

# SECULARISATION AND THE CHURCH AND STATE RELATIONSHIP: A SOCIO-LEGAL EXPLORATION

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## ABSTRACT

Church and state relations continue to remain unclear in Australia. Throughout the eighteenth and early nineteenth century, sectarian rivalry emerged as many religious organisations began to challenge the factual and legal dominance of the Church of England in Australia. In order to appease these tensions, the government passed the 1836 *Church Act* which provided four Christian denominations with equal legal rights. In practice, the legal change did not minimise sectarian rivalry. Calls for an improved system of fairness were endemic as the Church of England continued to receive more privileges than all other Christian denominations and religious organisations. The dilemma now lay in the government's ability to reconcile the competing interests of *all* religious organisations, and those who had no religion at all. This paper focuses on the four main constitutional conventions on religion in the late nineteenth century, and examines the many motions that were put forward to improve and clarify the legal relationship between the church and state. It then examines how the community voted on these motions and endorsed a change that supported secularisation and religious plurality. It then discusses the implications of this change on the church and state relationship in the twenty-first century.

## 1 INTRODUCTION

It is widely accepted that church and state relations continue to remain unclear in Australia. Such a view is substantiated by research into church and state relations (Allison, 2006; Frame, 2006; Hogan, 2001; Irving, 2004; Wallace, 2003). Throughout Australian history, the church and state relationship has changed from European settlement to the twenty-first century.

In the eighteenth century, Governor Macquarie used the Church of England doctrine to establish authority, punishment and order (Hogan, 1987; Carey, 1996). He protected the privileged status of the church by monitoring church services conducted by the Reverend Samuel Marsden, who also served as the town Magistrate (Hogan, 1987). During this period, the church differentiated into a number of denominations including the Catholics, Methodists and Presbyterians. As the Church differentiated, different Christian denominations developed sectarian tensions, as they each sought to challenge the Church of England and each other for the most privileges from the state (Hogan, 1987).

Two major responses were made to deal with these rising tensions. First, by the mid-nineteenth century, the law became secularised, and the legal system differentiated from the Church so that it became religiously neutral and independent (Mason, 2006). Second, the Australian constitution legally differentiated the church, state and judiciary in 1901. This meant that the state no longer controlled a monopoly over religion, and that the church, state and judiciary became formally recognised as independent and specialised legal entities that were linked but not controlled by the other. As a result, the legal

relationship between the church and state changed from the early reliance on Church of England doctrine, to the Constitutional endorsement of state neutrality (Ely 1976; Hogan, 1987).

In this paper I will use the four main constitutional conventions on religion to examine the many motions that sought to change and improve the legal relationship between the church and state in the emerging Commonwealth. I will explore how different motions either supported or opposed the secularisation of the church from the state. I then discuss how the final outcome supported secularisation and provided a greater system of fairness for all through state neutrality. The change appeals to those who are religious and those who are not as it provides religious choice and inclusion. It also clarifies the legal relationship between the church and state in Australia.

## **2 DISCUSSION**

### **2.1 1891 CONSTITUTIONAL CONVENTION**

During the late nineteenth century, the churches argued for public recognition, whilst those outside the church sought protection from Christian self-interest (Frame, 2006). In 1891, Attorney-General Inglis Clark proposed a compromise solution at the first constitutional convention. Clark promoted secularisation by proposing a strict separation of the church from the state. He submitted the following two clauses:

46. The Federal Parliament shall not make any law for the establishment or support of any religion, or for the purposes of giving any preferential recognition to any religion, or for prohibiting the free exercise of any religion (Mc Leish, 1992:217)

81. No [State] shall make any law prohibiting the free exercise of religion (Mc Leish, 1992:217).

Clark contended that "Christianity has propagated itself with increasing volume from age to age by the contact of soul with soul, without depending on any special organisation" (Ely, 2001: 41). The motion sought to appeal to those who did not want an established church, and those who had no religion. Strict separation meant that the government could not force specific religious beliefs on the community, which would encourage the development of religious plurality. The convention held minimal if any debate on the practice of strict separation, and raised many unanswered questions (Ely, 1976; Mc Leish, 1992; Puls, 1998). For example, could the state still support religious organisations in some way? Would strict separation allow religion to maintain public significance, or would their influence be limited to the private realm?

Under this motion, and the motions that follow, the 'church' was primarily responsible for minimising the sectarian tensions they had created. However, if the 'church' was unable to resolve their issues internally, they could have recourse to the law. In so doing, they would be guided by the above motion, which was a proposed framework for the fair and equitable development of church and state relations in Australia. The convention only endorsed clause 81 as "the government was thought incapable of legislating about religion" (Mc Leish, 1992:217). Drafting did not resume until 1896 because of the internal politics of New South Wales, and the declining public interest in convention debates (Mc Leish, 1992; Ely, 1976).

### **2.2 1896 CONSTITUTIONAL CONVENTION**

This convention debated further motions on the role that religion should play in the emerging Commonwealth. The Protestants and Catholics proposed a motion for an established 'church' that was more inclusive of diverse Christian denominations (Ely 1976). The churches developed this motion together as their anxieties over public status continued to grow (Ely, 1976). The motion sought to address the internal division within the church, and to provide it with continued public significance through government

support (Ely, 1976). The following 'recognition' motion was proposed by Reverend Professor Gosman:

That this Convention of the people, acknowledging the existence of a wide-spread belief in the government of the world by Divine Providence, desires to commend the cause of Australian Federation to the wisdom and piety of the people; that the Supreme Rule may be invoked to further, if it pleases him, the Federal Movement, and so to guide and direct the course of events that Australian unity may rest upon an enlightened public opinion and on a solid foundation of righteousness, the only guarantee for the creation and continuance of national prosperity and peace (Ely, 1976:10).

The motion proposed a similar relationship to that which had existed in the late eighteenth century as religion could be imposed on the Australian people in an effort to minimise secularisation. In contrast to the earlier relationship, the motion did not appear to preference one Christian denomination, but Christianity in general as the ultimate source of Australian law. It is unclear what interpretation of Christianity would prevail, and how different Christian denominations would reach agreement on a common set of norms and expectations. In addition, the motion did not represent the diversity of religious organisations that existed, and those who had no religion at all. The motion was defeated as most people continued to support Clark's original proposal from the 1891 convention (Ely, 1976). On the last day of the convention the Reverend J. Field proposed a compromise solution between strict separation, and the return to an established 'church' model. His motion was as follows:

That this convention, acknowledging the Government of the World by Divine Providence, commends the cause of Federation to all who desire, not only the material, but also the moral and social advancement of the people of Australia (Ely, 1976:9).

This motion was passed as it contained a fundamental difference to the first recommendation that was put forward. Instead of 'invoking' God, it simply 'acknowledged' him (Ely, 1976). The difference was significant as it meant that religion could not be used as a vehicle to maintain political control. In the alternative, God was to be acknowledged in a community that provided religious choice, and a de-facto, but not controlling relationship between the church and the state. In supporting secularisation, the motion opened up the possibilities of exchange and dialogue between its citizens as equals under law. It also appealed to a diverse range of religious organisations and those who had no religion.

### **2.3 1897 CONSTITUTIONAL CONVENTION**

In 1897, further debates and motions were put forward in an attempt to clarify the church and state relationship, and to ensure the church maintained public significance. The Protestants and Catholics used this convention to submit two alternative proposals. On the 5<sup>th</sup> March 1897, Patrick Francis Moran, a Cardinal Archbishop of Sydney, proposed a motion that sought to extend the ambit of Clark's original motion (Ely, 1976). His proposal was as follows:

Religion is the basis of our Australian Constitution and of its laws; and in accordance with the spirit of religion, genuine liberty of conscience is the birthright of every Australian citizen, and full and free exercise of religious worship, so far as may be consistent with public order and public morality, shall be accorded to all (Ely, 1976:13).

Although Moran was a Catholic, he sought to promote a motion that would appeal to all Christians (Ely, 1976:14). The motion, like Gosman's before it, sought to secure a public role for religion in the Commonwealth (Ely, 1976). In contrast to previous motions, this motion extended the ambit of the free exercise provision, and sought to foster a greater acceptance of religious plurality (Ely, 1976). It also sought to ensure that the church was not secularised from the state. The motion was not supported by the Catholics, who sought to dissolve their former partnership with the Protestants, and to propose their own motion (Ely, 1976). In this way, the 'church' began to create more problems than it solved. In the quest to maintain its independence from the state, the 'church' became divided on the best way to achieve their vision. By mid-February, a United Protestant

Meeting was formed to defeat Moran's motion (Ely, 1976). The New South Wales Council of Churches; representing the protestant denominations and Church of England, sought community support for the following motions proposed on a petition:

1. That in the preamble of the constitution of the Australian Commonwealth it be recognised that God is the Supreme Ruler of the World, and the ultimate source of all law and authority in nations (Ely, 1976:21)
2. That there also be embodied in the said Constitution, or in the standing orders of the Federal Parliament, a provision that each daily session of the Upper and Lower Houses of the Federal Parliament be opened with a prayer by the President and Speaker, or by a chaplain (Ely, 1976: 21)
3. That the Governor General be empowered to appoint days of national thanksgiving and humiliation (Ely, 1976:21)

In a similar way to Moran, this petition sought to show that religion could not maintain a public role in Australian society unless secularisation was minimised. In contrast to Moran's motion, the Protestants believed that there needed to be a closer relationship between the church and state by imposing religion on the Australian people. As a result, the motion did not appeal to those who had no religion. It seems implied that the Protestants wanted the ultimate source of law to revolve around their own interpretations of the bible. As such, the motion did not readily address the tensions that were arising from the growth and demands of religious plurality. As the religious momentum began to increase, the Seventh Day Adventists launched a counter-campaign against the Council of Churches. In so doing they argued that:

Each has its particular sphere and...the realm of one is in no sense the realm of the other...[W]e are opposed to anything and everything tending towards a union of religion and the civil power (Mc Leish, year: 218).

This comment shows that other Christian denominations did not support the imposition of Protestant ideals in the law. By early September, Henry Bournes Higgins, a Victorian barrister, became the 'agent and ally' in the Adventists campaign (Ely, 1976). As a result, debate continued to strengthen between those who supported and opposed secularisation in the development of the church and state relationship. In seeking to respond to change, there remained minimal if any discussion on an objective criterion that could be developed to protect a diversity of religious interests. Despite the absence of any agreed structure, the churches' continued to remain concerned about their future public status. Rising public pressure enabled the recognition question to be re-considered in April 1897 (Ely, 1976). Motions to have God recognised in the preamble and constitution remained unsupported at this time (Mc Leish, 1992). This was due to the current mood of the convention which was summarised by Barton in the following way:

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 (Mc Leish, 1992:218).

Despite proposals to the contrary, there continued to remain strong support for a strict separation of church and state. Barton's comment raises important questions for consideration. For example, how was the secular going to accommodate religious freedom and expression? And what did this mean for the church and state relationship and the public significance of religion? Barton argued that strict separation would minimise sectarian rivalry as it would enable the government to not favor or discriminate against a particular religion (Mc Leish, 1992). In the continuing climate of uncertainty, debate and tension continued to deepen. Many delegates would not support legislation that did not contain reference to God.

## **2.4 1898 CONSTITUTIONAL CONVENTION**

This convention led to the final acceptance of a motion that enshrined the separation of church and state. The motion was ultimately adopted in the Australian Constitution, and has influenced the development of the church and state relationship in the twentieth and

twenty-first century. Under the proposed change, secularisation was embraced as the church was no longer under the monopoly of the state. In the alternative, the church and state became legally differentiated, yet maintained a *de facto* relationship through the practice of state neutrality. This solution minimised sectarian rivalry and appealed to all religious organisations, and those who had no religion at all. The implications of this change and the steps that led to this outcome will now be discussed.

During the 1898 convention, Higgins could see that popular support was mounting for God to be recognised in the preamble (Ely, 1976). As such, Higgins proposed a compromise motion that would also represent the interests of non-religious delegates (Ely, 1976). In so doing, he supported secularisation by proposing a motion that endorsed recognition with a proper safeguard to ensure that reference to God would not be recognised as *de facto* authorisation for Christianity (Ely, 1976). The motion was initially rejected as the majority of delegates could not see the danger in supporting legislation without a safeguard (Ely, 1976).

On the 2<sup>nd</sup> March 1898, Patrick Glynn successfully passed a motion that supported the recognition of God in the preamble (Ely, 1976). The motion read as follows: "humbly relying on the blessing of Almighty God" (Ely, 1976:70). For many, this attempt was 'unsectarian and simple' and appealed to "thousands to whom the rest of its provisions may forever be a closed book" (Ely, 1976:70). After the motion was passed, Higgins continued to argue for a safeguard to be inserted so that one religious organisation could not receive more privileges than another (Ely, 1976). This would encourage the development of religious plurality and equality under the law. It would also help to prevent any future attempts to develop an established church (Frame, 2006). Higgins proposed the following safeguard motion:

The commonwealth shall not make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or for imposing any religious observance, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth (Mc Leish, 1992: 88).

This motion was accepted as it appealed to non-religious delegates and those whose religion was marginalised (Mc Leish, 1992:221). It now comprises section 116 of the Australian Constitution. It has been contended that:

The impulse animating section 116 is the preservation of neutrality in the federal government's relations with religion so that full membership of a pluralistic community is not dependant on religious positions and divisions are not created along religious lines (Mc Leish, 1992:208).

As religious organisations became differentiated and secularised from the state, their relationship to the state was changed in three fundamental ways. First, the state no longer maintained a monopoly over religion. As a result, individuals were now able to choose whether they would follow a particular religion. Second, religious plurality was able to be developed and maintained. Third, all religious organisations would receive equal rights under the law. In addition, religion could maintain public significance as it would be supported but not controlled by the state. This outcome supports Bouma's (2006) observation that "secular societies are not irreligious, antireligious or lacking in spirituality" (Bouma, 2006:5). In the alternative, the 'secular' allows religion to maintain a public and private role whilst encouraging inclusion, accommodation and choice. The terms of federation were embodied in the *Commonwealth of Australia Constitution Act of 1900* (Joseph & Castan, 2001). The legislation was a British act that came into force in Australia on the 1<sup>st</sup> January 1901 (Joseph & Castan, 2001).

### 3 CONCLUSION

This paper has sought to show how the legal relationship between the church and state was changed, improved and clarified in the late nineteenth century through the adoption

of section 116. This legislative provision is based on the principle of state neutrality which means that a government cannot favour or discriminate against any religion. The debates show that whilst some religious organisations and individuals were happy to support secularisation others were not as they thought it would minimise the public significance of the church. In the end, secularisation was supported as it provided a greater system of fairness for all by promoting religious plurality, freedom and choice. It also allows the church to maintain a public and private role in Australian society. Unless another constitutional change occurs, section 116 will continue to guide all Australian legal decisions in the future.

## 4 ACKNOWLEDGMENTS

I acknowledge with gratitude my supervisor Prof. Gary Bouma, for his guidance and comments on drafts of this paper.

## 5 REFERENCES

- Allison, L. (2006) 'Does God have a place in Government?' Presented at the Separating Church and State Conference, Melbourne 17th June.
- Bouma, G. (2006) *Australian soul: religion and spirituality in the twenty-first century*, Melbourne: Cambridge University Press.
- Carey, H. (1996) *Believing in Australia: A Cultural history of religions*, New South Wales: Allen & Unwin.
- Ely, R.G. (2001) 'Andrew Inglis Clark on the Preamble of the Australian Constitution', *The Australian Law Journal*, 75, 1: 36-43.
- (1976) *Unto God and Caesar: Religious issues in the emerging Commonwealth 1891-1906*, Melbourne: Melbourne University Press.
- Frame, T. (2006) *Church and State: Australia's imaginary wall*, New South Wales: Hyde Park Press.
- Hogan, M. (2001) 'Separation of church and state?', [www.australianreview.net/digest/2001/05/Hogan.html](http://www.australianreview.net/digest/2001/05/Hogan.html). Accessed on 2nd November, 2006.
- (1987) *The Sectarian Strand: Religion in Australian Society*, Victoria: Penguin Books.
- Irving, H. (2004) 'Australia's foundations were definitely and deliberately not Christian', [www.onlineopinion.com.au/view.asp?article=2272](http://www.onlineopinion.com.au/view.asp?article=2272) Accessed, 28th October, 2006.
- Joseph, S. & Castan, M. (2001) *Federal Constitutional Law: A Contemporary View*, Sydney: Lawbook Co.
- Mason, K. (2006) 'Law and Religion in Australia'. Presented at the National Forum on Christian Heritage, Canberra, 7th August 2006.
- Mc Leish, S. (1992) 'Making sense of religion and the constitution: A fresh start for section 116', *Monash University Law Review*, 18, 2:207-236.
- Puls, J. (1998) 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees', *Federal Law Review*, 26,1:139-163.

Wallace, M. (2003) 'Is there a separation of church and state in Australia?', [www.abc.net.au/rn/talks/perspective/stories/s990773.htm](http://www.abc.net.au/rn/talks/perspective/stories/s990773.htm). Accessed 20th February, 2007.