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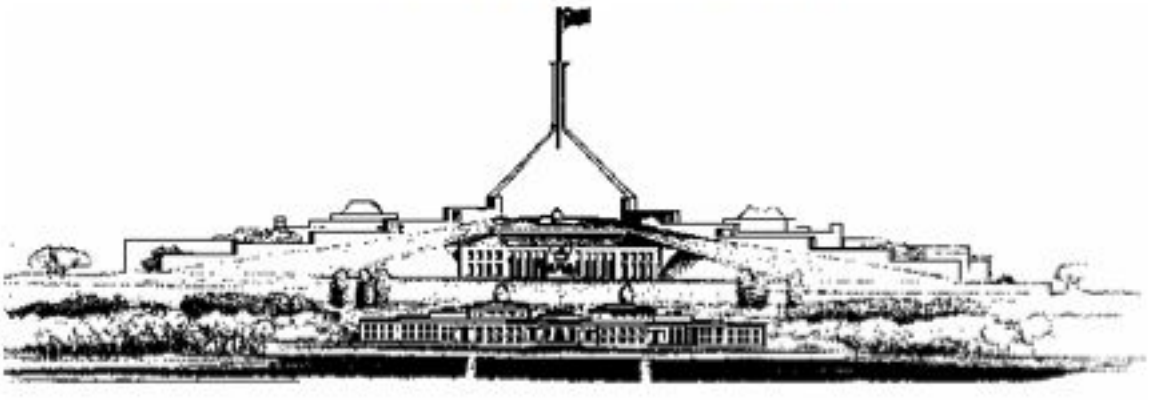

THE SENATE

PROOF

MOTIONS

Syria

SPEECH

Thursday, 10 September 2015

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner		**Responder**	
Speaker	Fawcett, Sen David	**Question No.**	

Senator FAWCETT (South Australia—Deputy Government Whip in the Senate) (16:39): I rise to address this issue in two ways. One is around the principle of whether the parliament or the executive should approve the deployment of our forces. I note that the Democrats, then the Greens, and then the Greens again—and now I think the Greens for the third time—have put bills into this place dealing with this issue. In fact, it has been the subject of a Senate inquiry in the past. The second part I will deal with is the topic of Syria itself and Australia's decision to extend our current operations from the Iraq area of operations across the border into eastern Syria.

I have spoken in this place before in response to the Green's contention that the parliament should be the one which authorises forces to serve outside the territorial limits of Australia. The bill they put up previously proposed that the ADF not be permitted to serve outside the territorial limits of Australia except in accordance with a resolution agreed to by each house of the parliament or in accordance with a number of specific circumstances. They went through a number of those circumstances, but also had some provisions for emergency situations where the Governor-General can proclaim that an emergency exists that may require ADF service.

As I said, that concept has been put forward before on a number of occasions. When the Senate Foreign Affairs, Defence and Trade Legislation Committee examined the bill by the Democrats, when Senator Faulkner was the Minister the Defence, they came up with a number of concerns as to the practicality of that occurring. I would encourage people who have an interest in this matter to read that report. It was a comprehensive report. It had issues such as, for example, the decisions that are made by the executive using classified and sensitive intelligence and the disclosure of that intelligence. They said it:

… may well compromise an operation and the safety of Australian forces or those of their allies.

They go on to say:

On the other hand, the committee contends that if such information were necessarily withheld from the Parliament, then those required under the proposed legislation to make critical decisions about the deployment of forces would not be fully informed—an equally concerning situation for the security of the nation and its forces.

These are two very simple and easy-to-understand concerns with this issue.

I say that as someone who is privileged to serve at the moment on the parliament's Joint Committee on Intelligence and Security, where we do get access to a range of information from the various security agencies. And as we come into the public inquiries and debates in this place, it is often difficult to convey a sense of why, and the importance of, certain actions without being able to speak freely about that information. That is why the parliament does put in place smaller groups which are cleared to have access to that information, so that they can make a decision—an informed decision—on the behalf of the parliament, who are the representatives of the people of Australia.

We have just seen recently that Joint Committee on Intelligence and Security fulfilling that function quite effectively with the citizenship bill so that we achieve a balance in the legislation between the national security requirement to give agencies the powers they need with the things that characterise Australia as being an open and fair society where individual liberties are respected.

We will step up a scale: it is that same principle that is employed by having the National Security Committee of cabinet. So, the executive are the ones who, under our Constitution, provide the advice to the Governor-General around the passage of legislation. But they also make executive decisions around the deployment of Australian forces. It is for the same reason that that group—the National Security Committee of cabinet—can receive detailed, informed briefings on sensitive and classified information which will give them the context and the understanding of the consequences of action and, equally, the consequences of inaction.

They also understand the costs and benefits, in terms of global outcomes, national outcomes and the expenditure of revenue associated with each of those actions, and many of those things cannot be discussed in a public space. That is why that system, which works well, was set up, and why there is no requirement in the Constitution or the defence legislation for parliamentary involvement in most acts of declaring war or deploying troops. As outlined in a Parliamentary Library paper:

… the power to make war, deploy troops and declare peace – are now part of the executive power of the Commonwealth exercised by the Governor-General on the advice of the Federal Executive Council or responsible ministers. Contemporary practice, however, is that decisions to go to war or deploy troops are matters for the Prime Minister and Cabinet and do not involve the Governor-General or the Federal Executive Council.

Since the establishment of the National Security Committee of cabinet in 1996, this body is the primary body that has access to all the classified information and briefs from departments. They then make the decision on behalf of the government. That is the Australian system.

We have heard in the discussion today and in previous debates claims that the parliaments of peer nations provide this function. Let me turn to a few of our key peers—the Canadians, for example. Under Canadian constitutional law:

The Federal Cabinet can, without parliamentary approval or consultation, commit Canadian forces to action abroad, whether in the form of a specific current operation or possible future contingencies resulting from international treaty obligations. Under the Canadian Constitution [Constitution Act, 1867, sections 15 and 19], command of the armed forces … is vested in the Queen and exercised in her name by the federal Cabinet acting under the leadership of the Prime Minister.

So Canada still has the same executive power that is exercised here in Australia. Let me turn to New Zealand:

The formal right to declare war was clearly part of the Royal Prerogative inherited from Great Britain in 1840 and it remains an acknowledged part of New Zealand law. Defence and wartime prerogatives include the right to declare war and peace, and the deployment and armament of defence forces.

The Royal Prerogative is primarily exercised by the Governor-General on the advice of elected ministers or executive by authority of the *Letters Patent Constituting the Office of the Governor-General of New Zealand 1983*.

Let us look at the UK, a case which has frequently been quoted recently:

The deployment of troops and the issuing of orders to engage in hostilities are matters of Royal Prerogative, exercisable by Ministers. The Government has liberty of action in this field, and Parliament need not give its approval.

… … …

Since 2003 there have been calls for aspects of the Royal Prerogative, including the monarch's war powers, to be codified and subject to parliamentary scrutiny.

A draft bill to modify the UK legislation is before the House of Lords, but it is far narrower than the legislation which has been presented on several occasions in this place. It applies only to decisions by the government to authorise the use of force by UK forces if that is both outside the UK and regulated by the laws of armed conflict. At this stage it is still only a draft before the House of Lords. The decision of Prime Minister Cameron to seek in-principle support from the House of Commons in 2013 was a decision he made and accepted. But he used his discretion to do that. The UK government is not bound to do that by their law.

In the United States the constitution, under article I, section 8, clause 11:

… grants to Congress the power to declare war, to raise and support armies, and to provide and maintain a navy.

While the President is made the commander-in-chief of the armed forces under article II, section 2, clause 1, the specific power to deploy US armed forces is covered by the War Powers Resolution 1973, also known as the War Powers Act. That resolution imposes on the President the following:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances …

Well, like in a lot of areas of politics, these things are not necessarily agreed. 'Every possible instance' and 'consult' are not defined by the resolution and have been interpreted in different ways at different times by different parties. Notably, the term 'consult' does not equate to the approval of Congress, a matter that is being put before the Senate today. Many US presidents have claimed that the war powers resolution is an unconstitutional infringement on their authority as commander-in-chief and have refused to be bound by it. The US courts, likewise, have been reluctant to accept jurisdiction in matters seeking to enforce the resolution, asserting that it is a political rather than a judicial matter. In one case in 2003, a judge of the District Court:

… rejected the contention that the president must have congressional authority to order American forces into combat by saying 'Case law makes clear that the Congress does not have the exclusive right to determine whether or not the United States engages in war'.

It is fairly clear that Australia has a system that is not unlike most of our peers—Canada, the UK, the US and New Zealand—whereby the executive, for very practical reasons, has the authority to make informed and timely decisions.

I come now to the topic of Syria. The discussion that has occurred in the last few days in terms of Australia's commitment to extend our air operations into Syria would almost have you believe that we had decided to redeploy the AIF and invade the Middle East. In practical terms, as the CDF mentioned during the media conference the other day, the difference this extension makes is that the sorties that go into Iraq will either divert about 10 degrees left of track, or go 50 or 100 miles further north of their current area of operation.

If you look at the map, you will see that the eastern part of Syria comes across the northern part of Iraq. The practicalities on the ground are that Daesh know that our rules of engagement are tight because we have a policy of not inflicting civilian casualties. They know that they can avoid the containing airpower of the Allies in two ways. The first way is by embedding their fighters amongst civilians. We have seen that before, in Gaza, and its horrific consequences for civilians. People commit horrific war crimes by doing that.

They also know that, under the current rules of engagement, if they withdraw across the border—and, bear in mind, we are talking about a desert where, in practical terms, the border does not exist—like crossing the chamber here, a certain number of participants in the allied action cannot prosecute action against them. This means that, if you are notified of a target and, by the time you get your asset in place, that target has driven 100 yards further on, you cannot legally attack it. This means that we no longer give people who have been wreaking havoc in Iraq the option of seeking refuge by driving 200 yards across the border. It is not a significant force going to invade Syria. We are talking about a very pragmatic extension of the area of operations to avoid the situation where forces who have been either conducting combat operations or providing logistics support within Iraq can seek refuge by just crossing the border, waiting for the aircraft to leave and coming back and do it all again. I do not see that that can be criticised in any way in that it is a very common sense extension of the rules of engagement of our forces there so that they can effectively reduce, or hopefully destroy, the military capability of Daesh.

The fact that we are doing this is legal—that was covered off today by the Attorney-General—under the principles of collective self-defence and the four requirements that are laid out under international law. All four of those requirements are met in this case. So it is legal, it is practical, in terms of avoiding people seeking refuge, and it does not expose our forces to any greater danger in that kind of operation just into eastern Syria than their current operations do. Obviously, if they were to go deep into Syria where Assad's forces are and where Russian forces are potentially moving in, that would be a different scenario, but that is not what is being proposed. It is important that people realise the limitation that has been placed on the area of operation that is being considered, or has been decided on, in this case.

The last part I want to talk about is principle. Senator Di Natale might be surprised by this, but I agree with him: the long-term solution is not just about Daesh; it is about all the forces that are acting in that region: the Assad forces, the regime, the Sunni majority, the plethora of opposition groups, the external actors who are taking part in that. But no amount of talk here and no amount of goodwill here is necessarily going to bring those parties to the table immediately. Hopefully it will happen one day—probably with the exception of Daesh, who I do not believe are actually inclined to negotiate with anyone—but it does not happen overnight.

The Greens mentioned the treaty with Iran and said it occurred out of the blue. It was hardly out of the blue. A lot of nations worked at that for a long period of time, with many extensions before that finally occurred. The question practically is: if we strive for that goal—and I do not see that we are militarily going to be able to impose a solution to a problem that has been inherent in this part of the world for centuries—it is going to take a period of time. Just as we look back at situations like Rwanda and the genocide that occurred there, there is collective guilt in the United Nations—recognised by Mr Ban when he spoke at the 20th anniversary—that the UN could have and should have done more to prevent that genocide. We cannot wait for a month, a year or five years. How long will it take before those parties to come together if they have had these tensions for centuries? Therefore, just as we look back and say, 'Why didn't we do more in Rwanda?' we are saying here that, as a minimum, we will not give Daesh the freedom to roam at will and form into large groups to conduct major military operations. Clearly, they are still there and they are still active. They embed themselves with the civilian population. But we have managed to degrade their capabilities and, particularly, degrade their ability to form large military-like organisations to use indirect firepower indiscriminately by application of air power. Every time we have seen a recognisable target, we have been able to interdict and destroy that target.

The mission here is about saying, 'What can we do at reasonable risk to degrade Daesh while the very things that Senator Di Natale talked about are occurring? How do we stop the flow of oil and arms across the Turkish border? How do we stop the recruitment of foreign fighters?' The Joint Committee on Intelligence and Security visited the US, the UK and France in dealing with this whole topic. That visit highlighted that one of the key things that attracts Australians, Americans and Europeans of the Muslim faith to go over there to fight is the very existence of the Islamic State. It is seen as fulfilling a destiny.

Ways to degrade Daesh include stopping oil and stopping the flow of arms, but also one must stop the flow of fighters. Clearly, the more we can degrade their military capability and degrade their presence on the ground the more we create an environment where perhaps the other parties can negotiate for peace. But it is important to understand that the context of the motion that has been put forward by the Greens is that, for very good reason, it is the executive and not the parliament—not only here but in the countries of our allies—who make these decisions. The decision to go into Syria is not a huge step from where we have been and it is occurring for very good and practical reasons. Our whole presence there is not just mindlessly lobbing bombs; it is to say, 'What reasonable steps can we take to prevent genocide and the freedom of action of a particularly nasty force which this world will be well served to see the back of?' I will not be supporting this motion.