SCHOOL CHAPLAINCY, SECULARISM AND CHURCH–STATE SEPARATION IN A LIBERAL DEMOCRACY

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I INTRODUCTION

Some emotional claims have been made about *Williams v Commonwealth* (*the First Williams Case*),[1] including news headlines such as *Man 1, God 0 in school chaplains case*[2] and *Man who sued to ban God thrilled with win.*[3]

In the *First Williams Case,* the merits of the National School Chaplaincy and Student Welfare Program (NSCSWP) were not the focus, so much as whether there had been a legitimate exercise of the Commonwealth government's executive spending power under section 61 of the *Constitution*. Neither was the court interested in 'banning God', in the sense that the plaintiff's application based on s 116 of the *Constitution* was unanimously rejected by the Court, a fact which received little media attention.

The challenge the plaintiff makes in his second High Court application (*the Second Williams Case*)[4] is whether it is constitutionally valid to authorise a spending program by regulation (rather than by a specific act of Parliament, involving review of the spending by the Senate).[5] The second case also seeks to challenge whether there is power for federal Parliament to pass such a specific enactment in relation to school chaplaincy.[6] The High Court in *The First Williams Case* left that question open, along with the possibility of school chaplaincy being funded by the Commonwealth making directed grants to the states for that purpose.[7] The second case does not raise any issue of church–state separation or religious freedom under s 116 of the *Constitution*.

The plaintiff was reported to have explained his second High Court application in the following way:

> I'm most disappointed that I should have taken this to the High Court the first time around at huge emotional and financial expense … only to have the decision and our

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[1] *Williams v Commonwealth of Australia* [2012] HCA 23 (20 June 2012) ('*The First Williams Case*').
[2] Jenny Dillon, 'Man 1, God 0 in school chaplains case', *Courier Mail* (online), 27 January 2011 <http://www.couriermail.com.au/news/queensland/man-1-god-0-in-school-chaplains-case/story-e6freoof-1225995744028>.
[3] Katina Curtis, 'Man who sued to ban God thrilled with win', *The Australian* (online), 20 June 2012 <http://www.theaustralian.com.au/news/breaking-news/man-who-sued-to-ban-god-thrilled-with-win/story-fn3dxity-1226403474933>.
[4] High Court of Australia, matter S154 of 2013 (filed 8 August 2013) ('*Williams No. 2*').
[5] Ibid, Further Amended Statement of Claim, para 58.
[6] Ibid, Further Amended Statement of Claim, para 92.
[7] *The First Williams Case,* 91 (Gummow and Bell JJ), 593 (Kiefel J).

democracy bypassed by all three parties simply to keep the money flowing for the very program that was declared illegitimate to be funded by the government in the first place. [8]

The solution to the funding defect identified by the Court in *the First Williams Case* was an amended Act of federal Parliament and an amended Regulation made under that Act.[9] Is the critical issue really that this solution was a failure of the democratic process? Or does the concept of a liberal democracy make a more fundamental challenge than the two *Williams Cases* for the role of spirituality in children's lives and education?

II   THE CHALLENGE OF LIBERAL DEMOCRACY FOR SPIRITUALITY AND EDUCATION

The ideas of separation of church and state and religious freedom are consistent with the teaching of Jesus that we should 'give to Caesar what is Caesar's and to God what is God's'.[10] After some convolution, liberal thought reached a rough consensus that the state should not interfere with matters of faith or religious practice and that citizens have a right to resist any such interference.[11] In John Stuart Mill's terms, 'The rights of the individual against society have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients openly controverted.'[12]

Although Mill was writing after the Reformation, these ideas were born out of a conflict between Protestant and Catholic faith – a context in which the state sought to control belief by force. Secularism, as a liberal principle, was not ideological opposition to religion in the public sphere; rather, it was a pragmatic political arrangement to help diverse groups coexist.[13] For some liberal thinkers (such as Erasmus, Milton and Locke), their position on religious freedom and non-interference was an expression of their religious views; for others (such as Hume, Helvetius and d'Holbach), it was an expression of their atheism.[14]

It is important to note that liberal thinking on these matters arose in response to a particular historical context and was far from uniform,[15] nor as well formed then as found later in various liberal democratic constitutions (such as Australia's s 116, which we discuss later). It is just as important that liberal thought today take account of its

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[8]   Jane Lee, 'School chaplaincy challenge heads back to High Court', *The Age* (online), 9 August 2013 <http://www.theage.com.au/national/school-chaplains-challenge-heads-back-to-high-court-20130809-2rmk1.html>.

[9]   *Financial Framework Legislation Amendment Act (No.3) 2012* (Cth), amending the *Financial Management and Accountability Act 1997* (Cth), and Part 5AA of and Schedule 1AA to the *Financial Management and Accountability Regulations 1997*. These came into effect with Royal Assent on 28 June 2012.

[10] Matthew 22:21, *New International Version* (Bible Society in Australia Inc., 1984). Cf. Tom R. Frame, *Church and State: Australia's Imaginary Wall* (UNSW Press, 2006) 31, 36-39.

[11] DJ Manning, *Liberalism* (St Martin's Press, 1976) 39.

[12] John Stuart Mill, *On Liberty* (Everyman, first published 1859, 1972 ed) 71. The assertion of the individual right against the state must be distinguished from an assertion that a principle of autonomy necessarily creates diversity. As Macedo points out, where the state suppresses religious views or expression under a rhetoric of neutrality or as the promotion of reason, the result is homogeneity under 'a single religion of reason' which marginalises those who do not express their views within the framework of that state-favoured principle. See William A. Galston, 'Two Concepts of Liberalism' (1995) 105(3) *Ethics* 516-534.

[13] Ian Hunter, 'The Shallow Legitimacy of Secular Liberal Orders: The Case of Early Modern Brandenburg-Prussia,' in Geoffrey Brahm Levey and Tariq Modood (eds) *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press, 2009) 27-55.

[14] Manning above n 11, 44.

[15] Ibid, 32.

social milieu. What, then, pragmatically promotes reason, discourse and mutual respect in our contemporary context?

In 2011, the Australian Human Rights Commission published a research report into *Freedom of religion and belief in 21st Century Australia*.[16] The report acknowledged the fundamental importance of spirituality for Aboriginals and Torres Strait Islander peoples, the Christian heritage of the colonial era and the inheritance (religious as well as cultural and economic) from migrants in relation to other religious traditions. In its analysis of a 2010 study, the Commission painted an interesting picture about attitudes to spirituality:

> Forty-five per cent of Australians agreed – in many cases strongly agreed – with the proposition that 'there is something beyond this life that makes sense of it all', while almost a quarter (22 per cent) disagreed. A third (34 per cent) was unsure. … Level of education was not a differentiating variable, nor was country of birth. … The same survey asked Australians: 'How important is religious faith or spirituality in shaping your life's decisions, such as career, relationships and lifestyle?' Thirty-eight per cent said it was either very important (13 per cent) or important (25 per cent); almost a quarter (23 per cent) said it was of little importance. A very substantial number (38 per cent), especially men, said it was not important. Older age, country of birth, and religious affiliation (but not education) were differentiating variables.[17]

By that analysis, there is a rough equivalence in Australian society between those to whom religious faith or spirituality is important or not important. Census data shows a population with very substantial religious identification:[18]

Religious Identification	1947 Census %	1971 Census %	1996 Census %	2001 Census %	2006 Census %	2011 Census %
Christian (various denominations)	88.0	86.2	70.6	68.0	63.9	61.1
Other religions	0.5	0.8	3.5	4.8	5.6	7.2
Atheist, agnostic, humanist, rationalist	-	-	0.16	0.26	0.32	-
No religion	0.3	6.7	16.5	15.5	18.7	22.3
Not stated	10.9	6.1	8.7	9.8	11.2	9.0

The Census data shows a clear increase in religious diversity (largely due to immigration from non-Christian backgrounds, with the largest non-Christian faith groups now being Buddhist and Muslim).

There also has been a decline in the proportion of those with a faith or sense of spirituality seeking an institutional or ceremonial expression of their belief.[19] For

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16   Australian Human Rights Commission (2011) *Freedom of religion and belief in 21st Century Australia,* <https://www.humanrights.gov.au/sites/default/files/content/frb/Report_2011.pdf> 5.

17   Ibid 6.

18   Derived from Census data provided in Australian Human Rights Commission (2011), above n 6, 15-21. Cf. Australian Bureau of Statistics, '2071.0 – Reflecting a Nation: Stories from the 2011 Census, 2012–2013,' Latest Issue (21 June, 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>.

example, the 'no religion' category above shows very significant increase over time (now representing 22.3 per cent of the population). Nevertheless, as Edith Cowan University's Honorary Research Fellow, Philip Hughes, observed of this group – commenting on data up to 2010 – 'a miniscule proportion said they were Atheists, while many considered themselves to be 'religious' or 'spiritual'. They were simply not identifying with a particular organized form.'[20]

While the percentage growth for atheists, agnostics, and humanists between 2001 and 2006 was high, that represents an increase in number of persons over the period from 20,000 to 61,000 in aggregate. As indicated in the table above, the 2011 Census did not differentiate these groups, combining them together under 'No Religion'. It is reasonable to assume that the percentage of those opposed to religion has continued to rise. If the trend between 2001 and 2006 continued, we would expect atheists, agnostics, humanists and rationalists in the 2011 Census collectively to represent 0.4 per cent of Australians, together comprising fewer than 100,000 Australians.

Even if we allowed for *all* of the 2011 'No religion' and 'Not stated' respondents to be those with a principled objection to religion – which clearly is not the case – this still leaves a strong majority of roughly 70 percent of the Australian population identifying with faith or spirituality in some form. It may well be that many of these ascribe only moderate importance to their beliefs in shaping life's decisions, as explored above. Nevertheless, the notion that Australia's public sphere and public education should reflect a 'secular' society (in the secularist sense, discussed later, of excluding belief from schools or public forum) is more an ideological aspiration than a reflection of reality.[21]

We raise these matters not to say that a majority opinion about faith or spirituality (if there is such a thing as a majority opinion) should be imposed on those in the minority. However, it does show that Australian society is religiously diverse, that a large proportion of the population regards religion or spirituality as important, and that a significant proportion does not. Our context, unlike the relatively simple delineation of Christians (Catholic and Protestant), Deists, and Free Thinkers at the birth of secularism, is one of fragmentation. We find a plurality of voices with no simple way to adjudicate between their claims to rationality and justice.[22] Rather than a homogenous cosmopolitanism exported to the world by the West, we find 'multiple modernities' – religious and non-religious alike – all influencing and being influenced by a modernising world.[23] However, religion and faith remain relevant to society as a whole, and therefore to Australian education.

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[19] For interpretation of these trends, see Tom Frame, *Losing My Religion: Unbelief in Australia* (University of New South Wales Press, 2009).

[20] Philip Hughes, 'Are Australians 'losing their religion?'' (2010) 20(2) *Pointers: Bulletin of the Christian Research Association* 1, 6.

[21] It may also be viewed as a *strategy* for the increasing secularity of Australian society, such as by the Rationalist Society of Australia, '10 Point Plan for a Secular Australia' (2012) <http://www.rationalist.com.au/10-point-plan-for-a-secular-australia/>.

[22] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988); Geir Skeie, 'Plurality and Pluralism in Religious Education' in Marian Souza, Gloria Durka, Kathleen Engebretson, Robert Jackson and Andrew McGrady (eds), *International Handbook of the Religious, Moral and Spiritual Dimensions in Education*, International Handbooks of Religion and Education, vol. 1, part 1 (Springer, 2006) 307-319.

[23] José Casanova, 'Cosmopolitanism, the Clash of Civilizations and Multiple Modernities' (2011) 59(2) *Current Sociology* 252-267. See also Shmuel Eisenstadt, 'Multiple Modernities' (2000) 129(1) *Daedelus* 1-21; Charles Taylor, *A Secular Age* (Belknap Press, 2007) 424-437; David Martin, *On Secularization: Towards a Revised General Theory* (Ashgate, 2005) 123-140.

So what should be the response to this diversity in relation to schools and education? Is the best solution an exclusion of discussion about something cherished by so many – whether a view that religion/spirituality is important in daily life or a cherished view that is antithetical to religion? What best achieves the liberal ideals?

Liberal thinking includes a tradition of discourse and appeal to reason.[24] Originally, this was directed at the 'mischief' of institutional authority and dogma (at that time from the church) being used to restrict freedom of inquiry in the sciences and liberal arts.[25] The liberal solution to a subject which provokes dissonant views is not to exclude the subject from discussion or make it part of the 'self regarding' realm of private reflection, but rather to allow free thinking and discourse because 'upon the free exchange of opinion depended the growth of human knowledge'.[26]

Political philosopher and eminent scholar of secularisation, Charles Taylor, has shunned simplistic notions of secularism as building an impermeable and impassible wall between religion and the public sphere. Rather, he advocates 'fair and harmonious modes of coexistence' among diverse communities of belief.[27]

This accords with the philosophy undergirding Australian education in relation to spirituality. Compared to the 1989 and 1999 two-page *Hobart* and *Adelaide Declarations,* the 2009 twenty-page *Melbourne Declaration* represents a more complex and constructivist vision of education, arguably the coming of age of the 'multi-citizen', pursuing social capital through multicultural citizenship education.[28] Sensitive to critical theory and education for emancipation,[29] this vision for Australian education speaks of 'building a democratic, equitable and just society – a society that is prosperous, cohesive and culturally diverse.'[30] It is holistically concerned with the 'intellectual, physical, social, emotional, moral, *spiritual* and aesthetic development and wellbeing of young Australians,' nurturing 'an appreciation of and respect for social, cultural and *religious* diversity, and a sense of global citizenship.'[31]

The *telos* of Australian education effectively has two goals: 'Australian schooling promotes equity and excellence; [and] all young Australians [will] become successful learners, confident and creative individuals, and active and informed citizens.'[32] In pursuit of these goals, it is noteworthy that *religion* and *spirituality* are mentioned seven times as integral to this vision. Religious literacy, understanding and respect – beyond mere tolerance of the persistence of religion in public life – are key factors in a globalised and pluralistic world toward social cohesion and discovering unity amidst multi-religious diversity.[33]

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[24] George Myerson, *Rhetoric, Reason and Society* (Sage, 1994).

[25] For example, see Spinoza's argument for judgement to be 'entirely free and unhampered' in *Theologico Politicus Treatise* (first published 1677, trans. R. H. M. Elwes, 2009 ed) ch 20, sec 43.

[26] This is DJ Manning's summary of Helvetius' thesis from his 1758 treatise *On the Mind*, in Manning, above n 11, 47.

[27] Charles Taylor, 'Foreword: What Is Secularism?' in Levy and Modood (eds), above n 13, xxi-xxii.

[28] Simon Marginson, *Educating Australia: Government, Economy and Citizen since 1960* (Cambridge University Press, 1997).

[29] Anthony Welch, *Australian Education: Reform or Crisis?* (Allen & Unwin, 1996).

[30] Ministerial Council on Education, Early Childhood Development and Youth Affairs (MCEECDYA), *Melbourne Declaration on Education Goals for Young Australians* (2008) <www.mceecdya.edu.au/verve/_resources/national_declaration_on_the_educational_goals_for_young_australians.pdf> 4.

[31] Ibid; emphasis added.

[32] Ibid 7-9.

[33] Jonathan Sacks, *The Persistence of Faith: Religion, Morality & Society in a Secular Age* (Continuum, 2005). For Australian reports aligning with this European consensus, see Desmond Cahill, Gary Bouma, Hass Dellal and Michael Leahy, *Religion, Cultural Diversity*

Australian educational policy has responded to the challenge of a multi-religious society by favouring the liberal ideal of diversity through mutual toleration and a framework of civic unity in the face of plurality of views.[34] *The Melbourne Declaration* emphasises that '[s]uccessful learners … are able to solve problems in ways that draw upon a *range of learning areas and disciplines* … [and] are able to *make sense of their world* and think about how things have become the way they are.'[35] In turn, 'Confident and creative individuals … have a sense of self-worth, self-awareness and personal identity that enables them to manage their emotional, mental, *spiritual* and physical wellbeing.'[36] Moreover, '[a]ctive and informed citizens … *appreciate* Australia's social, cultural, linguistic and *religious diversity*, … history and culture'. In pursuit of 'democracy, equity and justice', the goal of Australian education is students who are 'able to relate to and *communicate across cultures* … [and] *work for the common good*, in particular sustaining and improving natural and social environments.'[37]

The vision for Australian education is best understood as open, tolerant and even-handed as regards religion and spirituality, consistent with the values of diversity as well as *liberty, equality* and *fraternity*.[38] Such an approach to free discourse, aside from enabling an individual to develop her own ideas and sense of identity, can help students find unity amidst a fragmented multicultural and multi-faith diversity.[39] As Matthew Harding has pointed out, provided religious belief is promoted as a matter of personal choice, in a plural society religion and spirituality can be viewed a positively enhancing the Razian liberal value of personal autonomy.[40] Compared with the privatisation and exclusion of belief, which tends to suppress deep-seated differences and balkanise society, open yet respectful and informed dialogue promotes harmony and democratic political process.[41] This is particularly important when, as Boston University Professor Stephen Prothero points out, 'Religion is now emerging alongside race, gender, and ethnicity as one of the key identity markers of the twenty-first century'.[42]

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and   Safeguarding   Australia   (2004) <http://amf.net.au/library/uploads/files/Religion_Cultural_Diversity_Main_Report.pdf>   17; Gary Bouma, Sharon Pickering, Anna Halafoff and Hass Dellal, *Managing the Impact of Global Crisis Events on Community Relations in Multicultural Australia: Background Report* (Multicultural Affairs Queensland and Department for Victorian Communities, 2007) <http://arts.monash.edu.au/about/interreligion/impact-global-crisis-report.pdf>.

[34]   Galston, above n 12. It is this model of diversity which prevails in this policy, rather than an approach with 'unavoidable non-neutral consequences for … religious beliefs' such as Macedo's. See Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Harvard University Press, 2003) 12.

[35]   MCEEDYA, *Melbourne Declaration*, above n 30, 8; emphasis added.

[36]   Ibid 9; emphasis added.

[37]   Ibid; emphasis added.

[38]   Promoted by Charles Taylor, above n 27, xi-xii.

[39]   Michael Grimmitt (ed), *Religious Education and Social and Community Cohesion* (McCrimmons, 2010); Wolfram Weisse (ed), 'Religion in Education – A Contribution to Dialogue or a Factor of Conflict?' Presentation of the REDCo-Project in the European Parliament, December 3, 2008; Craig Engelhardt, 'The Necessary Role of Religion in Civic Education,' in Steven Jones and Eric Sheffield (eds), *The Role of Religion in 21st-Century Public Schools* (Peter Lang, 2009) 163-186; John Hull, 'The Contribution of Religious Education to Religious Freedom: A Global Perspective' (2001) *International Association for Religious Freedom* <http://www.iarf.net/REBooklet/Hull.htm>.

[40]   Matthew Harding, 'Religion and the Law of Charity: A Liberal Perspective' (2014) 29 *Journal of Law and Religion* (forthcoming), 10-11.

[41]   Stephen Prothero, *Religious Literacy: What Every American Needs to Know – and Doesn't* (Harper San Francisco, 2007) 10.

[42]   Ibid 4-5. Cf. Douglas Johnston and Cynthia Sampson, *Religion, the Missing Dimension of Statecraft* (Oxford University Press, 1994).

Apart from the liberal principles of freedom of conscience, freedom of discourse and personal autonomy already discussed, there are other liberal principles in play in relation to the challenges of an Australian multi-cultural and multi-faith community. These include the principle of the *common good* which is embedded in the *Melbourne Declaration* and was articulated by Montesquieu: 'What is called unity in a body politic is a very delicately balanced thing; true unity is unity or harmony which results in all the parties, no matter how opposed they may seem to be, working for the general good of the society'.[43] Notions of *the* common good can easily become oppressive when they exclude the voice of whole communities.[44] Thus, the silencing of perspectives under the rhetoric of 'secular' education is 'thoroughly *illiberal.*'[45]

As discussed later, a large part of school chaplaincy involves social and emotional support to students, on a voluntary basis, under a model of promotion, prevention and early intervention – and referral to psychological counselling services for those students suspected of needing treatment or case management. School chaplaincy also develops a sense of positive school community and links to the wider community that enables students and teachers to receive material, social and emotional support, especially at times of tragedy and natural disaster. In this way, school chaplaincy works for the general good of society in that liberal tradition. Further, the spiritual support offered by chaplains must be non-coercive, voluntarily received and available to all regardless of faith or no faith, [46] which is consistent with liberal views of diversity and tolerance.

A young person's spirituality involves issues of human rights.[47] Denying the opportunity for that nurture in a school environment would be a serious concern, as the Australian Human Rights Commission concluded in 2011:

> As this research process has amply demonstrated with the spread and depth of responses from across Australia through the many consultations and the 2033 submissions, religion in a civil society cannot be ignored, nor can it be privatised, and nor can it be relegated to the margins. Religious groups contribute to the spiritual and social wealth of the nation.[48]

The challenge of liberal democracy is how to ensure society is safe for different views to be experienced, expressed and explored, for individuals to be allowed the freedom to choose their beliefs or to have no beliefs, and for those of differing views and backgrounds to dialogue and exist in an environment of mutual respect.

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[43] *Les Causes de la grandeur et de la decadence des Romains* [1734]. Quoted in Manning, above n 11.

[44] The *common good* is both complex and contested, as explained by Manuel Velasquez, Claire Andre, Thomas Shanks, and Michael Meyer, 'The Common Good' (2010) *Markkula Center for Applied Ethics*, Santa Clara University <http://www.scu.edu/ethics/practicing/decision/commongood.html>. Nevertheless, this language is adopted by the *Melbourne Declaration*, and it seems to be implied in a pragmatic sense by any vision of a pluralist democracy. Cf. Miroslav Volf, *A Public Faith: How Followers of Christ Should Serve the Common Good* (Brazos Press, 2011) 55-74.

[45] Warren Nord, *Does God Make a Difference? Taking Religion Seriously in Our Schools and Universities* (Oxford University Press, 2010) 85-86, 190-191, 197, 286.

[46] See n 63 and n 64 below.

[47] 'The right to a sense of spiritual well-being is firmly embedded in the 1989 United Nations Convention on the Rights of the Child. A clear duty is placed on all those involved to ensure that a child or young person's spiritual well-being is nurtured along with his or her physical and intellectual well-being.' Department of Education and Children's Services, South Australia (2006) *Does Spiritual Wellbeing belong in Education?* Discussion Paper, 6 <http://www.decd.sa.gov.au/learnerwellbeing/files/links/Does_Spiritual_Wellbeing_be.pdf>.

[48] Australian Human Rights Commission (2011) above n 16, 80.

III   THE SECULARIST 'SOLUTION'

For current purposes, we will use Geoffrey Levey's working definitions: ''secular' refers to a delimitation or principled exclusion of religion, 'secularism' to an ideological opposition to religion, and 'secularisation' to the waning of religious belief and observance among a group or in society.'[49]

Objections to chaplains in 'secular' schools typically assume a simple syllogism:[50]

> Major premise: Australian society and our public education system are secular.

> Minor premise: School chaplaincy is concerned with religious experience.

> Conclusion: *Chaplaincy has no legitimate place within Australian public education.*

The tension some feel in this regard has been summarised well by the Australian Human Rights Commission:

> Some Christian voices in this research raised concerns at what they consider an 'aggressive secularism', which they see as being opposed to democratic principles in that secularists do not respect different views and, as such, are holding to a double standard whereby Christian views are dismissed because they are religious, and secularist views are unchallenged. The sense was that there is a default position that secular is 'right', that secular is framed as more logical and rational, a framework that those with religious views would reject. Secularists, on the other hand, would argue that secular views *are* more logical and rational, and feel that religion is for consenting adults in private.[51]

Secularists commonly assert that the mantra of Australian public education being 'free, compulsory and secular' – as was determined in the various *Education Acts* of the late nineteenth-century – has been eroded beyond recognition[52] and cite the funding of chaplains in state schools as a prime exhibit. This is, however, anachronistic. 'Secular' never meant the total exclusion of religion from schools.[53] Furthermore, it

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[49]   Geoffrey Brahm Levey, 'Secularism and Religion in a Multicultural Age' in Levey and Modood (eds) *Secularism, Religion and Multicultural Citizenship* 4, above n 13.

[50]   For instance, at a popular level consider Anonymous, 'Prayers Should Not Be Allowed' (15 December 2010) Letters, Comment & Announcements, *The Somerset* 4. For a more nuanced academic formulation, see Catherine Byrne, 'School Chaplaincy Case: A Missed Opportunity for Secular Education' *The Conversation*, 21 June 2012 <https://theconversation.edu.au/school-chaplaincy-case-a-missed-opportunity-for-secular-education-7789>.

[51]   Australian Human Rights Commission (2011) above n 16, 27.

[52]   Peter Meadmore, ''Free, Compulsory and Secular'? The Re-invention of Australian Public Education' (2001) 16(2) *Journal of Education Policy* 113-114, 116-117. See also Marion Maddox, 'Values-R-Us: The Christianisation of Australian Schools and the Dissolution of the Common Good,' Seminar at University of Queensland, Brisbane, May 23, 2012. Similar views are expressed in Marion Maddox, *Taking God to School: The End of Australia's Egalitarian Education?* (Allen & Unwin, 2014) Ch 2.

[53]   Ian Mavor, 'Religion in Australian Schools' (1989) 16(1) *Religion & Public Education* 83-90. Catherine Byrne takes a different view, at least in relation to curriculum and religious observance in Victorian schools for the five years from 1 January 1873, under the *Education*

mistakenly appeals to the 19th century as a model appropriate for plural Australian society in the 21st century. The secularist mantra ignores the demographics and dynamics in Australian society today, modern educational values (such as reflected in the *Melbourne Declaration*) and more than a century of research and thinking about the holistic developmental needs of children and of the role of schools in cognitive, social and personal development, rather than only pedagogy.

For example, late primary and secondary school aged children are in a developmental phase characterised by questioning that emerges with formal-operational ('hypothetico-deductive') thinking, during which it is beneficial to bring one's deepest (and often subconscious) beliefs to the surface.[54] As students (and particularly teenagers) dialogue with a range of perspectives, they are afforded an opportunity to integrate their identity around critically held beliefs that can exist amidst a plurality of positions.[55] A holistic educational system, based on 21st century thinking, should not seek to exclude a non-coercive and supportive exploration of beliefs about spirituality as a fundamental dimension of identity.

It has been recognised in the European Court of Human Rights that a secularist approach is not neutral:

> Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all world views rather than a preference for one. … A preference for secularism over alternative world views – whether religious, philosophical or otherwise–is not a neutral option.[56]

The major premise in the syllogism above (namely that Australian society and our public education system are 'secular') is true only in the more limited sense that education is for the development of students to face concerns of this age, rather than their indoctrination into a particular set of religious beliefs from a bygone era.[57] However, that is quite a different thing from excluding support for exploration of live options of belief from that process of education and personal development. Again, this is hardly neutral. Students learn what matters most in life not only by what we include

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Act 1872 (Vic)*,* until non-sectarian religious instruction was permitted again. Catherine Byrne, 'Not 'Secular': Australia's failed idea' (2012) *Journal of Religious History* 12, 17. In any case, school chaplaincy is not about curriculum in the sense of that act.

[54] David Elkind, *All Grown Up and No Place to Go: Teenagers in Crisis*, (Perseus Books, revised edition, 1998), 48; Wayne Weiten, *Psychology Themes and Variations* (Wadsworth/Thomson Learning, 5th edition, 2001), 447; Barry Wadsworth, *Piaget's Theory of Cognitive and Affective Development* (Longman, 5th edition, 1996), 124.

[55] Weiten, above n 33, 445-46; James Fowler, *Stages of Faith: The Psychology of Human Development* (Harper Collins, 1995) 153. Concerning the often underestimated ability of children to reason philosophically (and thus engage in dialogue about religion), see Gareth B. Matthews, 'Philosophy and Developmental Psychology: Outgrowing the Deficit Conception of Childhood' in Harvey Siegel (ed) *The Oxford Handbook of Philosophy of Education* (Oxford University Press, 2009) 162-176.

[56] *Lautsi v. Italy,* Appl. No. 30814/06, Grand Chamber (18 March 2011), per Judge Power. Discussed by Ian Leigh in 'The European Court of Human Rights and Religious Neutrality', Gavin D'Costa, Malcolm Evans, Tariq Modood and Julian Rivers (eds) *Religion in a Liberal State* (Cambridge University Press, 2013).

[57] In defense of religious development and discussion among children against charges of indoctrination, see Elmer J. Thiessen, *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture* (McGill-Queen's University Press, 1993) 154, 216, 239, 273. Calling all religious conversation 'indoctrination' is based on an Enlightenment conception of – what is by many now seen to be – an 'antiquated epistemology' that stresses the absolute autonomy of rational individuals. It ignores interdependence, progressive development, and trust in all knowing.

in education, but by what we exclude – forming the so-called 'null curriculum'.[58] This 'age' is experiencing a resurgence of religion and its influence in the public sphere.[59] As such, rather than being neutral, the sidelining of such perspectives may be considered a form of 'secular indoctrination'[60] and not free thinking liberal dialogue promoting diversity.

Arguably the most principled objections to religion in public education are voiced by secularists, summarised by former Justice of the High Court of Australia, the Honourable Michael Kirby, when he suggests 'secular' schools require 'secularism':

> Whatever may be our beliefs in our hearts and at home, when we enter the school gates, we acknowledge the space that must be left for private convictions. We do not attempt to enforce upon immature children or school staff a particular religious conviction. … Secularism permitted private conscience to flourish and diversity to exist alongside official orthodoxy.[61]

We agree that it is unethical (and possibly illegal) to coerce students or enforce religious observance within a state school.[62] That is certainly a concern the National School Chaplaincy and Student Welfare Program seeks to overcome by its requirement for consultation and consent[63] and by prohibiting proselytising, coercive behaviour, manipulation and undermining a student's religious or other beliefs,[64] all measures which are succeeding.[65]

However, it does not follow from a false premise of assumed coercion that the exploration of one's spirituality and beliefs, whether religious or not, should be kept private, left at home and excluded from schools. Would the risk of coercion in any other sphere of human experience, such as gender identity or political positions, require that subject matter also be left at home and removed from respectful and non-coercive discussion in the educational space? The solution is to ensure that coercion does not occur, and not to silence substantive discussion.

The secularists' exclusionary 'solution' runs counter to the liberal ideal of free discourse and personal autonomy (as already discussed) and the modern approach to

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[58] Elliot W. Eisner, *The Educational Imagination* (Merrill, 3rd ed, 2002) 26.

[59] See, for instance, Judith Butler, Eduardo Mendieta, Craig Calhoun and Jonathan Van Antwerpen, *The Power of Religion in the Public Sphere* (Columbia University Press, 2011); Jürgen Habermas, 'Religion in the Public Sphere' (2006) 14(1) *European Journal of Philosophy* 1-25.

[60] Nord, above n 45, 286.

[61] Michael Kirby, 'In Praise of Secular Education' (Speech delivered at Sydney Grammar School,   3   December   2009)   <http://www.michaelkirby.com.au/images/stories/ speeches/2000s/2009+/2418.Speech_-_Sydney_Grammar_Speech_Day_2009.pdf>.

[62] Concerning 'illegality', Australia (since 1980) is a signatory to both Article 18 in the 1948 *Universal Declaration of Human Rights* and the 1966 *International Covenant on Civil and Political Rights*, obliging the government (and government schools) to ensure that '[e]veryone shall have the right to freedom of thought, conscience and religion.' See Gary Bouma, Desmond Cahill, Hass Dellal and Athalia Zwartz, 'Freedom of Religion and Belief in   21st   Century   Australia'   (Australian   Human   Rights   Commission,   2011) <http://www.humanrights.gov.au/sites/default/files/content/frb/Report_2011.pdf> 2-3.

[63] Australian Government – Department of Education, 'National School Chaplaincy and Student   Welfare   Program   Guidelines'   (December   2013)   < http://docs.education.gov.au/system/files/doc/other/nscswp_guidelines.pdf>   (NSCSWP Guidelines).

[64] Ibid, s 3.1.2.

[65] See below n 88.

education which encourages supported exploration of issues and for students to form their own conclusions based on available evidence.[66]

How can an argument based on freedom of 'thought, conscience and religion' conclude that the solution is the absence of discussion or exploration of the issue? That would be a freedom from religious thought, rather than freedom to explore and decide in a supportive, non-coercive and safe environment.

Does secularism permit public expression of diverse metaphysical perspectives in state schools? For this, we consider reflections from the 2008 Australia New Zealand Secular Association conference where it was claimed that secularism has no interest in 'muzzling or devaluing the valuable contributions to public life made by many people motivated by religious belief,' whether in politics or education.[67] As social commentator Jane Caro argued, debating ideas is the 'stuff' of engaging liberal education.[68]

In this understanding, students should be supported to dialogue respectfully with a range of viewpoints, defending and commending their position in a dynamic rather than doctrinaire environment. Some secularists, however, are cautious about giving any voice to spirituality or religion in public education, appealing to the 'slippery slope' of dialogue preceding domination.[69] However, as premier American philosopher of education, Nell Noddings – herself an atheist – argues, we must 'educate for belief and non-belief':

> What can schools do to prepare students to live in a world of pluralistic values? Religion plays a significant role in the lives of individuals, and increasingly it is playing a political role that affects both believers and unbelievers. We cannot remain silent on this vital topic and still claim to educate.[70]

The minor premise in the syllogism referred to above (namely that school chaplaincy is concerned with religious experience) is not a complete picture of school chaplaincy, as discussed later in this paper. Certainly, there is a strong element of non-coercive support for students wanting to explore their spirituality, but school chaplaincy is not about doctrine, dogma or denominational teaching.

IV THE LEGAL SOLUTION

So how should an Australian liberal and civil[71] democracy balance the rights of those who want to explore belief and spirituality with those who do not? The constitutional solution is found in s 116 of the *Australian Constitution*, which is reproduced below alongside the equivalent provision from the First Amendment to the Constitution of the United States of America:

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[66] See, for instance, Martha Nussbaum, 'Tagore, Dewey, and the Imminent Demise of Liberal Education' 52-64, and Amy Gutmann, 'Educating for Individual Freedom and Democratic Citizenship: In Unity and Diversity There Is Strength' 409-427, in Siegel, above n 55.

[67] Max Wallace (ed), *Realising Secularism: Australia and New Zealand* (Australia New Zealand Secular Association, 2010) 4-5.

[68] Jane Caro, 'The Culture Wars, Schools and Secularism' in ibid, 94-95, 98-100.

[69] See Muriel Fraser, 'Introduction: Secularism and 'Faith-Based Welfare'' 8, 15, and Lloyd Geering, 'New Zealand's Contribution to the Secular Global World' 46, in ibid.

[70] Nel Noddings, 'The New Outspoken Atheism and Education' (2008) 78(2) *Harvard Educational Review* 386.

[71] This is the preferred expression of the Australian Human Rights Commission, rather than 'secular society'. See above, n 16, 8.

s 116 Australian *Constitution*	US First Amendment
The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.	Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The High Court of Australia has identified some critical differences between the words of the two sections and their respective contexts. [72] First, the US provision forms part of the American Bill of Rights, whereas the Australian provision is not a personal guarantee of rights, but rather 'a denial of legislative power to the Commonwealth, and no more'. [73] Secondly, the words 'for establishing' in the Australian section have a narrower connotation than 'respecting an establishment', and are directed at a 'statutory recognition of a religion as a national institution … the selection of one to be preferred from among others'. [74] This is reinforced by the remaining provisions of the section (prohibiting the imposition of a religious observance etc), which would be unnecessary if the 'establishment' provision were to be widely interpreted as a prohibition against the Commonwealth providing 'any recognition or aid or support to one or more religions or to religion generally'. [75]

It is for reasons of different context and wording that the Australian High Court has taken a different approach to this issue than the Supreme Court of the United States of America:

> I respectfully endorse what Gibbs J. said recently in *Australian Conservation Foundation Inc. v The Commonwealth of Australia* (1980) 28 ALR 257, at p270: 'Although we naturally regard the decisions of the Supreme Court of the United States of America with the greatest respect, it must never be forgotten that they are often against a different constitutional, legal and social background from that which exists in Australia.'[76]

Justice Gibbs' expanded on this in relation to s 116:

> [T]he course of the decisions in the United States shows that the test which has been adopted in that country, so far from being clear and predictable in its operation, has led, in its application, to continuing controversy. … we should not substitute for the words of s 116 a test which those words do not appear to warrant, particularly when it does not commend itself by any obvious considerations of justice or convenience.[77]

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[72] *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559; [1981] HCA 2 *(the 'Defence of Government Schools', or 'DOGS' case).*

[73] Ibid 653 (Wilson J).

[74] Ibid. Gibbs J in the *DOGS case* (at 595-597) describes four possible meanings for 'establish', namely (1) protect in law; (2) confer the position of a state religion (which is the sense his honour says is used in s 116 – at 604); (3) support in the observance of doctrine or ordinances; or (4) found or set up a church or religion.

[75] Which was the plaintiff's contention in the *DOGS case*, explained at 651 (Wilson J). Other members of the Court also drew attention to the differing language and therefore the need for a different approach in Australia than in the US (for example Barwick CJ in the *DOGS case*, ibid at 578-579).

[76] Ibid 652 (Wilson J).

[77] Ibid 23.

Therefore s 116 of the *Australian Constitution* contains four specific requirements for Commonwealth legislation, and no more: (1) no establishment of a state religion; (2) no imposed religious observance; (3) no prohibition on free exercise of religion; and (4) no religious test for office. It is that last element which was the subject of consideration in *the First Williams Case*, as will be discussed later.

Rather than creating a personal right of church–state separation, it is therefore more accurate to describe s 116 as preserving 'religious equality, freedom of religion and … 'the right of a man [sic] to have no religion''.[78] Those are the liberal principles enshrined in the *Australian Constitution* and, contrary to any secularist ambition,[79] they do nothing to restrict the liberal traditions of diversity, personal autonomy, discourse and reasoned thinking.

V   School Chaplaincy – a Model of Social, Emotional and Spiritual Support

The expression 'chaplain' does not describe a single function and has different expressions and emphases in different contexts. Therefore, to understand chaplaincy in government schools in Australia, there is little or no value in examining chaplaincy in other kinds of schools (such as religious schools) or contexts such as the military, hospitals and universities.

The word 'chaplain' is derived from the Old French word *chapelain*, meaning cape or coat, evoking an image of a chaplain as a person who would wrap their cape around a homeless or sick person to provide warmth or comfort.[80] That kind of practical support and comfort is an enduring part of chaplaincy in the many contexts in which it exists. It is the kind of non-judgmental care and support modelled by Jesus himself. It does not require Christian chaplains to compromise their beliefs – quite the contrary, it is a practical outworking of those beliefs.

Chaplaincy in government schools in Australia takes a particular form, which is adapted both to the needs of students and the government school context in which it operates. The qualifications required for school chaplaincy are in youth work and pastoral care (rather than being clerical), including a minimum level of skills to identify issues affecting youth and how to conduct appropriate referrals.[81]

So what do school chaplains actually do? The parameters of the role are defined under the National School Chaplaincy and Student Welfare Program Guidelines (*NSCSWP Guidelines*):[82]

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[78]   Ibid 616 (Mason J, quoting Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 123).

[79]   Above, n 21.

[80]   'Chaplain' in *The Oxford English Dictionary* (online) <www.oed.com>. The term acquired a religious connotation in Medieval contexts as applying to those who cared for the relic cape of Saint Martin, leading to a role of caretaker of relics generally and of the *chapel* as the place where the relics were stored or displayed, and where people could be quiet and reflect. See: David J. Pohlmann, *School Chaplaincy Services in Queensland State Schools – A Case Study* (unpublished doctoral thesis, Griffith University, January 2010) 1-2. While that Medieval reliquary connotation does not exist in modern forms of chaplaincy, the function of practical support and comfort is a strong element across the models of chaplaincy we find today in different contexts.

[81]   NSCSWP Guidelines, above n 63, s 5.5.

[82]   Ibid. Some states and territories also have developed school chaplaincy policies, which apply in addition to the NSCSWP Guidelines. For example, in Queensland, the Department of Education, Training and Employment has a policy as part of its Student Learning and Wellbeing Procedures; 'Chaplaincy Services in Queensland State Schools' (July 2012) <http://ppr.det.qld.gov.au/education/learning/Pages/Chaplaincy-Services-in-Queensland-State-Schools.aspx>.
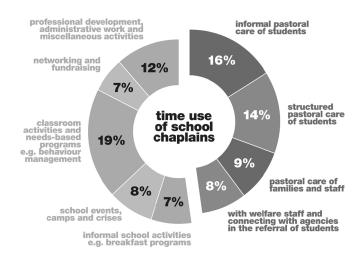
[School chaplaincy is] a service that complements the care offered by other helping disciplines and aims to assist school communities through the provision of help and care to support the personal and social wellbeing of students and the school community, including:

(a) assisting school counsellors and wellbeing staff in the delivery of student welfare services;

(b) providing students, their families and staff with support and/or appropriate referrals, in difficult situations such as during times of grief or when students are facing personal or emotional challenges;

(c) supporting 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, and facilitating access to support agencies in the community where applicable;

(d) supporting students and staff to create an environment which promotes the physical, emotional and intellectual development and wellbeing of all students;

(e) supporting students and staff to create an environment of cooperation and mutual respect, and promoting an understanding of diversity and the range of cultures and their traditions;

(f) being approachable to all students, staff and members of the school community; and

(g) supporting students, their families and staff of all beliefs and not seeking to impose any beliefs or persuade an individual towards a particular set of beliefs.[83]

A 2009 study analysed the division of time-use among school chaplains:[84]

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[83] NSCSWP Guidelines, above n 63, s 1.5. To give structure to the long role elements described in the NSCSWP Guidelines, the Queensland Department of Education, Training and Employment uses six headings to capture the different dimensions of school chaplaincy: (1) Social and Emotional Support; (2) Spiritual Support; (3) Community Development; (4) Mentoring and Role Modelling; (5) Supporting Education; and (6) Extra-curricular activities.

[84] Philip Hughes and Margaret Sims, *The Effectiveness of Chaplaincy as provided by the National School Chaplaincy Association to Government Schools in Australia* (2009) <http://pandora.nla.gov.au/pan/121186/20110209-0000/chaplaincyeffectiveness.pdf> 16.

It is such a service that the plaintiff in the two *Williams Cases* seeks to prevent the Commonwealth funding. This is not because the NSCSWP has failed to secure appropriate performance and compliance with protections such as the prohibition on proselytisation or coercion[85] which, for the worker, is a matter required by a Code of Conduct under the federal guidelines.[86] The rate of complaints in relation to the NSCSWP, and the National School Chaplaincy Program (*NSCP*) which preceded it, is very low.[87] The data show a program performing exceptionally well. The following are figures for the whole of Australia since the inception of the government's school chaplaincy program.[88]

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[85] NSCSWP guidelines, above n 63, s 3.1.2.

[86] Ibid Attachment A.

[87] The NSCP ran under its own terms between 2007 and 2011, when it was replaced with the NSCSWP. The current NSCSWP Guidelines are in their fifth revision.

[88] Derived from data provided by Department of Education, Employment and Workplace Relations (*DEEWR*) (which administered the NSCP and continues to administer the NSCSWP), as at 10 September 2013.

	NSCP	NSCSWP[89]
Complaints (av. No. pa)	68.2	49.2
Facts substantiated (av. No. pa)[90]	23	-
Breach (av. No. pa)	-	21
Rate per worker (av. Pa) (substantiated/breach – all categories)[91]	0.54%	0.60%
Rate per school serviced (av. pa) (substantiated/breach – all categories)[92]	0.85%	0.59%
Performance related (av. No. pa) (all complaints – whether substantiated/breach, or not)	28.2	27
Code of Conduct related (av. No. pa) (all complaints – whether substantiated/breach, or not)	15.8	12.6
Administrative and other (av. No. pa) (all complaints – whether substantiated/breach, or not)	24.2	9.6
Code of Conduct related complaints (all complaints – whether substantiated/breach, or not) - rate per school serviced per annum	0.58%	0.36%

When the Commonwealth Ombudsman reviewed the former National School Chaplaincy Program in 2011, some saw this as evidence that the program was faulty and divisive.[93] However, the level of complaints about the NSCP at that stage was less than one percent per annum, as shown above. A few months later the Ombudsman confirmed the recommended changes to the program[94] had been satisfactorily

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[89] The figure for 2013 is to 10 September (31 complaints nationally). The average has been performed per month and extrapolated for the full year.

[90] According to an explanation provided by DEEWR on 12 September 2013, the NSCSWP (from 2012) records that a complaint has been made and whether there was a breach of the program guidelines or funding agreement. However, under the NSCP (between 2007 to 2011) the complaint was either 'substantiated' or not – meaning that the facts underlying the complaint were made out (or not), but this did not include a finding that the facts demonstrated a breach of the program guidelines or funding agreement. Therefore, 'substantiated' complaints data under the NSCP may include matters which are not a 'breach' as such.

[91] This figure represents the average number of 'substantiated' or 'breach' complaints over the life of the program divided by the number of workers employed during the life of the program, expressed as a percentage. Many workers were employed in more than one school, may have been employed more than once during the program or may not have been employed for the full length of the program.

[92] This figure represents the average number of 'substantiated' or 'breach' complaints over the life of the program divided by the number of schools approved for the program, expressed as a percentage.

[93] For example Paul Gallagher, 'The "weeping sore" of the National School Chaplaincy Programme' (29 July 2011) <http://luckylosing.com/2011/07/29/the-weeping-sore-of-the-national-school-chaplaincy-programme/>.

[94] The five main recommendations were: to improve guidance for schools for consultation about whether to engage a chaplain; to clarify what constitutes proselytising; to improve the definitions of chaplain and pastoral care and to mandate the minimum qualification (which the principal chaplaincy providers already required); to improve the complaints mechanism; and to improve funding agreements and their requirements for accountability. See, Commonwealth Ombudsman, 'Department of Employment, Education and Workplace Relations Administration of the National School Chaplaincy Program' (2011) <http://www.ombudsman.gov.au/media-releases/show/188> 18.

implemented.[95] Rather than the improvements made to the program's complaints mechanism leading to a materially increased level of complaints, the level has remained less than one percent per annum as shown above.

With complaint rates of less than one percent for all categories of complaint, and Code of Conduct related complaints as a fraction of this, clearly there is no basis in fact for any criticism of the school chaplaincy program as constituting 'religion slipping in through the back door' or an 'insidious beachhead for proselytizing churches'. Instead, the evidence is that school chaplains provide a service complying with the checks and balances set out in the federal guidelines, to deliver a valued program of social, emotional and spiritual support for students.

That has been demonstrated in a 30 month longitudinal study of school chaplaincy completed in 2012 by the Research Centre for Vulnerable Children and Families at the University of Western Australia, led by Associate Professor Maria Harries OA.[96] The study looked at a wide group of stakeholders including school principals, teachers, parents (including regional indigenous parents), students, psychologists and professional associations such as primary and secondary school associations, Parents and Citizens Associations and the Department of Education in Western Australia. In that group, 96 per cent of respondents supported the work of school chaplains and agreed that the chaplains' work as members of a student support services team was valued. Among school staff (including principals and teachers):

(a) 82 per cent indicated that the social and emotional support provided by school chaplains to students had a considerable positive impact;

(b) 83 per cent indicated that school chaplains helped to build up students' confidence to a considerable extent;

(c) 72 per cent considered the programs that the school chaplains ran helped to develop students' self esteem;

(d) 80 per cent responded that students from culturally and linguistically diverse communities were assisted; and

(e) 81 per cent concluded that students who were experiencing grief and loss or facing relationship difficulties were helped.

The value of chaplains as agents for community development and support was demonstrated in early 2013 with the floods in Queensland where school chaplains, in partnership with the community, responded to tragedy and natural disaster with practical help, material assistance and emotional and spiritual support. The Queensland Minister for Education, Mr J-P Langbroek, saw this firsthand:

> [I]t epitomised what we are trying to say as a government when we say… that we would like to make schools the centre of their community and to have engagement with their community. It really shone out like a beacon to me that the community connections that our government encourages are epitomised by what the chaplains did. … I think a lot of people do not know what chaplains do.[97]

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[95] Commonwealth Ombudsman (Cth), 'DEEWR makes good on on school chaplaincy program' (Media release, 14 March 2012) <http://www.ombudsman.gov.au/media-releases/show/199>.

[96] Harries, Cant, Lavery, Philips and Di Risio, *Evaluation of YouthCARE Chaplaincy Service in Western Australia* (unpublished report, University of Western Australia, 2012) ch 4.

[97] Queensland Parliament, Record of Proceedings (12 February 2012) <http://www.parliament.qld.gov.au/documents/hansard/2013/2013_02_12_WEEKLY.pdf> 44.

School chaplaincy is specifically directed at the spiritual dimension of wellbeing, while also providing social and emotional support and the development of community – all matters which positively influence a child's wellbeing and the promotion of good mental health outcomes. It is well accepted that the promotion of intrinsic values (such as a meaningful philosophy of life and emphasis on relationships and community) and spirituality are important factors in the promotion of resilience and good mental health outcomes.[98] This accords with current educational frameworks:

> [S]chools are only too aware that students with high levels of wellbeing make better learners – they demonstrate more effective academic, social and emotional functioning and generally engage in more appropriate behaviour at school.[99]

Just as there is a recognition of the bio-psycho-social-spiritual dimensions of wellbeing for students, there is broad support for a spectrum of actions to meet the needs of students,[100] summarised as:

(a) Promotion of protective factors;
(b) Prevention or reduction of risk factors (whether to a general population group (universal), to at-risk groups (selective) or to indicated individuals);
(c) Early Intervention for those exhibiting early signs and symptoms of mental health issues;
(d) treatment of mental health issues; and
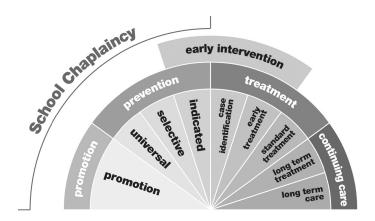(e) continuing care.

The first stages of this spectrum are known as PPEI (promotion, prevention and early intervention). The relationship of this model to school chaplaincy under the NSCSWP model can be illustrated as follows:[101]

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[98] Jean Twenge, Brittany Gentile, Nathan DeWall, Debbie Ma, Katharine Lacefield and David Schurtz, 'Birth Cohort Increases in Psychopathology among Young Americans, 1938–2007: A cross-temporal meta-analysis of the MMPI' (2010) 30(2) *Clinical Psychology Review* 145-154. See the set of protective factors (which include 'moral beliefs' and 'participation in a church or other community group') and risk factors in Commonwealth Department of Health and Aged Care, *Promotion, Prevention and Early Intervention for Mental Health – A Monograph* (Commonwealth Department of Health and Aged Care, 2000) 15-16.

[99] Department of Education, Training and Employment, 'Learning and Wellbeing Framework' (2011) <http://deta.qld.gov.au/initiatives/learningandwellbeing/resources/learning-and-wellbeing-framework.pdf>. Supported by R Diekstra, M Sklad, C Gravesteijn, J Ben, and M Ritter, 'Effectiveness of school-based social and emotional education programmes (Part One and Part Two)' in *Social and Emotional Education: An International Analysis* (Fundacion Marcellino Botin, 2008) 255- 312. See also Joseph Durlak, Roger Weissberg, Allison Dymnicki, Rebecca Taylor, and Kriston Schellinger, 'The impact of enhancing students' social and emotional learning: A meta-analysis of school-based universal interventions', *Child Development* (2011) 82(1) 405-432. See also Sheldon Rothman, and Julie McMillan, 'Influences on achievement in literacy and numeracy' (2003) LSAY Research Reports, Longitudinal surveys of Australian youth research, report number 36.

[100] Department of Health and Aged Care, above n 98, ch 3.

[101] This is adapted from Patricia Mrazek and Robbert Haggerty, *Reducing the Risks for Mental Disorders: Frontiers for Preventive Intervention Research* (National Academy Press, 1994). It is this model relied on in the Department of Health and Aged Care, above n 98.

This illustrates how school chaplaincy complements professional psychological counselling. While psychological counselling involves case management, treatment and continuing care, school chaplaincy is directed at the PPEI end of the spectrum – to promote protective factors, decrease risk factors and assist in early intervention and referral to other care professionals (such as psychological counsellors). [102] When a student is suspected of needing psychological counselling, school chaplains refer and typically then support the student through ongoing care as an adjunct to professional help.

That is not to say that the needs of students can be understood or met only in mental health terms. Consistent with spirituality as a dimension of educational values and the importance of a spiritual world view for a significant proportion of the Australian population, chaplains bring a sense of spirituality to pastoral care conversations: to promote in students a sense that they are listened to, accepted, loved and valued; to encourage forgiveness and reconciliation in situations of conflict; and to make sure students needing counselling or other professional help are referred appropriately. For students identifying with religion or spirituality, or wanting support for such a world view, this is more than compassion. Indeed, as Matthew Harding points out:

> [T]he maintenance and promotion of religious beliefs … generate substantial private goods in the form of the spiritual, emotional and intellectual resources that religion offers to those who are searching for answers to questions about the origins and meaning of the universe, the relationship of the human to the divine, and ethics and morality.[103]

The school chaplaincy program is optional within schools. Through a process of school community consultation, schools decide whether to have a chaplain or not. Evidence of such consultation is a mandatory requirement before federal funding is available for a chaplaincy service at a school.[104] In addition, no child is required to participate in religious observance. There may be some informal activities where the role of a school chaplain is no different from a support worker or teacher (for example,

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[102] NSCSWP Guidelines, above n 63, s 5.5 requires school chaplains to be trained to nationally accredited standards to be able to identify possible mental health issues and refer to other care professionals. Specifically, see CHCMH301C – Work effectively in mental health; and CHCCS422A – Respond holistically to client issues and refer appropriately. Referral is subject to the direction and guidance of the relevant school principal, but might include an in-school guidance officer or counsellor.

[103] Harding, above n 40, 12.

[104] NSCSWP Guidelines, above n 63, s 5.3

where the chaplain is helping with a school activity or camp), but if there is a religious component, both federal and state policies contain consent arrangements.[105]

In contrast to the secularist 'solution', then, the optional school chaplaincy program accords with principles of a liberal democracy and best educational practice by promoting the social, emotional and spiritual development of its young and diverse citizens toward the common good.

VI THE *WILLIAMS* CASE

Prior to the Court's decision in the *First Williams Case*, federal government financial support for school chaplaincy was made pursuant to a spending decision of the Commonwealth executive government under s 61 of the *Constitution*, supported by annual appropriation Acts, and implemented through funding agreements entered into between the Commonwealth and the school chaplaincy providers.

This followed a 'common assumption'[106] that, if the Commonwealth has legislative power in a particular subject matter, the executive spending power extended to being able to enter contracts and expend money relating to that subject matter. The Court in the *First Williams Case* rejected that proposition[107] and therefore found the relevant grant contracts and expenditure were beyond the executive power of the Commonwealth in s 61.[108]

However, the Court was unanimous in rejecting the plaintiff's contention that the school chaplaincy program, and federal expenditure towards it, involved the Commonwealth imposing a religious test for an office under the Commonwealth.

The Commonwealth's response was to create a regime under which the Commonwealth can contract and spend money on matters specified in a regulation.[109] Schedule 1AA to the regulations currently specifies more than 450 Commonwealth spending programs which are authorized under those provisions, including the NSCSWP.

If the plaintiff succeeds in the *Second Williams Case*, that regulatory regime may be overturned[110] and spending for those programs will need to be either the subject of a specific Act or a directed grant to the states under s 96 of the *Constitution*. Such an outcome turns on questions about the scope of the executive spending power, the effect of the *First Williams Case* and whether the Senate has been sufficiently engaged in the process of authorising the relevant spending programs.[111] It does not address liberal principles of Australian civil society.

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[105] Ibid s 5.2. For an example of a state policy see the Queensland Department of Education, Training and Employment, 'Chaplaincy Services in Queensland State Schools' (July 2012) <http://ppr.det.qld.gov.au/education/learning/Pages/Chaplaincy-Services-in-Queensland-State-Schools.aspx>.

[106] Derived originally from a 1902 opinion of Alfred Deakin as Attorney General, challenged by Queensland (as intervener in *The First Williams Case*) in oral submissions, as described in *The First Williams Case,* 125 (Gummow and Bell JJ).

[107] The Court also did not find an alternative valid basis for the relevant contracts and expenditure, such as those summarised by French CJ at 83 in *The First Williams Case*.

[108] Ibid 4 (French CJ); 134 (Gummow and Bell JJ).

[109] Above n 9.

[110] Clause 1 of the Further Amended Writ of Summons, *Williams No. 2*, seeks a declaration that the relevant provisions of the Act and regulations are invalid. An alternative relief sought is specific to only the funding agreement under the NSCSWP for the school which the plaintiff's children attend.

[111] Above n 5.

VII CONCLUSIONS – THE FUTURE?

Earlier we referred to a simple chain of reasoning which summarised the secularist objection to school chaplaincy:

Major premise: Australian society and our public education system are secular.

Minor premise: School chaplaincy is concerned with religious experience.

Conclusion: *Chaplaincy has no legitimate place within Australian public education*.

We live in a society where religious belief or spirituality is important to many (but takes a variety of forms), yet of little importance to others. The challenge of liberal democracy is how to ensure society is safe for different views to be expressed and explored, for individuals to be allowed the freedom to choose and express their beliefs or to have no beliefs, and for those of differing views and backgrounds to dialogue and exist in an environment of mutual respect. Not only are these cherished liberal values,[112] these are also Australian *educational* values.[113]

Secularists often insist that religion or spirituality is an entirely private matter and that society and schools should be free from the discussion of them – that those views should be left at home.[114] Under that secularist view, federal funding for school chaplaincy is not appropriate – it holds that the government of a 'secular society' should not fund a service which includes any element of spirituality. It is that outcome the plaintiff sought in *The First Williams Case* and now, again, seeks in *The Second Williams Case*.

However, that approach ignores both the challenge of liberal democracy and the evidence of spirituality as a protective factor in mental health terms[115] and, through that, to enhance educational outcomes.[116] It is this modern meaning of *secular* as exclusionary, rather than a neutral acceptance of faith or non-faith, which has led the Australian Human Rights Commission among others to reject the rhetoric of a '*secular* society' and to instead refer to a '*civil* society'.[117]

Whether the current funding model survives the challenge in *The Second Williams Case*, or whether funding instead is provided via specific legislation or directed grants to the states under s 96 of the *Constitution*, remains to be seen. However, the correct syllogism for a modern Australian liberal democracy is:

Major premise: Australian society and our public education system are liberal and civil.

Minor premise: School chaplaincy is a non-proselytising, non-coercive form of social, emotional and spiritual support for students, directed at essential promotion, prevention and early intervention activities, which builds a sense of positive community within schools.

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[112] Above n 22.
[113] Above n 30.
[114] To use Justice Kirby's phrase, above n 61.
[115] Above n 98.
[116] Above n 99.
[117] Australian Human Rights Commission, above n 16, 8.

Conclusion: *School chaplaincy meets an essential need within Australian public education and should be publicly funded.*