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(Telephone & E-mail supplied).
[5th October, 2009 as revised on
29th Oct. & 4th November, 2009.]

Senator The Hon. Mark Bishop, (also as the)
Chairperson, Senate Foreign Affairs, Defence, and Trade.. Legislation Committee,
(within the Standing Committee on Foreign Affairs, Defence, and Trade),
P.O.Box 6100, Parliament House, [E-mail: fadt.sen@aph.gov.au]
CANBERRA. A.C.T., 2600. [senator.bishop@aph.gov.au]

Dear Senator Bishop,

1.a) I thank you for inviting me to make a submission in writing to your Legislation Committee's Inquiry into the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No.2]. I note that this noble Bill is being carried forward with commendable zeal by Sen. Scott Ludlam, also a senator from W.A.

b) I became aware of the former Australian Democrats' 2002-3 precursor Bill during the lead-up to the war on Iraq, and referred to it in both my paid advertisement (copy provided) inserted in January, 2003 in my former home-town of Leeton's newspaper called the "Irrigator"..AND in my legal lamentation of our involvement in the supreme international crime of aggressive war which the Australian Law Journal published as the sole refutation of UTS Prof. S. Blay's earlier (May, 2003) apologia for the attack by, inter alios, Australia, which commenced upon Iraq circa 20 March, 2003 : my letter achieved nothing except my own deeper grief for our poorfella country: see [2003] 77ALJ @pp.412-3 (July, 2003 Issue).

c) On Feb. 8, 2005 I was involved in a serious (but no-one injured) car accident as I left Leeton and rural practice after 37 years a solicitor there..and I did not become aware, for some 18 months afterwards, of the Democrats' need to upgrade their old Bill to a document worthy, in the recorded (Hansard) words of Sen. The Hon. John Hogg on Feb. 10 2005, of being the subject of "arguing the toss". Thus, until about August, 2006, by when I approached them and offered help, I missed noticing the beginning of the Democrats' valiant efforts to revive the public's understanding of our "National Stain". On offering help, I was informed by a Democrats' Senator that their Party had in the past obtained legal advice from Prof. George Williams (UNSW) – and I telephoned Prof. Williams on their behalf, who expressed himself unable to help at the time because of major and pressing commitments. During November 2006, two Democrats Senators, Allison and Bartlett, wrote me appreciatory letters: and when Prof. Williams was still unavailable early in 2007, I, in mid-March, contacted Professor +George Winterton, (Constitutional Law in my own University of Sydney), who, despite a battle with cancer, gave the Democrats massive drafting assistance. This work was shared by the Hon. Harry Evans, AO, the Clerk of the Senate, between March and Sept 2007. They kindly included me in the discussions on the constitutional and electoral law involved in the drafting work and to which I made only a minor contribution or two...sufficient, I hope, after the (cancer) death of Winterton on 6 November, 2008, following the expiry of all four Democrats' Terms on 30 June 2008, and in view of the ?now-imminent retirement of Mr Evans, to claim a moral interest in the upholding, verbatim-text or full material essence, of The "War Powers" draft Bill which was filed as Senate Office Bill '5408' on 17th October 2007 and was then First Read by former senator Andrew Bartlett on Reconciliation Day, 2008...and it is my desire and request to be 'recognized' before this Inquiry to that limited extent, having not any intent or desire to advocate any drafting changes not acceptable to Senator Scott Ludlam = despite, in my eagerness to "please, if possible" General (R'td) Peter C Gration, endeavours made by me to draft minor amendments which I hoped might enamour him more of this nobly-inspired Bill. Only in recent weeks have I drafted significant and arguably-desirable changes to "new Section 50C, subsec.(11)" with which, Sen. Ludlam approving, I'd be happier (to see) as the final subsection's new words.

d) Well, good Senators Hogg and Bishop : that toss-arguing game is up; the Greens inherited a wonderfully improved-upon-2002/5 "War Powers" Bill which I fully support and so do many others, - and for which there is increasing demand among the thinking Australian public, so that I feel justified in calling upon you, and all Hon. Senators, to join with Sen. Ludlam and –for the honour of our country and ALL Parties - ensure that this , nobler-than-ever, "Bartlett-Winterton-Evans-Ludlam" Bill named in Line 2 above...be legislated before our 'true sovereign' (Parliament) adjourns for its Christmas Recess !

e) This Bill doesn't call for any other changes. It's fine..as Winterton would have said: "clear and succinct". The ONLY subclause which wasn't exhaustively improved-upon was/is Subsection Eleven(11);and with the attached expanded version of Subsection (11) of Sec.50C, I'd be comfortable that the Augean Stable Door (of Militarism Rampant) would not spring open, were its minor clarifications substituted. A copy of my most-recent redraft of Sec.50C(11), as referred-to in paragraph 1c),(above).. is attached.

f) As a silent witness, I would like to call, if this Hon. Committee permits, a "symbolic copy" of Defence Act,1903, Section SIXTY (60)...which requires an affirmative vote of BOTH Houses of the Parliament before the Executive may implement civil Conscription : how analogously-relevant that must be in the consideration of these amendments to Section 50C! Mind all of you: it is wonderful to have this, your Committee, sitting upon this extremely-important issue (one already resolved in the USA since 1973,and under active consideration in the United Kingdom); also bearing in mind that, in addition to the Parliamentary Librarian's list of States already WITH a "WPA" there should be added little Lithuania : a visiting-during "WYD,2008" Pilgrims' Chaperone whom I met was a Lithuanian Cabinet Minister, Ms Ramune Visockyte, who assured me (through an interpreter) that: "Not even for NATO would Lithuania go to war without the approval of our Seimas [Parliament]" And just look at all the similarly-situated NATO countries, after the woes of two World Wars centred upon them, happy to endorse the maxim: 'Give Peace Every Chance.'

g) I gratefully recall the opinion imparted to me in writing on the Ides of March, 2007, by an Australian Professor of Constitutional Law OTHER than either +Winterton –or the "very fixed on the concept of a 'Joint Sitting' of Both Houses" and "high profile" Prof. George Williams: -this 'other Professor', now elsewhere in this Commonweal' of ours, wrote to me after I explained plans to improve The Democrats' 2002-5 "WP"Bill: * "Dear Ian, In my capacity as a private citizen, I support your proposal that there should be legislation controlling the power of the executive government to declare war. As a private citizen, I believe that the Howard Government's decision to declare war on Iraq was a terrible decision. As a constitutional lawyer, I believe that valid legislation can be drafted to control the executive's power to declare war.

Best wishes with your campaign for this legislation, which I support.

xxxxxxx Professor , Faculty of Law, [Campus & State names withheld]."

h) Eight days later, or soon after accepting, at my request, a "pro bono" retainer for the Australian Democrats Senators, Prof. +George Winterton informed me of the UNSW's Prof. George Williams' publicised opinion that committal of troops to foreign wars by our Australian Government should be endorsed by a Joint Sitting of the two Houses of our Parliament. I can't verify that, but Professor George Williams wrote an Article which I HAVE read (& it was to that same effect)which was published in the "Canberra Times" in June, 2008. Everything relevant which I heard from Winterton led me to believe that he deprecated Prof. Williams' preference in this regard. I can only say that I do not agree with any opinion which would tend deliberately to negate the Constitutional role of our "States' and Review House" – this Honourable Senate.

2. Among the selected-few copy-E-mails I extracted from my files for the possible information of this honourable Committee...there is ONE ,take my word, which encapsulates more in a mere 7 A4 pages than perhaps any other mere 7 pages among the debris of trying to "argue the toss" internally – in preparation for meeting Sen. Hogg's high expectations despite his absence...and that is a 7 page E-mail from Winterton to Maguire, (Sen) Bartlett, Evans,(Sen) Stott-Despoja, [3 former Staff] AND Gen. Peter Gration. The main item is Gen. Peter's "last-printed-words-on –this- subject-of-possible-redrafting-so-far" in the Letter of 15.02.'08 @ 1040HRS.. but the most appropriate for Hon. Committee Members is that "from the grave" namely what I now choose to call +George Winterton's " Last Words" which happen, of course, to be printed on p.1 (top page) of scroll of Tues, 19 February 2008 12:10PM above my subject: "RE : Bellum Volens-Facere Delenda Est":

"Dear Ian,

The wisest course would probably be for the Senate to send the Bill to its Standing Committee on Legal and Constitutional Affairs which could hear from the military experts and fine-tune the exceptions to the general proscription against the dispatch of troops to (potentially) fight overseas without parliamentary approval. Harry Evans' views should, of course, be sought on this. Best wishes. George."

[The incidental mention of possible "fine tuning of exceptions to the general proscription" COULD be the basis, without making Winterton turn in his grave, upon which your Committee could make a careful, and presumably minor only, exception or twain to Sec, 50C (11), that is, the very end of the Bill, in subsection Eleven, the only subsection from the 2003 Bill not already carefully re-cast in the drafting sessions between March & September,2007 =THIS Committee shall learn that Gen.Gration would be happier with subsec.11].

3. After I read your letter of invitation (dated 7th, & received 9th September) I decided to E-mail my since-deferred submission firstly, on 5th Oct., to you..then (6th) "follow-up" with one of six identical sets of hard copies of any documents intended as "inclusions",- all to be sent at the same time (so to arrive at Capital Hill not earlier than yours) by mail in padded Australia Post envelopes being one, each, of such document sets and a copy of this letter- to you and your five (5) colleague-Hon.Senators...and you'd recall that happened.

4. After my first conversation with Dr K.Dermody (on 2nd inst.),and each of several much more recent such talks, I've had a better idea of your procedure, and I do thank her sincerely for her courtesy to me. I was, indeed, happy not to have full Electronic Lodgement as a mandatory requirement, and I'll be grateful to rely upon her,or her staff, to send this "last effort" to you, even overseas, & then on your publicly-accessible system.

5. I had very much hoped to have been able to send you a "copy E-mail " from the Melbourne Office of Rt Hon. Malcolm Fraser, AO, former Prime Minister, but his secretary, Mrs Heather Barwick, Emailed me a few weeks ago to say that Mr Fraser would not give me his own written answer to my question as to whether he would reinforce his Opinions expressed in Speech delivered to Melbourne University's Military Law Institute on 25 October, 2007, entitled : 'Finding Security in Terrorism's Shadow' -esp. his opinion at top of p.7 of 7pp. that Australian decisions as to "whether or not the nation should go to War" *SHOULD be made by votes IN BOTH HOUSES of Federal Parliament" -and instead had requested her to reply to me saying he (Mr Malcolm Fraser) "agrees with [the Opinion circulated to, inter alios, him, of] General Gration." = meaning Full Gen. Peter Gration,

our 1990-1 Gulf War Commander-In-Chief. The "responsive-locus" of this message is elusive. Presumably, in the events which have happened, you and your Hon. Committeemen shall make, being truly interested, your own arrangements to 'phone Gen. Gration

[Listed] to respectfully clarify his views on this noble Bill - I'm sure your Committee could persuade him to come and discuss the matters he considers, as our Gulf/Kuwait War GOC, and you consider, are relevant to this, your Inquiry into the legislatability of the captioned Bill.-- **Reverting to ex-PM Fraser :Please read his great Speech of 25 October,2007,= and 'nota bene' that this former PM Fraser, who was truly compassionate towards Vietnamese and other Refugees...showed no sign of support for Prof. George Williams' (de-facto)*"swamping-of-the Senate" and *pro- Govt of the day-favouring model as published since 2004, and in the "Canberra Times" in June 2008, and again very recently. The Committee - and I write with all respect due to Prof. George Williams as an eminent jurist - would be entitled to bear in mind that this preferred model (if its even- greater than preceding Howard Govt's Executive Power Concentration Syndrome remains uncured by the ultimately-inevitable Caucus -Led Humble Pie prescription) seems plausibly to have, perhaps, been accepted by the good Professor as an unavoidable prerequisite for fulfilment of a noble National Political aspiration. Politics is oft ignoble; and I would call upon the ALP which governed Australia through most of WW2 and until 1949 thereafter...to remember Dr H V Evatt and his role in the setting-up of the United Nations, and the Nuremberg Tribunal which castigated * Aggressive War-Making as THE SUPREME CRIME AGAINST HUMANITY...and to rapidly "think again" about any Policy which might do more for the grandiosity of an ephemeral leadership than for salvaging the honour, and protecting the true Security, of our dear land of Australia.

That "Canberra Times" Link to the argument which the late Prof. +George Winterton strongly deprecated is, and you may have to retype it ! =

<http://www.onlineopinion.com.au/view.asp?article=7512>

Professor Winterton was adamant that "Joint Sitzings of Both Houses" were subConstitutional , showcase style, and my added comment is : " perhaps suitable for creating Royal or US Presidential TV spectacle?"

IT FOLLOWS from the above that I TOTALLY SUPPORT the methods (such as Constitutional & Electoral laws permit) which were designed for The Democrats by Professor +Winterton and Mr Harry Evans, AO, and are now set forth in the Bill now being examined for adherence to the principle of maximisation of the involvement of Members/Senators through the processes of Each House of Parliament under our Federal Democratic System = and paramountly in relation to questions surrounding any involvement in any warfare about which external threats leave us with any viable/honourable "preferential option for peace".

Hon. Senators & Members are invited to study the 3 Attached E-mails of Gen. Gration, all specifically "released" for inclusion in this Finally Amended Submission.; but Parliamentarians should that in satisfying good Gen. Gration, I am not presently persuaded that any change to this Bill of Sen. Ludlam's...identical with that developed during 2007 for the former Democrats by "Winterton & Evans"... beyond, perhaps, the widened

version of Subsection Eleven (11) of Defence Act, 1903, Section 50C, should be entertained = always "subject to the Parliamentary Debate".

6. Partly in the same regard as with former PM Fraser – that is to say, re: persons whom it would be improper for me to approach or importune further...would your Office send an experienced military liaison officer to Russell Hill to interview any appropriate Officer(s)

as most appropriate to advise your Parliamentary Office in relation to the practicalities of working with Leaders of All Parties represented in Both Houses, especially as to any verifiable "Security Issues" alleged to be possible complications in the expected necessary future task or privilege of truthfully advising about and maintaining reasonable Security concerning, real/reliable (not contrived to the confounding of our Democracy) Intelligence findings/concerns. and the like...as well as possible "Restricted Access or Closed/ Crisis Sessions" and the like.

8. I cannot too-strongly commend for early legislation through Both Houses, this noble & necessary Bill.

IAN STUART DENIS MAGUIRE

Solicitor (since 28 May, 1965) and Public Notary (s.1986) in NSW; -virtually r'td, on health grounds, incl. major surgery during last May, - since Dec, 2008.'

Formal pre-Admission qualifications : Solicitors' Admission Board Certificate, early 1965; LL.B (Syd.U. 1966) -formerly in wide-ranging general practice at Leeton, NSW, 1968 to 2005, then part-time at new home.

- (11) For the purposes of this section, service beyond the territorial limits of Australia does not include non-warlike service by members of the Defence Force :
- (a) on an Australian vessel or aircraft wherever deployed but which is not engaged or reasonably to be supposed to be about to engage in hostilities or in operations during which hostilities are likely to occur, or to be provoked, by the mere presence or course of such vessel or aircraft (considered as a unit or part of any formation); and not being a unit in any joint exercise not acceptable to any littoral, bordering, or overflown State;
 - (b) as part of a limited rapid-reaction force engaged in a bona fide and strictly nondisproportionate (and being without perceptible risk of creating innocent casualties or uncontrollable escalation) hot-pursuit of armed-forces (regular or rogue or insurgent status unclear) based in a regional friendly State, whether or not already disavowed by such State, and which reactive use of moderated force shall be notified to the United Nations at the first reasonable opportunity;
 - (c) as part of United Nations - sponsored peacekeeping activities which have not changed their predominant character to that of peace - enforcement and/or open warfare between or among States;
 - (d) the rescue and/or extraction of Australian citizens and dependent and non - combatant persons associated with them from disasters and threats from civil strife overseas;
 - (e) as part of an Australian diplomatic or consular mission, or an official visitor or accredited conference attendee;
 - (f) for the purpose(s) of their education or training (but not by embedment in the armed forces of another State involved in non-UN-sponsored armed conflict at the time of commencement of such education or training);
 - (g) for purposes related to the procurement or refurbishment of equipment, or of stores; or to any goodwill visit foreknown to be welcome in both port and State of destination (or later-planned arrival); or
 - (h) pursuant to their temporary attachment as provided by Section 116B ; [and, further to subsection (4) of that section, any such temporarily – attached member shall be recallable to service within the ADF structure at any time upon reasonable notice (not required to exceed one month's duration) by the ADF (directly to such member and/or to, or via, his or her interim commanding officer of the host nation.)]
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From: Peter Gratton
Sent: Wednesday, 7 October 2009 9:27 AM
To: 'Ian and Claire Maguire'; 'adrian D'hage'
Cc:
Subject: RE: Bellum Volens Facere Delenda Est

Dear Ian,

Your proposed redraft of para (11) picks up some of the concerns, but not entirely. Even with these amendments, the draft Bill still has the potential to impose unnecessary administrative restraints on the ADF in going about its day-to-day non-warlike business. In times of real threat when short notice retaliatory actions may be necessary, there is also the potential to constrain the ADF from acting in the optimum way to protect the nation. There is also the question of threshold, to define a level below which Parliamentary approval is not required, by virtue of the scale of a proposed operation, its gravity in international terms, and the remoteness or otherwise of the likelihood of having to use force. This would avoid the Parliament wasting its time on relatively trivial matters.

For these reasons, I believe the main operative clause should not make the sweeping statement that ADF personnel may not serve outside Australia (and then try and define the many exceptions to this), but rather come directly to the point and say something along the lines of "The ADF shall not engage in war or warlike operations, other than in the defence of Australia and its Territories, except in accordance with a resolution of the Parliament."

The whole thing will require very careful drafting after due consultation, particularly with Defence.

Regards

Peter Gratton

----- Original Message -----

From: Peter Gratton
To: 'Ian and Claire Maguire'
Sent: Friday, February 15, 2008 10:40 AM
Subject: RE: Dear Peter: Just ONE more secret Admirer ---

Dear Ian,

Now that the Bill is before the Senate, further comment from me seems superfluous. Nevertheless, I will let you know where I stand.

I support the principle of obtaining Parliamentary approval for non-routine deployment of our forces into armed conflict or situations likely to result in armed conflict. However I think the Bill as drafted is unsatisfactory, and I would not support it.

Considerations of flexibility, security and negotiation with allies are important, particularly in the highly charged atmosphere that is usual when a deployment is being contemplated. They are probably manageable, but their importance should not be underestimated.

My main concern is the focus on "the territorial limits of Australia" as the criterion for Parliamentary approval. This was presumably intended to allow use of our forces in the defence of Australia without approval of Parliament. However, any Defence of Australia would almost certainly involve the deployment of forces beyond the territorial limits – mainly naval and air, but possibly land as well. It would also much weaken the deterrent value of forces

such as our F111s and submarines if a potential enemy knew that they could not be used without the fanfare of Parliamentary debate.

There could also be unnecessary administrative problems, as there are plenty of non-warlike deployments beyond the territorial limits other than those excluded in clause (11), e.g. official visits, attendance at conferences and the like, rescue or extraction of Australian citizens from threatening situations overseas, peace keeping under UN, and combined exercises with the forces of other countries.

A form of words along these lines would be more suitable. The precise wording would need more careful thought and consultation.

“ The ADF shall not undertake non-routine deployments to engage in armed conflict, or in situations likely to result in armed conflict, other than in the defence of Australia and its territories, except in accordance with a resolution --- etc.”

I would retain the allowance for emergency declaration by the G.G., and would include an exemption for the small number of individuals serving on attachment with the armed forces of other countries. Their participation or otherwise with their unit in war need not come before Parliament.

Regards

Peter Gratton