

Codify parliamentary convention in the Australian way of war

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November 2022

Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry on ‘how Australia makes decisions to send service personnel into international armed conflict’.

Submission status: This is a personal submission.

Summary:

Use parliamentary conventions, not law, to strengthen parliament’s role in the Australian way of war. Codify existing precedents to make them conventions: the John Howard precedent—a motion of the House of Representatives to send the Australian Defence Force to war; the Tony Abbott and Julia Gillard precedents—set out the mission and its aims. Then give parliament, and Australia, regular formal reports on the conflict. Revive the convention that major government statements on Australia strategy and defence should be presented and tabled in parliament.

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RECOMMENDATIONS

Precedent and codifying conventions

Recommendation 1: Use conventions, not law, to give parliament a proper role in Australia's way of war.

Recommendation 2: Identify precedents from previous government to guide future government action in parliament on going to war. Codify precedents that should be treated as conventions.

A vote of the House of Representatives

Recommendation 3: A House of Representatives vote before or after the Australian Defence Force is deployed—the John Howard precedent.

The mission and the means

Recommendation 4: Set out the aims, the role of the ADF, the risks and Australia's interests—the Tony Abbott and Julia Gillard precedents.

Answer to parliament and the people

Recommendation 5: The prime minister and defence minister should give parliament (and Australia) regular formal reports on the conflict. Revive the convention that major government statements on Australia strategy and defence should be presented and tabled in parliament.

When Australia became a nation on 1 January 1901, it was at war in South Africa and China.

The six Australian colonies had sent militia and bushmen contingents to the [Boer War](#) (1899–1902) and dispatched troops and ships to the [Boxer Rebellion](#) (1900–01).

The Commonwealth of Australia was blessed with its own continent and the most peaceful act of federation. The nation was formed by agreement and referendum. Yet the Commonwealth inherited a foreign military tradition at its birth.

The first military unit established by the new federal government was the ‘Australian Commonwealth Horse’, which served in the final stage of the South African conflict. They were the first Australian troops to wear the rising sun badge that now clips the brim of the slouch hat. One of Australia’s most questionable fights, the Boer War, has one of Canberra’s most [striking memorials](#)—a patrol of four mounted soldiers edging their bronze horses down a slope to Anzac Parade.

The memorial has a verse from the journalist-poet Banjo Patterson, who served as a correspondent in South Africa:

*When the dash and the excitement and the novelty are dead,
And you’ve seen a load of wounded once or twice,
Or you’ve watched your old mate dying—with the vultures overhead,
Well, you wonder if the war is worth the price.*

Patterson’s ‘worth the price’ question often recurs in considering the nine times Australia committed to war in the [90 years from 1914 to 2003](#).¹ What he reported as an imperial war would become alliance wars. The distinction between wars of choice and wars of necessity is fraught, yet the Boer War counts as our first war of choice—Vietnam and Iraq are later additions to that column.

Australia goes abroad to fight for its alliance, to help set the central balance, and for what we now call the rules-based global order. We send our diggers offshore. Statecraft meets strategy as the expeditionary force sets out.

Australia has spent much of its history, as Coral Bell masterfully recounted, as a [‘dependent ally’](#), but it is a finely calculated reliance.² Dissecting Australia’s [strategic culture](#) and way of

¹ David Horner, *The War Game*, Allen & Unwin, 2022.

² Coral Bell, *Dependent Ally: A Study in Australian Foreign Policy*, Allen & Unwin, 1994.

war, Michael Evans observed that our pragmatic politics meant this ‘dependency has always been clever, cynical and calculated’.³

The Boer War heralded another constant in the way the nation goes to war—the lack of any initiating role for the federal parliament. When Australian troops first sailed for South Africa, parliament didn’t even exist. In every war since, parliament has been the ghost with no formal voice in the most fundamental choice a nation can make. The executive has almost unfettered war powers.

The prime minister declares the deployment or announces the conflict and the military march. This is the leader’s most [profound prerogative](#). The prime minister confident of cabinet and party can act without any authorisation or resolution from the parliament.

Surveying the role of [parliament in Australian foreign policy](#) 40 years ago, a smart Liberal senator (John Knight) and a fine historian (W.J. Hudson) pointed out what an unhinged prime minister could do with the profound prerogative. The ‘marvellous freedom of executive government in external policy’ meant a deranged PM could declare war simultaneously on the United States and the Soviet Union, thus bringing ruin and destruction on Australia and its people. By contrast, if the same leader wanted to add a cent in tax to the cost of cigarettes, he or she would face a long legislative trek through the parliament.⁴

The terms of reference of this inquiry confront the tensions in any effort by parliament to limit the profound prerogative: secrecy and security and military imperatives versus what a democracy needs from its parliament.

The inquiry must turn to precedent and convention because no legal check is likely. The parties of government—Labor and Liberal-National Coalition—are not interested in changing the *Defence Act* to hand more power to the Senate. A tacit Labor–Coalition consensus blocks any hope of a change in law to give parliament a veto over the war power. A legislative limit on the executive prerogative raises the prospect of the government-controlled House of Representatives voting for war but the Senate voting for peace, negotiation and delay.

The minimalist solution is not to push against executive powers, but to formalise conventions to ‘parliamentise’ the war powers.

Over the past two decades, prime ministers as diverse as John Howard, Tony Abbott and Julia Gillard have offered precedents that are the footholds on which [parliament could build conventions](#). Build on the ANZUS precedent set by Howard with his parliamentary resolution after the September 11 attacks on the US; Howard’s Iraq war resolution; Abbott’s criteria as the

³ Michael Evans, *The Tyranny of Dissonance: Australia’s Strategic Culture and Way of War 1901-2005*, Land Warfare Studies Centre, 2005, p.57.

⁴⁴ John Knight and W.J.Hudson, *Parliament and Foreign Policy*, Canberra Studies in World Affairs, Department of International Relations, Australian National University, 1983.

basis for future resolutions on war and the Afghanistan reporting precedents established by Gillard. Codify these precedents to make them conventions.

Aim for a checklist and not a legal check when war is launched. And use the checklist for greater parliamentary oversight of the way war is waged.

Turning to parliamentary convention, not law, isn't a lesser option.

Australia's parliament is a robust and responsive beast. Adopting the convention solution plays to parliament's strengths and history, avoiding complex arguments about enacting laws that could shackle government action and slow military responses. As just one example of the complexity, drafting purgatory threatens any attempt to legislate different approaches to 'wars of necessity' and 'wars of choice'. Did WWII start as a war of choice and then become a necessity after Japan arrived?

History tells the story of what the robust Australian parliament can do, even during our worst conflicts.

When WWI broke out, Australia was in the midst of an election campaign that changed the government; losses at the front and the conscription referendum at home smashed that Labor government. In WWII, a collapsing government discarded its prime minister (Robert Menzies) and shortly after lost office in a vote of confidence in the House of Representatives.

As General Douglas MacArthur remarked in Canberra in 1942 after witnessing a ['fierce debate'](#) in the House on government use of its extraordinary war powers on the home front: 'If the men of Australia fight as well as they argue we are certain of victory.'⁵

Australia's parliamentary democracy delivers, even when the times are dire. And that means the rights of parliament that already exist should be strengthened by being codified. Build new parliamentary conventions into the Australian way to war.

Australian researcher Peter Mulherin pursues this in ['War-power reform in Australia: \(re\)considering the options'](#), arguing for a new war-powers convention as a small step towards democratising the decision of going to war: 'While not legally binding, this constitutional convention would represent an agreement by the major parties that overseas combat operations will be properly debated in Parliament.'⁶

Beef up the informal rules that guide the parliament so it can impose informal constraints on the executive's power. Express what parliament and the people are owed. Strengthening parliamentary convention would be an improvement on the status quo, Mulherin concludes:

⁵ Tom Mead, *Breaking the News*, Dolphin Books, Sydney, 1998, p.61.

⁶ Peter E. Mulherin, 'War-Power Reform in Australia: (Re)considering the Options', *Australian Journal of Politics & History*, Vol. 66, Issue 4, December 2020.

Despite some arguing that legislative reform is preferable, it may also be impossible, given the reluctance of the Coalition and ALP to change the law. Therefore, a new constitutional convention would be an important step towards strengthening debate when Australia goes to war.

In '[Going to war democratically: lessons for Australia from Canada and the UK](#)', Mulherin argues that Canada and the UK have taken steps this century to 'parliamentarise' their war powers, while in Australia the prerogative remains absolute.⁷

Citing Canada and the UK as comparable parliamentary democracies with close alliance and historical ties, Mulherin lays out a three-step argument about what Canberra can learn from London and Ottawa: '(1) a more democratic foreign policy formation is a normative "good"; (2) war-power reform is one way to democratise foreign policy formation; and (3) lessons drawn from the examples of Canada and the United Kingdom may help Australia reform its war-power arrangements'.

So, no law, but stronger conventions in the House of Representatives offering more detailed benchmarks for the powers of review held by the Senate.

RECOMMENDATIONS

The way Australia goes to war needs new conventions to give parliament a greater role in the weightiest choice any nation can make.

Creating parliamentary customs or conventions is the only realistic way to touch the prime minister's almost [unfettered power](#) to launch war.

To examine how Australia goes to war, parliament must examine itself.

How much can parliament touch the war prerogative of the prime minister and cabinet?

What say should parliament have, if any, in the most fundamental choice a nation can make?

How much are the parties of government—Labor and the Liberal-National-Coalition—ready to nod to parliament as the basis of their power and legitimacy?

Parliamentary inquiries seldom sail so close to the fundamentals.

⁷ Peter E. Mulherin, 'Going to war democratically: lessons for Australia from Canada and the UK', *Australian Journal of International Affairs*, Vol. 73:4, 2019.

Precedent and codifying conventions

Recommendation 1. Use conventions, not law, to give parliament a proper role in Australia's 'way of war'.

Recommendation 2. Identify precedents from previous government to guide future government action in parliament on going to war. Codify precedents that should be treated as conventions.

Invoking precedent, convention and tradition is a means to establish legitimacy, set standards and guide future actions. A small example is the sign on a university notice-board stating: 'College tradition is that students do not walk on the grass in the main quadrangle. This tradition begins today.' The sign has AAA provenance (Apocryphal And Anonymous) yet it illustrates the truth that tradition is a useful tool. As the historian Eric Hobsbawm noted, 'Traditions' which appear or claim to be old are often quite recent in origin and sometimes invented.'⁸

This inquiry doesn't have to invent anything. It can draw on the recent history of the Australian parliament to codify previous government actions that can be identified as precedents to be followed in future.

Use conventions, not law, to give parliament a fuller role in Australia's way of war. The committee doesn't have to invent tradition, merely codify or list precedents set by previous prime ministers and governments. The purpose is to set these precedents as conventions to be followed by future governments.

Turning to convention is a means around Labor and Coalition aversion to changing the law, to give parliament a more clearly-defined role in the use of the war powers.

The tensions are plain in the [terms of reference](#) drawn-up by Deputy Prime Minister and Defence Minister Richard Marles—and starkly expressed in his [reference letter](#) to the committee. Marles warned the committee against any move to weaken cabinet's right to go to war:

[U]nder Australia's Westminster system of government, decisions about the deployment of the ADF into international armed conflicts are within the prerogative powers of the Executive. I am firmly of the view that these arrangements are appropriate and should not be disturbed.

The Labor-Coalition consensus means there'll be no change of the *Defence Act*. But that political reality offers a place to start, not an end. This is an inquiry where parliament must think about itself as well as the rights of the executive.

Rather than pushing against the constitution and the executive's [profound prerogative](#) for war, parliament should build on its history to [codify conventions](#). Seek to '[parliamentarise](#)' the war powers.

⁸ Eric Hobsbawm & Terence Ranger (Eds), *The invention of tradition*, Cambridge University Press, 1983, p.1.

The call for both houses of parliament to vote on war crashes against the fact that Australian governments seldom command a majority in the Senate. Neither Labor nor the Coalition will give another iota of power to the upper house.

A convention for a vote in the lower house on deploying the Australian Defence Force already exists. The inquiry should note the precedent in the House of Representatives and call on future governments to follow it.

A vote of the House of Representatives

Recommendation 3: A House of Representatives vote before or after the ADF is deployed—the John Howard precedent.

Build on the ANZUS precedent set by Howard with his parliamentary resolution after the September 11 attacks on the US and Howard’s Iraq war resolution. The flexibility of the Howard convention—a vote before or after war—is that it doesn’t compromise any government’s ability to respond immediately to an emergency or an attack.

The ANZUS precedent is the eight-point motion that Howard [moved in the House](#) on 17 September 2001, invoking the ANZUS Treaty following the 9/11 attacks on the US.

The motion didn’t go to the military actions that followed, but set out fundamental arguments for why Australia would act. That’s the place to start for all future motions on military action, to state the principles and purposes.

A resolution for war should be considered by the House even if—as happened with Iraq—the government has already sent Australia’s military to fight.

Australian troops were in action in Iraq on 20 March 2003, when the [House voted to approve](#) the Iraq motion moved by Howard (and defeat Labor’s rival motion). Howard’s resolution was a damnation of Iraq as a rogue state and an assertion that Australia was acting under clear authority of the United Nations. Labor’s opposition motion argued that Australia didn’t have UN authority to commit troops.

In the [debate on the Iraq resolution, Howard](#) said Australia’s forces would be part of the US-led coalition but operate under separate national command with separate rules of engagement and separate targeting policies.

After the war, in ‘the post-conflict stage, the phase 4 stage,’ Howard told the House, there could be a role for the Joint Standing Committee on Foreign Affairs, Defence and Trade in ‘oversighting the Australian involvement in the phase 4 process’. The committee never played such a detailed role in Australia’s Iraq experience, but the ‘oversight’ thought is a parliamentary foothold for future wars.

Howard created the National Security Committee of Cabinet which is established at the heart of government. In the same way, the Howard precedent on a House resolution for war—before or after deployment—should be treated as a valuable precedent/convention in our Westminster system.

Governments are made in the House of Representatives, while the Senate is the house of review. The House of Representatives is where the vote on war should happen.

The mission and the means

Recommendation 4: Set out the aims, the role of the ADF, the risks and Australia’s interests—the Tony Abbott and Julia Gillard precedents.

Howard’s ANZUS and Iraq resolutions are starting points for future deployment resolutions. Building on the Howard convention, the government should present the House with a motion that offers answers to the fundamental questions posed by Abbott on 1 September 2014.

In a [statement to parliament](#) on the threat that ‘the death cult’ Islamic State posed to Iraq and Syria, Abbott said that if a request for Australian military help in Iraq came from the US and the Iraqi government, it’d be considered against these criteria:

‘Is there a clear and achievable overall objective? Is there a clear and proportionate role for Australian forces? Have all the risks been properly assessed? And is there an overall humanitarian objective in accordance with Australia’s national interests?’

For a war against another nation, rather than terrorists, other big questions could be added to the Abbott criteria: What is the scope of the commitment? What are the aims? What forces are needed? What would victory would look like? What is the desired end or the exit strategy?

Add to the Abbott points, the set of questions outlined by Julia Gillard in her [Afghanistan speech](#) on 19 October 2010. Gillard told parliament that she would ‘answer five questions Australians are asking about the war’:

- why Australia is involved in Afghanistan;
- what the international community is seeking to achieve and how;
- what Australia’s contribution is to this international effort—our mission;

- what progress is being made; and
- what the future is of our commitment in Afghanistan.

The resolution that goes to the House, even if the government has already ordered war, should address those fundamentals—aims, means and ends.

The executive has the power to give the order, but it isn't asking too much that it give parliament and the people a clear account of what's to be done.

Making those precedents conventions would call for a House of Representatives resolution on committing Australian forces overseas that sets out the objectives and conditions of the deployment. That resolution should declare the mission, the aims (Abbott's clear and achievable objectives), the forces that could be used, and the end point and anticipated exit strategy.

Answer to parliament and the people

Recommendation 5: The prime minister and defence minister should give parliament (and Australia) regular formal reports on the conflict. Revive the convention that major government statements on Australia strategy and defence should be presented and tabled in parliament.

A significant precedent in Gillard's [Afghanistan speech](#) on 19 October 2010 was her promise of regular formal statements to parliament: '[T]oday I announce as Prime Minister that I will make a statement like this one to the House each year that our Afghanistan involvement continues. This will be in addition to the continuing ministerial statements by the Minister for Defence in each session of the parliament.'

Using those benchmarks, there should be a standing reference to the Joint Parliamentary Committee on Foreign Affairs and Defence whenever Australian forces are deployed. The committee should hold hearings once a year in which it calls the secretary of Defence and the chief of the ADF to give evidence on the deployment or conflict and how the aims of the mission are being met.

While building fresh conventions on parliament's role, it's time to revive conventions that have been so ignored they've fallen into disuse. Major government announcements on defence and strategy should be presented and tabled in parliament. That was the convention that prevailed from the first Defence white paper in 1976, then 1987 and 1994, and again when John Howard presented his Defence white paper to the House in 2000.

In this century, however, parliament is bypassed in order to serve the TV cameras.

Defence white papers haven't been presented in parliament. Instead, they've been unveiled on a Navy ship at Garden Island in Sydney (Kevin Rudd), in an Air Force hanger in front of an RAAF jet and two lines of ADF uniformed personnel (Julia Gillard), and at the Australian Defence Force Academy (Malcolm Turnbull). Turnbull's 2017 foreign policy white paper was released in the foyer of the Department of Foreign Affairs and Trade while Scott Morrison went to ADFA to release the 2020 Defence Strategic Update. The politics and pictures of these performances were presidential, no parliamentary.

Governments have developed an absent-minded habit of not bothering to make policy documents also papers of the parliament.

Gillard, for instance, did not table in parliament the 2013 Defence white paper or the 2013 National Security Strategy. When tackled on this at the time, the PM's office said it was all on the department's website and was dealt with at Senate Estimates. The Estimates process is one of the major parliamentary innovations of the past 40 years. But on this reading, parliamentary scrutiny of Australian international policy is best served by Senators in committee questioning senior public servants. It's a narrow understanding of how the Canberra system explains national security to parliament and the people.

A test of the Albanese government's view of parliament will be whether next year's Defence Strategic Review is presented to the TV cameras or tabled and debated in the House of Representatives.

For parliament to have more say, it must do more work to play a more consistent and continuing role. Not much has shifted since James Brown's 2016 judgement that parliament's 'oversight of national security is underdone and weak'.⁹ Brown lamented the lack of parliamentary scrutiny of the ADF, the Defence Department and national strategy:

In Australia's bright and blessed circumstances today, we rarely think of war: it is something we go to, not something that comes to us. It seems we often shrink from talking about war in any detailed way, as if to speak of evil might set us on an inevitable path towards it...Our mechanisms for going to war lack the institutional rigour necessary to navigate a more complex world, and our decisions about conflict are not grounded by public trust and democratic legitimacy. We need urgently to re-engage with the problems of war, and to rethink just how it is that we choose whether we fight or not.¹⁰

To have a greater voice in the Australian way of war, parliament should do more of the thinking.

⁹ James Brown, 'Firing line: Australia's path to war', *Quarterly Essay*, Issue 62, 2016, p. 57.

¹⁰ Brown, p. 5.

The joint committee should hold regular hearings to review Australian military missions (monitor the checklist). And building on Senate Estimates, in each parliament the joint committee should review Australian strategy and Defence equipment programs.

Taking recent precedents and codifying them as conventions means the parliament could test policy, shape thinking and record the detail that makes the history. Building such tradition grounds the issues of trust and democratic legitimacy where it belongs, in our parliament.

In war, a government must convince its own people. Give reasons for the sacrifice, make sense of the death. As ever, parliament must be where the power and the policy meet the people.