



10 September 2021

Senate Foreign Affairs, Defence and Trade Committee  
Parliament House

Dear Secretary

### **Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020**

Thank you for the opportunity to make a submission to this inquiry. I do so in a personal capacity.

I have examined these issues over the course of many years, including through my article 'The Power to Go to War: Australia in Iraq' (2004) 15 *Public Law Review* 5. The article comments on one of the precursors to this Bill, the Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill 2003.

My view is that the prerogative power of the Commonwealth in this area should be altered by legislation. However, the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020, in requiring a resolution by each House of the Parliament to deploy troops abroad, should not be enacted in its current form.

The Bill should instead provide that a resolution of a joint sitting of both Houses is required. This would emphasise the importance of the decision and would involve all Members and Senators. However, it would also generally allow the government of the day, with its greater majority in the lower house offsetting its deficit in the Senate, to gain the outcome it wishes so long as it can maintain party discipline. This would involve an appropriate measure of symbolism and deliberation. It would not, however, remove the capacity of the executive in most cases to determine the course for which it will ultimately have to answer at the ballot box. An alternative to this approach would be to require a positive resolution only by the House of Representatives.

Other nations also provide for a parliamentary role. For example, the United States Constitution states that the President is the nation's commander-in-chief, but vests the power 'to declare war' in Congress. The aim is to check the power of the President by ensuring that declarations of war are made after careful deliberation and have popular support. The system is not foolproof. The United States has a long history of Presidents bypassing Congress by engaging in military conflict overseas in undeclared wars.

Australia's Constitution says nothing about the power to go to war. It states only that the Governor-General commands our military forces as the Queen's representative. The answer instead lies in a centuries old convention from the United Kingdom. It permits our Governor-General to exercise the personal power of the Monarch to send Australia to war. In practice, this royal prerogative is exercised by the Governor-General acting on the advice of the prime minister. There is no requirement that the prime minister involve Parliament, though it is kept informed and on occasion has debated the deployment of troops.

Our approach to declarations of war is taken from the United Kingdom, but that nation has since changed its approach. Britain did so after Prime Minister Tony Blair committed forces in support of the United States in Iraq in 2003. An independent inquiry found that the nation went to war after Blair promised President George W Bush: 'I will be with you, whatever.' This commitment was honoured despite evidence that Iraqi leader Saddam Hussein did not pose an imminent threat.

Soul-searching after the United Kingdom's decision to go to war in Iraq led to recognition that it is dangerous to leave the decision to the prime minister and their cabinet. A prime minister can be blindsided by their close relationship with the leader of another country, may neglect key facts or exercise poor judgement. The decision to commit troops may also be distorted by political factors, such as a hope that war against an external threat will bolster a government's popularity.

Conservative Prime Minister David Cameron recognised the need to restore trust in the community by improving transparency and political accountability when sending soldiers overseas. His government included a new convention in the Cabinet Manual in 2011 to check the power of prime ministers to go to war. The manual states that, except in an emergency, troops will not be committed until the House of Commons has had an opportunity to debate the matter.

The change in the United Kingdom means that, so long as Parliament is sitting and there is not an emergency, the nation's elected representatives will debate whether their military is deployed overseas. The wide acceptance of this convention means that the United Kingdom will not likely go to war without parliamentary support, even if this is contrary to the view of the prime minister.

The convention was applied in 2013 when the House of Commons debated a government motion that the United Kingdom join United States-led strikes in Syria. This. The motion was defeated, and Cameron responded by ruling out military action. The Prime Minister also assured the House that no further action would be taken without parliamentary support. By contrast, Prime Minister Theresa May ordered military action in Syria in 2018 without a debate in Parliament, which at the time was in recess.

Australia stands in the unfortunate position of having adopted the British approach to declarations of war, which that nation has now abandoned. It is time that we also recognised that it is dangerous to vest such a formidable power in one person without a parliamentary check.

Before we again send our troops into harm's way, Australia should follow the British lead in requiring a debate and vote in Parliament. A Prime Minister determined to take Australia to war should be required to explain their reasoning in parliament. Our elected representatives must also be given the opportunity to consider the strategic objectives and likely duration of the engagement. This should be required in every case, except where an emergency demands an immediate response.

Yours sincerely

Professor George Williams AO