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Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade

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Dear Committee,

What follows is The Australia Institute's submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into international armed conflict decision making. We have given a short response to the most relevant term of reference below (points (a) and (b)), with more detail and other relevant material contained in our earlier submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee's inquiry into the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020, which is attached to this covering letter.

(a) the approach of similar Westminster system democracies around the world;

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. 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. Some particularly relevant comparisons are:

In Canada, the Trudeau Government asserts "the exclusive role of the executive in military" matters. That said, the norm of giving Parliament a say on military deployments, or at least combat operations, may now be entrenched after a number of parliamentary debates were held during the Harper Government.

In the United Kingdom, going to war is an executive prerogative but it is a convention that the UK Government gives the House of Commons an opportunity to debate the matter before troops are committed. A proposal to codify the convention in law was rejected in 2016.

In the United States, the Constitution gives to Congress the power to declare and fund war, while making the President the Commander-in-Chief. However, the United States most recently formally declared war in World War II. Multiple US presidents have engaged in military interventions without congressional authorisation, or where the existence of or need for congressional authorisation is ambiguous.

(b) parliamentary processes and practices, including opportunities for debate to provide greater transparency and accountability on the deployment of the ADF;

When the Australian Defence Force has been deployed abroad, 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.

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.

Accountability to Parliament: 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.

Apparent bipartisanship around such a decision should not be a reason to reduce Parliamentary accountability. 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.¹ 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.

Carr's point is cogently argued, and makes the case for a more independent and spirited legislature to check executive power. However, while a more independent and spirited parliament would be welcome, we do believe that legislation is needed to give Parliament a say on overseas service. In the absence of legislation requiring the consent of both houses, it is House of Representatives that has the greater power over the government – but the Senate that is more likely to use that power.

It is also the case that formalising a power makes it a responsibility. Parliaments that do not have responsibility for war can still scrutinise governments who wage war, but they are much more likely to do so if they do have explicit responsibility for war.

¹ 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/>

Conclusion

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.

The Institute would welcome the opportunity to discuss research findings in further detail at any committee hearing, should there be one.

Regards,

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