The Secretary
Senate Foreign Affairs, Defence and Trade Committee
Parliament House
Canberra ACT 2600

Dear Sir/Madam

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

On 20 August 2009 the Senate referred the *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2]* to the Senate Foreign Affairs, Defence and Trade Committee for inquiry and report.

According to the Explanatory Memorandum, the purpose of the Bill is to ensure that, as far as is constitutionally and practically possible, Australian Defence Force personnel do not serve overseas in warlike actions without the approval of both Houses of the Parliament.

This submission is a response by the undersigned to the Committee's invitation to interested individuals and organizations to make submissions.

The Royal Prerogative

The right of the Executive, rather than the Parliament, to decide to send troops to war is in the Australian constitutional context a legacy of the Royal Prerogative, which in turn has its roots in the pre-democratic notion that the power to make war is an attribute of the sovereign rather than of the people. In the globalised world of the 21st century, and in any society founded on the belief that power flows from the people to the state rather than from the state to the people, it is both an anachronism and an anomaly.

Transparent and inclusive procedures for taking such decisions are both possible and demanded in a healthy democracy. They would bring several advantages.

As the decision to commit Australian troops to the invasion of Iraq shows, the current situation in which the Prime Minister, with or without the advice and consent of his colleagues and their departmental advisers, can commit Australian forces to war or warlike operations in circumstances short of a direct attack on Australia's homeland, can have a range of undesirable consequences. These include misleading, overstated or over-certain claims to the Australian Parliament and people, patently absurd claims of self defence against a real and imminent threat to Australia, a lack of clarity as to what the mission is and what success would look like, and vexed questions of UN authority, a source of legitimacy with which Australian people are comfortable, and of legality[1] in

[1] In relation to the questions of UN authority and legality, see the contrasting opinions given to the Government and the Leader of the Opposition, published in the *Melbourne Journal of International Law*, Volume 4, May 2003, and available online at http://mjil.law.unimelb.edu.au/issues/archive/2003%281%29/06Iraq.pdf.

relation both to customary international law and to the provisions of the Charter of the United Nations.

Post-World War II Deployments

The pattern of Australian decision-making on several of the most important deployments of Australian forces overseas since World War II – notably Vietnam, Afghanistan (a series of separate and distinct deployments) and Iraq – has had one or more of these undesirable features, and has consequently raised substantial domestic dissent.

In each of these situations the government of the day had in mind some party political advantage through the exploitation of the claimed special relationship with the US as well as of patriotism. One might have expected that this natural but undesirable attribute of the most serious decisions a government can make would have disappeared with the end of the Cold War. This reasonable expectation and hope was dashed, however, by the decision to join the war on Iraq, the way it was taken, and the way it was presented.

There have been other deployments which did not raise such problems – East Timor, Bougainville, the Solomon Islands and various United Nations peacekeeping or police operations – but our contention is that each of these would have benefited by being submitted for approval by the Parliament, to put beyond doubt that the deployment had the formal approval of the elected representatives of the Australian people. We submit that all deployments of Australian forces into warlike situations would have more credibility and political force both within the nation and within the alliance if they have been subjected to a Parliamentary process rather than avoiding that process.

Governance

We submit further that the requirement to submit a case to Parliament would have the additional benefit to the quality of Australian governance that it would impose on the Government of the day the discipline of putting on the record a clear statement of what the purpose of the deployment is, on what premises it is based, what the nature of Australia's involvement will be, and how long it is expected to last.

The Iraq war also dealt a serious blow to good governance because it appears that policy advice was neither sought from nor offered by the government's senior civilian advisers. The governance deficit needs to be addressed in several ways, and we submit that a more open system of decision-making and parliamentary involvement would make a useful contribution.

Questions of Legality

The Iraq war raised grave issues of legality, and the then Government's defence was unconvincing. This is a highly undesirable situation for a country like Australia, whose security is bound up with observing international legal norms and encouraging their

wider acceptance, including in the Asian region. Asian countries have been trenchant critics of the failure to respect the international norms relating to the use of force and the misuse of the United Nations by the "Coalition of the Willing".

The invasion of Iraq is very difficult to justify by reference to the traditional criteria enshrined in the customary international law on pre-emptive or anticipatory self-defence, the standard precedent for which is the *Caroline* Case which arose from an 1837 attack by Canadian loyalists, inside United States territory, on a vessel that was being used to aid the activities of Canadian republican rebels.

The *Caroline* Affair has been used to establish the principle of "anticipatory self-defence" in international law. The principle is quite restrictive: it holds that pre-emptive action may be justified only in cases where the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation". It is well established that to be a valid use of force in terms of self-defence under international customary law, there is a need that it be immediate, proportionate and necessary.

It is clear that the rights available under the customary law which flows from the *Caroline* Affair can be invoked only within very narrow confines. Defendants at Nuremberg sought to invoke them as a defence in relation to the invasions of Denmark and Norway, but the International Military Tribunal was not impressed.

Circumstances of anticipatory self defence fitting the *Caroline* principles would seem to arise so rarely, and when they do arise to do so with such immediacy, that they would be unlikely to present insuperable difficulties in relation to the proposed transfer of the war-making power to the Parliament.

Uses and abuses of Intelligence

The decision by the "Coalition of the Willing" to commit to an invasion of Iraq, ostensibly in pursuit of Weapons of Mass Destruction, is often characterized as a "failure of intelligence". We submit that this claim is itself another example of misleading the Australian public, as indicated by the following first-hand account of what was going on in the United States, upon which Australia relied so heavily for its intelligence assessments.

Writing in the prestigious journal *Foreign Affairs*, Paul R. Pillar, who served as the CIA's National Intelligence Officer for the Near East and South Asia from 2000 to 2005, says:

> *In the wake of the Iraq war, it has become clear that official intelligence analysis was not relied on in making even the most significant national security decisions, that intelligence was misused publicly to justify decisions already made, that damaging ill*

will developed between policymakers and intelligence officers, and that the intelligence community's own work was politicised"[2].

Pillar went on to say:

If the entire body of official intelligence analysis on Iraq had a policy implication, it was to avoid war – or, if war was going to be launched, to prepare for a messy aftermath. What is most remarkable about prewar U.S. intelligence on Iraq is not that it got things wrong and thereby misled policymakers; it is that it played so small a role in one of the most important U.S. policy decisions of recent decades.[3]

We submit that a calm and deliberative process of Parliamentary scrutiny of the case for going to war could make a significant contribution to avoiding a similar disconnect between the intelligence assessments and the policy-making process emerging in the course of future Australian consideration of the case for deployment of the Australian Defence Force for warlike purposes.

'Self-Defence' and Justification

The fact that habitual justifications of self-defence for sending Australian ground forces into warlike situations have involved deception and exaggeration is unbecoming for one of the world's oldest democracies and humiliating for one in Australia's situation.

Australia has been one of the most secure countries in the world in the post-war era, as reference to the various editions of the Strategic Basis of Australian Defence Policy produced since 1970 will indicate. Since the Second World War, warlike situations in which Australian forces have been deployed have been limited in scale and geographic extent, and undeclared, and have not constituted a direct threat to Australia or its territories. Yet in the Iraq war the justification of self-defence became more strident but more unconvincing than ever before. This suggests that in the age of the 'War against Terror' – terminology which has been renounced by the United States and the United Kingdom but not yet renounced by the Australian Government – Parliamentary scrutiny of political rhetoric needs to be strengthened.

The Practicability of Codifying the Prerogative

We submit that it is not possible to conceive of a situation in which the demands of Australia's alliances would preclude the government from following the procedures set out in the draft Bill. The decision in principle to go to war has often been made long before any public announcement, and also without adequate consideration and debate within the Executive.

[2] Paul R. Pillar "Intelligence, Policy and the War in Iraq", *Foreign Affairs,* March/April 2006, pp 15-27.
[3] Ibid., p.16

Also, in the case of substantial deployments involving more than the emergency deployment of the Ready Reaction Force, the lead time to prepare the relevant force elements for deployment will be greater than the lead time required for Parliamentary debate.

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

Some might argue that the requirement to seek Parliamentary approval could impede timely action by the Government at time of national peril, because sensitive information which is known to the Government could not be disclosed to the Parliament. Our response to that would be that there has been a long tradition in this country, and other countries governed under a Westminster system, of briefing the Leader of the Opposition at times of national peril. If the Prime Minister were unable to convince the Leader of the Opposition of the merits of a proposed deployment, then we would submit that the need for the proposed deployment would be by definition less than compelling.

Joining Acceptable Company

The circumstances surrounding the decision to commit to the Iraq war – the misuse of intelligence, and failure to take due heed of its limitations and the caveats with which it was provided; the failure to make best use of the United Nations and its capabilities and procedures; the unilateralism; the mixed or ulterior motives of American neo-conservatives, with whom Australian politicians and officials were closely associated; the attendant distraction of attention from Afghanistan and the pursuit of al-Qaeda; and the affront to many moderate Muslims – indicate a requirement to change legislation or practices to give Parliament more control or participation in the decision-making process.

As a result of the Iraqi experience British Prime Minister Gordon Brown announced in July 2007 that the United Kingdom Parliament would be given a role in sending troops to war, and he has recently established a Committee of Inquiry into all aspects of the decision to go to war against Iraq.

It is now broadly accepted in the United Kingdom that it would be inconceivable that troops would be sent to an armed conflict without prior Parliamentary approval. The question of how that practice should be codified is under active consideration.

Australia, as a fellow member of the "Coalition of the Willing" and as a Westminster democracy, could be expected to give the most serious attention to changes in British practice. While Australia was not a policy innovator in the invasion of Iraq in the sense in which the U.K. was, its policies and their consequences had distinctive features which call for reflection and an open mind about the desirability of change. It is therefore

disappointing and disquieting that the Prime Minister's then Senior Adviser (Foreign Affairs, National Security, Defence and Trade), Mr Gary Quinlan, replying on the Prime Minister's behalf to a letter from Dr Kristine Klugman, President of Civil Liberties Australia, stated:

> *The Government takes its responsibility in committing to any military operation extremely seriously. The process is legally valid and has been followed by successive Australian Governments. Any decision to commit Australian Defence Force personnel into a conflict involves extensive consultation with various organisations and agencies. The emphasis of all parties in this robust and enduring process is to safeguard Australia's national interest. The government is satisfied with the existing procedure and has no intention of revising it.*

This indicates a regrettable lack of willingness on the part of the Government to consider changes to our national procedure in the light of the Iraq experience.

Our main response to the formulation quoted above is that the extensive process of consultation that is described makes it all the more remarkable that the Government does not propose to consult the Parliament, and certainly supports our contention that in normal circumstances there would be time to consult the Parliament.

Also, any commitment to due diligence made either by the Prime Minister or on his behalf can only be a statement about the practices of the current Government; it cannot bind future Governments.

The Explanatory Memorandum accompanying the Bill points out that if the proposed changes were accepted, Australia would be joining many like-minded democracies. The international advantages of being in such company should not be underestimated.

We submit that Australia should join up to this reform of the power to commit forces to warlike actions. The unsatisfactory aspects of the decision making process relating to the invasion of Iraq present, we believe, a compelling case that the Prerogative Power should be codified.

We thank the Committee for the opportunity to make this submission.

Yours sincerely

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