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The Church as Advocate in the Public Square: Lessons from the National Human Rights Consultation

1. The Patrimony of Monsignor McCosker

I acknowledge the Ngunnawal, the traditional owners of this place as well as those many great Australians who represented the people in this Old Parliament House until 1988. Let's recall that it is only two years ago that for the first time Aboriginal elders welcomed everyone to the new Parliament House on the eve of the national apology. Matilda House-Williams, an elder of the Ngambri people, said on that occasion:

A welcome to country acknowledges our people and pays respect to our ancestors' spirits who have created the lands. In doing this the Prime Minister shows what we call proper respect to us, to his fellow parliamentarians and to all Australians. For thousands of years our people have observed this protocol. It is a good and honest and a decent and human act to reach out and make sure everyone has a place and is welcome.

I am honoured to deliver the 2010 McCosker Oration here in Old Parliament House, across the road from the Aboriginal Tent Embassy. I never knew Monsignor Frank McCosker, but like most of you I have known people who were very influenced and helped by him. In 1989, I moved from Melbourne to Sydney and ministered in the parish

of St Canices where Eileen Davidson was a daily mass goer. She was a great sodality organizer. Having been one of Fr McCosker's early collaborators in social work, she was one who combined a strong spirituality, a simple piety and a passionate commitment to social justice lived both by a dirtying of the hands and a stretching of the mind. When we established Uniya, the Jesuit Social Justice Centre, Monsignor John Usher served on our board – bringing that combination of Sydney priest as back room connector and unthreatening public face which was a hallmark of his mentor Monsignor McCosker.

Preparing this oration, I was helped by Damian Gleeson's 2009 address to the Australian Catholic Historical Society on *Monsignor J. F. McCosker's influence on Commonwealth Social Policy in the 1950s.* This year being the silver jubilee of my own ordination, and having just completed the National Human Rights Consultation which did not win favour with all Church leaders, I was much taken with McCosker's letter to Cardinal Gilroy on the occasion of his own silver jubilee of ordination. He wrote:[1]

Your Eminence will never know how much has been involved in trying to keep the Social Welfare system moving ever so slowly forward to meet the minimum standard of principles long established elsewhere and skills virtually unknown within the church… During the past ten years I have worked an absolute minimum of twelve hours a day and sometimes eighteen and nearly all of it on social welfare. Much of this has been really difficult because there was no support from any quarter in the church and I was forced to take calculated risks to establish something that would safeguard the church. Both the apostolate and the interest will die with me or become lost in my involutional dementia (doddering old age)

I make no pretence to have worked anything like the hours of McCosker nor to have experienced his acute isolation, but I do admit to the occasional desolating moment in the apostolate of social justice wondering whether there is real (rather than notional) support within the Church and sufficient commitment to our transcending our own self interest to ensure the common good for all persons in the community we are privileged to share. It was Cardinal Gilroy's successor who described the recommendations of our

[1] McCosker to Gilroy, 23 December 1956, CFWB, SAA

National Human Rights Consultation as being not only "long winded and vague" but also as a Trojan horse which "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". Today's cardinal wrote in *The Australian*: "Strangely, the Brennan report is weak on defending human rights." Having a passionate commitment to religious freedom as a fundamental human right, having devoted much of my 25 years of priesthood to the defence of human rights, and knowing the publicly tested commitment of my fellow committee members Mary Kostakidis, Mick Palmer and Tammy Williams to human rights, I take note of the Cardinal's very public criticisms. I hope they are wrong; but that is for others to judge.

Thanks to McCosker's tireless efforts, there is now a solid commitment by the Australian Catholic Church to providing a national response to social welfare concerns grounded in the extensive experience of Catholic welfare agencies, drawing on the strengths of the tradition of a Catholic social teaching, approved and supported by the bishops but with the capacity to agitate issues professionally and politically without constant Episcopal presence, endorsement or criticism. Tonight I want to reflect in light of the National Human Rights Consultation how we as Church can do better in promoting justice for all in our land.

2. The Place of Religion in Today's Secularist Environment

In the mid 1950s McCosker, described by Gleeson as "a consummate observer of social policy", urged the Australian bishops to adopt a national position on welfare policy. McCosker wrote:[2]

Social Welfare in Australia is at present in a state of active development and adolescent ambivalence. The activities, organisation and legislation in one state influence the planning in another. Until recently [Catholics] had little or no representation at any level and consequently no voice in planning for the future.

[2] Report on proposed National Catholic Welfare Committee and affiliation with International Conference of Catholic Charities [1956 Report to Jan 1957 Australian Bishops Conference (this annotation in handwriting)], File 550001, NCWC Collection, CSSAA.

Thanks to McCosker that is no longer the situation 50 years on. But we as Church are now working in a very different public ambience than did he. Last October, 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 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 world view and religious tradition. We acknowledge that it would be prudent to put our case in terms comprehensible to those who do not share that world view 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.

Hitchens thought me Jesuitical for joining issue with Jones who simplistically described homosexuality as a sin in Catholic teaching. I begged to differ:

"Homosexuality is not a sin. It's a disposition. If you want to argue about whether particular homosexual acts are appropriate for an individual in a moral context, that would require a pastoral discussion with that individual. What we were discussing previously was what should be the law in a civil society such as Australia where you

have people of different religious convictions and the question was whether or not there should be same-sex marriage. Now, that is not an issue which is resolved by determining what the Catholic Church says to its own members it regards as moral or immoral. They're quite distinct questions."

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? What ought be the law or the public policy? Unlike those Muslim fundamentalists who would want to impose Sharia law even on non-Muslims (and thankfully that is not the view of most Muslims living in Australia), we Catholics are part of a religious tradition and of a religious insitution with a teaching authority which helps us to distinguish between issues of pastoral practice and concern, moral judgment, and law and public policy. Our religious tradition injuncts us to respect the dignity of others, including the dignity of those who are very "other". We are called to live, profess and develop this tradition in a social context which is often hostile to any religious perspective on life. 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.

In his most recent novel *Ransom,* David Malouf wrestles with those things which cannot be changed or which are very unlikely to be changed by the human subject – enhancing the acceptance of same; and those things which can be changed or done differently if only we dare.

The king Priam feels absolutely powerless and humiliated, watching from the fortressed walls of the doomed Troy as Achilles drags the corpse of his son Hector through the dust

day after day. Priam decides to cast aside all regal regalia and to seek to pay a handsome ransom for the return of his son's body.

Priam's family and closest advisers try to convince him not to go ahead with such a daft plan. The wise Trojan Polydanus says to him:

I beg you, spare yourself this ordeal. Do not, for the affection we all bear you, expose yourself to the hazards of war and of the road, or to the indignities that Achilles and any other Greek who happens along may heap upon you. Be kind to your old age. Relieve yourself of this unnecessary task.

Priam is resolute in his purpose:

I cannot stop what may be about to occur. That I leave, as I must, to the gods. If the last thing that happens to me is to be hunted down in the heart of my citadel, and dragged out by the feet, and shamelessly stripped and humiliated, so be it. But I do not want that to be the one sad image of me that endures in the minds of men. The image I mean to leave is a living one. Of something so new and unheard of that when men speak my name it will stand forever as proof of what I was. An act, in these terrible days, that even an old man can perform, that only an old man ***dare*** *perform, of whom nothing now can be expected of noise and youthful swagger. Who can go humbly, as a father and as a man, to his son's killer, and ask in the gods' name, and in their sight, to be given back the body of his dead son. Lest the honour of all men be trampled in the dust.*

Priam dresses simply, leaving the fortressed Troy and travels with the peasant Somax and his two mules pulling a primitive unadorned cart with the ransom. When he comes face to face with Achilles, the killer of his son, Priam says:

Do you think I ever imagined, when I was a young man as you are now, in the pride and vigour of my youth, that I would in old age come to this? To stand, as I do now, undefended before you, and with no sign about me of my royal dignity, begging you, Achilles – as a father, and as one poor mortal to another – to accept the ransom I bring

and give me back the body of my son. Not because these cups and other trifles are a proper equivalent – how could they be – or for any value you may set upon them. But because it does high honour to both of us to act as our fathers and forefathers have done through all the ages and show that we are men, children of the gods, not ravening beasts. I beg you, ask no more of me. Accept the ransom and let me gather up at last what is left my son.

And so he does, and so we remember him thousands of years on – the father and king who dared to do something new and unheard of, drawing on and invoking all that was noblest in his traditions and in the depths of the human heart.

As you contemplate in your own lives and in the lives of your clients those things which are abiding and those which are peripheral and perfunctory, do not be too readily dismissive of the religious and cultural instincts and practices. It is very fashionable in the Q&A of contemporary Australia to be dismissive of religion. But all participants in the public square need to concede there are experienced intelligent people of a religious disposition, just as there are experienced intelligent people who have no need nor desire for the religious sentiment. That's why the right to religious freedom is so important.

3. The Place of Human Rights

In the Church there is agreement about the importance of the right to religious freedom; the disagreement is about whether that right would be sufficiently protected if Australia ever adopted a Charter of Rights in any form whatever, and whether religious communities would be better or worse placed to counter the power and agenda of secularist groups and institutions which do not prize the right to religious freedom as we do. It is not a disagreement about the need for the State to protect and recognise human rights. Since the Second Vatican Council the Catholic Church's highest teaching authority has been committed to human rights. That Council's *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)* states:[3]

[3] Gaudium et Spes #37

There is a growing awareness of the exalted dignity proper to the human person, since the human person stands above all things, and their rights and duties are universal and inviolable. Therefore, there must be made available to all people everything necessary for leading a life truly human, such as food, clothing, and shelter; the right to choose a state of life freely and to found a family, the right to education, to employment, to a good reputation, to respect, to appropriate information, to activity in accord with the upright norm of one's own conscience, to protection of privacy and rightful freedom, even in matters religious.

The language of rights and duties, building on the notion of the individual's inherent dignity, resonates strongly in the Australian community, including the Q&A contingent. *Gaudium et Spes* and the papal teaching that have followed it are good news for all of us in the espousal of human rights.

Some rights advocates make the mistake of speaking only about rights and not about duties. Pope Benedict XVI is very strong on this connection. In his latest encyclical *Caritas in Veritate* he says:[4]

[I]ndividual rights, when detached from a framework of duties which grants them their full meaning, can run wild, leading to an escalation of demands which is effectively unlimited and indiscriminate. An overemphasis on rights leads to a disregard for duties. Duties set a limit on rights because they point to the anthropological and ethical framework of which rights are a part, in this way ensuring that they do not become licence. Duties thereby reinforce rights and call for their defence and promotion as a task to be undertaken in the service of the common good.

Last year, 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. We proposed a list of responsibilities to be included in any education campaign for human rights in Australia. That list includes:

- to respect the rights of others

[4] *Caritas in Veritate,* #43

- to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- **to show respect for diversity and the equal worth, dignity and freedom of others**
- to promote peaceful means for the resolution of conflict and just outcomes
- to acknowledge and respect the special place of our Indigenous people and acknowledge the need to redress their disadvantage
- **to promote and protect the rights of the vulnerable**
- **to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable**
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.

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 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% unopposed, 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. But tonight I want to consider the major concern expressed by some Church leaders, including Cardinal Pell, about 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".[5] That concern, if well founded, would be good grounds for opposing the introduction of a federal Human Rights Act.

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

Once again, let's start with the highest teaching authority of our Church. Vatican II's Declaration on Religious Freedom *Dignitatis Humanae* teaches:[6]

[T]he human person has a right to religious freedom. This freedom means that all people are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, *within due limits*.

……

Provided the just demands of public order are observed, religious communities rightfully claim freedom in order that they may govern themselves according to their own norms, honor the Supreme Being in public worship, assist their members in the practice of the religious life, strengthen them by instruction, and promote institutions in which they may join together for the purpose of ordering their own lives in accordance with their religious principles.

……

[I]t comes within the meaning of religious freedom that religious communities should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity. Finally, the social nature of man and the very nature of religion afford the foundation of the right of men freely to hold meetings and to establish educational, cultural, charitable and social organizations, under the impulse of their own religious sense.

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:

[6] Dignitatis Humanae, ##2,4

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 Vatican Council's observations about due limits and the just demands of public order.

4. Church Concerns with the Victorian Charter

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? 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.

(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) provides[7]

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

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

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 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 involement 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".[8] 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

[8] Scrutiny of Acts and Regulations Committee, Alert Digest No 11 of 2008, p. 6

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".[9] 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] 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".[10]

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 modeled 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

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

Church groups in Victoria have just emerged from a grueling 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:[11]

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

[11] 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

and marital status when making appointments to key religious posts. An exemption along these lines has existed for more than 30 years."[12] 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."[13] She said, "I believe that equality is morphing into an ideology hostile to the Christian faith."[14] 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."[15] 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 manifestly in opposition to the teachings of the religion and the beliefs of its followers. Is that too much to ask?"[16]

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.

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

[12] The Tablet, 30 January 2010,
[13] Hansard, House of Lord, 15 December 2009, Column 1439
[14] Ibid, Column 1441
[15] Ibid, Column 1442
[16] Ibid, Column 1473

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 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."[17] 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."[18] 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

[17] SARC, Final Report, Exceptions and Exemptions to the Equal Opportunity Act 1995, p. 61
[18] Rob Hulls, Media Release, 27 September 2009

discrimination."[19]

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."[20] 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:[21]

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.

…

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.

[19] C Prowse, Evidence to the SARC, 5 August 2009, p. 3
[20] Ibid, p. 5
[21] Evidence, SARC, 5 August 2009, p.2

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.[22] 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

[22] National Human Rights Consultation Report, pp. 157-60

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 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.

5. Who Speaks for the Church?

Over the years, I have often been involved in public advocacy of policy positions consistent with Catholic social teaching and with the Church's moral tradition. I make no claim that all bishops have agreed with my own analysis as to how Church teaching is to be applied when making law or public policy, rather than how it is to be applied when simply enunciating what is moral or preferable behaviour for the individual wanting to live a good life consistent with Church teaching.

This is the first time that I have been on the other side of a public inquiry process, trying to respond to the various Church voices putting sometimes contrary views on an issue of law or public policy. What were we to make of the varying formal positions on a Human Rights Act put forward by the governing bodies of the three major churches?

The Australian Catholic Bishops Conference "noted that much discussion has been about whether or not there should be a Charter of Rights. On that particular issue, the ACBC does not take a particular stand at this stage." The Anglican General Synod said: "We support the enactment of human rights legislation because this has the potential to have a beneficial effect on government policy and the legislation and administration which give effect to that policy."[23] The Uniting Church National Assembly submitted: "The Uniting Church believes that a Human Rights Act, operating within Australia's system of open and democratic government, will provide greater protection for

[23] However the Sydney Anglicans then put it in a submission opposing a federal Human Rights Act.

fundamental rights and freedoms, promote dignity, address disadvantage and exclusion, and help to create a 'human rights culture' in Australia."

As if that was not confusing enough, Cardinal Pell expressed outright opposition to a Charter in any form. Moving beyond the neutral position of the Australian Catholic Bishops Conference, the Archdiocese of Sydney co-operated in activities with the Australian Christian Lobby after the release of our report. The Lobby which describes itself as "a parachurch group" was opposed to a Human Rights Act in any form. For me and my committee members, it was difficult to get a handle on just who the Lobby represents.[24]

It became too complex a task to try and represent in the report the viewpoint of the various churches on a Human Rights Act. Thus we omitted all reference to same. I daresay this will become a common response by public inquiries which doubt the public's interest in investigating the complex arrangements now in place for church leaders to express diverse views under various guises.

6. Countering the Objectionable Aspects of the Soft Left, Secularist Agenda

Following the release of our report, Cardinal Pell repeated his strong opposition to a Human Rights Act in any form. He wrote: "I fear a charter could be used or abused to limit all sorts of freedom, and religious freedom. Already in Victoria legislation is attempting to coerce prolife doctors to cooperate in abortions. However that government will answer for this in the next and subsequent elections."

Obviously there is room in the Church not just for disagreement about the application of laws but also about the electoral repercussions of controversial laws. The abortion reform was an Act of the Victorian parliament which did not split on party lines. My own political opinion, for what little it may be worth, is that the Brumby government will not answer for the abortion law reform "in the next and subsequent elections". Where will that then leave church leaders who put their faith in parliaments unconstrained by

[24] Jim Wallace, Executive Director of the Australian Christian Lobby provides an explanation of the ACL's modus operandi at http://www.eurekastreet.com.au/article.aspx?aeid=19116.

charters of rights and in an electorate increasingly secularised and indifferent to religious moral pleas?

Some Church leaders think that Church positions on contested moral issues have a better chance of being reflected and maintained in law and policy if parliaments are not constrained by a human rights Act. Judging by recent debates on abortion, RU486, and stem cells, I have my doubts. Gone are the days when church leaders behind closed doors can do deals with political leaders about laws and policies as the Archbishops did with Bob Carr on employment exemptions. While it is important and proper for Church leaders to have good working relationships with our political leaders, we Church people have as much interest as our fellow citizens in ensuring that our political leaders are appropriately constrained by checks and balances when making controversial decisions.

I understand the concerns of those church leaders who fear that the secularising effect of the soft left "liberal" agenda will be accelerated by the passage of a Human Rights Act. Those concerns would prove to be misplaced if a Human Rights Act could be designed to ensure that parliamentarians have due regard for freedom of religion and conscience, including the conscience of the religious citizen who is out of sympathy with any prevailing soft left liberal agenda.

Within our broad church, there is plenty of room for a diversity of views. Through my participation in this inquiry I have become more convinced that the Church will be in better standing in the community if it consistently espouses the need for elected politicians to respect the human rights of all persons, without opposing proposals for human rights Acts on the basis that such laws might allow unelected judges to interfere with the privileges which church leaders have been granted by elected politicians. The church should take a consistent public position on the need to protect and respect the right and duty of a person to form and inform their conscience, and to that conscience be true. Bishop Christopher Prowse put the matter well to the Victorian Parliament's Scrutiny of Acts and Regulations Committee:[25]

The denial of a person's right to hold and exercise their own conscience and beliefs is an

[25] SARC, Hansard, 5 August 2009, p. 3

effective denial of their own personhood and individuality.

A human rights Act which constrained popular politicians from interfering with that right even when exercised by religious people could be a cause for good. The way forward is for us to insist in the public square on the need for all players to respect the right of all persons including religious people to freedom of conscience and belief, for us within our church community to respect the consciences and dignity of all including those who are gay or lesbian, encouraging everyone to form and inform their conscience and to that conscience be true, and to provide public advocacy grounded in our daily contact with the poor, informed by the richness of our Church tradition, and co-ordinated by credible Church voices in the public square.

When Monsignor McCosker faced divisions in the hierarchy over the best approach to take to new Commonwealth marriage laws after his National Catholic Welfare Committee had provided a detailed analysis, the Apostolic Delegate wrote congratulating him noting that "careful and calm studies of this nature cannot but bring increased prestige and influence in the Church in Australia"[26]. Whatever the differences in our hierarchy over issues to do with human rights, their protection and limits in Australia, may the interventions and researches of Catholic Social Services Australia always bring prestige and influence to the Church in the secularized Australian environs dependent on Church commitment to enhance the human rights of society's poorest and most vulnerable.

[26] Apostolic Delegate to McCosker, 10 August 1959, File 550001, NCWC Collection, CSSAA