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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2021

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated by authority of

Adam Bandt MP

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2021

OUTLINE

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.

The Bill is a revised version of one first introduced into the Senate in 1985 by Senator Colin Mason (NSW, Australian Democrats). The improvements in this Bill consist mainly of more detailed provisions relating to emergency situations which occur when the Parliament is not meeting and the information which is required to be provided to the public and the Parliament.

The Bill would insert a new section into the *Defence Act 1903* under which service of members of the Defence Force beyond the territorial limits of Australia in warlike actions would require the approval of both Houses of the Parliament, with certain exceptions.

FINANCIAL IMPACT

The bill will have no financial impact.

NOTES ON CLAUSES

Clause 1 – Short title

1. This clause provides for the Act to be cited as the *Defence Amendment (Parliamentary Approval of Overseas Service) Act 2021*.

Clause 2 – Commencement

2. This clause provides for the whole of this Act to commence the day after it receives Royal Assent.

Clause 3 – Schedules

3. This clause give effect to the Schedules. It provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – Amendments to the *Defence Act 1903*

4. After Division 3 of Part III

Item 1 of the Schedule would insert section 29A into a new Division 4 in Part III of the *Defence Act 1903*.

Subsection (1)

This subsection provides that members of the Defence Force may be required to serve within the territorial limits of Australia.

Subsection (2)

This subsection provides that, with the exceptions specified in the following subsections, members of the Defence Force may not be required to serve beyond the territorial limits of Australia except in accordance with a current resolution agreed to by each House of the Parliament authorising that service.

Subsection (3)

This subsection provides that, in an emergency requiring the deployment overseas of members of the Defence Force, the Governor-General may make a Proclamation authorising that deployment. The Governor-General would, of course, in accordance with constitutional practice, act on the advice of the Prime Minister of the day.

Subsection (4)

This subsection provides that such a Proclamation be made only on the written advice of the Prime Minister to the Governor-General explaining the emergency and why it is not practical to seek the authorising resolution of each House before the deployment takes place.

Subsection (5)

This subsection provides for the publication of any such Proclamation and advice within 24 hours, so that the public may be adequately informed of the emergency situation and the reasons for the deployment of forces overseas.

Subsection (6)

This subsection provides that each house of the Parliament is to be supplied, within two days after a Proclamation is made, with essential information concerning the emergency and the deployment of the forces. This information is to be in the form of a report containing the Governor-General's Proclamation, the advice provided by the Prime Minister and statements of reason for the deployment, its legal authority, geographical extent, expected duration and the number of members of the forces involved.

Subsections (7), (8) and (9)

These subsections provide for situations in which the Parliament is not meeting when a Proclamation is made. These provisions seek to ensure that, as far as is constitutionally and practically possible, the Parliament will be consulted at the earliest possible time about the emergency and the deployment of the forces overseas.

(7)

This subsection provides for the situation in which Parliament is in session (i.e. the Parliament has not been prorogued under section 5 of the Constitution) but either House is adjourned indefinitely, or for more than two days. In that circumstance, the Presiding Officer of that house is to summon that House to meet within two days after the proclamation is made. The subsection refers to the *Parliamentary Presiding Officers Act 1965*, which specifies who is to exercise the statutory powers of the president of the Senate and the Speaker of the house of Representatives when those officers are unavailable, or their offices are vacant.

(8)

This subsection provides for the situation in which the Parliament is not in session (i.e. the Parliament has been prorogued). In that circumstance, a proclamation is to cease to have effect seven days after it is made. Paragraph (a) provide for the situation of the Parliament having been prorogued before a proclamation is made, while paragraph (b) provides for the situation in which the Parliament is prorogued within seven days after a proclamation is made. In both cases, the proclamation ceases after seven days (paragraph (c)) and no similar proclamation may be made until the Parliament meets (paragraph (d)).

The effect of this subsection is that, if the government deploys forces overseas in an emergency while Parliament is prorogued, and the government intends that the deployment continue beyond seven days, the government will be compelled to advise the Governor-General to summon the Parliament to meet within that period to seek parliamentary approval for the deployment.

(9)

This subsection provides for the situation of a Proclamation being made in an emergency situation during a general election, or close to general election brought about by the expiry of the House of Representatives. When there is no House of Representatives (i.e. the House has been dissolved or has expired), there is no opportunity for the Parliament to consider whether to approve or disapprove of an overseas deployment of forces. In that situation, the executive government alone has the power to continue a deployment brought about by an emergency. Under the constitutional and statutory timetable for general elections, there is a maximum period of 140 days when the country is without a complete Parliament during a general election. This subsection seeks to ensure that the Parliament is consulted about such a deployment at the earliest practical time. It does this by providing that a Proclamation will cease seven days after the day for the return of the writs for the general election. If the government wishes to continue beyond that limit a deployment which was initiated because of an emergency during the election period, the government will have to advise the Governor-General to summon the Parliament to meet within the seven day period.

Paragraph (a) provides for the situation in which the House of Representatives has been dissolved or has expired when a proclamation is made (i.e. the general election process has begun). Paragraph (b) provides for the situation in which the House of Representatives expires within seven days after a Proclamation is made. Normally, a general election begins with a dissolution of the house of Representatives; not since the Parliament of 1907-10 has the House been allowed to expire. If a Proclamation were made within seven days of the expiry of the House, there would probably not be adequate opportunity for the Parliament to consider a Proclamation, and in that circumstance the Proclamation would also cease seven days after the return of the writs.

Subsection (10)

This subsection provides that, when members of the Defence Force are deployed overseas in the circumstances covered by the section, the Minister for Defence must report in writing to each House of the Parliament after the commencement of each of the months of February, April, June, August, October and December of each year, commencing within 2 months after each deployment. The report will include information on the status, legality, scope and anticipated duration of the deployment, on efforts to resolve the circumstances

requiring the deployment, and on any reasons why the Parliament should allow the deployment to continue.

Subsection (11)

This subsection provides that the requirement for parliamentary approval of overseas deployment of forces does not apply to normal, non-warlike overseas service, consisting of attachments of Australian service personnel to foreign forces, service in diplomatic or consular missions, on aircraft or ships not involved in hostilities, for educational or training purposes, or for purposes related to the procurement of equipment or stores.

The circumstances requiring parliamentary approval are deliberately not limited to war or warlike action. The rationale of this is that any service other than that described in this subsection could well lead to hostilities or other problems and should not be embarked upon without that approval.

Services on a vessel or aircraft would not require approval unless likely to lead to hostilities in the terms of the Bill. Any service on land overseas other than that specified in the subsection could lead to hostilities and would require approval.

There may be some forms of service which would not be exempt under the subsection but which are regular and unlikely to lead to hostilities. If there are such forms of service undertaken on a regular basis, the government should table a list of them when both houses are sitting, seek approval under the Bill and subsequently report on them in accordance with the Bill.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2021

This bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the bill

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.

The Bill is a revised version of one first introduced into the Senate in 1985 by Senator Colin Mason (NSW, Australian Democrats). The improvements in this Bill consist mainly of more detailed provisions relating to emergency situations which occur when the Parliament is not meeting and the information which is required to be provided to the public and the Parliament.

The Bill would insert a new section into the *Defence Act 1903* under which service of members of the Defence Force beyond the territorial limits of Australia in warlike actions would require the approval of both Houses of the Parliament, with certain exceptions.

Human rights implications

The Bill enhances what many regard as a pre-eminent human right to peace, safety and stability and gives effect to the United Nations Declaration on the Right of People to Peace.

Conclusion

This bill is compatible with human rights because it advances the protection of human rights.

Adam Bandt MP