Chapter 2

The proposal for parliamentary approval

2.1 Australian legal experts generally acknowledge that while the power to declare war and deploy troops overseas is not specified in the Constitution, it currently forms part of the executive power under section 61 of the Constitution.[1] Professor Geoffrey Lindell noted, however, that under the Westminster system of government, Parliament may legislate to regulate or limit the exercise of prerogative powers. He concluded:

> …it is likely that the Australian parliament possesses such power under, for example, the power to make laws with respect to defence under s51(vi) of the Constitution.[2]

2.2 In this chapter, the committee considers a private senator's bill that is intended to confer on the Australian Parliament the authority to curb the power of the executive to send members of the Defence Force to serve outside Australian territories. The committee starts by tracing the history of this bill.

Defence Amendment Bill 1985

2.3 For decades now, a group of Australian citizens and politicians have actively canvassed the possibility of Parliament having a say in the decision to commit ADF personnel to an overseas conflict. In April 1985, Senator Colin Mason, Australian Democrats, took the first major step toward achieving this objective by introducing the Defence Amendment Bill 1985. This bill stipulated that members of the Defence Force 'may not be required to serve beyond the territorial limits of Australia except in accordance with a resolution agreed to by each House of the Parliament authorizing the service'. He explained:

> The purpose of this Bill is to place the responsibility for the decision to send Australian troops overseas with both Houses of Federal Parliament subject to exceptions covering the movement of personnel in the normal course of their peacetime activities and the need to take swift action in an emergency.[3]

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1 See for example, Geoffrey Lindell, 'Authority for war', *About the House,* May–June 2003, p. 23. George Williams, 'Comments', 'The Power to go to war: Australia in Iraq", editor Fiona Wheeler, *PLR,* vol. 15, no. 5, 2004, p. 5 and 'Now to say, never again', *Canberra Times,* 7 June 2008.

2 Geoffrey Lindell, 'Authority for war', *About the House,* May–June 2003, p. 23. See also Charles Sampford and Margaret Palmer, 'The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq', *Griffith Law Review,* vol. 18, no. 2, 2009, p. 350.

3 Senator Colin Mason, *Senate Hansard,* 18 April 1985, p. 1186.

2.4 In his view, the legislation if enacted would ensure that both Houses of Parliament would have the opportunity to debate fully any move to involve ADF personnel in a war-like situation. He contended that this debate, followed by a vote of all elected federal representatives, would result in 'a more reasoned basis for sending defence force personnel overseas'.[4] Debate on the bill was held in 1986 but was adjourned.

2.5 Senator Paul McLean, Australian Democrats, introduced the same bill in the Senate in 1988. In his second reading speech, he repeated, in many cases word-for-word, the purpose of, and reasons for, passing the proposed legislation.[5] It was restored at the second reading stage to the Notice Paper in 1993 and 1996.

2.6 On 27 March 2003, similar legislation, the 'Defence Amendment (Parliamentary approval for Australian involvement in overseas conflicts) Bill 2003', was introduced jointly by Senator Andrew Bartlett and Senator Natasha Stott Despoja (Australian Democrats). It was restored to the Notice Paper on 17 November 2004 and debated in the Senate on 10 February 2005. The arguments in favour of, and in opposition to, the legislation built on those of 1986. A number of senators participated in the debate which was then adjourned.

2.7 On 13 February 2008, Senator Bartlett presented the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008. The same bill was introduced in the Senate by Senator Scott Ludlam (Australian Greens) on 17 September 2008.

Purpose of the Bill and core provision

2.8 Almost a quarter of a century has elapsed since a bill was introduced in the Senate similar in content to the one now before the committee. The core provision of the proposed legislation remains unaltered (with minor word changes) from the 1985 and 2003 versions of the bill. The current bill stipulates that members of the Defence Force may serve within the territorial limits of Australia but may not serve beyond these limits except in accordance with a resolution, which is in effect and agreed to by each House of the Parliament, authorising this service.[6]

2.9 Throughout the history of this legislation, those engaged in debate on its provisions have acknowledged the seriousness of the decision to commit Australian forces overseas. Although agreeing on the gravity of the decision, they have very different views on who should make this decision.

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4 Senator Colin Mason, *Senate Hansard,* 18 April 1985, p. 1186.

5 *Senate Hansard*, 22 February 1988, p. 387.

6 Subsections 50C(1) and (2), Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008.

2.10 In 1986, Senator Don Chipp, Australian Democrats, supported the 1985 bill designed to strengthen the authority of Parliament over the exercise of the executive's prerogative power to deploy Australian troops abroad. He expressed concern that the executive—the Prime Minister and Cabinet—could commit Australia to 'a disastrous course of action without Parliament and Australian people knowing what the arguments for and against were, and what the potential hazards might be'. He argued that an important measure would be to require 'a full and free debate in both Houses of Parliament'.[7]

2.11 When introducing the 2003 bill, Senator Bartlett reinforced this view about the need to obtain parliamentary approval before Australian ADF personnel could serve abroad. He explained:

> The Executive should not be able to involve Australian troops in an overseas conflict if they have not been able to successfully make their case at least to the Parliament. What the Democrats are seeking is for the Parliament, as the voice of the people, to have some control over the situation.[8]

2.12 During debate on the bill in 2005, he noted the legislation would create:

> …a simple mechanism to provide the check that would require the government to make to the parliament the case for sending Australian men and women in the Defence Force to put their lives on the line. To suggest that the parliament should have no role in such a fundamental decision is an approach that does not recognise the fundamental importance of the parliament.[9]

2.13 At this time, those in support of the bill cited the government's decision to send troops to Iraq as an example of why the legislation was needed. Senator Lyn Allison stated:

> Being accountable to the will of the people through the parliament will restrain democratic leaders and help prevent them from initiating foolhardy and risky wars. Committing the lives of citizens to an overseas conflict is no small decision. It requires that leaders be particularly cautious both when starting wars and in joining coalition with others. They must be able to persuade others by the strength of the augment and by the evidence.[10]

2.14 When presenting this bill to the Senate in 2008, Senator Ludlam argued that 'the responsibility of sending Australian men and women into danger and quite possibly to their deaths should not be solely on the shoulders of a handful of leaders'. In his view, the lack of proper mechanisms 'saw the Australian Prime Minister rapidly

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7 Senator Don Chipp, *Senate Hansard*, 17 April 1986, p. 1916.

8 *Senate Hansard*, 27 March 2003, p. 10320.

9 See Senator Andrew Bartlett, *Senate Hansard*, 10 February 2005, p. 126.

10 *Senate Hansard*, 10 February 2005, p. 106.

deploy troops to an illegal war in Iraq in 2003 without consulting the people's representatives in Parliament'. He said:

> A lesson can and must be learned from this kind of mistake, which is more easily made when a handful of people take closed and secret decisions on behalf of a nation without due consultation or participation. The Howard government was the first government in Australia's history to go to war without the support of both houses of Parliament. This bill provides an opportunity to ensure this never happens again.[11]

2.15 He also noted that there were appropriate exemptions made in the bill that would not interfere with the non-warlike overseas service in which Australian troops engage.[12]

2.16 In advancing their argument, those supporting the proposed legislation cited countries where parliamentary consent for military personnel to serve in war was needed or where countries were considering introducing such a requirement. For example, Senator Ludlam informed the Senate that the bill would bring Australia into conformity with principles and practices used in democracies such as Denmark, Finland, Germany, Ireland, Slovakia, South Korea, Spain, Sweden, Switzerland and Turkey.[13]

2.17 The majority of the 31 submissions to the committee's inquiry were in favour of the bill. Unequivocally, they endorsed the principle that the executive should not be able to make such an important decision without reference to, or endorsement by, the Australian Parliament: that such a decision should 'not be left in the hands of one person or a select few'.[14] In general, they held that the proposal to require parliamentary approval for an overseas deployment was a positive move that would strengthen Australian democracy by improving the transparency and accountability of important decisions by the executive government. It would promote an open system of decision-making and parliamentary involvement and confer 'more credibility and political force' on the decision.[15] For example, Mr Robert O'Neill wrote:

> A wider Parliamentary debate could lead to wider national consultation, resulting in much better decisions on war and peace.[16]

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11 *Senate Hansard*, 17 September 2008, p. 4982.

12 *Senate Hansard*, 17 September 2008, p. 4982.

13 *Senate Hansard*, 17 September 2008, p. 4982.

14 See for example, *Submission 14*. See also *Submission*s *3, 4, 5, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27* and *30*.

15 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 2. See also *Submission 3* and *23*. The Civil Liberties Association argued that 'the current system does not provide an effective level of accountability and scrutiny necessary for the significant decision to send troops', p. 6.

16 Robert O'Neill, *Submission 5*, p. 3.

2.18 The Women's International League for Peace and Freedom (Australian Section) believed that:

> …it is important that Australia's parliament should have oversight of any decision to commit our country's troops to a war. Without such parliamentary oversight, the possibility exists for an Executive (or indeed for an influential leader acting virtually alone) to make a rash or overzealous decision that has little or no backing from the electorate.[17]

2.19 Many suggested that the current arrangements were outdated, 'an anachronism and an anomaly'.[18]

2.20 Unfortunately, while many of the submissions supporting the bill gave their strong in-principle support for the legislation, they did not refer to the provisions of the bill. This meant that they did not assist the committee in its analysis of the practical application of the provisions and their implications for the safety and success of operations. Their opinions expressed in submissions were at the level of broad principle without close considerations of the consequences should specific provisions of the bill be enacted.

2.21 During the 2005 date, those in favour of the executive retaining the authority to deploy troops, referred to the long standing Westminster convention that the executive government has the discretion to commit forces to operations overseas.[19] Some cited the Commonwealth Constitution as the legal basis or authority to validate the legitimacy of this prerogative.[20] They argued that the executive branch of government is elected by the people to make hard decisions and is answerable to the people for those decisions.[21] Senator Sandy Macdonald asserted that 'Governments are elected to govern, and it would be a gross act of irresponsibility to abandon that responsibility'.[22]

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17 *Submission 13*, p. [2]. The Human Rights Council of Australia was of the view that: 'A decision of such seriousness perforce deserves and requires a decision-making process equal to the most serious that our constitutional system provides and that is a decision of the Parliament'. *Submission* 10, pp. 1–2. Just Peace found 'it incomprehensible that there is not a strict parliamentary process in place underpinned by law such as that proposed in the Bill, so as to prevent the Government of the day from committing the country to war without parliamentary debate and approval', *Submission 15*, p. 2.

18 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 1.

19 See Senator Linda Kirk and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 118, 130.

20 See Senator Linda Kirk, Senator Sandy Macdonald and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 118, 122, 130. See also Senator Alan Ferguson and Senator John Hogg, *Senate Hansard*, 10 February 2005, pp. 109, 113.

21 See Senator Marise Payne, *Senate Hansard*, 10 February 2005, p. 130. Also see Senator Sandy Macdonald, *Senate Hansard*, 10 February 2005, p. 122.

22 See Senator Sandy Macdonald, *Senate Hansard*, 10 February 2005, p. 122.

2.22 In response to concerns about the lack of accountability, those rejecting the bill argued that parliamentary processes already exist that allow for debate and scrutiny—media, question time, parliamentary committees and ultimately by the Australian people at the ballot box.[23] For example, the Minister for Defence, Senator the Hon John Faulkner, recently noted that the opportunities for debate are not limited to ministerial statements. He cited 'matters of public importance, urgency motions, general business—all of which provide senators with the opportunity to debate important issues'. He then referred to Australia's engagement in Afghanistan which has:

> …been canvassed in detail during the Chief of the Defence Force's opening statements at Senate estimates. Here the CDF, the secretary of defence and other departmental and ADF representatives are ready, willing and available to answer any questions about the issue from senators.[24]

2.23 In response to the examples of countries that require prior parliamentary approval for deployments, Senator John Hogg and Senator Marise Payne listed the countries in 2005 where such approval was not necessary. They included Canada, Belgium, France, Poland, Portugal and the United Kingdom.[25] In this regard, Senator Payne noted that 'different parliamentary systems, different parliamentary chambers, make different arrangements'.

2.24 A House of Commons Research Paper also highlighted the difficulty dividing countries into two distinct categories because of their unique political histories and constitutional frameworks. Furthermore, it showed that approval has different meanings or applications in various countries. For example, it noted that in some cases parliamentary approval may be needed to declare war but not to deploy troops and certain military service may not require approval.[26] The debates in the UK reflect the complexities in legislating for parliamentary approval. Although supporting the principle of such approval, the UK Government recognised that the main challenge was to formulate a process that would be 'sufficiently adaptable to be able to respond quickly and flexibly to the variety of situations that could arise'. It pointed to difficult issues that needed to be resolved such as allowing for exceptional circumstances, the need for urgent deployment, potential dangers of a retrospective approval process,

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23 Senator John Hogg, *Senate Hansard*, 10 February 2005, p. 113. See also Senator Alan Ferguson, Senator Sandy Macdonald and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 109, 122, 130.

24 *Senate Hansard*, 2 February 2010, pp. 2–3.

25 *Senate Hansard*, 10 February 2005, pp. 113, 130.

26 Claire Taylor and Richard Kelly, *Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues*, House of Commons Library, Research Paper 08/88, 27 November 2008, p. 41–55.

security implications from the release of information, the timing of the vote and definitional issues such as 'armed conflict'.[27]

Committee view

2.25 The committee accepts that the authority of the government to make decisions regarding the commitment of Australian forces overseas follows a long established convention. It understands, however, as noted by Professor Lindell, that if the parliament so wished it could impose limitations on the executive's prerogative to deploy troops. The committee also notes that some countries, to varying degrees, require parliamentary approval before their military forces can be deployed.

2.26 The main question before the committee, however, is not about the principle of parliamentary debate or approval but whether the bill before it provides an effective and credible alternative to the current practice. The committee is concerned with how the provisions of this bill would operate in practice.

2.27 In the following section, the committee considers the provisions of the bill; key issues that have arisen during debates in relation to these provisions; and the extent to which the drafters of the legislation have responded to matters raised during these debates.

Provisions of the Bill

2.28 During the two debates on predecessor bills, senators have had the opportunity to place on the public record their support for, or opposition to, the proposed legislation and to explain their reasons. As early as 1986, and through to the present day, some senators have identified what they believe are serious deficiencies in the proposed legislation. Their concerns have centred on the disclosure of classified material, the constraints that the bill may impose on Defence activities, unclear, misunderstood or inappropriate definitions and the scope of the bill.

Informed decision making; use of classified material

2.29 In 1986, Senator Mason told the Senate that if passed the bill would ensure a full debate in both Houses on sending Australian forces overseas. The then Minister for Resources and Energy, Senator Gareth Evans, sympathised with the underlying philosophy of the proposed legislation but raised a number of problems with its practical implementation. He expressed concerns about the disclosure of intelligence, noting:

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27 *Government response to the report of the Public Administration Select Committee on the Draft Constitutional Renewal Bill,* Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty the Queen, July 2009, pp.11–12 and *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill,* Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty the Queen, July 2009, pp. 46–47.

> …situations may develop where there is a need to determine measures to be taken without the publicity associated with debate in the Parliament; situations where public knowledge could limit our strategic options and indeed put our forces at risk.[28]

2.30 Senator David MacGibbon also identified a problem with the use of classified material. He argued that a decision to commit troops could be made 'only in the full knowledge of all the circumstances—knowing the diplomatic circumstances that are involved, the strategic involvement and all the military and economic factors'. In his view, these must, 'be weighed up in the light of a careful assessment of all the options that are open to the government of the day. That simply cannot be done in open debate in any chamber of this parliament'.[29]

2.31 Nearly two decades later, senators opposing the 2003 version of the bill raised similar concerns. Representing both major parties, they argued that the executive is the only body that has 'full and proper knowledge of military and strategic decisions and the one-on-one contact with Australian allies' to be able to make a considered and well informed decision.[30] In their view, Parliament does not have access to all available intelligence and the complete range of advice from the Public Service.[31] Thus, they concluded that the usefulness of public debate would be limited because information critical to making a sound decision is only within the province of the executive.[32]

2.32 These senators similarly rejected the alternative of providing Parliament with all available intelligence to enable a fully informed debate. In their assessment, such an arrangement would be both impractical and detrimental to security. In particular, they were concerned that the disclosure of classified material, such as specific details on a deployment or intelligence advice given to governments on a confidential basis, would compromise the safety and security of an operation. Senator Linda Kirk explained:

> There will often be cases where information simply cannot be made public. If it were to be made public it could very much undermine our strategic position when we are about to embark on a war. This could not even be overcome by holding a secret session of parliament, or something of the like, because that is contrary to our system of government and it would not be the proper manner in which to do this.[33]

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28 *Senate Hansard*, 17 April 1986, p. 1912.

29 Senator MacGibbon, *Senate Hansard*, 17 April 1986, p. 1913.

30 See Senator Kirk, Senator Sandy Macdonald and Senator Marise Payne, *Senate Hansard*, 10 February 2005, pp. 118, 122, 130.

31 Senator Alan Ferguson, *Senate Hansard*, 10 February 2005, p. 109.

32 See for example, Senator Sandy Macdonald, *Senate Hansard*, 10 February 2005, p. 122.

33 Senator Linda Kirk, *Senate Hansard*, 10 February 2005, p. 118. See also Senator Payne, p. 130.

For the major parties, the problems were serious—the inability of Parliament to have access to all the information needed to make critical decisions concerning the deployment of Australian ADF members or disclosing information that could jeopardise the safety and success of a military operation.

2.33 While the 2008 proposed legislation resembles closely its predecessor bills, it does include additions that relate directly to the release of information. Subsection 50C(5) requires the publication of the Governor-General's proclamation within 24 hours after it is made with the accompanying advice from the Prime Minister that explains the circumstances of emergency which rendered it inexpedient to seek a resolution from the Parliament. Subsection 50C(6) stipulates that the Governor-General's proclamation be laid before each House of the Parliament within two days after it is made together with a report setting out:

(a) the Prime Minister's advice to the Governor-General as noted above;

(b) the reasons for the proposed deployment;

(c) the legal authority for the proposed deployment;

(d) the expected geographical extent of the proposed deployment;

(e) the expected duration of the proposed deployment; and

(f) the number of members of the Defence Force proposed to be deployed.

2.34 The bill would also impose reporting obligations for the duration of the deployment.[34] This regular written report to both Houses of Parliament is to include information on:

(a) the status of each such deployment, including its legality, scope and anticipated duration;

(b) what efforts have been, are being, or are to be, made to resolve the circumstances which required such deployment; and

(c) whether there is any reason why the Parliament should not resolve to terminate such deployment.

2.35 In a submission to the inquiry, Paul Barratt AO, Andrew Farran and Garry Woodard rejected the contention that sensitive information which is known to the Government could not be disclosed to the Parliament. They argued:

> …there has been a long tradition in this country, and other countries governed under a Westminster system, of briefing the Leader of the Opposition at times of national peril. If the Prime Minister were unable to convince the Leader of the Opposition of the merits of a proposed

34 The report is to be made on the first sitting day of that House after the commencement of each of the months of February, April, June, August, October and December. The Minister is to commence reporting within 2 months after the deployment.

> deployment, then we would submit that the need for the proposed deployment would be by definition less than compelling.[35]

2.36 They did not mention how classified information would then be conveyed to all parliamentarians including independents and members of minor parties and then discussed publicly without increasing the risk of some form of disclosure of security sensitive material.

2.37 The Australian Anti-Bases Campaign Coalition noted that:

> To argue that the prime minister and cabinet are likely to be closer to, and have greater insight into, a given international situation is to admit that the government has failed to keep parliament and the public adequately informed.[36]

2.38 Mr Tim Wright wanted to go further with the reporting provisions. He suggested that the executive be required to provide information additional to that stipulated. For example, he cited estimates of the likely number of Australian troops to be killed and seriously injured in the conflict and the same information for the citizens of the invaded country as a result of Australia's participation.[37]

2.39 Interestingly, although only two submissions expressed reservations about the use of classified material, both were in a position to have sound knowledge about the nature and extent of such information and the likely security implications should it be disclosed. The Submarine Institute of Australia explained:

> The submarine's greatest strength is its ability to operate undetected in sea areas controlled by a potential adversary. It goes without saying, therefore, that the success of submarine operations relies on strict security—disclosure of submarine operational plans negates the submarines primary advantage, potentially putting the submarine at greater risk and leading to a deterioration in strategic circumstances.[38]

2.40 It recommended that the bill be amended to make provision for the Prime Minister to determine that covert operations be excluded from the requirement to have parliamentary approval. The Navy League of Australia also drew attention to the possibility that advice provided by the Prime Minister to the Governor-General 'may contain classified material'. It therefore suggested that subsection 50C(6) may have to be altered.[39]

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35 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 5.

36 *Submission 26*, p. [3].

37 *Submission 25*, p. 2.

38 *Submission 6*, p. 1.

39 *Submission 12*, p. [2].

2.41 The committee's inquiry into peacekeeping operations looked closely at the decision-making process before Australia commits personnel to an overseas operation. It became aware of the high level and extensive discussion and consultation that takes place within and between the Department of Defence, the Australian Federal Police, the Department of Foreign Affairs, the Attorney-General's Department, the Department of Prime Minister and Cabinet and other agencies such as the Office of National Assessments. Other agencies would be included in this process as required until the National Security Committee of Cabinet considers all submissions and makes a final decision. Generally such a decision would be taken after close consultation with other countries. Much of the information under consideration would be classified, for example risks to personnel, Defence or AFP assets, their strength and location, their force readiness, as well as the level of commitment and capabilities of likely allies, and the compatibility and complementarity of their forces. Clearly much of this information could not be disclosed and, if so, would have the potential to compromise the safety and security of any proposed operation or adversely affect diplomatic relations with potential allies.[40]

Committee view

2.42 The concern about the disclosure of sensitive or classified information was raised in 1986 and again in 2005 and 2009. Based on observations made during debates and by submitters, the committee is not yet convinced that the bill fully appreciates security implications and the need to take account of the appropriate and secure use of classified material. The committee also believes that without a full understanding and appreciation of the complex and interrelated security, strategic and diplomatic circumstances, members of parliament would lack the institutional ability to make important decisions on Australia's engagement in overseas conflicts.

Constraints on deployment

2.43 In 1986, Senator MacGibbon feared that if enacted, the legislation would affect the effective mobilisation of Australia's Defence Forces.[41] It should be noted, however, that the bill contemplated situations requiring an immediate or prompt response. It provides for the Governor-General by proclamation to declare that an emergency exists that requires overseas service. The bill did not define 'emergency'.

2.44 It also made provision for situations when the Parliament was not in session or either House was adjourned for a period of time. At the time of the Governor-General's proclamation, if the Parliament were not in session, it was to be summoned to meet within two days after the making of the proclamation. Similarly, when a House was adjourned, it was to be summoned to meet within two days after the

40 The committee devoted a number of chapters to the decision-making process. See chapters 3–8, Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's involvement in peacekeeping operations'*, August 2008.

41 *Senate Hansard*, 17 April 1986, p. 1913.

proclamation. In 2005, Senator Hogg, however, noted practical difficulties when Parliament was not in session:

> It implies that everyone is close at hand and able to be summoned to participate in the debate within two days. Meanwhile, very strategic issues are passing us by, and that might not be in our interest. There are no grounds for the delay under such circumstances.[42]

2.45 Again those joining Senator Hogg in opposing the bill on this issue represented both the major parties. They referred to the importance of the government and ADF having the flexibility to respond to an emergency. Both Senator Payne and Senator Sandy Macdonald noted that currently the government has the ability to respond to emerging threats quickly and decisively, an approach that has served Australia well in the past.[43] Senator Kirk was of the view that the bill would restrict the option of a government to deploy ADF personnel overseas at short notice which could 'very much disadvantage the position of our troops and also disadvantage Australia strategically'.[44] Both she and Senator Hogg cited Solomon Islands and the shooting of Adam Dunning as instances requiring a prompt response.[45] Senator Kirk stated:

> If this legislation had been in force, parliament would have been required to be recalled before troops could be despatched to the Solomon Islands. That would have been most difficult and inconvenient. Similarly, when troops were deployed to Aceh, following the Boxing Day tsunami, the provisions of this relief assistance would also have required the approval of the parliament.[46]

2.46 In this regard, Lieutenant General Ken Gillespie told the committee during its inquiry into peacekeeping that the situation in Timor Leste in May 2006 required an immediate response. He said action 'also necessitated a significant number of meetings at various levels…to work out the dynamics and the response that was required from a number of agencies'.[47] Indeed, the committee's report into Australia's

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42 *Senate Hansard*, 10 February 2005, p. 113.

43 See Senator Sandy Macdonald and Senator Marise Payne and, *Senate Hansard*, 10 February 2005, pp. 122, 130.

44 See Senator Kirk, *Senate Hansard*, 10 February 2005, p. 118.

45 On 22 December 2004, Australian Federal Police Protective Service Officer Adam Dunning, was shot and killed in Solomon Islands, while performing a routine patrol in Honiara, protecting the residences of the Prime Minister and Governor General. AFP Media release, 'Police Arrest James Tatau in relation to the murder of Adam Dunning and the attempted murder of another three PPF Officers in Solomon Islands', 11 January 2005, http://www.afp.gov.au/__data/assets/pdf_file/1971/mr110105arresttatau.pdf and 'AFP remembers one its fallen', 22 December 2005, http://www.afp.gov.au/__data/assets/pdf_file/1970/mr_05122__dunninganniversary.pdf

46 *Senate Hansard*, 10 February 2005, p. 118.

47 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's involvement in peacekeeping operations*, August 2008.

involvement in peacekeeping provided some insight into the complexities of peacekeeping and the speed with which circumstances of an operation could change markedly and unexpectedly. For example, it found that Australia's experience in peacekeeping operations that respond to intra-state conflicts such as those in East Timor and Solomon Islands 'demonstrated the spectrum of security responses required'. It referred to the essential need for the ADF and AFP to be able to move 'in and out of different security levels'.[48] It also highlighted decisions needed to be made on the ground dealing with self defence and the emerging military doctrine including responsibility to protect.

2.47 During the committee's current inquiry, a number of submissions elaborated further on the response needed when time is critical. Some were of the view that the bill does not remove the power that may be needed in an emergency.[49] Paul Barratt AO, Andrew Farran and Garry Woodard stated their belief that:

> …it will in almost all circumstances be the fact that there is no pressure of time such as to prevent adequate consultation with and debate within the Parliament, and we believe that the provisions of the draft Bill are adequate to deal with situations of genuine emergency where the need for a response is instant, overwhelming and leaving no choice of means.[50]

The Australian Anti-Bases Campaign Coalition supported this argument, stating that the bill:

> …mitigates any concerns about the possible impracticality of seeking parliamentary resolutions by providing for deployment in genuine emergency circumstances without prior parliamentary authority.[51]

2.48 To ensure that this provision was not misused, Civil Liberties Australia wanted to limit the situations in which an exemption for urgent deployment could be used. It suggested that the explanatory memorandum provide additional guidance as to what constitutes an emergency.[52] As noted earlier, the bill offers no definition whatsoever of an emergency.

2.49 As in 2005, a number of those opposing the proposed legislation in 2008 were concerned not only with defining the meaning of emergency but, from an operational point of view, the practical application of the provisions of the bill.

2.50 The Australian Association for Maritime Affairs noted that modern military operations tend to reflect escalating or de-escalating political developments as evident

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48 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's involvement in peacekeeping operations*, August 2008.

49 Marrickville Peace Group, *Submissions 19*, p. 1 and also *Submissions 21* and *26*.

50 Paul Barratt AO, Andrew Farran and Garry Woodard, *Submission 21*, p. 5.

51 The Australian Anti-Bases Campaign Coalition, *Submission 26*, p. [3].

52 *Submission 23*, p. 7.

in maritime operations, 'where a routine peacetime deployment to a geographic region may change from being an opportunity to exercise with friendly (and potentially friendly) forces to:

- an operation to evacuate Australian citizens, with or without the cooperation of whatever local government may exist; to
- the interdiction of weapons deliveries either to the local government or to its internal opponents; to
- strikes, or threats, against selected targets; to
- the insertion of Australian or allied land forces; and
- operations in defence of Australian trade, resources, facilities or even homeland which may flow from the initial incident.[53]

The Association explained:

> …in the real world, depending on the aims and calculations of the foreign forces involved, incidents can escalate to the brink of all-out hostilities, and then may de-escalate again in a matter of hours. This Bill…seeks to insert a parliamentary approval process requiring up to two days notice, or perhaps not at all if Parliament has been prorogued, into an already complex diplomatic and operational environment.[54]

2.51 Brigadier (retired) Adrian D'Hage supported the proposal requiring parliamentary approval before 'committing the country to war'. But he also recognised the need in some instances for quick and decisive action to deploy troops overseas. He stated:

> For smaller deployments such as company size groups to the Solomon Islands, the Fiji crises et al, decisions need to be made in a timely and effective manner, and will often be made by the security committee of Cabinet, or the full Cabinet itself, without the need for debate in parliament. That flexibility is essential to meet situations which arise with little or no warning, are relatively small in nature, and do not involve the country in a major war (the definition of which and in itself is not easy).[55]

2.52 The Navy League of Australia raised a number of related pertinent matters such as whether the proclamation would have retrospective effect. It noted the possibility of situations arising where 'actions intended to be covered by the Bill would have occurred before either the Governor-General, Prime Minister or the Parliament could act'.[56] The Australian Association for Maritime Affairs noted that

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53 *Submission 8*, pp. 3–4.

54 *Submission 8*, p. 4.

55 Arian D'Hage to Ian Maguire, 20 December 2007, additional information from Mr Maguire *submission 31*.

56 *Submission 12*, p. [2].

the bill fails 'to address the legal or military practicalities if Parliament is *not* recalled, or if Parliament does not approve the deployment'.[57]

Committee view

2.53 The committee recognises that extensive consultation with a range of organisations and agencies and robust analysis by defence, foreign affairs, and related strategic experts is required before making a decision to deploy Australian forces overseas. Inevitably, this process will involve classified material and continuing access to advice and intelligence from a range of government departments. At times, it may require intense and clearly focused consideration of matters followed by quick and decisive action.

2.54 The committee recognises that in many cases there would be ample opportunity for the Parliament to debate overseas developments likely to draw Australia into military action. On such occasions, the committee fully endorses the involvement of Parliament in debates about possible Australian deployment. It is of the view, however, that in some cases, engaging the two Houses of Parliament in the decision making process may well deny the government and its defence and security organisations the flexibility and adaptability needed to undertake operations safely and effectively. The bill should allow for these rare occurrences. In this regard, the committee notes that while the bill provides for emergency situations it does not define what is meant by the term emergency.

2.55 Finally, there are unanswered questions about situations where Parliament may not approve, or delay approval of, a deployment when ADF personnel, because of the need for urgent action, have already deployed. In the committee's view, the bill does not adequately address problems associated with the disclosure of classified material, the definition of emergency situations and the ability to respond quickly and effectively to emerging threats.

Definitions and scope of the legislation

2.56 During its inquiry into peacekeeping, the committee found that today's international environment is not only very different from that experienced after the Second World War, but is also more fluid. Traditional boundaries between military and civilian roles have blurred as the scope of operations have expanded to include, for example, a focus on helping to create long term stability in fragile states.

2.57 Thus, one of the main challenges in formulating a bill governing war-like service is defining activities that would come under the legislation. The 1985 bill did so by specifying service that would be exempt from the provisions, which meant service:

57 *Submission 8*, p. 1.

- pursuant to their temporary attachment to the forces of another country as provided by section 116B of the *Defence Act 1903*; or
- as part of an Australian diplomatic or consular mission; or
- on an Australian vessel or aircraft not engaged in hostilities or in operations during which hostilities are likely to occur; or
- for the purpose of their education or training; or
- for the purposes related to the procurement of equipment or stores.[58]

2.58 In 1986, Senator Evans noted that at the time Australia faced no identifiable military threat. He informed the Senate that:

> It is lower level challenges to our sovereignty such as harassment, sabotage and small scale raids that are regarded as most credible.[59]

2.59 In his view, such threats 'would develop, at least initially, in the maritime environment and in the northern approaches to Australia'. He stated further that to require the proclamation of a state of emergency and the recall of Parliament to enable effective countering of low level threats would not be 'a practical basis for defence planning'.[60]

2.60 Furthermore, he argued that, if passed, the bill would severely hamper Defence in the protection of the country and in carrying out normal duties across a range of activities. He was concerned that the legislation would not exempt such activities and would:

- preclude defensive activity such as protection of Australian shipping;
- severely constrain the operational effectiveness of the Defence Force in such routine circumstances as hot pursuit in the Australian fishing zone beyond territorial limits;
- complicate arrangements for the employment of Defence Force personnel in other countries under the defence co-operation program; and
- in other instances where the Australian defence forces may be involved in providing humanitarian or disaster relief assistance.

2.61 He accepted that even though the exemptions could be expanded, 'it would be difficult to arrive at a list in the legislation which is both comprehensive and clear in its coverage of routine peacetime activities'. Senator Evans also observed the

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58 Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2], ss 50C(11).

59 *Senate Hansard*, 17 April 1986, p. 1912.

60 *Senate Hansard*, 17 April 1986, p. 1912.

difficulty, even after hostilities have begun, of deciding, 'in advance, the limits of required deployments'.[61]

2.62 In 2005, a number of senators were also troubled by what they saw as definitional ambiguities and problems associated with possible interpretations of Defence activities that would be covered by the requirement for approval. For example, Senator Kirk noted that the vague definitions 'make it most unclear how the legislation would operate'.[62] Senator Hogg argued that 'when one talks about overseas conflicts one needs to be very careful about what one means'. He said:

> One needs to be careful about the word 'war'. We had a role in East Timor. There was clearly an overseas conflict; there was clearly a war taking place in East Timor between some dissident forces and those people who ultimately achieved their personal freedom. In my view, the same could be said to have been the case in the Solomons. There are other cases as well: Bougainville, Sudan, Rwanda and so on. In that sense, it is very important to see what the definitions actually are.[63]

2.63 The confusion created by inconsistencies between the explanatory memorandum, the second reading speech and the wording of the bill add another layer of uncertainty about the exact meaning and intention of the proposed legislation.

Warlike and non-warlike operations

2.64 As far back as 1985, those supporting the bill conveyed the impression that the movement of personnel in the normal course of their peacetime activities would be exempt from the requirement for parliamentary approval. They relied on the provision listing exemptions to provide that assurance. This assertion was repeated in 1988, 2003 and 2005. Furthermore, the language used by the sponsors of the proposed legislation suggested that the bill applied to warlike service and that 'classifying service into warlike and non-warlike service is straightforward'. For example, Senator Bartlett told the Senate in February 2005:

> This bill simply says that, if Australia is going to send our men and women to engage in a war overseas, it should get the support of both houses of parliament before doing so. That is all it says.[64]

2.65 But the debates in 1986 and 2005 show that the list of exemptions was far from adequate. This failure was not rectified by the 2008 bill. Indeed, despite the criticism levelled at the potential for routine military activities to be captured by the approval requirement, the provision exempting specific service remained unaltered.

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61 *Senate Hansard*, 17 April 1986, p. 1912.

62 *Senate Hansard*, 10 February 2005, p. 118.

63 *Senate Hansard*, 10 February 2005, p.113.

64 *Senate Hansard*, 10 February 2005, p. 126.

The exemptions are listed in subsection 50C(11) of the bill and are identical to those given in 1985.

2.66 Today, many of those supporting the bill continue to assert that non-warlike activity would not be subject to the approval process. The explanatory memorandum to the 2008 legislation states clearly that the service of members of the ADF 'beyond the territorial limits of Australia in warlike actions would require the approval of both Houses of the Parliament'. It also explains that the bill provides that the requirement for parliamentary approval of overseas deployment of forces does not apply to normal, non-warlike overseas service. Likewise, when introducing the bill, Senator Ludlam maintained that the exemptions were appropriate and would not interfere with the non-warlike overseas service of Australian troops.[65]

2.67 A number of submitters picked up on these statements and assumed that the bill required that only war or 'warlike service' would need Parliament's approval. For example, the Women's International League for Peace and Freedom was pleased that the bill 'does not apply to normal, non-warlike overseas service':

> Thus,…appropriate exemptions would exist to ensure that no impediments would interfere with overseas service for Australian troops in such missions as a peacekeeping operation, and emergency deployment or disaster relief.[66]

2.68 The Australian Anti-Bases Campaign Coalition understood that overseas deployments that 'come under the rubric of "peacekeeping"; and deployments that are part of humanitarian and disaster relief efforts' were exempted from the bill.[67]

2.69 The committee notes that although the explanatory memorandum refers to warlike actions, the bill does not. Indeed, the words 'war' or 'warlike' do not appear in the proposed legislation. As discussed previously, the bill relies on subsection 50C(11) to determine what is and is not covered by the proposed legislation. Thus parliamentary approval is needed unless the service outside Australian territory is part of a temporary attachment of an ADF member to the forces of another country; part of an Australian diplomatic or consular mission; on an Australian vessel or aircraft not engaged, or unlikely to be engaged, in hostilities; or for the purposes of their education, training or procuring equipment or stores.[68]

2.70 For some submitters the exemptions were too narrow. The Australian Association for Maritime Affairs noted that Australia's seaborne trade interests extend

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65 *Senate Hansard*, 17 September 2008, p. 4982.

66 *Submission 13*, p. [2].

67 *Submission* 26, p. [3]. For further examples see also, Campaign for International Co-operation and Disarmament, *Submission* 14; Shelley Booth, *Submission* 16; Stop the War Coalition, *Submission* 20, p. 2; and Bill Fisher and Miriam Tonkin, *Submission* 30, p. [1].

68 Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008, subsection 50C(11).

well beyond Australia's territorial limits and 'may require the assistance of Australian defence assets or by other friendly nations'. In its submission, it posed a range of queries about the classification of Defence activities and used the current anti-piracy operations off Somalia to illustrate its concerns. For example, it asked whether participation in the international anti-piracy operation was considered 'service' under the terms of the bill meaning that:

> …RAN units could not even be committed to such an operation without a resolution of the Parliament or could be committed but only with the proviso that they might be unilaterally withdrawn 48 hours later?[69]

2.71 The Navy League of Australia voiced similar concerns about what is considered warlike. It noted that recently two RAN ships in transit to the United States and Europe were unexpectedly called on to deal with Somali pirates. It asked the same question—'was the RAN ships' action a *warlike act*?' It contended that it would be undesirable to have commanders of Australian ships in doubt as to the legality of their actions: that ADF members must have clarity as to what may be done legally.[70]

2.72 Although Australia is a maritime country with an extensive exclusive economic zone and relies heavily on sea routes for its trade, concerns about defining military action were not confined to maritime operations. The Australian Association for Maritime Affairs referred to the use of the 'vague term "service" in the bill'. It stated:

> There are many fairly precisely defined forms of 'service' undertaken by ADF personnel—war service, war-like service, hazardous service, etc—forming a spectrum of 'service' which require specific determinations by the Minister. At which level of defined 'service' does the Bill apply?[71]

2.73 According to General (retired) Peter Gration, there 'are plenty of non-warlike deployments beyond the territorial limits' other than those excluded in subsection 50C(11). As examples, he cited—official visits, attendances at conferences and the like, rescue or extraction of Australian citizens from threatening situations overseas, peace keeping under UN and combined exercises with the forces of other countries.[72] Although he supported the principle of obtaining parliamentary approval for non-routine deployment of Australian forces into armed conflict or situations likely to result in armed conflict, he was of the view that the bill as drafted was unsatisfactory. He explained:

> The primary operative clause should address what the Bill actually aims at—Parliamentary approval of participation in foreign wars. There are major issues of national security involved, and drafting would need careful

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69 *Submission 8*, p. 4.

70 *Submission 12*, p. [1].

71 *Submission 8*, p. 2.

72 Peter Gration to Ian Maguire, 15 February 2008, additional information from Mr Maguire *submission 31*.

> consideration and consultation, not only with interest groups and retired people like me, but with the ADF and Departments who would be involved in implementation.[73]

2.74 Ms Melissa Parke MP noted that the bill should also provide for 'service in United Nations missions to be included in the definition of "normal, non-warlike overseas service"'.[74] People for Nuclear Disarmament (Western Australia) noted the importance of ensuring that the ADF's humanitarian roles in responding to disasters such as earthquakes and tsunamis were not impaired.[75]

2.75 In his submission, Mr Ian Maguire, who has long been interested in the legislation, proposed a redrafted and expanded subsection 50C(11). In his list of 8 exemptions, he included service 'as part of United Nations-sponsored peacekeeping activities which have not changed their predominant character to that of peace-enforcement and/or open warfare between or among States'. He also included 'the rescue and/or extraction of Australian citizens and dependent and non-combatant persons associated with them from disasters and threats from civil strife overseas'.[76]

2.76 General Gration has commented on the difficulties drafting this subsection. He noted 'the potential to impose unnecessary administrative restraints on the ADF in going about its day-to-day non-warlike business'.[77]

Territorial limits of Australia

2.77 The committee also notes another problem associated with definitions in the bill. The Australian Association for Maritime Affairs sought clarification on the meaning of 'the territorial limits of Australia' as used in the proposed legislation. It asked does it mean the 12 nautical mile Territorial Sea limit, or the 200 nautical mile Exclusive Economic Zone, or even the vaster area of seabed resources claimed by Australia. It stated further:

> If it is only the Territorial Sea limit, then the Bill may be perceived as inhibiting the power of the Government to take immediate and decisive action to protect Australian interests…
>
> If the Bill is intended to cover the full geographic range of Australia's maritime *interests* then considerable clarification appears to be needed.[78]

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73 Peter Gration to Ian Maguire, 21 February 2008, additional information from Mr Maguire *submission 31*.

74 *Submission 11*, p. 2.

75 *Submission 22*, p. [2].

76 *Submission 31*.

77 Peter Gration to Ian and Claire Maguire, 7 October 2009, additional information to *Submission 31*.

78 *Submission 8*, p. 2.

2.78 According to the Association, the difficulties do not stop with determining the sea boundary. It explained that under international law Australian warships as well as 'public vessels' enjoy sovereignty and 'represent an extension of the sovereignty of the state to which they belong'. Thus, the Association informed the committee that:

> Arguably the 'territorial limits of Australia' include the actual vessels themselves and therefore such vessels, and their personnel serving onboard, take the 'territorial limits of Australia' with them wherever they go and no matter what operations they undertake.[79]

2.79 In its overall assessment, the legislation 'suggests a lack of appreciation of the realities of modern military operations and, particularly, the flexibility provided by maritime power, as well as the needs of the defence of Australia's worldwide maritime interests'.[80]

2.80 General Gration also referred to the meaning attached to the 'territorial limits of Australia'. He presumed that this term was intended to allow use of Australian forces in defence of Australia without the approval of Parliament. In his view, however, any defence of Australia would 'almost certainly involve the deployment of forces beyond the territorial limits—mainly naval and air, but possibly land as well'. He concluded:

> It would also weaken the deterrent value of forces such as our F111s and submarines if a potential enemy knew that they could not be used without the fanfare of Parliamentary debate.[81]

Imposing conditions or requirements

2.81 By 2005, concern about the scope of the bill had expanded considerably beyond definitions of warlike to include matters such as the extent to which Parliament's approval would involve details of, or impose conditions on, a deployment. Senators opposing the legislation raised questions such as would the resolution of the Parliament go as far as including the rules of engagement. These rules are concerned with the laws of armed conflict and prescribe the types of force that may be used by a deployment in different circumstances. Although the rules must be consistent with international law and Australian domestic law, their adequacy and appropriateness is related to the main objectives of the operation and the level of force protection deemed necessary. They are extremely important to those engaged in any military operation. Senator Payne said:

> I have a greater regard and respect for the Australian Defence Force doing those things with professionals, expertise and a regard for operational

79 *Submission 8*, p. 3.

80 *Submission 8*, p. 5.

81 Peter Gration to Ian Maguire, 15 February 2008, additional information to *Submission 31*.

> security than to even contemplate that that should be part of the process of the parliament.[82]

2.82 Senator Hogg also asked whether the resolution by both Houses would go to issues such as rules of engagement which in his view were 'most important':

> If they are left at the beck and call of a parliament which might not be fully informed or have at its disposal all the information, then our forces may well be adversely affected by a resolution of the parliament as to their engagement. Would such a resolution include the strategy to be involved in such an engagement. Would it have time limits. What time limits would there be? What other conditions might apply?[83]

2.83 Clearly, the proposed legislation should be clear on the extent to which Parliament's resolution to approve the deployment of troops is able to impose circumstances or conditions on that deployment.

Committee view

2.84 The committee has identified a number of shortcomings in the proposed legislation that date back to 1986. These deficiencies relate to the uncertainty and confusion around the use and application of terms such as war and non-warlike service and assumptions made about their application. The committee is also concerned about the nature of the resolution to be agreed to by both Houses of the Parliament and the extent to which it could impose conditions on the deployment.

2.85 Before completing its consideration of the bill, however, the committee touches briefly on a number of procedural or technical questions. The committee will not provide a detailed discussion on these matters as it has already identified serious deficiencies in the bill.[84]

Other concerns—position of Governor-General, summoning parliament, joint sitting and consequential amendments

2.86 In 1986, Senator Evans referred to more technical difficulties with the bill but did not elaborate except for citing the operation of the amendment when Parliament has been dissolved. In 2005, some senators also noted possible procedural impracticalities with summoning parliament.[85]

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82 *Senate Hansard*, 10 February 2005, p. 130.

83 *Senate Hansard*, 10 February 2005, p. 113.

84 Senator Evans, *Senate Hansard*, 17 April 1986, p. 1912 and Senator Hogg, *Senate Hansard*, 10 February 2005, p. 113.

85 Senator Evans, *Senate Hansard*, 17 April 1986, p. 1912, Senator Hogg, *Senate Hansard*, 10 February 2005, p. 113.

2.87 Additional provisions were inserted in the 2008 bill dealing with possible procedural matters associated with summoning the Houses of Parliament.

2.88 New subsections (8) and (9) take account of circumstances when the Parliament is not in session at the time the Governor-General makes a proclamation about an emergency requiring the deployment of members of the ADF. Under the proposed legislation, when the Parliament is not in session or has been prorogued within 7 days after the proclamation, the proclamation shall cease to have effect 7 days after it was made. Furthermore no proclamation, the same in substance, shall be made until the day on which the Parliament next meets. The legislation also allows for situations where the House of Representatives has been dissolved or has expired and the day for the return of writs for the general election has not occurred or the House has expired within 7 days after the making of the proclamation. In such cases, the Governor-General's proclamation shall cease to have effect at the expiration of 7 days after the day appointed for the return of the writs for the general election.

2.89 The former Clerk of the Senate, Mr Harry Evans, informed the committee that the main constitutional problem sought to be overcome was 'the ability of the Parliament to statutorily regulate the constitutional power of the Governor-General to prorogue and summon the two Houses'. He was of the view that 'the attempt by the bill to deal with this and related problems is reasonably clear'.[86]

2.90 In 2005, a number of senators expressed concerns about the position of the Governor-General and whether he was to act on the advice of the executive government or whether he or she was to 'take counsel from other parliamentary representatives'. As noted earlier, subsection 50C(4) stipulates that the Governor-General's proclamation declaring that an emergency exists 'shall not be made except on the written advice of the Prime Minister to the Governor-General'.

2.91 Some senators were very concerned about the political consequences for the office of the Governor-General. Senator Payne and Senator Macdonald argued that the proposal 'would place the Governor-General in an unacceptable position'. They suggested that the office of the Governor-General could be politicised' and that the bill runs counter to the fundamental premises of our constitutional system of government.[87]

2.92 On another matter, Professor George Williams said that the bill should not be enacted in its current form. He favoured a joint sitting of Parliament as opposed to separate sittings by each House.[88] Just Peace had also entertained the notion of a joint sitting.[89]

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86 Mr Harry Evans to Chair of Foreign Affairs, Defence and Trade Legislation Committee, 24 August 2009.

87 *Senate Hansard*, 10 February 2005, pp. 122 and 130.

88 *Submission 1*, p. 1.

89 *Submission 15,* p. 4.

2.93 Finally, the Australian Association for Maritime Affairs drew attention to the need for consequential amendments to the Navy, Army and Air Force Acts.[90] For example section 33 of the *Naval Defence Act 1910* states that 'Members of the Navy may be required to serve either within or beyond the territorial limits of Australia'. Section 4F of the *Air Force Act 1923* has a similar provision which states 'Members of the Air Force may be required to render air-force service on land or sea or in the air, and either within or beyond the territorial limits of Australia'.[91] This need for consequential amendments could be easily rectified.

Long standing government policy

2.94 The Department of Defence did not make a submission to the inquiry. The Minister for Defence, the Hon John Faulkner, however, recently made clear that the government is opposed to any such legislation and that 'committing troops to war should remain the prerogative of the Prime Minister and Cabinet'. A spokesperson for the Minister stated, 'the Government maintains—as have governments past of both political persuasions—that the power to deploy the Australian Defence Forces beyond Australian territorial limits is a matter for the executive branch of government'.[92]

Conclusion

2.95 Those involved in the 1986 and 2005 debates or in making submissions to this inquiry recognised the seriousness of the decision to send members of the Defence Force abroad on warlike service. Those supporting the bill believed that any such decision required debate and approval by Parliament. While also acknowledging the critical importance of parliamentary debate, most opponents of the bill stopped short in accepting the requirement for both Houses of the Parliament to approve the deployment of Australian troops. They held misgivings about the practical application of some provisions.

2.96 Since 1986, when the Defence Amendment Bill 1985 was debated, a number of shortcomings in the proposed legislation have been raised consistently. Aside from revising the provisions governing procedures when Parliament is not in session, the bill before the committee shows little evidence that it has addressed deficiencies that were apparent in earlier versions of the legislation. They include issues around the treatment of classified material; constraints on the ability of Defence, in some cases, to mobilise its forces safely and effectively; and serious problems with definitions.

Classified material, informed decision-making

2.97 The committee is of the view that the disclosure of classified or sensitive intelligence may well compromise an operation and the safety of Australian forces or

90 *Submission 8*, p. 2.

91 See section 33, *Naval Defence Act 1910*, and section 4F, *Air Force Act 1923*.

92 Quote taken from the *Age*, 'Labor MP says Parliament should approve war', 23 December 2009.

those of their allies. On the other hand, the committee contends that if such information were necessarily withheld from the Parliament, then those required under the proposed legislation to make critical decisions about the deployment of forces would not be fully informed—an equally concerning situation for the security of the nation and its forces. The committee finds that the legislation does not address these concerns adequately.

Requirement for flexibility and adaptability

2.98 Although the proposed legislation allows for emergency situations, the committee is concerned that the process of seeking Parliamentary approval may, in some circumstances, cause difficulties for the effective and safe deployment of Australian forces. The committee is concerned about the possible delay especially should debate in Parliament become prolonged. It also has concerns about possible unintended consequences that may arise including implications for the Defence Force should approval not be forthcoming after forces have been dispatched in response to an emergency.

Scope of bill— extent of parliament's involvement in deployment, military activities over which parliament exercises authority, and the definition of territorial limits

2.99 The committee believes that a major flaw in the proposed legislation is its failure to take account of military service such as peacekeeping, capacity building in other countries, humanitarian assistance, anti piracy, responses to maritime incidents such as harassment, sabotage, small scale raids and illegal fishing and covert operations such as those involving submarines. This list is not exhaustive. Furthermore, the committee notes an inconsistency between the explanatory memorandum with its use of the words non-warlike overseas service and subsection 50C(11) which makes no reference to peacekeeping or humanitarian or disaster relief operations.

2.100 In this regard, the committee is of the view that critical terms should not be used in the explanatory memorandum without reference and clear definition in the bill. The committee is of the view that subsection 50C(11) as currently drafted is unsatisfactory and requires thorough revision, after exhaustive consultation with Defence and, if required, the AFP.

Complex legislation

2.101 The committee suggests that any proposal to limit or remove the power of the executive to decide on the commitment of Australian troops to overseas service needs to be examined carefully by the Department of Defence, Attorney-General's and relevant security agencies. They must be an integral part of any consideration to change the current process for committing troops to overseas service. Such agencies are best placed to understand and advise on matters such as the disclosure of classified material and of the contents of diplomatic consultations, of the complexities of formulating rules of engagement and the safety and operational implications associated with public debate on such matters. Defence have a sound understanding of

the complexities in pre-deployment preparation and readiness, the location and strength of Australia's military assets, the strategic importance of covert actions, responding to incidents such as piracy, and the complicated and changing nature of peacekeeping operations. This list indicates some of the complex circumstances that any legislation dealing with the deployment of troops must recognise. Clearly, those most knowledgeable about such matters need to be involved in the formulation and drafting of legislation governing the commitment of Australian forces to overseas service.

Overall assessment

2.102 The committee is not in any way against the involvement of both Houses of Parliament in open and public debates about the deployment of Australian service personnel to warlike operations or potential hostilities. It agrees with the views of most submitters that the Australian people, through their elected representatives, have a right to be informed and heard on these important matters. But, while wholeheartedly supporting debate in Parliament on any anticipated, proposed or actual deployment to overseas warlike operations, the committee cannot endorse this proposed legislation. It is of the view that the bill leaves too many critical questions unanswered to be considered a credible piece of legislation. It believes that, while well intended, the bill may have unforseen and unfortunate consequences that need to be identified and resolved before further consideration could be given to proposed legislation.

Recommendation

2.103 The committee recommends that the bill not proceed.

SENATOR MARK BISHOP
CHAIR