AUSTRALIANS FOR WAR POWERS REFORM

Joint Standing Committee on Foreign Affairs, Defence and Trade
Inquiry into the implications of the COVID-19 pandemic for Australia's foreign affairs, defence and trade

Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade
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Canberra ACT 2600

Submission by Australians for War Powers Reform

Who we are:

Australians for War Powers Reform (ARBN 162 022 979) includes among its members former senior military officers, diplomats, defence officials and academics. It is an Australian Registered Body which was incorporated in Victoria in 2012 to campaign, inter alia, for reform of the so-called 'war powers' – the power to deploy elements of the Australian Defence Force into armed international conflict.

Our Submission relates to the overarching Term of Reference, and sub-items 1 and 5.

Summary

We wish to make five key points in relation to the Terms of Reference of this Inquiry:

- COVID-19 will have profound effects upon the balance of power and influence in the world, and in our region in particular
- COVID-19 will intensify the move to more automated weapons systems, and more reliance on artificial intelligence
- Any effective review of Australian defence and strategic policy must be based on a sober and realistic appreciation of what we can expect from the lynchpin of Australian defence policy since the onset of the Cold War – the ANZUS Treaty
- Leaving in the Executive the power to deploy the Australian Defence Force into international armed conflict is not a safe and secure basis for Australian defence policy
- Accordingly, the so-called "war powers" should be relocated to the Federal Parliament, subject to adequate provision for the government of the day to take emergency action in response to direct threats to Australia.

The strategic implications of COVID19

The global pandemic COVID19 is still playing itself out. Members of the global community of nation states have responded with varying degrees of timeliness and efficacy, leading to greatly different outcomes related to the size of their economies and populations.

The response of our traditional allies the United States and the United Kingdom has been particularly ineffective, leading to the United States having the highest death toll, the United Kingdom the highest in Europe, and both at the higher end of deaths per million population.

The crisis has inflamed divisions within US society, and between leading state actors, most notably the US and China, at a time when China is becoming more assertive in the region and beyond. In our view the international behaviour of the various leading actors will have long term effects upon their standing in the world. There is widespread commentary, in particular, about the US under its current administration being unfit for any kind of leadership position in relation to the COVID19 crisis and other global challenges, including "America First" characteristics of individual actions. Its hostile stance towards the World Health Organisation must be seen in the context of the Trump Administration's hostility to multi-national action more generally, his hostility towards NATO and the withdrawal of US from the Joint Comprehensive Plan of Action (JCPOA) on Iranian nuclear capability being cases in point.

While much of this can be attributed to the particular personality and world view of President Trump, the strength of the support he has received from the Republican leadership in the US Congress indicates that it would be unwise to assume that this will pass into history with the Trump Presidency. This problem has been worsened by Australia's failure sufficiently to condemn and distance ourselves from policies that are leading us in a dangerous direction.

The emergence of such an infectious and potentially lethal virus has profound implications for defence capability. It has always been the case that defence platforms are designed for military effectiveness rather than crew comfort. Both space and payload are at a premium. Operating in cramped conditions and close proximity to others is part and parcel of many kinds of military service. Social distancing is not an option on a submarine.

This inevitably raises questions about the dependability of platforms that depend upon many service personnel being in close proximity in confined spaces for extended periods. Of course we can only fight wars with the weapons at our disposal, so reliance will continue to be placed upon these platforms, but this new element of uncertainty raises two important issues:

- It will tend to accelerate the development of autonomous weapons systems using artificial intelligence. That artificial intelligence is only as good as the people who designed it. Such weapons not only carry dangers for civilian populations in cultures and environments for which the decision-making capabilities of the weapons were insufficiently prepared; they also carry the danger of inadvertently triggering responses that lead to military escalation.
- In any nuclear weapons state in which the leadership entertains doubts about the extent to which the conventional military forces can be relied upon, there is the danger of an early resort to the use or threat of the use of nuclear weapons.

Implications for Australia's Foreign Affairs, Defence and Trade policy, particularly with respect to strategic alliances and regional security

The above considerations mean that it is essential to undertake a root and branch appraisal of the assumptions upon which Australian defence policy has routinely been based.

In particular it is timely to review one of the fundamental bases of Australian defence policy – the ANZUS alliance – and what place it should take in our future strategic policy.

There is no doubt that the alliance is important to Australia – it has long provided, inter alia, a basis for access to US technology and intelligence. Unfortunately, however, in Australian political lore it has been elevated to a status which the text of the treaty does not warrant. Australian politicians have routinely spoken of ANZUS both as providing security assurances from the United States, and as giving rise to obligations to assist the United States in military operations initiated by it, including military operations outside the Pacific Region.

The operative clauses of the Treaty are:

Article III

> *The Parties will consult together whenever in the opinion of any of them the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific.*

Article IV

> *Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.*
>
> *Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.*

Article V

> *For the purpose of Article IV, an armed attack on any of the Parties is deemed to include an armed attack on the metropolitan territory of any of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.*

It is clear that the only material obligation is to consult – any action which might be taken "to meet the common danger" is entirely dependent upon each party's "constitutional processes". In the case of

the United States, that means the US Congress, where, under the US Constitution, the power to make war resides.

The above articles need to be read in the context of the Preamble, which has the parties

> ***REAFFIRMING*** *their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all Governments…*

And Article I, which provides

Article I

> *The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.*

Regrettably, our US ally has not been notable for its faith in the purposes and principles of the United Nations, nor for its willingness to refrain from the threat or the use of force.

It is vital in our view that Australian defence policy be founded upon a correct reading of our treaty obligations, and our obligations under international law, including our treaty obligation under both ANZUS and the UN Charter to attempt to resolve by peaceful means any international disputes in which we might be involved. To ensure that, we must ensure that we are not dragged into military conflict by misunderstanding or misrepresentation of our obligations, and that we do not become parties to conflict triggered by brinkmanship or the unintended consequences of "smart" weapons systems going wrong.

Policy and practical measures required to form an ongoing effective national framework to ensure the resilience required to underpin Australia's economic and strategic objectives

Deliberations under this heading must be based upon a correct technical understanding of the concept of resilience. A useful definition of resilience is "the capacity of a system to absorb disturbance and reorganise so as to retain essentially the same functions, structure and feedbacks – to have the same identity". Put another way, it is in this context, the property of Australia's social and economic processes to maintain their general structure and functions in the face of disturbance, even though they must adapt and change in various ways.

Clearly any entry into military conflict at a significant scale would be a severe test to our social and economic systems.

We submit that leaving the power to deploy the ADF into international armed conflict in the hands of the Executive is not a reliable way of ensuring that the ramifications of Australian entry into conflict are fully considered, nor of ensuring that they are in accordance with international law. The small group decision making is too prone to group-think, especially when it is led by a Prime Minister

determined to show the US that we are "a good ally". The incentive to question the legality of what is proposed, or to challenge the intelligence assessments on which it is based, will be distinctly lacking. Similarly the huge humanitarian implications of a decision to go to war, especially for civilians where we fight our wars, become marginalised, if indeed they are considered at all.

To the extent that they think about the matter at all, most Australian citizens would expect that any decision to deploy the ADF would only be taken after careful consideration by Cabinet. This overlooks the fact that Cabinet has no constitutional role. It is convened only when the Prime Minister wishes to convene it, and considers only the matters which the Prime Minister wishes it to consider. On matters of national security the Prime Minister would at best consult the National Security Committee of Cabinet (NSC).

The record shows that decisions to enter into the wars in Vietnam, Afghanistan and Iraq were in fact taken by the Prime Minister alone. In the case of the invasion of Iraq, NSC was consulted only on the form that our participation would take, not on the threshold question of whether or not it would be in Australia's national interest to participate.

To overcome this problem, we propose that the Parliament should be involved in any decision to expose members of the ADF and the nation itself to the perils and uncertainties of armed conflict. Currently our war power is exercised simply by the Defence Minister formally implementing a decision by the Prime Minister or the Cabinet, under a section of the Defence Act in a way that was not contemplated by its drafters. The momentous decision is not subject to prior authorisation, third party sign off or judicial review of the kind expected of much more mundane decisions. The Parliament has no formal role and its power subsequently to withdraw confidence in the Prime Minister is made even less likely by the opening of hostilities.

Following a decision of the government to restrict the jurisdiction of the International Court of Justice in March 2002, the legality under international law is unlikely to be tested. The Governor-General is no longer even asked to sign off on the decision (with no ability to ask questions, satisfy him/herself of the legality of the proposed action or fulfil the role of the Crown to 'counsel, advise and warn'). We argue that the decision to go to war must be made by the most democratically elected body at the heart of our democracy. Our Westminster system delegates much to the Executive but the most important decisions must come back to the Parliament for prior approval.

The members of the ADF and the Australian public deserve in our view to know that the decision to embark on a war-like course is the result of careful deliberation by their elected representatives with at least the leaders having full access to all relevant legal, intelligence, military and humanitarian information. This will not only generate better decisions but will legitimate those occasions when we must do what states sometimes have to do – to kill and be killed on a large scale.

Four principal arguments against Parliamentary involvement are raised by those who wish to preserve the status quo.

Minor parties might block the necessary resolution in the Senate. For the negative vote of a minor party to be effective, however, it would be necessary that there also be a negative vote

from the major Opposition party: the combined votes of Government and Opposition would make the views of the minor parties irrelevant. As it is difficult to conceive of a major (or indeed a minor) party voting against deployment of the ADF at a time that the nation is genuinely under threat, this sounds more like a concern that the involvement of the Parliament would make it more difficult for the Government of the day to inject the ADF into wars of choice – which is of course the whole point of the exercise.

The Parliamentary process will take too long.

Apart from the Ready Reaction Force at Townsville (essentially the 3rd Brigade, consisting of the 1st, 2nd and 3rd Battalions, Royal Australian Regiment, in aggregate about 4,000 civilian and military personnel), most combat elements of the ADF are held at a low state of readiness. Quite properly, most units are not maintained in a battle-ready state, and before they can be deployed a major investment in both personnel training and materiel is required in order to bring them up to the required standard. So there is ample time for Parliament to consider and vote on the question.

The Government might have access to information or intelligence which it cannot reveal.

This is an argument that cannot be accepted within the framework of a Westminster-style Parliamentary system. While it is certainly true that a government may be in possession of information that cannot be used in Parliamentary debate, it is fundamental to our system that today's Opposition Leader could be tomorrow's Prime Minister – even without an election. All that is required for the government to fall is for it to fail to win a confidence motion on the floor of the House of Representatives, at which point the Prime Minister of the day will normally advise the Governor-General to prorogue Parliament and call a general election, but the Governor-General would have the alternative of giving the Opposition Leader an opportunity to test the confidence of the House.

This being the case, it is fundamental to our national security that at the very least relevant leading members of the opposition not only be cleared to deal with national security classified information, but that at times of looming threat they be made privy to the available intelligence so that both government and opposition can conduct themselves in relation to the matter in an informed way. This is what happens in practice; for example, in 2015, when the Government was considering a request to extend RAAF air strikes from Iraq into Syria, then Prime Minister Tony Abbott indicated an intention to brief Opposition Leader Bill Shorten on the situation.

There is a more subtle point to be made here. While secret intelligence can be very valuable in giving early warning of and filling out the detail of an emerging threat, situations will be rare in which a direct threat to Australia would emerge without any warning signs being discernible from open sources. Thus whatever secret intelligence the government might possess which confirms its suspicions about an emerging threat, it is safe to assume that for Parliamentary purposes it will be able to follow the commonplace practice of presenting a rationale which

derives from open sources, and perhaps simply stating that this picture is confirmed by classified information in the government's possession, which information has been shared with the Opposition leadership.

Beyond this, arrangements could be made for closed briefings to be provided to, say, the Joint Committee on Intelligence and Security, or indeed closed sessions of the two Houses, as happened on occasion with the House of Commons during World War Two when much more was at stake.

The process would be nugatory because everyone would simply vote on party lines. This may be so, but cannot be assumed to be so. Certainly the limited Australian history shows that on the occasions when deployments have been debated in Parliament, members have voted on party lines. Historically, however, these debates have taken place against the backdrop of a decision already taken. This brings into play two dynamics. First, there is the feeling of obligation towards the members of the ADF who are being put into harm's way, the feeling that we should not undermine the morale of the troops by suggesting that they should not be participating in the conflict.

Second, there is the defensive shield: "It doesn't matter what I think, the decision has already been taken by Cabinet and my job now is to support it and to support the young men and women of the ADF".

We believe, however, that if Parliament itself were to be the place where the matter is decided, quite a different dynamic would come into play. If the matter is to be put to a vote in both houses, each and every member of Parliament would have to participate in that process knowing that their vote would be recorded and would be a matter of history for all time, no matter how the matter turned out. People who felt strongly about it could not absolve their consciences with the thought that the matter has been taken out of their hands; the matter is very much in their hands, and we may see what looks very much like a conscience vote.

The British experience of prior authorisation has shown that MPs take the decision very seriously and there is there is a great deal of voting across party lines. With such prior votes having been taken Iraq, Libya and Syria (twice) it is very close to a convention.

If it turns out that the matter is decided on party lines and the government of the day wins the day, one can hardly complain that there has been a failure of the democratic process.

Australians for War Powers Reform has paid considerable attention to the key issues that would need to be resolved in framing legislation to give effect to this reform.

Some of the key issues to arise are:

Independent legal professional advice on the legality of the proposed military action should be provided and, in most cases, released. If the Attorney-General does not feel 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 who hold practising certificates and hence must comply with the relevant code of ethics. In any case the relevant parliamentary committee should be able to call on other advice.

Compulsory jurisdiction of the ICJ

In all cases, Australia should accept the compulsory jurisdiction of the ICJ on the legality of the war or publicly acknowledge that it is not certain of its case and give reasons for nonetheless proceeding.

Jurisdiction of the ICC

Australia should congratulate the 34 states parties which have ratified the amendment to the Rome Statute, bringing into effect the crime of aggression under that Statute (which occurred when 30 countries ratified it).

Australia should ratify the amendment itself without reservation.

Australia should affirm that it has itself been committed to refrain from waging aggressive wars since 1928, when it was, with USA, UK, France, Germany, Japan and others, an original signatory of the 1928 Kellogg-Briand pact (noting that China signed soon after). Its commitment continued with our signing of the UN Charter and leadership of the Tokyo International Military Tribunal for the Far East. Most importantly, our major alliance, the ANZUS treaty Article 1 commits us to refrain from aggressive war:

> *The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.*

However, ratifying these amendments to the Rome Statute and accepting the compulsory jurisdiction of the ICJ on the use of force would demonstrate that the above declarations are sincere commitments which can be tested in independent international tribunals.

Australia should urge all nations to ratify the Rome statute and acceptance of the compulsory jurisdiction of the ICJ - with particular emphasis on the Kellogg Briand signatories. Australia should also state that it is happy to sign bilateral or multi-lateral treaties incorporating mutual commitments to the form of Article 1 of the ANZUS.

Australia should launch an independent enquiry into previous use of force by Australia to ensure that we learn the right lessons from those involvements and to give those who believe they were legal the opportunity to test their views. While it is our view that almost all were legal, and one was clearly not, this is a matter that should be subject to rigorous debate and independent determination.

Role of the Governor-General

Pending the passage of legislation giving effect to reforms of the kind we are advocating, there needs to 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, declarations of war and peace treaties were approved by the British Crown. This was transferred to the Governor-General. To the surprise of some recent Governors-General, they were not involved in decisions to go to war. It appears that Australia has gone to war in two major wars (2001 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 it might be unlikely that the High Court would invalidate a decision to go to war under section 8, there is absolutely no doubt about the constitutional validity of going through the Governor-General or the Governor-General in Council. Using the latter method would incorporate some limited but potentially important safeguards (eg. 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 and ask for further advice).

Legal basis for command

It is of vital interest to the Defence Minister and all members of the ADF that any decision to engage in war-like activity be constitutionally bullet-proof. To have the 'war powers' slip imperceptibly from being the subject of solemn declaration by the Governor-General, to being only a secret Prime Ministerial or Cabinet decision implemented by the Minister for Defence under his/her Defence Act administrative powers 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.

In closing, we would observe that COVID19 (a new and so far untreatable pandemic disease) represents just one of ten catastrophic risks to humankind identified by the Commission for the Human Future in a recent report, the others being decline of key natural resources and an emerging global resource crisis, especially in water; collapse of ecosystems that support life, and the mass extinction of species; human population growth and demand, beyond the Earth's carrying capacity; global warming, sea level rise and changes in the Earth's climate affecting all human activity; universal pollution of the Earth system and all life by chemicals; rising food insecurity and failing nutritional quality; nuclear arms and other weapons of mass destruction; advent of powerful, uncontrolled new technologies; and national and global failure to understand and act preventively on these risks.

As we saw with last summer's bushfires, most if not all of these risks will place increasing strain on Australia's capacity to manage crises, as bushfires intensify, more extreme weather events occur at home and in our region, and sea level rises and food insecurity trigger mass movements of people. There is a critical need for Australia to take serious and effective climate action and other environmental protection measures, to help mitigate these risks. In addition there is a need to strengthen our civilian emergency response capacity. Any militarisation of our crisis responses in the region, for example by increasing ADF capacity at the expense of civilian capacity, risks suspicions in the region about our motives. In addition, some of the operations in which the ADF was engaged highlighted the fact that the ADF can be an awkward and inappropriate fit with the civilian organisations that are our first line of defence against natural disasters

In AWPR's view, the rapidly changing nature of the threats we face, most of which are not amenable to military force, must lead to a cooperative rather than confrontational focus within our region and globally. This strengthens the case for the strongest degree of scrutiny before deployment decisions are made. To achieve this, such decisions should be located in our Parliament. We doubt that in the future Australia will be able to indulge the luxury of deploying combat forces for purposes not directly connected with the defence of Australia.

We would be happy to appear before the Committee to elaborate the above.

(Paul Barratt AO)
President
Australians for War Powers Reform
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