Winning on a technicality?

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A recent case in the High Court of Australia has been closely watched by everyone interested in the relationship between government and religions. In this briefing, we'll explain it and offer some comments. But first, some background.

The court: You'll recall that the High Court is Australia's top court. Its main task is to rule on matters of legal principle. Most people's familiarity with the High Court begins and ends with Darren Kerrigan's famous fictional win in *The Castle*, where the Court ruled on a matter of constitutional interpretation. The recent case was also about how the Constitution should be interpreted.

The Constitution: The Australian Constitution is not a document of great literary flair. But it's been pretty well thought through to do its job. Two sections of it are relevant to this case. *Section 116* (*s 116*), towards the end, governs the relationship between the Commonwealth government and religions (and the part underlined was relevant for this case):

> 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.

Oddly, most Australians think that this Section is the same as the U. S. Constitution's First Amendment, which many think erects a 'wall of separation' between church and state. Actually, the First Amendment mentions no such 'wall': that came as a later interpretation. It reads that 'Congress shall make no law respecting an establishment of religion …'.

Both clauses are about 'establishment', and oppose the introduction of a State church, as was found historically in various European nation states. It's unlikely that either clause intended to prohibit partnerships between government and religious people who are helping the community. Our clause, written later, also adds the word 'any'. Some think this insertion makes the emphasis different, so that while our Commonwealth must avoid favoritism of 'any' one particular religion, it is not at all prohibited from partnering with religions in general.

A previous High Court decision allowed for Government funding of religious schools: as long as there is no favoritism toward 'any' one denomination of school, our Commonwealth forms helpful partnerships with community-minded religious people who educate children. Our Constitutional framers, and its High Court interpreters, never felt the need absolutely to 'separate' Commonwealth governance from church ministries done for the common good.

The other relevant Section for this case related to the Commonwealth's 'executive power', that is, it's authority to do powerful things to rule us. *Section 61* says:

> The executive power of the Commonwealth … extends to the execution and maintenance of this Constitution, and the laws of the Commonwealth.

Well get to what that means below.

The issue: The case arose from the National School Chaplaincy Program (NSCP). This scheme was introduced by the Howard Government in 2007, and offers schools up to $20,000 per year to introduce or extend chaplaincy services. About 2700 schools have received funding under the program to date. The Gillard government has promised to extend the scheme to up to 1000 further schools. Scripture Union Queensland (SUQ) entered into a Funding Agreement with the Federal Government to provide chaplaincy services at State schools in Queensland.

The services being provided included assisting the School and Community "in supporting the spiritual wellbeing of students" and "being approachable by all students, staff and members of the school community of all religious affiliations". It's another example of partnerships between the Commonwealth and religious people. Agreements with various chaplains are not 'establishing any religion'.

Crucially, the funding for the Chaplaincy program was not provided under legislation, but under a series of funding arrangements administered by the Commonwealth, as an

expression of its 'executive power'. That's been normal practice in a variety of Commonwealth Government funded activities.

The SUQ case: Mr Ron Williams' children attended a Queensland State school where SUQ provided chaplaincy services as per the Agreement.

It seems clear that Mr Williams was motivated by the secularist quest for what he calls "freedom from religion" (see further below). Therefore he challenged the chaplaincy program on two grounds—firstly, that it effectively imposed a religious test on a Commonwealth officer; and second, that it exceeded Commonwealth funding powers.

On 20 June 2012, a majority of the High Court held found the agreement was invalid. They did so on the basis of Mr Williams' second challenge (funding powers), but not its first (the religious test on Commonwealth officers).

The Court unanimously rejected the part of Mr Williams' challenge that was based on *s 116*. Mr Williams contended that the definition of 'school chaplain' imposed a test for that office and that the position of a school chaplain was an "office… under the Commonwealth" due to the relationship between the Government and SUQ. The High Court held that the school chaplain did not hold office under the Commonwealth as they were engaged by SUQ, an external organisation. Therefore the Commonwealth did not enter into contractual or other obligations with the chaplains.

But a majority of the High Court held that the Funding Agreement and payments made to SUQ were invalid because they were beyond the executive power of the Commonwealth. In simple terms, the High Court found that the Commonwealth lacked the power to fund chaplains via executive action without accompanying legislation. The Commonwealth had argued that the payments were supported by the executive power granted by *s 61* of the Constitution. *S 61* provides that the executive powers of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

A majority of the court found that, in the absence of the statutory authority, *s 61* did not empower the Commonwealth to enter into the Funding Agreement or to make the payments in question. In particular, the High Court found that the Commonwealth's executive power does not include a power to do what only the Parliament can authorise the Executive to do, such as entering into agreements or contracts. The key result of this judgement has less to do with chaplaincy or any notion of religious freedom and far more to do with *administrative process*. Any government expenditure that lacks authorising legislation, or doesn't flow via the States, is now potentially problematic.

Government reaction: The Attorney General Nicola Roxon has stated the Government's intention to continue funding the chaplaincy program, and says that the government remains "committed" to it. The response is appropriate precisely because the High Court decision doesn't change the basic principle of government partnership with community-minded religious citizens. Queensland premier Campbell Newman expressed a similar kind of support for the chaplaincy program: "I want the chamber to know that this government is 100% behind the chaplaincy program because it's good for kids at school and it's good for families". The Opposition Leader, Tony Abbott, has also expressed bi-partisan report, reminding Australians that the Liberal Party "invented the program": "We want it to continue… Let's have a look at the decision and see what the government has in mind. I think it would be a real pity if this program wasn't able to continue."

In response to the High Court's procedural concerns, Ms Roxon added that it would consider different ways to ensure funding for the program.

But the finding potentially affects all sorts of direct Commonwealth funding. George Williams, a leading Australian constitutional lawyer, has described these implications as "massive". The judgment may impact on any other programs where Commonwealth funds have been allocated in the absence of legislation authorising the Commonwealth to do so—programs such as various arts grants, the local government Roads Recovery program and the direct funding of private schools.

Obviously, scrutiny over Parliamentary spending is a good thing, but the government needs to work out how to retain efficiency in its systems of parliamentary funding. This High Court decision means that the government will more frequently need Parliamentary authorization

of its spending, via legislation. More Commonwealth programs will require the support of independent MPs, crossbenchers, and the Senate. Christians, who try to have great respect for those who lead us (see e.g. 1 Peter 2:12–17), have every reason to consider that a great outcome.

Secularist reaction: By 'secularist' we mean those who want no religious expressions that are not privately conducted and paid for. Mr Williams, by his own admission, took the case to the High Court to ensure "a level playing field within the public school system for our children that has freedom of religion and freedom from religion". Hence the decision has been reported as secularist win for "freedom from religions".

That's an odd spin, to put it mildly. At best, it's a technical win for secularists, and not a very big one. The decision does not put at risk the on-going partnerships between the Commonwealth and its religious citizens. It opens these partnerships to parliamentary scrutiny, which we welcome.

Secularist reaction reveals the way some people just cannot seem to 'play nicely' with the many religious people they must share society with. For example in this shrill piece, Catherine Byrne wants the decision to have implications for religious instruction in State schools. She thinks that these 'infringe both children's rights and church-state separation', and are a kind of 'religious intrusion'.

We've been through this (and here). 'Church-state separation' is a meaningless slogan in this context: Special Religious Education is very carefully set up to impose nothing on anyone. It does not establish any religion. Byrne objects that NSCP money can be used to by those who teach SRE. But that's not really very relevant: it's up to a school principal to judge whether a chaplain remains "approachable by all students, staff and members of the school community of all religious affiliations".

Of course secularists' children are always free to opt out; nothing is imposed on them. There are ample Commonwealth services serving their needs too, so there is no injustice here. It's time for secularists to accept that they share Australian cultural space with religious people, and that their various partnerships with government are not going away any time soon. Let the Parliament arbitrate which of these partnerships remain worthwhile.

Our reaction: We think the judgement rejected all the significant aspects of Mr Williams' "religious freedom" challenge. We think it's probably an affirmation of the careful way that Australian society effects a partnership between government and community-minded religious people.

Of course, the Commonwealth cannot 'impose' any religious observance. In Christian theology, trusting Jesus is a kind of miracle that no human could ever successfully 'impose upon' another (see e.g. Romans 8:5–7). Therefore it's important for Christians in receipt of taxpayers' money to conduct themselves with care. No one should expect them to hide their Christian identity, or to be silent about it. But they'll need to remain 'approachable' to all others, whatever they believe. On-going partnerships between Christians and others must always be community minded: we'll seek for their good at many levels. If this finding reminds Christian chaplains who receive NSCP money to be careful and courteous in the face of community concerns about what they do, that can't be a bad result either.

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Sources/Further Reading:

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