

# A REAL THREAT OR A MERE SHADOW? SCHOOL CHAPLAINCY PROGRAMS AND THE SECULAR STATE

REX TAUATI AHDAR\*

## I INTRODUCTION

*Williams v Commonwealth*<sup>1</sup> is an important decision for many reasons. In this article I shall focus on the broader normative arguments concerning state-funded chaplains, specifically those in public schools.<sup>2</sup> I will address each of the principal objections to publicly-funded school chaplains, and endeavour to answer each one. The main criticisms of school chaplains and the Australian Federal Government's National School Chaplaincy and Student Welfare Program<sup>3</sup> ('NSCSWP'), as it is now called, can be usefully drawn from an article by Greens member of the New South Wales Upper House, Dr John Kaye.<sup>4</sup> After considering the major objections, I will next briefly discuss the religious test argument and then conclude with some brief thoughts on the compatibility of chaplaincies with the secular state.

The US Supreme Court once had to decide whether legislative chaplains paid out of the public purse were a 'real threat' under the Constitution versus a 'mere shadow' on the Establishment Clause.<sup>5</sup> For over a century, chaplains compensated out of public funds had said a prayer at the start of each day's proceedings of the Nebraska state legislature.<sup>6</sup> The majority of the Supreme Court concluded the paid chaplains represented no 'real threat' to religious freedom nor to the principle of the non-establishment of religion.<sup>7</sup> That same conclusion ought to be reached in respect of state-funded school chaplains in Australia.

## II VIOLATION OF THE SEPARATION OF CHURCH AND STATE

Providing funding to school chaplains runs *counter to the separation of church and state* ... Public funding of chaplains puts the state in the compromised position of financially supporting and being seen to endorse specific religions. It reopens old wounds about state religions and it excludes those who subscribe to no religion. It is the first step on a *very slippery slope* that, in the long run benefits very few sectors of the multicultural and multi-religious society.<sup>8</sup>

---

\* Professor, Faculty of Law, University of Otago. This article is a revised version of a paper presented at the 'After *Williams*' Colloquium, School of Law, University of Southern Queensland, Toowoomba, 4 October 2013.

<sup>1</sup> [2012] HCA 23.

<sup>2</sup> State-funded chaplains are, it seems, also operating in religious schools: see the Australian Government, *National School Chaplaincy and Student Welfare Program Guidelines*, June 2013, 5.2.

<sup>3</sup> The original National School Chaplaincy Program, begun in 2007, was broadened and became the National School Chaplaincy and Student Welfare Program in September 2011.

<sup>4</sup> John Kaye, 'Preaching to the Unconverted: Chaplaincy on Trial', *Viewpoint*, No 6, June 2011, 27. <<http://www.viewpointmagazine.com.au/>> (hereafter 'Kaye').

<sup>5</sup> *Marsh v Chambers*, 463 US 783, 7954, 818 (1983) (quoting Goldberg J in *Abington School District v Schempp*, 374 US 203, 308 (1963)).

<sup>6</sup> Ibid 794.

<sup>7</sup> Ibid 791, 794

<sup>8</sup> Kaye, above n 4, 28, 30 (italics supplied).

The phrase ‘separation of church and state’ is not found in s 116 of the Australian Constitution. It is even not found in the American Constitution. It is a phrase that has, nonetheless, entered into global currency. It originates from a letter by Thomas Jefferson to a committee of the Danbury Baptists Association in 1802.<sup>9</sup>

Believing with you that religion is a matter which lies solely between man and his God. ... I contemplate with sovereign reverence that act of the whole of the American people which declared that their Legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof’, thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience.<sup>10</sup>

(Perhaps Jefferson adopted the phrase from Roger Williams who wrote, in 1643, of ‘the wall of separation between the garden of the Church and the wilderness of the state.’)<sup>11</sup> Interestingly, Jefferson was not implying that politics and religion be kept apart.<sup>12</sup> In the very next paragraph of his Danbury letter, President Jefferson wrote he would offer up a prayer on behalf of his correspondents.<sup>13</sup>

The phrase, wall of separation between church and state, was plucked from the relative obscurity of the personal correspondence of one of the America’s Founders and came to public prominence after it was quoted in the first Supreme Court decision on the Free Exercise Clause,<sup>14</sup> *Reynolds v United States* in 1879,<sup>15</sup> and in the first case on the Establishment Clause, *Everson v Board of Education* in 1947.<sup>16</sup> (As it happens, *Everson* also involved state funding of a program run in public schools.)<sup>17</sup> Arlin Adams and Charles Emmerich observe that the Supreme Court in *Everson*, ‘raised the figure of speech to constitutional status’<sup>18</sup> when it asserted that Jefferson’s words captured the intent behind the clause against establishment of religion. In that decision the Court opined: ‘The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.’<sup>19</sup>

Since then it has taken on something of a life of its own. Its popularity is matched only by its controversial nature. American judges have often criticized its overuse and its invocation as a sort of mantra to scupper any relationship that might be forged

<sup>9</sup> Arlin M Adams and Charles J Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (University of Pennsylvania Press, 1990) 23.

<sup>10</sup> Thomas Jefferson, ‘Reply to the Danbury Baptists Association, 1 January 1802’ in H Washington (ed) *The Writings of Jefferson*, vol 8 (1853) 113; quoted by the Supreme Court in *Reynolds v United States* 98 US 145, 164 (1879). See further Douglas Laycock, ‘The Many Meanings of Separation’ (2003) 70 *University of Chicago Law Review* 1667, 1677-78.

<sup>11</sup> John Witte Jr and Joel A Nichols, *Religion and the American Constitutional Experiment* (Westview Press, 3<sup>rd</sup> ed, 2011) 27.

<sup>12</sup> John Witte Jr, *God’s Joust, God’s Justice: Law and Religion in the Western Tradition* (Wm. B. Eerdmans Publishing Co., 2006) 228.

<sup>13</sup> Jefferson wrote (ibid): ‘I reciprocate your kind prayers for the protection and blessing of the common father and creator of man.’

<sup>14</sup> The Free Exercise Clause is taken from the latter words of the first sentence of the First Amendment and the Establishment Clauses from the opening words of that sentence, viz: ‘Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ...’.

<sup>15</sup> 98 US 145, 164 (1879).

<sup>16</sup> 330 US 1 (1947).

<sup>17</sup> The *Everson* majority held that a local New Jersey board of education was entitled to reimburse parents for the expenditures on their children’s bus fares as they attended Catholic schools. Transportation reimbursement for children attending public schools was already in place.

<sup>18</sup> Above n 9, 23.

<sup>19</sup> *Everson*, 330 US 1, 18 (1947).

between the state and religious organizations. Justice Reed, dissenting in *McCullum*, cautioned ‘A rule of law should not be drawn from a figure of speech.’<sup>20</sup> Justice Stewart, dissenting in *Schempp*, warned:

It is a *fallacious oversimplification* to regard [the religious clauses language] as establishing a single constitutional standard of ‘separation of church and state,’ which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. ... The two relevant clauses of the First Amendment cannot accurately be reflected in a *sterile metaphor* which by its very nature may distort rather than illumine the problems involved in a particular case.<sup>21</sup>

In 1971, the Supreme Court explained that:

[Our] prior holdings do not call for a total separation between church and state; total separation is not possible in an absolute sense. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. ... [T]he line of separation, far from being ‘a wall’, is a *blurred, indistinct, and variable barrier* depending on all the circumstances of a particular relationship.<sup>22</sup>

More blunt was Rehnquist J who, dissenting in *Wallace v Jaffree*, castigated reliance on this metaphor explaining that the ‘wall of separation between church and state is a metaphor based on bad history, a metaphor that has proved useless as a guide to judging. It should be frankly and explicitly abandoned.’<sup>23</sup>

Scholars, in the main, have been no less scathing. The *Everson* Court elevated separation of church and state as ‘a constitutional end in itself, [an] historic move [that] was as unreflective as it was fateful.’<sup>24</sup> The ‘separation of church and state’ lacked historical authority and foundation.<sup>25</sup> Douglas Laycock notes the phrase is ‘deeply entrenched’ in American society and people will not quit using it. It is galling then that it ‘has no sufficiently agreed meaning to be of any use, and until we develop vocabulary that communicates distinct theories of separation, we should give up using the phrase altogether.’<sup>26</sup> For John Witte Jr the metaphor unfortunately became ‘a mechanical and monopolistic test that courts applied bluntly, even slavishly, in a whole series of cases.’<sup>27</sup> Christopher Eisgruber and Lawrence Sager lament that ‘[q]uestions about the “height of the wall” inevitably push public debate in grand, speculative and ideological directions’ and that ‘metaphors and slogans about walls and separation can never provide a sensible conceptual apparatus for the analysis of religious liberty.’<sup>28</sup> The famous wall of separation metaphor, scolds Andrew Koppelman, ‘which has been

<sup>20</sup> *Illinois ex rel McCollum v Board of Education*, 333 US 203, 247 (1948).

<sup>21</sup> *Abington School District v Schempp*, 374 US 203, 308-309 (1963) (italics mine).

<sup>22</sup> *Lemon v Kurtzman*, 403 US 602, 614 (1971) (italics mine).

<sup>23</sup> 472 US 38, 107 (1985).

<sup>24</sup> Mary Ann Glendon and Raul F Yanes, ‘Structural Free Exercise’ (1991) 90 *Michigan Law Review* 477, 481.

<sup>25</sup> Philip Hamburger, ‘Against Separation’, *Public Interest* (2004) Spring 177, 178-180.

<sup>26</sup> Laycock, above n 10, 1700.

<sup>27</sup> Witte, above n 12, 209.

<sup>28</sup> Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2007) 18, 22-23.

the focus of enormous contestation, does not entail any particular set of legal rules', which bears out 'its useless indeterminacy'.<sup>29</sup>

### III 'SEPARATIONISM' IN AUSTRALIAN JURISPRUDENCE

How well has the separation of church and state maxim travelled? Has the metaphor, and the philosophy it represents, been accepted by the Australian courts interpreting s 116? Have the judges erected the wall 'down under'? Has strict 'no-aid separationism'<sup>30</sup> been followed?

The short answer is 'no'. The more than century-old presence of an anti-establishment prohibition has not given rise to the erection of such a wall in Australia.<sup>31</sup> Bishop and historian, Tom Frame's short but (in my view) eminently sensible monograph is aptly subtitled, *Australia's Imaginary Wall*.<sup>32</sup>

Section 116 of the Constitution begins: 'The Commonwealth shall not make any law for establishing any religion ...' The Establishment Clause has had a negligible effect upon religious practice in Australia.<sup>33</sup> Certainly, its impact has been nothing like the sustained, if decidedly uneven, secularising effect that its American First Amendment counterpart (upon which section 116 was modelled)<sup>34</sup> has had. There have been very few cases upon it and s 116 has never been invoked to strike down a law.<sup>35</sup>

First, s 116 (unlike its American equivalent) places no restriction upon the States when it comes to legislative measures regarding religious matters and it is only a limitation upon 'the Commonwealth', or Federal Parliament, in this respect.<sup>36</sup>

Second, the High Court in the leading, indeed only, case to reach it on the meaning of the anti-establishment provision, *Attorney-General of Victoria, ex rel Black v Commonwealth* (the *DOGS Case*),<sup>37</sup> gave the clause a narrow reading. The

<sup>29</sup> Andrew Koppelman, *Defending American Religious Neutrality* (Harvard University Press, 2013) 205, n 16.

<sup>30</sup> See Michael McConnell, 'Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine' in Rex Ahdar (ed), *Law and Religion* (Ashgate, 2000) ch 4, 69-74.

<sup>31</sup> 'Instead of the wall of separation in the US, the Australian pattern provides for equitable support for religions from the state. Instead of a doctrine of non-entanglement in the US, the Australian tradition has a doctrine of equitable entanglement.' Bruce Kaye, 'Is the Emperor Wearing the Wrong Clothes? Human Rights and Social Good in the Context of Australian Secularity: Theological Perspectives' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) ch 3, 48.

<sup>32</sup> Thomas Frame, *Church and State: Australia's Imaginary Wall* (University of New South Wales Press, 2006). For some the absence of a wall of separation is most regrettable: see eg Max Wallace, *The Purple Economy: Supernatural Charities, Tax and the State* (Australian National Secular Association, 2007) part 1A and the submission of the Australia New Zealand Secular Association quoted in Australian Human Rights Commission, *2011 Freedom of Religion and Belief in 21<sup>st</sup> Century Australia* (2011) 47. <<http://www.humanrights.gov.au/publications/2011-freedom-religion-and-belief-21st-century-australia>>

<sup>33</sup> See generally Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167, 170, 173-175; Tony Blackshield, 'Religion and Australian Constitutional Law' in Peter Radan et al (eds), *Law and Religion: God, the State and the Common Law* (Routledge, 2005) ch 4, 85-86, 98-101.

<sup>34</sup> See Murphy J in the *DOGS Case* (1981) 146 CLR 559, 621; Mortensen, above n 33, 169.

<sup>35</sup> George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2002) 111.

<sup>36</sup> See Wilson J in the *DOGS Case* (1981) 146 CLR 559, 652.

<sup>37</sup> *Ibid.*

Establishment Clause prevents the Federal Legislature from purposefully<sup>38</sup> creating a national church or religion. It does not, as the appellants, the Defence of Government Schools ('DOGS') organization contended, preclude the Commonwealth from passing legislation providing for financial assistance to be given to non-governmental religious schools. Mason J stated:

The first clause in the section forbids the establishment or recognition (and by this term I would include a branch of a religion or church) as a national institution. ... to constitute 'establishment' of a 'religion' the concession to one church of favours, titles and advantages must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.<sup>39</sup>

An expansive separationist reading was thus expressly rejected. Stephen J explained:

The very form of s 116, consisting of four distinct and express restrictions upon legislative power, is also significant. It *cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state*, from which may be distilled the detailed consequences of such separation. On the contrary, by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.<sup>40</sup>

For Wilson J, 'The separationist view of establishment ... [did] not sit well with the form of s. 116, addressed as it [was] only to the Commonwealth Parliament. ... If the first clause [no establishment] is to be read, as the plaintiffs contend, as requiring the erection of a 'wall of separation' between the church and the state, then it is difficult to see what room is left for the operation of the following [three] clauses.'<sup>41</sup>

The *DOGS* Court's interpretation coincides with the view expounded by Professor Reid Mortensen that, even though modelled on its US counterpart, 'it is questionable that the Commonwealth clause [s 116] was originally intended to incorporate the concept of separation of church and state that the United States Supreme Court has subsequently read into the First Amendment clause.'<sup>42</sup> It would be anachronistic to assert that separationism was in the Founders' minds;<sup>43</sup> the strict separationist stance first appeared in the post-World War II American Religion Clause case law, a half century after the Framers turned their energies to the content of the Australian Constitution.

Murphy J dissented vigorously in the *DOGS* case. He charged that the majority's narrow reading, rejecting the separationist construction, was tantamount to interpreting s 116 as if it were a mere 'clause in tenancy agreement rather than a great constitutional guarantee of freedom of and from religion.'<sup>44</sup> A reading that did not curtail a law that supported any religion but only a law that prevented the setting up of

<sup>38</sup> The High Court majority placed great weight ('bloated significance' in Dr Mortensen's opinion, above n 33, 174) upon the word 'for', a word not found in the US counterpart (which refers to 'respecting' an establishment of religion).

<sup>39</sup> *DOGS Case* (1981) 146 CLR 559, 612. See similarly Barwick CJ at 582; Gibbs J at 597 and 604; Aickin J at 635, agreed with Gibbs and Mason JJ.

<sup>40</sup> Ibid, 609 (Stephen J).

<sup>41</sup> Ibid, 654 (Wilson J).

<sup>42</sup> Reid G Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (Ph D Thesis in Law, University of Queensland, 1993) 223.

<sup>43</sup> The debates and speeches in the lead up to s 116 do not shed much light on the intention of the founders: Ibid 189-191; Mortensen, above n 33, 169.

<sup>44</sup> *DOGS Case* (1981) 146 CLR 559, 623.

a nation church simply ‘ma[d]e a mockery of s.116.’<sup>45</sup> For him, the majority’s narrow reading ‘would deny that s. 116 [was] a guarantee of freedom from religion as well as of religion.’<sup>46</sup> Murphy J’s was a lone voice in the Court however.

The decidedly cool reception of separationism in Australia was wise, for the heyday of strict separationism has passed in the United States. From approximately 1947 to 1989, notes John Witte Jr, the US Supreme Court ‘applied its newly-minted separationist logic’ to invalidate many instances of government support for religion in the public school system. Yet, he continued, ‘it is also well-known that the Supreme Court of late has abandoned much of this strict separationism in favour of other principles of religious liberty – neutrality, accommodation, noncoercion, equal treatment and nonendorsement most prominently.’<sup>47</sup>

#### IV OPPORTUNITY FOR PROSELYTISING

In as much as the NSCP provides direct funding to maintain the *foot soldiers* of various denominations, it is a direct flow of public money across the separation. ... the unwritten contract between the parents and the system is that no religion will be *marketed* at their children. ... Many other parents reject all religions and seek to protect their children from *proselytising* until they are old enough to form their own mature opinions. ... The NSCP not only creates the perception of publicly-funded individuals who are likely to *cross that line*, but also in some cases the reality.<sup>48</sup>

Consistent with the idea of separation of church and state, critics see the danger of school chaplains proselytising to vulnerable children. However, supporters of chaplaincy point out that the NSCSWP Guidelines expressly forbid this, and they do so in some detail. A lengthy quotation is merited:

Services provided during Program funded hours must *not include*:

- *providing religious education* in their schools. The decision on whether non Program funded religious education is delivered by the same person who is employed with Program funding is to be determined by schools and Funding Recipients. However, to avoid potential role confusion, best practice recommends that these roles be conducted by different persons. Where this is not a school preference / not possible, schools need to ensure they take all necessary steps to delineate the roles, including on the school website ...
- *attempting to convert students* to a religion or set of beliefs through proselytising/evangelising. School chaplains/student welfare workers must not
  - *coerce* students to attend activities that have religious content / focus
  - ask or encourage students to proselytise/evangelise within the school
  - deliver activities/services that promote a particular view or religious belief without prior approval and consent as per Sections 3.1 and 5.2
  - *put students in a position of feeling manipulated or intruded upon* by intense persuasive conversation.
- *initiating faith discussions with a view to coercing or manipulating students to a particular view or spiritual belief*. While recognising that an individual school

<sup>45</sup> Ibid 633.

<sup>46</sup> Ibid 624.

<sup>47</sup> John Witte Jr, ‘That Serpentine Wall of Separation’ (2000) 101 *Michigan Law Review* 1869, 1904. See similarly McConnell, above n 30, 73-74 (but placing the shift in the tide some 8 years earlier with the ruling in *Widmar v Vincent*, 454 US 263 (1981)); Glendon and Yanes, above n 24, 517-18, 532-33 (by the mid-1980s the hold of strict separationism had begun to decline in the Supreme Court).

<sup>48</sup> Kaye, above n 4, 30 (*italics mine*).

chaplain/student welfare worker may respond to questions and in good faith express views and articulate values consistent with his or her own beliefs, a school chaplain/student welfare worker *must not take advantage of his or her privileged position to proselytise, evangelise or advocate for a particular view or spiritual belief*

- *attempting to undermine* students' religious or other beliefs
- *using other methods* such as social media – blogs and Facebook, or newsletters and school websites, *to proselytise/evangelise* to students within their school, in their role as a Program funded school chaplain/student welfare worker.<sup>49</sup>

But critics respond that, first, regardless of what the rules say, the incentive will be there still to do so and, secondly, there is evidence that proselytising has indeed occurred.

As for the first charge, some contend that to expect chaplains not to evangelise is to expect them to do something in direct conflict with their training: 'It's like asking someone with dental training to work as a general practitioner.'<sup>50</sup> The analogy is not apt. The better way to have put it would be to say: 'It is like asking a general practitioner not to treat kidney disease or (these days) to deliver babies' – and that is hardly something a GP would cavil at. The chaplain is a religious GP who *could* turn his or her hand to evangelism, but that is not his or her specialty, nor the prime focus of the chaplain's training, any more than ophthalmology or orthopaedics is for a general medical practitioner.

Regarding the evidence to date, it would be naïve to believe there have been no instances where some chaplains have 'crossed the line'. Allegations were made that evangelising had taken place in Victoria, although Bishop Stephen Hale denied that any such thing had been occurring.<sup>51</sup> Nonetheless, there are powerful incentives against chaplains proselytising that a school, funding recipient and chaplain herself would be unwise to ignore. A school would risk losing the funding entirely for the immediate future and a chaplain would incur the stigma and embarrassment of being dismissed whilst bringing odium upon the denomination or parachurch organization to which he or she belonged. Furthermore, the Guidelines lay down detailed mandatory complaints handling and grievance resolution procedures,<sup>52</sup> coupled with close monitoring and regular reporting<sup>53</sup> of the on-the-ground operation of chaplains. Breaches of the Code of Conduct may see the Department of Education, Employment and Workplace Relations require all or some of the funding to be repaid to the Government.<sup>54</sup> The overzealous or imprudent chaplain who evangelizes would only do so once and the resultant publicity would certainly deter others who might be tempted to overstep the mark.

<sup>49</sup> NSCSWP Guidelines, above n 2, 3.1.2 (italics added).

<sup>50</sup> David Penberthy, 'Let us pray that school chaplains are given the chop', *The Punch* <<http://www.thepunch.com.au/articles/let-us-pray-that-school-chaplains-are-given-the-chop/>>.

<sup>51</sup> Jewel Topsfield, 'We are not out to convert children in schools: bishop', *The Age*, 14 May 2011. A controversy arose after the Dr Evonne Paddison, chief executive of Access Ministries, the parachurch body that delivers religious education classes in Victoria, was reported as stating (in 2008) that, 'What really matters is seizing the God-given opportunity we have to reach kids in schools. Without Jesus, our students are lost.' Bishop Hale countered that what Dr Paddison stated in 2008 did not reflect what occurred in schools: 'We are extremely respectful of the balancing act that's involved in what we do,' he said. 'It's clearly a pretty tricky exercise to go in and teach children Christian stories and Christian values and to not go over the top and seek to then contend that in such a way children feel like they are pressured to do something.'

<sup>52</sup> NSCP Guidelines, above n 2, ss 5.6.5 and 7.

<sup>53</sup> Ibid s 6. Every school must have a Complaints Officer.

<sup>54</sup> Ibid s 7.1.6.

## V ALIENATION OF RELIGIOUS MINORITIES

[I]n a profoundly multicultural and religiously diverse society, the placement of a representative of one belief system in a school *sends an unacceptable message* to children who come from a background that differs from the chaplain chosen by their institution. . . . For many public schools, no one chaplain can hope to reflect anything but a small subset of the beliefs and cultural practices of the students and their parents. At best the others will *feel neglected and left out*. At worst, the impression will be created that the school values their religion and hence themselves less than others.<sup>55</sup>

Secularists tend to presume that religious minorities feel alienated when majoritarian religious practices are introduced or upheld. US Supreme Court judge, Justice Sandra Day O'Connor, promulgated a test for violation of the Establishment Clause that captures this objection, the so-called 'Endorsement test'. The government ought be wary of endorsing religion since: 'Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.'<sup>56</sup>

But the critics seldom proffer evidence for this intuition. More often, the fear of alienating minorities is a pretext for secularising public programs and for the relentless evisceration of all traces of religion from public life and institutions. Interestingly, a leading British Muslim scholar, Tariq Modood, has rejected the plea for disestablishment of the Church of England and the creation of a thoroughly secular state. It is, he noted, 'a brute fact' that not a single article or speech could be found by any non-Christian faith in favour of disestablishment. Rather, secularists had been using minorities (claiming the desire to accommodate them) to justify courses of action that these secular elites had decided upon by themselves to advance their own purposes. Modood charged that 'proposals to dismantle establishment in the name of multi-faithism must be viewed as disingenuous'<sup>57</sup> and he castigated the attempt 'to wrap a homogenising secular hegemony in the language of multi-culturalism and rights of minorities.'<sup>58</sup> The most vocal critics of establishment in the name of religious pluralism were in fact usually atheists, rationalists, and the like, rather than Muslims, Sikhs, Hindus and the adherents of other minority religions, whose views, Modood wryly noted, were rarely solicited.<sup>59</sup>

Furthermore, there is nothing in the NSCSWP to prevent persons from other religions from being appointed as chaplains. And, as for the plight of atheists, free thinkers, agnostics, humanists and so on, 'student welfare workers' were added to the Program from January 2012. These persons are expressly required to be non faith-based or secular workers.<sup>60</sup>

<sup>55</sup> Kaye, above n 4, 28 (emphasis added).

<sup>56</sup> *Lynch v Donnelly*, 465 US 668, 688 (1984); *County of Allegheny v ACLU, Greater Pittsburgh Chapter*, 492 US 573, 627 (1989). On the endorsement test in the US courts see eg Witte and Nichols, above n 11, 181-82.

<sup>57</sup> Tariq Modood, 'Establishment, Multiculturalism and British Citizenship' (1994) 65(1) *Political Quarterly* 53, 61.

<sup>58</sup> Ibid 63.

<sup>59</sup> Tariq Modood, 'Introduction: Establishment, Reform and Multiculturalism' in Tariq Modood (ed), *Church, State and Religious Minorities* (Policy Studies Institute, 1997) ch 1, 9.

<sup>60</sup> NSCP Guidelines, above n 2, s 1.1.



## VI EXPENSIVE, INEFFECTIVE AND RUN BY UNQUALIFIED AMATEURS

In a cash-constrained education environment, spending money on enthusiastic but *unqualified amateurs* may not be the best use of resources. ... The *prioritising* of chaplaincy, or religious education programs in general results in a deficit in other education funding areas. The \$222 million allocated to the chaplaincy program exceeds the \$200 million given to fund services for students with a disability. ... The most remarkable feature of the NSCP has been the *total absence of evidence that the program fulfils its goals*. ... There is a strong case that this money would be better used to employ qualified professional welfare workers. Doing so would provide more assurance to students and teachers that the welfare needs of students are being addressed.<sup>61</sup>

The days of unqualified amateurs are numbered, as the Guidelines now require chaplains to have satisfied certain minimum qualifications.<sup>62</sup> The question whether \$222 million is too much is a surely perilous one for an outsider from the Shaky Isles to begin to answer. If the chaplaincy and student welfare worker program is working effectively then it seems to me that the benefits to society (intangible and difficult to quantify as they may be) of providing students and staff with timely support to overcome unexpected episodes of grief and to face personal crises<sup>63</sup> is money well spent. The extensive reporting and monitoring mechanisms set out in the Guidelines are an attempt to systematically gauge the efficacy of the Program. To be fair, many of the goals of the program – for example, helping students explore their spirituality, enabling them to overcome or cope with crises, reducing bullying – hardly lend themselves to easy assessment.

## VII IMPOSITION OF A ‘RELIGIOUS TEST’ FOR A COMMONWEALTH ‘OFFICE’

Section 116 of the Constitution states that ‘no religious test shall be required as a qualification for any office or public trust under the Commonwealth’.<sup>64</sup>

The High Court of Australia in *Williams* rejected the argument, in rather summary fashion, that a school chaplain was an ‘office under the Commonwealth’ and that the definition and requirements for the appointment of such chaplains imposed a religious test for that office. There was, curiously, no reference to the two High Court decisions which considered the application of the religious test clause.<sup>65</sup>

For Gummow and Bell JJ, the term ‘office’ contemplated a ‘closer connection’ to the Government than the case at hand.<sup>66</sup> The Government does not directly contract with chaplains but with their umbrella body (‘funding recipient’), in the case of Queensland, the Scripture Union of Queensland. In their Honours’ view, the fact that the Federal Government funded the SUQ was insufficient to render a chaplain appointed by the SUQ an office holder under the Commonwealth. There was said to be nothing in the case law on the religious test clause in the US Constitution – clearly the

<sup>61</sup> Kaye, above n 4, at 28, 31 (italics added).

<sup>62</sup> NSCP Guidelines, above n 2, s 5.5.

<sup>63</sup> Ibid s 3.1.1 (‘What do school chaplains/student welfare workers do?’).

<sup>64</sup> See generally Mortensen, above n 4, 283–288. ‘The test clause’, he observed, ‘reinforces the central assumption of secular government that the citizen’s religion is not, *ipso facto*, an indication of disloyalty, divided loyalty or an inability to contribute to the common good.’

<sup>65</sup> As noted by Luke Beck, ‘*Williams v Commonwealth: School Chaplains and the Religious Test Clause of the Constitution*’ (2012) 38 *Monash University Law Review* 271, 276. The two cases are *Crittenden v Anderson* [1950] HCA 23 (23 August 1950); and *Church of Scientology Inc v Woodward* (1982) 154 CLR 25.

<sup>66</sup> *Williams v Commonwealth* [2012] HCA 23, [110].

model for the Australian provision – that contradicted the High Court’s conclusion.<sup>67</sup> Article 6 states: ‘no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.’

Heydon J spent longer on the ‘office’ argument but concurred with his colleagues:

An ‘office’ is a position under constituted authority to which duties are attached. That suggests that an ‘officer’ is a person who holds an office which is in *direct relationship* with the Commonwealth and to which qualifications may attach before particular appointments can be made or continued.<sup>68</sup>

Here, the Federal Government had *no* legal relationship with the chaplains, let alone a direct one. ‘It cannot appoint, select, approve or dismiss them. It cannot direct them. The services they provide in a particular school are determined by those who run that school. The provision of those services is overseen by school principals.’ Heydon J criticized the plaintiff’s construction of ‘office’ under s 116 as ‘unattractive’<sup>69</sup> in terms of its potentially wide sweep. It would mean that whenever the Federal Government entered into contracts pursuant to which services were to be furnished by persons with whom the Commonwealth had no legal relationship, that party would nonetheless still hold an ‘office’. That would ‘radically expand s 75(v)’<sup>70</sup> (which refers to ‘officer of the Commonwealth’).

This seems right. If, for example, a school contracted out cleaning services to a private firm, then, under the plaintiff’s construction, the janitors employed by that firm would be ‘officers’. Thousands of persons who work for organizations with whom the government has contracted to provide social services – faith-based providers such as Catholic Social Services or the Salvation Army come to mind – would suddenly be transformed into Government officers. That would surprise those workers. The wide interpretation seems unwieldy and impracticable. The plaintiff submitted that ‘if his proposed construction of s 116 were not adopted, the Commonwealth could evade s 116 by engaging subcontractors to perform its activities and stipulating that those subcontractors employ only adherents to a particular religious faith.’<sup>71</sup> That argument does not follow. If the Commonwealth could stipulate to the principal contractor (with whom it has a direct relationship) that subcontractors (with whom the Government has no relationship) be of a particular religion (or race, gender and so on) then the Commonwealth *would* have a measure of control and direction over their selection and dismissal. The relationship would no longer be remote but resemble the ‘closer connection’ that Gummow and Bell JJ considered marked officers.

Heydon J commented curtly that it was unnecessary to deal with the plaintiff’s ‘somewhat controversial’<sup>72</sup> submission that the eligibility criteria imposed a religious test. But he had in fact earlier in his opinion traversed the issue. The NSCP Guidelines stipulated that chaplains had to be recognised ‘through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service.’<sup>73</sup> But, he added, the Guidelines also provided that ‘In particular circumstances, *secular* pastoral care workers may be employed under this program.’<sup>74</sup> (These, as it transpired, have now been added to the Program.) The services to be delivered to the school and

<sup>67</sup> Ibid [110].

<sup>68</sup> Ibid [444] (*italics mine*).

<sup>69</sup> Ibid [446].

<sup>70</sup> Ibid.

<sup>71</sup> Ibid [443].

<sup>72</sup> Ibid [448].

<sup>73</sup> The revised NSCSWP Guidelines, above n 2, retain that identical wording: see s 2.1.

<sup>74</sup> *Williams v Commonwealth* [2012] HCA 23, [305] (*italics supplied*).

its community spoke of ‘general religious and personal advice’, ‘comfort and support’ to students and staff whilst respecting the religious beliefs and views of all those to whom they might render their services. In Heydon J’s view, the Guidelines:

conveyed the impression that, at least at this school, neither the NSCP nor the qualification for ‘chaplains’ had much to do with religion in any specific or sectarian sense. The work described could have been done by persons who met a religious test. It could equally have been done by persons who did not.<sup>75</sup>

The very label ‘chaplain’ was perhaps an unnecessarily misleading if not inflammatory one – as the present case demonstrated – and his Honour wryly offered some milder, less provocative and more apt job titles for a multicultural, post-Christian society such as Australia:

In ordinary speech a ‘chaplain’ is the priest, clergyman or minister of a chapel; or a clergyman who conducts religious services in the private chapel of an institution or household. Those who are ‘school chaplains’ under the NSCP’s auspices fall outside these definitions. Their duties in schools are unconnected with any chapel. They conduct no religious services. Perhaps those supporting validity committed an error in calling the NSCP a ‘chaplaincy program’ and speaking of ‘school chaplains’. The language is inaccurate and may have been counterproductive. Some vaguer expression, more pleasing to 21st century ears, like ‘mentor’ or ‘adviser’ or ‘comforter’ or ‘counselor’ or even ‘consultant’, might have had an emollient effect. The plaintiff must have found the words ‘chaplain’ and ‘chaplaincy’ useful for his contention that the NSCP was void under s 116.<sup>76</sup>

## VIII CONCLUDING THOUGHTS

When viewed in isolation, the principle of separation of church and state serves religious liberty best when it is used prudentially not categorically. Separationism needs to be retained. ... The principle of separation of church and state, however, also needs to be contained, and *not used as an anti-religious weapon in the culture wars* of the public square, public school, or public court. Separationism must *be viewed as a shield not a sword* in the great struggle to achieve religious liberty for all. A categorical insistence on the principle of separation of church and state avails us rather little. James Madison warned already in 1833 that ‘it may not be easy, in every possible case, to trace the line of separation between the rights of Religion and the Civil authority, with such distinctness, as to avoid collisions & doubts on unessential points.’ This caveat has become even more salient today.<sup>77</sup>

The line of separation between religious communities and civil government is one that will always be contestable. Justice Jackson was prescient in predicting in 1948 that it would be ‘as winding as the famous serpentine wall designed by Mr Jefferson for the University he founded.’<sup>78</sup>

Can one maintain the ideal of a ‘secular Commonwealth’ and still have taxpayer-funded school chaplaincy programmes? Secular Commonwealth describes

<sup>75</sup> Ibid [306].

<sup>76</sup> Ibid [307].

<sup>77</sup> John Witte Jr, ‘Facts and Fiction About the History of the Separation of Church and State’ (2006) 48 *Journal of Church and State* 15, 42, 43 (italics mine).

<sup>78</sup> *McCullum v Board of Education*, 333 US 203, 237-8. The university referred to is the University of Virginia and the author had the good fortune in 2013 to witness first-hand the sinusoidal red-brick walls that gird the Rotunda building.

‘government in which as nearly as practicable, religion is regarded as irrelevant to a citizen’s political, legal, social and economic status.’<sup>79</sup>

The answer, I suggest, is ‘yes’. The secular state can and does take many forms globally. Some secular states subscribe to ‘hostile’ or ‘hard’ secularism.<sup>80</sup> Here, religion is inexorably equated with irrationality, superstition and raw emotion and thus is to be excluded as far as possible from public spaces, programmes and institutions. ‘Programmatic secularism’, as the former Archbishop of Canterbury, Dr Rowan Williams, prefers to label it,

assumes ... that any religious or ideological system demanding a hearing in the public sphere *is aiming to seize control of the political realm and to override and nullify opposing convictions*. It finds views of the human good outside a minimal account of material security and relative social stability unsettling, and concludes that they need to be relegated to the purely private sphere. It *assumes that the public expression of specific conviction is automatically offensive to people of other (or no) conviction*. Thus public support or subsidy directed towards any particular group is a collusion with elements that *subvert the harmony of society as a whole*.<sup>81</sup>

But neither this kind of assertive *laicist* secular state nor this type of repressive secularism has found much favour in Australia. As Mortensen noted, ‘of the institutions of secular government only “the separation of church and state” has failed to receive some expression in Australia.’<sup>82</sup> Despite the attempts by earnest strict separationists (who advocate a high wall of separation), Australian political culture has accepted a more accommodating version of the secular state, one that instantiates a ‘benevolent’ or ‘open’ version of secularism. It is comfortable with what Rowan Williams calls ‘procedural secularism’.

Procedural secularism is the acceptance by state authority of a prior and irreducible other or others; it remains secular, because as soon as it systematically privileged one group it would ally its legitimacy with the sacred and so destroy its otherness; but it *can move into and out of alliance with the perspectives of faith*, depending on the varying and unpredictable outcomes of honest social argument, and *can collaborate without anxiety with communities of faith* in the provision, for example, of education or social regeneration.<sup>83</sup>

Political affirmation of secularism of this latter, benevolent sort is what enables Cardinal George Pell to write that he can ‘rejoice in the separation of church and state’<sup>84</sup> whilst nonetheless condemning the hard secularist no-aid stance of some opinion-makers in Australia. This type of ‘benign separation of church and state’<sup>85</sup> is, for Pell, laudable.

The indefatigable efforts of those such as Mr Ron Williams to belatedly introduce a strict form of American-style, no-aid separationism into Australia have consistently failed. They failed in the *DOGS* case and they failed again politically, if not necessarily

<sup>79</sup> Mortensen, above n 42, 452.

<sup>80</sup> On the definition and varieties of ‘secular state’ and ‘secularism’, see Rex Ahdar, ‘Is Secularism Neutral?’ (2013) 26 *Ratio Juris* 404.

<sup>81</sup> Rowan Williams, ‘Secularism, Faith and Freedom’, a lecture delivered at the Pontifical Academy of Social Sciences, Rome, 23 November 2006, (italics added); <<http://www.archbishopofcanterbury.org/articles.php/1175/rome-lecture-secularism-faith-and-freedom>>.

<sup>82</sup> Mortensen, above n 42, 452.

<sup>83</sup> Williams, above n 81, (italics added).

<sup>84</sup> Michael Casey (ed), *Cardinal George Pell: God and Caesar – Selected Essays on Religion, Politics & Society* (The Catholic University of America Press, 2007) 53.

<sup>85</sup> Ibid 50.

legally, in Canberra in the school chaplaincy case. (The ink in the High Court judgment was barely dry when the Federal Parliament passed a new statute authorising the funding of the national school chaplaincy program.)<sup>86</sup> In truth, the national school chaplaincy program was never, to invoke the language of the US Supreme Court,<sup>87</sup> ‘a real threat’ to religious freedom and a Secular Commonwealth, but was, at most, ‘a mere shadow’ upon those ideals. And shadows, as our parents taught us, cannot hurt us.<sup>88</sup>

A wall of separation requires the solid, sun-baked ground of scepticism and religious hostility beneath it. It simply cannot be built on the soft and malleable soil of religious tolerance. So long as Australians till the ground of religious tolerance, understanding, non-coercion and neutrality, the conditions will remain inhospitable for the wall.

---

<sup>86</sup> It passed the *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth) on 28 June, eight days after the High Court opinion was handed down. The Explanatory Memorandum to the Bill (section 1.5) states: ‘The Bill would, if enacted, provide a mechanism to enable the requisite parliamentary authority for the National School Chaplaincy and Student Welfare Program to be given.’

<[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4864\\_ems\\_e31d9d8d-2624-4546-8c42-397952c4c6a6%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4864_ems_e31d9d8d-2624-4546-8c42-397952c4c6a6%22)>

<sup>87</sup> In *Marsh v Chambers*, 463 US 783

<sup>88</sup> When I delivered this paper, a respondent at the Colloquium pointed out that shadows can indeed frighten children. Granted, but is it not the responsibility of wise parents to teach children that shadows cannot harm us?

