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Williams High Court Decision

June 2012

On Wednesday 20 June 2012, the High Court handed down its judgment in the case of Ronald Williams v the Commonwealth of Australia & Ors.

The case was brought by Mr. Ronald Williams, who challenged the funding agreement between the Commonwealth of Australia and the Scripture Union of Queensland for the provision of chaplaincy services at a State school in Queensland under the National School Chaplaincy Program, on the basis that the agreement was:

a) beyond the executive power of the Commonwealth under section 61 of the Constitution; and
b) prohibited by section 116 of the Constitution, which prevents a religious test from being applied to any office of the Commonwealth.

While the High Court unanimously dismissed the part of Mr. Williams' challenge based on section 116 of the Constitution, finding that a chaplain did not hold an office under the Commonwealth; the Court found by majority that the funding agreement was invalid because it was beyond the executive power of the Commonwealth, as outlined in section 61 of the Constitution.

The judgement summary is available here (PDF). The full judgement is available here.

Judgement

The High Court's findings were based on Section 61 of the Constitution. Section 61 provides that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." In the absence of legislation authorising the funding agreement between the Commonwealth and the Scripture Union of Queensland, the Commonwealth agreed that it was entered into relying on the executive power provided by Section 61.

However, the Court found that section 61 did not empower the Commonwealth to enter into such an agreement, or to make the challenged payments. The Court held that the Commonwealth's executive power does not include a power to do what the Commonwealth Parliament could authorise the Executive to do, such as entering into agreements or contracts, whether or not the Parliament had actually enacted the legislation.

A majority also held that section 44 of the *Financial Management and Accountability Act* 1997 (Cth) did not provide the Commonwealth with the necessary statutory authorisation to enter into the funding agreement or to make payments to SUQ under that agreement.

Implications

The High Court's findings were that the Commonwealth lacked the power to enter into a funding agreement with a third party without enabling legislation. The judgment therefore goes to the scope of executive power, and has implications far beyond the National School Chaplaincy Program. Recent Governments have generally taken a broader view of the Commonwealth's executive authority to spend Commonwealth funds. However, a majority of Justices found that Commonwealth expenditure must be authorised by legislation, and not solely through the Appropriations Acts.

The validity of other programs that are funded by an agreement between the Commonwealth and a third party or an Appropriation Act where there is no other legislative backing is now in question. To ensure the validity of such programs, the Parliament would need to enact legislation to support them, or the funding would have to be delivered via other means.

One alternate way to deliver funding would be to do so via the States. Under Section 96 of the Constitution, funding can be delivered to the States with conditions attached so that the same outcomes are achieved as if it was delivered directly to the third party.

Government Response

On 25 June 2012, Attorney General the Hon. Nicola Roxon MP together with Minister for School Education, the Hon. Peter Garrett MP AM, announced that after taking legal advice from Robert Orr QC, the Acting Solicitor General, the Government would introduce legislation into the Parliament on Tuesday 26 June to ensure the continuation of the Chaplaincy Program, and other affected programs.

The legislation will amend the *Financial Management and Accountability Act 1997,* and regulations under that act, to provide legislative authorisation for existing programs that have already been approved by the Parliament through the Appropriation Acts. The legislation will also include a regulation-making power for additional programs that might be identified in the future. Such future regulations would be disallowable by the Parliament.

The Department of Education, Employment and Workplace Relations has already put arrangements in place to allow payments to Chaplain providers to begin within 24 hours of Royal Assent. The Government has spoken with the Opposition, the Greens and the Independents to outline the legislation and seek their support for this legislation in the national interest. The Government hopes that the legislation will be passed by Parliament within a week.

The joint press release is available here.

Organisations' whose Commonwealth funding agreements are not supported by legislation are encouraged to consult with the federal government directly regarding the implications for their own agreement.

Background

The National School Chaplaincy Program was introduced by the Howard government in 2007, offering schools up to $20,000 a year to introduce or extend chaplaincy services. In 2011, the Gillard

Government announced that the program would be extended so that schools could choose to employ a chaplain or a secular welfare worker.

More information about the National School Chaplaincy Program is available here.