



AUSTRALIANS FOR WAR POWERS REFORM

AWPR Response to the Parliamentary Inquiry into War Powers

On Friday 31 March 2023 the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) released the final report from its *Inquiry into international armed conflict decision making*. The full report can be found [here](#).

The JSCFADT made seven recommendations to the federal government. The following is a response to those recommendations from Australians for War Powers Reform (AWPR)

GENERAL COMMENTS FROM AWPR

We thank the Committee for all their work, and for the recommendations, some of which, if implemented, would bring Australia a little closer to a decision-making process for going to overseas wars that befits a modern democracy. This is a first step in the right direction, but there is a long way to go. The vast majority of the submissions the Committee received urged change on a much larger scale. As momentum builds towards a major war with China, the problem remains of decisions for war being in the hands of a tiny number of people, and it is an increasingly urgent problem to resolve.

We note and deeply regret that the Committee's report, while stating that the power to send our military personnel into conflict is 'the gravest decision a government can make', was released on the Friday afternoon of the last parliamentary sitting day before the budget sittings in over a month's time. This has more the appearance of wanting to bury any discussion of the gravest decision a government can make, rather than promote it.

AWPR notes also the very significant warnings against change that were given by Defence Minister Marles and Foreign Minister Wong very early in the inquiry process. These were not good faith interventions but were anti-democratic and clearly intended to squash any aspirations for change on the scale that's needed.

Recommendation 1

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

AWPR response to Recommendation 1

Reaffirm from where/whom/when? Who decided this, how and with what authority? **The Constitution doesn't specify an Executive prerogative to make decisions about going to war.** The Australian people have never agreed to this, and in fact opinion polls show that the Australian people overwhelmingly do *not* want this.

Recommendation 2

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

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

AWPR response to Recommendation 2

This recommendation confirms that the constitution does not specify who decides whether we go to war or not. If it were clear in the Constitution, the Cabinet Handbook would not need amending. The decision as to where that power lies is a political one, not a constitutional one.

What happens ‘in the modern era’ to use the report’s own words, should reflect what Australians currently want, and that is for parliament to decide whether we go to war, because the current process lands us in one disastrous war after another.

Section 8 of the Defence Act 1903 states ‘*The Minister has general control and administration of the Defence Force.*’ This is totally different from deciding when we go to war. The Defence Act cannot legitimately be used to authorise sending the ADF to war.

The reference to ‘conflicts that are not supported by the UN Security Council’ are deeply alarming. Unless such conflicts are a matter of self-defence with our nation under direct attack – in which case there would be no need for any discussion about a military response – **such wars are illegal under international law.** We should be reaffirming that principle, not setting up a mechanism whereby Australia could engage in illegal wars. The report’s recommendation that there is a role for the Governor-General in authorising such wars must be totally rejected.

A statement regarding the objectives and legality of the proposed war is important, and a good recommendation. The stated objectives should not be vague, but must be specific military goals (particularly important given the frequency of shifting goalposts in wars), which would indicate the exit point also.

The likely costs of the proposed war must be outlined too:

- Human costs, for the ADF and others. Briefings from relevant humanitarian agencies should be included, as civilians bear most of the costs of modern wars.
- Economic costs
- Risks to our international relations
- Other costs

Additional comment re Recommendations 1 and 2

The Report struggles with the lack of constitutional support for the Prime Minister or “the Executive” to have the power to take Australia to war. This power does not exist in Section 61 of the Constitution, and certainly not in the Defence Act.

Section 61 states: “The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.”

The government should face the bald fact that the Constitution does recognise a Parliament, but it does not mention a Prime Minister. **There is no constitutional support for a Prime Minister to arrogate to themselves war powers.**

Recommendation 3

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

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

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

AWPR response to Recommendation 3

An urgent recall of parliament would be an improvement on the current situation, but if it is mostly to inform parliamentarians of decisions made, rather than to have them make the decisions, then it would be of far more limited value.

There is in addition a serious need for parliamentary debate on ways forward where there is a situation of escalating tensions, in order to avert crises or triggers (possibly manufactured) that lead to the claim that 'we have no choice' but to go to war.

Recommendation 4

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

- a **Statement to both Houses of Parliament be made at least annually** from the Prime Minister and Government Senate Leader and debate facilitated

- an Update to both Houses of Parliament be provided at other times during the year (at least twice) from the Minister for Defence and Minister representing the Minister for Defence in the other Chamber and debate facilitated

These practices should be replicated in the Cabinet Handbook.

AWPR response to Recommendation 4

Regular statements to parliament would be welcome. Such statements should address - with evidence - all the factors set out in the original statement to parliament, including:

1. any issues that relate to legality
2. progress in achieving the specific military goals and towards reaching the exit point
3. the costs – total human costs, economic costs, changes in our international relations, and other costs

In addition, after any armed conflict an independent public inquiry should be established to report on how Australia entered the war, whether its stated purpose was achieved, its results, and all its costs as listed above.

Recommendation 5

3.61 The Committee recommends the Government:

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

AWPR response to Recommendation 5

This is welcome

Recommendation 6

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

Defence and specified portfolio agencies including:

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

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

- individual domestic intelligence reports
- intelligence sourced from foreign intelligence bodies where such provision would breach international agreements
- detail regarding operational matters or information regarding highly sensitive capabilities or protected identities, except where specifically authorised by the Minister for Defence. Statutory restrictions should be placed on members, their staff (one of whom should be able to obtain a security clearance at minimum NV2 level) and secretariat staff regarding the disclosure or publication of classified information with appropriate penalties including imprisonment for breaches.

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

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

- Six Government members and five non-Government members, with a minimum of:

- One Government Member of the House and one Government Senator
- One Opposition Member of the House and one Opposition Senator
- One Government Member as committee chair

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

AWPR response to Recommendation 6

The establishment of a Joint Statutory Committee on Defence could have merit and warrants further discussion. **Such a committee could allow for greater parliamentary discussion** of “war or warlike operations” than happens now with the Defence Committee of the Joint Standing Committee on Foreign Affairs Defence and Trade.

However, the proposed composition of the Committee would be unlikely to reflect the makeup of the parliament. The cross-bench, who play an increasingly strong role in Australian politics, would most likely be excluded, and so it would be little better than the current situation of having decisions made by the Prime Minister and the Ministers chosen by the PM. Appointment of the Committee by the Prime Minister is unacceptable.

The recommendation implies that the proposed statutory defence committee would only be discussing wars or warlike operations after they had been initiated by the Prime Minister, **thus maintaining the undemocratic dominance of the Executive** over Parliament in relation to war powers. The proposed Statutory Defence Committee would be likely to rank higher in the Committee hierarchy than the present Joint Standing Committee on Foreign Affairs, Defence and Trade. It could give a virtual monopoly to the Minister for and Department of Defence and unless invited, the Minister for Foreign Affairs would not be present at its meetings. This could have the effect of excluding or marginalising diplomatic options from the Committee's consideration of military options.

Recommendation 7

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