The 'Rules of Engagement': The Great War's Legacy on Law and Order

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Abstract

This article will examine New Zealand laws that were introduced during the First World War, and which evolved out of a need to bring order to society at a time of world-wide chaos. It will consider the introduction of laws that dealt with sedition and 'intoxicating liquor', issues that challenged the government's ability to maintain law and order, and the leading legal cases of 1917 arising out of those new laws. These cases helped determine the legality of New Zealand's role in the Great War, and the extent of the Government's right to make laws committing New Zealand to conflicts outside its three-mile limits. Also considered will be the ongoing legacies of those laws, how long they continued to be used as a means to control society after the First World War had ended, and whether there are aspects of those laws that have continued to have effect in law and on society up to the present day.

Keywords

Intoxicating liquor; liquor; prohibition; sedition; seditious utterance; six o'clock closing; treating; War Regulations; War Regulations Amendment Act 1916

INTRODUCTION

In a speech delivered on 16 March 2017, Lord Neuberger, the President of the Supreme Court of the United Kingdom, helpfully summarised the fundamental way that good government works: 'the legislature makes the law, the executive carries the law into effect, and the judiciary interprets and enforces the law'.[1] This paper looks at how the judiciary in 1917 interpreted and enforced the laws that were introduced during the Great War to bring order to New Zealand society at a time of world-wide chaos.

The decisions considered in this paper reflect the attitudes of the judiciary during a time of war. In 1992, Justice Michael Kirby, a former judge of the High Court of Australia, who at the time was the President of the New South Wales Court of Appeal, noted in a judgment that '[o]ften, judicial approaches betray common attitudes to the proper function of the law and of the courts'. His Honour also noted that judicial attitudes needed to be assessed within the context of the time in which those attitudes were expressed: 'Such attitudes reflect the times in which the opinions were stated and the conception then held concerning the roles of the courts and of the law in upholding the suggested rights of parties and performing functions as part of the third branch of government'.[2]

On 2 November 1914, three months after war had been declared, the New Zealand Government enacted the War Regulations Act, which empowered the Governor in Council to 'make such regulations as he thinks necessary': 'For the purpose of better securing the public safety, the defence of New Zealand, and the effective conduct of the military or naval operations of His Majesty during the present war'.[3]

By 10 November 1914, the War Regulations were gazetted into law, and a new legal regime was in force. During the course of the Great War, and for a short period thereafter, the War Regulations governed everything from dealings with 'enemy aliens', contracting with the government, the sale and exportation of goods, coal, wheat, and wool, and extended to some 221 pages of rules by which society was to be bound. Those rules included the reversing of the burden of proof—with

1 'Reflections on significant moments in the role of the Judiciary', Lord Neuberger, President of the Supreme Court, 16 March 2017, published in *The New Jurist*, 25 March 2017, http://newjurist.com/reflections-on-significant-moments-in-the-role-of-the-judiciary.html, accessed 24 April 2017.

2 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (NSWCA).

3 Section 2 of the War Regulations Act 1914.

Bulletin of the Auckland Museum 21: 131–138
https://www.aucklandmuseum.com/discover/research/publications/bulletin/vol21/bennington
https://dx.doi.org/10.32912/bulletin/21/19

some offences requiring the defendant to prove he or she was not guilty of the alleged offence—and the relaxing of the rules of evidence, such that the Court could 'admit such evidence as it thinks fit, whether such evidence is legally admissible in other proceedings or not'.[4]

This paper will focus on two aspects of the War Regulations that had a significant impact on New Zealanders at home—the regulations regarding intoxicating liquor and sedition.

NO TREATING!

We will start at the beginning of 1917. The third of January to be precise. It was a rough morning, cold and wet. At 9:00 a.m., Frank Bond, Stanley Naylor, and Daniel Peck entered the Royal Oak Hotel at Weber, within the Pahiatua Licensing District, where the licensee of that establishment, Mr Welch, was present with another elderly patron. Frank Bond asked Mr Welch to supply him with 'intoxicating liquor' for the four men present. Following that drink, Daniel Peck ordered the next round. Then Mr Welch 'gratuitously' supplied the third round, which was followed by a fourth round, purchased by the old man at the bar, whose name was not disclosed. These were apparently very quick drinks, as Stanley Naylor and Frank Bond reportedly left the Royal Oak Hotel by 9:15 a.m. Daniel Peck also left the hotel about this time, but returned shortly afterwards, where he cashed a cheque, and became embroiled in an argument with Mr Welch on the riding prowess (or otherwise) of a Mr Power, since deceased. The argument escalated, with Mr Welch casting doubt upon the value of Daniel Peck's cheque. Outraged at the besmirching of his character, Daniel Peck took himself off to the local police constable to complain about Mr Welch.

Five months earlier, on 7 August 1916, the War Regulations Amendment Act had been passed into law, which had given the Governor in Council the right to make regulations suppressing the practice of 'treating'.[5] The War Regulations on Intoxicating Liquor came into force on 28 August 1916. So, unluckily for Mr Welch, by 3 January 1917, it was an offence under the War Regulations: (a) to buy 'intoxicating liquor' for any person other than yourself; (b) to sell 'intoxicating liquor' to someone who was buying it for someone else; and (c) to consume 'intoxicating liquor' that someone had bought for you.

The War Regulations on Intoxicating Liquor also placed the burden of proving that the offence had not been committed on the defendant. Normally, criminal cases place the burden of proof—to the standard of 'beyond reasonable doubt'—on the prosecutor.

This was the issue before the Magistrates Court in Dannevirke in February 1917, in the case of *Police v Welch*.[6] In Mr Welch's defence, his patrons gave evidence in an attempt to undo the allegations made by Daniel Peck, who, the Magistrate acknowledged was 'an elderly man, used to the consumption of alcohol, who is easily provoked when he has had liquor', and who had acted out of 'pique' and was now 'sorry for his action'.[7] Unfortunately for Mr Welch, the Court found the integrity of his witnesses wanting, with the Magistrate finding those witnesses' statements to be 'untrue', 'having been concocted for the purpose of this case', 'shadowy and inconclusive', and 'too ridiculous for serious consideration'.[8]

The Magistrate explained in his judgment what the reversal of the onus of proof meant for a defendant who was now required to establish his innocence: 'The result of this is, that if, under such circumstances, a doubt exists in the mind of the court as to defendant's guilt or innocence, that doubt must be resolved in favour of the informant and not the defendant'.

In assessing the evidence before him, the Magistrate found Mr Welch guilty of the offence of treating and convicted him accordingly. The Magistrate also observed that, 'Not only has [the] defendant been guilty of an offence but he has endeavoured to escape punishment by indiscriminate perjury and subornation of perjury. Further the evidence shows that the defendant has been openly flaunting the regulation'. Mr Welch was fined £50 and ordered to pay court costs.[9] To be fair to Mr Welch, he did not really have many options when it came to defending the charges.

WAR REGULATIONS — LEGISLATION OF A 'SPECIAL KIND'

A month prior to that early-morning drinking session, the War Regulations on Intoxicating Liquor had been upheld by the Supreme Court, which in 1917 was the equivalent of today's High Court. In *Hackett v Lander and Solicitor-General*,[10] Justice John Hosking was asked by the applicant, Hackett, to find that regulation 8(1) of

4 Section 3 of the War Regulations Amendment Act 1915.

5 Section 3(1)(h)(iv) of the War Regulations Amendment Act 1916.

6 *Police v Welch* [1917] MCR 33.

7 *Ibid.* at 34.

8 *Ibid*.

9 According to the Reserve Bank's inflation calculator, £50 in 1917 would be worth $6,569 today.

10 *Hackett v Lander and Solicitor-General* [1917] NZLR 947.

the War Regulations on Intoxicating Liquor[11] was '*ultra vires*'[12]. Under regulation 8(1), anyone convicted of an offence under those Regulations received a six-month disqualification from being employed as a bar attendant.

His Honour declined to make the order sought by Hackett—that the regulation was *ultra vires*—as his Honour had found that the War Regulations were legislation of a 'special kind':

> It is conceived in the interests of the public safety, the defence of New Zealand, and the effective conduct of the war. Its unusual and comprehensive terms indicate that Parliament considered that while it was not in session there must be authority somewhere to act as with the authority of Parliament to meet the exigencies of the moment. The ultimate issue at stake is whether we are to maintain our power as a community to govern ourselves or make any laws at all. To this end and in the circumstances mentioned the powers referred to have been given to the Governor in Council, and on the grounds stated they are in my opinion pre-eminently powers to which that large and liberal interpretation should be given which the Acts Interpretation Act prescribes, and if any doubt exists or alternative interpretations are open in relation to their exercise the inclination should be in favour of the powers.[13]

The Judge also noted that the powers granted to the Governor in Council authorised him to 'prohibit acts which *in his opinion* are injurious, and in regard to the suppression of treating and other matters to make such regulations *as he thinks advisable*' [the Judge's emphasis].[14] This language, said Justice Hosking, removes from the Courts all competence to pronounce upon the advisableness or propriety of any particular regulation.[15]

PROTECTING OUR SOLDIERS – THE INTRODUCTION OF SIX O'CLOCK CLOSING

One commentator has argued that the various War Regulations on 'intoxicating liquor' were targeted towards the young soldiers. Jock Phillips, in *A Man's Country*,[16] states that: 'The enlistment of young men into the Army artificially created a new and exclusive male community. Respectable New Zealanders with memories of old frontier male communities and more recent worries about gangs of urban larrikins were uneasy about how these men would behave once they were away from the moral supervision of their mothers. In particular, people were nervous about what would happen when soldiers were on the loose and came to town'.[17]

The need to control these young men so recently separated from their mothers resulted in a number of regulations that restricted the sale and provision of alcohol for the duration of the war:

- On 16 February 1915, the War Regulations were amended to include the prohibition of the sale of, or the provision of, any intoxicating liquor to any member of the Defence Forces or Expeditionary Forces, when in uniform, for consumption elsewhere than on the premises where it was sold.[18]
- On 15 November 1915, the War Regulations were again amended, this time to prohibit the taking of any intoxicating liquor onto a troop train.[19]
- On 29 November 1915, new War Regulations made it an offence to bring or send intoxicating liquor into a camp, or to have possession of intoxicating liquor in a camp.[20]
- In addition to the no treating law, the amendments to the War Regulations dated 21 August 1916 introduced a further prohibition – women were no longer allowed to enter or remain in a bar after

11 Regulation 8(1) provides: 'Every bar-attendant, other than a member of the family of the licensee, who is convicted of an offence against these regulations shall be disqualified for the period of six months thereafter from being employed or serving in any capacity in or about the same or any other licensed premises'. On 2 April 1918, this regulation was amended, such that a Magistrate had the power to remove or vary the disqualification, where the bar-attendant had not previously been convicted of an offence under those regulations.

12 'A thing is done by a public authority, a company, or a fiduciary person, ultra vires, when it is not within the scope of the powers entrusted to such authority, company, or person'. John S. James, *Stroud's Judicial Dictionary of Words and Phrases*, Volume 5, S-Z, Sweet & Maxwell Limited, London, 1986.

13 Supra note 10 at 949.

14 *Ibid*.

15 Supra note 10 at 949–950.

16 Jock Phillips, *A Man's Country: The Image of the Pakeha Male – A History*, rev. ed. (Auckland: Penguin Books, 1996).

17 *Ibid*, 70–71.

18 Regulations 1 and 2 of the Additional War Regulations dated 16 February 1915.

19 Regulation 14 of the Additional War Regulations dated 15 November 1915. 'Troop train' was defined as 'any railway-train or railway-carriage which for the time being has been set apart for the exclusive use of the Defence Forces, or which is for the time being exclusively or chiefly occupied or used by members of those Forces'.

20 Regulation 2 of the Additional War Regulations dated 29 November 1915. 'Camp' was defined as 'any land occupied or used, or in course of preparation for occupation or use, as a place for the training or exercise of an expeditionary force under the Expeditionary Forces Act, 1915'.

> 6 pm, or to loiter about the entrance of any such bar, unless they were the licensee, a servant of the licensee, or a member of the licensee's family. This regulation was supposed to protect young men from the lascivious nature of prostitutes.

Another of the restrictions which was aimed primarily at soldiers was that of six o'clock closing. The government had originally proposed an 8 pm closing time, but this was amended to 6 pm following 'indignation meetings' like the one held in the Auckland Town Hall and chaired by Auckland Mayor, Mr James Gunson in September 1917.[21] At that meeting, Mr Robert A. Laidlaw, a prominent Auckland businessman, moved the following resolution before over 3,000 citizens at a meeting of the Business Men's Committee: 'That this meeting of Auckland citizens enters the strongest protest against the Government's attempt to thwart the will of the people by proposing to close hotel bars at 8 p.m., when the known and expressed will of the electors is that hotel bars be closed at 6 p.m. during and until six months after the war'.[22]

In support of his resolution, Mr Laidlaw declared that drinking after 6:00 pm was pro-German in its character, and that drink was the enemy of national efficiency in time of war. Drinking was also causing, together with the German submarines 'by their inhuman piracy', the threat of famine in Britain, with British women and children forced to queue outside shops for hours in the cold and the wind, from seven in the morning until four in the afternoon. In support of this argument, Mr Laidlaw explained that the 800,000 gallons of spirits imported from Britain by New Zealand in 1916 wasted 20,000,000 lb of grain, which would have been enough to make 13,000,000 2 lb loaves of bread.

Mr Laidlaw proclaimed that by reducing the drinking hours to six o'clock, New Zealand would also increase the efficiency of its soldiers and civilians—who were a sober lot, he was quick to acknowledge—from 90 per cent to 100 per cent. That 10 per cent increase in efficiency, declared Mr Laidlaw, would give New Zealand 'its share in the margins the allies need for an overwhelming victory'. According to the *New Zealand Herald*, Mr Laidlaw's speech was met with 'prolonged' and 'vigorous' applause, and his sentiments were echoed throughout the country.

And so, on 2 December 1917, the Government introduced six o'clock closing. Designed initially to expire six months after the war ended, it became permanent in 1918, and remained in law until 1967.

SEDITION

The War Regulations not only controlled how and when New Zealanders could drink, they also imposed serious restrictions on what they could say. The Additional War Regulations made on 19 July 1915 made it an offence to:

> publish, or cause or permit to be published, any statement or matter likely to interfere with the recruiting, training, discipline, or administration of His Majesty's Forces, whether by sea or land, or with the effective conduct of the military or naval operations of His Majesty or his Allies in the present war, or likely to be injurious to the public safety in the present war, or to prejudice His Majesty's relations with foreign Powers, or any false reports relative to the present war and likely to cause alarm, or any statement or matter which in any manner indicates disloyalty or disaffection in respect of the present war.[23]

This regulation was further expanded on 4 December 1916, so that it became an offence for any person to 'publish, or cause or permit to be published, or do any act with intent to publish or to cause or permit to be published a seditious utterance'. A 'seditious utterance' was 'any utterance which is published with a seditious intention, or the publication of which has a seditious tendency'.[24]

The War Regulations, having provided this seemingly opaque definition, went on to further define the meaning of seditious intention and seditious tendency by providing 14 different offences which would fall within these meanings.[25]

The common law offence of sedition existed prior to the War Regulations coming into force and had been codified in New Zealand in the Criminal Code of 1893, and in the Crimes Act 1908, but it required an element of incitement to violence. Of the 14 seditious offences introduced by the December 1916 War Regulations, only one concerned incitement to violence. The rest were designed to stamp out those 'utterances' that, to name but a few:

- 'excited disaffection against His Majesty or the Government of the United Kingdom or of New Zealand, or of any other part of His Majesty's dominions';[26]
- interfered 'with the recruiting, training, discipline, equipment, or administration of His Majesty's

21 'Six O'clock Closing', *New Zealand Herald*, Volume LIV, Issue 16647, 18 September 1917.

22 *Ibid*.

23 Regulation 4 (1) of the Additional War Regulations dated 19 July 1915.

24 Regulations 1–9 of the Additional War Regulations dated 4 December 1916.

25 A further offence was added by Regulation 4 of the Additional War Regulations, made on 18 June 1918, which made it an offence to 'insult, offend, annoy, or discredit, whether in New Zealand or elsewhere, the subjects, or any class or classes of the subjects, of any State which is in alliance with His Majesty in the present war with Germany, or which is at peace with His Majesty'.

26 Regulation 4(a) of the Additional War Regulations dated 4 December 1916.

Forces, or with the effective conduct of the military or naval preparations or operations of His Majesty or his allies, whether in New Zealand or elsewhere';[27]
- prejudiced 'His Majesty's relations with foreign Powers';[28] or
- excited 'disloyalty, whether in New Zealand or elsewhere, in respect of the present war'.[29]

That was the law at the beginning of 1917, and it was enforced, with over 200 men being convicted of sedition. Those who found themselves with criminal records for 'sedition' included:

- Sidney Briden, a chauffeur, who was convicted for starting a rumour about the torpedoing of a troopship;[30]
- Michael Cusack, a freezing worker, who was convicted for encouraging his fellow workers at the Horotiu freezing works to go on strike. The Magistrate found this to be seditious because 'it had a tendency to interfere with the supply of frozen meat required by His Majesty for purposes in connection with the present war'. His Worship also found it unbelievable that anybody could be 'so selfish, so unpatriotic'.[31]
- Mr Fitzgerald, a Greymouth publican, who was convicted for making certain statements to about six other men while in a bar of a hotel, which 'indicated disloyalty in respect to the present war'. The Magistrate considered that this was not a case requiring imprisonment, but it was, when looking at the position of the defendant and the manner in which he gave expression to his sentiments, a serious one. Mr Fitzgerald was fined £20 and court costs.[32]
- John Arbuckle, a union official, was convicted for writing to the unions to tell them that the Denniston Miners Union would go on strike if any of its members were conscripted.[33]
- Patrick 'Paddy' Webb, the Labour MP for Greymouth, was sentenced to three months' imprisonment following his conviction for opposing conscription.[34]

THE CASE OF *SEMPLE V O'DONOVAN*

In addition to the many cases that came before the Magistrate's Courts, the issue of sedition also made its way to the Full Court of the Supreme Court. The case involved Robert Semple, an Australian, who came to New Zealand in the early 1900s having been blacklisted in Australia following a long, bitter, and violent industrial dispute on behalf of the Victorian Coal Miners' Association.[35] Robert Semple fought for miners' rights in New Zealand, and with the outbreak of war, became a strident opponent of compulsory military training. In 1916, he sought to use the industrial bargaining power of the miners to force the government to back down on compulsory conscription. Robert Semple had stated: 'Conscription and liberty cannot live in the one country. Conscription is the negation of human liberty. It is the beginning of the servile state'.[36]

The government was not going to allow Robert Semple to challenge its authority—especially when the country was at war. He was charged and convicted of sedition and sentenced to 12 months' hard labour.

But Robert Semple did not accept his conviction. He appealed, and on 27 March 1917, Mr G. Hutchinson, counsel, appeared before the Full Court of the Supreme Court in Wellington, and asked the Court to grant the appeals sought by Robert Semple, and four other gentlemen who had also been convicted of 'uttering seditious utterances', Tom Brindle, Peter Fraser, Fred Cooke, and James Thorne.[37] Hearing their appeals were the Chief Justice, Sir Robert Stout, and Justices John Denniston, Theophilus Cooper, and Frederick Chapman.

The case was important less for its ruling on sedition, and more for its ruling confirming the Government's ability to make laws that could be enforced beyond New Zealand's three-mile limit.

There were seven points of appeal, one of which included whether or not the War Regulations were *ultra vires*. The Court found that they were not. But the main argument against the convictions was that the New Zealand Government did not have the power or jurisdiction to enact the Military Service Act 1916. It was an interesting point of appeal, because, as was

27 Regulation 4(e) of the Additional War Regulations dated 4 December 1916.

28 Regulation 4(i) of the Additional War Regulations dated 4 December 1916.

29 Regulation 4(n) of the Additional War Regulations dated 4 December 1916.

30 *Grey River Argus*, 26 May 1917, cited by Eldred-Grigg, *The Great Wrong War: New Zealand Society in WW1* (Auckland: Random House, 2010), 330–331.

31 *Canterbury Times*, 21 March 1917, cited by Eldred-Grigg, *The Great Wrong War*, 330–331.

32 *Police v Fitzgerald* [1917] MCR 35.

33 *Grey River Argus*, 21 April 1917, cited by Eldred-Grigg, Stevan, *The Great Wrong War*, 330–331.

34 Eldred-Grigg, *The Great Wrong War*, 330–331.

35 'Semple, Robert', Te Ara The Encyclopedia of New Zealand, http://www.teara.govt.nz/en/biographies/3s11/semple-robert, accessed 24 April 2017.

36 Law Commission, *Reforming the Law of Sedition*, Report 96, March 2007, para 47.

37 *Semple & Ors v O'Donovan & Anor* [1917] NZLR 273.

noted by the Chief Justice, the regulations under which the men had been convicted were not made under the Military Service Act, and nor were the seditious utterances wholly a criticism of that Act.

However, the appeal having been raised in respect of that point, the Court was then able to give its opinion on the matter, and in the Chief Justice's opinion, the New Zealand Parliament did have the power to pass the Military Service Act:

> The Parliament in New Zealand has power "to make laws for the peace, order and good government of New Zealand". It cannot therefore be suggested that it could not make laws to defend New Zealand beyond the three-mile limit of New Zealand. It could create a navy for the defence of New Zealand. An enemy might carry war into New Zealand without ever landing sailors or soldiers. Could New Zealand not take steps to prevent an enemy's navy attacking our country? The proper defence of New Zealand might require New-Zealanders to go many thousands of miles beyond its territory to defeat its enemies. Our defence and the defence of our trade depends mainly upon the British Navy. Can it be suggested that we could not send help to our defenders? To uphold the contention of the appellants would mean that New Zealand was helpless to keep its own peace.[38]

Sir Robert Stout's opinion was shared by all four Supreme Court judges, with Justice Chapman stating in his judgment:

> A Dominion is empowered by its constitution to defend itself, and for that purpose to pass the necessary legislation. It would be absurd to suggest that this must be limited to maintaining a Force within its own borders, when as a matter of common knowledge it must be evident that it is essential in many cases that an enemy should be attacked elsewhere if the defence is to be effective. A necessary power in connection with the defence of the Dominion is the power to take part in the defence of the Empire as a whole, and that may and at present does involve sending Expeditionary Forces to other parts of the Empire and to foreign countries.[39]

Justice Denniston was also not impressed by the arguments raised on behalf of the appellants, and his Honour stated:

> It seems to me futile to contend that the power of the General Assembly of the Dominion to make laws for the peace, order, and good government of New Zealand is limited to matters and things done by its inhabitants within the Dominion, and precludes it from legislating with a view to use the resources of the Dominion, whether in men, materials, or money, beyond its territorial limits. The peace of the Dominion is part of the pax Britannica – its safety is involved in and depends on the safety of the Empire. This was in fact hardly challenged by counsel for the appellants.[40]

Justice Denniston also noted that 'An offensive war is often really defensive. It would be poor policy for every member of a scattered Empire to wait until it was individually attacked'.[41]

Of the four Judges presiding over this case, Justice Denniston was particularly appalled by the 'seditious' actions of the men before him.

> We are engaged, in common with the greater part of the civilized world, in the most gigantic war the world has ever known – in a life-and-death struggle for our national existence. In older days, at moments of supreme necessity, the Romans, a people who reverenced law, handed over control to a Dictator. At a last extremity recourse is had to martial law, which is really the negation of law. Short of these, and to prevent recourse to these, there is the recourse to special war legislation, which may involve the inversion of the ordinary rights of citizenship. Under these, in Britain, powers hitherto undreamt of have been bestowed upon and exercised by the Executive, and cheerfully accepted and obeyed. The Administration there and here has been a machine devoted to the task of meeting a deadly national peril. Those of us who cannot see their way to assisting its working can at least refrain from applying sabotage to the machinery.[42]

It will come as no surprise that the Court found that all five men had failed in their appeals. Each of their appeals were dismissed, and their convictions of 12 months' imprisonment, some with hard labour, remained unchanged.

SEDITION OR A RIGHT TO CRITICISE?

Despite the growing number of convictions for sedition, people did not give up their right to criticise the government and the laws it had put in place to maintain order during the war. Also prosecuted for sedition was miner Hubert Armstrong, who was sentenced to 12 months' imprisonment in 1917 for a speech that contained the following words:

38 *Ibid.* at 281.

39 Supra note 37 at 290.

40 Supra note 37 at 283.

41 Supra note 37 at 284.

42 *Ibid*.

> I claim the right to criticise the government of the country. I claim the right to criticise any piece of legislation enacted by the government of this country, that, to my mind is against the interests of the people of the country, whether military service, or any other Act and I am going to do so … Semple, Cooke and the rest of them are in gaol today because they are said to be disloyal to their country … I say their names in the near future will be honoured when the name of the Wards and the Masseys will be looked on as the greatest gang of political despots that ever darkened the pages of this country's history.[43]

Patrick Webb, having already served three months following his 1917 conviction, also continued to fight against conscription. In 1918, he was sentenced to two years' hard labour following a court martial, where he declared that conscription was not backed by the mandate of the people, and that because of the sedition laws, he was being denied the right to criticise the government.[44]

AUSTRALIA AND SEDITION

Australia also had its own issues with sedition, and in 1917, the case of *Pearce v Jones*[45] came before Australia's highest court, the High Court of Australia. Pearce and Smith had been charged under regulation 28(b) of Australia's War Precautions Regulations, which made it an offence for 'any person who by word of mouth makes statements likely to prejudice the recruiting of any of His Majesty's Forces'.

Pearce and Smith had been present at a meeting of the Trades Hall Council, where Pearce, as Chairman of the meeting, put to the meeting a resolution 'that in the opinion of the Trades Hall Council the Political Labour Council Executive should call upon all Labour Members of Parliament to refuse to assist in recruiting'. Smith seconded the resolution.

The issue was, therefore, whether, in putting the motion to the meeting, Pearce had made a statement that was likely to prejudice the recruiting of any of His Majesty's Forces, and whether Smith, in seconding it, had done the same. The High Court of Australia was unanimous. Pearce, said Justice Barton, had not breached the law:

> By putting the resolution I do not think he, by word of mouth or in any other way, made the statement contained in the resolution. He invited the meeting, as he was bound to do, to give their affirmance or negation of that view. It was no concern of his, as chairman, whether they affirmed or denied it, and he does not appear to have voted. They happened to affirm it, and it is alleged now that because the affirmance was illegal he in putting the resolution to the meeting did an illegal act. Even if the affirmance of the resolution was an illegal act, I do not think that the chairman was in the relevant sense a party to making it.[46]

Pearce's appeal was allowed, and his conviction overturned. Smith, however, was not so lucky. Said Justice Barton:

> The case of Smith is different. He seconded the resolution. In my judgment, and I think I have the concurrence of my brothers, a proposition affirmed in a resolution is equally affirmed by the person who moves the resolution and the person who seconds it. Whether a statement is absolutely repeated in words or whether agreement with it is merely expressed by word of mouth is in common sense and, I think, in law, absolutely the same thing. To have affirmed, by seconding, a resolution that the Political Labour Council should call upon all Labour Members of Parliament to refuse to assist in recruiting, is to become a party to it in the sense of expressing verbally his approval of it. He makes the statement his own.[47]

Justices Isaacs and Gavan Duffy concurred. Smith's appeal was dismissed, and his conviction was upheld.

THE LEGACY

Despite being introduced as temporary measures during the war, both sedition and six o'clock closing survived the revocation of the War Regulations in 1920. So what was the legacy of these laws, which were introduced supposedly as temporary measures, but which both outlasted the Great War by decades?

In a national referendum held in 1949, the majority of voters supported the continuation of six o'clock closing, but by September 1967, 50 years after that 'indignation meeting' held in Auckland, a second national referendum garnered the support of 67 percent of voters to not only extend drinking hours to 10pm, but also to allow women back into the public bar for the first time since the war.[48]

One recent commentator has suggested that the six o'clock closing time, rather than moderating the drinking of New Zealand men, was the cause behind our binge-drinking culture. 'Faced with a maximum of an hour's drinking between the knock-off hooter and 6pm, workers

43 Law Commission, *Reforming the Law of Sedition*, Report 96, March 2007, para 49, citing B. Kendrick, "Hubert Thomas Armstrong: Miner, Unionist, Politician" (MA Thesis, University of Auckland, 1950).

44 *Grey River Argus*, 16 March 1918, cited by Eldred-Grigg, *The Great Wrong War*, 330–331.

45 Pearce v Jones [1917] HCA 50; (1917) 23 CLR 438 (24 September 1917).

46 *Ibid*.

47 *Ibid*.

48 Tom Hunt, 'Referendum ended the 6 o'clock swill', *The Dominion Post*, 13 October 2012.

learnt to guzzle as much as possible before time ran out. What we now call binge-drinking was institutionalised, fuelled by the early-closing law. Grizzled old men would show fresh-faced 21-year-olds the ropes. Techniques were refined; habits were formed, all in the name of getting blind drunk in a matter of minutes'.[49]

Sedition outlasted six o'clock closing by a further 40 years. The last prosecution was that of Timothy Selwyn in 2006, who had been protesting the government's foreshore and seabed legislation.[50] Mr Selwyn was charged with two counts of sedition, one of which was for publishing the following statement in pamphlets found in Sandringham Road in Auckland, near the electorate office of the then Prime Minister, the Rt Hon Helen Clark, which allegedly expressed 'a seditious intention, namely an intention to encourage lawlessness or disorder': 'Tonight concerned Pakeha vented their anger and disgust at the Government's attempts to steal by confiscation and without consultation, Maori land in the form of the Foreshore and Seabed Bill by attacking the electorate office of the Prime Minister. The broken glass symbolises the broken justice of this issue and we call upon other like-minded New Zealanders to commit their own acts of civil disobedience to send a clear message that such injustice can never be accepted!'[51] The second charge related to a longer, but similar, statement, which was published in pamphlets left in Ponsonby Road, Auckland.

To draw attention to these statements, Mr Selwyn sent emails calling for militant action against the Government's foreshore and seabed legislation, broke the glass of the Prime Minister's electorate office window with an axe (and left the axe embedded in the broken glass), and included in the pamphlets calls to like-minded New Zealanders to carry out similar acts to the attack on the Prime Minister's office, and their own acts of civil disobedience. He was convicted by a jury in the District Court at Auckland, and subsequently sentenced to 17 months' imprisonment (for both the sedition and 13 dishonesty sentences). Mr Selwyn appealed his conviction, but was unsuccessful, with the Court of Appeal dismissing his appeals both against the conviction and his sentence in April 2007.[52]

A month before the Court of Appeal released its judgment, in March 2007, the Law Commission published a report calling for the reform of the law of sedition.[53] In his Foreword to that report, then-President of the Law Commission, Sir Geoffrey Palmer, stated that the Law Commission had concluded that the width of the sedition offences meant that they were 'an unjustifiable breach of the right of freedom of expression'.[54] Sir Geoffrey noted that they had been used inappropriately in times of political unrest and perceived threats to authority to fetter vehement and unpopular political speech.

In words that echoed both Hubert Armstrong's and Patrick Webb's claims that they had a right to criticise the government, Sir Geoffrey stated: 'In a free and democratic society, defaming the government is the right of every citizen. In times beset with threats of terrorism we should not close the open society. To do so would only encourage enemies. In New Zealand, free speech and public debate must be "uninhibited, robust and wide open", and it may include "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials"'.[55]

The Law Commission found that the law of sedition was in breach of the New Zealand Bill of Rights Act 1990, and was no longer necessary, as those elements of it that should remain were more appropriately covered by other offences. It recommended that the law on sedition be repealed. The Government agreed, and on 1 January 2008, the offence of sedition was no longer part of New Zealand law.[56]

The case law arising out of the challenges to the War Regulations on treating and sedition demonstrate the coming of age of New Zealand as a nation that could make laws independent of England. Both the War Regulations and the Military Service Act were challenged on the grounds that they were *ultra vires*—that New Zealand's Government had passed laws that it had no authority to pass. In both cases, the Supreme Court found that the Government did have the power to make laws to protect New Zealand during a time of crisis, and that those laws could extend beyond New Zealand's three-mile limit.

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49 Richard Boock, 'Legacy of the six o'clock swill', www.stuff.co.nz, 28 August 2012.

50 Law Commission, *Reforming the Law of Sedition*, Report 96, March 2007, at para 57.

51 *R v Selwyn* [2007] NZCA 123 at [6].

52 *R v Selwyn* [2007] NZCA 123.

53 Law Commission, *Reforming the Law of Sedition*, Report 96, March 2007.

54 *Ibid* at 6.

55 *Ibid*.

56 The sedition offences were contained in sections 81 to 85 of the Crimes Act 1961; they were repealed by the Crimes (Repeal of Seditious Offences) Amendment Act 2007, which came into force on 1 January 2008.