

AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

The religious school funding decision that flouted the Constitution

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By [Tom Orren](#) | 30 September 2022, 8:00am <https://independentaustralia.net/life/life-display/the-religious-school-funding-decision-that-flouted-the-constitution,16817> | [0](#) comments |

A 1981 High Court decision to allow the funding of religious schools was a bad move that fractured Australia's education system, writes [Tom Orren](#).

AUSTRALIA'S [Constitutional Convention](#) was a series of meetings held between 1891 and 1898 to design a constitution for the proposed Federation. It set the stage upon which our nation's future was to be built. After intense discussion, a draft constitution was approved and the Commonwealth of Australia was created in 1901.

Today, few people realise that our [Constitution](#) was heavily influenced by both the [U.S. Constitution](#) and the secular, enlightenment movement that had influenced it. As a result, one of its main aims was to separate church and state. One brief section of the *Constitution* ([Section 116](#)) acknowledges that aim.

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

Like many laws, this one is prohibitive. It was not meant to encourage certain behaviours, it

Its intention was to prevent the Commonwealth from doing anything that might:

- establish any religion;
- impose any religious observation (practice) on the population;
- prohibit the free exercise of any religion; and
- exclude any person from any Commonwealth office on the basis of their religion.

The last three prohibitions are pretty clear but the first one has proven to be somewhat ambiguous and, therefore, controversial. That's because it's unclear exactly what the Constitutional Convention meant by not making '*any law for establishing any religion*'.

On its own, the term '*establishing*' is ambiguous. Does it mean "setting up from scratch" or does it mean "further establishing a religion that's already established"? And does '*any*' mean "all religions in general" or "any particular religion"? It's impossible to say from the words alone. To understand what they mean, we have to go back and see what the people at the Constitutional Convention were aiming at.

Religion and education

Immediately after Federation, neither the Commonwealth nor the states funded religious schools, mainly because Catholic schools refused to use the secular readers prescribed by the various governments. They insisted on readers that were approved by the Catholic Church, so they remained proudly independent and self-funded — and good on them for that.

But half a century later, the Catholic system found itself in trouble. Some of its schools were literally falling apart, so they asked the Commonwealth Government for help. The then Prime Minister, [Robert Menzies](#), begrudgingly agreed to provide them with limited emergency funding. That was the first crack in the dam wall.

Soon after, the Church increased pressure on the Government to fund the upgrading of science labs. And, after a Catholic school in Goulburn closed its doors and told students to turn up at the local public high school (which, naturally, did not have room for them), the Government relented and the crack widened.

Fast-forward to 1972 when [Gough Whitlam](#) was trying to win a federal election and saw an opportunity to gain "[the Catholic vote](#)" by promising modest, ongoing funding for Catholic schools. That's when the floodgates really opened up. After that, every religion decided to get in on the act and the Catholic Church redoubled its efforts. Today, Commonwealth funding has reached a point where some Catholic schools receive [more public funds](#) than their public school neighbours.

Challenging 'state aid'

Not that the legality of all this funding went unchallenged. In the 1960s and '70s, many Australians were convinced that access to free, high-quality and secular public education was the key to a progressive and egalitarian society. More importantly, they thought that funding religious schools was illegal under *Section 116*. So, in the mid-1960s, a group called Defence of Government Schools (or [D.O.G.S.](#)) took on the might of the religious sector and mounted a [High Court challenge](#) to Commonwealth "state aid".

The only problem was that challenges to the High Court have to be mounted by an individual (or individuals), so someone had to volunteer to step up to the plate. That person was [Ray Nilsen](#) (who took out a mortgage to fund it) along with Ray's sister and brother-in-law, Sylvie and Bob Child (who sacrificed their life savings and their chance to build a new home).

But even that wasn't enough. The group also needed the support of a (any) state attorney-general, however, finding one proved difficult because few state politicians were keen to pick a fight with the Catholic Church. That search took from 1964 to 1979 and, eventually, the Liberal Attorney-General of Victoria, [Vernon Wilcox](#) (a supporter of "state aid"), came to the party.

The cost of that delay almost sent D.O.G.S. broke but somehow they kept going. However, there was another catch. If the plaintiffs lost, not only would they have to pay their own legal bills, but they might have to pay the costs of the Catholic Church and that meant the prospect of losing everything — or going to gaol.

In the end, the case cost D.O.G.S. around half a million dollars, which was paid for in blood, sweat and tears. The funds came in dribs and drabs from far and wide. There were hundreds of fund-raising events. Some donated a proportion of their earnings.

Lance Hutchinson (secretary of Victoria's D.O.G.S.) painted roofs to pay the final \$28,000 to the D.O.G.S. legal team. Others included; Richard and Margaret (or Jean) Ely, Kath Taylor (secretary of NSW D.O.G.S.), and George Wilson and Bruce Ross (both from Tasmania), the [NSW Teachers Federation](#), the [Victorian Council of State School Organisations](#), the Victorian [Technical Teachers](#) and Primary Teachers Unions. Even some Catholic families donated.

But as the case dragged on, raising funds became more and more difficult, especially since the Catholic Church threatened to sanction anyone who supported D.O.G.S.

The main reason for that huge bill was the delaying tactics used by the religious lobby. Just the "[Trial of Facts](#)" (a "pre-trial" about whether religious schools were actually religious) took 26 days – at \$5,000 a day – because the religious sector called 49 witnesses (compared to D.O.G.S.'s five) and tendered 116 documents.

The idea was to bankrupt D.O.G.S. before the case got to trial. The twin threats of legal and personal annihilation would have taken the wind out of most sails but Ray, Sylvie and Bob maintained a steady course and, eventually, the case made it to court.

From bad to worse

In 1981, the High Court overruled the challenge and D.O.G.S. was ordered to pay costs. Staunch to the end, Ray Nilsen and Lance Hutchinson said they would rather go to gaol than pay the Church's costs and the Catholic Church decided not to pursue them. It was a small price to pay for the rivers of gold that would follow.

Since then, many have questioned that decision, but why?

There are several reasons:

- Was there judicial conflict of interest?
- Was the Constitution misinterpreted?
- Did the Catholic Church make false claims?
- And, contrary to the *Constitution*, did the ruling actually "establish" religion as a major player in Australian education?

Judicial conflict of interest

Early in the history of the challenge (and prior to his appointment to the High Court), Justice [Keith Aickin](#) (a conservative protestant) had agreed to act on behalf of the religious sector — and had rejected two similar requests from D.O.G.S. It was clear where his sympathies lay, however, he did not reveal this conflict of interest. The D.O.G.S. legal team had to do that.

In a perfect world, Aickin would have recused himself from all deliberations and from the final decision, but he made a point of concurring with it. One wonders what influence he had on his fellow judges and, also, the schools attended by the children and grandchildren of the other judges.

Misinterpretation: ‘Any religion’

Instead of interpreting the words *‘any religion’* as “any and all religions”, the High Court interpreted them as “a particular religion” and, in doing so, it turned the intention of the Constitution Conventions on its head. By saying that *Section 116* only applied to the establishment of “a particular” religious school or system, it implied that it was perfectly acceptable for the Commonwealth to fund “all religious schools”.

What the Constitutional Convention had designed as a barrier between church and state became a highway that enshrined funding for religious schools.

In other words, that decision literally “established” religion in both education and society, even though “the minutes” of the Constitutional Convention demonstrated a clear intention to prohibit it.

For example, in one debate (on 2 March 1898), [Edmund Barton](#) (a later HC Justice) stated:

“...you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.”

Despite this, the Full Bench forbade the use of “the minutes” as evidence. Justice [Lionel Murphy](#) wrote a strong letter of dissent about that decision.

He said (in part):

‘[It is inconsistent] To read s116 as prohibiting only laws for establishing one religion or church... [because] that... [permits] laws for establishing... [any] number of religions or churches... Such a reading trivialises the section.’

Given the potential for bias, one wonders what influence Judge Aickin might have had on that decision, especially since the High Court now accepts that “evidence of intent” is vital for interpreting the law.

Misinterpretation: That word, ‘Establish’

The Court also focused on a very narrow definition of the word “establish”. It took it to mean “establish a new religion” rather than “further establish an existing religion, or religions”. That unfortunate choice of word proved to be a timebomb. To some, it meant “not funding any religious activity (especially education)” while, to others, it meant “not funding the establishment of a specific, new religion”. The only way to prove what it meant was to refer back to the Constitutional Convention but, of course, that had been prohibited.

Religious schools do not teach religion?

Part of the defence of the Catholic Church was that its schools were no more “religious” than public schools and, therefore, that they posed no threat whatsoever to the secular nature of education. However, it is irrefutable that Catholic schools spend a significant amount of time teaching religious beliefs, traditions and ceremonies — for example, rehearsals for [Confirmations](#) and the [Stations of the Cross](#).

Moreover, in one Catholic school I know of, the HSIE coordinator was asked to monitor the teaching of history and geography. Several teachers openly admitted: “Oh, we don’t teach that, we use the time to teach religion instead.” I doubt that that was an isolated case.

However, it might be best to let the Catholic Church speak for itself. On 16 September 2022, the following statement was found on the website of a random Catholic school, but I have replaced its name and saint to protect its anonymity. It demonstrates the importance of religious practice.

The statement read:

[Our school] places significant emphasis on the celebration of Liturgy in the community. Liturgy is a central part of the rhythm of the school year with important times such as the beginning and end of the school year being marked by liturgical celebrations.

Other significant school days and events such as St. [insert saint] Day... Retreats and Reflection Days have liturgy at the heart of the celebration. In addition to the calendar of the school year, [our school] is also attuned to the liturgical seasons of the Church’s year.

Liturgical events mark the significant days and seasons of the Church’s year such as Ash Wednesday, Holy Week and the seasons of Advent, Lent and Easter.

Ultimate proof of the High Court’s error

The best evidence of all that that High Court ruling was wrong is the answer to a simple question: “Has the public funding of religious schools helped in ‘establishing any religion’ in Australia?” There is only one answer to that — “Yes!”

It has led to a mushrooming of fee-paying, religious schools of dozens of different faiths. These have split communities and segregated children on the basis of religion and income — the exact opposite of what the “Founding Fathers” intended. The worst fears of D.O.G.S. have been realised. Australia is a more divided and less egalitarian country because of that decision.

Even if we accept that funding for religious schools does not breach the intent of the Constitutional Convention, our “Founding Fathers” would roll over in their graves to discover that three in every five dollars of Commonwealth funding now go to [private schools](#). And they would die another death if they saw the amount of funding that goes to elite private schools.

More recently, overturning the D.O.G.S. challenge has led to a plethora of religious universities, which take advantage of the Commonwealth’s generous tertiary funding arrangements (especially if they can attract a large number of first-year students — regardless of their chances of success).

The [Australian Catholic University](#) has benefitted greatly from this but one university stands out above all the rest — the Australian campus of the U.S.-based (and Catholic) [Notre Dame University](#). One might ask why an American university would be interested in setting up in Australia. The answer is obvious — to take the opportunity to get as much money as possible from the Australian Government to help “establish” Catholicism in Australia.

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