop relief supplies to fleeing Yezidi civilians was transformed first into the deployment of RAAF transport aircraft, and then the deployment of six F/A-18 combat aircraft and a refueller, plus 200 SAS deployed as "military advisers".

An important part of the solution to this small group decision-making, with its attendant risks, and lack of accountability to parliament, press, or voters, is to enact legislation requiring that Parliament be involved in any future decision to deploy the ADF into international armed conflict. This would impose on Government the obligation of explaining to Parliament the purpose of the deployment, what it is intended to achieve, how long it is expected to last, what are the prospects of "success", and what success would look like; in short, the benefits, costs and risks as the Australian electorate believes it has the responsibility to decide.

It would impose on individual Parliamentarians the responsibility of deciding how they will vote on such an important matter in the light of the case and the evidence that is presented to them.

Prior to taking its decision, Parliament should receive authoritative advice as to the legality of the intended deployment, for example by having the Government table a written opinion from the Solicitor-General (an independent statutory officer).

The current power of the Executive to commit the ADF to international armed conflict without consulting Parliament is a legacy of the notion preceding the establishment of the Australian Constitution that the power to make war is an attribute of the sovereign rather than of the people. In any polity founded on the notion that power flows from the people to the state and not the other way around, it is both an anachronism and an anomaly.

This anomaly needs to be corrected as a matter of urgency. We are currently engaged in military conflict in Northern Iraq with no obvious strategy and for no clearly discernible purpose, and we cannot know what is around the corner in other potential conflict zones.

#### FOR FURTHER COMMENT:

AWPR President Paul Barratt: 0411 276 996

AWPR Secretary Sue Wareham: 02 6253 1117

E: [info@iraqwarinquiry.org.au](mailto:info@iraqwarinquiry.org.au)

WEB: [iraqwarinquiry.org.au](http://iraqwarinquiry.org.au)

TWITTER: [IraqWar\\_Inquiry](https://twitter.com/IraqWar_Inquiry)

FACEBOOK: [IraqWarInquiryGroup](https://www.facebook.com/IraqWarInquiryGroup)

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