

Submission into JSCFADT inquiry into international armed conflict decision making.

Submission by Dr Anthony Bergin, 28 October 2022

Thank you for giving me the opportunity to make a submission to the Committee's inquiry into international armed conflict decision making. I am a senior fellow at the Australian Strategic Policy Institute. This submission is made in my personal capacity.

I would point the Committee to three items where I have addressed matters relevant to the inquiry's terms of reference.

The first is my Senate Occasional Lecture in 2017 and the Q and A. that followed.

https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Senate_training_and_lectures/Senate_lecture_series/Transcripts/Senate_Occasional_Lecture_Series_transcripts_and_audio_recordings_-_2017

The second is a piece by me published on 29 August 2016 in the *Australian Financial Review*, reprinted below

Quote

Going to war can't wait for MPs, *AFR*

The Greens plan to reintroduce a bill to debate war powers when Parliament returns this week. A group of federal MPs and senators from different parties are saying that it's time we changed the war powers invested in the Prime Minister and Cabinet. Going to war, it's argued, is too important to be left solely to the PM. We should tame this power, with Parliament acting as a check on this discretion authority of the executive government.

While any government would be criticised if it completely ignored the views of Parliament in any significant overseas operation, Parliament doesn't decide when Australia goes to war.

But the whole idea of Parliament voting on decisions to go to war is poor public policy. Proponents of parliamentary approval appear to be focused on the decision to go to Iraq in 2003. But John Howard's government had a strong majority on floor of the House of Representatives and surely would have prevailed in any vote.

Parliament can now debate deployments. But when time is of the essence, the executive may need the ability to deploy the Australian Defence Force during crises and emergencies. Parliament doesn't sit that often.

What we have now ensures that if the PM and the Cabinet are convinced that our vital national interest requires it to deploy the ADF overseas and a majority of MPs

disagree then parliament must either accept the executive's right to decide or withdraw its confidence in the government. That's the bedrock of responsible government as applied to decisions about whether to deploy our military forces.

In simple terms it's about democratic legitimacy: allowing a government to govern, unless Parliament no longer has confidence in the government. In that case an alternative government must be cobbled together or an election must be held.

Australians expect their governments to make difficult policy choices: outsourcing a decision on when military force should be deployed is an abdication of the authority given to government through their electoral mandate.

If we passed legislation to grant the Parliament legal control over expeditionary military deployments it may invite the judiciary to review the legality of our military deployments. We should be very wary of involving judges in what are essentially political questions.

The basis issue is whether we want parliamentarians to prevent the executive from sending the armed forces on expeditionary operations with no immediate consequence to them. It will be all check with no balance: minor parties and independent senators unable to secure a mandate at an election would have power over the most important decision any government can make.

We should not add to confusion and ambiguity when it comes to decisions on overseas deployments. But that's what would happen given the new normal is that the government of the day doesn't have control of the Senate. The executive would be hamstrung in acting, regardless of the political, diplomatic and military circumstances of a crisis.

Time is often of the essence and a decision to go to war potentially mired in political controversy offers little comfort to a deployed ADF, which should be able to take to the field confident that it has the full support of the Australian people as reflected in the policy of the government.

All that said, governments should take Parliament into their confidence more often, providing, for example, a statement to Parliament outlining the basis of the decision to deploy and reporting regularly on the progress of military operations.

The current arrangements are, however, good enough. We should preserve the existing relationship between the Parliament and Cabinet when it comes to decisions about overseas military deployments.

Even if we introduced a vote to go to war it would be unlikely to make any practical difference to the actual outcome. There's not a single example where it would have changed a decision on Australia's commitment to send our troops to war.

Unquote

The third is a piece I co-authored with the late Senator Russell Troad on 2 September 2014 in *The Australian*, reprinted below.

Quote

Parliamentary vote would dangerously restrict executive in war, *The Australian*

In recent years there have been increasing calls for greater parliamentary scrutiny over the executive's long-held prerogative to commit Australia's defence forces to overseas combat operations. Although this has superficial appeal it is a dubious proposition, both as an exercise of parliamentary democracy and as sound security policy.

No Australian government has ever taken this course in all the conflicts in which we have been engaged. That's not to say policy and practice shouldn't change, but there needs to be a compelling case and it's not clear that there is one.

Proponents of parliamentary approval appear to be focused on the decision to go to Iraq in 2003 and argue that what they see as Australia's ill-conceived involvement might have been avoided if there had been a parliamentary vote. This is questionable: John Howard's government had a strong majority on floor of the House of Representatives and surely would have prevailed in any vote.

Governments are elected to govern. There's no greater responsibility than to protect the national interest. Central to that task is the onerous need to decide when military force should be deployed. Australians expect their governments to make difficult policy choices: outsourcing this responsibility is an abdication of the authority given to them through their electoral mandate.

That said, parliament's role could be considerably enhanced in this area. This might include governments taking parliament into their confidence more often, providing, for example, a statement to parliament outlining the basis of the decision and reporting regularly on the progress of military operations. In some cases, time could be set aside in the parliamentary schedule for a debate.

But the idea of parliament voting on decisions to go to war is poor public policy. Governments need the capacity to react quickly to events. Sometimes they won't be able to disclose all secret intelligence that supports a decision.

At the same time, there is the challenge of determining precisely what kind of action on the part of a government 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 a 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.

That is the reason parliaments (and, in the case of the US, congress) haven't always shown full faith with legislative restrictions on their power. A government, perhaps for very sound strategic reasons, asserting executive authority runs the grave risk of serving only to undermine the authority and legitimacy of the parliament if unworkable restraints are placed on its capacity to act.

But most critically, where the government of the day doesn't have control of the Senate, (now the norm in Australian politics), the executive would be hamstrung in acting, regardless of the political, diplomatic and military circumstances of a crisis.

Working this through is a serious challenge. We have a bicameral legislative system, the logic of which is that both houses have to agree to measures. Time is often of the essence and a decision to go to war potentially mired in political controversy offers little comfort to a deployed ADF, which should be able to take to the field confident that it has the full support of the Australian people as reflected in the policy of the government.

The current Greens bill on a war vote by both houses would, if accepted, simply hamstring the government of the day to the whim of minor parties. A party unable to secure a mandate at an election would have power over the most important decision any government can make.

The Greens platform states the deployment of the ADF "must be for defence and peacekeeping, and not for offensive action". But this would mean that we would not commit to alliance operations or a war such as Afghanistan. It would have ruled out the first phase of our East Timor deployment (which didn't start off as a peacekeeping operation). Could it be suggested seriously that this would have been in Australia's national interests?

A one-chamber vote might be workable if a decision on troop deployments were thought necessary. But we 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 vote to go to war it would be unlikely to make any practical difference to the actual outcome. We can't think of a single example where it would have changed a decision on Australia's commitment to send our troops to war.

Unquote

The central argument in the two articles above and my Senate Occasional Lecture is that parliament voting on decisions to go to war is poor public policy. I would be happy to elaborate at a later stage if the Committee so wishes. Thank you again for the opportunity to contribute to the Committee's work on this important issue.

Dr Anthony Bergin, 28 October 2022.