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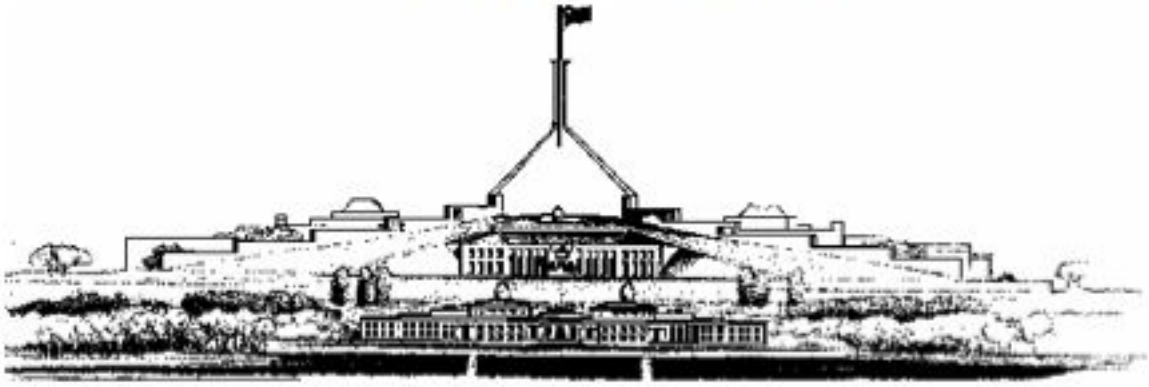

THE SENATE

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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Speaker	Feeney, Sen David	**Question No.**	

Senator FEENEY (Victoria—Parliamentary Secretary for Defence) (17:09): I am pleased to have this opportunity to speak on the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2010 [No. 2], the initial version of which the Greens introduced in 2008. This bill was the subject of an inquiry by the Senate Foreign Affairs, Defence and Trade Legislation Committee, which was chaired by my colleague Senator Bishop and reported in February last year. As the Senate knows, the committee's majority report recommended against proceeding with this bill, so it will come as no surprise when I say that the government will not be supporting it. Given that the opposition parties have today indicated that they too will also be opposing this bill, it is clear that we are now embarked upon nothing more than a ritualistic exercise.

This bill will not pass the Senate, and the Greens know why it will not. The Senate knows all the arguments for and against this bill, because this bill is the latest in a succession of similar bills stretching back to 1986 which were moved by the Greens and before them by the Australian Democrats. On each occasion that these bills have been brought before the Senate, the same arguments have been trotted out by its movers on the crossbenches and the same counterarguments have been trotted out by the government and by the opposition of the day. Senator Ludlam, in the second reading speech he incorporated into the *Hansard* in September last year, has done no more than repeat the arguments that were made by former Senators Stott Despoja, Bartlett, McLean and Mason in debates on earlier manifestations of this bill. So it is no surprise that the arguments I am going to put forward in opposition to this bill are essentially the same arguments that have been put by Labor and the coalition parties in earlier debates; nor is it a surprise they are the same arguments that were made in the majority report of the Senate Foreign Affairs, Defence and Trade Legislation Committee.

The gist of the bill and of Senator Ludlam's second reading speech is that the executive of government should not have the power to commit Australia's defence forces outside Australia without the approval of both houses of parliament. The bill does provide an exemption from this requirement in an emergency situation, when forces could be deployed via proclamation by the Governor-General, but such a proclamation would have to be retrospectively approved by both houses of parliament. The justification that its advocates have put forward for this proposal is that a decision to commit Australian forces outside Australia is too important to be left to the executive government. On the face of it, this is an attractive proposition—there are few more important decisions a nation can take than to send its armed forces into harm's way. The decision to put the lives our service men and women at risk is indeed a grave responsibility that no democratic government takes lightly. I note that previous speakers have spoken very eloquently on that point and on the responsibilities that flow from the deployment of our armed forces.

There are, however, weighty arguments to be put against this superficially attractive proposition. The most important of these are as follows. Firstly, there is the incompatibility of this proposal with the Westminster system of government, most particularly in a bicameral parliament. Secondly, there is the difficulty of expecting a legislature to make such a decision when it does not and cannot have the full range of information it would need to make such a decision. Thirdly, there is the fact that our defence forces need clear and unambiguous terms of deployment and the flexibility to respond to situations in which they find themselves.

I now address each of these points in turn. It has always been a principle of the Westminster system that the parliament legislates, but the executive governs. The executive was once the Crown; today it is the cabinet acting in the name of the Crown. The parliament decides what the law should be, but it is the executive which then puts those laws into effect. When there is a dispute about the meaning of the law, it is resolved by an independent judiciary. This is the separation of powers, and it is, of course, one of the foundations of our highly successful system of government. The Constitution gives this parliament the power to legislate in the area of defence, and the parliament has done so by creating the Australian Defence Force and the defence department to administer it. The Minister for Defence is the executive head of that department, and he recommends to cabinet how, when and where the ADF should be deployed. That is an executive decision, not a legislative one. The role of the legislature is to legislate, not to manage the implementation of the laws that it passes. Thus, the parliament creates

immigration law but it does not decide which individuals will get visas. The parliament creates social security laws but it does not determine individual pension cases. The same principle should apply in the field of defence. It is open to this parliament to pass laws which regulate the manner in which the ADF should be deployed. It is not the proper function of parliament to make executive decisions about such deployments.

This does not, of course, mean that the parliament is powerless in these important matters. Under the Westminster system, the government holds office only so long as it has the confidence of the lower house of the parliament. If the parliament wishes to overturn an executive decision, whether in defence or, indeed, anywhere else, it can do so by censuring the minister or perhaps by passing a vote of no confidence in the government.

The violation of Westminster principles that this bill represents is made worse by the fact that it stipulates that the deployment of forces outside Australia will require the support of both houses. I am sorry as a senator to have to say this, but it is a cardinal Westminster principle that the government relies on the support of the lower house of parliament. The government does not need the confidence of the Senate—although, let me say, we prefer to have it. We have a bicameral legislature in which the two chambers are frequently controlled by different parties. There have only been nine years since the 1950s in which a government has had the majority in the Senate. This bill, if passed, would make the ability of a government to make executive decisions in the field of defence dependent on the support of a house which is deliberately designed by the system of proportional representation not to have a government majority. This is unsound in constitutional theory and would be completely unworkable in practice.

I turn now to the issue of the ability of the parliament to exercise the kind of quasi-executive role which this bill would create for it. One of the advantages of a system of executive government is that it enables decisions to be made by people who are in full possession of the information which is necessary for those decisions to be made properly and which cannot, by its nature, be public. This principle operates in all fields of government, whether it is taxation, immigration or pensions. This parliament passes taxation legislation, but parliament does not, and should not, have before it the details of every individual taxpayer so that it can decide how much tax they should pay. That matter is decided by officials who have a professional obligation to preserve the confidentiality of the information they have access to. If that is true of taxation, then it is immeasurably true of defence.

This bill would create a situation in which one of two highly undesirable things would have to happen: either the parliament would have to make a decision about approving or not approving deployment outside Australia, without possessing the intelligence information upon which such a decision should be based; or, alternatively, the parliament would have to require that all such intelligence information be provided to it so it could then make an informed decision. That would, of course, run the grave risk of exposing our defence personnel in fact to increased danger, and it would also immediately end all forms of intelligence cooperation between Australia and its allies. As anybody who has worked in the defence space comprehends, that would of itself be a grave blow to Australia's security.

It has been suggested that parliament could hold sessions in camera in which confidential information could be given, as was done by the Churchill government in the United Kingdom during World War II. In fact, the purpose of those meetings was to share confidential political information, not details of operational matters. Mighty parliamentarian though he was, Winston Churchill would never have dreamed of allowing the House of Commons—let alone, I might say, the House of Lords—to usurp the role of the executive government to make operational decisions about where, when and why British forces should be deployed. I do not think there can be any doubt that any confidential information given to a closed session of the parliament might soon be leaked, negating the entire purpose of the exercise.

Let me now address the most serious problem that this bill would create. The bill says:

… members of the Defence Force may not serve beyond the territorial limits of Australia except in accordance with a resolution, which is in effect and agreed to by each House of the Parliament, authorising the service.

This bill does create various exemptions from this proscription, such as for peacekeeping and humanitarian purposes, but these do not substantially detract from the basic purpose of the bill, which is to prohibit the deployment of the ADF outside Australia for operational purposes without the authorisation of both houses of parliament. The Senate may note that the bill does not specify that parliamentary approval is needed only when the purpose of deploying forces outside Australia is to take part in a war. It applies to all deployments of the ADF, unless they meet one of the exempt categories specified in the bill.

It is regrettable, to put it mildly, that, after more than 15 years of intermittent debate of this issue in the House and in the Senate, the proponents of this bill still have not addressed the basic problem that it creates—that is, it would make the effective and flexible operation of our defence forces impossible. The bill would require specific parliamentary approval every time the Navy proposed sending a ship or a submarine outside Australia's territorial waters. It would require parliamentary approval every time the Royal Australian Air Force proposed to fly an aircraft to New Zealand, Papua New Guinea, East Timor or the Solomon Islands, or to fly a patrol over the Southern Ocean or the Tasman Sea. It would require the disclosure of each and every operational activity of the ADF outside our own territory.

The proponents of the bill will no doubt argue that these missions will usually come within one or another of the exemptions provided for in the bill. But this ignores the fact that the exact purpose of many ADF operations cannot and should not be disclosed, so it would not be possible to tell the parliament whether any given deployment would or would not come within those exemptions. The ADF should not be required to disclose this information. This bill would put the ADF in a position of having to choose between disclosing operational secrets and misleading the parliament. Of course the ADF would remain true to its duty and its situation would become impossible.

The bill provides an exemption for deployments conducted for non-warlike purposes, but this fails to address one of the basic facts of military life: it is not possible to know in advance what our forces may encounter when they are conducting operations. A mission to Somalia, for example, may be exempted from the provisions of this bill because its intention is humanitarian assistance, but what happens if such a mission were to come under attack, which is not only perfectly possible but has been witnessed in countries with no effective government? Will the ADF be required to seek resolutions of both of houses of parliament before its members can defend themselves?

This bill would be not only very harmful to the operations of our defence forces but also quite unnecessary. The fact is that Australian forces are never operationally deployed to wars or warlike situations without vigorous parliamentary debate. That was true of both world wars, of Korea, Malaya, Vietnam, the Gulf War, East Timor, the Iraq war and, of course, Afghanistan. Every one of these deployments has been debated, sometimes at great length and with great passion and even with great bitterness, in our democratic parliament, and that is exactly as it should be. The government of the day has had to justify its course of action before the parliament, and every three years it has to justify its actions before the people. Governments are also subject to relentless scrutiny in the media, and that again is as it should be.

Let me also take this moment to reflect on the fact that the Department of Defence and the ADF are organisations which are solidly committed to the principle of transparency in government. We of course have a budget process, where the structures of the various components and force elements inside the ADF are matters of public knowledge—they are not secret. We have an estimates process in which Defence can be thoroughly scrutinised by this parliament—and, of course, it is. In a whole range of ways information about Australian defence forces is publicly available.

The government and previous governments have long asserted the virtue of the fact that, through that transparency and that clarity, we provide ourselves and our neighbours with a clear sense of what the tasks of the Australian defence forces are. The white paper clearly sets out the strategic context in which this government and this country are building its ADF capabilities. This, unfortunately, does stand in contrast to other nations which continue to shroud their militaries and their strategic thinking behind veils of secrecy. But that is not something that has been a tradition in Australia. This transparency is a virtue of this government, previous governments, the ADF and the Department of Defence—and it will long continue to be so.

For all these reasons, the government remains resolutely opposed to this bill, as all governments have been since this proposal was first raised in 1985. I commend the government's position to this Senate and I trust that the Senate will once more reject this bill.