

Abstract

The decision to go to war is arguably the most important decision any government can make. Yet it is the least regulated of any government decision. We have all observed the many hours of parliamentary debate and back room negotiation on controversial legislation. Yet the Prime Minister alone can decide to send Australian service personnel into international armed conflicts. How can this be? Is this consistent with our democracy? How do similar countries deal with the decision to go to the war? What are the alternatives? These are some of the issues to be explored.

How many members of this Committee have stood at the front of Parliament House and looked across at the War Memorial? Or stood on the steps of the War Memorial and looked across at Parliament House? Did Committee members ever contemplate the relationship between the two, between the role of the Parliament and the decision to go to war? How did Australia decide to go to war in Vietnam, in Afghanistan, in Iraq, in Syria?

What has been the cost, the financial cost and the human cost? Looking across from the War Memorial, one can see the public entrance to the Australian Parliament. One can enter the front of the Parliament building, one can visit the House of Representatives Chamber and the Senate Chamber, one can watch the parliamentarians as they debate legislation. But the executive entrance is hidden at the rear of the building. It is fenced off. It has its own separate security entrance. So it

is with decisions to go to war, these decisions are deeply hidden in the interstices of the executive, fenced off from public scrutiny.

My submission is a call for change. A call for regulation. Not regulation of citizens. Regulation of the executive. Regulation of the most important decision any government can make, the decision to go to war, a decision inevitably involving life and death, the lives and deaths of members of the Australian Defence Forces, the lives and deaths of those against whom we wage war, enormous destruction of property and enormous expenditure of public moneys. Yet this momentous decision, the commitment of the nation to war, is perhaps the least regulated of any government decision.

Australia has a written constitution. Detailed provisions in our Constitution authorise the Parliament to make laws on everything from taxation to lighthouses to pensions. The Parliament passes hundreds of pieces of legislation every year. Yet neither the Constitution nor legislation regulate exercise of the power to go to war. Simply put, the decision is part of the executive power, conferred by s 61, a power derived from the royal prerogative.¹ How can this be? How do other nations handle such

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s 68 of the Constitution vests command in chief of the naval and military forces of the Commonwealth in the Governor-General. This provision confers no more than titular command. The role is to be exercised in a constitutional manner, that is, with ministerial advice (see Sir Ninian Stephen, 'The Governor-General as Commander in Chief' (1984) 14 Melbourne University Law Review, 563, 569-571. Sir Ninian explained that the provision subordinates the armed forces to the civil power (571). So far as can be ascertained from publicly available documents, the Governor-General is not involved in decisions to go to war.

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decisions? What should be done? These are some of the questions I will address. They are questions fundamental to the functioning of our democracy.

What sparked my interest? Many factors. Obviously a major factor was the disastrous 2003 invasion of Iraq, a decision now widely seen as a monumental mistake with appalling consequences for the Middle East. And serious consequences for us as terrorists strike back. In the UK the processes leading up to the decision to join that war have been the subject of meticulous inquiry. The processes for going to war have been changed. In contrast, in Australia, while there has been an exhaustive inquiry into the intelligence failures, there has been little serious investigation of the processes leading up to Australia's decision to join in that war, or, indeed, the processes leading up to deployment of Australian forces in Vietnam, Afghanistan, and now Syria. Many see those decisions as being based on little more than the whim of a Prime Minister and a Prime Minister's subservience to foreign, in this case American, influence rather than full consideration of Australian interests. Recent Australian decisions to go to war have followed decisions of close allies. This has not always been the case.

A brief survey of some Australian decisions to go to war

First World War

In the case of the First World War, Australia's commitment of an expeditionary force and of the recently established Royal Australian Navy was made before Britain had even decided to go to war! Australia was of course in the midst of a double dissolution election campaign and in the grip of war fever. Australia's decision was driven not by the Prime Minister or by the Cabinet but by the British appointed Governor-General, Ronald Munro-Ferguson. He had cabled Prime Minister Cook on Friday 31 July 1914 suggesting a Cabinet meeting to advise Britain 'what support to expect from Australia'². Cook called an emergency Cabinet meeting on 3 August 1914. Only four³ of the ten member Cabinet attended. Curiously, Charles Bean, official war historian, characterises the Australian decision as 'democratic'.⁴ The channel of communication to London at that time was through the British appointed Governor-General to the Colonial Office . Governor-General Munro-Ferguson's cable to London, committing an expeditionary force and the navy, was sent that afternoon. At that time the British Cabinet was still seriously divided between neutralists and interventionists. As recently as 26 July 1914 Colonial Secretary Lewis Harcourt had told Prime Minister Asquith that 'under no circumstances would he support British intervention in a European war that might arise from the Austro-Hungarian

² Munro Ferguson to Cook, 31 July 1914, handwritten copy, in file entitled 'War 1914: Notifications (Outbreak), ' A11803, 1914/89/1, Part 1, National Archives of Australia.

³ Cook, Millen, Irvine and McColl. See 'Meeting of Cabinet', *Argus*, 5 August 2015

⁴ Charles Bean, *Official History of Australia in the War of 1914-1918, Volume 1, 11th ed.*, 15-17; see also Ernest Scott, *The Official History of Australia in the War of 1914-1918, Volume 11*, 13.

ultimatum to Serbia'.⁵ Somewhat ironically, the Australian cable went to the very same Colonial Secretary, Lewis Harcourt, the leader of the 'radical' faction in the British Cabinet seeking to keep Britain out of the war.⁶ It was not until 40 hours after the Australian cable that the British Government announced its declaration of war. The Labor Opposition leader Fisher had famously declared, at an election meeting on 31 July 1914, that 'Australians will stand behind our own to help and defend her to our last man and our last shilling'.⁷

On 5 August 1914 when Cook relayed to Fisher the text of the Colonial Office cable to the Governor-General that war had broken out with Germany, Fisher replied '...again assure your government [that the] opposition will support you on all measures taken in support of [the] Mother Country and in protecting Australian interests'.⁸

In summary, the 'decision' was driven by the (British appointed) Governor-General, was formally taken by the executive, the Opposition was not consulted but offered full support and there was no parliamentary debate. The Governor-General of

⁵ Harcourt, Cabinet Journal, 26 July 1914, Harcourt Papers, cited by Douglas Newton, *At the Birth of Anzac: Labor, Andrew Fisher and Australia's Offer of an expeditionary Force to Britain in 1914*, in Bongiorno, Frances and Scales (eds), *Labour and the Great War (1914)*, 23

⁶ Douglas Newton, *At the Birth of Anzac: Labor, Andrew Fisher and Australia's Offer of an Expeditionary Force to Britain in 1914*, in Bongiorno, Frances and Scales (eds), *Labour and the Great War (2014)*, 22.

⁷ 'Australia's Patriotism'. *Argus*, 1 August 1914, 'Crisis of our Fate', *Argus*, 2 August 1914, and 'Federation Elections', *Colac Herald*, 3 August 1914.

⁸ 'Will support the Prime Minister', *Daily Telegraph*, 6 August 1914 and 'Parties in Unison: Opposition Supports Ministry', *Argus*, 6 August 1914.

Australia at that time was also the representative of the British government. It was not until an Australian, Sir Isaac Isaacs, was appointed Governor-General that Britain appointed a British Representative in Australia⁹ and the first British High Commissioner was not appointed till 1936¹⁰. Some may see close parallels with United States influence on later decisions to go to war.

The Second World War

On Sunday 3 September 1939, Australians tuned in to their radios to hear Prime

Minister Robert Menzies make a fateful announcement. "Fellow Australians," said Menzies,

"It is my melancholy duty to inform you officially, that in consequence of persistence by Germany in her invasion of Poland, Great Britain has declared war upon her and that, as a result, Australia is also at war."

Was that view inevitable? Would it have been open to Australia independently to declare war (or indeed to declare neutrality?) That appears to have been the view taken by New Zealand which acted in its own right by formally declaring war on Germany on 3 September. Menzies seemed to have acted on a more conservative view, that at the time of federation the power, or prerogative, to go to war remained with the British crown as the head of the Empire. On this

⁹ 1931, Ernest Crutchley.

¹⁰ Geoffrey Whiskard. Crutchley and Whiskard lived at Old Canberra House.

view, the King's declaration of war applied to all the Dominions. Any residual doubts concerning the scope of the s 61 executive power and the role of the Australian Governor-General were surely resolved in 1941 and 1942 with the passage of the *Statute of Westminster Adoption Act 1942* and the assignment, by King George VI, acting on the advice of Prime Minister Curtin, to the Governor-General of the power to declare war against a number of Axis countries.¹¹ So far as I have been able to ascertain, there have not been any subsequent declarations of war by the Governor-General.

One might reasonably have expected that future decisions to go to war would be made by the Governor-General in the exercise of the s 61 executive power.

So what happened?

The Korean War

In the House of Representatives Prime Minister Menzies delivered a statement in the House of representatives and moved that the House approves of the action taken by the Government in placing at the disposal of the United Nations the forces indicated in the statement of the Prime Minister'.¹² In the Senate, the leader of the Opposition, William Ashley, stressed 'that any future Australian

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Attorney-General Evatt explained that the assignments avoided any legal doubt, House of Representatives, Debates, 16 December 1941, vol 169, pp1080-1089. There can be no doubt that s 61 now enables the Governor-General to exercise all the common law prerogative powers (*Cadia Holdings Pty Ltd v NSW* (2010) 242 CLR 195, 226.

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House of Representatives, Debates, 6 July 1950, pp. 4838-4839.

commitments should have the approval of Parliament'.¹³ The approval motions were carried in both Houses.¹⁴

Malayan Emergency

This was the first occasion that a Prime Ministerial statement on deployment of armed forces overseas led to dissent in the Parliament. In response to Prime Minister Menzies statement on 20 April 1955, the Leader of the Opposition, Dr Evatt, opposed the use of armed forces¹⁵ and the Opposition moved that 'this House rejects the government's proposals to dispatch Australian armed forces to Malaya as set out in the paper read by the Prime Minister'.¹⁶

Vietnam War

On 24 May 1962, the Minister for Defence issued a press release announcing that Australia was sending a group of military instructors to that country. Parliament had been adjourned for the winter recess.

Much later, on 29 April 1965, Prime Minister Menzies delivered a ministerial statement announcing a decision to provide an infantry battalion to Vietnam.¹⁷

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Senate Debates, 6 July 1950, p.4834.

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House of Representatives, Debates, 6 July 1950, p. 4860, Senate, Debates, 6 July 1950, 4833.

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House of Representatives, Debates, 27 April 1955, p. 200.

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House of Representatives, Debates, 4 May 1955, p.403.

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House of Representatives, debates, 29 April 1965, p.1060.

The Leader of the Opposition, Arthur Calwell, said in response ‘we oppose the Government’s decision...We oppose it firmly and completely.’¹⁸ Both Houses approved the Government’s motions.¹⁹

Gulf war

Prime Minister Hawke delivered ministerial statements on 21 August 1990 and 4 December 1990, the second statement supporting the UN Security Council resolution requesting that member states provide support.²⁰ The Leader of the Opposition, John Hewson, was critical of the Government for failing to consult with the Opposition prior to its original decision to deploy Australian forces to the Gulf.²¹ Both Houses approved the Government’s motions.²² A further Prime Ministerial statement was made on 21 January 1991²³ and resolutions supporting the Australian forces in the Gulf were carried.²⁴

Afghanistan War

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House of Representatives Debates, 4 May 1965, p.1102

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House of Representatives, Debates, 6 May 1965, p.1288, Senate, Debates, 25 May 1965, p. 1211.

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House of Representatives, Debates, 21 August 1990, p. 1118, House of Representatives, Debates, 4 December 1990, p. 4319.

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House of Representatives, Debates, 4 December 1990, p. 4325.

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House of Representatives, Debates, 5 December 1990, p.4432, Senate, Debates, 4 December 1990, p. 4936.

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House of Representatives, Debates, 21 January 1991, p. 2.

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House of Representatives, Debates, 22 January 1991, p. 266, Senate, Debates, 22 January 1991, p. 267.

I have not been able to find any statements in the parliament announcing the deployment of Australian forces. On 4 October 2001 Prime Minister John Howard announced Australia's commitment at a press conference.

The 2003 Iraq war

On 10 January 2003, Prime Minister John Howard foreshadowed at a press conference 'some forward deployment' of the ADF to the Persian Gulf. On 22 January 2003, Defence Minister Robert Hill announced the decision to deploy HMAS *Kanimbla*, a Special Forces Task group and a RAAF reconnaissance team. On 4 February 2003 Prime Minister John Howard delivered a ministerial statement that the world must deal decisively with Iraq.²⁵ A further statement, on 18 March 2003, was followed by a motion endorsing the Government's decision to commit ADF elements to the international coalition of military forces.²⁶ Simon Crean, Leader of the Opposition, opposed the commitment to war and called for the troops to be returned.²⁷ The House of Representatives carried a motion supporting the Government. In sharp contrast, the Senate carried a motion opposing the decision to commit troops and called for the Australian troops to be withdrawn.²⁸

25 House of Representatives, Debates, 4 February 2003, p.10642.

26 House of Representatives, Debates, 18 March 2003, p. 12505.

27 House of Representatives, Debates, 18 March 2003, p. 12512.

28 Senate, Debates, 20 March 2003, p. 9886.

Australia entered the Iraq war as one of three members of a coalition, the US, the UK and Australia, on the basis of a false claim that Iraq had weapons of mass destruction. We now know, from a thoroughly researched study by an ‘insider’ historian, that, notwithstanding other pretexts, the Prime Minister’s motive was to strengthen the alliance with the United States.²⁹ The decision was not taken by Cabinet. It was not authorized by the Governor-General. Indeed, Governor-General Peter Hollingworth was not even consulted. I understand, from a well placed source, that the Governor-General was concerned. I understand also, from sources that I believe to be absolutely reliable, that when the archives are eventually thrown open to academic researchers eagerly searching for cabinet papers, policy papers and departmental analysis of the merits of going to war, the objectives and outcomes, little or nothing will be found. This for one of the most disastrous decisions in Australian history.

There is one curious exception. Formal legal advice was prepared. Unlike the UK’s legal advice, the Australian legal advice was given at departmental level. It is not known why the advice was not given by the Attorney-General, or by the Solicitor-General, or by the Chief General Counsel (the Commonwealth’s leading international law expert). One possible inference is that none of the more senior office holders was willing to give the advice the government required. A former Solicitor-General has described the advice as ‘Alice in

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Albert Palazzo, *The Australian army and the war in Iraq 2002-2010*, 521, (recently released under FOI in redacted form). Palazzo describes Howard’s statements about enforcing UN resolutions, combatting global terrorism and contributing to the post-war reconstruction of Iraq as “mandatory rhetoric.”

Wonderland’ and ‘untenable’.³⁰ In contrast to the exhaustive and damning Chilcott inquiry in the UK, there has been no public inquiry into the process that led to Australia joining the invasion of Iraq.

Would the outcome have been different had there been a requirement for parliamentary approval or prior parliamentary debate? Perhaps not. But it was well known that many in the Australian foreign policy, intelligence and defence communities had strong reservations. One senior ONA analyst resigned over misrepresentation of the intelligence. Proper parliamentary scrutiny including inquiry by a parliamentary committee may well have elicited more information about the alleged justification for war and changed perceptions.

The conflict in Syria

Australian involvement in Syria is an example of a slide into war with a minimum of parliamentary involvement. On 14 August 2014, Prime Minister Tony Abbott issued a press release announcing ADF operations in Syria. A RAAF Hercules C130J dropped supplies to Yezidi civilians trapped on Mount Sinjar. This was clearly a humanitarian mission. What followed was unarguably different. On 3 March 2015, Prime Minister Tony Abbott announced in a media release a commitment of 300 regular troops to train Iraqi forces. By then, the ADF Air

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Quoted by Margo Kingston, Sydney Morning Herald, 21 March 2003.

task group was flying regular strike and refuelling missions in Iraq and 170 Special Forces advisors were assisting Iraqi troops. On 9 September 2015 Prime Minister Abbott in another media release announced that Australian air strikes would be extended into east Syria. This was seen as an extension of the Iraq war against ISIS. The next day, on 10 September 2015, Attorney-General George Brandis informed the Senate that the legal basis for the action was the principle of collective self-defence in Article 51 of the UN Charter. Civilian casualties arising from Coalition air strikes have been widely reported. It is of interest that these operations led to changes in Australian legislation to ensure that strikes against non state actors did not expose ADF members to prosecution for war crimes.³¹ But it seems Australia did not commit ‘boots on the ground’.³²

The legal basis for the deployment of the ADF overseas

The Australian Constitution confers on the Parliament power to legislate on a wide range of matters, ranging from taxation to postal service to marriage and divorce to lighthouses. But unlike other more modern constitutions, it says nothing about going to war. In fact the power to go to war is an unfettered

31 *Criminal Code Amendment (War Crimes) Act 2017.*

32 Chief of the Defence Force, Senate Estimates, Senate Foreign Affairs, Defence and Trade Committee, Official Committee Hansard, 21 October 2015, p. 140

executive power, part of the executive powers vested in the Queen and exercised by the Governor-General pursuant to s 61 of the Constitution.

It seems that at the time of federation the power, or prerogative, to go to war remained with the British crown as the head of the Empire. Why was this awesome power part of the royal prerogative. The answer is steeped in English history, particularly the struggles of the 17th century. The English Parliament was prepared to leave the power to declare war with the King. Any residual doubts concerning the role of the Australian Governor-General were surely resolved in 1941 and 1942 with the passage of the *Statute of Westminster Adoption Act 1942* and the assignment, by King George VI, acting on the advice of Prime Minister Curtin, to the Governor-General of the power to declare war against a number of countries.³³

A student of the Constitution might reasonably have inferred that Australian decisions to go to war would have followed that path, an exercise by the Governor-General of s 61 executive power acting on the advice of the Prime Minister or the Federal Executive Council. Alas no. It seems our Governors-General were not involved, not even consulted, in the decisions to invade Iraq, Afghanistan and Syria. Indeed, the formal legal basis for deployment seems to me to be clouded in mystery.

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Attorney-General Evatt explained that the assignments avoided any legal doubt, House of Representatives, Debates, 16 December 1941, vol 169, pp1080-1089. There can be no doubt that s 61 now enables the Governor-General to exercise all the common law prerogative powers (*Cadia Holdings Pty Ltd v NSW* (2010) 242 CLR 195, 226.

One might reasonably have expected that the decision-making chain for so important a decision would immediately be made available. Surely the process leading up to such a decision should be publicly accessible and open to public scrutiny. Surely there must be a clear and certain legal basis for the decision.

Because I was unable to find any publicly available documentation relating to the invasion of Iraq, I wrote, twice, to a former Minister for Defence requesting any publicly available documentation. I did not receive any response. I met the former Secretary for Defence, [REDACTED] (whom I knew in my former public service capacity) at a function. He assured me that Defence would provide the documentation and referred me to Defence Legal. The only response I received from [REDACTED], then head of Defence Legal, is that he was unable to provide me with legal advice—this notwithstanding my repeated explanations to [REDACTED] that I did not seek legal advice, my request was confined to publicly available documents.

Frustrated, I made a Freedom Of Information application. Again, I asked for publicly available documents. No response was ever received, not even an acknowledgment.

What inferences can one draw? Can it be that Defence is so concerned that the processes for going to war may be invalid that they are unwilling to disclose those processes. I encourage the Committee to make the same requests to Defence that I made, to make available to the Committee the formal

documentation authorizing the deployment of Australian forces to Iraq, Afghanistan and Syria.

So how were the decisions made and implemented? Curiously, there is no specific legislative provision for going to war. There is provision in the Defence Act for a declaration of a time of war but this seems directed at securing the validity of domestic war related legislation. Scattered provisions in the Defence Act are of interest. Section 50C provides that members of the Army may be required to serve 'beyond the territorial limits of Australia'. Section 50D provides that the Governor-General may publish an order in the Gazette calling out the Reserves. The power may be exercised in circumstances of warlike operations. The power can only be exercised with the advice of the Executive Council or, in urgent circumstances, the advice of the Minister. Parliamentary approval is not required (Until 2001, the legislation required Parliament to be recalled). Sections 59 and 60 make provision for conscription 'in time of war'. Conscription requires a Proclamation which must be tabled in Parliament. The Proclamation does not come into effect unless it is approved by resolution of each House of the Parliament. This is the closest we get to any requirement for parliamentary approval. But it is confined to conscription. It does not extend to deployment of the Australian Defence Forces.

So far as I have been able to establish the Government relies on s 8 of the Defence Act. Section 8 is in Part II of the Defence Act, headed 'Administration', inserted to implement the Tange Report reforms, to improve defence

administration. The section vests general control and administration of the Defence Force in the Minister for Defence. I invite the Committee to reflect on those words, ‘general control and administration of the Defence Force’, in Part II of the Act headed ‘Administration. Does anyone think those words constitute a legislative delegation to the Minister for Defence of the executive power to go to war? Alternatively, are those words directed at relatively mundane matters of internal administration. That is what Part II is about. Would much clearer and much more specific language be necessary to authorize the exercise of such a momentous power as the power to go to war? To the extent that the sole legal basis for the deployment of Australian forces is based on this provision, the validity of deployment must surely be open to doubt. One may reasonably ask whether members of the Australian Defence Force are in fact authorized under Australian law to engage in hostile operations. Perhaps it is unsurprising that the Minister and the Department were unwilling to disclose the relevant documentation to me.

An understanding of the current legal processes for authorizing entry into war is surely a threshold issue for this Committee and I encourage the Committee to ask the Department of Defence for explanation of the current procedures and to provide the Committee with relevant documentation authorising the deployment of the ADF to Afghanistan, to Iraq and to Syria..

Australian practice

The first announcement of Australian decisions to go to war are often made to the media. The Parliament is informed subsequently. Prime Minister Howard announced the decision to go to war in Iraq at a press conference on 18 March 2003. Later the same day the Prime Minister asked the House of Representatives to ‘endorse the Government’s decision to commit Australian Defence Force elements to the war in Iraq’.³⁴ Recent Australian practice has been for a ministerial statement in the Parliament followed by a motion that the paper be printed, a parliamentary procedure that provides opportunity for debate. One notable exception was Australia’s involvement in Afghanistan, announced in a press statement by Prime Minister Howard on 4 October 2001.

Significantly, the decision to go to war has always been taken before the Parliamentary statement. The statement and subsequent debate do not provide opportunity for parliamentary authorization. On a number of occasions the (Labor) opposition has expressed strong opposition.³⁵ In contrast the Coalition Leader of the Opposition supported the first Gulf war³⁶ but criticised the

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Commonwealth Parliamentary Debates, House of Representatives, 18 March 2003, 1205.

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Eg Opposition leader Herbert V Evatt opposed use of armed forces in Malaya ((20 April 1955), Opposition leader Arthur Calwell opposed confrontation with Indonesia (23 March 1965), Opposition leader Arthur Calwell opposed the decision to send troops to Vietnam (4 May 1965), Opposition leader Simon Crean opposed the decision to commit forces to the second Iraq war (2003) and the Senate adopted a motion calling for Australian troops to be withdrawn (20 March 2003).

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John Hewson, House of Representatives, Debates, 21 January 1991.

Government for its failure to consult the Opposition prior to its decision to deploy forces to the Gulf.³⁷

UK developments

The UK, like Australia, is a parliamentary democracy. The power to go to war was traditionally part of the ‘royal prerogative’. Remember there was a time (many centuries ago) when the monarch exercised almost absolute monarchy. Over the past 15 or so years there have been unsuccessful proposals for radical reform but at least a convention developed that the Prime Minister would seek parliamentary approval. In 2003, Prime Minister Tony Blair sought parliamentary approval for Britain’s entry into the Iraq war. Prime Minister Gordon Brown was unsuccessful in achieving support for legislation requiring parliamentary approval. In 2011 a parliamentary committee proposed legislation requiring parliamentary approval but no legislation has been enacted. In 2013 Prime Minister David Cameron accepted the defeat in the House of Commons of his proposal for military action in Syria, widely seen as acceptance of parliamentary sovereignty. The proposal was subsequently approved in 2016. In summary, it was for a time accepted that, as a matter of convention, parliamentary approval is required although the scope of the convention may lack clarity.

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John Hewson, House of Representatives, Debates, 4 December 1990.

The United States

The US Constitution provides that the Congress shall have the power to declare war.³⁸ There has not, however, been any formal declaration of war since World War II. Resolutions passed by Congress³⁹ appear to give the President legal authority to deploy troops (although there may be a question whether what amounts to delegation of the war power to the President is valid)

Ireland

The Irish situation is interesting because the Irish constitution specifically provides that war shall not be declared and Ireland shall not participate in any war save with the consent of the *Dail Eireann*.⁴⁰ A challenge to a decision to allow US aircraft to use an Irish airport en route to Iraq failed because the Dail had actually approved the arrangement. The Court emphasised that the essential purpose of the constitutional provision was to ensure democratic control of executive action.⁴¹

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Article 1,s 8 cl 11

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War Powers Resolution of 1973 and a 2002 resolution in relation to Iraq.

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Article 28.3.1

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[2003] 2 Irish Law Reports Monthly (HC) 357, 398-400.

Many European constitutions require parliamentary approval of decisions to go to war.⁴²

Validity

This is not the occasion for an exhaustive analysis of the validity of past Australian decisions. The formal steps authorising deployments seem uncertain. My letters to the Minister for Defence and the Secretary to the Defence Department seeking any publicly available information have not been answered. So far as I have been able to ascertain, the Governor-General has not been involved. I simply observe that authorisation by the Governor-General (in Council) may go some way to ensuring at least proper consideration by the various organs of the executive government. If the only formal documentation relating to a decision to deploy Australian forces is a direction under s 8 of the *Defence Act*⁴³ 1903, obvious questions arise whether such decisions are ‘administrative directions’ and within the scope of s 8. Also, in light of recent decisions limiting the scope of the executive power, does the massive financial expenditure involved in overseas deployments require specific legislative

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See also the constitutions of France, Article 35, Austria, Article 38, Denmark, s 19(2), The Netherlands, Article 96(1), Spain, Article 63(3) and Sweden, Ch10.

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S 8, which enables the Minister to issue directions, is in Part 11 of the Act, headed Administration. If Part 11 is intended to deal with administrative matters, is a direction to give effect to a decision to go to war within the scope of s 8? If a s8 direction is not sufficient authority and there is no other formal instrument, what are the consequences for the validity of an operation. If Australian forces are deployed without lawful authority, what are the consequences for individual members of the forces when people are killed and property destroyed?

authorisation? These are matters for another day.⁴⁴ At this stage I simply observe that it is beyond doubt that the exercise of prerogative or s 61 executive powers are not beyond judicial scrutiny.

Proposals for Reform

I begin by observing that Parliament may legislate to regulate, limit or impose conditions of the exercise of the executive power of the Commonwealth.⁴⁵

Several Bills requiring parliamentary approval of overseas deployments of Australian forces have been introduced into the Parliament, always by minor parties.⁴⁶ None of the Bills has attracted major party support.

Arguments for public debate

Debate informs public understanding of issues. Defence and foreign policy are matters properly central to the functions of government. Compare the hours of

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Courts may be reluctant to interfere with the exercise of prerogative or executive powers relating to foreign affairs or defence (*GCHQ* [1985] AC 374, 418), but an issue relating to the lawfulness of expenditure is undoubtedly justiciable.

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Brown v West (1990) 169 CLR 195, 202; [1990] HCA7, Plaintiff M68-2015 v *Minister for Immigration and Border Protection* [2016] HCA1, 123.

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Defence Amendment Bill 1985 (Senator Mason, Australian Democrats)

Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill 2003 (Australian Democrats)

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 (Australian Democrats)

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 (No 2) (Australian Greens). The Bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee. The majority recommended that the Bill not proceed but stressed that it was not opposed to involvement of the Parliament in 'open and public debate about the deployment of Australian service personnel to warlike operations or potential hostilities'. (report, 28).

parliamentary debate on trivial issues with the almost complete absence of serious parliamentary consideration of this most fundamental decision. I began with the observation that the 2003 invasion of Iraq was a monumental disaster with catastrophic consequences for the Middle East yet the invasion was preceded by only the most limited parliamentary consideration. Similarly little parliamentary consideration was given to further involvement in Iraq and in Syria, to Australia's objectives, to the legal basis for Australian deployment or to the cost. A requirement for parliamentary approval may well trigger parliamentary processes including referral to a committee of the parliament and detailed scrutiny of the reasons for the proposed deployment, the objectives, the costs (human as well as financial), the readiness of the defence forces and the lawfulness of the proposal. The democratic process would be enhanced. Forces deployed into the field would go knowing they had the support of the parliament.

Undoubtedly issues remain to be resolved, what kinds of military activities should require parliamentary approval, should humanitarian and peacekeeping operations be excluded, should extension or escalation of operations require further approval, what provision should be made for emergencies, to what extent should parliament or committees of the parliament have access to intelligence, legal advice and advice on military capabilities.

The risk of bad decisions remains. Remember Prime Minister Tony Abbott is said to have seriously contemplated sending 3000 Australian soldiers to the MH17 crash site in Ukraine.

Arguments against

A number of arguments have been put forward against requiring parliamentary approval.

Intelligence

The case for war may be based on sensitive intelligence assessments. I am not an intelligence expert and not the best person to advise the Committee on intelligence and security matters. I would however draw to the Committee's attention that the 2003 invasion of Iraq demonstrates the danger of unquestioning reliance on intelligence reports. In relation to intelligence, appropriate procedures can be developed, for example, limited disclosure to the Leader of the Opposition and to selected shadow ministers (eg defence, foreign affairs) and to the Joint Parliamentary Committee on Intelligence and Security. I note that there is precedent for a joint meeting of the Senate and the House of Representatives 'for the purpose of discussing in secret the present (ie WWII) war, and hearing confidential reports in relation thereto'⁴⁷. In relation to any security risk arising from prior notification of deployments, provision could be

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House of Representatives , Debates, 20 February 1942, p.6, p.7

made for special circumstances, for example, authorization of deployments by the Governor-General with appropriate advice from, for example, the Minister for Defence and the Chief of the Defence Force and the Solicitor-General.

Time

It is sometimes contended that any requirement for prior parliamentary approval would be impractical because of the need to be able to deploy in an emergency. In practice most deployments for war require months of preparation. The Parliament can probably be recalled more quickly than the Defence Forces can be deployed (experience during Covid showed that the Parliament can even meet ‘virtually’ where required). Only a very small part of the ADF is ‘battle ready’ at any given time. Urgent deployments are usually undertaken to meet natural disasters or for humanitarian relief. These kinds of deployments can easily be exempted from any requirement for parliamentary approval. Special provision can also be made for authorization of deployments in real emergency situations, for example, authorization by the Governor-General (in Council, eg with the advice of the Prime Minister and the Minister for Defence) after receipt of advice from the Chief of the Defence Force that the Defence Force is ready and advice from the Solicitor-General that the proposed deployment would be lawful.

The composition of the Senate

One of the more curious arguments I have heard concerned the composition of the Senate, in particular, the influence of minority parties. Members of the Committee may be aware that at a presentation at the Australian National University, the author of a relevant Quarterly Essay said he had originally favoured a requirement for parliamentary approval but changed his mind when he considered the composition of the Senate. The Senate is an intrinsic part of our Parliament. A negative Senate vote can only come about if both the Opposition and the minor parties oppose the proposal. One can reasonably ask whether those who advance this argument, that because of the composition of the Senate parliamentary approval is impractical, also contend that it should no longer be necessary for our laws to be enacted by both Houses of the Parliament? Alternatively, if contrary to my view the Senate is seen as a serious obstacle, a requirement for parliamentary approval could be limited to approval by the House of Representatives. Another view, put seriously at the same ANU function, was that there should not be debate after Australian forces had commenced operations because the feelings of those in the forces might be hurt. Surely the decision whether to go to war or to continue military operations must be able to be discussed freely in the Parliament. Subservience to the feelings of the military is unacceptable.

Section 4 of the *Defence Act 1903* contemplates the making of a proclamation ‘of the existence of war’ but as ‘war’ is defined to mean invasions *of* Australia, the provision does not, it seems, authorize invasions *by* Australia. Proclamations were made in relation to WW1 and WW11 but not in relation to recent wars.

I conclude with observation about changes, changes in the nature of war and changes in society. Contrast the kind of society in which the Royal prerogative developed. We no longer fight pitched battles. We are no longer an absolute monarchy. In wars today we actually seek to minimise risk to our service personnel while maximising damage to the enemy. We expect the enemy to retaliate. Nowadays the other side may be more diffuse. They also will seek to inflict maximum damage at minimum cost. Retaliate is no longer a cavalry charge. Responses may include suicide bombs in places where many people congregate, a nightclub in Bali, a concert hall in Paris, or a vehicle attack in Nice or a bridge in London or buildings in Melbourne. When the royal prerogative developed, people were subjects of the king. We are no longer subjects. We are citizens. When Prime Ministers Howard, Abbott and Turnbull took us to war, we civilians at home were put at risk. Surely going to war is no longer an occasion for exercise of prerogative or executive power. Surely that is an anachronism. Citizens must have a voice. That voice is through the Parliament.

Finally, a comment to tantalise the constitutional lawyers. I used to be a constitutional lawyer. But I was a pre *Williams* constitutional lawyer. All the erudite advices I provided to Prime Ministers and Ministers on their power to spend if they had an appropriation and perhaps a relevant head of power must now be consigned to the dustbin of history. As I understand *Williams*, the core concept is that legislative authority is necessary to authorize Commonwealth expenditure. How does this apply when a Prime Minister decides to bomb Syria or to send troops to Afghanistan Does an administrative direction under s 8 of the Defence Act provide the requisite

legislative authority? Could a State Attorney-General or a disgruntled affected member of the Defence Forces challenge the deployment? Can we anticipate more exploration of the Constitution?

So what do I propose?

First, a statement in the Parliament, preferably by the Prime Minister, outlining the proposed deployment, the reasons for it, the objectives and the legal basis for the use of force. It would be for the Parliament to determine whether to refer the statement to a committee of the Parliament. That process would enable detailed scrutiny.

Parliamentary debate and parliamentary committees are integral to the democratic process.

Secondly, a legislated requirement for an affirmative vote of both Houses, or at least of the House of Representatives, approving the proposed deployment. This would surely be consistent with our modern democracy.

I conclude with words written by Malcom Fraser in his introduction to a book of essays 'How does Australia go to war? A call for accountability and change'.

Malcolm Fraser wrote

'We must never again allow the circumstances to exist in which one man has the capacity to commit Australia to war'.