



8 November 2022

Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade

Dear Secretary

Inquiry into international armed conflict decision making

Thank you for the opportunity to make a submission.

Westminster countries have engaged in lengthy debate over past decades on how they decide to deploy force into armed conflicts overseas. The United Kingdom in particular has made significant reforms. As recognised in UK Cabinet manual, a convention has emerged that such a decision requires, except in emergencies, a prior opportunity for the House of Commons to debate and approve the deployment. A like convention has also begun to emerge in Canada.

Australia should embark on the same path. In doing so, it should learn from the experience of the United Kingdom by legislating for the reform. We propose that the Federal Parliament legislate to require parliamentary approval to enter an international armed conflict in all but the most time-critical emergency situations.

Parliamentary processes and accountability

In Australia, as in other Westminster democracies around the world, the power to enter an armed conflict is derived from the royal prerogative and is exercisable by the executive without control or oversight by parliament.

The traditional conception of the relationship has been that the matter is for the executive alone, with parliament often playing little or no role in the making of the decision, other than being informed by the executive of developments.

Recent years have seen change in Westminster democracies to the relationship between parliament and the executive when it comes to the exercise of the prerogative power to declare war. The most significant change has been to permit greater involvement by parliament in the making and scrutiny of such decisions. This appears to have been influenced by ideas of accountability: that where lives are at stake, the executive should not make such a decision of its own motion.

There are several difficulties with the status quo in Australia. First, the international obligations upon states involved in an armed conflict have changed but the prerogative power to enter armed conflict has not. The Australian *Constitution*, for example, was drafted four decades before Australia submitted to the UN Charter framework that currently governs its international obligations in respect of the use of force. This means that the use of force by Australia can raise issues that were not imagined at the time our constitution was drafted. This has led to an incompatibility

between public expectations of participation in decision-making with the entry into armed conflicts by the executive acting alone.

Secondly, there are a number of public policy arguments to be made for the parliamentary oversight of the decision to go to war, including: the gravity of the decision and inappropriateness of it being made a single figure (the Prime Minister) or a small group of persons (the Prime Minister and cabinet); the lack of accountability of the executive to the community, a defect not shared by parliament; and the lack of clarity and criteria for making the decision to go to war. This very point, that the power to commit a country to international obligations which may have far-reaching consequences is one that parliament should oversee so that it can properly represent the views of the public, was recognised by the UK government in 2007:

The Government believes that [the exercise of the prerogative without formal parliamentary agreement] is now an outdated state of affairs in a modern democracy. On an issue of such fundamental importance to the nation, the Government should seek the approval of the representatives of the people in the House of Commons for significant, non-routine deployments of the Armed Forces into armed conflict, to the greatest extent possible. This needs to be done without prejudicing the Government's ability to take swift action to protect our national security, or undermining operational security or effectiveness.¹

These factors mean that it has become recognised that executive should not have an unfettered power to decide to deploy the armed forces overseas. Its ability to do so based upon an ancient prerogative is increasingly ill-fitting for modern times. In particular, human rights, international law and other concerns have come to the fore in a way that demonstrate the need for parliamentary deliberation. The strength of these considerations underpins the emergence of a convention requiring parliamentary involvement in the United Kingdom, and progress towards such a convention emerging in Canada.

United Kingdom

In the United Kingdom it has become usual for a government considering entering an armed conflict to present its decision to parliament before the exercise of the power. Since 2011 a convention has emerged that the House of Commons have an opportunity to debate, and since about 2013 to approve, the deployment of armed forces overseas.

As described since October 2011 in the United Kingdom Cabinet Manual, an authoritative source of laws, rules and conventions of the UK government, the convention is said to be that “the House of Commons should have an opportunity to debate the matter” before troops were committed “except when there was an emergency and such action would not be appropriate”.²

¹ Ministry of Justice, “The Governance of Britain”, July 2007, Policy Paper, CM7170, [26]: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf>.

² United Kingdom Cabinet Office, *The Cabinet Manual*, October 2011, [5.36].

In 2018, a House of Commons briefing paper set out the threshold of the convention as follows:³

On the basis of the evidence, one could make the argument that, at the very least, prior parliamentary approval will be sought under the convention if any of the following applies:

- *The possibility of premeditated military action exists.*
- *Military forces are to be deployed in an offensive capacity.*
- *Deployments for training, humanitarian aid or logistical assistance would not meet these threshold criteria. However, should an existing non-combat operation evolve into one in which offensive action is envisaged (mission creep), then it could feasibly be expected that the threshold would be reached and fresh approval would have to be sought from Parliament*

The briefing paper also stated that “Under the Convention, as it has developed, it has been made clear that the Government would also come to the House retrospectively in emergency situations”.

The convention in the United Kingdom of parliament voting on proposed entry into armed conflicts appeared to be cemented by the Cameron government’s actions in 2013, in relation to the proposal that the UK join the US in military action in Syria. On 29 August 2013, parliament rejected a government motion that “a strong humanitarian response is required from the international community and that this may, if necessary, require military action that is legal, proportionate and focused on saving lives by preventing and deterring further use of Syria’s chemical weapons”. The motion failed by 272-285 votes. In the aftermath, Prime Minister Cameron stated: “I also believe in respecting the will of this House of Commons. It is very clear tonight that, while the House has not passed a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly.”⁴

The defeat of the government’s motion to undertake military action in Syria was widely viewed as confirming the changed relationship between Parliament and the executive in relation to this power, and an as an affirmation of parliamentary sovereignty. Apparent confirmation of this change in relationship come soon after with the Cameron government’s decision to seek parliamentary approval for action against ISIS in September 2014 and December 2015 (votes which ultimately succeeded).

However, in April 2018 the May government conducted a series of airstrikes in Syria without parliamentary debate or consent. In a debate after the fact, Prime Minister May acknowledged the existence of the convention but provided reasons that the government believed this action did not fall within it. Prime Minister May argued, on the basis of a 2016 statement by the then-Defence Secretary, that there was a broad exception to the convention wherein “Governments can use their judgment about how best to protect the security and interests of the UK. In observing the

³ Claire Mills, House of Commons Briefing Paper CBP 7166, “Parliamentary approval for military action”, 8 May 2018 <<https://researchbriefings.files.parliament.uk/documents/CBP-7166/CBP-7166.pdf>>.

⁴ United Kingdom House of Commons, Hansard Parliamentary Debates, 29 August 2013, <<https://hansard.parliament.uk/commons/2013-08-29/debates/130829800001/SyriaAndTheUseOfChemicalWeapons>>.

convention, we must ensure that the ability of our armed forces to act quickly and decisively, and to maintain the security of their operations, is not compromised ... If we were to attempt to clarify more precisely circumstances in which we would consult Parliament before taking military action, we would constrain the operational flexibility of the armed forces.”⁵ Given that the airstrikes appeared to be essentially the same kind of action contemplated in 2013, 2014 and 2015, the refusal to consult Parliament has created uncertainty about the scope of the convention.

Ultimately, the state of decision-making to enter international armed conflicts in the United Kingdom is that a convention of parliamentary approval before deployment of the armed forces has emerged. However, the boundaries of the convention continue to be uncertain because, in the absence of legislation modifying the prerogative, the executive can continue to assert exceptions to the convention.

Canada

In Canada, there are signs that a convention for parliament to approve military action may emerge but it is at an earlier stage of evolution than in the United Kingdom.

At certain times, the Canadian government has sought the approval of Parliament before making decisions about armed conflicts. In 2006, for example, the Canadian Parliament voted to extend the presence of its armed forces in Afghanistan, which had been slated to end in 2007 (although, notably, Prime Minister Harper stated that he would extend the mission for one year with or without the support of the House).⁶ In 2008, parliamentary approval was again sought, and granted, for extending the deployment in Afghanistan, although it was given on the basis that there would be a withdrawal of Canadian armed forces in 2011.⁷ This occurred in relation to other conflicts as well: in March 2011, Parliament passed a motion approving the deployment of armed forces to Libya, and in June and September 2011 voted on an extension of these operations; and in 2014, the House of Commons was again asked to vote to approve air strikes against ISIS in Syria.

Despite these examples, the executive’s ability to act in relation to armed conflicts without a formal vote in Parliament continues. The government did not seek parliamentary approval for entry into Afghanistan in October 2001, with Prime Minister Chrétien simply announcing the deployment of Canadian armed forces.⁸ Several days later, however, the House of Commons overwhelmingly passed a motion affirming its support for the deployment.⁹ Likewise, further parliamentary approval was not sought by Prime Minister Harper in 2010 for an extension to

⁵ United Kingdom House of Commons, Hansard Parliamentary Debates, 17 April, 2018, Col 205 – 208, < <https://hansard.parliament.uk/Commons/2018-04-17/debates/bcddb216-4a57-413a-9f5a-e4440a8023c8/CommonsChamber>>.

⁶ Canadian House of Commons, Hansard Parliamentary Debates, 17 May 2006: <<https://www.ourcommons.ca/DocumentViewer/en/39-1/house/sitting-25/hansard>>.

⁷ Canadian House of Commons, Hansard Parliamentary Debates, 13 March 2008: <<https://www.ourcommons.ca/DocumentViewer/en/39-2/house/sitting-66/hansard>>.

⁸ Prime Minister Jean Chrétien, “An Address to the Nation Concerning the International Campaign Against Terrorism”, 7 October 2001: <https://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/jean_chretien/2003-12-08/stagingp_m_3a8080/default.asp@language=e&page=newsroom&sub=speeches&doc=nati_onterrorism.20011007_e.htm>.

⁹ Canadian House of Commons, Hansard Parliamentary Debates, 15 October 2001: <<https://www.ourcommons.ca/DocumentViewer/en/37-1/house/sitting-94/journals>>.

deploy “military trainers” in Afghanistan.¹⁰ The Prime Minister justified this on the basis that it was a training mission, rather than deployment of troops. Nor was a vote held in 2014 with regards to Canada’s response to Russia’s invasion of Ukraine, which included deploying fighter aircrafts to the region. In 2016, Prime Minister Trudeau announced changes to the military’s mission in Iraq without a vote, although he pledged to consult Parliament.

There is some evidence that the Canadian Parliament believes it is important to be consulted before such a decision is made. However, much of the discussion in Canada seems to have framed parliamentary approval as a courtesy rather than a requirement. At best, it can be said that there is supportive practice of parliamentary approval prior to entering armed conflicts that has yet to become a convention of the type recognised in the UK.

A legislative response is preferable

The United Kingdom and Canada are on the right path, but a convention is not by itself sufficient. The fact that, for example, the May government could so easily depart from the convention in its deployment of force in Syria in 2018 demonstrates the weakness of this approach. The response of that government also suggested a capacity to reinterpret the convention to provide significant latitude for it to be ignored. Likewise, Canada’s framing of parliamentary approval as a courtesy rather than a requirement shows the limits of practice and conventions.

A legislative response is needed. Parliament should assert its role in decision-making on whether to deploy troops overseas. This should not be left the discretion of the executive by way of a convention, and instead should be formalised in legislation. Legislation will also provide the opportunity to set out the scope of parliamentary involvement with greater precision that can take account of the need for emergency action. In such a case, it is reasonable that the executive be able to act unilaterally while also being required to retrospectively seek parliamentary endorsement.

A legislative framework will also permit careful attention to be given to how parliament will, or will not, access intelligence and other information held by the government that may be important to assessing military action. In essence, a legislative approach has the benefits of providing a more secure framework for parliamentary involvement that reflects human rights and other concerns, while also ensuring the framework is supported by an appropriate process and tailored to the many circumstances in which force may be deployed overseas.

Security implications and structuring a legislative response

Any legislative response must be carefully structured. It should set out an opportunity for Parliament to debate and then vote on the deployment of troops to hostile action overseas. The executive would make the decision but could not proceed without parliamentary support.

On 7 December 2020, Australian legislators introduced the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020 (Cth). In November 2021, the Senate Foreign Affairs, Defence and Trade Legislation Committee

¹⁰ BBC News, “Canada PM says no vote needed to extend Afghan mission”, 12 November 2010: <<https://www.bbc.com/news/world-us-canada-11748277>>.

recommended that the Parliamentary Approval Bill not proceed.¹¹ The reasons provided for that recommendation identify three important issues that any legislative response must contend with.

First, the committee noted risks to operational security. It is no doubt true that there will invariably be classified or sensitive intelligence being considered when the decision to enter an international armed conflict is made. This, naturally, should not be debated in open parliament. However, this is not a reason to reject a legislative response. Although there will never be the ability to for parliament to debate classified material, if a parliamentary debate on all but the classified facts is held members of the public will be able to tell MPs their concerns about the non-classified aspects of the situation, which can be borne in mind when parliament weighs all of the information in its decision-making. If required, the legislative proposal could expressly stipulate that no classified or sensitive information could be disclosed or debated in open parliament.

Secondly, the committee raised concerns that parliamentary approval of decisions to enter international armed conflict risked the ability of Defence to respond flexibly and in a timely manner. There are several responses. The legislative proposal should contain a mechanism for emergency action as there are legitimate concerns that requiring parliamentary approval of decisions to exercise the prerogative would hamper the executive's ability to act in emergency situations, such as an imminent attack. There should be clear exceptions in the statutory scheme with regards to particular kinds of emergency situations. These, then, should require retrospective debate and approval by parliament.

Thirdly, the committee raised concerns that the legislative proposal did not consider space and cyberspace capabilities creating uncertainty regarding parliamentary approval for decision-making in these domains. The changing nature of modern warfare means that these uncertainties are likely to continue. However, this is not a reason to reject a legislative proposal. The threshold should remain the same regardless of the "type" of military operation: if a cyberspace operation, for example, required an exercise of executive prerogative power to commence the operation that should be subject to approval by parliament.

Yours sincerely

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¹¹ Senate, Foreign Affairs, Defence and Trade Legislation Committee, *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020*, November 2021, 10 <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024793/toc_pdf/DefenceAmendment\(ParliamentaryApprovalOfOverseasService\)Bill2020.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024793/toc_pdf/DefenceAmendment(ParliamentaryApprovalOfOverseasService)Bill2020.pdf;fileType=application%2Fpdf)>.