WHY DID WE GO TO WAR IN IRAQ?

A CALL FOR AN AUSTRALIAN INQUIRY

The Iraq War Inquiry Group consists of Australians from diverse backgrounds who are concerned that there has been no in-depth, high-level and independent inquiry into how Australia decided to take part in the invasion of Iraq in 2003. As a consequence, there has been little informed public discussion of the lessons to be learned and the alternatives and potential improvements in the process by which Australian institutions respond to future conflicts.

Published in August 2012

The chapters in this document have been written by members of the Iraq War Inquiry Group, and do not necessarily reflect the views of the group as a whole, or any individual member, in every respect.

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Cover: Iraqi children who fled escalating violence in southern Iraq. *Credit: Bikem Ekberzade*
Above: A coalition soldier on patrol in Riyahd village in Iraq in March 2007. *Credit: Andy Dunaway*

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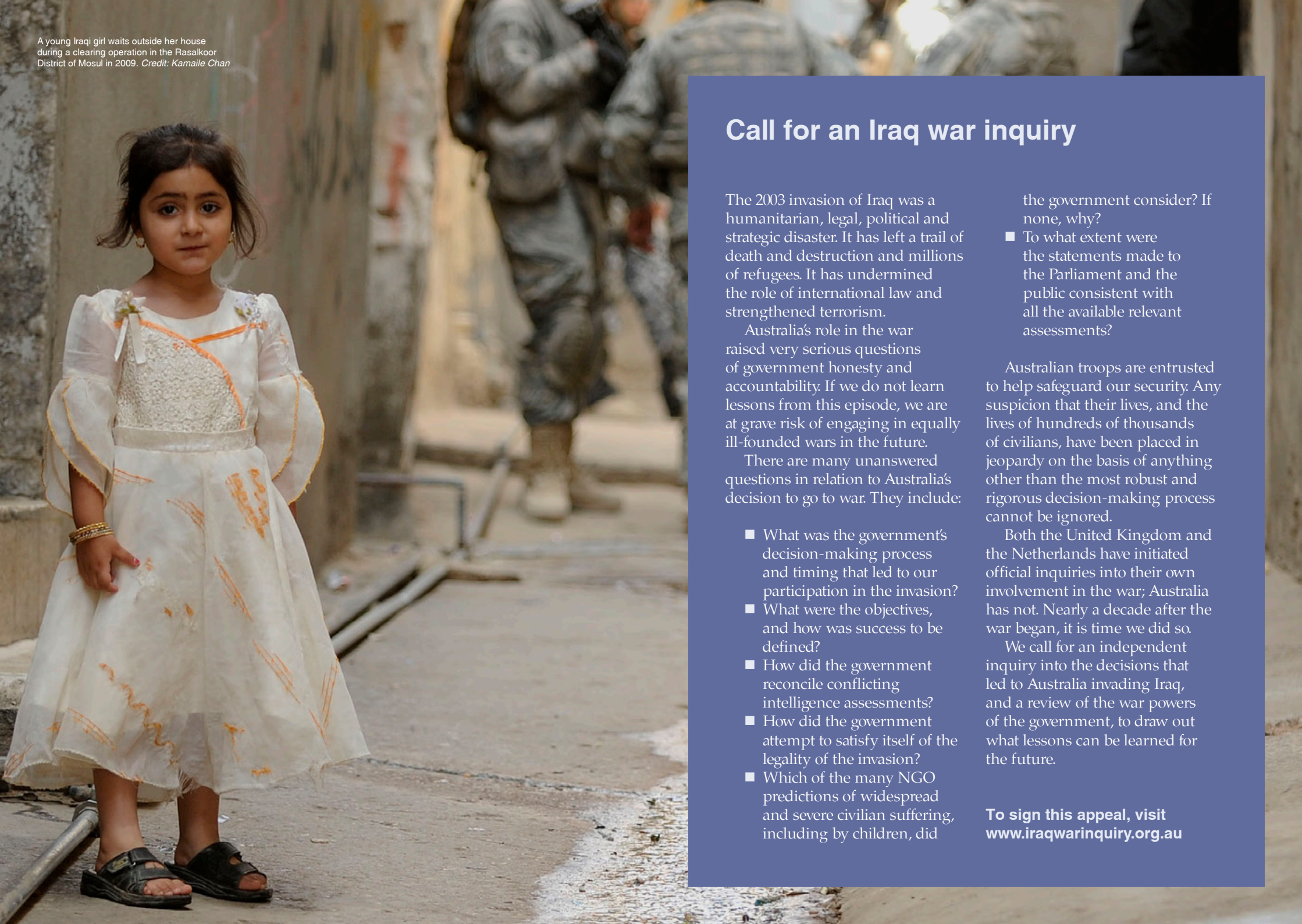

A young Iraqi girl waits outside her house during a clearing operation in the Rasalkoor District of Mosul in 2009. *Credit: Kamaile Chan*

Call for an Iraq war inquiry

The 2003 invasion of Iraq was a humanitarian, legal, political and strategic disaster. It has left a trail of death and destruction and millions of refugees. It has undermined the role of international law and strengthened terrorism.

Australia's role in the war raised very serious questions of government honesty and accountability. If we do not learn lessons from this episode, we are at grave risk of engaging in equally ill-founded wars in the future.

There are many unanswered questions in relation to Australia's decision to go to war. They include:

- What was the government's decision-making process and timing that led to our participation in the invasion?
- What were the objectives, and how was success to be defined?
- How did the government reconcile conflicting intelligence assessments?
- How did the government attempt to satisfy itself of the legality of the invasion?
- Which of the many NGO predictions of widespread and severe civilian suffering, including by children, did the government consider? If none, why?
- To what extent were the statements made to the Parliament and the public consistent with all the available relevant assessments?

Australian troops are entrusted to help safeguard our security. Any suspicion that their lives, and the lives of hundreds of thousands of civilians, have been placed in jeopardy on the basis of anything other than the most robust and rigorous decision-making process cannot be ignored.

Both the United Kingdom and the Netherlands have initiated official inquiries into their own involvement in the war; Australia has not. Nearly a decade after the war began, it is time we did so.

We call for an independent inquiry into the decisions that led to Australia invading Iraq, and a review of the war powers of the government, to draw out what lessons can be learned for the future.

To sign this appeal, visit www.iraqwarinquiry.org.au

Foreword

How did Australian armed forces come to be involved in the US-led invasion of Iraq in 2003, and why? What were the decision-making processes that led to that commitment? Were those processes adequate in terms of our system of government as we understand it and for the future?

It is often stated with wide approval that a decision to 'go to war' is the most serious act that can be taken by government. What this statement belies is how those decisions are taken. Rhetorically, Australia was responding to an existing state of affairs, in the words of US President George W Bush, the 'war on terror'. But where was the 'terror' in Iraq in that context? Was this armed action on a pretext, extraneous to Iraq, premeditated on another agenda more to do with alliance 'obligations' to the US?

These are serious questions for Australia's future foreign and defence policies, and how these should be pursued within a democratic framework. They are raised in this timely publication to lay the basic groundwork for a deeper inquiry. The purpose of the inquiry would not be to rake over old coals but to develop a better understanding of how warfare decisions are reached and to strengthen the governmental structures against precipitous or ill-considered actions in future.

The nature of war these days has radically changed. It places an unusual weight and responsibility on a small number of troops who carry the major burden, while most people feel no consequences from that war. Two aspects of its justification that may need reformulation are the concepts of 'national interest' and 'self-defence'. Both can be abused or exploited for self-serving purposes. Is the national interest such that Australia should see itself in permanent alignment with a given power, whose decisions on war and peace become our decisions? Or should the touchstone of 'national interest' in our case relate first and foremost to specifically Australian considerations and follow from there? Is it far-fetched to proclaim that actions a world away involve our self-defence and hence can be justified under the one exception provided for the use of force in the UN Charter (article 51)? When that exception was drafted it envisaged threats and acts against a state of an immediate nature leaving no room for delay or reference to the Security Council. The Iraq situation had been with the Security Council for months, and it had not been impressed enough to sanction armed measures.

What this publication shows is that the invasion of Iraq was being planned some two years before, indeed immediately after George W Bush was elected, and was conceived at the instigation of the so-called 'neo-cons'. There was a terror threat to the US and indeed to the world, but at that stage its base was essentially in Afghanistan. The groundwork for dealing with it was already well developed but became a casualty of the distraction caused by the Iraq diversion. By March 2003 the US was well and truly committed, with large troop and tank deployments already in the Middle East, which could not brook further delay as the heat and sandstorms of the hot season approached. To have pulled back then would have been a humiliation. It was this premature over-commitment which inexorably drew the US and its partners into a conflict which both desired; it had not reached a relevant threat level, and had not achieved the requisite diplomatic and legal basis. It lacked an irrefutable rationale in the minds of significant influential Britons, Americans and Australians.

In retrospect, what we now see were frantic efforts to create the prerequisites by manipulating intelligence assessments to fit the case, with all the sophistication that that task required. The general public had become confused as to whether the weapons of mass destruction allegedly being developed or held by Saddam Hussein existed and were being placed in a state of readiness to justify both 'national interest' and 'self-defence' claims. But the extensive worldwide public demonstrations against the prospect of invasion – exacerbated by the persistent denial to the UN weapons inspector of the time he needed to complete his task – suggest that an instinctive wisdom informed the public perception which, had it prevailed, much human loss and destruction could have been prevented.

In all this, the Australian government may have thought it had no choice if it were to retain the confidence of the US. But was this a misjudgement, confusing the nature of our obligations under ANZUS, which requires only consultation about threats in the Pacific region? Did the government really think through the issues independently and the implications for our standing with Asian neighbours? Did it really evaluate the intelligence presented to it and ignore its flaws? Did it want to? Did it really consider the legal issues surrounding the proposed invasion objectively, or was it not really interested? Did the Cabinet

formally sit down and consider all the issues calmly and clearly and make a determination based on that? Did it allow the prime minister as early as September 2001, following a quick phone call to the foreign minister from Washington, invoking ANZUS, effectively to pre-empt the deliberative process and commit Australian armed forces to the proposed US actions regardless of these considerations? Is this how decisions about the commitment of our armed forces to foreign campaigns should be made now and in the future? The implications are profound.

This study by well-informed and experienced persons in the practice and study of government in matters of defence, foreign and constitutional affairs concludes with the proposal that the manner and consequences of Australia's participation in the Second Gulf War should be the subject of a public inquiry for the betterment and integrity of future decision-making processes in these critical areas of policy – on the lines of the Chilcot inquiry in the UK, which has a similar and overdue purpose in that country.

More specifically, such an inquiry could lead to a re-evaluation of the 'war powers' of government and their exercise, and address the role of parliament in the authorisation of armed force abroad. As matters stand, parliament's role is *ex post facto*, to approve actions already taken under the prerogative at a stage where the denial of finance would in effect betray the armed forces. In an age where armed conflict situations often lack definition (neither war nor peace), and where something started has the potential to creep and even spin out of control, the public interest requires that the actions of the government of the day be better regulated and constrained in situations other than where the nation might be facing a direct armed attack leaving no room for delay or wider deliberation.

Rt Hon Malcolm Fraser AC CH
August 2012

Iraqi children walk by coalition soldiers on patrol at a market in Narhwan in 2007. *Credit: Timothy Kingston*

Executive summary

On 19 March 2013, 10 years will have passed since Australian, British and US forces (and a Polish contingent) invaded Iraq. The reasons we did so, and maintained a military presence there for most of the decade, were unclear then and are not yet satisfactorily explained. The invasion took place without the approval of the UN Security Council and, according to most international lawyers, in defiance of international law.

Coalition forces overthrew the government of Iraq, and then and in the years that followed they killed and wounded many thousands of Iraqis, as well as sustaining great losses themselves. Prisoners under coalition supervision were tortured and killed, cities were devastated and degradation of the countryside was widespread.

British and Australian public opinion was strongly against the war before it started and, while US public opinion was initially in favour, this was at a time when around two-thirds of Americans believed that Saddam Hussein was at least partly responsible for 9/11. The justifications given by US and British leaders for the invasion, which Australia accepted, were later shown to be based on false information, on which Australia apparently relied. A future prime minister of Australia could commit our country to a similarly dubious war, in defiance of public opinion, in breach of international law, at even greater cost, and with no demonstrable benefit to Australia. 'Why did we follow America without question?' Malcolm Fraser asked in his Whitlam Oration on 6 June 2012. Australians still await an answer from government.

We are accustomed to holding inquiries after natural disasters and man-made accidents in Australia. We rigorously debate and scrutinise government administration and expenditure, and we carefully investigate the causes of deaths and injuries, seeking to avoid future mistakes and losses. The disastrous and costly Iraq war should be treated no differently.

Inquiries into it have been made by individuals in the United States and by governments in Britain and the Netherlands, but in Australia, apart from two investigations of the intelligence that informed the Howard government's decision (one headed by an MP, the other by a former Secretary of the Department of Foreign Affairs and Trade), no wide-ranging, independent inquiry has been held. Unless we know how decisions were made to go to war, we cannot safeguard Australia against undertaking ill-founded military actions in the future.

An Australian inquiry

The primary purpose of this collection of papers is to engage Australians in a concerted effort to prevent the Iraq war experience from recurring. We call for an inquiry into the decisions that led to Australia invading Iraq, and a review of the war powers of the government with a view to improving the processes by which this democracy goes to war.

This is not to prejudge the issue. Those who think that the original decision was and remains the right one, the processes adequate, and the outcome on balance good can and should be able to make their case before an independent review. Others may have changed their minds and have much to say about how the processes should be improved. Others again who opposed it then may be as unsurprised as they are saddened by the outcome, and eager to prevent its repetition.

Questions and answers

Contributors have come together from a wide range of disciplines, each bringing particular expertise to this collection. They raise and respond to a series of questions. Ramesh Thakur considers why Australians should recall the mismatch between reasons given for the war and the way it was conducted, and why this is the time to set up such an inquiry. The second chapter provides a timeline of events leading to the war in Iraq, from January 2001, well before the invasion, to March 2003, prepared by Garry Woodard with the assistance of Paul Barratt and Andrew Farran. In their respective chapters, Rod Barton evaluates the evidence the Australian government relied on before invading Iraq, and Sue Wareham and Jenny Grounds investigate what consideration it gave in advance to the humanitarian costs of the war. Proposing five possible models for an inquiry, Edward Santow takes into account the powers an inquiry would require, how it would handle classified information, and the degree of independence it would enjoy. Charles Sampford looks at how Westminster-style governments have gone to war and some of the means for improving that process and how these decisions should take into account the ANZUS Treaty. Inquiries held by the UK are investigated by Gerry Simpson. Alison Broinowski and Charles Sampford consider some next steps for Australia, ending with a list of questions which the contributors hope will stimulate further research and discussion.

Australian soldiers from the Al Muthanna Task Group carry out range practice in Iraq with 9mm Browning pistols in 2006. *Credit: US Government*

CHAPTER 1

Why an inquiry, and why now?

Prof Ramesh Thakur

Taking a country to war is the single most solemn international responsibility of any government. It requires our soldiers to kill complete strangers solely on the authority of the government. It puts their lives on the line. Death and serious injury to the diggers can mean broken dreams and shattered futures for their families. It can leave families and entire villages traumatised in countries where the fighting takes place. It may sow bitter hatred among peoples and create foreign enemies for generations. It can inspire acts of terror against Australian people and symbols. This is why war must always be the option of last resort and must never be chosen lightly.

Domestically, the state enjoys a monopoly on the legitimate use of violence. The power and means to use violence is vested in law enforcement authorities, including the authority to use deadly force when warranted. Even so, in most modern democratic Western societies, every time that the use of force in the line of duty by a police officer results in a death, a full inquiry is conducted by competent authorities for an independent determination as to whether the action was justified and how such a tragedy might be avoided in future.

Under conditions of modern international society, for the rule of international law to be entrenched and widely established, it may be helpful for the leading democratic states to adopt an analogous policy with respect to war. That is, at a reasonable but fixed distance in time from when the decision to go to war was made, an independent inquiry by competent authorities should be conducted to review the decision and draw appropriate conclusions on justification, preparations and consequences. This should become a normal and routine aspect of democratic accountability. It is merited and will mark a fitting culmination of three separate historical trends: the increasing restrictions placed on states to go to war unilaterally, the progressive transfer of authority to use force across borders to international authorities, and the declining casualty-cum-fatality rates with an accompanying rise in the value placed on individual lives, even of soldiers, in modern Western democracies.

The progressive delegitimisation of war

Violence is endemic in nature and in human relations. War between states has been an enduring feature since the emergence of the current international system in 1648, ironically following the Peace of Westphalia. But it is far from an endearing feature and is, indeed, an affront to the modern internationalised human conscience and sensibility.

Until the somewhat prematurely labelled 1914–18 'war to end all wars', the organised violence of war was an accepted and normal part of the state system, with distinctive rules, norms and etiquette. In that Hobbesian world, the only protection against aggression was countervailing power, which increased both the cost of victory and the risk of failure. For victors and defeated alike in Europe, wars meant displacement, destruction, deprivation, privation, invasion, occupation and mass murder. Europeans have a shared memory of war as a terrible human-made calamity: would France really want to repeat its 'victories' in the two world wars?

In the late Tony Judt's words, the US today 'is the only advanced democracy where public figures glorify and exalt the military'. Britain, France and Germany lost 1–2 million soldiers each in World War I; the US lost fewer than 120,000. China, France, Germany and the Soviet Union each lost 2–11 million soldiers in World War II; the US lost under half a million. The total US civilian deaths from the two world wars was under 2000, compared with 2–16 million deaths in each of Germany, Poland, the Soviet Union and China.

Against this background of the age of total wars, an important step in the development of the idea that an international community has both the right and a responsibility to mute armed conflict between its member states was the Pact of Paris of 1928. Its signatories condemned 'recourse to war for the solution of international controversies and renounce[d] it as an instrument of national policy in relations with one another'. The normative breakthrough, that war was an illegitimate method of dispute settlement, was of great symbolic significance even if it fell short of being an enforceable contractual obligation. Although the League of Nations failed to prevent another world war, from the ashes of the Second World War the United

Nations resurrected the cause of securing peace. US President Abraham Lincoln meditated on the 'scourge of war', an apt description that found its way into the UN Charter, whose preamble begins with the clarion call: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.'

Since 1945, the UN has spawned a corpus of law to stigmatise aggression and create a robust norm against it. The UN vision replaced the League's futile efforts to abolish war with a provision for states to use military force collectively and to abide by the rules of the UN Charter. As such, negotiations and the rule of law were to replace the unilateral use of force. Only the Security Council could take or authorise military action to restore the peace. The normative primacy of peaceful over forceful means, and of the proposition that the international community has a stake in war avoidance, justifying its involvement in bilateral disputes between member states, is firmly entrenched.

Since 1945, the UN has spawned a corpus of law to stigmatise aggression and create a robust norm against it.

Of course, countries retained the right to use military force in individual or collective self-defence. That was not the case in 2003. Iraq was not implicated in the terrorist attacks of 11 September 2001. Reasons for the UN failure to support the war included deep doubts over the justification for going to war and anxiety about the human toll, uncontrollable course and incalculable consequences of war in a volatile and already inflamed region.

Washington had five great claims for the Iraq war: the threat posed by the proliferation of weapons of mass destruction (WMD) to Saddam Hussein's Iraq; the threat of international terrorism; the need to establish a beachhead of democratic freedoms and the rule of law in the Middle East; the need to bring Saddam Hussein to justice for the atrocities committed by his regime; and the duty to be the international community's enforcer. Each goal was badly undermined by the means chosen, and their collective damage to world order was greater than the sum of their separate parts.

In October 2004, the CIA's Iraq Survey Group reported with finality that while Saddam Hussein had harboured ambitions to get WMD, the Iraqi programs to build them had decayed completely. UN sanctions had helped to dismantle them and UN inspections had given an accurate assessment of Saddam's WMD capability. No credible evidence was ever produced to link Saddam Hussein to al-Qaida or international terrorism, while the Iraq invasion itself proved a powerful recruiting weapon for al-Qaida among alienated Muslim communities around the world.

The war was illegal. Only the United Nations, not individual states, had the right to decide if Iraq was in breach of UN resolutions. Security Council Resolution 1441 did not use the key phrase 'all necessary means' to enforce it, hence the need for a second UN resolution that never came. UN inspectors under Hans Blix were still doing their job and Iraq was being compliant. The US position on legality did not apply to Britain and Australia because Congress had granted special war-making powers to President George W Bush. In her resignation letter submitted on the eve of the Iraq war, Elizabeth Wilmshurst, the deputy legal adviser to the UK Foreign Office, described military action in Iraq as 'an unlawful use of force' that 'amounts to the crime of aggression'.

Although some advocates for the war might still want to argue the case for its lawfulness, most war supporters instead are more likely to argue that, regardless of its legal status, it was still legitimate in that it rid Iraq and the world of Saddam Hussein. But in order to oust a regime based solely on might with few redeeming features to make it right, established institutions and conventions for ensuring that force is legitimately exercised were set aside by a superpower supremely confident of its might and prepared to ignore what is right.

Finally, it is difficult to see how one country can enforce UN resolutions by defying the authority of the world body and denigrating it as irrelevant.

Why now?

First, 2013 will mark the 10th anniversary of the launch of the Iraq war. A decade on is a good time to reflect back on the reasons, circumstances and decision-making procedures by which a country went to any war, and to consider its consequences.

Second, there is by now widespread, although not unanimous, international agreement that the Iraq war was morally wrong, illegal, unjustified and had many seriously damaging consequences for Western interests. The primary justification for going to war was to destroy an alleged active program of building

weapons of mass destruction. This has been proven definitively false. In 2008 former US secretary of state Madeleine Albright said that the invasion of Iraq was 'the greatest disaster in American foreign policy', worse even than Vietnam in its unintended consequences. 'And the biggest unintended consequence in Iraq is … that actually Iran has … won the war in Iraq.' We need to study the long-term effects of the war on Australia's security interests.

Third, the Iraq war was in violation of Australia's international obligations under the ANZUS Treaty. Article 1 of the treaty obligates Australia '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'. As already argued, this obligation to respect the UN Charter was breached in 2003.

The Iraq war was in violation of Australia's international obligations under the ANZUS Treaty.

Fourth, the UK has had several inquiries related to the Iraq war, including one which is yet to report. An all-encompassing inquiry into Australia's involvement in the Iraq war therefore would be following in Britain's footsteps, not setting a precedent.

Fifth, since 2003 the international community has for the first time agreed to a definition of aggression. At the conclusion of the International Criminal Court review conference in Kampala, Uganda, on 12 June 2010, article 8 *bis* of the Rome Statute was amended. The 'crime of aggression' is defined to mean 'the planning, preparation, initiation or execution … of an act of aggression' in violation of the UN Charter. An act of aggression is defined as 'The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack'. We must carefully study the implications of this and draw the right lessons from the Iraq war for future calls to arms.

Sixth, next year Australia will also commence disengaging from military combat operations in Afghanistan. Because of the geographical and chronological proximity of Iraq and Afghanistan, an inquiry could benefit from considering the two experiences together, including the difficult question of to what extent the Iraq war undermined the prospects for success in Afghanistan.

Seventh, the Middle East region remains as tense as ever, with the volatile situation in Syria and the standoff with Iran over its nuclear program threatening to descend into internal, regional and/or international war at short notice. Some commentators also perceive Australia as being drawn into a US-led strategy of containment of China in the Pacific. This too has considerable potential to flare up into inter-state conflict that could entangle Australia. It would be difficult to conduct a thorough and satisfactory inquiry into a past war in the midst of a new war. It is better to study the lessons now when we still can: both to avoid another war if we can, and to conduct it after due diligence and democratic accountability if we cannot.

Finally, Australia has been campaigning for and is cautiously hopeful of being elected to a two-year term on the UN Security Council in 2013–14. This puts extra responsibility as a member of the key international law enforcement body to reaffirm its war-making authority and competence, and also to make sure that we have drawn the hard lessons from a previous flawed war.

Australian armoured vehicles in firing positions during a range practice in Iraq in 2007. *Credit: Rob Nyffenegger*

CHAPTER 2

How did we get there?

Garry Woodard with Paul Barratt and Andrew Farran

There was no orderly, consecutive process of decision making on whether Australia should go to war in Iraq in 2003. From 9/11, in 2001, Prime Minister John Howard had made up his mind to follow US President George W Bush in the war against terrorism. Australian decisions were not about whether but how. It was taken for granted that the prime minister was the decision-maker and that whatever was the prime minister's decision, that would be it. No minister or official offered advice, or dissent, on this score. Iraq was therefore unique in Australia's post-war history, although it had many common features with the policymaking procedures for the previous major war in which Australia was involved: Vietnam.

Therefore, an inquiry into how Australia went to war in Iraq should consider not Australian decision-making processes themselves but rather the nature, adequacy and relevance to Australia's national interests of reactions by the prime minister and Cabinet to the decision-making processes of its two major allies, the US and UK, particularly the US. Australia would not always have been involved in these processes, but it can be taken for granted that it was closely informed. So a decision not to express a view as they proceeded would itself represent a policy position.

An inquiry would be expected to elucidate the extent of Australia's knowledge, through ministerial communications, diplomatic reports and intelligence exchanges, and of course the voluminous public material on US and UK thinking which was available in the media. To what extent was this knowledge properly evaluated, and what evidence is there for this?

TIMELINE 2001–2003

The following is a timeline built around the sequence of events in the US and the UK:

2001

January
Ten days after becoming president, George W Bush meets for the first time with his national security principals, with 'Mideast policy' as the advertised subject. The principal subject is 'how Iraq is destabilizing the region' and the outcome of that discussion is that Secretary of Defense Donald Rumsfeld and Chairman of the Joint Chiefs of Staff, General Hugh Shelton, are to 'examine our military options' and 'how it might look' to use US ground forces to challenge Saddam Hussein.

February
CIA Director George Tenet presents to Congress the intelligence community's comprehensive annual statement on worldwide threats. The sole mention of Iraq in relation to weapons proliferation is a single sentence saying that Iraq is probably conducting work on ballistic missiles and that, if it received foreign assistance, it could develop an intercontinental ballistic missile capability 'sometime in the next decade'. Saddam's economic infrastructure is in long-term decline, his ability to project power outside Iraq is 'extremely limited', and international sanctions are keeping his diminished military from operating effectively even inside Iraq.

February–August
The US draws up a 'liberation strategy' for Iraq. The dominant theme in advice from the intelligence community and the State Department to policymakers during this time downplays the immediacy or severity of any threat from Saddam and specifically any threat based on unconventional weapons.

March 2001 through 2002
The intelligence communities produce diverse assessments of Iraq's WMD program, initially with particular reference to aluminium tubes. Australia's intelligence community would have been involved.

April
The Australian government is advised that AWB Limited is under intense pressure to pay kickbacks to the Saddam Hussein regime.

September

10th Prime Minister Howard arrives in Washington, meets with President Bush and attends an embassy barbecue with all the US neo-con establishment from Vice-President Dick Cheney down.

11th Terrorists attack the US at several locations (the World Trade Center, the Pentagon, etc). There is immediate US discussion of reprisals against Iraq. Defense Secretary Donald Rumsfeld advises, 'Go massive. Sweep it all up. Things related and not.' Minutes taken by a Rumsfeld aide five hours after the attack read: 'Best info fast. Judge whether good enough [to] hit SH [Saddam Hussein] @ same time. Not only UBL [Usama bin Laden].' (This became publicly known on 4 September 2002.) Discussions continue for a few days until President Bush orders concentration on Afghanistan. Howard is briefed by well-informed Australian ambassador Michael Thawley (whose advice on Afghanistan, Iraq and the free trade agreement Howard is acknowledging to journalist Tony Jones on the ABC when Bush's acknowledgement is stopped by the shoe-throwing incident).

12th Howard pledges support, and decides to invoke the ANZUS Treaty after a discussion with US Ambassador Tom Schieffer and a telephone call to Foreign Minister Alexander Downer.

26th President Bush makes an address to the nation. The Defence Intelligence Organisation (DIO) criticism of its tone proves controversial in Canberra.

November

21st President Bush directs Defense Secretary Rumsfeld to construct in secret a fresh plan for going to war in Iraq.

December

28th General Tommy Franks presents a first draft war plan. Further development of war plans, with Australian participation through an Australian colonel at US Central Command (CENTCOM).

2002

January

Forces start to be reassigned from Afghanistan. State of the Union address: 'Axis of Evil' label is applied to Iraq, Iran and North Korea. Principal themes: terrorism and WMD. Rogue regimes 'could' give advanced weapons to terrorists.

February

Secretary of State Colin Powell speaks to Congress; Vice-President Cheney says the US will never allow a nuclear attack by terrorists; the intelligence community reports that Iraq obtained yellowcake uranium from Niger (later rejected by DIO); US Deputy Secretary of Defense Paul Wolfowitz in Germany makes the first statement about pre-emption.

March

Statements along the same lines are made by UK Prime Minister Tony Blair during a visit to London by Cheney; the Foreign Office expresses reservations. Thawley, on instructions, issues an ultimatum to Saddam on Fox TV.

April

The *New Yorker* publishes an article on pre-emption to achieve regime change in Iraq which proves to be accurate on Bush administration thinking and as a prediction of what would happen. (Ex-Joint Intelligence Organisation director Gordon Jockel later tells the Jull committee in 2007 that this would immediately have been on intelligence community desks in Canberra.) Bush and Blair meet at Crawford and agree on the desirability of regime change in Iraq, Blair stating three desirable prerequisites but not making them preconditions. Blair gives a speech in Texas. Howard, carrying a basic brief on Iraq, holds talks with Blair. Bush tells Britain's ITV: 'I made up my mind that Saddam needs to go.'

May

Donald Rumsfeld tells Congress that terrorists are seeking to acquire WMD from Iraq, Libya, North Korea, Syria, etc. Asked if he has a plan to attack Iraq, General Franks replies: 'That's a great question … my boss has not yet asked me to put together a plan to do that.'

June

Howard is in Washington to address Congress. Accompanied by ONA Director Kim Jones, he lunches with CIA Director George Tenet. The doctrine of pre-emption is proclaimed (and later taken up by Howard). To a deputy raising doubts about war, national security adviser Condoleezza Rice says: 'Save your breath. The president has already made up his mind.'

July

MI6's Richard Dearlove advises UK Cabinet that the US is set on war, wants to remove Saddam by military action, and is fixing the intelligence and the facts around the policy. He mentions anticipated acquiescence of Australia, which may well have been fully informed. A British Cabinet Office paper of 21 July predicts that 'Australia would be likely to participate [in the Iraq war] on the same basis as the UK'. The Foreign Office queries the legality of military action. Rumsfeld rejects army and air force secretaries' warning of another

Vietnam, saying: 'We're going to get in, remove Saddam and get out. That's it.' General Franks secretly requests $700 million for war preparations. Bush approves, unbeknownst to Congress. Money is taken from an appropriation for the war in Afghanistan.

August
Powell also expresses strong reservations to President Bush and national security adviser Rice. White House chief of staff Andrew Card establishes the White House Iraq Group to plan and coordinate the selling of the war.

7th The completed war plan is submitted to President Bush by General Franks.

September
The White House Iraq Group coordinates PR, including for and with allies.

7–8th A media blitz – 'we don't want the smoking gun to be a mushroom cloud'. Cheney presents 'new information' of a link between Saddam and al-Qaida (which is later rejected by Australia's DIO).

12th Bush addresses the UN, leading to Saddam's agreeing to re-admit UN inspectors on the 18th. The Australian government makes public use of an ONA report, which uses foreign intelligence (later criticised in the Flood report and by the Jull committee, which suggested ONA was responding to 'policy running strong').

October
A month of intense activity and extreme rhetoric (introducing unmanned aerial vehicles) as the Bush administration seeks a war resolution from Congress, submitting a highly contentious national intelligence estimate. The UK National Intelligence Committee also produces a 'dodgy dossier' to justify war.

November
UN Security Council resolution 1441 offers Iraq a final opportunity to comply with its disarmament obligations set out in previous resolutions.

December
Significant troop deployments are made to the Middle East.

2001–2

Australian discussions of Iraq relate to modalities and intelligence. Officials are not asked for and do not offer advice – first reported by former Defence Deputy Secretary (Strategy and Intelligence) Hugh White; confirmed (specifically for the period from October) by three departmental heads to Paul Kelly in *The March of the Patriots* (2009).

2003

January
27th Hans Blix from the UN Monitoring, Verification and Inspection Commission and Mohammed ElBaradei from the International Atomic Energy Agency report to UN, the former more equivocal and asking for more time. The tenor of the report is that although the regime has still to account for many banned weapons, it is cooperating well, and no WMD have been found. Blair is in Washington; he and Bush agree to start a war on 10 March, asserting there will be no serious religious or sectarian strife after the invasion (though a CIA assessment has contradicted this).

February
4th Prime Minister Howard cherry-picks foreign intelligence. At this time and through February, ONA strengthens advice that Iraq has WMD.

5th Secretary of State Powell addresses the UN; some of his evidence – for example, mobile factories to produce biological weapons – proves to be incorrect, and is queried, notably by France and Germany, which are dismissed by the US as 'old Europe'. There is a stalemate in the UN.

10th Howard is in Washington for talks with President Bush.

11th Howard sees Hans Blix in New York.

March
Early March Blix and ElBaradei report further progress, saying no proscribed activities have been discovered.

14th Howard addresses the National Press Club and is queried on his failure to produce evidence of links between Saddam, al-Qaida and 9/11 by Laurie Oakes and on regime change by Michelle Grattan.

17th RJ Mathews from the Defence Science and Technology Organisation writes to Howard expressing reservations about the intelligence and noting regime change will increase the danger of dissemination of Iraqi know-how on WMD.

18th Howard quotes (new) British advice that war is legal and says the Australian position is similar.

19th War starts. Australian troops are in action before any announcement and before the ultimatum to Saddam has expired.

The UN Security Council meets on 14 February 2003 to hear a briefing on the progress of the weapons inspectors in Iraq. *Credit: Evan Schneider*

CHAPTER 3

What evidence was available?

Rod Barton

'I stand by the fact that before we entered the war, we had a very strong intelligence assessment that Iraq had a WMD capability.' So said John Howard on 20 July 2003 shortly after he had committed Australia to war to rid Iraq of its weapons of mass destruction. But what was this 'very strong intelligence assessment' and on what information was it based? Two major Australian inquiries into the intelligence that led Australia to war have been held, one in December 2003 by a parliamentary joint committee on ASIO, ASIS and DSD intelligence on Iraq's weapons of mass destruction, and the other in July 2004 by Philip Flood into Australian intelligence agencies. Although neither inquiry had terms of reference sufficiently broad to answer all the questions, and each had other failings, much has now been placed in the public domain. In addition, a total of five inquiries have been conducted in the US and the UK, with which Australia has intelligence-sharing agreements, and these have revealed further information particularly on the sources for Mr Howard's 'very strong intelligence assessment'.

Sources of information

Undoubtedly, and perhaps surprisingly to some, the greatest source of intelligence for Iraq's WMD came not from intelligence collection agencies such as the CIA, but from the United Nations via its weapons inspectors. After the First Gulf War in 1991, Iraq was required by a Security Council resolution to destroy its nuclear, chemical and biological weapons and also the long-range missiles that could deliver these weapons. Not only were the weapons themselves to be eliminated, but also all the support facilities, materials and equipment that were used to make them. This included research institutes, manufacturing plants and test facilities. To supervise the destruction of Iraq's WMD capabilities, the UN established an inspection commission, and from 1991 until the end of 1998 about a thousand inspectors, including more than 150 Australians, combed the country to ensure that the destruction carried out was done comprehensively and completely. As part of this process, thousands of Iraqi scientists, engineers and military personnel involved with Iraq's former WMD programs were interviewed and close to a million documents seized. In short, a massive database on Iraqi capabilities was established, and although it was closely held by the UN, inevitably some of the details filtered back to the countries that provided the inspectors.

Following Operation Desert Fox, a US and UK bombing campaign against Iraqi facilities in December 1998, Iraq banned further weapons inspections. However, when the threat of war again loomed in late 2002, Iraq allowed entry of new teams of inspectors, and inspections continued until almost the outbreak of war in March 2003. During this time, over 300 sites were visited to establish whether there were any indications that weapons programs had been resumed during the three years the inspectors had been absent. Some of these 300 sites were those suggested by countries, including the US, that believed they had intelligence on where Iraq might be making WMD.

Of course, after only three months of inspections, there were still discrepancies and uncertainties, and as Hans Blix, the head of the UN weapons inspectorate, reported to the Security Council on 14 February 2003, 'we do not know every cave and corner' of Iraq. But he also reported that there was nothing to indicate any renewed WMD activity. On the same day, Mohammed ElBaradei, the head of the International Atomic Energy Agency, similarly reported that his teams had 'found no evidence of ongoing prohibited nuclear or nuclear-related activities in Iraq', but pointed out that there were 'a number of issues … still under investigation.'

Perhaps more significant than the lack of evidence for WMD was the state of Iraq's industries in 2003: a WMD program needs facilities such as steelworks and chemical, electronics and fabrication plants. After years of sanctions, UN inspectors noted that factories had fallen into disrepair and Iraq's capacity to support even a basic WMD program was severely limited. Support for a technologically sophisticated program, such as one required for nuclear weapons, was non-existent.

Thus the largest database on Iraqi capabilities, the UN collection, provided no evidence of any renewed WMD activity. Although there were some uncertainties and issues to be

resolved, these related to pre-1991 weapons and whether these had been completely eliminated. Iraqi chemical or biological weapons, if they did exist, would be at least 12 years old by early 2003 and would therefore be of dubious utility. In any case, UN weapons inspectors assessed there would be only small numbers of such weapons; even if they existed, they would pose little threat beyond the borders of Iraq.

Intelligence agencies had also been collecting information on Iraq. US Secretary of State Colin Powell presented a declassified version of this to the Security Council on 5 February 2003. Almost all of it was ambiguous and open to other interpretations. For example, telephone intercepts of Iraqi officials could be interpreted as references to hidden weapons but, equally, other explanations were possible. Similarly, satellite images of trucks allegedly carrying chemical weapons could just as easily have been transporting something more innocent.

The most definitive, although ultimately incorrect, piece of information possessed by the US related to an alleged biological weapons factory mounted on a semi-trailer. The US claimed that 'the source was an eyewitness, an Iraqi chemical engineer who supervised one of these facilities'. At the time, this might have seemed like persuasive evidence except for the fact that this was a single source and there was no other corroborating information. It should not therefore have been accepted as evidence of a WMD capability and indeed was not by Australian intelligence agencies.

In fact, the so-called 'source' was an Iraqi refugee in Germany. He had not been interviewed by US authorities but by German intelligence, which had passed on its findings to the CIA. German intelligence had, however, advised the US that they believed the source was unstable and a fabricator. The German reservations were well justified and the source has since admitted that he made up the story to get a visa and work permit to allow him to live in Germany.

Assessment of intelligence

Australia had limited capacity to collect its own intelligence on Iraq, but through intelligence-sharing agreements most, although not all, of the results of special collection efforts by the US and UK were available to Australian analysts. In addition, Australian analysts were well informed on much of the information in the vast UN database. Of the two Australian intelligence assessment authorities advising the government before the 2003 Iraq war, the Defence Intelligence Organisation (DOI) was the better placed to provide technical advice on WMD. It

Members of the UNSCOM team inspect mustard agent 155-mm artillery projectiles in Fallujah, Iraq, in August 1991. *Credit: Shankar Kunhambu*

has a branch staffed with highly qualified personnel who are experts in chemical, biological and nuclear weapons. On the other hand, the Office of National Assessments (ONA) in the Department of Prime Minister and Cabinet has few technical specialists, but has greater expertise in the political dimensions of the Middle East. The agencies worked in close cooperation, but produced their own independent assessments to the government in the lead-up to the war.

It has become evident that up to September 2002 both agencies had similar assessments of Iraq's WMD capabilities, but after that date views diverged, as the parliamentary joint committee revealed in December 2003 and the Flood inquiry later confirmed. DIO maintained its previously held view that Iraq had not restarted its WMD programs. For example, it stated on biological weapons that: 'There ha[ve] been no known offensive research and developments since 1991, no known BW [biological weapons] production since 1991 and no known BW testing or evaluation since 1991.' And on chemical weapons, DIO asserted: 'There is no known CW [chemical weapons] production.'

ONA, however, after September 2002, was more upbeat. For example, it reported: 'Iraq has almost certainly been working to increase its ability to make chemical and biological weapons.'

Both agencies assessed that Iraq probably retained some old pre-1991 weapons in limited numbers, but DIO added that over time they would have degraded and hence 'the capacity for Iraq to effectively employ weaponised CW agents is uncertain'.

Were these assessments fair and reasonable?

The Iraq Survey Group reported on 30 September 2004 that at the time of the Iraq war in March 2003, Iraq had no WMD and no programs to make them. This is now well established. Therefore, both Australian assessment agencies had got it wrong, ONA more so than DIO. On the other hand, neither agency had made the gross errors of their US and UK counterparts that had presented the intelligence as definitive, had stated with certainty that Iraq had resumed its chemical, biological and nuclear weapon programs, and that Iraq posed an imminent threat to the international community. After the war, British and American inquiries showed that many claims about Iraq's WMD were false.

The benchmark by which the Australian intelligence agencies should be judged is not what is known now, but whether they had fairly assessed the evidence

available at the time. By this test, DIO's assessment that Iraq had some old weapons but no new programs was reasonable. ONA's more aggressive assessment on the likelihood of renewed weapons program does not seem objectively based. One can only speculate on why, with the same raw intelligence, its views diverged so far from those of DIO.

Was it a 'very strong intelligence assessment'?

It is not clear what briefing John Howard received just prior to the Iraq war. ONA and DIO had different views on the evidence for Iraq's possession of WMD, and reports from both would have been forwarded to his office. Even if he had listened only to what ONA was saying, it hardly seems to be the 'very strong intelligence assessment' that he claims. For example, although ONA assessed Iraq had 'almost certainly been working to increase its ability to make chemical and biological weapons', it does not suggest that stockpiles of weapons had actually been manufactured. Therefore, it is not surprising that Philip Flood, who conducted one of the inquiries into Australian intelligence, told an SBS interviewer on 22 July 2004 that the evidence on Iraq's WMD was 'thin, ambiguous and incomplete'. So perhaps this is why on 4 February 2003 the prime minister, in presenting his case to parliament for decisive action against Iraq, did not refer to Australian intelligence but instead cited the aggressive UK and US assessments.

In any case, the possession by Iraq of WMD is not the point. Before a decision to go to war in 2003, the question that should have been asked is: did Iraq pose a threat either to neighbouring countries or to the wider international community, including Australia and its allies? Again it is not clear whether this was addressed by the Australian intelligence community, although it seems not. And more critically, was this asked by the Howard government? We do not know the answer, but if this question was not asked, then that was a fundamental and catastrophic failing.

An Iraqi boy watches as US soldiers conduct site surveys in the Al Ewaj region of Tikrit in September 2009. *Credit: Steven King*

CHAPTER 4

How highly did the children rate?

Dr Jenny Grounds and Dr Sue Wareham OAM

The invasion of Iraq was a humanitarian disaster. This was not the result of things unexpectedly going wrong. During 2002 and 2003, many individuals and groups expressed concern about the certain harm to human health, and also to the environment, if the war proceeded.

Millions of people in the streets in over 800 cities throughout the world, including in Australia, could see that Iraqi civilians, including children, would pay the cost for the actions of their leaders. What is not clear is the extent, if any, to which the predictions of large-scale human suffering weighed in the Australian government's decision-making process.

Warnings of the likely consequences of the war presented a consistent message – that Iraqi society was degraded by the 1991 Gulf War and over 10 years of crippling economic sanctions, and that it would not be capable of withstanding further military conflict. The impact of the sanctions had been documented repeatedly during the 1990s, by a multitude of UN agencies and non-government organisations. As early as July 1993, the Food and Agriculture Organization and the World Food Programme reported that the economic sanctions had 'virtually paralysed the whole economy and generated persistent deprivation, chronic hunger, endemic under-nutrition, massive unemployment and widespread human suffering'. Large-scale starvation was avoided due to an effective public rationing system.

The UN Oil-for-Food program, implemented in 1996, provided some relief but not a major improvement in the well-being of the people, and widespread malnutrition remained. Infant mortality, which is a good indicator of a country's health status generally, had fallen to 65 per 1000 live births just before the 1991 Gulf War, but had risen again to 103 by 1998, reflecting the huge deterioration in health conditions in that period. Denis Halliday and

Hans von Sponeck, successive heads of the Oil-for-Food program, each resigned from that position in protest at the effects of the sanctions, which continued to take a heavy toll on innocent lives.

Against this background, reports that emerged in 2002 and 2003 expressed alarm at the further suffering that would be inflicted by the impending war.

Pre-war warnings

In November 2002 Medact, the UK affiliate of International Physicians for the Prevention of Nuclear War, released a report *Collateral Damage: The health and environmental costs of war on Iraq*. The report examined the short- and long-term effects of the 1991 Gulf War, the sanctions, and the no-fly zones imposed on Iraq with continued bombing by US and UK forces, and portrayed a nation, in 2002, that was weakened and impoverished. 'The Iraqi people's mental and physical health and well-being were seriously harmed by the direct impact of the 1990–91 war,' it stated. 'They were further weakened by the indirect effects of the conflict in a variety of ways that stem from the consequences of economic collapse, and from widespread infrastructural destruction and damage to services and facilities.'

The report argued that even a best-case scenario – a short war comparable to that of 1991 – would have a much greater impact on the Iraqi people and surrounding countries than that war did. It was estimated that new attacks on Iraq could lead to up to half a million deaths on all sides, including the effects of the initial attack, ongoing conflict and refugee deaths.

The Australian launch of *Collateral Damage* was at Parliament House in Canberra on 12 November 2002, and it received significant media coverage. The report was commended by General Peter Gration, former chief of the Australian Defence Force, who said, 'This is not an exaggerated tract by a bunch of zealots. It is a coldly factual report by health professionals, who draw on the best evidence available … erring on the side of caution.'

The findings of the *Collateral Damage* report were reinforced in January 2003 by the Center for Economic and Social Rights in New York, which also predicted humanitarian disaster in the event of war. The Center sent a team of experts in food security and nutrition, public health infrastructure, public health care, and emergency medicine to Iraq to examine preparedness for further violence and deprivation. Their report, *The Human Costs of War in Iraq*, stated that the international community (the UN and relief agencies) was unprepared for the humanitarian

disaster of another war in Iraq. The healthcare system was extremely fragile and grossly inadequate even before the war began. One of the report's authors stated that 'Iraq has become like a vast refugee camp'. The authors also expressed concern that Pentagon war plans for Iraq explicitly threatened civilian infrastructure.

Also in January 2003, the International Study Team, an independent group of academics, researchers, and practitioners who had reported on infant mortality in Iraq as a result of the 1991 war and the economic sanctions, published a further report, *Our Common Responsibility: The impact of a new war on Iraqi children*. The report stated that:

- Iraqi children suffered significant psychological harm from the threat of war that was hanging over them
- Iraqi children were still in a significantly worse state than they were before the 1991 war
- Because most of the 13 million Iraqi children were dependent on food distributed by the Iraqi government, the disruption of this system by war would have a devastating impact on children who already had a high rate of malnutrition
- The international community had little capacity to respond to the harm that children would suffer by a new war.

On 25 February the World Food Programme also warned that the impending invasion might disrupt the government food hand-outs to millions of Iraqis – a system, it said, that was very effective in delivering essential rations. (As predicted, the distribution of food rations was disrupted.)

Australia's federal parliamentarians were aware of at least some of these dire predictions, and many expressed their opposition to our participation in the impending war. They issued a statement in early 2003 noting: 'Civilians are the first casualty of war. War will mean further humanitarian and environmental devastation, and a flood of new refugees.'

War and its effects

The war began on 19 March, and its effects were apparent very early on. In late March UNICEF expressed concern at frequent power cuts, leading to cuts to clean water supply in Basra. In April the International Committee of the Red Cross reported that the medical system in Baghdad had virtually collapsed. Also in April UN agencies reported that looting and lawlessness obstructed their operations. On 2 May UNICEF reported on the dangers confronting Iraqi children,

A vehicle burns in Baghdad in 2006 after being hit by a mortar. *Credit: Keith W. DeVinney*

including insecurity which prevented aid delivery, infectious illness from degraded water supply, unexploded munitions, school closures and children on the streets, and enormous stress on hospitals with inadequate supplies and ongoing malnutrition. The problem of insecurity was so great that, by September 2003, staff of the International Committee of the Red Cross, Oxfam, Save the Children and Merlin (Medical Experts on the Frontline, a UK service delivery organisation) had withdrawn their international staff from Baghdad and were scaling down their operations in Iraq, after the August bombing of the UN headquarters and the Jordanian embassy in Baghdad.

The terrible plight of the children continued. In February and March 2004 the *Washington Post*, the *New York Times* and *The Independent* reported on the appalling conditions in Iraq's paediatric hospitals, with very poor sanitation and shortages of essential medications and equipment. Deaths and maiming from unexploded ordnance, including cluster bombs, took a further toll on children. The UN News Service reported as early as 17 July 2003 that over 1000 children had been killed or injured by cluster bombs or Iraqi munitions.

Refugees from the war number in the millions. *Costs of War*, a June 2011 report from Brown University's Watson Institute for International Studies, stated that '3.5 million Iraqis have fled their homes and have not returned' since 2003. That number includes 1.7 million internally displaced persons and 1.8 million Iraqi expatriates. The UN High Commissioner for Refugees puts the number even higher, estimating 4.7 million displaced Iraqis since the invasion.

> If we are to learn anything from this disaster, we must establish how it unfolded and the role, if any, played by the ample warnings that accurately predicted its full horror.

Despite great difficulties in data collection, and in the absence of any official civilian casualty figures, some estimates of the war's death toll emerged. In October 2004 the medical journal *The Lancet* reported a cluster sample survey which estimated that the war had caused the deaths of approximately 100,000 Iraqis, with violence being the primary cause of death. The violence was mainly attributed to coalition forces.

The violence continues

Tragically, predictions of ongoing instability and violence triggered by the war were accurate. A further study published in *The Lancet* in October 2006 – from respected researchers using sound techniques – estimated a figure of 655,000 excess deaths (deaths over and above those that would usually have occurred) from the start of the war until July 2006, 92 per cent of these being due to direct violence. While precision with such figures is not possible, the authors gave a possible range from 390,000 to 940,000 excess deaths.

At the lower end of estimates of the death toll is the database Iraq Body Count, which analyses press and media reports of deaths. It has documented 107,000–117,000 Iraqi civilian deaths from violence since the start of the war until July 2012.

Regardless of the exact number of deaths, which we will never know, the toll is enormous. Far greater still is the legacy of shattered bodies and minds and human misery.

In 2003, before Australia went to war, Defence Minister Robert Hill gave assurances that our troops would adhere to international humanitarian law and would not attack civilian targets. However, the government knew, or should have known, that during the 1991 Iraq war, the attacks by US forces on civilian infrastructure had destroyed much of Iraq's electrical generating capacity, with a disproportionate effect on children's health from contaminated water supplies (see T Nagy, *Iraq: The human cost of history*, 2004). Australians would have been naive to assume that in planning and executing the 2003 invasion the protection of civilians would be our ally's highest priority.

Nearly 10 years later, the children, women and men of Iraq are paying a heavy price for the war, as they will continue to do for a long time. They do not have the luxury of 'moving on'. If we are to learn anything from this disaster, we must establish how it unfolded and the role, if any, played by the ample warnings that accurately predicted its full horror.

Iraqi residents must wade through a lake of water due to a main break in Baghdad in 2008. *Credit: Charles Gill*

CHAPTER 5

What sort of inquiry is needed?

Edward Santow

Assuming there should be an inquiry into the legality of Australia's involvement in the war in Iraq, there are a number of possible models for such an inquiry. These include a parliamentary inquiry (by the House of Representatives, the Senate or a joint committee); an inquiry with the powers of a Royal Commission; an ad hoc (judicial) inquiry without Royal Commission powers; an inquiry undertaken by the Australian Law Reform Commission; or a citizens-initiated inquiry that is initiated without the involvement of the Commonwealth Government. In determining which model is most appropriate, the many factors that might be taken into account include:

- The powers of the person(s) leading the inquiry (such as powers of compulsion for evidence to be given, to force attendance and to ascertain classified information)
- How to deal with information that has been or may be classified, including in relation to the final report
- The level of independence of the inquiry.

Parliamentary inquiries

One option would be to hold an inquiry through the federal parliamentary system. This could be undertaken by the Senate, by the House of Representatives or by a joint committee of both Houses of Parliament. One advantage of a parliamentary inquiry is that submissions and evidence given to the inquiry could be made publicly available and covered by parliamentary privilege. (Section 16 of the federal *Parliamentary Privileges Act 1987* provides for this immunity). This would provide immunity against defamation and other legal liability in respect of witness testimony.

An advantage of a parliamentary inquiry is that it would be undertaken by the legislative arm of government, with access to the senior executive. If reforms are proposed, the legislators – at least

those who have participated in the inquiry process – might have more of a stake in their implementation.

Having said that, the strict party discipline within the modern incarnation of Australian Westminster democracy might discourage those members who fear political embarrassment, were the report to criticise past governments, from exercising complete candour in the inquiry process. To the extent that the inquiry members are inquiring into their own behaviour, or those with whom they have strong political allegiances, there is a risk that there could be at least a perception of less independence.

SENATE INQUIRY

The Senate has the power to initiate an inquiry via its committee system. This initiation, which occurs by way of referral, would set out the matters on which the committee can investigate and report. There can also be referral to a committee if there is a bill before the Senate. In Chapter 16 of *Odgers*, the powers of committees are outlined. Like Royal Commissions, there is a power to send for persons and documents by way of summons and requests that documents be produced.

There is the power to hold video-recorded proceedings. There can be a decision by the committee to hold the proceedings in public or in private. Proceedings might be held in private if, for example, the relevant portion of the proceedings might disclose material the publication of which could damage national security. There is also the option of releasing the private evidence of the hearing in the future, when the information is no longer classified and is safe to release.

The advantages of this model of inquiry, especially in terms of public perception, include that it can provide a forum for a full investigation of issues. However, should there be involvement of ASIO or ASIS, the Senate committee might lack the power to receive highly classified information. Such information may only be able to be released to the Opposition Leader and National Security Committee of Cabinet.

This model also allows for hearings to be as open as practicable, while allowing the committee to hear classified evidence. The option of partial publication seeks to balance national security and openness, by allowing scrutiny of classified material but preserving the option of publicly releasing the classified information at some later date.

Independence is also enhanced by the separation of the person(s) conducting the inquiry from government bodies that are directly involved in operations, such as the Australian Defence Forces, ASIO

and ASIS. However, such an inquiry would remain within the political realm. As such, it is unlikely to have – in perception or reality – the same level of independence as, for example, a Royal Commission.

HOUSE OF REPRESENTATIVES INQUIRY

The process by which the House of Representatives might initiate an inquiry of this nature is summarised on the Parliament's website. It says:

> *The inquiry process may vary from inquiry to inquiry as circumstances demand but usually consists of the following steps:*
>
> 1. *Reference received by the committee.*
> 2. *Reference advertised through various media, and submissions sought from individuals and organisations.*
> 3. *Submissions received and authorised for publication.*
> 4. *Committee conducts on-site inspections, background briefing and seminars (where appropriate).*
> 5. *Committee conducts public hearings with selected individuals and organisations requested to give oral evidence.*
> 6. *Committee considers evidence and prepares report.*
> 7. *The report is presented to the Parliament and may be debated.*
> 8. *Copies of the report are made available through various means including through the national and state libraries and publication on the Parliament's website.*
> 9. *Government considers report.*
> 10. *Government responds to report by presenting response in the Parliament.*

The powers and relative merits of a House of Representatives inquiry would be very similar to the powers of a Senate committee inquiry. However, it should be noted that, by definition, the government of the day controls the House, and so it is less likely to be able to break from the strictures of political party discipline.

A Royal Commission and ad hoc inquiry without Royal Commission powers

The establishment and functioning of a Royal Commission is governed by the federal *Royal Commissions Act 1902*. The Governor-General, acting on the advice of the government of the day, institutes a Royal Commission. She or he issues letters patent, establishing the Royal Commission and setting out the inquiry's remit.

A Royal Commission has very broad powers to conduct inquiries. However, in establishing a commission of an inquiry, the government might opt to give the commission less than the full powers. This could be in relation to a judicial inquiry. A judicial inquiry is also created by the Governor-General through issuing letters patent. There is also the ability to establish a non-statutory form of inquiry into particular events.

The *Royal Commissions Act* provides a Royal Commission or inquiry with powers including:

- To summon witnesses and take evidence
- To apply for search warrants
- To issue a penalty for the refusal to give evidence or be sworn
- To have a person arrested for failing to appear
- To inspect, retain or make copies of documents
- To issue penalties in relation to false or misleading evidence, bribery of witnesses, fraud on witness, destroying documents or other things, preventing a witness from attending, causing injury to a witness, employers dismissing employees who are witnesses at the Royal Commission, and contempt of the Royal Commission.

Witnesses and others giving evidence to a Royal Commission would have the same rights as if they were giving evidence in the High Court. Similarly, a Royal commissioner would enjoy all of the immunities and privileges that a High Court justice has, and a legal practitioner assisting the commission, or appearing on behalf of a person at the commission, would have the same privileges that they would have in appearing before the High Court.

Royal Commissions have special rules in relation to privilege. Generally speaking, a person cannot refuse to produce a document on the basis of legal professional privilege without first having their claim accepted by the commissioner.

There is also a provision in relation to the privilege against self-incrimination. It is not an excuse to fail to provide evidence or documents if they may incriminate the person. It is only acceptable if it 'might tend' to incriminate the person in relation to:

- An offence and the person has either been charged with that offence and proceedings relating to it have not concluded, or
- A penalty and proceedings have commenced in relation to the penalty and have not been concluded.

An ad hoc judicial inquiry is an inquiry that is established by the government in relation to a particular matter. It is 'judicial' in the sense that the inquiry is led by a former or serving judicial officer. While this person would be acting in their personal capacity, and so would not bring with them their judicial powers to deploy for the purposes of the inquiry, their status as a current or former member of the judiciary might lend the inquiry a greater sense of independence. Such an inquiry can resemble a Royal Commission in some respects. The issuing of letters patent by the Governor-General could be used to initiate an ad hoc judicial inquiry. The extent to which such an inquiry would resemble a Royal Commission, as well as its relative independence, would largely depend on the extent of the powers provided to the inquiry commissioner.

Frequently, ad hoc judicial inquiries are commenced by way of an enabling act of Parliament. It would depend on the content of such legislation as to whether there is protection of all involved in the inquiry by privilege, and how far such privileges would extend. If an ad hoc judicial inquiry is established with some powers that a Royal Commission has, the issues of privilege would resemble those discussed above. The Australian Law Reform Commission (ALRC) noted in 2009 that 'non-statutory inquiries may not provide legal protection to inquiry members'. This indicates privilege may not attach to all involved in an inquiry that is commenced without an enabling act of Parliament.

CLASSIFIED INFORMATION

As the ALRC has explained, Royal Commissions have tended to deal with classified information differently from ad hoc judicial inquiries. It appears that there is no prima facie right for Royal Commissions to have access to classified information. The ALRC noted some of the difficulties in relation to classified information. The Clarke inquiry into the case of Dr Mohammed Haneef (an ad hoc judicial inquiry) is indicative of some of the problems that would be faced in relation to classified information. The ALRC has summarised some of the ways that classified information has been dealt with by Royal Commissions:

- Holding hearings and examinations in private
- Withholding material, such as transcripts and exhibits, from publication, or deferring publication of such material
- Making orders prohibiting the disclosure of particular documents or classes of documents
- Making orders prohibiting the disclosure of the identity of participants in an inquiry
- Making orders relating to how a person should be examined and what documents can be shown to the person
- Adapting inquiry procedures, for example, implementing arrangements with inquiry participants and the Australian government to enable agreement to be reached on what portions of the transcript should, and should not, be published
- Requiring inquiry participants to provide notice prior to referring to national security information in the course of the inquiry, including in submissions
- Preparing confidential volumes or annexures of the report and placing limits on their distribution
- Making recommendations to the Australian government regarding which parts of a report should, or should not, be made public
- Preparing abridged versions of findings and recommendations suitable for publication
- Examining national security information and preparing summaries of such information for use in the conduct of the inquiry
- Entering into arrangements with Australian government agencies for the protection of national security information provided to the inquiry, including handling and storage
- Making arrangements for persons accessing national security information in the course of an inquiry to obtain security clearances.

RELATIVE MERITS

The ALRC has found that Royal Commissions are perceived by the public to be more independent and the public are 'more likely to accept inquiry processes and decisions' of Royal Commissions. It has also commented that they are 'sometimes seen to be more independent than other types of inquiries because they are supported by statute'.

There is the disadvantage that a Royal Commission cannot implement or legislate any of its recommendations. Instead, it is the legislature's responsibility to consider and, if it deems it appropriate, to implement these recommendations.

Inquiry by the Australian Law Reform Commission

The ALRC was established to conduct inquiries on difficult questions of legal and public policy. Its inquiries can be initiated only by the Attorney-General referring a

matter to the ALRC and providing terms of reference that demarcate its investigative boundaries.

However, the commission tends to focus its inquiries on general issues (such as privacy, sedition or gene patenting) as distinct from the legality of a particular decision. In order to bring an ALRC-led inquiry within its statutory remit, the focus of the inquiry would need to be on the legal process by which Australia enters armed conflict generally. This would not preclude the ALRC from investigating the legality of Australia going to war in Iraq, but this probably could not be the main focus of the inquiry.

Unlike judicial inquiries and Royal Commissions, the ALRC does not wield any coercive powers to require evidence or documents to be given to the inquiry. As such, it appears that the issues relating to privilege being claimed where evidence or documents are called for, like in ad hoc judicial inquiries and Royal Commissions, would not arise. However, the ALRC does have the 'power to do everything necessary or convenient to be done for, or in connection with, the performance of its functions.' Its modus operandi is to consult relevant stakeholders and undertake research. This informs the ALRC's thinking and is reflected in its process, which usually starts with an issues paper (providing background context and asking a series of questions), followed by a discussion paper (setting out draft proposals for reform) and concluding with a final report that contains its reform recommendations.

The final report is provided to the government, which is obliged to table it in Parliament. The government retains full discretion regarding whether to implement the recommendations of the ALRC through legislative changes.

While the ALRC would lack the power to obtain classified information, it does have experience in dealing with questions of national security. An example is its inquiry into classified information, *Keeping Secrets Report: The protection of classified and security sensitive information.* As noted above, the ALRC does have a wide-ranging power. There is no statutory provision provided for in the *ALRC Act 1996* that deals with the issue of privilege. However, the ALRC published a policy in June 2010 in relation to submissions and inquiry material. Generally, the ALRC attempts to make all submissions public. However, where information is provided to it in confidence, it will not make the information publicly available. If a request for such a document were made under the federal *Freedom of Information Act 1982*, the ALRC has stated that in most instances it would be denied under section 45.

RELATIVE MERITS

The ALRC is an independent statutory authority, and so is more autonomous than a parliamentary committee. However, it is only able to inquire about the issues set out by the Attorney-General. Further, there is no obligation on the government to follow the ALRC's recommendations, although historically a high proportion of its recommendations are implemented by government.

Citizens-initiated inquiry

A citizens-initiated inquiry would be an inquiry that is established by a group of citizens without the official imprimatur of government. Such an inquiry could be launched by an individual, one or more not-for-profit organisations, or a broad coalition of stakeholders. A citizens-initiated inquiry would not attract the privileges or powers that are attached to a parliamentary inquiry, ad hoc judicial inquiry, Royal Commission or ALRC inquiry. There are privileges, such as privilege against self-incrimination, professional legal privilege and parliamentary privilege, which attach to various other methods of inquiry that would not operate in this method of inquiry. As such, witnesses giving evidence will not be covered by these privileges, and may be less inclined to provide evidence, as this could expose them to legal action.

As an obvious practical matter, the resources available to a citizens-initiated inquiry would depend on those stakeholders who choose to back it. While it would lack the legal power to compel the production of evidence or the appearance of particular witnesses, it could use the federal *Freedom of Information Act* to obtain government-held information that is not exempt from disclosure. Of course, however, in an inquiry such as this, it is highly likely that the government would rely on the statutory exemption from disclosure in respect of information that might prejudice national security or international relations. This would significantly hamper the ability of such an inquiry to obtain evidence not already in the public domain.

RELATIVE MERITS

In principle, a citizens-initiated inquiry could be expected to generate stronger public support given that it would be completely separate from government, which would be the main subject of the inquiry. However, in practice, this support and its relative independence would rely heavily on the people most closely associated with the inquiry. If the inquiry were perceived as being closely aligned to a particular political party or ideological cause, its independence would be diminished.

An Australian soldier takes part in a joint exercise with the US military at Shoalwater Bay in Queensland in 2011. *Credit: Andrew Dakin*

CHAPTER 6

A better Westminster way to war?

Prof Charles Sampford

In Montesquieu's famous tripartite separation of powers (executive, legislative and judicial), the power to make war was clearly part of the executive power. It was the quintessential sovereign power when the sovereign and state were inseparable and supposedly all powerful.

As legislative and judicial powers were separated from executive powers and given to *parlements*/parliaments and courts, the power to make war remained clearly within the executive power of the English sovereigns. But this power was always subject to practical limitations of finding the necessary soldiers, arms and money to pay for them.

From the 17th century, the power of the purse of the English parliament constrained all government action and meant that monarchs started to appoint ministers who could get legislation, especially money bills, through parliament. They came to be led, coordinated and then nominated by a 'prime' minister.

The 'loss' of the American colonies led to the crystallisation of the parliamentary system. Although executive power legally remained in the sovereign's hands, it was increasingly exercised by ministers appointed by the sovereign under powers conferred by legislation or exercised by the sovereign on the 'advice' of ministers – advice which was increasingly taken. Executive power was divided into four kinds:

1. Powers given to 'Queen-in-Council' or 'Privy Council' in which the sovereign would make decisions in the presence of, and on the advice of, her ministers. Commonwealth countries had similar bodies called the Governor-General-in-Council and/or Federal Executive Council. Actions can only be taken on ministerial advice but the governor-general can ask questions and will generally want to be satisfied of the legality of the decision taken.
2. The 'prerogative' exercised directly by the sovereign – seen as the residue of the sovereign's once theoretically absolute power. These were increasingly exercised on advice and those powers which could be exercised without advice came to be called the 'reserve powers'.
3. Statutory powers given to ministers or nominated officials under legislation.
4. Powers that are neither statutory nor prerogative (such as the power to enter contracts).

Most executive activity is carried out through the last two but the most significant decisions are carried out through the first two.

The war power in Australia

At Federation, Australia did not gain full independence. Although section 61 of the Constitution vested executive power in the queen and exercisable by the governor-general, this did not include the power to declare war. When the king declared war acting on his UK advisers, Australia automatically went to war as well.

In 1942, Australia adopted the 1931 *Statute of Westminster*, became independent and hence transferred the war power to the governor-general. Acting on the advice of the Australian cabinet, he declared war against four belligerents. It was generally assumed that these declarations were made under section 61 of the Constitution, which now included full executive power.

However, to put the matter beyond any doubt, Attorney-General HV Evatt arranged for a formal delegation of war-making power from the king to the governor-general under section 2 of the Constitution. As it was in war, so it was in peace with the governor-general signing off on peace with Germany in 1951.

In 2003, most constitutional lawyers expected that the political decision would be taken by cabinet as a whole or the security cabinet but legally authorised by the governor-general on advice from the prime minister either exercising the prerogative or through the Federal Executive Council.

The governor-general, Peter Hollingworth, certainly thought so: 'I saw it as my duty to ask the government of the day what instruments, if any, were required to invoke such an action or to ratify the decisions of government.' With regard to Afghanistan, 'the Prime Minister informed me that no order from the Governor-General was required. In that matter, he cited the ANZUS Treaty as the basis for action by the government.'

On Iraq he writes:

> *I had previously read public statements made by some academics and international lawyers, and, on the advice of the Official Secretary, I sought clarification from the Attorney-General as to technical ramifications that could arise under international law. I had not requested it, but he immediately referred the matter to the Prime Minister who met with me to address the issues from available legal advice. He … informed me that no recommendations were ever put to any of my predecessors in relation to troop deployments to places such as Somalia, Bougainville, Bosnia, Cambodia, Rwanda, the Persian Gulf, Vietnam or East Timor.*
>
> *He had previously given an undertaking that in such circumstances he would in future request the Minister for Defence to recommend to the Governor-General in Council that the deployment of Australian forces overseas be noted by way of recognition of the position of Governor-General essentially as the titular Commander-in-Chief of the Australian Defence Forces.*

When Australia went to war, the prime minister set out the political process by which the decision had been made, citing the process followed by Prime Minister Bob Hawke in 1991. However, it was widely known that Governor-General Bill Hayden had complained that he had not been asked to give his prior approval and it had been assumed that this was an error which would have been rectified. The claim to a long-standing practice was surprising – though all of the other conflicts Howard cited had involved activities approved by the sovereign power and did not involve a war between sovereign states that would give rise to a declaration of war.

This does raise the question of the legal means by which the political decision by cabinet had been effected. Cabinet has neither constitutional status nor legal power. Political decisions reached there are legally executed by ministers, officials, the governor-general or the Federal Executive Council under one of the four forms of executive power set out in the first section of this chapter.

It now appears clear that cabinet's decision was effected through a statutory power vested in the defence minister under a 1975 amendment to the *Defence Act* which vests 'the general control and administration of the Defence Force' in the minister and requires the military to exercise its powers 'in accordance with any directions of the Minister'. This may not sound like a delegation of power to the defence minister to make war and there is no hint of such an intention in the Tange report, which recommended the change, or the debate that accompanied it – including assurances that the governor-general's powers would be unaffected. The other intriguing element of the governor-general's statement is the undertaking by the prime minister to take the matter before the Federal Executive Council 'for noting'. It is not clear whether there is a place in FEC meetings for noting decisions and, if so, whether it precludes the governor-general asking questions as he can with regard to normal FEC decisions (including legal ones such as the one he asked).

Enhancing the process

The process whereby decisions to go to war are taken by cabinet, especially those under the effective control of strong prime ministers, has been queried by many, and several suggestions have been made for their improvement. Most of these suggested changes have roots in our or other Westminster systems and their adoption would be in complete accord with the longstanding Westminster tradition of progress through incremental reform incorporating lessons learned in institutional practice. We will briefly review them in turn.

PARLIAMENTARY APPROVAL

Parliamentary approval in the lower house was sought and secured by both Tony Blair (in advance) and John Howard (retrospectively). Some have sought to legislate to require such approval reflecting the requirement for congressional approval under the US constitution. However, it should be remembered that Congress is not in a position to get rid of a president through a no-confidence motion – which is a much broader power to control governments incurring the displeasure of a majority of the lower house. If parliamentary approval is required in both houses, a potential check is imposed on governments and coalitions that do not control the upper house. Garry Woodard's suggestion of a nationally televised joint sitting is a good one but is constitutionally difficult. A variation could be that decisions to go to war be supported by a majority in the lower house *and* a majority of all MPs in both houses, which would have the same effect.

But we should be careful of expecting too much of such requirements. Even in the US, this constitutional provision is a limited deterrent to wars of aggression. It did not stop the wars against Canada in 1812, Mexico in 1846, Spain in 1898 or Iraq in 2003.

Much depends on the quality of information parliament receives.

LEGAL ADVICE

Blair and Howard provided legal advice to parliament. The advice was much criticised, not least for representing a minority view among international lawyers and not recognising either the majority view of the likely outcomes if it went to court. Blair did not supply Lord Goldsmith's earlier and fuller advice to cabinet, let alone to parliament. Howard did not even consult the solicitor-general. Parliament needs independent advice.

In some jurisdictions the attorney-general has a duty to make legal decisions and give legal advice independently of cabinet – traditionally by convention in the UK and Commonwealth jurisdictions and legislated in Queensland. In the UK, this included the provision of legal advice to parliament as well as the government. However, this can give rise to significant tensions as illustrated by Goldsmith's secret and public advice. Some of the independent powers have been largely transferred to statutory bodies (most notably that over prosecutions). In Australia, the attorney-general's 'client' is the government and not the parliament. Under standing orders the attorney-general cannot be asked for a legal opinion in question time. The attorney-general at the time of the Iraq war, Daryl Williams QC, considered that his position in cabinet and the far greater executive responsibilities of Australian attorneys-general compared to British attorneys-general meant that the solicitor-general (an independent statutory officer) should be the one to provide written opinions.

Given this background, Westminster parliaments might consider a range of options:

- Securing a legal opinion from the solicitor-general provided they are satisfied with the government's brief
- Securing independent legal opinion on the basis that the client of the solicitor-general is the government
- Seeking an advisory opinion from the ultimate appellate court. Given the gravity of going to war, it would be not unreasonable to require the court to give this priority, but the Australian High Court has ruled it does not have the constitutional power to do so
- Establishing a standing panel of former judges or prominent international lawyers to provide advice.

As proof of good faith, Australia should also consider accepting the compulsory jurisdiction of the International Court of Justice for any occasion on which it

resorts to armed force provided that the state which seeks to question any claimed illegality by Australia also accepts the court's compulsory jurisdiction over breaches of international law cited by Australia as a reason for the use of armed force (what I call the 'so sue me' approach).

Seeking and hearing such opinions could be given to a parliamentary committee which reported to parliament. This would give it the time and the ability to handle any confidential, privileged or secret information. There are many parliamentary and congressional committees which handle such matters with necessary security clearances. The presence of opposition members is no bar to their receiving such briefings as they could be ministers following the next election.

MILITARY AND INTELLIGENCE ADVICE

The same committee that heard legal advice could also receive confidential briefings on military and intelligence assessments. These assessments must, of course, be professional, independent, frank and fearless.

THE FEDERAL EXECUTIVE COUNCIL

While the Iraq war was not brought before the Federal Executive Council, there is merit in doing so and it would appear procedurally superior to both the governor-general acting on the prerogative alone on advice or the defence minister acting under section 8 of the *Defence Act*.

Under the cabinet handbook, the attorney-general would presumably have to provide a certificate (though clarification would need to be made as to whether the certificate merely dealt with the domestic legality or the international legality as well). There is also an opportunity for the governor-general to perform the role Walter Bagehot identified for a constitutional monarch – to counsel, advise and warn – and to ask questions about the legal basis of a decision before signing off on documents.

The ICC imperative

Now that Australia has agreed to extend the jurisdiction of the International Criminal Court to crimes of aggression and subject itself to that jurisdiction, the US prosecutor's closing statement at Nuremberg is coming true: 'Let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.'

Australia will need to provide mechanisms for evaluating proposals for going to war to protect ministers, governors-

general and service chiefs from subsequent investigation and prosecution. It will also need to establish credible and independent means for such investigation and prosecution within Australia to ensure that the ICC will not feel it necessary in a future conflict.

While Australia has five years in which to do this, do this it must. If it gets in early, it will provide a model for other Westminster democracies and ensure that any decisions to enter conflicts before that are taken on a sound basis and not run the risk of the damage so many believe to have occurred.

Public and parliamentary debate

While the formal parliamentary processes are at the natural centre of discussion, they do not operate in a vacuum but in a highly charged public debate. The quality of debate in parliament will affect and be affected by that public debate. Several important professions are involved – lawyers, soldiers, journalists and politicians.

Lawyers should remember that their primary duty is to the law and the system of justice (in this case international justice as well as domestic justice) and should not use the lesser likelihood of litigation to give clients the advice they want to hear – or to claim that the law is as they would like it to be rather than as it is likely to be determined by a court of competent jurisdiction. Lawyers may advocate for legal change but not pretend that it has already happened.

Similarly professional journalists have a critical role in the formation of public opinion in a democracy – never more so than in the gravest decision any nation can take.

The military profession is called on to risk the ultimate sacrifice during war and need to provide their professional opinion when their civilian masters are considering whether or not they are called upon to do so. Some do not see politicians in professional terms. We can and do and again see the greatest need for that professionalism when they are making that decision on behalf of the people they serve.

ANZUS

Mr Howard's reference to ANZUS did not address Dr Hollingworth's question about domestic constitutional process with respect to the Afghanistan war. But it did address an important issue of national policy. We do not yet know exactly what part the US alliance played in the Iraq decision and how this was squared off with other issues (legality, WMD, potential civilian casualties). One suspects that it loomed very large.

The case for an inquiry does not depend on opposition to ANZUS and the US alliance, though some may seek to falsely portray it as

such. In my view, there is a strong case to be made by those, like me, who are strong supporters of both.

AN ALLIANCE TO BE VALUED

My support for that alliance is based on shared values on which that alliance was forged and for which Australians and Americans fought and died. Like many Australians, this is bolstered by personal and family ties. Among the shared values was concern for the international rule of law. This was recognised as co-signatories of the 1928 Pact of Paris, which was enshrined in article 2 of the UN Charter, the Nuremberg trials and article 1 of the ANZUS Treaty itself. President Dwight D Eisenhower eloquently stated in 1959 a core value of that alliance that was reflected in the UN Charter and article 1 of the ANZUS Treaty:

> *The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs … Plainly one foundation stone of this structure is the International Court of Justice. It is heartening to note that a strong movement is afoot in many parts of the world to increase acceptance of the obligatory jurisdiction of that Court … One final thought on rule of law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But … if an international controversy leads to armed conflict, everyone loses; there is no winner. If armed conflict is avoided, therefore, everyone wins. It is better to lose a point now and then in an international tribunal, and gain a world in which everyone lives at peace under a rule of law.*

This is a statement by an American president, a Republican and one of the United States' most distinguished and successful soldiers who led 'United Nations' forces (as they were already called) in Western Europe at the time our alliance with the US was forged. The last comment is particularly poignant coming from an ex-soldier. It also reminds us that the US was committed to the international rule of law and the compulsory jurisdiction of the ICJ for most of the history of the UN, and longer than Australia.

The family connection relates to another great theme of the Iraq war – the use of intelligence. Intelligence cooperation between our two countries commenced in 1942 with code-breaking activity and the formation of the Combined Operations Intelligence Centre at General Macarthur's Headquarters. Members included Zelman (later Sir Zelman) Cowen and Caspar Weinberger (and other less well-

known bright young volunteers including Lt Horrie Sampford, whom the Americans decorated for his work). They were entrusted with all the secrets of the Pacific War to provide intelligence analysis. The analysis provided did not always accord with the expectations or views of 'the brass'. But they recognised both the temptation and the folly of telling their superiors what they wanted to hear rather than what they needed to hear. Doing the latter was neither disloyalty nor insubordination but their professional duty and the best service they could render to our allies and friends. To do otherwise risked lives, battles and, in 1942 when the balance of forces was more even, the war itself.

Support for the alliance does not mean uncritical support of an ally. All friends have flaws, all nations have flaws and great nations permit great flaws as well as great strengths. We should understand rather than judge. But we should not offer blind support. Australia was a cheerleader for the American desire to go to war. We might have considered ourselves loyal. But those who are cheerleaders for a friend's folly are not likely to be thanked for it when the folly is realised (and I am sad to say that I thought the term 'folly' was appropriate even then). A true friend warns against folly even at the risk of that friend's disapproval – as Prime Minister Robert Menzies did in warning President Eisenhower he would not join in conflict over the Taiwan Straits. This can take courage. In 2003, we do not appear to have questioned US intelligence forecasts. We publicly endorsed their claims to the legality of the war that no other country accepted (according to Lord Goldsmith's contemporary advice not published until 2006).

> The US was committed to the international rule of law and the compulsory jurisdiction of the International Court of Justice for most of the history of the UN, and longer than Australia.

We should recognise the damage suffered by the United States and the consequent risks to our perceived security interests:

- The war cost the US trillions of dollars, weakening the US as a military and economic power. This weakened the US relative to China and other potential rivals and increased the likelihood that the US would lose its number-one position and bring forward the time at which that might happen. American weakness changes the balance of power in the Pacific and is not in Australia's strategic interests.
- The human cost for the Americans was significant but the suffering caused to others was many times that. Even if that were unimportant to ANZUS members, the cost to the US in its 'soft power' was enormous.
- The potential damage to the values we share.
- The bad example we set for rising powers.

The US cannot afford more follies of this nature. As a good friend with a perceived interest in their strength and prosperity, we should help them avoid them. We should inquire into our own approach to war to be a more effective friend and a country more secure and more confident of our values.

Six-year-old Abdullah was injured during a UK cluster munition strike on Basra in 2003. *Credit: DanChurchAid*

CHAPTER 7

The UK inquiries into the Iraq war

Prof Gerry Simpson

There are a number of ways in which the decision to go to war in Iraq might be subject to some sort of administrative or judicial scrutiny. This chapter considers, as possible models, three recent British inquiries into the Iraq war, but begins by placing these in the context of other possible avenues for judicial or quasi-judicial review. At the international level, the International Court of Justice might be compelled to offer a judgement on the legality of the war or the subsequent occupation. This could occur in one of two ways: either through an advisory opinion requested by an organ of the United Nations, or because a state that has itself accepted the jurisdiction of the court (around a third of states have) brings a case against the United Kingdom (or, conceivably, Australia) claiming that it has violated international law by invading and/or occupying Iraq. Before the International Criminal Court, individuals, too, might be held responsible for breaches of international law. Indeed, the prosecutor of that court did initiate a preliminary investigation into alleged UK war crimes and crimes against humanity in Iraq but found that there was no evidence of the sort of systematic abuse of international law that might enliven the court's jurisdiction. The ICC did not have in 2003, and will only possess at the earliest by 2017, jurisdiction over the crime of aggression (a crime prosecuted successfully at Nuremberg and Tokyo; and one that some observers consider may have been committed by members of the 'coalition of the willing' in 2003).

At the national level, there is the possibility of claims for judicial review of government decisions to go to war (the UK Campaign for Nuclear Disarmament brought just such a case, unsuccessfully, against the Blair government in 2002); criminal prosecutions of leaders or service personnel for crimes committed during the war (there have been criminal prosecutions brought against UK servicemen under British law); or a human rights claim under relevant legislation or under a regional human rights treaty; or civil disobedience cases in which the alleged criminality of the war forms part of a defence to various more minor criminal charges.

Former prime minister Tony Blair has had to answer questions before quasi-judicial panels in a manner resembling that of a defendant in a criminal trial, after the Labour government that he led became a world leader in establishing administrative inquiries into different aspects of the Iraq war. Three inquiries were set up, and are considered below. The most wide-raging – and still ongoing – is the Iraq Inquiry itself, under its chairman, John Chilcot. Do these inquiries offer useful precursors or models for an Australian Iraq inquiry?

The Hutton inquiry

On 29 May 2003, the BBC flagship radio program 'Today' carried a report by one of its journalists, Andrew Gilligan, contending that the Blair government and, in particular, its press officer Alistair Campbell, had 'sexed up' an intelligence document on the threat posed by the Baath regime. Particular attention was given to the government's claim that Iraq could use weapons of mass destruction in 45 minutes. David Kelly, an arms control expert at the Ministry of Defence, who had been Gilligan's source for the story, appeared at the Foreign Affairs Committee of the House of Commons, and was later found dead in woods near his home. As a result, the government established, in July 2003, an inquiry under Law Lord Brian Hutton into the circumstances surrounding the death of Dr Kelly.

But what were these circumstances? Or, more problematically, what was the permitted ambit of reviewable circumstances? At one extreme was the view that this was simply a glorified coroner's report. But for many others, this was an inquiry into the war itself. Lord Hutton's job, in the eyes of the anti-war coalitions, and in the fears of the government itself, was to put Her Majesty's government on trial and perhaps even to convict it of criminal acts.

On 24 January 2004, Lord Hutton told the nation that Dr Kelly had committed suicide, admonishing the BBC severely and the Blair government gently (for having released Kelly's name without warning him, and for 'subconsciously' influencing the Joint Intelligence Committee's intelligence warnings). Lord Hutton's report declared that the Blair government had made an innocent mistake. But it did not still the desire for judgement.

The Butler inquiry

Only days after Hutton's report, US President George W Bush too set up an inquiry into the intelligence received leading to the intervention in Iraq. Shortly after that, on 3 February 2004, Tony Blair entrusted a senior civil servant, Robin Butler, to do a similar job for the UK. This inquiry touched on matters taken up at Hutton and foreshadowed those currently under investigation at Chilcot, namely, the part played in the decision to go to war by intelligence relating to Iraq's WMD capacity.

The Butler inquiry handed down conclusions that were more critical of the government and the intelligence community than Hutton's, finding that the intelligence provided to the government was 'unreliable' and assessments of that intelligence were inflated. Butler criticised the government also for relying too heavily on 'flawed' intelligence from other states, for having too much faith in material and assessments supplied by not disinterested Iraqi dissidents, and for constructing dossiers (intended to convince the public) from raw intelligence material. The intelligence community was criticised for failing to follow validation procedures in relation to dubious human intelligence and for a tendency to accept worst-case estimates. The most contentious of the findings related to the infamous Niger uranium yellowcake (President Bush had referred to it, as evidence of Iraq's intentions, in his 2003 State of the Union speech). Butler, surprisingly, found that there was evidence to suggest that the Iraqis had tried to acquire uranium from Niger (though this finding itself was not fully substantiated).

In the end, though, the Butler inquiry concluded that no recent intelligence had made the case for going to war more compelling than it had been in, say, July 2001 than it might have been in relation to other states at that time. The inquiry ended by stating its concern about the effect of the government's policy-making procedures on reducing the scope for informed collective political judgement.

The Chilcot inquiry

On 15 June 2009, in the dying days of the Brown government, the prime minister established an inquiry into a period of decision-making before and after (2001–2009) the Iraq war, and into the adequacy of government processes that had led to the decision to go to war. There were no lawyers on the panel, though the legality of the war has absorbed a great deal of the panel's attention and international lawyers have been asked to submit legal opinions to the inquiry.

The Chilcot inquiry began its hearings on 24 November 2009.

A coalition air strike at the edge of Fallujah, Iraq, in November 2004. *Credit: James J. Vooris*

It has the power to request the appearance of officials and politicians operating at the highest levels of government during the crisis, and, indeed, there have been some very high-profile appearances from the government side, and from the civil service. The inquiry has generated an enormous amount of declassified material on the government's decision-making leading up to the Iraq war, a documentary record that is quite revealing.

It is unclear when the inquiry will conclude its report, but it is expected to exceed a million words, and is unlikely to be published before late 2013. A controversy is brewing about whether the inquiry can publish classified material that it has nevertheless seen (a dialogue is underway on this question). One hundred and fifty witnesses have attested to their understanding of what happened in the decision-making around the Iraq war, more than 20 witnesses have provided written submissions, and of tens of thousands of written records, many have been published on the inquiry's website. The inquiry has held seminars on its work. So, even if no report is published this will have been a valuable undertaking.

But the report may leave some questions unanswered. They may include: What role should international law advice play in decisions to use force? What precisely is the role of law officers, like the attorney-general, when providing advice (advocate or adviser)? Should legal advice be put before cabinet? Full advice? Summary advice? Conceptual questions arise as well about the nature of law itself: whether the lawfulness or unlawfulness of acts can be decided by international law, or whether it is 'pretty vague' (as Jack Straw, Blair's foreign minister, told the Chilcot inquiry) and reducible to a matter of opinion.

It is vitally important that any inquiry has the full support of government. Without access to government ministers and officials, and government records, any inquiry that is established will be unable to conduct its work properly.

Australia has a close interest in three lessons that may be drawn from Chilcot. First, it is vitally important that any inquiry has the full support of government. Without access to government ministers and officials, and government records (some of them classified), any inquiry that is established will be unable to conduct its work properly.

Second, the membership of an inquiry panel must be both independent and capable of forensic examination of the issues. (Members should not have supported the Iraq war or have presented the government's intelligence in support of it, as was the case in the Butler committee.)

The Chilcot panel has impressed in many respects. It certainly has not allowed itself to be cowed by the witnesses, and the mixture of historians, civil servants and politicians has worked well at times. However, it may be worth thinking about appointing a former judge or leading barrister to any Australian panel, since some of the questions engaged will involve nice legal distinctions and require further pursuit.

Third, the information gathered and the witness interviews must be made widely and publicly available through highly professional means of communication (at Chilcot, the ability to access full transcripts, declassified documents and video evidence has been extraordinarily useful). An inquiry, under these conditions, into Australia's decision to go to war is clearly required. Further investigation of Australia's participation in the war and engagement in the occupation could be of great benefit.

A sandstorm near the Al Asad Air Base in Iraq in September 2011. *Credit: Cecilio Ricardo*

CHAPTER 8

Never again?

Dr Alison Broinowski and Prof Charles Sampford

Going to war is the most serious decision a government can make. War is not 'politics carried on by other means'. It is a form of organised, pre-meditated mass killing – deliberate in the case of combatants and inevitable in the case of non-combatants who die and suffer as an entirely predictable consequence of the decision to go to war. We need extraordinarily good reasons to engage in it.

Geoffrey Blainey observes that wars begin when the leaders of countries on both sides believe that more can be gained from fighting than not doing so – pointing out that at least one side will be wrong. Eisenhower sees worse odds – in armed conflict, everyone loses. The Iraq war is a classic example.

Yet, 10 years after going to war in Iraq, Australians still have received no comprehensive account from the government about the reasons for doing so or an evaluation of its results. The events described in the chapters above indicate the ability of an Australian prime minister to take us to war for good or ill, and the limited checks and balances available to ensure that the cause will be just, the ends defined, the prospects for success good and that the killing and suffering is likely to be proportionate to the achievable ends. Whatever one thinks of Labor or Liberal, Hawke or Howard, the two Presidents Bush, or the decisions of each, the vital ethical, legal and governance question is whether this is the way we want to go to war. Immediately after the attacks on New York and Washington, DC, in September 2001, Mr Howard invoked the ANZUS Treaty, unilaterally extending its application to support the United States anywhere in the non-specific 'war on terror'. It is right and proper to consult an ally following an attack, and one ally may offer to assist another even if not bound to do so (we would hope the US would do the same if our civilians were targeted outside the Pacific area). But we have processes for considering treaty obligations which his government had bolstered by including a joint parliamentary committee. As PM, neither Hawke nor Howard was obliged to put the invasion of Iraq to a vote in parliament – both seeking only retrospective endorsement of cabinet's decision. Neither involved the governor-general. Unfortunately, Mr Howard did not carry through with an undertaking to have it 'noted' by the Federal Executive Council – which would have constituted an improvement. As to the ends for which Australia went to war, he described the task of Australian forces as helping the United States find and destroy Iraq's weapons of mass destruction to stop them being passed to al-Qaida, or being used to attack other countries. He declared that Australia supported President Bush's global war on terror. Having repeatedly denied that Australia was committed to 'regime change' in Iraq, he told the parliament, on 4 February 2003, that Australia would share the burden of destroying Saddam Hussein. He did not specify whether the purpose of the long-planned invasion was to stop Iraq developing nuclear weapons, take control of Iraqi oil, reform the Middle East one country after another, or something else. He did not tell Australians how long he anticipated our forces would be there, how much the war could cost, how we would know if or when we had won or lost, or what Australia's responsibilities would be for humanitarian aid, rebuilding Iraq or coping with refugees.

Even though he told the National Press Club he could not justify war if Saddam Hussein had no WMD, he continued to do so even when no WMD could be found, now claiming that the world was safer as a result of the invasion of Iraq. However, it was not clear that Australia was a safer place. On 13 March 2001, Mr Howard said he took a 'very proactive view of the American alliance', but could give no assurance of the United States' reciprocal protection of Australia. It could be argued that the war weakened the United States and its ability to assist us.

Finally, the decision to go to war exposed Australia to the accusation of having waged an illegal war (which would be the first in our history). While he continued to insist that the war was legal, his government had taken steps which made it difficult for the International Court of Justice to hear such a case. (Before that, a country attacked by Australia could take us to the ICJ, but Iraq in 1991 and Afghanistan in 2001 would have been foolish to do so). He never seemed to recognise the possibility that his decision to invade Iraq was wrong, nor did he established a general inquiry

Prisoner abuse at Abu Ghraib Prison in Iraq in November 2003. *Credit: US Government*

into the war as the British have done. This has not prevented Australian researchers seeking to learn the lessons of the Iraq war. John Langmore has pointed to the danger of a risk-averse public service that shirks its responsibility to speak truth to power. He and Garry Woodard remind us of the dangers of removing the boundaries between policy and intelligence, lessons we thought we had learnt. More suggestions for improvements in the way we go to war include:

- Requiring support in one house, both houses or a televised joint sitting
- More comprehensive information provided to parliament, including independent legal advice and full military and intelligence briefings given to a parliamentary committee
- Final sign-off in Federal Executive Council following the issue of a certificate of legality by the attorney-general
- Acceptance of compulsory jurisdiction of the ICJ for any wars we engage in, and provision for the investigation and prosecution of the crime of aggression (as will be necessary after 2017)
- Promotion of well-informed public debate, and government regard for the views expressed.

These changes are being proposed by those who do not wish Australia to repeat what many see as the illegality, errors of intelligence, loss of life, humanitarian catastrophes, and huge waste of money and material that occurred in Iraq – along with the damage to Australia's international standing. They will not passively accept that an invasion is 'in the national interest', nor compliantly agree that continuing a long, costly war is 'staying the course', 'getting the job done' and 'the right thing to do'.

If we do not take this opportunity, a decade on from the invasion of Iraq, Australia is at risk of being drawn into future wars that do us much more harm. They could go as badly for us as for those we fight, and we could make lasting enemies of powerful countries which should remain major trading partners.

We are obliged, therefore, to demand that the Australian government be democratically accountable for future decisions to go to war, and for the results of such decisions. To achieve this change, an Iraq war inquiry, long overdue, is a necessary first step. The implementation of recommended changes in the way decisions for war are made is a necessary second step.

Some unanswered questions

Our group has not taken an immutable position, nor do we claim to have addressed all the concerns that others may have. This is a collection of papers, intended to stimulate debate and invite support to coalesce around optional courses of action. We have gathered some possibilities together under several headings to assist discussion, which we list here in the form of questions.

Models for an inquiry

A number of models exist for an inquiry including a Royal Commission, a 'judicial' inquiry, a parliamentary inquiry, an inquiry undertaken by the Australian Law Reform Commission or other government body, and a citizens-initiated inquiry.

- On the relative merits, which model would be most appropriate for our purposes?
- What should be the scope of this inquiry? That is, what issues should it be permitted to consider?
- How should the proposed inquiry be established with reference to key issues including: confidential and classified information; securing independence from government and other key stakeholders; powers, for example, to compel witnesses to give evidence; timing, report and recommendations.

Intelligence

According to the intelligence inquiries in Australia that followed the 2003 Iraq war, views diverged between ONA and DIO concerning the nature of the evidence for the possession by Iraq of WMD. We need to know:

- What was the Australian intelligence advice given to the government in the lead-up to the war and how was the divergence of views between the two assessment agencies reconciled?
- Was the intelligence advice challenged at the time by any members of the government, and if so by whom?
- What was the nature of the challenges, what was the response by the assessment agencies and how were doubts resolved?
- Was the intelligence given to the government restricted to advice on the possession by Iraq of WMD, or was wider advice also provided on whether Iraq posed an actual threat? If there was a threat assessment, what did it say?
- Philip Flood, who conducted a post-war inquiry into Australian intelligence, described the evidence on Iraq's WMD as 'thin, ambiguous, and incomplete'. How does Mr Howard reconcile this with his presentation to parliament on 4 February 2003?

Humanitarian issues

- Were any UN, NGO or other reports of the effects of the 1991 Gulf War, the economic sanctions and the likely effects of a further war considered in the government's decision to go to war in 2003? If not, why not? If so, which reports, and how much weight was given to them?
- What degree of civilian suffering did the government expect from the war, and what level of suffering was considered acceptable? Did the government request estimates of civilian casualties?
- Were any contingency plans made by the government to help reduce and deal with the predicted enormous humanitarian effects of the war?

Legal issues

- Were the Australian lawyers drafting the government's advice in contact with those drafting advice for the British and American governments, and which Australian ministers or ministerial staff were informed? What other legal advice did the government seek? What legal advice was provided to the governor-general?
- Why did the Australian government change its acceptance of the compulsory jurisdiction of the International Court of Justice when it did? Was its response in parliament on the war misleading?
- Why did the prime minister fail to bring the decision to go to war to the Federal Executive Council as he had told the governor-general he would?

Contributors

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Rod Barton is a former Director of Strategic Technology, Defence Intelligence Organisation. In 1991 he became a UN weapons inspector, a job that he was to work at for the next 13 years, including as a special adviser to Hans Blix, Executive Chairman of the UN Monitoring and Verification Commission on Iraq. Following the 2003 Iraq war, Rod Barton was employed as the senior adviser to the CIA in the hunt for Iraq's missing weapons by the Iraq Survey Group. He is the author of *The Weapons Detective: The inside story of Australia's top weapons inspector* (2006).

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A young Iraqi girl watches coalition troops conducting atmospherics in Al Qurna in April 2010. *Credit: Christopher Wellner*

An Iraqi woman and her family sit outside their mud hut while coalition soldiers visit their farm house near the Sinjar mountains in northern Iraq to inspect a well in 2009. *Credit: Carmichael Yepez*

'How did Australian armed forces come to be involved in the US-led invasion of Iraq in 2003, and why? What were the decision-making processes that led to that commitment? Were those processes adequate in terms of our system of government as we understand it and for the future?'

Rt Hon Malcolm Fraser AC CH, Foreword