



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

BILLS

**Defence Amendment (Parliamentary Approval
of Overseas Service) Bill 2010 [No. 2]**

Second Reading

SPEECH

Thursday, 7 July 2011

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner
Speaker Faulkner, Sen John

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Senator FAULKNER (New South Wales) (16:33): I have often argued that, of all the responsibilities of a national government, nothing is more important than the defence of the nation, its people and their interests. I also made the point to the Kokoda Foundation last year—or perhaps it was in late 2009—that force of arms alone cannot discharge that responsibility. In the modern world, we must confront and confound a far more varied range of threats and balance a far more complex range of priorities than purely military ones. The security of any nation and the safety of its citizens must depend on intelligence and diplomacy, on military power and moral suasion, on international cooperation and multinational coalitions. How the parliament and elected governments discharge this heavy responsibility is something that does warrant the closest parliamentary scrutiny and consideration.

So I welcome the debate on the critically important issue of parliamentary approval for the deployment of Australian troops overseas. And I note too that the Australian Greens—and, before them, the Australian Democrats—have over a number of years attempted to introduce legislative amendments to require such an outcome. The first of many versions of this bill was introduced by former New South Wales senator Colin Mason, from the Australian Democrats, in 1985. Senator Mason introduced the Defence Amendment Bill 1985, which sought to require parliamentary approval in most circumstances before Australian troops could be deployed overseas. The bill proceeded to the second reading stage but, without government and opposition support, it did not pass. During debates over the deployment of Australian troops to Iraq in 2003, Democrat senators Andrew Bartlett and Natasha Stott-Despoja introduced a private senator's bill, the Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill 2003. That bill proposed to repeal and substitute section 50C of the Defence Act 1903, which allowed the deployment of Australian troops overseas and required both houses of parliament to approve a declaration of war and commitment of troops overseas. That bill did not pass. Senator Andrew Bartlett reintroduced a similar bill on 13 February 2008, the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008. Again, it did not pass.

Also, for the record I note that the final report of the 2020 summit from May 2008 includes on page 347 its support for 'an undertaking to allow a vote in both houses of parliament before (except in case of emergency) committing Australia to war or to a warlike situation'. The final report states that participants voted yes on this idea. The report goes on to say:

... it seems like a good idea and there is a provision in case of an emergency. Examples from other democratic countries considered.

Senator Ludlam of the Australian Greens then introduced the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 (No. 2) to the Senate, on 17 September 2008. He said at the time:

The purpose of this bill is to ensure that, as far as is constitutionally and practically possible, Australian Defence Force personnel are not sent overseas to engage in warlike actions without the approval of both Houses of the Parliament.

On 20 August 2009 the Senate Selection of Bills Standing Committee recommended that the draft bill be referred to the Foreign Affairs Defence and Trade Legislative Committee for report by the end of 2009. The committee did then report in February 2010. It recommended that the bill not proceed. The committee said:

It is of the view that the bill leaves too many critical questions unanswered to be considered a credible piece of legislation. It believes that, while well intended, the bill may have unforeseen and unfortunate consequences that need to be identified and resolved before further consideration could be given to proposed legislation.

However, the committee did support debate in parliament on any anticipated, proposed or actual deployments to overseas warlike operations. Senator Bishop, as chair of the committee, said that the committee was mainly concerned with how the provisions of the bill would operate in practice. I think some of Senator Bishop's words are interesting. He said:

The committee has identified a number of deficiencies in the bill that need to be attended to by those who are interested in this debate if the bill is going to be brought forward this time or some time in the future for passage.

The report included a dissenting report by Senator Ludlam, who indicated that the Australian Greens were disappointed in the report's findings. But, not to be discouraged, Senator Ludlam later that year introduced the Defence Amendment (Parliamentary Approval of Overseas Service) Bill (No. 2) 2010 into the Senate. Again, the purpose of the bill is to prohibit any member of the Australian Defence Force from serving outside of Australia's territorial limits without parliamentary approval, subject to some specific exemptions.

To complete the record, most recently, on 15 November 2010, the member for Melbourne, Mr Bandt, introduced the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2010. Again, the purpose of that bill was to prohibit any member of the Australian Defence Force from serving outside of Australia's territorial limits without parliamentary approval—again, subject to specific exemptions. That bill was not progressed.

So the parliament has had a number of opportunities over the past quarter of a century to debate the issue of whether its approval should be obtained before the ADF is deployed overseas for warlike operations. The existing practice in Australia is that any decision to deploy members of the ADF beyond Australia's territorial limits is at the sole prerogative of the executive of the Commonwealth. I want to say here and now that I have supported and continue to support that power remaining a prerogative of the executive.

Under Australia's constitutional arrangements the executive power of the Commonwealth is vested in the Queen and exercisable by the Governor-General, who customarily acts on the advice of the government of the day. This power includes the decision to deploy the ADF to undertake combat operations as well as a range of activities other than war fighting, such as peacekeeping operations and disaster relief. In practice, this power is exercised by the Prime Minister and other ministers. These decisions do not require an act of the parliament or a decision of the parliament. They are an exercise of executive power under section 61 of the Australian Constitution. The current government—consistent with the views of previous governments—regards this longstanding constitutional practice as appropriate and does not support any proposal to alter these arrangements.

The February 2010 report of the Foreign Affairs, Defence and Trade Committee on the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 (No. 2) found that the bill 'leaves too many critical questions unanswered' and 'may have unforeseen and unfortunate consequences'. Although I know it is often argued that parliamentary approval is required in certain other countries, it is not a logical consequence to argue that such a position should apply in the Australian context. While it is true that the forms of parliamentary approval or parliamentary consultation are required in some other systems of government, it is very important to realise that such comparisons or analogies are, if not invalidated, then certainly complicated by the major differences in the constitutional frameworks of these countries. I stress again: any decision to deploy military forces to combat is a most onerous and serious decision for a government to make. It is a very, very heavy responsibility. It is a life and death matter.

The bill that we are debating today does raise crucial issues that go to the powers of ministers, including constraints on those powers, the role of the executive and the parliament. It also raises some very critical issues about possible consequences—I would say perhaps unintended consequences. The issue of placing constraints around a government's capacity to respond with the required urgency to an event remains a very serious concern. There has to be flexibility when time is of the essence. The risk of an operation commencing but then not receiving the approval of either house of the Commonwealth parliament—either the Senate or the House of Representatives—is a major concern to me. I never want to see Australian Defence Force personnel placed in a position of being involved in a dangerous operation and finding out subsequently that they are without legal authority or even legal protections. I am also concerned about how those defence operations that may be clandestine in nature or may be considered preparatory deployments are able to be accommodated within the provisions of this bill, particularly where the definition of 'warlike' and 'non-warlike' service can be unclear or ambiguous.

We live and operate in the real world, and any legislation in here that we enact must be able to work in real life situations and it must be able to pass the real world test. Consistently, as Senator Ludlam said in his speech, I have not supported this legislation, but I do not want my opposition to the bill to be misinterpreted. I am strongly of the view that openness and transparency in government are at the heart of the democratic contract. I believe the public record shows, or I hope it does—actions speak louder than words on this—I have been very committed the entire time I have been in this parliament to ensuring that matters, including matters concerning the involvement

of the ADF in conflicts, are open to the fullest possible public scrutiny and debate. When I was Minister for Defence I produced very regular and very detailed ministerial statements to the parliament on Afghanistan, and I very much commend that approach to ministers and to the parliament.

While the government is not required to consult parliament after deploying forces overseas, inevitably we have seen some very robust parliamentary debate ensue after such deployments. I acknowledge that the parliament is in effect asked to endorse, if you like, a decision—if it is asked to endorse it at all—taken by the executive. However, there have been times when the very robust debate, including in this chamber, has led to the opposition of the day, and at least one house of the Australian parliament, opposing Australia's involvement in a conflict, or called for parliament to be better consulted on the war. The best example of this occurred in relation to Iraq in February 2003. I commend the amendment I moved to the ministerial statement of the then Leader of the Government in the Senate, Senator Hill, about Iraq. I proposed that the government of the day—that is, the Howard government—be censured:

... for forward-deploying Australian troops to a potential theatre of war with Iraq in the absence of any United Nations authorisation and without revealing to the Australian people the commitments on which that deployment was based;

... declares its opposition to a unilateral military attack on Iraq by the United States—

and went on after a number of other elements to the motion to declare—

that it has no confidence in the Prime Minister's handling of this grave matter for the nation.

And that was agreed, as Senator Ludlam said, by the Senate.

Senator Ludlam: But we could have stopped it.

Senator FAULKNER: Yes, but that was the view of the Australian Senate. You have to be fair about this; it was not the view of the House of Representatives, as you know. It is possible, of course, for the House of Representatives on a matter such as this to pass a motion of want of confidence in a Prime Minister. It did not occur on that occasion, and it has not occurred in Australian history since Federation. But that is just a fact of life. What Senator Ludlam asks us to do—and I think it is a perfectly reasonable question—is to make clear that there is no misunderstanding on the issue of whether the decision to deploy is a military decision, and I see Senator Ludlam nodding. The decision to deploy is a civilian decision. It is a matter for the civilian government. It has been since Federation, it is now and I for one hope like hell it always will be. It must be. The issue here, Senator Ludlam, is which civilian authority. I respect your view that it should be both houses of the parliament, but you asked for clarity on this issue and you will get it from me. No question—it should be a civilian authority. In my mind, no question that it should be executive government. I, too, accept the principle that it should be parliaments and only on certain occasions executive governments. It is a very risky business for civilians to get into operational matters. It is a very risky business indeed, and I support that principle, too, absolutely. I support the current system, but I do so on very strong grounds. (*Time expired*)