Religion, the law and medicine

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Should religious beliefs have a role in the way medicine is practised? The author examines some of the ways religion can influence policy, the law and medical practice.

There are numerous ways in which religious beliefs can influence political decision-making, the law and the implementation of policy. In his book *The High Price of Heaven*, Sydney journalist David Marr discusses many of the ways this can happen.[1]

In this article, I comment on the types of religious influence identified by Marr, as well as one he barely mentions – the direct intervention by religious bodies in the process of litigation. I discuss in particular the application by the Roman Catholic Church to appear as an *amicus curiae* (friend of the court) in two recent cases relevant to medical practitioners.

While religious influence is inevitable in the political process, is the Church's direct intervention in the judicial process appropriate? Let's begin by examining some of the ways in which religion influences policy and law.

How religion influences policy and law

Religious background of politicians

The attitudes of politicians (and judges), like those of everyone else, can be shaped by their religious upbringing. Therefore, knowing politicians' religious and other backgrounds can give an indication of how they are likely to vote on particular issues and often explains why they act as they do – it is all part of the political process. For example, what Marr calls the 'Catholic doctrinal position on fertility control' has 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'.[1]

Lobbying of MPs by the Church and its members

It is also part of the political process that constituents lobby their representatives in an attempt 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 little ground for objection to this practice.

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What is an amicus curiae?

The *amicus curiae* procedure has provided courts with a source of information and advice that the parties involved in the litigation may be unable or disinclined to provide. Appellate judges, aware of the profound implications their decisions may have for people other than the parties and for the law itself,[10] have been willing to accept t hese submissions 'to ensure that an appropriate range of argument is presented to the Court'.[11]

Allowing such intervention 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.[12] As laws have become more complex, courts have expanded the role of *amici curiae* so that an increasing range of bodies has been permitted to submit arguments. For example:

- the Tasmanian Wilderness Society was heard on ecological issues in the *Tasmanian Dams* case[13]
- the NSW Public Interest Advocacy Centre (PIAC) on a new lead standard in *Human Rights and Equal Opportunity Commission v. Mt Isa Mines*[14]
- PIAC representing the Consumers Federation of Australia in *National Australia Bank v. Hokit*[15]
- the Australian Film Commission and 10 other parties on standards for the Australian content of programs in *Project Blue Sky Inc v. Australian Broadcasting Authority*.[16]

The same is true of lobbying by Church officials, although it may raise some concerns when the power of the Church is brought to bear on an issue on which community opinion is divided. To quote Marr: '[T]he new Catholic archbishop of Perth, Barry Hickey, killed stone dead a bill to extend antidiscrimination laws to homosexuals and lesbians in Western Australia… Hickey issued a fax to all members of Parliament vociferously condemning the dangers the legislation posed to family and children. That was the end of the bill'.[1]

Church directives to religious personnel

There are other activities of the Church that affect policy in the broader community – quite legitimately, in my view. Churches are entitled to direct those who preach religious doctrine and to take action against rebels. One example is the heresy trial in Sydney 'after the ordained master of St Andrews Presbyterian College at Sydney University voiced doubt about the infallible myth of the Bible and questioned St Paul's sexuality'.[1] Another example, although less directly concerning church doctrine, is when the Roman Catholic Church vetoed plans of the Sisters of Charity to establish a safe injecting house for heroin addicts in Darlinghurst, NSW.[1]

Religious influence that may raise concern

Church directives to employees

What about the situation in which religious bodies are conducting activities that lie outside the religious sphere – for example, activities traditionally performed by the State? Recently the Roman Catholic Church has expanded its activities in the secular sphere and is now the biggest employer outside government. It runs hospitals, charities and schools as well as unemployment services like Centacare.[1]

In this situation, there must be some concern about the Church's right to ignore antidiscrimination legislation in selecting its employees, and to exclude single mothers, *de facto* partners, homosexuals and remarried divorcees.[1] Should there be one set of laws for religious bodies and another for all other employers? As Marr pithily puts it: 'Nurses nurse the sick. Physics teachers teach physics. Drivers for St Vincent de Paul drive trucks'.[1]

Is it reasonable to accept the Roman Catholic Church's claim that 'everyone employed by a church body [is] engaged in propagating religion'?[1] I think not, particularly if Marr's assertion is true: 'Ask [F]ather Brian Lucas [Sydney lawyer–priest and, according to Marr, 'official spokesman for the church and the archdiocese of Sydney'] for an assurance that the Catholic Church would distribute government aid in a strictly nondiscriminatory way, and that assurance won't come'.[1]

Church intervention in litigation

In my view, the recent direct intervention by the Roman Catholic Church in civil litigation is very troubling.

The first case in which the Church sought to intervene was the NSW abortion case *CES v. Superclinics*.[2] It sought to do so by applying for *amicus curiae* status (which was granted) in a proposed appeal to the High Court (see the box above on this page).[3]

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 that 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*,[4] in which assisted reproductive technology (ART) specialist Dr McBain successfully challenged the ban on single women gaining access to ART programs in Victoria.

Dr McBain argued that the *Infertility*

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Treatment Act 1995 (Vic), which limited access to 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. Justice Sundberg devoted a large part of his judgement to the submissions of the Roman Catholic Church, but rejected all of the Church's arguments. Later, the Church applied to the High Court for an order to review Justice Sundberg's decision. This application has not yet been heard by the High Court.[5]

Why might such influence raise concerns?

The direct intervention by religious bodies in the functions of the State is, in my opinion, questionable. The court process is a function of the State and, under the constitutional doctrine of separation of powers, the judiciary is independent of the legislature and the executive. Its processes are objective and should be free from political influence.

Furthermore, civil litigation essentially involves a dispute between private parties. The parties define the issues and decide which arguments to make to the court. The parties should not be required to have their actions delayed, to address new issues, or to bear additional costs because of intervention by a third party.

Until recently, *amicus curiae* interventions have been 'relatively rare' in Australia.[6] Applicants for *amicus* status 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'.[6] 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'.[7]

In so extending the scope of amicus submissions, Australian courts have moved towards the American position, 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'.[8] But is this a desirable trend? And 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?[9] Or is it making a type of 'special pleading' and is this pleading appropriate in a multicultural society?

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Concluding remarks

While religious influence is inevitable in the political process, I believe that the direct intervention of religious bodies in the judicial process is inappropriate unless they have a direct interest in the litigation, such as the Australian Catholic Health Care Association in *CES v. Superclinics*. Interventions based purely on religious doctrine should be discouraged. That such intervention has recently occurred in two cases relevant to medical practitioners signals potential room for religious bodies to exert an unwarranted influence on the practice of medicine.

Series Editor's comment

An interest should be declared. I was claims manager for the medical defence fund that supported one of the defendant doctors in the *CES v. Superclinics* case. When the case went to the High Court and both pro- and anti-abortion groups sought status as *amici curiae*, I thought it threatened to become a three-ringed circus. The plaintiff and the other defendants had similar fears. This led to sufficient movement in the negotiating positions taken by all parties to allow the case to be settled before it was due to run in the High Court.

The limits to self-determination

In any democratic society, the individual's right of self-determination is recognised in both common law and statute. For example, we may disagree with the religious tenets of those who believe that receiving a blood transfusion is a mortal sin but we must respect their properly expressed refusal to have a transfusion, even if that refusal will lead to death. But what if it is another's life at stake, such as a child's? The law can and will intervene. Similarly, some religious groups say ritual circumcision is part of their belief system. Male circumcision can be performed lawfully, but female 'circumcision' is banned. Male circumcision is seen as a fundamentally cosmetic procedure that has possible but remote medical benefits and known but remote risks. Female circumcision is seen at law to be mutilating surgery.

The individual's right of self-determination is not absolute. Generally, you are entitled to go to hell in your own way, provided you do not take or force anyone else to go with you. However, people who express suicidal ideation are often classed as mentally ill and incompetent to make their own decisions, even when the ideation has a religious basis. Joan of Arc heard voices, led her people and ended up a martyr. Nowadays, she would be certified for psychotic, suicidal ideation. Nowadays, society will often intrude when it perceives that an individual is capable of harming him- or herself, or others.

Who decides the boundary?

Who decides the boundary between self-determination and society's right to block it? The most difficult cases are those centred on deeply held clashes of belief – and the most extreme clashes centre around the status of the fetus. Science cannot resolve this clash. You either believe 'life' is inviolate from the moment of conception or you take a different view.

Both statute law (such as that recently passed in Western Australia) and the common law Menhennit ruling state quite clearly that a mother has a right, in defined circumstances, to terminate a pregnancy. However, many individuals and church groups passionately believe that a fetus is a life, and that terminating a pregnancy at any stage is murder and at odds with God's laws.

Resolving such a clash is impossible. The three-ringed circus mentioned earlier is an apt analogy – the three rings being the church, the State (parliament/the people) and the courts (the judiciary). The church claims moral superiority – the voice of God. Parliament claims populist superiority – the voice of the people. The courts claim legal superiority – the voice of logic, reason and the law.

Where do doctors stand?

Where does this leave the doctor? Two imperatives are clear:

- doctors must obey the law
- doctors must not impose their personal moral beliefs on their patients

Doctors must obey the law

You practise as a doctor, not a moralist, judge or politician. As a doctor, you must act lawfully – not according to your personal beliefs about what is 'right' or 'just'. If you do not know what is lawful, you must seek advice. Contact your indemnity fund or the AMA. Sometimes, you will need to go to court to get that advice – for example, if asked about performing a sterilising operation on an incompetent patient.

Doctors must not impose their personal moral beliefs on their patients

There was a deeply religious Roman Catholic doctor who practised just down the road from me in the early 1970s. It would have been entirely appropriate for him to say to patients seeking prescriptions for the oral contraceptive pill, 'I'm sorry, but for personal reasons I do not provide that service'. It would not have been appropriate for him to overstate the risks of the pill – for example, 'I don't prescribe the pill because it is unsafe. It exposes patients to an unacceptably high risk of breast cancer and venous thromboses'. He was an excellent and caring doctor and I am sure that he did not consciously use medical fear as a means of imposing his moral beliefs on his patients. Are you sure that your medical advice to patients is solely based in medicine and not influenced by your own moral and religious beliefs and prejudices? MT

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References

1. Marr D. The high price of heaven. 2nd ed. Sydney: Allen & Unwin, 2000.
2. *CES v. Superclinics* (1995) 38 NSWLR 47.
3. *Superclinics Australia Pty Ltd v. CES & Ors* S141/1995 (15 April 1996). See also Hon Justice Susan Kenny. Interveners and amici curiae in the High Court. (1998) 20 Adel Law Rev 159-171 at 164; Neville W. Abortion before the High Court; what next? Caveat interventus: a note on *Superclinics Australia Pty Ltd v. CES* (1998) 20 Adel Law Rev 183-192.
4. *McBain v. State of Victoria* [2000] FCA 1009 (28 July 2000). See also Skene L. Access to assisted reproductive technology for single, gay, de facto or married women. Medicine Today 2000; 1(12): 67-69.
5. *Australian Catholic Bishops Conference & Anor, ex parte The Hon Justice Sundberg* C 21/2000 (17 Oct 2000).
6. *Bropho v. Tickner* 40 Fed Ct Reports 165 at 172 (Wilcox J).
7. *National Australia Bank v. Hokit* (1996) 39 NSWLR 277 at 381 (Mahoney J); *Levy v. Victoria* (1997) 189 CLR 579 at 604-5 (Brennan CJ).
8. Re L. The amicus curiae brief: access to the courts for public interest associations (1984) 14 Melb Uni Law Rev 522-533 at 522.
9. Owens RJ. Interveners and amici curiae: the role of the courts in a modern democracy (1998) 20 Adel Law Rev 192-198 at 194.
10. Former Chief Justice, Sir Anthony Mason. Interveners and amici curiae in the High Court: a comment (1998) 20 Adel Law Rev 173-176.
11. Id at 174.
12. *Encyclopedia of the Laws of England*. 3rd ed. London: Sweet & Maxwell, 420; Grice v. The Queen [1957] 11 Dominion Law Reports (2d) 699 at 702 (Ont Sup Court, Ferguson J).
13. *The Commonwealth of Australia & Anor v. State of Tasmania & Ors* (1983) 158 CLR 1.
14. *Human Rights and Equal Opportunity Commission v. Mt Isa Mines* (1993) 46 FCR 310, discussed by Durbach A. Intervention in High Court litigation: a comment (1998) 20 Adel Law Rev 177-182.
15. *National Australia Bank v. Hokit* (1996) 39 NSWLR 377; see also Durbach, reference 8.
16. *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 153 ALR 490.

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