Pax Christi Victoria

15 October 2009

Senator Mark Bishop
Chair
Senate Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6100
Parliament House
Canberra ACT 2600

October 2009

Dear Secretary,

Inquiry Into Defence Amendment (Parliamentary Approval Of Overseas Service) Bill 2008 [No: 2]:

Thank You for your letter of 7th September 2009 extending an invitation to Pax Christi Victoria to make a submission on the above-mentioned Bill. We also appreciate the willingness of other parties to make their own informative Submissions public on your Web-Site.

We support the Bill and its purpose of ensuring that Australian Defence Force Personnel do not serve overseas in warlike actions without the approval of both Houses of the Commonwealth Parliament. Historically, the desirability for Parliamentary control over military deployments by the Executive Government is reflected in the terms of the English Bill Of Rights of 1689. The Bill of Rights was passed after a period of conflict between the British Crown and Parliament over issues including military adventures of the monarch undertaken without Parliamentary approval or funding. It provisions include a prohibition on raising or keeping a standing army in times of peace without Parliamentary approval *and* on levying money for use of the Crown by pretence of prerogative except in such manner and for such period as Parliament approves.

Whilst precisely the same considerations may not apply in the case of an executive effectively presided over by Ministers drawn from a democratically-elected legislature, we nevertheless support the contemporary arguments for the Defence Amendment (Parliamentary Approval Of Overseas Service) Bill 2008 outlined by Senator Scott Ludlam in his Second Reading Speech on 17th September 2009. Specifically, we agree that well-informed decision-making is best promoted via public consultation and debate in an elected legislative forum and that this is reflected in the lack of proper legal justification for the war in Iraq, to which Australia committed forces without the approval of the Senate. This is particularly so in light of the seriousness of the potential consequences of deployment of Australian Defence Force Personnel to serve in warlike actions overseas, i.e.: loss of life of our own personnel and those against whom they are deployed, destruction of public infrastructure and private property in the territory in which a deployment takes place and damage to international relations. The risk of military action *by pretence of prerogative* remains one which is best minimised by a

requirement for Parliamentary debate and approval of such action. We also agree with Senator Ludlam that general international support for Parliamentary control of military forces in post-conflict societies is consistent with a more general principle that such control is desirable in the interests of good governance.

The historical principle that the executive government's activities are only to be funded in the manner and for the period that Parliament approves is now enshrined in Section 83 of the Commonwealth Constitution (ie: any such money, for military purposes or otherwise, must first be appropriated by Parliament). However, military deployments overseas are typically funded by more generic pre-existing legislative appropriations. Once a military deployment has already occurred, it is widely considered politically impossible for any democratically-elected legislature to simply terminate funding for the deployment whilst troops are still in the field. Once the lives and well-being of military personnel are at stake, it is also morally problematic to do so. This was demonstrated dramatically after Congressional Elections in the United States of America returned a legislature effectively elected on a platform of terminating the Bush Administration's military deployment in Iraq, which was nevertheless practically unable to swiftly implement this platform. Difficulty in using the legislature's ultimate exclusive power over revenue-raising to *terminate* a military deployment strengthens the argument for express Parliamentary approval of such deployment *initially* as the only practical means for Parliament to meaningfully exercise this important historical and contemporary check on executive power. The proposed new Sub-Section 50C(10) of the Defence Act 1903 provides for a useful *additional* mechanism for *ongoing* Parliamentary scrutiny of military deployments via two monthly reports to Parliament on each such deployment by the Minister of Defence.

We support a requirement that the Senate as well as the House of Representatives approve service of Australian Defence Force Personnel overseas in warlike actions. We believe this requirement can be sufficiently justified by a number of considerations already outlined earlier in this Submission: The historical and contemporary importance of Parliamentary control over the executive government; the extreme gravity of the potential consequences of deploying Australian Defence Force Personnel overseas in warlike actions and the practical political difficulty of legislative action to terminate an existing military deployment of this kind. In light of these considerations, we do not believe that a requirement of approval by *each* House of Parliament separately is too onerous.

The Bill contains proposed provisions for military deployments without Parliamentary approval in genuine emergencies [proposed new Sub-Sections 50C(3)-(9) of the Defence Act]. Proposed Sub-Sections 50C(8) and (9) contain appropriate provisions for automatic expiry of approval of such deployments within 7 days if Parliament is not in fact given an opportunity to approve them (due to not sitting, adjournment, or calling of an election). However, consideration might be given to whether proposed Sub-Sections 50C(6) and (7) might go even further than requiring a *report* to Parliament on a military deployment in what the Prime Minister and Governor-General have deemed to be an emergency; ie: actual Parliamentary approval might still be required. This is particularly so since the report to Parliament must take place within 2 days of the Governor-General's proclamation, early enough logistically for a deployment to be reversed. The political considerations outlined in the last Paragraph of this Submission are likely to prove a significant deterrent to any: “precipitous” refusal by Parliament to approve such a

military deployment. Even covert actions could at least be approved by reference to more general Parliamentary approval of the wider military action with which they are associated. The military and moral legitimacy of covert actions not associated with more overt military action would seem dubious at best.

Other submissions to the Committee regarding this Bill note that Parliamentary approval for Australian military deployments overseas in warlike actions has in fact always been sought historically and indeed always obtained from the House of Representatives. Only in the case of the war in Iraq in 2003 was the Senate's approval not forthcoming when the Australian Government sought it. This history is consistent with general desirability and practicality of Parliamentary approval of Australian military deployments overseas in warlike actions. Other Submissions also note the greater legislative role in approval of such deployments in Western nations with which Australia shares significant cultural and political heritage. This is so of the United Kingdom (albeit bolstered by recent developments), United States of America (albeit subject to significant constitutional complications and controversy), Canada and a number of Western European nations.

On a discrete point, we support proposed coverage of the Bill to include the navy and airforce as well as the army. More limited scope of current legislation as to military service does not appear to be logically justified.

There may also be room for *more* proscriptive provisions that those of the proposed new Sub-Section 50C(6) of the Defence Act regarding substantive content of reports to Parliament on military deployments overseas in an emergency. Express reference might be required to consistency of any such deployment with the Charter of the United Nations (ie: that it be justified by self-defence, authorisation by the Security Council of the United Nations, or possibly by humanitarian intervention pursuant to customary international law). The Charter embraces at least in part the principles of a just war summarised by Dutch philosopher Hugo Grotius in the seventeenth century (ie: just cause, legitimate authorisation, right intention, proportionality and use of force only as a last resort, with peace as an ultimate goal and with reasonable hope of success in achieving this goal). These principles themselves draw upon the earlier theories of Christian theologians such as St Thomas Aquinas. To the extent that they are endorsed by the United Nations, this is indicative of approval by peoples of more diverse ethnic, cultural and religious backgrounds. It is therefore worth giving consideration to a legislative requirement that Parliamentary approval of Australian military deployments be sought by express reference to the very broadly accepted criteria embodied in the Charter of the United Nations. Again, other Submissions to the Committee note that the Australian Government has in fact generally sought to justify such deployments by reference to these criteria in the period since the Charter was adopted.

Yours sincerely,

Revd. Harry Kerr, Convenor, Pax Christi Victoria