AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

Press Release 724

RELIGIOUS LIBERTY:

A FUNDAMENTAL HUMAN RIGHT OR PART OF A BALANCING ACT IN DISCRIMINATION LEGISLATION.

The debate over same-sex marriage has promoted a discourse around religious liberty.

This issue has taken centre stage for those who object on the basis of religious belief or matters of conscience. The debate about laws which are in conflict with the religious belief of individuals or churches has to date centred around legislative exemptions .

Caroline Evans,a former Dean of the Melbourne Law School at the University of Melbourne considers that, although there may be sometimes good reasons for giving exemptions on religious grounds, under non-discrimination law, the '*current balance between protecting religious institutions but not religious individuals provides evidence that it is a sensible principle to continue with respect to same sex marriage.*' [1]

Evans mentions segregationist churches in the US who discriminate on the basis of race or pacifist Quakers withholding tax for defence spending. She ignores two thousand years of persecution, and bloodshed (ongoing in some parts of the world) and the French, American – and Australian Englightenment solution. This was a separation of religion from the State, a Bill of Rights provision –Section 116 – of the Australian Constitution. This provision has not been mentioned in any current commentaries on the same sex marriage debate.

In this paper, I suggest that recent developments in discrimination law, both here and internationally, are cold comfort for both institutions and individuals who have strong religious beliefs and are prepared to say 'Here I stand, I can do no other' on the same-sex marriage issue.

Perhaps religious men and women of strong conscience should look again at Section 116 of the Australian Constitution which says:

The Commonwealth shall not make any law for establishing any religion, or *for imposing any religious observance, or for prohibiting the free exercise of any religion, and no*

[1] Evans, C.'Same Sex marriage, religious freedom and the law ', https://pursuit.unimelb.edu.au/articles/same-sex-marraige-religious-freedom-and-the-law , accessed 5 November 2017.

religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This section, which until 1981 some citizens considered a ' religious liberty' or 'Bill of Rights' type clause was based on the First amendment and Article 6.3 of the Constitution of the United States [2] Our Founding Fathers understood that it prohibited both State interference in religion on the one hand and State Aid to both religion and religious institutions in 1898. [3]

In relation to Section 116 however, Australian churches and religious men and women of Christian conscience, will need to look back, in shame, to the DOGS case of 1981.[4] In order to take the Queen's shilling for their religious schools, the defendants in this case—churchmen and women —argued for 26 days in the High Court of Australia that their schools were not religious institutions; were no more religious than public schools; and the words' any religion' meant 'a particular State religion'. With the exception of Justice Lionel Murphy, the six judges of the High Court, agreed with them.The majority judges ignored the intention of the Founding Fathers of 1898, namely the separation of religion from the State. They and turned the religious liberty clause of the Australian Constitution on its head.[5]

How? According to the majority judgements, the words' any religion' really means 'a State religion'or 'a State church'. However, if this meaning is given to "any religion' and transferred to the remaining clauses, Section 116 reads:

The Commonwealth shall not make any law for establishing a State religion or church , or *for imposing any religious observance [**of a State religion or church]** , or for prohibiting the free exercise of **a State religion or church**, and no religious test [of a State religion or church] shall be required as a qualification for any office or public trust under the Commonwealth.*

On this interpretation Section 116 is no longer a prohibition on the Commonwealth. The Commonwealth can make **any law** it wishes concerning religion so long as it does not make it for a State religion or church. In 1981 the plaintiffs believed that a Bill of Rights protection, a clause that they believed was a protective shield —had been turned into a sword.[6]

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[2] **First amendment, Constitution of the United States:** ***Congress shall make no law respecting an establishment of religion****, or prohibiting the free exercise thereof…* And

Article 6.3 Constitution of the United States: *…no religious test shall ever be required as a qualification to any office or public trust under the United States*

[3] Constitutional Convention Debates 1898, vol. 2 pp. 1779 ff ;R. Ely, Unto God and Caesar, (1976) MUP;

[4] *A-G (Vic) ex rel Black v Commonwealth* [1981] HCA 2: 91981) 146 CLR 559 at 605

[5] Jean Ely, *Contempt of Court*, 2011 Arena Press; M.J. Ely Erosion of the Judicial Process, 1981, Salter Press.

[6] The plaintiffs (the DOGS) subsequently opposed the extension of Section 116 to the States in the 3 September 1988 referendum. They placed a two page Advertisement in the national newspaper. Politicians in Canberra, most of whom initially supported the Referendum, waxed abusive, and Ray Nilsen, the co-ordinator of the High

Thirty six years later, Australian religious schools for the wealthy are overflowing with taxpayer largesse while impoverished public schools go begging. And Australian citizens are now cognizant of sex abuse scandals perpetuated in some taxpayer funded religious schools. Australian churches and many of their employees have long since lost the moral, let alone the liberty of conscience initiative in Australian society.

However, some citizens in Australia may still believe that liberty of and from religion is a basic human right that should not be downgraded into a balancing act in discrimination legislation, administered by tribunals using an inquisitorial method. Although religious groups are currently lobbying for religious exemptions in any same sex marriage legislation, and these may initially have a chilling effect, they are no substitution for what was intended as a strong Bill of Rights section of the Constitution – if it had **not** been read down and out by black letter law judges.

Those who believe in separation of religion from the State, might like to consider developments in the High Court itself and academic commentaries on the DOGS case since 1981. Scholars who accept the High Court decision in the DOGS case, are a minority. Some, including Caroline Evans, are prepared to question it, while others strongly advocate a wall of separation between religion and state as the only solution to liberty of and from religion.

But first,

Are Exemptions from Discrimination Legislation a Guarantee of Religious Liberty?

The short answer is "No" with the question, " If religious organisations are paid by the State to run public services like education, health, and employment agencies : Why should they be exempt ?" Why should parents and children with the wrong beliefs or sexual orientation be turned away from schools and hospitals that are 80-90% publicly funded ? These are basic issues of accountability and democratic procedure.

Should he who pays the piper, call the tune?

Caroline Evans claims that under current discrimination legislation individuals like cake makers may not be protected but religious institutions are. But are they?

Commentators[7] discuss the issue as a balancing act between liberty and equality, both considered fundamental rights deserving of legislative protection in a democratic society.

Court case rang the Catholic Education authorities and told them that if the Referendum succeeded he would be in the State Courts the next day. The Catholic Church authorities and the Coalition opposed the referendum and it failed.

[7] Bobbi Murphy, 'Balancing Religious Freedom and Anti-Discrimination: Christian Youth Camps Ltd v Cobaw Community Health Services Ltd', *Melbourne Law Review*,2017, vol 5 at http://austli.edu.au/au/journals/MelbULawRw/2017/5.html Mark Russell, 'Christian Brethren-owned Camp Discriminated against Gays: Court,' *The Age* 16 April 2014.

But what happens when they are in conflict?

In the last decade, there has been a landmark case - the Cobaw case,[8] which tested the extent to which it is lawful for religious groups to discriminate through carve-outs or exemptions to anti-discrimination legislation. Cobaw Community Health Services successfully sued Christian Youth Camps ('CYC') for unlawful discrimination on the basis of sexual orientation. CYC ran Phillip Island Adventure Resort, a commercial operation established by the Christian Brethren Trust . The Christian Brethren are opposed to homosexual activity as being against biblical teaching. Cobaw wished to hire a camp facility from the appellants for the use of same sex attracted young people. CYC (by its camp manager) refused.

The majority judges, Maxwell P and Neave JA (Redlich JA dissenting) held that CYC was unable to bring its conduct within the religious exemptions of the 1995 Equal Opportunity Act of Victoria. [9] The majority judges found that CYC was not a 'body established for religious purposes' and therefore could not avail itself of the exemption under S 75 of the EOA 1995. CYC existed for the fundamentally commercial purpose of making campsite accommodation available to the public, and the requirement that the camp be conducted in accordance with Christian beliefs and principles did not transform this secular purpose into a religious one. The Court noted that although the provision of services may have a religious motivation, unless the activity itself is intrinsically religious, 'it is difficult to see ow questions of doctrinal conformity or offence to religious sensitivities can meaningfully arise.' [10]

Given the number of religious organisations providing various social services on a commercial basis, this approach may have far-reaching consequences. For example, in 2017 the Catholic Church in Victoria is involved in 492 schools, at least 11 hospitals and numerous aged care facilities and child welfare institutions

Maxwell P and Neave JA (Redlich JA dissenting) held that corporations could not hold beliefs, and therefore could not rely on the exemption under s 77 of the EOA 1995.[11] Even if this was not the case, the refusal was also not necessary to comply with genuine religious beliefs or principles.

In law, churches may be voluntary organisations. But many educational, health and other enterprises run by religious groups are administered by corporations. If Maxwell P. is correct, and corporations cannot hold beliefs, where does this lead for religious exemptions for discrimination legislation?

It should be noted that all judges focused on the concept of dignity, identity, status and self-worth when discussing the young people discriminated against. This approach mirrors the

[8] Cobaw Comunity Health Services Ltd v Christian Youth Camps Ltd [2010] VCAT 1613 (8 October 2010) [7] (Judge Hampel).*Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75; (2014) 308 ALR 615

[9] Ibid 679 {302}- [303]

[10] Ibid 671 [268]; see also at 679 [303]

[11] Ibid 680[308], 682[316] (Maxwell P), 706[411] (Neave JA, 721[473] (Redlich JA)

approach taken in Canada and South Africa. [12] In this case, theirs was the more 'fundamental' right. Religious liberty, freedom of and from religion, freedom of conscience has been downgraded in a 'balancing' act .

Above all, it should be noted that in the Cobaw case all three judges, servants of the State were free to determine what under Section 75(2) constituted the 'doctrine' and ' injury to the religious sensitivities' of the Christian Brethren when they decided that the exemption under Section 75(2) of the Equal Opportunity Act did not apply.

Since the Cobaw case, there have been changes to the religious exemptions in the EOA 1995.[13] These adopted the broader definition of 'religious body' found in the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 38 (5) (b) The definition now reads

'an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles' [14]

Religious 'entities' may take some comfort from this 'broader' definition, but individuals appear to have no protection. And the actual definition of '*religious doctrines, beliefs or principles*' which for many citizens are private matters of conscience central to their *dignity, identity, status and self-worth* will be defined 'objectively' rather than 'subjectively' by civil magistrates.

So much for separation of religion from the State. So much for the late eighteenth century enlightenment solution hammered out after centuries of religious wars, bloodshed and persecution.

Yet the concept of separation of religion and the State, whatever the High Court may have said in 1981, was firmly embedded in the Australian Constitution by the two men, Henry Bournes Higgins and Andrew Inglis Clark who ensured its inclusion in the first place.

It is a very powerful idea, and ideas have a habit of resurrecting themselves in every generation. If properly interpreted the idea of separation of religion from the State could - and should - solve the problems of both parties in the Gay marriage debate.

A lot of water has gone under Australian social and ideological bridges since the DOGS case in 1981 when this powerful idea was turned on its head.

This is the subject of the next Press Release.

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[12] Law v Canada [1999] 1SCR 497, 529 [51] (Iacobucci J). National Coalition for Gay and Lesbian Equality v Minister of Justice [1999] 1 SA 6, 37 [36] (Ackerman J) (Constitutional Court)

[13] In particular Section 75 (2) of the 1995 Act exempted from the anti-discrimination provisions of the Act "anything done by a body established for religious purposes" that (a) conforms with the doctrines of the religion; or (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

[14] Equal Opportunity Act 2010 s 81 (b)

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