

Secretary
Senate Foreign Affairs, Defence and Trade Committee
Parliament House
Canberra ACT 2600

16 October 2009

Dear Committee,

Submission to the Senate inquiry into parliamentary consent for war

Thank you for the opportunity to contribute to the inquiry into the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 introduced by Senator Scott Ludlam. It is an important initiative and deserves serious consideration by this Committee.

The decision by the Executive branch of the Australian government in 2003 to participate in the US-led invasion of Iraq made clear the need for legislation of this kind. It is hard to imagine an exercise of public power with more severe consequences, and yet it was left to a few Cabinet ministers and subject to little public scrutiny. This demonstrates a major shortcoming in our system of government.

Former US President George W. Bush has said that Australia's commitment of troops was vital in his decision to proceed with the planned invasion. It is a sobering thought that the entire war, not merely Australia's participation in it, may not have occurred had the power to commit Australian troops to overseas battle been vested in the Parliament, not the Executive.

The enactment of this bill would, in my view, be a vast improvement on the status quo. It is absurd, indeed tragic, that in a democratic society the Executive arm of government has the unfettered power to wage war. But despite my strong support for Senator Ludlam's Bill, I contend that it does not go far enough in entrenching a norm of non-aggression.

I admit that it would significantly reduce the likelihood of Australia sending troops overseas in the future by requiring Executive justification and parliamentary authorisation for the waging of war. But it should also limit the circumstances in which Australian troops may be sent into battle. Politically, this may be a far more difficult task. But it is not without precedent internationally, as I shall show.

I make the following suggestions and observations in relation to the Bill:

1. Executive justification for waging war:

Section 56C(6) of the Bill is an important inclusion because it ensures a degree of transparency in committing Australian troops to overseas military conflicts by providing parliamentarians with a basis for casting an informed vote on the matter. Similarly, Sub-section 10 is important because it ensures a degree of transparency in the waging of the war.

However, the Bill does not make clear what would be the consequences if the information rendered in accordance with Sub-section 6 proved to be grossly inaccurate due to poor analysis of the way the war might unfold.

It is hard to imagine, for example, that in 2003 the Executive arm of government would have provided anything close to an accurate estimate of how long Australia's participation in the conflict might last. It is likely that any official estimate provided to the Parliament would have been much shorter than five years.

Specifically, what would be the consequences if:

- (a) The reasons for the deployment change during the conflict (as occurred in Iraq);
- (b) The geographical range of the deployment is extended considerably;
- (c) The deployment is prolonged considerably; or
- (d) The number of troops grossly exceeds the number expected.

Would the military operation, in such circumstances, be illegal under Australian law by virtue of a lack of parliamentary consent, and if so what should be the consequences? The case for legal sanctions against members of the Executive would be particularly strong if the information rendered in accordance with Sub-section 6 were found to be deliberately misleading.

Furthermore, I believe that Sub-section 6 should require the Executive to provide information additional to that set out in (a) through to (f), for example, estimates of:

- (a) The likely number of Australian troops to be killed and seriously injured in the conflict;
- (b) The likely number of citizens of the invaded country to be killed or seriously injured as a result of Australia's participation in the conflict; and
- (c) The likely consequences to the country's natural environment, including from unexploded ordnance, as a result of Australia's participation in the conflict.

Admittedly, these may be difficult estimates to make. But they are absolutely necessary if Australia's parliamentarians are to make an informed decision about whether to support the involvement of Australian troops in overseas military action.

2. Resolutions by both Houses, as opposed to a joint sitting:

Professor George Williams in his submission to this inquiry recommends that the Bill be amended such that parliamentary authorisation to commit troops to overseas battle would be determined by a joint sitting of the Houses of Parliament rather than resolutions of each House. He does so on the basis that the Government should have the ultimate say as to whether or not troops are committed. I object to this position for two reasons:

- (a) It would not alter the status quo in any meaningful way. The power to wage war would effectively remain in the hands of a few individuals, namely, the Cabinet ministers. The party discipline of the major Australian political parties would all but guarantee that the government of the day would be able to secure the necessary authorisation. The only benefit — and not an insignificant one, I admit — would be that the decision-making process would be open to greater scrutiny.
- (b) My second and related objection is that it would undermine the authority of the Senate as a House representing the interests of the states and, perhaps more important, representing the views of Australians who do not support either of the major political parties. There is no compelling reason for making it easier for the government of the day to pass a Bill to go to war than to pass any other Bill. If anything, it should be procedurally more difficult.

3. A prohibition on the use of aggressive force:

As noted, the Bill seeks to transfer the power to wage war from the Executive arm of government to the Legislative arm. This is a worthy cause, as it would democratise an important decision-making

process. However, I contend that the Bill should also limit the circumstances in which Australian troops may be committed to battle.

In particular, I believe that the Bill should prevent the legislature from authorising the use of aggressive force, whether or not such force has been approved by the UN Security Council according to the principle of collective security. This is based on my view that aggressive force can never be justified, as it only ever aggravates the problems it seeks to alleviate. Australia should work to resolve disputes and promote respect for human rights through peaceful means only.

In my view, a legislative prohibition on the use of aggressive force would not be perfect, as the Parliament would be free to repeal the prohibition at any stage. However, it would at least provide an additional barrier against the use of aggressive force and contribute to a norm of non-aggression in this country. I consider a constitutionally entrenched prohibition to be preferable, though certainly less likely to be put in place. Such prohibitions, it is worth noting, exist in Japan and Costa Rica.

Prohibiting aggressive force might seem like an unrealistic option, but some nations have refrained from engaging in war for very long periods. Sweden, for example, has not gone to battle in over 170 years and Switzerland in almost 200 years. Iceland has been at peace for more than 700 years, and Costa Rica has had no military since the end of World War II. It attributes its economic prosperity, relative to other Central American countries, to this fact.

Australia's aggressive ways need not continue, and they must not. It is time for us to reject the notion that war is somehow a normal state of affairs, a prerogative 'right' of states, an acceptable and occasionally necessary course of action. As individual citizens, we do not have the power to kill or maim other human beings, and nor do we seek that power. Why should the Government, whether or not with the authority of Parliament, have the right to kill and maim in our name? I for one do not consent. I hope you also see the sense in prohibiting the use of aggressive force.

Yours sincerely,

Tim Wright