

Creative tension

Parliament and national security

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Executive summary

At a time when the challenges to Australia's national security, if not unprecedented, are at least of a magnitude not experienced for a generation, when public confidence in the capacity of our politicians and the institutions of our government to deliver effective solutions to those challenges needs to be greatest, there's good reason to ensure that the Australian Parliament plays a strong and vigorous role in providing the robust checks and balances necessary for the health of our parliamentary democracy.

Enhancing parliament's role in national security would reinforce Executive accountability, expand public access to policy processes, improve the quality of public debate about national security and strengthen our democratic foundations.

If they wish to do so, parliamentarians can move the needle in the direction of change to improve and strengthen the management of our national security policy in an era of growing complexity, challenge and change.



Foreign Minister Julie Bishop speaks during House of Representatives question time at Parliament House in Canberra, 4 March 2015. (AAP Image/Lukas Coch)

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First, enhance respect for parliament by using its existing procedures to more fully consider and debate issues of foreign affairs, defence, intelligence and border security.

Second, develop parliamentarians' education in national security by providing a new members' orientation program focused on national security; running an enhanced program of regular informal briefings to parliamentarians by senior public servants; providing site inspections by specific national security agencies; and creating a cross-party parliamentary friendship group dedicated to improving understanding of Australia's national security policy.

Third, examine parliament's exercise of war powers. Despite the sometimes intense nature of this debate, the parliament has yet to conduct a thorough investigation into the desirability of Australia extending some measure of authority to parliament over the overseas deployment of the ADF.

Fourth, encourage parliamentary diplomacy. Our parliamentarians are an underused resource in Australia's foreign relations. At a time when the nation's overseas diplomatic footprint is proportionally the lowest of any OECD country, we could make better use of them to enhance our international presence, such as through their participation in international negotiations, attendance at diplomatic conferences, membership of delegations and roles in special missions for which they have unique knowledge or experience.

Fifth, review parliamentary committees' resources. Improving parliament's role requires increased human and financial resources for key national security committees. This should include considering the feasibility of seconding national security experts to committees for particular inquiries and references.

Sixth, take steps to enhance the potential impact of committees' reports by having the presiding officers of parliament (the President of the Senate and the Speaker of the House of Representatives) establish a program to train chairs and potential chairs of parliamentary committees, including by developing skills in report writing. Emphasise the different forms of reports, ways to convey clear policy messages, and writing and editing to ensure accessibility for readers.

Finally, examine the mandates and work habits of each of the key national security committees to ensure that their work remains relevant to the changing demands of Australian society and the development of sound public policy.

Each of the existing parliamentary committees in the area of national security needs some degree of reform, particularly in intelligence oversight.

Introduction

Nearly 40 years ago, one political scientist came to a rather pessimistic conclusion about the Australian Parliament's role in foreign policy: 'Not only is its influence over policy making extremely limited but its discharge of the functions of policy scrutiny and public education is gravely deficient.'¹

A few years later, in one of the few extended studies of parliament's role in foreign affairs, Knight and Hudson noted that any discussion of the subject could 'well seem at first sight an exercise in the obscure and the futile'.²

And 12 years ago, in their study on the making of Australian foreign policy, Allan Gyngell and Michael Wesley expressed similarly pessimistic views about the work of the Joint Standing Committee on Foreign Affairs, Defence and Trade on policy processes and of the parliament in general in relation to foreign policy formulation.³

However, the landscape isn't entirely bleak. While progress has been more evolutionary than revolutionary, parliamentarians, at times with the cooperation of the government of the day, have demonstrated greater enthusiasm for extending parliament's influence in the realm of foreign affairs and national security.

There's now an increasingly lively debate about the further extension of parliament's role. It perhaps reflects the logic of a view expressed in a Senate committee report over a decade ago:

[As] foreign policy considerations become increasingly important features of Australia's political and economic landscape, and as the domains of international and domestic law-making become increasingly enmeshed, it is vital that Australia's national parliament engages more fully in foreign and trade policy development.⁴

This ASPI *Strategic Insights* seeks to contribute to this debate as it relates to national security, which is here defined broadly as that area of public policy covering Australia's foreign relations, defence, intelligence capacity and relevant facets of counterterrorism, immigration and border protection. It reviews existing processes and mechanisms relating to parliament's engagement in national security and explores areas for reform, particularly of the parliamentary committee system (see box).

In preparing this paper, the authors interviewed members of parliament, senators, officials from Australian Government agencies and the staff of various parliamentary committees, who spoke to us on the basis of anonymity.

The core message in this *Strategic Insights* is that enhancing parliament's role would reinforce Executive accountability, expand public access to policy processes, improve the quality of public debate about national security and help to strengthen the foundations of Australia's parliamentary democracy.

National security and the parliamentary landscape

A casual observer could be easily forgiven for thinking that the Australian Parliament has the power to formulate and implement Australia's national security policy. Our Constitution makes numerous references to the capacity of parliament to act in relation to matters such as external (foreign) affairs, defence and immigration, among other areas of responsibility.

But a literal reading of the Constitution is misleading. By custom and constitutional convention under our Westminster system of government, the power to make and implement Australia's national security policy is firmly in the hands of the Executive branch of government.

For over a century, successive Australian governments of all political persuasions have jealously protected that power. In 1950, Percy Spender, as the Minister for External Affairs in an early Menzies government and a distinguished lawyer, was unambiguous when he remarked that foreign policy 'is and must remain the responsibility of the Executive'.⁵ He wasn't the first to make that assertion.

Parliamentary committees with responsibilities in relation to national security

Joint Standing Committee on Foreign Affairs, Defence and Trade

The Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) considers and reports on such matters relating to foreign affairs, defence, trade and human rights as may be referred to it by either house of parliament, the Minister for Foreign Affairs, the Minister for Defence or the Minister for Trade. The JSCFADT may inquire into matters raised in annual reports of relevant departments and authorities or in reports of the Commonwealth Auditor-General. It consists of four subcommittees: Foreign Affairs and Aid; Defence; Trade; and Human Rights.

Parliamentary Joint Committee on Intelligence and Security

The *Intelligence Services Act 2001* requires the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to review the administration and expenditure of the organisations that make up Australia's intelligence community: the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Office of National Assessments, the Australian Defence Intelligence Organisation, the Australian Imagery and Geospatial Organisation and the Australian Signals Directorate. The PJCIS reviews any matter relating to those organisations that's referred to it by the responsible minister or by a resolution of either house of parliament.

Joint Standing Committee on Treaties

The Joint Standing Committee on Treaties (JSCOT) inquires into and reports on matters arising from treaties and proposed treaty actions, and on any question relating to a treaty referred to it by either house of parliament or by a minister. The JSCOT may also inquire into and report on other matters referred to it by the Minister for Foreign Affairs on conditions prescribed by the minister.

Senate Foreign Affairs, Defence and Trade Committee

The Senate Foreign Affairs, Defence and Trade Committee (FADT) is one of eight pairs of standing committees that include a references committee and a legislation committee in discrete subject areas. The FADT legislation committee may inquire into and report on bills, estimates of expenditure and the annual reports and performance of relevant departments and agencies. The FADT references committee may inquire into and report on matters referred to it by the Senate, other than those to be referred to the legislation committee.

Much of the explanation can be found in Australia's inheritance of the conventions of the Westminster system of responsible parliamentary government, particularly the 'royal prerogative' in relation to foreign affairs,⁶ which includes the power to recognise states, accredit diplomats and ratify treaties. Over time, that power passed to the ministers (the cabinet) in the British system, and that arrangement was later accepted as part of our constitutional arrangements.

Executive authority in relation to foreign affairs and, by extension, to national security is reinforced by several other critical factors, such as:

- the unique nature of this area of public policy
- the challenges in managing a complex and fast moving international agenda
- the demand for confidentiality in the conduct of relations between states

- the ability of national governments to draw on the vast resources of key agencies of state to design and implement policy decisions
- the reality that most citizens see national security issues as far removed from their day-to-day concerns and as so complicated that they are best left to experts.

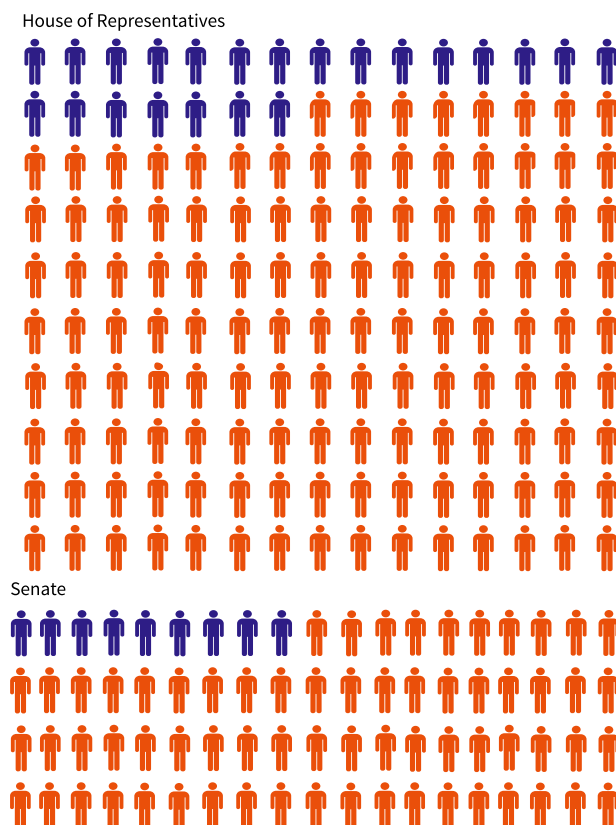
History and convention aside, the dynamics of parliamentary involvement in national security continue to be shaped by three powerful realities of Australian political life.⁷

First, the authority of the Prime Minister in relation to national security has grown and continues to do so. This tendency was noticed as far back as the Whitlam and Fraser governments but gained momentum during the Howard and Rudd governments; it shows few signs of declining in the Abbott government. For managing a coherent national security policy, this might or might not be desirable, but it can easily suck oxygen out of an open policy process, limiting other parliamentary voices and, on occasions, other ministerial voices.

Second, there's a growing imperative in all political parties to achieve and enforce party discipline: all maintain that 'disunity is death'. While this undoubtedly has considerable logic in the modern Westminster system, if it's overused or applied too strongly it constrains members' and senators' independence of action and weakens the capacity of opposition and backbench parliamentarians to hold the Executive arm of government to account.

Third, parliament is generally ill-served by the limited knowledge and experience of national security issues that members and senators bring to their parliamentary duties. In the 44th parliament (Figure 1), few parliamentarians come to office with an extensive academic or practical understanding of foreign affairs, defence or intelligence questions.

Figure 1: Expertise on national security among the members of the 44th Australian Parliament



*National security is defined broadly to include: service as a member of the armed forces in Australia or elsewhere, graduate or undergraduate qualifications in international affairs, defence, security or related studies and experience in defence research or as a policy adviser in the field.

Compared to lawyers, union officials or teachers elected to parliament, people with defence force or international relations expertise have always been in a noticeable minority.

Nor is there much incentive to increase one's knowledge or expertise once elected. While there are clearly exceptions, few parliamentarians see their electoral future as having much to do with mastering the sometimes byzantine world of national security policy. Nor will a well-earned reputation for critical thinking in this arena necessarily impress party leaders and improve prospects for promotion.

As things stand, ambitious parliamentarians are better off trying to impress their constituents with the depth of their knowledge of the complexities of social security entitlements, the environment or even the more arcane parts of income tax law than with a profound understanding of contemporary global affairs.

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Perhaps parliamentarians can be forgiven for these rather utilitarian calculations of their career interests. In many different ways, modern parliamentary ritual, heavily partisan as it has become, often seems able to diminish the importance of national security; it often encourages political point scoring and partisanship, rather than clear and independent thought or careful critical analysis of often complicated and challenging issues.

Perhaps a political fear that parliament might find its critical voice has led to the observable decline in ministerial statements and parliamentary debates on national security, both of which are now few and far between. Whatever the reason, this has been a clear trend over time and over a succession of governments.

No less egregious in its disrespect for the institution is ministers' inclination to announce key policy changes to the media outside parliament, rather than to colleagues within it. For example, Prime Minister Gillard released the 2013 Defence White Paper in the belly of a C130 Hercules aircraft parked on the apron at Fairbairn airbase; more recently, Prime Minister Tony Abbott announced important new counterterrorism measures at the Australian Federal Police headquarters. Media opportunities such as these are the life-blood of modern political life, but their impact on respect for parliament as an institution shouldn't be underestimated.

Despite these trends, parliament's processes and procedures continue to offer many opportunities to ventilate national security issues and, theoretically, strengthen the ability of backbenchers who want to develop their interests in national security policy.

In both chambers of the Australian Parliament, members can contribute to legislative, adjournment, grievance and address-in-reply debates and can contribute to committee reports. Responses to (sadly) all too rare ministerial statements, periodic notices of motion and the daily ritual of question time present further opportunities to raise issues.

The parliamentary committee system is more promising for members seeking a more profound engagement on national security issues. For those matters, the system extends to four key committees: the Joint Standing Committee on Foreign Affairs, Defence and Trade; the Parliamentary Joint Committee on Intelligence and Security; the Joint Standing Committee on Treaties; and the Senate Foreign Affairs Defence and Trade Committee. Other committees are more marginally engaged.

In this system, partisanship often seems to be forgotten, or at least put to one side (albeit temporarily), as senators and members summon their better angels to focus on the national interest and reach policy positions through consensus and agreement.

But in the more ritualised arena of the parliamentary chambers, politics often rules as well-trodden policy paths are reiterated, set-piece rhetorical exchanges are commonplace, entrenched party positions and ideological convictions are reinforced and perceived weaknesses and failures of policy, usually by governments, are identified and usually magnified.

The perspective of eminent Australian political scientist and scholar of international relations, TB Millar, may be some decades old, but at times it still rings true:

The national torture to which parliament submits members of the public unwary or dedicated enough to tune into the compulsory broadcast of its proceedings is nowhere more painful than in the debates on foreign affairs and defence. Rarely is there a clash of intelligent and informed debate.⁸

While there are many historical and systemic reasons for the marginalisation of parliament on national security matters, like some other national institutions it's the victim of the 24/7 media cycle. The voracious media require constant feeding and sustenance but usually and rather perversely take little more than a perfunctory interest in national security. There are exceptions, of course, such as the attention now being given to ISIL and the threat of Islam-inspired terrorism here and abroad. The situation isn't helped by the infrequency with which parliament meets—an average of only 18 weeks a year in recent years.

However it's to be explained, parliament's limited stature and role in the conduct of national security policy is hardly a recipe for good governance. There's considerable room for reform.

At a time when the challenges to Australia's national security, if not unprecedented, are at least of a magnitude not experienced for a generation, when public confidence in the capacity of our politicians and the institutions of our government to deliver effective solutions to those challenges needs to be greatest, there's good reason to ensure that the Australian Parliament plays a strong and vigorous role in providing the robust checks and balances necessary for the health of our parliamentary democracy.

As a recent paper by former New South Wales Labor senator John Faulkner argues, the case for expanded parliamentary oversight and the protection of individuals' rights and liberties becomes stronger at a time when successive governments have provided Australian intelligence and national security agencies with increasingly intrusive powers to act against domestic and international terrorism.

While a balance needs to be struck between security imperatives and citizens' rights, the idea that 'enhanced powers demand enhanced safeguards'⁹ is not only a sound principle of parliamentary accountability and the oversight of Executive power; it also underscores a basic principle of parliamentary democracy—the right of the citizens to be protected against excessive intrusions by the state on their rights, freedoms and liberties.

But the case for enhancing the role of parliament, and especially its committees, in relation to national security doesn't just depend on the need for oversight and accountability.

The responsibility to enact the legislative agenda of the government of the day is of course parliament's inescapable burden. Beyond that, however, lies the opportunity for parliament to set the agenda for new issues of public policy, to be a mechanism to aggregate disparate electoral interests and build consensus on necessary policy reforms, and to deepen and improve public knowledge and understanding of especially complicated or complex policy challenges. All are important parliamentary tasks and ought to be encouraged.

Conducting business

Most of these parliamentary functions and processes could be improved significantly by some measured changes to general parliamentary procedures and by some carefully calibrated reforms to the way parliamentary committees conduct their affairs in the arena of national security.

Parliamentary procedures are a function of the standing orders of the Senate and the House of Representatives. Contrary to common belief, the two chambers' standing orders are quite different, reflecting their different constitutional roles, electoral make-up and, perhaps most significantly, distinctive institutional cultures. A vivid and significant example of those differences can be seen in the Senate's now well-established practice of Estimates committees—a process for examining a government's plans for public expenditure that takes place three times a year. This is a practice unknown in the House.

The effectiveness of standing orders in organising and managing parliament's business depends on the way they are interpreted by the two chambers' presiding officers (the President of the Senate and the Speaker of the House) and the way each bends to or accommodates the will of the chamber.

In the House, this usually means adjusting to the political priorities of the government of the day, while in the Senate it's a more complex task, depending on the political make-up of the chamber. However they may be written, the standing orders of the two chambers are animated through the way they are interpreted, and that's generally a political, even highly partisan, process. In the House, the process responds to the government's political agenda; in the Senate, it responds to the interests of a coalition comprising a majority of senators, however it might be formed.

It follows that reforming the way parliament conducts its business isn't merely a matter of changing the standing orders but demands changes to the standing orders of both houses independently. In each case, this is almost always a highly political activity, often engaging the perceived partisan interests of the major players, whether they are parties or, particularly in the Senate, individuals. This often makes change difficult for even the most dedicated reformer.

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Seven measures to strengthen the role of parliament in national security

For reasons noted above, particularly the power of the Executive, reforming the way parliament approaches national security is especially challenging. However, some general reforms would materially improve parliament's role in the national security area without significantly affecting the Executive's authority.

These changes would help to reinforce the fundamental constitutional principle in Australia that we operate under a Westminster system in which the Executive is of the parliament, not removed or separate from it.

1: Respect parliament as the forum for consideration of national security issues

Governments of the day should reinvest in respect for parliament as an institution. This could be achieved in any number of ways, from ensuring that the parliament sits more often to significantly reforming question time.

However, from a national security perspective, using the parliament's existing procedures to more fully consider and debate foreign affairs, defence, intelligence and border security, among other matters, would reinforce the standing of parliament while also giving parliamentarians the opportunity to contribute to policy thinking.

For many years, governments have been inclined to bypass the parliament when dealing with security issues. In part, this has been a function of rapid changes in the way parliament engages with the media, but more than anything else it has suited the political imperatives of successive governments—not necessarily the cause of good public policy.

Australian governments now and in the future should commit themselves to ensuring that the Australian Parliament is the primary national institution for discussing and debating the nation's national security policy. To that end, they should ensure that parliament is the forum for pronouncements on all key national security policy decisions and that it's provided with regular opportunities to discuss, consider and debate policy issues.

2: Develop parliamentarians' education in national security

Australian parliamentarians in general are poorly educated and informed on national security. Over time, drawing them into more regular engagement in this area would enhance their knowledge and understanding of the key security challenges and dilemmas facing the nation.

The international security environment is challenging and will continue to be so for the foreseeable future, so good national security policy choices call for better educated parliamentarians.

This isn't merely a sound parliamentary ideal. During research for this study, senior public servants in key national security agencies consistently lamented the absence of a better informed parliament to more fully and critically assess policy decisions and choices.

Far from believing that parliamentary ignorance is a virtue that makes their task as public servants more straightforward, most senior national security officials said that they'd prefer to know that our representatives clearly understand the defence and security challenges we face as a country. They'd welcome constructive and more informed parliamentary contributions to the national security policy conversation.

The responsible parliamentary officers and, perhaps most importantly, the chairs of the relevant parliamentary committees should seriously consider ways to improve senators' and members' knowledge and understanding of national security issues.

This could include providing a new members' orientation program focused on national security; an enhanced program of regular informal briefings to parliamentarians by senior public servants; site inspections of specific national security agencies; and the creation of a cross-party parliamentary friendship group dedicated to improving knowledge and understanding of Australia's national security policy through seminars, lectures and briefings by experts in the field.

3: Examine parliament's exercise of war powers

In recent years, there have been more and stronger calls for the Australian Parliament to have a greater role in decisions by the government of the day to deploy military forces overseas. Ideas about the appropriate extent of the parliament's role vary. Some suggest that parliament should be responsible for declaring war, while others would limit its role to consultation.

Either way, these ideas involve a significant extension of parliament's power, which has traditionally not extended to this area of policy because that would involve a derogation of Executive prerogative. Yet, in other countries, notably the US and more recently the UK, legislatures have had these powers in some form.

The authors are cautious on this matter and aren't persuaded that the extension of 'war powers' to the Australian Parliament would materially improve the development of public policy in Australia.¹⁰ Governments are elected to govern, and that authority extends to making difficult decisions about the appropriate use of military force. Other salient factors are the need for timeliness in decision-making, the unique knowledge that governments possess about often complex foreign affairs issues and the challenges in securing an appropriate resolution from a possibly fractious legislature.

However, there's opinion in the other direction, including from no less than a former Coalition prime minister, Malcolm Fraser.¹¹ Despite the sometimes intense nature of this debate, the parliament has yet to conduct a thorough investigation of the matter.

The Defence subcommittee of the Joint Committee on Foreign Affairs, Defence and Trade should consider inquiring into the desirability of Australia extending some measure of authority to parliament over the overseas deployment of the ADF.

4: Develop parliamentary diplomacy

Many of Australia's 226 parliamentarians regularly engage with government officials and fellow parliamentarians from other countries. Their contacts are through parliamentary friendship groups, visiting delegations, overseas visits to other parliaments and such international organisations as the Commonwealth Parliamentary Association.

Overall, however, Australia's parliamentarians are a rather underused resource in our foreign relations. At a time when the nation's overseas diplomatic footprint is proportionally the lowest of any OECD country,¹² there's room for some creative thinking to identify opportunities to make better use of interested and able parliamentarians to enhance our international presence.

One useful measure would be to expand the structured and focused outgoing parliamentary delegations programs (see box).

Committee visits

Excluding ad hoc delegations, three committee visits feature in the Australian Parliament's outgoing delegation program each year: an Asia committee visit, a committee visit to New Zealand and the Pacific, and a committee visit to China.

Each of the visits rotates between House of Representatives, Senate and joint committees. The presiding officers make the decision based on bids from eligible committees outlining how the committee's current work program would benefit from the proposed visit.

The rotation is 'staggered' so that all parliamentary committees are eligible to bid for one of the committee visits each year. Many committees find the visits a valuable tool to broaden the scope of their inquiries.

An Asia–Pacific committee visit was introduced to the outgoing delegations program in 2009 to enable parliamentary committees to explore relevant issues with neighbouring countries and to build further parliamentary links with Asia and the Pacific.

From 2014, the *Asia–Pacific* committee visit was modified to focus on just the Asia region (the successful committee visits two Asian countries each year), while the Pacific component was added to the New Zealand committee exchange.

The intention was to increase engagement with Asia and build stronger relationships between parliamentary committees and their counterparts in the region.

The visit is open to all parts of Asia, including parts of the Middle East and Western Asia. In 2015, this visit will be by a House of Representatives committee.

The *New Zealand* committee exchange has been part of the outgoing delegations program for many years, recognising the special relationship between Australia and New Zealand. Under the exchange, a New Zealand parliamentary committee also visits Australia each year.

In 2014, the outgoing New Zealand committee exchange visit was modified to become an annual committee visit to New Zealand and *one Pacific region country* (excluding the US, which is already included as part of the outgoing delegations program for each term of parliament). In 2015, this visit will be by a joint committee.

The *China* committee visit is an annual commitment under the terms of a memorandum of understanding between the Australian Parliament and China's National People's Congress, under which a delegation from China also visits Australia each year. In 2015, this visit will be by a Senate committee.



The Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) representatives in Africa as part of its inquiry into Australia's relationship with the countries of Africa, March 2011.

In conjunction with the relevant parliamentary committees, the Minister for Foreign Affairs and her department should consider ways in which members of parliament might make useful contributions to the conduct of Australia's international diplomacy, such as through parliamentary participation in international negotiations, attendance at diplomatic conferences, membership of delegations and participation in special missions for which a senator or member has unique knowledge or experience.

5: Review parliamentary committees' resources

A material improvement in parliament's role in national security issues requires increased human and financial resources for key committees.

In line with general budgetary restraint, the resources allocation to the functions of parliament has eroded steadily over recent years. The financial resources available to committees have suffered: overall allocations to the House and Senate declined from \$18.2 million in 2009–10 to \$15.5 million in 2013–14.¹³

This has had an impact on the length of committee inquiries, the employment of staff, the ability to have witnesses attend hearings and the capacity of members to undertake inquiry-related travel, among other things.

The allocation of resources for committees is in the hands of each of the houses. The Department of the Senate and the Department of the House of Representatives allocate funds from their budgets for their committee offices. For joint committees, the responsibility rests with the department that administers the committee.

The allocation of resources for committees raises two broad issues: the number of available staff and the extent of their specialist knowledge and expertise. The number of Senate committee staff numbers has declined in recent years, and there's been only a modest increase in House committee staff.¹⁴

Some relief from this pressure can be provided by using the central research services available to all parliamentarians through the Parliamentary Library, particularly the expertise available in the Foreign Affairs, Defence and Security section. While the library provides excellent services, over recent years it has suffered a steady erosion of its resources, and hence its capabilities.

In general, the committee staff are 'making do', but they are consistently under pressure from the heavy workloads of the committees. They are enduring long and demanding hours, often to meet tight deadlines, to support their committee's activities.

The challenges are compounded in the area of national security, as it's now a well-established practice to rotate committee staff, who are generalists, among the various committees of the parliament. Despite the high levels of professionalism among committee staff, these arrangements can undermine the effectiveness of committees, depriving them of staff continuity and experience and high levels of subject expertise.

To deal with the challenges in committee resourcing, the Senate and the House should each review the staffing and resourcing of its committees. In the Senate, several 'domestic' committees dealing with matters relating to the internal operations of the Senate may be suited to undertaking such a review. The House's counterpart domestic committees could conduct a similar review for House committees. Alternatively, the presiding officers could consider initiating an appropriate form of review.

These reviews should examine, in particular, the extent to which greater budgetary constraint has affected the provision of staff to parliamentary committees with responsibilities in the area of national security.

They should also consider staff's expertise and the continuity of staff's committee assignments and explore ways to ensure that both are maximised. They should examine the feasibility of seconding national security experts to committees for particular committee inquiries and references.

The chairs of the key national security committees should explore the possibility of making secondments to their committees from among personnel in the national security agencies. Secondments would not only increase committees' human resources and build staff's expertise, but would help to improve secondees' knowledge and understanding of the working of parliament and the role it plays in the administration and oversight of Australia's national security policy.

6: Enhance the potential impact of committees' reports

The nature and structure of the reports of parliament's committees, including those in relation to national security, are a function of many things: the composition of the committee, an inquiry's terms of reference, the political sensitivities of references, the evidence tendered to the committee and the competence of its chair.

Often, a committee secretary will take on the task of drafting a report along lines suggested by the chair. This work is usually done with great professionalism, but using a rather formulaic template. According to some people interviewed for this report, this often leads to reports that are too long and ponderous and that lack a clear policy direction.

Sometimes, the messages in committee reports are mixed. For example, a recent Senate Legal and Constitutional Affairs References Committee report on firearms was significantly split: there were widely diverging views between the chair's (Labor) section and a section by the majority of members (Liberals, Nationals and Senator Leyonhjelm).¹⁵ Similarly, a report by that committee on telecommunications interception had a chair's report, remarks from government senators and comments from opposition senators.¹⁶

It isn't always possible to keep politics out of committee reports, but unanimous reports tend to carry greater weight. Either way, as research for this paper revealed, parliamentary reports in the areas of foreign affairs, defence and national security aren't

always given the attention within government agencies that they deserve or that the committees expect. One reason for this is that they are rarely presented in ways that are readily digestible by busy public servants.

Committee chairs can change this by carefully considering the way their reports are structured and presented, but the pressure of time, other responsibilities and lack of experience, and even want of interest, often combine to discourage different approaches. Given that committee chairs come to their roles with relatively little experience, a program to enhance their skills would be a useful investment in building parliamentary capacity.

In conjunction with party whips, the presiding officers of the parliament should establish a program of training for chairs and potential chairs of parliamentary committees. In addition to focusing on committee procedure and the art of good chairmanship, the program should include the development of skills in report writing, with an emphasis on different forms of reports, conveying clear policy messages and ensuring accessibility for readers.

7: Examine committee mandates

One key factor in ensuring the integrity of the committee system is the need to ensure that the committees' work remains relevant to the changing demands of Australian society and the development of sound public policy. The committees of the Australian Parliament tend to be rather conservative in this regard.

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The committees are more deferential to ministerial preferences and place a higher premium on secrecy than is the case in some other parliamentary systems, not least the system at Westminster in London. Change is needed if the committee system is to remain relevant to the demands of a modern parliamentary democracy. Each of the existing parliamentary committees relevant to national security needs some reform.

The **Joint Standing Committee on Treaties** (JSCOT) has struggled with the fact that international instruments arrive on its agenda only after they've been negotiated by governments, often through a protracted process.

Inserted into the parliamentary process between signature and ratification, the instruments are virtually impossible to amend, regardless of any judgement the committee might form about their merit. This doesn't negate the value of the committee process, but it does challenge the overall effectiveness of the process.¹⁷

One obvious way to overcome this problem would be to have JSCOT scrutinise instruments before they are signed, but that would involve a radical departure from a traditional prerogative of the Executive government.

A less intrusive approach would be to give members of the committee access to the negotiations for treaties and agreements before they are concluded. This could occur through a confidential briefing of the committee or perhaps by including key committee members in negotiating delegations.

JSCOT should inquire into ways its members might gain insight into the progress of treaty negotiations before the treaty is concluded and signed. The inquiry could consider encouraging treaty negotiators to provide JSCOT with regular updates on the progress of treaty negotiation, including committee members in negotiating delegations, or both.

The **Joint Standing Committee on Foreign Affairs, Defence and Trade** (JSCFADT) is the longest standing and arguably the most prestigious national security committee of the parliament. It has a wide remit. Together with the Senate Foreign Affairs, Defence

and Trade Committee, it assumes much of the parliament's burden of investigation and oversight in foreign affairs and defence. The government of the day has a majority of the members of the committee.

Over time, some of JSCFADT's inquiries have resulted in influential reports valued by governments, but at other times it has struggled to make an impact. On the other hand, its series of regular briefings by distinguished academic, diplomatic and government personnel help to inform committee members of key trends and developments in international relations, and is widely regarded as a very valuable part of its work.

JSCFADT's mandate and structure have changed over time, but one element of its mandate has remained since its formation: the need for its inquiries to be approved by an appropriate minister (usually the Foreign Minister) or by resolution of one of the houses of parliament.

This power of veto was used relatively recently to prevent the committee holding an inquiry on a matter of some substance. While the veto has been used only sparingly, it remains a constraint on the committee's independence; it's a vestige from a bygone era that compromises the committee's capacity to make a potentially valuable contribution to policy debates in Australia. It should be removed.

Consideration might also be given to establishing the committee in a form similar to the Public Accounts Committee of the parliament, which is created under its own legislation.

With or without such a radical reform, JSCFADT's reputation would be enhanced, its members' capacity to contribute to policy debates strengthened and its ability to exercise Executive oversight improved if it could develop a more structured workload and greater continuity in its program of activities and inquiries.

The committee's regular exercise of its power to inquire into the Defence Department's annual report is something of a model that could be usefully extended to the annual report of the Department of Foreign Affairs and Trade. The committee should take particular notice of the department's foreign aid functions, which are substantial in budgetary terms but receive relatively little consistent parliamentary scrutiny.

...inviting the Secretary of the Department of Foreign Affairs and Trade (presumably with ministerial approval) to provide a regular update to the Foreign Affairs subcommittee on the state of Australia's international relations would be a valuable exercise.

JSCFADT's public education role would be enhanced if the already well-established practice of ministerial appearances before the committee for private briefings were extended to public briefings on matters of contemporary importance, such as events in Afghanistan or the Middle East. Alternatively, it might consider following the example of the House Economics Committee, before which the Governor of the Reserve Bank appears regularly. Although the heads of Australian Government departments aren't statutory officers, as the Reserve Bank Governor is, inviting the Secretary of the Department of Foreign Affairs and Trade (presumably with ministerial approval) to provide a regular update to the Foreign Affairs subcommittee on the state of Australia's international relations would be a valuable exercise in public education, assisting both the committee and Australians more widely. A similar briefing might be provided to the Defence subcommittee by the Secretary of the Defence Department.

As part of its responsibilities, JSCFADT could also investigate the contents of Defence or Foreign Affairs white papers. A good starting point would be the Abbott government's forthcoming Defence White Paper.



Department of Foreign Affairs and Trade Deputy Secretary Ewen McDonald (left) and Secretary Peter Varghese appear before the Senate Standing Committee on Foreign Affairs, Defence and Trade at Parliament House in Canberra, 3 June 2015. (AAP Image/Mick Tsikas)

The **Parliamentary Joint Committee on Intelligence and Security** (PJCIS), established in 2001, is the newest of the parliamentary committees dedicated to the oversight of national security matters. During the reforms to Australia's counterterrorism legislation in recent years, it's also been among the busiest, undertaking a series of valuable reviews of proposed legislative changes.

As noted above, the recent paper by a former senator (and member of the committee) John Faulkner very effectively brought together many themes relevant to PJCIS's contemporary role and responsibilities. That paper made a series of recommendations about committee oversight and accountability, which the authors of this ASPI paper endorse. The recommendations relate to the membership of the committee, its role in the oversight of the counterterrorism functions of the Australian Federal Police, its capacity to generate its own inquiries, increased resources for the Inspector-General of Intelligence and Security, greater liaison between the committee and other oversight bodies, such as the Inspector-General and the Independent National Security Legislation Monitor, and a call for sunset clauses in controversial legislation. Faulkner also recommends extending PJCIS' powers and access to certain classified documents.

While those recommendations certainly deserve endorsement, there's a legitimate question about whether they go far enough. In the UK, the Intelligence and Security Committee has a broadly similar role. Although that committee's made up of parliamentarians, it isn't a committee of the parliament: it reports to the Prime Minister, not the parliament. Nevertheless, it has a wider, more intrusive oversight mandate. In 2013, the committee's powers were extended when its enabling legislation was amended to permit it to 'examine or otherwise oversee the expenditure, administration, policy *and operations*' (emphasis added) of the UK's key intelligence agencies. This reform effectively provides the UK's Intelligence and Security Committee with powers of oversight broadly analogous to those of congressional intelligence oversight committees in the US.

By comparison, the mandate of Australia's PJCIS is severely constrained. It's formally restricted to reviewing the administration and expenditure of Australia's six intelligence agencies and specifically precluded from investigating a long list of matters, including operations.¹⁸

The powers now vested in Australia's intelligence agencies are greater than ever before, have recently been expanded yet again and can't justifiably escape closer public oversight. Given that oversight traditions in the US are profoundly different from those in Australia, the American model can't easily be recommended, but those in the UK emerge from a similar parliamentary tradition and are therefore worthy of close Australian scrutiny. To that end, this report supports Faulkner's call for the government to commission a comprehensive public review of the oversight of Australia's intelligence agencies. The inquiry should pay attention to intelligence oversight regimes in other countries, particularly the US and the UK, and should examine the impact of the recent changes to the powers of the UK's Intelligence and Security Committee.

The Senate's committee system is a fundamentally important element of the work it undertakes as a house of review. In the area of national security, the Senate's role is reflected in the work of several committees based on their specifically assigned portfolio responsibilities. Leaving aside the joint committees it shares with the House of Representatives, over the past 40 years the Senate has developed an elaborate committee system of its own, covering all aspects of government administration.

In relation to national security, the key committee is the **Senate Foreign Affairs Defence and Trade Committee (FADT)**, although some agencies, such as the Australian Security Intelligence Organisation and the Australian Federal Police, come under the Legal and Constitutional Affairs Committee. Like other Senate committees, FADT has both a legislative and a references identity, depending on the functions being performed at the time of its sitting. The power of Senate references committees to initiate inquiries is constrained: inquiries are referred to them from the Senate.

Sitting as a legislative committee, FADT scrutinises any legislation referred to it. Three times a year, it sits as a Senate estimates committee to examine proposed government expenditure (in essence, the budget). Estimates hearings can sometimes be torrid affairs for the public servants who appear before them, as the examination of budgetary items can be detailed and forensic. Perhaps for that reason, some of the public servants interviewed for this study were unflattering in their comments about the process and urged reform.

Generally, however, senators regard estimates hearings as an important part of the way parliament discharges its responsibility to ensure Executive accountability. Given that view, the likelihood of significant change in the process is very low.

When sitting as a references committee, FADT has undertaken some of the most important inquiries by a parliamentary committee. Its inquiries have covered a wide range of issues, including in recent years military justice (2005), naval shipbuilding (2006), public diplomacy (2007), procurement procedures in Defence (2012), the Indian Ocean rim (2013) and Australia's aid program (2014).

...FADT references committee performs a valuable public service under some notable constraints, not the least of which is the relatively small size of the committee.

As with the Senate committee system more generally, the FADT references committee performs a valuable public service under some notable constraints, not the least of which is the relatively small size of the committee: it usually comprises only six senators, who have many other demands on their time, including work on other committees.

Because FADT is an integral part of a much more comprehensive system of committees, its structural reform in isolation would be difficult, so the case for that reform isn't compelling. Nevertheless, the committee's effectiveness would be improved by two specific reforms.

First, it would benefit from an increased allocation of resources, including the secondment of specialist advisers from national security agencies for the duration of specific inquiries.

Second, the committee could adopt a more structured approach to its work, inquiring into the most important areas of national security policy as a regular part of its remit. With six-year terms, senators are uniquely placed to take on this task. At the same time, this would give a clearer focus to the committee's role, which is distinct from that of the joint committee, and enable greater attention to several areas of policy that for the most part escape parliament's regular, systematic attention.

One more obvious area of public policy in need of that attention is the foreign aid budget, which even after recent cutbacks is in the vicinity of \$4 billion and for the most part largely removed from parliament's regular scrutiny. A second area is capability planning within the Department of Defence, which has come to the committee's attention in the past. It's at least arguable that the shortcomings identified in the recently completed First Principles Review of Defence wouldn't have become so serious if the parliament had benefited from more sustained monitoring and scrutiny of the department's capability management.¹⁹

Given that the government has accepted the recommendations of the First Principles Review, following up the implementation of the required reforms is an obvious task for FADT.

Beyond that responsibility, neither the review of official development assistance nor the regular scrutiny of defence capability development needs be an annual undertaking. However, if they were a regular part of FADT's work cycle, and undertaken in conjunction with inquiries into other important matters of national security, such as strategic policy or national security planning, the committee would be able to develop a high level of expertise that would make its work a fundamentally important element of parliamentary accountability and oversight. At the same time, FADT sitting as a references committee should continue with its valuable work on selective inquiries.

Concluding remarks

Since the end of World War II, the Australian Parliament's engagement on national security policy has expanded as the nation's international personality has evolved and changed. That engagement has always taken place within the constraints of our Westminster system of parliamentary governance, in which the Executive arm of government has remained dominant in the formulation and implementation of foreign and security policy. This is unlikely to change significantly in the foreseeable future.

However, within those constraints, the role of the parliament as a forum for discussing national security, investigating new and significant policy challenges and overseeing Executive authority, particularly in relation to intelligence activities, has grown significantly.

That growth has been reflected in the steady but rather piecemeal expansion of the parliamentary committee system, which now covers all areas of national security policy. If anything, the process has been evolutionary, as parliament has rather carefully and cautiously tested its ability to press the boundaries of its role, sometimes against strong resistance from ministers.

Executive and ministerial resistance has often been cloaked in rhetoric about defending traditional ministerial prerogatives and the values of the Westminster system, but when change has occurred its impact on those prerogatives and values has been limited and it hasn't significantly degraded Executive authority. But reform has changed the institutional culture of the parliament. It has legitimised parliament's role as an increasingly important partner of the Executive in the conduct of Australia's national security policy.

There's undoubtedly room for further expansion of this role. Developments in the UK, where the responsibilities of the parliament's Intelligence Oversight Committee have been expanded and debates on the floor of the House of Commons about overseas deployments of British forces are becoming more common, may be a pointer for change in Australia.

Some significant past reforms of the Australian system have been the result of outside influences (such as the findings of the Hope royal commissions of 1970s and 1980s and the Flood review of 2004), but others have occurred at the initiative of the parliament. This is where the challenge of further reform must be accepted.

If they wish to do so, parliamentarians have the capacity to move the needle in the direction of change. As Martin Indyk noted in his study of the role of backbenchers during the 30th parliament nearly 40 years ago, ‘they were able to overcome obstacles to influence and were able to make their voices heard . . . through determined and adept use of the means at their disposal.’²⁰

Arguably, the task has become easier than it was then. Certainly, there’s a strong argument that change would not only enhance the role and the standing of the parliament as the representative institution at the heart of Australian democracy, but that it would also improve and strengthen the management of Australian national security policy in an era of growing complexity, challenge and change.

Notes

- 1 Brian L Hocking, ‘Parliament, parliamentarians and foreign affairs’, *Australian Outlook*, August 1976, 30(2):302.
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- 4 The (not quite) white paper on Australia’s foreign affairs and trade policy, *Advancing the national interest*, Senate Foreign Affairs, Defence and Trade References Committee, December 2003, p. viii.
- 5 Quoted in Martin Indyk, *Influence without power: the role of the backbench in Australian foreign policy, 1976–1977*, Parliamentary Library, 1977, p. 5.
- 6 For a discussion, see Knight & Hudson, Ch. 3.
- 7 For a general discussion of the challenges, see Kate Burton, *Scrutiny or secrecy: committee oversight of foreign and national security policy in the Australian Parliament*, Department of Parliamentary Services, Parliament of Australia, November 2005.
- 8 Quoted in Martin Indyk, p. 30.
- 9 John Faulkner, *Surveillance, intelligence and accountability: an Australian story*, occasional paper, November 2014, p. 1.
- 10 Russell Trood, Anthony Bergin, ‘Parliamentary vote would dangerously restrict executive in war’, *The Australian*, 2 September 2014.
- 11 Malcolm Fraser, Paul Barrett, ‘Going to war is a matter for parliament’, *The Australian*, 6 September 2014.
- 12 *Australia’s diplomatic deficit: reinvesting in our instruments of international policy*, Blue Ribbon Panel report, Lowy Institute for International Policy, March 2009.
- 13 Portfolio Budget Statements, 2014–15; Department of the House of Representatives and Department of the Senate, annual reports, 2013–14.
- 14 Between 2008–09 and 2013–14, Senate committee staff declined from 62 to 53. House committee staff grew from 61 to 65 during the same period. See Senate and House annual reports.
- 15 *The ability of Australian law enforcement to authorise to eliminate gun-related violence in the community*, Senate Standing Committee on Legal and Constitutional Affairs, [online](#).
- 16 *Comprehensive revision of Telecommunications (Interception and Access) Act 1979*, Senate Standing Committee on Legal and Constitutional Affairs, [online](#).
- 17 For a discussion of these challenges, see *Treaty scrutiny: a ten year review assessing the 1996 reforms in 2006*, report 78, Joint Standing Committee on Treaties, September 2006, pp. 31–36.
- 18 *Intelligence Services Act 2001*, especially Part 4.
- 19 The review noted that when addressing criticisms Defence, among other things, was inward looking, had a propensity for obfuscation, avoided fixing underlying problems, showed a willingness to ‘game the system to its advantage’ and lacked transparency. See *First Principles Review: creating one Defence*, Department of Defence, April 2015, p. 15.
- 20 Martin Indyk, p. 49

Acronyms and abbreviations

ADF	Australian Defence Force
FADT	Senate Foreign Affairs, Defence and Trade Committee
JSCFADT	Joint Standing Committee on Foreign Affairs, Defence and Trade
JSCOT	Joint Standing Committee on Treaties
OECD	Organisation for Economic Co-operation and Development
PJCIS	Parliamentary Joint Committee on Intelligence and Security

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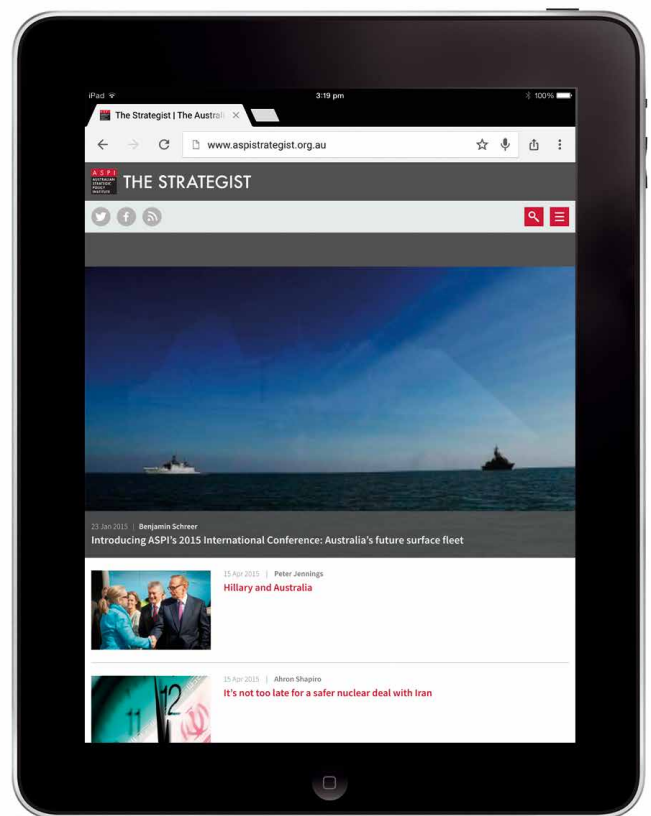
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