



18 November 2022

Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade

ASPI submission: Inquiry into international armed conflict decision making

The following constitutes our submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into international armed conflict decision making.

In line with our Charter, these represent our personal views and not ASPI's institutional position. At least two ASPI senior fellows, Dr. Anthony Bergin and Graeme Dobell, who have deep experience on these issues, have also submitted views to the Committee in a personal capacity.

When considering the inquiry's terms of reference, in line with ASPI's core purpose and expertise, we have focused this submission on the security implications of pre-notification of Australian Defence Force (ADF) deployment. We make some top-level observations about parliamentary processes in Australia and in comparable democracies but focus on the security implications because these are both within our remit and because security is the core factor for decisions related to deploying ADF personnel into armed conflicts.

We note that Parliament has considered topics related to the overseas deployment of the ADF on multiple occasions, including in the last term of Parliament. Those parliamentary processes have not changed the Executive's prerogative to decide when and how to deploy the ADF into international armed conflict, which has legal basis in Article 61 of the Constitution and the *Defence Act 1903*.

In this submission, we refer to material collated during earlier parliamentary processes, in part to obviate the necessity to reiterate the same arguments again in full. In particular, we expect the Committee will recall the inquiry by the Senate Foreign Affairs, Defence and Trade Legislation Committee into the Defence Amendment Bill (2020), notably the September 2021 submission by the Department of Defence as well as the Committee's final report and recommendations of November 2021 (notwithstanding the dissenting report by the Australian Greens).

The approach of similar Westminster system democracies around the world

We are of the view that comparisons between democratic systems are fraught with risk of misinterpretation and false equivalence. Other systems should neither be ignored nor copied. An understanding of how other countries make such decisions is important, but it should not be definitive as even our closest allies, the United States and United Kingdom, do not have identical legislative systems to ours so any attempt to simply mimic another country's processes could distract from pursuing an approach best suited to Australia's unique political and strategic conditions. That is, the argument is not as simple as saying that because the US and UK have particular parliamentary rules, so should we.

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In this regard, we recall conclusion 2.32 (p.10) of the Senate inquiry in 2021:

While noting that some countries, to varying degrees, require parliamentary approval before their military forces can be deployed, the committee also notes that such comparisons are complicated by the major differences in the political history and constitutional frameworks of these countries together with their various nuanced positions.

Parliamentary processes and practices, including opportunities for debate to provide greater transparency and accountability on the deployment of the ADF

Discussions on parliamentary practice to expand debate and improve transparency are wholly distinct from giving Parliament a role in decisions to deploy the ADF into international armed conflict, which would fundamentally change longstanding Executive prerogative. We support debate but oppose any degradation of the Executive's decision-making power for reasons set out below.

As Defence submitted to the Senate inquiry in 2021, the Executive's prerogative over the deployment of the ADF into international armed conflict is exercised by the Prime Minister in Cabinet. The National Security Committee of Cabinet is properly advised by policy, military and intelligence officials, with full disclosure to the NSC of classified and sensitive material to facilitate decision-making.

As made clear in the 2021 Senate inquiry's conclusion 2.39 (p.11), Parliament already has the means through its normal processes to debate and scrutinise Government decisions on ADF deployment. This is part and parcel of Government accountability to Parliament and the Australian people. Parliamentary debate, including through mechanisms such as Question Time, motions, Senate Estimates and Committee inquiries should continue.

ASPI senior fellows Graeme Dobell, Dr. Anthony Bergin and others have advocated that Parliament could strengthen precedents for debating ADF deployments into firm conventions (e.g., see Dobell's article in ASPI's *The Strategist*, 14 November 2022), based on precedents that include the ANZUS and Iraq resolutions during John Howard's Government. We submit that, should any fresh conventions be established, they should be limited to facilitating debate and neither involve pre-notification requirements or decision-making powers regarding ADF deployment. In addition, the Executive must retain discretion about whether and how to report certain types of deployments, even retrospectively. Such discretion is, for example, likely to be appropriate around the deployment of special forces, submarines or surveillance aircraft, where secrecy may be paramount even after a mission is complete.

We note the assertion in the Defence Minister's referral letter to the Committee that, in the past, some governments might have had different interpretations of how frequently they should report retrospectively to Parliament after deciding to deploy the ADF into conflict. The Committee might consider ways to making Parliament's expectations of the Government clearer in regard to retrospective notification and on opportunities to debate deployments, while still maintaining government discretion for operational and security reasons.

The security implications of pre-notification of ADF deployment that may compromise the safety of ADF personnel, operational security, intelligence and/or have unintended consequences

We understand pre-notification in this context to mean changing the law in order to require the Government to tell Parliament in advance of deploying the ADF. Notification discussions are distinct from decision-making or approval processes.

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We have grave concerns about any mandated requirement for pre-notification of deployment, as it would put ADF personnel at additional risk and damage Australia's national security, weaken our reliability in the eyes of our allies and partners, give advantages to our adversaries, and harm deterrence, which is an essential component of maintaining peace in the Indo-Pacific. Important operational concepts requiring high levels of secrecy and possibly deception are incompatible with pre-notification. Government discretion on when to notify, taking into account intelligence agency and allies' security assessments, is vital to Australia's defence.

Parliamentary scrutiny is vital in our democracy, including on issues of deployment. It could lead to greater transparency and improved ADF culture, as demonstrated by the Afghanistan Inquiry (Brereton) Report, published in November 2020. But requiring pre-notification does not serve democratic principles or establish whether a deployment is justified. Rather it would curtail the Executive for no substantive public benefit, potentially put the lives and operational success of the ADF at risk, and serve those who would do us harm in conflict by providing prior notice of intended Australian action.

Successive parliamentary inquiries have considered pre-notification and concluded that it engenders a variety of significant security implications, which its advocates fail to address persuasively. These include risks relating to:

- i. operational security and the safety of ADF personnel, including arising from parliamentary handling of classified information;
- ii. the ability of the ADF to respond in a flexible and timely manner; and
- iii. applying pre-notification across all fields of conflict, notably cyber and space domains.

We refer to the final reports in those earlier inquiries rather than reiterate each parliamentary committees' concerns and conclusions in full again here.

The security risks of pre-notification have heightened as our strategic environment has deteriorated and as information has become a distinct security domain. Since the last parliamentary inquiry to consider pre-notification reported its findings in November 2021, Russian President Vladimir Putin has invaded Ukraine and forged a 'no limits' partnership with Chinese President Xi Jinping, who has consolidated his power through the 20th Party Congress and pursues an aggressive foreign policy that includes a commitment to impose communist rule over Taiwan. North Korea has ramped up ballistic missile tests, threatening our key partners, and Iran continues to pursue nuclear weapons. We also increasingly see state and criminal actors attacking our interests through cyberspace and both Russia and China displaying potentially hostile behaviour towards US space capabilities on which our forces rely.

The coercive playbook developed by these countries includes economic coercion, espionage, propaganda and disinformation operations, cyber attacks, hostage diplomacy, and the use of paramilitary militias, mercenaries, criminal affiliates and other proxies. Targets include civilians, critical infrastructure and our political systems. These hybrid capabilities operate in the grey zone between war and peace, producing a state of perpetual tension, with probing and coercion short of clearly recognisable war. However, as we are seeing from Russia's conduct in Ukraine, hybrid tactics are also relevant during the preparation and conduct of armed conflict. Russia's behaviour also reminds us that the threat to use nuclear or other weapons of mass destruction can be used as a coercive instrument.

Recent governments and the Department of Defence have recognised the growing complexity of our deteriorating strategic environment. The 2020 Defence Strategic Update removed the assumption of a warning time before an attack and positioned the ADF to shape our strategic environment, and deter and respond to the threats we face, including in the grey zone. We expect the 2023 Defence Strategic Review will ask the ADF to do more across all three areas—shape, deter and respond. Each of these objectives requires the ADF to be deployed overseas in a prompt and flexible manner, often outside the public eye, which is incompatible with pre-notification.

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Furthermore, we reject any notion that the security implications of pre-notification could be mitigated by selective application. For instance, it would be misleading and impractical to put ADF deployments into categories such as conflict-related or discretionary, emergency or routine. The ADF can only fulfil its responsibilities for our defence and national security if it is able to operate seamlessly across all its core objectives—shape, deter and respond.

The terms of this inquiry ask whether there would be other unintended consequences to pre-notification. We submit that the damage to our relationships with allies and partners and the erosion of deterrence require particular consideration.

The Australia-US alliance and some of our key security partnerships, notably with Japan, require reliable interoperability between armed forces and joint preparation for regional contingencies. In addition, a wider network of regional partners appreciates that the ADF can work with them discreetly. These relationships rest on confidence that the Australian Government can act to meet its commitments and protect sensitive operational information. Such confidence would be damaged by any requirement to pre-notify Parliament about ADF deployments.

The detrimental effects of pre-notification on our alliances and security partnerships cannot be mitigated by circumscription or assurances. This is because the damage arises in large part from the perception of how Australia's political system operates, whatever the reality. We could not expect all levels of our allies and partners' governments, militaries and public to comprehend or trust any assurances we gave that pre-notification would not apply to areas of work with them. We would therefore risk being excluded from early, sensitive engagement by allies on security matters. This could place our forces at an operational disadvantage, and our policy-makers would be highly constrained precisely when they need to be providing 'frank and fearless' advice to decision-makers. And our adversaries would exacerbate the problem by spreading disinformation.

The same logic applies to deterrence, which is central to avoiding conflict and managing escalation in the Indo-Pacific. Looking at the Australia-US alliance, the concept of integrated deterrence—which runs through the National Security Strategy, National Defense Strategy and Nuclear Posture Review published by the US Government in October 2022—includes greater emphasis on coordination with allies and partners. Alongside a strengthened bilateral alliance with the United States, Australia is investing in wider frameworks relevant to deterrence, including the AUKUS technology partnership and closer security cooperation with Japan.

The credibility of Australia's contribution to these deterrence frameworks will be closely scrutinised not only by the allies and partners involved, but also the adversaries we seek to deter. Third countries will also pay attention, drawing conclusions about regional order and the balance of power. Any impression that pre-notification could hamper the ADF's capacity to act in a timely and flexible manner alongside allies and partners would damage deterrence and increase the likelihood of escalation and conflict. Again, perceptions matter, whatever nuances and caveats might be written into a pre-notification system.

We therefore submit that any form of mandatory pre-notification of ADF deployments must be rejected. As is already the case, the Government would of course still retain the option of voluntarily bringing plans for ADF deployments to the attention of Parliament as it sees fit, but there should be no requirement. We further submit that, despite years of advocacy, proponents of pre-notification have been unable to persuasively mitigate its security implications because it is impossible to do so. As the security threats we face have only become more complex through advanced technology, the risks of pre-notification have only worsened.

Any related matters

Our focus has been to address the term of inquiry on the security implications of pre-notification. Consistent with our view that mandating pre-notification requirements is incompatible with the

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Executive's responsibility to manage national security threats, we disagree with the view held by some that decisions on deployment and participation in conflict should be a parliamentary decision-making power. For the avoidance of doubt, we recommend rejecting any requirement that seeks parliamentary approval to deploy or join conflict. Such a requirement would either wholly debilitate Australia's capacity to serve as an ally and partner or be rendered null and void by virtue of its impracticality. Debate itself is healthy and should occur – but it should occur with Australians and all other countries knowing that, no matter the nature of the debate, the decision to enter future conflict and deploy ADF is an Executive decision for the government of the day.

Drawing on points made in Defence's submission in September 2021, we oppose any suggestion that Executive powers to deploy the ADF could be restricted to a time-limited period—as little as seven days in the unsuccessful, Australian Greens-sponsored Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020—after which parliamentary approval for sustained deployment would be required. Such time-limited emergency proclamations would in effect amount to a parliamentary veto over the Executive's prerogative, which we have already explained is impractical and detrimental to our national security.

Conclusion

Australia is facing the most challenging strategic circumstances since the Second World War. To confront the full range of contingencies we face, it is essential that the ADF can be deployed overseas promptly and decisively. The decision-making process to achieve this must be one on which our allies and partners can rely, and our adversaries understand. Any change that clouds this process, or is perceived by foreign actors as doing so, diminishes our national security and increases the risk of war by undermining deterrence. Debate in Parliament on security matters is a vital part of Australia's democratic system. There must be confidence that the robust debate allows different views to be heard before, during and after conflict, but this should not decide whether the ADF is deployed.

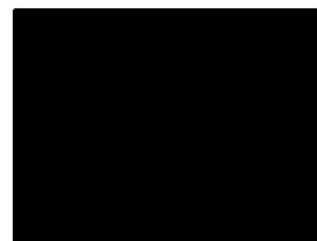
Therefore, we agree with the position set out in the Deputy Prime Minister and Minister for Defence Richard Marles' referral letter to the Committee of 27 September 2022: The Executive's prerogative to decide on the deployment of the ADF into international armed conflicts is appropriate and should not be disturbed. This is compatible with the Executive maintaining the practice of explaining its decisions to Parliament and the Australian people in a timely and regular fashion. Our preference and recommendation is to recognise the importance of the dual system of parliamentary debate and Executive decision-making and support the status quo. However, we are open-minded about more clearly codifying Parliament's expectations for regular reports by the Executive, provided initiatives to this end were properly framed and the Executive retained discretion to withhold information for good reason. We oppose any requirement to pre-notify Parliament about ADF deployments.

We would be happy to discuss with the Committee, including at any forthcoming hearing.

Justin Bassi
Executive Director



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