

## WHY THE PRIME MINISTER IS WRONG ABOUT THE SEPARATION OF CHURCH AND STATE IN AUSTRALIA

**Max Wallace**

On 28 February Democrats' Senator Allison moved a motion which had as its intention a legislative change towards Australia separating church and state. The Prime Minister responded on 2 March that

What the separation of church and state means in this country is that there is no established church .. we don't have the Anglican Church as the official state religion, that's what it means.

He continued that the Democrats motion was

... an absurd proposition which shows a total misunderstanding of the nature of the separation of church and state.

In defining separation of church and state in this way the Prime Minister was echoing the words of Edmund Barton, the man who was to become Australia's first Prime Minister. In the course of debates about Australian Federation Barton said in 1897:

The whole mode of government, the whole province of the state is secular. The whole business that is transacted by any community, however deeply Christian, unless it has an established church, unless religion is interwoven expressly and professedly in all its actions – is secular business as distinguished from religious business.

He went on to say

In these colonies where state aid to religion has long been abolished, the line of demarcation is most definitely observed.

The reference to the abolition of state aid to religious organisations in the nineteenth century is the way into explaining why the Prime Minister is wrong when in 2006 he repeats, in essence, what Barton said in 1897.

The reason is that the High Court in the 1981 Defence of Government Schools/State Aid case interpreted the religion s.116 of the Constitution to mean that far from preventing state aid to religious schools, s.116 should be read to mean that so long as aid was for educational and not religious purposes it was not unconstitutional. In coming to this conclusion the Court swept away the demarcation Barton articulated in 1897. It ignored the fact that religious schools were set up to *foster* religion.

What the four clauses of s.116 have in common is that they prevent the Commonwealth from doing things concerning religion. The Court told us what the Commonwealth *can't do* as opposed to what the Commonwealth can do in respect of religion.

The first, as the Prime Minister says, restricts the Commonwealth from 'establishing' a national religion, presumably by an act of Parliament.

The second restricts the Commonwealth from imposing religious observance on citizens.

The third prevents the Commonwealth from restricting the free exercise of a citizen's faith.

The fourth says there cannot be a religious test for public office in Australia. For example, one could not be denied a position in the public service because of one's faith.

In the course of their deliberations on these clauses in the DOGS/State Aid case two Justices made it plain that s.116 cannot be interpreted to mean separation of church and state.

Justice Wilson said:

The fact is s.116 is a denial of legislative power to the Commonwealth and no more ... the provision cannot answer the description of a law which guarantees within Australia the separation of church and state.

Justice Stephen said that s.116:

... cannot readily be viewed as the repository of some broad statement of the principle concerning the separation of church and state from which may be distilled the detailed consequences of such separation.

So here is an extremely significant constitutional issue – the court is interpreting s.116 to mean (1) there is *no* separation of church and state in Australia while simultaneously asserting (2) that the first clause of s.116 means that the state cannot 'establish' a state church.

To put this in plain English, if the Anglican Church was the 'official' religion of Australia, as it is in England, there could not be a separation of church and state in Australia. As Justice Wilson said:

Establishment involves the deliberate selection of one to be preferred from among others, resulting in a reciprocal relationship between church and state which confers rights and duties upon both parties ...

So, one could argue, as does the Prime Minister, that because there is no 'reciprocity' between the Anglican Church and the Commonwealth of Australia, that there is a separation between church and state. But this is to ignore the comments cited above by Justices Wilson and Stephen where they interpret s.116 as a brake on any Australian government separating church and state.

According to Justices Wilson and Stephen and Justices Barwick, Gibbs and Mason all s.116 does is prevent the Commonwealth from establishing a state church. S.116 does not – and this is where the Prime Minister is wrong – *simultaneously create*, either directly or indirectly, a *separation* of church and state.

The court did not say 'non-establishment' was equivalent to 'separation of church and state'. In fact, two Justices plainly said, as we have seen, that it did not. The DOGS plaintiffs asked the Court to determine that s.116 *meant* separation of church and state and the Court said it *did not*.

Professor Charlesworth says that in the view of the Court s.116 was ‘only a fetter on legislative power of obscure origin.’<sup>i</sup>

Also, it is ironic that a former senior member of the Queensland Liberal Party published statements in 2002 that contradict the Prime Minister’s view.

Graham Young, who described himself as the chief editor and publisher of *On Line Opinion* and a former Vice-President and Campaign Chairman of the Queensland Liberal Party, said on 15 January 2002:

The separation between Church and State is an American concept and refers to the establishment of any particular religion as the official religion. From at least the time Henry VIII proclaimed himself head of the Church of England there has been no such separation in the UK, and *as a consequence no such separation in Australia, which takes its form of government from Britain*. Queen Elizabeth is both Queen of Australia and Head of the Church of England, making a clergyman uniquely apt as her representative. (Emphasis added).

So while the Liberal Prime Minister in 2006 says that in Australia -

the separation of church and state means .. there is no established church ...

the former Vice-President and Campaign Chairman of the Queensland Liberal Party said in 2002 there is

no such separation in Australia ...

and that

... Australia takes its form of government from Britain.

Young misses the High Court’s very clear statements that there is no established church in Australia. Similar comments on this subject were made by Archbishop Hollingworth prior to this appointment as Governor-General. Writing in the Brisbane Anglican magazine *Focus* in June 2001 he said:

Those who have raised [the question of separation of church and state] have confused the Australian Constitution with the US Constitution. The only ‘separation’ that applies here in Australia is to do with those pertaining to the Executive, the Legislature and the Judiciary of the Commonwealth itself. There is not a clear cut separation between church and state as is the case in the US tradition.

If separation is not ‘clear cut’, then how can the PM claim that non-establishment of a state church is equivalent to separation in Australia? And what does he say to the Court’s finding, cited above, that s.116 does not mean separation of church and state? The Prime Minister should be aware of this. As Treasurer in 1981, he was one of the three Ministerial Respondents in the DOGS/State Aid case.

Archbishop Hollingworth’s comments were more accurate. Also, there is enough expert opinion to say that, contrary to the Prime Minister’s belief, the Court did not interpret s.116 to mean separation of church and state.<sup>ii</sup>

Also, when we turn to the State constitutions we see there is no mention of separation. Recently, this has allowed the Labor Government of South Australia to appoint the

Vicar-General of the Catholic Archdiocese of Adelaide to executive positions within the South Australian government.

Speaking at length in the Legislative Council to the Vicar-General's appointment, Liberal MLC, the Hon. Julian Stefani said on 1 June 2005:

Monsignor Cappo has compromised his position with the church because of divided loyalties between state and church. He cannot serve two masters.

He said:

The perception which the Vicar-General has created is not likely to be removed from the hearts and minds of thousands of Catholics who, like me, disapprove and, in the strongest terms, condemn the acceptance of [Monsignor Cappo's] three appointments, because we believe in the total independence and separation of powers and functions between the church and the state.

It follows that in his remarks about church-state separation, the Prime Minister was referring to Federal law only. What is clear is that at both the State and Federal levels the situation is a confused mess. The obvious way out of this mess, I suggest, is for Australia to have a Referendum that turns us into a Republic with a new law clearly separating church and state. The Referendum could include a clause that the new law separating church and state would also apply at a state level.

Of course, if you were a Constitutional Monarchist, you would deny there is a problem. That is what the Prime Minister has done. The reason he has done so, I suggest, is partly because as a Constitutional Monarchist, he has a Menzies-like sentimental attachment to the past. On 2 March he also said separation of church and state ...

Doesn't mean that we abandon our Judeo-Christian heritage, it doesn't mean we eliminate public ... references.

But what about the significant proportions of the population who are not Christian or have no belief? Surely multiculturalism, if it means anything, means that the government recognises a strict equality between all its citizens in its public references and its government. It's not a matter of forgetting our heritage. It is a question of recognising all of them without preference.

Australia is supposed to be governed by the rule of law. If separation is not spelt out clearly in constitutional terms, if there is doubt, then there is no constitutional separation at all. Where does that leave us?

While it appears the Anglican Church is one among many in Australia, our country of course is a Constitutional Monarchy. At the apex of our system of government sits the Queen of Australia represented here by her Governor-General. The Queen is also the head of the British Anglican Church.

While that does not mean that the Australian Anglican Church is the established church of Australia, the British Union Jack is in the corner of our flag with the crosses of three Christian saints: St George, St Andrew and St Patrick.

It is drawing a long bow, I suggest, to claim there is separation of church and state in Australia when the Anglican Christian tradition, as opposed to others (including non-belief) is so symbolically strong in our culture, and the law, as we have seen, is flawed.

I suggest separation of church and state is impossible within a Constitutional Monarchy. What the Prime Minister is unintentionally telling us that it is time he went and that it's time that a Republican Prime Minister took over and put an end to the image of Australia as an enclave of British privilege in the South Pacific. It is *he* that has a 'misunderstanding of the nature of separation of church and state.' The problem is, when you look at the candidates on both sides of politics who might move to separate church and state, it's hard to see who would do this. As the late Justice Lionel Murphy said of religion, 'if put to the test, all might fail.'

But there is an incentive. In a Newpoll carried out on 3-5 February 2006, when asked 'Do you think there is, or there is not, a law separating church and state in Australia?' 46 per cent said 'No'. 20 per cent said 'yes' and 34 per cent didn't know.

When told there is no law 'separating churches and religious groups and the governments of Australia, either Federal or State' and asked whether they would support a law to separate church and state - in round figures - 32 per cent strongly agreed, 16 per cent partly agreed, 18 per cent partly disagreed, 19 per cent strongly disagreed and 16 per cent said 'don't know.'

These figures, I suggest, reflect concern with the impact of religion on politics in Australia and a willingness to find a better *modus vivendi*.

In addition to the need for Australia to become a secular Republic with both eyes open, there is also the question of what the DOGS/State Aid case was about: money. Billions of taxpayers' dollars have flowed to religious schools after the DOGS/State Aid case. Since that time public education has been allowed to slowly wither on the vine. Suggestions are emerging now that public education be 'privatised'. If there are problems in public education, they are more due to lack of funding rather than just the nature of the curricula, teachers' skills and other issues. Why wouldn't public schools lack a culture of learning when the public's money has been given to private schools on a scale that was bound to lead to the long term denigration of public education? It is time to re-visit these questions and the first step is to clearly separate church and state in Australia.

Max Wallace is a Director of the Australian National Secular Association which is helping to organise a conference on separation of church and state at the University of Melbourne in June.

<sup>i</sup> Professor Hilary Charlesworth, *Writing in Rights*, UNSW Press, 2002, p.28.

<sup>ii</sup> Michael Hogan, 'Separation of church and state: s.116 of the Australian Constitution', *Australian Quarterly*, Vol.52, No.2, 1981; 'Separation of church and state?' *The Drawing Board: an Australian Review of Public Affairs*, 2000-2001, University of Sydney.

Professor George Williams, *Human Rights Under the Australian Constitution*, Oxford, 1999, p.111.