

TERRA INFIRMA? PARLIAMENT'S UNCERTAIN ROLE IN THE 'WAR ON TERROR'

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'[I]t is absolutely essential that balancing liberty and security should not be the exclusive responsibility of the executive and that, as a representative and guarantor of people's rights, the parliament should exercise close oversight in this respect'.¹

I INTRODUCTION

In this article, I examine the role of the Commonwealth Parliament in the 'war on terror'. The term 'terra infirma' in the title of this article refers to my concerns about the infirmity of the institutional foundations of Parliament's contribution to the 'war on terror'. I provide examples of these concerns in the body of the article. My argument is that the root cause of this infirmity is Parliament's own uncertainty about its role in national security – an uncertainty fuelled by claims from the Executive Government that the times demand strong government and, by implication, a sympathetic, supportive and potentially supine Parliament.

When writing about 'the Parliament', I should acknowledge that one could mislead readers with the impression that 'the Parliament' exists as a unified political institution. The constitutional framers who drafted the provisions relating to what the Constitution terms 'the Parliament' knew full well that this formal unity would be balanced by an underlying diversity of informal but inevitable political parties. Doctrines of responsible parliamentary government might have included concepts of 'an independent Parliament' but this did not imply a 'Parliament of independents' free of political parties. Australian constitutional framers drew upon party-friendly doctrines of responsible government, and anticipated that 'the Parliament' would be the sum of its

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1 Hans Born (ed), *Parliamentary Oversight of the Security Sector – Principles, Mechanisms and Practices*, Geneva: Inter-Parliamentary Union (IPU) and Centre for the Democratic Control of Armed Forces (2003) 111.

partisan parts.² Although none of this is controversial, it is relevant here because disputes over Parliament's role in national security are inevitably party disputes over public policy priorities, as well as party disputes over parliamentary roles and priorities. Further, it should come as no great surprise that non-government parties have the greatest interest in strengthening parliamentary capacities to contribute to national security as one important way of holding the governing party accountable. Finally, these partisan tensions take intra-parliamentary form when Australian governing parties lack control of the Senate for reasons that are well known, relating to the different electoral systems used for the two houses of 'the Parliament'.

II LIBERTY AND TERROR

In this time of 'war on terror', as with most other times of war, the Executive Government is consolidating vast powers to regulate many aspects of civil as well as military life. I accept that these powers are probably necessary to the war effort and I note the Howard Government's argument that civil liberty is strengthened rather than weakened by the current anti-terrorism policy. My interest here is in public accountability rather than public necessity. This growth in executive power poses a challenge to Parliament to devise its own contribution to national security. Parliament has important responsibilities in the field of national security, particularly in relation to homeland civil security, as distinct from international security. Two areas of security policy call out for parliamentary attention. The first is protection of civil liberty against incursions by well-meaning but intrusive governments; and the second is protection of civil government, including civil processes of parliamentary government, against the military modes of conduct favoured by militant governments.

The two parliamentary areas of security policy are closely related. Generally, Parliament can contribute most effectively to the cause of civil liberties through its contribution to the processes of civil government. The ideal is an independent Parliament energetically engaged in the parliamentary processes of representation, law-making and accountability – to refer to three general spheres of parliamentary activity.³ By implication, Parliament is at its least effective in contributing to national security when it retreats from active involvement in the processes of civil government, convinced by an assertive political executive that the security of the civil realm is best left in the hands of those responsible for the security of the military realm. But this war is not quite like all other wars: the 'war on terror' is being played out on civil as much as on military fields, thereby providing executive governments with unprecedented incentives to apply military solutions to the insecurities of the civil realm.

2 Gordon S Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives* (1989) 9–18.

3 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998).

In fairness, I should declare my own position that Parliament is unduly persuaded by the anti-terrorist drumbeat of the political executive and tends to delegate many of its own national security responsibilities to the executive government. The first step in redressing the imbalance between Parliament and the executive government is to specify in greater detail the national security responsibilities that can reasonably be expected of Parliament. Executive governments are not slow to do the work of specification for Parliament, usually in quite minimal terms, appealing to Parliament to use its constitutional powers to legislate in relation to defence and external affairs. For all intents and purposes, this executive-derived specification limits Parliament to the provision of formal approval of the government's preferred legislative scheme for realigning civil liberties and national security obligations. Think of this minimalist model of Parliament as the warrant officer model, with Parliament providing a warrant of formal authorisation for executive designs on the regulation of national security. In what follows, I will seek to sketch an alternative model of the Parliament as a commanding policy institution with independent roles in promoting national security.

III THE PROBLEM WRIT LARGE

A recent case study illustrating the generally docile and reactive character of parliamentary involvement in national security is the passage of the latest Howard Government legislation arming the Commonwealth government with new security powers for use in the 'war against terror'. As I write, the Anti-terrorism Bill 2004 (Cth) has yet to pass Parliament. But the general features of its parliamentary treatment tell a larger tale of very patchy parliamentary scrutiny of government initiatives. This tale begins with the acknowledgement by executive governments that the Australian Constitution grants considerable legislative power over defence (and presumably national security) to the Commonwealth Parliament. As far as executive governments are concerned, Parliament's role might sensibly stop there, ideally performed whenever Parliament passes government security legislation in unamended form. In this most recent case, this executive expectation has come to grief because the Senate has had the pluck to refer the Bill to the Legal and Constitutional Legislation Committee, chaired by that plucky Government senator Marise Payne, who managed to get her Committee to report back to the Senate recommending a range of amendments to fetter government powers.⁴

In one sense Parliament, or at least the Senate, has the Government over a barrel. In the weeks leading up to Senate debate on those Committee amendments, the situation looks challenging: the Government might well have to accept the realities of Senate politics and live with all or some of the proposed Committee amendments. But this description flatters Parliament, suggesting that

4 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-terrorism Bill 2004 (Cth)* (2004).

possession of the legislative power provides Parliament with considerable leverage over government policy, including security policy. A closer look at the legislative history reveals a rather different picture. The Anti-terrorism Bill 2004 (Cth) was introduced in the House of Representatives by Attorney-General Philip Ruddock on 31 March 2004. The first and second readings were moved within seconds of one another. The Minister's second reading speech occupies some five Hansard pages. The whole second reading debate in the House of Representatives occupies an additional 40 Hansard pages, with debate involving only eight members (three Liberal, three Labor, one Australian Greens), other than the sponsoring minister. Attorney-General Philip Ruddock was measured and unfailingly polite in his introductory and concluding contributions, forcefully drawing attention to the theme that civil liberties were enhanced rather than diminished through the increase of government powers over national security.⁵

The Bill passed the House of Representatives on 13 May, with no need for a recorded vote at any stage of the legislative proceedings. One reason for this calm speed was that both Government and Opposition knew that much of the real debate over specific provisions would occur in the Senate. Indeed, the relevant Senate Committee accepted the reference on the Bill the very day that the Bill was introduced into the lower house. The Senate inquiry proceeded in parallel with proceedings in the House of Representatives debate. Further, the Senate Committee completed its hearings and reported back to the Senate before the lower house had even begun its substantive debate on the second reading of the Bill.

One effect of this division of legislative labours between the two houses is that the Labor Opposition in the House of Representatives, speaking a day after the tabling of the Senate report, flagged its intention to use its numbers in the Senate to support the bipartisan recommendations of the Senate Committee. The real question is whether the Government parties in the Senate will support the Payne Committee's recommendations. Shadow Attorney-General McClelland commended Minister Ruddock for expediting the reference of the Bill to the Senate Committee and used his debating time to rehearse arguments that the Opposition would be making in the Senate debate. The odd person out was Mr Organ, the Australian Greens member for Cunningham, who seemed to acknowledge the legislative realities of the House's relative unimportance compared to the Senate, but who also understood his own legislative responsibilities as a member of the lower house. Even though his party had two Senate representatives, Mr Organ filled up a good five of the 40 Hansard pages with his own case about the threat to civil liberties posed by the Bill.⁶ Perhaps the most telling aspect of his case was the support he drew from media criticism of the decision by the Labor Opposition to support the Bill even before they had examined it in detail. Again we find evidence of the Senate overshadowing the House, because much of Mr Organ's detailed argument about the civil liberties

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27657–62; 12 May 2004, 28444–52; 13 May 2004, 28590–622 (Philip Ruddock, Attorney-General).

6 *Ibid.*, 13 May 2004, 28609–14 (Michael Organ).

impacts of the Bill was drawn from the evidence supplied to the Senate Committee through its many submissions.

Debate in the Senate had two reports to guide it. The Senate Scrutiny of Bills Committee issued its provisional Alert Digest on the Bill the day after the report was tabled from the Legal and Constitutional Legislation Committee.⁷ But, in contrast to Mr Organ, the Senate specialist civil liberties watchdog flagged only one suspect provision relating to the indefinite detention regime of arrested persons. This single item was less substantial than the suite of recommendations from the Senate Legal and Constitutional Committee.⁸ This Committee has now investigated all of the Howard Government's major legislative initiatives in the 'war on terror' and is the Parliament's primary scrutiny body of the legislative agenda of the 'war on terror'. This time around, the Committee held only one public hearing, inviting six parties (of the total of 28 parties lodging submissions) to participate as witnesses. The Government and Opposition parties on the Senate Committee supported four amendments and a number of other revisions and refinements to the Bill. The Australian Democrats dissented, unpersuaded of the need for the legislation, and flagged their support for a position in keeping with the civil liberties case made by Mr Organ in the lower house.⁹

The fate of this 2004 legislation nicely illustrates the prevailing pattern of parliamentary treatment of government legislation. Governments know that the Senate is the real test of their ability to enact legislation. Oppositions know that their best chance of improving government legislation is also the Senate, sometimes through negotiations with the government and at other times with the minor parties or independents. Minor parties like the Australian Greens face similar options, using the lower house to declare their policy positions and the Senate to try to improve public policy more generally. The relevance for present purposes of this discussion is that the legislative capacities of 'Parliament' vary from one house to the other in politically relevant ways that have little to do with the formal variations in legislative power set out in the Constitution. From a government's perspective, the main problem is not the variation as such but the deviation of the Senate from the model of orderly predictability that the government has come to expect of the House of Representatives.

Why does the government take the Senate's role so seriously? Clearly, it is not because of a recognition of any distinctive claim by the Senate about the relative merits of its legislative procedures. The Howard Government is realistic: it waits on the Senate simply because as a government it understands that parliamentary politics is a numbers game and that the numbers in the Senate are not under the tidy control of the governing party. The Howard Government, like almost all its predecessors, would prefer to restore what it sees as the real relativities within Parliament by curtailing the constitutional power of the Senate to block or even amend government legislation passed by the House of Representatives. The latest expression of this sentiment is the Howard Government's Executive Committee,

7 Senate Scrutiny of Bills Committee, Parliament of Australia, *Alert Digest 6/04* (2004) see especially 5–6.

8 Senate Legal and Constitutional Legislation Committee, above n 4.

9 'Dissenting Report by the Australian Democrats', *ibid* 57–9.

chaired by former Liberal minister Neil Brown, inquiring into constitutional alteration options to bypass legislative deadlocks between the two houses.¹⁰

My point is the simple one that even on legislative policy, which one might think was part of the core business of Parliament, executive governments only reluctantly concede the right of the Senate to engage in parliamentary scrutiny of the merits of government initiatives. Against this background, it should come as no surprise that governments have few if any expectations that Parliament has a part to play in national security policy and practice.

IV THE PROBLEM WRIT LARGER

To balance the focus on parliamentary capacities, I turn now to the executive government perspective on security policy. The most useful way to illustrate this is to visit the official website of Mr Ruddock's Attorney-General's Department to learn about 'Australia's National Security Agencies'.¹¹ The 'indicative diagram' of the structure of institutional relationships across the national security agencies is a classic picture of executive government with no place for legislative institutions.¹² The National Security Committee of Cabinet sets the policy priorities; the National Counter-Terrorism Committee ('NCTC') draws together many of the key public service players across Australian Commonwealth, State and Territory jurisdictions; and the Minister's own Department carries the responsibility for national coordination of security activities. I accept that Parliament cannot and should not be considered a security agency in the sense of being 'involved with prevention, response or investigation', to use the official terms in the 'indicative diagram'. But the simple listing of the many executive agencies at federal and state level now involved in national security underscores the need for oversight of the many agencies deploying national security powers – such federal agencies as the Australian Security Intelligence Organisation ('ASIO'), the Australian Defence Force, the Australian Federal Police ('AFP'), the Australian Customs Service, the Australian Protective Service, the Department of Foreign Affairs and Trade, the Department of Immigration and Multicultural and Indigenous Affairs, the Department of Defence, the Department of Health and Ageing, the Department of the Prime Minister and Cabinet, the Department of Transport and Regional Services, and Emergency Management Australia, together with State and Territory police and emergency services.

The problem is not simply one of enlarged Commonwealth powers, which of itself would justify closer parliamentary scrutiny of government. The problem is also one of federalism, or to speak more accurately, one of what in Canada is called 'executive federalism': intergovernmental coordination devised by

10 Neil Brown (Chair), Consultative Group on Constitutional Change, *Resolving Deadlocks: The Public Response* (2004). Tabled by the Prime Minister 1 June 2004.

11 National Security Australia <<http://www.nationalsecurity.gov.au>> at 15 November 2004.

12 National Security Australia <<http://www.ag.gov.au/agd/WWW/nationalsecurityHome.nsf>> at 15 November 2004.

participating executive governments with little or no scope for parliamentary involvement at either the federal or state level.¹³ The 'war on terror' is the latest example of what one might term 'intergovernmental inflation' which is the increasing use of executive agreements brokered by the Federal Government and managed through intergovernmental bodies comprising federal and state officials, operating with little or no parliamentary authority or accountability. Parliament can become involved at the request of the participating executive governments but the usual or preferred form emerging from these intergovernmental bodies is the adoption of uniform national legislation (or regulation) – an arrangement which greatly diminishes the initiative and latitude available to Commonwealth or State Parliament. The relevant Parliaments can either agree or not agree to adopt the proposed model legislation, but they have no scope for alteration or amendment of the legislative regime devised and determined by executive governments.

The momentum provided by the establishment of the Council of Australian Governments ('COAG') under the Hawke and Keating Labor Governments has accelerated with the more recent establishment of the NCTC, representing federal and state officials responsible for national security. Modelled on COAG meetings, the NCTC issues official communiqués which outline policy and practice in national security. But just as COAG has sparked parliamentary resentment over the lack of parliamentary accountability associated with 'intergovernmental inflation', so too the NCTC will inevitably attract parliamentary resentment over the exclusion of Federal and State Parliaments from any involvement in the policy and practice of national security.

Typical of the resentments against the lack of public accountability in intergovernmental agreements is Senator Harradine's complaint about the flavour of international relations overtaking intergovernmental negotiations, typified by what Senator Harradine terms the 'quaintly titled' communiqués published at the conclusion of inter-executive meetings.¹⁴ In making his case that COAG and associated ministerial council meetings lack public accountability, Harradine is inviting other political actors to take aim at additional examples of allegedly 'secretive, dictatorial institutions' favoured by 'lazy and arrogant governments to avoid accountability and public scrutiny in difficult and controversial policy areas'.¹⁵ To be sure, the Harradine case reflects uneasiness over the closed-door development of national policy on stem cell research, but the same general uneasiness will arise in relation to security policy. The following sections sketch the general contours of this parliamentary uneasiness as it has arisen in response to increased international tensions and to the prerogatives of executive governments in claiming sole responsibility for determining the legal framework of Australia's place in the new world disorder.

13 John Uhr, 'Parliament and the Political Management of Federalism' in Peter Carroll and Martin Painter (eds), *Microeconomic Reform and Federalism* (1995) 267.

14 See, eg, Brian Harradine, 'National Policy Issues are Being Debated in Atmosphere of Secrecy', *The Canberra Times* (Canberra), 28 August 2003, 15.

15 *Ibid.*

V THE SOLUTION WRIT SMALL

How could the Commonwealth Parliament deal itself into the policy and practice of national security? One answer comes from a perusal of the very same national security website, which conveniently lists 'key pieces of Australia's national security legislation' including 19 Commonwealth Acts, from the *Crimes Act 1914* (Cth) through to the *International Transfer of Prisoners Amendment Act 2004* (Cth). Although each of these laws empowers the federal government, they should not be seen as disempowering Parliament. In general, Parliament's role does not come to an end with the parliamentary passage of a piece of legislation. Parliament's constitutional competency rests on its possession of legislative power which includes, but is not confined to, the activity of legislating. By virtue of its legislative power, Parliament has constitutional authority to inform itself of any matters it deems necessary to the performance of its legislative functions. These matters can range from proactive issues, such as the need for particular legislation whether or not that need is recognised by the executive government, to reactive issues such as the quality of executive action in implementing legislation. And joining the span from proactive to reactive issues is the generic issue of government funding through parliamentary appropriation, the relevance of which is demonstrated by the remarkably broad policy impact of estimates hearings conducted twice yearly by the Senate.

Many national security agencies are established through legislation, which provides Parliament with an oversight justification. Having legislated to establish bodies such as ASIO and the AFP, the Commonwealth Parliament has good reason to watch over the way executive governments implement the law, through public scrutiny of the performance of both the political executive and agency officials. Given that so many security agencies take the form of statutory authorities with legislated degrees of professional independence from the government of the day, Parliament has added reason to examine agency performance with an eye to protecting professional independence against misplaced political interference from the political executive. In some cases, Parliament has dealt itself into this game of professional protection through legislative provisions giving Parliament a formal role in the appointment process of agency heads. Finally, the fact that national security agencies must comply with constitutional requirements for annual parliamentary appropriations gives Parliament an additional good reason to satisfy itself that the political executive and agency officials are capable of carrying out the legislated or publicly stated functions of the entity in question.

There is one further avenue of parliamentary potential to note. The Commonwealth Parliament has considerable potential at its disposal in its committee system, particularly those committees with a dedicated oversight function in relation to national security agencies. There is more potential here for constructive contributions to national security than one might think, given the lack of interest from executive governments in parliamentary participation in policy and its administration. At the most general, there are the two broad-brush defence committees: the Joint Committee on Foreign Affairs, Defence and Trade,

as well as the Senate Committee on Foreign Affairs, Defence and Trade. And at the centre of specific security responsibilities, there is the so-called 'Intelligence Committee': the statutory Joint Committee on ASIO, the Australian Secret Intelligence Service ('ASIS'), and Defence Signals Directorate ('DSD'). Only the first of these three agencies is identified on the official website in the list of national security agencies, which rather reinforces the importance of sustained parliamentary oversight of the security industry.

The so-called Intelligence Committee of the Commonwealth Parliament is established under the *Intelligence Services Act 2001* (Cth). This legislation replaced earlier legislation which established ASIO subject to review by a dedicated joint parliamentary committee.¹⁶ Under this new legislation, Parliament has dealt itself into national security matters to a considerable extent, because this Committee has statutory authority to review the administration and expenditure of the three primary intelligence agencies (ASIO, ASIS, and the DSD), over and above its capacity to act on a formal reference from the responsible minister or from either house of Parliament. This Committee has already indicated its potential independence through its 2003–04 inquiry into the debate over the accuracy of intelligence over Iraq's alleged weapons of mass destruction.¹⁷ The Committee has also investigated legislative initiatives to bolster the powers of ASIO to combat terrorism, and provides Parliament with considerable potential expertise on the legal framework for the Government's use of civil and military intelligence in the 'war on terror'. But the Committee has adopted the understandable practice of meeting confidentially with security officials, thereby trading off public accountability for closer participation in national security policy and practice, so the public can only hope that their elected representatives strive to act as advocates of community interests and not lowly paid but highly flattered security consultants to the executive government.

There are other parliamentary committees with potential roles in national security. The Joint Committee on the Australian Crime Commission has taken over functions originally performed by the oversight committee established under the National Crime Commission legislation – the Joint Committee on the National Crime Authority. This oversight Committee is perhaps the closest that the Commonwealth Parliament comes to having a committee on organised crime. An often unutilised committee is the Joint Standing (as distinct from statutory) Committee on Migration which could feasibly undertake reviews of border security in keeping with its history of close scrutiny of migration law and regulation. Finally, there is the Joint Standing Committee on Treaties which takes us into the explicit area of international politics, which is the most challenging and politically charged area of international executive agreements, as the following section shows.

16 *Australian Security Intelligence Organisation Act 1979* (Cth).

17 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Inquiry into Intelligence on Iraq's Weapons of Mass Destruction* (2004).

VI THE SOLUTION WRIT LARGER

The 'war on terror' raises many issues of national security, including the relationship between Australian national security and international insecurities associated with terrorism. National security depends in the main upon international security. Not surprisingly then, the intergovernmental arrangements internal to Australia are matched by growing international arrangements between Australia and a number of international agencies. This is not the place to record the increasing use by Australian governments of bilateral and multilateral international agreements. More relevant for our purposes is some acknowledgment of the Commonwealth Parliament's steadily increasing interest in international executive agreements, dramatically illustrated by two parliamentary developments: the 1996 establishment of the Parliamentary Treaties Committee and, more recently, the parliamentary debate over the 'war of the willing' on Iraq with the unprecedented Senate resolution against the government decision to commit Australian troops to the war.

According to established convention, Parliaments generally play minor roles in international affairs, in marked contrast to the distinctive role of Congress (particularly the Senate) in US national security and international relations.¹⁸ But the Australian Parliament, which has explicit constitutional power to legislate for external affairs and defence, is increasingly active in international affairs. A widening circle of parliamentary interests are making greater use of various parliamentary mechanisms to investigate the performance of the executive in managing Australia's international relations, including national security arrangements. Parliament has begun to display something of a creeping envy of Congressional activism in international relations. The proposed free trade agreement ('FTA') between Australia and the US is one of the most interesting examples of executive agreements attracting parliamentary scrutiny. Parliament's role here is basic because, even in the absence of parliamentary power to approve the proposed treaty, Australian implementation of the FTA will require extensive domestic legislation. The decision by the Bush Administration to try to secure Congressional approval for the proposed FTA before the 2004 presidential elections has heightened parliamentary interest in this and related aspects of the Australia-US alliance. Debate over the FTA is bringing to the fore not only substantive issues of the alliance but also procedural issues about parliamentary roles in broader international relationships affecting national security.

Conventional wisdom holds that Parliament has a negligible role in the policy development, implementation or indeed critical review of executive government performance in managing Australian international and security relations. The settled view has been that Parliament 'has had a virtually insignificant role in the making of foreign and defence policy, this being almost wholly the function of the executive'.¹⁹ Even those who would welcome greater parliamentary

18 See generally Kenneth C Wheare, *Legislatures* (2nd ed, 1968) ch 7.

19 Claire Clark, 'Parliament, Defence and Foreign Policy' in John R Nethercote (ed), *Parliament and Bureaucracy* (1982) 291, 291.

contribution to foreign policy regret that Parliament's impact is typically reactive and negative, failing to display a constructive sense of policy initiative. The scholarly consensus is that the Australian Parliament has never exercised any significant influence over the making of Australian foreign policy; that Parliament typically reacts to, rather than initiates, policy developments; and that Parliament's most valuable impact is on elected members' own knowledge and awareness of foreign policy issues.²⁰

But things are changing quite fast. Despite these traditional limitations, parliamentary participants are no longer so respectful of 'executive prerogatives', a fact which reflects renewed Australian appreciation of the interrelationships between international and domestic policies. The negotiation of the FTA tells a larger tale of resurgent parliamentary interest in Australia's place in the new international order. The surprising breadth of involvement by parliamentary committees in matters relating to the FTA illustrates many of the institutional capacities Parliament can draw upon when its members are motivated to contribute to international relations. The institutional mechanisms begin with the Opposition-dominated Senate Foreign Affairs, Defence and Trade Committee inquiry into the FTA.²¹ The same Senate Committee tabled a related report on the Government's recent white paper on foreign affairs just a month after the FTA report.²² Second is the Joint (that is, bicameral) Committee on Foreign Affairs, Defence and Trade, with its overlapping inquiries into Australia's participation in the World Trade Organisation, in the United Nations, and its 'watching brief' on the 'war on terrorism'.²³ Third is the Joint Treaties Committee established by the Howard Government in 1996, to which the final text of the FTA will be referred for public examination, along the lines of the Committee's earlier review of the FTA with Singapore.²⁴ Finally, there is always the prospect of a Senate select committee: one prominent example being the committee established to review the Australia-US FTA which reported twice before the eventual passage of the Government's implementing legislation, alerting non-government parties to a range of policy and legislative problems.²⁵

These parliamentary committees are the most prominent examples of a more general institutional capacity evident in other parliamentary mechanisms, of

20 Allan Gyngell and Michael Wesley, *Making Australian Foreign Policy* (2003) 173–8.

21 Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Voting on Trade - Inquiry into the General Agreement on Trade in Services and an Australia-US Free Trade Agreement* (2003). The inquiry was formally referred to this Committee by the Senate on 12 December 2002.

22 Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The (Not Quite) White Paper - Australia's Foreign Affairs and Trade Policy, Advancing the National Interest* (2003).

23 Joint Standing Committee on Foreign Affairs, Defence and Trade, originally established 1952. The committee's resolution on WTO scrutiny dates from 29 August 2001; the resolution to review annually the UN from 2 July 2002; and the resolution to 'watch over' terrorism from 15 May 2002.

24 Joint Standing Committee on Treaties, Parliament of Australia, *Report 52: Treaties Tabled 4 March 2003* (2003) ch 2. See also Anne Twomey, 'Federal Parliament's Changing Role in Treaty Making and External Affairs' (Research Paper No 15, Department of the Parliamentary Library, 2000).

25 Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia, *Interim Report* (2004); *Final Report* (2004).

which Senate estimates hearings are perhaps the least appreciated. Whenever the parliamentary will is present (which is unpredictable), these twice-yearly budget review hearings allow elected members to bring, for broadly public or narrowly partisan purposes, considerable public scrutiny to the policy and administrative performance of the political and bureaucratic executive management of Australia's foreign relations.²⁶ The fact that governing parties have not controlled the Senate since 1981 provides the Upper House with considerable potential to check government initiatives, in international as well as domestic policy. Accordingly, the surprising turn to international activism has had its most dramatic expression in the Senate, with the recent passage of the unprecedented Senate resolution opposed to Australian military participation in the US-led Iraq war.²⁷ The three days of Senate debate included significant acknowledgement of the need to strengthen parliamentary oversight of foreign policy-making by Australian governments. This debate echoed many of the original views of the Senate Committee, controlled by the then opposition, now in government, which had initiated the call for the establishment of a dedicated parliamentary treaties committee with greater independence and power than the current treaties committee.²⁸

My conclusion is that these emerging mechanisms for closer parliamentary involvement in international affairs mean that there is now considerable institutional interest in Parliament in making an active contribution to the 'war on terror'. But, as the next section shows, this institutional development does not imply that those parliamentarians who are most interested in making a contribution to national security know how that contribution can be most effective.

VII A MODEL OF BEST PRACTICE?

The Commonwealth Parliament is finding its own way as an institutional participant in national security policy and practice. This has not come about as a result of any encouragement from executive governments, which adhere to quite traditional views of national security as solely an executive responsibility. Indeed, the primacy of executive governments in managing national security means that parliamentary institutions can complement rather than compete with

26 Gyngell and Wesley, above n 20, 175. On the influence of estimates hearings, see, eg, Joint Standing Committee on Treaties, above n 24, 54–5.

27 Commonwealth, *Parliamentary Debates*, Senate, 20 March 2003, 9887–8. For the origin of the debate, see Commonwealth, *Parliamentary Debates*, Senate, 18 March 2003, 9497.

28 Senate Legal and Constitutional Committee, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995). The Chairman was Senator Ellison, now the Justice Minister. See also Constitutional Commission, *Final Report of the Constitutional Commission* (Maurice Byers, Chairperson), Australian Government Publishing Service (1988) vol 2, 731–49. See also Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered. Treaties and Treaty Making: An Official's Handbook* (3rd ed, 2003), especially 5–6, 15–16, 24–5. A useful starting point for historical study is Joint Standing Committee on Treaties, Parliament of Australia, *Report 24: Seminar on the Role of Parliaments in Treaty Making* (1999).

executive institutions. Parliament has broken loose from the grip of conventional restraints on legislative independence; and while executive governments will inevitably complain about parliamentary interference into executive prerogatives, it is worth noting that international best practice in security policy now favours greater parliamentary involvement. The Inter-Parliamentary Union ('IPU') based in Geneva has recently co-sponsored a handbook on Parliamentary Oversight of the Security Sector devised by the Geneva Centre for the Democratic Control of Armed Forces ('DCAF').²⁹ This IPU benchmark is more consistent with recent Australian parliamentary practice than with traditional parliamentary restraint.

Although Australian parliamentary experience has not inspired the IPU model, it is important to note that the emerging international model of parliamentary involvement in security policy and practice supports recent Australian parliamentary developments. The Commonwealth Parliament was moving in the right direction and can now appeal to the IPU model, drawing on 'international best practice' to justify its continued progress towards more active roles in national security matters. According to the new IPU/DCAF framework, effective parliamentary oversight of national security depends on a combination of political will and institutional power: political will from non-executive members of Parliament to use the following range of institutional powers over and above general legislative powers – to summon executive members 'to testify at parliamentary meetings', to summon 'military staff and civil servants' and indeed 'civilian experts' to testify at parliamentary meetings, to 'obtain documents from the executive' including 'access to all budget documents', and the power to 'review and amend defence and security budget funds'.³⁰

This obligation of oversight goes further than the review of policy implementation. It reaches into policy as well as administration: into what the IPU Handbook terms the leading edge of executive policy-making as disclosed in the prevailing 'security policy concept', the related 'crisis management concept' and the underlying 'military strategy/doctrine'.³¹ The IPU Handbook provides a general model of the core functions of parliamentary institutions with security oversight responsibilities, and these begin not with legislative duties but with examination of 'security policy' including examination of 'petitions and complaints from military personnel and civilians concerning the security sector'.³²

Finally, the IPU Handbook provides encouragement to those in Parliament who fear that the 'war on terror' will be used to justify even greater executive powers over civil and military realms. Parliaments around the world should accept as their responsibility, the duty of holding executive government to account to protect the community against government temptations to adopt loose definitions of national security threats allowing for interpretations 'fitting the circumstantial needs of the executive'; or 'excessive and lasting powers without

29 Born, above n 1.

30 Ibid 71–2.

31 Ibid 73.

32 Ibid 85.

proper checks and balances’; and ‘militarisation of the police force’ even to the point of redirecting police forces to ‘control and repress opposition’.³³

How does the Commonwealth Parliament rate on this scale of energetic scrutiny of national security policy and practice? The important thing to note is that the emerging IPU standard of sustainable scrutiny measures many institutional activities beyond the legislative process. Importantly, here the Commonwealth Constitution actually helps: the Commonwealth Parliament is in a strong position to contribute to extra-legislative activity precisely because the Constitution protects its legislative power. Armed with this power, the Parliament is able to develop many allied institutional capacities, some (for example, Senate estimates hearings) in formal terms being closely related to legislative functions and others more substantively related to agency oversight and accountability functions. The IPU agenda highlights both sides of this activity: reviews of the accountability of national security agencies as well as legislative consideration of government initiatives. From time to time, the Commonwealth Parliament displays its capacity for constructive national security contributions in either legislative or accountability activities. Both types of activity would be strengthened if the Commonwealth Parliament took stock of its strengths and weaknesses in light of the IPU standard of best practice and of the need for closer investigation of Australian executive governments before building its national security activities. Such moves must be based on a realistic model of institutional feasibility – within the practical limits of parliamentary activism and consistent with Australian political will. Civil libertarians can take comfort from the fact that this political will has proven more elastic and expansive within Parliament than executive governments might have anticipated.

VIII CONCLUSION

These international developments involving the IPU underscore just how important it is for legislative institutions to become as internationally focused as have executive institutions. The Commonwealth Parliament has considerable institutional capacity if it (and here I should repeat my earlier warning about the misleading unity of ‘the Parliament’) ever has the political will to contribute to the ‘war on terror’. I have argued that the primary focus can and should be on defending the civil realm from undue incursion of the steadily expanding military realm. Executive governments have few if any incentives to invite closer parliamentary scrutiny of government conduct in national security policy and practice. This is but the latest expression of the time-honoured theme in executive-legislative relations, and not one that should surprise or deter a Parliament intent on protecting the public against ill-conceived public policy or maladroitness in public administration. The Commonwealth Parliament has to make up its own mind on the extent of its proper involvement in the ‘war on terror’; Parliament is already involved and, through consideration of the new IPU model

33 Ibid 100–1.

of best practice, can begin to evaluate where parliamentary institutions can 'add value' to Australian national security policy and practice.