

Parliament and national security: Challenges and opportunities

Australian Senate Occasional Lecture Series

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Introduction

I'd like to thank the Senate for the invitation to present this talk today. Senator Russell Trood was originally asked to deliver this address, but Russell sadly passed away early this year.

Russell, as most would know, was a Liberal Senator for Queensland from 2004–2010 and deputy chair of the Senate Committee on Foreign Affairs, Defence and Trade.

Russell had enormous respect for the Senate and the parliamentary committee processes. Prime Minister Turnbull described Senator Trood as 'one of Australia's finest foreign policy minds' and Senator George Brandis said, after Russell's passing, that 'we're all better for knowing him'. Russell and I had discussed today's topic many times. Russell is very much in my thoughts today.

In my talk today, I'll offer some suggestions for strengthening and deepening Parliaments' engagement with issues of national security, and why we shouldn't just leave it all to the Prime Minister and the leaders of our Defence and intelligence agencies leaders to deal with.

First, let me turn to national security and the parliamentary landscape - and no, this isn't about bollards!

Constitutional convention declares that the power to make Australia's national security policy is firmly in the hands of the Executive branch of government. Broadly, national security covers public policy to do with foreign relations, defence, intelligence, and relevant facets of counterterrorism, immigration and border protection.

Given this is a *Senate* occasional lecture, I should note that many national security problems now directly impact on the States.

The States have an interest in the ADF's role in domestic counter-terrorism, countering violent extremism and natural disaster response. In counter-terrorism Joint Counter-Terrorism Teams consist of state/territory police, and work with AFP and ASIO. In natural disasters it's the states that have primary responsibility. The states are vital in protecting critical infrastructure.

Aside from custom and convention, the dynamics of parliamentary involvement in national security continue to be shaped by four powerful realities of Australian political life.

First, the Prime Minister's authority in relation to national security continues to grow. This might be desirable for managing a coherent national security policy or for acting quickly, but it can easily suck oxygen out of an open policy process, limit other parliamentary voices and, on occasions, other ministerial voices.

When the Leader of the Opposition is briefed by the Prime Minister on national security decisions it often brings the occupant into the 'cone of silence'. While sensible to have policy continuity, pushing too hard to get consensus on national security can act to inhibit debate and critical thinking and reduce accountability.¹ Bipartisanship can inhibit Parliament from scrutinizing operational matters with more vigour, or from using the full breadth of Parliament's powers to compel information from the executive.

Second, all political parties increasingly seek to achieve and enforce party discipline. While this undoubtedly has considerable logic in the modern Westminster system, if it's overused or applied too strongly it constrains Members' and Senators' independence of action, and weakens the capacity of opposition and backbench parliamentarians to hold the Executive to account in national security.

Third, Members and Senators are less likely to have a background in international relations, defence or domestic security than to have a background in law, education or politics. Those Parliamentarians with an interest or expertise in national security may exercise greater influence than their colleagues. Parliamentary oversight on these matters may in some ways depend on the strength of such individuals.

Fourth, despite what I said about Australia politicians generally treating national security in a bipartisan fashion, the modern parliamentary ritual tends towards political point scoring. This makes it more difficult to analyse complicated national security issues with the rigour they deserve.

Despite these trends, Parliament's processes and procedures continue to offer many opportunities to ventilate national security issues and, theoretically, strengthen the ability of backbenchers who want to develop their interests in national security policy.

I'd now like to turn to the topic of *parliament and war powers*. In recent years, there have been increasing calls by civil society groups, and some representatives from the minor parties, for greater parliamentary scrutiny over the Executive's long-held prerogative to deploy Australian military forces overseas.

¹ Andrew Carr, 'Is bipartisanship on national security beneficial? Australia's politics of defence and security' *Australian Journal of Politics and History* Vol. 63, No.2, 2017

The UK, for example, has since 2011 moved to a system in which Parliament must be involved in any decision to go to war.

In 2013, the House of Commons debated a government motion that the UK join US-led strikes in Syria. The motion was defeated, and Prime Minister Cameron responded by saying he'd respect the result.

But in my view governments need the capacity to react quickly to events. Involving Parliament could hamper its ability to do so and impose a heavy additional burden on decision-making.

The unique knowledge of complex foreign affairs issues needed and the access to intelligence required for informed decision-making pose additional challenges to greater parliamentary involvement.

Governments are elected to govern; and there's no greater responsibility than to protect the national interest. Central to this task is the onerous need to decide when military force should be deployed.

Australians expect their governments to make difficult policy choices. In simple terms, it's about democratic legitimacy: allowing a government to govern, unless Parliament no longer has confidence in the government.

But some contend that going to war is too important to be left solely to the Prime Minister. Instead, parliamentarians should have the right to vote on military action and should have an obligation to explain their position.

Senator Nick Xenophon, for example, made exactly this argument quite recently at the Australian Strategic Policy Institute with a great title for his speech, 'On killing chickens and scaring monkeys'. Senator Xenophon argued in favour of war powers reform, against a backdrop of a changing regional strategic environment and a potential future confrontation between the United States and China.

Senator Xenophon stated quite plainly that he doesn't think any Australian participation in the South China Sea conflict ought to occur until 'every member of the Australian Parliament has had a chance to vote on it'².

From this idea flow a number of questions. For the entire Parliament to give an informed vote it stands to reason that they'd require more information to do so. Given most of them vote along party lines, then there's an argument that it would be better go straight to the party executive and do a deal.

² Senator Nick Xenophon, 'On killing chickens and scaring monkeys', Address to the Australian Strategic Policy Institute, 20 April 2017

But in general it would mean extending the inner circle privy to such sensitive information to include each and every parliamentarian. It's not a "show stopper", but members of the defence and intelligence communities would resist this idea.

More importantly, however, there's the challenge of determining precisely what kind of government decision should trigger action— is it any deployment of the ADF, a commitment for a certain period, a certain force structure? Could action under a UN Security Council decision constitute an exemption? Would a commitment to peacekeeping trigger the need for a vote?

In our complicated world, the occasions and circumstances in which force in its various manifestations is required is becoming more difficult to describe and define. Having parliament involved at every turn would impose a heavy additional burden of decision-making in relation to issues that are already among the most difficult government makes — and the most carefully considered.

A parliamentary authorisation model could perhaps be framed in such a way as to address at least some of these concerns. Senator Xenophon, for example, advocates a model that distinguishes between 'wars of choice' and 'wars of necessity'.

He argues that this provides the necessary flexibility to take into account a range of contingencies; protects the security of classified information; and provides for the time-sensitive nature of emergencies.

'Wars of necessity' are defined as—and I quote the Senator—'military actions taken in self-defence and require the use of rapid and/or covert military force', in other words, actions provided for in Article 51 of the UN Charter.

Conversely, 'wars of choice' are those covered by either the framework of collective action in Chapter VII of the UN Charter or a request for assistance from the legitimately constituted government of a state.

But I'd agree here with the Australian Strategic Policy Institute's Rod Lyon, who argues that the distinction between wars of necessity and choice isn't that useful.³

By allying ourselves with other countries, aren't we, Rod asks 'effectively saying that we accept an element of automaticity to our involvement in conflicts where they are attacked? ... it sounds more than a little odd subsequently to claim that we take all such treaties as denoting mere wars of choice. If we thought that, why did we sign a treaty?'

³ Rod Lyon 'Wars of necessity, wars of choice' *The Strategist* 26 April 2017

Dr Lyon is also right to question the idea that wars of necessity are just wars of self-defence. In the Second World War, for example, even before our homefront was attacked, we confronted a group of adversaries 'who wanted fundamentally to reshape the world'. Even if they hadn't attacked Australia, it's right to question how we could've sat that one out. Strategic necessity doesn't end at our low water mark.

There are some other issues to consider. Passing legislation to grant Parliament control over expeditionary military deployments may invite the judiciary to review the legality of them. In my view we should be very wary of involving judges in what are essentially political decisions.

Senator Xenophon rightly acknowledges that a degree of flexibility in Executive power is necessary to allow for unforeseeable circumstances. Indeed, our constitution and High Court jurisprudence substantiate that Executive power is subject to control by the legislative branch of government. But just because something can be done, doesn't mean it should be, or that it's the right thing to do.

Furthermore, where the government of the day doesn't have control of the Senate, the new normal in Australian politics, it'd just add confusion and ambiguity to overseas deployment decisions to give the parliament a vote.

Under these circumstances, parliamentarians would be able to prevent the executive from sending armed forces on operation with no immediate consequence to themselves: it'd be all check, with no balance.

I suppose a one-chamber vote might be workable if a decision on troop deployments were thought necessary.

But then we in effect have that already in the House of Representatives, where members can change a government or the majority party can change a leader if they oppose a war strongly enough.

Even if we introduced a parliamentary vote to go to war it'd be unlikely to make any practical difference to the actual outcome. I can't think of a single example where it would've changed a decision on Australia's commitment to send our troops to war. We should therefore, in my view, preserve the existing relationship between the Parliament and Cabinet when it comes to decisions about overseas military deployments.

That said, while an extension of war powers may be a bridge too far, Parliament's role could be considerably enhanced in this area.

Government might take Parliament into its confidence more often providing, for example, a statement to Parliament outlining the basis of the decision and reporting

more regularly on the progress of military operations. In some cases, time could be set aside in the parliamentary schedule for a debate.

The Defence subcommittee of the Joint Committee on Foreign Affairs, Defence and Trade could consider inquiring into the desirability of Australia extending some measure of authority to Parliament over the overseas deployment of the ADF.

I'd now like to suggest *four measures to strengthen Parliament's role in national security*.

First, Parliament should be respected as the forum for considering national security issues. Existing parliamentary procedures can be better utilised to consider and debate, for example, foreign affairs, defence, intelligence and border security more fully. Doing so would reinforce the standing of Parliament while also giving parliamentarians the opportunity to contribute to policy thinking.

For many years governments have seemed inclined to bypass the Parliament when dealing with security issues.

This is regrettable but, in part, has been a function of rapid changes in the way Parliament engages with the media and a view by government that the micro parties really can't be educated to contribute anything meaningful - that it's better to have conversations behind the scenes with them.

But it must be said that it has simply suited the political imperatives of successive governments—not necessarily the cause of good public policy.

Australian governments should commit themselves to ensuring that the Australian Parliament is the primary national institution for discussing and debating the nation's national security policy. They should ensure that Parliament is the forum for pronouncements on all key national security policy decisions and that it's provided with regular opportunities to discuss, consider and debate policy issues.

It's regrettable that recent Defence White papers have been launched in military aircraft hangers or at naval bases. And just last month we saw the Defence Minister announce that Australia will increase our troop numbers in Afghanistan, an announcement made not in the Parliament, but in a response during Senate Estimates. Contrast this with what we saw in Canada a few weeks ago, where Canada's Foreign Minister launched Canada's new foreign policy, not at some diplomatic meeting or a mega conference, but right on the floor of the Canadian parliament.

Second, we should develop parliamentarian's education in national security. In these challenging and uncertain times, good national security policy choices call for

parliamentarians who have been sufficiently educated and informed on national security matters.

This could include providing a new members' orientation program focused on national security; an enhanced program of regular informal briefings by senior public servants; site inspections of specific national security agencies; participation by parliamentarians in national security exercises and the creation of a cross-party parliamentary friendship group dedicated to improving knowledge and understanding of Australia's national security policy, through seminars, lectures and briefings by experts in the field.

Third, we should develop what I'd call parliamentary diplomacy. Although many Senators and MPs regularly engage with foreign government officials and parliamentarians through various mechanisms, such as parliamentary friendship groups, overall our parliamentarians are a rather underused resource in our foreign relations.

At a time when the nation's overseas diplomatic footprint is ranked 20th out of 35 OECD countries, and 18th in the G20 group,⁴ there's room for some creative thinking to identify opportunities to make better use of interested and able parliamentarians to enhance our international presence.

One useful measure would be to expand the structured and focused outgoing parliamentary delegations program. No doubt they would have to bear the brunt of the tabloids having a crack about expenditure on overseas 'jollies' by our politicians!

In conjunction with the relevant parliamentary committees, the Minister for Foreign Affairs and her department should consider ways in which members and senators might make useful contributions to the conduct of Australia's international diplomacy, such as through parliamentary participation in international negotiations, attendance at diplomatic conferences, membership of delegations and participation in special missions for which a parliamentarian has unique knowledge or experience.

Yes, I can hear you say, 'don't all our representatives think they're smart and want a high profile' and so what I'm suggesting just risks diverting valuable resources from government, or creating 'fake' programs where the less knowledgeable MPs or Senators can't do any real damage.

But we live in a democracy so we need to manage those risks. None of us has all the answers!

Fourth, I suggest we should review parliamentary committee resources; enhance the potential impact of committee reports; and examine committee mandates.

⁴ <https://globaldiplomacyindex.lowyinstitute.org/#>

The parliamentary committee system is impacted by the general bipartisan agreement on the overall thrust of national security policy.

While this makes it easier to pass legislation and is a better look in international negotiations, it also means that the two major parties don't press for committees to have access to sensitive information.

Moreover, bipartisanship means that sometimes the larger policy questions aren't vigorously debated, leaving the committees to look at marginal areas of disagreement. It'll be interesting here to see what comes out of this month's announced inquiry by the defence sub-committee' of the Joint Standing Committee on Foreign affairs, Defence and Trade that aims to find out if our two major political parties could reach a bipartisan agreement on Defence planning and if it's desirable that they should.

Turning to the Committees themselves, several suggestions can be made to strengthen their role in national security.

A material improvement in parliament's role in national security issues requires increased human and financial resources for key committees.

The resources allocation to the functions of Parliament has eroded steadily over recent years. This has had an impact on the length of committee inquiries, the employment of staff, the ability to have witnesses attend hearings and the capacity of members to undertake inquiry-related travel, among other things.

The Senate and the House should each review the staffing and resourcing of its committees. These reviews should examine the extent to which greater budgetary constraint has affected the provision of staff to parliamentary committees with responsibilities in national security.

The chairs of the key national security committees should take much more advantage of making secondments to their committees from among personnel in the national security agencies. Secondments would not only increase committees' human resources and build staff expertise, but improve secondees' knowledge and understanding of the working of Parliament and the role it plays in the administration and oversight of Australia's national security policy.

Parliamentary reports in the areas of foreign affairs, defence and national security aren't always given the attention within government agencies that they deserve or that the committees expect. As Professor Julius Sumner Miller was once fond of saying: "Why is it so?"

I think the answer relates to the way committee reports are structured and presented. Committee Chairs need to consider this and work to ensure that the pressure of time,

other responsibilities, level of experience or even want of interest, doesn't discourage different approaches.

Compared to some other parliamentary systems, not least in the UK, Australian committees are more deferential to ministerial preferences and place a higher premium on secrecy.

We certainly don't want committees to be places where politicians park difficult decisions or as, Sir Barnett Cocks, former Clerk of the House of Commons once observed: "A committee is a cul-de-sac down which ideas are lured and then quietly strangled."

So let's now consider in a bit more detail some of the existing parliamentary committees relevant to national security, all of which would benefit from some degree of reform.

Take for example, the *Joint Standing Committee on Treaties* (JSCOT) which has struggled with the fact that international instruments arrive on its agenda only after they've been negotiated by Government, often through a protracted process.

Committee members would be better placed to offer comment and review at an earlier stage when there's still the opportunity to make a valuable contribution. This could occur through a confidential briefing of the committee or perhaps by including key committee members in negotiating delegations.

JSCOT could consider encouraging treaty negotiators to provide JSCOT with regular updates on the progress of treaty negotiation, including committee members in negotiating delegations, or both.

The *Joint Standing Committee on Foreign Affairs, Defence and Trade* (JSCFADT) has a wide remit, and together with the *Senate Foreign Affairs, Defence and Trade Committee*, it assumes much of the Parliament's burden of investigation and oversight in foreign affairs and defence. Some of us will ask why there are two committees with overlapping remits when a Joint Standing Committee might serve both Houses. I suspect the reason is historical and, like the Constitution, not easy to change but maybe it'd be worth taking a fresh look at this issue.

The bipartisan consensus between the major parties on defence and the self-selecting nature of the Defence sub-committee suggests that this is largely a discussion between people who agree. I'd note here that the few parliamentarians with military experience will on the whole be more comfortable with technical issues and military matters.

Over time, some of Joint Committee's inquiries have resulted in influential reports valued by governments. This is especially the case when they're unanimous; they address an issue that ministers are not confident about or where they may be

concerned about the objectivity of their departments; or when they offer a novel take on a controversial or neglected issue.

I'd note that oftentimes the influence of committee reports is felt years later, because they shape the marketplace of ideas rather than exercising direct influence over policy at a given time, although I couldn't find a survey on Committee reports and influence on Government policy. Perhaps we could refer this question to a Committee!

The need for its inquiries to be approved by an appropriate minister or by resolution of one of the houses of Parliament is, however, a constraint on the Committee's independence.

This condition is a vestige from a bygone era that compromises the Committee's capacity to make a potentially valuable contribution to policy debates in Australia. It should be removed. Committees should have power to self-refer and initiate their own inquiries outside of their powers to consider matters arising from annual reports of relevant agencies. Of course either House can give a referral but that's more common by the Senate. Yes, a committee can approach a Minister to get a reference but if Committee members thought the Minister wouldn't support the request they're unlikely to ask for it!

The Committee's public education role would be enhanced if the practice of ministerial appearances before the committee for private briefings were extended to public briefings on matters of contemporary importance, such as events in Afghanistan or the Middle East.

Alternatively, it might consider following the example of the House Economics Committee, before which the Governor of the Reserve Bank regularly appears.

Although the heads of Australian Government departments aren't statutory officers, inviting the Secretary of the Department of Foreign Affairs and Trade to provide a regular update to the Foreign Affairs subcommittee on the state of Australia's international relations would be a valuable exercise in public education.

Let me say something on the Parliamentary *Joint Committee on Intelligence and Security* (PJCIS), one of Parliament's busiest committees in recent years. Since Sep 2014, when the National Terrorism Alert Level was raised to 'probable', there's been eight legislative packages progressed through the Federal Parliament. It should be noted that ASIO and the AFP also come under the Legal and Constitutional Affairs Committee.

The Intelligence Services Act 2001 mandates a composition of this Joint Committee comprises of six House of Representatives members and five Senators. It's currently

required to have a membership of the majority of government members. Consequently, its findings often align with the government of the day.

This is the committee that the government immediately refers counter- terrorism legislation to and it has served as a check and balance really well.

Sometime one might argue almost too well in the sense that it sometimes doesn't always serve immediate security needs: it's taken 2 years in some cases, (such as legislation lowering the age of control orders), between the legislative update requested for operational needs and the actual approval. That's not helpful for people on the ground.

It's fair to say that approvals have, however, sped up when the committee knows more, and has more experience with the topics. In other words once people have been in the committee for a while they have the history, context, and perspective to make quicker decisions and understand the issues. But what happens once new people rotate in? We're repeatedly losing this maturity and knowledge base.

When law enforcement and security agencies recommend changes, these are carefully asked for based on what they need.

But one of the side effects of the Joint Committee's work is that you can get a watered down version of legislation. The result is that sometimes agencies have been cautious in proposing new laws as they know they'll actually lose something as a result even on pre-existing, and therefore previously approved, laws.

Sometimes the agencies have to justify the need for a law to be ongoing such as the control order law and laws around keeping people in detention: once passed, the agencies still have to go back each year and redefend the need for it.

The committee may decide the need or urgency is no longer there. But, shortly down the track circumstances may change again making the law vital. That's tough for law enforcement and security agencies. Balancing the important oversight role of the committee with law enforcement's need to be agile and responsive to on-the-ground is a tough dilemma.

But there's no doubt that counter terrorism legislation is best developed in a considered and ongoing manner to anticipate as well as respond to the changing threat environment. And here the Committee has served us well in terms of the legislative review process and typically including public inquiry into the legislative review process.

One way to institute an additional check would be to have all six intelligence agencies appear before Senate Estimates. Right now only ONA and ASIO do so.

Only one of the six intelligence agencies, ASIO, is required to produce an annual report to Parliament and any sensitive or operational parts of that report are redacted. I'd suggest all six intelligence agencies should produce an annual report to Parliament.

In the UK, the Intelligence and Security Committee has a broadly similar role to that of our intelligence and security committee. Although the UK committee is made up of parliamentarians, it reports to the Prime Minister, not the Parliament.

Nevertheless, it's got a wider, more intrusive oversight mandate. In 2013, the committee's powers were extended when its enabling legislation was amended to permit it to examine or otherwise oversee the expenditure, administration, policy and very interestingly *operations* of the UK's key intelligence agencies.

Expanding our parliament's intelligence committee's to oversight operations to see not if they were lawful, but rather effective, does, however, raise some curly questions. Who, for example, would scrutinise an operation if our parliamentarians themselves were involved?

Such a change would probably mean overturning the historical practice of not applying to Members and Senators the same checks and balances required of public servants. And instead subject our parliamentarians to the security clearance regime.

What would happen, for example, if one or more parliamentarians failed to be security cleared? I should add here that the joint committee is the only one where the Prime Minister has to approve appointments to the committee. That is set out in the Intelligence Services Act 2001.

While some might argue that those excluded through this process would be unable to represent voters adequately, and thus this move would present a challenge to our democratic system, I'd argue that it doesn't. It simply excludes people without a clearance from accessing information that is sensitive, and given that this rule would now apply to everyone on the committee, this is surely a democratic outcome. I'd add that the equivalent committees in the UK and US require security clearances. And by the way, the Australian Secretariat staff of the joint Committee are required to be security vetted to the highest levels.

Moreover, the greater number of people who are given sensitive information and intelligence, the higher the chance of leaks and compromised operations.

And there's another consideration that I touched upon earlier. Processes and approvals within the intelligence and security committee is sped up when its members are more educated and experienced—both with respect to the issues at hand and the function of the committee itself.

The rotational nature of the committee means this maturity and knowledge base can be lost.

My earlier suggestion regarding the importance of education is relevant here as well; if all parliamentarians are better equipped to engage with difficult national security issues, they'll come to parliamentary committees better prepared.

I'd add purely as an aside here that the Inspector-General on Intelligence and Security, while not based in the Parliament, is a critical position in our system. The Inspector-General has unfettered access to all information on operations, including classified information. The IG doesn't report to the public, and this may give a perception of less oversight, but the IG does report to government.

The thrice-yearly Senate Estimates process is the locus of accountability in the Australian system. For all its faults, and there's no doubt that they've become quite politicised, Estimates hearings provide Senators with the opportunity to vigorously question executive officials and officers.

The fact that any Senator can ask questions and the Estimates process happens three times a year for two days of eighteen hours is impressive. It's an incredible accountability mechanism.

The role of smaller parties to shape the Senate references committee shouldn't be overlooked. It allows smaller parties to use their votes in the Senate to secure reports in the references committee. This can be pertinent in the defence realm and is another area where the Australian model looks quite good compared with others.

One area that escapes parliament's systematic attention is the foreign aid budget. Another area is capability planning within the Department of Defence. Perhaps they could become part of the Senate's Foreign Affairs, Defence and Trade Committee's regular work program.

Let me conclude.

The role of the Parliament as a forum for discussing national security, investigating new and significant policy challenges and overseeing Executive authority, particularly in relation to intelligence activities, has grown significantly.

That growth has been reflected in the steady but rather piecemeal expansion of the parliamentary committee system, which now covers all areas of national security policy. If anything, the process has been evolutionary, as Parliament has rather carefully and cautiously tested its ability to press the boundaries of its role, sometimes against strong resistance from ministers.

But reform has changed the institutional culture of the Parliament. It's legitimised Parliament's role as an increasingly important partner of the Executive in the conduct of Australia's national security policy.

There's undoubtedly room for further expansion of this role, as I've discussed today.

Enhancing Parliament's role in national security would reinforce Executive accountability, expand public access to policy processes, improve the quality of public debate about national security and strengthen our democratic foundations.

Our parliamentarians should move the needle in the direction of change to improve and strengthen the management of our national security policy in an era of growing complexity and challenge. Thank you.