

Submission - Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020

*Submission to the Senate Foreign Affairs, Defence and
Trade Legislation Committee*

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INTRODUCTION

Thank you for the opportunity to make a submission to the inquiry into the Defence Amendment (Parliamentary Approval of Overseas Service) Bill.

The question of who ultimately decides when Australia goes to war touches on the work of two of the Australia Institute's programs: the International & Security Affairs Program and the Democracy & Accountability Program.

The Australia Institute's Democracy & Accountability Program was founded in 2021 to improve the quality of Australian governance and heighten public trust in politics and democracy. Although the program is new, the Australia Institute has written about democracy and accountability issues since it was founded in 1994.

The Australia Institute established the International and security Affairs program in 2019 in recognition of the fact that, in a globally connected world, domestic and international policy issues are inextricably linked.

We also understand that Australians for War Powers Reform have made a submission to this inquiry, making important arguments endorsing the merits of this bill. Given this, we have focused on two issues complementary to their submission: democratic accountability and responsibility for national security.

AUSTRALIA'S PRACTICE IN COMMITTING TO WAR

Prior to 1942, Australia had no capacity to exercise independent decision-making powers on the vital issue of declaring war: as part of the British Empire, Australia, like Canada, New Zealand and south Africa, had no option but to join with the British Imperial government in declaring war. In 1914, Prime Minister Fisher simply followed the Asquith government into war with Germany. The only freedom available to the Australian government was to determine the size and nature of its contribution. Similarly, when Prime Minister Chamberlain announced on 3 September 1939 that Britain was at war with Germany, Prime Minister Menzies announced, just over an hour later: 'it is my melancholy duty to inform you officially, that in consequence of a persistence by Germany in her invasion of Poland, Great Britain has declared war upon her and that, as a result, Australia is also at war'. Australia's involvement in both WW1 and WW2 was a direct consequence of decisions taken by the British Cabinet.

As Jonathan Curtis, of the Research Branch of the Commonwealth Parliamentary Library wrote in 2014:¹

¹ Curtis (2014) *'To the Last Man' - Australia's entry to war in 1914*,
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/AustToWar1914

Under the Australian Constitution, the power to declare war is the prerogative of the executive arm of government, which as noted above, was the British Imperial Government for the purposes of foreign policy in 1914. This reflects the view that the executive power of section 61 is taken to include all the 'prerogatives of the Crown under the English common law' including the power to make treaties with the governments of other countries and making war and peace. As a matter of constitutional law, Parliament has no formal decision-making role.

In similar fashion, Australia's participation in the Vietnam War was decided by the Executive, with small tactical units deployed in the early stages of the conflict, growing larger as the war progressed to the point that conscription was introduced to provide the manpower necessary to field an army Brigade and the supporting naval and air components.

In each case that the Australian Defence force has been deployed abroad since Australians were withdrawn from Vietnam in 1971, the decision to commit Australian forces has been taken by the Executive without reference to the Parliament for approval.

In recent conflicts, such as the Gulf War and the wars in Iraq and Afghanistan, it has become the Government's practice to commit forces using an administrative provision of the Defence Act 1903 (s.8)², thereby ignoring the role and responsibility of the Governor-General, who alone has the Constitutional power to authorise the deployment of the ADF into international armed conflict. As the late Paul Barratt AO noted in an earlier submission to the Minister for Foreign Affairs on behalf of the Australians for War Powers Reform, the Constitution does not require the Executive to seek the authorisation of the Governor-General or the agreement of the parliament. But to ensure that actions by the Government are consistent with the Constitution and international law, the Governor-General should be consulted in advance, either by virtue of his own office or as the Governor-General-in-Council. The Governor-General is constitutionally obliged to receive legal certification from the Attorney-General, and must, as Commander-in-Chief, be assured that members of the ADF are legally deployed.

It is the view of The Australia Institute that the use of an administrative provision of the Defence Act as a means of avoiding full parliamentary scrutiny of government decision-making on matters potentially involving the lives of Australian citizens does not accord with either the spirit or the practice of government accountability to the parliament and the people.

² *Defence Act 1903 [Cth]*, <https://www.legislation.gov.au/Details/C2016C00955>

CASES IN OTHER COUNTRIES

Parliamentary involvement in decisions around deployment and war is not unusual. Involvement can be *ex ante* (before) or after deployment, and be as strong as a veto or as weak as merely a requirement to be informed of a decision the executive has already taken.

A review of 49 democracies found that 30% had a parliamentary *ex ante* veto as of 2004, with a further 5% inconclusive.³ Many more had other parliamentary involvement in decision-making around war, including the right to be consulted or the power to cut short a deployment.

As the following examples show, none of these countries have proven sclerotic or impossibly divided when it comes to waging war. There is no practical barrier to such laws, which can always be worded to allow for urgent action in the cases of national defence, rescue operations and so on.

Canada

[T]he meaning of the government's "letting Parliament decide" policy would remain ambiguous: "Decide what? Whether we are to be at war at all, or merely how deep we're in?"⁴

In Canada, the executive reserves the exclusive power to wage war. However, this is obscured by Canadian prime ministers often claiming that Parliament is the decision-maker though this has never legally been the true.⁵

In both 1914 and 1939, Canada's prime minister said that it was Canada's parliament that would decide whether Canada went to war. This is an interesting contrast to Australia, where even by World War 2 Australia's executive did not see any role for Australian decision-making (as discussed above).

³ Note: The review considered democracies over several years; by 2004 some of the 49 countries did not meet the threshold required to qualify. Wagner, Peters, & Glahn (2010) *Parliamentary War Powers Around the World, 1989–2004. A New Dataset*, pp. 22–23, https://dcaf.ch/sites/default/files/publications/documents/OP_22.pdf

⁴ Hillmer & Lagassé (2016) *Parliament will decide: An interplay of politics and principle*, p. 332, <http://www.jstor.org/stable/44631189>

⁵ Different approaches under different prime ministers (and for different conflicts) are described in Hillmer & Lagassé (2016) *Parliament will decide: An interplay of politics and principle*, pp. 330–331. For a description of how this worked in World War II, see Granatstein (2009) *Going to war? "Parliament will decide,"* <https://www.theglobeandmail.com/opinion/going-to-war-parliament-will-decide/article4287580/>

While not requiring parliamentary debate, parliament must be recalled within 10 days if the armed forces are placed on active services.⁶

Between 2006 and 2015, the Harper Government held a range of positions on when parliament would have a say on military deployments, what having a say entailed, which deployments were within scope, and what the consequences of a “No” from parliament would be. In practice, the Harper Government used its control over whether and when votes were held to its benefit, including to wedge opposition parties, manufacture bipartisanship and quell dissent.⁷ Similarly, the current Trudeau Government asserts “the exclusive role of the executive in military matters”.⁸ That said, the norm of giving Parliament a say on military deployments, or at least combat operations, may now be entrenched.⁹

United Kingdom

While going to war is an executive prerogative, it is a convention (albeit a new one) that the UK Government gives the House of Commons an opportunity to debate the matter before troops are committed.¹⁰ The results of the debate are not binding, but are respected: when the House of Commons voted “No” in 2013, the Cameron Government did not proceed with its planned military intervention in Syria.¹¹

It should be noted that a proposal to codify the convention in law was rejected in 2016 by then Secretary of State for Defence Michael Fallon.¹² In 2011, the Cameron Government sought only retrospective approval for deployment in Libya.¹³ In 2018, then Prime Minister Theresa May ordered military strikes on Syria while Parliament was not sitting, avoiding a parliamentary debate in a move called “legally questionable” by then Opposition Leader Jeremy Corbyn.¹⁴

⁶ *National Defence Act* (Canada), sec.32, <https://laws.justice.gc.ca/eng/acts/N-5/FullText.html>

⁷ Lagassé (2017) *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, pp. 291–292

⁸ Lagassé (2017) *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, p. 296

⁹ Hillmer & Lagassé (2016) *Parliament will decide: An interplay of politics and principle*, pp. 336–337

¹⁰ gov.uk (2010) *Cabinet Manual*, p. 44, <https://www.gov.uk/government/publications/cabinet-manual>

¹¹ Appleby (2016) *FactCheck Q&A: who is responsible for going to war in the Westminster system?*, <http://theconversation.com/factcheck-qanda-who-is-responsible-for-going-to-war-in-the-westminster-system-62342>; Haddon (2013) *Parliament, the Royal Prerogative and decisions to go to war*, <https://www.instituteforgovernment.org.uk/blog/parliament-royal-prerogative-and-decisions-go-war>

¹² Fallon (2016) *Armed Forces Update*, <https://questions-statements.parliament.uk/written-statements/detail/2016-04-18/HCWS678>

¹³ Lagassé (2017) *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, p. 288, <https://doi.org/10.1093/pa/gsw029>

¹⁴ BBC News (2018) *Syria air strikes: UK confident strikes were successful, says PM*, <https://www.bbc.com/news/uk-43763605>

United States

[I]t belongs to Congress only, to go to war - **Alexander Hamilton**¹⁵

The United States Constitution gives the Congress the power to declare and fund war, while making the President the Commander-in-Chief.¹⁶ The United States has only formally declared war against 11 countries, in five wars – most recently in World War II. Congress has routinely authorised military engagements without declaring war, including the Quasi-War in 1798. Exactly what the Constitution allows the President and Congress to do, and what the Founders intended, is the subject of debate.¹⁷

Since 1973, the War Powers Resolution has formalised two circumstances under which the President can deploy the armed forces outside of the United States without a declaration of war: when they have “statutory authorisation” or when there is a national emergency.

Multiple US presidents have engaged in military interventions without congressional authorisation, or where the existence of or need for congressional authorisation is ambiguous. Examples include President Bill Clinton’s bombing campaign in Kosovo, President Barack Obama’s intervention in Libya and President Donald Trump’s assassination of an Iranian general.

ACCOUNTABILITY

Australia has a system of representative democracy in which our executive is formed from and is ultimately responsible to our parliament. It is our MPs and senators, not our prime ministers, who are chosen by the people, and therefore they who are better placed to decide whether the country goes to war or not.

This point is elided by defenders of executive control over war-making. For example, former Defence Minister Brendan Nelson argues that, at federal elections:

¹⁵ Alexander (2012) *John Yoo’s “War Powers”: The Law Review and the World*, p. 345, <https://www.jstor.org/stable/23239881>

¹⁶ *The Constitution of the United States: A Transcription* (The Constitution of the United States: A Transcription), sec. I(8), II(2), <https://www.archives.gov/founding-docs/constitution-transcript>

¹⁷ The case for a broad executive power is made in Yoo (2001) *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, <https://www.justice.gov/olc/opinion/president%E2%80%99s-constitutional-authority-conduct-military-operations-against-terrorists-and>; detailed challenges to Yoo’s reasoning are found in Alexander (2012) *John Yoo’s “War Powers”: The Law Review and the World*; Fisher (2011) *The Law: John Yoo and the Republic*, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1741-5705.2010.03836.x>

Although candidates and parties have policies, election commitments and manifestos, in the end we are choosing a person—a prime minister, to exercise judgement on our behalf and that of our nation over three years.¹⁸

This is simply not the case. In the end, each electorate chooses an MP to exercise judgment on their behalf. Had Australia's Founders wanted Australians to directly elect their head of government, they would have written the Constitution to allow for it. Having done so, they may well have included the kinds of limits on executive war powers that their compatriots in the United States did a hundred years earlier.

BIPARTISANSHIP

The Australia Institute has already made the argument that bipartisanship on security issues actually makes Australia *less* safe, in *I'm here for an argument* by Dr Andrew Carr:

[Bipartisanship] weakens the quality of national policy, reduces accountability, lowers public engagement, and risks estrangement between the military and civil leadership. As it currently operates, the demand for bipartisanship is putting Australia at risk.¹⁹

Carr finds that bipartisanship has metamorphosed from an *outcome* that might result from deliberation or negotiation to a *process*, which stifles debate on security and defence.

Carr expands on the points in his paper in a piece for the Lowy Institute's *The Interpreter*, where he argues that party discipline and bipartisanship on security issues mean that the parliament would not robustly and usefully debate war even if it had the power to do so. In fact, since prime ministers are already responsible to the parliament, the legislature has all the powers it needs already: "Emergency sessions can be called, prime ministers required to ask questions, votes to withhold funding passed and threats of dissolving the government made". The problem is the norms, not the laws.²⁰ Carr's point is cogently argued, and makes the case for a more independent and spirited legislature to check executive power. In fact, comparing the United States and the United Kingdom (discussed above) seems to prove Carr's point:

¹⁸ Nelson (2015) *The Role of Government and Parliament in the Decision to Go to War*
https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop63/c01

¹⁹ Carr (2017) *I'm here for an argument: Why bipartisanship on security makes Australia less safe*,
<https://australiainstitute.org.au/report/im-here-for-an-argument-why-bipartisanship-on-security-makes-australia-less-safe/>

²⁰ Carr (2017) *Should war require parliamentary approval?*, <https://www.lowyinstitute.org/the-interpreter/should-war-require-parliamentary-approval>

the UK's norm proves more powerful than the US' laws.²¹ The House of Commons' role was strengthened by the efforts of backbenchers and the threat of revolt.²²

However, while a more independent and spirited parliament would be welcome, we do believe that legal changes are needed. Between the House of Representatives and the Senate, it is the former that has the greater power over the government – and it is the former that is less likely to use that power. The Senate has proven itself to be a free-thinking organ of accountability, prepared to frustrate the government when necessary. The bill under consideration would allow either house to prevent or limit war. Of course, it would still require the opposition to take a different position to the government, but we know that does occur – most notably with the Iraq War. Simon Crean can rightly claim to have been vindicated on that topic.²³

It is also the case that formalising a power makes it a responsibility. Parliaments that do not have responsibility for war can still make trouble for governments who wage war, but they are much more likely to do so if they *do* have responsibility for war. Failing to condemn something is very different from endorsing it; this bill flips the expectation.

WILL PARLIAMENT BE ACCOUNTABLE?

A counterpoint that it is worth noting is that parliaments have not always been held responsible for failed wars, even when they have voted for them. British foreign policy academic James Strong observes:

Unlike ministers, furthermore, MPs generally avoid being held accountable for unsuccessful deployments they approve. No-one today blames parliament for Iraq even though three-quarters of MPs voted for it. The Foreign Affairs Committee (2016) condemned Cameron for how British operations in Libya turned out, despite the fact eight of its eleven members supported intervention.²⁴

²¹ A point also made in Haddon (2013) *Parliament, the Royal Prerogative and decisions to go to war*

²² Lagassé (2017) *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, p. 289

²³ Crean (2018) *Labor's decision to oppose the Iraq war was correct, history shows*, <https://www.smh.com.au/politics/federal/labor-s-decision-to-oppose-the-iraq-war-was-correct-history-shows-20180319-p4z51v.html>

²⁴ Strong (2018) *The war powers of the British parliament: What has been established and what remains unclear?*, p. 18, <https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/31497/Strong%20The%20war%20power%20of%20the%20British%20parliament%3A%20What%20has%20been%20established%20and%20what%20remains%20unclear%3F%202018%20Accepted.pdf>

Firstly, it is worth celebrating that MPs on the Foreign Affairs Committee acted in accordance with the evidence, even though it reflected badly on their own legislative record. However, the broader point remains – if MPs face no political consequences for their vote, then they will not be held to account. As the UK Parliament’s role in approving deployments becomes entrenched, expectations will be higher.

In the United States, legislators are held to account for their voting record on war. In the 2008 Democratic primary Barack Obama contrasted his record on the Iraq War with that of rival Hillary Clinton – since she voted for the Iraq War and, unlike other politicians like John Edwards, never renounced her vote.²⁵

CONCLUSION

It is clear that there is a growing tendency on the part of democracies that are aligned with Australia for their national Executives to refer matters of critical national importance to their parliaments. This is not simply a response to the growing need for proper accountability by governments for their decisions and action. It is also a recognition that the legitimacy of an Executive’s decisions and actions is increasingly dependent on the support of the Parliament, the people’s representatives. Untrammelled power is a danger to any democracy. It is also a danger to the Executive itself, since the refusal to seek the endorsement of the Parliament undermines the authority and credibility of the Executive and will almost certainly, in any healthy democracy, precipitate the expression of no-confidence in the Executive and its inevitable fall.

²⁵ Obama was not a senator for the 2002 Iraq War vote, but was a vocal critic of the war at the time. Whitesides (2007) *Obama says he opposed Iraq war from start*, <https://www.reuters.com/article/us-usa-politics-obama-idUSN0923153320070212>