

**AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT
SCHOOLS
Press Release 726**

RELIGIOUS LIBERTY: PART THREE

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

Senator Brandis told the ABC's Q&A program that the private bill put forward by Liberal senator Dean Smith to change the Marriage Act could include a "**declaratory statement**" in line with Article 18 of the International Covenant on Civil and Political Rights (ICCPR).

That article states: "*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*"

Section four of article 18 says: "*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*"

Senator Brandis said: "I think it will do no harm to have a declaratory statement in the bill based on the language of article 18 of the ICCPR to the effect that nothing in the bill can limit or take away from a person's right to manifest their religious faith by worship, practise, observance or teaching," he said. "Now if we introduce those words they'll make no difference whatsoever to the right of same-sex people to marry but they might provide a level of reassurance to those who were not convinced to vote yes."

The question is of course: **What legal force does a mere declaratory statement have?** And is this the best that a once powerful Catholic Church squeeze out of the corridors of power? Even if a declaratory clause protects religious freedom will it apply consistently for all faiths - such as those which wish to practice sharia or aboriginal customary law?

The limitations of Section 18 of the Universal Declaration of Human Rights on which Section 18 ICCPR have been exposed by Meg Wallace in her *Freedom From Religion: Rethinking Article 18 Cilento Books (2015)*. See www.amazon.com/author/megwallace

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. respect the exclusive character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

DOGS suggest that those who are genuinely interested in freedom of and from religion should go back to the prohibition intended by the Founding Fathers in Section 116 of the Australian Constitution and look at what has happened since the DOGS case in 1981.

In Press Release 725 DOGS promised to bring supporters up-to date with legal and other developments with Section 116 since 1981. So here is the relevant information:

A lot has happened since the DOGS case of 1981.

Firstly, *The Acts Interpretation Act Amendment Act* of 1984¹, Section 7 amended the original 1901 Act to include a Section 15AB. This permitted the use of extrinsic material in the interpretation of an Act to determine the meaning of a provision when it is ambiguous or obscure, or the ordinary meaning leads to a result that is manifestly absurd or unreasonable. In 1988 the Mason High Court reversed the original interpretative rule and the books of the Convention debates were read in open court.²

As a result, many legal commentators and historians, confronted with recent issues of religion and the state have been revisiting the DOGS case. They have discovered what the plaintiffs could have told them in 1981 – that what was clearly a version of the religious liberty clauses in the American Constitution, has been rendered meaningless in the Australian context.

Case law Since 1981

In 1990, the narrow interpretation of Section 116 was upheld by French J. in a case of a marriage celebrant case. The applicant's argument that the marriage register was a form of establishment was rejected. Following Barwick CJ and Gibbs J. in the DOGS majority judgement, French J. said that the only invalid Commonwealth legislation in relation to

¹ *Acts Interpretation Amendment Act* (Cth) 1984 No. 27 of 1984, Section 7.

² *Cole v Whitfield*, [1988] HCA 18; (1988) 165CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

marriage, would be that it authorised a monopoly in religious marriages in favour of one particular denomination.³

In 2011 Marella Harris and the Hoxton Park Residents Action Group sought to prevent the construction of the Malek Fahd Islamic School and mosque on residential land at Hoxton Park Road. They commenced proceedings in the Equity Division of the NSW Supreme Court based on the allegation that the funding was obtained by way of a grant made under the Schools Assistance Act 2008 (Cth) and the Education Act (1990) (NSW) and contravened Section 116 of the Constitution.

On the basis of the majority decision in the DOGS case, Rein J. in the first instance, found that ‘a law’ for ‘establishing any religion’ had to recognise that religion as a state religion, church of national institution’⁴ and dismissed the case. The Plaintiffs appealed.

But in the NSW Court of Appeal, Basten J. with whom Allsop and Beazley JA agreed, distinguished the *DOGS* case on the facts and considered the law as stated in 1981 might not be settled. He found the case differed in two respects from the DOGS case. First it alleged direct funding of a religious institution for religious purposes ; and secondly in his opinion, developments in constitutional law since the DOGS case in 1981, might allow submission to be made supporting a more flexible approach to the constraints of legislative power as set out in s 116.⁵

He was in fact mistaken about the plaintiffs arguments in the DOGS case. In 1979 there was a Trial of Facts of 26 days in which the issue was whether religious schools were religious institutions or even more religious than State Schools. Evidence was provided by the plaintiffs that schools in Churchill and Geelong were used for church purposes. These have been referred to in the Justice Murphy dissent.⁶

However, Basten J. was correct in stating that there had been developments in Constitutional law since the DOGS case. One was the admission of the Constitutional Convention Debates into the High Court as extrinsic evidence.

The other was the academic commentaries resulting from a close examination of the historical narratives ‘chosen’ by the majority judges. In the process some discovered, as Murphy J. had done, the work done by Tasmanian historians, and in particular R.G. Ely on the events and ideas surrounding the insertion of the religious liberty clause into the Australian Constitution. H.B. Higgins took centre stage with his Seventh Day Adventist

³ *Nelson v Fish* (1990) 21 FCR 430.

⁴ *Hoxton Park Residents’ Action Group Inc v Liverpool City Council* [2010] NSWSC 1312 , [31]

⁵ *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 166 [32-34]. Also see L. Beck, ‘Dead Dogs? Towards a Less Restrictive Interpretation of the Establishment Clause: Hoxton Park Residents Action Group v Liverpool City Council (No.2) *University of Western Australia Law Review*, March 2014, Vol. 37, Issue 2. 59-73.

⁶ *Attorney-General (Vic) (Ex rel Black) v Commonwealth* [1981] HCA 2, (1981) 146 CLR 580, [High Court](#) Australia 579 at p.633

friends in their academic papers. But it took longer for them to discover, back in 1891, the importance of Andrew Inglis Clark.

Meanwhile, in 2008 the question of freedom not only of, but from religion raised its head. Ron Williams, a secularist parent, from Toowoomba, reacted against the imposition of a chaplaincy program on his local State school. and Aided by ardent and determined secularists, he decided to put the High Court on trial. He came, with Max and Meg Wallace from the secular society to Melbourne to discuss the case with the plaintiffs in the DOGS case. They met up with Ray Nilsen. Ray, who had five university degrees, including a Masters in Psychology and a LLB, was a Christian in the dissenting tradition with a strong humanist streak. He only had a year to live, but was relieved that activists like himself were waking up to what had been lost in 1981.

The Williams cases, both of which were successful⁷,—but not on Section 116—generated media coverage, academic conferences and commentaries. In the first case The High Court ruled that in the absence of any statutory authorisation beyond a mere appropriation statute, the School Chaplaincy program was not a lawful basis for Commonwealth expenditure⁸

When the Commonwealth funded the States Chaplaincy programs through legislation, Mr Williams went back to the High Court.⁹ The High Court held that the legislation was not supported by any constitutional head of power. The Commonwealth then turned to Section 96 grants to the States.

All High Court judges in 2012 said that, given ‘the significance of the place of s 116 in the Constitution’, the term ‘office’ in the final clause ‘ should not be given a restricted meaning. It has been noted by Luke Beck from the University of Western Sydney that the rejection of ‘restricted’ meanings of terms used in Section 116, conflicts with the restricted meaning of ‘establishment’ majority judgements in the 1981 *DOGS* case.¹⁰

4. Commentaries on the Establishment Clause

When the Constitution took effect in 1901, Quick and Garran argued that Section 116 was redundant as the Commonwealth had not been given the legislative power under [Section 51](#) to establish a religion or prohibit its free exercise. They also considered it self-evident that establishment meant ‘the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others.’¹¹ In 1963, a lawyer, Clifford Pannam wrote that this provision was regarded "by all as having little

⁷ *Williams v Commonwealth* (No 1) ('School Chaplains Case') [2012] 248 CLR 15. *Williams v Commonwealth* (No. 2) [2014] HCA 23

⁸ For discussion of this aspect of the case, see Shipra Chordia, Andrew Lynch and George Williams, ‘Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism’ (2013) 37 *Melbourne University Law Review*, 189; Gabrielle Appleby and Stephen McDonald, ‘Looking at the Executive Power through the High Court’s New Spectacles’ (2013) 35(2) *Sydney Law Review* 253; Benjamin B Saunders, ‘The Commonwealth and the Chaplains: Executive Power after Williams v Commonwealth’ (2012) 23 *Public Law Review*, 153.

⁹ *Williams v Commonwealth* (No. 2) [2014] HCA 23 .

¹⁰ L. Beck, ‘The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study’ *Adelaide Law Review*, (2014) Vol. 35, 225 at 228.

¹¹ [Quick & Garran, Ibid](#) 951 - 952

practical value". Pannam considered the provision would only become significant if the High Court held that it applied to laws made by governments of the territories.¹² Yet in 1964 Professor P.H. Lane, said that it was sufficient if a law 'is merely directed towards, or tends to' the establishment of religion.¹³

Within a decade after the *DOGS* case, there was growing disquiet about the High Court's interpretation of the meaning of 'establishment' from secularists. Had the High Court favoured religion to the exclusion of non-religious beliefs? Could this problem only be solved by a separationist interpretation?

Since 1981, commentaries have either favoured a

- national church interpretation
- non-preferential / limited neutrality/non-discrimination interpretation or
- separationist/ strict neutrality interpretation

The National Church Interpretation

In 1998 Joshua Puls, at that time a tutor at Newman College, the University of Melbourne,¹⁴ argued against the separationist interpretation as well as secularism as a 'quasi religion' in a long, learned article. He concluded that 'Section 116 is adequate and appropriate if one does not expect it to do too much.'¹⁵ and

*'the effect of any constitutional provision as loaded with value judgments as one involving religion will inevitably be dependent not so much on the fine wording of that section but on the desired outcome sought by the judges applying it.'*¹⁶

And in 2009, with the secularists' promotion of the *Williams* (Chaplaincy) cases gaining public momentum, Jennifer Clarke, Patrick Keyzer and James Stellios in a Constitutional Law commentary for students, agreed with J. Puls that the court's narrow interpretation of the provision is consistent with the intention of the Constitution's drafters, who never intended for it to be a protection of individual rights,¹⁷

The Limited Neutrality, non-preferential, or non-discrimination Interpretation

The narrow view taken by the High Court of the 'establishment' clause in the *DOGS* case unearthed problems for the 'free exercise clause'. The satisfaction of one might violate the other. Too strict a view of the non - establishment clause might amount to hostility to religion

¹² Pannam, Clifford L. (1963). "Travelling Section 116 with a U.S. Road Map". [Melbourne University Law Review](#). 4 (1): 41–90 at 41.

¹³ P.H. Lane, 'Commonwealth Reimbursements for Fees at Non State Schools' (1964) 38 ALJ 130 at 132.

¹⁴ Joshua Puls was also seconded in 1996 to the Royal Household of the Prince of Wales and the Duchess of Cornwall as assistant Private Secretary and later became the official Secretary to the Governor of Victoria and Executive Director of the Cabinet Office in Victoria's Department of Premier and Cabinet.

¹⁵ J. Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees, Federal Law Review, Vol 26, 139 at 160

¹⁶ Ibid 164

¹⁷ Clarke, Jennifer; Keyzer, Patrick; Stellios, James (2009). *Hanks' Australian Constitutional Law: Materials and Commentary* (8th ed.). Chatswood, NSW: LexisNexis Butterworths.

and constitute an infringement of free exercise. And what protection was offered to the exercise of non-religion ?

In 1992 Stephen McLeish now Justice McLeish of the Victorian Court of Appeal, and from Melbourne University and later Harvard argued for a limited principle of ‘neutrality’ in the federal government’s relationship with religion by suggesting that secularism could be defined as a ‘quasi-religion’.¹⁸

McCleish complained that the High Court attempted to discern the meaning of Section 116 with unsuitable’ legalistic tools. The assumption that it was primarily concerned with legislative power rather than civil rights led the majority judges to examine a challenged law on its face rather than how it affected citizens in practice.¹⁹ He suggested a qualified ‘neutrality’ rather than a ‘separation’ test.

McLeish’s research however, led him back into nineteenth century religious and education history and to the the historical circumstances surrounding the insertion of Section 116 into the Constitution. He discovered Andrew Inglis Clark and Tasmanian historians of the 1960s and 1970s like John Reynolds, Justice J. M. Neasey and R.G Ely who had realised the importance of the Tasmanian Attorney General and Supreme Court judge in regard to the 1891 draft of the Australian Constitution.²⁰

In 2009 academics Gonzalo Villalta Puig and Steven Tudor called for the court to broaden Section 116 by finding in it an implied right to the freedom of thought and conscience. In their view most Australians correctly "believe that the Constitution protects the right to freedom of thought and conscience just like it protects other civil and political freedoms", and the court should give effect to that belief.²¹

In 2013/14, Luke Beck, a graduate from Sydney University, and lecturer in the School of Law at the University of Western Sydney, looked into the Constitutional Convention debates and concluded that the standard account²² of the concerns of Henry Bournes Higgins when he proposed the religious liberty were mistaken . Higgins’ real concern, he argued, was a realisation that the Commonwealth’s enumerated powers in Section 51 were wide enough to

¹⁸ S, McLeish, ‘ Making Sense of Religion and the Constitution: A Fresh Start for Section 116’ *Monash University Law Review*(1992) Vol 18, No 2. 207 at 228

¹⁹ , Ibid 207

²⁰ Ibid , 217. H, Reynolds, ‘A.I. Clark’s American Sympathies and his Influence on Australian Federation’ (1958) 32 *ALJ* 62; J.M. Neasey, ‘Andrew Inglis Clark Senior and Australian Federation’ (1969) 15 *Australian Journal of Politics and History* no 2, 1; R.G. Ely ‘ Andrew Inglis Clark and Church State Separation’ (1975) 8 *Journal of Religious History*, 271; R. G. Ely *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (Melbourne, Melbourne University Press, 1976)

²¹ Villalta Puig, Gonzalo; Tudor, Steven (2009). "To the advancement of thy glory? A constitutional and policy critique of parliamentary prayers". *Public Law Review*. **20** (1): 56–78

²² Quick and Garren; Ibid Clifford Pannam, Ibid Justice Mason and Justice Wilson in the DOGS High Court case, Ibid; JA La Nauze, *The Making of the Australian Constitution* (MUP 1972) 229; Reid Mortensen ,’Judicial Inactivism in Australia’s Secular Commonwealth’ in Christine Parker and Gordon Preece (eds) *Theology and Law: Partners or Protagonists* (ATF Press, 2005) 52,55; Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012)70, DOGS case, (1981) 146 CLR 559,612, and 654

authorise legislation dealing with religion.²³ In his questioning of the standard Quick and Garren interpretation, Beck drew upon the historical works of R.G. Ely,²⁴ and Helen Irving.²⁵

In 2014, armed with the High Court decisions in the Hoxton Park School Chaplaincy cases, Beck went further. Although he was not prepared to say that the DOGS case majority judgement was ‘wrong’ he concluded that it was not authoritative.

He suggested that High Court reasoning on the meaning of the anti-establishment clause in s.116 required reconsideration. It was too narrow. He argued for a limited neutrality position: namely a prohibition on federal expenditure for religious purposes such as for religious activities, or instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth, and the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories.²⁶

In 2016, Beck concentrated on the narrow purposive test used by Chief Justice Barwick and the Majority in the DOGS case, namely the definition of ‘for’ in Section 116 as meaning ‘for the sole purpose of’²⁷ as opposed to the broader American First Amendment version of ‘with respect to’. A substantial part of his analysis dealt with the Constitutional Convention Debates and what he believed was the intention of H. B. Higgins. He considered that Higgins regarded ‘for’ and ‘respecting’ as synonymous.²⁸

Beck was joined in his opinion that the DOGS case was no longer ‘authoritative’ by Professor Reid Mortensen²⁹ in Queensland. The 2012 *Williams (Chaplaincy)*³⁰ cases prompted a Conference in Williams’ home town of Toowoomba at the University of Southern Queensland on 4 October 2013. The papers presented at this Conference were published in a special issue of the University of Queensland Law Journal in 2014.³¹ Mortensen’s article in this Journal, *The Establishment Clause: a Search for Meaning* argued that the *Williams* case revealed the impoverished condition of jurisprudence on section 116. He wrote:

...the plaintiff’s silence on the possible application of section 116’s establishment clause is largely possible because, in the Defence of Government Schools case (‘the DOGS case’) the High Court rendered the clause meaningless...it does not seem worth the effort while the DOGS case is ‘settled law’.

²³ L. Beck, *Higgins’ Argument for Section 116 of the Constitution*, Legal Studies Research Paper No 14/45 May 2013, Sydney Law School, University of Sydney.

²⁴ R. Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891- 1906*, (MUP) (1976)

²⁵ H. Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (1999) (Cambridge University Press)

²⁶ L. Beck, ‘The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study,’ (2014) *Adelaide Law Review*, Vol 35, 225-250

²⁷ Carolyn Evans noted that this was

²⁸ L. Beck, ‘The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution,’ *Federal Law Review*, (2016) (Forthcoming)

²⁹ Reid Mortensen is the Professor of Law and Head, School of Law and Justice University of Southern Queensland, Australia.

³⁰ *Williams v Commonwealth*, (2012) 288 ALR 410.

³¹ R. Mortensen, ‘The Establishment Clause: A Search for Meaning,’ *University of Queensland Law Journal*, (2014) Vol. 33(1) 109

But Mortensen could not and did not accept that Section 116 was meaningless. He also believed that the ‘win’ in the Williams case improved the prospects for the establishment clause to have a greater reach.

He immediately referred back to the Constitutional Convention debates of February/March 1898. He noted that Higgins and Richard O’Connor thought that it would replicate the operation of the American First Amendment, although neither seemed to have a full understanding of American case law at that time. He concluded that the blatant plagiarism of the American clauses may have been unthinking, but the fact that the clause is in the Australian Constitution in itself suggests that it should not be ignored.

He did not go further back to Inglis Clark, who could have told him in considerable detail what it all meant. He did however, complain that, although Section 116 was obviously based upon the American First Amendment, the High Court in the DOGS case had looked at it through a British lens, rendering it a Washminster mutation.,³² He was far from impressed by the majority’s historical references, noting the odd reference to the Scottish *Overtoun*³³ case and Mason J’s reference to the established Episcopalian Church of Ireland in 1900 when it had been disestablished for 29 years. Mortensen concluded that the Dogs case was not the High Court’s finest moment.

Mortensen considered that if it were assessed purely on its merits, the DOGS case should be ripe for overruling. The DOGS majority national church interpretation of the establishment clause can only give effect to a limitation on Commonwealth power, if, without the clause, the Commonwealth could create a national church or religion. But the Commonwealth does not have such a power. The majority judgement in the DOGS case renders the clause meaningless.

As he searched for a meaning to the clause, Mortensen also rejected the separationist interpretation of Murphy J.³⁴

He chose, instead to promote the principle of non-discrimination.³⁵

³² Ibid 2014.

³³ Barwick J and Wilson J’s use of *Free Church of Scotland v Overtoun* [1904] AC 515 646, 656,677,694. concerned whether a union of Presbyterian churches in Scotland was conforming to the idea of establishment held by one of the uniting churches – the Free Church of Scotland.. It referred to the Westminster Confession definition of 1643.

³⁴ Ibid 123-125

³⁵ Mortensen looked in detail at Australian precedents since the *DOGS* case casting his net widely. He discovered Family law cases where section 116 was given a non-discrimination interpretation for example, by Justice Carmichael in *Evers v Evers*, a custody case involving a Jehovah’s Witness parents where the mother’s convictions had lapsed.

[the] freedom I see...granted by section 116 is a freedom from the imposition of theological ideas: Parliament and the courts cannot prefer Christianity to any other religion, or prefer any religion to none at all

And Planning Law cases where section 116 was used as a ‘signpost of religious equality. For example, a majority of the NSW Court of Appeal in *Municipal Council v Moslem Alawy Society*[1985] NSWLR 525 at 544

What did he mean by this principle? A half way point to please everyone—and, as the nineteenth century Australian experience of State Aid to churches proved — none. He wrote:

The aim of the principle of non-discrimination is to coordinate, sometimes through extremely messy arrangements, Australia's religious and moral pluralism, and to assure equal access to the public square.

The Separationist/ Strict Neutrality Interpretation

The majority judges in the DOG's case defined what they considered the prevailing late 19th century understanding in English legal circles of the nature of the act of legislatively 'establishing' religion.

In 1986 R. Ely tested not only the English definition but his own in his 1976 work, *Unto God and Caesar*.³⁶ He did this by examining in a lengthy historico-legal study all of the Statutory establishments of religion in England from ca 1300 to 1900.³⁷ He concluded that he and all the Australian High Court judges were mistaken. He distinguished two major kinds of religious 'establishment' in the English statutes during that period: the Erastian and the High Church interpretation. The High Church interpretation in turn took two forms: the Papal and the High Anglican. After considerable research he discovered that in the later 19th century, and during the preceding centuries, the Erastian interpretation held the centre ground. But, resulting from the Oxford Movement of the middle 19th century decades, the dominant Erastian interpretation became the subject of a vigorous but largely unsuccessful, High Anglican attempt to subvert and transform it.

Ely concluded that, beyond reasonable doubt, around the close of the nineteenth century the dominant English judicial understanding of the words 'establishing any religion' was on Erastian rather than High Church lines.

The interpretation that found favour in the Australian High Court however, was that promoted by a minority of the established English church, namely the middle to late nineteenth century High Anglicans.

As a result, Ely argued that, although following English precedent had poor credentials, late nineteenth century England was the place to look for 'meanings' of the act of legislatively

held that a house used for prayer and the reading of the Koran was a 'place of public worship' for town planning purposes, even though the general public had no access to it. Justice McHugh held that:

The preservation of religious equality has always been a matter of fundamental concern to the people of Australia and finds its place in the Constitution s 116.

³⁶ Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891-1906*, Melbourne, 1976, at p. 95

In the English sense, a law could be said to 'establish' religion, if it conferred on any church, in a substantial way, the kind of legal and financial privileges that the Church of England in the eighteenth and nineteenth century did enjoy, but that other English churches of that time did not.

³⁷ R. Ely 'The View from the Statute: Statutory Establishments of Religion in England ca. 1300 to ca 1900.' *University of Tasmania Law Review* 9(1986) Vol. 8 No 3, 225

‘establishing’ religion, the DOGS challenge would not so readily have failed if ‘establishing any religion’ was interpreted, as it clearly should have been, on Erastian lines.

In the Erastian perspective, statutorily to ‘establish’ religion is to command, in due parliamentary form and make enduringly lawful, certain arrangements which substantially benefit religion within the realm. Such an arrangement might properly be the current Australian State Aid to religious schools situation. Could the States Grants Acts under challenge in the DOGS case also be described as ‘An Act to establish Godly and Useful Learning among the Young’.

By 1990, W. Sadurski, from Sydney University and later an eminent legal academic in Yale and Europe, regarded the strict separation interpretation of the non-establishment clause as the only escape from an ‘unattractive dilemma’ of ‘either favour[ing] religion to the detriment of non-religious beliefs, or interpret[ing] genuinely secular beliefs as “religious”’.³⁸ This could only be resolved, he argued ‘by adopting the policy of strict neutrality. No aid and no disadvantage is to be triggered by a description of a certain belief or activity as ‘religious’.

In 1993 Justice Michael Kirby, attended an International Religious Liberty Association conference in Suva Fiji and gave a paper on ‘Religious Liberty in Multicultural Australia: Past Tolerance-Present Indifference- Future Problems ‘

He noted that although Australia has a constitutional recognition of the general separation of the public realm of government from the private realm of religion in the provisions of its national constitution, Section 116 had not proved very powerful in its application. In conclusion, he advocated a ‘system of religious liberty and the separation of civil and religious identity as an important condition of peace.’³⁹ In discussion he invited DOGS plaintiffs present at the Conference to approach the High Court once more. They noted the predilections of the majority of members of the then current Court and graciously declined.

In 1994 [George Williams](#),⁴⁰ a Professor at the University of NSW, condemned the court's literal interpretation of the Section 116 provision, saying the court has ‘transformed the Constitution into a wasteland of civil liberties’. He argued that as an "express guarantee of personal freedom", the provision should be interpreted broadly and promote "individual liberty over the arbitrary exercise of legislative and executive power"⁴¹

³⁸ W. Sadurski, ‘Neutrality of Law Towards Religion (1990) 12 *Syd LR* 421, 452. Wojciech Sadurski is a visiting Professor of Law at Yale Law School as well as the Challis Professor in Jurisprudence at the University of Sydney Law School and a Professor at the University of Warsaw, Centre for Europe. His most recent books include *Constitutionalism and the Enlargement of Europe* (OUP 2012), *Equality and Legitimacy*) OUP 2008), and *Rights before Courts* (Springer 2005 and 2014).

³⁹ M. Kirby, ‘Religious Liberty in Multicultural Australia: Past Tolerance – Present indifference – Future Problems,’ International Religious Liberty Association, South Pacific Division, Pacific Congress, Suva, Fiji, 9 June 1993, 30.

⁴⁰ Professor at the University of New South Wales who, as chair of the Victorian Human Rights Consultation Committee in 2005 helped bring about Australia’s first State bill of rights, the Victorian Charter of Human Rights and Responsibilities

⁴¹ G. Williams, ‘*Civil Liberties and the Constitution – A Question of Interpretation*’. *Public Law Review*. 5 (2): 82–103 at 90

In 2002 Williams repeated his call for a broad interpretation of Section 116 in his *Human Rights under the Australian Constitution* ⁴²

In 2006 Helen Irving ⁴³ from Sydney University, a researcher specialising in, amongst other things, the use of history in constitutional interpretation, addressed the ‘Separating Church and State: Keeping God out of Government’ national conference of the Rationalist Society of Australia held in Melbourne, that year. She claimed that, whereas one can say, with some qualifications, that there is a constitutional separation of church and state in the United States, the same cannot be said about Australia – despite having the same words in our Constitution.

She announced that in 1981 the Australian High Court effectively got it wrong when it came to interpreting the Constitution from an ‘originalist’ perspective, i.e. if you think the Constitution should mean what the framers or founders wanted it to mean. She argued that the framers of Australia’s Constitution intended Australia to be secular, erecting a ‘wall of separation between church and state’, following the United States example. But in the *DOGS* case the High Court interpreted the provision in such a way as virtually to deplete it of meaning.

When turning to the framers of the Constitution, she did not stop at the Constitutional Convention debates. She noted that Section 116 was incorporated into the Constitution in two phases; at the First Federal Convention in 1891 and at the second in 1897-98. She noted that, although it is suggested that Section 116 was only included in 1898 because of the inclusion of this statement of pious hope in Almighty God, because some feared at the time that this might lead to an association between the new Commonwealth and an official religion.

This account ignored the fact that the anti-establishment provision had been proposed at the First Federal Convention in the Inglis Clark draft and adopted. It was not and never was, meant to be merely a provision for mitigating the effect of recognising God in the Preamble.

She criticised the majority judgements, accusing Chief Justice Barwick of balancing his particular conclusion ‘on the head of a pin’ - the difference in language between the United States and the Australian establishment clauses. She agreed with the Justice Murphy dissent.

In conclusion she said:

..the High Court got it wrong when they concluded that section 116 was not intended as a broad statement of separation of church and state; and they got it wrong in suggesting that ‘establishment’ was intended to have a narrow meaning...the history of sectarians, and religious persecution, which the framers understood well, and which served as a background to their deliberations on both the reference to God in the preamble and their inclusion of a prohibition on religious laws, suggests that they had a wide purpose and

⁴² Williams, George (2002). *Human Rights under the Australian Constitution*. South Melbourne: Oxford University Press.

⁴³ Helen Irving was appointed to the Faculty of Law in 2001 and is the Director of the Julius Stone Institute of Jurisprudence. She is currently Pro-Dean (Staff Development). In 2005-2006 she held the Harvard Chair of Australian Studies as a Visiting Professor at Harvard Law School.

scope in mind. They appreciated the multiple dangers inherent in allowing governments to involve themselves in religious matters. ⁴⁴

Most commentaries on the DOGS case now agree on one thing. The historical analysis of the meaning of the 'establishment' clause in 1900 were either odd, inadequate or just plain wrong.

The Lionel Murphy Dissent:

Unlike the majority judges, Justice Murphy referred to American case law and history. He noted its explanation in Jefferson's letter to the Danbury Baptists, ⁴⁵and turned to the co-author of the establishment clause James Madison. He also noted the 1975/76 historical research by Richard Ely on the influence of American developments on the framers of the Australian Constitution. ⁴⁶ He refused to be misled by the Quick and Garran account which had been seriously questioned by Ely.

As a result Murphy followed a separationist interpretation.

In conclusion, let us remember that religious liberty exercises the minds of minorities who have suffered persecution and go back to those Danbury Baptists. This group fled Old World persecution, and lobbied Jefferson to insert the First Amendment into the American Constitution. What did Jefferson have to say to these Baptists about religious freedom?

Believing with you that religion is a matter which lies solely between man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" thus building a wall of eternal separation between Church & State. Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their

⁴⁴ Helen Irving, 'Same Difference? A comparison of the 'Establishment Clause' in the Australian and United States Constitution, *Rationalist Society of Australia website*, posted by Meredith Doig, 18 November 2014

⁴⁵Library of Congress Jefferson's Letter to the Danbury Baptists
<https://www.loc.gov/loc/lcib/9806/danpre.html> Accessed 06/06/2017

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⁴⁶ Ibid p. 628 ; R.G. Ely, *Unto God and Caesar*, (1976) MUP, pp 93, 95-96, 99-100

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