

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

Thank you for the opportunity to make a submission concerning this important proposed legislation. This submission is intended to supersede an earlier version lodged on 2 October 2021.

I am a retired Barrister and Solicitor, teacher and former part-time consultant to *The Human Rights and Equal Opportunity Commission*. I have maintained an interest in this area for many years and have written several online articles related to this subject for the ABC and others.

I make this submission in the context of a history of very problematic decision-making in this area since the Second World War. During this period, we have seen rash and highly contentious personal decisions by Prime Ministers to commit Australia to long term disastrous military interventions in Vietnam, Iraq and Afghanistan at the behest of an ally who seems very likely to embroil us in further similarly ill-conceived ventures in the future.

Such decisions are far too important to be left in the hands of any one individual person—in particular, a Prime Minister, who may be personally vulnerable to the influence of a more powerful ally leader—or a small select group of individuals chosen by the Prime Minister from his supporters. That is far too narrow a base upon which to rely for wise decision-making.

Given the increasing proliferation of weapons of mass destruction, modern warfare involves a very real existential threat to the future of humanity. It is essential, therefore, that we put in place the best possible decision-making processes to ensure much wiser decisions concerning military action in the future.

1. I therefore broadly support this Bill, in particular:

i) the requirement that decisions relating to the overseas service of members of the Defence Force must be authorised by Parliament as a whole, to avoid all the limitations associated with the current very narrow decision-making process;

ii) the need for a mechanism for dealing with emergencies, to ensure not only protection from imminent attack in the case of genuine emergencies but also proper Parliamentary scrutiny of such decisions as soon as possible; and

iii) the need for regular reporting back to Parliament of all relevant information during any period of deployment, to ensure that continuing deployment can still be justified.

These amendments would ensure that such momentous decisions—involving the state authorised killing of other human beings—are given much fuller consideration. In this way, they would be subjected to proper initial and ongoing scrutiny and debate by an authority truly representative of the wider Australian community.

It is even more important to have this greater representation in the decision-making process in recognition of the enormous human suffering that inevitably accompanies modern warfare (mostly of innocent civilians, in particular women and children), and also having regard to the huge economic costs and the very serious social consequences involved.

In a democracy, such decisions are best entrusted to the representatives of the people in Parliament as a whole and not left to the judgment of one or a few individuals representing one political party or other vested interests.

2. I would also support the proposed amendment suggested by Prof. Williams in his submission, to require authorisation by a majority vote of a joint Parliamentary sitting of both Houses of Parliament. However, I would go further and require a two thirds majority vote, in order to reflect the seriousness of the decision and its consequences. This calls for a higher than normal degree of confidence in the correctness of the decision that military action can be justified. It would also ensure some degree of broader cross-party support, reflecting wider community representation.
3. The Bill should be further amended to require, in the legislation, that there be a 'conscience' vote on this issue. We should require each member of Parliament to exercise personal responsibility and vote in accordance with his or her own individual best judgment and conscience, having regard to relevant criteria, rather than voting along party lines or deferring to the judgment of others. The authorisation of the killing of other human beings necessarily requires nothing less than a personally responsible conscience vote.
4. The Bill should also be amended to include a list of relevant criteria for determining such decisions. Such criteria should be made explicit in the legislation to ensure that the decisions are not simply determined on the basis of vague assertions of the 'national interest', 'public policy', 'strategic' or 'economic' considerations but ultimately on whether the decision can be justified morally and ethically in accordance with well-established international legal principles, which include the following:

“...[the requirement that there be] the threat of an imminent attack; whether military action is a last resort...; the proportionality of our response to the threat; the minimization of “collateral damage” to innocent third parties; the likelihood of a successful restoration of peace within a foreseeable time frame; ... whether further threats of violence are likely to be avoided or exacerbated by military action; etc” <https://www.abc.net.au/news/2010-10-01/39408>
<https://tasmaniantimes.com/2011/11/lest-we-forget-how-do-we-justify-afghanistan/>

Specifying the relevant policy, legal and moral criteria in the legislation would greatly assist all members in arriving at the wisest, most defensible decisions and would help focus the public debate on matters of legal and moral principle and not just material interests or political expediency.
5. Of course, proper scrutiny of such decisions depends on access to as much of the relevant information as possible. The Bill needs to be further amended to ensure and enable the fullest possible access to the advice upon which the Executive is relying, consistent with the secrecy requirements of national security, which should be narrowly construed.
6. Finally, with the rapid escalation of advanced weapons technologies (including inter-continental ballistic missiles and drones) and facilities such as Pine Gap—which can be activated for war purposes without involving overseas service by members of the Defence Force—consideration should be given to treating decisions concerning their deployment from Australia in the same way as is proposed in this Bill.

In the likely event that the Bill will not pass in its present form—because of the long-standing refusal of both major parties to entertain any restriction on the Crown prerogative to engage in war—I would support, as a last resort, a further amendment as an interim measure that might gain wider support.

7. The Bill could be amended to guarantee Parliamentary scrutiny but allow for only a non-binding resolution concerning whether or not there is Parliamentary support for the Executive decision.

There would thus be a legislative requirement that Parliament be 'consulted' but its determination would be declaratory or advisory only, without in any way limiting the power of the Executive.

This would go some way to addressing the need for full Parliamentary scrutiny and for ensuring that the representatives of the people have the opportunity to declare whether they support the Executive decision or not.

It would also overcome the major argument of the opponents to the Bill that we should not limit the Crown's Executive power in any way because to do so could have unspecified unforeseen consequences to national security.

Such a motion voted on by Parliament as a whole, though not enforceable, would still serve a valuable function as an official, independent resolution, analogous to a non-binding 'declaration' by a court or 'determination' by a body like The Human Rights and Equal Opportunity Commission. It could have a powerful effect on the Executive. However, it would be left to the Prime Minister/National Security Committee/Cabinet to make and accept full responsibility for the final decision.

This option, in my opinion, should only be supported on the basis that it would be a first transitional step towards finally requiring authorisation by Parliament, through subsequent amendment.

8. In the event that the Bill is not supported in any form, I believe the next appropriate step would be for this matter to be immediately referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade or other appropriate body for further inquiry and report, in order to specifically address the various concerns that have been expressed about this proposal.

Such concerns as have been raised should not be regarded as insuperable obstacles to achieving the desired Parliamentary scrutiny, accountability and transparency. Rather, they should be regarded as invitations to think more creatively about how to achieve these important goals, to which we should all be committed.

For example, such a body could consider a wider range of options, including the following.

9. Legislation could require that such decisions be made (and/or recommended to Parliament) by a two third majority vote of a specially constituted Joint National Defence Committee.

This expanded Committee could consist of an equal gender mix of members of the Government, Opposition parties and Independents, all signing the Official Secrets Act and bound by a Code of Conduct that prevents any disclosure of Committee deliberations. It would be able to operate in exactly the same way as the current National Defence Committee and consider all the same national security advice and information, with the same agility.

It could make an equally well informed judgment but one that would be much more representative of, and acceptable to, the Parliament and the Australian people as a whole, than the current narrow, politically partisan, male-dominated process.

Given that military engagement typically lasts longer than any one government, it would make a lot of sense to have decisions made by this more representative Joint National Defence Committee, particularly if Parliament was ultimately considered inappropriate to make such decisions because of national security concerns. Of course, Parliament should still be consulted, as recommended above.

A decision to engage in war is arguably the most important decision any government can make because it involves the state sanctioning of what would otherwise amount to murder, grievous bodily harm, property destruction and economic and social dislocation on a massive scale.

Such decisions are far too momentous for any one person or small select group of people to be permitted to make.

People are often outraged by Prime Ministers making “captain’s calls’ concerning such minor matters as appointments of honours. Yet decisions to engage in potentially catastrophic warfare affecting millions of people’s lives are often seen in the same way—as little more than ‘captain’s calls’ made by the Prime Minister (at the behest of, and to please, a foreign leader), which are subsequently ‘rubber-stamped’ by a select group of his or her political supporters. While this may be a caricature, it is understandable that many people feel outraged at our very narrow decision-making process and the decisions that result from it. We desperately need reform not only to improve the quality of the outcomes but to re-establish public trust in the integrity of the process.

It is clear that we can no longer afford to leave absolute power to make such momentous decisions in so few hands. There needs to be more checks and balances and more opportunities for genuine debate, if we are to make sounder judgments.

Such decisions should be more representative and reflect the wisdom of the Australian people—hence the overwhelming majority public support for requiring such decisions to be made by Parliament as a whole, rather than by a select few, representing only one side of the political spectrum.

I commend the Bill and the above suggested amendments as an important step in the right direction, in order to promote wiser, more democratic decision-making in the future and to create a more peaceful world in which all peoples may flourish.

Scott MacInnes

13 October 2021

International Day for Disaster Risk Reduction