The Secretary
Senate Foreign Affairs, Defence and Trade Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

On the day before the attack on Baghdad, I wrote to the Governor-General, the PM and Leader of the Opposition. A copy letter was delivered also to every member of the House and Senate, all dated and delivered 18 March 2003. I delivered a second copy of the same with a covering letter here included to the G-G at Yarralumla on 23 March 2003 . I attach a photocopy text of those letters.

I submit that, in a demonstration of honest dealing with the Parliament and the people of Australia upon an issue of the utmost constitutional importance - and of the utmost moral significance, given the death, suffering and destruction visited upon Iraq and its people under an act of aggression done by the Commonwealth of Australia and other polities, acting together on and after 19 March 2003 - the whole document submitted herein, including this forenote, should be attached to the report of the Committee to the Parliament, in vindication of the Constitution Act 1901,s. 51 (vi.) its provisions, history, meaning and effect, all of which are now threatened, *de facto, if not de iure,* by the Bill under enquiry by the Committee.

Yours faithfully,

Note: Regrettably, for me at least, the original text is no longer available to me in electronic form. I request that you make this circumstance good out of the Commonwealth's resources for the benefit of those who read as they run.

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Dated this 23 September, 2009

J.F. Staples,

Tuesday, March 18, 2003

AN OPEN LETTER TO THE PRIME MINISTER AND THE LEADER OF THE OPPOSITION

Gentlemen,

What is projected by you, the Prime Minister, and not clearly and firmly opposed by you, the Leader of the Opposition - with your nimble footwork back and forth, and from side to side on the morality of the issue - is an act of aggression against the state of Iraq, its territory and its people.

Not only is an unprovoked act of war contrary to the law of nations and contrary to the United Nations Charter, it is an invasion of the Australian Constitution.

No Australian may lawfully act outside or over and above the Constitution, least of all the Governor-General, the Commander in Chief of our armed forces. And this is so whether or no he acts consistently with the advice of his Prime Minister, and other members of the Executive Council.

Nor can any deficiency, any hiatus in the provisions of the Constitution be made good by mere claims of politicians to relevant power or by understandings reached in the Parliament behind the Speaker's Chair.

S. 51 of the Constitution does not provide the necessary authority for what is projected. Let me set out the one single provision in the Constitution Act which goes to the making of war:

> S.51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth of Australia with respect to:-
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> (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

To use the armed forces of Australia constituted under appropriations of the revenues and moneys raised and received by the executive government for a purpose which is not a purpose of the Commonwealth identified in the Constitution is a wrong against Section 81 of the Act.

Appropriations of the Parliament for disposal by the Executive in this context must be deemed to be limited to the naval and military defence of the Commonwealth and of the States, unless authority for the application of those resources can be found under some other head of the law of the Constitution.

There is no relevant reserve power that can be identified to support the use of those military resources for the making of aggressive war. The question remains whether there is available to the Governor-General a component of the Royal Prerogative which suffices.

I assert that by reason of the enactment of the Australia Act 1986 (Cth) the Royal Prerogative, a quality of the Queen in right of the United Kingdom, is no longer available as a source of law in Australia. Moreover, I deny that any authority for initiating a war of aggression against a foreign state was available to the Governor-General from the time of the federation of the colonies into a new, over-arching polity and before 1986.

To understand the law of war-making in the Australian context outside Section 51(vi) one must give account to a little history.

The Australian Constitution results from a draft prepared by colonial politicians and lawyers during the 1890s. At the end of that decade a draft constitution for a new polity was settled. It was determined by the draftsmen firstly, to obtain the approval of the citizens of the colonies by referendum and secondly, to submit the same to London for enabling legislation by the Parliament of the United Kingdom, the source at that time of our constitutional laws.

Those who prepared the draft were not concerned to challenge or qualify the overweening authority of the Crown in right of the United Kingdom or, if you like, of the Empire. They were content to leave full control over the various components of the British Empire in the initiating by any of them of wars of aggression to the Crown in the Home Country.

Whilst, in various ways, London was prepared to suffer, even to encourage, a high degree of local government and decision-making in domestic matters in its possessions, no one – not here in Australia, nor in any other subject place – ever entertained a claim to be free to make war other than in self-defence against a foreign power. It was accepted that authority to embark upon wars of aggression was peculiarly within the province of the government at Westminster.

No one anywhere claimed or conceded at that time that a colony or component of the Empire not at Westminster could take an independent initiative for war, could declare war as an aspect of its capacity to conduct its own foreign relations. If war upon a foreign state was to be initiated, it was, by common consent a decision within the competence of the United Kingdom government alone and not for any colonial administration anywhere.

Upon that simple but fundamental qualification of whatever self-government was extended to any subject polity in the Empire, there was unbridled consensus on every side.

Our Constitution was drafted, approved, submitted, received and enacted upon that common understanding. London baulked upon one point only when it received the draft. There was to be a full right of appeal to the Privy Council for litigants ultimately disappointed in any of the Supreme Courts having jurisdiction in the new Commonwealth.

Nothing sat more easily in the minds of those concerned with the carriage of the draft into law than that the new federal legislature should have nothing more than power to make laws merely for the naval and military defence of the new polity. For war-making, nothing more was sought or conceded. In the new Commonwealth of Australia the Crown, acting upon the advice of ministers in the government of the United Kingdom, was to be the sole source of any initiatives or declarations for war affecting the Commonwealth of Australia not being a war within the contemplation of Section 51(vi). In such matters Westminster knew best.

Provision was made for an office of Governor-General. Section 2 of Chapter 1 provides:

> 2. A Governor-General appointed by the Queen...shall have...and may exercise ...subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

Letters Patent dated 29 October 1900, amended by Letters Patent dated 15 December 1920 and Letters Patent dated 30 October 1958 are the sole source outside the Constitution itself of the powers of the Governor-General. Nowhere within them is to be found a skerrick of power provided to the Governor-General, acting by and with the advice of the Executive Council, to undertake a war of aggression against a foreign state. The question is simply not raised, let alone disposed of, directly or indirectly, in any manner whatsoever.

The question arises, wherefrom do you, the Prime Minister, draw your authority to act against Iraq today. You cannot point to any source of lawful authority in the constitutional documents of this country.

Your predecessors in office did not claim an independent authority for war-making beyond the naval and military defence of the Commonwealth at the commencement of our participation either in World War I or World War II. In 1914 there was never a doubt here that due authority to declare war upon Germany and others resided in London or nowhere at all. On 3 December 1939, the Prime Minister, Mr. Menzies, in a radio broadcast to the people of Australia, took it as given that if the United Kingdom declared war upon Germany, Australia itself was automatically at war with Germany, by the very formalities of the matter. Australia fell into a state of war against Germany and Italy, in Menzies' view, by force of law. This was a circumstance which may have met with his approval, but it was not his point.Thus, Australia entered into the Second World War. It engaged in military action at the side of the United Kingdom and for the defence of the values and assets of the British Empire.

On 7 December 1941 Japan attacked Pearl Harbor, territory of a friendly and helpful power, the United States of America. And on the same day it attacked territories of the Empire, more particularly Hong Kong and Singapore to our north.

The next day, 8 December 1941, the King of England, by Royal Instruments, assigned to the Governor-General of the Commonwealth of Australia the power to declare a state of war with Finland, Romania and Hungary then engaged in a war upon an ally of the United Kingdom, namely, the Soviet Union. It did this at a request of the Soviet Union conveyed to London.

It was in this context, the situation in Europe and the new situation in the Pacific, that a royal instrument authorized the Governor-General to declare war upon Japan. That country had not been up till then, either by its acts or declarations, in a state of war with Australia. Of this situation the Prime Minister, John Curtin, addressing the Parliament on 16 December 1941, said:

> '...the attacks made against Singapore and Pearl Harbor, against Great Britain and the United States of America are attacks which the Commonwealth of Australia accepts as constituting a direct attack upon itself.'

It was to these events that Curtin pointed in his government's claim of entitlement to commit Australia to war upon Japan. It was an act on the edges of self-defence, readily argued, one might think then and now, but Curtin must have had in mind s.51 (vi) in using this language.

In the same debate Dr. H.V. Evatt, who had lately retired from the High Court of Australia to become Attorney-General and Minister for External Affairs in the Curtin government, said this of the Letters Patent addressed by the King to the Governor-General.

> 'As to the procedure adopted, it was important to avoid any legal controversy as to the power of the Governor-General to declare a state of war without specific authorization by His Majesty. I express no opinion as to whether specific authorization was necessary as a strict matter of law...the matter was too important and too urgent to invite any legal controversy. We therefore decided to make it abundantly clear that there is an unbroken chain of prerogative authority extending from the King himself to the Governor-General. For that purpose we prepared a special instrument the terms of which were graciously accepted by His Majesty.'

Thus, the government of the day did not assert and did not act upon an independent entitlement to initiate war upon Japan. Japan at that point of time had not attacked, nor was it immediately threatening the territory of the Commonwealth. S. 51 could not be readily invoked. London was not to be, was not and would not be by-passed upon the point. For sure the United Kingdom was the fountainhead of authority for the making of war when the territory of the Commonwealth was not in direct danger.

Whatever role London might have been seen to possess in Australian affairs at that time, it was extinguished by the Royal Assent to the Australia Act. That legislation of the Parliament of the Commonwealth fetched assent in December 1985. It asserted that the status of the

Commonwealth of Australia was that of a sovereign, independent and federal nation. At that point of time and on that account all prospect of amplifying the powers of the Governor-General so as to bestow upon the Governor-General authority hitherto retained in the United Kingdom and hitherto set down expressly in royal instruments was passed up.

Thus, whatever authority exists in the Governor-General to make war upon a foreign state other than for the naval and military defence of the Commonwealth must be found in what had passed to the Governor-General before the Australia Act was proclaimed. There is nothing to be found to support the claim of law now made by you, the Prime Minister, fit to permit you to embark on a war of aggression against Iraq.

From what law, from what Instrument, from what Letters Patent, do you draw your entitlement? You cannot make good the incapacity of the Governor-General to assist you in your cause by silence in response to that question. Moreover, if there is a gap in the law, it cannot be made good by the Parliament, behind or in front of the Speaker's Chair. It can only be brought about by a relevant referendum. We have time for that. It cannot be said that the urgency of which Dr. Evatt spoke is in any way upon us at this time, and even it if were it would not be enough.

Your posture of lawful entitlement is the very antithesis of respect for the qualities of a parliamentary democracy. When Peter Andren, MP, moved a formal motion which called on the House 'to insist that, in the absence of specific, unambiguous and unanimous support of the Security Council, the defence forces not be involved in any military action in Iraq', you moved to close off the debate and Mr. Crean joined with you in doing so. There was no formal expression of the wishes of Parliament upon the question raised by Mr. Andren. Votes are what matter in Parliament. Each of you feared the rats in your ranks. So, there has been no expression of a formal kind by the House of Representatives in favour of your cause. It would not cure the legal deficiency if there was, but you would not risk the mark of measured disapproval in the Parliament.. Nor would Mr. Crean. He supported you in closing off a vote on the proposal. Each of you has stood firm for government by the *fait accompli.*

In England nothing may be done by the Crown in the making of war which is not in conformity with, which does not comply with the wishes of Parliament. We have seen the Prime Minister of the United Kingdom fall into the greatest political difficulties as he has sought to win the compliance of the House of Commons in advance of a decision for war. Even so, we see there the colour of parliamentary democracy not evidenced in the record in Canberra.

In the United States authority to wage war is reserved expressly and unarguably to the Congress, to the House of Representatives and the Senate. There is no presidential prerogative available to which President George W. Bush may have recourse. He has not obtained an authority of the Congress to make war upon Iraq. He seeks to avoid the parliamentary controversies dogging Mr. Blair. He skirts around the plain lack of authority from the Congress for the making of war on Iraq. He argues a nexus between Iraq and the terrorists of the Middle East, of September 11. Congress clearly empowered him to make war upon "terrorists" in the aftermath of 11 September 2001. To uphold his new and different initiative, which seeks the attack on Iraq sought by some in his Administration for a decade, he postulates a nexus which has escaped the scrutiny of hundreds of millions of people throughout the world.

We can say this in favour of President Bush: there is some colour of parliamentary sovereignty acknowledged in his stance. As well, leave of a kind, thin and unpersuasive, was given to him in advance of the day. But to what can you, here in Australia, point that upholds the sovereignty of Parliament in this matter? Nothing, nothing whatsoever.

The Governor-General cannot assist you in your cause. He has no authority to do so: you have no prior parliamentary authority and, even if you had such, under the rules of the Australian Constitution, it could give you at best merely a mite of solace in your wrongdoing.

Yours faithfully,