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#### A WELCOME INITIATIVE

At the time when then Prime Minister Howard committed Australia to join the coalition of the willing in the invasion of Iraq, it was a considerable shock to many Australians, whether they supported the war or not, to discover that no kind of Parliamentary approval was necessary before taking such a momentous step. This was indeed a step which Mr Howard himself acknowledged as one "that goes to the very heart of national leadership".

It is good to see that the Senate is once again reviewing this situation but somewhat sad to see how little publicity the inquiry has gained and, consequently, how few submissions.

Realistically, since neither of the major parties currently supports the idea of transferring power over the deployment of troops overseas from the executive to Parliament, rapid movement in this area is unlikely. Nevertheless, it is important to fully canvas the views on both sides so that members of Parliament and the public can have a full appreciation of the issues involved and the merits of the arguments on both sides. As with many reforms, time is often needed to allow an idea that at first appears to constitute a radical novelty to become familiar and then self-evidently necessary.

#### INFORMING THE PUBLIC

As a basic rule, it would appear to be reasonable to avoid committing Australian troops to fight in countries which most Australians cannot even find on the map. If, however, there are good and sufficient reasons why Australian lives should be put at risk in such areas, the government of the day should at a minimum be required to explain the necessity to Parliament and obtain the approval of the House of Representatives. Although the Bill currently under discussion requires a current resolution (renewable every two months) agreed to by each House of the Parliament authorising defence force service overseas, this may well be too complex. If the Senate also has to approve overseas deployments this raises more intricate questions and it might be preferable to start with a simple requirement for the approval of the lower house at the beginning of the deployment and for a defined period of time. Certainly six months would appear to be more practicable. I am not aware of any country that imposes such a two monthly limitation.

#### THE POSITION ACROSS THE OECD

Wolfgang Wagner has reviewed the situation across the OECD countries (in *Parliamentary Control of Military Missions: Accounting for Pluralism*, Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2006). He showed that across the OECD there are 11 countries, namely Australia, Belgium, Canada, France, Greece, Hungary, New Zealand, Poland, Portugal, the United Kingdom and the United States where parliament has a low level of control over overseas troop deployments. Then there are 7 countries, namely Austria, Czech Republic, Italy, Japan, Luxembourg, Netherlands and Norway with a medium level of control. Finally there are 8 countries with a high

level of Parliamentary control: Denmark, Finland, Germany, Ireland, Slovakia, Spain, Sweden and Switzerland.

One of his arguments is that countries which had extensive colonial possessions and fought many colonial wars do not have Parliamentary control over overseas military adventures. He could equally well have noted that countries which were formerly colonies themselves ( such as Australia, Canada and New Zealand) do not have such controls, reflecting a history in which they were expected to go to war whenever and wherever the imperial power directed them to.

#### THE DEMOCRATIC PEACE THEORY

The democratic peace theory hypothesises that liberal democracies never or rarely go to war against each other. In general the facts are strongly supportive of this theory, but what is not really clear is why it should hold true. It is often said that the general public in true democracies will not support war against fellow democrats, but there has been remarkably little discussion of just how it is that liberal democracies actually arrive at the decision to go to war and of how far such vital decisions are actually made in a democratic way. Because of our general reluctance to send our fellow citizens: the children and siblings of our friends, off to be killed however good the cause, it might be anticipated that the more democratic the control of overseas troop deployments to fight in foreign wars, the less common the occurrence of such missions.

#### WAR POWERS AND THE WESTMINSTER SYSTEM

The current power of the Australian prime minister to commit troops to war stems from the prerogative powers of English medieval kings, hardly the best of precedents. Those who oppose Parliamentary control tend to argue that such an innovation does not fit well within the Westminster system of democracy. This is a dated view and ignores recent developments in Canada and the United Kingdom.

Although there was no legal requirement to do so, the Canadian Parliament actually voted on the commitment of Canadian troops to the Gulf War in 1991 ( 217 for, 47 against). Advice on current deployments in Afghanistan by Canadian troops is provided by an independent panel. The then British Prime Minister Tony Blair asked Parliament's approval to commit troops in Afghanistan in 2002 and in Iraq in 2003 even though he was reluctant to establish a precedent in this area. The current British Prime Minister Gordon Brown has long favoured a shift of the power to wage war from the executive to the Parliament . In January 2006 he stated that "a case now exists for a further restriction of executive power and a detailed consideration of the role of parliament in the declaration of peace and war". The House of Lords Constitution Committee published their report Waging War: Parliament's Role and Responsibility in July 2006. This set out three options: legislation to create statutory constraints on the prerogative powers of the executive to declare war; a Joint Parliamentary Committee to oversee the armed forces or a new convention determining the role Parliament should play in making decisions to deploy forces outside the United Kingdom. The Lords' Committee recommended that in seeking Parliamentary approval the Government should indicate the objectives of the deployment, its legal basis, its size and likely duration. In emergencies there would also be provision for a retrospective Parliamentary vote on deployment. In his first Parliamentary speech as Prime Minister, Mr Brown proposed a wide range of constitutional reforms including giving Members of Parliament power to decide whether to wage war. In March 2008 the British Justice Secretary Jack Straw presented a draft

constitutional reform bill which "would require the prime minister of the day to seek the approval of this House before deciding to commit forces into armed conflicts abroad". Clearly, the United Kingdom is well advanced in the consideration of these issues and it might well be helpful to have information on the British debates more readily available to both Parliament and people in Australia. [NB: In both the United Kingdom and the United States, school children are expected to be able to debate the merits of executive/parliamentary control over overseas deployment of the armed forces]. Overall the British position appears to be that the political context is changing from one where the government refers deployment questions to Parliament out of expediency to one where it does so on grounds of propriety (Chatham House International Law Discussion, 14 February 2007).

Even in cases where it is clear that there is a considerable consensus in favour of going to war, there are powerful arguments for holding a Parliamentary debate and a vote both to inform the citizens of the justifications for and objectives of the war and to explore the risks ahead. Parents whose children are killed fighting for their country have a right to know why, and it is good that this justification be clearly spelt out in advance. Once there have been significant casualties, indeed as soon as our troops are committed overseas, it is very difficult for those who oppose their use in a particular situation to make their voices heard above the cries of disloyalty to our brave fighters. Yet, it is not the courage of our troops that is in question, but the wisdom of their political masters. At least Australia is fortunate in that, unlike the situation in the United States of America, our armed forces are not disproportionately drawn from the poorest and most disadvantaged sections of society who are required to accept mortal risks unthinkable to most middle class Americans.

#### THE MORALE OF THE ARMED FORCES

Arguments about the impact of parliamentary control on the morale of our armed forces can work in both directions. Troops should never have to feel that they are fighting the current prime minister's war to support his/her political campaigns or desire for an open invitation to the White House. On the other hand, debate in Parliament will make it clear that support for the deployment is not universal and thus potentially diminish morale, although the media are likely to have already revealed any divisions amongst politicians, the public and even the military leaders themselves. On balance, it would appear that well-informed debate should help morale by providing the best possible rational for overseas troop commitment.

#### SECRECY AND SUDDEN CHANGES OF SITUATION

Modern countries no longer declare war on each other. Britain last declared war in 1942 on Siam for allying with Japan. Opponents of parliamentary control often stress the importance of issues of secrecy and surprise in military matters. It is morally questionable that Australia should ever engage in a war for reasons which cannot be made public. Arguments relating to secrecy often confuse the broad questions of whether Australia should participate in a particular overseas theatre of war with the narrower questions, which may require secrecy, of exactly how Australia participates. A more cogent series of questions relate to situations where, for example, Australian troops are originally committed to a peace keeping exercise which rapidly transforms from a hostile peace to outright warfare. Clearly any requirement for parliamentary control needs to

have a provision for retrospective consideration of such emergencies. There are also potential questions of mission creep where there can be support for an original deployment which fades away as the mission drags on and the death toll rises. This is why the government should be required to set out the objectives and the likely duration of the mission at the start and to resubmit the issue to Parliament if the boundaries of the proposed scope and or duration are likely to be significantly exceeded.

#### MULTILATERALISM AND COALITIONS

One issue which is sometimes raised by the opponents of Parliamentary control is that the line between going to war and the original commitment to other forms of military engagement is much less clear than it used to be. Whether one supports Parliamentary control or not, this is certainly an issue which needs to be carefully considered especially since in our region Australia relies on exchanging our support in the present for the expectation of the support of others in the future should it be required. But this can be an argument which cuts both ways. Let us imagine, if we can, a scenario where our American allies wish us to join them in a coalition which the government of the day does not perceive as being in Australia's best interests, nor a battlefield on which we would consider Australian deaths to be justifiable. In such a case, a requirement for a Parliamentary mandate could be a very valuable shield helping us to preserve alliances whilst protecting our own interests.

Australia now usually (invariably ?) commits troops alongside the troops of allies in groups such as coalitions of the willing or missions mandated by the United Nations. Just this week, the United Kingdom Government has declared its willingness to commit 500 more troops to work/fight in Afghanistan, conditional on the engagement of more troops from the coalition partners engaged in that country. Those coalition partners will face different constraints in deciding on further commitments depending on whether they are low, medium or high Parliamentary control countries. It was Clemenceau who said that war is too important to leave to the generals, today we have to decide how far the declaration of war is too important to leave to the Prime Minister of the day. In Britain the view is now that "it is important that key decisions that affect the whole country - such as the decision to send troops into armed conflict - are made in the right way and with Parliament's consent ....In a modern 21st century parliamentary democracy, the Government considers that basing these powers on the (royal) prerogative is out of date"(The Governance of Britain, July 2007, CM 7170).

As a general rule, it might be expected that the requirement for Parliamentary support will result in Australia being engaged in fewer overseas military battles rather than more. It is very difficult to envisage a situation in which Parliament actively supports sending troops where the government of the day is opposed to such an adventure. Conversely, if the government, which, by definition, has a parliamentary majority has good reason to send Australian troops to be engaged overseas it should be able to convince the Parliament of the merits of its case.

This does, however, as noted above, raise the question of the role of the Senate, where the government of the day may not, as at present, hold a clear majority.

#### CONCLUSION

Whilst every death is a deep tragedy, Australia has to date been extraordinarily fortunate in the low level of casualties sustained in our recent and current military engagements

overseas. But at some point, the combination of our skills and good luck is going to fail. When that happens, the nation and the relatives and friends of those who die will have a right to know that their sacrifice was not in vain and that they died in a good cause. We should know that they died in a good cause and not because we had agreed to support our allies whatever their cause. Currently President Obama is wrestling with the question of whether he and the Congress should commit additional troops to Afghanistan. No one would suggest that this is an easy or simple question to answer either for America or for America's allies who are also being asked to expand their contributions. As opposed to the situation during World War 2, Western governments today are not faced with existential threats but rather with complex policy choices. But still our troops and our citizens alike have the right to require that the decision to send our people out to face the daily threat of being killed is made following the best informed debate which we can possibly have, and that means a debate in which Parliamentarians, as the citizens' representatives, have their say.

"Unchecked executive power in the security sphere does not lead to good decisions, but if legislatures want to be able to contribute usefully, they may need to develop the culture and the institutions to be able to do so" (Chatham House International Law Discussion Group 14 February 2007).