AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

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THE CHAPLAINCY CASE: TWO DEFINITE STEPS FORWARD IN THE BATTLE FOR SEPARATION OF RELIGION AND THE STATE

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DOGS congratulate both Ron Williams, the quietly determined, suburban dad from Toowoomba who took on the Federal government over its funding of the controversial National School Chaplaincy Program (NSCP) and his many supporters. The High Court's finding Summary of decision at:http://www.hcourt.gov.au/assets/publications/judgment-summaries/2012/hca23-2012-06-20.pdf full decision: http://www.austlii.edu.au/au/cases/cth/HCA/2012/23.html has generated considerable comment but DOGS have three points to make based upon their own hard experience in the DOGS case (See Jean Ely *Contempt of Court* (2011) available at Embiggen Books Melbourne) :

1. Ron Williams, as a taxpayer, citizen, parent, was given Standing in the High Court to sue the Commonwealth on a Constitutional matter involving both Section 61 and Section 116. (The DOGS only got into the High Court with fiat from the Victorian Attorney General)
2. The majority judgement delivered by French CJ contained considerable analysis of the intentions of Andrew Inglis Clark, one of the principal architects of the Commonwealth Constitution and Alfred Deakin, another of the architects of the Commonwealth Constitutions and the first Attorney-General of the Commonwealth. If the High Court in the DOGS case had looked at the intentions of the Fathers of the Constitution, particularly Inglis Clark, Henry B. Higgins and others when they inserted Section 116 in the Constitution, State Aid they would have been hard put to find that State Aid to religious schools was constitutional.
3. Although the High Court did not find on Section 116 in the Ron Williams case, the problem of the relationship between religion and the State in Australia is not going to disappear at any time soon. As triumphalist churches grow greedier, the numbers of those who understand the importance of a secular State increase.

COMMENTARIES ON THE RON WILLIAMS HIGH COURT CHAPLAINCY CASE

The Secular Party has this to say:

Media Release - Secular Party of Australia
20 June 2012

Governments should not promote religions in the minds of children at taxpayer expense. The Secular Party thus welcomes the finding of High Court that the Commonwealth's funding of the National Schools Chaplaincy Program is unconstitutional.

The ruling was based on Section 61 of the constitution which requires that such expenditure be authorised by legislation. Being a Chaplain requires passing a religious test, and Section 116 requires that there be no religious test for public office. Chaplains were not found to be employees of the Commonwealth, so these grounds were dismissed.

However, if the funding NSCP funding was properly legislated, as now required under S61, then there would be increased grounds for regarding Chaplains as employees, hence such funding may well then be unconstitutional under Section 116.

Whether in technical breach of the constitution or not, the NSCP was certainly against the intention of the constitution, and against the secular principle of "separation of church and state". This principle is being violated, just at the time we need it more than ever.

Religions are not only divisive and conflictual. They lack basis in evidence. Governments should be in the business of promoting harmony through reason and evidence-based beliefs. The NSCP was doing the exact opposite. Chaplains should now be replaced by qualified counsellors and youth workers.

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For commentary by the FIRIS (Fairness in Religion in Schools) group see their view of
https://theconversation.edu.au/school-chaplaincy-case-a-missed-opportunity-for-secular-education-7789

For the Comment by the ABC's Chrys Stevenson on 21 June 2012, Chaplaincty Challenge: Trophy for Williams, but 'poison chalice'for the states? see
http://www.abc.net.au/religion/articles/2012/06/21/3530781.htm

See also

- **Related Story:** States play cat and mouse in High Court chaplaincy challenge *Chrys Stevenson 29 Aug 2011*
- **Related Story:** School chaplains: The real issue isn't separation of church and state *Michael Bird 18 Oct 2011*
- **Related Story:** High Court upholds chaplaincy challenge *News Online 20 Jun 2012*
- **Related Story:** Court rules on chaplains in classes *7.30 20 Jun 2012*

- **Related Story:** Chaplaincy funding ruled unconstitutional *Lateline 20 Jun 2012*

Professor George Williams' commentary is of academic interest

Queensland father of four Ron Williams undertook a David versus Goliath battle when he challenged the National School Chaplaincy Program in the High Court. He did so because he believed funding for chaplains in state schools breached the separation of church and state.

This line of attack failed, but he succeeded in having the funding struck down because it breached a different set of principles. The High Court recognised that the scheme ran counter to the federal character of Australia's system of government and the notion that the expenditure of money should be subject to parliamentary oversight.

Hundreds of millions of dollars of federal funding have been provided for chaplains in schools across Australia. Williams argued this breached the requirement in section 116 of the constitution that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

Predictably, this argument failed. The judges did not need to look at the issue of whether a religious test was involved because school chaplains do not have a contractual or other arrangement with the federal government and so do not hold "office under the Commonwealth".

Williams had a back-up argument, and it was a strong one. He relied upon the High Court decision of Pape, which in 2009 very nearly struck down the Rudd government's $900 cash stimulus payment. Although Bryan Pape lost that case, he demolished the long-held assumption that the Commonwealth can spend money in whatever area it wishes. Instead, the court held that the Commonwealth can spend money only in areas in which it has legislative or executive power.

The chaplaincy program is one of many federal programs that provide funding according to a set of government guidelines rather than legislation enacted by Parliament. This meant the program relied upon the Commonwealth's executive power.

In a major blow to the Commonwealth, the High Court gave this executive power a surprisingly narrow reading. It held that the power does not support spending of this kind, and if the payments are to be made at all, they must be supported by legislation.

The problem for the government is that it is not clear that this type of scheme can be supported by legislation. The Federal Parliament can pass laws only in certain areas, and has no general power over education.

The only certain path by which the Commonwealth can restore the chaplaincy program is to channel the funding through the states using section 96 of the constitution. However, the states would have to agree to receive the money for this purpose, and the government will be wary about building the states and their bureaucracies into the scheme.

The decision of the High Court is narrow in the sense that it struck down only school chaplaincy funding. However, in doing so, the court addressed fundamental principles about the scope of federal power that affect a broader range of Commonwealth arrangements.

A variety of federal schemes have been on shaky ground since the High Court decision in Pape. The Commonwealth had undoubtedly been hoping the Williams case would resolve matters in its favour. Instead, the High Court has imposed even more stringent limits.

This decision will force the federal government to go back to the drawing board in considering what programs it funds and how it does so. Unless it does this as a matter of priority, others could be emboldened to bring further challenges.

Direct federal funding of local government, including the Roads to Recovery program, continues to be subject to considerable doubt. The Commonwealth might also be on vulnerable ground in the education sector generally. Questions can be raised about direct federal funding of private schools and universities. Support for some community groups, the arts and sports might also be an issue.

Williams did not win a victory on the ground of separation of church and state, but did achieve a major win for the states. Chief Justice French in particular emphasised how the power to spend should be read in light of the creation by the constitution of a "truly federal government".

The result of the case could be major, long-term changes in how federal funding programs are undertaken. It is likely to mean that the Commonwealth will spend more money via the states. Although this emphasises the federal character of the constitution, it will come at a cost of enormous complexity and uncertainty.

George Williams is the Anthony Mason professor of law at the University of NSW.

Read more: http://www.brisbanetimes.com.au/opinion/politics/school-chaplains-ruling-alters-concept-of-federal-funding-20120620-20oet.html#ixzz1yNW5wViM

Meanwhile, the one Labor Member of the Commonwealth parliament who understands the way the voter winds are blowing, the great survivor, Bob Carr, has this to say:

BOB Carr has described the Federal Government's funding of school chaplains as "abhorrent".
In a blog on the eve of the next step in a High Court challenge to the funding of the school chaplain program, Mr Carr said he strongly believed in a "wall of separation" between church and state.
"I don't want to see squabbles at P&C meetings about whether a minister, priest, imam or rabbi gets the gig for a school," he said.
"The notion of the state funding religious activity is abhorrent."
Queensland father of six Ron Williams is due to appear in the High Court next week to argue his claim that government funding of chaplains is unconstitutional.
"My view has always been that government funding for school chaplains is wrongheaded and should have been abandoned with the election of the Rudd government," Mr Carr said.

The funding program was introduced by the Howard government in 2001 and Kevin Rudd expanded on the program when he became prime minister in 2007.(• *Jenny Dillon Education Editor* *The Daily Telegraph* May 02, 2011 12:00AM
See **Bob Carr slams chaplain funds** **http://www.dailytelegraph.com.au/news/bob-carr-slams-chaplain-funds/story-e6freuy9-1226047968524**

DOGS REPEAT:

> **Although the High Court did not find on Section 116 in the Ron Williams case, the problem of the relationship between religion and the State in Australia is not going to disappear at any time soon. As triumphalist churches grow greedier, the numbers of those who understand the importance of a secular State increase.**

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