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.

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. He said that “[the former Premier of Queensland] Joh Bjelke Peterson was a man of rock-hard Calvinistic faith”\(^1\); that federal politician Brian Harradine is a “Catholic Independent, unfettered by party discipline [who] has held a crucial vote in the Senate”\(^2\), 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.\(^3\)

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” 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”.\(^4\) 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”), 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). 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 when 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 trumped 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 principles, so far as can be ascertained, 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 case—such as whether the regulations cover embryos created by the Pro-Life Alliance are quite technical or specific to the Australian cases. In the English case, the High Court, despite the fact that the church was not a 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.

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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”.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”.28 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”.29

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”.30 Is this a desirable trend? Is the view of the Roman Catholic inclining to provide. Appellate judges, in particular, aware of information and advice that the parties may be unable or disinclined to present, might have a legitimate right to present evidence on how its 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. 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 *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 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
amici 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
promise 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
interest 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
deciding whether
to hear arguments from a wide range of views, especially on
basis such involvement can be challenged. Courts often want
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CONCLUSION

Despite our intuitive concern about the church and church
cases 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
discussion 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 promot-
ing 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 doc-
trine, but 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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1 Marr D. The high price of Heaven [2nd ed]. Craws Nest, NSW: Allen
2 See reference 1: 217.
4 See reference 1: 226.
5 See reference 1: 227.
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.
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 514/1995. 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 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
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16 [2000] FCA 1009 (28 July 2000). Discussed by Skene L. Voices in the
1950s family values v human rights: in vitro fertilisation, donor
insemination and sexuality in Victoria. Public Law Review
17 Re The Honourable Justice Sundberg. Ex parte Australian Catholic
Bishops Conference & Anor (C21/2000).
18 The Queen on the application of Bruno Quintavalle on behalf of Pro-Life
Alliance v Secretary of State for Health. High Court Co/4095/2000,
QBD, Admin ct, 15 Nov 2001 (Crane J).
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.
London: Sweet & Maxwell, 420; Grice v The Queen [1957] 11
Dominion Law Reports (2d) 699 at 702 (Ont Sup Court, Ferguson J).
21 The Commonwealth of Australia & Anor v State of Tasmania & Ors
22 [1993] 46 FCR 310. Discussed by Durbach B. Intervention in High Court
describes “PIAC’s history as a public interest amicus curiae” as “brief
and chequered”: 177.
25 For example, former Chief Justice, Mason Sir A. Interveners and amici
curiae in the High Court: a comment. [1998] 20 Adelaide Law Review
27 Brapno v Tickner 40 Fed Ct Reports 165 at 172 (Wilcox J).
28 National Australia Bank v Hokit [1996] 39 NSWLR 277 at 381 (Mahoney
29 Re L. The amicus curiae brief: access to the courts for public interest
associations [1984] 14 Melbourne University Law Review
1984; 14: 322–33 at 322. 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
31 Fish S. The trouble with principle. Cambridge, Mass: Harvard University
is to say they neither asserted there is no inconsistency nor conceded an
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 argument is 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.