UTS FACULTY OF LAW RESEARCH

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# TRANSCRIPT

## Executive Power and the School Chaplains Case, Williams v Commonwealth– Karena Viglianti

**David Carter:** Karena Viglianti is a Quentin Bryce Law Doctoral scholar and a teaching fellow here in the Faculty of Law at the University of Technology in Sydney. She is currently completing her PhD in constitutional law which we're here to speak about today in particular in relation to the body of law that emerges in relation to Section 61 of the Australian Constitution.

Karena, thanks for being here but first let's talk a little bit about Section 61 and what we traditionally understood Section 61 deals with.

**Karena Viglianti:** Section 61 of the Constitution deals with the Executive power of the Commonwealth. It has a few limbs to it. For the purposes of my PhD, what I'm mainly focused on is when can the Commonwealth Executive act without statutory power and what has the high court said in a trilogy of cases starting with Pape v Commissioner of Taxation and Williams 1 and 2 which are the two recent chaplaincy decisions.

**David Carter:** In essence, the question is about saying, what are the powers of the Commonwealth government, the Executive in particular, particularly when there is no sort of enabling legislation or legislation that specifically gives them this power, drawing in a sense directly from the power granted by the Constitution. These issues come up in particular and it's a recent case of course which is Williams and the Commonwealth funding of chaplaincy services in State schools.

Let's talk a little bit about those two cases first. What was the question here that the court was asked to decide in Williams?

**Karena Viglianti:** In Williams 1, which is really the primary case that tells about the High Court's latest pronouncement on executive power, what had happened was the Commonwealth government was attempting to fund chaplains in State schools. Traditionally, that area is regarded as something that the States deal with. There was no statutory head of power in the Constitution that the Commonwealth had used to pass specific legislation. The argument by Mr. Williams, who had a son at the relevant school that was receiving some of these funding services for chaplains, was that the Commonwealth Executive had no power to act because there was no enabling legislation.

**David Carter:** The question before the court in Williams 1 and 2 and obviously the related cases was without this enabling legislation, was the Commonwealth allowed to- did it have the power to fund this somewhat controversial program?

**Karena Viglianti:** Following Williams 1, the Commonwealth went off and amended another Commonwealth statute to attempt to enable the Commonwealth executive to fund the service. In Williams 2, there were a series of arguments, but one of the arguments was that the Executive had the power to act because there were some amendments to the relevant Commonwealth legislation.

In Williams 2, the Commonwealth basically failed in its argument again. It tried to reopen some of the issues that had been determined in Williams 1. We now have a joint judgment (with one additional judgment) that says that, if the Commonwealth Executive wants to act, it need a specific statute that is referrable to a head of legislative power under the Constitution. There's no presumption, outside the prerogative, or what has been termed the 'nationhood power', that the Commonwealth Executive has any power to act unless there is a piece of legislation enabling that action. In Pape, what the majority had rejected was the proposition that Sections 81 or 83 of the Constitution were a source of spending power for the Executive.

The position we are left with at the moment, is that Section 61 is the section that deals with executive power but, if the Executive needs to act, it needs some head of legislative power that it's executive action is then related to or authorized by under the Constitution.

**David Carter:** You mentioned Pape. I suppose that brings up really the history, I suppose, of interpretation here. There's not a huge number of cases that deal with this question, although of course the reaction to specific instances, like for example the funding of chaplaincies sort of controversial program. It seems to be sort of reported, in the popular media anyway, as a question about the kind of legitimacy of the program as such. Of course, we know that really the arguments are about the legitimacy of the decision making power or the power of the Commonwealth.

What does Pape and the kind of history of decision making here tell us about how the High Court is acting now? Has there been a shift here with Williams or is this kind of consistent?

**Karena Viglianti:** It depends on what you mean by consistency. Part of my thesis will be to argue that one of the core principles on which all of the decision in the Section 61 jurisprudence and related decisions on Sections 81 and 83 come back to one key point under the doctrine of responsible government, which is based on a theory of political accountability.

There have been some recent articles in the field that suggest that Williams 1 was a departure from previous decisions. Part of my argument is to say, when we come back to core principles underlying the Constitution, including the political theory, there is nothing here that is new. What we are really dealing with is a question of when will individual judges decide to intervene in action taken by the Executive. The debate is really a debate about what mechanism is sufficient to enable that form of political accountability required by the Constitution.

In Williams 2, the High Court has just made an interesting pronouncement in the joint judgment saying we are not going to give you the blueprint for how this section works. My argument in response that would be, "Well, you probably should because there is a huge argument to say that it might actually be your job to give us a precedent that would enable practitioners and academics to work out when executive action would be constitutionally valid or constitutionally invalid." The Court may see itself as having already done that in Williams 1, but there is still room for debate about that in some senses.

In particular, part of the argument in my thesis is to say that the failure by the Court to date to outline the underlying assumptions in these judgments is part of the problem and it may really amount to a failure to bring any of these decisions on validity or invalidity back to some clear political theory and clearer historical understanding of major doctrines that individual judges are relying upon in when they are determining whether or not to intervene in any particular case.

**David Carter:** I suppose that's one of the important marks of constitutional law and in constitutional interpretation. Which is, when here we have a really important section of the Constitution, a really important question, what can the Executive government do? But of course, it's not as if there is sort of a kind of clear set of elucidadic principles out of case law as such that tells us what to do. As you are saying, there's both- I suppose a historical aspect to this but also a really political theory, okay, and kind of understandings of what the role of government is and responsibility is.

Let me explore a little bit with you then in terms of responsible government. Your argument seems so be then that what the court is doing, should be doing, is reflecting a particular understanding of the concept-ability call, responsibility, responsible government, sorry. That responsible government of course is a political idea, it's a piece of political theory rather than sort of doctrine as such.

**Karena Viglianti:** Yes. The way that decisions of the Court have understood any of the many meanings of responsible government. In the thesis, I explore a number of different meanings of responsible government as well. What the Court does is pick up a political concept and enforce that political concept as a legal, that is, as a constitutional, requirement.

The debate that we could have in Australia is really the one that's been going on for at least 50 years in the United States. They seem a bit more ahead of us in this respect than us about the particular methodology being employed, including a very basic theoretic proposition about the role of a constitutional court and the role of judicial review. Tied up and underlying all of that of course are the sorts of particular views that individual judges hold about what constitutes law and what constitutes politics.

At the very core of all those determinations about whether or not something is constitutionally valid is actually a particular viewpoint of an individual judge about what the role of the Court is, and when does something constitute of purely political matter.

**David Carter:** Really, individual judge on the Court then, you are sitting there and you are Mr Williams. You are hearing arguments. This is now this kind of a, hesitant to say, mess, because this is obviously what we do. I suppose when we are on the High Court we deal with these questions, but how are they working this out? What are the kind of things that they are taking into account? Is it look, kind of well sort of scheduled approaches that the courts take? Is this kind of historically anomalous? Are they looking at the history of interpretation? What is it that they are kind of grasping on? Is it even known?

**Karena Viglianti:** I would say it is not known. Professor Aroney has recently commented on this and said that, perhaps what we are really failing to do in Australia is properly identify the methodology that is being employed by the Court in deciding any constitutional question, not just the sort questions about Executive power.

This is the debate that is not really being had in Australia. There are certain academics, like Jeff Goldsworthy who has looked at this a bit in terms of constitutional interpretation. But interpretive methodology is really something that seems to be a problem across all areas of constitutional interpretation in Australia.

In particular, when you start dealing with a very vague provision like Section 61, there is even more of a choice to be made because they are, of course, fewer words in the constitutional text, which give the Court more discretion and to the individual judge as to whether or not to intervene.

At the moment, the basis for intervention is based on some pretty mixed methodologies and it seems to me that actually part of the problem there is no one is being clear about what an appropriate methodology for constitutional interpretation is. I'm not just talking about the sorts of issues that were raised in cases like Engineers.

There are more fundamental problems about the approach to constitutional interpretation in Australia which also get tied up not just in the failure to identify the legal and political theory that underlies the operation of the constitution, but also a failure to use history in a consistent way as well or be clear about why you are using one methodology or another.

What the Court is doing at the moment is dipping a little bit into using a particular historical method, but not being consistent about that, then, occasionaly, taking a paragraph from a political text but not actually contextualising that text and its importance. By not contextualizing it, that may be giving it primacy in a way that a political theorist or a political scientist wouldn't. And this raises a bigger question of why a lawyer would go into another discipline in reaching a judicial determination at all.

**David Carter:** I think as you were saying, there is sort of you've mapped different definitions, I think was the word you used, of responsible government. Is that the kind of outcome of this kind of lack of clarity or is this kind of a healthy kind of open debate that is happening amongst the jurists?

**Karena Viglianti:** The different uses are not really appreciated. What will tend to happen is that, even within the same judgment, there will be a particular use of responsible government and then that will morph, even within the space of a paragraph, into another meaning of responsible government. There is a failure to properly identify what the term responsible government actually means in the particular use that is being made of it. What is happening is that we seem to be using the term as if it could only ever have one meaning and that we all absolutely understand what it means in a particular use. This is unusual for practitioners, since we are usually very keen on definition. Yet there is a lack of definition about responsible government and how it is being used within particular context.

Along with the separation of powers doctrine, responsible government is probably the most important doctrine in the Constitution. It's been referred to as the 'keystone in the arch of personal liberty'. We are talking about a very fundamental concept and yet, each and every time that it's being used to justify a decision, what the particular concept means in that context is not being clearly extrapolated.

What this means is that, in 50 years time, practitioners and judges will face the same problems that we are facing at the moment because you can't pick up a judgment and read not just the outcome but also the actual underlying theory and the underlying methodology that tells you why the decision was reached in the first place. Essentially what it is, is a failure to outline assumptions. I guess as practitioners, the reason we do that is because we don't actually realize how much of the doctrine that we are looking at is grounded in theory.

**David Carter:** The judges then, as you said, are kind of not being clear about the sources they are using, the kind of approaches they are taking. Is that why we are seeing issues like Williams and 61 and the interpretation of a canapemby. I suppose, we are sort of so uncertain as to what the Court might decide in any one instance.

**Karena Viglianti:** Yes. I think what we are seeing is a lack of clarity because some of the basic assumptions are not being clearly outlined. It's very difficult to take issue with what the real issue is when nobody has actually sat down and set out what their assumptions are: what their methodology is in the first place.

There could be an argument to say well, "That is not the role of the court and it's not the role of practitioners." However, in constitutional law you are dealing with a doctrinal space which is highly theoretical as well. Public law generally lends itself to that.

My argument is to say, when we are dealing with one of the most fundamentally important pieces of the compact between Australians and the people they elect, it's not good enough to sit there and say 'There is a precedent and it's clear'. The precedents in this area have not been clear, probably for the reason that to date they haven't come up all that much in litigation. In other words, the section hasn't been tested enough times to be able to discern the theory that underlies the decisions. Now we seem to have people that are willing to litigate and the Court has given them standing. What we are creating is a series of challenges because of

course practitioners see the basis for the challenge and then of course there is a popular spate of litigation. That seems to happen after Bryan Pape took on the Commonwealth in 2009.

If we never get any clarity around some of the basic theory and why we are using a particular methodology, it's not possible to see the sort of progression I think that we actually have seen in the United States and it's constitutional interpretation where these issues are getting addressed. At least they have made a start.

**David Carter:** We have an example in the United States of a jurisprudence innocence in a kind of practiced judicially and in the academy as well where practitioners and academic practitioners and jurists are making these kind of more clear statements as to kind of principle and political theory. How is that going to happen in our own context do you think? You are saying there is a role obviously for kind of academic practitioners. Is this something the judges are going to be able to start to do, kind of on a braver High Court?

**Karena Viglianti:** I think there is certainly the possibility because at the moment there are two recent appointments in particular who have always valued the role of theory and the role of academics to the practice of law. In particular, Justice Keane and Justice Gageler have a good understanding of theory. You can see a little bit of that in the argument in Williams 1 when Gageler was still the Solicitor-General for the Commonwealth. Ideas about functionality and constitutional interpretation are present in some of the submissions that the Commonwealth made. They are not as clear in Williams 2. There are certainly judges sitting on the current Court who I think would be very receptive to these ideas. Why that has been brought to Australia, I don't know, but I've seen in some recent documents some interest in debates about different approaches to constitutional interpretation and how they impact outcomes rather than the sort of analysis we have seen to date which tends to be very broadly based and just sort of divided into two categories of 'formalism' and 'functionalism'. We are sort of back to the old debate from Engineers in those broad divisions.

I think part of the arguments in Engineers and the way in which we are analyzing the Engineers decision to this day lacks the nuance that America has already achieved in its analysis. Now whether it has actually had any great success in America is another matter, but at least they are talking about it. At least they are thinking about it.

**David Carter:** This is going to be on the agenda because of the recognition the standing that's been granted to people to litigate these matters. It is a rare instance for an individual citizen to litigate a constitutional matter. But here we have Mr. Williams for example, two very significant cases in relation to the chaplaincy issue. But there are also others.

**Karena Viglianti:** Yes. There are about 426 agreements at the moment that the Commonwealth is currently dealing with. Now the interesting thing will be, which of those get challenged because Williams himself didn't seek to challenge anything other than the chaplaincy program. He specifically determined not to challenge any other Commonwealth funding, such as the Commonwealth funding for roads. I think the

real issue is to whether those matters come up and certainly this was the case even with Bryan Pape, as whether or not you have an individual or an association or somebody who might get standing, who wants to challenge.