# WA Society of Jewish Jurists and Lawyers Inc

# Religion and the Constitution

Chief Justice Robert French AC

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## The origins of the religion clause — section 116

Australia does not have a Bill of rights of the kind found in many Constitutions around the world. Nevertheless there are some important provisions protective of rights and freedoms. One of those is s 116 which is expressed as a limit on the law-making power of the Commonwealth Parliament. It provides:

> 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.

That prohibition does not apply to the States. A State law purporting to establish a religion or prohibiting its free exercise would not contravene s 116. Further, s 116 does not create a justiciable individual right to the free exercise of religion. However, an individual, the subject of a law prohibiting the free exercise of his or her religion, could challenge the validity of that law in proceedings arising under it.

Section 116 was inspired by the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

There are two elements to the First Amendment relevant to religion. The first is the establishment clause. The second is the free exercise clause. Both are reflected in s 116.

The drafting of the Commonwealth Constitution took place at Conventions of representatives of the Australian colonies who met for that purpose in the 1890s. One of the leading participants was the Attorney-General for Tasmania, Andrew Inglis Clark. In 1891, he prepared a preliminary draft of an Australian Constitution which drew extensively from that of the United States and formed the basis for much of what was to appear in the Constitution as finally adopted. He proposed four rights guarantees inspired by the US Constitution. They were:

1. The right to trial by jury.

2. The right to the privileges and immunities of State citizenship.

3. The right to equal protection under the law.

4. The right to freedom and non-establishment of religion.

He later tried to introduce an additional guarantee of due process of law. There was opposition to his guarantees at the 1898 Convention, especially those relating to equal protection and due process. Opponents were concerned about their effects upon the legislative powers of the States. Similar concerns defeated a suggestion that the States should be subject to the same constitutional limit as the Commonwealth in relation to laws establishing religion or prohibiting the free exercise of a religion.

In the end, limited rights provisions were adopted based on Clark's proposals. One of them was s 116. Two other survivors from his original proposal were s 80, providing for trial by jury of offences against Commonwealth law tried on indictment, and s 117, protecting the residents of one State from discrimination by another State on the basis of residence. The latter is a diminished version of the equal protection guarantee which he had proposed.

Clark's first draft Constitution contained two fairly wide-ranging clauses relating to the non-establishment and free exercise of religion.[1] One of them, cl 46, proposed a limit on Commonwealth power. It provided:

> The Federal parliament shall not make any Law for the establishment or support of any religion, or for the purpose of giving any preferential recognition to any religion, or for prohibiting the free exercise of any religion.

The other, cl 81, was directed to the States (referred to in the draft as Provinces):

> No Province shall make any law prohibiting the free exercise of any religion.

The latter clause survived the drafting process up to the end of the 1891 Convention with the word 'State' substituted for the word 'Province'.

When the Constitution-making process was revived in 1897 after an interregnum, the first draft Constitution which was considered contained only the restriction on States making laws prohibiting the free exercise of any religion. The absence of any corresponding limitation on Commonwealth power is probably explained by the view that there was no head of power proposed which would have allowed the Commonwealth to make laws relating to religion and therefore no need for a provision denying power to do so. The prohibition applicable to the States remained in successive drafts until the 1898 Conventions when it had become cl 109. However, in March 1898 cl 109 was dropped and a new cl 109A, the precursor of s 116, was inserted. That clause continued in more or less the same form up to the enactment of the *Commonwealth of Australia Constitution Act* by the British Parliament in 1900.

It is interesting to look back at the Convention Debates and to read what some of the delegates had to say about the non-establishment and free exercise elements of the clause.

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[1] J M Williams, *The Australian Constitution — A Documentary History* (Melbourne University Press, 2005) 86, 90.

The views of at least some of them seem to have been framed by a worldly and inclusive approach to religious diversity. In March 1891 one of the delegates, Sir George Grey, said:

> In my youth it was said that men of different religious faiths could not sit in the same legislature together, and they were excluded — Jews, Catholics, Nonconformists — nobody it was thought but members of the Church of England could form a legislative body that was of any use at all.[2]

In words that would seem blindingly obvious to us today, he said:

> But it was found that that was a great mistake; that men of different religious faiths could sit side by side in the same legislature; that talent and ability can be drawn forth from any religious opinions whatever.[3]

He thought that that principle should be established for the Federation. Although he did not explain precisely how he thought it should be established, his sentiments were consistent with the proposition later reflected in s 116 that there should be no religious test required as a qualification for any office under the Commonwealth.

There was some concern expressed about the ability of the States to control or restrict bizarre or extreme religious practices. A Tasmanian delegate, Sir Edward Braddon, wanted to ensure that the States should not be prevented from prohibiting:

> the performance of any such religious rites as are of a cruel or demoralizing character or contrary to the law of the Commonwealth.[4]

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2 *Official Record of the National Australian Convention Debates*, Sydney, 2 March 1891, 140.

3 Ibid.

4 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 657.

He seemed to have in mind the sect known as Thuggees and religious rites known as 'suttee', a species of ritual murder, and 'churruck' which he identified as 'barbarous cruelty, to the devotees who offer themselves for the sacrifice'.[5]

Henry Bourne Higgins, later to become a Justice of the High Court, wanted to extend the proposed limitation on law-making power with respect to religion to the Commonwealth. He proposed initially that the clause be amended to read:

> A state shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance.[6]

Later he also proposed the reintroduction of a prohibition upon both States and Commonwealth making laws for the establishment of any religion or imposing any religious observance.[7]

Another prominent delegate, Joshua Symon, made the interesting point that if there were to be a prohibition against the State or Commonwealth enacting a law interfering with the free exercise of religion, it might be implied that laws could be enacted interfering with persons of no religion. Among these he classified Agnostics, Atheists and Deists. One delegate, Mr Gordon, interjected that Deists had a religion. Mr Symon said some people would not agree. Mr Gordon said that Jews were Deists. Mr Symon ducked the question, pleading that he was 'not skilled in the refinements of theology'. Perhaps anticipating further definitional difficulties, he asked the leader of the Convention whether it was necessary to have the clause in the Bill at all.[8] Dr Cockburn thought the whole clause was an anachronism, and applied to a state of things that could never occur. He pointed to the particular political context in which the framers of the American Constitution introduced their free exercise and establishment clauses in the First Amendment. He also had a rather dark view of religious extremism. He observed there was no atrocity which the human mind could devise which had not at some time or another been perpetrated under the name of religion and

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5 Ibid.
6 Ibid 658.
7 Ibid.
8 Ibid 659.

that the States should have the power to prevent such occurrences as the rites of the Thuggees. The concern about Thuggees, coming out of Tasmania and South Australia, is intriguing. There was no suggestion that there was any group carrying on such practices in either Colony. Dr Cockburn thought the proposed clause should be struck out and the States should be allowed to retain the right to do what they thought was necessary to preserve and maintain their civilisation. Among those things were laws against Sunday trading.[9]

In the event, the reference to State legislative power was dropped and a clause closer in language to the present s 116 was adopted by the Melbourne session of the Convention in 1898 on the motion of Henry Higgins. One of his arguments, perhaps foreshadowing constitutional amendment debates in the second half of the 20th century, relied upon the reference to Almighty God in the Preamble of the Constitution, which recites that the people of the Commonwealth humbly rely upon 'the blessing of Almighty God'. He was worried that the inclusion of the reference to God in the Preamble might support an implication that the Commonwealth Parliament had some power with respect to religion.[10] The proposed clause would clearly deny that power to the Commonwealth.

It is an oddity of s 116, which imposes a limit upon Commonwealth legislative power, that it appears in Ch V of the Constitution, entitled 'The States'. That placement reflects the fact that for most of its drafting history it was a clause imposing a prohibition on the States rather than on the Commonwealth. The absence of any limit on the power of the States to make laws establishing a religion or affecting the free exercise of religion was the subject of comment by John Quick and Robert Garran in their *Annotated Constitution* published in 1901:

> Whilst the Constitution forbids the Federal Parliament to interfere with the free exercise of religion, it does not make any provision for protecting the citizens of the States in their religious worship or religious liberties; this is left entirely to the State Constitutions and laws, and there is no inhibition in regard to the subject imposed upon the States.[11]

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9 Ibid 660.

10 Ibid 662–664.

11 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (The Australian Book Company, 1901) 953.

That having been said, there are today a number of States, including Western Australia, which for many years have had in place legislation which prohibits discrimination on religious grounds.[12] There is no equivalent Commonwealth law prohibiting discrimination on religious grounds. The *Equal Opportunity Act 1984* (WA) renders unlawful various forms of discrimination based on religious conviction. It covers workplace and employment discrimination and discrimination in other areas, including education, provision of goods, services and facilities, accommodation and clubs. There are exceptions covering cases in which the employer is a religious body[13] and the duties of the employment or work involve participation in religious observance or practices.

State anti-discrimination laws are not constitutionally protected against alteration. Although the Commonwealth Parliament has passed laws, based principally on the external affairs power against race, sex, disability and age discrimination, there is no general Commonwealth law prohibiting discrimination on the grounds of religious belief or otherwise protecting rights to religious practice. Such a law, if enacted, would no doubt have to rely upon a relevant international convention and the external affairs power. Such a law, if enacted, would constitutionalise protection against discrimination on religious grounds to the extent that, by operation of s 109 of the Constitution, any State law inconsistent with the Commonwealth law would be invalid to the extent of the inconsistency.

## The meaning of religion

An important threshold question to be asked about s 116 is what is meant by the word 'religion'? It does not seem, in the Convention Debates, to have been linked to established denominations or even to the Christian churches. The term is used today in a variety of ways and at different levels of generality and specificity. Frequently it describes a body of beliefs and practices held and conducted within a particular organisational structure. It may be used in a more general sense in the language of the philosophers of religion. So Paul Tillich wrote of 'religion' in the largest and most basic sense of the word as 'ultimate concern'.[14] Martin

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12 *Equal Opportunity Act 1984* (WA) pt IV ss 53–65; *Anti-Discrimination Act 1977* (NSW) ss 4 and 7 as 'race' includes 'ethno-religious origin'; *Equal Opportunity Act 1991* (Vic) s 6(J) as repealed by the *Equal Opportunity Act 2010* (Vic) s 6(n); *Racial and Religious Tolerance Act 2001* (Vic) s 8; *Anti-Discrimination Act 1991* (Qld) pt IV s 124A; *Anti-Discrimination Act 1998* (Tas) s 16(o); *Equal Opportunity Act 1984* (SA) s 85T(1)(f) though only in relation to religious 'appearance or dress'; *Discrimination Act 1991* (ACT) s 7(i); *Anti-Discrimination Act 1996* (NT) s 19(1)(m).

13 *Equal Opportunity Act 1984* (WA) s 66.

14 Paul Tillich, *Theology of Culture* (Oxford University Press, 1959) 7–8.

Buber spoke of an 'I-Thou' relationship between persons in which God is the eternal Thou.[15] That was not a description rooted in any particular institutional framework.

The difficulties of formulating legal criteria for the characterisation of a body of beliefs, observances and practices as a religion were highlighted in the decision of the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic).*[16] Prior to that decision there had been little judicial consideration of the concept of religion under the Australian Constitution. The question in the case was whether the Church of the New Faith, established by the Scientology Movement, was a religious institution for the purposes of exemption from Victorian payroll tax. The question was one of statutory interpretation. Nevertheless, the approach taken by the Court was at a level of generality which made it relevant to the constitutional question: What is a religion for the purposes of s 116? The Court held that the beliefs, practices and observances of the 'Church' were a religion in Victoria.

The task facing the Court was a challenging one. As Latham CJ had observed in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*:

> It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world.[17]

The criteria necessarily had to be wide. Mason ACJ and Brennan J observed that the guarantees provided by s 116 of the Constitution would lose their character as a bastion of freedom if religion were defined so as to exclude from its ambit minority religions outside the main streams of religious thought.[18] Importantly, what was protected were not the tenets of each religion, for no such protection could be given by the law, but rather as their Honours said:

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15 See Martin Buber, *I and Thou* (Ronald Gregor Smith, trans, T & T Clark, 1937) [trans of *Ilch and Du* (first published 1923]).

16 (1983) 154 CLR 120.

17 (1943) 67 CLR 116, 123.

18 (1983) 154 CLR 120, 131–132.

> Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted.[19]

On the other hand, the law could not operate on the basis of a definition of religion which included the beliefs, practices and observances of any group who simply asserted that their beliefs, practices and observances were religious. A more objective criterion was required. The criterion was to be found in indicia exhibited by acknowledged religions so that any set of beliefs, practices and observances accepted by a group of adherents and exhibiting that criterion would be held to be religion.

After an extended consideration of the range of religious beliefs, Mason ACJ and Brennan J proposed a two-fold criterion:

- Belief in a supernatural Being, Thing or Principle; and
- The acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[20]

The latter limitation would, no doubt, have gone some way to assuaging the concerns of 19th century Tasmanians and South Australians about murders and barbarous rites perpetrated in the name of religion.

The criterion was not limited to theistic religions. To do so would have excluded Buddhism and, perhaps, other acknowledged religion. Their Honours said:

> We would hold the test of religious belief to be satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described.[21]

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[19] Ibid 132.
[20] Ibid 136.

The joint judgment of Wilson and Deane JJ also demonstrated the difficulty of formulating a workable legal criterion for determining whether a set of beliefs, practices and observances is a religion. Their Honours identified the following indicia:

- The particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses.
- The ideas of the religion relate to man's nature and place in the universe and his relation to things supernatural.
- The ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance.
- However loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups.
- The adherents themselves see the collection of ideas and/or practices as constituting a religion.[22]

Those indicia were described as 'aids' in determining the question whether a particular collection of ideas and/or practices should be objectively characterised as a religion. All however were satisfied by most or all leading religions. Ultimately, the question would be a matter of judgment on the basis of what the evidence established about the claimed religion. The approach thus suggested involved a kind of multifactorial assessment. It is significant that the case was not a case about s 116. There have been only a handful of decisions of the High Court involving s 116. Nevertheless, those decisions do touch upon different aspects of the section.

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21 Ibid 140
22 Ibid 174.

## Seven cases about section 116

An early and important point about s 116 was made by the High Court in its first decision on the provision in *Krygger v Williams*.[23] Mr Krygger, who was charged with failing to render personal military service as required by the *Defence Act 1903* (Cth), objected that it was against his religious beliefs to do so. He equated military training with gambling. He said:

> To me it is much a sin in the sight of God as gambling, racing or any other sin; no matter what it might be God makes no allowance for sin. If I went to military training I would be prohibited from the free exercise of my religion.[24]

Despite this, he was convicted by a magistrate and ordered to be committed to confinement in the custody of a Sergeant Major for a period of 64 hours. He appealed to the High Court. He received short shrift. Sir Samuel Griffiths said:

> To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.[25]

Justice Barton was quite dismissive. He said:

> the *Defence Act* is not a law prohibiting the free exercise of the appellant's religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill. I think this objection is as thin as anything of the kind that has come before us.[26]

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23 (1912) 15 CLR 366.
24 Ibid 367–368.
25 Ibid 369.
26 Ibid 372–373.

Compulsory voting was the next cab off the rank in *Judd v McKeon*,[27] a case in which s 116 was mentioned by way of observation only in a dissenting judgment. The appellant, who had been charged with failing to vote at an election for the Senate, did not take a religious objection. He simply argued that all candidates at the election supported capitalism and that the Socialist Labor Party of which he was a member, worked for the ending of capitalism and the inauguration of socialism, and consequently its members were prohibited from voting for any of the candidates. His appeal was dismissed but Justice Higgins who dissented made the observation that:

> I might add that, in my opinion, if abstention from voting were part of the elector's religious duty, as it appeared to the mind of the elector, this would be a valid and sufficient reason for his failure to vote (sec 116 of the Constitution). But no ground based on religious duty has been taken by this elector.[28]

His Honour would have taken a broad view of a 'valid and sufficient reason' for not voting. However his colleagues did not agree.

As a young barrister I had occasion to defend a member of the Jehovah's Witnesses in a prosecution for failing to vote in a State election in Western Australia.[29] There was no religious exemption available under the State electoral legislation as it then stood**;** only a 'valid and sufficient reason' exemption. The goal was to persuade the court that the exemption covered objections to voting based on sincerely held religious beliefs. I did not succeed in that goal, but the State Electoral Act was subsequently amended to include a religious exemption.[30] As the case was one involving State law, s 116 of the Constitution

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27 (1926) 38 CLR 380.

28 Ibid 387.

29 *Blakeney v Coates* (unreported, Supreme Court of Western Australia, 22 September 1982)

30 *Electoral Act 1907* (WA) s 156(16). This section, in the relevant part, reads:

> Every elector who —
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> (a) fails to vote at an election without a valid and sufficient reason for such failure (in this section the words valid and sufficient reason shall include an honest belief on the part of an elector that abstention from voting is part of his religious duty);
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> ...
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> shall be guilty of an offence.

The words in parenthesis were inserted by the *Electoral Amendment Act (No 2) 1982* (WA) (Act No 123 of 1982).

was not engaged. In any event, *Krygger* would not have provided much encouragement for such a course.

In 1943, the High Court decided the leading case of *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*.[31] The Court held that s 116 of the Constitution did not prevent the Commonwealth Parliament from making laws which prohibited the advocacy of doctrines or principles prejudicial to the prosecution of a war in which the Commonwealth is engaged even though those doctrines or principles were advanced in pursuance of religious convictions. As recited in the case stated for the Full Court, their beliefs led Jehovah's Witnesses to proclaim and teach publicly that the British Empire and other organised political bodies were organs of Satan, unrighteous, governed and identifiable with the Beast in the thirteenth chapter of the Book of Revelation. Their teachings were that Jehovah's Witnesses have no part in the political affairs of the world and must not interfere in the least manner with wars between nations. They refused to take an oath of allegiance to the King or other constituted authority. The National Security (Subversive Associations) Regulations declared a number of bodies, including the Adelaide Company of Jehovah's Witnesses Inc, to be prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. Pursuant to those Regulations, the Attorney-General directed an officer of the Commonwealth to take possession of, control and occupy premises of the Jehovah's Witnesses. They in turn sought an injunction in the High Court to restrain the Commonwealth and its servants on the basis that they were trespassing on their premises. One of the regulations was held by majority to be beyond the defence power and others to be beyond the regulation-making power conferred by the *National Security Act 1939* (Cth). However, the constitutional challenge based on s 116 did not succeed.

What emerged from the various judgments of the Court was the familiar proposition that freedoms guaranteed by law are not absolute, but are freedoms in a society organised under the Constitution.[32] Williams J encapsulated the position of the Court when he said:

> ... the meaning and scope of s 116 must be determined, not as an isolated enactment, but as one of a number of sections intended to provide in their inter-relation a practical instrument of government, within the framework of which laws can be passed for

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31 (1943) 67 CLR 116.

32 Ibid 131 (Latham CJ), 155 (Starke J), 159 (Williams J).

> organizing the citizens of the Commonwealth in national affairs into a civilized community, not only enjoying religious tolerance, but also possessing adequate laws relating to those subjects upon which the Constitution recognizes that the Commonwealth Parliament should be empowered to legislate in order to regulate its internal and external affairs.[33]

The establishment limb of s 116 was tested in *Attorney-General (Vic) v Commonwealth*.[34] Under challenge in that case were Acts of the Commonwealth Parliament appropriating money for the implementation of legislation making grants to the States under s 96 of the Constitution for payments to non-government schools to finance their educational programs. Some of the intended recipients were schools owned and run by religious bodies, largely by the Roman Catholic Church and its agencies. In summary, the Court held by a six to one majority, with Justice Murphy dissenting, that a law would offend against the establishment limb of s 116 if it had the effect or purpose of constituting or recognising a particular religion, including a branch of a religion or a church as a national institution. A law providing for financial aid to the educational activities of church schools was not a law for establishing a religion even though it might indirectly assist in the practice of that religion. The decision focused on the concept of 'establishment' of a religion. It took a narrow and historically oriented view.

Barwick CJ referred to the concept of establishing a religion as it was understood at the end of the 19th century. His Honour said:

> In my opinion, as used in an instrument brought into existence at the turn of the century, establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion.[35]

That view was informed by the position of the Anglican Church in England. Gibbs J took a similar fairly narrow view of the concept of establishment. He said:

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33 Ibid 159.
34 (1981) 146 CLR 559.
35 Ibid 582.

> The natural meaning of the phrase 'establish any religion' is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church.[36]

His Honour thought that on ordinary principles of construction that was the meaning that ought to be given to the words of s 116 unless sufficient reason was shown for adopting another meaning.[37] Stephen J, in similar vein, linked the concept of establishment in s 116 to the establishment clause in the First Amendment in the United States Constitution and observed:

> even if the framers of our Constitution had seen fit to adopt verbatim the terms of the First Amendment, they would have been doing no more than writing into our Constitution what was then believed to be a prohibition against two things, the setting up of a national church and the favoring of one church over another. They would not have been denying power to grant non-discriminatory financial aid to churches or church schools.[38]

Mason J described establishment as meaning '... the authoritative establishment or recognition by the State of a religion or a church as a national institution'.[39] Wilson J similarly inferred a legislative intention to adopt a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution.[40] What these judgments reflected was a fairly tight historically-based view of establishment which did not cover merely preferential treatment of particular religions.

The question of Commonwealth funding for the provision of chaplaincy services in schools was raised in *Williams v Commonwealth*.[41] The s 116 argument in that case concerned the public office limb. The plaintiff contended that the funding of school chaplains by the Commonwealth involved the imposition of a religious qualification for a public office. The funds in question, however, were provided to the Scripture Union for the provision of chaplaincy services in State schools. They were not related to any qualification

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36 Ibid 597.
37 Ibid 598.
38 Ibid 610.
39 Ibid 616.
40 Ibid 653.
41 (2012) 86 ALJR 713.

for public office in the Commonwealth. That argument in the *Williams' case* was unsuccessful and disposed of shortly.

The free exercise limb of s 116 was invoked in *Kruger v Commonwealth*[42] in proceedings brought by Aboriginal persons who said that they had been removed and detained and kept away from their mothers and families pursuant to ss 6 and 16 of the *Aboriginals Ordinance 1918* (NT). Put shortly, the argument was that the laws and regulations under which they were removed from their families were laws which prohibited the free exercise of their religion contrary to s 116. That argument was not accepted primarily on the basis that the challenged law did not evidence a purpose of prohibiting the free exercise of the religion of the Aboriginal people. Gummow J, with whom Dawson J agreed, observed that the critical question in the infringement of s 116 is whether the purpose of the law was to prohibit the free exercise of religion.[43] Nothing appeared in the challenged Ordinance which suggested that it had that impermissible purpose.

A potential application of the public office limb of s 116 surfaced in a judicial observation in *Crittenden v Anderson*.[44] In that case, a Roman Catholic member of Parliament was said to have been disqualified from holding office under s 44(1) of the Constitution because he was under an acknowledgment of allegiance to a foreign power, namely the Vatican. Fullagar J held that to impose such a disqualification would be to impose a religious test in violation of s 116.

## Religion in the public square

The cases to which I have referred all involve, in one way or another, the impact of Commonwealth laws upon religious belief, practice or observance. The constitutional debates are necessarily played out in the public square of which the judicial branch of government is an important element.

There is another sense in which religion enters the public square. That is when its adherents seek to propose or oppose the making of laws according to whether those laws are consistent or inconsistent with their religious beliefs. There may be ongoing debate within at least some organised religions about whether their institutions have any role in the shaping of

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42 (1997) 190 CLR 1.

43 Ibid 60–61 (Dawson J), 160 (Gummow J).

44 (Unreported, High Court of Australia, Fullagar J, 23 August 1950) noted in (1977) 51 ALJ 171.

laws which do not affect them as institutions but of which they approve or disapprove according to their doctrines. A short answer to that question from a narrow constitutional perspective is that persons who advocate or oppose laws according to their religious beliefs have the same rights and freedoms as anyone else in our society to put their point of view. It could not be otherwise. Points of view about the merits or demerits of laws or governmental practices may be informed by political ideologies, considerations of workability, moral perspectives and related to those, religious perspectives. In participating in such debates on matters relating to the Commonwealth Parliament and the Executive Government of the Commonwealth, people advocating a religious perspective enjoy the same implied freedom of political communication as does any other person under the Constitution.

That freedom of course, like all freedoms, is not absolute. It must be exercised in the context of an ordered society governed by law. A recent example of the tension between the exercise of the implied political freedom, in that case by two religious evangelists, occurred in the case of a Street Church in South Australia.[45] Two preachers of that Street Church regularly expressed their views to pedestrians and shoppers in Rundle Mall in Adelaide. They challenged the validity of a by-law which they said impermissibly constrained their implied freedom of political communication. It was a by-law of the City of Adelaide requiring that permits be obtained by anybody who wished to canvass, preach or harangue in or about roads in the central business district. The validity of the by-law was upheld by the High Court in that case.

## Conclusion

Section 116 of the Constitution protects the free exercise of religion in Australia, prohibits the establishment of any religion and prohibits the imposition of any religious qualification for Commonwealth public office. It is a provision of importance. While Australia can properly be described as a secular society in a constitutional sense, the social reality is that there are many Australians for whom religious belief is an important part of their lives. Their expression of that belief in practice and observance is protected by s 116. Their expression of views about how society should be ordered are protected to a degree by the implied freedom of political communication. In the end, however, the greatest protection lies in a culture of tolerance and respect for freedom of expression and religious belief and

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45 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197.

practice within the Australian community. Without that culture, constitutional protections may be of little avail.