

Submission to the
Royal Commission into Victoria's Mental Health System

The provision of mental health services by chaplains and chaplaincy
provider organisations within the State of Victoria

A review of chaplaincy services to the public health system by the religion of
Jehovah's Witnesses and Watchtower Bible and Tract Society of Australia

Submission by Steven Unthank and Lara Kaput

5 July 2019

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Introduction

This submission focuses primarily on the provision of mental health services within the public school system under the National School Chaplaincy Programme, and the provision of mental health services within the public hospital system by chaplains and chaplaincy provider organisations.

The provision of mental health services within the State of Victoria is all encompassing and includes, not just the provision of registered mental health services, but also chaplaincy services and access to the justice system, including the right to recognition as a person before the law and equal protection of the law.¹

The provision of mental health services through the National School Chaplaincy Programme and through public hospital chaplains – A VCAT Case Study

On 27 January 2015 the National School Chaplaincy Programme (“NSCP”), in its current format, commenced operating in the State of Victoria. In all contracts and documentation prepared by the Victorian Government Solicitor’s Office the *Health Records Act 2001* was cited as the primary and only overarching source of legislation protecting the privacy rights of school children using the NSCP within the public school system. Both chaplains and chaplaincy provider organisations were required under the agreement to comply with all legal obligations under the *Health Records Act 2001* in relation to protecting the privacy rights of children within the public school system.

About a year earlier, on 14 February 2014, representatives of the Jehovah’s Witnesses organisation had argued before the Human Rights Division of the Victorian Civil and Administrative Tribunal that chaplains and chaplaincy service providers within the health system are not subject to the *Health Records Act 2001*. See *HD v HE* (Human Rights) [2014] VCAT 740.²

Recommendation 1

We recommend that the *Royal Commission into Victoria’s Mental Health System* conduct a full investigation into whether chaplains and chaplaincy provider organisations, that provide mental health and wellbeing support services within the public-school system and the public hospital system, are subject to the *Health Records Act 2001* and/or the *Privacy and Data Protection Act 2014*; and that any omissions within in the legislation be corrected to include chaplains and chaplaincy services under the *Health Records Act 2001*.

Steven Unthank and Lara Kaput

¹ Section 8. *Charter of Human Rights and Responsibilities Act 2006*.

https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/cohrara2006433/s8.html

² *HD v HE* (Human Rights) [2014] VCAT 740. <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2014/740.html>

Chaplaincy in Victoria and the Privacy Rights of Children

Presented by Lara Kaput

Lecture delivered by Steven Unthank

29 April 2018

at

The Rationalist Association of NSW, Inc.
Humanist House, Sydney

Introductions

Meg Wallace^a: Now we at the Rationalists¹ are very pleased to facilitate this meeting today. To publicise legal action which past members of the Jehovah's Witnesses² are preparing to bring against the Church.

And of course, this afternoon we have Lara Kaput and Steven Unthank who are going to present their case to you. And so we're very pleased to be supporting them in this action. Thanks.

Lara Kaput: Thank you. You might notice there is a picture on the wall that I brought with me from Melbourne today. That picture is in the National Gallery of Victoria.³ I recommend you see it firsthand because it's actually haunting but a beautiful painting, because what you see are the crows circling, the lamb is not yet dead, and the ewe is standing above protecting it.

Some of us were those lambs in the past, as Jehovah's Witnesses. We're now stepping up to be the ewe, to help protect the lambs that are still there.⁴ That's why we're here today. I want to thank you for inviting us. We're really honoured to be here.

About a year ago, I made a complaint to the ACNC, the Australian Charity and Not-for-profit Commission. I asked them to make the complaint urgent because of what I'd seen in the Australian Royal Commission into Institutional Responses to Child Sexual Abuse. When I made that complaint I said, 'please, make this urgent'.⁵

And they said, 'we can do that, if you give us a petition with 500 signatures'. Within two weeks, I had a petition⁶ with 1,292 signatures. And I read every comment.

Max Wallace^b made a comment.⁷ I read that comment. And I contacted Max. And that's how we're here today. So today I'm going to hand over to my friend, my childhood friend and colleague, Steven Unthank. Thank you.

^a Meg Wallace is a former law lecturer at the University of Canberra and a senior policy officer in the public service of the Australian Capital Territory. She is the author of "Health Care & the Law" and "Freedom From Religion: Rethinking Article 18" and numerous academic and popular publications exploring the topics of health law, ethics and human rights.

^b Max Wallace is vice-president of The Rationalists Association of NSW and a council member of the New Zealand Association of Rationalists and Humanists.

Background information that forms the foundation of the lecture

On 27 January 2015 the National School Chaplaincy Programme (“NSCP”), in its current format, commenced in the State of Victoria. In all contracts and documentation prepared by the Victorian Government Solicitor’s Office the *Health Records Act 2001 (Vic)* was cited as the primary and only overarching source of legislation protecting the privacy rights of school children using the NSCP within the public school system. Both chaplains and chaplaincy provider organisations were required under the agreement to comply with all legal obligations under the Health Records Act in relation to protecting the privacy rights of children within the public school system.

About a year earlier, on 14 February 2014, representatives of the Jehovah’s Witness Church had argued before the Human Rights Division of the Victorian Civil and Administrative Tribunal that chaplains and chaplaincy service providers within the public system are not subject to the *Health Records Act 2001 (Vic)*. See *HD v HE* (Human Rights) [2014] VCAT 740.

In relation to those proceedings the then Health Services Commissioner, now known as the Health Complaints Commissioner, was invited by the Applicant “HD” to apply to be joined as a party or as an intervenor for the purpose of protecting the privacy of all children within the public school system, the public health system, and also within the Country Fire Authority in relation to chaplaincy services.

Further, the Office of the Health Services Commissioner was put on notice that an adverse ruling by the Tribunal, in relation to chaplaincy services, had the potential to undermine and weaken the privacy protection of all children and adults within the public health system in the State of Victoria. The commissioner declined to be involved.

FOREWORD TO LECTURE: Establishing the parties to the VCAT proceedings

The published reasons for eventually dismissing the proceedings in *HD v HE* (Human Rights) [2014] VCAT 740 at [14]⁸ states that the First Respondent, HE, is identified as “a religious organisation and is an Australian Public Company, Limited by Guarantee (ACN No. 002861225).”

According to the federal government’s ASIC Lookup database⁹ the Australian Company number 002861225 belongs to Watchtower Bible & Tract Society of Australia.

The Australian Business Registrar ABN Lookup states that the corporation, Watchtower Bible & Tract Society of Australia, trades in Australia under the trading name of “Jehovah’s Witnesses.”¹⁰

LECTURE BY STEVEN UNTHANK

National School Chaplaincy Programme: Operating outside of the law in the State of Victoria? - Legal implications and liability under the *Health Records Act 2001 (Vic)*. – The 2014 ruling in the Health Privacy List of the Victorian Civil and Administrative Tribunal.

Steven Unthank: It's nice to be here, thank you for the invitation. What I want to discuss for a little bit is the National School Chaplaincy Programme.¹¹

As reported in the media a number of people have taken legal action in relation to the programme, including Ronald Williams who took his concerns all the way to the High Court of Australia.¹²

When the Abbott government announced changes¹³ to the National School Chaplaincy Programme in 2014 there were unintended consequences.

As time went on, the Commonwealth Government decided to fund Social Welfare¹⁴ work, school chaplaincy and counsellors, under what is now known as the National School Chaplaincy Programme.¹⁵ That in effect, made some question, 'Is this the State becoming a religion?' Some protested against that.

In the end, following legal action, the Commonwealth Government handballed the funding to the individual States. I'll be using the State of Victoria as an example to highlight the unintended consequences of the programme.

The Victorian Government currently receives funding from the Commonwealth Government to run the National School Chaplaincy Programme.¹⁶ Prior to these changeovers taking place, under the then government arrangement private chaplaincy service providers were, in part, also subject to the overarching Commonwealth *Privacy Act 1988*.^{17,18}

These privacy laws applied to a chaplain who had knowledge of, say, health problems with young girls in a state school, or health problems with young boys in a state school. That knowledge she or he had was, in part, also protected under the Commonwealth Privacy Act and the Australian Privacy Principles.¹⁹ But by shifting everything to the State under State contracts, any existing overarching protection of the Commonwealth Privacy Act was removed.

Now, all of the protection of children's health information and anything they spoke to a chaplain about, came under individual State legislation. In the State of Victoria, that was primarily the Health Records Act.

A discussion on privacy laws pertaining to chaplaincy services in the State of Victoria: The Commonwealth *Privacy Act 1988* or the Victorian *Health Records Act 2001*?

During the period of time the Williams High Court challenge was being run I was running an unrelated religious vilification case within the VCAT.²⁰ At the same time I was also keenly following another development, challenging the Victorian *Health Records Act* in relation to chaplaincy, as it made its way through the Office of the Health Services Commissioner²¹ and into the VCAT.

This particular case dealt with the subject: Does the Victorian Health Records Act apply to chaplaincy; and are chaplains subject to the Act?

According to the published final reasons in this chaplaincy case, the parents of a child had lodged a complaint with the Victorian Health Services Commissioner about a breach of their child's privacy by a Jehovah's Witness chaplain²² who was under a State contract and providing chaplaincy services in a public hospital.

So what this meant is that Watchtower^c and the Jehovah's Witness religion had a contract with the State Government of Victoria, as a chaplaincy provider organisation, to provide a chaplain to a Gippsland public hospital. And that chaplain was working in the paediatric ward.²³

He breached privacy laws by revealing confidential information about a young child to members of a Gippsland Jehovah's Witness church.²⁴ So that became the first test case.

The Jehovah's Witnesses and their lawyers²⁵ went up and argued that chaplains and chaplaincy service providers are not subject to the Victorian *Health Records Act*. They presented their arguments.

They were also facing potential fines if found guilty of unlawfully obtaining access to health information.²⁶

So they flew in their team of lawyers, naturally, and a sealed hearing so no one would know the full details of the parties involved.²⁷

And, what happened is that they presented their arguments.

They argued more or less that:

We do not provide health services in Victoria. Chaplaincy services are spiritual — not health.

It should not be under the Health Records Act.

We do not collect information on people in hospitals.

We do not collect health information.

*We have never provided first aid services at any of our religious conventions, including at Rod Laver Arena, and therefore do not hold or use health records.*²⁸

And some of the questions they were asked:

'Well, how do you know that there's a child is in a hospital?'

'How do you know if there's someone in a hospital from your church?'

How do you find out about that?'

^c Watchtower Bible and Tract Society of Australia Ltd is the corporation that manages and administers the Church of Jehovah's Witnesses in Australia. See also the Foreword To Lecture notes.

I don't know.

'How do you get into hospitals so as to access children?'

*I just walk straight in.*²⁹

These were the answers from church leaders explaining how they access children in hospitals.

So they presented their arguments. The judgement came down in March 2014. And the case was lost. That means the church won.

The case was won by the church.³⁰

The Human Rights List of the VCAT accepted their arguments that chaplains are not subject to the Health Records Act; and that chaplaincy provider organisations are not subject to the Health Records Act.

Sounds all good — except for when the National School Chaplaincy Programme (“NSCP”) started in Victoria, in its current format, the following year in 2015. The Health Records Act was the primary State legislation, for government and non-government organisations, that was referred to in protecting the privacy of public school children using the NSCP.

The State Government Solicitor’s office drew up the agreements between chaplains, chaplaincy provider organisations and the public school system.³¹ Everyone agreed to abide by the following laws for the protection of privacy— the Health Records Act and the Privacy and Data Protection Act.³²

However the VCAT had just ruled that the Health Records Act doesn’t apply to chaplains and chaplaincy provider organisations.

So as it stands at the moment, today, there is not one single piece of legislation in Victoria— and there hasn’t been for the last three years —that is protecting the health privacy of school children in relation to chaplaincy services.³³

It doesn’t adversely affect chaplains within private schools. Why? Because private schools, as a corporation or non-government organisation, have a backup bit of legislation which includes the Australian Privacy Principles³⁴ that protect health privacy.

This VCAT ruling applies within the public school system, it applies to chaplains in the fire services, to chaplains within the police force, in fact, to chaplains everywhere within government organisations.³⁵

The merry-go-round and a disregard for the privacy rights of children

So now we start on the merry-go-round. There is a document from the Health Complaints Commissioner that says they can’t handle privacy complaints against chaplains because of this VCAT ruling. So, that was it. No one was protecting the children’s privacy.

As was mentioned earlier tonight I have been a CFA volunteer firefighter since 2012. Among my contacts I found a second potential test case within the Country Fire Authority where a volunteer firefighter had his health privacy unlawfully breached in relation to seeking the provisions of chaplaincy services.

The volunteer firefighter initially went to the Information Commissioner³⁶ who more-or-less said:

‘We can’t take your case as it deals with chaplains and chaplaincy. You have to refer it to the Health Commissioner.’

There were further discussions with the Office of the Information Commissioner in Victoria, who oversees the *Privacy and Data Protection Act*. And they stated:

‘We cannot handle complaints that involve a chaplain for a breach of privacy because that doesn’t come under our legislation, the Privacy and Data Protection Act’.³⁷

The volunteer firefighter’s complaint was then referred to the Health Complaints Commissioner and then not accepted by the commissioner. Why? The Office of the Health Complaints Commissioner more-or-less explained to the volunteer firefighter:

‘We can’t accept your complaint, because this ruling³⁸ says chaplaincy does not come under the Health Records Act.’

So, how do you think the volunteer firefighter felt? Well, you see, the volunteer firefighter was the same complainant in both complaints, the one against the Church of Jehovah’s Witnesses and the public hospital involving chaplaincy services, and the one within the Country Fire Authority involving chaplaincy services. The exact same person. And he can’t get justice. That’s the predicament he is in.

As such there was no misunderstanding for this man or anyone familiar with the VCAT case or the matter. Chaplains and chaplaincy provider organisations ARE NOT SUBJECT to any health privacy laws within the State of Victoria. This is a scandal. This is unacceptable. This is wrong. Even when the Country Fire Authority was informed of the VCAT ruling they were not interested.

Someone had to do something and someone had to stand up for the health privacy of all children within the Victorian public school system, all patients within the Victorian public health system, and all volunteers within the Country Fire Authority seeking chaplaincy services. Someone did, and that someone has been me.

The ‘stand against injustice’ and a ‘struggle for principle’

I raised my concerns and the evidence, with almost every politician in the Labor Party, the Liberal Party, and the National Party. None of them were interested in the health privacy of school children under the chaplaincy programme, including potentially their own. None of these politicians were interested in the health privacy of patients within the public health system, including potentially themselves or their family.

So I took action. I got involved. I stood up. How? I personally raised this issue with the Minister for Health.³⁹ He too did not want to get involved. I took the issue up with the Office of the Health

Complaints Commissioner again and again. They did not want to do anything. Everyone was willing to maintain the status quo.

In writing to the Minister for Health, I explained the health privacy situation, and used the Church of Jehovah's Witnesses as the main example. I wrote that this religion is currently operating with chaplains in all seventy-four public hospitals in Victoria. They've got access to the computer database. They've got access to patients. They've got access to their records. They can talk to doctors. They're in the Royal Children's Hospital. They're in the Monash Children's Hospital. They can collect that information. And if anyone breaches health privacy, there's no recall for any of the patients.

I received a written reply personally from the Minister for Health, David Davis MP. I will discuss his response shortly.

If you think back to your history lessons on the Eureka Stockade or Rebellion in Victoria, a hundred and sixty odd years ago, the everyday citizens rose up against the colonial forces and that's the best of what we had in Australia as a civil war.

Many of us are proud of the Southern Cross flag.⁴⁰ You can recreate the moment and do the tours at Ballarat.⁴¹ Yes, I'm fascinated by it. The gold miners, and the former convicts who were now in the goldfields, and others, were standing against perceived injustice. These men rose up, they stood, they lost and they won.⁴²

As Victorians we have naturally sought out laws to protect our rights. However, over the years we have developed legislation in Victoria to the point that we've become known as a nanny state. Regardless, everything has to be protected. We want everything to be protected. Our health privacy. We want the speed limit lowered in the suburbs to save lives. Some want the blood alcohol level for drivers down to zero. To protect people, sometimes from themselves.

We have a Charter of Human Rights in Victoria. It's actually called the Charter of Human Rights and Responsibilities Act.⁴³ Everyone forgets the last bit. There are responsibilities that come with rights.⁴⁴

Regarding the Minister for Health, as mentioned earlier, when I wrote to him about this chaplaincy debacle and the problems in the Jehovah's Witnesses I got a really nice letter in reply.

The Minister for Health was not willing to do anything about the situation whatsoever. He was unwilling to stand up for one single child, one single patient, one single Victorian person, so as to protect their privacy under any chaplaincy services in the public health system or under any chaplaincy programme in public schools as it applied.

Unfortunately this is the way it often is—very few people actually care, or care enough to want to do something. I care!

Conclusion

So here I am today, in the State of New South Wales, giving a lecture on the failings of the State of Victoria when it comes to protecting the health and privacy of its own citizens.

I remember my battle over the Working with Children laws⁴⁵ between 2008 and 2012 in trying to force certain religious organisations to comply with the mandatory child protection laws. I made a lot of enemies but in the end child protection won. Why? I care!

I'm happy to stand up, especially for those that are vulnerable. There is a sense of achievement when you stand up to protect someone. There is a sense of giving. Most of the time, in fact, nearly all of the time, these people never know you stood up for them. That's okay. We stand up anyway.

Privacy. Think about that term and what it means to you.

Your privacy.

Others privacy.

Our children's privacy.

We have come to rely on privacy laws for our own privacy and peace of mind. Privacy means a lot to all of us, but there is very little without actual accountability. And right now I am fighting and struggling to protect our privacy and the privacy of the children we care about, and to hold accountable those who have little regard for our privacy.⁴⁶

Thank you.

Closing comments

Max Wallace: Well described. Thanks very much. Can I suggest that we all have a drink and...do you want to mingle?

Just a final comment. Meg would like to say something, and then I'll say something and then Meg will sum up. Alright I'll do the editorial first and then Meg will sum up. We Humanists and Rationalists today didn't invite you here today for the purposes of converting you to our belief. Heavens no.

Audience: [laughs]

Max Wallace: Can I say, 'you can trust us!?' And you're very welcome to come to the next session on the 27th May. And now Meg.

Meg Wallace: I'd like to say on behalf of the New South Wales Rationalists, thank you for coming. We're very pleased to have brought you here today and we'll look forward to helping progress your case. And we really hope it bears fruit in the future. Not only for Jehovah's Witness religion but for others who are in various religions.

So, once again, thank you.

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Additional resources and links

<https://www2.health.vic.gov.au/about/legislation/health-records-act>

<https://www.education.vic.gov.au/school/teachers/health/mentalhealth/Pages/nscpchaplaincy.aspx>

<https://www.education.vic.gov.au/school/principals/spag/safety/Pages/chaplaincy.aspx>

<https://www.education.vic.gov.au/school/principals/spag/safety/Pages/chaplaincy.aspx#link10>

<http://www.education.vic.gov.au/Documents/school/principals/health/1571006genchapparent.docx>

<https://www.pmc.gov.au/domestic-policy/religious-freedom-review/submissions/dr-meg-wallace>

References

¹ The Rationalist Association of NSW, Inc. Founded in 1912. <https://www.nswrationalists.org>

² For information and research on Jehovah's Witnesses see JW Facts. <http://jwfacts.com/>

To join the online discussion on Jehovah's Witnesses visit the forums: <https://www.jehovahs-witness.com/> or <https://www.reddit.com/r/exjw/>

³ August Friedrich Albrecht Schenck. *Anguish (Angoisse)*. Oil on canvas. (c. 1878). National Gallery of Victoria, Melbourne. <https://www.ngv.vic.gov.au/explore/collection/work/4344/>

⁴ For a brief summary of, and links to, recent TV documentaries and media articles on child abuse within the Church of Jehovah's Witnesses see Barbara Anderson's web site: <http://watchtowerdocuments.org/child-abuse-cases/>

⁵ Brown, Rachel. 2017. "Inside the Jehovah's Witnesses: A 'perfect storm' for abuse." *Sydney Morning Herald* newspaper. 9 March 2017. Interview with Lara Kaput and Lisa Flynn of Shine Lawyers. <https://www.shine.com.au> <https://www.smh.com.au/national/inside-the-jehovahs-witnesses-a-perfect-storm-for-abuse-20170309-guukur.html>

⁶ Petition by Lara Kaput on Change.org: "Cancel The Watchtower Bible and Tract Society's Charity Status."

"This petition is in direct support of the following concerns raised with The Australian Charities and Not-for-profit Commission (ACNC)

Case no. 291746

Case no. 290182

The nature of my concern relates to the uncharitable and harmful activities of the Watchtower Bible and Tract Society or Jehovah's Witnesses. I learnt of these concerns as I was indoctrinated into the Jehovah's Witnesses as a child. In addition to my experience, a report entitled 'REPORT OF CASE STUDY NO. 29.' 'The response of the Jehovah's Witnesses and Watchtower Bible and Tract Society of Australia Ltd to allegations of child sexual abuse' was released on October 2016 by the Australian Royal Commission into Institutional Responses to Child Sexual Abuse..."

<https://www.change.org/p/australian-charities-and-not-for-profit-commission-acnc-cancel-the-watchtower-bible-and-tract-society-s-charity-status>

Case Study No. 29: <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Case%20Study%2029%20-%20Findings%20Report%20-%20Jehovahs%20Witnesses.pdf>

⁷ Max Wallace wrote in the comments: "This is an important test case. Would like to hear more." Wallace added a personal contact email address via the Secular Party Education website: <http://spe.org.au/>

⁸ *HD v HE* (Human Rights) [2014] VCAT 740. <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2014/740.html>

⁹ ASIC. 2018. Database Lookup. Commonwealth of Australia. https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?_afLoop=3003402451040482&_afWindowMode=0&_adf.ctrl-state=14tuql6c_4 Accessed April 2018.

¹⁰ ABR. 2018. Australian Business Registry. Commonwealth of Australia. <https://abr.business.gov.au/ABN/View?id=420028612255> Accessed April 2018.

¹¹ Commonwealth Ombudsman. 2011. *Administration of the National School Chaplaincy Programme*. Report No. 06/2011, page 4. The Department of Education, Employment and Workplace Relations. Canberra, Australia: Commonwealth Ombudsman. — The background of modern school chaplaincy is summarized by the Ombudsman as:

“The National School Chaplaincy Program

On 29 October 2006 the then Prime Minister, the Hon John Howard, announced the Government’s decision to provide funding for chaplains to play a part in the nation’s schools...

In 2008 the then Deputy Prime Minister approved changes to the Chaplaincy Program permitting schools that were unable to recruit a suitable chaplain to appoint alternative individuals such as counsellors, youth workers or other secular support staff. Under the program these individuals were to be described as ‘secular pastoral care workers’...

Special funding was also granted through the Chaplaincy Program to schools affected by the 2009 Victorian bushfires and the 2011 Queensland floods, to make additional chaplaincy services available.

In August 2010, the Australian Government announced that a further \$222 million would be provided to extend the Chaplaincy Program to December 2014.”

https://web.archive.org/web/20140211224017/http://www.ombudsman.gov.au/files/commonwealth_ombudsman_chaplaincy_report_06_11.pdf

¹² *Williams v Commonwealth of Australia* [2014] HCA 23 <http://eresources.hcourt.gov.au/showCase/2014/HCA/23>
In commenting on the case HighCourtChallenge.com published the following statement on 19 June 2014:

“The High Court unanimously decided that legislation enacted by the Commonwealth Parliament which purported to provide legislative authority to make agreements for the outlay of public money, and to make payments under those agreements, is invalid in its operation with respect to a funding agreement between the Commonwealth and Scripture Union Queensland (“SUQ”). By that agreement, the Commonwealth was to pay SUQ to provide chaplaincy services at schools in Queensland.

In December 2010, Ronald Williams brought a proceeding in the High Court challenging the payment of money by the Commonwealth to SUQ for SUQ to provide chaplaincy services at the state school Mr Williams’ four children attended. In 2012, the Court held that the funding agreement between SUQ and the Commonwealth, and the payments made under it, were not supported by the executive power of the Commonwealth under s 61 of the Constitution.

Soon after the Court made orders in that proceeding, the Parliament enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) (“the FFLA Act”). The FFLA Act amended the *Financial Management and Accountability Act 1997* (Cth) (“the FMA Act”) and the *Financial Management and Accountability Regulations 1997* (Cth) (“the FMA Regulations”) to provide legislative support not only for the making of agreements and payments of the kind which were in issue in the first proceeding, but also for the making of other arrangements and grants.

Mr Williams then brought a fresh proceeding in the High Court against the Commonwealth, the relevant Minister and SUQ, challenging the validity of the relevant provisions of the FMA Act and FMA Regulations inserted by the FFLA Act. He challenged the validity of those provisions both generally and in their particular operation with respect to the payment of money by the Commonwealth to SUQ under the then funding agreement. Both the agreement and the payments made under it were said to be made under the “National School Chaplaincy and Student Welfare Program”.

The Court held that, in their operation with respect to the challenged funding agreement and the challenged payments made under that agreement, none of the challenged provisions is a valid law of the Commonwealth. The provisions are not, in their relevant operation, supported by a head of legislative power under the Constitution. Providing at a school the services of a chaplain or welfare worker for the objective described in the FMA Regulations is not a provision of “benefits to students” within the meaning of s 51(xxiiiA) of the Constitution. The Court further held that the Commonwealth’s entry into, and expenditure of money under, the

funding agreement was not supported by the executive power of the Commonwealth. The making of the payments was therefore held to be unlawful.”

¹³ In September 2011, under the Gillard Government, schools were given the option to engage a secular student well-being officer instead of a chaplain (a religious support worker). In May 2014 the Abbott Government removed the provisions of the previous government to allow schools to engage a ‘secular student well-being officer’ and required all chaplains to be affiliated with a religion or religious denomination.

¹⁴ The National School Chaplaincy Programme (NSCP), previously known as the National School Chaplaincy and Student Welfare Programme between 2011 and 2014, is a federal government programme that funds chaplains in primary and secondary schools.

¹⁵ Collins, Sarah-Jane. 2011. “New choice for school chaplaincy program.” *Sydney Morning Herald* newspaper. 8 September 2011. Accessed April 2018.

“For the first time since the introduction of the controversial national school chaplaincy program, schools will be able to choose whether to use their funding for a chaplain or a secular welfare officer.

Schools Minister Peter Garrett yesterday announced the changes to the Howard government program, saying funding would be extended to schools that want to employ student welfare officers instead.

...Existing school chaplains operating under the program will now have to ensure they meet a minimum skills requirement of the mental health and making referrals units of a Certificate IV in Youth Work.

New chaplains and student welfare officers appointed from 2012 will need to have completed a Certificate IV in Youth Work, Pastoral Care or an equivalent qualification.”

<https://www.smh.com.au/education/new-choice-for-school-chaplaincy-program-20110907-1jxur.html>

¹⁶ “Project Agreement For The National School Chaplaincy Programme.” Signed on 3 November 2014 by The Honourable Martin Dixon MP, Minister for Education, State of Victoria. http://www.federalfinancialrelations.gov.au/content/npa/education/project-agreement/nat_school_chaplaincy.pdf

¹⁷ An example of this overarching aspect of the Privacy Act 1988 (Cth) was considered in a privacy complaint that had been referred to the Office of the Australian Information Commissioner, and accepted. This multi-faceted privacy breach concerned allegations made by a female patient in a Victorian public hospital against a chaplain working in the public health system and against the Director of Obstetrics and Gynaecology (a doctor) of a Victorian public hospital, both of whom had on-shared her private health information to the Church of Jehovah’s Witnesses without the female patient’s consent. This sensitive health information, including any lawful blood management during child birth, was then adversely used and published by the Church of Jehovah’s Witnesses against the female patient to her detriment. Investigations into the health privacy breach revealed that lawyers for Watchtower Bible and Tract Society of Australia, and the Church of Jehovah’s Witnesses, had in fact solicited the Victorian hospital’s Director of Obstetrics and Gynaecology for access to female patient’s medical records and health information and those of her baby. The health information was subsequently provided without the patient’s informed consent or written consent, neither of which would ever be granted.

Upon discover of the health privacy breach the female patient applied to the Victorian Civil and Administrative Tribunal for an emergency hearing for the purpose of seeking an injunction against Watchtower Bible and Tract Society of Australia and the Church of Jehovah’s Witnesses so as to protect her health privacy. In this VCAT hearing the female patient was represented by Steven Unthank. The Victorian public hospital Director of Obstetrics and Gynaecology was represented by Rachel van Witsen and Vincent Toole, solicitor and legal counsel for Watchtower Bible and Tract Society of Australia.

The health complaint against the Director of Obstetrics and Gynaecology was also referred by the Office of the Health Complaints Commissioner to the Australian Health Practitioner Regulation Agency (AHPRA) for investigation. The Director of Obstetrics and Gynaecology resigned his position as a director within a Victorian public hospital and immediately left the country.

Office of the Australian Information Commissioner (OAIC): <https://www.oaic.gov.au/>

Australian Health Practitioner Regulation Agency (AHPRA): <https://www.ahpra.gov.au/>

¹⁸ Privacy Act 1988 (Cth). http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/pa1988108/

¹⁹ Privacy Act 1988 (Cth)— Schedule 1 Australian Privacy Principles. http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/pa1988108/sch1.html

²⁰ Racial and Religious Tolerance Act 2001 (Vic). http://classic.austlii.edu.au/au/legis/vic/consol_act/rarta2001265/

See *Unthank v Watchtower Bible and Tract Society of Australia* (Human Rights) [2013] VCAT 1421. <http://www9.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/1421.html>

See also “Pizer’s Annotated VCAT Act 5th Edition” [VCAT.75.250] page 348. Jason Pizer QC and Emrys Nkvapi.

and <https://www.humanrightscommission.vic.gov.au/home/the-law/racial-and-religious-tolerance-act>

²¹ Now known as the Victorian Health Complaints Commissioner. <https://hcc.vic.gov.au/>

²² For information on the provision of chaplaincy services by the Church of Jehovah’s Witnesses see:

Jehovah’s Witnesses Hospital Liaison Committees <https://wol.jw.org/en/wol/d/r1/lp-e/1200272785>

Jehovah’s Witnesses Hospital Information Services <https://wol.jw.org/en/wol/d/r1/lp-e/1200272783>

Jehovah’s Witnesses Patient Visitation Groups <https://wol.jw.org/en/wol/d/r1/lp-e/1102014935#h=52:0-53:0>

For information on the Church of Jehovah’s Witnesses and blood transfusions see: <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/Office-of-Public-Advocate-Practice-Guidelines--Jehovahs-Witnesses-and-Blood-Transfusions>

See also the website: Advocates for Jehovah’s Witness Reform on Blood. <http://ajwrb.org/>

²³ Zwartz, Barney. 2014. “Child in Jehovah’s Witness court bid.” *The Age* newspaper. 18 February 2014. Fairfax. <https://www.theage.com.au/national/victoria/child-in-jehovahs-witness-court-bid-20130217-2elcg.html>

²⁴ In *HD v HE* (Human Rights) [2014] VCAT 740 at [4] the father’s consternation over the Jehovah’s Witness Church’s public announcement of his child’s epilepsy and seizures, was published verbatim:

“[W]e had yet to discuss and decide whether we would share any private and confidential medical information about our daughter with anyone. Further to this, the [religious organisation], have for many years, clearly stated that in some cases, there is a direct link between demonism and epilepsy and seizures. This was taught to me from my childhood onwards and the teaching has not changed. To learn that my daughter had had an actual seizure scared me, not because I believe there could be a link between demonism and epilepsy, as I absolutely do not believe this at all, but what scared me is that [the religious organisation] are taught that some, not all, just some cases of epilepsy and mental distress are caused by demonic factors. I was fearful that this belief could cause our daughter or even our family to be treated differently or shunned by ignorant members of the church.”

In the originating privacy complaint to the Health Services Commissioner the father of the child had written:

“We had yet to discuss and decide whether we would share any private and confidential medical information about our daughter with anyone. Further to this, the teachings of Jehovah’s Witnesses, have for many years, clearly stated that in some cases, there is a direct link between demonism and epilepsy and seizures. This was taught to me from my childhood onwards and the teaching has not changed. To learn that my daughter had had an actual seizure scared me, not because I believe there could be a link between demonism and epilepsy, as I absolutely do not believe this at all, but what scared me is that Jehovah’s Witnesses are taught that some, not all, just some cases of epilepsy and mental distress are caused by demonic factors. I was fearful that this belief could cause our daughter or even our family to be treated differently or shunned by ignorant members of the church.”

Regarding epilepsy, and a number of other related conditions, Jehovah’s Witness elders have written instructions from the Church in handling matters involving epileptic seizures and mental distress. This fact was evidenced in a Statutory Declaration issued to the Health Services Commissioner by Elder Terrence O’Brien, Director, Watchtower Bible and Tract Society of Australia, and branch overseer of Jehovah’s Witnesses. In his Statutory Declaration O’Brien provided documented evidence that the Church of Jehovah’s Witnesses believes and teaches that some forms of epilepsy and seizures are actually caused by demonic factors. O’Brien’s statement also referenced, among other sources, the following Church policy and instructions to elders that:

“[I]f the elders have good reason to suspect that demonic influence is involved, there is no harm in their making some inquiry.” – *The Watchtower* magazine, October 15, 1988.

Consent from the parents of the child was not obtained by the Church of Jehovah’s Witnesses to conduct any religious inquiry into their child in relation to any allegations of demon possession.

Postscript: Just as the parents feared both the child, the child’s siblings, and themselves were indeed shunned and ostracized by the entire Church of Jehovah’s Witnesses (“JW”), including by the young child’s JW grandfather.

²⁵ The Watchtower in-house lawyers involved in the case were: Vincent Toole, Rachel van Witsen, and Ivan Novian.

²⁶ Section 82 of the *Health Records Act 2001* states:

“Unlawfully requesting or obtaining access to health information
A person or body must not, by threat, intimidation or false representation, request or obtain access to health information relating to himself, herself or any other person.
Penalty: In the case of a body corporate, 300 penalty units;
In any other case, 60 penalty units.”
http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/hra2001144/s82.html

²⁷ Respondent 2 in the proceedings, identified in all documents as “Chaplain [first name, last name]” was anonymized as “HF.” During the proceedings Chaplain “HF” acknowledged he was under contract to a state hospital and wore hospital staff issued identification identifying him as the hospital “CHAPLAIN.”

A verbal submission was made to the Tribunal by a journalist from *The Age* newspaper (Fairfax) arguing that reporting on the proceedings, and the publishing of the identification of Respondent HE, the “religious organisation,” during the proceedings could in no way identify the child in the case and therefore a suppression order was not necessary.

²⁸ This claim by Watchtower Bible and Tract Society of Australia, namely that they do not provide first aid health services in the State of Victoria at their religious conventions, and nor do they maintain first aid health records, was brought to the attention of Melbourne Olympic Park Trust (MOPT) and their lawyers and also to the attention of WorkSafe Victoria. The reason for this claim is that the Jehovah’s Witnesses had held annual religious conventions at the Rod Laver Arena and MOPT area for the past 30 years. Someone had to have provided the first aid services in compliance with occupational health and safety laws and MOPT contracts. Evidence presented during the proceedings established that St John Ambulance, the usual first aid provider at MOPT events, did not in fact provide first aid at the Jehovah’s Witness conventions. (See *HD v HE* (Human Rights) [2014] VCAT 740 at [14].) The net result of the discussions engaged in with MOPT and WorkSafe Victoria was that the Jehovah’s Witnesses ceased hiring any venues within the MOPT area and the City of Melbourne for large religious conventions. Instead commenced holding numerous small religious conventions at their own assembly hall in Melton, Victoria.

²⁹ Testimony of witness Elder Peter Linke for Watchtower Bible and Tract Society of Australia.

³⁰ In *HD v HE* (Human Rights) [2014] VCAT 740 at [13] the necessary questions considered by the Tribunal in the proceedings were described as:

“Is HE an organisation to which the Act applies? Is it a health service provider? Does it provide a health service in Victoria? If not, is it a body corporate that collects, holds or uses health information? If it is, has there been an interference with privacy? Has there been an act or practice that breaches HPP2.2 as alleged?”
<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2014/740.html>

³¹ VGSO. 2014a. “Service Agreement For the Provision of Chaplaincy Services For organisations that have executed the Providers Agreement - Victorian Government School Council (School) And Chaplaincy Services Provider (Provider).” Victorian Government Solicitor’s Office. <http://www.education.vic.gov.au/Documents/school/principals/health/nscpserviceagreement.DOCX>

VGSO. 2014b. “Provider Agreement For the Provision of Chaplaincy Services in Victorian Government Schools - The State of Victoria through the Department of Education and Training (the Department) and Chaplaincy Services Provider (Provider).” Victorian Government Solicitor’s Office. <http://www.education.vic.gov.au/Documents/school/principals/health/nscpprovideragreement.DOCX>

³² Privacy and Data Protection Act 2014 (Vic). http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/num_act/padpa201460o2014317/

³³ The “Chaplaincy Information, Records and Reporting Policy” published by the Victorian Department of Education and Training states:

“This policy is for use by Victorian government schools that are not participating in the Commonwealth Government’s National School Chaplaincy Programme (NSCP)...

“The aim of Chaplaincy Services in Victorian government schools is to support the emotional wellbeing of students by providing pastoral care services and strategies to support the emotional wellbeing of the broader school community...

“Chaplains and Chaplaincy Providers are required to comply with all of the following:

- the *Public Records Act 1973* (Vic) and any standards, policies or guidelines issued from time to time, including any retention and disposal authorities that may be relevant to the records (**Public Records Act**)
- the *Health Records Act 2001* (Vic) and any applicable principles and code of practice (**Health Records law**)
- the *Privacy and Data Protection Act 2014* (Vic) and any applicable principles and code of practice (**Privacy law**)
- this Policy as published on the Department of Education and Training website and as amended from time to time.”

<http://www.education.vic.gov.au/Documents/school/principals/health/1571012genchaprecpol.docx>

See also page 12 of the State of Victoria contract document “General Service Agreement For the Provision of Chaplaincy Services For Victorian Government schools that are not participating in the Commonwealth Government’s National School Chaplaincy Programme (NSCP)” which states:

“3.2 Privacy

The Provider acknowledges that it will be bound by the *Health Records Act 2001* and the *Privacy and Data Protection Act 2014* and any applicable principles and code of practice under those Acts with respect to any act done or practice engaged in by the Provider under or in connection with this Agreement in the same way and to the same extent as the Department or the School would have been bound had it been directly done or engaged in by the Department or the School.”

<http://www.education.vic.gov.au/Documents/school/principals/health/AgreementnonNSCP.docx>

³⁴ Privacy Act 1988 (Cth)— Schedule 1 Australian Privacy Principles. http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/pa1988108/sch1.html

³⁵ **Chaplaincy services in the State of Victoria adversely affected by the ruling include:**

All chaplaincy services offered through Spiritual Health Victoria: <http://www.spiritualhealthvictoria.org.au/>

Pastoral and Spiritual Care at the Royal Children’s Hospital: <https://www.rch.org.au/cpc/>

Pastoral and chaplaincy services at all public hospitals.

Chaplaincy services within the Country Fire Authority: <https://www.cfa.vic.gov.au/volunteer-careers/welfare-services-for-families>

Sports Chaplaincy: <https://sportschaplaincy.com.au/>

Chaplaincy services within Victoria Police: <https://www.vicpolice.com.au/cops-and-bloggers/speeches/the-chaplain-works-with-the-humanity-of-the-police-officer>

Chaplaincy services within the Victorian Department of Human Services: <http://www.vccem.org.au/>

Chaplaincy services provided through the United Fire Fighters Union of Australia – Victoria Branch: <https://www.ufuvic.asn.au/membership/support-services/>

³⁶ Office of the Victorian Information Commissioner. <https://www.cpdp.vic.gov.au/>

³⁷ On 19 October 2016 the Office of the Commission for Privacy and Data Protection, after reviewing the privacy complaints recommended that all complaints be referred to the then Office of the Health Services Commissioner (“HCC”) by reason that anything to do with the provision of chaplaincy or chaplaincy services through a government organisation falls under the *Health Records Act 2001*. The correspondence issued by Michael O’Connor, Assurance and Legal Policy Advisor, Office of the Commission for Privacy and Data Protection, stated in part:

“As it appears from your email and attachments that the information involved ... is the health information of yourself and your children you will need to contact the Office of the Health Services Commissioner who oversee the *Health Records Act 2001* (Vic). Health information is excluded from the definition of personal information covered by the *Privacy and Data Protection Act 2014* (Vic). The Health Services Commissioner will be able to give you advice on how to progress this matter.”

³⁸ *HD v HE* (Human Rights) [2014] VCAT 740. <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2014/740.html>

³⁹ David Davis served as the Victorian Minister for Health between December 2010 and December 2014. <https://www.parliament.vic.gov.au/epc/members/details/22/37> Accessed April 2018.

⁴⁰ Migration Heritage Centre. 2010. 1854 The Eureka Flag. The Migration Heritage Centre, Powerhouse Museum. <http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/1854-the-eureka-flag/index.html>

⁴¹ “Blood on the Southern Cross.” Eureka Rebellion tour, Sovereign Hill, Ballarat, Victoria. “‘Blood on the Southern Cross’ is an explosive multi-million dollar sound-and-light show like nothing you’ve ever seen before! The story of the Eureka Rebellion, a dramatic battle between gold miners and Government forces at Ballarat on 3 December, 1854, is retold nightly by ‘Blood on the Southern Cross.’” <http://www.sovereignhill.com.au/sound-light-show/>

⁴² In commenting on the Eureka “Stockade” Rebellion, American writer Mark Twain wrote: “I think it may be called the finest thing in Australasian history. It was a revolution—small in size; but great politically; it was a strike for liberty, a struggle for principle, a stand against injustice and oppression. ... It is another instance of a victory won by a lost battle. It adds an honorable page to history; the people know it and are proud of it. They keep green the memory of the men who fell at the Eureka stockade.” *Following the Equator* (1987). Mark Twain.

⁴³ Charter of Human Rights and Responsibilities Act 2006 (Vic). http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/cohrara2006433/ See also <https://www.humanrightscommission.vic.gov.au/human-rights/the-charter>

⁴⁴ Section 13 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) states:

“Privacy and reputation

A person has the right—

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with;”

http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/cohrara2006433/s13.html

⁴⁵ In 2011 Steven Unthank, as both the Informant and Prosecutor, was granted extraordinary leave to launch a private criminal prosecution within the Magistrates’ Court of Victoria (Latrobe) against the *Church of Jehovah’s Witnesses & Ors* (unincorporated accused) and against *Watchtower Bible and Tract Society of Australia & Ors* (corporate accused) over ongoing breaches of the Working with Children laws and the refusal of the church to comply with the working with children check as it applied to religious organisations and ministers of religion.

The net result of the criminal prosecution was that the Church of Jehovah’s Witnesses agreed to comply with their legislative requirements regarding mandatory child protection for some 2000 ministers of religion and volunteers who worked with children across the entire State of Victoria, including within the public health system as chaplains.

The criminal prosecution within the Magistrates’ Court of Victoria (Latrobe) ran from 26 July 2011 until 21 February 2012, upon which date the Director of Public Prosecution discontinued the criminal prosecution as the religion had finally complied with child protection laws for all 2000 ministers of religion and volunteers. Five separate Jehovah’s Witness legal entities were prosecuted on a total of 35 separate criminal charges. The court action was financed by Steven Unthank.

Working With Children Act 2005 (Vic). http://classic.austlii.edu.au/au/legis/vic/consol_act/wwca2005232/

⁴⁶ **“What is privacy?”**

‘Privacy’ is not defined in legislation, and providing a conclusive definition is difficult. Privacy relates to the principles of human dignity, human uniqueness, the importance of solitude, and has historically been described as ‘the right to be left alone.’

Privacy encompasses several overlapping notions, including secrecy, confidentiality, solitude of the home, informational self-determination, freedom from surveillance, and the protection of an individual’s intimate relationships.

Privacy has been recognised broadly as a human right in international instruments including the United Nations *Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. In Victoria, a right to privacy is included in the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

Privacy of personal information has increasingly come into the spotlight internationally and in Australia. This is largely as a consequence of the exponential rise in sophistication of digital and other surveillance technologies, and the increasing ability for governments and organisations to collect and store detailed caches of personal information.

As a result, laws protecting information privacy have been enacted in numerous countries, including Australia. Many of these laws are based on guidelines developed by the Organisation for Economic Cooperation and Development (OECD) in 1980.”

<https://www.cdpd.vic.gov.au/menu-privacy/privacy-what-is>

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