

Introduction

Civil Liberties Australia (CLA) welcomes the opportunity to make a submission to the Inquiry into the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No.2] (the Bill).

CLA is a national organisation which advocates for the rights of individuals and actively monitors the use of power by governments. We frequently contribute to the development of Bills, and this is our 15th such contribution so far this year. We thank Committees of the Parliament, and the Parliament, for adopting some of our proposals from earlier submissions.

CLA supports the aim of this Bill in general, in that reform is needed in:

- how Australia becomes involved in war and like situations;
- the ongoing information provided to the Australian people;
- financial considerations; and
- how the Australian people can have opportunities to signify their continuing support, or otherwise, for any war and for the involvement of Australia's defence and similar forces.

Should Parliament not pass this current Bill, CLA asks the Government to instigate a public dialogue on the way Australia goes to war, conducts war, finances war, and ends war.

Whenever we mention 'war' in this document, we take 'war' to include 'warlike situations' and 'peacekeeping operations' and the like. That is, the circumstances include those where Australian forces operate overseas, such as in World War One, World War Two, the Korean War, the Malayan Emergency, the Vietnam War, the Gulf Wars, Iraq and Afghanistan, and in relation to deployment of Australian troops or resources for involvement with one or more other countries, such as in Cyprus, Sudan, after the Aceh earthquake and in other disasters.

In proposing a national dialogue, debate and finally new legislation, we believe any democracy should – in relation to war – operate to four main principles, with further parliamentary and national debate required to decide whether there should be a fifth.

The 4 CLA Principles:

1. Australia should go to war only if war is endorsed by the people of Australia.

Endorsement usually means by a vote of the national parliament (in an emergency, an interim decision for up to 30 days may be taken by the executive, pending endorsement vote, or otherwise, by the national parliament).

2. All relevant facts about the war must be disclosed to the Australian people at the earliest opportunities, fully and frankly, whether deemed positive or negative.

This must occur through the national parliament or outside of it in urgent situations. The only facts withheld – for a short period of days rather than a few weeks – should be those constrained by operational reasons involving the safety of Australian or allied people. The Prime Minister should be responsible for ensuring this requirement is met.

3. At regular intervals – not longer than 120 days – those primarily responsible for conducting the war must provide a full report to the Australian people.

Such reports are to be tabled in the Australian Parliament in the ordinary course of events or, if needed, made available by a major public statement at a venue open to the public and the media. Those primarily responsible should be the Prime Minister, Defence Minister and the Chief of the Defence Force.

4. At regular intervals, not longer than 365 days, a separate budget allocation for continued conduct of the war (including at least a two-year forward projection) shall be put before the national parliament for endorsement or otherwise by both Houses.

The Treasurer and Defence Minister should be jointly responsible for providing the information. Should the budget allocation not be passed by the Parliament, the war shall cease when the then-approved funds run out, or as decided by a related vote.

Abiding by the CLA Principles would ensure that:

- any war was initially endorsed by the people,
- the people were made aware regularly of major events as they happened,
- that the strategic and tactical aims and whether they were being met were openly discussed, and
- the cost of the war was well and publicly known.

But, in relation to war, these 4 CLA Principles are not enough. After committing to a war, the next most significant event is ending one. The Australian people should be involved in making that decision also, where possible.

Australia is currently involved in warlike situations where the Australian people have not been given the opportunity to confirm they wish to continue the Australian involvement. For example, since 1964 Australian police officers have served continuously as part of the UN Peace-keeping Force in Cyprus. There are 15 Australian Federal Police officers serving there now.

At some time – possibly well before 45 years – it should have been the responsibility of other nations around the Mediterranean or in Europe to take over from the Australian contingent, particularly over the past 10-15 years when Australia's responsibilities in the Pacific region grew quickly and widely. It might well be that the Australian people, if asked, believe our nation has done enough, and expended enough funds, in relation to Cyprus...but in 45 years the Australian people have never been consulted about ending the Cyprus deployment.

Similar questions as to termination of engagement will eventually arise in relation to:

- Solomon Islands: since 2003, and continuing (about 80-110 military people and 236 police);
- Timor Leste: since 1999, continuing (about 650 military personnel, plus 4 military officers with the UN 'political mission', and about 60 police);
- Other areas in or around which Australian personnel are stationed, such as the Sinai, Sudan, Vanuatu, Horn of Africa, etc – including Special Forces operations – with an unknown number of Australian personnel in total; and
- Iraq (since 2003, now small numbers) and Afghanistan (where there are indeterminate numbers, but certainly more than 2000 troops).

SOURCES:

Police information: Table 2 AFP Deployed Personnel as at 14 March 2007, The Australian Federal Police Submission March 2007, to the Senate Standing Committee on Defence, Foreign, Affairs and Trade: Inquiry into Australia's involvement in peacekeeping operations.

Defence information: Dept of Defence website, 16 Oct 2009. "The Government has approved the deployment of approximately 3300 Australian Defence Force personnel to 13 operations overseas and within Australia to protect Australia and its national interests."

Going to war is usually a very public matter: withdrawing from war does not appear to attract similar attention, but it should and in both cases the Australian people should be consulted if possible, at the start and at the end. There is a debate over whether the people's decision to end a war should be by a vote of the Parliament only, or by a national referendum.

A vote of the Parliament has the advantage of being quicker, cheaper and easier. The Parliament is meant to represent the people.

However, the MPs may not be truly representative on a question of continuing a war if it is a considerable time (say two years or more) since a national election, or if a conscience vote is not allowed (and MPs vote on party lines). As well, neither the Parliament nor Members have an overt tradition of consulting the Australian people on such issues.

For such important issues as, for example, whether or not Australia continues to send about 350 people each year overseas for what has now become a police education and training role in the Solomon Islands, or for how long Australia continues to commit more than 2000 personnel to war in Afghanistan (when the role is similarly heading towards training and education), a referendum may be a more appropriate determining mechanism.

CLA recommends that the Parliament should put the issue to the Australian people in a referendum, for the people to decide what powers they want in this regard. That is, do the people want the power to decide, by referendum, when Australia should withdraw from a war, after the war has been operating for a defined period.

CLA Principle 5:

5. The Australian Parliament should hold a referendum to ask the Australian people whether they want the ongoing power to conduct a binding referendum vote on a war's continuation once every three years approximately.

The question to be put could be along these lines:

Do you agree or not agree that, whenever Australia has been at war (or involved in a warlike situation) for longer than two years, a referendum should be held, within the following 12 months, as to whether the Australian people wish to continue the conduct of the war.

If the people decide, by their vote, that they want the power to be consulted in a referendum, CLA believes such a war-continuation referendum should not be held in conjunction with, or closer than three months to, a national election for fear of a referendum vote dominating other important national issues.

Such a separate referendum would be held after a further gap of two years following the first referendum (that is, about five-six years into a war the Australian people would be given a second chance to vote for or against the continuation of the war)...and so on, within further periods of a maximum of three years.

Such a referendum should be decided in keeping with the then rules of conducting national referendums; the vote of such a referendum would be binding on the national government.

Issues with the status quo

Sending people to war is the toughest decision a government can make. It has become customary for that decision to be taken by 'the Executive' (and formally signed off by the Governor-General, when required). However, the 'Executive' is not a defined term: no-one knows for sure who is on 'the Executive' at any particular point in time.

It is a different entity from the Executive Council or Executive Government, and it may or may not include Ministers formally empowered to act under the *Defence Act 1903* (the Defence Act) to decide to commit Australia's troops either within Australia or overseas.

The current situation places enormous power in the hands of a body without any formal, effective accountability to Parliament; it is contrary to a modern functioning democracy, and to proper governance of the nation.

At present, there is no provision for the decision to commit troops to combat overseas to be debated in the Parliament. At present, there is no custom for such a debate in Parliament, either at the time of committal or at any subsequent interval.

The only means of accountability under the current regulatory regime is the doctrine of ministerial accountability to Parliament. The doctrine of ministerial accountability is probably the principle most observed in the breach over the past few decades. No serious political commentator would now argue that an ill-defined and even more poorly-observed ministerial accountability doctrine is a sufficiently strong bulwark against the overweening power to commit Australian men and women to a war, possibly without a defined objective and with no demarcated end point.

The current system does not provide an effective level of accountability and scrutiny necessary for the significant decision to send troops overseas. There is no requirement for a flow of information to Parliament, representing the people, necessary for the Parliament to effectively monitor ongoing Executive decisions and the progress of the war. Nor is there any formal process to instigate debate on such issues.

There is no requirement for specific funds to be allocated, at the beginning or for continuance, of the war. A war must, by its nature, impose a significant, extra financial burden on the Australian people.

Sending Australian men and women into potential combat situations overseas is a most serious decision, which ought to be subject to democratic debate by the representatives of the Australian people. The consideration of all issues of national importance, including the issue of war, should be laid before the Parliament and subject to the debate and scrutiny of the people, through their representatives.

Failure to provide a role for the people's representatives in the decision to send Australian troops to war is an indictment of Australia's claim to be a modern democracy. At the time the original Defence Act was passed in 1903, there was no notion – in the minds of the people of Australia or the parliamentarians of Australia – that Australia was a sovereign nation which could and would act independently of Britain. Seventy years ago, when Australia was declared to be at war by the then-PM, the decision was not taken as a sovereign nation but as a consequence of the decision of another nation, Great Britain.

Such is no longer the case. The people of Australia comprise an independent nation. We expect to make our own major national decisions, wherever possible. When it comes to war,

other than in an emergency, the nation has time to make such decisions at the very least through the parliamentarians we elected to represent us when major national decisions need to be made.

There is no obligation on the Prime Minister to seek Parliament's consideration in any way in relation to a decision to go to war. This was evidenced in 2003 by the Government's decision to send troops into Iraq without consulting Parliament beforehand, and without seeking the support of both Houses of Parliament after the initial decision.

Australian should not be a country where one person, or an unspecified small coterie, can usurp the right of the Australian people for parliamentary oversight of the decision to commit Australian troops to wage war in and/or against another nation. Equally, the Australian people should have the right to make a decision about when a war should end.

Assessment of the Bill

The proposed Bill improves on the current regulatory regime and goes some way to ensuring scrutiny and democratic accountability of any decision to commit Australian troops to combat overseas.

The primary aim of the Bill is to establish a regime for the Parliament to approve the service of the Defence Force beyond the territorial limits of Australia. This will subject the consideration of whether to go to war to open and informed debate by the people's elected representatives.

The Bill also creates a framework for emergency deployment. CLA believes some type of system for an urgent deployment decision is needed. However the situations in which this exemption can be used should be limited and additional guidance as to what constitute an 'emergency' should be expanded on in the explanatory material and made clear in the legislation to ensure that this provision is not misused.

Provisions relating to publishing an emergency proclamation made by the Governor-General and the expiration period for the proclamation are important mechanisms for ensuring that Parliament can retrospectively scrutinise and debate the decision.

The continuous reporting mechanism to Parliament every two months on the deployment of troops overseas provided in the Bill is central to the ongoing accountability of the decision to commit troops overseas. CLA agrees with the principle, but would alter the timeframe.

An argument against the Bill will come from those who say that legislation which seeks the resolution of Parliament before deploying troops is impracticable. However many countries require Parliamentary scrutiny before endorsement of a decision to go to war. These include, but are not limited to:

- France, where Article 35 of the 1958 Constitution provides that a declaration of war is authorised by Parliament.
- Germany, where Parliamentary approval of committing troops to war is an unwritten constitutional principle, as was recently upheld by the German Constitutional Court.
- Spain, where Article 63 of the Constitution reads as follows: “It is incumbent on the King, after authorisation by the Parliament, to declare war and make peace”.

The US Constitution divides the powers related to war and provides for a role for its house of parliament in the decisions regarding committing troops overseas. The War Powers Resolution mandates regular consultation with Congress and written notification within 48 hours of such action.

Furthermore Australia itself has, in the recent past on one occasion, sought parliamentary resolution for troop deployment, demonstrating that any such requirement would not be overly onerous. In 1991 a motion was placed before the Parliament which gave diplomatic and military support to the international coalition in the Gulf War. There was no dissent to this motion.

CLA supports the proposed Bill. The Bill strikes a balance in providing for the accountability of the decision to go to war, with the need to create a framework for decisions to be made in the case of an emergency situation. This Bill would remedy the current unsustainable situation where Parliament is excluded from the democratic decision-making processes. While we support the Bill, we believe it could be improved if CLA’s Principles were the basis of new legislation.

Australia needs a dialogue on this issue

If the members of Parliament are minded not to pass the Bill, CLA strongly calls for a national discourse on the way Australia commits troops to overseas combat. CLA wrote one of its series of Australia Day letters to the Prime Minister on 26 January 2008 calling for a national discussion and debate on how Australia makes national decisions in times of war

and conflict involving the potential presence and involvement of Australian forces overseas. CLA was then, and is now, seeking discussion of issues, including but not limited to:

- who and/or what body is entitled by the Constitution and legislation to take the decision that Australia declares war and/or sends troops overseas;
- at what level of involvement of the Defence Force do the formal decision-making rules come into effect; and
- what role does the Australian Parliament play?

CLA is not alone in calling for a debate on these issues. The Governance stream of the 2020 Summit submitted ideas about Parliamentary reform including that “The Commonwealth government to make an undertaking to allow a vote in both houses of Parliament before (except in cases of emergency) committing Australia to war or to a war-like situation”.

Simply for clarity reasons, serious discussion on this issue is needed to remove uncertainty whether either the Prime Minister or the Governor-General has, in fact, the authority under the Constitution to send troops overseas if the direct defence of the Commonwealth is not at stake. Section 51(vi) provides the Parliament with the power to make laws with respect to “the naval and military defence of the Commonwealth, and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth”. This power, on the face of it, does not contain the authority to makes laws where the defence of Australia is not an issue. Furthermore, there are questions whether the Letters Patent provide the Governor-General or the Executive with sufficient power to approve the launching of a war against another sovereign state. Given the uncertainty in this area, CLA advocates a national debate and discussion on the issue, with a view to clarifying the position at law.

The United Kingdom has recently considered this issue in its Governance of Britain Green Paper in July 2007. The paper proposed that the UK Government should seek the approval of the House of Commons for significant non-routine deployments of the UK armed forces into armed conflict, to the greatest extent possible, without prejudicing the Government’s ability to act to protect national security, or undermining operational security or effectiveness. CLA supports Australia likewise having a dialogue on this issue...and ultimately enacting similar provisions.

Conclusion

CLA appreciates the opportunity to comment on the Bill. CLA supports this Bill in its current form, as it is a significant step forward in providing for democratic accountability for the decision to send Australian troops overseas.

However, if Parliament is not minded to accept the Bill, CLA strongly urges the Australian Government to instigate a national discussion, akin to the one currently occurring in the United Kingdom, on the way in which the decision to deploy troops overseas – and within Australia – is made in the 21st Century, more than 100 years after the basis of the Australian Act governing the issue was passed.

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