AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

PRESS RELEASE 558#

THE CHAPLAINCY CASE: WHAT DOES IT ALL MEAN?

The second High Court challenge to the School Chaplaincy program by Queensland father Ron Williams has succeeded. The Federal Government has no executive power to fund the program. But what does this mean?

Promoters of separation of religion and the Commonwealth as enshrined in Section 116 of the Constitution can only be disappointed. The High Court has completely side-stepped the obvious issue - namely the freedom of and FROM religion in a secular state coupled with the right of taxpayers and their children to a secular education. Or has it? See : http://www.smh.com.au/comment/chaplaincy-program-has-no-place-in-state-schools-20140619-zsen7.html#ixzz35hR27qDo

The High Court gave a limited standing to Williams then addressed two important issues:

1. The limitations on the executive to fund, directly or by contracting with private providers, programs of their choosing.
   The High Court refused submissions that the Executive could distribute public moneys without reference to the Parliament or the other sections of the Constitution. Nor, like the British Government - as a single polity, without reference to the States of the Federation.
2. The benefits under s51(xxiiiA) of the Constitution were delineated. Under the legislation in dispute Chaplains supported '*the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community*.' This was held to lack specificity and **not be a provision of benefits to students under the Constitution.**

Does this mean that benefits to students must be 'specific' and, for the High Court described in secular rather than 'values' terms.

The taxpayer is left wondering. Have the promoters of the Chaplaincy program, religious men and women wishing to be paid by taxpayers to preach the faith –theirs is a thinly masked Christian religious ministry to public schools, have they jargonised and spin-doctored themselves into a corner.

No worries. No Chaplain is going to be retrenched any time soon. They are more important to the ideologically driven Abbott Government than the sacked workers of the Motor Car Industry.

Religious organisations that provide chaplains to schools have already been paid for all of 2014, including $37 million of unused funds. The government has waived the providers' debts — not just for the money that has already been spent, but also **$37 million that has yet to be spent** in the first half of next financial year.

This means that the para-churches will be able to **continue funding chaplains for the remainder of this year**, even though the High Court has found taxpayers' funding for the scheme to be illegal!

Did this happen by accident? Unlikely. The government changed the funding model after Williams's first High Court win, probably in anticipation of a further challenge. See http://www.reasonroad.org.au/school-chaplains-high-court-challenge/

Williams v Commonwealth of Australia
[2014] HCA 23
19 June 2014
S154/2013

is found at

http://www.austlii.edu.au/au/cases/cth/HCA/2014/23.html

The most interesting part of the finding is paragraphs 37-48 when five judges (Justice Crennan dissenting on this point) discussed the meaning of **'benefits to students'** under the Constitution

> 37. As already noted, the Commonwealth parties and SUQ each sought to support the impugned provisions, in their relevant operation, as laws with respect to the provision of benefits to students within s 51(xxiiiA). It is that issue to which these reasons now turn.

Benefits to students?

> 38. The impugned provisions seek to authorise the making of agreements about and payments for the provision of services which are to be available to students. The "objective" set out in item 407.013 in Pt 4 of Sched 1AA to the FMA Regulations refers to assisting "school communities to support the wellbeing of their students".
> 39. Some of the argument proceeded on the footing that the services provided under the program would be available not only to students but also to members of the relevant "school community". This aspect of the argument depended upon identifying the content of the relevant program by reference to the guidelines for "administration and delivery" of the program published by the relevant Commonwealth department. The funding agreement made with SUQ required compliance with those guidelines, as varied from time to time.

40. How and why reference could properly be made to those guidelines in order to identify the content of the program specified in item 407.013 was never satisfactorily explained by any of the parties or interveners. And the Commonwealth parties suggested that reference could be made to the guidelines as varied from time to time.

41. It is by no means obvious that the guidelines, whether as they stood at the time of enactment of the relevant provisions, or as they stood from time to time, are documents which can properly be taken into account in either construing the relevant legislative provisions or determining their validity. It is not necessary, however, to pursue those issues to their conclusion. It is enough to say that, if the program, properly understood, permitted the provision of services not only to students but also to the wider "school community", this broader understanding of its content would appear to point away from characterising the program as providing benefits to students.

42. It is, therefore, not necessary to explore who is or may be a member of a "school community". Rather, it is enough to observe that all students *may* use the chaplaincy services provided at a school. For the purposes of argument, it may be accepted that some students would derive advantage from using the services and, in that sense, *should* do so. But no student and no member of the school community *must* do so. All may; perhaps some should; none must.

43. As has just been noted, it may be assumed that provision of chaplaincy services at a school will help some students. Provision of those services will be of benefit to them. It will be of "benefit" to them in the sense of providing them with an advantage or a good**[18]**. But the word "benefits", where twice appearing in s 51(xxiiiA), is used**[19]** more precisely than as a general reference to (any and every kind of) advantage or good. The meaning of the word "benefits" accepted by the majority in *British Medical Association v The Commonwealth* ("the *BMA Case*")**[20]** was that expressed by McTiernan J: "material aid given pursuant to a scheme to provide for human wants ... under legislation designed to promote social welfare or security". And that material aid may be provided in various ways. McTiernan J referred**[21]** to the provision of benefits in the form of "a pecuniary aid, service, attendance or commodity".

44. In *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* ("the *Alexandra Hospital Case*")**[22]** all five members of the Court accepted that "the concept intended by the use in [s 51(xxiiiA)] of the word 'benefits' is not confined to a grant of money or some other commodity" and that the concept "may encompass the provision of a service or services". The Court treated this conclusion as supported, even required, by the decision in the *BMA Case*. And it was on this footing that the Court decided in the *Alexandra Hospital Case* that the payment of money to the proprietor of an approved nursing home, in respect of each qualified nursing home patient, for each day on which the patient received nursing home care in that nursing home, was provision of a "sickness and hospital benefit". As the Court pointed out**[23]**, the benefit could be identified either as the money paid to the nursing home proprietor or as the services provided by the proprietor to the patient as the quid pro quo for the money payment made by the Commonwealth. But each description reflected the central fact that the intended ultimate beneficiary of the benefit was a particular patient: the identified patient in respect of whom a particular payment was made.

45. It would not be right to attempt to state some comprehensive definition of what may be "benefits", whether "benefits to students" or any of the several other forms of benefits identified in s 51(xxiiiA). Nothing in these reasons should be

understood as attempting that task. It is enough, for the purposes of this case, to observe that the constitutional expression "benefits to students" cannot be construed piecemeal. That is, the expression is not to be approached as if it presented separate questions about whether there is a "benefit" and whether that "benefit" is provided to or for "students".

46. Section 51(xxiiiA) uses the word "benefits" in several different collocations. It uses the word to refer**[24]** to the provision of aid to or for individuals for human wants arising as a consequence of the several occasions identified: being unemployed, needing pharmaceutical items such as drugs or medical appliances, being sick, needing the services of a hospital, or, as is relevant to this case, being a student. The benefits are occasioned by and directed to the identified circumstances. In the usual case, the assistance will be a form of material aid to relieve against consequences associated with the identified circumstances. Provision of the benefit will relieve the person to whom it is provided from a cost which that person would otherwise incur. In the case of unemployment and sickness benefits, the aid will relieve against the costs of living when the individual's capacity to work is not or cannot be used. That aid may take the form of payment of money or provision of other material aid against the needs brought on by unemployment or sickness. Pharmaceutical and hospital benefits provide aid for or by the provision of the goods and services identified. And in the case of benefits to students, the relief would be material aid provided against the human wants which the student has by reason of being a student.

47. Providing at a school the services of a chaplain or welfare worker for the objective described in item 407.013 in Pt 4 of Sched 1AA to the FMA Regulations is not provision of "benefits" of the kind described by McTiernan J in the *BMA Case* or by the Court in the *Alexandra Hospital Case*. Providing those services does not provide material aid to provide for the human wants of students. It does not provide material aid in the form of any service rendered or to be rendered to or for any identified or identifiable student. There is no payment of money by the Commonwealth for or on behalf of any identified or identifiable student. And the service which is provided is *not* directed to the consequences of being a student. There is no more than the payment of an amount (in this case to an intermediary) to be applied in payment of the wages of a person to "support the wellbeing" of a particular group of children: those who attend an identified school. And the only description of how the "support" is to be given is that it includes "strengthening values, providing pastoral care and enhancing engagement with the broader community". These are desirable ends. But seeking to achieve them in the course of the school day does not give the payments which are made the quality of being benefits to students.

48. Providing money to pay persons to provide such services at a school is not to provide benefits which are directed to the consequences of being a student. It is not a provision of benefits to students within the meaning of s 51(xxiiiA).

12.00 NOON SATURDAYS