

RELIGION, SECULARISM, AND THE NATIONAL SCHOOL CHAPLAINCY AND STUDENT WELFARE PROGRAM

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I INTRODUCTION

When the Howard Government introduced the National School Chaplaincy Program ('the Program') in 2006,¹ it almost certainly had no idea it was placing hundreds of government programs at risk and starting on a path that would lead the High Court to announce a dramatic re-definition of executive power.² In 2012, the High Court in *Williams v Commonwealth* invalidated the Program on the basis that the executive cannot, except in specific circumstances, spend money without supporting legislation.³ Parliament quickly scrambled to provide legislative support,⁴ but the ultimate success of its effort is likely to be judged by the High Court in the near future.⁵

What the Howard Government must have foreseen, however, was that the Program would prove divisive and immediately incur criticism that it inappropriately lent government support to religious activity in public schools.⁶ Although successive governments continued to fund the program,⁷ opposition remained strong.⁸ In July of

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¹ See Jason Koutsoukis, 'School chaplain plan gets go-ahead', *The Age* (online), 29 October 2006 <<http://www.theage.com.au/news/national/school-chaplain-plan-gets-go-ahead/2006/10/28/1161749357902.html>>; Linda Silmalis and Clair Weaver, 'Chaplains to join schools', *The Sunday Telegraph* (online), 29 October 2006 <<http://www.dailytelegraph.com.au/chaplains-to-join-schools/story-e6frewt0-1111112433361>>.

² See *Williams v Commonwealth* [2012] HCA 23. The decision in *Williams* led Parliament to scramble to legislatively protect 427 existing grants and programs. See Parliamentary Library, Bills Digest No. 175 (2012) 6 (discussing the *Financial Framework Legislation Amendment Bill (No. 3) 2012* (Cth)).

³ See *Williams v Commonwealth* [2012] HCA 23.

⁴ See *Financial Framework Legislation Amendment Act (No. 3) (2012)* (Cth). The bill received Royal Assent less than 48 hours after being introduced. See Amanda Sapienza, 'Using Representative Government to Bypass Representative Government' (2012) 23 *Public Law Review* 153, 161.

⁵ The original plaintiff in *Williams* has now challenged the constitutional validity of the new legislation. See High Court Challenge II (2012), <<http://www.highcourtchallenge.com/>>. One scholar calls passage of the bill 'a provocative act of defiance of the High Court.' Anne Twomey, 'Health Reform: Turning a Deaf Ear to the High Court and a Blind Eye to the Constitution', *The Conversation* (27 February 2013) <<http://theconversation.com/health-reform-turning-a-deaf-ear-to-the-high-court-and-a-blind-eye-to-the-constitution-12448>>.

⁶ See Koutsoukis, above n 1 (discussing how the Program will be introduced 'despite a volley of criticism'); Silmalis & Weaver, above n 1 (stating that the Program 'was immediately criticised for discriminating in favour of Christians').

⁷ See Kevin Rudd, Keynote Address (Speech delivered at the Australian Christian Lobby National Conference, Canberra, 21 November 2009) (announcing additional funding for the Program for 2010 and 2011 school years); Commonwealth, Department of Education, Employment, and Workplace Relations, 'National School Chaplaincy and Student Welfare Program expansion rounds' <<http://deewr.gov.au/national-school-chaplaincy-and-student->

2011, the Commonwealth Ombudsman issued a report critical of several aspects of the Program, including an alleged failure to properly articulate for chaplains the difference between allowable religious guidance and prohibited proselytisation.⁹ Months later, the Commonwealth released the results of its public consultation on the Program.¹⁰ The consultation process led to the Program being renamed and modified to better accommodate secular ‘student welfare workers’ in addition to chaplains.¹¹ All of this took place against the backdrop of the flurry of written submissions and three days of oral arguments in *Williams*. When the decision was released on 20 June 2012, however, only a scant few pages in the extremely lengthy opinion discussed the plaintiff’s argument that the Program violated Section 116 of the *Constitution*,¹² and the vast majority of this discussion involved a technical analysis of whether a school chaplainship was an ‘office or public trust under the Commonwealth.’¹³

The purpose of this article is to address the question at the heart of the dispute over the Program: does it constitute an inappropriate involvement of religion in government affairs? The anti-establishment provision of Section 116 of the Constitution has remained stillborn ever since the *Defence of Government Schools (DOGS)*¹⁴ case.¹⁵ Thus, this discussion treats the question not as a matter of constitutional law but instead as a matter of good governance. As Marion Maddox notes, ‘[b]eyond strictly constitutional concerns, religion-state questions raise

welfare-program-expansion-rounds> (stating that in August of 2010, the Commonwealth announced funding for the Program until December of 2014); Peter Garrett, Media Release, ‘National School Chaplaincy Program’ (10 May 2011) (announcing extension of the Program to cover 1,000 new schools). In June of 2013, both the Labour and Liberal parties indicated their continuing support for the Program. See Jewel Topsfield, ‘Access Ministries in red, despite \$5m grant’, *The Age* (Melbourne), 10 June 2013.

⁸ See, e.g., Michael Bachelard, ‘Chaplains in Schools Challenged’, *The Age* (online), 5 September 2010 <<http://www.theage.com.au/victoria/chaplains-in-schools-challenged-20100904-14vde.html>> (reporting criticism of the Program from the Australian Psychological Society, the Australian Council of State School Organisations and parent Ron Williams, the plaintiff in *Williams v Commonwealth*).

⁹ See Commonwealth Ombudsman, *Administration of the National School Chaplaincy Program* (2011) 11.

¹⁰ See Commonwealth, *Consultation Process and Outcomes for the National School Chaplaincy Program* (2011).

¹¹ See AAP, ‘Schools to be given choice of secular staff under chaplaincy program’, *The Australian* (online), 7 September 2011 <<http://www.theaustralian.com.au/national-affairs/education/schools-to-be-given-choice-of-secular-staff-under-chaplaincy-program/story-fn59nlz9-1226131326544>>. Prior to this point, schools could hire ‘secular pastoral care workers’ only if they demonstrated that traditional religious chaplains were unavailable. *Ibid.* This significant change will be discussed in more detail below.

¹² See *Williams v Commonwealth* [2012] HCA 23.

¹³ *Australian Constitution*, s 116.

¹⁴ [1981] HCA 2.

¹⁵ See, e.g., Reid Mortensen, ‘The Unfinished Experiment: A Report on Religious Freedom in Australia’ (2007) 21 *Emory International Law Review* 167, 174 (discussing the *DOGS* case and concluding that the High Court’s interpretation of Section 116 ‘leaves little for the Establishment Clause to do. It only bans something about which the Federal Parliament appears to have no positive power to legislate – the creation of a national church.’). See also, Jared Clements, ‘Section 116 of the Australian Constitution and the Jurisprudential Pillars of Neutrality and Action-Belief Dichotomy’ (2008) 11 *International Trade and Business Law Review* 255, 256 (‘The High Court often takes a mystifying and incoherent approach when characterising section 116’). For this reason, the present article makes no further reference to Section 116.

additional matters at the intersection of political philosophy, public policy and cultural policy.¹⁶

The following sections of this article discuss whether the Program violates the principle of government neutrality towards religion, and, if so, whether the violation is justified. Part II of this article provides an extensive history of the Program and explains its purpose and operational structure. Part III discusses the contested concept of ‘neutrality’ and concludes that the concept, although often criticised, remains a valuable guiding principle in articulating the proper relationship between church and state in liberal democracies, Australia included. Part IV applies this concept to the Program and demonstrates that, even on a narrow understanding of the principle, the Program is not religiously neutral. It proceeds to propose a method for redesigning the Program to achieve its legitimate ends while avoiding discrimination between different religions and between religious and secular individuals. Part V offers a few concluding remarks.

II THE PROGRAM

In order to determine whether the way the Commonwealth has chosen to fund chaplains in schools is religiously neutral, the Program’s purpose and operation must be analysed in detail. Since its inception, however, the Program has operated in a legislative void, which makes this inquiry difficult. Apart from appropriations and inclusion in the omnibus response to *Williams*, the Program is wholly the creation of a ministry of the executive branch. The Program has changed dramatically since it began in 2006, and the rules of its operation are formally reflected in an occasionally bewildering array of guidelines, application criteria, contracts, codes of conduct, FAQs, and more. Newspaper accounts, Senate committee hearings, appellate submissions, Ombudsman reports, and other resources help to supplement this information and provide some insight into how closely the design of the Program matches its actual execution. To understand how the Program has evolved since it began, it is useful to separate its history into three phases: the original scheme (2006 to 2010); the transition year (2011); and the current scheme (2012 to present).

A *Original Scheme (2006 to 2010)*

On 29 October 2006, Prime Minister John Howard announced the National School Chaplaincy Program.¹⁷ The stated purpose of the Program was to ‘assist our schools in providing greater pastoral care and supporting the spiritual wellbeing of their students.’¹⁸ According to Howard, the Commonwealth would spend \$ 90 million over three years to support chaplains in school, with each school eligible for up to \$ 20 000 per year.¹⁹ The Program would be voluntary for schools, and funding available

¹⁶ Marion Maddox, ‘The Church, the State, and the Classroom: Questions Posed by an Overlooked Sector in Australia’s Education Market’ (2011) 34 *University of New South Wales Law Journal* 300, 300. Maddox goes on to argue that ‘The current transfer of public funds to religious schools and state and private school chaplains marks a major change in public policy, with potentially far-reaching effects on Australia’s political and social fabric.’ *Ibid* 315.

¹⁷ See John Howard, ‘National School Chaplaincy Program’ (Media Release, 29 October 2006) <
[¹⁸ *Ibid*.](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FD7MV6%22>.”</p>
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¹⁹ *Ibid*.

only upon a showing of support from the ‘school community.’²⁰ The crux of the announcement concerns exactly what schools chaplains are supposed to do:

Chaplains will be expected to provide pastoral care, general religious and personal advice and support to all students and staff, irrespective of their religious beliefs. A chaplain might support school students and the wider school community in a range of ways, such as assisting students in exploring their spirituality; providing guidance on religious values and ethical matters; helping school counsellors and staff in offering welfare services and support in cases of bereavement, family breakdown or other crisis and loss situations. ... [T]his new initiative should in no way replace existing careers advice and counselling services funded by the states.²¹

Although chaplaincy programs in various forms had long existed in the states, the announcement of the Commonwealth plan was controversial.²² Howard defended the Program from criticism, saying it was no worse than the long-existing practice of funding religious private schools.²³ In regards to the concern over the potential for divisiveness in forcing a multicultural, multi-denominational ‘school community’ to choose a single chaplain, he responded that schools often faced such difficulties.²⁴ He concluded that chaplains funded by the Program would not be engaging in religious instruction and that the Program did not undermine Australia’s secular nature.²⁵

Three days after the announcement, the Program was debated at length during a Senate committee hearing.²⁶ The divisiveness of the Program came under heavy fire, with one Senator stating that ‘a number of school governing bodies are already in turmoil as a result of religious minorities within the school pushing for a particular chaplain to be appointed in their community. Others have been objecting; others have been saying they do not want one at all.’²⁷ A government official tasked with developing the Program responded only that ‘I do not think we would say that we were considering divisiveness; we were considering the range of combinations and possibilities that might arise ... We have also received representations which have been very positive about the program’.²⁸ Discussion was had about the nature of the services provided by chaplains, with the Program’s developers suggesting that it would probably be at the request of a student and constitute ‘one-on-one support’ ‘in a way similar to a school counsellor.’²⁹ Emphasis was again made that chaplains would not provide religious instruction, but instead ‘personal pastoral support.’³⁰ However, the

²⁰ Ibid.

²¹ Ibid.

²² See above, n 6.

²³ See ‘Howard defends chaplain scheme proposal’, *Sydney Morning Herald* (online), 30 October 2006 <<http://www.smh.com.au/news/NATIONAL/Howard-defends-chaplain-scheme-proposal/2006/10/30/1162056916538.html>>.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Evidence to Senate Committee on Employment, Workplace Relations, and Education, Parliament of Australia, Canberra, 1 November 2006, 160-172. Ministry personnel charged with developing the Program acknowledged that it lacked a statutory foundation, which was the essence of the executive power issue that would come to the fore in *Williams*. Ibid 171 (‘CHAIR: Will this be the subject of legislation through the parliament, or will it be done through regulation? MR BURMESTER: It would be a program for which funds are appropriated, but it would not have its own legislation. There will be an annual appropriation to fund this program of government. MS PAUL: Under administered guidelines.’).

²⁷ Ibid 163 (Senator Nettle).

²⁸ Ibid 163 (McDonald).

²⁹ Ibid 166 (Paul).

³⁰ Ibid.

bulk of the hearing was taken up with a discussion of an unusual statement made by Howard in his announcement of the Program: ‘Individual chaplains for whom funding is provided will need to be approved by the Government.’³¹ Whether this constituted a ‘veto’ power, and what standards, if any, would exist for the exercise of this power, were of concern to several Senators.³² However, as guidelines and application materials for the Program had not been written yet, answers were perhaps understandably not forthcoming.

In December 2006, the Department of Education, Science and Training issued ‘National School Chaplaincy Programme Guidelines.’³³ The guidelines were revised a month later in January 2007,³⁴ and schools were able to begin applying for funding for chaplains. As originally constituted, the Program made funds available only for individuals who met the following criterion: ‘formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service.’³⁵

The guidelines were not a model of clarity, and led a Senate committee in May 2007 to inquire whether the Program only allowed religious individuals to be chaplains.³⁶ The following colloquy took place between Senators Carr and Barnett and Program administrators Lisa Paul and Chris Sheedy:

Senator CARR — So they must be religious.

Senator BARNETT — With respect, Senator Carr, you can’t put words in his mouth.

Senator CARR — I just asked a question.

Senator BARNETT — He has read the guidelines. They are perfectly clear.

Senator CARR — No, I do not think they are. That, to me, implies that you must be religious?

Ms Paul — Yes.

Mr Sheedy — There has to be a link with a religious organisation.

Senator CARR — Yes.

Ms Paul — That is the nature of the initiative, yes.³⁷

Some clarification was also gained on the guidelines’ requirement that ‘[t]here must be extensive consultation with, and support from, the broader community, particularly parents, about the demand for and the role of a school chaplain.’³⁸ A Program administrator indicated that this required a demonstration by the applicant school of what sort of consultation process was followed, with the results of a survey listed as an acceptable example.³⁹ During the hearing, evidence was tendered that in the first round of applications, approximately 15 per cent of eligible schools in Australia sought funding for chaplains,⁴⁰ but less than .05 per cent of those that applied took advantage of the guidelines’ offer that ‘[s]chools and their communities may engage the services of more than one school chaplain to reflect the diversity of student

³¹ Howard, above n 17.

³² Evidence to Senate Committee (1 November 2006), above n 26, 167-172.

³³ See *Williams v Commonwealth* [2012] HCA 23, [92] (Gummow and Bell JJ). An extended treatment of the Guidelines in their current form takes place below.

³⁴ *Ibid* [11] (French CJ).

³⁵ Evidence to Senate Committee on Employment, Workplace Relations, and Education, Parliament of Australia, Canberra, 31 May 2007, 73 (Sheedy).

³⁶ *Ibid* (Senator Carr).

³⁷ *Ibid*.

³⁸ *Ibid*.

³⁹ *Ibid* (Sheedy).

⁴⁰ *Ibid* 74 (McDonald).

populations[.]⁴¹ Program administrators were unable, at this early stage, to provide a statistical breakdown of the denominational affiliations of funded chaplains.⁴²

The application for the funding of the school chaplain that led to the litigation in *Williams* was submitted and approved during this time period, and a brief discussion of it may prove instructive as to how the process worked in practice. On 4 April 2007, Darling Heights State School ('DHSS') applied to the Program for funding of a chaplain.⁴³ The application makes it clear that the image some might have of a chaplain sitting in his or her office waiting for a student in need of spiritual advice to drop in is very different to what at least some schools had in mind. In its application, DHSS sought a chaplain to do the following:

1. WORKING WITH STUDENTS (PREP-7): Being able to talk to/counsel students who are experiencing a range of issues that are impacting on them. This may either be referral from Teacher/s or else the child seeking assistance. Also being visible at Break Times so that children may approach and seek help.
2. READING GROUPS/CLASSROOM ASSISTANCE: Improves knowledge of individual students by observing how they function in the classroom. Invaluable information can be gleaned and observance by students assists the person to build relationships and trust with the students. Children seek the person out as she is seen as a confidante.
3. GIRLS STUFF AND BOYS STUFF: Working with both genders in the Upper School who are experiencing issues at home, display poor self-esteem/friendship skills or need extra care. The program covers self-esteem, appreciation, positive thinking/talking & responsible behaviour.
4. BOYS MENTORING PROGRAM: Overseeing the program for boys who need some extra help in dealing with their emotions (anger/anxiety/fear). Boys to be mentored by a positive male role model who can help them learn to handle their emotions/behaviour.
5. WORKING WITH TEACHERS/STAFF/PARENTS: Ensuring that all stakeholders are able to access the services provided. This involves being available to talk to people about personal issues that may be impacting on them. Having an additional support level available ensures that some minor issues do not become major issues.⁴⁴

The sought-after chaplain is intended to be quite active in the school and present during reading groups, instruction periods, and break times.⁴⁵ Interestingly, the activities listed for the chaplain make no mention of 'assisting students in exploring their spirituality', the core purpose identified by Howard in launching the program.⁴⁶ The application was signed by DHSS' principal and approved by the school's parent-teacher association. In addition, it was endorsed by Scripture Union Queensland, the private entity that would provide the school with 'chaplaincy services.'⁴⁷ In making use

⁴¹ Ibid 74; Question on Notice (DEST Question No. E095_08) to Senate Committee (31 May 2007), above n 35.

⁴² Evidence to Senate Committee (31 May 2007), above n 35, 75 (Paul; Sheedy).

⁴³ See *Williams v Commonwealth* [2012] HCA 23, [15] (French CJ).

⁴⁴ See *ibid* [297] (Heydon J, dissenting).

⁴⁵ *Ibid*.

⁴⁶ See above n 17.

⁴⁷ *Ibid* [296] (Heydon J, dissenting).

of a chaplaincy-provider, DHSS was following the normal pattern, as many schools applying to the Program made use of them rather than hire chaplains directly.⁴⁸

The Program approved DHSS' application for funding in July 2007,⁴⁹ and entered into a funding agreement with Scripture Union Queensland a few months later.⁵⁰ The funding agreement stated that all chaplains operating under the auspices of the Program were required to sign a Code of Conduct and it obligated Scripture Union Queensland to ensure that any potential breaches by a chaplain of the Code were investigated and dealt with appropriately.⁵¹ The Code of Conduct imposed several duties on chaplains, one of which was to '[r]espect the rights of parents/guardians to ensure the religious and moral education of their children is in line with their own convictions.'⁵² The Program began funding a chaplain at DHSS in October 2007.⁵³

The process followed by DHSS, and described in *Williams*, appears to be the conventional way the Program dispenses funding. To summarize, the normal process appears to follow this pattern:

1. School officials canvass the 'school community' to determine whether there is support for chaplaincy, and, if so, what particular faith and/or particular individual should be sought.
2. If consensus is reached, school officials put together an application to the Program for funding that includes an endorsement from a service provider like Scripture Union Queensland.
3. If the application is approved, the Program enters into a contractual agreement with the service provider and transfers funds to it.
4. The designated chaplain must sign a Code of Conduct.
5. The service provider then places the chaplain in the school. Both the service provider and the school principal are responsible for supervision of the chaplain under guidelines incorporated into the Funding Agreement.
6. The Program is available to process complaints from members of the school community and retains the ultimate authority to cancel funding for a chaplain and/or seek repayment.

In 2008, the Program was moved slightly in a secular direction. The requirement that all chaplains be affiliated with a religious organisation was liberalised to allow schools to hire 'secular pastoral care workers' if the schools could demonstrate that their sincere efforts to find a traditional religious chaplain had failed.⁵⁴ The policy change came up for discussion, and some mockery, during a Senate committee hearing

⁴⁸ In some States, a single entity provides the vast majority of chaplaincy services to schools. For example, in Queensland, the major provider is Scripture Union Queensland (the fourth defendant in *Williams*). In Victoria, it is ACCESS Ministries. ACCESS Ministries has probably been the most controversial provider, as there have been allegations that it improperly used its access to students to proselytise. See, e.g., Jewel Topsfield, 'School Religion Classes Probed', *The Age* (online), 13 May 2011 <<http://www.theage.com.au/national/school-religion-classes-probed-20110512-1ekr9.html>>; Evidence to Senate Committee on Education, Employment, and Workplace Relations, Parliament of Australia, Canberra, 2 June 2011, 75, 81-82.

⁴⁹ See *Williams v Commonwealth* [2012] HCA 23, [69] (Crennan J).

⁵⁰ See *ibid* 70.

⁵¹ See Submissions of the Fourth Defendant, 12 July 2011, *Williams v Commonwealth* [2012] HCA 23, 83. Under the funding agreement, Scripture Union Queensland was liable for repayment of government funds in the event of a substantial breach of the Code. See *ibid*.

⁵² See *Williams v Commonwealth* [2012] HCA 23, [300] (Heydon J, dissenting). The Code of Conduct and Program Guidelines are discussed in more detail below.

⁵³ See *ibid* [471] (Crennan J).

⁵⁴ See Commonwealth Ombudsman, above n 9, 4.

in June that year.⁵⁵ Program staff explained that the change in policy affected a relatively small number of schools which had already applied for and been approved for funding from the Program but that had not yet found a traditional chaplain.⁵⁶ ‘Their intention was always to get a chaplain’, staff explained. ‘If they are unable to after a certain amount of time has elapsed, they will have the option of having a secular worker instead.’⁵⁷ This led one Senator to ask rhetorically ‘this chaplaincy program is a program where God is optional; is that correct?’⁵⁸ Another compared the policy change to ‘that episode in *Yes, Prime Minister!*’, where they were talking about the appointment of an Anglican Bishop who was a modernist and who did not believe in God.⁵⁹ Reference was made to Program guidelines, which listed one of the functions of a chaplain as ‘[s]upporting students to explore their spirituality’.⁶⁰ This led to the question ‘How do you have spiritual support without God?’⁶¹ The transcript of the committee hearing clearly reveals, however, that the subject was treated with levity and that Program staff were not pressed for a serious answer.⁶²

During the hearing, Program staff discussed the launch of a monitoring plan that aimed for on-site inspections of 10 per cent of funded schools each year.⁶³ The monitoring plan was designed to gauge how schools were using Program funds, whether complaints were being made, and whether the schools deemed the Program worthwhile.⁶⁴ On the subject of complaints, the Program stated it had received just one formal complaint about alleged proselytising (which was deemed unfounded) but had ‘heard of one case where a chaplain was quite patently proselytising; it was picked up by the principal straightaway and that chaplain is no longer in the school. A more appropriate chaplain was chosen very smartly.’⁶⁵ Staff were questioned about allegations that at least one school receiving funding refused to consult with the ‘school community’ about getting a chaplain⁶⁶ and that another used Program money to fund a self-esteem program for girls that included material on ‘skin care, makeup, hair care, [and] nail care[.]’⁶⁷ The response from Program staff indicated it was unclear whether the first allegation was true,⁶⁸ and that ‘the type of program that is running at a school is entirely up to the school community within the guidelines that are set out by the Commonwealth for this funding.’⁶⁹

In November 2009, Prime Minister Kevin Rudd gave the keynote address to the Australian Christian Lobby National Conference and addressed the topic of school

⁵⁵ See Evidence to Senate Committee on Employment, Workplace Relations, and Education, Parliament of Australia, Canberra, 4 June 2008.

⁵⁶ See *ibid* 92 (Sheedy). Sheedy put the figure at approximately 190 of the 2,700 funded schools.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* 93 (Senator Mason).

⁵⁹ *Ibid* 94 (Senator Fifield).

⁶⁰ *Ibid* 93 (Sheedy).

⁶¹ *Ibid* 93 (Senator Mason).

⁶² This change in policy, and a major change in 2011 that allowed every school the option to have either a chaplain or a secular student welfare worker, are crucial factors in a consideration of whether the Program has a coherent purpose. This issue will be discussed in Section IV(B) below.

⁶³ See *ibid* 82-83 (Sheedy).

⁶⁴ See *ibid* 87 (Sheedy).

⁶⁵ *Ibid* 89 (Sheedy).

⁶⁶ See *ibid* 84-86.

⁶⁷ *Ibid* 88 (Senator Allison).

⁶⁸ See *ibid* 86.

⁶⁹ *Ibid* 87 (Sheedy).

chaplaincy.⁷⁰ In announcing \$42 million in additional funding to fund the Program for the 2010 and 2011 school years, Rudd said:

School chaplains and counsellors are in a unique position to help young people navigate the often choppy waters of adolescence ... Chaplains do great work. They provide a listening ear for individual students – who are often more comfortable talking to a chaplain or a counsellor than a teacher, because they see them as being independent of the school authorities. They provide an additional adult role model in the school. They help connect the school community, including parents and teachers as well as children themselves. They organise informal school activities where students can make new friendships and develop new interests. They can arrange expert help with specific challenges, such as dealing with family breakdown, bullying, self-esteem, drugs, grief and behavioural management problems. And when critical incidents affect a school – such as the bushfires earlier this year in Victoria – they can play a very important active role in helping the community cope with those hard times.⁷¹

When read carefully, the speech contains a fascinating elision of the religious element of chaplaincy. Chaplaincy is not justified as it was under Prime Minister Howard by its ability to provide ‘support [to] the spiritual wellbeing of ... students’ or to ‘assist students in exploring their spirituality.’⁷² Indeed, the benefits which a chaplaincy program are said to provide are not necessarily religious in nature: a ‘listening ear’ to students, a liaison between students and their parents or teachers, a referral point for students in need of drug, grief, or bullying problems, etc. Twice in the above extract, chaplains and counsellors are treated as equivalent roles. In other words, chaplains are not described as having a particularly religious role to play in schools, despite the Program’s insistence at the time that secular individuals could be hired only if religious chaplains were unavailable. Despite being given to a religious audience, the secular tone of the speech may have been intentional: along with the extra funding, Rudd announced that a full review of the Program would soon take place.⁷³ That review would ultimately lead to the Program allowing each school to choose whether they wanted their chaplain to be religious or secular.⁷⁴

In the two months prior to Rudd’s speech, two events would occur with relevance to the history of the Program. One of them would make an immediate splash and then fade to obscurity, while the other would pass unremarked but soon put the Program’s entire existence at risk. The former was the release of a major research paper titled *The Effectiveness of Chaplaincy*.⁷⁵ The latter was the enrolment of three of Ronald Williams’ children in Darling Heights State School.⁷⁶

The Effectiveness of Chaplaincy was a research report written by a pair of Australian academics.⁷⁷ The report was commissioned by the National School

⁷⁰ See Rudd, above n 7.

⁷¹ Ibid.

⁷² See Howard, above n 17.

⁷³ See Rudd, above n 7.

⁷⁴ Discussed below.

⁷⁵ Philip Hughes and Margaret Sims, *The Effectiveness of Chaplaincy* (Edith Cowan University Social Justice Research Centre) (September 2009).

⁷⁶ See *Williams v Commonwealth* [2012] HCA 23, [302] (Heydon J, dissenting). Williams’ three oldest children were enrolled on 5 October 2009, and his youngest on 27 January 2010.

⁷⁷ See Hughes and Sims, above n 75. Dr Philip Hughes is an ordained United Church minister and at the time of the report was a Research Fellow in Edith Cowan University’s Social Justice Research Centre and a Senior Research Officer with the Christian Research Association. See ‘Staff – Philip Hughes’, Christian Research Association, <<http://www.cra.org.au/staff-philip-hughes/>>. Margaret Sims is a Professor in the School of Education at the University of New England.

Chaplaincy Association ('NSCA'), an umbrella organization of Christian chaplaincy service providers that includes Scripture Union and ACCESS Ministries.⁷⁸ The report set out to gauge the effectiveness of chaplains supported by the Program, and although it covered only Christian chaplains who were provided to government schools by members of the NSCA, this data-set comprised 85 per cent of Program-funded government schools.⁷⁹ The researchers determined that the most efficient way to measure the effectiveness of NSCA chaplaincy was through a survey of school principals and on-site visits and interviews with staff, students, and parents at 21 schools across Australia.⁸⁰ Their analysis of survey results concluded that '97 per cent of chaplains have been effective in performing the major role of providing pastoral care for students'⁸¹ and the authors reported that in their interaction with 329 staff members, students, and parents, they received only a single negative comment about chaplaincy.⁸² The authors thus recommended that funding to the Program be increased so that more schools could take advantage of it, that funding from the Program to schools be more generous for schools with large numbers of students or with 'high welfare needs', and that 'given the advantages of the values orientation and the community and church networks that chaplains bring to the position, this funding should be retained for chaplains rather than used for youth workers, social workers or school counsellors.'⁸³ The report provided ammunition to supporters of the Program,⁸⁴ was referenced in a Senate committee hearing,⁸⁵ and was mentioned in Rudd's speech to the Australian Christian Lobby that announced additional funding for chaplaincy.⁸⁶

⁷⁸ See Hughes and Sims, above n 75, 3.

⁷⁹ See *ibid* 3.

⁸⁰ See *ibid* 4.

⁸¹ *Ibid* 52.

⁸² See *ibid* 5.

⁸³ *Ibid* 53.

⁸⁴ Examples drawn from different points in the Program's history include ACCESS Ministries, 'Chaplaincy – the facts' (2011) <<http://www.accessministries.org.au/sitebuilder/media/knowledge/asset/files/1/aug2011factsheetchaplaincy.pdf>>; Scripture Union Queensland, 'Research Findings on 'The Effectiveness of Chaplaincy' by Edith Cowan University and University of New England, < <http://www.suqld.org.au/document.doc?id=43>>; National School Chaplaincy Association, 'Effectiveness of Chaplaincy', <<http://schoolchaplaincy.org.au/effectiveness-of-chaplaincy/>>. Given its unnuanced recommendations, there are obvious weaknesses in the persuasive value of the report. First, it was written as a commissioned project and thus raises the natural concern that the buyer is getting exactly what it paid for. The report was mocked on this ground in a 2011 Senate committee hearing by the chair, who said 'They evaluated themselves ... I could come up with good marks when I evaluate my performance too!' See Evidence to Senate Committee on Education, Employment, and Workplace Relations, Parliament of Australia, Canberra, 20 October 2011, 60. Second, the report measured principals' *satisfaction* with chaplaincy, something different than an objective analysis of the *effectiveness* of chaplaincy. Third, the report did not consider whether chaplaincy is more or less 'effective' than alternatives, such as funding of youth workers or counsellors. This point was raised by New South Wales in its refusal to allow the researchers to visit schools in the State. See *ibid* 10. Fourth, the report did not analyse schools where chaplains were not present to establish a 'baseline' to compare the resolution of problems in schools with chaplains against schools without them. Fifth, by relying purely on survey and interview results, the report runs the risk of selection bias and confirmation bias.

⁸⁵ See Evidence to Senate Committee on Education, Employment, and Workplace Relations, Parliament of Australia, Canberra, 22 October 2009 (Senator Mason).

⁸⁶ See Rudd, above n 7 (mentioning 'researchers studying the effectiveness of the program' and reproducing a quotation given to them by a school principal). Compare to Hughes and Sims, above n 75, 30. The use of the report by Rudd was criticised by at least one observer. See Maralyn Parker, 'Public Schools Do Not Need Christian Chaplains', *Daily Telegraph Blog*

For present purposes, the most interesting aspect of the report is its discussion of the religious aspect of chaplaincy. The report makes it clear that chaplains may be involved in almost any aspect of the normal school day:

34% of [chaplains'] time is spent in group, classroom and school activities. Most chaplains run programs or activities in which they work with small groups of students. These may include groups related to handling grief, or groups aimed at building the self-esteem of students. Many chaplains run breakfast programs ... [o]thers run groups after school ... Chaplains commonly assist teachers in classroom activities ... Chaplains participate in all sorts of programs depending on their own abilities and capacities and on the needs at the school. Some are involved in art, drama and music, for example. Many chaplains take part in school sporting programs.⁸⁷

The report emphasises that 'there was no evidence in any of the case studies that people felt that the chaplains were proselytising, were using their positions for undue influence, or were 'pushing' their beliefs on others.'⁸⁸ However, and perhaps ironically, the vast majority of what chaplains do (according to the report) has nothing to do with religion or spirituality at all. On a survey question asking chaplains to state what activities they had spent time on in the prior two weeks, dealing with 'spirituality and 'big picture' issues of life' ranked # 8 out of 11, behind topics such as 'behaviour management issues', 'bullying and harassment', 'grief and loss', and more.⁸⁹ The report notes that 'many chaplains were not involved in any specifically religious activities' and 'in general, the spiritual aspect of chaplains' work was conducted in a low key way.'⁹⁰ When asked what their 'most important contribution' to the school was, only 1 per cent of chaplains listed 'providing Christian and/or spiritual counsel.'⁹¹ When students were asked about ten possible ways chaplains assisted them, the category of 'helped students to think about the 'big picture' issues of life' received the lowest ranking of the ten for the answer 'chaplain helped a lot this way'.⁹² The report concludes on this issue that '[t]he religious dimension did not come up very often in the comments by the students. For most students, the chaplain was simply a friendly person they could talk to.'⁹³

This description of day-to-day activities of chaplains, coming from a report that was extremely supportive of the Program, nonetheless raises a 'Chaplaincy Catch-22.' By adhering scrupulously to the Program's Code of Conduct and Guidelines, chaplains had for the most part mitigated the concern that they would be actively taking part in proselytisation, religious education, discrimination, or recruitment activities. However, by being so conscientious about avoiding potentially divisive religious activities, the

(online), 25 November 2009 <http://blogs.news.com.au/dailytelegraph/maralynparker/index.php/dailytelegraph/comments/public_schools_do_not_need_christian_chaplains/asc/P40>.

⁸⁷ Hughes and Sims, above n 75, 17. See also *ibid* 4 ('The major part of the work of chaplains is pastoral care of students. Much of this takes place in personal interactions with students, sometimes in casual contexts such as in the playground, but sometimes in a more structured way in the chaplain's office.'). According to the report, 82% of chaplains ran 'needs-based programs such as handling grief or behaviour management', 73% 'had led in school events or special ceremonies', and 49% 'had participated in school camps.' *Ibid* 5.

⁸⁸ *Ibid* 46.

⁸⁹ *Ibid* 20.

⁹⁰ *Ibid* 21. The report notes exceptions, such as one chaplain who led a Christian student group over the lunch period, and another who led staff prayer meetings. See *ibid*.

⁹¹ See *ibid* 27. 2% of principals surveyed chose this answer.

⁹² See *ibid* 40. The students responded to the question as follows: 33 per cent said they did not know, 8 per cent said the chaplain had 'not done this', 24 per cent said the chaplain had 'helped a little this way', and 35 per cent said the chaplain had 'helped a lot this way.'

⁹³ *Ibid* 42.

vast majority of school chaplains spent the vast majority of their time taking part in purely secular activities the likes of which could have (presumably) been done just as well by a youth worker or guidance counsellor. Why then would the Program favour religious individuals over secular ones in funding? In other words, was it conceivable that even the *worst* religious chaplain would be better for a school than even the *best* secular youth worker? As discussed later in this article, the Chaplaincy Catch-22 would be exacerbated by further changes in the Program.

2010 saw the Program continue without substantive change. In August that year, the Commonwealth government promised to continue funding the Program through 2014, allocating a further \$222 million for 1000 additional chaplains.⁹⁴ However, change was on the horizon. At the same time it announced the funding, the government announced the beginning of a consultation process to evaluate the Program. In December, the Commonwealth Ombudsman began an investigation into the Program.⁹⁵ That same month, Ronald Williams filed documents in the High Court, asking it to declare the Program unconstitutional.⁹⁶ Once again the Program would be scrutinised, but unlike the report commissioned by the NSCA, the outcome would not be so favourable.

B *The Transition Year (2011)*

In 2011, the Program would be in the news more than ever before. Over the first few months of the year, Ronald Williams' challenge to the constitutionality of the Program garnered attention,⁹⁷ as did the February release of a government discussion paper asking for input on the Program's future.⁹⁸ Supporters of the Program moved to its defence, as exemplified by Scripture Union Queensland's establishment of a 'fighting fund' for its legal costs,⁹⁹ the holding of a National Prayer Day for School Chaplaincy that involved hundreds of churches,¹⁰⁰ and an online petition that was signed by almost 15 000 people in just two weeks.¹⁰¹ On 10 May, the Commonwealth repeated its strong support for the Program,¹⁰² but controversy was brewing over complaints that chaplains and service providers were proselytising in schools. One chaplaincy provider in NSW was reported to have published on its website that it was thankful to 'look back on another year of bringing the great news of Jesus to precious young people' at a high school it serviced, and then went on to give examples of two

⁹⁴ See Commonwealth Ombudsman, above n 9, 4. The announcement was not met with universal acclaim, as the Australian Psychological Society called the Program 'dangerous' to children's mental health' and the Australian Council of State School Organisations called it 'the wrong response and for the wrong reasons.' Bachelard, above n 8.

⁹⁵ See Commonwealth Ombudsman, above n 9, 1.

⁹⁶ See Case S307/2010, High Court of Australia, <<http://www.hcourt.gov.au/cases/case-s307/2010>>.

⁹⁷ See, e.g., John Farmer, 'Dad's High Court Challenge Begins', *The Chronicle* (Toowoomba), 17 January 2011; Marilyn Parker, 'Challenging the \$220m Chaplains', *Daily Telegraph* (Sydney), 27 January 2011.

⁹⁸ See, e.g., Justine Ferrari, 'School Chaplains Not Representative', *The Australian*, 12 February 2011.

⁹⁹ See John Farmer, 'Father Not Put Off by Opposition', *The Chronicle* (Toowoomba), 31 March 2011.

¹⁰⁰ See *ibid.*

¹⁰¹ See Daryl Passmore, 'Battle to Save School Chaplains', *Courier-Mail* (Brisbane), 23 April 2011.

¹⁰² Garrett above n 7.

students who had converted to Christianity.¹⁰³ ACCESS Ministries, a major chaplaincy service provider in Victoria, found itself in hot water over a speech made by its chief executive, who stated: 'In Australia, we have a God-given open door to children and young people with the gospel, our federal and state governments allow us to take the Christian faith into our schools and share it. We need to go and make disciples. What really matters is seizing the God-given opportunity we have to reach kids in schools.'¹⁰⁴ The Federal Education Minister promised to investigate.¹⁰⁵

Two weeks later, Program staff faced another round of questioning in Senate committee hearings, and the issue of proselytisation was addressed. Program staff said they had received only a 'relatively small number' of complaints about service providers during the Program's existence¹⁰⁶ and only 72 complaints about misconduct by particular chaplains.¹⁰⁷ They explained that the problematic speech given by ACCESS Ministries' CEO was caused by 'confusion about two separate roles that ACCESS Ministries perform': chaplaincy and religious education programs.¹⁰⁸ The confusion was 'in the public mind, and perhaps a little bit of confusion within the organisation themselves[,] but Program staff were confident that the problem had been solved by a new rule within the provider that it would not have the same person serving as a chaplain and delivering religious education.'¹⁰⁹ Other discussion centred on the difficulties imposed by the Program on a school if it wanted to hire a chaplain directly instead of going through a service provider.¹¹⁰ Interestingly, due to Program rules that said schools could only hire secular 'pastoral care workers' if they had tried and failed to find religious chaplains, Program staff reported that only 10 out of 2,674 schools funded by the Program ended up with a secular individual in the role.¹¹¹

When the Commonwealth Ombudsman released the results of its investigation a month later, four major problems with the Program were identified.¹¹² First, the

¹⁰³ See Hager Cohen, 'Chaplains Accused of Pushing Religion in Schools', ABC News (online), 8 April 2011 <<http://www.abc.net.au/news/2011-04-08/chaplains-accused-of-pushing-religion-in-schools/2625218>>.

¹⁰⁴ See Topsfield, above n 48. The speech was actually given in 2008, but only came to light later. Ibid.

¹⁰⁵ See *ibid.*

¹⁰⁶ See Evidence to Senate Committee (2 June 2011), above n 48, 75 (Sheedy). According to Program staff, there were no 'specific complaints about the chaplaincy providers' until the ACCESS Ministries issue received media coverage. See *ibid.*

¹⁰⁷ See *ibid.* The complaints could be about proselytizing, but also about other types of misconduct such as providing counselling when not qualified to do so. See *ibid.*

¹⁰⁸ See *ibid.* 81 (Sheedy). Program staff acknowledged that they had received a complaint about proselytisation by a chaplain provided by ACCESS Ministries in 2009. See 'Complaints About ACCESS Ministries', Questions on Notice, DEEWR Question No. EW0474_12, Senate Standing Committee on Education, Employment, and Workplace Relations (2011).

¹⁰⁹ See Evidence to Senate Committee (2 June 2011), above n 48.

¹¹⁰ See *ibid.* 69-70.

¹¹¹ See *ibid.* 70 (Sheedy). After Program staff gave as an example a reason a school might not be able to find a traditional religious chaplain was because the school was located in a remote area, one Senator responded 'If you want your students to be able to have a secular chaplain, you may as well move out to the bush. Is that your suggestion?' *Ibid.* 73 (Senator Hanson-Young). Staff disclaimed that having been the suggestion, but said the issue was one of the things undergoing review. See *ibid.* (Paul).

¹¹² See Commonwealth Ombudsman, above n 9, 1. A driving force for the Commonwealth Ombudsman's decision to review the program was a 2010 report issued by the Northern Territory Ombudsman. See Northern Territory Ombudsman, *Investigation Report on the Operation of the Chaplaincy Services Within Five Government Rural Schools of the Northern Territory* (2010). This report was quite critical of the operation of chaplaincy in the Northern Territory. However, the complaints investigated actually occurred just prior to the

Ombudsman found that insufficient guidance was given by the Program to schools on how to gauge whether there was sufficient community support for a chaplain.¹¹³ The Ombudsman cited as an example a parent who complained that the school her children were enrolled in applied to the Program and received funding for a chaplain even though a majority of the parents the school had surveyed were against the decision.¹¹⁴ Second, the Ombudsman identified defects in key sections of the Program's Guidelines and Code of Conduct. The role of the chaplain was identified in the Guidelines as including 'providing support for grief, family breakdown and other crisis situations' which led, according to the Ombudsman, to a perception that chaplains would be expected to involve themselves in extremely serious issues they likely would have had no training for, such as suicidal thoughts, signs of physical abuse, eating disorders, and more, thus leading to a perception they were equivalent to psychologists or trained crisis counsellors.¹¹⁵ Further, the Code of Conduct was said to put chaplains in the difficult position of being asked to interpret 'proselytisation', which was forbidden, and talking about their faith with students, which was allowed.¹¹⁶ According to the report, '[t]his makes it more difficult, except in very extreme cases, to determine whether a chaplain has crossed the line. This in turn makes this part of the code of conduct almost impossible to enforce, limiting the protection the code of conduct was designed to provide.'¹¹⁷ A third major issue involved the lack of a requirement that chaplains hold any qualifications other than a relationship with a religious organisation.¹¹⁸ Finally, the Program's process (or lack thereof) for handling complaints came under criticism.¹¹⁹ The Federal Minister for Education said that he 'broadly agreed with the Ombudsman's recommendations'.¹²⁰

As the report was handed down, the parties on both sides of the High Court challenge were busy making written submissions. The question of whether the Program was religious or secular in nature received little attention, as the submissions focussed on the highly technical questions of whether a chaplainship was an 'office under the Commonwealth' and whether the executive had the authority to fund the Program in the absence of enabling legislation.¹²¹ There was some discussion of how the chaplains in the school where Ronald Williams' children were enrolled took part in a wide variety of activities, not just individual counselling on spiritual issues.¹²² At oral

involved schools receiving funding from the Program. See Commonwealth Ombudsman, above n 9, 2. I have therefore not discussed it further in this article.

¹¹³ See Commonwealth Ombudsman, above n 9, 8.

¹¹⁴ See *ibid.* The report states that the parent believed the school council and staff were under 'the mistaken belief that a chaplain could effectively fulfil a counsellor's role.' *Ibid.*

¹¹⁵ See *ibid.* 5.

¹¹⁶ See *ibid.* 11.

¹¹⁷ *Ibid.* The report noted that '[c]riticism around chaplains' religious affiliations is due to almost all chaplains funded under the program having links to Christian organisations.' *Ibid.* 5. This assertion will be borne out by statistics discussed below.

¹¹⁸ See *ibid.* 9.

¹¹⁹ See *ibid.* 16. According to the report, Program staff told the Ombudsman that the provision of chaplaincy had led to 277 complaints 'and that it was still conducting quality assurance checks on its database.' *Ibid.* 16. This number is almost four times as high as reported during the Senate committee hearings a month prior, and the reason for the discrepancy is unclear.

¹²⁰ See Justine Ferrari, 'The role of school chaplains under government program needs to be made clearer: report', *The Australian* 26 July 2011.

¹²¹ See generally, Plaintiff's Amended Submissions, 28 June 2011, *Williams v Commonwealth*, High Court Registry; Submissions of First, Second, and Third Defendants, 11 July 2011, *Williams v Commonwealth*, High Court Registry; Fourth Defendant's Submissions, 12 July 2011, *Williams v Commonwealth*, High Court Registry.

¹²² See Plaintiff's Reply to Interveners, 28 July 2011, *Williams v Commonwealth*, High Court Registry 5 (stating that the chaplain 'was involved in aspects of the life of the School that

argument that August, there was discussion of how the Program's Guidelines addressed the requirement that a chaplain have a link to a religious organisation, and, in Justice Gummow's view, there was a problem similar to that identified by the Ombudsman: poor drafting.¹²³ 'This is one of the structural problems', he said. 'We do not have legislation. You simply have the Executive producing these vast documents with somewhat loose expressions which have never been subject to legislative scrutiny and any attempt at legislative precision.'¹²⁴

Although criticism of the Program was mounting from the press, the Senate, the High Court, and the Ombudsman, a response was on the way. In September, the results of the Commonwealth's consultation process were announced,¹²⁵ and the Program would be in for a major change. The decision was made to allow each school to decide whether it wanted a traditional religious chaplain or a 'secular student welfare worker.'¹²⁶ The change was strongly supported by schools and parent groups,¹²⁷ but opposed by the major chaplaincy service providers such as Scripture Union, ACCESS Ministries, GenR8 Ministries, and YouthCARE, all of which are Christian religious organisations.¹²⁸ On the other hand, some major teachers' unions and secular

extended far beyond the forms of individually directed pastoral care that one might ordinarily associate with the title 'chaplain.' Indeed, she was a presence in the classroom.');

Fourth Defendant's Submissions, above n 121, 37 (discussing how the school sought funding for a chaplain to provide programs on subjects such as 'personal grooming and hygiene', 'nutrition', 'students who are educationally or socially at risk', 'holiday activity', and more).

¹²³ Oral Hearing in *Williams v Commonwealth*, High Court Registry, 9 August 2011.

¹²⁴ *Ibid.*

¹²⁵ See *Consultation Process*, above n 10. The consultation process lasted approximately one year and was conducted in two stages. In the first stage, large organizational stakeholders were asked for input and a discussion paper was developed. In the second stage, submissions were welcomed from the public, and over 6,000 responses were received. See *ibid* 1. Oddly, the report that announces the results of the consultation process and the government's plan for changing the Program is only six pages long and quite cursory.

¹²⁶ See AAP, 'Schools to be given choice', above n 11. In addition, minimum qualifications were announced for chaplains. See *ibid*. A crucial ambiguity on this point must be noted. In both the media, *ibid*, and some Program documents, the change was described as allowing a new choice of a 'secular' student welfare worker. See e.g., *Consultation Process*, above n 10, 2 (discussing '[m]odifying the program to allow for choice of secular workers'); Australian Government, 'National School Chaplaincy and Student Welfare Program FAQ: Program Changes' (25 November 2011) <<http://deewr.gov.au/national-school-chaplaincy-and-student-welfare-program-frequently-asked-questions>> ('[t]he change to offer school choice will make sure that these schools do not miss out if the school community would prefer to have a secular worker.'). The Program continues to describe student welfare workers as 'secular' today on the front page of its website. See Australian Government, National School Chaplaincy and Student Welfare Program, <<http://deewr.gov.au/national-school-chaplaincy-and-student-welfare-program>> (stating that '[s]chools funded under the program can choose the services of a school chaplain ... or select the services of a non faith-based, or secular, student welfare worker.'). However, nowhere in the binding Guidelines or Code of Conduct are student welfare workers *required* to be secular. Thus, the possibility exists that the 'school community' will decide on a student welfare worker but hire someone with a religious background for the role. For example, one service provider in 2012 advertised for a 'student welfare worker' but listed, as a 'highly desirable' qualification, 'committed Christian faith with a reference from your minister/pastor'. See Young Life Australia, 'Student Welfare Worker, 2 days p/w - Yandina, QLD', 2 July 2012 (originally posted on www.seek.com.au; on file with the author). How widespread this practice is, or whether most student welfare workers are in fact secular, is unclear. I am indebted to Ron Williams for bringing this point to my attention.

¹²⁷ See *Consultation Process*, above n 10, 2.

¹²⁸ See *ibid* 4-5.

organisations opposed the Program altogether,¹²⁹ but the consultation report indicated that a majority of large organisations and individuals favoured retention of Federal funding for chaplaincy.¹³⁰ Thus, the Program would continue to exist but with a new tolerance for the non-religious and a new name: the National School Chaplaincy and Student Welfare Program.¹³¹

C Current Scheme: 2012 to Present

The High Court handed down its decision in *Williams v Commonwealth* on 20 June 2012.¹³² The decision made short shrift of the plaintiff's s 116 argument¹³³ but found the Program invalid on the basis that legislative support was needed for the executive to spend money in this context.¹³⁴ Although one newspaper reported that the case 'brought the Federal Government's school chaplaincy program to its knees',¹³⁵ supporters were not concerned: the Commonwealth Education Minister said he would ensure the current funding would continue,¹³⁶ the Attorney-General said the government 'had already looked at a range of contingency measures',¹³⁷ the new CEO of Scripture Union Queensland was confident that a funding solution would be found quickly enough 'to ensure that no chaplains were lost',¹³⁸ and the chaplain at the school where Ronald Williams' children studied even said she was 'pleased with the decision ... [t]he Federal Government has promised to validate chaplaincy and find a way to support chaplains. It is much better than working under a system that was bound to fall down.'¹³⁹

The government's proposed solution came a week later. On 26 June 2012, new legislation was introduced in the House of Representatives to validate the Program and the hundreds of other programs at risk after *Williams*.¹⁴⁰ The bill 'passed both houses unamended and was given Royal Assent less than 48 hours after being introduced.'¹⁴¹ Ronald Williams immediately vowed a second constitutional challenge to the Program,¹⁴² a promise that was kept a year later when the Commonwealth was served with a writ of summons on 8 August 2013.¹⁴³ The Commonwealth Attorney-General

¹²⁹ See *ibid* (including the Australian Secular Lobby, Australian Psychological Society, NSW Teachers Federation, and the Queensland Teachers' Union).

¹³⁰ See *ibid* 1-2.

¹³¹ See AAP, above n 11.

¹³² See *Williams v Commonwealth* [2012] HCA 23.

¹³³ See Graeme Orr and William Isdale, 'Responsible Government, Federalism, and the School Chaplaincy Case' (2013) 38 *Alternative Law Journal* 3, 4 ('it is telling that the substantive rights issue that motivated the plaintiff was dispensed with in barely a page in each judgment. This left over 200 pages for the real heart of the case: the procedural-institutional question of the Commonwealth's money power.').

¹³⁴ *Ibid*.

¹³⁵ 'High Court in favour of father', *The Chronicle* (Toowoomba), 20 June 2012.

¹³⁶ Daniel Burdon, 'Chaplaincy decision has implications', *The Chronicle* (Toowoomba), 20 June 2012.

¹³⁷ See *ibid*.

¹³⁸ 'High Court in favour of father', above n 135.

¹³⁹ John Farmer, 'Ruling may improve chaplaincy', *The Chronicle* (Toowoomba), 22 June 2012.

¹⁴⁰ See *Financial Framework Legislation Amendment Bill (No. 3) 2012* (Cth).

¹⁴¹ Sapienza, above n 4, 161.

¹⁴² See 'High Court dad back for round two', *The Chronicle* (Toowoomba), 10 July 2012.

¹⁴³ See Jane Lee, 'School chaplains challenge heads back to High Court', *The Age* (Melbourne), 9 August 2013.

stated that he was ‘confident in its position and will vigorously defend any challenge to Commonwealth programs.’¹⁴⁴ As of this writing, the litigation is on-going.

Now that the history of the Program has been recounted, it would be fruitful to examine in more detail how it is structured both formally and in practice. Formally, there are two key documents which detail how chaplaincy is intended to operate in schools: Guidelines¹⁴⁵ and a Code of Conduct.¹⁴⁶ Each of these documents is incorporated by reference into the funding agreements signed between the Commonwealth and chaplaincy service providers.¹⁴⁷

On their own terms, the Program Guidelines state that they ‘must be adhered to by all parties involved in school chaplaincy/student welfare projects.’¹⁴⁸ The voluntary nature of the Program, for both schools and individual students, is highlighted as a key principle.¹⁴⁹ The suggested list of ‘[s]ervices and actions’ that chaplains/workers could provide under the Program include a wide variety of generally-worded concepts, such as ‘[a]ssisting school counsellors and wellbeing staff in the delivery of student welfare services’, ‘providing students ... with support and or appropriate referrals, in difficult situations such as during times of grief or when students are facing personal or emotional challenges’, and ‘promot[ing] the physical, emotional, social and intellectual development and wellbeing of all students.’¹⁵⁰ Only one of the seven examples relates to religion: ‘[s]upporting students to explore their spirituality and providing guidance about spirituality, values and ethical matters or referring students to, or sourcing appropriate services, to meet these needs’.¹⁵¹ The concepts of ‘school chaplains’ and ‘student welfare workers’ are each defined, with the only difference between them being that the former ‘is recognised through formal ordination, commissioning, recognised religious qualifications or endorsement by a recognised or accepted

¹⁴⁴ Ibid. See also, Australian Government, National School Chaplaincy and Student Welfare Program, ‘High Court Challenge Frequently Asked Questions’, (17 November 2012) <<http://foi.deewr.gov.au/documents/high-court-challenge-frequently-asked-questions>> (‘Can the Program be challenged again in the High Court? The Government has taken action which it believes is an appropriate response in light of the reasons the High Court found agreements and payments under the National School Chaplaincy Program to be invalid. Further challenges could be pursued, but the Government is committed to defending any further legal action taken against the program should that occur.’).

¹⁴⁵ See Australian Government, National School Chaplaincy and Student Welfare Program Guidelines, (June 2013) (Revision 5) <<http://foi.deewr.gov.au/documents/national-school-chaplaincy-and-student-welfare-program-guidelines>> [‘*Guidelines*’].

¹⁴⁶ See *ibid* ‘Attachment A.’

¹⁴⁷ See *Guidelines*, above n 145, 10.

¹⁴⁸ See *ibid* 10. The Guidelines form part of the Funding Agreement between the Commonwealth and Funding Recipient (usually a chaplaincy service provider). See *ibid*. However, if there is a conflict between the Guidelines and the Funding Agreement, the Funding Agreement takes precedence. See *ibid*. This does create a potential risk that the Guidelines, transparent and accessible, can be undermined in practice if service providers are successful in negotiating changes in Funding Agreements. The extent to which this risk is real or speculative is not clear. I am indebted to Ron Williams for this point.

¹⁴⁹ See *ibid* 10-11. See also *ibid* 25-26, recommending ‘annual consent forms at enrolment’ and ‘consent forms for prearranged one on one appointments/sessions ... particularly where there is religious or spiritual content’. According to the Guidelines, it is not clear that ‘opt-in’ consent is required, as reference is also made to ‘opt-out’ arrangements. See *ibid* 25. In addition, consent is not deemed necessary for ‘general interaction’ which includes chaplain/worker ‘attendance at school coordinated events such as school camps and assemblies, discussions with students who have approached the chaplain/student welfare worker directly during a moment of urgency or otherwise and general playground interaction.’ *Ibid* 25.

¹⁵⁰ *Ibid* 11.

¹⁵¹ *Ibid* 11.

religious institution or a state/territory government approved chaplaincy service'.¹⁵² Program funding is extended only to legal entities termed 'Funding Recipients' which are required to demonstrate the usual array of safeguards to ensure that Commonwealth money is being spent properly,¹⁵³ in addition, however, each Recipient must undergo 'a verification of the religious denomination of the organisation, if applicable, as per the Australian Standard Classification of Religious Groups to ensure it is a recognised religion'.¹⁵⁴

The Guidelines largely treat chaplains and student welfare workers as indistinguishable roles, applying the same statements of what they may and may not do.¹⁵⁵ In terms of religion, both are forbidden from using 'theological terminology and language that assumes that those with whom they speak share their beliefs' but must instead 'ensure that any faith based statements are presented as personal beliefs rather than as factual assertions'.¹⁵⁶ Neither may provide religious education,¹⁵⁷ 'take advantage of his or her privileged position to proselytise, evangelise or advocate for a particular view or spiritual belief'¹⁵⁸ or perform religious ceremonies without consent of the students involved.¹⁵⁹ Each, however, may 'respond to questions and in good faith express views and articulate values consistent with his or her own beliefs',¹⁶⁰ 'provid[e] services with a spiritual content ... including facilitating discussion groups and lunch time clubs',¹⁶¹ and 'support students who express a desire to explore their spirituality'.¹⁶² Of the 16 items listed under the heading 'What do school chaplains/student welfare workers do?', 14 are expressed in purely secular terms.¹⁶³

Every chaplain and student welfare worker is required to sign the Code of Conduct as a condition for support under the Program.¹⁶⁴ The Code requires chaplains and workers to adhere to it and the Guidelines even while acting outside their role if 'conduct in a private capacity might impact their delivery of the services under the

¹⁵² Ibid 12. The interesting (and problematic) phrase 'recognised or accepted religious institution' is discussed in further detail below. Certain educational qualifications are required for both chaplains and student welfare workers. See *ibid* 27.

¹⁵³ See *ibid* 13 (including incorporated status, history of proper accounting, and holding of insurance). The Funding Recipients then employ chaplains and provide them to schools under a 'Service Agreement' signed by the school principal. See *ibid* 17-18. The school principal is responsible for the day-to-day supervision of the chaplain or student welfare worker. See *ibid*.

¹⁵⁴ See *ibid* 13. This 'recognised religion' requirement is inexplicable given other features of the Program, and is also discussed in further detail below.

¹⁵⁵ See *ibid* 14-15.

¹⁵⁶ Ibid 14. The requirement that religious statements must be presented as 'personal beliefs' rather than fact would presumably be considered problematic by religious individuals who consider their faith commitments to be based on divine revelation of truth rather than mere personal opinion. As discussed in Section IV(D) below, this raises the issue of religious participants finding themselves morally compromised by participation in the Program.

¹⁵⁷ See *ibid* 15.

¹⁵⁸ Ibid 16. In the glossary, the term 'evangelise' is defined as '[t]o preach or advocate a cause or religion with the object of making converts to Christianity.' Ibid 48. The term 'proselytise' is defined as '[a]ttempt to convert someone to another opinion and/or belief, particularly a religion.' Ibid 49. 'Pastoral care', which chaplains and student welfare workers are allowed to provide, is defined as '[t]he practice of looking after the personal needs of students, not just their schoolwork.' Ibid 48.

¹⁵⁹ Ibid 16.

¹⁶⁰ Ibid.

¹⁶¹ Ibid. Consent of those involved must be obtained.

¹⁶² Ibid.

¹⁶³ See *ibid* 15.

¹⁶⁴ See *ibid* 51 (reprinting Code of Conduct),

Program.¹⁶⁵ Chaplains and workers agree to '[r]espect, accept and be sensitive to other people's views, values and beliefs' and be respectful of parents' attempts control their children's spiritual upbringing.¹⁶⁶ Discrimination on religious or sexual orientation grounds is forbidden,¹⁶⁷ as is proselytisation and evangelism.¹⁶⁸

Formal documents like these, of course, are aspirational in nature. Finding information on how the Program actually operates, in a day-to-day sense, is much harder as little has been published on the topic. Apart from anecdotal information contained in newspaper coverage and complaints and the problematic survey results in *The Effectiveness of School Chaplaincy* report,¹⁶⁹ there is no publicly available data on how well chaplains and student welfare workers adhere to the Guidelines and the Code. However, two pieces of data provide an interesting angle from which to view the Program in terms of religion. First, we know that from the beginning of 2012 schools have had the option of employing a secular student welfare worker instead of a chaplain. Evidence tendered in Senate committee hearings indicate that since the option was offered, approximately 25 per cent of schools seeking new funding have opted for a student welfare worker.¹⁷⁰ However, because schools which applied for funding prior to 2012 were not given this choice, the total number of chaplains as of November 2012 was 2607 compared to just 229 secular student welfare workers (8 per cent of the total).¹⁷¹ Second, of the 2607 chaplains, 2593 were Christian (99.5 per cent).¹⁷² Of the 14 remaining chaplains, 6 were Muslim, 4 were Jewish, 2 were Aboriginal traditionalists, and 1 each was Buddhist and Baha'i.¹⁷³ As a basis for comparison, 61 per cent of the general Australian population identified as Christian in the 2011 census, 2.2 per cent as Muslim, .5 per cent as Jewish, and 2.5 per cent as Buddhist.¹⁷⁴ Just over 22 per cent of Australians reported having no religion.¹⁷⁵

With an understanding of the history of the Program and an overview of its present structure, we can now evaluate whether it should be considered secular in nature. The next section of this article discusses a framework for neutrality, while Part IV applies that framework to the Program.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ See *ibid.*

¹⁶⁸ See *ibid.* 52. The language used in the Code on this subject reproduces that contained in the body of the Guidelines.

¹⁶⁹ Discussed above, nn 75-93 and accompanying text.

¹⁷⁰ See Evidence to Senate Committee on Education, Employment, and Workplace Relations, Parliament of Australia, Canberra, 18 October 2012, 119 (Sheedy).

¹⁷¹ See 'Denomination of the Chaplains', Questions on Notice, DEEWR Question No. EW0726_13, Senate Standing Committee on Education, Employment, and Workplace Relations (2012); 'Qualifications of the Welfare Officer', Questions on Notice, DEEWR Question No. EW0727_13, Senate Standing Committee on Education, Employment, and Workplace Relations (2012).

¹⁷² See 'Denomination of the Chaplains', above n 171. Program staff apparently had little information on what particular denomination of Christianity the vast majority of chaplains belonged to, as 1,776 were labelled 'unspecified.' *Ibid.*

¹⁷³ See *ibid.*

¹⁷⁴ See Australian Bureau of Statistics, 'Cultural Diversity in Australia' (21 June 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>>.

¹⁷⁵ See *ibid.*

III SECULARISM AND NEUTRALITY

Before inquiring into whether the Program is consonant with secular government, two key questions must be addressed: what is meant by the term ‘secular’ and why does it matter if the Program is secular or not? Each of these questions will be answered in turn.

Secularism, of course, is the classic liberal democratic answer to the dilemma posed by religious pluralism.¹⁷⁶ In theory, at least, it ‘has the ability to reconcile competing claims to ultimate authority, to confine the influence of religion on state power, and to limit actions based on personal conscience.’¹⁷⁷ What secularism means and what secularism requires are issues that are as contested as any in the field of law and religion, and if space were no concern one could dwell on definitions, counter-definitions, justifications, and critiques *ad nauseum*.¹⁷⁸ This article takes the position that secularism is best understood and applied as requiring government neutrality when it comes to religion: neutrality between religions, neutrality within religions, and neutrality between religious and non-religious members of society.¹⁷⁹ In this context, Professor Douglas Laycock’s distinction between formal neutrality and substantive neutrality is useful:

Formal neutrality requires neutral *categories*. A law is formally neutral if it does not use religion as a category—if religious and secular examples of the same phenomenon are treated exactly the same. Substantive neutrality requires neutral *incentives*. A law is substantive neutral if it neither ‘encourages [n]or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.’¹⁸⁰

¹⁷⁶ See Benjamin Berger, ‘The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State’ (2002) 17 *Canadian Journal of Law and Society* 39, 49. See also Carl H. Esbeck, ‘Religion and a Neutral State: Imperative or Impossibility?’ (1984) 15 *Cumberland Law Review* 67, 67 (‘The proper relationship between church and state has long been a vexing problem. Tension between the two is indigenous in the very nature of these institutions: the state making powerful claims on its citizens and the church asking uncompromised loyalty of the same individuals who are religious adherents.’).

¹⁷⁷ Berger, above n 176, 49.

¹⁷⁸ See, e.g., Rex Ahdar, ‘Is Secularism Neutral?’ (2013) 26 *Ratio Juris* 404, 408-09 (discussing the views of one scholar who created a 12-point taxonomy of secularism).

¹⁷⁹ Predictably, there is also a voluminous literature debating the meaning and value of ‘neutrality’ in this context. See, e.g., Ahdar, *ibid*; R. George Wright, ‘Can We Make Sense of ‘Neutrality’ in the Religion Clause Cases?: Seven Rescue Attempts and a Viable Alternative’ (2012) 65 *Southern Methodist University Law Review* 877; Douglas Laycock, ‘Substantive Neutrality Revisited’ (2007) 110 *West Virginia Law Review* 51 [‘Revisited’]; Gabriël A. Moens, ‘The Menace of Neutrality in Religion’ [2004] *Brigham Young University Law Review* 535; Douglas Laycock, ‘Formal, Substantive, and Disaggregated Neutrality Toward Religion’ (1990) 33 *DePaul Law Review* 993 [‘Neutrality Toward Religion’]. As one scholar notes, ‘If permitted to choose the yardstick of ‘neutrality,’ any clever lawyer can with equal ease state six ‘neutral’ purposes and effects of a governmental policy or half a dozen reasons why the law is not neutral and thus ‘unfair.’’ Michael A. Paulsen, ‘Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication’ (1986) 61 *Notre Dame Law Review* 311, 333. See also, Steven D. Smith, ‘Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test’ (1987) 86 *Michigan Law Review* 266, 331 (‘Scholars and judges ought to pay due respect to the ideal of neutrality – and then recognize that all the hard analytical, interpretive, or historical work remains to be done.’).

¹⁸⁰ *Revisited*, above n 179, 54-55 (quoting *Neutrality Toward Religion*, above n 179, 1001).

A law that makes distinctions, on its face, by reference to religion will fail the test of formal neutrality. A classic example is the original *Act of Settlement*'s restriction on Catholics inheriting the throne, which on its own terms stated that:

That all and every Person and Persons who shall or may take or inherit the said Crown ... and is are or shall be reconciled to or shall hold Communion with the See or Church of Rome or shall profess the Popish Religion or shall marry a Papist shall be subject to such Incapacities as ... [are] established ...¹⁸¹

A requirement of formal neutrality is not particularly controversial in most circumstances in Western liberal democracies. Explicit categorisation of people by religion is widely seen to be as odious as categorisation by race, and rarely if ever can a persuasive justification be made for it in the legislative arena.

However, a requirement of formal neutrality can also be easily evaded by drafting that, whether through malice or ignorance, avoids explicit categorisation by religion but still results in the infliction of severe burdens or the proffering of substantial benefits to a particular religious group or groups to the exclusion of others. This underpins the requirement of substantive neutrality. Laycock gives the example of a law criminalising the consumption of wine by minors;¹⁸² such a law would be formally neutral, but would serve as a major disincentive for Anglican minors to partake in the sacrament of communion. Similarly, a law that forbade all commercial and recreational activity on Sunday mornings does not make religious classifications on its face, but would still result in favouritism to mainstream Christianity. A law that is not formally or substantively neutral might still be necessary for the achievement of other compelling secular objectives, but otherwise it should be considered deeply problematic in liberal democracies.

It must be acknowledged that this entire approach – favouring secularism and neutrality – has been the subject of great controversy in the academy. Much of the critique has centred around the so-called ‘myth of neutrality,’¹⁸³ which holds that secularism cannot be considered neutral because it involves taking a particular stance on disputed issues of morality and faith. A recent article by Professor Rex Ahdar provides a good example:

[T]he primary and natural meaning of ‘secularism’ denotes a *political philosophy* ... that denies the existence or relevance of a transcendental or divine dimension to public affairs. ...

If one accepts my characterization of secularism ... then secularism cannot be neutral. The short, almost trite, point is that no philosophy or coherent belief system is neutral in the sense that none is indifferent, impartial or unbiased regarding its own nature or its key doctrines. ...

A state that subscribes to secularism ... cannot be neutral, any more than a state that commits itself to Catholicism, non-denominational Evangelical Christianity, Islam,

¹⁸¹ *Act of Settlement (1700)* (UK). This provision will be changed by legislation that recently passed the Parliament of the United Kingdom. See *Succession to the Crown Act 2013* (UK). Under the new legislation, marrying a Catholic is no longer an incapacity.

¹⁸² See *Revisited*, above n 179, 55.

¹⁸³ See Esbeck, above n 176, 62-63 (‘Recently there has been the claim, originating from a theological base, that the state can be neither neutral nor neglectful about values of the first order, such as the nature of mankind and the purpose of life. ... The deduction follows that state neutrality is not only impossible and thus a myth ... In short, the argument concludes, either the state favours Christianity or it favours an opposing philosophy. There is no neutral ground.’).

Hinduism or Marxism can say it is neutral. The state's very position or stance is anchored to a particular political philosophy or 'ism.' A state that adopts secularism is not *standpoint* neutral.¹⁸⁴

This assertion is an important one and has a long pedigree. It certainly deserves a better response than can be provided in the space available here, and this article is not intended to persuade those who have already decided that the state should be neither secular nor neutral towards religion. Nonetheless, a few brief comments may be in order.

First, as a matter of abstract philosophy, the assertion is undoubtedly true. Anytime a state adopts a political or philosophical position that holds any content whatsoever, that position will not be neutral in relation to positions that are not adopted or that include content that is inconsistent with the favoured position. The assertion is logically sound because the adoption of any position, including secularism, necessarily excludes at least some other positions, such as theocratic ones.

Second, as a pragmatic matter, the assertion is irrelevant. Liberalism embraces secularism not because it wishes to take no position whatsoever, but because it wishes to take no position on questions of religious truth. Secularism, through a careful avoidance of religious establishment, 'is concerned more with achieving equality in individuals' sense of belonging to the state. Its goal is a vision of equal citizenship, without distinction in the way individuals of different faiths relate to the state.'¹⁸⁵ Secularism is not neutral in relation to every position, but by definition it is neutral on the ultimate, transcendental question: is there a god, and if so, what is he, she, it, or they like? If 'secularism' and 'religion' are conceived of as binaries, secularism will of course not appear to be neutral. But if secularism is conceived of refereeing the contentious individual and societal division between atheism and theism,¹⁸⁶ or Catholic and Protestant, or Shiite and Sunni, then secularism is as neutral as the state can possibly be on such a vital issue of great historical and practical import. Secularism allows the state to acknowledge that religion is special; thus, freedom of religion is guaranteed in 97 per cent of world constitutions.¹⁸⁷ Simultaneously, however,

¹⁸⁴ Ahdar, above n 178, 408, 415, 419. An earlier form of this view is reflected in Rex Ahdar and Ian Leigh, 'Is Establishment Consistent With Religious Freedom?' (2004) 49 *McGill Law Journal* 635, 678 ('A secular baseline is commonly admired by many liberals as a neutral, impartial one, but that depends entirely upon one's viewpoint. Few religious people believe that secularism, in the guise of a strict separation between organised religion and public institutions, is really neutral.').

¹⁸⁵ Jeremy Webber, 'The Irreducibly Religious Content of Freedom of Religion' in Avigail Eisenberg (ed), *Diversity and Equality: The Changing Framework of Freedom in Canada* (University of British Columbia Press, 2006).

¹⁸⁶ There is an important distinction that is often lost in this debate. Secularism is not the same thing as atheism. We can easily imagine a state that is atheistic (that affirmatively states there is no god) and conveys that position through education and propaganda. Of course, imagination need not be invoked, as we have real-world examples of officially atheistic states such as North Korea and the former Soviet Union. Secularism, as neutrality, does not deserve the reputation it holds among some believers. As with any principle, secularism can be taken too far. Recent legislation in France and proposed legislation in Quebec to prevent private individuals from displaying their own articles of faith in certain public contexts are good examples. Although secularism requires the government to remain neutral on questions of faith, it certainly does not require individuals acting in non-government roles to do so.

¹⁸⁷ See Davis S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163, 1200. Law and Versteeg's research examined every constitution in force as of 2006. Recent research into every constitution enacted since 2000 results in a similar finding. See Jeremy Patrick, 'Religion in

secularism allows the state through anti-establishment clauses¹⁸⁸ to decide that the mixing of religion and government is problematic for each.

Third, whenever one reads the ‘myth of neutrality’ objection to secularism, one should always ask: what does the writer propose in its place? The answer is almost invariably, but not coincidentally, a form of religious establishment – ‘soft’ or ‘hard’ – that reflects the faith commitments of the writer or the majority in the society. The liberal tradition’s embrace of secularism as the solution to religious pluralism advises against making the religion of the state a matter for democratic debate. The ideal of equal citizenship does not allow for the creation of ‘haves’ and ‘have nots’ in such a manner, and this is what makes the concept of secularism an attractive option for constitution-makers outside the West, in countries as different as Ecuador, Nepal, and the Central African Republic.¹⁸⁹

The next section of this article evaluates the Commonwealth’s chaplaincy program through the secularist lens of formal and substantive neutrality.

IV APPLICATION: PROBLEMS AND SOLUTIONS

The question: ‘is chaplaincy secular?’ may, at first glance, seem to be a ridiculous one. The concept of chaplaincy, by common definition, is religious in nature, and thus necessarily excludes the label ‘secular.’ The answer to the question may appear to be so obvious as to warrant no explanation. However, this article suggests that the answer is not so easy in the context of the National School Chaplaincy and Student Welfare Program. The role of a ‘chaplain’ under the Program, both formally and in practice, likely does not accord with most people’s understanding of the term. Changes to the Program arguably ‘decouple’ the Commonwealth from each school community’s choice as to whether to have a chaplain or a ‘student welfare worker.’ And even if we ultimately determine that the Program is not religiously neutral, it is important to specify the particular features that are problematic in order to decide whether any of it can be salvaged.

This Section examines five features of the Program. The requirement that religious institutions which are funding recipients must belong to ‘a recognised religion’ and the distinction between chaplains and student welfare workers are examined through the concept of formal neutrality. The enormously disproportionate number of Christian chaplains compared to chaplains of other faiths and to student welfare workers is examined through the concept of substantive neutrality, as is the issue of whether Program guidelines require religious chaplains to compromise their faith commitments in order to receive funding. Finally, the original justification for the Program – that students should be provided with ‘spiritual benefits’ – is examined through both formal and substantive neutrality.

A *The ‘Recognised Religion’ Requirement*

The Program does not directly pay or supervise chaplains. Instead, it distributes money to ‘funding recipients,’ which are usually chaplaincy service providers but are

New Constitutions: Recent Trends of Harmony and Divergence’ (2013) 44 *McGeorge Law Review* 903.

¹⁸⁸ The First Amendment of the United States Constitution and Section 116 of the Australian Constitution are obvious examples.

¹⁸⁹ See Patrick, above n 187, 908 (listing ten countries with Constitutions enacted since 2000 that explicitly describe themselves as at least ‘secular’, and fourteen more that include more explicit anti-establishment clauses).

sometimes religious schools themselves.¹⁹⁰ In order to be a funding recipient, the Program requires that entities satisfy six criteria; five of them are neutral factors related to good governance over Commonwealth funds, but the sixth is very different: ‘a verification of the religious denomination of the organisation, if applicable, as per the Australian Standard Classification of Religious Groups, to ensure it is a recognised religion’.¹⁹¹ From the view of formal neutrality, a government determination that something is or is not a ‘recognised religion’ is clearly problematic. Because the Program now allows schools to choose either traditional chaplains or secular student welfare workers, the religious affiliation of a service provider should presumably have no relevance for funding determinations. More so, the ‘verification’ is not simply for statistical or categorisation purposes, as it is affirmatively listed as one of the ‘eligibility checks’ that must be passed by a religious funding recipient.¹⁹²

The incorporation of the Australian Standard Classification of Religious Groups (ASCRG) is baffling in this context; the ASCRG is a statistical tool created by the Australian Bureau of Statistics for ‘collecting, aggregating, and disseminating data relating to the religious affiliation of the Australian population’.¹⁹³ The ASCRG is not meant to ‘imply the expression of any opinion ... concerning the relative merit or importance or particular religions or the people who practise them.’¹⁹⁴ As the approximate numerical threshold for inclusion of a religion in the ASCRG is 1,000 members in Australia,¹⁹⁵ small religious groups falling below that threshold, even if concentrated in a discrete location, would not be eligible for funding from the Program.¹⁹⁶ Inquiries with Program staff about this requirement resulted in the statement that ‘[t]his test is applied ... to ensure that organisations supplying faith-based workers to schools are recognised under a legitimate religion/religious denomination.’¹⁹⁷ The idea that inclusion in the ASCRG makes a religion ‘legitimate’ is clearly groundless insofar as it equates size with merit, and nor does the response indicate what policy justification there is for the criterion.¹⁹⁸ Therefore conditioning

¹⁹⁰ See National School Chaplaincy and Student Welfare Program, ‘FAQ: Funding Recipients’, 21 December 2011 (on file with the author).

¹⁹¹ Ibid. See also *Guidelines*, above n 145, 49 (defining ‘school chaplain’ in terms of ‘endorsement by a recognised or accepted religious institution’).

¹⁹² See ‘FAQ: Funding Recipients’, above n 190.

¹⁹³ Australian Bureau of Statistics, *Australian Standard Classification of Religious Groups, 2011*, ‘About the Classification’, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1266.0main+features102011>>.

¹⁹⁴ Ibid.

¹⁹⁵ See E-mail from Frances Doherty, Research Analyst, Australian Bureau of Statistics to Jeremy Patrick, 30 April 2013. The numerical threshold is only approximate, as final decisions for listing involve stakeholder consultation. See *ibid*.

¹⁹⁶ It could be that, in practice, this provision poses little or no obstacle to funding. Small religious groups may be able to articulate their beliefs in a manner that more or less fits with a currently listed religion, or it may be that no small religious groups are likely to place chaplains to begin with. There is no available empirical data on the issue. As a matter of formal neutrality, the availability of funds only to ‘recognised religions’ is problematic even in the absence of a demonstration of actual injury.

¹⁹⁷ See E-mail from David Brown, Assistant Director, NSCSWP to Jeremy Patrick, 15 March 2013. See also E-mail from David Brown, Assistant Director, NSCSWP to Jeremy Patrick, 17 April 2013 (‘[t]his is a very basic check and is designed to do no more than assure that a religion an organisation is affiliated with meets an accepted definition of religion and is recognised as such.’).

¹⁹⁸ This question was asked. See E-mail from Jeremy Patrick to David Brown, Assistant Director, NSCSWP, 29 April 2013 (‘it is not clear to me what interest DEEWR has in whether a religious group is listed in the ASCRG or what danger the Department is trying to guard against.’). One might speculate about fears of ‘cults’ spreading harmful or embarrassing beliefs or ‘fake religions’ acting fraudulently to obtain government funding,

government funding on such a determination clearly violates the standard of formal religious neutrality.

However, this criterion could be easily removed in order to cure the problem without further impact to the operation of the Program.

B *Chaplains v Student Welfare Workers*

In one respect, the decision in 2011 to allow schools to choose between religious chaplains and secular student welfare workers was laudable from the standpoint of religious neutrality: a government program that was formerly solely carried out by religious persons was opened up for secular individuals as well. In a crucial way, however, the change has made the Program internally incoherent. If ‘chaplains’ and ‘student welfare workers’ each have exactly the same roles and restrictions (as they do), why distinguish between them? Why force schools to articulate a choice for one or the other, why require chaplains to meet a qualification that student welfare workers do not have to meet, and why distinguish between religious service providers (subject to the eligibility check discussed above) and secular service providers? By allowing schools to choose secular student welfare workers to carry out the same functions as chaplains (including delivering spiritual benefits), the Program has implicitly conceded that there is nothing special about the religiousness (or lack thereof) of the individual chosen. Maintaining the distinction, and forcing all individuals funded by the Program to identify themselves as ‘chaplains’ or ‘student welfare workers’ and thus disclose their personal faith commitments, would be akin to the Commonwealth offering money to schools to hire music program directors, but requiring those schools to determine in advance whether they want a ‘gospel singer’ or a ‘generalist musician.’ Secularism’s requirement of formal neutrality towards religion warns against the state making distinctions based on religious adherence, even if the distinctions do not come attached with substantive differences.

The alternative is a program in which the religious identity of individuals is affirmatively declared as a prohibited ground of discrimination under the Program when it comes to hiring by schools and service providers. Instead of a distinction between religious chaplains and secular student welfare workers, there would be a single role with a neutral name (‘youth care worker’, ‘student support aide’, etc.) that would be open to religious individuals (of any faith) and non-religious individuals alike, so long as they meet the Program’s qualifications and sign the Code of Conduct. Such a solution ends the ‘divisive’ debates within school communities about what faith a chaplain should be,¹⁹⁹ removes the perception that the Commonwealth is funding religion (and Christianity in particular), and places religious and secular individuals on an even playing field. But most importantly, it does so in a way that still allows the Program to achieve its goals of ensuring the wellbeing of students.

An understandable objection to this proposal relates to the original purpose of the Program: providing care for the ‘spiritual wellbeing’ of students. How can we expect an atheist or someone whose religious affiliation is not known to deliver spiritual succour to students? Assuming, for the sake of argument, that the provision of spiritual

but inclusion in the ASCRG is no protection against the former fear and the latter fear is outlandish since the organisation need not pretend to be religious in order to get funding to begin with. Finally, it is not clear what would happen if a potential funding recipient identified itself with a listed ASCRG religion but professed core beliefs in contradiction to the orthodox understanding of that religion’s tenets; would the Program rely purely on self-identification or would the ‘eligibility check’ require a decision on whether the religion ‘really’ fits into the professed category?

¹⁹⁹ See above n 27.

benefits remains a legitimate aspect of the Program,²⁰⁰ there are three responses. First, the vast majority of a chaplain's activities have absolutely nothing to do with religion. As discussed above,²⁰¹ chaplains spend the vast majority of their time dealing with student problems that are secular in nature. According to research in *The Effectiveness of Chaplaincy*, only 1 per cent of chaplains reported that the most important work they did involved 'providing ... spiritual counsel'²⁰² and the report concluded that '[t]he religious dimension did not come up very often in the comments by the students. For most students, the chaplain was simply a friendly person they could talk to.'²⁰³ Similarly, government statements in support of the Program²⁰⁴ and even the Program's own Guidelines almost uniformly discuss the benefits and role of chaplaincy in terms of secular benefits.²⁰⁵ A second response to the objection is this: secular student welfare workers are already tasked with providing spiritual benefits to students. How this works in practice, and whether or not they are good at it, cannot be determined under the literature available, but the point is that, from the Program's point of view, they are qualified to do so.²⁰⁶ Third, from its inception, the Program operated on the premise that a chaplain of any faith could legitimately provide spiritual advice to a student of any other faith. As discussed below, this conception of the nature of religious belief and advice is problematic, but if we are to take it at face value, is it any more absurd for any atheist to offer a Catholic student spiritual advice than it would be for a Scientologist or Jehovah's Witness?²⁰⁷ Because the Program operates on the premise that spiritual benefits can be provided to students regardless of the denominational commitment or secular nature of the chaplain or student welfare worker, there appears to be no rational reason to hold that the religious identity of that adult is relevant, in any way, to their ability to satisfactorily carry out the work they are required.²⁰⁸

²⁰⁰ This issue is discussed in the next subsection.

²⁰¹ See above nn 81-93 and accompanying text.

²⁰² See above n 91 and accompanying text.

²⁰³ See above n 93 and accompanying text.

²⁰⁴ See Rudd, above n 7.

²⁰⁵ See above nn 150-151 and accompanying text.

²⁰⁶ See the discussion of the Guidelines in text accompanying note 152 above. One could imagine a system where only chaplains (not student welfare workers) could provide spiritual benefits in addition to other forms of student aid, but such a rule would then undermine the Program by articulating the principle that some students (in schools with a chaplain) are in need of spiritual comfort and others (in a school with a student welfare worker) are not.

²⁰⁷ One might plausibly argue that religious schools should have more leeway to choose a chaplain of the same faith. I offer no opinion on this point, other than to note the irony in a religious school needing a federally funded chaplain in order to ensure its students' 'spiritual wellbeing' is maintained.

²⁰⁸ There is an interesting aspect to this proposal that would need to be addressed in more detail with further research. Federal funding of chaplaincy did not arise in a vacuum. Chaplaincy was, and is, a common feature in most States. See Hughes and Sims, above n 75, 7. Chaplains in such programs 'were funded by a mixture of funding from local churches and communities and the schools themselves.' *Ibid.* One of the perceived virtues of traditional religious chaplains is that they bring with them 'community and church networks' that aid the school in many of its endeavours. *Ibid.* 53. Federal funding of chaplaincy is often a *supplement* to these already-existent programs, allowing more schools to have chaplains or for established chaplains to work longer hours or more days per week. If the Program became religiously neutral and expected schools and service providers to fill the role on a non-discriminatory basis, would churches withdraw their support? Or would some schools have both a church-funded chaplain and a Federally-funded non-denominational worker, each designated as qualified to provide 'spiritual benefits'? The issue is an intriguing one.

C *Denominational Dominance*

On its face, the Program is denominationally neutral: nowhere in the Guidelines, Code of Conduct, or other formal materials will one find the expression of a preference for one faith over another when it comes to chaplaincy. An examination of the Program in practice, however, tells a completely different story. As discussed at the end of Section II, a single religion has been the almost exclusive recipient of Program funding: Christianity. An incredible 99.5 per cent of Program-funded chaplains identify themselves as Christian, a percentage far disproportionate to the religion's adherence in Australia (61 per cent).²⁰⁹ Even if the Program is religiously neutral in theory, it is not religiously neutral in substance.

What explains this discrepancy? One can only speculate, but two causes seem likely.

First, the Program's determination that local 'school communities' decide on the religious affiliation of their chosen chaplain inevitably favours the religious beliefs of the majority. In the liberal democratic tradition, religion is one thing that should not be submitted to a vote.²¹⁰ Some might argue that the independent decisions of 'school communities' acts as a 'circuit-breaker' to absolve the Program (and therefore the Commonwealth) of responsibility for this mono-denominational dominance. In the well-known American case *Zelman v. Simmons-Harris*,²¹¹ this sort of reasoning was displayed when the Supreme Court held that a State did not violate the Establishment Clause when it gave parents private school tuition vouchers even though 96 per cent of parents chose to use those vouchers on religious schools.²¹² The majority stated that: 'if numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral criteria, than a government cannot, or at least cannot easily, grant special favours that might lead to religious establishment.'²¹³ Federal funding for chaplaincy in Australia, however, is not determined solely by the private choices of discrete individuals, but by the 'school community', which includes, according to the Program, the school and 'parents, teachers, friends, former students, counsellors/social workers and other people who are connected with the school.'²¹⁴ School principals decide on the form that consultation with the 'school community' will take, and school principals are ultimately responsible for interpreting the results of that consultation and deciding whether to apply for chaplaincy funding and, if funding is received, what religious affiliation they wish that chaplain to have.²¹⁵ The decisions of government school principals cannot be seen as simply the independent choices of private individuals that have no effects on others. Thus, although Program staff are not deciding on the religious affiliation of school chaplains, the Program has simply delegated that decision to other government employees. The problem of a lack of substantive religious neutrality remains.²¹⁶

A second possible explanation for the dominance of Christianity in Program-funded chaplains is that every major chaplaincy service provider in Australia has a

²⁰⁹ See above n 172 and accompanying text.

²¹⁰ Because of the nature of school catchment areas, parents of minority religious faiths likely have no real choice but to send their child to a school that has chosen a Christian chaplain.

²¹¹ 536 U.S. 639 (2002).

²¹² See *ibid* 658.

²¹³ *Ibid.* 652-53 (quoting *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion)).

²¹⁴ *Guidelines*, above n 145, 49.

²¹⁵ *Ibid* 17.

²¹⁶ Under a substantive neutrality analysis, the intent of the government is not relevant. If it were, we could still maintain that the government should be held to have intended the natural and foreseeable results of its actions.

Christian mission.²¹⁷ The Program is structured to work through service providers, and makes it quite difficult for individual schools to receive funding to hire chaplains directly.²¹⁸ As discussed during Senate committee hearings, '[f]or a school not to have to go through one of the main providers under this program, there is quite a bit of bureaucracy that goes with it ... It is not a streamlined process for a school to choose their own chaplain'.²¹⁹ Schools routinely hire and supervise a wide variety of employees: teachers, janitors, secretaries, librarians, computer technicians, and more. The hiring or supervision of chaplains is not such a specialised task that it falls outside the competency of schools; and, in any event, school principals are required to oversee chaplains regardless of how they were sourced.²²⁰ The obstacles facing schools which wish to gain Program funding directly often forces them to work with one of the major Christian-affiliated service providers which thus has predictable results for the religious character of the Program as a whole.

The solution to this violation of substantive religious neutrality is two-fold. First, the barriers enacted by the Program to schools hiring their own chaplains need to be removed. This may require a reconfiguration of the Program's current funding protocol.²²¹ Second, 'school communities' should be required to make the determination of whether a chaplain or student welfare worker is needed and, if so, which individual should be hired, without reference to religious affiliation. If, under the Program's current operating ideology a satisfactory chaplain or student welfare worker can be of any faith or none, there is no reason for school communities to take this factor into consideration. Schools would need to place themselves behind a veritable Rawlsian 'veil of neutrality', knowing that if they seek a chaplain or student welfare worker, they may end up with someone of any religious or secular affiliation.

²¹⁷ The members of the National School Chaplaincy Association (NSCA) were responsible for providing 85% of chaplains in government schools in 2009. See Hughes and Sims, above n 75, 4. The NSCA currently consists of four organisations: Scripture Union, ACCESS Ministries, GenR8 Ministries, and Schools Ministry Group. See National School Chaplaincy Association, <<http://schoolchaplaincy.org.au/>>. Each of the four organisations is a Christian ministry. See Scripture Union Australia, 'About SUA', <http://www.scriptureunion.org.au/index.php?option=com_content&view=article&id=47&Itemid=54> (stating the organisation's aims are: 'a. to make God's Good News known to children, young people, and families and b. To encourage people of all ages to meet God daily through the Bible and prayer so that they may come to personal faith in our Lord Jesus Christ, grow in Christian maturity and become both committed church members and servants of a world in need.');

ACCESS Ministries, 'Core Values', <<http://www.accessministries.org.au/about/core-values>> (stating that one of the organisation's 'Core Values' is 'Commitment to teach, live and commend the Christian faith through the ministry of Christian religious education and pastoral care');

GenR8 Ministries, 'Statements of Faith', <<http://www.genr8.org.au/about/statements-of-faith>> (stating 'We acknowledge the commission of Christ to proclaim the Good News to all people, making them disciples, and teaching them to obey him');

Schools Ministry Group, 'About Us', <<http://www.smg.asn.au/about-us>> (listing 11 Christian denominations as its members). With the possible exception of the Schools Ministry Group, it would be fair to say that the members of the NSCA are evangelical in nature.

²¹⁸ See Evidence to Senate Committee (2 June 2011), above n 48, 69-70.

²¹⁹ Ibid 70 (Hanson-Young).

²²⁰ See *Guidelines*, above n 145, 17 (listing 'overseeing the delivery of the chaplaincy/student welfare service within the school').

²²¹ If the major reason government schools are unable to serve as service providers themselves is that they are not incorporated entities, money could be channelled directly to the chaplains themselves or the Program could operate through grants to the States. Each of these alternatives brings its own complications, but each would be worthwhile if it helps to render the Program religiously neutral.

This then, would eventually help the Program better reflect the religious diversity of Australia as a whole.

D *Compromising Religion*

It is important to remember that the justification for holding that a liberal democracy should be neutral when it comes to religion is not just to protect the state from the divisive effects of religious establishment. The justification is twofold, and the often overlooked aspect is that state neutrality towards religion protects religion itself from being compromised by entanglement with the state. The various and sometimes subtle ways in which a government can distort the religious values of a church were, of course, the primary danger that led to Roger Williams' famous 'wall of separation' metaphor.²²² The danger is explained well by Carl Esbeck:

[W]hen churches have become unduly involved with the agencies of government, they risk being subverted in that their ministries become redirected to meet ends chosen by government ... State aid to religious programs, conditioned on conformity to the proverbial bureaucratic 'strings,' can slowly sap all spiritual content from a ministry ... Moreover, when a church believes it is called to speak prophetically and criticize the state, its expression is rendered tepid under the chill of real or apparent threats from government.²²³

In the context of the Program, the bureaucratic 'strings' mentioned by Esbeck are very real indeed. Chaplains and student welfare workers are prohibited from 'using theological terminology and language that assumes that those with whom they speak share their beliefs.'²²⁴ They must 'ensure that any faith based statements are presented as personal beliefs rather than as factual assertions.'²²⁵ They may not proselytise or evangelise.²²⁶ Nor may they 'express views that are discriminatory or biased based on the grounds of religious ideology, beliefs or sexuality.'²²⁷ As laudable as we may think these restrictions are for the protection of students, they all involve suppression of the expression of what very well may be the core beliefs of a faith. Asking, for example, a fundamentalist Christian chaplain to label his belief in the resurrection of Christ as a 'personal belief' (opinion) rather than a 'fact' is incredibly problematic because it asks him to assert a reduced truth-claim about something central to his identity. An equivalent would be asking an evolutionary biologist whether evolution is a 'personal belief' or a 'fact'; the two options will clearly not be perceived as equivalent. Similarly, prohibiting believers from evangelising is directly contrary to core precepts of many faiths, which instruct adherents to, for example, spread the 'Good News' of Christ's love²²⁸ or to warn nonbelievers of Christ's Second Coming.²²⁹

²²² See Jimmy D. Neff, 'Roger Williams: Pious Puritan and Strict Separationist' (1996) 38 *Journal of Church and State* 529, 539.

²²³ Esbeck, above n 176, 83.

²²⁴ *Guidelines*, above n 145, 14.

²²⁵ *Ibid.*

²²⁶ See *ibid* 16.

²²⁷ *Ibid.*

²²⁸ See Scripture Union Australia, above n 217.

²²⁹ See William Sims Bainbridge, *The Sociology of Religious Movements* (Routledge, 1997) ch 4 (discussing the Adventist movement, including denominations such as the Jehovah's Witnesses and Seventh-Day Adventists, and stating that 'the core assumption of the Adventist cultural system is the imminent Second Coming of Christ' at 118).

A good example of this concern came during a 2011 Senate committee hearing.²³⁰ Senator Marshall, the chair, stated that the views of Scripture Union on homosexuality could be summarised as ‘Homosexuals will burn in hell’ and asked whether a Scripture Union chaplain could convey this view to children.²³¹ Program staff replied that this would be outside the guidelines, and the organisation ‘will have had to have made a choice that they can abide by those guidelines.’²³² The chair then asked if that meant Scripture Union ‘would compromise their beliefs in order to provide a chaplaincy service.’²³³ Senator Marshall’s statement should not be seen as evidence that Scripture Union actually holds these views,²³⁴ but putting the factual dispute to one side, the larger issue remains. If a student asks ‘is God okay with me being gay?’ and the chaplain has a sincere, religiously-based view that homosexuality is a sin, how can the chaplain respond in a way that does not ‘express views that are ... biased based on the grounds ... [of] sexuality’ while still remaining true to his faith? He could equivocate or refuse to answer at all, but then he is not caring for the student’s ‘spiritual wellbeing’ that he may see as crucial to his position.

It is one thing to ask all persons who carry on a secular role in the public sphere to refrain from taking advantage of their position to spread their religious beliefs. It is quite another to designate someone as being responsible for ‘support[ing] the spiritual wellbeing of [school] students’²³⁵ and then set limitations on what that means in a way that asks believers to compromise their faith commitments. Modern liberal values of tolerance, diversity, and inclusivity may not always be compatible with some faiths, and this is the problem with the Program. The government wants it both ways: religious counselling to students and oversight on what that counselling entails. This is a circle that cannot be squared in a fashion that is consonant with religious neutrality. More so, it is not just individual chaplains who are at risk of having to compromise their beliefs under the Program.²³⁶ When an evangelical ministry receives literally millions of dollars from the government to supervise chaplaincy, does it still have the same willingness to criticize government policies in other contexts or does it feel that the risk of losing funding is too high? This is the core of Roger Williams’ justification for separation: the more the government funds religion, the more religion is beholden to government. If democracy functions best when there are multiple independent communities of virtue, government funding that alters the expression of faith commitments undermines this principle.²³⁷

²³⁰ See Evidence to Senate Committee (2 June 2011), above n 48.

²³¹ Ibid 83 (Marshall).

²³² See *ibid.* (Paul).

²³³ Ibid (Marshall).

²³⁴ The Program later received ‘strong reassurances’ that Scripture Union would ensure its chaplains were complying with the Code of Conduct on this issue. See Evidence to Senate Committee (20 October 2011), above n 84, 63 (Sheedy).

²³⁵ Garrett, above n 7.

²³⁶ One might argue that concern for chaplains’ conscientious beliefs is misplaced; after all, they have voluntarily accepted payment for their services with full knowledge beforehand of what the limitations on their expression would be. Speaking in general constitutional terms, we might say that their free exercise of religion has not been infringed because they have waived their rights in agreeing to the condition; but even if freedom of religion is a right that can be waived in this fashion, government distortion of religion is still a problem of religious neutrality because it allows the government to ‘pick and choose’ which types of religious expression are acceptable.

²³⁷ In this volume, Professor Reid Mortensen suggests that this concern for the spiritual integrity of religious groups and religious individuals amounts to unjustifiable paternalism, as those affected are themselves the best judges of whether their beliefs are being compromised and, if so, whether it matters. See Reid Mortensen, ‘The Establishment Clause: A Search for Meaning’ (2014) 33(1) *University of Queensland Law Journal* (this edition) section IV(A)..

The risk of the Program compromising faith could be mitigated by providing chaplains with more leeway in how they express their religious beliefs; for example, they could be allowed to use theological terms in mixed company, state that their beliefs are facts, seek converts, and condemn homosexuality. Of course, this greatly increases the risk that students will feel pressured or coerced by authority figures in an environment that is supposed to be safe and welcoming. The only way to avoid both risks is to re-fashion the roles of both chaplains and student welfare workers as secular ones, and remove their function of tending to the ‘spiritual wellbeing’ of students. This idea will be discussed further in the next section.

E *Spiritual Wellbeing*

We cannot complete an examination of whether the Program is religiously neutral without directly grappling with its hallmark feature: the provision of what we might call ‘spiritual benefits’ to students. When John Howard announced the program, chaplains’ core duties were to include ‘supporting the spiritual wellbeing of their students,’ ‘provid[ing] ... general religious ... advice’, and ‘assisting students in exploring their spirituality’.²³⁸ The Program’s current Guidelines and Code of Conduct reflect this duty.²³⁹ Although there is a strong case to be made that in reality this is actually a very small part of a chaplain or student welfare worker’s role in schools,²⁴⁰ this duty can be fairly characterised as the root cause of the controversy over the Program.

The greatest hurdle in evaluating this aspect of the Program is deciding what it means and how it works in practice. Program documents do not define ‘spiritual wellbeing’, and nor is it obvious what features or symptoms point to a student being spiritually unwell and in need of assistance. The point is not intended to be a glib one, and perhaps this is a ‘we know it when we see it’ ability of chaplains and student welfare workers. Still, if we carve out of ‘*spiritual wellbeing*’ secular concepts such as mental health, emotional stability, moral virtue, and so forth, we are left with a very sensitive and slippery conception of whether an individual’s relationship or identity with an (arguably) transcendental reality is a healthy one. The problem from the perspective of state neutrality towards religion is that this question is one that can *only* be answered from a specific faith perspective. We can use terms such as ‘religion’ and ‘spirituality’ when speaking in the abstract, but individual chaplains and student welfare workers always function with content given to those terms, and that content will vary between individuals on the basis of their particular religious or spiritual beliefs and affiliations.

My argument from integrity, however, has two aspects. The first is indeed paternalistic, as it suggests that preventing the government from directly or indirectly coercing men and women of conscience is a laudable goal. True, some religious groups are more than happy to alter their core values for profit or an opportunity for evangelism; but they are not the ones who need protecting. Believers of all stripes are often faced with pressures to compromise in order to take part in secular activities; but it is an entirely different matter for the government to invite them to fulfil a religious role and then second-guess how they choose to fulfil that role. Second, the argument from integrity also has a non-paternalistic, utilitarian aspect. The moral autonomy of religious and other groups has long been recognised as an important bulwark against totalitarian tendencies in government. From a liberal perspective, allowing such important ‘communities of virtue’ to be co-opted and neutered by extensive (but conditional) public funding deprives society of an important barrier against government overreach.

²³⁸ Howard, above n 17.

²³⁹ See *Guidelines*, above n 145, 14, 51.

²⁴⁰ See above nn 88-93 and accompanying text.

The point might best be expressed through examples. If a student comes to a chaplain or student welfare worker because he has been having doubts about God's existence, is this 'crisis of faith' a sign that the student is not spiritually well and in need of assistance or a healthy demonstration that the student is going through a common phase and should be left to resolve it however he sees fit? Would the chaplain or student welfare worker's answer differ depending on whether he or she is Lutheran, Buddhist, or atheist, despite each of them being charged similarly with tending to that student's 'spiritual wellbeing'? If a student has flirted with changing religions multiple times, something that is not uncommon among adolescents, is this a problem? If a formerly spiritually lackadaisical student suddenly becomes a zealous devotee of a local ministry despite her parents' protests, should the chaplain or student welfare worker intervene? Would the answer change depending on whether the student's new faith is a traditional Christian denomination or a newly-opened branch of Scientology? Will a Unitarian chaplain and a traditionalist Muslim chaplain each react the same way if a 16 year old girl announces she no longer plans to wear a hijab while in public?

The purpose of these rhetorical questions is to demonstrate that there is no such thing as 'spiritual wellbeing' in the abstract; nor is there such a thing as generic 'religious advice.' Because of this, from a standpoint of government neutrality towards religion, we will never *know*, in an epistemological sense, whether any given student is in real need of spiritual assistance or what form that assistance should take. Nor will we know whether the advice given by an actual chaplain or student welfare worker was helpful in solving the problem, because we will not know if there was a problem in the first place.²⁴¹ Whether through irony or synchronicity, the central thrust of the Program has to be taken on faith. Unfortunately, that is something adherence to religious neutrality does not allow us to do.

The answer to this problem is a familiar one: it is the role of parents to supervise the spiritual upbringing, or lack thereof, of their children.²⁴² The government cannot sponsor substitute spiritual custodians because it simply cannot ensure that these custodians will effectively customise their advice to respond to the phenomenon of religious pluralism. As religious pluralism increases in Australia, the dominance of chaplaincy by Christians becomes more problematic, and the ideal that a single chaplain can effectively tend to the spiritual needs of every student in a school becomes more naive. Indeed, one might argue that the students most in need of spiritual support are those that belong to minority religious faiths because they are more likely to face bias or bullying; but these are the faiths that are *least* likely to find that their school's chaplain understands their beliefs. More so, they are the students most likely to have to opt-out of the wide variety of school programs run by chaplains, and thus find themselves further set apart from their classmates.²⁴³

²⁴¹ It may be that even the general question of whether students as a collective need spiritual succour is not one that should be resolved through the democratic process.

²⁴² One might argue that the government has a special responsibility to provide chaplaincy for soldiers or prison inmates because in those contexts, the government is itself responsible for taking those individuals away from their chosen sources of spiritual comfort. The argument is much debated in the literature, but carries no weight in the context of government schools because students retain ample freedom to obtain spiritual advice outside of school hours. From a perspective of neutrality, the question is why would the government think it has any role to play in the spiritual upbringing of school children in the first place?

²⁴³ Under current Program Guidelines, students' consent to chaplaincy is on an 'opt-out' basis. See *Guidelines*, above n 145, 65. Because chaplains and student welfare workers may be involved in everything from classroom reading groups to sports to after-school clubs, students who wish to avoid all contact with chaplains and student welfare workers will find themselves frequently segregated from their classmates. In light of this concern, it would be preferable, if nothing else, for the Program to switch to an 'opt-in' form of consent. The

If the spiritual element of chaplaincy were removed so it complies with the principle of religious neutrality, there is strong reason to believe that the Program's primary benefit to students would still remain. Compassionate adults, regardless of religious belief, would be available to assist students as allies outside of the administrative hierarchy rather than as authority figures. They could still serve as a 'listening ear' or as a 'friend in the playground,' still assist in times of grief or stress, and still help to spot students suffering from serious problems like suicidal thoughts or eating disorders and refer them to expert assistance.²⁴⁴ In other words, the best features of chaplaincy remain even when the nebulous concept of spiritual wellbeing is removed.

V CONCLUSION

The issue of Commonwealth funding for chaplaincy is a controversial one from many perspectives. Is it sound educational policy? Is it an example of 'pork-barrelling?' Is it constitutional? This Article has addressed the issue from the perspective of secularism and concludes that the current method by which the Commonwealth has become involved in chaplaincy, the Program, fails the tests of formal and substantive neutrality towards religion. The Program irrationally inquires into the religious affiliation of service providers, maintains an unnecessary distinction between 'chaplains' and 'student welfare workers' while giving them the same role in providing spiritual aid, and compromises the religious beliefs of those same individuals by restricting the types of spiritual aid they can provide. Further, the structure of the Program has resulted in chaplaincy being overwhelmingly dominated by a single religion. Finally, the original core purpose of chaplaincy, ensuring the 'spiritual wellbeing' of students, is not one that can be attained, in principle or in practice, without favouring some religious views over others.

The Program's problems in comporting with religious neutrality are serious, but solutions are available to ameliorate the problem. As students, school principals, and even chaplains themselves attest, the provision of spiritual comfort is only a small part of the benefits they provide. Thus, the Program can be recast in a secular form by collapsing the distinction between 'chaplains' and 'student welfare workers', removing the function of tending to students' 'spiritual wellbeing,' making it easier for schools to participate in the Program without the intercession of evangelical service providers, and prohibiting religious discrimination in hiring. This may be seen as radical surgery to transform the Program into something it was never meant to be; but in reality, it allows the best features of the Program to flourish while simultaneously removing its most divisive aspects.

potential of the Program to stigmatize members of minority faiths and non-believers is an issue that should be addressed through further research.

²⁴⁴ One might argue that 'guidance officers' or others are already designated to perform this role in many schools. Nonetheless, limited research indicates that chaplaincy enjoys widespread support from school administrators and students for serving these same precise functions, with the religious element of chaplaincy usually considered only as a distant add-on. The reasons why chaplains and student welfare workers remain popular even with the availability of guidance officers are unclear; this is a point worth further investigation.

