

Human Rights, the Churches, and the Vocation of the Christian Lawyer

Queensland Christian Lawyers Dinner

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Introduction

Forty years ago there was a state of emergency declared in this city while an all white Springbok rugby team played against the Wallabies. On 2 August 1971, the Vice President of the Queensland Bar published this letter in *The Australian*:

The contemporary discussion of law and order has been overlaid with other issues: apartheid and football (as to which there is little disagreement), politics and protest (as to which there will always be disagreement).

The fact remains that law and order are essential to a civilised community.

Law binds both the ruler and the ruled. The ruler who contemns the law can scarcely insist upon its observance by the ruled.

Each must obey the law in the appropriate way – the ruler, by exercising no more power than the law gives him, and by exercising that power honestly and fairly and with statesmanship; the ruled, by refraining from deliberate infringements of the laws properly enforced by the rulers.

Law and order are bilateral – if either side rejects law and order the other side is encouraged to do the same. The moral obligation of obedience is diminished.

When legitimate protest degenerates into unlawful disruption, governments are invited to assume powers of doubtful legality, and to condone unlawful actions by police. When governments do not exercise their powers honestly and fairly and with statesmanship, they invite disruptive expressions of protest.

In either case both the rulers and the ruled attack the concept of law and order. Is it not time for both to examine their consciences?

When attending the Bar common room for lunch that day, a senior silk told the Vice President that there was now no prospect of his ever being a judge. That Vice President happened to be my father, and he did end up a judge; in fact he became Chief Justice of Australia. There is a place for conscience and courage in the law, especially when the prevailing political orthodoxy of those who exercise power is contrary to one's deeply considered assessment of human rights and human dignity.

Everyone is in favour of human rights. Aren't they? But where do they come from? Do we derive them from our very humanity? And what are the limits on these rights? There may be agreement about the need to protect basic human rights. But there is plenty of room for disagreement about how best to protect them. Is there a particular Christian take on this discussion?

In Australia, one could be justified for entertaining the suspicion that human rights discourse is the privileged language of secularists with a soft left agenda. Many church leaders of all persuasions are wary about human rights talk. My suggestion tonight is that human rights is the new discourse appropriate for Christian lawyers with a commitment to the human dignity of all persons, including the most vulnerable and at both ends of the life cycle, and for Churches with a commitment to the public interest including public morality.

Often human rights is identified with that quasi-gray area between law and politics. After all if you have a cause of action, why not just litigate it without invoking the language of human rights? And if you have a popular claim, why not have your politicians legislate it without the need for referring to international human rights instruments?

Many lawyers who are Christians are not altogether comfortable in attending a Christian lawyers' function. But such a function provides us with an opportunity to engage with each other about our sense of personal vocation, our commitment to service of our faith communities, our professional obligations and our political perspectives on the controversies of the moment.

For me as a Catholic priest, the first challenge is to determine to what extent I will share and speak from the depths of my own Catholic tradition and to what extent I will speak in terms familiar to Christians of all different traditions and to lawyers of all faith traditions and none.

A good starting point for me is to reflect on the times when I have declined invitations from public officials to assist with inquiries with a human rights perspective and when I have accepted. I have accepted only twice in my life: first when the Goss government here in Queensland was elected with a commitment to legislate a right of freedom of assembly; and second when the Rudd government in Canberra was elected with a revised party commitment to consult about a national human rights act, rather than with a commitment to legislate for same. On each occasion I had written a book expressing views on the issue. One was *Too Much Order with Too Little Law*; the others was *Legislating Liberty*. It was not as if I was coming with a hidden agenda.

On the other hand back in 1987, Justice Marcus Einfeld asked me to participate in the Human Rights inquiry into the conditions of Aborigines living at Toomelah. I declined because on the eve of the bicentenary I thought that I should remain free as a Catholic priest to agitate the rights of Aborigines in the public forum during the bicentenary. Then Robert Tickner, Minister for Aboriginal Affairs, repeated requests that I serve on the Council for Aboriginal Reconciliation of which I had been a great advocate. I declined, on the basis that it needed someone off it to defend it. Human rights discourse in the public square is always politically charged and it requires political as well as legal judgments to be made.

Speaking to the mother of two Christian lawyers in preparation for this address, I asked her: “What would be the greatest quandary for your children as lawyers and Christians?” She answered simply and with great insight: “They would wonder what to leave at the door when they do their lawyering and they would ask what extra should they take with them as lawyers given that they are good Christians.” In recent weeks I have been very impressed with some of the Australian lawyers, including members of the Queensland profession, offering *pro bono* services and spirited advocacy for young people on death row in Bali and Indonesian boys being held in Queensland jails for months without charge simply because they were on boats carrying asylum seekers.

Three years ago, the new Chief Justice of Australia, Robert French, was sworn in at the High Court of Australia. In the course of his acceptance speech, he said:

Let me now move to conclusion by way of confession. I was taught by the Jesuits and one of them, Father Daven Day who became a family friend of long standing, has travelled to Canberra for this occasion. He has joined our family on occasions of joy and sorrow in weddings, baptisms and family funerals. Although I declare myself in all humility, and no doubt to his disappointment, an agnostic with a sense of wonder, the Catholic confessional tradition runs strongly in my blood.

You will understand that we Jesuits are very proud that our small school in Perth has produced two of the only three High Court Justices to have come from Western Australia. Both Robert French and John Toohey came to that Bench with a proven track record for their commitment to social justice, especially for indigenous Australians. How wonderful that the new Chief Justice would invite his old teacher and publicly acknowledge him in such a way. How blessed that this teacher established such a relationship with his student that for a lifetime he would then join that student’s family “on occasions of joy and sorrow in weddings, baptisms and family funerals”. Of course, we Jesuits would hope that many of our graduates would become people of adult faith, but that is not the only purpose for our involvement in the education of children and young adults.

Last month of the feast of Thomas More, Chief Justice French spoke at a church function in Canberra on “Public Office and Public Trust” eloquently answering what we leave at the door and what we carry with us. Quizzed by the audience, he said, “When the law provides us with choices they are then informed by morality.” When laws aren’t so full of choices, another audience member asked, how then does one resolve their commitment to the law with their own morality? “It is my sworn duty to

apply the law,” Chief Justice French said. “If the law requires me to come to a decision, even if I think it is unjust or harsh, I must apply the law. That’s what legitimises me as a decision maker. If there were too many instances like this then you couldn’t continue in the job. Thankfully that hasn’t been an issue for me.”

As lawyers, you have duties to your clients and to the court. As law makers, judges have duties to follow precedent, to faithfully interpret statutes, and to apply and develop the common law in accordance with clearly articulated notions of justice without fear or favour. As law makers parliamentarians have duties to accommodate satisfactorily the rights of all persons as well as the common good, the public interest, and public morality.

The trouble with much human rights discourse is that it is too readily reduced to assertions just about individual rights and non-discrimination. Human rights discourse needs to be more subtle when it comes to a conflict of rights situation or when the law is having to consider the public interest or the common good as well as individual liberties.

The Australian Oxford academic John Finnis in his new book of essays *Religion and Public Reasons* identifies three types of practical atheism: that there is no God, that God is unconcerned with human affairs, and that God is easily satisfied with human conduct or easily appeased or bought off.¹

He reminds us that “neither atheism nor radical agnosticism is entitled to be treated as the ‘default’ position in public reason, deliberation and decisions. Those who say or assume that there is a default position and that it is secular in those senses (atheism or agnosticism about atheism) owe us an argument that engages with and defeats the best arguments for divine causality.”²

A year or so ago, to the disapproval of some of my family and friends I agreed to appear on Tony Jones’s *Q&A* with Christopher Hitchens. As I said to family and friends at the time, it is part of my day job. Someone has to do it. Something crystallized for me that night when they played a video clip question from a young man Joseph Bromely who according to Jones “looks enormously like a young Malcolm Turnbull”. Bromely said:

Hello Comrades. Can we ever hope to live in a truly secular society when the religious maintain their ability to affect political discourse and decision making on issues such as voluntary euthanasia, same-sex unions, abortion and discrimination in employment?

Jones and Hitchens were clearly simpatico with this approach, as were many in the audience, but I was dumbstruck, wondering how can we ever hope to live in a truly

¹ J Finnis, *Religion and Public Reasons*, Oxford University Press, 2011, p 124

² *Ibid*, p. 45

democratic society when secularists maintain their demand that people with a religious perspective not be able to claim a right to engage in the public square agitating about laws on issues such as voluntary euthanasia, same-sex unions, abortion and discrimination in employment? We have just as much right as our secularist fellow citizens to contribute in the public square informed and animated by our worldview and religious tradition. We acknowledge that it would be prudent to put our case in terms comprehensible to those who do not share that worldview or religious tradition when we are wanting to win the support and acceptance of others, especially if we be in the minority. But there is no requirement of public life that we engage only on secularist terms. And we definitely insist on the protection of our rights including the right to religious freedom even if it not be a right highly prized by the secularists.

Professor Finnis, a Catholic but making a point equally applicable to all faith communities, says, “Outside the Church, it is widely assumed and asserted that any proposition which the Catholic Church in fact proposes for acceptance is, by virtue of that fact, a ‘religious’ (not a philosophical, scientific, or rationally grounded and compelling proposition), and is a proposition which Catholics hold only as a matter of faith and therefore cannot be authentically willing to defend as a matter of natural reason.”³

For Finnis, much of what John Rawls in his *Political Liberalism* describes as public reason can be equated with natural reason. Whereas Rawls would rely only on an overlapping consensus not wanting to press for objective reality of right and wrong, Finnis would contest that the only content of an overlapping consensus would be that which can be objectively known through natural reason.

Same Sex Adoption and Same Sex Marriage

I am one of those Catholics who was delighted to read the speech by Kristina Keneally to the NSW Parliament when she was explaining why she would support legislation allowing same sex couples to adopt children when such an adoption is judged to be in the best interests of the child, while at the same time allowing Church adoption agencies to opt out of any arrangements facilitating adoptions by same sex couples. Explaining why she was allowing her party a conscience vote on the issue, she told Parliament: “This bill is not ordinary business. It goes to core beliefs about how families form and how children are raised. It requires us to consider views that will either be in conflict or in congruence with our values and beliefs, which are

³ Ibid, pp. 114-5

formed by our personal experiences and therefore deeply held. For many of us it raises issues of faith.” She concluded her speech with these words:⁴

I recognise that these issues are complex and nuanced and they demand respectful attention. Particularly to those who share my faith, I say that in my mind the Gospel message is one of acceptance. Jesus was not a man of judgement but rather a man of love. When I look at this issue about the adoption of children who are vulnerable, children who would know no other love and acceptance, and I see people offering up that unselfish love to a child, it is something that I, not just as a Christian and a Catholic but as the Leader of this State, want to support. In considering my decision, I have sought to form my conscience fully. I have considered the Gospel, and particularly Jesus’ teaching that all laws of the Church should be based on the commandment to love God and to love one another. I have observed how same-sex parents show us examples of that love in how they sublimate their needs for the children in their care. Perhaps most compellingly I have reflected my own experience of such love, first as a child and now as a parent. I am fully appreciative of the empowerment a child receives when love and stability is provided in their life. In considering all of that, I must, in my conscience, support this legislation.

Barry O’Farrell, the leader of the Opposition party, also a Catholic, supported the legislation. He told Parliament: “I support this measure ... for the sake of children but also because I don’t believe our society should exclude because of gender, sexuality, faith, background or some other factor, people who have a contribution they can make...That’s not the free and confident society I seek.” Not every Catholic would reach the same conclusion. But we can be proud that Catholic civic leaders have been prepared to give an account of themselves having formed and informed their consciences. The Premier outlined the process she had followed, by praying the scriptures and reflecting on Church teaching and then acting on her conscience.

Cardinal Pell was clearly displeased with the approach taken by these Catholic civic leaders, claiming that this law “represents bad social engineering”, being just “a re-election stunt to seek the votes of minority groups, (having) little to do with extending even mistaken notions of human rights (same-sex parenting orders are already available) and clearly subordinat(ing) the rights of the child to those of an adopting adult.”⁵ I read Mrs Keneally as being on about much more than that, and very nobly so. And I did not read Mr O’Farrell as just playing catch-up with Mrs Keneally. It is

⁴ New South Wales, Legislative Assembly, *Hansard*, 1 September 2010, at <38>

⁵ Cardinal George Pell, *Sunday Telegraph*, 5 September 2010

difficult to conceive how either leader was engaging in a re-election stunt given that they had adopted the same approach to the legislation, thus not giving the voters any grounds for distinguishing them on this issue.

In her very mature consideration of the issue, Kristina Keneally considered the three classes of children who would be affected by the legislation. First are those children who are already living with two same-sex parents where one of the parents is not fully recognised by the law. Keneally observed that these children “are currently denied legal and material benefits flowing from adoption, including confirming the child’s entitlement to inheritance if their parent dies and providing certainty about custody if one parent dies. This puts these children in a vulnerable position.”

Second are children who have been fostered by same sex couples but unable to be adopted by their foster parents. Keneally told Parliament: “This is a particularly vulnerable group of children. They can no longer be cared for by their birth parents. What we know is that for children in this situation the stability of adoption by their foster parents provides the best possible chance for their development, their health, their wellbeing and their education.”

Then there is a third group, those children not already in a relationship with their adoptive parents and who are adopted after their birth parents have relinquished them. In New South Wales, there were only 20 of these unknown, unrelated children last year. Adoption decisions in these cases are always made considering the best interests of the child. Keneally observed: “This legislation would make it legal for these children to be adopted by same-sex parents. However, under the *Adoption Act* the views of the relinquishing parents must be considered in relation to what is in the best interest of the child. This includes any views regarding same-sex parenting. The proposed legislation makes no change in this regard.”

I have every sympathy for those who espouse the ideal that every child have and know a father and mother. But in our broken world that is not always the case. Have not the Catholics Keneally and O’Farrell done the right thing in this situation? On these and other contested moral issues in the realm of law and public policy, the days have gone when church leaders can simply issue universal edicts commanding assent

by Christian politicians. What's needed is respectful dialogue and informed conversation as well as pastoral attention to the particular individuals affected by proposed law or policy.

This has been a major issue of discussion on the ABC website since last Sunday when I appeared on the *Compass* program to discuss same sex marriage. One character masquerading under the name "Catz" has been insistent that I can no longer call myself Catholic because of my errant views. Catz simply asserts "Homosexuality is a mortal sin."

And yet no less a figure than Cardinal Ratzinger (now the pope) in his 1986 letter to Catholic bishops makes the observation "the particular inclination of the homosexual person is not a sin".⁶

There are some Catholics, including some bishops, who think I am too liberal in my approach to these issues. Thankfully we are a broad church, and there is a variety of roles and gifts, none of us being infallible. There is a need to distinguish the questions: what is right or wrong? What is right or wrong for Catholics or Christians generally? What ought be the law or the public policy? One of the real tensions for us as a Church presently is that while insisting on the right to religious freedom, including the freedom to staff Church institutions with personnel sympathetic and supportive of our religious beliefs, we can be perceived to be intolerant or discriminatory in an inappropriate way towards those who live a lifestyle at odds with our formal teachings. Often it is wrong to discriminate; but there are times when it is right and praiseworthy to be very discriminating in choosing the best candidate for an important position in an organization. Even when it is right to be very discriminating, we may need to have an eye to the care and dignity of the person who may feel excluded or judged.

The National Human Rights Consultation

In 2009, I had the opportunity to take a bird's eye view of the nation, chairing the diverse committee charged with reporting back to government the community's thinking about human rights protection in Australia.

It is fashionable to claim discussion about an Australian human rights Act is just the concern of elites, the fetish of lawyers and citizens with an axe to grind. 35,000

⁶ Admittedly Ratzinger in not very helpful language to the contemporary ear does go on to say that "it is a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination itself must be seen as an objective disorder. Therefore special concern and pastoral attention should be directed toward those who have this condition, lest they be led to believe that the living out of this orientation in homosexual activity is a morally acceptable option. It is not."

people made submissions to us. More than 6,000 came through the door and sat down for a two-hour discussion with us, as we conducted over 60 community roundtable discussions the length and breadth of the country. Of the 35,000 people who sent submissions of any sort, 33,356 expressed a view for or against a human rights act. 87% of those who expressed a view were in support. The overwhelming majority of those 6,000 persons who attended a community roundtable supported such an Act. The independent research resulting from a random telephone survey of 1200 persons turned up 57% in support, 14% opposed, and 30% undecided. Many of those surveyed and participating in our processes would have been Christians, even including committed Catholics.

In all those months of discussion, and with every conceivable controversial issue being raised from varying perspectives, only one person got up and abused the audience. This speaks well of the Australian democratic spirit and our tolerance for differing viewpoints. At times, that tolerance verges on apathy and irresponsibility. But usually it demonstrates a fine national ethos for tolerating difference and respecting the other whose worldview and life experience is so different.

Another heartening aspect of our inquiry was that we were able to tap the concerns of the average Australian, conceding that the 40,000 who chose to participate in our processes were not necessarily a representative sample of the community. Detailed focus groups and the telephone survey revealed that 64% of us think that human rights in Australia are adequately protected. This is a great country to live in, and we know it. But there are some groups for whom we have a strong concern. More than 70% of us think that people with a mental illness, the elderly, and persons with disabilities need greater protection of their human rights than they are presently receiving. A majority of us also think that people living in remote areas (especially indigenous Australians) and children wherever they live need greater protection. We are split on the rights of asylum seekers. While 42% think we have got the balance right, 30% of us think that asylum seekers need less protection of their rights, 28% thinking they need more protection. A third of us would favour greater protection of the human rights of indigenous Australians living in urban areas. But 55% think we do enough in that regard and 13% think urban Aborigines and Torres Strait Islanders need less protection of human rights.

Since our report has been released, the Churches have been identified as the chief critics of a human rights Act in any form. This is an unfortunate and incorrect caricature of the situation. The major concern expressed by some Church leaders is the threat that a human rights Act could be to freedom of religion. Cardinal Pell has pithily expressed the concern “that human rights statutes, such as the Charter of Rights and Responsibilities in Victoria, seem to end up violating and diminishing

some human rights rather than protecting them”.⁷ That concern, if well founded, would be good grounds for opposing the introduction of a federal Human Rights Act.

Consistent with the International Covenant on Civil and Political Rights (ICCPR) (and in stark contrast to the Victorian Charter) my committee distinguished between derogable and non-derogable rights. A non-derogable right is one that the State cannot pare back even during times of national emergency. We listed amongst the non-derogable rights:

Freedom from coercion or restraint in relation to religion and belief. No person will be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

Other rights are derogable in that they can be limited by the State so as to protect other rights and to maintain the common good. We listed amongst the derogable rights:

- the right to freedom of thought, conscience and belief
- freedom to manifest one’s religion or beliefs

If these rights are to be limited in any way there is a need for the decision maker to have regard to type of right which is being limited. One relevant consideration when it comes to limiting the right to be free to manifest one’s religion or beliefs is that it is a right listed in the ICCPR as being one which can be subject only to such limitations as “are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.

The articulation of these rights and the limits on them are consistent with the just demands of public order.

Church Concerns with the Victorian Charter of Rights and Responsibilities

During the course of our inquiry, we heard strong church concerns about three issues which people thought to impact unduly on religious freedom: (1) the religious vilification laws in Victoria; (2) the compulsory referral clause in the Victorian Abortion bill; and (3) the exemptions for church bodies from the discrimination laws.

So the appropriate issues for inquiry were: do these three laws and policies unduly limit the right to freedom of religion? If so, would a Charter of rights help or hinder the protection and enhancement of the right and the due setting of limits on the right?

⁷ G Pell, *The Struggle for Religious Freedom*, Address to Australian Christian Lobby National Conference Dinner, 20 November 2009, reprinted in *Quadrant*, January 2010

In each instance, I concluded that there was an attempt to unduly limit the enjoyment of the right, but that a Charter in each instance would have helped or would have been irrelevant. I could not see the Charter itself and its faithful implementation working any harm to the freedom of religion. Given that some church leaders thought the Charter contributed to an undermining of the freedom of religion in these cases, it is worth considering them in some detail. Note: I am not putting the case for or against a Charter. Our report does that even handedly in Chapters 12 and 13. I am just wanting to test the key anti-Charter arguments put by the Churches, to see whether freedom of religion could be enhanced or undermined by the enactment of a Charter.

(a) Religious Vilification

Since 11 September 2001, Australians have displayed an increased sensitivity to the demands of Muslim Australians that their perspective on pressing social and political questions be heeded. There has been spirited debate in the Australian community about the need for religious vilification laws to protect Muslims from uninformed attack by Christian fundamentalists. At some of our community consultations, we heard individuals, even church leaders, expressing concern that a national charter of rights might entail a national religious vilification law similar to that in Victoria. The Victorian laws (enacted before the Charter and therefore without the benefit of a statement of compatibility) provides⁸

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

In my view, the application of the Victorian religious vilification law has hindered rather than helped religious and social harmony. The *Catch the Fires* litigation in Victoria has placed a permanent cloud over the utility of all religious vilification laws in Australia. These laws cannot be administered with sufficient transparency and neutrality. Even if one were to accept the utility and desirability of **racial** vilification laws, there is a strong case for stopping short of **religious** vilification laws or for at least enacting such laws only for criminal prosecution at the behest of the Attorney General. While it is inherently racist for a person to claim membership of the best race, it is no bad thing for a religious person to claim membership of the one true religion. That is the very point of religious belief. That is what religious people do. Within the great religious traditions, there are strands which urge universal respect and love for all persons regardless of their religious affiliation. But the State overreaches itself when it adapts laws prohibiting vilification on the grounds of a physical characteristic premised on absolute equality of all persons regardless of that physical characteristic to laws prohibiting vilification on the grounds of religious

⁸ s 8(1), *Racial and Religious Tolerance Act 2001 (Vic)*

belief when there is no necessary presumption by believers that all religions are equally good and true. How are officers of the State to distinguish between the religious belief which might be robustly criticised and some of whose fanatical practitioners might be rightly reviled or ridiculed from those other practitioners who are to be respected regardless of the errancy of their beliefs or the potential of their beliefs to be misconstrued by others for destructive purposes?

Even if there be strong religious tensions in a multicultural society, those tensions will not be resolved and the adverse effects of the tensions will not be avoided by laws which can be administered by the State arranging for religious practitioners to report on each other, with State tribunals then attempting to arbitrate what is a reasonable portrayal of one religion by the believers of another. There are some places the law should not tread. At the very least there is room for credible argument that religious vilification laws unduly interfere with the right to freedom of expression and the right to freedom of conscience, religion and belief – and well beyond what can be demonstrably justified in a free and democratic society. It is very doubtful that the broad Victorian religious vilification law permitting *Catch the Fires* type litigation would be passed by a Parliament constrained by a legislative human rights act.

While there are citizens of diverse religious beliefs in a democratic state, there will always be a place for diverse religious arguments and positions in the public forum. Like their fellow citizens they should be free to advocate peacefully their preferred policy positions as competently or foolishly as they are able or as they wish. They should have confidence that the separation of powers ensures that their own legitimate interests are not overridden by local populist pressures. They should expect to gain little from seeking application of overbroad religious vilification laws which may turn out to be counterproductive. In time they will win the same acceptance and security within the nation state as my Irish Catholic forbears came to enjoy in what many still consider the most godless place under heaven.

(b) Compulsory referral for abortion

Prior to my appointment to chair the National Human Rights Consultation Committee, I had some involvement in the Victorian debate about clause 8 of the Victorian *Abortion Law Reform Bill 2008* to force a conscientiously objecting doctor to refer a patient seeking an abortion to another doctor who did not share the same conscientious objection. I thought such a provision was in flagrant breach of right to freedom of conscience, religion and belief, could not be justified, and would not pass muster if the bill to Parliament was accompanied by a statement of compatibility as required by the Victorian Charter.

When Lord Joffe's *Assisted Dying for the Terminally Ill Bill* was first drafted in the United Kingdom it contained two clauses similar to section 8 of the Victorian *Abortion Law Reform Act 2008*. Clauses 7(2) and (3) of the original Joffe Bill

imposed a duty on physicians who invoked their right to conscientiously object, to "take appropriate steps to ensure that the patient is referred without delay to a physician who does not have such a conscientious objection". The Westminster Parliament's Joint Committee on Human Rights remarked:

3.14 We consider that imposing such a duty on a physician who invokes the right to conscientiously object is an interference with that physician's right to freedom of conscience under the first sentence of Article 9(1), because it requires the physician to participate in a process to which he or she has a conscientious objection. That right is absolute: interferences with it are not capable of justification under Article 9(2).

3.15 We consider that this problem with the Bill could be remedied, for example by recasting it in terms of a right vested in the patient to have access to a physician who does not have a conscientious objection, or an obligation on the relevant public authority to make such a physician available. What must be avoided, in our view, is the imposition of any duty on an individual physician with a conscientious objection, requiring him or her to facilitate the actions contemplated by the Act to which they have such an objection.

3.16 In the absence of such a provision, however, we draw to the attention of each House the fact that clauses 7(2) and (3) give rise in our view to a significant risk of a violation of Article 9(1) ECHR.

The UK bill was accordingly amended to provide that "No person shall be under any duty to refer a patient to any other source for obtaining information or advice pertaining to assistance to die, or to refer a patient to any other person for assistance to die under the provisions of this Act" (cl. 7(3)). Under the revised UK provision, the doctor with a conscientious objection would have no additional legal duty other than "immediately, on receipt of a request to do so, transfer the patient's medical records to the new physician". (cl. 7(6))

When confronted with cl 8 of the Abortion Law Reform Bill, it was not surprising that the Victorian Scrutiny of Acts and Regulations Committee saw a need to provide parliament with a compatibility statement and drew attention to the equivalent attempted provision in the UK, the response by the UK Committee, and the amendment proposed in the UK Parliament. The Victorian committee noted:

Clause 8 sets out the obligations of health practitioners who hold a conscientious objection to abortion, including (in clause 8(1)(a)) an obligation to refer women who request an abortion to another practitioner who has no conscientious objection. The Committee observes that some practitioners may hold a belief that abortion is murder and may regard a referral to a doctor who will perform an abortion as complicity in murder. The Committee therefore considers that clause 8(1)(a) may engage the Charter right of such practitioners to freedom of belief.

The Committee rightly observed that the compatibility of this clause with the Charter “depends on its satisfaction of the test in Charter s. 7(2), including whether or not there are less restrictive means available to achieve the purpose of the clause”.⁹ The Committee then very properly referred two questions to Parliament for its consideration:

1. Whether or not clause 8(1)(a), by requiring practitioners to refer patients to doctors who hold no conscientious objection to abortion, limits those practitioners’ freedom to believe that abortion is murder?

2. If so, whether or not clause 8(1)(a) is a reasonable limit on freedom of belief according to the test set out in Charter s. 7(2) and, in particular, whether or not there are any less restrictive means available to ensure that women receive appropriate health care?

No credible answers were provided by Parliament. The questions could only have been answered, Yes to the first and No to the second.

Victoria is the first Australian state to have legislated a Charter of Human Rights and Responsibilities Act. It reproduces many of the rights in the ICCPR including the freedom of thought, conscience, religion and belief (s.14). Unlike the ICCPR, the Victorian Charter does not specify that any rights are non-derogable. And all rights can be restricted for reasons other than the need “to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.¹⁰ Section 7(2) specifies the justified limits on rights:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Helen Szoke, Chief Conciliator/CEO, Victorian Equal Opportunity and Human Rights Commission purported to answer the questions posed by the Scrutiny of Bills committee when she wrote to *The Australian* on 1 October 2008 stating:

⁹ Scrutiny of Acts and Regulations Committee, Alert Digest No 11 of 2008, p. 6

¹⁰ Article 18(3), ICCPR

The purpose of the charter is to provide a framework to help us balance competing rights and responsibilities. Freedom of conscience is not the only issue at stake here, and to suggest so is to simplify an extremely complex issue. In this case, a doctor's right to freedom of conscience needs to be balanced with competing considerations such as a patient's right to make a free and informed choice. Sometimes limits on human rights are necessary in a democratic society that respects the human dignity of each individual.

Suffice to say that this simple solution is in stark contrast to the reasoning and conclusion reached by the UK Parliament in its consideration of a similar clause. Thankfully, the Victorian Equal Opportunity and Human Rights Commission has now stated, “[SARC’s] interpretation of the Charter is preferable and ... the bill should have been accompanied by a statement of compatibility”.¹¹

The offensive s.8 would never have been adopted by Parliament had a statement of compatibility been required. To this day, no one has been able to draft a coherent statement of compatibility for this clause. The strong advocates for a national Human Rights Act modelled on the Victorian law would do themselves an enormous favour were they to convince the Victorian Attorney General Robert Hulls to repeal s. 8 or were they to try and produce a statement of compatibility. While s.8 remains on the statutes books, religious critics of a federal human rights Act will remain convinced that such a human rights regime is applied only selectively and ideologically, impairing the fundamental rights of religious persons. If the Victorian Charter distinguished between derogable and non-derogable rights (one of which is freedom from coercion or restraint in relation to religion and belief) opponents of s.8 would have been able to claim that the provision was a flagrant breach of a non-derogable right, causing Parliament to reject such a provision.

(c) Exemptions from employment laws

Church groups in Victoria have just emerged from a gruelling two year campaign to maintain justifiable exemptions from the provisions of the Victorian *Equal Opportunity Act 1995*. A similar issue has arisen in the UK motivating Pope Benedict XVI last week to say to UK bishops on their *ad limina* visit and in preparation for his forthcoming visit to the UK:¹²

Your country is well known for its firm commitment to equality of opportunity for all

¹¹ Victorian Equal Opportunity & Human Rights Commission, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2008) 103.

¹² Address Of His Holiness Benedict XVI to the Bishops of the Episcopal Conference of England and Wales on their "Ad Limina" Visit, Consistory Hall, 1 February 2010

members of society. Yet as you have rightly pointed out, the effect of some of the legislation designed to achieve this goal has been to impose unjust limitations on the freedom of religious communities to act in accordance with their beliefs. In some respects it actually violates the natural law upon which the equality of all human beings is grounded and by which it is guaranteed. I urge you as Pastors to ensure that the Church's moral teaching be always presented in its entirety and convincingly defended. Fidelity to the Gospel in no way restricts the freedom of others – on the contrary, it serves their freedom by offering them the truth. Continue to insist upon your right to participate in national debate through respectful dialogue with other elements in society. In doing so, you are not only maintaining long-standing British traditions of freedom of expression and honest exchange of opinion, but you are actually giving voice to the convictions of many people who lack the means to express them: when so many of the population claim to be Christian, how could anyone dispute the Gospel's right to be heard?

A week before the Pope spoke, the House of Lords had already acted and voted by 216-178 to reject parts of the UK Equality Bill which would have lifted the exemption for churches in employment. The crucial amendment reinstating the church freedom in employment was proposed by the Anglican Conservative peer, Baroness O'Cathain who told the House of Lords, "Organisations that are based on deeply held beliefs must be free to choose their staff on the basis of whether they share those beliefs." She added that Churches must be allowed to "discriminate on the grounds of sex, sexual orientation and marital status when making appointments to key religious posts. An exemption along these lines has existed for more than 30 years."¹³ When foreshadowing amendments in the House of Lords back on 15 December 2009, Baroness O'Cathain had expressed concern about the 2007 sexual orientation regulations which had led to church agencies terminating their adoption services because they believed that the limited number of children available for adoption should, in their best interests, be placed with family units including an adult male and an adult female. She asked, "Why are Christians being increasingly marginalized in Britain in 2009? Poring over the evidence, I have no doubt that the equality and diversity agenda lies near the heart of the problem."¹⁴ She said, "I believe that equality is morphing into an ideology hostile to the Christian faith."¹⁵ Supporting her, Baroness Cumberledge said, "Anti-discrimination law, protecting religious beliefs as much as other characteristics, should not be framed in such a way that it prevents those very beliefs being put into practice, but that, I fear, is exactly where the Bill takes us."¹⁶ Baroness Cumberledge urged the House of Lords that "in a number of significant posts, it is right for the religious employer to require that their lives are not

¹³ The Tablet, 30 January 2010,

¹⁴ Hansard, House of Lord, 15 December 2009, Column 1439

¹⁵ Ibid, Column 1441

¹⁶ Ibid, Column 1442

manifestly in opposition to the teachings of the religion and the beliefs of its followers. Is that too much to ask?"¹⁷

The exemptions now maintained in the UK are quite consistent with the recognition and protection of the human rights of all persons, including religious people who want to associate as religious groups and organizations for the purpose of contributing to the common good of the society of which they are a part and which they serve.

Cardinal Pell makes the point nicely:¹⁸

Should The Greens have the right to prefer to employ people who believe in climate change, or should they be forced to employ sceptics? Should Amnesty International have the right to prefer members who are committed to human rights, or should they be forced to accept those who admire dictatorships? Both cases involve discrimination and limiting the freedoms of others, and without it neither organisation would be able to maintain their identity or do their job effectively. □ □ Church agencies and schools are not exempt from anti-discrimination law in New South Wales, and the language of "exemptions" is misleading. Parliaments are obliged by international human rights conventions like the ICCPR to provide protection of religious freedom in any laws which would unfairly restrict the right of religious communities to operate their schools and services in accord with their beliefs and teachings.

While there may be strong agreement about the need to maintain a Church's right to employ in certain positions only persons who live in conformity with Church teaching, there is plenty of room for disagreement as to how most prudently and charitably to exercise that right. It is not only secularist, anti-Church people who think that Church organisations and leaders would be displaying homophobia by singling out only gays and lesbians for exclusion from employment in some key positions when heterosexual persons are also living in what the Church might formally regard as irregular situations.

In Victoria, the Scrutiny of Acts and Regulations Committee of the Parliament conducted a lengthy review into the exceptions and exemptions to the *Equal Opportunity Act 1995*. As in the UK, many church personnel here presumed that the Charter (or Human Rights Act) was instrumental in calling into question the existing exemptions. That was not the case. They are quite separate statutes. A case can be made that a Charter espousing the key rights to religious freedom and conscience could assist in setting the appropriate limits on State intervention with Church organisations wanting to employ persons whose lifestyles (hopefully not just sexual) are consistent with church teaching.

Government and Opposition members of the Victorian committee actually decided that the Charter provisions had no role to play in determining the appropriate exemptions to be provided to the churches. Even the government members of the

¹⁷ Ibid, Column 1473

¹⁸ G Pell, "Freedom of Thought, Conscience and Religion Are Fundamental Rights", 13 March 2011

committee decided not to recommend that the exemptions for Churches be put through the Charter test. They observed “that whilst such a test would allow the balancing of the non-discrimination right against right to freedom of the religion in each specific case, there is a more compelling need for clarity in the law in an area where many charitable and volunteer based organizations operate.”¹⁹ The Catholic Church ran a strong campaign to retain the existing exemptions (with some minor exceptions in relation to discrimination on the grounds of race, impairment, physical features or age which could never be justified as being consistent with Church teaching). The government responded to the Church pressure with the Attorney General publicly guaranteeing the retention of the key exemptions two months before the parliamentary committee reported. The Attorney General Rob Hulls was able to tell the public, “These proposed changes follow consultation with religious bodies and have the support of the Catholic Church.”²⁰ Definitely no adverse impact of the Charter in this case! Basically the politicians agreed with the evidence of Bishop Prowse to the parliamentary committee that “the exemptions and exceptions which are an integral part of the existing legislation provide the right balance between freedom of religion and freedom from discrimination.”²¹

Given that churches and church organizations (many of which are members of Catholic Social Services Australia) are now in receipt of substantial public funds with commitments to deliver services to the general community and not just church members, there may in accordance with Vatican II be some limits on the freedom enjoyed by those organizations when ordering their affairs for the delivery of those government funded services. On the other hand, as Francis Moore, the business manager for the Catholic Archdiocese of Melbourne told the parliamentary committee, “The popularity of the services we provide, whether in education, health or welfare, are testament to the value the community attaches to the manner and way in which we deliver our services.”²² Those citizens who choose not to espouse Catholic values can presumably find employment elsewhere. Were the Church to have a virtual monopoly on some sector of service delivery with government funding, there may be a need for the Church, in justice, to provide employment opportunities for some persons not espousing Church values. But there is no instance of this presently.

I agree with Dennis Fitzgerald, Executive Director of Catholic Social Services Victoria who told the Victorian parliamentary inquiry:²³

In order to effectively carry out this work, our mission on behalf of the church, Catholic organisations need to be able to adopt employment practices that will reflect the religious nature of our organisations.

...

¹⁹ SARC, Final Report, Exceptions and Exemptions to the Equal Opportunity Act 1995, p. 61

²⁰ Rob Hulls, Media Release, 27 September 2009

²¹ C Prowse, Evidence to the SARC, 5 August 2009, p. 3

²² Ibid, p. 5

²³ Evidence, SARC, 5 August 2009, p.2

That does not mean that all of our senior people need to be Catholic — some of our distinguished leaders in the sector are not Catholic — but it does mean that we need a critical mass within the leadership group of the organisation to retain affiliation with the Catholic Church.

During our public inquiry, Bob Carr told a conference convened by the Australian Christian Lobby and the Archdiocese of Melbourne that one of the chief advantages of not having a Charter was that church leaders could deal directly with government. He told the story of the two Archbishops of Sydney coming to see him as premier when there was discussion about a proposed Bill to restrict the freedom of Churches to employ only those persons living consistently with Church teachings. He was able to give them an immediate assurance that their interests would be protected. Once again it is a matter for prudential political assessment. But I think those days have gone. It is a good thing for society that elected political leaders and church leaders are able to meet and talk confidentially. Whatever the situation in the past, it is now not only necessary but also desirable for church leaders to give a public account of themselves when seeking protection of freedom of religion within appropriate limits, especially when they are in receipt of large government funds for the provision of services to the general community, and not just to Church members. Church special exemptions regarding employment are all the more defensible when church personnel including bishops and those with the hands-on directing of church agencies are prepared to appear before a parliamentary committee and provide a coherent rationale for those exemptions, rather than simply cutting a deal behind closed doors with the premier or prime minister of the day.

My committee decided not to buy into the ongoing contemporary dispute about the desirability of an Equality Act over against a harmonisation of existing, diverse discrimination laws. In our report, we outlined the pros and cons of both sides of that argument.²⁴ Thus we did not think it appropriate to include a general non-discrimination right in a Human Rights Act (which would amount to a de-facto one clause Equality Act within a Human Rights Act). The absence of such a right made the recommendation of a discrete cause of action for breach of a specified right by a Commonwealth public authority all the more tenable. Thus the concern of Victorian churches about exemptions from discrimination laws is completely irrelevant to any consideration of a federal Human Rights Act in the terms in which we proposed it. Some Church leaders may have overlooked this point in their criticism of our proposed federal charter. For example, Cardinal Pell has said, “There is no doubt that if Australia gets a charter of rights, upfront or by stealth, it will be used against religious schools, hospitals and charities by other people who don’t like religious freedom and think it shouldn’t be a human right. The target will be the protection in anti-discrimination laws that allow religious schools to exercise a preference in employment for people who share their faith.” That is an issue for resolution when it comes to determining how best to revise federal discrimination laws - whether there should be an Equality Act or better harmonization of existing discrimination laws - an

²⁴ National Human Rights Consultation Report, pp. 157-60

issue on which my committee expressed no view. If the recent UK and Victorian experiences are anything to go by, a Human Rights Act will be useful when it comes to invoking the existence and importance of the right and irrelevant when it comes to setting the limits on freedom of religion and belief.

On 4 April 2011, 20 key church leaders met with Prime Minister Gillard. After the meeting, Cardinal Pell said the leaders told Ms Gillard: “We are very keen to ensure that the right to practise religion in public life continues to be protected in law. It is not ideal that religious freedom is protected by so called 'exemptions and exceptions' in anti-discrimination law, almost like reluctant concessions, crumbs from the secularists' table. What is needed is legislation that embodies and recognises these basic religious freedoms as a human right.”²⁵ That sounds suspiciously like a Human Rights Act to me.

So where are the Christian Churches on human rights, and where ought we be? If there is to be legislation recognising religious freedom as a human right, are there other freedoms which should be similarly protected? If not, why not?

Christian lawyers, churches and the Malaysian Solution

I will now consider a contemporary issue causing great angst in the community and with our political leaders: the so called “Malaysian solution”, the latest attempt to stem the flow of asylum seekers arriving in Australia by boat. This proposal involves people trading by the government of a democratic country committed to the rule of law. People trading is wrong even when part of a broader suite of policies designed to arrest transborder flows and to ameliorate slightly some pressures on other governments accommodating large numbers of asylum seekers. Even if it works, it is wrong.

Any proper assessment of the proposal requires a consideration of the case of the bona fide refugees sent from Australia to Malaysia. They have no right to settle in Malaysia, no rights to work, education or welfare while their claims are undetermined, and no guarantee that their claims will be determined in a timely, transparent manner.

If the transfer to Malaysia is appropriate, a fortiori, so too would be return to Indonesia given that Australia has arrangements in place with IOM and UNHCR there for some minimal accommodation of entitlements while awaiting status determination. De facto we would be deciding that protection is now available in Indonesia or Malaysia and all persons heading for Australia are engaged in secondary movement, not direct flight.

²⁵ *The Australian*, 5 April 2011

This is not part of a regional solution to a regional problem. At most it is a bilateral attempt at solving an Australian problem. Malaysia has 200,000 people to care for. That must be part of the so-called regional problem and solution. A one off taking of 1,000 pa for four years is no durable contribution to that part of the regional problem.

If Nauru were to sign the Refugee Convention, if people were to be detained only for the purpose of identity, health and security checks, and then housed there humanely until their claims are processed (with at least the same standard to food, clothing and accommodation as Christmas Island), and if those proved to be refugees were to be guaranteed immediate release from detention and prompt resettlement, that would be preferable to the Malaysia option.

Everyone, including the strident supporters of the Howard-Ruddock Pacific solution know that it was a one-off solution to stopping the boats, posited on the false claim that even proven refugees would not be resettled. Most were - and in Australia or New Zealand. And they would be again. There is no clear message you can send to people smugglers and their clients: "Don't head for Australia or you will end up in Nauru before you end up in Australia or New Zealand."

The search is still on for a replacement for the Pacific solution achieving the same result. Any acceptable solution must fulfil the following conditions: no people trading; legally guaranteed access to food, clothing and shelter during processing; prompt resettlement on proof of claim. If the numbers to be resettled in Australia became too great, skewing our humanitarian intake, there could be a case for revisiting the temporary protection visa (TPV) despite its treacherous side effects including the need for more women and children to risk perilous journeys.

To stop the boats and secure the borders, one needs to engage in measures contrary to the Refugee Convention.

We should: adhere to the Refugee Convention; do deals moving asylum seekers from Australia only with countries which are signatories to the Convention; foster a regional approach to the full suite of regional problems; and enter into only morally coherent bilateral arrangements regarding distinctively Australian problems.

I see no need for church groups or agencies to be ahead of the field in offering endorsement of the government's proposal or processes in the formulation of the Malaysia solution.

On process, even Bill Farmer, former head of the Immigration Department and ambassador to Jakarta, has gone public indicating that these arrangements cannot work unless the governments do the hard negotiating with attention to detail out of the public eye, and prior to any grand announcements.

On the proposal, it is going to be unworkable (ie. failing to have the desired universal deterrent effect) unless some children, including unaccompanied minors, are included in the transported caseload. It will be morally indefensible insofar as it permits the removal of children, including unaccompanied minors, who may well be bona fide refugees and whose needs and entitlements will not be sufficiently protected in Malaysia. Why would a church group publicly endorse something which it knew to be either unworkable or immoral?

Until the Malaysia solution is in place, church groups should continue to advocate publicly the need for any proposal to receive the endorsement of UNHCR and to advocate privately with UNHCR on what they view as the necessary minimum conditions for endorsement.

Publicly, church groups should continue to insist that Australia comply with all its international treaty obligations (including the Convention on the Rights of the Child). Given that our key neighbours are not signatories to the Refugee Convention, church agencies should continue to urge all governments in the region to work towards a truly regional solution to the regional problems of people movement and asylum.

Once any Malaysia solution is in place, church groups or agencies as ever should work hard and pragmatically to make it work as best it can, minimizing the adverse impacts on the most vulnerable including unaccompanied minors.

Any legislative backing for the Malaysia solution may well be subject to the legislative requirements of the forthcoming Human Rights (Parliamentary Scrutiny) Bill 2010 which is presently before the Senate and expected to pass readily now that the Greens hold the balance of power. The Executive will need to provide a statement of compatibility with all key international human rights instruments, and the joint parliamentary committee will need to be satisfied with compliance. The committee will provide a useful forum for church groups and agencies to put a principled legal position.

Conclusion

In a pluralistic democratic society, it will always be difficult for a Christian lawyer publicly identified with their faith tradition to involve themselves in contested human rights debates at that interface between law and politics. The risk of being misunderstood is great; the prospect of being parodied all too apparent. Last month when delivering the Lowitja O'Donoghue Lecture, Paul Keating said,

Many people here will be familiar with the sorry tale which became part and parcel of the Native Title

(Amendment) Act 1998. That amendment arose from the Coalition government's so-called Ten Point Plan, a plan facilitated in the Senate with the support of Senator Brian Harradine under the advice of the Jesuit priest, Frank Brennan.

As an aside, let me say, and as a Catholic, let me say, wherever you witness the zealotry of professional Catholics in respect of indigenous issues, invariably you find indigenous interests subordinated to their personal notions of justice and equity: because unlike the rest of us, they enjoy some kind of divine guidance.

Back then, the Catholic Senator Harradine negotiated significant improvements to the lamentable Howard package. The key plank of the improved package was drafted by lawyers for the National Indigenous Working Group. Though the Catholic Keating warns against "the zealotry of professional Catholics in respect of indigenous issues", it should be remembered that I commended Harradine for his wily improvement on the Howard proposals because, third time around, he managed to deliver in spades on the compromise previously accepted behind closed doors by key indigenous leaders and their advisers.

At the time, Noel Pearson said: "It looks, on the face of it, in this penalty shoot-out situation, Brian Harradine's won four-nil. Full credit to Senator Harradine for having promised us that he was going to hold the line. He's surely held the line. He's held out on a stubborn position." Admittedly, things later went pear-shaped.

I will happily commend Labor and the Greens should they follow the Keating legacy and challenge, improving the package even further. I don't claim any divine guidance for this, only a commitment to good policy, transparent process and sound principles, regardless of who is in power, and regardless of who controls the Senate. It's called politics – not divine guidance. Mind you, I think I will be waiting an eternity before any government decides to increase the statutory rights for native title holders.

As Christian lawyers we are missioned to be "cunning as serpents and yet as harmless as doves" (Mt 10:16), setting the moral parameters for just process and just outcomes, trusting and helping our professional colleagues to form and inform their consciences, and to that conscience to be true. Discharging our public trust to our clients, to the courts, to the public and to the rule of law, we leave at the door our personal agendas comprehensible only to our co-religionists but we carry with us the profound commitment we have to human dignity, the common good and the public interest which is often abandoned by those with short term partisan agendas, especially those masquerading as disinterested secularists invoking one dimensional human rights discourse.