

The Church and State Relationship in Australia: The Practice of s.116 of the Australian Constitution

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Abstract

In the twenty-first century, the practice of church and state relations remains topical in Australian public debate. In this paper I investigate how the church and state relationship has developed and is regulated in Australian law. In particular, I examine what High Court cases reveal for the practice of church and state relations in federal legislation. I explore whether the High Court has interpreted s.116 in a neutral way, or in line with the views of the government in power. The cases that will be considered are: *Krygger v Williams* (1912) 15 CLR 366 HCA 12, *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 HCA 12, *Attorney General (Vic.) v Ex Rel. Black v the Commonwealth* (1981) 146 CLR 559 HCA 2, *Church of the New Faith v Commissioner of Pay-roll tax (Vic.)* (1983) 154 CLR 120 HCA 40. The legal analysis reveals that the status of church and state relations remains unclear in federal legislation. It is argued that the interpretation and practice of s.116 by the High Court and legislature is influenced by the government in power, and the political climate of the day.

Introduction

In the twentieth and twenty-first centuries, church and state relations have become increasingly central and topical in federal legislation and parliamentary debates within Australia. Marion Maddox argues that under the Howard government, the Christian right (Evangelical Christian churches, political parties and lobby groups) exerted significant influence and opposition towards the legalization of homosexual marriage, the RU486 drug, and the provision of IVF to single women.² Others, such as Amanda Lohrey, have observed the increased influence of the Hillsong Church, Exclusive Brethren, and the Catch the Fire Ministries on Howard Government policies.³ In the 2007 federal election, the Prime Minister of Australia, John Howard and opposition leader, Kevin Rudd, made public comments about their Christian beliefs, raising further questions about the appropriate practice of church and state relations in Australia.⁴

Lyn Allison, a former Democrats senator, contends that political leaders who continue to speak publicly about their Christian faith do not represent those from minority religions such as Buddhism, Islam and Hinduism.⁵ In various legislative policies from the

¹ Monash University. The author would like to acknowledge the contributions of Prof. Gary Bouma and Dr Andrew Singleton of Monash University for their helpful comments on earlier drafts of this paper. A vote of thanks also goes to the anonymous reviewer for their comments and suggestions.

² Maddox, *God Under Howard: The Rise of the Religious Right in Australian Politics* (2006)

³ Lohrey, *Voting for Jesus: Christianity and Politics in Australia* (2006)

⁴ Simons, *Faith, Money Power: What Religious Revival Means for Politics* (2007).

⁵ Allison, 'Does God have a Place in Government?' Presented at the Separating Church and State Conference, Melbourne 17th June, 2006

Therapeutic Goods Act 1999 to the *Marriage Act 1961*, politicians continue to challenge the norms of the religious institution by making policy decisions on specifically Christian grounds.⁶ The perceived, if not actual influence of the Christian right in federal legislation gives rise to three important questions for the church and state relationship in Australia. How is the church and state relationship regulated in Australian law? What do High Court cases reveal for the practice of church and state relations in federal legislation? Has the High Court interpreted s.116 in a neutral way, or in line with the views of the government in power? Before exploring these questions I will briefly examine US case law, and the role of religion in US politics. US case law has been influenced by the political climate of the day. In the past, US case law showed that strict separation meant no aid to religion. In the twenty-first century, church and state issues are now being resolved through a principle of state neutrality, which involves state funding to religious and secular institutions in an 'equal way'.⁷ In contrast to Australia, US case law and public discussions on church and state issues are well advanced, and provided a window to understand the Australian context.

The Church and State Relationship in the US

Scholars have drawn parallels between the church and state relationship in Australia and the US, as the Australian Government, like the US Congress, cannot make law that establishes 'a' religion ('any' religion in AUS), or prohibits the free exercise of religion. The two provisions are respectively detailed under s.116 of the Australian constitution and the First Amendment of the US constitution.⁸ Both provisions define the church and state relationship in two different ways - The US through a strict separation of church and state, and Australia through a de facto relationship between church and state. A de facto relationship means that the state can provide financial support to all religious organisations.

The US and Australian provisions are written and interpreted in similar but different ways. The first amendment in the US constitution refers to "respecting an establishment of religion," whereas the Australian constitution refers to "any law for establishing any religion."⁹ In contrast to s. 116, the US provision is interpreted in a broad way and refers to a relationship between law and subject matter. The US provision applies to the states through the fourth amendment, and is supported by a Bill of Rights.¹⁰ Australia does not have a Bill of Rights and s.116 has not been extended to the states, despite a constitutional referendum to change the situation in 1998. Whilst the one exception is the state of Tasmania, that protection can be usurped by legislation.¹¹ In contrast to the US, the Australian provision contains an express prohibition on the imposition of any

⁶ Ibid.

⁷ Monsma, "Church and State: Two Models" (2002) 14 *Policy Studies Review*, 1, 205-214

⁸ Mc Leish, "Making Sense of Religion and the Constitution: a fresh start for section 116" (1992) 18 *Monash University Law Review* 207-236

⁹ Ibid

¹⁰ Puls, "The Wall of separation: section 116, the first amendment and constitutional religious guarantees" (1998) 26 *Federal law Review* 139-164

¹¹ Richardson, "New Religions in Australia: Public Menace or Societal Salvation?" (2001) 4 *Nova Religio* 2, 258-265

religious observance. Although there are similarities between the last clause of s.116 and Art VI, s.3 of the US constitution, the US constitution is not reproduced verbatim in the Australian context, and its meaning and effect cannot be directly translated into the Australian context.

US litigation has considered the scope of the establishment and free exercise provisions overtime. In 1947 the Supreme Court considered the establishment clause in *Everson v Board of Education*. The court interpreted the first amendment in a broad way and held that it was constitutional for the state of New Jersey to transport students to secular and religious schools.¹² Although the case was used to guide subsequent decisions, it led to widespread controversy and debate. In *Lemon v Kurtzman*, a leading 1971 case, the Supreme Court held that a 1968 Pennsylvania Education Act that provided state reimbursement for teacher's salaries, textbooks and instructional material at nonpublic schools was unconstitutional.¹³ The court also developed the *Lemon* test to guide future decisions on the establishment clause. The test is as follows: a statute must have a secular purpose; its principal or primary effect must not advance or inhibit religion; and it must not foster an excessive government entanglement with religion.¹⁴ The Supreme Court has also considered a number of subsequent establishment cases. In 1985, *Aguilar v Felton* held that teachers could not be reimbursed for providing remedial education to students in a religious school.¹⁵ In 1987, *Edwards V Aguillard* held that public school science classes could not teach biblical creationism.¹⁶ The twenty-first century has seen moves in the opposite direction as *Zelman v Simmons-Harris* held that a state voucher program that provided tuition fees for religious and other private schools was a valid use of state funds.¹⁷

The Free Exercise of Religion has also been considered. For example, the Supreme Court has found that religious beliefs are not a requirement for public office. In 1961 *Torcaso v Watkins* held that state laws cannot prohibit atheists from running for public office.¹⁸ Similarly, *McDaniel v Paty* held that religious ministers are entitled to stand as candidates in political elections.¹⁹ During war time periods, the Supreme Court has examined conscientious objection on religious grounds. During the early twentieth century, war time objectors opposed the 1917 Draft Act which required all able bodied males to serve in the war. Under the act, a soldier could be excluded from serving on the battlefield but not from performing a noncombatant role. *Arver v the United States*, a 1918 decision, upheld the validity of compulsory conscription. Future cases on conscientious objection defined a test for religious belief.²⁰ In *Seeger*, a person could be exempt from military service if a person had "a given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the

¹² Puls, supra note 10

¹³ Ibid; 403US 602 (1971)

¹⁴ Ibid

¹⁵ 473 US 402 (1985)

¹⁶ 482 US 578 (1978)

¹⁷ 536 US 639 (2002)

¹⁸ 367US488(1961)

¹⁹ 435US 618 (1978)

²⁰ 245US366(1918)

orthodox belief in God of one who clearly qualifies for the exemption.”²¹ In *Welsh*, a 1970 case, the test was broadened even further: “opposition to war must stem from the registrant’s moral, ethical or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.”²² To date, the Free Exercise of religion in federal statutes and laws is guided by the Religious Freedom Restoration Act of 1993, which shows that religious freedom can only be restricted if there is a “compelling interest.”

Although the US has a strict separation of church and state, religious lobbyists and politicians play a significant role in promoting Christian values in government policy and society.²³ During the 2004 presidential election, Christian evangelicals were instrumental in supporting George Bush, and promoting the message of the Christian right through 350 television programs, 750 radio stations and a viewer audience of around 141 million Americans.²⁴ In 2008 George Bush used the White House Website to remind voters of his support for the National Religious Broadcasters Convention which promotes the evangelical message to the world.²⁵

Politicians and scholars have argued that the church and state relationship in the US and Australia is characterised by state neutrality, a key term in modern theories of liberal democracies.²⁶ Ahdar and Leigh contend that liberalism is characterised by individualism, rationalization, neutrality, privatisation of religion and ‘public reason.’ Under this framework, the focus is on the individual to the detriment of the community, and their ability to operate as free moral agents that make autonomous rational choices. ‘Public reason’ involves the ‘principle of secular rationale’ or ‘epistemic abstinence,’ which means that if religious arguments are publicly advocated, they must be accompanied by a ‘secular’ or ‘public’ justification.²⁷ According to Jonathan Crowe, arguments couched in secular terms are capable of rational justification and political validity because they appeal to religious and secular citizens.²⁸ In this way, religion is relegated to the private sphere and state neutrality is supported.

In practice, neutrality and the public-private divide have proven to be problematic and contentious in the US and Australia.²⁹ In both countries religion remains a public, not private matter, which has increased the political nature of religion. In addition, Ahdar and Leigh have questioned the validity of the ‘value free’ framework that liberal scholars use

²¹ 380 US 163 (1965) at 166

²² 398 US 333 (1970) at 340.

²³ Maddox, *supra* note 2

²⁴ Denton, ‘God on My Side’, Video, Produced by Jon Casimir and A Jacoby, 76 minutes, the Australian Broadcasting Commission, 2006; Lohrey, *supra* note 3

²⁵ Office of the Press Secretary, ‘President Bush Attends National Religious Broadcasters 2008 Convention’, at <http://www.whitehouse.gov/news/releases/2008/03/20080311-3.html> Accessed 15 March 2008.

²⁶ Monsma, *supra* note 7; Allison *supra* note 5; Mc Leish, *supra* note 8; Stewart ‘Rudd calls on church support’ (2006), 2nd October, Late Line, ABC, at www.abc.net.au/lateline/content/2006/s1753913.htm Accessed 30th April, 2008.

²⁷ Ahdar and Leigh, *Religious Freedom in the Liberal State*, (2005) 47-45.

²⁸ Crowe, ‘Preaching to the Converted? The Limits of Religious Arguments in Politics’ (2005) 21 *Policy* 4

²⁹ Ahdar & Leigh, *supra* note 27; Maddox, *supra* note 2; Allison, *supra* note 5

to promote conditions of religious freedom, as there remains ambiguity over the practice of neutrality in various legislative policies. Examples include the role of religion in public schools, and public displays and practices of religion in society.³⁰ The ambiguity has arisen, at least in part, from the tension between the Free Exercise Principle and Non-Establishment clause, as the former clause supports government involvement with religion while the latter calls for their separation.³¹

Past Research on the Church and State Relationship in Australia

In the Australian context, research has considered the development and scope of s.116, and the influence of religious leaders in politics. In supporting modern liberalism, Stephen McLeish contends that s. 116 is based on the concept of neutrality. Joshua Puls states that s.116 emphasizes “full membership into a plural community regardless of religion, race and ethnicity”.³² In contrasting both the US and Australian constitutional provisions, Puls points out that in the US, religious guarantees are pursued with more vigilance, and religion is more political due to increased legislation like the Bill of Rights. In line with US research, these scholars are unable to demonstrate how state neutrality or “full membership into a plural community” can be achieved in various legislative policies. Australian and international researchers such as Michael Hogan and James Richardson have observed that s. 116 is unable to prevent religious discrimination or the erosion of religious freedom from a determined federal government.³³ Peter Young has noted that church and state relations are often resolved “in accordance with the particular circumstances of the problem rather than by resort to some overarching principle.”³⁴

On the nexus between religion and politics, Evans and Kelly have found that 32% of Australians believe that religious leaders should not influence government decisions whilst 11% of Australians strongly agree that the religious influence needs to decrease in society.³⁵ Further research has documented the rise of mega churches, such as Hillsong in Australia, and their partnership with former liberal ministers such as Peter Costello.³⁶ Whilst High Court Justices like Michael Mason have promoted a more activist role for the Australian judiciary, there remain few if any studies that have examined the implications of High Court cases on the practice of church and state relations in federal legislation. In addition, the influence of the legislature on church and state case law remains understudied in Australia. Although some studies have examined Australian opinion on issues such as abortion and homosexuality, researchers have not considered

³⁰ Ibid.

³¹ Sadurski “Neutrality of Law Towards Religion” (1990) 12 *Sydney Law Review*, 421-454

³² Puls, supra note 10; Mc Leish, supra note 8

³³ Hogan, “Separation of Church and State: Section 116 of the Australian Constitution” (1981) 53 *The Australian Quarterly* 2, 214-228; Richardson “Minority Religions (‘Cults’) and the Law: Comparisons of the US, Europe and Australia” (1995) 18 *University of Queensland Law Journal* 183-207

³⁴ Young, “Series on Church and State Church and State in the Legal Tradition of Australia” (2003) 1 *The Journal of Anglican Studies Trust* 2, 92-118

³⁵ Evans and Kelley, *Australian Economy and Society 2002: Religion, Morality and Public Policy in International perspective 1984-2002* (2004), 114-115

³⁶ Maddox, supra note 2; Lohrey supra note 3 ; Simons supra note 4

these findings in the context of s. 116.³⁷ In order to address the research gap, this paper investigates how the church and state relationship has developed in Australian law. I then examine what four High Court cases reveal for the practice of church and state relations in federal legislation. I explore whether the High Court has interpreted s.116 in a neutral way, or in line with the views of the government in power. The selected cases either directly or indirectly consider s.116 of the Australian Constitution. I begin with a brief overview on how the church and state relationship has developed in Australian law.

Australia's Religious Foundations

From European settlement in 1788 to the early nineteenth century, Australian colonial law reflected the dominance and privileged status of the Church of England in the UK. Although migration patterns created a religiously diverse landscape, the Church of England maintained a monopoly over religion and hindered the growth of other religions.³⁸ Religious freedom was minimised as religion was developed and maintained through a 'military chaplaincy' style of leadership that imposed authority, punishment and discipline.³⁹ The church, state and judiciary operated under the one institution – British Colonial administration. The legal relationship between the church and state was very close in the late eighteenth to early nineteenth century. In 1826 for example, the Corporation of the Trustees of Church and Schools was provided with colonial land and distributed "one-seventh of the lands of New South Wales to the corporation for the purposes of the Church of England and education in the new colony".⁴⁰

During the early nineteenth century the role of religion began to change, as different Christian denominations grew in numbers, and advocated for improved legal rights. Overtime, the Church of England monopoly was slowly loosened through a variety of legal changes. From the early 1800s, Catholic, Methodist and Presbyterian ministers were given the legal right to practice their faith.⁴¹ In 1833 the Corporation of the Trustees of Church and Schools land was finally dissolved by Governor Burke⁴² who sought to recognise the 'demand for full religious equality.'⁴³ The legislation was replaced by the 1836 *Church Act* ("the Act") which provided four Christian denominations with equal rights under law.⁴⁴ The Act provided government subsidies and support for the recruitment and employment of clergy, and the construction of church buildings.⁴⁵ State aid was later extended to Jews and dissenters.⁴⁶ By the mid-nineteenth century, the

³⁷ Evans and Kelley, *supra* note, 35; See K Mason, 'Should Judges Speak Out?', Presented at the JCA Colloquium, Uluru, 9th April, 2001.

³⁸ Frame, *Church and State: Australia's Imaginary Wall* (2006); Carey, *Believing in Australia: A Cultural History of Religion*, (1996)

³⁹ Bouma, *Australian Soul: Religion & Spirituality in the Twenty-first Century* (2006), 40

⁴⁰ Young, *supra* note 34, 100

⁴¹ McLeish *supra* note 8

⁴² Sir Richard Bourke was Governor of NSW from 1831- 1837

⁴³ Nunn, 'A short history of the Church of England in Victoria 1847-1947', www.anglicanhistory.org/aus/hwnunn_victoria1947/.

⁴⁴ Hogan, *The Sectarian Strand: Religion in Australian Society* (1987)

⁴⁵ Frame *supra* note 38, 49.

⁴⁶ Gregory, *Church and State: Changing Government Policies Towards Religion in Australia* (1973)

judiciary differentiated from the church and state and became an independent and specialised legal entity that was linked with but not controlled by the other two institutions. In theory, the change meant that the law would be administered in a religiously neutral manner.⁴⁷

As the nineteenth century progressed, the religious mosaic continued to change and to produce tension in the church and state relationship. During the Gold Rush years of 1851 to 1861 migration tripled and many new religious groups arrived from England, and included the Baptists, Brethren, Churches of Christ, Congregationalists, and Salvation Army.⁴⁸ Other religious groups arrived from Asia and included Muslims, Hindus and Sikhs.⁴⁹ Hans Mol shows that in 1851, 52.7% said they affiliated with the Church of England, compared with 26.1% to the Catholic Church, 10.3% to the Presbyterian and 5.6% to the Methodists⁵⁰. By 1881, 38.4% identified with the Church of England, 24.2% with the Catholic Church and 11.5%, 11.3% and 2.2% with the Presbyterian, Methodist and Baptist churches respectively.⁵¹ Demographic changes within and between the various religious groups increased tensions towards the Act, as various religious denominations campaigned for more state privileges than the other.

Over time, many religious leaders, such as William Grant Broughton, a former Anglican Archbishop, raised complaints about many of the act's terms.⁵² Concerns were also raised by liberal or secular Australians who "disapproved of both the amount of government money being lavished on the churches, and of the fact that the state was involved at all in the official support of religion."⁵³ In the end, the Act had more critics than supporters, and was ultimately abandoned across the Australian colonies through the passage of separate acts between 1851 and 1890.⁵⁴ By the end of the nineteenth century, further legal changes were needed to respond to the changing role of religion, and the heightened sectarian tension that had ensued.

S. 116 of the Australian Constitution

In 1901 the church and state relationship was defined under s. 116 of the Commonwealth Constitution. The terms of the constitution can only be changed through constitutional amendment, and s. 116 remains unchanged to date. The section reads as follows:

The Commonwealth shall not make any law (i) for establishing any religion, or (ii) for imposing any religious observance, or (iii) for prohibiting the free exercise of any religion, and (iv) no

⁴⁷ K Mason, 'Law and Religion in Australia,' Presented at the National Forum on Christian Heritage, Canberra, 7th August 2006

⁴⁸ Bouma *The Religious History of Australia: 19th Century Immigration*, Australia's Religious Communities: A Multimedia Exploration, CD Rom Standard Edition, (Melbourne, Christian Research Association, 2000)

⁴⁹ Ibid

⁵⁰ Mol, *The Faith of Australians* (1985), 6-7

⁵¹ Ibid, 6-7

⁵² Frame supra note 38

⁵³ Hogan, supra note 44, 57

⁵⁴ McLeish supra note 8

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

Under this section, the Commonwealth can only make laws that indirectly concern religion. To date, the High Court has considered three cases that directly concern s.116 of the constitution. I will now examine these three cases, and review a fourth case that discusses the definition of religion, and indirectly considers s. 116. The court cases that will be examined are: *Krygger v Williams* (1912) 15 CLR 366 HCA 12, *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 HCA 12, *Attorney General (Vic.) v Ex Rel. Black v the Commonwealth* (1981) 146 CLR 559 HCA 2, *Church of the New Faith v Commissioner of Pay-roll tax (Vic.)* (1983) 154 CLR 120 HCA 40. Within the context of the legal analysis, I will discuss what these cases reveal for the practice of church and state relations in federal legislation. I will consider whether the High Court has interpreted s.116 in a neutral way, or whether their decisions have been influenced by the views of the government in power.

Australian High Court Cases

***Krygger v Williams* (1912) 15 CLR 366 HCA 12**

This was the first High Court case to directly consider the free exercise provision of s.116. The appellant, Edgar Krygger was a Jehovah's Witnesses, and declined to participate in compulsory military training as he believed it was against his religion. He was convicted of failure to serve 'without lawful excuse.' The High Court was then asked to consider whether a person can be exempt from bearing arms, and a duty to be trained on religious grounds under s.125 of the *Defence Act 1903-10* ("the Act"). The appeal was dismissed as the court held that s. 125 of the *Defence Act* does not exempt a person from being trained on religious grounds and does not prohibit acts done in the exercise of religion. A person can be excused from bearing arms on religious grounds but cannot be excused from participating in a non-combatant role under Part XII of the Act. In delivering his judgment, Griffith CJ considered s.61A of the Act which relates to exemptions from service in times of war. His comment, extracted below, shows that conscientious objection must satisfy a subjective test.

Where there is any ground for thinking that *real* conscientious objection may exist, [all our laws] make careful provision for the protection of people's conscientious objection...To base a refusal to be trained in non-combatant duties upon conscientious grounds is absurd.⁵⁵

"Real" conscientious objection is defined under s. 61A (1A) and (2).

(1A) Persons whose conscientious beliefs do not allow them to engage in duties of a combatant nature (either generally or during a particular war or particular warlike operations) are not exempt from liability to serve in the Defence Force in time of war but are exempt from such duties while members of the Defence Force as long as those beliefs continue.

⁵⁵ 370-371 of judgment

(2) A person who, in pursuance of section 60, has been called upon to serve in the Defence Force and is, by virtue of this section, exempt from service shall, notwithstanding the exemption, do any act that such a person is required, by or under the regulations to do.

These sections show that a person can theoretically make a “conscientious objection”, but their objection cannot be used to exempt them from participating in the war effort in a non-combatant role. Griffith CJ contends that in times of war, community interest must override an individual’s specific religious beliefs:

No one can doubt that the defence of this country is almost, if not quite, the first duty of a citizen, and there is no room for doubt that the legislature has power to enact laws to provide for making citizens competent for that duty.⁵⁶

In times of war, the court held that the preservation of the state is “almost, if not quite, the first duty of a citizen.”⁵⁷ As such, religious freedom is not absolute and must be consistent with the maintenance of civil government. Hugh Smith has pointed out that changes to the *Defence Act* in 1910, significantly changed exemptions to military service for conscientious objectors. Under the changes, doctrines of religion were omitted so that “the atheist’s conscience was placed on a par with that of the Christian.”⁵⁸ In addition, exemptions from compulsory military training were also narrowed, so that more Australian citizens would participate in the war.⁵⁹ These changes occurred in the context of the government being unable to introduce compulsory conscription in 1916 and 1917. Although the restrictions were influenced by the war time context, religion was also influenced by the views of the Liberal government. In 1939 Labor contrasted Liberal party policy by campaigning, albeit unsuccessfully, to widen the exemptions for conscientious objection. Whilst the Labor party passed some changes in the early war years; such as the total exemption from military service on conscientious belief, the regulations were eventually terminated in 1946.⁶⁰

***Jehovah’s Witnesses v Commonwealth* (1943) 67 CLR 116 HCA 12**

The second case to directly consider s. 116 involved the Jehovah’s Witnesses. In a similar way to *Krygger*, the court considered the free exercise of religion during a time of war. During the Second World War the Jehovah’s Witnesses held religious services in Kingdom Hall, Adelaide. On 17th January 1941 the Governor-General declared by an Order in Council that the Jehovah’s Witnesses were prejudicial to the war effort, and that the Commonwealth could take possession of Kingdom Hall under the *National Security (Subversive Associations) Regulations*. The Jehovah’s Witnesses sued the Commonwealth for trespass and for discriminating against them under s. 116 of the Australian Constitution. The court considered whether the Commonwealth could prevent the advocacy of religious principles that were prejudicial to the war under the *National*

⁵⁶ 370 of judgment

⁵⁷ Ibid

⁵⁸ Smith “Conscience, Law and the State: Australia’s Approach to Conscientious Objection since 1901” (1989) 1, *Australian Journal of Politics and History*, 35, 16

⁵⁹ Ibid

⁶⁰ Ibid

Security (Subversive Associations) Regulations, made under the *National Security Act (1939)* (Cth).

The court held that the *Jehovah's Witnesses* were an "unlawful" organisation as they were undermining the war effort and the survival of their country. The Commonwealth was therefore entitled to seize and occupy the group's meeting places. The court focused on the word 'for' in s.116 to determine whether the purpose of the law was 'for' the prohibition of the free exercise of religion.⁶¹ The court adopted a test of proportionality and held that religious freedom is not absolute, and that any restrictions on religious freedom must not be 'undue', and 'reasonably necessary for the protection of the community and in the interests of social order.'⁶² Proportionality is best explained through the following maxim: 'One should not use a sledgehammer to crack a nut.'⁶³

The majority held that the restrictions were not 'undue' as the Jehovah's Witnesses wanted to use religion to overthrow the state, to maintain a monopoly over religion, and to undermine the rights of those holding alternative religious and secular views. For example, during the war effort, the Jehovah's Witnesses argued that the state was an organ of Satan and that Australia should function as a theocracy. Latham CJ observes that the Jehovah's Witnesses 'proclaim and teach publicly both orally and by means of printed books and pamphlets that the British Empire, and other organised political bodies are organs of Satan.'⁶⁴ In addition, he notes that the 'Jehovah's Witnesses are Christians entirely devoted to the Kingdom of God which is a Theocracy.'⁶⁵ In a similar way to *Krygger*, the court held that in times of war, all Australians must put their country ahead of their religion. In his dissenting judgment, Williams J observes that:

If the Governor-General, by Order published in the *Gazette*, declares that the existence of any body corporate or unincorporate is prejudicial to the defence of the Commonwealth or the prosecution of the war, that body becomes unlawful and is dissolved by force of the declaration (regs. 3 and 4). Any doctrines or principles which were advocated by that body become unlawful and any printing or publishing of such doctrines or principles becomes unlawful; and no person shall hold or convene any meeting or with any other person assemble in any place for the purpose of advocating such doctrines (reg. 7 & 8)⁶⁶

Although it is important for the court to protect community interests, Williams J, argues that the *Subversive Regulations* raise concerns for the rights of minority religions. For example, Williams J points out that the regulations are wide which means the government can declare an organisation unlawful on an infinite number of grounds.⁶⁷ The court also showed that they can make decisions without considering their broader context. For example, Hugh Smith contends that very few groups applied for conscientious objection during WW2 as Australia was directly under threat and most Australians wanted to be

⁶¹ 132 of judgment

⁶² Stark J at 155; Joseph & Castan, *Federal Constitutional Law: A Contemporary View* (2001)

⁶³ Ibid, 377

⁶⁴ 146 of judgment

⁶⁵ 146 of judgment

⁶⁶ 163 of judgment

67158-168 of judgement

involved in the war.⁶⁸ In addition, it was not until 1971 that the Jehovah's Witnesses were reflected in census forms, totaling 0.3% of the population.⁶⁹ The government's reaction against the *Witnesses* was out of proportion to their potential level of threat. The court did not show a willingness to accommodate religious belief as a legitimate conscientious objection until the cold war.⁷⁰ Clear evidence of religious discrimination against the *Witnesses* is therefore apparent.

Jehovah's and *Krygger* adopted contrasting but similar approaches to the development of religious freedom in Australia. In *Krygger* the definition of conscientious objection was so narrow that religious belief was equated with non-religious belief, and a broad discrimination against religion occurred. In *Jehovah's*, conscientious objection was so broad, that it led to specific discrimination against a minority religion. In the early to late twentieth century, the practice of church and state relations involved the promotion of Christianity and cultural sameness to the detriment of secular and minority religious views. Gary Bouma has noted that up until 1947 "it was normal to be a member of the Church of England, of British background, to eat meat pies, and to fear the Yellow Peril."⁷¹ As a result, the Church of England remained dominant in Australian society, if not law, until the mid twentieth century as 39% of the population supported the church, compared to 12.6% for the Catholic church, the second largest denomination at that time.⁷² In this way, both cases show that the practice of s.116 is influenced by the views of the government that is in power and the political climate of the day.

Jehovah's raises an important question for the development of majority and minority rights in the twenty-first century. Where should a government draw the line between religious freedom and state protection against perceived attacks to overthrow the government? The influence of the 9/11 terrorist attacks in Australia is another case in point. Although only a small number of Islamic fundamentalists attacked the New York Twin Towers in 2001, religious discrimination against Australian Muslims increased after the attacks, as the government sought to combat Australian terrorism through the 2002 *ASIO Bill*.⁷³ The bill provided unprecedented search and detention powers, and has come under significant criticism from community groups and lawyers who argue that it makes a mockery of basic human rights.⁷⁴ As the threat of terrorism increased around the world, the Howard government wanted to be seen to be doing something. The bill placed significant restrictions on Australian citizens perceived to be a threat to national security. The legislation was particularly powerful in limiting the rights of Muslim-Australians. In both these examples, it can be seen that war and the threat of terrorism can lead to discrimination against minority religions in federal legislation, and this view can be

⁶⁸ Smith, *supra* note 58

⁶⁹ Bouma, *supra* note 39

⁷⁰ Smith, *supra* note 58

⁷¹ Bouma, "The emergence of religious plurality in Australia: a multicultural society" (1995) 5 *Sociology of Religion* 3, 285-302

⁷² Bouma, *supra* note 39

⁷³ Otherwise known as the *Australian Security Intelligence Organisation Amendment (Terrorism) Bill [No. 2]*.

⁷⁴ C Mahon & K Palmer, 'How the ASIO bill ravages your civil rights', June 23, 2003 at www.theage.com.au/articles/2003/06/22/1057220477057.html. Accessed 19th March 2008

upheld by the High Court. Most significantly, Australian religion is regulated by political agendas that can shift the boundaries between an acceptable and unacceptable religion at any given time.

Attorney-General (Vic); Ex rel Black v Commonwealth (1981) 146 CLR 559 HCA 2

This was the third case to directly consider s.116. In contrast to the previous two cases, this case considered the establishment of any religion. The Attorney-General of Victoria challenged the validity of a number of Commonwealth Acts of Parliament in so far as they related to benefits being provided to non-government schools supported by religious bodies, particularly the Roman Catholic Church. Eleven acts passed between 1972 and 1979 were challenged. They acts related to: States Grants (Schools) Acts and States Grants (Schools Assistance) Acts. The plaintiffs argued that government funding to non-government schools would establish a particular religion, and that the constitution requires a strict separation of church and state. The High Court rejected this proposition by a six to one majority and ruled in favor of the defendants. In reaching their decision the court held that ‘establish’ should be read narrowly. In the majority, Barwick CJ contended that the meaning of ‘establish’ had not changed since 1900:

Establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion.⁷⁵

In addition he argued that:

A law which in operation may indirectly enable a church to further the practice of religion is a long way away from a law to establish religion as that language properly understood would require it to be if the law were to be in breach of s.116...The law must be a law for it, i.e. intended and designed to set up the religion as an institution of the Commonwealth.⁷⁶

The court held that a religion can only be established if it becomes identified with the state, and citizens have a duty to maintain and protect it. A religion can never be established by a law that indirectly preferences one religion over another. The court affirmed a ‘level playing field’ between religious organizations and the education system, as all religious schools are entitled to the same funding from the state. The education system accommodates those who are religious and those who are not as individuals have the option of attending a non-religious school. In addition, government funding to religious schools can never establish a religion as religion can never be forced or imposed on any person under s. 116. The present case can be contrasted with *Jehovah’s*. In a similar way to *Jehovahs*, the court showed its willingness to support a diverse range of interests, but this time, during a time of peace. The court also reflected the political climate of the day. For example, John Warhurst contends that this case was fuelled by Liberal politicians wanting to maintain government through the support of Catholic voters who continued to increase in numbers, and to challenge the dominance of the

⁷⁵ 582 of judgment

⁷⁶ 583 of judgment

Church of England in Australia.⁷⁷ The Liberal government also wanted to challenge traditional political alliances, where Catholics generally supported the Labor party and Protestants supported the Liberal party.⁷⁸ Warhurst argues that if the High Court had not validated the status quo, Malcolm Fraser would have called a national referendum on state aid.⁷⁹

The court did not provide a strong precedent on the practice of church and state relations in education. It continues to remain unclear whether a government can fund religious schools that teach or exhibit discrimination on religious grounds when the broader society has developed norms of religious tolerance and openness.⁸⁰ Whilst the court established a precedent on the establishment of any religion, it did not provide clarity or guidance on process issues relating to its ongoing implementation in federal legislation. In addition, the Commonwealth government and High Court of Australia have failed to provide accountability mechanisms for the distribution of government money to private schools.⁸¹ As such, a government can theoretically discriminate against a religious school that promotes a minority religion such as Islam. At present, Australia provides one of the highest levels of government funding to private schools, and one of the lowest levels of accountability in relation to other OECD countries, and those with comparable spending regimes.⁸² Despite 70% of Commonwealth funding going to private schools, the 'government holds schools to basic criteria, such as compliance with broad curricular goals, financial requirements or testing procedures.'⁸³

The NSW and Victorian Attorney General, as well as the Australian public, continue to raise concerns about the current practice: from money being used beyond its stated purpose, to the inadequacy of self reporting mechanisms.⁸⁴ A recommendation has been put forward to establish a Schools Advisory Council to improve transparency, and to ensure the equitable and fair distribution of government funds.⁸⁵ If implemented, the recommendation would seek to improve accountability in areas such as capital funding, salaries, record keeping and common curriculum.⁸⁶ In accordance with the cases that precede it, *Attorney General* also shows that on the whole, the High Court of Australia interprets the practice of religious freedom in line with the views of the government that is in power.

⁷⁷ Warhurst, "Patterns and Directions in Australian Politics over the Past Fifty Years" (2004) 50 *Australian Journal of Politics and History* 2, 170

⁷⁸ Brett "Class, Religion and the Foundation of the Australian Party System: A revisionist interpretation" (2002) 37, *Australian Journal of Political Science*, 1, 39-56.

⁷⁹ Ibid.

⁸⁰ Ibid

⁸¹ Aulich & Aulich, *Proposals for Improved Accountability for Government Funding to Private Schools* (2003)

⁸² Ibid, 8

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ibid

Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.) [1983] 154 CLR 120

The Church of Scientology (formerly known as Church of the New Faith) objected to paying tax under the Pay-roll Tax Act 1971 (Vic.) as they believed they were exempt under provision 10 (b) of the Act which provided an exemption for religious institutions. In their judgment the court indirectly considered s.116 by examining whether Scientology was a religion, and entitled to the same payroll tax exemptions as Christian churches. The court held that Scientology was a religion and entitled to the same tax exemptions as other Christian churches. In reaching their decision the court debated the meaning of the words 'religion' and 'religious', and considered whether the word 'religion' should be given a narrow or wide reading. The court attempted to determine what was 'sufficient, even if not necessary' to define a religious group as a religion, and held that 'the list is not exhaustive; the categories are not closed.'⁸⁷ According to Mason and Brennan J 'religion' is to be given a broad meaning so that the court can represent a wide range of religious practices and beliefs.

A definition cannot be adopted merely because it would satisfy the majority of the community or because it corresponds with a concept currently accepted by that majority. Though religious freedom and religious equality are beneficial to all true religions, minority religions – not well established and accepted – stand in need of especial protection.⁸⁸

Mason ACJ and Brennan J developed a broad two part test to define a religion. In their view, the criterion for religion is two fold:

First, belief in a supernatural being, thing or principle; second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.⁸⁹

Wilson J and Deane J determined the definition of religion by reference to a number of important indicia which each has varying importance. They can be summarised as follows:

1. Belief in the supernatural, i.e. reality which extends 'beyond that which is capable of perception by the senses
2. The ideas relate to man's nature and place in the universe and his relation to the supernatural
3. The ideas are accepted by adherents as requiring or encouraging particular standards or codes of conduct or to participate in specific practices having supernatural (or 'extra-mundane') significance;
4. That however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or groups; and
5. The adherents themselves see the collection of ideas and/or practices as constituting a religion.⁹⁰

⁸⁷ Murphy J, 154 of judgment

⁸⁸ 131 of judgment

⁸⁹ 136 of judgment

⁹⁰ 120-121 of judgment

The wide definition of religion provides an important precedent for the practice of s.116. First, it shows that the High Court supports the development of Australian religion and religious plurality by developing conditions where all religious organisations can be treated in an equal way. Second, a wide definition of religion prevents instances where a religious organisation can establish a monopoly over religion. Third, the High Court showed that it is receptive to new ways of understanding and responding to the changing role of religion to ensure that it does not favor or discriminate against any religion.

Church of the New Faith affirmed Australia's commitment to religious diversity. Gary Bouma and Andrew Singleton have observed that Australia has a long history of successfully managing religious diversity and conflict through a religiously neutral judiciary and legislature.⁹¹ However, in the context of the present paper, and the political nature of religion, the authors do not describe how the judiciary and legislature are able to produce religiously neutral outcomes that do not favor or discriminate against secular and religious views. Whilst process issues are important, the end result of a legal and government decision is also significant.

Many scholars⁹² suggest that the Howard government favoured the Christian right to the detriment of other religions in Commonwealth legislation. It remains unclear how the neutrality that Bouma and Singleton allude to can actually be practiced in federal legislation. The *ASIO Bill* has shown that legal recognition of a minority religion does not mean they will be treated in an equal way in the wider Australian community. In this way it can be seen that the interpretation and practice of s.116 by the High Court and legislature is influenced by the views of the government that is in power, and the political climate of the day.

High Court Decisions and the Practice of s.116 in Federal Legislation

This paper considered three questions. How is the church and state relationship regulated in Australian law? What do High Court cases reveal for the practice of church and state relations in federal legislation? Has the High Court interpreted s.116 in a neutral way, or in line with the views of the government in power? Although the High Court has examined the scope of s.116 by considering the free exercise and establishment provisions, the court has not provided strong guidance on how s.116 should be practiced in a variety of legislation, from homosexual marriage, to the provision of IVF to single women. To date, the High Court has held that s.116 is breached if a state religion is established and religious views are not consistent with the maintenance of civil government, or prejudicial to the continued existence of the community. In practice this has meant that any religion can be favoured over another so as long as it does not interfere with the maintenance of civil government. This is supported by research into liberal theories of government that produce a preference rather than neutral outcome in federal legislation.⁹³ It remains unclear how church and state relations *should* be practiced

⁹¹ Bouma & Singleton, "A Comparative Study of the Successful Management of Religious Diversity: Melbourne and Hong Kong", 19 *International Sociology* 1, 5-24

⁹² Maddox *supra* note 2; Lohrey *supra* note 3; Simons *supra* note 4

⁹³ Ahdar and Leigh, *supra* note 27

in federal legislation as s. 116 remains influenced by the government that is in power, and the political climate of the day. Australia is similar to the US, where it can also be observed that religion is influenced by the political climate of the day. This can be seen from the political nature of the Bill of Rights, a large body of case law on church and state relations, and an increasing number of politicians professing their religious beliefs in public.⁹⁴

In Australia, political accountability on church and state issues remains minimal as policies that concern religion are never high on a politician's campaign agenda. As the definition of religion remains debatable, the ability to represent religious and secular views in an equal way is found wanting. Although it is the job of High Court justices to administer the law in a fair and equitable manner, the above judgments do not provide strong guidance on how religious and secular interests can be treated in an equal way. It is impractical to argue, as Stephen McLeish does, that s.116 is based on the principle of state neutrality. The word neutrality' implies that there can be a point where religious and secular views become neutralized, i.e. treated in an equal way in law and public policy. In practice, federal legislation always favours a particular position to the detriment of another. It is therefore impossible to argue that all federal policies can treat all citizens in an equal manner all the time. Moreover, there has never been a period in Australian history where people with diverse religious and secular views are completely content with the legal and government representation that exists.⁹⁵ As religion remains a public and political matter, neutrality can never exist, despite government attempts to accommodate an apolitical view of religion. The legal analysis supports research by Michael Hogan, James Richardson and Peter Young. Richardson and Hogan have observed that s. 116 is unable to prevent religious discrimination or the erosion of religious freedom from a determined federal government.⁹⁶ Peter Young contends that church and state issues are often resolved "in accordance with the particular circumstances of the problem rather than by resort to some overarching principle."⁹⁷

In Australia, the interpretation and practice of s.116 by the High Court and legislature is influenced by the government that is in power, and the political climate of the day. There is little doubt that s.116 offers minimal protection against religious discrimination.⁹⁸ As Lyn Allison and Marion Maddox have observed, federal politicians continue to preference one religion over another and fail to represent a diverse set of interests.⁹⁹ At the same time, no legal challenges, or public outcries have occurred on perceived breaches to s.116 in Howard Government policy. This is interesting given the contrasting state treatment between the Jehovah's Witnesses and Christian right. For example, Liberal governments have shown that they support the Christian right but do not support

⁹⁴ Denton, *supra* note 15; Lohrey, *supra* note 3; Puls, *supra* note 9

⁹⁵ Hogan, *supra* note 34

⁹⁶ Hogan, *supra* note 33; Richardson, *supra* note 33

⁹⁷ Young, *supra* note 34

⁹⁸ Hogan *supra* note 33; Richardson *supra* note 33

⁹⁹ Allison, *supra* note 5; Maddox *supra* note 2

a theocracy developed by the Jehovah's Witnesses¹⁰⁰. This is despite the fact that the Christian right adopt a similar fundamentalist stance on legislative policies. One rationale for the favorable treatment of the former is that the Christian right engages in party politics and votes conservatively, whilst the Jehovah's Witnesses do not take part in national politics and do not vote.¹⁰¹ Sections of the community that do not vote put their own rights in danger, as they provide minimal, if any, incentive for a government to support them. In the public domain, religion is a numbers game for the astute politician. Until the middle of the twentieth century, the Church of England was notionally, if not legally recognized as the established Church in Australia as 39% of the population supported the church, compared to 12.6% for the Catholic Church, the second largest denomination at the time.¹⁰²

In the 1960s the Catholic Church increased their membership base significantly, while numbers in the Church of England declined. As a result, state and federal elections in the 1960s focused on providing state aid to independent and Catholic schools.¹⁰³ In the twenty-first century, weekly church attendance figures are significantly higher in Pentecostal churches compared to all other Christian denominations.¹⁰⁴ In the lead up to the 2007 federal election the Howard Government and Rudd opposition appealed to the denomination that was politically active, and had the highest weekly church attendance figures in the nation – the Pentecostals and Hillsong Church. By learning from US trends, politicians partnered with evangelical groups to improve their electoral chances. In this context, political trends reveal that constitutional arrangements like a strict separation or de facto relationship between church and state, are largely irrelevant compared to the political climate of the day.

In light of these conclusions, future research needs to consider the following questions. Are Australian's satisfied with the regulation of Australian religion? How can federal politicians improve their ability to represent religious and secular interests? In what ways, if at all, can the law be practised in a bipartisan way? In the twenty-first century, the practice of church and state relations remains topical as the Howard and now Rudd government discuss religion with low levels of accountability. Until further changes arise, questions surrounding the practice of church and state relations will remain determined by public opinion and the ballot box.

Conclusion

In this paper I investigated how the church and state relationship is regulated in Australian law. My focus was on four Australian High Court cases and what they revealed for the practice of church and state relations in federal legislation. I considered

¹⁰⁰ Robert Menzies, a Liberal MP, served as Prime Minister of Australia from 1939 to 1941 and from 1949 to 1966. During the former period, the Governor General declared the *Jehovah's Witnesses* to be prejudicial to the war effort.

¹⁰¹ Maddox, *supra* note 2.

¹⁰² Bouma, *supra* note 39

¹⁰³ Negus, '1963 Election', television program, broadcast 4/10/2004 on the ABC, www.abc.net.au/gnt/history/Transcripts/s1213157.htm

¹⁰⁴ Evans and Kelley, *supra* note 35

whether the High Court has interpreted s.116 in a neutral way, or whether their decisions have been influenced by the views of the government in power. The legal analysis reveals that the status of church and state relations remains unclear in federal legislation. It is argued that the interpretation and practice of s.116 by the High Court and legislature is influenced by the government in power, and the political climate of the day.

