AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT

SCHOOLS

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Religious Men in Australia should be careful what they wish for:

Separation of Religion and the State in Australia is officially - Gone!

A Shield has Become a Sword

Section 116 of the Australian Constitution entrenched religious freedom and freedom from religion in Australia in 1901. But it was read down by the majority judges in the High Court in the DOGS case in 1981.

Religious schools wanted to have their cake and eat it. They wanted State money but they did not want State control. He who pays the piper calls the tune. And the tune now includes cries of 'discrimination'. The Federal Government intends to legislate on religion. Religion and the State are entangled - almost irretrievably.

Separation of religion and the State is no more. In the Ruddock Report pp 35-36 this is now official (See Appendix)

The Commonwealth Government is getting involved in determining discrimination in matters of religion.

But are discrimination and vilification laws just another form of blasphemy law, with a return to the era of religious and culture wars ?

For those concerned about the morals of a 'Godly' nation rather than the lessons of history and enlightenment separation of religion and the State, it may prove to be so. The absolute right to 'freedom of conscience' is now reduced to a mere section of discrimination law in which it will be weighed and often found wanting.

Prime Minister Morrison, and religious men who have forgotten their own history have politicised religion in Australia. This at a time, when the hypocrisy of so many churches and church schools have revealed themselves as shameless in their mendacity.

As Christians contemplate the birth in poverty – and the sacrifice of Christ this Christmas, they should ask:

How has this happened?

The Latest Nail in the Separation Coffin

has been described by Karen Middleton in the *Saturday Paper* of 15 December 2018. She

The push by conservative Coalition MPs to entrench churches' rights to discriminate on sexuality grounds appears to have backfired, with a long-awaited national religious freedom review recommending exemptions for religious organisations from other discrimination laws be wound back or scrapped.

In response, Prime Minister Scott Morrison promised what the review expressly recommends against – ***a new religious freedom commissioner within the Human Rights Commission.***

Morrison will also create a new federal religious discrimination act, in line with the review's recommendations, to elevate religious discrimination to the same status as other forms of discrimination – protecting the right to adhere to a faith, or to have no faith at all.

The review panel questioned the extent to which religious rights were overriding other human rights across Australia.

Morrison himself was quoted as asking

"*Why, in this country, should it be … illegal for someone to turn someone away because of a disability or their gender or their sexual identity, but it's okay to turn someone away because of their religion?" "I mean, how can we allow that to stand in Australi*a? That shouldn't be happening here.

SO- religion has been politicised and will be an issue in the Federal election.

This is only the latest nail in the coffin of separation of religion from the State.

But the rot started back in 1964-69 when State Aid was given to religious schools and the Public Treasury was invaded by religious schools. The legal battle was lost with the DOGS case of 1981. Only Justice Murphy had the insight – and the guts- to look at the intention of the Founding Fathers and understand the true meaning of Section 116 of the Constitution.

DOGS quote from Justice Murphy's Judgement :

39. The purpose of our establishment clause is the same as that in the United States' Constitution. There does not seem to be any real doubt that if the establishment clause is construed in Australia as it is in the United States, (and if the Commonwealth's argument about the non-applicability of s. 116 to financial appropriations and s. 96 grants is rejected) then the challenged laws are unconstitutional. Section 116 of the Constitution does not assert or deny the value of religion (including religious teaching). It secures its free exercise, but denies that the Commonwealth can support religion in any way what-so-ever. The Commonwealth cannot be concerned with religious

teaching - that is entirely private. Section 116 recognizes that an essential condition of religious liberty is that religion be unaided by the Commonwealth. (at p632)

40. The argument that the aid to church schools is only of minor assistance to the religious aspect of the schools and its major impact is to aid the secular aspects is no answer to the plaintiffs' challenge. In his famous Virginia Memorial and Remonstrance against Religious Assessment, Madison tellingly explained "That the same authority which can force a citizen to contribute threepence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." (in *The Mind of the Founders,* ed. Marvin Meyers (1973), p. 10) (at p632)

41. The fact is that under the Commonwealth laws vast sums of money are being expended for the support of church schools. The result of the capital grants Acts is that great and increasing sums are being given to churches to acquire property, which can then lawfully be used for religious purposes apart altogether from schooling. Although the *States Grants (Schools Assistance) Act* 1978 forbids approval of projects (for grants) "if the sole or one of the principal objects" is "to provide facilities for use, wholly or principally, for in relation to religious worship" (s. 15), this does not prevent a grant for a project as long as religious worship is not the sole or principal object, or one of the principal objects and the Act does not prevent subsequent use of the property for any purpose, even exclusive use for religious worship. The evidence showed that two Catholic parish school buildings, at Churchill and Corio in Victoria although not used wholly or principally for or in relation to religious worship, have been used for religious purposes (apart from schooling). Eighty per cent of the Catholic primary school building at Churchill in the Latrobe Valley, in Victoria was contributed by the payment of Commonwealth grants. The building is also used as the local parish church. A nearby street sign indicates that the building is a Catholic church. $127,000 of the $180,000 cost of construction of the parish primary school in Corio outside Geelong, was provided out of Commonwealth grants. Both these buildings have been used for celebration of mass for the local parish each Sunday, and for confessions each Saturday, and occasionally for other religious services. There is nothing in the challenged Acts to restrict similar use of other property obtained with moneys given to the churches pursuant to these Acts. The effect of the Grants Acts is that the wealth of the churches is increased annually by many millions of dollars of taxpayers' moneys. They have the effect of establishing religion. As Douglas J. observed "In common understanding there is no surer way of 'establishing' an institution than by financing it" (*Wheeler v. Barrera* [1975] USSC 117; (1974) 417 US 402, at p 430). (at p633)

42. Section 80 (trial by jury) and s. 116 are among the very few guarantees of freedom in the Constitution. In *R. v. Federal Court of Bankruptcy; Ex parte Lowenstei*n [1938] HCA 10; (1938) 59 CLR 556, at pp 581-582 (41 Law Ed 2d 159, at p 180) , Dixon and Evatt JJ. asserted that this Court's reading of s. 80 made a mockery of the Constitution. A reading of s. 116 that the prohibition against "any law for establishing any religion" does not prohibit a law which sponsors or supports religions, but prohibits only laws for the setting up of a national church or religion, or alternatively prohibits only preferential sponsorship or support of one or more religions, makes a mockery of s. 116. Jefferson warned against this tendency.

> *"Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction"* (Jefferson, *Writings* (Washington ed., 1859), p. 506).

We should heed his warning.

DOGS suggest that, as wealthy church schools scream at their loss of privileges to discriminate against pupils, teachers and employees on the basis of religion , they remember that they, with their mendacity, have contributed to making their peculiar right to religious liberty '*a blank paper by construction*'

State Ad to religious schools is the basis of the problem of religious liberty in Australia.

APPENDIX

Excerpt from the The Ruddock Report : PP 35-36

1.1 Section 116 of the Constitution limits the ability of the Commonwealth to legislate in respect of religion. It provides:

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

1.2 Section 116 has a number of important limitations. First, it is a limitation on the legislative power of the Commonwealth only. The States are not limited by its terms. Whether the Territories are restricted by section 116 has been considered by the High Court on a number of occasions but the position remains unclear.[1] Second, section 116 is a limitation on Commonwealth legislative power; it does not create a 'right' for individuals to hold or manifest their faith. Nor does it create a positive obligation on the Commonwealth to do anything to ensure freedom of religion.

1.3 The High Court has tended to take a narrow approach in interpreting section 116. A law will only fall foul of the 'free exercise' limb of section 116, for example, if its purpose is to restrict religious practice, even if its effect is to burden disproportionately the practices of a particular religion.[2]

1.4 **Section 116 does not impose a strict separation of church and state. The High Court has upheld, for example, the funding of faith-based schools as being consistent with section 116.[3]**

1.5 There have been two attempts to amend section 116 by way of referendum to extend its application to the States and Territories, in 1944 and 1988, both of which failed. The 1988 proposal also would have amended the wording of the 'establishment' limb of the provision. This may have upset the conclusion reached in *Attorney-General (Vic); Ex Rel Black v Commonwealth* ('*DOGS Case*') and is often cited as a reason why that proposal failed.

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[1] See *Lamshed v Lake* (1958) 99 CLR 132; *Kruger v Commonwealth* (1997) 190 CLR 1.
[2] See *Kruger v Commonwealth* (1997) 190 CLR 1.
[3] See *Attorney-General (Vic); Ex Rel Black v Commonwealth* ('*DOGS Case*') (1981) 146 CLR 559.

1.6 The only other constitutional provision in Australia that expressly concerns religion is section 46 of the *Constitution Act 1934* (Tas), which provides:

> (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
>
> (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

1.7 Section 46 has not been subject to judicial application. However, observations made by Tracey J in *Corneloup v Launceston City Council* suggest it may be of limited scope:

> …s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified "guarantee" has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person's religion of choice: see *McGee v Attorney-General* [1974] IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the "guarantee". In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.[4]

1.8 No other State or Territory protects freedom of religion in its constitution.

[4] [2016] FCA 974, [38].