Australia and constitutional secularism in the 21st Century: The uses and abuses of Section 116 of the Australian Constitution

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While Australia is a secular democracy in the sense that there is no state religion, such as the Church of England in the United Kingdom, there remains significant debate about what the relationship between church and state in Australia is, and what it should be. Central to this discussion is the Australian Constitution, specifically Section 116 of this which deals with the Commonwealth and religion.

Section 116 of the Australian Constitution states that:

> "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

The language and the sentiment being expressed deliberately echoes the First Amendment to the United States Constitution, also known as the "establishment clause", which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". Some have argued that this demonstrates a clear desire for a separation of church and state in Australia; echoing the Founding Fathers of the United States who, despite their personal religious views, sought a secular society. It is instructive to note that Australian governments and courts do not talk of a "wall of separation" between church and state in the same way their equivalent American institutions do, despite the United States being a far more religious nation in general.

It has been argued that this prohibition of any religious tests for office was inserted into the Australian Constitution largely as a reaction to the document's preamble, which includes the words "humbly relying on the blessings of Almighty God", which gives the Constitution a religious flavour. However a possible explanation for Section 116 was as a reassurance that the recognition of "almighty God" in the preamble did not mean the ability of the commonwealth to legislate in such areas was being sought. Other sections of the Constitution identify a subject area about which the commonwealth can make law, while this section identifies a special area where it cannot. Most agree that this section was a political compromise born of pressures from competing religious and secular sectors of colonial society, and evidence of this "quick fix" is the fact that despite applying only to the Commonwealth, Section 116 is located in the part of the Constitution that deals with the states. Despite this, as Section 116 only applies to the Commonwealth, theoretically there is no constitutional barrier to one of the states enacting laws either restricting or establishing a religion. A final aspect of Section 116 that is particularly significant is that it seems to specifically grant a right to religious freedom in a document that is otherwise mostly unconcerned with rights.

While in many ways the Constitution remains an artefact of the times in which it was drafted, today Australia is progressively becoming an ever more secular nation. In the 1911 Census, only 10,000 respondents or 0.4% of the population stated they had no religion, in the 2011 Census this number was 4.8 million, or 22% of all Australians. It must be noted that before the 1971 Census, the first after the successful referendum of 1967 which mandated that Aboriginal and Torres Straight Islanders be included people in population counts, the religious beliefs of Aboriginals, like their very existence, were not recorded. Therefore Australia in 1911 was, in all likelihood, not as Christian as the official number suggests. The reporting of "no religion" on the Australian Census has increased by an average of 3.9% per decade, with a 6.8% increase between 2001 and 2011. A

Nielsen Poll of 1000 adults taken in December 2009 found that 84% of Australians agree that religion and politics should be kept separate. This general irreligiousness is also backed up by data on church attendance; despite Australia possessing more churches than schools (13,000 vs 9500), only around 8% of the population regularly attend religious services.

These community trends, however, are not reflected at the federal parliamentary level; a 2013 survey revealed that 80% of the 2010-13 members of parliament believed in a God. While historically discussion of MPs and senator's religious views had been almost taboo, the socially conservative Howard government opened up a new era where such things were now in the open. This may have been a result of the higher numbers of Catholics in government, and this era also coincided with the establishment of the openly Christian Family First party. Post-2013, the Abbott cabinet of 19 featured 8 Catholic members, double the percentage of Catholics in the Australian population, and Tony Abbott himself trained for the priesthood in the 1980s before entering politics.

Ever since the British House of Commons was established in the 16th Century, each sitting has been opened with a Christian prayer, a tradition adopted by former British colonies such as Canada, Australia and New Zealand which then carried over into the new Australian federal parliament. The first recorded discussion on the constitutionality of parliamentary prayer occurred during a Senate debate on 14 June 1901, however no action was taken and the tradition inherited from Britain continues to this day. As with many features of Australian politics up to and including the office of prime minister, there is no requirement for, or even mention of, parliamentary prayer in the Constitution; the only mandatory requirement of parliamentarians is found in Section 42:

> Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

From this it is evident that the only oath required is to the Constitution. Yet Order 38 of the House of Representatives Standing Orders states:

> On taking the Chair at the beginning of each sitting, the Speaker shall [after reading an Acknowledgement of Country] read the following prayers: Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon thisParliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia. Our Father, which art in Heaven: Hallowed be Thy Name. Thy Kingdom come. Thy will be done in earth, as it is in Heaven. Give us this day our daily bread. And forgive us our trespasses, as we forgive them that trespass against us. And lead us not into temptation; but deliver us from evil: For Thine is the kingdom, and the power, and the glory, for ever and ever. Amen.

Order 50 of the Senate Standing Orders similarly provides:

> The President, on taking the Chair each day, shall read the following prayer: Almighty God, we humbly beseech Thee to vouchsafe Thy special blessing upon this Parliament, and that Thou wouldst be pleased to direct and prosper the work of Thy servants to the advancement of Thy glory, and to the true welfare of the people of Australia. Our Father, which art in Heaven, Hallowed be Thy name. Thy kingdom come. Thy will be done in earth, as it is in Heaven. Give us this day our daily bread. And forgive us our trespasses, as we forgive them that trespass against us. And lead us not into temptation; but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever and ever. Amen.

These parliamentary standing orders require participation in an inherently religious practice that is plainly Christian, if not specifically Protestant, in character. A religious test therefore appears to exist in the requirement to recite the prayers. In October 2008, House Speaker Harry Jenkins suggested some re-phrasing of the prayers should be considered. This found support from the Australian Federation of Islamic Councils' president, Ikebal Patel, who agreed that Parliament should not be a “Christian club”, but was strongly opposed by the Liberal and National party leaders, Malcolm Turnbull and Warren Truss who insisted that the Lord's Prayer was “non-partisan

and a commitment to the common good of the people of Australia". As the Lord's Prayer does not mention Australia and is unquestionably Christian as it occurs only in the New Testament, this statement would appear to have no basis in historical or evidential reality. South Australian Legislative Council member Ian Hunter makes the point that in a representative democracy such as Australia, those elected are not sitting in parliament to represent their own beliefs but rather as representatives of their communities which are made up of individuals of many religions or none at all. This offers an explanation as to why many Christian MPs and Senators use arguments from tradition rather than from personal belief when defending parliamentary prayer.

Other than parliament, another sector of federal responsibility that constitutes the holding of an office under the Commonwealth, and is therefore subject to Section 116, is the Australian Defence Forces. According to Defence Regulations 2002, Chapter 11, a person cannot be appointed as a chaplain in the ADF unless "the person is a member of a church or faith group approved by the Religious Advisory Committee to the Services". This means, in practice, that a religious test is required for employment in what is unquestionably a commonwealth office. However I have found no legal challenges to the mandatory religious requirements for holding this public office.

A recent high profile test of Section 116 was in the High Court case *Williams v Commonwealth of Australia (2012)*. In this, the plaintiff, Roland Williams, was objecting to the Howard government's 2006 funding scheme known as the National School Chaplaincy Programme (NSCP) which provides Commonwealth support for school chaplains. As Mr Williams' children were being educated in Queensland, the chaplains came from Scripture Union Queensland, an explicitly evangelical Christian organisation. Mr Williams objected to this in his suit, arguing that the NSCP imposed a religious test for a government office in contrary to Section 116, as the chaplains were being paid for by the Australian public. The High Court rejected this charge, claiming that as the

chaplains were not contractual employees of the Commonwealth but rather worked for the state schools using federal government money. Therefore by focusing solely on what constitutes "holding an office under the Commonwealth", the funding was allowed to continue.

The *Williams* case was decided by the defendants' argument that under Section 61 of the Constitution, which details the limits of the power of the executive, the federal government was within its legal authority to enter such a funding arrangement. Section 61 states that:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Therefore even though no statute was enacted by the federal parliament for the creation, administration and funding of the NSCP, the Commonwealth successfully argued that it had the authority under Section 61 to conduct the programme. This finding echoes a previous High Court case that also challenged the Commonwealth on section 116 and was defeated, the Defence of Government Schools of *DOGS* case (1981). The plaintiffs in *DOGS* cited the similarity of Section 116 to the First Amendment to the United States Constitution, and the large body of American case law to argue that Australia should follow the United States Supreme Court in prohibiting the spending of public money on religious schools. The plaintiffs argued that Commonwealth funding for such schools was establishing a de-facto religion, however this Court ruled 5-1 that this was not the case, as Section 96 of the Constitution allows the federal government to allocate funding as it sees fit. Section 96 states:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

In the *DOGS* case only Justice Lionel Murphy agreed that state funding for religious institutions was a form of establishment forbidden by the Constitution. Murphy took a broad approach to the definition of "establishment", arguing that a more expansive definition was required in order to protect religious freedom in Australia. However in this case, and more generally since Federation, the High Court has tended to interpret Section 116 narrowly, as meaning only the establishment of a state religion by the Commonwealth, rather than more broadly in regards to the secular character and intent of the Constitution as it relates to the federal government. The other five justices took this more conservative position based on a historical British interpretation of establishment, and by this interpretation Section 116 functions only as a limit on government power, specifically the power to establish or promote a particular state church.

The High Court of Australia, possibly due to its historically conservative leanings, has been unwilling to rule against politically and culturally sensitive areas such as religious funding for schools, and consistently takes a narrow rather than broad interpretation of Section 116. This is borne out in quotes such as former Justice of the High Court, Sir Ninian Stephen, who said that Section 116 "*cannot readily be viewed as a 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*", while another former High Court Justice, Sir Ronald Wilson, argued that "*Section 116 is a denial of legislative power to the Commonwealth and no more ... The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state*".

The relationship between church and state has also been commented on by Australia's two most prominent Christian prime ministers of recent years. In a 2006 essay for *The Monthly* entitled "Faith in Politics", then Opposition Leader, Kevin Rudd offered his take on church-state relations. This

mostly consisted of a detailed discussion about one of his personal heroes, the German theologian Dietrich Bonhoeffer, as well as a very shallow account of contemporary Christianity and its role in the world, while avoiding any of the controversial areas discussed previously. Rudd concedes that scientific enquiry, secular humanism, modernism and post-modernism have all worked to push Christianity from the public area, but neglects to mention Christianity's role in its own demise, from its dogged adherence to childish stories of miracles to its backward moral prescriptions to the long history of abuses of power by its priesthood. Rudd insists that a Christian perspective "must nonetheless be argued", but does not comment on whether this is compatible with Australia and its Constitution or even desirable.

His successor in The Lodge, Tony Abbott, in his book *Battelines* mentions his own religious views several times, but never touches on any Constitutional issues, even though he has in the past described himself as a "constitutional conservative". Abbott criticised Rudd and his *Monthly* article for being, in Abbott's view, too left-wing in his interpretation of Christianity. Abbott states that he "never had the slightest intention of becoming a morals campaigner" while attempting to justify his Catholic-inspired opposition to the abortion drug RU486 when health minister in the Howard government, to highlight only one of the book's many contradictions. However it is perhaps unsurprising that neither leader addressed the overwhelmingly secular character of Australia and its constitution. Doing so would lead to difficult questions about how they choose to push their own personal religious views into the public sphere rather than represent their varied constituents, as Ian Hunter described above. It is also possible they avoid discussing the Constitution as they believe the public is not interested and/or they don't understand its role in Australian democracy.

While much could be said about the role of religion as a political wedge issue and the courting of the religious vote in elections, in relation to Section 116 of the Australian Constitution several very

solid points can be made. Australia in the 21st Century is a very irreligious country, and becoming more so by the year, yet we have a national parliament that is far more religious than the national average, and that legislates more according to the beliefs of its majority than the honest desires of the electors the MPs and Senators are in Canberra to represent. Thus, issues like parliamentary prayer and the restrictive regulations on what Australian Defence Force chaplains are allowed to believe in and practice go almost without public comment, and when they are raised the usual argument mounted in their defence is not the Constitution or the law, but rather tradition. While the debate over the role of faith in Australia will continue, the evidence of what modern Australia is actually like argues strongly for less government support for religion in our ostensibly secular democracy.

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