

From: [Ernst Willheim](#)
To: [Committee, JSCFADT \(REPS\)](#)
Cc: [REDACTED]
Subject: RE: [SEC=OFFICIAL] RE: war power submission
Date: Friday, 27 January 2023 2:23:35 PM

Thank you for the invitation to raise additional questions.

I appreciate the opportunity to provide this supplementary submission. I am happy for it to be published as a supplementary submission.

I observe, first, that it is clear from the very substantial number of submissions that there is widespread community support for the Parliament to have a role in any decision to deploy Australian forces in hostilities overseas.

Against this background may I suggest to the Committee that, instead of asking, why should the Parliament be involved, the Committee should be asking why should the Parliament NOT be involved.

It is appropriate to put the issue this way for the simple reason that the Parliament is integral to our democratic process. For example, the executive introduces the Budget, but the Parliament must pass it. The executive introduces legislation, but the Parliament must pass the legislation. So it should be with any proposal to deploy Australian forces in hostilities overseas. The executive should introduce the proposal to the Parliament, the Parliament must then pass it. The initiative is with the executive. Approval is a matter for the Parliament.

What are the reasons against a requirement for parliamentary approval?

The main reasons advanced turn on the possible need for urgency and the relevance of confidential intelligence. Both can be addressed by special provisions.

I addressed the urgency issue at greater length in my original submission. In brief legislative provision can be made for authorisation by the Governor-General in emergency circumstances, with appropriate advice from the Prime Minister or the Defence Minister, the Chief of the Defence Force and the Solicitor-General. I add that the Committee is concerned with deployments overseas. Different considerations may arise in relation to the defence of Australia.

I also addressed the intelligence issue in my original submission. Intelligence issues are important. In my public service career, as a senior officer of the Attorney-General's Department I had significant involvement at the very highest level of government in highly sensitive intelligence matters, including advising on ASIS and nuclear matters. I mention that only to make clear that it should not be thought that I lacked appreciation of the significance of intelligence in high level decision-making. In my submission arrangements can be made for confidential briefings to the Leader of the Opposition and to selected shadow ministers (eg the Shadow Defence Minister, the Shadow Attorney-General). It may also be appropriate to provide a confidential briefing to a parliamentary committee dealing with intelligence matters.

Another unresolved issue is the legal and constitutional basis for deployments of Australian forces in hostilities overseas. It may be that governments rely on s 61 of the Constitution although it seems clear that the Governor-General has not been involved in

relation to recent decisions. It appears also from public comments including analysis of the most recent releases of Cabinet decisions that at least in relation to the deployment to Iraq the decision was made by the Prime Minister and not by Cabinet or a Committee of the Cabinet. I repeat my earlier submission that there should be publicly available documentation, a publicly available paper trail, in respect of such important decisions. The legal uncertainty with respect to the executive power, the role of the Governor-General, and the possible relevance of provisions the Defence Act should be resolved.

Ernst Willheim

Honorary Professor

ANU College of Law

Australian national University
