AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

PRESS RELEASE 916

RELIGIOUS FREEDOM:

Religious administrators want to have their cake and eat it.

Perhaps the time has come to call their hypocritical bluff.

One of the most basic human right is that of freedom of conscience. But, as Baron de Montesquieu once said '*A Nation may lose its liberties in a day but not miss them for a century*'. In Australia, however, it has only taken forty years since a key High Court case on religious liberty, the DOGS case of 1981[i], for religious liberties to be 'missed'.

Australian religious lobbyists and employers who are now heavily entangled with the State, heavily dependent upon government funding**,** are complaining bitterly about their lack of religious liberty and demanding exemptions from anti-discrimination legislation in their employment practices**.** They were promised a "religious freedom" review as a consolation prize when same-sex marriage was legalised in late 2017. That review, led by former Liberal MP Phillip Ruddock, found Australia does not have a religious freedom problem, but did recommend new legislative protections against religious discrimination. In response, in December 2018, the Morrison government promised a Religious Discrimination Act.

In particular, religious educational administrators who wish to have power to sack teachers whose personal lifestyle conflicts with their values, are concerned by State laws which make such discrimination illegal. They hope to set up a conflict of laws situation with stronger Federal legislation and threaten a High Court case under Section 109 of the Australian Constitution.

BUT

Why is Section 116, the Religious Liberty Clause of the Australian Constitution not Mentioned in this Conflict?

The strange thing about the current situation in which contending parties have resorted to expensive Advertisements in the media, is the complete silence on the Section 116, the religious liberty clause in the Australian Constitution. This 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 religious tests shall be required as a qualification for any office or public trust under the Commonwealth.

One would have thought that the third clause of this Bill of Rights type clause, namely ***'The Commonwealth shall not make any law for prohibiting the free exercise of any religion'*** would be of interest to those demanding 'religious liberty' to discriminate against employees on the basis of religious belief and practice. But no, there has been no reference to this potentially very powerful clause of the Australian Constitution by conservative religious groups. Why?

Is this because, in 1981, when the millions, now billions of taxpayer dollars to religious schools came under threat in the 1981 DOGS case, church school representatives persuaded the Barwick High Court, (Justice Murphy in dissent) that the words 'any religion' in the first, 'establishment clause' of Section 116, really meant 'a particular 'established' church ', for example, the Church of England. Given this very narrow interpretation of the first, establishment clause, the third clause, becomes at best, meaningless.[ii] For example, if the words' any religion are replaced by 'a particular 'established' religion' the third clause reads

'The Commonwealth shall not make any law for prohibiting the free exercise of a particular 'established' church ."

Does this mean that the Commonwealth can make a law for prohibiting the free exercise of any religion so long as it is not a particular, 'established' church?

What could have been a shield became a sword.

What is a Religious School?

Religious lobbyists are currently making much of the fundamental 'religious'nature' of their schools. *The Age* of 16 November contained a half page advertisement signed by leaders of the Anglican, Roman Catholic, Hindu, Coptic, Jewish, Krishna, Sikh, Russian Orthodox, Syro-Malabar, Islamic, Church of Christ, and Greek Orthodox churches. They said:

For people of faith, religious beliefs shape all aspects of life. Parents that send their children to religious schools expect that the school's environment faithfully represents the religious ethos in every respect, including the conduct of all teachers and staff . With this Bill, the ability for schools to meet this legitimate expectation will be severely compromised because, in effect, the Bill

erroneously disconnects religious belief from conduct that is consistent with this belief.

The Trial of Fact in the DOGS case: What is a Religious School?

In 1979 church school representatives demanded a 26 Trial of Facts in the DOGS case to prove that church schools were hardly more religious than State schools.[iii]

This Trial of Facts in the DOGS case commenced on 6 March 1979 at 10.40 am in the High Court building at 250 Little Bourke Street, Melbourne. Justice Murphy was the presiding judge. The Trial took 26 days in court before it got to the full High Court Hearing on the Law. It involved 54 witnesses: 49 called by the plaintiffs and 5 by the defendants. The defendants, in order to avoid cross-examination of religious school witnesses, called only representatives from State Schools. Father Martin, at that time the Director of Catholic Education, attended Court most days but did not appear in the witness box. Sixty-nine per cent of the 49 witnesses called by the plaintiffs were representatives from the Roman Catholic system, although Roman Catholic schools were in fact the recipients of over 80% of federal funds. Altogether there were one archbishop. three bishops, twelve principals, four parish priests and 14 Roman Catholic Church officials.

There were 116 documents tendered by the plaintiffs as evidence that religious schools were what they had claimed to be for over 100 years, namely religious institutions. Given that the case was about the establishment clause of Section 116 of the Australian Constitution, the DOGS plaintiffs thought the number of documents oddly appropriate.

There were also eleven profiles, statements of facts and submissions on the facts and the law. The DOGS incurred costs of at least $5000 a day, and the opposition would have incurred costs of at least twice that amount. On the plaintiffs' side the money came from State schools around Australia and the sacrificial giving of dedicated individuals. Although the National Council for Independent Schools and the Rev. Father Martin had been the official representatives of the Church school interest, it was reported that the Catholic bishops had paid the legal bills for all Church school interests.[iv]

Justice Murphy, the trial judge, did not find on the facts. There were two sets of facts concerning the religiosity or otherwise of Church schools. The plaintiffs' Statement was based on the official face of Church schools. The Church school Defendants' Facts were based upon their interpretation of the testimony of

witnesses. At the end of the Trial of Facts, both submissions were handed up to the full Court.

The Full High Court heard the arguments on the law on 24 March 1980 on the basis of the plaintiffs' Statement of Facts. At the end of the hearing on the law however, Counsel for the Church school interest indicated that if they lost on the law they would return to have the legal arguments considered on their Statement of Facts. Chief Justice Barwick referred to this as having another snail in the bottle. [v]

What were these 'facts' presented by the Church school interest? The ninth chapter on the Trial appears in '*Contempt of Court'* (2011) by Jean Ely. The original transcripts of the case will be made available online in the future and make very entertaining reading.

The only witness who claimed his school *religious school's environment faithfully represented the religious ethos in every respect*, was Mr Albert Miller, the Principal of the Donvale Christian School. Counsel for the church school interest got him out of the witness box as quickly as possible.[vi]

But the written Submission of the National Council for Independent Schools and the Rev. Father Francis Martin, presented to the court in July 1979 [1]after the hearing of all the Trial evidence, stated that Catholic schools were 'schools in the same sense as Government Schools,' their curricula being 'fundamentally identical save that in the case of Catholic schools there are more frequent classes in religious instruction'. This religious instruction was presented as totally separated from the secular, and as being 'about' rather than 'for' religion. The old fashioned concept of 'permeation' of the school curriculum with particular religious values was reduced to 'care and concern' for students, a characteristic equally applicable to an atheist school. Lutheran, Adventist and Jewish schools were similarly presented as schools giving at least the same instruction as government schools. The 19th century concept of a Catholic or other denominational conscience indissolubly tied to a belief in church authority was undermined. The authority of the bishop was delegated down the line to administrators and principals.[vii]

In a nutshell, when taxpayer funding was at stake, religious schools —with a few on and off religious appendages — were insignificantly different from government schools.

If Counsel for the Church school interest was right and Church schools are not substantially different to public schools, why have religious, fee-paying schools

[1] Submission of the National Council for Independent Schools and the Rev. Father Francis Martin, July 1979.

at all? Perhaps the churches are really about power, money, ability to pay, and not creed.

Since 1981, predictably, a third of Australian children have been separated out, on the basis of the religious belief of their parents – or their ability to pay fees – into a myriad of sectarian systems of schools. The cost to the taxpayer has mushroomed from millions into ever increasing billions of dollars, and the levels of inequality have increased accordingly, with public schools, who take all comers, carrying the main burden.

Religious administrators want to have their cake and eat it. But perhaps the time has come to call their hypocritical bluff.

LISTEN TO THE DOGS PROGRAM

855 ON THE AM DIAL: 12.00 NOON SATURDAYS

http://www.3cr.org.au/dogs

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[i] *Attorney-General for Victoria (at the elation of Black and Others) and Black and Others v The Commonwealth, and the National Council of Independent Schools and Father F. Martin (Sued as Representing Non-Government Schools)* (1981) 146 C.L.R. 559

[ii] There has been a considerable literature questioning the findings in the DOGS case, See Jean Ely , *Constitutional Law and Historical Judgment*, at http://www.adogs.info/high-court-case. The High Court has been very shy about revisiting the 1981 interp0retation of Section 116 although, in the 2013 Chaplaincy cases, they had the opportunity to do so.

[iii] An extended account of the Trial can be found in Chapter 9 of Jean Ely, *Contempt of Court* (2011) Dissenters Press which is available from 3CR, Smith St Fitzroy, or at http://www.adogs.info/high-court-case.

[iv] *Geelong Advertiser*, 12 February 1981.

[v] *Transcript of High Court Proceedings*, 24 March, 1981.

[vi] *Transcript of High Court Proceedings*, 16 May 1979, pp. 1503-1527, Witness, Mr A. S. Miller.

[vii] *Submision of the National Council for Independent Schools and the Rev. Father Francis Martin*, July 1979