The role of the church in developing the law

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The church and other community organisations have a legitimate role to play in influencing public policy. However, intervention by the church and other religious bodies in recent litigation in Australia and the United Kingdom raises questions about the appropriateness of such bodies being permitted to intervene directly in the court process as amici curiae. We argue that there are dangers in such bodies insinuating their doctrine under the guise of legal argument in civil proceedings, but find it difficult to enunciate a principled distinction between doctrine and legal argument. We advise that judges should exercise caution in dealing with amicus submissions.

1. WAYS IN WHICH RELIGION INFLUENCES ETHICS

Religions have developed and required the observance of moral precepts since humans organised themselves into societies and cultures. While many people believe that even the West’s currently dominant secular democratic systems derive from the Judaean-Christian moral culture, an equally arguable position is that deeper, naturalistic and inescapable truths about how humans live together underpin all religious/moral cultures. While many people believe that even the West’s currently dominant secular democratic systems derive from the Judaean-Christian moral culture, an equally arguable position is that deeper, naturalistic and inescapable truths about how humans live together underpin all religious/moral cultures. While many people believe that even the West’s currently dominant secular democratic systems derive from the Judaean-Christian moral culture, an equally arguable position is that deeper, naturalistic and inescapable truths about how humans live together underpin all religious/moral cultures. While many people believe that even the West’s currently dominant secular democratic systems derive from the Judaean-Christian moral culture, an equally arguable position is that deeper, naturalistic and inescapable truths about how humans live together underpin all religious/moral cultures. Even judgments that appear to be based on reasoned analysis are affected by religious belief. Our analysis does not, however, provide a clear way of distinguishing legitimate from illegitimate ways of intervening.

2. WAYS IN WHICH RELIGION INFLUENCES POLICY AND LAW

The church participates in the development of the law in different ways. Some of these we see as inevitable, such as when individual politicians vote according to a religiously informed conscience. Others we see as legitimate, as when churches and their members lobby politicians to effect changes to legislation. We raise questions concerning a third category of influence, which is when the church intervenes in civil litigation.
possible. For example, the church is as much justified in arguing that abortion should continue to be a criminal offence, as abortion providers associations are in arguing the opposite view.

2.3 Church intervention in litigation

In our view, the development of most concern regarding the relationship between the church and the organisation of the state has been the recent direct intervention by the Roman Catholic Church in civil litigation. An examination of two recent Australian cases may help clarify and develop legitimate principles which could be applied in this area. In two recent Australian cases (described below), the church has been granted leave to appear as an amicus curiae; and, in the more recent case, to seek review of a federal court judgment in the High Court, despite the fact that the church was not a party to the initial litigation. This type of intervention goes far beyond the English and American practice of receiving written submissions from the church and other interested parties that might assist the court in a particular case.

This is evident when one compares the English and Australian cases. In the English case, A (Children) (the "conjoined twins case"), the Court of Appeal noted the church's submissions to the court and said that the court was "grateful for them" (per Ward LJ; emphasis added). The church's submission made five salient points based on Roman Catholic faith and morality: "human life is sacred and inviolable; ... a person's bodily integrity should not be invaded when that can confer no benefit; ... the duty to preserve one person's life cannot without grave injustice be effected by a lethal assault on another; ... there is no duty on doctors to resort to extraordinary means in order to preserve life; ... the rights of parents should be overridden only where they are clearly 'contrary to what is strictly owing to their children'" (per Walker LJ). The archbishop also referred to a joint statement by the Anglican and Roman Catholic archbishops in the aftermath of the House of Lords' judgment in Airedale NHS Trust v Bland concerning the value of human life and the need to give "special care and protection" to vulnerable patients.

The submission of the Pro-Life Alliance was more specific concerning the issues of the conjoined twins. For example, it argued that "the negative obligation to refrain from the intentional deprivation of life in effect trumps the positive obligation to take steps to protect the enjoyment of the right to life" (per Ward LJ).

Although the judges clearly considered the Archbishop's submissions carefully and discussed them in the judgments, they were not accepted. Walker LJ said: "The five salient points made by the Archbishop are entitled to profound respect" but "ultimately the court has to decide this appeal by reference to legal principle, so far as it can be discerned, and not by reference to religious teaching or individual conscience" [emphasis added].

In another English case currently before the High Court, the Pro-Life Alliance has applied for judicial review of advice provided to parliament by the minister for health in response to parliamentary questions about changes to regulations on cloning. As in A (Children), some of the arguments advanced by the Pro-Life Alliance are quite technical or specific to the case—such as whether the regulations cover embryos created by cell nuclear replacement (the "Dolly" technique); or only certain cases—such as whether the regulations cover embryos created by the Pro-Life Alliance are quite technical or specific to the case.

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The *amicus* procedure has provided courts with a source of information and advice that the parties may be unable or disinclined to provide. Appellate judges, in particular, aware of the profound implications their decisions may have for people other than the parties and for the law itself, have been willing to accept these submissions “to ensure that an appropriate range of argument is presented to the Court”.

In Australia, *amicus* interventions have been “relatively rare”. Until recently, applicants were not permitted to make submissions merely because they would present facts or an argument that would not be presented by the parties; they were also required to “have an interest in the resolution of issues in the litigation”. Now, this requirement has been relaxed so that *amicus* submissions may be received if they are “apt to assist the court in deciding the instant case”.

In so extending the scope of *amicus* submissions, Australian courts are developing a position similar to the US, where *amicus* briefs are used to present partisan views reflecting, for example, “the community’s concern in consumer protection, sexual or racial equality, and environmental conservation”.

Is this a desirable trend? Is the view of the Roman Catholic Church a community interest of a type that should be heard in this way? Is the church not seeking to present a “legislative interest” that should be presented to parliament—to change the law—rather than to the courts to influence their decision? Is the view of the Roman Catholic Church a community interest of a type that should be heard in this way? Is the church not seeking to present a “legislative interest” that should be presented to parliament—to change the law—rather than to the courts to influence their decision? Is this a type of “special pleading” that is inappropriate in the context of civil litigation?

### 3. DEVELOPING PRINCIPLES

An initial mistake in approaching these questions is to conclude that since the church virtually was the state but no longer is, it should now be restricted to dealing with matters of private, personal morality in contrast to public and policy concerns. We have already noted that accepting the lobbying of MPs by the church is to accept that the church is a legitimate public player. The view that the church now ought to be relegated to the private sphere may stem from the hold exerted on us by the enlightenment idea that liberal pluralist societies are foundationally neutral regarding values. However, one might say, on the other hand, that the liberal position itself is just another value system, albeit that one of its primary values is tolerance; or that secularism is really another religion (or analogous to one); or that there is no really neutral or objective position. If one takes account of those arguments, it is easier to see that the church, like other institutions, legitimately competes for support in elaborating ways of living life and organising society in a public, not just a private sense.

The suggestion that the church should now confine itself to private matters leads to a number of possible ways of distinguishing how the church and others should function as *amicus curiae*. Some we think are intuitively attractive but do not withstand scrutiny.

#### 3.1 The church as a hierarchical institution

It might be thought that in democracies, submissions by hierarchical institutions like the church ought not be acceptable in legal and policy deliberations. We suggest, however, that the structure of the institution should make no difference, if pluralism values variety. Moreover, in the case of the church and indeed most institutions, the acceptance by members of the governance and teachings of the institution is a familiar way in which individuals exert their own autonomy. (Needless to say, there are interesting and important moral and psychological questions concerning the acceptance of the church's teachings, but these cannot be pursued here. Suffice to say that such questions apply to the acceptance of membership of any group.)

#### 3.2 Scope of interests

We suggest that there can be no in principle distinction between church and secular submissions as *amicus* on the basis that secular interests are broad whereas those of the church are simply those of its members and therefore narrow enough to be described as special pleading. Secular interests, such as support for the preservation of wilderness, may also be limited in a similar way, and hence constitute cases of special pleading.

#### 3.3 Financial advantage

The fact that some churches are well funded confers an advantage in intervening, which some may find objectionable. Retaining counsel to represent one’s interests is expensive, and many institutions and individuals cannot afford to do so. This means that arguments advanced by the church may not be challenged by other parties. Financial inequalities are, however, a fact of life, and many secular lobby groups have extensive financial resources.

#### 3.4 Nature of submissions

There is a final and for some a compelling argument for distinguishing between church and secular bodies, when permitting an intervention in civil litigation. This is the perceived difference between the kind of submission they make. It may be thought that secular bodies will be likely to present verifiable factual material while the church will limit itself to doctrine, or metaphysics. Perhaps this prejudice is encouraged by our current cultural acceptance of the truth and authority of science. This argument mistakes the message for the messenger. There is no reason to think that the church could not produce hard-won scientific material which it believed was important for the court's deliberations, just as any secular body could do. There is also no reason to suppose that secular bodies may not submit material which is just as doctrinal as the most traditional religious beliefs. Beliefs in God's moral laws and beliefs in the enduring value of wilderness, for example, are both beliefs in a doctrine, which is not based on evidence of a scientific kind. The belief in the enduring value of wilderness for its own sake is not established by a scientific study of wilderness; indeed such studies are carried out against the background of that metaphysical commitment.

While it is therefore a mistake to distinguish the messengers, is there a meaningful distinction here in the kind of argument that an *amicus* should be permitted to make to the court? Consider the distinctions between empirical data, legal argument, and doctrine.

Empirical data will most readily satisfy the requirement that *amicus* submissions be “apt to assist the court in deciding the instant case”. A person or body applying for *amicus* status may have specialist knowledge which would not otherwise be available to the court. On this basis, as well as on the basis of interest, the Australian Catholic Health Care Association would have a legitimate right to present evidence on how its responsibility to operate a number of health care facilities and provide pregnancy counselling and advice would be affected by the decision in *CES*. Although it is open to the parties to present evidence of this type, they may choose not to do so in the circumstances of the particular case. In *McBain*, counsel for two defendants (the state of Victoria and the minister responsible for the legislation) took a “neutral” position on the alleged inconsistency between the state and federal provisions; the licensing authority did not appear; and it was not in Ms Meldrum's interests to defend the state legislation. Without the intervention of the Roman Catholic Church, the judge would not have heard arguments concerning the alleged inconsistency. Its arguments were therefore “apt to assist the court”.

Now consider doctrine, be it religious or secular. It appears that the greater willingness of appellate judges to consider...
amicus submissions rest on the courts’ declaratory as well as adjudicative function, and the belief that the court will benefit from the presentation of a range of views. A submission which was clearly no more than a doctrinal assertion would appear to be beyond the legitimate scope of the amicus function, because it would be of no help to the court, given the limitations which apply even to appellate courts in developing the law. It would be to shift the balance between the court’s responsibilities to the parties and to how the law can be developed in the context of a particular case, too much in the direction of the latter. Although it is true that courts do make new law through cases, the law at any one time is a distillation of a moral-social compromise in the development of which any putatively helpful doctrinal views have usually already been considered. The place for argument on policy and balancing of values and interests is parliament, not the courts.

Finally, consider the presentation of legal argument by or on behalf of the church. In our view, this is the most problematic issue. One reason is that it is very difficult to distinguish between doctrine and legal argument. Even if the presentation of doctrine is not permitted, it can be disguised as legal argument. Indeed, this will inevitably be the case. In CES, for example, the alleged lacunae in the legal argument from the parties that was anticipated in the High Court included the basic unlawfulness of abortion and the alleged incoherent state of the law in relation to the status of the unborn child. These matters raised legal arguments, albeit that their acceptability would promote the doctrine of the Roman Catholic Church. Similarly, in McBain, the arguments advanced by the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether the Roman Catholic Church were not that children should be born to married couples (its doctrine); but legal arguments: the meaning of the word “services” in the Victorian Act; whether

CONCLUSION

Despite our intuitive concern about the church and church bodies becoming directly involved in civil litigation between private individuals, it is difficult to see on what theoretical basis such involvement can be challenged. Courts often want to hear arguments from a wide range of views, especially on contentious issues. What principled limit can be imposed in deciding whether amici should be permitted to participate and the kind of submissions they are permitted to make? We have difficulty in suggesting any.

In view of the increased involvement of the church in recent Australian cases, however, we believe judges should be alert to the possibility that the church (or any other group) will make improper use of the court process for the purposes of promoting its doctrine, under the guise of presenting legal argument. In A (Children), the Archbishop stated explicitly that his submission was based on the teaching of the Roman Catholic Church. In other cases, legal argument may be based on doctrine, as in the Pro-Life Alliance application for judicial review of the English cloning regulations. Judges should remain alert to this danger and adopt appropriate safeguards, so that the voice of the church can be heard but will not be accepted as determinative.

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