



**AUSTRALIANS FOR
WAR POWERS REFORM**

Including the CAMPAIGN FOR AN IRAQ WAR INQUIRY

Public Seminar:

***Legislating Reform of the
War Powers***

**ANU Faculty of Law
Moot Court
23 October 2015**

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Executive Summary

Australians for War Powers Reform – a Public Seminar on ‘LEGISLATING REFORM OF THE WAR POWERS’, at ANU Faculty of Law, Moot Court, on 23 October 2015

Because final versions of the six submitted papers will be available on the AWPR website, this report does not try to summarise them in close detail, but rather seeks to draw out some key themes and points of linkage among them.

Readers of this Executive Summary and the papers which follow should bear in mind that the aim of the Seminar was to air the key issues involved in this most important of issues, not to try to resolve them or achieve a consensus on them in a single sitting. Some important issues emerged which will need to be borne in mind in framing a robust system of Parliamentary decision-making. One is the requirement for Parliament to have available to it definitive, independent advice about the legal basis for the proposed conflict. Another is the Constitutional role of the Governor-General in authorising the use of armed force and providing the legal basis for it – a matter that needs to be borne in mind under our current system. Some see problems of structure as well as process in our current system. These are not competing either/or positions, they are essential elements of the whole, and we suggest it is primarily a matter for the legislators to fit them into a robust legislative framework.

The program was as follows:

Chair: Paul Barratt AO

0930-1000 Opening statement: The Hon. Melissa Parke MP

1000-1030 ‘Is parliamentary approval sufficient? Legal, military and intelligence aspects’ :

Professor Charles Sampford

1100-1130 ‘Amending the Defence Act’: Andrew Farran

1130-1200 ‘Notes on the role of the Governor-General’: Dr Cameron Moore

Chair: Dr Sue Wareham

1300-1330 ‘Can parliamentary conventions limit executive privilege?’ Margaret Swieringa

1330-1400 ‘Readiness’: Lt. Gen John Sanderson AC (Retd.)

1400-1430 ‘Avoiding the first casualty: the media’s scrutiny of wars: Nic Stuart

Chair: Professor Ramesh Thakur

1500-1600 **Rapporteur’s report** : Tony Kevin

Final Reflections from the Chair

Background to this Seminar

Australians for War Powers Reform was initially established as the Campaign for an Iraq War Inquiry (CIWI), to campaign for an independent inquiry into the highly questionable decision-making processes involved in Australia’s biggest and worst war of choice, launched by a coalition of the willing, and unsanctioned by the necessary UN Security Council resolution authority: the 2003 US/UK/Australian invasion of Iraq. It also set itself the objectives of increasing public awareness of the issues involved in decisions to deploy the Australian Defence Force, and to campaign for the so-called “war powers” to be relocated from the Executive to the Parliament.

In 2014, as renewed war broke out in Iraq and Syria, the group decided to make war powers reform the primary objective, and changed its name to **Australians for War Powers Reform** (AWPR). Part of the rationale for this change was the extent to which the issues that were in view in the 2003 invasion of Iraq were actually part of a broader systemic pattern, both before and since 2003, of defects in process, transparency and accountability when Australia sends its military forces into action abroad. These defects were again sharply evident in 2014-15.

Pursuant to its public education and reform objectives, and because there has been no full and independent inquiry into how and why Australia invaded Iraq in 2003, in June 2015 AWPR published a book of collected essays by various writers, and edited by Alison Broinowski, under the title ‘**How does Australia go to war? A call for accountability and change**’.

The book consisted of 13 chapters plus an introduction by Paul Barratt, a conclusion by Alison Broinowski, and a preface by former Prime Minister the late **Malcolm Fraser**, who linked our group’s work to his important final book, published in 2014 – ‘**Dangerous Allies**’. It is worth recalling these inspirational words by Mr Fraser in his Preface. He emphasised that Australia now needs to do these things:

‘Our relationship with the US must be changed. We must recapture Australian sovereignty and sense of strategic independence. We must never again allow the circumstances to exist in which one man has the capacity to commit Australia to war. As this book shows, in many other democratic countries, including the US, the basic authority to declare war or stay at peace rests with the Parliament. It is essential and urgent in Australia that the power to declare war or to stay at peace be transferred from the Prime Minister to the Australian Parliament’.

The launch of ‘How does Australia go to war?’ in Parliament House in June 2015 was attended by several interested parliamentarians including Senators Scott Ludlam (Greens) and Lisa Singh (ALP), and MHRs Alannah MacTiernan (ALP), the Hon. Melissa Parke (ALP), and Andrew Wilkie (Ind). Senator Ludlam suggested that a useful next step would be a day-long seminar to chew the issues over in more depth and structure. Alison Broinowski, in consultation with Paul Barratt and Sue Wareham, designed a topic and speaker list. The Hon. Melissa Parke MP opened this Seminar and Professor Ramesh Thakur of the Australian National University closed it.

Over the past year, events in Iraq and Syria have emphasised the urgency of our work. In response to mounting global horror at ISIS atrocities in Syria and Iraq, Prime Minister Tony Abbott took Australia in 2014 into our third Iraq War, first in Iraq alone, then facilitating Allied bombing raids into Syria, and subsequently in 2015 authorising direct RAAF bombing missions in Syria.

In a now familiar sequence of mission creep under confused and unclear objectives, Mr Abbott first in September 2014 announced the deployment of 600 aircrew personnel and Special Forces military advisers to Iraq to join the coalition fight against ISIS in that country
<http://www.businessinsider.com.au/australia-will-prepare-and-deploy-military-to-iraq-2014-9> .

In October 2014 the first RAAF bombing missions began in Iraq. In April 2015, Australia sent an extra 330 ADF ground troops into Iraq for support and training missions there.

<http://www.smh.com.au/federal-politics/political-news/australia-sends-330-extra-troops-to-iraq-but-tony-abbott-wont-rule-out-future-syria-attacks-20150414-1mkoyo.html>

The RAAF conducted its first bombing missions in Syria in September 2015

<http://www.smh.com.au/federal-politics/political-news/australian-raaf-hornet-jets-conduct-first-bombing-operations-against-islamic-state-in-syria-20150915-gjnk2a.html>.

So far, there have been no ADF casualties or captures by the enemy. Over the course of this year of gradual Australian military escalation, there were no declarations of war; no parliamentary debates on goals, or limits, or rules of engagement; an increasingly unclear picture of what our war aims are, who our allies are, who our enemies are or what level and kind of threat to Australian security they represent.

Yet again our response to a request by our major ally to deploy elements of the Australian Defence into international armed conflict seemed to be an unseemly haste to comply, without asking any of the requisite questions about war aims and means. But were we asked during 2014-15, or did we press our way in again as volunteers, as we did in the Iraq War of 2003? And who made such decisions to volunteer Australian forces? And on what reasoning?

The present Australian war rationale in Iraq and Syria, such as it may be gleaned from government public statements, is even murkier than in 2003. At least then, it was about confronting a defined threat from Saddam. Now, which do we regard as worse, ISIS or the Assad regime? Is the current apparently efficient Russian military intervention in Syria in support of Assad's government, and consistent with the UN Charter right of sovereign states to seek allies in self-defence, helpful or harmful to our war aims in Syria and Iraq? Are the Russians our 'allies' in Syria, or just at the moment 'not our enemies'? Do we want the Russians to succeed or to fail in their stated war aims to strengthen the security of the Assad Government against its military enemies? Is there a democratic opposition that we are supporting in Syria? If so, where is it and what military strength does it have? What impact is further bombing likely to have on the

civilian population, on whose behalf we are claimed to be intervening? And so on ... the questions multiply.

At the AIIA National Conference on Monday 19 October, both the Foreign Minister Julie Bishop and the Shadow Foreign Minister Tanya Plibersek seemed quite conflicted and less than well informed on these matters. It might be questioned whether if there were to be a parliamentary debate, the major parties would be able to throw much more light on them, given the general current lack of knowledge of and expertise on Middle Eastern affairs in Australia. Our view, however, is that a decision-making debate in Parliament would concentrate the minds of all participants and require all Parties to present cogent arguments to the Australian people on whose behalf they would be deciding this most important of matters. Debate in Parliament would permit independent and minor party representatives like Andrew Wilkie and Senator Scott Ludlam scope to probe the case that was being put and perhaps express dissenting views, and there is always the possibility that the quality of the decisions made would be enhanced by the debate. Importantly, a Parliamentary Resolution in favour of any proposed deployment, would put beyond doubt that the deployment had the backing of Parliament.

This AWPR Seminar is also timely given the new Canadian Prime Minister Justin Trudeau's recent decision to withdraw the Canadian air force from coalition bombing operations in Iraq and Syria. This surely must increase pressure on Australia's new Prime Minister Malcolm Turnbull to come up with a more transparent public account, preferably in Parliament, of what the Australian Government is hoping to achieve by our current military action in Iraq and Syria? No such account was forthcoming under Prime Minister Abbott.

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Melissa Parke in her opening address commented that Australia is now again enmeshed in the Middle East military disaster we helped to create in 2003. She sees no clear international legal basis for Australia to be conducting military operations again in Iraq or Syria. We failed to do anything useful to bring about peace in the Middle East while we were on the UN Security Council. Are we now happy to be apparently giving military support to the Assad regime, responsible for creating so many refugees fleeing Syria? The UK Parliament has at least debated its level of involvement in

Syria. Australia continues to ‘muddle along with a low-quality, low-integrity approach’. There have been no serious debates in the Labor Caucus, nor in the Government party room. Labor is so afraid of being wedged on Iraq and Syria that it has gone along with every government military escalation. But we could do better, as the Canadians under Trudeau have now shown.

The need for inter-operability with US forces is locking Australia into bad military practice, e.g. on the US military use of cluster bombs in combat in Afghanistan, weapons which Australia does not itself use for Geneva Protocol reasons.

Professor Charles Sampford asked the question – **would Parliamentary debate and approval of decisions to go to war of themselves be sufficient for accountability?**

He said if we are serious about reform in this area, (and see his earlier paper in ‘How does Australia go to war?’), we will need to aim for more than just a parliamentary debate and approval. There is a deep irony for those who are concerned about Australia’s participation in ill-judged American wars of choice to champion parliamentary approval as the solution to this mischief. Such wars can only start with the approval of the US Congress, a power that is constitutionally entrenched in a legislature that is much more independent of the executive. This is not to say that Australia should not have explicit parliamentary approval for military action but that other mechanisms are needed to improve accountability (and, very importantly, to increase the legitimacy of those times when Australia does use force). Australia needs a number of mutually reinforcing mechanisms, a multi-faceted approach to safeguard against bad decisions on peace and war. This is even more important than parliamentary approval in itself. Parliamentary approval would be the culmination of the following additional integrity elements:

As central policy driver, **advice from bipartisan expert parliamentary committees**, which would aim for consensus advice and could hear evidence from public service and military experts, academics, or any other expert witnesses they may call). Such evidence could if necessary be heard in camera by a committee or even, by the full Parliament in camera (as the UK did during World War Two when much more was hanging on the issues and the information received). If it is a parliamentary committee (which is sufficient and more practical), the members of this committee

could be the members of the Cabinet security sub-committee and their shadow ministers (there can be no objection to the shadow ministers hearing what they would hear if there were a change of government). Alternatively, half could be nominated by the government and half by the opposition (who would be required to check with the cross benchers on nominees) with security clearances for those who were not the above shadows.

Independent legal professional advice on the legality of the proposed military action, should be provided to the Committee and, in most cases, released. If the Attorney-General does not feel he is in a position to provide completely independent advice (the duty of all lawyers), this would be from an independent statutory officer such as the Solicitor-General, or from a panel of independent legal experts. The opposition member of the Committee could, in any case, call for other advice which would be presented to the Committee. In all cases, Australia should accept the compulsory jurisdiction on the ICJ on the legality of the war or publicly acknowledge that it is not certain of its case and give reasons for its willingness to flout international law.

Lawyers giving advice should, wherever practicable, have practising certificates so that their work can be scrutinized if necessary by the professional associations of which they are a part.

It is noted that the view of the British and Australian governments the ‘client’ of the law officers is the government. Lord Bingham does not agree. Blair’s withholding of the longer (and highly professional) advice of Lord Goldsmith from the rest of cabinet seems hard to justify.

Independent military and intelligence agency advice including likely casualties, risks and exit strategies, under rules making their duties to inform the Parliament paramount (this would, again, be secret).

While the above reforms address the main concerns of accountability, legality and legitimacy, I would suggest that there be an immediate return to the previous practice of acting through the prerogative and Governor General rather than through

the Defence Act and the Minister for Defence. Until the Statute of Westminster was ratified in 1942 (retrospectively backdated to September 3 1939 (just in case?)) declarations of war and peace treaties were approved by the British Crown. This was transferred to the Governor-General and constitutional texts saw the power to make as quintessential. To the surprise of some Governors-General, they were not involved in decisions to go to war and it appears that Australia has gone to war in two major wars (1991 and 2003) through the use of section 8 of the Defence Act, which deals with general control and administration of the armed forces and that does not appear to have been drafted with that intention. While I disagree with a co-author that this invalidates the decision under Australian law, there is no doubt which means is constitutionally bullet-proof. Going through Federal Executive Council would also have some safeguards in that the Cabinet handbook requires the Attorney General to certify the legality of any proposed actions taken – and the Governor-General can ask questions of the ministers present.

Because Australia is bound increasingly by ICC and ICJ rules now coming into force, our politicians need to know that taking Australia into an illegal war could actually be in breach of our own criminal law after ICC statutes enter fully into force by 2017. In any case, the suggestion by Lord Goldsmith in his long March 7 2003 advice that the British cabinet could be guilty of murder under English law should be explored and clarified in Australia.

We need clarification of legal ethics for lawyers giving advice to the Crown in matters of peace and war. There is a temptation to seek, and a temptation to give, advice that the client would like to hear. Domestically, this is in breach of the requirements for independence of lawyers in giving advice – backed by the realisation that bad advice will be exposed by judicial decisions about the substantive matters and the ethics of the judges advising. Where the client is capable of preventing the matter coming to court, the temptation for each is greater. I suggest that these are matters for the local bar and international bars to consider and develop codes that cover these issues.

There is much talk about an international ‘rules-based order.’ In the 2005 ‘UN Summit’ the UN General Assembly unanimously adopted a declaration which committed the signatories to develop the rule of law in both national and international

affairs. This is entirely consistent with the views of influential Americans from the generation who forged the ANZUS alliance.

The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone. The cost will be a great deal of hard work, both in and out of government particularly in the universities of the world. Plainly one foundation stone of this structure is the International Court of Justice ... [and] the obligatory jurisdiction of that Court. ... One final thought on rule of law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But ... if an international controversy leads to armed conflict, everyone loses.
President Dwight D. Eisenhower¹

“Let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.”
Robert Jackson, Chief US Prosecutor, Opening Address at Nuremberg.²

These are the principles underlying that alliance and are the reasons why I remain a supporter of that alliance – not least Article 1.

If we are serious about an international rules-based order, we should look at what we might do to enhance that rules based order – with certain benefits and international forms of legal redress only being accorded to those who sign up to the Rome Statute and the compulsory jurisdiction of the ICJ.

For example, I would be in favour of restricting ISDS rights to countries with these dual ICC/ICJ commitments (as well as making ISDS determinations subject to appeal to the ICJ).

¹ Dwight D. Eisenhower, "Remarks Upon Receiving an Honorary Degree of Doctor of Laws at Delhi University," (11 December 1959), <http://www.presidency.ucsb.edu/ws/?pid=11617>. Those who are surprised by the source of the quote should recall that this soldier turned politician used federal troops to protect a black student in Little Rock and warned of the military industrial complex. In Delhi, the old warrior who had masterminded the 6 June Normandy landings of the ‘United Nations’ (a phrase used in newspapers on that day) made his plea for law not war.

² The International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal (Blue Series) 14 November 1945-1 October 1946*, vol. 2 (Nuremberg: Hein, 1947; repr., 1995), 154.

Andrew Farran then addressed the question – **is there any point in amending the Defence Act?** He suggested that in discussions concerning War Powers, the Defence Act should not be a central issue. It becomes so only because the Howard Government in 2003, and governments since, have relied on this Act entirely as their legal authority for committing Australian forces into armed conflict abroad. But the Defence Act is derivative of powers conferred on the Parliament with respect to ‘defence’, including the administration and management of the armed forces. But to commit our forces into warlike operations abroad is something else.

There is a prior problem of definition: what is ‘war’ in its contemporary sense? It is rare for countries to declare war these days. We have not done so since 1942. Since then none of our combat missions abroad have been declared as wars. We joined these conflicts at the request of the directly affected governments, or the United States, or pursuant to perceived UNSC obligations. These engagements all had attributes and features of warfare, and our forces were expected to observe the various Geneva Conventions and Protocols.

What we are discussing really is the deployment of Australian forces in overseas combat missions in the absence of an armed attack on Australia and without United Nations Security Council mandates for the use of force. For the purposes of this discussion, therefore, the deployment of Australian forces in UN or other peacekeeping, humanitarian and disaster relief, and advisory missions where combat operations are not anticipated, is not an issue.

Historically and conventionally the power to declare and authorise war, and the power to engage in hostile warlike operations abroad, was vested in the Crown Prerogative, derived from British constitutional practice. In 1942 that power was vested for Australia in the Governor-General in Council. It still lies there.

So, can this power be delegated by Parliament to a single Minister, the Minister for Defence, and exercised thereby without reference to the Governor-General in Council? This is seriously doubtful, and no amendment of the Defence Act would achieve that result in law.

This appears to be acknowledged by Parliament. The section of the Defence Act cited by current governments as providing this authorisation is Section 8. This section of the Act (Part II) is headed 'Administration'. That word hardly implies the Prerogative Power and is not sufficient in itself to do so. The section refers to 'general control and administration' of the forces. The intent was to ensure more clarity, order and efficiency in defence administration; not to authorise war-making.

The position and authority of the Governor-General in Council is the pinnacle of Executive Power in Australia and should be respected until there is a change of the Constitution in this respect. It affords protection to the Minister for Defence in the event that he may appear to have committed Australian forces to an illegal war or illegal armed conflict abroad, when he could be subject to the jurisdiction of the International Criminal Court, rather than sharing that liability with the government as a whole.

Parliament indirectly is involved, in providing the money for combat. Under a system of 'Responsible Government', governments would wish to share with the Parliament the responsibility for their actions, in peace and war. But what we have seen lately is as far from that as one might get. The commitment of our forces in the cases of Afghanistan, Iraq and now Syria, bypassed all formal processes including the Governor-General in Council. Instead authorisation was given by administrative act of the Minister for Defence, pursuant to Section 8 of the Defence Act. As far as we know, no formal Opinions as to the legality (domestic and /or international) of these commitments were sought from the Solicitor-General (or from a possibly conflicted Attorney-General). Nor have Parliamentary debates on the policy aspects and justifications of these actions been allowed, pre- or post-commitment. Collectively, this amounts to serious neglect amounting to contempt of the institutions and proprieties of the Commonwealth. The weakening of these formal structures allows for short-cuts in the use and deployments of the armed forces and the exposure of those forces to unaccountable risks (legal and physical) which no government should contemplate or allow.

In sum, the Farran and Sampford papers agreed that the traditional War Powers authority of the Governor-General in Council should be restored as formally central to

the process. As long as Australian Prime Ministers can go on ‘creeping into wars’ under Section 8 of the Defence Act dealing with the Defence Minister’s general control and administration of the armed forces, there will remain serious contempt of our institutions and unaccountable risks to our armed forces.

Dr Cameron Moore’s paper, ‘**Notes on the Role of the Governor-General**’, written from the perspective of a military law academic with ADF service experience, finished in a similar place. He critiqued the present system of a Prime Minister taking unaccountable opaque war decisions, sometimes alone, or sometimes in secret session of the National Security Committee of Cabinet, later formally endorsed in Defence Minister’s orders under the Defence Act:

‘The current approach of decision making via the National Security Committee of Cabinet alone is also undesirable for the following reasons: the NSC process does not necessarily provide a clear statement of the legal basis for, and strategic intent of, the use of military force, and it also does not provide a clear constitutional source of authority for the ADF to act. As a result, Parliamentary and public debate is less informed and effective in holding the government to account; it is less clear which actions of the ADF are within the scope of lawful authority and which are not; and members of the ADF are potentially exposed to personal legal liability, for following orders for which the source and legal basis are unclear’.

Moore notes that although large groups of politicians can make wrong war decisions as easily as small groups can, there is much to be said for increasing the clarity, scrutiny and constitutional authority of the process. His paper lists many problems with the current NSC-based approach. There is no legal basis for recent NSC executive practice, which the Prime Minister can readily dispense with. The NSC has no authority to issue a public authoritative legal document of its decisions. There is no positive authority in Australian case law or statute to kill, capture or destroy in war. Because of international law prohibition on Australia declaring war, following the United Nations Charter prohibitions on countries declaring war except in self-defence or pursuant to UNSC resolution, some important domestic law advantages in declarations of war were lost. Section 68 of the Constitution grants command-in-chief of the ADF to the Governor-General. The Royal war prerogative – the power to declare war and make peace – passed from the King in 1941 and 1942 to the Governor-General, with whom it has since remained. To have such powers slip

imperceptibly from being the subject of solemn declaration by the Governor-General, to being only a secret Cabinet decision implemented by the Minister for Defence under his Defence Act administrative powers, defies the principle of legality. It also raises serious questions about the military duty of obedience in war under the war prerogative. This is not a hypothetical issue. The court martial of two commandos in 2011 raised the important question of what was the authority for them to be using lethal force in combat in Afghanistan. In Australian law, only the war prerogative could possibly authorise the deliberate offensive causing of death, destruction or capture against the enemy. The Governor-General is the only official to whom the power to exercise the war prerogative has been given and, having command-in-chief, is the only one who can issue orders to the ADF to exercise powers under that prerogative.

Dr Moore's proposed solution to these issues is to have an order from the Governor-General to the Chief of the Defence Force (CDF) to deploy the ADF for a particular purpose. The order would briefly state the international and domestic law basis and the strategic intent. Such an order could provide the basis for informed parliamentary and wider public scrutiny and debate. It could be particularly helpful in considering the initial decision to use force and in later scrutiny of mission creep beyond the scope of the order. It could be pleaded in court as a defence of lawful authority or lawful superior orders.

These changes could be made as changes to current executive practice – because what was done administratively in and since 2003 can be similarly undone – or by legislation, enacted to require this to occur. Parliament could take the further step of requiring a parliamentary authorisation before the use of military force. Moore concludes that orders from the Governor-General to give effect to such authorisations may still be useful and necessary.

Dr Moore's paper ends with case study examples based on recent actual events e.g. the East Timor intervention. He proposes texts of draft orders by the Governor-General to the ADF to exercise military force under the War and other Prerogatives: a look at what might have been, and might be in the future if this proposal were accepted.

The three afternoon papers were less about workshopping the central issues of legal options re war powers legislation; and more about amplifying the present and potential roles of surrounding policy-influencing factors; Parliament, ADF force readiness, and media scrutiny.

Margaret Swieringa's paper, '**Can parliamentary conventions limit executive privilege?**', looked closely at the operation of the various kinds of parliamentary committees and their potential role in reviewing and scrutinising Executive Government decision-making under War Powers. Reference by Parliament to such committees – a matter of course under various domestic decision-making Parliamentary conventions, and exercised both in public and secret hearing formats, would improve the quality of subsequent full-chamber parliamentary debate and decision-making on going to war. Her paper usefully amplified Charles Sampford's advocacy of greater use of such expert parliamentary committees. Her paper offered a hypothetical case study of how such committees might have played useful roles in better informing the Australian Parliament, both prior to and subsequently in review of, John Howard's decision as Prime Minister to commit Australia to war in Iraq in 2003. She notes that there was usually plenty of time – around a year from when the operation was first publicly floated – for such committee references.

Lt General (ret.) John Sanderson AC, in his paper, '**Readiness**', discussed practical issues of Australian Defence Force readiness to go to war and constraints on this. Australia's present defence doctrine is conflicted, neither forward defence nor continental defence. 'Australia's posture for the long-term defence of the Continent and the interests of its neighbours is weak and insipid, while its capacity to contribute substantially to the adventures of its major allies is minimal'. Casualty minimisation plays a major role in maintaining public support for our strategy of support of American interests. Our military stands ready 'as part of our imperial tradition' to take part in UN- or US-managed military coalitions or peacekeeping operations abroad: our military systems are designed for inter-operability with allies and are trained and exercised for battle-readiness under many contingencies and short warning times. The East Timor intervention was exceptional, because we did that pretty much alone and without much logistical enmeshment with our major ally. There are perils in not having a proper public debate on issues of military readiness in the new geostrategic

reality. It seems that for all Australian governments today, ‘the US comes before the UN’. The highly contentious invasion of Iraq in 2003, by a US-led coalition without UNSC authority, confirmed this reality.

Nic Stuart’s paper ‘**Avoiding the first casualty: the media’s scrutiny of wars**’ argued that it is no longer true (if ever it was) that the media provides a sturdy break preventing the executive from exercising untrammelled power in matters of war and peace. Democracies can and do go to war. Even under the old mainstream media dominance in 2003, the coalition governments succeeded in whipping up the media hysteria that made it possible to invade Iraq. Since 2003, the onset of the internet age has reshaped the balance of power between the media and the Executive. Serious journalism is fragmenting and, now more than ever, the demand for a ‘story’ is increasing. Journalists are increasingly shaping reports to pander to their audiences, organisational pressures, and even their own sources. Their work can now increase pressures to go to war. That is why it is vital that the power to declare war or go to war is entrusted to Parliament.

There was discussion of this thesis. Perhaps the Internet age, with diverse new start-ups, independent websites and blogs developing around communities of interest and information, caters better to individual interests than the old system and can create a more informed audience than in 2003, if there is cross-fertilisation of ideas? Multiple sources of news and comment in the Internet today, both domestically and internationally, may make war news manipulation harder for governments. There seems to be more scepticism now of the standard mainstream news scripts, e.g., currently out of Iraq, Syria or Ukraine. The role of truly independent, objective journalism is more important than ever in such contested propaganda theatres.

In discussion, **Allan Behm** drew attention to an important paper by Sir Ninian Stephen in 1986-87 on how the War Prerogative is actually exercised: namely, only on the advice of Ministers. Obviously, a Governor-General could not take Australia to war on his own decision. The challenge might be to demonstrate the accountability of our present system rather than to change it?

Tony Kevin drew attention to how inadequately major great-power tensions and rivalries, that increase the risk of war through accident or folly, are being reported and analysed in current mainstream media narratives. These narratives heavily influence the views of our parliamentarians on both sides of politics. He gave as current examples the issue of the South China Sea islets being fortified by China and the American determination to contest those claims with military convoys: and the prevailing narrative that contentiously demonises Russia as the main aggressor in Ukraine, and as now acting improperly in supporting Assad in Syria. These are follies of perception, he suggested.

He also noted a War Powers case study not discussed today, but highly relevant: that Prime Minister Abbott came close in July 2014 to sending a large armed SAS contingent into the middle of East Ukraine's violently contested civil war battlefield, 'to protect the security of the MH17 crash site'. We seem to have narrowly averted such a dangerous warlike move, which could have caused major fighting and serious Australian and Ukrainian casualties.

General (rtd.) Peter Gration AC commented that as CDF he would be pleased to receive a War Directive from the Governor-General on the lines of the examples Dr Cameron Moore had today proposed.

Professor Ramesh Thakur offered some concluding reflections on the Seminar. The day had really been about two things: improving transparency and improving accountability of war decision-making. Everyone agreed today there needed to be more public and parliamentary debate on war-making. It could no longer be left to Prime Ministers. The intention is not to have Parliament micromanage a war but to engage in a sober and informed debate on the strategic rationale and justification for deploying Australian soldiers into armed conflict theatres of operations. A debate in Parliament could be initiated by a Government statement that provides a clear basis of the legal authority; the strategic justification for the overseas deployment, indicating the level of commitment, the goals and objectives of the mission and safeguards against mission creep, and the relationship of the size and means of Australian contribution to the overall mission goals; an indication of the likely timeframe of deployment and what would constitute success (or failure) in the event of which

Australian soldiers could be drawn down and withdrawn as a hedge against open-ended deployments.

The media still play a very important role in providing external scrutiny.

Does the US still matter a lot more than the UN (Sanderson)? It has done so in recent years, since Kosovo really, but it would be dangerous for Australia to rely on this continuing to be so in future. Despite the US pivot to Asia, Chinese power continues to grow. In our increasingly multipolar world, for our own national security as well as international peace, we need a rules-based international order – which leads us back to the UN Security Council.

Canada's election outcome is important to Australia because our two countries are so similar. We see in Justin Trudeau's victory over Stephen Harper a reaffirmation of democratic traditions, civility, respect for public etiquette, rejection of discrimination against dual citizens, and a new realism on climate change. To many Canadians, the former Canadian PM had diminished national attributes that Canadians cherish, and the rest of the world admires. Canadians had taken foreign policy seriously in this election. Trudeau had refused to be wedged, arguing his case with conviction, and jumped from third place at the start of the campaign to first on election day. The third candidate had let himself be wedged and, having started the campaign in first place, was sidelined.

The question asked during this Seminar 'should a Prime Minister have sole discretion to send my children to war?', has now been answered No in the US, UK and France; but Yes in Australia. We are the outlier democracy.

Some suggested bumper stickers:

Support the troops = Debate in Parliament.

No Debate ... No War

War Without Debate = Contempt for the People

In conclusion: We should ask for a public statement by the government in Parliament as a necessary but not sufficient condition for any decision by Australia go to war.

Debate in Parliament and its committees then would become the focus of better decision-making.

Tony Kevin, Rapporteur, 26 October 2016

**Charles Sampford – synopsis of paper presented at AWPR
Seminar 23 Oct 2015**
(full paper to follow)

Prof Sampford’s presentation was based on published work and a major chapter in a forthcoming book including:

- (1) ”Sovereignty and Intervention” Closing Keynote, World Congress on Legal and Social Philosophy, New York June 1999 in Campbell and Leiser (eds) Human Rights in Theory and Practice Ashgate, London, 2001
- (2) ‘Reconceiving the Rule of Law for a Globalizing World’ in Zifcak (ed) Reconceiving the Rule of Law, Routledge, London, 2005
- (3) ‘The Rule of Law’ *Oxford Companion to Australian Politics*, Oxford University Press, 2007 (with the assistance of Dr Tom Round)
- (4) ‘The Potential for a Post-Westphalian Convergence of “Public Law” and “Public International Law”’ in Jeremy Farrall and Kim Rubenstein (eds) *Sanctions Accountability and Governance in a Globalised World* (CUP, Cambridge, 2009)
- (5) A better Westminster way to war? In Bronowski, A. (ed) *Why did we go to war in Iraq? A call for an Australian Enquiry* Committee for an Iraq War Inquiry, Sydney, 2012 pp 54-65
- (6) “Thin Theories” of the Domestic and International Rule of Law” in Popovski (ed) *International Rule of law and professional Ethics*, in press Ashgate, Aldershot, 2014
- (7) ‘Dreams and Nightmares of Alternative Power Futures’ in Sampford, Lewis and McGuire (eds) *Shifting Global Values* Routledge, London, 2013
- (8) ‘Aggression and Monetary Gold: Quo Vadis?’ in Sampford, Keyzer and Popovski (eds) *Access to International Justice*, Routledge, London, 2014 (with M. O’Gorman)
- (9) ‘From the Right to Persecute to the Responsibility to Protect: Feuerbachian Inversions of Rights and Responsibilities in State–Citizen Relations’ Thakur and Maley (eds) *Theorising the Responsibility to Protect*, Cambridge University Press, Cambridge, 2015 (with R Thakur)
- (10) “Get New Lawyers”, 6 Legal Ethics 2003, 185-205
- (11) “More and More Lawyers But Still No Judges” 8 Legal Ethics 16-22, 2005
- (12) “The constitutional power to make war: domestic legal issues raised by Australia’s action in Iraq” 18 (2) Griffith Law Review (2009) with Margaret Palmer.
- (13) Chapter 16 in Sampford and Breakey, Law, Lawyering and Legal Education, Routledge, London forthcoming 2016

Andrew Farran: Amending the Defence Act Paper Presented at AWPR Seminar October 23rd, 2015

Synopsis: The Defence Act is a derivative product of the Parliament, derived from a legislative power in the Constitution. It is concerned with the administration and management of the armed forces. It does not, contrary to current practice, authorise the commitment of military forces to armed conflict abroad. The power to do so is embodied in the Prerogative Power vested in the Governor-General in Council. No amendment of the Defence Act can alter that fact. The question here is what constraints, safeguards and processes should be observed before a decision to commit our forces to armed conflict abroad is put before the Governor-General in Council for authorisation, and as a matter of 'responsible government' how should the Parliament be engaged in such processes.

My topic is titled "Amending the Defence Act – What's the point?"

In the broad sweep of these discussions - which concern the so-called War Powers and how we go to war - the Defence Act should not be a central issue. It becomes so only because the Howard Government, and governments since, have relied on this Act entirely as their legal authority for committing Australian forces into armed conflict abroad.

The Defence Act is derivative of the powers conferred on the Parliament with respect to 'defence', including the administration and management of the armed forces. No problem with the management of the armed forces at home. But committing the forces into war like operations abroad is something else.

Before pursuing that aspect, a word or two about 'War Powers' per se. Powers (plural) is the operative word here as the powers are an amalgam, derived from various sources. If the word "War" is specific and operative, there is a problem of definition; i.e. what is 'war' in its contemporary sense? Does it have any clear meaning since it is rare for countries to declare war these days. We haven't done so since 1942 when it was declared on Japanese occupied Thailand. Since then there has been inter alia the Korean War, the Malayan Emergency (not a war), the Vietnam War and - more problematically - the Afghan, Iraq and now Syrian wars. The Korean and Vietnam wars were not declared, nor any since. Notwithstanding any relevant international legal implications in some instances, we joined these conflicts at the request of the directly affected governments or the United States or pursuant to perceived UNSC obligations. These engagements all had the attributes and features of war or warfare, and our forces were expected to observe the various Geneva Conventions and Protocols, even if in some case their oppositions did not.

Historically and conventionally the power to declare and authorise war, and we can assume the power to engage in hostile warlike operations abroad, was vested in the Crown Prerogative, derived from British constitutional practice. In 1942 that power was in turn vested for Australia in the Governor-General in Council to remove any doubt about its exercise in the Pacific War. It still lies with the Governor-General in Council.

That being the case the question arises whether it can be delegated by Parliament to a single Minister, the Minister for Defence, and exercised thereby without reference to the Governor-General in Council. That I seriously doubt, and in my view no amendment of the Defence Act would achieve that result in law.

This appears to be acknowledged by the Parliament itself. The section of the Defence Act cited by current governments as providing this authorisation is Section 8. This section of the Act (Part II) is headed "Administration". That word hardly implies the Prerogative Power and is not sufficient in itself to do so. The section refers to "general control and administration" of the forces, along with the respective Chiefs. It will be recalled that what prompted this version of the Defence Act was the intent to implement what were known as the Tange Report reforms, to ensure more clarity, order and efficiency in defence administration.

The position and authority of the Governor-General in Council is the pinnacle of Executive Power in Australia and should be respected until there is a change of the Constitution in this respect. It affords protection to the Minister for Defence in the event that he may appear to have committed Australian forces to an illegal war or illegal armed conflict abroad, when he could be subject to the jurisdiction of the International Criminal Court, rather than sharing that liability with the government as a whole.*

Turning to the role and position of the Parliament, its role is less than direct apart from providing the money for combat. In reality if this were denied to a government one could conclude that it would not be a popular war and that there would be negative consequences for that government. One might hope that under a system of 'Responsible Government' governments would wish to share responsibility for their actions, in peace and war, with the Parliament. But what we have seen lately is as far from that as one might get. The commitment of our forces in the cases of Afghanistan, Iraq and now Syria, by-passed all formal processes including the Governor-General in Council. Instead authorisation was given by administrative act of the Minister for Defence, pursuant to Section 8 of the Defence Act. As far as we know no formal Opinions as to the legality (domestic and /or international) of these commitments were sought from the Solicitor-General (or from a possibly conflicted A-G). Nor have Parliamentary debates on the policy aspects and justifications of these actions been allowed whether pre- or post-commitment. Collectively, this amounts to serious contempt of the institutions and proprieties of the Commonwealth. The weakening of these formal structures allows for short-cuts in the use and deployments of the armed forces and the exposure of those forces to unaccountable risks (legal and physical) which no government should contemplate or in turn allow.

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- Senator Johnston, then Minister for Defence, was reported as having stated to the Senate on 1st September 2014 the following *inter alia*: "The Prime Minister and the cabinet, taking their responsibilities seriously, recommended to the Governor-General that Australian forces be deployed. This is the way we have always done our business." Interestingly, this was not widely reported nor as far as I know have the Executive Council's records in this regard been released or published. Even so it is not known what processes were followed prior to the

Governor-General being consulted and apprised, particularly with respect to the necessity for armed combat and its overall legality. ENDS

***Andrew Farran:* Early career in foreign affairs and defence with overseas postings, subsequently senior lecturer in law, Monash University. Since then engaged in trade policy consultation, corporate advising, and publishing. Currently, company director, writing and wool production. Hon Treasurer, Campaign for an Iraq War Inquiry and Australians for War Powers Reform.**

Notes on the role of the Governor-General

Dr Cameron Moore* - paper presented to AWPR seminar 23 October 2015

I INTRODUCTION

Prior parliamentary authorisation for use of military force is not desirable because it could politicise key operational questions such as force composition and rules of engagement, even in a situation where there is bipartisan support. This could both delay and publicise matters, which need to be dealt with quickly and without alerting the adversary.³

Nonetheless, the current approach of decision making via the National Security Committee of Cabinet alone is also undesirable for the following reasons:

- The NSC process does not necessarily provide a clear statement of the legal basis for, and strategic intent of, the use of military force, and
- It also does not provide a clear constitutional source of authority for the ADF to act.

As a result:

- Parliamentary and public debate is less informed and effective in holding the government to account;
- It is less clear which actions of the ADF are within the scope of lawful authority and which are not, and
- Members of the ADF are potentially exposed to personal legal liability for following orders for which the source and legal basis are unclear.

II EXECUTIVE vs LEGISLATIVE AUTHORITY

On the character of executive power, and why it must be a separate power, Montesquieu stated:

The executive power should always be in the hands of a monarch, because the part of the government that almost always needs immediate action is better administered by the one than the many, whereas what depends on legislative power is better ordered by many than by one.⁴

Blackstone had read Montesquieu⁵ and reflected something of this view in 1803 in his own *Commentaries* in the chapter 'Of the King's Prerogative':

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³ The US Congressional Authorisation for Use of Military Force is not directly comparable because the US has a presidential system, not responsible parliamentary government.

⁴ Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Anne Cohler, Basia Miller and Harold Stone trans and eds, Cambridge University Press, 1989) Book 11, Ch 6, 156-157 [trans of *De L'Esprit de Lois* (first published 1748)], 161.

⁵ *Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States and of the Commonwealth of Virginia* (1803, Hein Online reproduction) 260.

We are next to consider those branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite these several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.⁶

Consistent with this, the influential commentator on the *Australian Constitution*, Harrison Moore, writing in 1910, emphasised the importance of executive power to the whole constitutional endeavour and, in doing so, reflected a view of executive power shared by the theorists discussed above:

In the history of Australia the want of such an authority to speak and to act for the whole was as potent a factor in producing union as the absence of a common legislative power. The authority must be continuous, and not occasional; it must be capable of prompt and immediate action; it must possess knowledge and keep its secrets; it must know discipline. In a word, it must have qualities very different from those which belong to the large representative and popular bodies which in modern times exercise legislative power.⁷

It could ignore the lessons of history to make the exercise of war powers subject to a legislature which is meant to be representative and deliberative, rather than an executive which can respond to the unpredictable with ‘unanimity, strength and dispatch’. A larger number of politicians is not necessarily going to make a better decision than a small group of politicians. Prior parliamentary approval of the use of force by the ADF may not stop Australia making foolish and uncertain military commitments, as the involvement of the legislature in the United States also has not.⁸ Even so, rather than more process, there is much to be said for increasing the clarity, scrutiny and constitutional authority of the existing process. This may also not prevent Australia making foolish and uncertain military commitments, but it might just make such decisions more considered.⁹

III PROBLEMS WITH THE CURRENT APPROACH

A Limitations of Authorisation by the National Security Committee of Cabinet

There are significant problems with the current approach of authorisation for the use of military force deriving from a decision of the National Security Committee of Cabinet alone. The National Security Committee has no particular legal basis of its own. It is not authorised by any particular law nor does any particular law prohibit it making

⁶ Ibid 250.

⁷ W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 292.

⁸ See discussion in Professor Charles Sampford, ‘Issues and Options: Changing the Constitution and Complying with International Law’ in Alison Broinowski (ed), *How Does Australia Go to War: A Call for Accountability and Change* (Australians for War Powers Reform, 2015) 41, 44.

⁹ See ibid 44.

decisions with respect to the use of military force. It is an executive practice which a Prime Minister can readily dispense with. There is rarely a public authoritative legal document which states the legal basis for, and purpose of, the use of military force. This is despite the fact that the NSC may be authorising the use of the most extreme powers available to any government, which is to order the deliberate causing of death, destruction and capture, and which may be completely offensive rather than defensive in character. Further, the National Security Committee of Cabinet does not have the authority of itself to issue any such document.

B Limitations of Australian Law with Respect to War

To underscore the significance of this, in contrast to the international law of armed conflict, there is no positive authority in Australian case law or statute to kill, capture or destroy in war. Division 268 of the *Criminal Code Act 1995* (Cth) proscribes a range of actions contrary to the international law of armed conflict but provides no authority to take warlike action. There is ample recognition in Australian case law, mostly pre 1945, of the war prerogative but not what the war prerogative authorises. Such matters have traditionally been non-justiciable, so such case law as there is does not directly authorise actions against the enemy but instead renders it immune from the legal liability.¹⁰ The extent of this immunity is unclear and the subject of continuing litigation before the courts in the United Kingdom,¹¹ although the doctrine of combat immunity derives from the 1940 High Court of Australia case of *Shaw Savill and Albion Co Ltd v Commonwealth*.¹²

C Declarations of War

Until 1942, declarations of war clearly invoked the war prerogative.¹³ This had the advantage of identifying the enemy and the duties of those in the armed forces under an obligation of military obedience. The advent of the *United Nations Charter* era saw the end of declarations of war, as Article 2(4) of the *Charter* required member states to refrain from the threat or use of force in their international relations whilst preserving the inherent right of self defence under article 51. Unfortunately, this meant that some important domestic law advantages in declarations of war were lost as a result of the international law difficulties in continuing their use.

Currently there is no clear constitutional authority for a direction of the NSC to the Chief of the Defence Force. It is only the Minister for Defence who has ‘the general control and administration of the Defence Force’ under s 8 of the *Defence Act 1903* (Cth). Further, no minister can exercise the power of command over any member of the ADF and therefore there is no defence of lawful orders available to a member of the ADF for following an NSC direction. Sections 9 and 9A of the *Defence Act* clearly distinguish the power of command from that of control and administration. Section 9 grants the power of command to the Chief of the Defence Force, and chiefs of the single services over their respective services, subject to s 68 of the *Constitution*, which grants command-in-chief to the Governor-General.

¹⁰ *Shaw Savill and Albion Co Ltd v Commonwealth*. (1940) 66 CLR 344.

¹¹ *Smith v Ministry of Defence* [2013] UKSC 41.

¹² (1940) 66 CLR 344.

¹³ Below n 12. Note that *Defence Act* s 4 still provides for proclamations of a time of war and also a time of defence emergency, as well defining war to be an attack on Australia.

To elaborate, the King, by special royal instruments in 1941 and 1942, gave to the Governor-General the power to declare war separately against Japan,¹⁴ Finland, Hungary and Rumania¹⁵ Bulgaria¹⁶ and Thailand.¹⁷ It was not a general grant of power, as the royal instruments specified which countries Australia could declare war against. It did however mean that the Governor-General could exercise all aspects of the war prerogative in respect of those countries, noting that previous High Court authority indicated that the Commonwealth could exercise all aspects of that prerogative other than the power to declare war and make peace.¹⁸ It is important that the war prerogative only passed to the Governor-General in very precise terms. It did not pass to any other Commonwealth official. As to whether the Governor-General can now exercise the war prerogative generally, contemporary High Court jurisprudence appears to accept that the Governor-General may now exercise all the prerogative powers of the Crown appropriate to the Commonwealth.¹⁹

1 *Principle of Legality*

Even if a view prevails that there is now a convention that the NSC exercises the war prerogative, the lack of a formal instrument issuing from the Governor-General invoking the war prerogative is still problematic. As mentioned above, the exercise of war powers can be extreme. To have such powers slip imperceptibly from being the subject of a solemn public declaration by the Governor-General to being only a secret cabinet decision defies the principle of legality, stated so clearly in *Entick v Carrington* in 1765, that ‘one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant’.²⁰

2 *Military Duty of Obedience and the Defence of Lawful Orders*

Further, it is the Governor-General who has command-in-chief of the naval and military forces of the Commonwealth. Ministers do not have the power of command, as stated above. The significance of this is that it is an offence under the *Defence Force Discipline Act 1982* for a member of the ADF to disobey a lawful command or a lawful general order.²¹ Failure to comply with a ministerial direction is not an offence, although it may result in adverse administrative action. Importantly, members of the

¹⁴ Commonwealth, *Gazette*, No 252, 9 December 1941, 2727 cited in Deirdre McKeown and Ray Jordan, ‘Parliamentary Involvement in Declaring War and Deploying Forces Overseas’ (Background Note, Parliamentary Library, Commonwealth, 2010) which gives a detailed summary of parliamentary records in regard to Australia’s warlike operations since 1914, 31; See also Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1941, (Dr H V Evatt) quoted in Charles Sampford and Margaret Palmer, ‘The Constitutional Power to Make War’ (2009) 18(2) *Griffith Law Review* 350, 358-359.

¹⁵ Commonwealth, *Gazette*, No 251, 8 December 1941, 1849, cited in McKeown and Jordan, above n 12, 31.

¹⁶ Commonwealth, *Gazette*, No 14, 14 January 1942, 79, cited in McKeown and Jordan, above n 12, 31.

¹⁷ Commonwealth *Gazette*, No 198, 20 July 1942, 1733, cited in McKeown and Jordan, above n 12, 31.

¹⁸ The apparently equally diminished role of the Queen in respect of the use of military force by the United Kingdom does not change the significance of this point for Australia.

¹⁹ The majority of the High Court in *Cadia Holdings Pty Ltd v NSW* stated that:

‘The executive power of the Commonwealth of which s 61 of the *Constitution* speaks enables the Commonwealth to undertake executive action appropriate to its position under the *Constitution* and to that end includes the prerogative powers accorded the Crown by the common law.’ (2010) 242 CLR 195, 226 (Gummow, Hayne, Heydon and Crennan JJ).

²⁰ (1765) 19 St Tr 1030.

²¹ *Defence Force Discipline Act 1982* (Cth) ss 27 & 29.

ADF also have a common law duty to obey lawful orders. As put by Murphy J in *A v Hayden* in 1984, ‘Military and civilians have a duty to obey lawful orders, and a duty to disobey unlawful orders’.²² Members of the ADF are far more subject to orders than civilians. The issuing of an order from the Governor-General to the ADF invoking the war prerogative and identifying the enemy makes it a duty for members of the ADF to cause the killing or capture of the enemy, or destruction of enemy property, where it is lawful to do so under the law of armed conflict. For example, the *Defence Force Discipline Act 1982* proscribes the following conduct:

- s 15F Failing to carry out orders (with respect to operations against the enemy, which includes pirates and mutineers (s.3)), and
- s 15 G Imperilling the success of operations (against the enemy).

Additionally, ss 11 and 14 of Act requires service tribunals to take account of a member’s duties, as well as the obligation to obey lawful orders in dealing with service offences. This provides some defence to members of the ADF that such action is lawful in so far as it is their duty to carry it out. It also provides some measure against which members of parliament and the public can assess whether members of the ADF are lawfully exercising powers under the war prerogative and when they are not.

3 Commando Court Martial

This is not a hypothetical issue. The prosecution of two commandos before a court martial in 2011 raised the important question of what the authority was for them to be using force in Afghanistan.²³ Although the trial did not proceed beyond the preliminary hearing stage, it still demanded consideration of why the use of lethal force in combat is not murder, or manslaughter in that particular case, if there is no positive authority to use such force. In Australian law, only the war prerogative could possibly authorise the deliberate offensive causing of death, destruction or capture against the enemy.

4 Need for Clear Authority

If the powers to use force in war can only derive from the war prerogative, it should be made very clear that such powers are being invoked and the enemy against whom they are being invoked. The Governor-General is the only official to whom the power to exercise the war prerogative has been given and, having command-in-chief, is the only one who can issue an order to the ADF to exercise powers under that prerogative.

D External Security Operations Which Are Not War

To compound these issues, there is no authority in case law or statute, with the exception of the relatively new *Maritime Powers Act 2013* in relation to maritime

²² *A v Hayden* (1984) 156 CLR 532, 562

²³ Transcript of Proceedings, *Sergeant J and Lance-Corporal D*, Australian Defence Force General Court Martial Pre-Trial Directions Hearing, Brigadier Westwood, Chief Judge Advocate, 20 May 2011, 1-3, 36. On the controversy as to whether the DMP should have prosecuted these charges, see Justice Paul Brereton, ‘The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law’ (2011) 85 *Australian Law Journal* 91.

operations, to use coercive force to enforce a UN Security Council resolution.²⁴ A number of the ADF's forceful operations overseas since 1945 have however been under the authority of United Nations Security Council Resolutions, at least in international law terms. In terms of Australian law, where such force amounts to the conduct of an armed conflict, as in the case of Iraq in 1991,²⁵ this may rely upon the war prerogative. Where there is no enemy however, as in the case of Somalia or East Timor for example, no particular Australian case law or statute provides for the use of force in mission accomplishment by the ADF beyond that which any citizen could exercise in self defence. This means, on a narrow view, that the ADF could exercise less power in Somalia²⁶ or East Timor²⁷ than the Australian Federal Police could exercise in Canberra, even while trying to restore law and order to those strife torn places. Whilst some English cases recognise that the foreign affairs prerogative may authorise the use of coercive powers as an Act of State,²⁸ no Australian case has accepted these precedents as part of the common law of Australia.²⁹

A secret decision of the National Security Committee of Cabinet cannot cure this problem. Absent statute, an order of the Governor-General may at least provide some clear link to the foreign affairs prerogative and a clear order with which members of the ADF must comply, thereby providing a defence to the extent that the order is lawful. It may be that statute could go some way to providing a more certain legal basis for external security operations. Experience suggests however that the dynamic and often warlike nature of such operations means that it is always likely to be necessary to rely upon prerogative powers. Statutes cannot anticipate every eventuality.³⁰ To the extent that the external affairs prerogative is even more uncertain with respect to coercive powers than the war prerogative, at least this means that the Commonwealth would more likely bear legal liability for its misuse rather than individual members of the ADF.

IV PROPOSED SOLUTION

One way to address these issues would be to have an order from the Governor-General to the Chief of the Defence Force to deploy the ADF for a particular purpose, which states the international and domestic law basis and strategic intent. The order could provide the basis for informed parliamentary and wider public scrutiny and debate. Apart from consideration of the initial decision to use military force, an order could be particularly helpful in scrutinising 'mission creep' beyond the scope of the order.³¹ Equally, whilst probably non-justiciable,³² an order could be pleaded in court as a defence of lawful authority or a defence of lawful superior orders. Further, any

²⁴ See *Bradley v Cth* (1973) 128 CLR 557, 583, Barwick CJ and Gibbs J rejected Security Council Resolutions which had not been given legislative recognition in Australia as justification for executive action within Australia that would otherwise have been unlawful.

²⁵ SC Res 678, UN SCOR, 2963rd mtg, UN Doc S/RES/678 (29 November 1990).

²⁶ SC Res 794, UN SCOR, 3145th mtg, UN Doc S/RES/794 (3 December 1992).

²⁷ SC Res 1264, UN SCOR, 4045th mtg UN Doc S/Res/1264 (15 September 1999)

²⁸ See *Al-Jedda v Secretary of State for Defence* [2011] 2 WLR 225.

²⁹ See *Habib v Commonwealth* (2010) 183 FCR 62

³⁰ See for example discussion of the issues surrounding the Detainee Management Unit in East Timor in Bruce Oswald, 'The INTERFET Detainee Management Unit in East Timor' (2000) 3 *Yearbook of International Humanitarian Law* 347, 348.

³¹ For some similar ideas in the United Kingdom, see Alison Broinowski, 'Odious Comparisons: How Australia and Some Other Countries Go to War' in Broinowski (ed.), above n 6, 29, 32.

³² *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3.

revocation of such an order would unequivocally remove the authority to take further military action.

It may well be that this proposed development could occur simply as a change to current executive processes but it may also be that parliament enacts legislation to require this to occur. The proposed order of the Governor-General may have to be tabled in parliament so that it may be debated, as is the requirement currently with certain call out instruments under Part IIIAAA of the *Defence Act 1903*.³³ This more modest aim may be more achievable than legislation requiring prior parliamentary approval for the use of military force. Still, if parliament did take the further step of requiring parliamentary authorisation before the use of military force, orders from the Governor-General may be both useful for the reasons outlined above, but also necessary because the *Constitution* vests command-in-chief in the Governor-General and not the Parliament.

³³ eg *Defence Act* s 51X.

V DRAFT ORDERS

War Prerogative

Whereas:

the Republic of Iraq is under armed attack by forces known as the Islamic State in Syria and Iraq, and

the Government of Iraq has requested military assistance from Australia to repel that attack;

I, General Sir Peter Cosgrove, Governor-General of the Commonwealth of Australia and having Command-in-Chief of the naval and military forces of the Commonwealth, on the advice of my ministers and acting in accordance with the war prerogative exercisable by me, order the Chief of the Defence Force to use force to assist the Government of Iraq to resist enemy forces known as the Islamic State in Syria and Iraq, in accordance with such directions as my ministers may give.

Notes:

- Identifies an international law legal basis to act, which is collective self defence of Iraq and the invitation of the Government of Iraq.
- Provides a clear strategic intent, which is resisting the enemy of Iraq, even if there is no strategic end state.
- Acknowledges the convention of acting upon ministerial advice but does not purport to be the exercise of the power of the Governor-General-in-Council, which is not required and could be an undesirable procedural impediment, particularly in relation to further operational directions from the minister.
- Clearly states that the order relies upon the war prerogative as exercisable by the Governor General.
- Closely reflects the language of ss 61 and 68 of the *Constitution*.
- Clearly states that it is an order, which the CDF and every other member of the ADF is obliged to obey, thus granting some legal protection.
- Clearly identifies the enemy, which invokes the common law doctrine of combat immunity and the statutory provisions of the *Defence Force Discipline Act 1982* dealing with actions relating to the enemy.
- Whilst stating the purpose of the mission, does not purport to deal with matters the subject of Rules of Engagement (ROE), such as the precise geographical limitations on the range of action, which can more accurately be dealt with in detailed operational orders such as ROE.

External Affairs Prerogative

Whereas:

United Nations Security Council Resolution 1264 authorises the establishment of a multinational force under a unified command structure to restore peace and security in East Timor, and

authorises states participating in this multinational force to use all necessary means to fulfil this mandate;

I, General Sir Peter Cosgrove, Governor-General of the Commonwealth of Australia and having Command-in-Chief of the naval and military forces of the Commonwealth, on the advice of my ministers and acting in accordance with the external affairs prerogative exercisable by me, order the Chief of the Defence Force to use force to fulfil the mandate given by United Nations Security Council Resolution 1264, in accordance with such directions as my ministers may give.

Notes:

- Identifies an international law legal basis to act, which is *United Nations Security Council Resolution 1264*.
- Provides a clear strategic intent, which is fulfilling the mandate, even if there is no strategic end state.
- Acknowledges the convention of acting upon ministerial advice but does not purport to be the exercise of the power of the Governor-General-in-Council, which is not required and could be an undesirable procedural impediment, particularly in relation to further operational directions from the minister.
- Clearly states that the order relies upon the foreign affairs prerogative as exercisable by the Governor General.
- Closely reflects the language of ss 61 and 68 of the *Constitution*.
- Clearly states that it is an order, which the CDF and every other member of the ADF is obliged to obey, thus granting some legal protection.
- Whilst stating the purpose of the mission, does not purport to deal with matters the subject of Rules of Engagement (ROE), such as the precise geographical limitations on the range of action, which can more accurately be dealt with in detailed operational orders such as ROE.

Deployment to Exercise Statutory Authority

Whereas:

The Maritime Powers Act 2013 grants powers to members of the Australian Defence Force to enforce certain Australian laws, and

The Minister for Immigration and Border Protection seeks to utilise the Australian Defence Force to assist in enforcing certain Australian laws at sea;

I, General Sir Peter Cosgrove, Governor-General of the Commonwealth of Australia and having Command-in-Chief of the naval and military forces of the Commonwealth, on the advice of my ministers and acting in accordance with the prerogative with respect to the control and disposition of the armed forces exercisable by me, order the Chief of the Defence Force to deploy the Australian Defence Force to exercise powers under the Maritime Powers Act 2013 in order to assist the Minister for Immigration and Border Protection to enforce certain Australian laws at sea, in accordance with such directions as my ministers may give.

Notes:

- Identifies the basis in Australian law to act, which is the *Maritime Powers Act 2013*.
- Provides a clear strategic intent, which is assisting the Minister for Immigration and Border Protection to enforce the law, even if there is no strategic end state.
- Acknowledges the convention of acting upon ministerial advice but does not purport to be the exercise of the power of the Governor-General-in-Council, which is not required and could be an undesirable procedural impediment, particularly in relation to further operational directions from the minister.
- Clearly states that the order relies upon the prerogative with respect to the control and disposition of the armed forces as exercisable by the Governor General.
- Closely reflects the language of ss 61 and 68 of the *Constitution*.
- Clearly states that it is an order, which the CDF and every other member of the ADF is obliged to obey, thus granting some legal protection.
- Whilst stating the purpose of the mission, does not purport to deal with matters the subject of Rules of Engagement (ROE), such as the precise geographical limitations on the range of action, which can more accurately be dealt with in detailed operational orders such as ROE.

Standing Defence of Australia and the ADF

Whereas:

It is the duty of the Commonwealth to protect every State from invasion; the Commonwealth has the inherent right to protect itself, and the Defence Act 1903 grants powers to members of the Australian Defence Force to protect Australian Defence Force installations, vessels, aircraft and vehicles;

I, General Sir Peter Cosgrove, Governor-General of the Commonwealth of Australia and having Command-in-Chief of the naval and military forces of the Commonwealth, on the advice of my ministers and acting in accordance with the prerogative with respect to the defence of the realm exercisable by me, order the Chief of the Defence Force to use force to defend Australia from armed attack and to protect the Australian Defence Force from attack, in accordance with the Defence Act 1903 and with such directions as my ministers may give.

Notes:

- Identifies the basis in Australian law to act, which is the constitutional duty of the Commonwealth to protect the states and its inherent right to protect

itself,³⁴ as well as the *Defence Act 1903* with respect to defending the ADF from attack.

- Provides a clear strategic intent, which is the defence of Australia and the ADF itself, even if there is no strategic end state, as well as providing a standing duty for the ADF to defend Australia and the ADF itself.
- Acknowledges the convention of acting upon ministerial advice but does not purport to be the exercise of the power of the Governor-General-in-Council, which is not required and could be an undesirable procedural impediment, particularly in relation to further operational directions from the minister.
- Clearly states that the order relies upon the prerogative with respect to the defence of the realm as exercisable by the Governor General.
- Closely reflects the language of ss 61, 68 and 119 of the *Constitution*, as well as the jurisprudence on nationhood power.
- Clearly states that it is an order, which the CDF and every other member of the ADF is obliged to obey, thus granting some legal protection.
- Whilst stating the purpose of the mission, does not purport to deal with matters the subject of Rules of Engagement (ROE), such as the precise geographical limitations on the range of action, which can more accurately be dealt with in detailed operational orders such as ROE.

Internal Security

There is no order drafted here for internal security purposes as Part IIIAAA of the *Defence Act 1903* deals with such orders from the Governor-General in some detail. Where an internal security response would fall outside of the scope of the Act and rely upon the executive power, call out orders should closely follow the statutory scheme.³⁵

³⁴ See Appendix 9: ‘Opinion of Sir Victor Windeyer, KBE, CB, DSO on Certain Questions Concerning the Position of Members of the Defence Force When Called Out to Aid the Civil Power’ in Justice Robert Hope, ‘Protective Security Review’ (Parliamentary Paper 397, Parliament of Australia, 1979).

³⁵ See *Defence Force Regulations 1952* (Cth) Part 3.

Can Parliamentary Conventions Limit Executive Privilege?

AWPR Seminar 23 October 2015

Margaret Swieringa

If we make the assumption, inherent in a democratic process, that debate is valuable, that dissent is a right and that consideration of alternative views can refine and improve policy-making and decisions, then Parliament should have a role and indeed does have a role in most areas of Government. Parliamentary committees and their work are integral to democratic consideration of significant government decisions. The most marked exception today is the last remnant of Executive Privilege - the decision by an Australian government to go to war.

Note arguments against parliamentary participation: lack of flexibility, timeliness and security of classified information or arguments about process - one or two chambers voting or a joint sitting.

1. Flexibility: what does this mean? Parliament not sitting – it can be recalled. Rigidity of parliamentary business - parliamentary business has numerous procedures to suspend standing orders and facilitate emergency debates.
2. Timeliness: the time frames for deployments overseas are considerable – 6, 9 months to a year. Parliament and/or its committees can operate very quickly when needed.
3. Security of intelligence information. The decision to go to war is not about the details of military deployment and rarely reliant on intelligence, but about broader strategic considerations and these should be conveyed to parliament and the public.
4. The process of the vote. Decisions about whether it be a vote of the lower House alone or both Chambers or a joint sitting should be resolved within the bill establishing the role of Parliament.

Process: The Powers and Limitations of Parliament and its Committees

There is an ideal, a theoretical construct, for the operation of parliamentary committees:

- That they reflect the chamber from which they come,
- that they offer the possibility for members to examine issues in detail not possible in the chamber as a whole,
- that they have considerable powers to call for witnesses and documents with all the powers and privileges of the Parliament,
- that they bring expert opinion into the considerations of parliament,
- that, as such, they are educative of members and therefore assist their decision making. (That they can be an effective training ground for Ministers.)
- that they offer an interchange between the parliament and the public,
- that they work, where possible, on a consensus basis, giving greater weight to their findings,
- that reports and recommendations of committees are private to the committees until after tabling and therefore separate from Executive influence.

On the whole committees are **advisory**, making recommendations to the Chamber and the Executive government. However some committees, especially statutory

committees, have some compulsory powers whereby their recommendations have more force— for example that their recommendations must be considered prior to Executive action being taken. This process is usually written into the Acts governing statutory committees. Public Works Committee approval of expenditure is necessary on certain works, the listing of terrorist organisations must be considered and agreed by the Intelligence Committee are two examples.

Committees are there to scrutinise executive action, to enhance probity, to expose maladministration and waste and finally to review after the fact actions taken by government in a process of lessons learned. Hearings are generally conducted in public and press coverage, especially where an issue is serious and/or controversial, can be a valuable contribution to debate. There is a view in the bureaucracy that one of their yardsticks when judging their advice or their actions is: How would this look at Senate Estimates? Adverse exposure of this sort is something Governments try to avoid - except perhaps where they see advantage in confrontation.

However:

Between the idea and the reality falls the shadow.

Often these processes are honoured in the breach.

How meaningful and timely is the work of the Parliament and its committees?

The separation of powers is not complete in our system. Unlike the US Congress, the Executive is embedded in the parliament. The House of Representatives is dominated by the Governing party and therefore the House committees, as a reflection of the Chamber, are dominated by the government members and there is a government Chair. This is not the case in the Senate where the numbers are finely balanced and the Chairs alternate between the Government and the Opposition.

The potential for there to be government control of the findings and outcome of the committee is clearly there. The privilege attaching to untabled reports seeks to obviate that, but not always successfully.

Similarly party discipline means that there is likely to be government control of a vote in the House in support of any decision the executive has taken or wants to take. Highly charged issues can mean that members take ideological stands. War, climate change, same sex marriage, education are examples.

Party discipline can detract from consensus, even in the face of contrary evidence presented to a committee by experts in the field.

Or consensus between the major parties can frustrate acceptance of expert and community opinion on issues as is the case with the war powers question.

So there are complex circumstances that affect how parliament and its committees perform in their role. Will they toe the party line or will they seriously examine issues, provide the necessary or even effective curbs on rash executive actions?

Even where committees are critical or reformist in their views, what influence can they have on an Executive bent of a particular course of action?

A Theoretical Case Study: Iraq

It is notable that there was at least a twelve month lead time up to the deployment of troops to Iraq in March 2003. The possibility of war as a result of the attacks on the World Trade Center was canvassed almost immediately by the Bush Administration, which also quickly turned its attention, in the State of the Union Address in January 2002, from attacks on Afghanistan to war with Iraq. The Australian government had pledged full support in anything the Bush administration decided to do and a day of debate occurred in the Australian Parliament in September 2001 and nothing further was debated until September 2002.

If Parliament had operated at its optimum in 2002 prior to the Iraq war it might have looked like this.

Given the attitude of the US government arguing for war with Iraq and the pledges of the Australian government to do all it could in support of the United States, the matter could have been taken up by a number of Parliamentary committees. And they had twelve months to do it - a very long time for the issue to be examined.

In February 2002, the Joint Committee on Foreign Affairs, Defence and Trade or the equivalent Senate Committee could have sought a reference from the Foreign Minister or the Defence Minister seeking to examine the prospect of a war with Iraq, the legality of the war and the strategic and military objectives of such action.

(The refusal of Ministers to provide a reference can be dealt with under other parts of most committees' powers. However, ideally, if there were a requirement for Parliamentary approval before Australia commits troops overseas in non-defensive actions, the relevant committees of the Parliament would have written into their resolutions of appointment or Acts a requirement that they examine all aspects of such a decision prior to the Parliamentary vote. It would then be automatic as it should be.)

The Intelligence and Security Committee could also have sought briefings on the background intelligence supporting the arguments for going to war in Iraq. This would only be done on a largely private basis, but there is usually scope for some public airing of the evidence. It is notable that both the British and the Americans aired the intelligence, faulty and doctored as it was, in public, before the war. (Perhaps they only aired it because it was doctored.)

The Legal and Constitutional Committees could have examined the legal arguments for going to war. There was/is no reason why international law as it applied to Iraq could not or should not have been canvassed publicly in 2002. Again a requirement for the Parliament to approve a decision to go to war would have made it essential that the Parliament be briefed thoroughly on the legal aspects of the question.

Estimates committees could and should have asked for the financial cost of the exercise, although this is usually and most accurately an after-the-fact process.

Witnesses from the Department of Foreign Affairs, the Department of Defence, the Attorney-General's Department, the Intelligence Agencies as well as academics and former bureaucrats, military and foreign policy think tanks could have been asked to give their views to committee inquiries in the months leading up to the decision.

The value of the committee process is that the questions could have been directed to the most relevant issues about why war was necessary or right or effective or legal. The historic context as well as the current strategic implications of a war could have been thoroughly examined. Consideration could have been given to the outcomes of a war in Iraq on the region. It would have clarified and tested the Government's arguments on the case for war.

These series of hearings could have taken place between February and May or June, with the committees reporting by end early August or September. Proper Parliamentary debates could then have been conducted prior to any decision that needed to be taken.

This process can be as long and detailed or as short as demanded by the circumstances. If needed, committees can meet for a day and produce a report within a few days or they can conduct a number of hearings and work in a longer time frame. In the case of Iraq, some months were available to the Parliament.

The reports of these committees could then have informed the debate in the chambers as well as the public debate in the press. Ideally then a binding vote might have taken place in the Chambers.

None of this happened prior to the invasion of Iraq in 2003 and the result has been disastrous. The debates in the chambers were repetitious, slogan riddled arguments opposed by an Opposition who had been kept in the dark and knew too little of the issues surrounding the proposed war. Whether the government would have changed course if there had been a better process is unknowable, but at least there was scope for a much more informed debate and the hope that they might have paused.

The role of committees does not end there. Assessments after the fact are also important.

On Iraq, the Australian process was very partial and inadequate. One Parliamentary inquiry only was held on the accuracy and use of intelligence, but no one asked about the strategic or military or legal advice that was given by the Departments of Foreign Affairs, Defence or the Attorney-General's Department. This inquiry was followed by a repeated internal inquiry conducted by Philip Flood into the Intelligence agencies.

In Britain parliamentary committees on both Foreign Affairs and Intelligence made inquiries. The Hutton, Butler and Chilcot inquiries followed. There has been nothing like this in Australia.

It is clear from the current circumstances of creeping involvement in Syria few lessons have been learned and still no questions are being asked.

READINESS

Paper given at AWPR Seminar 23 October 2015 by Lieutenant General John Sanderson, AC

Introduction

I have been asked to talk to you about military readiness. I know it doesn't say that in the Program for this seminar but mobilising a military response to an emergency is really about the readiness, or preparedness, of the Australian Defence Force to participate in the sort of activity that a Government or the People might want to undertake to defend themselves or the rights of some other community that is being dealt with in a way that arouses the national conscience. As we have discussed today, the issue of whether the Executive or the People, through their elected Parliament in the Westminster system, makes this decision to participate is very contentious. It depends on a number of factors, some of which are historical and involve issues of precedence, and others that involve issues of morality and immediacy associated with life and death and the national interest.

My military career after graduating from the Royal Military College as a Lieutenant has been devoted almost entirely to the issue of Readiness. The very first troop of Engineers I commanded was on 24 hours notice to move to participate in what might develop into a nuclear war against the Chinese in South East Asia. Our nation's commitment to the South East Asia Treaty Organisation in a climate involving containment of international communism with a heightened possibility of a Third World War was seen to demand this sort of readiness.

This commitment is probably what drew us into South Vietnam, beginning in 1962, and caused the Government of Australia to engage in the folly of national conscription for service in a limited war outside Australian territory. The term 'limited war' was used extensively in those days because the advent of nuclear weapons made the avoidance of absolute war imperative. While the conscripts called up by national ballot in limited numbers also provided the numbers for a national mobilisation capacity in the event of escalation beyond Vietnam, it was the casualty rates and the gradual public disenchantment with the killing of Vietnamese in their own country that played out to end this strategy. This disenchantment was worldwide, involving a range of revolutionary wars of independence and was, arguably, the straw that broke the camel's back for the Western ascendancy that had evolved over the previous three hundred years.

The capacity of the Western world to mobilise foundered from 1968 onwards creating a growing dependence on the economic and, increasingly, the technological might of the United States of America. The alignment of western strategic and political development with the interests of that country thereby intensified. The consequences of that reality for political debate in Australia are probably what draw us together for this seminar.

An Imperial Tradition

So what is new, you might ask? When I was a two-year old 73 years ago in 1942, my Father was involved in the Battle of El Alamein, having just come out of Palestine where they had been after the withdrawal of the 9th Division from Tobruk. Three of my uncles were engaged at the same time in a fight to the death against the Japanese on the Kokoda Track and another was with the 2nd/2nd Commando Company that had disappeared into East Timor. They were all members of the 2nd Australian Imperial Force and had joined up as volunteers in response to Menzies 1939 melancholy announcement that, as Britain had declared war on Germany, so had Australia. That was the way it was then and in the preceding First World War, when so many young Australians volunteered to fight for the Empire, against the Ottoman Forces in the Middle East and against the Germans in Europe, and so it was in 1939.

A complicating factor in 1940 was the emergence of a threat to Australia from Japan that had mobilised in the 1930s to extend its empire into China. While this threat did not come to fruition until two years later at the end of 1941, Australia had to mobilise for two strategic commitments at the same time – to support Great Britain in Europe and the Middle East and to prepare for a potential Japanese invasion of Asia. Conscription for the defence of the home territories was a given, but you still had to volunteer to fight outside Australia.

Unquestionably, it was American mobilisation from December 1941 that saved both Europe and Asia. Australia simply couldn't mobilise sufficient manpower and resources for either of these tasks and had to accept American ascendancy in the planning and control of all future operations, including those in the aftermath of the end of World War Two.

There are a number of accepted myths about the feistiness of various political leaders in dealing with both the British and the Americans in this process but the reality is that the Australian armed forces merely switched from being a subset of those of the British Empire to being a subset of the Armed Forces of the United States of America. Readiness to do this in the climate following the inconclusive end to World War Two required some restructuring of the Australian Defence Force. For the first time in Australian history a regular, full time, volunteer Army was created in 1948 and, almost immediately, went to war in Korea.

The new factor from the end of 1945 in this strategic environment was the United Nations whose Security Council was the agreed authority for enforcement action, either sanctions or war, against a recalcitrant member or non member that did not comply with the protocols and conventions agreed by the Organisation.

In order to establish their credentials with their own people, various Australian governments have, over time, put much effort into establishing the authenticity and authority of the United Nations mandate but have invariably taken the position of the United States of America where its interests have clashed with those of other members. This has included, when required, the provision of military capabilities of sufficient strength to affirm where its priority lies. 'The USA comes before the UN' is the unspoken truth behind the "Coalition of the Willing" of 2003 and various other positions taken by Australia over the years. If there was ever any doubt about this

commitment, the highly contentious invasion of Iraq in 2003 would have put it to rest. It is a part of Australia's imperial tradition.

Readiness in the New Geostrategic Reality

'Readiness' and 'Capability' are two terms that are central to national strategy and define the structure and activity of the various elements of the Australian Defence Force. Although these terms are not well understood, even within the Defence Force itself, they are fundamental to determining the resources that are put into personnel, operating costs and capital investment in new equipment for the future. In theory, they are determined by strategic assessment of the probable developments in the political and environmental nature of the world around us. This includes the likely reaction of allies to those changes.

A capability is the ability of the Defence Force to achieve specified outcomes at some future time in specified places. It varies in nature over time due to new technologies and political changes, including shifting alliances. Readiness defines which units, installations and equipments are to be ready to be a part of that capability requirement. Some capabilities are latent and exist in embryonic form against future contingencies that are not clearly defined, some are seen to have a more immediate application and are required at short notice, and others are engaged in real time, i.e. they are deployed to operational areas where they are conducting operations or preparing to do so. In the modern era some capabilities, particularly those involved with surveillance and intelligence gathering, are active in a constant and ongoing way. Their activities, of necessity, demand that they are afforded a high level of confidentiality.

Not all capabilities are about purely military action however. The ability to respond to humanitarian emergencies is a part of any Government's stock in trade. In many instances this can be done by civilian agencies but very few of these are maintained at levels of readiness suitable for the immediacy of the required responses. Military units are most often required but these are normally made available from those maintained at high levels for military action.

There is a new geostrategic reality emerging from the second half of the 20th Century. Australia had its first shock in this regard when Richard Nixon announced at Guam in 1969 that America was not going to get involved in any more Vietnams. It would fight the big ones such as in Europe and Korea, but the rest of us were to get on with making arrangements for our own defence and the management of affairs within our own regions.

Some of us took this seriously and thought that changing the balance from forward defence of the interests of our major allies to defence of this massive continent was overdue. The two strategies were not mutually exclusive. It was essentially a matter of priorities. However, the change in these priorities was resisted very strongly by those who had a vested interest in those pre-existing priorities and force structure of Forward Defence. This division within the Defence Force was a reflection of the division between the two major political parties and, quite possibly, the divisions within Australian society. From the election of the Howard Government in 1997 and the ascendancy of the Republicans in the United States, a return to the priorities of a policy of Forward Defence became inevitable.

The outcome of these divisions is a Defence Strategy that is neither one thing nor the other. Australia's posture for the long-term defence of the Continent and the interests of its neighbours is weak and insipid, while its capacity to contribute substantially to any of the adventures of its major allies is minimal. This contribution in no way denies the professionalism of Australia's Defence Force, which is outstanding in international terms and is a large part of the collateral used to authenticate Australia's commitment. It is simply that it cannot be of a magnitude that could be a significant determinant of the outcomes of the conflict, nor can it disguise the fact that casualty minimisation plays a substantial role in maintaining the commitment of the Australian public to this strategy of support for American interests.

Unfortunately, Australia is not the only western nation that plays this strategic game of minimising effort while maximising the threat. It is clear that western governments do not expect their constituents to commit to the full pain of actually concluding a conflict successfully and are reluctant to submit their own considerations to the full public view of a political debate. As a consequence, it is possible for them to make commitments from the small pool of existing high readiness elements that can operate from bases out of contact with the enemy and lodge themselves on the logistic support systems of the United States Armed Forces.

Training teams of specialists helping local armed forces to assume the role of defending the population and destroying the enemy have been a focus of all contributions to conflicts since 1960, as have air and naval components providing operational support from bases outside the conflict area. The result of these half-hearted efforts to be seen to be doing something while minimising casualties has invariably been failure, but western governments continue to do the same thing over and over again in response to these growing emergencies.

An exception to this process occurred for Australia in 1999 with the formation of an Australian led Peace Enforcement operation in East Timor designed to allow the election of a representative government and the transfer of power from Indonesia. The nation stumbled into this mission following a confused period of strategic uncertainty in Indonesia after the demise of the Suharto regime in the late 1990s. When the United Nations was required to follow through on a referendum in East Timor endorsing the idea of independence from Indonesia, Australia was confronted with the possibility of going to war with its nearest neighbour over an issue that was not fundamental to the strategic interests of either country.

Indonesia's perception of the extent to which Australia had fostered and developed its relationship with the United States and the subsequent high international exposure provided by United Nations endorsement of its actions helped to avoid conflict between the two countries. What it did do, however, was highlight the perils of not having a clear understanding of the emerging realities in the region in which Australia's future will be decided, and the hard work that will have to be done to establish a continental posture for the long term territorial integrity of the nation. The public debate about this is almost non-existent and the low levels of commitment required from the Australian people for the operational deployments of the last two decades seem carefully contrived to keep it that way.

WAR POWERS AND MEDIA POWER

Paper presented to AWPR Seminar on 23 October 2015 by Nic Stuart

We often hear about the power of the media, but I think it's time I came clean. That's why I'm admitting, despite my great luck to possess a regular column in such an excellent newspaper at the Canberra Times, I actually don't feel particularly powerful at all.

Now there may be a couple of reasons for this. Firstly, perhaps most importantly, it's because nobody ever pays any attention to anything I have to say. If they did listen to me, they wouldn't keep repeatedly making such disastrous mistakes. I'm afraid to say that politicians are the worst repeat offenders in this regard, although I should probably also include every member of my family. The difference is that when my children make mistakes, they're relatively small ones. Unfortunately this isn't the case with politicians. When they stuff-up they do so big time. And that's the point.

Sit on this side of the keyboard for a couple of months and watch as urgent warnings are ignored by others, and it quickly becomes apparent that the so-called 'power of the media' is a hugely over-rated phenomenon. It is, in fact (and as we say in the media) a complete beat-up. It would be nice to think accurate reporting can call politicians to account, but if you believe this actually happens you're living in a fantasy world.

Journalism hasn't become completely irrelevant – yet – although it's tempting to suspect this is only a matter of time. There are so many reasons for this that it's difficult to isolate any as being particularly relevant. The old ones are all still there, such as the ability to manipulate the media (even if only for a short time) by planting stories and harnessing sensation. This was responsible for whipping up the hysteria that made it possible to invade Iraq. But 2003 is *so* yesterday in news terms. That's because we've now entered an utterly new media landscape.

It's a commonplace to insist that the internet has changed everything, so I guess that insisting things are now different is not much of an insight. The point is that if the way we go about communicating with one another changes, it seems reasonable to expect that our social structures will also require changes. If new communications networks are opening up different radically possibilities we, as a society, need to recognise this and make the appropriate changes to the way we operate.

There are plenty of positives from this change. Indeed, many people may suspect that the imminent death of traditional journalism is enough of a bonus to make anything else irrelevant, so let's just focus on what this means. New start-ups, enabling and developing around communities of interest, are catering to the particular requirements of individuals far better than the traditional mass-media.

Take Facebook for example. Mark Zuckerberg has created a network (and a fortune) by simply recognising that friends, people with common interests, wanted to communicate with one another. He, brilliantly, managed to discover a way of profiting

from our natural desire to congregate with like-minded friends. This is the polar opposite of journalism.

Reporting is about telling people (who we call readers, listeners or viewers) the way the world 'is'. This distances individuals from their primary function (living a life) and transforms them into a new role, as a citizen (ABC); multi-cultural Australian (SBS); suburban consumer (Telegraph or Sun Herald); or, if they read the Canberra Times, a right-thinking, intelligent person! The point is that the very act of consuming news is predicated on thousands of decisions that are made. We journalists call these 'news values'. News is *not* simply unproblematic; the act of creation embodies all sorts of unarticulated assumptions about what is important and buries these in the editorial decisions that underlie the product.

So news is a social tool that assists people to integrate into society and news organisations spend their time constructing a world into which you can insert yourself. That's why social theorists used to accuse media moguls of manipulating society. Until recently, the only way you could reach a critical mass of people was to use the mass-media. Today, as we've seen, the internet is changing all that.

You can trace the moment when social media 'jumped the shark' to a point in December some two years ago. A PR consultant, Justine Sacco, was travelling to her family home in South Africa. Before leaving Heathrow on the 11-hour flight she thoughtlessly tweeted; "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!" While she was in the air her tweet ignited a fire-storm. By the time she landed in Johannesburg, Sacco had been sacked, accused by her company of making "hateful statements".

The point is not whether or not her punishment was appropriate; the real issue is that the affair took place entirely without reference to the traditional media. Both offence and verdict were instantaneous judgements. It's not so much that Sacco might have exculpated herself; the point is she never had a chance. Two new factors were at work. The first was time: the whole event had moved so quickly Sacco's business felt it needed to act immediately and sack her. The second was coherence. A small group of like-minded people who were (correctly) horrified by the tweet had quickly coalesced to demand action. As soon as Sacco was dismissed the angry mob dispersed. The entire cycle of stupidity, anger, outrage, and corporate action had occupied less than a day. Perhaps far more importantly, a new form of social communication had taken centre-stage.

We can't understand what's occurring now by deconstructing things in the old way. Our politics, society and lives have changed. That's what we really mean when we talk about the 24-hour media cycle. Speed of action. The velocity of our lives.

Think about what this means, however, for vital decisions. Such as, for example, going to war. Speed and cohesion, coupled with the amplification of political messages, present new and radical changes for the way we go about doing things in society.

In some ways the way things happen today probably has more in common with what happened in the assemblies and forums of Ancient Greece and Rome than it does with the ponderous, measured world of the 19th Century, prior to World War One. At that

time, in the years when our constitution was drawn-up, popular opinion was (essentially) irrelevant. Politicians deliberated, if necessary for ages, before acting.

This was especially true in the case of war. There were plenty of colonial conflicts, of course, to which such 'rules' didn't apply, nevertheless the idea that an English-speaking democracy would ever initiate a war seemed, somehow, completely implausible to most people.

This sense that 'war' happened to us is exemplified in the words chosen by Prime Minister Menzies when announcing Australia's entry into the Second World War in 1939. "Fellow Australians," he declared. "It is my melancholy duty to inform you officially that, in consequence of a persistence by Germany in her invasion of Poland, Great Britain has declared war upon her and that, as a result, Australia is also at war."

Our involvement in conflicts in Borneo, Malaya, Korea and Vietnam were all, similarly, allegedly direct responses to communist aggression (although the Gulf of Tonkin incident, in which a US warship believed it had been attacked by Vietnamese vessels, was later found to have been a 'mistake'). The idea that democracies don't choose to go to war lodged itself firmly in popular consciousness. Indeed, until 2003, the previous occasion on which the UK government had actually bothered to declare war on another country was in 1942, when it declared war on Siam (Thailand).

The invasion of Iraq changed everything. We now know that intelligence can be fabricated, cooked up and then selectively leaked in order to justify an unnecessary war. The legacies of this conflict reverberate through the Middle East - and the world - today.

In the time before the Internet the media may have provided a check on the ability of government to declare war. It doesn't any longer. That's why it's vital that the power to declare war is entrusted to Parliament. This is the only proper forum for making such a vital decision. The development of the internet and new communications networks in our society means that the media no longer provides an adequate check on the power of executive government.