# Constituting Religion After *Williams*: The False Dichotomy of Theocracy and Secularism


## Abstract

The *Williams* case is a relevant segue to consider the broader issue of constitutional relations between church and state in Australia. This paper argues that the dichotomous approach of theocracy as opposed to secularism is false and actually undermines the proper operation of s 116. A theocracy would contravene s 116 as an establishment of religion, but secularism also amounts to a conflict with s 116 as prohibiting the free exercise of religion. The necessary alternative is to find a middle ground compatible with s 116, one which will not establish any single state religion but will allow the contribution of different religious perspectives in the process of policy-making. This paper briefly considers how such an approach may be implemented.

# Constituting Religion After *Williams*: The False Dichotomy of Theocracy and Secularism

## Introduction: *Williams* and Section 116

In *Williams*, the court only briefly considered the application of s 116 of the Constitution, stating that the only relevant clause was whether 'school chaplain' is an office under the Commonwealth, and consequently whether a religious test is imposed as a qualification for that office, contrary to s 116. It was found that since school chaplains are directly employed by Scripture Union Queensland, rather than by the Commonwealth, 'school chaplain' is not an office under the Commonwealth. Hence, the objection failed at the threshold.[1]

However, the application of s 116 in this case raises the more vexed issue of the constitutional relationship between church and state in Australia generally.[2] For the purpose of context, section 116 of the 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.

There are commonly two approaches proposed in regard to the relationship between church and state. The first is that of theocracy, which will be briefly discussed below as a relatively

[1] *Williams v Commonwealth* [2012] HCA 23 at [107] – [110] per Gummow and Bell JJ.
[2] For an overview and consideration of the legal and historical context of s 116, see e.g. Blackshield, T, 'Religion and Australian Constitutional Law', in Radan, P, 'et al' (eds) *Law and Religion*, Routledge, New York, 2005.

uncontroversial contravention of the establishment clause. The second and seemingly more popular approach is that of secularism. However, this paper argues that a certain kind of secularism entails the prohibition of religion from the public square and the marketplace of policy ideas, and consequently it may amount to a conflict with s 116 as prohibiting the free exercise of religion. Hence, this paper will seek to articulate an alternative view which fulfils the original purpose and function of s 116 and allows a priority for democracy, which is the pluralistic encounter of various religious views and practices to inform public discourse and policy, rather than the state seeking to promote a particular religion or to exclude all religion. This paper concludes by briefly considering how such an approach may be implemented in public discourse through the example of the same-sex marriage debate, and finally returns to the issues raised in *Williams* by proposing how such an approach may assist in alleviating objections to the National School Chaplaincy Program.

**The Constitutional Impossibility of Theocracy**

A theocracy may be defined as a political system where the state and the church are identical. In other words, the supreme religious leader is the highest political leader, and the civil laws promulgated by this authority are understood to be direct divine revelation, or the law of God. The content and structure of religious belief and practice are ultimately created, proclaimed and enforced by the state, based on the tenets of the particular religion in question.[3] In this regard, it is important to note that some religions, such as Christianity, seem to eschew this approach. For example, chapter 13 of Paul's letter to the Romans in the New Testament commands Christians to be subject to the civil authorities and the laws of society, which are

[3] Hirschl, R, *Constitutional Theocracy*, Harvard College, Harvard, 2010 at 2.

distinct from the laws and authority of the church. Further to this, we have statements by Christ that one should (speaking in the context of paying taxes) "render to Caesar what is Caesar's", and that his "kingdom is not of this world" – in other words, it is not a civil or political kingdom such as the Roman Empire, but rather is a spiritual kingdom.[4] This implies that for Christianity at least, theocracy is not a suitable approach.

In any case, and more to the point, it seems fairly self-evident that s 116 excludes theocracy as a tenable constitutional model of the relationship between church and state in Australia. As Latham CJ notes in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, s 116 protects the right of a person to have no religion as well as to have a religion, and prohibits commonwealth law from imposing any religious observance. Indeed, all religions, particularly the minority religions, are to be tolerated, instead of the majority religion being determined by the state.[5] This is especially so when interpreting the clause prohibiting the Commonwealth making laws for establishing any religion, where the High Court in the case of *Attorney-General (Vic); Ex rel Black v Commonwealth* has understood this to mean s 116 prohibits the statutory recognition of a religion as a national institution or a state church, and a deliberate selection of one to be preferred before others which creates a reciprocal relationship imposing rights and duties on both parties. This may include the entrenchment of a religion as a feature of and identified with the body politic, and the identification of the religion with a civil authority so as to involve the citizen and the Commonwealth in the observance and maintenance of it.[6] As an aside, it may also be arguable that the state enforcement of religious exercise would actually contravene the free exercise clause, since state-enforced religious exercise is not free. In the debates of the 1898 Australasian

[4] See Romans 13:1-7; Matthew 22:15-22; John 18:33-36.
[5] (1943) 67 CLR 116 at 123-124.
[6] (1981) 146 CLR 559 at 582 per Barwick CJ; at 604 per Gibbs J; at 612 per Mason J; at 653 per Wilson J.

Federation Conference at which the now s 116 was drafted and discussed, Higgins seems to implicitly admit this point when he stated that "religious observance is of no value unless it is the outcome of a man's [sic] own character, and the outcome of a man's [sic] own belief".[7] Hence, s 116 renders a theocracy a constitutionally untenable option, and so it should be rejected.

**How Secularism Prohibits the Free Exercise of Religion**

The alternative model for the relationship between church and state is that of secularism. Secularism, in its most categorical form, can be defined as the complete separation of church and state in constitutional, legal, political, administrative and even cultural contexts. This entails the complete removal of religion from public affairs, and the preclusion of religious discussion in public discourse.[8] Ultimately, the secularist strategy is to "purify public reason from religious arguments".[9] Secularist thinkers in American liberal jurisprudence such as Dworkin, Ackerman, Galston, Rawls, Macedo, and Audi believe that values of freedom and toleration are preserved through this Berlin-wall of separation.[10] Closer to home in the Australian context, Thornton and Luker bemoan what they term to be the "intimate liason" between religion and government in the sense of Christianity in particular being allowed to have an influence on public affairs and discourse, which "compromise[s] the commitment to

[7] Higgins, *1898 Australasian Federation Conference*, 2nd March 1898, accessed online 20th August 2013 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1120;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default, at p 1736.
[8] Bader, V, 'Religious Pluralism: Secularism or Priority for Democracy?' (1999) 27 *Political Theory* 597 at 598.
[9] Id at 602.
[10] Id at 598.

state secularism".[11] Given the content of s 116 and the impossibility of theocracy, one can have a certain amount of sympathy for this approach, and it appears to be the dominant and favoured approach in a 'secular' liberal democracy such as Australia. However, bearing in mind the historical context and intentions of the framers, in addition to the practical effect of such an approach, this paper will argue that if expressed directly or indirectly in a law, this form of secularism actually contravenes s 116, for secularism entails the exclusion of religion and religious dialogue from the public square and the marketplace of ideas, thus contravening the prohibition against the free exercise of religion.[12] The emphasis in the pre-federation debates on s 116 was on the protection of the free exercise of religion from impedance by the state, and in contrast the community expectation that the state would not privilege one religion over another.[13] For example, both Higgins and Barton in the pre-federation constitutional debates were careful to emphasise that the mention of God in the preamble on one hand did not mean that people's rights with respect to religion would be interfered with on the other, and that there would be "no infraction of religious liberty" by the Commonwealth.[14]

[11] Thornton, M, and Luker, T, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71 at 74.

[12] This paper assumes a combination of a literal and originalist interpretation of s 116 of the Constitution. For a more detailed defence and analysis of this approach generally, see Craven, G, 'Original Intent and the Australian Constitution – Coming Soon to a Court Near you?' (1990) 1 *Public Law Review* 166; Goldsworthy, J, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Heydon, J, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review*.

[13] McLeish, S, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207 at 219.

[14] Higgins, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default, at p 654; Barton, *1898 Australasian Federation Conference*, Thursday 17th March 1898, accessed online 20th August 2013 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1130;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default, at p 2474.

For the framers then, rather than a strict insistence on the state as a secular entity, what was important was the state avoiding the promotion of religion which would cause sectarian division in the community.[15] It was actually felt that the community as a whole should have a religious character, but this religious character would be hindered by explicit state involvement.[16] Hence, there should be a state neutrality towards religion, reflected both in the avoidance of religious preference and protection of individual and group autonomy in matters of religion as participants in the wider community.[17] However, religious identities are simply not treated fairly (nor indeed, neutrally) by declaring that religion is a private matter or by excluding religious arguments from political and constitutional debates. The strict separation of church and state to the extent that, for example, a member of the clergy cannot hold public office, would constitute hostility toward religion, thus undermining the free exercise of it.[18] Such a principle can plausibly be extended to a member of clergy not being allowed to express a religious opinion in the context of a public office. If that is so, the same principle would apply to any person with a religious opinion expressing that opinion in a public context. Neutrality toward religion therefore includes the state not acting to impede the autonomy of individuals or groups making and pursuing religious choices, and this would include policy debate in a democratic process.[19] This is reflected in the intention of the framers, where Symon states that through s 116, the framers are "giving… assertion… to the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship, and that everybody is to be free to profess and hold any faith he [sic] likes".[20] To

[15] McLeish, above n 13 at 221-222.
[16] Id at 222.
[17] Id at 223.
[18] Id at 228.
[19] Id at 233.
[20] Symon, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default, at p 660.

profess a faith presumably includes public expression of that faith, otherwise the distinction made between holding a faith and professing a faith is meaningless and superfluous. This may then be relevant in terms of decision-making in regard to public policy. Thus, secularism actually contravenes the free exercise of religion under s 116 by preventing the free profession of religious faith and the consideration of various religious positions in public dialogue.

This constitutionally untenable dichotomy of options having been established, this paper will propose an alternative that will not establish any religion, yet will not exclude religious dialogue. Instead, concomitant with the proper operation of s 116, an approach is proposed which will allow the freedom for religious and non-religious alike to express their views in a public space, leading to a pluralistic encounter of perspectives which will combine and contribute to policy-making and allow true liberal democracy – the freedom to express and decide between a full array of perspectives, with the state promoting and excluding none. In this context it is also worth noting that secularism is a limited framework in the sense that it overlooks ways in which the dominant religion in a culture can be integrated into government operations. In other words, the political space is not characterised by a strict separation of secular and non-secular, but instead is imbued with religiously informed cultural and social values.[21] This paper seeks the explicit acknowledgement of this within the context of the proper operation of s 116, and thus allows the free expression of religious opinions in the public sphere, to be considered and critiqued in the marketplace of ideas in conjunction with the secular worldview. Hence, what is required is a sensible balancing of the different

[21] Randell-Moon, H, 'Section 116: The Politics of Secularism in Australian Legal and Political Discourse', in Spalek, B, and Imtoual, A, (eds) *Religion, Spirituality and the Social Sciences*, Policy Press, Bristol, 2008 at 52.

claims, taking into account minority religions, majority religions, and no religion.[22] This points the way to a solution beyond the dichotomy of theocracy and secularism doomed by s 116, a solution where the state allows all views, religious and non-religious, to be freely proposed and considered.

## A Third Alternative: Pluralistic Debate and the Priority for Democracy

Indeed, allowing pluralistic public debate between all religions and non-religions for the purpose of prioritising democracy is the proper fulfilment of s 116. As has been seen above, the framers did not desire a secular society which rejected the public display and discourse of religion. The historical and cultural context of the development of s 116 was a general endorsement of religion and a climate of tolerance based on a concern for the advancement of religion.[23] Consequently, the purpose undergirding s 116 was "the preservation of neutrality in the federal government's relations with religion so that full membership of a pluralistic community is not dependent on religious positions".[24] This is reflected in Symon's statement that "what we want in these times is to protect every citizen in the absolute and free exercise of his [sic] own faith, to take care that his [sic] religious belief shall in no way be interfered with".[25] Gaudron J in the case of *Kruger v Commonwealth* further argued that s 116 extends to invalidate laws which operate to prevent this free exercise of religion, not merely those

[22] Bader, above n 8 at 608.
[23] Puls, J, 'Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139 at 140.
[24] Id at 151.
[25] Symon, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default, at p 657.

which explicitly ban it. This implies that s 116 extends to provisions which authorise acts that indirectly operate to prevent the free exercise of religion.[26] Hence, if a law is made which promotes secularism, it follows that since secularism indirectly operates to prevent the free exercise of religion by precluding individual religious expression in public discourse, such a law must therefore be incompatible with s 116.

Those who support secularism often argue that s 116 only protects individual religious opinion, and does not protect acts done or statements made as a function of religious opinion. However, even the earliest cases considering s 116 acknowledge that it not only protects religious opinion or the holding of faith, but also, according to Griffith CJ in the 1912 case of *Krygger v Williams*, it protects “the practice of religion – the doing of acts which are done in the practice of religion”.[27] The seminal statement on this subject was made by Latham CJ in the *Jehovah’s Witnesses* case:

> It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious *opinions,* it nevertheless may deal as it pleases with any *acts* which are done in pursuance of religious belief, without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s 116. The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.[28]

So not only does s 116 protect freedom of religious opinion, as Latham CJ also concedes, but also protects acts done in pursuance of religious belief, including the public expression of a religious belief. In the more recent case of *Church of the New Faith v Commissioner of Pay-*

[26] (1997) 190 CLR 1 at 131-132.
[27] (1912) 15 CLR 366 at 369.
[28] *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 124-125 per Latham CJ.

*Roll Tax*, Mason ACJ and Brennan J agreed, stating that "conduct in which a person engages in giving effect to his [sic] faith in the supernatural is religious", and consequently is included under the protection of s 116.[29] It follows that protected religious belief and action includes utterance and consideration of religious opinions in public discourse, since this is an action which may follow from religious belief. Thus, against the option of secularism, there seems to be no reason in principle to exclude the public expression of religious opinion for the purposes of policy debate as conceived under s 116.

It may also be objected that this freedom of opinion, expression and action would allow the promotion of repugnant views and actions. However, it is important to note with Latham CJ and Rich J in the *Jehovah's Witnesses* case that the free exercise clause only operates to the extent that such exercise does not conflict with civil law and/or is not a danger or menace to society.[30] The framers were also conscious of this in their drafting process, acknowledging that the free exercise clause should not extend to protect religious beliefs which include particular religious rites involving murder and sacrifice.[31] Hence, both the framers and the High Court only wish to limit the free exercise of religion where it is dangerous to society and/or conflicts with already established law. This required the High Court to adopt a balance of proportionality with which to consider the issue – where a law by the Commonwealth actually operates to restrict the free exercise of religion, and it is reasonably capable of being considered appropriate and adapted to achieving some legitimate overriding

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[29] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 136 per Mason ACJ and Brennan J.

[30] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 126 per Latham CJ; at 149-150 per Rich J.

[31] Braddon, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default, at p 656.

public purpose, that law will be valid.[32] However, there appears to be no legitimate overriding public purpose for excluding the mere expression of religious opinion in public dialogue, and the effort to do so is not reasonably capable of being seen as appropriate and adapted to achieving such a purpose. Clearly, the mere expression of a religious opinion in public dialogue is not dangerous to society and does not conflict with already established law – and indeed, given the implied freedom of political communication and acknowledging with Latham CJ in the case of *Jehovah's Witnesses* the extent that faith can affect politics, a more constitutionally consistent model is this priority for democracy model which allows the free expression of religious opinion for the purposes of public debate in a democracy.[33]

Therefore, the origins and High Court interpretations of s 116 suggest not that it is embodying some broad principle of separation of church and state from which detailed consequences may be enunciated, but instead that it is protecting religious freedom in a way directly stated by the provision.[34] The right to a free exercise of religion also includes the right to express a religious viewpoint, just as it includes the right to not express a religious viewpoint, or the right to express a non-religious viewpoint. Similarly, the fact that the statement of a religious viewpoint may offend another is insufficient to curtail one's freedom to express such a viewpoint under s 116, just as a blasphemy law would probably be viewed

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[32] Beck, L, 'Clear and Emphatic: The Separation of Church and State Under the Australian Constitution' (2008) 27 *University of Tasmania Law Review* 161 at 184-185; *Kruger v Commonwealth* (1997) 190 CLR 1 at 134 per Gaudron J.

[33] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 125-126 per Latham CJ; C.f. *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 138-139 per Mason CJ. Further discussion of this proposition is beyond the scope of this paper, but is worthwhile pursuing. For more information, see e.g. Meaghan, D, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438; Bogen, D, 'The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws' (1997) 46 *Drake Law Review* 53; Aroney, N, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287.

[34] Beck, above n 32 at 163; *Attorney-General (Vic); Ex rel Black v Commonwealth* 33 ALR 321 at 350 per Stephen J.

as contravening s 116.[35] In other words, under the free exercise clause, one is entitled to express one's own religious or non-religious view which may offend the other, just as the other is entitled to express their alternative religious or non-religious view which may offend the one. Hence, what is required is a "priority for democracy", where all religious, philosophical and scientific voices (like votes) should be considered equally when it comes to decision-making.[36] As Bader contends:

> Instead of trying to limit the content of discourse by keeping all contested comprehensive doctrines and truth-claims out, one has to develop the duties of civility, such as the duty to explain positions in publicly understandable language, the willingness to listen to others, fair-mindedness, and readiness to accept reasonable accommodations or alterations in one's own view.[37]

One may of course disagree with what is expressed, but such is the nature of democratic discourse. The priority for democracy as the proper fulfilment of s 116 therefore should not only be free of secularist and theocratic remnants, but also explicitly allow for all religious or non-religious arguments compatible with the democratic process.[38]

This paper concludes with a brief example of how this principle may be applied to the policy debate regarding the question of whether to legalise same-sex marriage, followed by a proposition regarding how this approach may assist to allay objections to the implementation of the National School Chaplaincy Program. Former Prime Minister Kevin Rudd made same-sex marriage a policy issue during a leaders' debate prior to the election of current Prime Minister Tony Abbott, and has written publicly regarding how his Christian views (in

[35] C.f. Id at 187, 190.
[36] Bader, above n 8 at 612-613.
[37] Id at 614.
[38] Id at 617.

conjunction with other perspectives) have informed his policy stance.[39] Hence, this is an example of different religious and non-religious perspectives forming the viewpoint of one particular person informing government policy. Different religious and non-religious organisations and persons have varying opinions on whether same-sex marriage should be legalised. Some religious views may be to legislate a uniquely religious view of marriage, and since this would be theocratic such an approach must be rejected as contravening s 116. However, to simply silence religious views in favour of merely secular considerations would be to prevent public profession of religious faith and perspectives, thus contravening the free exercise clause under s 116. Indeed, such a view would appear to be so extreme that Kevin Rudd himself would have contravened s 116 in the way he came to his conclusion on same-sex marriage policy, since it incorporated religious or theological perspectives. Hence, a more moderate view which truly fulfils s 116 is to allow the free and pluralistic interaction of all perspectives in public policy debate, such that the Government can then make up its policy mind with all information, and the people can vote according to their own preference. This is the primary advantage of the priority for democracy model – it not only properly fulfils the free exercise of religion clause in s 116, but does so in the context of furthering the freedom of political communication and fostering a pluralistic, interactional and democratic community.

In relation to the National School Chaplaincy Program discussed in *Williams* particularly, it appears that the application of this new approach in contrast to the failed dichotomy of approaches outlined above could be delineated in the following way.[40] Firstly, the

[39] Rudd, K, *Church and State are able to have different positions on same sex marriage*, Monday 20th May 2013, < http://www.kevinruddmp.com/2013/05/church-and-state-are-able-to-have.html>. Accessed October 11th, 2013.

[40] Professor Rex Ahdar should be acknowledged for this suggestion in a personal conversation.

theocractic approach would be to make a law stipulating that a school chaplain or student welfare worker must be a Christian, or religious. Such a law would be problematic in the sense that the law would arguably be establishing a religion. The other horn of the dichotomy, secularism, would likely demand a law stipulating the opposite: that the chaplain or student welfare worker must not be a Christian or in any way religious. Again, this condition would appear to contravene the clause allowing the free exercise of religion in s 116. However, the priority for democracy model, allowing the free representation of pluralistic religious and non-religious perspectives, would have no such restriction. Instead, it is envisaged that the National School Chaplaincy Program would allow all religious and non-religious perspectives for their chaplains and student welfare workers.

Indeed, the program itself is apparently moving in this direction. In the Program Guidelines, it states that whether the chaplaincy/welfare services are provided “by a school chaplain or secular student welfare worker is a matter which must be decided by the school following consultation with the school community”.[41] In addition, participation in the program is voluntary for both children and parents of children.[42] Both school chaplains and student welfare workers have certain minimum requirements which are to be met, in addition to the school chaplain being recognised through formal religious qualifications or endorsement by a religious institution.[43] Therefore, according to the guidelines, in principle any person with any religious or non-religious position (assuming they meet the minimum requirements which are irrelevant for the purpose here) may be a school chaplain or student welfare worker. The religious affiliation expressed for the school chaplain is not specified, so it

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[41] Australian Government, *National School Chaplaincy and Student Welfare Program Guidelines*, September 2011, <http://ri.bne.catholic.edu.au/ree/RE/SiteResources/National%20School%20Chaplaincy%20and%20Student%20Welfare%20Progam%20Guidelines.pdf>, at 4. Accessed October 11th, 2013.

[42] Ibid.

[43] Id at 7.

seems that any recognised religion would be sufficient. Thus, the priority for democracy approach is implicitly being implemented in the National School Chaplaincy Program, allowing for the representation of all religious and non-religious perspectives. In this sense, the school becomes a microcosm of the free exposure of and dialogue between various religious perspectives, providing a pluralistic, tolerant civil society at large. As this paper has argued, such a vision, where the state neither sanctions nor prohibits religion in the public sector, protecting both freedom of exercise and freedom from establishment, is the consummation and proper fulfilment of s 116 of the *Constitution* in Australian life.

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