

# RESEARCH NOTE

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## Conscientious Objection to Military Service in Australia

### 1901 to Vietnam

Almost from Federation, Australia recognised the validity of conscientious objection (CO) to military service. 'Australia's *Defence Act 1903* was the first national legislation to grant total exemption from military service on the grounds of conscientious belief'<sup>1</sup> for those who could prove that the 'doctrines of their religion forbade them to bear arms or perform military service'.<sup>2</sup>

Over time, legal recognition of CO has developed and moved away from that based on religious belief to more secular attitudes. In 1910, the *Defence Act* was amended to remove the reference to religion and referred instead to persons being able to satisfy the prescribed authority that their conscientious beliefs did not allow them to bear arms.<sup>3</sup> However, CO did not apply to the universal compulsory military training scheme that operated between 1911 and 1929 for males aged 12 to 26 years.<sup>4</sup> Those who objected, including the fathers of minors, faced fines and/or gaol. Some boys suffered solitary confinement in Army gaols.<sup>5</sup>

As there was no conscription during WWI (two referenda supporting the introduction of conscription were defeated), the application of the law relating to actual combat service remained untested until the following war.

Conscription was introduced during WWII for service within Australia but the area of service was extended to the southwest Pacific zone in 1943.<sup>6</sup> The *Defence Act (No 2) 1939* broadened the definition of 'conscientious' to include all beliefs, not just religious beliefs or doctrine, thus allowing members of a non-pacifist church to

hold pacifist views as individuals. About one per cent of all conscripts applied for CO exemptions, and a quarter of these were rejected. Most successful applicants performed non-combatant duties or civil work.<sup>7</sup>

### Vietnam

Similar CO provisions existed in the *National Service Act 1951*. When the new national service scheme was introduced in 1964, Prime Minister Menzies argued that conscripts would be obliged to serve overseas as necessary. The courts clarified the definition of CO as having to be 'deep-seated and compelling'.<sup>8</sup> Between 1965 and 1971, 733 men were granted total exemption, 142 were exempted from combat duties and 137 had their applications rejected.<sup>9</sup>

### The Gulf War and the 1992 Act

The concept of selective conscientious objection (SCO), i.e. objection to a war or warlike operation, developed during the 1960s with some successful claims made during the Vietnam War. A private member's bill to amend CO provisions in the *National Service Act* introduced in 1983 was subsequently referred to the Senate Standing Committee on Constitutional and Legal Affairs. The Committee's report *Conscientious Objection to Conscripted Military Service* recommended that a framework for CO be incorporated into a *National Service Bill*. In addition, it recommended the recognition of specific conscientious belief 'so as to grant exemption from participation in a particular military conflict where to be compelled by law to do so would violate the individual's sense of personal integrity'.<sup>10</sup>

The Gulf War in 1990 brought these issues sharply into focus, and the

recommendations of the Committee were incorporated into the *Defence Legislation Amendment Act 1992*. The essential changes included the recognition of conscientious objection to particular conflicts and the requirement that prior parliamentary approval of conscription be obtained. The Act contains procedures to be followed by persons wanting to make a claim.

### Current Legal Situation

CO and SCO are available to persons conscripted to serve in the ADF. CO is available to volunteers in the defence force during peacetime by administrative practice, that is applying for discharge from the ADF. SCO is not available at present to volunteers.<sup>11</sup>

Under the Act, a conscript is exempt from service in time of war if he/she holds conscientious beliefs that do not allow them to participate in war or they hold such beliefs in relation to a particular conflict ([s. 61A\(1\)\(h\) and \(i\)](#)). Exemption from combatant duties is possible under s. 61A (1A). A conscientious belief is defined in the *Defence Act 1903* s. 4 as something that:

- (a) involves a fundamental conviction of what is morally right and morally wrong, whether or not based on religious considerations; and
- (b) is so compelling in character for that person that he or she is duty bound to espouse it; and
- (c) is likely to be of a long standing nature.

In wartime, conscription is introduced by proclamation of the Governor-General. It is laid before Parliament 90 days before it comes into effect and requires the approval of both Houses ([s. 60](#)). If compulsory military service

is instituted then a person who claims exemption on the ground of conscientious belief can have his/her claim determined by a Conscientious Objection Tribunal. A person must apply to the Secretary of the Department of Defence within seven days of being called upon. ([s. 61CA](#)).

### CO Tribunals

The Minister of Defence can establish tribunals as and when necessary by a notice in the Commonwealth Government Gazette. Each tribunal comprises a presiding member, who is a legal practitioner of not less than seven years standing ([s. 61CF](#)) and two other members.

Tribunal procedures are to be informal, quick, fair, just and economical, in accordance with substantial justice and the merits of the case. Tribunals are not bound by technicalities, legal forms or the rules of evidence, although they have the power to take evidence on oath or affirmation, or to summons persons to give evidence or produce documents ([s. 61CQ](#)).

Subject to Part IV of the Act and the rights of appeal, Tribunal determinations are final and binding for all purposes ([s. 61CC](#)). Tribunals are required to notify applicants of their determinations as soon as possible and to provide a written statement of reasons within 28 days of the determination being made. ([s. 61CE](#))

### Appeal Mechanisms

A party may apply to the Administrative Appeals Tribunal (AAT) to have a determination of a tribunal reviewed ([s. 61CZB](#)). There is opportunity for further appeal to the Federal Court on a question of law only and this jurisdiction is exercised by the Full Court ([s. 61CZD](#)).

### United States of America

Under the *Military Selective Service Act* 50 App USC s. 456 (j) no person is required to be subject to combatant training and service in the armed forces, 'who by reason of religious training and belief, is conscientiously opposed to participation in war in any form'. Political, sociological or philosophical views are not included.

The Supreme Court, however, has expanded the criteria for conscientious objector status from religious to non-religious, moral or ethical objection.<sup>12</sup>

A member of the armed forces may seek either separation or assignment to non-combatant duties for reasons of conscientious objection. This is achieved by administrative discharge and is discretionary within the military service concerned.<sup>13</sup> The President can also suspend promotions, retirements and discharges if he determines it is essential to the national security of the United States.<sup>14</sup>

### United Kingdom

The Human Rights Act 1998 implements the European Convention on Human Rights and Fundamental Freedoms. Article 9 guarantees the 'right to freedom of thought, conscience and religion'.

The Advisory Committee on Conscientious Objectors (ACCO), set up in 1970, advises on all conscientious objection claims to further service from Service personnel on grounds of conscience that have not been accepted by Service authorities.<sup>15</sup>

The House of Lords moved an amendment to the Reserve Forces Bill 1996 to include 'discharge on the grounds of conscience'. However, the government considered it unnecessary as long established procedures involving the ACCO existed.<sup>16</sup>

### New Zealand

There is no mention of CO in the Defence Act. However, the Bill of Rights 1990 s. 13 guarantees freedom of thought, conscience and religion.

### Conclusion

Trends since WWI indicate a move to an increasing recognition of CO to military service.<sup>17</sup> No doubt this has been influenced by 'new developments in political and ethical thought'<sup>18</sup> and the 20th century experiences of global conflicts.

1. Hugh Smith, 'Conscience, Law and the State: Australia's Approach to Conscientious Objection since 1901' *Australian Journal of Politics and History*, vol. 35, no. 1, 1989, p. 13.
2. Defence Act 1903, s. 61.

3. Defence Act 1910, s. 7 repealed the existing s. 61 and replaced it.
4. Krygger v. Williams (1912) 15 CLR 366 Barton J at p. 372.
5. John Barrett 'Falling in: Australians and "Boy Conscription" 1911–1915' 1979, especially chapter 5, p. 170 ff.
6. Peter Dennis et al., *The Oxford Companion to Australian Military History*, p. 177.
7. Hugh Smith, op. cit., p. 17.
8. ibid., p. 20 referring to High Court decisions in Regina v. District Court; ex parte White 116 CLR 644 and Wright v. Min for Labour and National Service (1969) 14 FLR 91 and others.
9. Peter Dennis, op. cit., p. 174.
10. Senate Standing Committee on Constitutional and Legal Affairs, *Conscientious Objection to Conscripted Military Service*, 1985, p. ix.
11. Ian Wing, 'Selective Conscientious Objection and the Australian Defence Force' *Australian Defence Force Journal*, no. 137 July–August 1999, p. 36.
12. Charles C. Moskos and John Whiteclay, Chambers II editors, *The New Conscientious Objection from sacred to secular resistance*, p. 42.
13. US Department of Defense Directive Number 1300.6, 20 August 1971.
14. 10 USCA, s. 12305. For more information on CO in the US see [www.objector.org](http://www.objector.org).
15. Advisory Committee on Conscientious Objectors [www.mod.uk/issues/open\\_government/ndp/bs.htm#\\_The\\_Advisory\\_Committee](http://www.mod.uk/issues/open_government/ndp/bs.htm#_The_Advisory_Committee).
16. Reserve Forces Bill, House of Lords Debates, 30 January 1996.
17. For instance in the US 64 700 men claimed CO status in WWI. In Vietnam over 170,000 were classified as CO between 1965 and 1970 in *Oxford Companion to American Military History*, p. 179–180.
18. ibid, p. 180.

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