

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.

The interaction of the church and the state has been a topic of discussion for centuries but it assumes new dimensions in the multicultural and multiethnic societies in which we live today. To what extent do church doctrine and religious belief continue to influence our ethical judgments, political decision making, laws and the implementation of policy, and to what extent is such influence both consistent with and desirable for a secular society?

In this paper, we argue that it is inevitable that the law and the law making process will be influenced by the church and religious beliefs and that this is unobjectionable. Moreover, despite our initial reservations about the church intervening directly in the court process, we have concluded that there is no logical basis on which such intervention can be precluded. We suggest that courts should examine carefully submissions from churches and other bodies to determine whether the points made are essentially legal principle or doctrine and that the latter should be regarded more sceptically. We do not, however, provide a clear test to distinguish legal principle from doctrine.

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 Judaeo-Christian moral culture, an equally arguable position is that deeper, naturalistic and inescapable truths about how humans live together underpin all religious/moral cultures, and that different systems develop within different historical contexts. Whatever theory is true, there will be real differences between the ethical systems of different historical periods and national states. In this paper, we will not focus on the influence of religion on the nature of ethics as such, but on questions concerning how religion influences developments in policy and the law.

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.

Our analysis does not, however, provide a clear way of distinguishing legitimate from illegitimate ways of intervening.

2.1 Religious background of politicians

The attitudes of politicians (and judges), like those of everyone else, are obviously influenced by their religious upbringing. Sydney journalist, David Marr, makes the following observations about prominent Australian politicians in his book, *The High Price of Heaven*.¹ He said that “[the former Premier of Queensland] Joh Bjelke Peterson was a man of rock-hard Calvinistic faith”²; that federal politician Brian Harradine is a “Catholic Independent, unfettered by party discipline [who] has held a crucial vote in the Senate”,³ and that the attitudes to Aboriginal Australia of the current Prime Minister, John Howard, were formed by his knowledge of Methodist missions and the *Missionary Review*.⁴

Knowing politicians' religious and other backgrounds indicates how they are likely to vote on particular issues and often explains why they act as they do. What Marr calls the “Catholic doctrinal position on fertility control”⁵ has, in his view, led to “[c]uts to Medicare rebates for IVF and the slashing of overseas aid for birth control programs . . . the effective barring of the ‘morning after’ pill RU486, and then the blackballing [as Chair of the National Health and Medical Research Council] of the man who recommended its release, scientist and committed Catholic, Dr John Funder”.⁶ These examples, as Marr says, demonstrate a considerable indirect influence of the church on the political process. It is, however, one that is inevitable, as members of parliament, like everyone else, are the product of their upbringing, education, and experience. Even judgments that appear to be based on reasoned analysis are affected by such subjective influences.

2.2 Lobbying of MPs by the church and its members

It is also part of the political process that constituents lobby their representatives to try to influence policy decisions. Lobbying by individual church members, or by church members in concert, is little different from lobbying by other people or groups in the community. Whether their religious affiliation is revealed or not, there seems no objection to this practice. It is part of the church's mission to promote its teaching and to have its values taken into account in the development of new legislation. This is not objectionable in a pluralist society that values variety in opinion and in which everyone is entitled to argue for their own ideals and influence policy as much as

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”),⁷ the Court of Appeal “[e]xceptionally . . . allowed the Archbishop of Westminster and the Pro-Life Alliance to make *written* submissions to [the court]” and said that the court was “grateful for them” (per Ward LJ; emphasis added).⁸ The Archbishop’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).⁹ 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*¹⁰ concerning the value of human life and the need to give “special care and protection” to vulnerable patients.¹¹ 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).¹²

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].⁹

In another English case currently before the High Court,¹³ 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 those formed by the fusion of male and female gametes (“ordinary” reproduction). They are not religious doctrine or belief.

Now consider the Australian cases. In the NSW abortion case *CES v Superclinics*,¹⁴ the Roman Catholic Church was granted *amicus curiae* status in a proposed appeal to the High Court.¹⁵ The case arose from a woman’s claim for damages against a medical clinic because its employee doctors failed to

diagnose that she was pregnant after a number of consultations and two pregnancy tests. She said the doctors had been negligent and that, because of the delayed diagnosis of pregnancy, she had been deprived of the opportunity to have the pregnancy terminated. The second case was *McBain v State of Victoria*¹⁶ in which assisted reproductive technology (ART) specialist, Dr McBain, successfully challenged the bar on single women gaining access to ART programmes in Victoria. He argued that the *Infertility Treatment Act 1995* (Vic) which limited ART to married or stable de facto heterosexual couples was inoperative because it was inconsistent with the federal *Sex Discrimination Act 1984*. The Roman Catholic Church applied for and was granted *amicus curiae* status in the Federal Court and Justice Sundberg devoted a large part of his judgment to submissions of the Roman Catholic Church (he rejected all of the church’s arguments). Later, the church applied to the High Court for an order to review Justice Sundberg’s decision¹⁷; and leave was granted for the case to be heard by the full court of the High Court of Australia.¹⁸ On 30 April 2001, Gummow J gave leave to the Women’s Electoral Lobby also to intervene in the proceedings as an *amicus curiae*.

This kind of participation in the law making process is different from that considered earlier. Civil litigation essentially involves a dispute between private parties. Traditionally, the parties (or their counsel) have defined the issues and decided what arguments to make to the court. The case may become a vehicle for changing the law, both directly and by being used as a judicial precedent in later cases. But the principal focus is still this dispute. One cannot distinguish some “political” cases from the broad run of disputes. In any case, a court, especially an appellate court, may take the opportunity to restate the law or to develop new principles. The parties accept that risk in the nature of the litigation; they cannot avoid it. But is it right that they should have their actions delayed, be required to address new issues, or to bear additional costs,¹⁹ because of third party intervention? The churches, particularly the Roman Catholic Church, are certainly affected by the ultimate outcome of cases on abortion and reproductive technology because, unlike in Britain, they are major providers of health care services, including several major women’s hospitals. But people are inevitably affected by judicial decisions that are relevant to their activities, whether they are professional groups such as doctors, or insurers, or landowners, or taxpayers. Surely it cannot be argued that everyone who may be affected by a judicial decision should be permitted to intervene in the litigation?

There are also questions concerning the constitutional doctrine of separation of powers. The judiciary should be independent of the legislature and the executive. Its processes are commonly thought to be objective and should be free of political influence. Nevertheless, judgments are often influenced by political factors, and many people believe that judges should explicitly state in their judgments the matters which they have considered in reaching their decisions.

Amicus intervention by the church as described in the two cases is a recent trend in Australia. Historically, an *amicus* was a disinterested bystander, usually a lawyer present in court, who sought to draw attention to a relevant point of fact or law that had escaped the court’s notice.²⁰ As laws have become more complex, courts have expanded the role of *amici curiae* so that an increasing range of bodies have been permitted to submit arguments. The Tasmanian Wilderness Society was heard on ecological issues in the *Tasmanian Dams case*²¹; the NSW Public Interest Advocacy Centre (PIAC) on a new lead standard in *Human Rights and Equal Opportunity Commission v Mt Isa Mines*²²; PIAC represented the Consumers Federation of Australia on customers’ rights and obligations in the banker-customer relationship in *National Australia Bank v Hokit*²³; and the Australian Film Commission and ten other parties were heard on standards on the Australian content of programmes in *Project Blue Sky Inc v Australian Broadcasting Authority*.²⁴

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,²⁵ have been willing to accept these submissions “to ensure that an appropriate range of argument is presented to the Court”.²⁶

In Australia, *amicus* interventions have been “relatively rare”.²⁷ 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”.²⁷ 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”.²⁸

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”.²⁹ 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?³⁰ 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 tolerance³¹; 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 *amici 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 *amici* 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 provisions³²; 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 acceptance 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 international treaties confer a right on a child to be born into a family, and the interpretation of apparently conflicting provisions in different treaties, etc.³³

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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- 2 **See reference 1: 174.**
- 3 **See reference 1: 217.**
- 4 **See reference 1: 28–9.**
- 5 **See reference 1: 226.**
- 6 **See reference 1: 227.**
- 7 *Re A (children) (conjoined twins: surgical separation)* [2001] 2 WLR 480; [2000] 3 FCR 577 (CA [Civ Div] 22 Sept 2000).
- 8 **See reference 7: 488.**
- 9 **See reference 7: 590.**
- 10 **[1993] AC 789 (HL).**
- 11 **See reference 7: 519.**
- 12 **See reference 7: 537.**
- 13 *Pro-Life Alliance v Secretary of Health* (High Court 26 Jan 2001, application for judicial review, Sullivan J).
- 14 The appeal was first heard on 15 April 1996: *Superclinics Australia Pty Ltd v CES & Ors* S141/1995. The Australian Episcopal Conference and the Australian Catholic Health Care Association sought leave to appear as *amici curiae* on 11 September 1996. Ultimately, the appeal did not proceed.
- 15 The Australian Catholic Health Care Association and the Australian Catholic Bishops Conference were only two of the parties to be granted *amicus curiae* status. The Abortion Providers' Federation was also granted leave to be heard as *amicus curiae* and the Women's Electoral Lobby gave informal notice of a similar application but did not proceed with it. Hon Justice Susan Kenny. Interveners and *amici curiae* in the High Court *Adelaide Law Review* 1998;20:159–71 at 164; Warwick N. Abortion before the High Court: what next? Caveat interventus: a note on *Superclinics Australia Pty Ltd v CES*. *Adelaide Law Review* 1998;20:183–92.
- 16 **[2000] FCA 1009 (28 July 2000).** Discussed by Skene L. Voices in the ART access debate. *Monash Bioethics Review* 2001;20:9–23; Walker K. 1950s family values v human rights: in vitro fertilisation, donor insemination and sexuality in Victoria. *Public Law Review* 2000;11:292–307.
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- 19 Even if the *amicus* is required to pay costs, those will be only "party-party" costs; the "solicitor-client" costs to be paid by the parties will be higher and even a winning party must pay the difference between the two types of costs.
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- 23 **(1996) 39 NSWLR 377.** Also see reference 22: Durbach.
- 24 **(1998) 153 ALR 490.**
- 25 For example, former Chief Justice, Mason Sir A. Interveners and *amici curiae* in the High Court: a comment. (1998) 20 *Adelaide Law Review* 1998;20:173–6.
- 26 **See reference 25: 174.**
- 27 *Brophy v Tickner* 40 Fed Ct Reports 165 at 172 (Wilcox J).
- 28 *National Australia Bank v Hokit* (1996) 39 NSWLR 277 at 381 (Mahony J); *Levy v Victoria* (1997) 189 CLR 579 at 604–5 (Brennan CJ).
- 29 **Re L.** The *amicus curiae* brief: access to the courts for public interest associations (1984) 14 *Melbourne University Law Review* 1984;14:522–33 at 522. Ms Re gives examples of *amicus curiae* intervention in the US.
- 30 **Owens RJ.** Interveners and *amici curiae*: the role of the courts in a modern democracy. *Adelaide Law Review* 1998;20:192–8 at 194.
- 31 **Fish S.** *The trouble with principle*. Cambridge, Mass: Harvard University Press, 2000.
- 32 **McBain v State of Victoria [2000] FCA 1009 (28 July 2000).** "[That] is to say they neither asserted there is no inconsistency nor conceded an inconsistency". http://www.Austlii.edu.au/au/cases/cth/federal_ct/2000/1009.html, para 3.
- 33 Similarly, in the appeal, *Re The Honourable Justice Sundberg; Ex parte Australian Catholic Bishops Conference & Anor* (C21/2000), the church's arguments are that the Commonwealth does not have power to legislate indirectly on ART under the Sex Discrimination Act; that Sundberg J erred in not considering the "best interests" of the unborn child, and that his interpretation of the Sex Discrimination Act was inconsistent with the constitutional power under which that act was enacted, etc. These are all legal arguments.