

## **Conscription, Conscience and Parliament** \*

Tom Frame

I have been thinking about the subject of this address for most of my life. I was born during the most turbulent period of the Cold War—the first week of the Cuban missile crisis in October 1962—and the same year the first Australians were deployed to South Vietnam. The Vietnam War was fought until I was a teenager. The day's fighting featured every night on television. I attended anti-war demonstrations and anti-conscription protests with my father. I can also remember Anzac Day parades at which young Vietnam veterans, many of them national servicemen, were jeered by opponents of Australian participation in the conflict.

As we mark the passage of 100 years since the people decided against making overseas military service obligatory, I will begin by examining the recruitment of military manpower, the recognition of conscientious objection and the parliament's role in the 1916 referendum. I then want to look briefly at the other occasions on which these matters achieved national significance—1943, 1968, 1990 and 2003—before contending that the 1916 referendum is really the first instalment of an evolving and expanding case study on the character of government authority and the limits of the state's coercive powers. Let me begin then with conscription.

### **Conscription**

Prior to the 20th century, most European states obliged their citizens to render some form of military service. Prior to Federation, service in the Australian colonial forces was entirely voluntary. Those who participated in the Maori Wars in the 1850s and 1860s, the Sudan War in 1885, the Anglo-South African War in 1899 and the Boxer Rebellion in 1900 chose to enlist and elected to serve overseas. The supply of volunteers usually exceeded demand. In 1901 the newly formed Commonwealth Government assumed sole responsibility for national defence and was empowered by the Constitution to raise and maintain naval and military forces. The *Defence Act 1903* determined that uniformed service would be voluntary, except in times of war, when men could be conscripted for home defence. A bill for universal (meaning compulsory) military training for Australian men aged 18 to 60 was introduced by the Deakin Government in 1909. Lord Kitchener, the most famous soldier in the British

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 28 October 2016.

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Empire, recommended its introduction during his 1910 visit to Australia. The legislation passed into law with bipartisan support shortly afterwards.

When the war that began in August 1914 continued beyond Christmas of that year and showed every sign of being a protracted conflict, when the list of Australians injured or killed in combat exceeded tens of thousands, when enthusiasm for the war waned and recruitment declined, when more men were needed to maintain the existing strength of the First Australian Imperial Force (1<sup>st</sup> AIF) than were volunteering, the Labor Prime Minister, Billy Hughes, decided to act. As an additional 5,500 men per month were required to ensure the AIF remained operationally viable, Hughes resolved to send men undergoing universal military training to the 1<sup>st</sup> AIF for service overseas. But the necessary legislation would not pass the Senate, where Hughes faced strong opposition, particularly from members of his own party. He could, however, introduce a bill to enable a referendum to be held, a bill that would pass with the support of the Commonwealth Liberal Party headed by Joseph Cook. As an indicator of what was to come, the bill was only just passed. It was the first time in the new nation's history that a question was put to the people for their judgment.

The *Military Service Referendum Act 1916* provided for a non-binding plebiscite. It was not strictly a referendum because the Commonwealth already had the necessary power to conscript men for overseas service, but a referendum is what the act provided. But why was the referendum needed? Prime Minister Hughes had two reasons. The first was the need to secure a symbolic popular mandate that would allow him to transcend deep political division. The second acknowledged that in 1916 conscription was a life and death matter. Was this an early instance of 'wedge' politics? Yes, but the wedge was applied to Hughes's own party rather than the opposition.

On 28 October 1916, the people would be asked in tortuous prose:

Are you in favour of the Government having, in this grave emergency, the same compulsory powers over citizens in regard to requiring their military service, for the term of this War, *outside* the Commonwealth, as it now has in regard to military service *within* the Commonwealth?<sup>1</sup>

The yes case in 1916 was largely pragmatic. It stressed the urgent need for more fighting men, the increased prospects of victory with an enlarged AIF, and the duty Australia owed to the empire. The yes case was popular among conservatives and the middle classes. The no case sought to highlight issues of governance and principles of conscience. The *Australian Worker* summed up the main no argument:

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<sup>1</sup> Emphasis added.

Society may say to the individual, “you must love this; you must hate that.” But unless the individual feels love or hatred springing from his own convictions and his own feelings, Society commands him in vain.

He cannot love to order; he cannot hate to order. These passions MUST find their source within his own soul.<sup>2</sup>

It was wrong to force men to fight against their will, to act in ways that might violate their conscience, to oblige them to risk their lives when those at home were safe and secure. There were also doubts about whether the additional men would make a difference to the war’s outcome and there were protests that Australia had already committed as much as it was able.

Confident that the yes case would easily prevail, three weeks before the plebiscite Hughes directed all eligible men aged between 21 and 35 to report to their local military authorities, where they would be medically examined and enrolled in a unit. Because it was difficult to prove personal identity and there was a lively trade in fraudulent exemption certificates, the men called up in October 1916 were fingerprinted. This highly unpopular measure, when added to resentment at Hughes’s presumption as to the plebiscite’s outcome, worked decisively against the yes vote. It was also a mini poll on the government’s popularity. Hughes’s personal standing as a strong leader heading a unified team was being slowly eroded by the gradual collapse of his cabinet through resignation and defection.

The referendum was defeated with 1,160,033 responding ‘no’ and 1,087,557 answering ‘yes’.<sup>3</sup> The turnout was 82.75 per cent of eligible voters while 97.36 per cent of the votes cast were valid. The referendum was lost in New South Wales, Queensland and South Australia and passed in Western Australia, Victoria, Tasmania and the federal territories. But the result turned on just 72,476 votes. The narrow margin meant that the issue was far from dead. When Australia was asked to provide a sixth division for the Western Front in 1917 and the need could not be met by volunteers, Prime Minister Hughes, now leader of the newly formed National Labor Party, went back to the people on 20 December 1917 with the question: ‘Are you in favour of the proposal of the Commonwealth Government for reinforcing the Commonwealth Forces overseas?’. Hughes’s plan was to have any shortfall in volunteer recruitment met by compulsory reinforcements of single men, widowers, and divorcees without dependents aged between 20 and 44 years who would be called

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<sup>2</sup> Henry Ernest Boote, ‘The Vital Argument’, *Australian Worker*, 7 September 1916, p. 17, emphasis in original.

<sup>3</sup> A breakdown of the vote against conscription was published in *Commonwealth Parliamentary Papers*, 1917–19, vol. IV, p. 1469.

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up by ballot. The referendum was defeated with 1,015,159 in favour and 1,181,747 against. It was a larger defeat than 1916 and left Australia to stand with South Africa and India as the only participating countries not to introduce conscription for the Great War.

In thinking about what was at stake in 1916 and 1917, it is important to separate opposition to conscription with recognition of conscientious objection. Opposition to conscription was (and is) based on political, procedural and practical considerations. For instance, opponents might argue that the case for compelling a section of the population to render military service is poorly conceived or wholly unconvincing. Opponents might take exception to the method by which men are selected (such as a ballot based on date of birth) or the exemption of certain classes of the population from obligatory service (such as the clergy). There might also be opposition to deploying unsuitable or inexperienced amateur soldiers for tasks better undertaken by trained and experienced professionals. Opposition to conscription can take many forms and may not involve any dimension of conscience.

Conscientious objection is focused on the objective of conscription—involuntary or compulsory military service during wartime—and the possibility that someone rendering such service might be required to kill another human being. Then (and now), possessing certain religious convictions and professing particular philosophical beliefs precludes the taking of human life under any circumstances, including armed conflict. Most societies respect these convictions and beliefs, exempting those professing them from compulsory military service in wartime. During the 19th century in Britain, for instance, Quakers were excluded from the operation of the Militia Act of 1803 while Russia allowed Mennonite Christians to pay a special tax in lieu of military service. Objection of this kind usually comes from pacifists (those opposed to all uses of physical force) who usually represent a dissenting opinion held by relatively few people. That pacifists comprise a small minority may explain why many governments have agreed to a compromise with those sincerely holding such convictions. This has generally been the attitude of Australian governments.

The *Defence Act 1903* defined ‘conscientious belief’ as ‘requiring a fundamental conviction of what is morally right and wrong, which is so compelling that the person is duty-bound to follow that belief’.<sup>4</sup> The Act recognised the validity of conscientious belief for ‘those who could prove that the doctrines of their religion forbade them to bear arms or perform military service’.<sup>5</sup> Australia was the first nation to grant

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<sup>4</sup> Moira Coombs and Laura Rayner, ‘Conscientious Objection to Military Service in Australia’, *Research Note*, no. 31, April 2003, Department of the Parliamentary Library, Canberra, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F2E296%22>.

<sup>5</sup> *ibid.*

exemption on these grounds. Exemption was limited to combatant duties and was restricted to individuals demonstrating membership of an organisation formally professing pacifism. Notably, no specific religious test was required after 1910. But there were no such grounds for exemption from compulsory military training. Conscientious objection was, of course, always available to volunteers during peacetime through the process of administrative discharge.

The 1916 conscription debate highlighted two contentious issues that were to have continuing significance. The first was the difficulty of reconciling the state's authority to compel individuals to render military service with the entitlement of individuals to seek exemption based on conscience. The second concerned the state's willingness to concede that it did not have an independent existence over and above serving the individuals comprising it, the individuals who remained the source of its authority.<sup>6</sup> The referendum also demonstrated that compulsion and conscience are ethical issues with political dimensions. This meant that conscription stood apart from other government activities. Acknowledging the moral gravity of obliging someone to take a human life and accepting that some citizens might be morally constrained from doing so, is the mark of a mature democracy and a tolerant society.

The argument *then*, and the argument that might be mounted against the reintroduction of conscription *now or in the future*, is that the political case for increased military manpower ought to be improved rather than the state's coercive powers exercised more vigorously. It is better to have willing volunteers than resentful conscripts. In 1916, Australian parliamentarians realised the gravity of the issues and resolved to share the burden with the public—directly and personally. They would not stand alone in accepting responsibility for sending men to their deaths. The people could never abrogate their own collective responsibility if they voted yes.

Notably, the vast majority of serving soldiers voted against conscription. They had seen the horrors of war and would not insist that others share the experience. Nor did they want to fight alongside reluctant comrades with whom they might not be able to trust their own lives.

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<sup>6</sup> It is difficult to assess the extent to which Australians have supported conscription because most opinion polls refer to compulsory military training or national service. Other than during the closing stages of the Vietnam War, more than 60 per cent of the adult population of Australia has purportedly supported either the introduction or continuation of national service. See Peter Sekules, 'A comparison of RSL policies on major national issues with prevailing public opinion', Australian War Memorial history conference, 13 February 1985, p. 6. It is noteworthy that Sekules makes no mention of any poll canvassing opinion on the recognition of conscientious objection. For a broader discussion of the politics of conscription see Henry Stephen Albinski, *Politics and Foreign Policy in Australia: The Impact of Vietnam and Conscription*, Duke University Press, Durham, 1970, pp. 193–202.

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The churches, as the chief guardians of the nation's moral conscience, generally accepted the justness of the Great War and the necessity of conscription for overseas service. Although there was no officially endorsed Anglican position on military service or conscientious objection<sup>7</sup>, Francis James noted 'the striking fact that between May 1916 and January 1918, no Anglican voice appears to have been raised against conscription in the Church Press or in any other Synod'.<sup>8</sup> As the largest denomination, leading Anglican churchmen strongly urged a vote in favour of conscription and conducted their own campaigns in support of the yes vote. As Michael McKernan has shown in *The Australian People and the Great War*, clergy who were inclined to pacifism or who were troubled by the community's general enthusiasm for the war were often hounded from their parishes and accused of disloyalty and even cowardice.<sup>9</sup> The most notable public opponent was the Roman Catholic Coadjutor Bishop and, from May 1917, Archbishop of Melbourne, Daniel Mannix, who referred to the fighting in 1914–18 as 'just an ordinary trade war'.<sup>10</sup> He was the only Australian Roman Catholic leader to respond positively to the 1917 peace proposals of Pope Benedict XV, who advocated the complete abolition of obligatory military service.

The failure of the conscription referenda was not lost on politicians during the Second World War. Although compulsory military training was resumed in October 1939 (war with Germany having been declared the previous month)<sup>11</sup>, general conscription did not begin until hostilities commenced against Japan at the end of 1941. By January 1943 and with the Labor Party in power, military manpower again became a pressing issue and one that could have divided the party a second time.<sup>12</sup> Prime Minister John Curtin prevailed and his party's policy platform was changed. In February 1943, legislation was introduced to define Australia in a manner that included the territories of Papua and New Guinea and the islands of Indonesia and British Borneo.<sup>13</sup> All troops, including the Citizen Military Forces (CMF), were liable for service in a special 'South-Western Pacific Zone'.<sup>14</sup> But this policy created two

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<sup>7</sup> Alan D. Gilbert, 'Protestants, Catholics and loyalty: an aspect of the conscription controversies, 1916–17', *Politics*, vol. VI, no. 1, May 1971, pp. 15–25.

<sup>8</sup> Francis James, in Roy Forward and Bob Reece (eds), *Conscription in Australia*, University of Queensland Press, St Lucia, 1966, p. 265.

<sup>9</sup> The experiences of two clergymen, one Methodist (the Reverend B. Linden Webb) and the other Presbyterian (the Reverend James Gibson), are described in detail in Michael McKernan, *Australian Churches at War: Attitudes and Activities of the Major Churches, 1914–18*, Catholic Theological Faculty, Sydney, 1980, pp. 30–1.

<sup>10</sup> *Argus*, 18 September 1916, p. 6; and *Catholic Press* (Sydney), 29 November 1917, p. 20.

<sup>11</sup> A statement by Prime Minister Sir Robert Menzies giving his reasons for introducing conscription for home defence was published in the *Daily Telegraph* (Sydney), 21 October 1939.

<sup>12</sup> Peter Love, 'Curtin, MacArthur and Conscription, 1942–43', *Historical Studies*, vol. 17, October 1977, pp. 505–11.

<sup>13</sup> New Guinea was then a League of Nations protectorate administered by Australia.

<sup>14</sup> See *Defence (Citizen Military Forces) Act 1943*.

armies: a volunteer army that could be sent anywhere and a conscript army that could only be deployed to the Pacific zone. This naturally complicated defence planning because some units were an amalgam of 2<sup>nd</sup> AIF volunteers and CMF conscripts and volunteers.

Complications aside, John Curtin's decision reflected the acute Japanese threat, acknowledged that American conscripts were now defending Australia and embodied a compromise with Australian reluctance to make overseas military service compulsory.<sup>15</sup> Of the two, historians have judged the latter to be the stronger impetus for the policy change.<sup>16</sup> In the post-Second World War period, Australian forces consisting entirely of volunteers deployed to the Korean War (1950–53), the Malayan Emergency (1948–60) and the Indonesian 'Confrontation' (1964–66)<sup>17</sup>, although compulsory military training was re-introduced in 1951 as part of a national service scheme<sup>18</sup> that continued until 1959.<sup>19</sup>

### **Fifty years on: the debate renewed**

Conscription was reintroduced using provisions contained in the *National Service Act 1951* without parliamentary debate (not that it was technically required) on 10 November 1964.<sup>20</sup> It is important to note that national service was reintroduced in anticipation of possible armed conflict with Indonesia rather than as part of an escalating commitment to South Vietnam. The Act exempted conscientious objectors on the grounds of religious and non-religious beliefs from either all military service or from combative military service, the distinction reflecting the beliefs held. Total exemption was granted on the basis of 'deep seated and compelling' conscientious objection. Ministers of Religion and theological students were specifically exempted.<sup>21</sup>

National service had not been a divisive political issue in the 1950s and did not generate immediate controversy when reintroduced in late 1964. In fact, a Gallup poll showed that 71 per cent were in favour of the scheme at that time and 25 per cent

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<sup>15</sup> 'Conscription and Conscience', *Current Affairs Bulletin*, vol. 40, no. 5, July 1967, p. 69.

<sup>16</sup> *CPD* (Reps), 3 February 1943, pp. 265, 269.

<sup>17</sup> Compulsory military training during peacetime was conducted in the period 1911–29 and 1950–60.

<sup>18</sup> *CPD* (Reps), 21 November 1950, pp. 2723–4, 2728.

<sup>19</sup> *CPD* (Reps), 26 November 1959, pp. 3185–86. In 1957, the scheme was reduced with the introduction of a ballot which would restrict the number of young Australian men 'selected' to undergo compulsory training, *CPD* (Reps), 1 May 1957, pp. 950–2.

<sup>20</sup> *CPD* (Reps), 10 November 1964, pp. 2715, 2717–18.

<sup>21</sup> See *National Service Act 1951* s. 29(1)(d) and (e).

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were against.<sup>22</sup> Attitudes changed little after 29 April 1965 when Prime Minister Sir Robert Menzies advised federal parliament that an infantry battalion would be deployed to South Vietnam for combat operations.<sup>23</sup> The 1 RAR deployment was an all-volunteer force. The following month the Defence Act was amended to allow national servicemen to deploy overseas, with the first Holt Government deciding in March 1966 that ‘nashos’ would serve in South Vietnam from mid-1966. Support for national service was now 68 per cent in favour and 26 per cent against.<sup>24</sup> By October 1970, 58 per cent still agreed with national service and 34 per cent were against with 8 per cent curiously undecided.<sup>25</sup> In September 1971, 53 per cent of 16 to 20-year-olds supported the continuation of conscription with the proportion in favour increasing with the age of respondents.<sup>26</sup> The notable difference was in attitudes to *where* national servicemen ought to be sent. In May 1965, 52 per cent were in favour of them being sent to Vietnam and 37 per cent wanted them to remain in Australia. Surprisingly by August of 1967 and after the first national serviceman, Errol Noack, had been killed in mid-1966, the percentage of those polled showed 42 per cent believing they should be sent to Vietnam (up 5 per cent) and 49 per cent for remaining in Australia (down 3 per cent).<sup>27</sup>

Prime Minister Holt explained that the United States was sending its conscripts to Vietnam and Australia was obliged to do likewise. To avoid the accusation that conscripts were carrying a disproportionate burden of the war-fighting effort, later legislation limited deploying units to less than 50 per cent national servicemen. Between 1964 and 1972, nearly 64,000 men were conscripted. Of that number 19,450 national servicemen would serve in Vietnam with around 200 killed. Of the regular army, 21,132 personnel deployed to Vietnam with 242 killed. Notably, early in their training many national servicemen were quietly ‘invited’ to express their interest in serving in South Vietnam or some other destination. Three out of four conscripts fulfilled their obligations within Australia, Malaysia or in PNG. National service could be avoided by enlistment in the CMF, deferment on the basis of particular circumstances, such as education, or exemption through conscientious objection.

Opinion was divided on whether the war in South Vietnam had a direct bearing on Australia’s security and whether it justified the deployment of conscripts. Disagreement on these two points led to calls for the recognition of ‘selective

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<sup>22</sup> Melbourne Draft Resisters’ Union, *Downdraft*, p. 85, cited in Peter Cook (ed), *Australia and Vietnam 1965–1972*, La Trobe University, Melbourne 1991; Australian Gallup Poll, 1789–1803, Oct–Nov 1964.

<sup>23</sup> Australian Gallup Poll 1852–1871, Sep–Oct 1965; Australian Gallup Poll 1900–1915, May–Jul 1966.

<sup>24</sup> Australian Gallup Poll 1916–1931, May–Jul 1966.

<sup>25</sup> Melbourne Draft Resisters’ Union, *op. cit.*

<sup>26</sup> Australian Gallup Poll 2292–2294, Sep–Oct 1971.

<sup>27</sup> Melbourne Draft Resisters’ Union, *op. cit.*



objection' also known as 'objection to particular wars' in 1966. Commentary focused on what were considered two unsubstantiated assertions in the National Service Act: first, that it focused on 'war' rather than 'wars' and assumed that all armed conflicts possessed comparable moral status; and second, that disagreeing with an elected government's decisions could be a matter of conscience. While critics of the Act conceded that a minority submits to the decision of the majority in a democracy, the decision to wage war raises moral issues so serious that compelling someone to render military service may reasonably be regarded as a matter of conscience and, therefore, an exception to the rule.

It was not until late 1968 that the courts clarified the scope of conscientious belief. In a case heard before the High Court<sup>28</sup>, Bruce Thompson claimed that the phrase 'any form of military service' in section 29A(1) of the National Service Act, meant that exemption was possible if an individual objected to 'any form of military service' including a particular war. The court was split. Chief Justice Barwick disagreed. The case was lost. The Department of Labour and National Service used Barwick's judgment to point out that:

it is open to a national service registrant, whose objection to military service is of a selective nature in that he holds a belief against participation in a particular conflict, to opt for part-time service in the Citizen Forces at the time for registration as an alternative to call-up for the full-time National Service.<sup>29</sup>

Furthermore, there were fears that legal recognition of selective objection could open doors to a general theory of selective obedience to law. The distinction between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to the payment of a particular tax, for instance, was apparently rather slight. Such recognition had the potential to erode public authority and destroy the fabric of government. There was also the additional complicating factor of distinguishing between political beliefs and party loyalties. The latter could involve all of the members of a political party seeking exemption from military service on the grounds that their party opposed a war. Those defending a right of selective objection note that it applies in the sole area where the executive government can compel personal service (which is different from paying taxes and obeying the speed limit). Personal service can also be compelled by the judiciary in the form of jury service and by the legislature in the form of compulsory voting. Both of these obligations are, of course, also accompanied by opt-out provisions.

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<sup>28</sup> *R v District Court of Queensland Northern District; ex parte Thompson*, [1968] HCA 48; (1968) 118 CLR 488.

<sup>29</sup> DLNS to Secretary, Prime Minister's Department, 11 December 1968, DLNS file 72/557.

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## Seventy-five years on: a new debate

Disagreements about selective objection continued until the end of Australian involvement in the Vietnam War and the proclamation of the *National Service Termination Act 1973*. Provisions relating to national servicemen were removed from the Defence Act in 1975.<sup>30</sup>

The debate was moribund until Michael Tate, a Labor Senator from Tasmania, proposed legislation to recognise a right to selective conscientious objection.<sup>31</sup> He later introduced a private members' bill into the Senate proposing changes to the *National Service Act 1951*.<sup>32</sup> The matter languished until 1990 when Senator Tate, by now the Justice Minister, circulated the first draft of a Defence Legislation Amendments Bill. It included recognition of selected conscientious objection for conscripts although the last national service trainee had been discharged from the Army in 1973. The service chiefs were mortified by the prospect of selected conscientious objection being offered even to conscripted personnel because they contended that some of the principles that applied to conscript service could (and would) be applied to volunteer service or create unhelpful confusion. These fears soon materialised when Leading Seaman Terrence Jones failed to report to HMAS *Adelaide* before the ship deployed to the Gulf of Oman in August 1990 to enforce United Nations' sanctions against Iraq after its invasion of Kuwait.

Leading Seaman Jones defended his action by saying (while he was absent without leave):

I am not a coward and I would be prepared to fight for my country, but I am taking a *political stand* because this is not our war, we are just following the Americans. I am prepared to die to defend my country but not to protect the United States oil lines.<sup>33</sup>

He inferred that it was moral to be political in this instance. Although the Defence Legislation Amendments Bill was still in draft form when Jones was declared absent without leave, the Greens (WA) Senator for Western Australian, Jo Vallentine, introduced a private senators' bill for 'An Act relating to conscientious objection to

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<sup>30</sup> Conscription could also take place under s. 60 of the *Defence Act 1903* which allows the Governor-General, by means of a proclamation, to call upon certain male persons to serve in the Defence Force at a time when there is a real or apprehended attack on or invasion of Australia. This Act does not recognise any right of conscientious objection.

<sup>31</sup> *CPD* (Senate), 23 August 1978, pp. 330–3, (Senator Tate).

<sup>32</sup> *CPD* (Senate), 28 October 1982, p. 1975, (Senator Tate).

<sup>33</sup> M. Metherell, 'RAN ship jumper attacks Bush', *Age*, 29 August 1990, p. 10, emphasis added.

certain Defence service'.<sup>34</sup> She described Leading Seaman Jones's decision as 'brave, courageous and principled', and believed he had 'very good reasons for not going.'<sup>35</sup> Jones was taking a political stand that Vallentine sought to protect as a matter of conscience. The inference was that a person's political beliefs were part of their moral conscience and therefore worthy of protection.

At his subsequent court martial, Jones was found guilty of being absent from his lawful place of duty without approved leave. He was sentenced to 21 days detention, reduction in rank to able seaman and forfeiture of four days pay. Jones then sought 'discharge at own request'. His court martial prompted an inquiry from the Human Rights and Equal Opportunity Commissioner, Brian Burdekin, who was concerned that the absence of any right of selective conscientious objection offended against the spirit the Human Rights and Equal Opportunity Act and was contrary to the International Covenant on Civil and Political Rights. In reply, the ADF insisted that:

an expectation that all *lawful* orders will be obeyed is fundamental to the maintenance of discipline ... Concomitant with this expectation there must exist a right ... to take disciplinary action where breaches of this fundamental obligation occur. In other words the right to enforce the obligation to serve is reasonable and not discriminatory. Accordingly, so far as volunteers are concerned, there is no scope for allowing for conscientious objection with respect to specified operations, or indeed combat generally, unless the matter is raised as a ground for discharge at own request.<sup>36</sup>

Recognition of conscience became a 'hot issue' again with the planned invasions of Afghanistan in 2001 and Iraq in 2003. Both operations provoked a great deal of discussion about the justification of Australian participation given the absence of any clear, unambiguous, immediate or direct threat to the Australian people and the national interest from either Afghanistan or Iraq. There were laments and complaints about both operations and many previously apolitical servicemen and women felt they and their skills had been used for domestic political advantage and international alliance leverage. This was very far removed from defending Australia and its national interests, some privately contended. Matters of conscience and the nature of obligation (a slight variation to compulsion) were again at the forefront of conversation. Based on my observations then and now, I would contend that the vast majority of ADF members have not actually thought much about the difference

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<sup>34</sup> Defence (Conscientious Objection) Bill 1990.

<sup>35</sup> *CPD* (Senate), 13 September 1990, p. 2313, (Senator Vallentine).

<sup>36</sup> Naval Support Command (NSC) Letter, Annex C, 'Human Rights Aspects of Conscientious Objection', to Assistant Chief of Defence Force (Personnel), October 1990, NSC file N90/32170, folio 56.

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between moral objections and political dissent, the majority do not know how to differentiate between them, and even fewer have thought about what they would do if confronted by a moral objection within their service.

Objection to military service always implies some degree of conflict in values between the state and the person who objects. But when the objector is not a pacifist, but selectively objects to military service because of the alleged immorality of the purpose or the legality of the methods used in combat, the conflict of values becomes much more acute and the resolution much more problematic. This is particularly so when objectors contend that the state's actions violate international law. No democratic government concerned about public opinion would be prepared to entertain such an admission by recognising such an objection. Yet, the recognition of a right to *selective* conscientious objection is a crucial one because it establishes the principle that wars and conflicts can be just and unjust and that agreement to serve in the armed forces ought to be conditional. This debate needs to continue. In the current absence of conscription, national service and universal military training, it is a favourable time for a new consensus to be sought.

### **The shadows of 1916**

The 1916 conscription referendum highlighted and worsened sectarian tensions within Australia—tensions which have since dissipated. But it has left a positive lasting legacy in the form of respect for conscience. Since joining the Navy 37 years ago, I have noticed a very substantial shift towards respect for the personal convictions of uniformed men and women. This is a welcome development. But conceptual challenges remain. I would contend that the two most pressing challenges are explaining the distinction between objection and opposition, and ensuring that moral conversation is not proscribed as incitement to mutiny within or beyond the ADF. Trying to pursue mission objectives with both effectiveness and efficiency while giving conscience due regard is not easy. I realise there is impatience with suspected or declared conscientious objection among volunteers, impatience reflected in the retort: 'if they don't approve they are free to leave'. But I would respond in two ways. First, what if their objection is valid because a planned action is morally objectionable? The presence of conscientious reflection in a unit may be crucial to preventing immoral and potentially illegal behaviour. Second, should a career be ended because a person thinks that their participation in one activity is incompatible with their moral conscience and seeks an alternative form of military service?

But the pressing issue is the difficulty of differentiating morals from politics to the extent that such a distinction is ever possible. I have met many people claiming to profess a moral objection when their position is no more than political dissent. They think that something is bad (by which they mean a poor option) rather than wrong (by

which they mean defying a principle). The present approach—to deal quietly and confidentially with individual cases of conscientious objection—is workable but unsustainable. It is presently workable because these cases are few in number while those involved usually prefer privacy and anonymity. I am not sure that this approach will be adequate given the evolving weapons, tactics, scenarios and corporate risk aversion associated with current and likely future operations.

Nonetheless I am confident that we can host a mature discussion that will be principled and pragmatic in balancing the nation's military manpower needs with respect for individual conscience. It is a discussion that necessarily involves parliamentarians and their staff, ethicists and uniformed people. I have already involved my academic colleagues and the military staff at the Defence Force Academy and I would welcome the chance to engage with the very able minds that work in this place as well.



**Question** — Thank you very much; it was a most enjoyable and sustaining presentation. There are two things I would like to clarify. First, did Prime Minister Cook's legislation pass? You mentioned it was supported by Kitchener.

**Tom Frame** — Yes it did. There was a statute that provided for universal military training for 18 to 60- or 65-year-olds in the ensuing period. That did get up. Lord Kitchener supported it. It was put up by Deakin and was passed the following year.

**Question** — Did it relate to service?

**Tom Frame** — No, just training, because there was already a provision on service in the Defence Act of 1903.

**Question** — My second question was on the Michael Tate amendment: did that get lost in the wash?

**Tom Frame** — No it didn't. It became part of a cluster of amendments to the Defence Act in 1992 and made Australia the only country in the world that has legislated for a right of selective conscientious objection for conscripts. I think we remain the only country in the world to have so legislated.

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**Question** — I have two questions. Is national service still on the statute books? Does the government have the power to conscript people?

**Tom Frame** — I don't believe it does. The *National Service Termination Act 1973* terminated national service. There is legislation that could be pulled out hurriedly and I presume put to parliament and passed. I believe the force and effect of the 1973 Act is that the Commonwealth would have to, if you like, bring a bill back to parliament. In 1964 the Act was dormant. My understanding is that the government is not empowered to do that now.

**Question** — So if they did bring it back they would not need a referendum as such?

**Tom Frame** — No. They did not need a referendum during the Great War either. There was no constitutional amendment involved in anything that was happening. It was to try to get a mandate for a particular action. In the same way, this parliament could decide matters in relation to the Marriage Act; it doesn't require an amendment to the Constitution. They called it a 'referendum', but 'plebiscite' is a better description of what it is. If it came back tomorrow, it wouldn't need that. The parliament could decide: a bill to reintroduce national service would be put to the parliament, passed, and then presumably the government could decide to act on it or not.

**Question** — My second question relates to the power of the prime minister to declare or involve us in war and the discussion you are initiating. Is that included in your wide view of this?

**Tom Frame** — This is a matter I have discussed with the 25th Prime Minister of Australia, John Howard. I have discussed it at length with him because I was involved in some conversations before the war in Iraq. I had certain understandings which I made plain in the *Australian*. I regretted the things I had said before the war, and I wrote an equally large article in the *Age* saying that I was wrong. That earned me notoriety on Al Jazeera, but nonetheless I thought it was the right thing to do. I hadn't necessarily supported a vote, say, of both houses of parliament sitting together passing a motion to declare that we would involve our people overseas. I hadn't taken that view, but I have moved in that direction since that time because it does seem to me of such gravity, not just to the people we send but to the people they meet on the other end. It does seem to me that this is a matter of gravity that we may formalise or regularise. You might, if I understand your question, suggest that it be beyond, for instance, the national security committee of cabinet and that it might be put to a broader test of support.

I have to say that I am moving in that direction. I know that Mr Howard has not moved at all, but we can have a friendly exchange on that. But I welcome the chance to tell him why I think in relation to Afghanistan and Iraq, for instance, there could have been other ways of doing it and more people from whom to seek a mandate. The question arises though: would you require that to happen if we quickly had to go to another Rwanda or Somalia? Would you want both houses of parliament sitting together to have a resolution to that effect, or would you say: 'No, that is the kind of thing we ought to be doing. We should do it straight away. Let's not delay. Let's go and do that.'? Because we do not declare wars anymore, we have deployments and we have armed conflicts and things like that, putting a fence around that thing that you want a bigger mandate for is a challenge in itself. But I should stop because I have asked you a question!

**Question** — I think it depends on the circumstances obviously and there is no one simple answer. It is certainly a matter for discussion.

**Tom Frame** — On Iraq and Afghanistan, I have to say, I am moving in the direction of saying that it would have been better with a much larger parliamentary mandate and therefore greater political legitimacy.

**Question** — I'd like to ask you about something where the dust has already settled. I was a strong opponent of the American rape of Vietnam. I am wondering if you would like to tell us what the Australian armed forces and the American armed forces achieved for ordinary Americans and for ordinary Australians. What did they achieve for ordinary Vietnamese? I note that Robert McNamara, the main architect of the war against the people of Vietnam, a few years before his death, turned up at the university of Hanoi and said to the staff and students there, among other things: 'We didn't know anything about you. I have now come to the conclusion that our participation in that war against you was wrong.' It is in his book, *The Fog of War*, and the film. So what do you think? What about these phoney theories about the dominoes?

**Tom Frame** — I can only answer one question. I would have to say, together with McNamara and many others, that both the decision to conduct the war in Vietnam and the manner in which it was conducted are low points for Australia and the United States. I think there is a great deal of regret about how it was done and the difficulties of achieving practical outcomes. It was the case that, in South Vietnam at least, there were a number of instances where the people democratically made their mind plain that they did not want to be connected to North Vietnam. That was not a system of government that they wanted and I think that has to be conceded. Having said that, the

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way in which the war was fought does seem to me to be removed from countries like ours. I don't think anyone would say that we had a moral mandate to be there.

I am always sensitive when I talk about Vietnam. I only remember it as a child growing up and being moved to tears in 1969 when Vietnam veterans were booed. I thought the target was wrongly chosen. But I would say that when people did go there they had their own views that it was right, that they thought they were doing something that was positive and productive. I am always anxious not to say that they did something that was inherently evil or wrong, or that there was nothing good in what they did. The war itself was misguided and the conduct of it, as everyone has said, was a low point both in diplomacy and in the conduct of a campaign. We still learn lessons from Vietnam, both diplomatic and political lessons, as we ought, and even in terms of how to do counterinsurgency—not that we do that any better, but at least we are better informed about the bad decisions that we might make.

**Rosemary Laing** — I have a question about the 1916 referendum, so called. It is incredible that, at a time when voting was not compulsory, the turnout was so extraordinary. How did people get their information about the terms of the question or the issue? Clearly the churches played a big role. Was there such a thing as a yes or no case? How did the ordinary voter get to engage with those issues?

**Tom Frame** — I think broadly there were three ways. One of them was that they had personal contact with their member of parliament, if they were in a major urban centre and not where it was difficult for the local member to get out and about. That was principally the way. We have got plenty of records of speeches given by the MP for wherever it may have been in support of or against the referendum question. The second way was of course newspapers. People relied heavily on newspapers. Not having radio or television and the internet a space-age thought, they would just acquire newspapers. It is one of the great sadnesses: I think good thought produces good writing and one of the reasons a lot of public conversations are impoverished is because people do not write; it is just grabs and words. When you write you have to put words on a page that don't have all the trickery of oratory. So papers were important. Things like the *Australian Worker* saying, 'This paper supports this view', or the *Bulletin* presenting an argument, were important. In terms of interaction with other people, where would you have a discussion? It was the case, if you look at the census, you are looking at say 96 per cent of the population belonging to four major denominations. Regular churchgoers were probably only about 35 per cent in that period. But people would hear a sermon, have a discussion or whatever else it might be, bring that home and that would continue because there were no other ways—that was a form of entertainment. So I would say those are the three main ways.



There is more than I have written, but not what I have read, concerning the churches because they were so influential in shaping votes. It is not possible for us to say that all Anglicans voted this way or Catholics voted that way, but if the oratory and the vehemence of it had any effect, and it was said to be sectarian, then you would think people would line up according to what their priests, pastors or ministers were urging. It is true too that people who had served or were thinking about serving had a lot of skin in this game, so to speak. So it was a matter of lively conversation. There were not so much attempts to stop those who were coming back who had been wounded from speaking, but they were powerful advocates when they did speak against the yes case. Therefore I think the fact that 82 per cent of people turned out is highly significant.

We first of all went to having compulsory registration for voting and later to compulsory voting and, if I could put in a small plug, our university is having a one-day conference looking back on the 1996 election and the first year of the Howard Government on 16 November. That is relevant to this conversation because Albert Langer advocated a way of voting in the 1996 election which was then made invalid immediately afterwards by the parliament here. But it seems to me to be in one sense illiberal if you say on the one hand, 'I don't think people should be compelled to vote', then say over here, 'People should be compelled to vote but only within these narrow parameters.' My colleague, Andrew Blyth, who is the centre manager where I work, is working on this. I think they are important issues. When it came to the referendum, you had yes or no options, people didn't need to be compelled and 82 per cent were there. The interesting thing is that when Senator Herbert Payne moved a motion for compulsory voting he said, 'The people can't be allowed to not be interested!' His view was that having compulsory voting would lead to a happy outcome where people would be knowledgeable about their nation's affairs. Making them vote would mean they could not ignore politics. There had already been a notable decline in voting for the nine elections where it was not compulsory. I am a strong believer in compelling the people to vote because it does not have that factor that I observed when I was in the UK. I was the local vicar at Anne Boleyn's Church in Kent and a man came up to me and said, 'Oh Vicar, you must pray on Thursday for rain.' I said, 'Why should I do that?' He said, 'Because the socialists won't vote!' We are talking here about 1997 and the view still held that the rain would have a democratic effect and I did not want that to be the case. So that is why I hold—you may disagree with me, and please do—that we take out a whole range of extraneous factors. But making the people decide in 1916 I think was important. It was an ancillary thing to say, 'If you are going to do this, you put your hand to it as well', but I think it was an important thing.