Supreme Court declares government's gag clause invalid

Sacked Australian teacher wins significant victory

By Linda Tenenbaum
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Sacked public high school teacher Geraldine Rawson has won a political victory with significant implications for hundreds of other teachers hounded out of Victoria's schools by the former Kennett Liberal government. The Victorian Supreme Court has upheld part of Rawson's challenge to Teaching Service Order 140 (TSO 140), promulgated by the Kennett government in 1993. Last Thursday, Justice Philip Mandie ruled that Clause 3.7 of TSO 140, was *ultra vires* (beyond the power of) the Teaching Services Act, and thus invalid.

While Justice Mandie's decision was narrow—he ruled that Clause 4.19, also challenged by Rawson, was valid and threw out her argument that both clauses infringed the implied right to freedom of communication in the federal constitution—he ordered the Education Department to pay Rawson's legal costs. In response to objections from the Department's barrister, Mandie noted that a partial victory was, in relation to the awarding of costs, a victory.

Clause 3.7 is one of three gag provisions contained in TSO 140 that were specifically designed to silence dissent over deep-going cuts to the public school system.

Justice Mandie described the clause as “a sweeping prohibition” on teachers disclosing any information gained in the course of their employment.

“There is no attempt to define the kinds of information intended to be covered which might provide some nexus with employment matters or enable the clause to be read down within reasonable confines. As it is expressed it covers all information whether relevant to the organisation and management of the school or the school system or the interests of the students or other educational matters or not...”

Geraldine Rawson, represented by David Grace QC, brought the Supreme Court action with the assistance of the Committee to Defend Public Education, formed by the Socialist Equality Party in 1995 to fight the cuts to public education. She was sacked from Buckley Park High School in Melbourne's western suburbs in 1998, after being charged two years earlier under TSO 140 for “failing to perform her official duties with reasonable skill, care and diligence” and for breaching Clauses 3.7 and 4.19—the so-called “confidentiality clauses” of the Order.

Her victory constitutes a blow, not only for the former Kennett government, but also even more revealingly for the incoming Bracks Labor government. Only six weeks earlier, following the shock electoral defeat of the Liberals, Bracks formed a minority Labor government on the basis of agreeing to a number of demands made by three Independent MPs who hold the balance of power in the state parliament. Among other things, Bracks pledged to repeal all the gagging provisions of TSO 140.

With a great deal of public fanfare, the new Education Minister, Mary Delahunty declared, two days before Rawson's court case was due to begin, that she was about to honour that pledge. On November 30, the first day of the hearing, Delahunty sent an unprecedented email to every state school teacher informing them that Clause 3.12 of TSO 140 had been repealed. That clause prohibits teachers from making public comment on the policies of the government or the Education Department—but is considerably narrower in scope than Clause 3.7. Meanwhile, inside the Supreme Court the Labor government was

vigorously defending the other two clauses. Moreover, it retained the services of the same Liberal law firm used by the Kennett government, Minter Ellison, as well as those of the well-known conservative QC, Dr Chris Jessup.

Speaking for the three defendants—the Deputy Secretary and Director of Schools and the Minister for Education—Jessup invoked legal precedents harking back to the nineteenth century to argue that the relationship between teachers and the Department of Education was akin to that of master and servant.

"... a servant is bound to obey the directions of the master, and... failure to do so is a basis for summary dismissal," he insisted.

Referring to the issue of confidentiality, Jessup raised that differences of opinion could emerge between employee and employer as to exactly what information should be regarded as confidential. "Your Honour," he submitted "the matter can be resolved quite simply by the employer saying `these are the range of facts and information that I wish to have kept confidential.' And 3.7 in effect is saying that."

"The point we make is that an employer can by its direction make something confidential, whatever it is, whether it is inherently confidential or not... It's not for the employee to make the judgment that the particular fact or matter wouldn't be of any consequence, of any harm or interest to the employer."

Jessup went on to stress that, in the opinion of the three defendants, public school teachers had an even greater onus on them to observe strict confidentiality than their counterparts in the private school system. "It is taxpayer education after all," he said, implying that because they are funded by the state, public school teachers should be obliged to accept stringent limitations on their right to freedom of speech.

Contrary to its carefully cultivated public profile, the new Labor government demonstrated in the course of the two day hearing that it agrees, at the most fundamental level, with both the repressive measures of its predecessor and the philosophy underpinning them.

The hearing also provided a damning exposure of the role of the Australian Education Union (AEU), the organisation ostensibly responsible for representing public school teachers. Throughout the seven years of the Kennett government AEU officials steadfastly refused to mount any industrial, legal or political challenge to the gagging provisions of TSO 140.

Maintaining that teachers charged and sacked under its provisions had no alternative but to abide by the law, the union oversaw the dismissal of some 600 teachers and the forced retirement, through intimidation and harassment, of many more.

In Rawson's case, the union responded with undisguised hostility. Had its leaders wanted to fight TSO 140, here was the perfect opportunity. Rawson had taken a stand and publicly defied TSO 140's confidentiality provisions. A test case could have been mounted, with the union summoning its considerable membership, financial and legal resources, not to speak of its connections in the media, to publicly expose the government's anti-democratic measures and defeat them.

Those Labor politicians, then in opposition, who demagogically raised the issue of TSO 140 in state parliament on a few rare occasions, would have been required to back their words with action.

In the event, the AEU not only refused to defend Rawson, it actively sought to undermine her attempts, and those of the Committee to Defend Public Education, to inform other teachers and union branches about her case and mobilise their support.

The politics guiding the union and the Labor party are now crystal clear. Behind their feeble public protests about TSO 140, they collaborated intimately with the Liberals, creating the conditions for the far-reaching attacks on teachers and the public education system as a whole to proceed. Rawson's case, conducted entirely independently of the official Labor and union apparatus has demonstrated incontrovertibly that it was possible to fight Kennett and TSO 140. The Labor and union leaders chose not to. The latter became Kennett's enforcers, while the former have now been caught out publicly defending, as the new government, TSO 140's most notorious provisions.