Serendipity, Doctors and the Australian Constitution

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SECTION 51 (XXIIIA) OF THE AUSTRALIAN CONSTITUTION ALLOWS THE FEDeral government to make provision for:

> maternity allowances, widow's pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental service (but not so as to authorize any form of civil conscription), benefits to students and family allowances.[1]

This clause entered the Constitution following a rare successful referendum in 1946, but it was not originally framed in quite that way. When it first appeared before the House of Representatives as the Constitution Alteration (Social Services) Bill in March 1946, both the word 'pharmaceutical' and the phrase 'but not so as to authorize any form of civil conscription' were missing. The absence of 'pharmaceutical' was simply a mistake, which was corrected in committee by the Attorney-General Dr Herbert Vere Evatt on 9 April. The phrase 'but not so as to authorize any form of civil conscription' was an amendment proposed by the Leader of the Opposition Mr (later Sir) Robert Menzies, and accepted by the attorney-general.[2] It is sometimes known as the Menzies–Newland placitum, because Sir Henry Newland, president of the British Medical Association's (BMA) Australian Federal Council from 1933 to 1949, wrote a letter to Earle Page (doctor and prominent Member of the House of Representatives) suggesting an amendment along these lines. Page passed the letter on to Menzies and to Senate Opposition Leader George McLeay.[3]

The amendment entered the Constitution during a time of major upheaval in Australian medical circles, with successive federal governments attempting to introduce a variety of health schemes. The BMA was not united in opposition to all the legislation, but ended up thwarting substantial portions of these schemes.

This amendment to the Australian Constitution protects doctors and dentists from civil conscription although other citizens do not enjoy the same protection. There is nothing in the Constitution, for instance, to protect the unemployed from work-for-the-dole schemes. This con-

stitutional protection for doctors was tested in the High Court in 1949, and the court ruled that even such an apparently trivial matter as requiring doctors to write prescriptions only on government forms constituted civil conscription.[4] The pharmaceutical benefits scheme itself was not ruled unconstitutional, but it was rendered unworkable by doctors' boycotts and by the High Court ruling against the compulsory use of government forms.

In the 1950s, the Menzies government, with Page as Health Minister, brought in a pharmaceutical benefits scheme that was acceptable to doctors. This turned out to be considerably more expensive than the scheme it replaced.[5] The degree to which later federal governments have been constrained in their health care provision by the no civil conscription clause is unclear, but the clause certainly ended up costing the Australian taxpayer a large amount of money in the 1950s.[6] So how has it come about that doctors and dentists have this particular constitutional protection, and not anybody else?

James Gillespie argues that Page and Newland were responsible for initiating the 'no civil conscription' amendment, and Newland himself argues that it was the best service he ever did the BMA.[7] This is a major claim, given the many years he served as federal president. Newland's version of the story is as follows:

> The Chifley government held a referendum, consisting of three parts, the first part dealing with marketing, the second dealing with industrial employment and the third dealing with social services. As President of the Federal Council, I went right through it very carefully, and I noticed that in the part dealing with industrial employment it was laid down that those employed should not be subjected to conscription. But when I perused the social services part, there was no word there that those employed in professional employment should be exempt from conscription. This seemed to me an iniquitous omission. There was no time to have it dealt with in the Federal Council so I wrote a letter to Mr. Menzies, as he was then, the Leader of the Opposition, and to Dr. Evatt who was in charge of the Bill. I suggested that they should have an amendment that there should be no professional conscription in any shape or form. Mr. Menzies replied: "I quite agree with you; I will introduce an amendment, but I shall not use your term 'professional conscription'. I think it would be very much better if I used the term 'civil conscription'."[8]

Unfortunately, this story fails to explain why the Constitution was changed. Nor does it explain why Menzies agreed to introduce the amendment, let alone why Evatt agreed to accept it. Page, for instance, proposed a different, but related, amendment to the same bill and his amendment was not accepted.[9] Examination of Newland, Menzies and

Evatt's correspondence and of the relevant debates in the House of Representatives reveals that the 'no civil conscription clause' was probably the result of a conjunction of accidental circumstances, most of which had nothing to do with doctors or dentists at all.[10]

An outline of events

The context for this story, amid an international, postwar ferment of debate on health care policy, is a range of moves in Australia to increase federal government involvement in the provision of health and welfare.[11] The Constitution of 1901 gave the federal government very limited power in this area. Canberra could provide for insurance, for quarantine, and to a certain extent for public health. Between the wars, successive governments of all political persuasions pushed at these boundaries, and their efforts were not really challenged until 1944.

In 1938 the Federal Council of the BMA, led by Newland, negotiated with the conservative Lyons government over details of its National Health and Pensions Bill, which set out to provide health care for employed workers. But rank and file general practitioner members objected, and the Federal Council of the BMA had to make an embarrassing about-face.[12]

As the attorney-general in the Lyons government Menzies was a supporter of the controversial National Health and Pensions Act, which was never implemented despite his becoming Prime Minister in 1939. However, before he lost the 1941 election, Menzies appointed a joint parliamentary committee on social security to look at future national policy. Almost immediately, the joint parliamentary committee asked the National Health and Medical Research Council to develop a plan for a coordinated national health service. Menzies, it would seem, believed that health policy might be an appropriate area for at least some federal government intervention.[13]

It should also be noted that in 1939, when Menzies was still attorney-general, he introduced the phrase 'Nothing in this section shall authorize… any form of industrial conscription' to a bill on national security.[14] The clause, which appears to have been influenced by the failure of two military conscription referenda during World War I plus more recent trade union suspicions of government direction of labour, was supported by the Labor Party.[15] In other words, the concept of legislative protection from non-military conscription was originally sponsored by Menzies with Labor Party support.

The other key figure in this story is Herbert Vere (Doc) Evatt. Like his political sparring partner Menzies, Evatt's background was law, and he resigned from the High Court in 1940 to take up Labor Party

politics.[16] In October 1941, Labor took office with Evatt as both attorney-general and the Minister for External Affairs. He then became involved in putting forward a number of referenda, all designed to increase the federal government's sphere of operation. Most failed to receive the requisite numbers in a majority of States.

In 1944, Evatt introduced the 'fourteen powers' referendum, designed to increase federal power during the war and for five years afterwards. It also failed to achieve a majority of votes and only gained majority support in two States. Importantly, conservative opponents of the referendum had claimed the increased powers would enable the federal government to introduce 'industrial conscription'. Labor politicians subsequently argued that people were 'stampeded by the cry of industrial conscription' and this campaign 'wrecked the referendum'.[17]

In April 1944, the government also passed the Pharmaceutical Benefits Act, which subsidised a limited range of drugs. The medical profession reacted strongly and in June of that year, the Federal Council of the BMA resolved not to be a party to the act, effectively ushering in a boycott of the act by doctors. The story of opposition to the act has been told at some length by Hunter, McGrath, Gillespie and Pensabene, among others,[18] but to summarise, doctors from both the left and the right of the political spectrum opposed the Pharmaceutical Benefits Act, although for different reasons. However, they were unable to challenge the act directly, because it did not directly affect them. Eventually, the Victorian State attorney-general was persuaded to challenge the validity of the act in the High Court. The challenge succeeded and the Pharmaceutical Benefits Act was declared unconstitutional.[19]

This High Court decision not only threw the Pharmaceutical Benefits Act into doubt, but also a range of other government legislation, including Menzies' child endowment program. Thus, Evatt set to work to draft another amendment to the Constitution, and in 1946 he put forward legislation to increase federal power. He wanted power to legislate for terms and conditions of employment (specifically a forty-hour week); to market primary products; and to introduce a national health service. He introduced three separate bills, so that if one failed the referendum it would not bring down the others, but all three were debated simultaneously in the House of Representatives in April 1946. Bearing in mind the defeat of his 'fourteen powers' referendum two years earlier, the proposed amendment on industrial powers requested the power to regulate '[t]erms and conditions of employment in industry, but not so as to authorize any form of industrial conscription.'[20]

As has already been noted, the Social Services Bill was designed to amend the Constitution to allow the federal government to make provision for 'maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, med-

ical and dental services, benefits to students and family allowances'. Despite speaking against various features of the three bills and debating them over several days, the Opposition voted with the government and passed the bills. Menzies then proposed his famous amendment, to be inserted after the word 'services': 'but not so as to authorize any form of civil conscription'.

Newland claimed the credit for the amendment, particularly after the BMA's successful appeal to the High Court in 1949, although in a letter to Menzies in March 1949 he thanked him 'for having prevented the conscription of the medical profession'.[21] But why did Menzies agree to propose the amendment in the House and why did Evatt agree to support it? No copy of Newland's original letter has been found, but it would seem from Menzies' reply that Newland actually proposed modifying the wording of the industrial employment referendum that was being debated at the same time. Menzies wrote:

> It was not appropriate to bring the amendment on the Industrial Bill, because the work of the medical profession is not 'industrial'. For that reason, I put the amendment forward in what seemed to me to be the appropriate place.[22]

The Attorney-General Dr Evatt accepted the amendment because the Labor government lost the so-called fourteen powers referendum in 1944 in the face of an organised campaign suggesting that a yes vote would be a vote for industrial conscription.[23] This suggests a rather different version of events from that put forward by Newland.

Newland and Menzies were acquaintances rather than friends,[24] and significantly Newland sent his original letter to Earle Page, a fellow surgeon, rather than to Menzies. Menzies may well have had support for the medical profession in mind when he proposed the amendment, but the form it took was very much his own creation. Reading the debates on the bill from 1946, it seems clear that Menzies 'owned' the no civilian conscription idea and was seen to do so by other members on both sides of the House. Evatt, in particular, was keen to acknowledge Menzies as the author of the idea, and did so early in the debates—a full week before Menzies proposed his 'no civil conscription' amendment to the Social Security Bill.[25] Menzies' amendment was, therefore, not in any way surprising, and in his 1970 autobiography he does not mention Newland's role in suggesting it. Menzies argues that he was 'deeply attached to the principles of private medical practice and the singular importance of the voluntary doctor-patient relationship'. He claims that he proposed the amendment because, as it stood, the bill included 'a power to nationalize medicine and dentistry'.[26] In his brief speech on the amendment on 10 April 1946, Menzies made

direct reference to the 'no industrial conscription' clause in the other bill and said:

> I would never object to medical and dental services being provided for the people under some proper government scheme. I have no objection to the Commonwealth having power to make proper laws in relation to medical and dental services, but so long as there is doubt—and I entertain grave doubts on the matter—as to whether that power does not authorize the nationalization of these two professions, their members are entitled to be protected against conscription just as are industrial workers under the bill I have mentioned.[27]

Evatt wanted the referendum to pass and he had had the recent experience of seeing a referendum fail in the face of an organised campaign suggesting it might result in industrial conscription. In addition, the Labor Party had no plans to, as Menzies put it, 'nationalise medicine and dentistry'. It was the early hours of the morning and the House had been sitting all night, when Dr Evatt stood up and spoke in favour of the amendment:

> It is perfectly true, as the right honorable gentleman said, that he has borrowed certain words from the bill dealing with industrial matters, but the Government had previously borrowed the same set of words from the National Security Bill introduced by the right honorable gentleman when he was Attorney-General. I believe that one good turn deserves another, and that if industrial workers are entitled to be protected against conscription, members of the medical and dental profession are entitled to similar protection.[28]

In the event, on polling day, 28 September 1946, a majority of the voters in each State passed the referendum to give the government power to introduce 'pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription)', but they did not pass the other two referenda.[29] Clearly, it had been Evatt's intention that workers in industry should have constitutional protection from civilian conscription, but the voters of Australia, as is so often the way with referenda, produced an unexpected outcome. Doctors and dentists ended up with constitutional protection from civil conscription, and other Australians did not. The irony is that the voters almost certainly believed they were voting for a national health service, or at least voting to give the government power to provide them with a national health service. In the event, the High Court ruled otherwise.

Conclusion

Why was the Constitution of Australia changed in this particular way? Was it the result of the power of organised medicine acting through its trade union, the BMA, to defeat the wishes of the Labor government? Was it the result of two men, Newland and Menzies—or perhaps three including Page—getting together to pull the wool over Evatt's eyes and change the course of history? The above outline of events seems to indicate that it was not the result of any such coherent action. On the contrary, the change to the Constitution seems to have been the result of a more arbitrary chain of events, most of which were not related to medicine at all. What occurred seems rather more like plain bad luck for the Labor Party and serendipity for those members of the medical profession who did not want a national health service.

Newland's role in the so-called 'Menzies-Newland placitum' has been somewhat exaggerated. We will never know whether Menzies would have come up with the amendment without Newland's suggestion of a similar amendment to a different bill, but the wording of the amendment and its acceptance by all major political parties owed as much to accident and a messy conjunction of circumstances as to any particular political perspicacity by Sir Henry Simpson Newland.

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1. *The Australian Constitution*, Australian Parliament House, viewed 20 June 2005, <www.aph.gov.au/senate/general/constitution/>.
2. Australia, House of Representatives, *Debates*, 1946, vol. 186, Constitution Alteration (Social Services) Bill, p. 1215.
3. Earle Page to Sir Henry Newland, 10 April 1946, R. G. Menzies to Sir Henry Newland, 10 April 1946, George McLeay to Sir Henry Newland, 11 April 1946, Correspondence of Sir Henry Newland 1916–1962, Newland Family Records, PRG 288/53, State Library of South Australia, Adelaide (hereafter 'Newland Papers'); Sir Victor Hurley, 'The Henry Simpson Newland Oration', *Medical Journal of Australia*, no. 2, 1952, pp. 361–6; 'Editorial: Two Men of Years and Honour', *Medical Journal of Australia*, no. 2, 1964, pp. 715–23.
4. *British Medical Association v. The Commonwealth* (1949) 79 CLR 201; Geoffrey Sawer, *Australian Federal Politics and Law, 1929–49,* Melbourne University Press, Melbourne, 1963, p. 216.
5. James Gillespie, *The Price of Health, Australian Governments and Medical Politics 1910–1960,* Cambridge University Press, Melbourne, 1991, pp. 256–60.
6. The only use of the 'no civil conscription' placitum since 1949 was in the General Practitioners Society Case, 1980, when a group of general practitioners challenged certain provisions of the Liberal Government's revised version of the Labor government's 1975 Medibank legislation. The case was dismissed on a technicality, but the judgment indicates that the 1949 interpretation might well be narrowed further if tested in court again. C. J. Barwick wrote: 'I do not read the decision of the majority in the British Medical Association Case as deciding that, without legal compulsion either by direct command or the imposition of penalties, civil conscription could result from practical or economic considerations.' <www.austlii.edu.au/au/cases/cth/HCA/1980/30>. *General Practitioners Society v. The Commonwealth* (1980) 145 CLR 532. I am grateful to an anonymous reviewer for this point.
7. Gillespie, *The Price of Health*, p. 223.
8. 'Editorial: Two Men of Years and Honour', p. 717.

9. Page to Newland, 10 April 1946, Newland Papers.

10. Menzies Papers, MS 4936, National Library of Australia, Canberra (hereafter 'Menzies Papers'); Newland Papers; Evatt Papers, Flinders University, Adelaide (hereafter 'Evatt Papers').

11. For the international context see: J. Rogers Hollingsworth, *A Political Economy of Medicine: Great Britain and the United States*, The Johns Hopkins University Press, Baltimore, 1986; Frank Honigsbaum, *Health, Happiness and Security: The Creation of the National Health Service*, Routledge, London, 1989. For a summary of changes in Australia see J. C. H. Dewdney, *Australian Health Services*, John Wiley & Sons, Sydney, 1972, pp. 25–81. In March and April of 1946, there was no mention in the *Medical Journal of Australia* of the proposed Australian referendum on health, but the full text of BMA policy on the British National Health Service Bill was published: 'The National Health Service Bill of Great Britain [Editorial]', *Medical Journal of Australia*, no. 1, 1946, pp. 517–21.

12. For a detailed discussion of the splits within the BMA see Gillespie, *The Price of Health*, pp. 87–111. See also Rob Watts, *The Foundations of the National Welfare State*, Allen & Unwin, Sydney, 1987, pp. 7–25. The health provisions of the act related mainly to general practice, proposing an insurance-funded panel system similar to that operating in Britain.

13. Sir Robert Gordon Menzies, *The Measure of the Years*, Cassell, London, 1970.

14. Australia, House of Representatives, *Debates*, 1946, vol. 186, 3 April, Mr. Chambers, p. 909.

15. ibid., p. 906. See also: Tom Sheridan, *Division of Labour: Industrial Relations in the Chifley Years, 1945–49,* Oxford University Press, Melbourne, 1989, pp. 1–17.

16. Kylie Tennant, *Evatt: Politics and Justice*, Angus & Robertson, Sydney, 1970, pp. 117–23.

17. Australia, House of Representatives, *Debates*, 1946, vol. 186, p. 1176 and 1183.

18. Hunter, 'Pharmaceutical Benefits Legislation'; McGrath, 'The Controversy over the Nationalisation of Medicine'. See also Gillespie, *The Price of Health*, pp. 209–31; Pensabene, *The Rise of the Medical Practitioner*, pp. 168–71.

19. Sawer, *Australian Federal Politics and Law*, p. 180.

20. Australia, House of Representatives, *Debates*, 1946, vol. 186, p. 904.

21. Newland to Menzies, 11 March 1949, Menzies Papers, MS4936/1/Folder 190. Although Newland claimed the credit for the amendment, particularly after the BMA's successful appeal to the High Court in 1949, he argued strongly for a 'no' vote during the referendum campaign. Newland Papers.

22. Menzies to Newland, 10 April 1946, Newland Papers.

23. Australia, House of Representatives, *Debates*, 1946, vol. 186, pp. 1176, 1183.

24. Newland, for instance, addresses his letter of 1949 to 'Dear Mr. Menzies' and Menzies wrote to 'Dear Sir Henry'. Newland to Menzies, 11 March 1949, Menzies Papers; Menzies to Newland, 10 April 1946, Newland Papers. This is in contrast to the letter addressed to 'Dear Bob' from another member of the medical profession, discussing Liberal Party policy on health in 1949. Alfred Derham to Menzies, 12 April 1949, Menzies Papers, MS 4936/37/548/Folder 35. Compare also correspondence between Newland and fellow surgeon Sir Alan Newton addressed to 'Dear Hal'. Newland Papers. The Archives of the Royal Australasian College of Surgeons contain two letters from Menzies to Newland, and these reinforce the impression that the men were acquaintances rather than friends. The tone of the letters is cordial but distant. Menzies to Newland, 2 March 1949, and Menzies to Newland, 26 August 1950, Special Bundle 37, Archives of the Royal Australasian College of Surgeons, Melbourne. There is no evidence from the papers of either Newland or Evatt that they had any relationship. A search of the correspondence files of both Newland and Evatt has produced no letters in either direction. Newland Papers; Evatt Papers. I am indebted to Michelle Riggs, Aliese Millington and Gillian Dooley in the Special Collections department of Flinders University Library for their assistance with this search.

25. Australia, House of Representatives, *Debates*, 1946, vol. 186, p. 906.

26. Menzies, *The Measure of the Years*, pp. 117–8

27. Australia, House of Representatives, *Debates*, 1946, vol. 186, p. 1215.

28. ibid., p. 1215.

29. A majority of the votes in NSW, Victoria and WA were for the other two referenda, but a majority of votes in Queensland, SA and Tasmania were against. *Commonwealth of Australia Gazette*, 1946, no. 212, 8 November, pp. 3169–70.