

AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT

SCHOOLS

PRESS RELEASE 780

DOGS CASE NO 2 ?

The State Aid to private schools issue has reached a high water mark . The tide of sympathy for ‘poor parish’ Catholic schools has almost gone out.

Legal beagles are contemplating putting the High Court on trial once again.

They believe that, four decades of blatantly unequal funding later, the DOGS case of 1981 could be revisited and the constitutionality of State Aid questioned once again.

This time, they wish to argue, not separation of religion from the State, but preferential treatment of Catholic schools.

According to Ann Patty from the [Sydney Morning Herald](#) Peter Goss, from the Grattan Institute, George Williams from the University of NSW and Luke Beck from Monash University believe that if public money is given to religious schools without bias, it is constitutionally valid. If not, there could be problems

School education analysts including Peter Goss from the Grattan Institute argue that funding for the Catholic system may have over-stepped that mark.

Figures for 2017 from the Grattan Institute show that state and federal governments provided all schools with \$49.5 billion. \$8.4 billion went to Catholic schools and \$5.7 billion to those in the independent sector. These figures did not take into account taxation expenditures (exemptions) provided to the private but not the public sector.

But the analysis also reveals that Catholic schools received the highest proportion of their government funding target for each school. It found that public schools received 90 per cent of the target funding they need to provide a good education. Catholic schools received 96 per cent and independent schools 95 per cent.

Goss, Beck and Williams go further. They believe that recent changes in the way the Australian Constitution is interpreted mean any special deals that favour one system of religious schools over others could now be in question.

Sixty years of rorting of gaming the political, legal and funding system by the Catholic sector are coming home to roost. Whereas in the 1980s the DOGS had to pay for advertisements to expose the transfer of Needs based funding from the poor to the wealthy schools, in later days, think tanks like the Grattan Institute and Save Our Schools have exposed the scandal.

Finally, Gonski took the lid off the garbage bin. And Auditor Generals started to do their job. Between 2016 and 2018 three auditors-general – Commonwealth, NSW and Victorian – reported a serious lack of transparency in the way non-government schools redistribute public funding.

In late 2017, the Australian National Audit Office criticised the federal Department of Education's reliance on non-government education authorities to report on their own implementation of policy requirements, without providing evidence of compliance with the needs-based funding system.

The NSW Catholic Bishops decided to protect themselves. In 2016, the NSW Catholic Bishops commissioned Kathryn Greiner to conduct a review of funding for Catholic schools. Her report, tabled in 2017, was critical of a lack of accountability and "prudent resource allocation". Greiner had been on the panel of Sydney businessman David Gonski's review of schools funding that former Prime Minister Julia Gillard commissioned in 2010.

Greiner's report said resources for quality education were being diverted to Catholic schools in highly populated areas of NSW "to the detriment of the greater need in the rural and remote Dioceses", including the most disadvantaged in Wilcannia-Forbes in north-western NSW.

Even the Coalition was concerned. When it amended the *Australian Education Act 2013*, the Turnbull government promised to end the "special deals" that consecutive Coalition and Labor governments have made with some non-government schools. The Education Act requires school funding to be "fairly and transparently distributed and allocated according to need".

Australia is also party to international conventions, including the *International Covenant on Economic, Social and Cultural Rights*, that provide all children with an equitable right to education, without discrimination. A growing equity gap between the top and bottom-performing students in international science, maths and reading tests raises questions about whether all students are funded based on need.

Dogs Case to be Revisited?

Section 116 prohibits the Commonwealth from making "any law for establishing any religion" and is known as the "establishment clause". There is general academic consensus that the narrow interpretation of Section 116 in the 1981 DOGS case was 'not a high point in the history of the High Court of Australia.

Legal experts have recently argued there is greater scope now for developing a broader interpretation of the clause to stop the preferential treatment of schools from one religious denomination over others. This includes giving special favours or advantages to one that are denied to others.

Constitutional law scholar Luke Beck, from Monash University, says that in the DOGS case, the majority judges were influenced by the fact that the government funding of Catholic schools was entirely non-discriminatory. Catholic and other religious private schools were all funded on the same basis.

"It follows that if government funding of religious schools was discriminatory, we would be in a different situation to the situation in the DOGS case," he says. "If government funding of religious schools was discriminatory in the sense that the schools associated with one faith tradition got a special deal, then there would be a real question mark about whether that special funding deal was constitutionally valid.

"More generally, any federal law that effectively 'plays favourites' between different religions has real constitutional doubts over it."

It is now 37 years since the High Court of Australia settled the constitutional argument over state aid for non-government schools. Today, the federal government's commitment to end what it has called "special deals" provides a new basis for asking how the DOGS case might be argued differently.

The DOGS case rejected comparisons between section 116 and an almost identical provision in the First Amendment in the United States Constitution and references to US case law. But the courts have been more open to drawing on US jurisprudence and a broader view of section 116 in more recent decisions.

Constitutional law scholars including Luke Beck and George Williams, from the University of NSW, say some "wiggle room" has emerged to use section 116 as a prohibition against inequality between different religious denominations and the preferential treatment of any one religion.

Beck believes if the DOGS case was re-argued today, the reasoning would be different. "Even without adopting a broader view of the establishment clause, there are potential constitutional issues with any special funding deal for Catholic schools," he says.

DOGS wish Luke Beck and George Williams well if they wish to take legal arguments further. But the issue in Section 116 is not just one of preferential funding and inequalities of opportunity for our children. It is even more basic - if that is possible. It is one of perhaps the most basic of human rights – the right to freedom of conscience. The right to be freedom of and from religion.
Citizens and taxpayers have the right to be free from being forced to pay one cent towards a religion to which they do not adhere.

Some of the comments to the Ann Patty article are of interest:

Leslie Miserable

What would a young Jesus say if he came to Sydney seeking an appropriate education? "I looked around and decided on one of those Roman Catholic schools on the north shore. I mean the pool, gym and computer labs are awesome. Unfortunately the fees are a bit too steep for Jo and Max. so a state school it is".

MarkOakley

Not one cent should go to a private for profit school

jaytee3650

Regardless of the constitution, it is not sensible to have the future Australia shattered by the bigotries, social, religious or other of the present generation. It is in the

National Interest that ALL private schools be banned, both for the unity of future Australia and for the best possible education outcomes. Finland has done this, and they are the tops.

Unfortunately the bigots are too entrenched for this to happen, but at the very least no, zero, zip public monies ought be spent on anything intended to divide the country.

Humanbeing2

I resent every cent taken from taxes to pay for private schooling when it is evident the money is being spent on non essential needs. These days money is inadvertantly given and funnelled into pools, sandstone gates and such items. Why can't the Pope look after his own flock when religious beliefs are being followed? They aren't short of a quid or two. I know Public schools in Sydney are in desperate need of teachers aids so classes could be realistically run. Public money = public schools. Money could be spent on teenage mental health support for all. No private schoolshould be depending on public funds each year. The private schools should be coming to government cap in ha NN Rd not public schools. How many politician's kids go to private religious schools. Conflict of interest easily transparent here.

TheThinMan

So the Catholic Church had no money to fix the toilets back in 1962. Go on, pull the other one. Public funding for church schools must cease.

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