

Religion in a Secular Society

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1. Introduction

The proposal from the Australian Human Rights Commission for a law to protect religious freedom has occurred at a time when, in Australia, we have witnessed attempts, by those who express an aggressive form of secularism, to exclude religious commentary from public debate. Adherents of this view seem to hold that the doctrine of the separation of Church and state is not, as the constitution provides, the protection of the Church and people of religious beliefs from government interference with religious belief and practice, but rather justifies the exclusion of all but atheistic, or at least agnostic, views from involvement in public debate. Aggressive secularism would thus seem to have emerged as a form of anti-religious radicalism and intolerance.

This paper focuses on issues around defining secularism and what kind of a secular society Australia is, and what role or place religions and religious beliefs have in a pluralist society. The paper explores the place of religious commentary in public debate in a pluralist society and the emergence of the secularist view that public policy can be shaped by insisting on neutrality in relation to matters of private morality and religious belief, a neutrality that therefore excludes religious moral beliefs from the realm of public policy formation and law. This paper argues that rather than representing neutrality, that view of secularism would seem to have emerged as a belief system in itself and therefore a partisan basis for policy formation.

The paper argues instead for tolerance of the many different beliefs found within Australia as a pluralist society, and respect for the right and, in fact the obligation, of all citizens to seek to participate in and contribute to the processes that lead to the formation of public policy. The paper suggests that as a tolerant society, we should welcome all to public debate so that public policy may be formed on the basis of listening to the arguments and evaluating proposals on their merits. In that way not only the outcomes, but the processes by which we attain those outcomes, may give expression to equal respect for the worth and dignity of each member of the human family, within his or her cultural or community context and as we seek to attain our shared goal of serving the common good of humanity.

2. A Secular Society

2.1 What is a Secular Society?

The judgement that we live in a secular society may reflect an historical aberration, a modern phenomenon, and largely an exclusively Western phenomenon. Though there are other States, such as Turkey, that are constitutionally secular (notwithstanding the recent judicial difficulties of Turkey's ruling AK Party with its Moslem identity).

The philosopher Charles Taylor in his recent book "A Secular Age"¹ suggests that a secular society may be one in which one can engage fully in politics without ever encountering God. Apart from some vestigial prayers on such an occasion as the opening of Parliament, now to be preceded by a welcome from the original owners of our land, (or an occasional speech from a member of minority religious party who became elected through the vagaries of the system for electing upper chambers and inter party dealing on preferences), Australian politics are basically secular according to Taylor's characterisation.

¹ Charles Taylor "A Secular Age" Harvard University Press: Cambridge, Massachusetts 2007

In another sense though, Australia is even more secular than our American counterpart. In 2005, only 40% of Australian marriages took place in the presence of a Minister of religion.² Whereas in America, 40% took place without a Minister of religion.³ America, despite a rigorous separation of Church and State, is the Western society with the highest statistics for religious belief and practice. Formal religious practice in Australia is in decline. In that sense a secular society may mean a society in which people are predominantly not religious by belief or practice especially where that is considered in terms of attendance at formal religious observances. In that case, though constitutionally secular, one would not describe Turkey as secular, given the vast majority of the population is Muslim, with 95% declaring their belief in a God and adopting religious practices⁴.

Taylor however identifies a third sense of secularism, by which he means to refer to the rise of the alternative of secularism as a form of belief.

A society may be secular in the first sense of religion not being a part of public life, the so-called separation of Church and State. It may be secular in the second sense of declining religious belief and practice. Finally it may be secular in the sense of secularism emerging as an alternative belief form.

It seems to me that it is the latter that we are witnessing in Australia, and it appears as a very aggressive exclusionist form of secularism which views religious belief and practice with arrogant intolerance and dismissiveness. This kind of secularist belief is characterised by attempts to exclude contributions to public discussion on the basis of a kind of bigotry that classifies the contributions of persons who are religious in a nominalist way. The view is summed up in the title of a recent conference convened by the Fabian Society on the topic: “Separating Church & State: Keeping God Out of Government.”

That secularism can be its own belief system can be seen in the words of Friedrich Nietzsche when he described the origin of positive atheism “to be found in a wholly deliberate act of choice, an inverted act of faith, a truly religious commitment in reverse”.⁵

The problem is that ideological secularists seemed to have colonised the word “secular” to their own ends. In its origins, “secular” referred to the affairs of the world, ie the governance of worldly affairs. Historically it had nothing to do with any idea of God being absent from the world but a recognition that the Church governs herself in the matters proper to herself and the State governs itself in the matters proper to itself without either institution as an institution usurping what is proper to each realm.⁶

It has however no longer become possible to use “secular” in its original meaning, as it has been taken over by those for whom it denotes a religious observance of an atheistic

² Australian Bureau of Statistics *Marriages Australia 2005* Document No. 3306.0.55.001 <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3306.0.55.001> Accessed 1st April 2008

³ <http://atheism.about.com/b/2006/01/27/religious-marriage-vs-civil-marriage.htm>

⁴ European Commission “Social values, Science and Technology”Eurobarometer 2005 http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf Accessed 1st April 2008

⁵ Charles Journet *The Meaning of Grace* Chapman: London 1960 p. 117

⁶ John Fleming private communication 24/9/2009

belief system or at the very least, an agnostic one, to the exclusion of any form of theism. In the age in which we live it might be better to use terms that are more properly descriptive of an inclusive multi-cultural, pluralist society in which everyone participates without discrimination as to race religion, class or cultural background. We ought perhaps to use the word “pluralism” to mean what was originally meant by “secularism”. A pluralist society is one that is tolerant of a wide range of belief systems, inclusive of all persons whatever their beliefs or their cultural background. In that way we would be taking a positive step to avoid the neutering noxious bigotry of some self proclaimed secularists which now borders on the totalitarian.⁷

2.2. Public Debate in a Pluralist Society

A question that every intelligent participant in public debate faces is the question of how to conduct oneself in pluralist debate and what are legitimate personal ambitions for that participation.

To expect to produce public policy to one’s liking would be an aspiration to demagoguery or tyranny. More than that, it would offend against basic ideals of freedom. It is not unreasonable however to expect that public debate on matters of public policy be about achieving a pluralist rationale for public policy and in that sense a public morality.

Human persons do not live in isolation but in community. We do need a public morality, a set of values that underlies our public structures and institutions and guides our conduct in community. Some basic norms are required for persons to live together harmoniously.

To that end, we each have a personal responsibility to seek to know the truth and to engage in discussion about the moral norms and public policy. Those who take that search for truth seriously, from idealists like Immanuel Kant, libertarians like John Stuart Mill through to religious conservatives, have upheld the view that the pursuit of truth is best served by protecting each person from external coercion, from anything that would impinge upon his or her psychological freedom or which would prevent individuals from freely associating or freely expressing their views. The right to freedom of thought, conscience and religion is essential for the protection of many other rights, and ought not to be impeded, provided that just public order is protected.

The search for truth, then, is an inquiry that should be free and informed and developed by dialogue. Freedom of association and free moral discussion are a crucial part of that inquiry.

Society also has the right to defend itself and its citizens against possible abuses committed on the pretext of freedom of religion (eg genital mutilation of women – though that is more a cultural phenomenon than a religious practice). But governments should not be arbitrary or unfair in that respect. Government has responsibilities to safeguard the rights of all citizens and for the peaceful settlement of conflicts of rights. Peace comes about when people live together in ways that respect the dignity and rights of each.

⁷ Ibid.

There is a thus need for a public morality, a set of norms that govern our relationships with each other based on the fundamental notion of equal respect for persons, our inherent dignity, and our inalienable rights. These notions constitute the basic components of the common good. Outside of these restraints and obligations of the common good, persons have freedom in full range.

2.3. State Neutrality about Religion in Australia

A legitimate aim of involvement in public debate is to seek to develop policies that give expression to equal respect for persons. There are many differences of opinion as to what constitutes respect for persons and indeed what is meant by “human dignity”. That discussion is fruitful and worthwhile, and the contributions of a plurality of approaches deepen and strengthen understanding. Open public debate thus serves important functions.

The point is not to exclude considered perspectives from discussion, but to listen to each and to gain the insights that each brings. Bigotry is limiting and destructive of community precisely because it is an effort to isolate and exclude contributions from discussion. In recent times we have witnessed the extraordinary bigotry of exclusive secularism that has attempted to exclude religious perspectives from public discussion.

As an example of this form of secularist activism, American jurist Ronald Dworkin asserts the essentially *religious* content of respect for the intrinsic value of human life. He argues that State enforcement of responsibilities to protect the intrinsic value of human life would breach the First Amendment and the understanding that a state has no business prescribing what people should think about the ultimate value of human life, about why human life has intrinsic importance, and about how that value is respected or dishonoured in different circumstances.⁸

This argument is linked in Australia to the Australian Constitution. Section 116 provides:

“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

The meaning of section 116 was determined by the High Court of Australia in the famous “Defence of Government Schools” (DOGS) case in 1981. Barwick CJ: “the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is “for establishing any religion”, the law to satisfy the description must have that objective as its express and, as I think, single purpose.”⁹

The purpose of these provisions in the Australian Constitution is, then, to limit the role of the State, not to limit the role of the Church or any other religious grouping. Having come from a society where the King nationalised religion and made the Church a

⁸ Ronald Dworkin, *Life’s Dominion* (New York: Knopf, 1993), 164.

⁹ *Black v. The Commonwealth*, (1981) HCA 2, (1981) 146 CLR 559 (2 February 1981), at 579, <http://www.austlii.edu.au/au/cases/cth/HCA/1981/2.html>.

department of State under parliamentary control, persecuting and marginalising those whose religious opinions differed from those of the State, it is not surprising that the founders wanted a Constitution which would allow maximum freedom of religion. Where religion is concerned, it is the Church that needs protection from the hubris of politicians and not vice versa. The Church did not impose religion upon England. England imposed its views on the Church.¹⁰

Moreover, the Australian Constitution does not exclude religious arguments, religious people, or the Churches from public debate. The opposite is true. People are not to have their religious freedom infringed by the state and are to be permitted to express their religious opinions in the public square. The Australian Constitution itself recognises the legitimacy of religion in the public square when, in its Preamble, it says that we, the Australian people, are “humbly relying on the blessings of Almighty God”. This is further supported by the custom of the Parliament to begin each day with prayer including the “Our Father”.¹¹

Perhaps it is fairer to say that the Australian Constitution provides for the cooperation between Church and state, religion and state. Michael Hogan, Research Associate in Government and International Relations at The University of Sydney, put it this way:

Australia does not have a legally entrenched principle, or even a vague set of conventions, of the separation of church and state. From the appointment of Rev. Samuel Marsden as one of the first magistrates in colonial New South Wales, to the adoption of explicit policies of state aid for denominational schools during the 1960s, to the two examples mentioned above, Australia has had a very consistent tradition of cooperation between church and state. “Separation of church and state”, along with “the separation of powers” or “pleading the Fifth”, are phrases that we have learned from the US, and which merely serve to confuse once they are taken out of the context of the American Constitution.¹²

What Australia does have is a principle of state *neutrality*, or equal treatment, when dealing with churches. This principle dates back at least to Governor Bourke (if not to Macquarie) in colonial NSW, and extends all the way into contemporary Australia where government monies at all levels go quite happily to the churches so that they can run schools, hospitals, employment agencies, social welfare bureaux and even drug injecting rooms. This principle of neutrality is not entrenched in either the State or Federal Constitutions, and has no legal standing. (Constitutionally, State governments could still conceivably nominate an established church; only the Commonwealth is forbidden to do so by Section 116 of its Constitution!) Ultimately, the strength of the principle comes from the conventions hammered out in colonial Australia that saw English and Scottish established churches deprived of their priority in government funding. It survives into the twenty-first century because no major party could seriously contemplate abandoning it.¹³

¹⁰ I am indebted to John Fleming in a chapter we co-authored entitled “Seeking a Consensus” in John Fleming and Nicholas Tonti-Filippini (Eds) *Common Ground? Seeking an Australian Consensus on Abortion and Sex Education* St Paul Publications 2007 pp. 312-330

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

The principle of state neutrality has coexisted in Australia with a strong secular tradition in politics in the sense that there is no official church and no expectation that what the Church or Church's might say would be translated into law. For most of our history most Australians have been quite happy with the principle that governments should not favour one church over another.¹⁴

2.4 Bigotry about Participation of Religion

Notwithstanding the legal position, many politicians and others have behaved in a way that does not respect the Australian Constitution by demanding that bishops, priests, ministers, churches, and other religious bodies stop “meddling” in politics. Such *ad hominem* attacks represent an egregious appeal to prejudice and unjust discrimination against certain people or institutions. It is also hypocritical in the strict sense because such advice is usually given by, but not expected to apply to, those whose religion is variously described as secular, “humanist”, atheistic, or agnostic.

Examples of publicly expressed religious bigotry by significant members of the press, political establishment, and others abound. The views of Christians are associated with fundamentalism, that unenlightened and ignorantly dogmatic religion, which is impervious to science, reason, and compassion. Alex Mitchell, columnist for Sydney's *The Sun Herald*, exemplified the crudest expression of anti-Catholic bigotry when accounting for the way in which NSW Senators voted against a private member's bill to overturn the ban on therapeutic cloning in 2006. Senators Ursula Stephens and Steve Hutchins were described as coming “from the darkest recesses of the NSW right”, while Senators Bill Heffernan and Concetta Fierravanti-Wells were “mediaevalists” who “took their stand somewhere around the fifteenth century when the Spanish Inquisition was in full swing”.¹⁵

Senator Amanda Vanstone, in supporting therapeutic cloning, said “There are different views on when life begins, but no religion has the right to seek to have its view legislated.” Never mind that Senator Vanstone then voted to have her own religious views legislated. Each politician was expected to vote, and Vanstone cast her vote according to her own opinion. But she was wrong to tell politicians of a different religious opinion to her own that they did not have the same right to seek to persuade the Parliament to a particular point of view. There is nothing in the Australian Constitution to justify the denial of equal rights to free speech on the basis of a person's religious or other opinions.

The Hon. Tony Abbott was constantly questioned about his objectivity and even his right to be able to hold the office of Minister for Health because he is a Catholic. This was a constant theme in the debate over the abortion drug RU-486. And the same line of questioning of his religious views continued in relation to the therapeutic cloning debate.

Question:

Do you get the feeling that every time you open your mouth on these issues of conscience or ethics people—your critics—impugn your motives because of

¹⁴ Michael Hogan, “Separation of Church and State?” (16 May 2001), <http://www.australianreview.net/digest/2001/05/hogan.html>.

¹⁵ Alex Mitchell, “Faulkner Lone State ALP Senator to Back Cloning Legislation,” *The Sun Herald*, 12 November 2006, 22.

your religious faith?

Tony Abbott:

I think that it's noteworthy that no one was demanding that religion be kept out of politics when Bruce Baird, Barnaby Joyce, and Stephen Fielding opposed the Government's immigration bill but, on this particular issue, there are enormous demands, including from prominent members of the Labor Party, that "religion" be kept out of politics.

Now, the truth is that I certainly haven't injected religion into politics, and I don't believe on the stem cell issue or the cloning issue anyone has injected religion into politics. The arguments that I've used, and other opponents of change in this area have used, are all based on human values. They're not based on religious teaching.

Question:

But it's a religious issue. Stem cells is a religious issue, and you could easily argue that case as well, couldn't you?

Tony Abbott:

Well, I—my arguments are not based on religious teaching. They're not based on Scripture; they're not based on what the Pope or the Archbishop of Canterbury or the Dalai Lama has said—they're based on what I think are decent human values that can be apprehended by anyone, regardless of his or her religious views.¹⁶

Abbott exemplified the classical Catholic approach to debating moral issues in the public square when he insisted that he was arguing on the basis of agreed "human values" (the wrongfulness of killing the innocent), and the scientific account of when human life begins. He did not appeal to data which is the sole preserve of revelation.

To make it clear that people should discount views contrary to those held by the elites, media outlets commonly describe dissenters as "devout Catholic" or "fundamentalist." We have yet to see anyone from the elites described as "atheist" or "agnostic". Which begs the question, "Why not?" All human beings are influenced by their personal religious and philosophical commitments. Why is this only to be considered a problem for Christians? The attempt to define out of public debate contributors who come from selected religious viewpoints (but not others) exemplifies how deeply anti-religious and sectarian bigotry goes, especially among those who would regard themselves as "enlightened", even "educated".

2.5 Religious Participation in the Public Square

When people of religious persuasion, either as individuals or in company with others of similar mind, take part in public discussion, they do so legitimately simply as citizens

¹⁶ "Doorstop Interview—Herceptin listed on the PBS," 22 August 2006, <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2006-ta-abbsp220806.htm?OpenDocument&yr=2006&mth=8>.

expressing a view about the common good and the principles that are needed to protect the common good. They are behaving responsibly by taking their civic role seriously, provided of course that they conduct themselves properly within the norms of the Australian democratic system. This caveat also applies to those who replace intelligent argument and debate with *ad hominem* attacks which invite people to disregard fellow citizens on the basis of their religion.

A major issue in this respect has been the issue of respect for human life. The view that human life is to be protected is implied by the simple idea of equal respect for persons. As such it is expressed as a right in the international human rights instruments, and in fact the only right which is explicitly recognised in the instruments as an inherent right (ICCPR n. 6). It is legitimate to argue about who is a person, but that is not essentially a religious debate, even if religious people may be inclined to be more sensitive to the need to protect those who are most vulnerable on the fringes of life.

The Australian Constitution protects religious freedom, including freedom of association and of expression. The right to be involved in public debate is therefore protected. It is manifestly unjust and extraordinarily bigoted to claim that religious people ought not to be permitted to contribute or that their contribution ought not to be considered.

At the same time, contribution to public debate needs to be aware of the sensitivities of others. Public policy advances through seeking points of agreement and being careful to respect areas of disagreement. There is a role for what John Rawls¹⁷ calls “public reason”. The latter is a discussion that takes place on the basis of agreed fundamental principles.

However it is important that there is also continued discussion of those fundamental principles, as well as on the application of them, and it is appropriate in a pluralist society that all perspectives are brought to bear upon that discussion in a considered way.

During the 2006 phoney Federal election campaign, the journalist David Burchell wrote of (now Prime Minister) Kevin Rudd's canny decision to present his political philosophy chiefly in terms of a personal sense of faith.¹⁸

This was seen as politically opportunistic rather than reflecting the reality of what Mr Rudd called a basic congruence between the Christian ethic of respect for individual human dignity and freedom, and the social democratic tradition out of which his party has evolved.

The journalist's cynicism belies our common need to listen to, to search for, and to identify those core values that will make our communities great, whomever and how many espouse them, and from wherever those values might originate.

¹⁷ John Rawls, ‘The Idea of Public Reason Revisited’ in John Rawls, *The Law of Peoples* (1999) Harvard University Press 1999

¹⁸ David Burchell “Rudd's religion strikes a chord” *Australian* January 6th 2007

The great traditions in every age and culture have tended to identify the very same core values. Our human need for a transcendent reality that is beyond the merely human ultimately outlasts every other alternative belief form both intellectually and emotionally.

3. Public Reason and the Case of Bioethics¹⁹

3.1 A Catholic in a Pluralist Environment

In this section I hope you will excuse its autobiographical nature. It is offered as a personal experience of the openness of Australian society to religious contribution in public policy formation and to that extent what may be considered something of an ideal of pluralist public policy formation.

For many years I have practiced as a consultant bioethicist and in that role have served Australian governments both State and Federal and on government committees, and elsewhere as a consultant to the Office of Technology Assessment of the US Congress and to the German Federal Department of Health and Welfare.

Though holding secular qualifications in Philosophy, I have never made a secret of my status as a practicing Catholic. From time to time I have drawn criticism for that, no more so than when in 2006 I was a member of an Australian Health Ethics Committee subcommittee on reproductive technology and a submission from a major university to the committee attacked my membership on the grounds of my religious beliefs.

As a general rule, my involvement in public policy development has been tolerated, though in the public forum, rather than being classified just in terms of my profession, the media generally insist on mentioning that I am Catholic, though they do not as a rule mention the religious beliefs of other participants in debate. To some extent that indicates secularist bigotry as though the readers, listeners or viewers need to be warned that the view that they are about to hear is a Catholic view, but other types of view need no such warning.

The circumstance (referred to above) in which I was criticised by a major university and thus a major client of the NHMRC for my beliefs, thankfully did not require me to offer a defence of my role on the committee in the process of developing public policy as a person with religious convictions. The submission had asserted that I should be excluded from membership of the committee. The NHMRC did not ask me to resign and the NHMRC, sensibly in my view, did not respond to, act on or make public the comments that referred to me in that way. However, had they done so in a way that was to my disadvantage, there would seem to be nothing in Australian law that would have protected me against being discriminated against on the basis of my beliefs, though an argument might have been put on the basis of a section 116 of the Constitution and an argument might have been put that the Australian Government as a signatory to the ICCPR had an obligation to protect me under clause 18..

Given that protection of freedom of religion is the subject of the present enquiry, it would seem to be worth producing here an explanation about the right of a person with religious convictions to be involved in the development of public policy. This

¹⁹ A large part of this section is drawn from an article entitled *Public Reason and Bioethics* which has been accepted for publication in the journal *New Blackfriars*.

explanation reflects a view about the way a tolerant pluralist society should operate when it comes to allowing participation in public policy formation.

Central to Christian ethics is a concept of human dignity founded on the *imago Dei*, and informed by the life and teachings of Jesus Christ. The Church however has many voices: prophetic, academic/professional, humanistic and artistic²⁰. In the field of bioethics the proclamation of the Word of God and witness to the person and teachings of Christ are prophetic and essential, but not always the voice that a pluralist audience is prepared to hear. More importantly, out of respect for the differing beliefs of others, one would not attempt to speak prophetically in circumstances in which there was not a shared basis of belief.

Bioethics, as a pluralist system of regulation of biomedical research and practice, demands a voice other than the prophetic. For a Christian, upholding the dignity of the human person within Bioethics calls us to develop a language and reasoning that belongs to the pluralist rather than the religious world. This of course may be seen by some as a conflict with the vocation of a Christian. It also means buying into the debate represented by the present pope, Benedict XVI's comment as Cardinal Ratzinger, that "reason has a wax nose", by which he meant that the shape of reason is determined by theological convictions²¹. In his 1996 address to the Congregation of the Doctrine of the Faith, "Current Situation of Faith and Theology" Cardinal Ratzinger agrees with Karl Barth's rejection of philosophy as the foundation of faith independent of faith, but rejects Barth's claim that faith is a pure paradox that can only exist against reason and totally independent from it. He calls for a new dialogue between faith and philosophy. "Reason", he said, "will not be saved without the faith, but the faith without reason will not be human."²²

My own understanding of the role of philosophy reflects the late Pope John Paul II's comment:

"Every people has its own native and seminal wisdom which, as a true cultural treasure, tends to find voice and develop in forms which are genuinely philosophical. One example of this is the basic form of philosophical knowledge which is evident to this day in the postulates which inspire national and international legal systems in regulating the life of society."²³

The task of a national bioethics committee, such as the one on which I currently serve, is to seek to be a part of the project of developing and applying those values that can be truly considered a "cultural treasure". In that respect I hope to be giving expression to the concluding words to philosophers of Pope John Paul II in his letter "Faith and Reason":

"They should be open to the impelling questions which arise from the word of God and they should be strong enough to shape their thought and discussion in

²⁰ John W. O'Malley, *Four Cultures of the West* (London: Harvard University Press, 2004) 7

²¹ Tracey Rowland, *Ratzinger's Faith: The Theology of Pope Benedict XVI* OUP 2008, p. 5

²² Cardinal Joseph Ratzinger An address to the Congregation of the Doctrine of the Faith, "Current Situation of Faith and Theology" (1996) <http://www.ourladywarriors.org/dissent/ratzsitu596.htm> Accessed 18th June 2008

²³ Pope John Paul II *Fides et Ratio* (1998) n. 4

response to that challenge. Let them always strive for truth, alert to the good which truth contains. Then they will be able to formulate the genuine ethics which humanity needs so urgently at this particular time. The Church follows the work of philosophers with interest and appreciation; and they should rest assured of her respect for the rightful autonomy of their discipline. I would want especially to encourage believers working in the philosophical field to illumine the range of human activity by the exercise of a reason which grows more penetrating and assured because of the support it receives from faith.”

In that respect I do not see that there is a dichotomy between faith and reason, or between theology and philosophy. Philosophy would be foolish indeed if it willingly blinded itself to theology and to Scripture and resolved never to consider propositions that emerged from consideration of the nature of the Creator and the relationship between created and Creator. What is different about philosophy is that it resolves to test those propositions against reason and to seek justification, rather than accept them simply as a matter of faith. For a Christian, there is no difficulty in considering the teachings of Christ, and, in faith, believing them to be true, but, because true, able to withstand the examination of reason.

It would be mistaken to think that, because in a pluralist society we cannot expect that others share our faith, we must not introduce Christian notions, and if we do, they must be under some other guise. Such subterfuge is beneath dignity. It is better to go into a committee meeting or a Parliament known for one’s faith in Christ Jesus, but also for one’s willingness to listen to others and to explore concepts with a view to seeking truth that is broadly recognisable by others. In other words, one seeks, as a matter of mutual respect, common ground between one’s own unashamed and obviously Christian beliefs and the beliefs of others, and with a willingness to question and to explore together what is true and good.

In his earlier critique of the Vatican document *Gaudium et Spes*, Ratzinger asserts that “... it seemed to many people, especially from German speaking countries, that there was not a radical enough rejection of a doctrine of man divided into philosophy and theology. They were convinced that fundamentally the text was still based on a schematic representation of nature and the supernatural viewed far too much as merely juxtaposed. To their mind it took as its starting point the fiction that it is possible to construct a rational philosophical picture of man intelligible to all and on which all men of goodwill can agree, the actual Christian doctrines being added to this as a sort of crowning conclusion.”²⁴

He goes on to attribute this error to the Thomists²⁵, “It can hardly be disputed that as a consequence of the division between philosophy and theology established by the Thomists, a juxtaposition has gradually been established which no longer appears adequate. There is, and must be, a human reason *in* faith, yet conversely, every human

²⁴ Joseph Ratzinger “the Dignity of the Human Person” in Herbert Vorgrimler (ed) *Commentary on the Documents of Vatican II* Vol V (Burns & Oates: London 1969), pp. 115-163

²⁵ Those who follow in the philosophical tradition of St. Thomas Aquinas who is a middle ages philosopher/theologian who applied the writing of the Ancient Greek philosopher Aristotle to the task of natural theology.

reason is conditioned by historical standpoint so that reason pure and simple does not exist.”²⁶

It is worth noting in this respect Ratzinger’s emphasis on historical standpoint, and thus on culture and tradition, is also a basis for much of the philosopher Alasdair MacIntyre’s approach, and the latter has drawn criticism on the grounds of relativism for it.

My own experience in working within a pluralist environment towards an agreed policy on matters of public ethics is that each of us does bring our own culture and tradition and that is likely to include theological traditions. What is spoken about, however, is not theology as such, but rather the search for a set of agreed and basic values upon which a coherent policy can be formulated. The reasons why we each uphold a basic value is not so much discussed as accepted, and what then emerges is a position that is both determined by individual culture, but also which transcends individual culture, because it is held in common across cultures and has been subjected to scrutiny and the need for justification on its own propositional terms.

A philosopher thus has more to contribute to that discussion than a theologian, precisely because as philosophers we are interested in exploring why a teaching is good for mankind and justifying it in human terms. A Christian philosopher regards him or herself as informed by faith but willing to see philosophical propositions tested for their justification, believing that what God wants for us is good for us because he loves us.

In that respect, the response I would wish to make to the claim that reason will not be saved without faith is to claim that independent of faith, goodness is a property that is recognizable by those who are unfamiliar with the Scriptures. In public discussion in a context of participants who belong to a range of faiths and none, it is legitimate and worthwhile to adopt the role of mutually seeking to identify a common understanding of human goodness and what we call the Pauline principle with respect to not doing evil by acting against human goodness, in order to achieve the good. In other words faith is informative and not separate from our experience of the good, but the good also appears to be a property which remains recognisable by those of no apparent faith. Faiths are not to be excluded from that pursuit, for that would be both arrogant and bigoted, but the task is one of seeking to find that which is transcendent of individual faith, culture and tradition.

At the level of discussing virtue, St Thomas Aquinas accepted the division of virtues and saw the cardinal virtues (wisdom, justice, restraint and courage) as distinct from the religious virtues (faith, hope and love), holding that all virtues other than the religious or theological are in us by nature, according to aptitude and inchoation, but not according to perfection. The theological virtues, he claims, are from without.²⁷ By that he means that the cardinal virtues belong to reason alone and recognised simply by reflecting on our human experience, but the theological virtues do require a source

²⁶ Ibid.

²⁷ “Sic ergo patet quod virtutes in nobis sunt a natura secundum aptitudinem et inchoationem, non autem secundum perfectionem: prater virtutes theologicas, quae sunt totaliter ab extrinseco” S. Thomae Aquinatis *Summa Theologiae* (Marietti: Taurini/ Romae 1952) Prima Secundae Partis Q. 63, Articulus I

external to us, namely revelation of divine truth in the person and teaching of Christ for them to attain their deepest and fullest meaning.

From practical experience in consulting in ethics within the practice of psychiatry, I would claim that the cardinal virtues transcend tradition and culture simply because to completely lack any one of them would be a form of mental illness. One only has to consider for a moment what it would be like to be totally without wisdom and thus unable to identify goodness, or to be totally without courage and thus unable to venture out, or to be totally without justice and thus lack a sense of the needs of others, or totally without restraint and thus be unable to control one's passions or inclinations. The cardinal virtues are essential to living in community.

The religious virtues however presuppose a God, but they are not without philosophical justification independently of faith in the person of Christ who so illuminates them by his personal witness and teaching. They belong to all religious traditions and not just the Christian.

Persons who believe in a divinity are entitled to seek to understand human nature through theological sources, and they are entitled to offer the fruits of their researches to the wider community to be evaluated for merit and worth. I would argue from the basis of a Christian understanding that human beings are designed for communion and that true human happiness and human fulfilment only ever occurs as a result of gift of self, and that that understanding does provide a depth of meaning for marriage and human sexuality. In this respect I hold that John Paul II did not replace appeal to what is supposedly 'against nature', with a radically biblical doctrine of the spousal relationship (or nuptiality), as some have claimed²⁸, but rather he has insisted on understanding sexuality in terms of the communion of persons that is our ultimate vocation and which finds expression in this life in the gifts of marriage and, by analogy, committed celibacy.

In other words far from decrying the "against nature" arguments, Pope John Paul II has instead developed the notion of what is a human nature, and that part of that nature is the vocation toward forming a communion of persons. For a Christian the *imago Dei* is not of a single person but of a communion of three persons. The relationship of each to the other thus provides the goal and the model for human relationships.

The task for Christian philosophy is the task that the late Pope John Paul gave himself in his doctoral dissertation, *The Acting Person*, of understanding human nature in a vocationally relational way. This is far from rendering non-theological ethics redundant. It is important that these developments of an understanding of human nature are challenged and justified on philosophical terms. It is only by doing so, that the Scriptural understanding of the human person, which is the basis of the John Paul II's Wednesday audiences on *Theology of the Body*, for instance, can gain credibility through its internal coherence and consistency in philosophical terms.

When we are able to do that, we will then have a conceptual framework that can be used in the engagement with our society. The greatest distance between Christian moral

²⁸ See for instance, Fergus Kerr *Twentieth Century Catholic Theologians*(Blackwell: Oxford 2007) p. 179

understanding and our Western culture occurs at the level of understanding of the spousal relationship. There is an urgent need to try to bridge that gap with a philosophical analysis of human nature that gives substance and justification to giving oneself in love. We need a way of constructing a common ground with others.

Critical analysis and evaluation as I was taught it at as a Philosophy post-graduate was a process that one learned, by which the worth of a philosophical work could be judged by the number of distinctions made and defended. This approach has had its detractors. The philosopher Alasdair MacIntyre argues that contemporary philosophy has condemned itself to engaging in irresolvable or more precisely stagnating disputes by virtually making a virtue out of difference and of splintering of positions. (MacIntyre, 1988, p.3) He claims:

“Modern academic philosophy turns out by and large to provide means for a more accurate and informed definition of disagreement rather than for progress toward its resolution. Professors of philosophy who concern themselves with questions of justice and of practical rationality turn out to disagree with each other as sharply, as variously and, so it seems, as irremediably upon how such questions are to be answered as anyone else.”

In my own experience on ethics committees and shaping policy, the much more important matter is not the fine points of disagreement and difference, but the development of agreement and consensus, for it is upon the latter that policy actually develops. In my own teaching I have come to recognize that an important skill for Bioethics graduates to learn is how to be able to analyse and evaluate toward a resolution, not to achieve more difference.

An aspect I have noted about good graduate student essays is that they had picked up the need to consider a range of views, and to work with the different concepts within those differences, but their method often seemed to be little more than to work to a favoured conclusion by dismissing other views on the basis of identifying some or multiple errors in those positions. Bad student essays did not even get that far and tended to resemble sermons rather than analysis.

My thought on the good student essays is that they have learned a skill, if it can be called that, which will not be particularly useful in policy-making. Instead of seeking resolution, they have learned to identify difference and then to adopt a view, like supporting a football team, and to support that view by decrying other views through seeking to identify error. This is not an approach that is likely to be effective on an ethics committee, or in any other public policy forums, and would seem in fact to work against the idea of an ethics committee or of policy-making being a process by which advice can be developed that is persuasive and broadly acceptable. The skill that they acquired was more suited to tyrants and dictators rather than to a rational democracy.

The much more difficult skill that I think is not well taught is how to use that understanding of difference to work towards consensus. The reality of ethical discussion between people who have different higher order beliefs is that they develop neuralgia points at which their basic higher order beliefs or assumptions are challenged. The skill of seeking resolution is to find formulations of words that either avoid or are at least acceptable to the variety of higher order beliefs or assumptions. In that way one

can indeed reach a consensus that can be supported from a variety of points of view. Thus there is an active process of analysis that can yield a constructive outcome through the knowledge that that analysis brings. The problem that I referred to in the student essays is that they more or less stopped at identifying difference and error, rather than moving on to seek solutions that were constructive.

This might be seen as condoning relativism, a charge that has been levelled at Alasdair MacIntyre who also holds to respecting a person's culture and tradition. The counter that I would make to a similar charge is that, working on an ethics committee, the task is a very practical one of identifying goodness and goodness, and it is not the preserve of any one culture or tradition, but transcends differences between culture, tradition and religion.

In this I have adopted the view that goodness is indeed real and knowable. The alternative view, that goodness is neither real nor knowable, supports an approach to ethics and public policy that declares the subjectivity and relativity of goodness and that the latter is no more than a positive attitude or liking. For the latter range of subjectivist views, public policy seeks only to preserve individual choice. It seeks to avoid making judgements about what is good for human beings and instead treats autonomy as a moral trump. If the autonomy as moral trump approach dominated, then ethics guidelines would be little more than guidelines for providing information, obtaining consent and appointing representatives for those who lack the capacity. But that is not my experience on government committees and in pluralist bioethics. The function of an ethics committee is to make a decision about whether a proposal really is good for people and to avoid doing harm to individual participants. The real work of an ethics committee depends on identifying what is good for people and what is harmful.

In the task of developing ethical guidelines, it is interesting that pluralist bioethics has had to call on notions that approximate to the Christian concepts of dignity and the language of moral imperatives. A moral language has developed to express ideas such as intrinsic evil and the Pauline principle (never do evil in order to achieve good) , and, in Australia at least, there is an as yet unarticulated move away from both autonomy as a moral trump and utilitarian concepts, and towards a theory of the good. This is most clearly expressed in the various ethical guidelines issued by the National Health and Medical Research Council, for which I will give account.

The 1970 & 80's ideas of replacing Utilitarianism with Principlism²⁹, and the latter's emphasis on autonomy as a moral trump, has given way to ideas of professional integrity and a taxonomy of acts never to be undertaken. It also involves accepting a notion of virtue – the characteristics of a *good* researcher or a *good* clinician. Thus the trend is toward both being influenced by virtue ethics and adopting a thick notion of the human person and the good of the human person. The teleology that one finds in Christianity, based on seeking communion with God, is not part of a pluralist dialogue, but to some extent the dialogue is still pervaded by an implicit sense of the transcendent nature of humanity.

²⁹ See for instance the approach taken by Beauchamp T L and Childress J F in successive editions of *their Principles of Biomedical Ethics*, 5th edn. Oxford University Press, 2001, though the latter edition has tended to move away from autonomy as the dominant value toward a virtue approach.

The history of the dominant view in pluralist Bioethics over the past thirty years can in large part be traced through the changing editions of the seminal text of Thomas L. Beauchamp and James F. Childress *Principles of Biomedical Ethics*. Their effort has been to try to capture not the foundations of Bioethics, because there are many and varied approaches that people may take, but what they think is something of a consensus about the principles to be applied on the basis of the variety of approaches. In doing so they have moved from their early adoption of the Principlism of the Belmont Report³⁰, the so-called “Georgetown Mantra”, and an emphasis on autonomy as the dominant principle. As they shifted away from that dominance, they also developed a discomfort with discussing the principle of justice in exclusively utilitarian terms, and then, in the latest edition, they adopted a version of virtue ethics, (though lacking a metaphysics or an anthropology, both of which classically inform virtue ethics).

Like other approaches, Christianity, in its various forms, has a role to play in contributing to efforts of that nature to find, at a practical level, a degree of congruence in the application of principles. In such efforts there are obvious tensions in the way in which the principles are applied and often a degree of deliberately constructed ambiguity in order to preserve consensus. The important feature though is the willingness to seek agreement and to find solutions that are respectful of the different foundational approaches that people may have adopted in the context of their own culture and tradition.

This experience in pluralist bioethics regulation raises some pertinent practical questions about natural law reasoning and the internal debates within religion about moral epistemology and whether human goods and the moral law are knowable or deducible in a sufficiently rich way as to give rise to an adequate ethic not based on the Word of God

For me though it indicated that there is a role for people of religious belief and none in seeking to understand and to promote what is good for human beings. Importantly, a person of religious beliefs has no less a role in the formation of public policy than anyone else and, in the task of public policy formation, they are entitled to advance their ideas, whether based on religious belief or not, for consideration by others. Those who claim otherwise, I would argue, are both bigoted and undemocratic. Perhaps more importantly, by excluding religious culture they would not only disenfranchise many, they would also be excluding a rich source of ideas about human nature and living in community. They would also be abandoning our culture, history, tradition and experience.

This process of seeking agreement across different religious and cultural belief systems is not new or restricted to the NHMRC. It is exactly what was attempted in the development of the international human rights instruments. The Catholic philosopher Jacques Maritain addressed the same question when he asked: ‘How much agreement can we reach regarding practices even while remaining incurably divided regarding the

³⁰ *The Belmont Report, Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, April 18, 1979

underlying theory for such practices?"³¹ The answer to that question was given in a very practical way by the rich content of the international instruments to which Maritain was a significant contributor and guide, especially the *Universal Declaration on Human Rights* and the two covenants that were its expression in international law: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. They were documents that many different nations, and hence people of many different cultures and religious beliefs, were able to become signatories.

3.2 The NHMRC Experience³²

The statutory functions of the Australian Health Ethics Committee (AHEC), a principal committee of the National Health and Medical Research Council (NHMRC), include providing advice or national guidelines about ethical issues in human research and in health care. In fulfilling those tasks, the members of AHEC are conscious that there is often debate about ethics.

The committee notes that ethics is sometimes said to be merely a matter of individual preference or cultural convention and responds that although ethical judgments may indeed express personal preferences, and may be connected in complicated ways with cultural conventions, AHEC regards ethics as a form of rational inquiry that concerns how we should live and what we should do.³³

The Committee notes further that even the best way of reasoning about ethical issues is a matter of debate. For example, some people emphasise the moral undesirability of certain acts (such as deliberate deception) in and of themselves and the moral desirability of certain standards of conduct (such as integrity in one's relationships with others) in and of themselves. Others emphasise the moral significance of anticipating the likely consequences of proposed acts (for example, the likely consequences for a woman who gestates a child for another woman).³⁴

Similarly, some people emphasise the duties we owe to each other (for example, the duty to respect another's personal autonomy). Others emphasise the moral claims we are entitled to make against each other (for example, a child's moral entitlement to knowledge of his or her genetic parents).

The Committee holds that all of these kinds of considerations matter, even if there can be reasonable disagreement among people about how they are to be balanced. In other words it does not seek to exclude contributions from the various views, but seeks answers to ethical questions based on considering responses from all perspectives. To some extent, that approach is required by the NHMRC Act by which AHEC is established.³⁵

³¹ Novak, M. (1999) "Human dignity, human rights" *First Things*, 97(November), 39-42).

³² I sought and obtained approval from the Chairman of the Australian Health Ethics Committee (AHEC) to use this account of the processes of the NHMRC and the AHEC.

³³ NHMRC *National Statement on Ethical Conduct in Human Research* Australian Government Canberra 2007 pp. 11-13

³⁴ Ibid.

³⁵ Ibid.

The NHMRC Act stipulates the diverse composition of AHEC and the necessity for public consultation in the development of guidelines, and the High Court, no less, has determined, in a case involving the tobacco industry, that not only must there be public consultation but that the NHMRC must give due regard to what is said in the submissions. AHEC therefore understands that it is the will of the Parliament that AHEC seeks to prepare advice and guidelines that reflect and to some extent define the values of the Australian community.

Accordingly, in developing ethical guidelines it is necessary for AHEC to ask what are the values at stake and what function do those values have in establishing an ethical basis for practice in research, in clinical practice and in the adoption of public health strategies.

A likely answer may be that we wish to preserve what Australians consider essential for the kind of life they (and their children and grand-children perhaps) wish to live as members of a community. Those values should be reflected in the way that medical research and practice develops and in the formulation and implementation of public health strategies.

The values and principles of conduct in each context differ because the relationships between people and the responsibilities differ. What is expected of a medical clinician may be different from what is expected of a medical researcher and different again from what may be expected of a manufacturer of therapeutic products or of a government department or agency implementing public health strategies.

3.3 AHEC's Values in Research

The *National Statement on Ethical Conduct in Human Research* (NHMRC 2007) describes the relationship between researchers and research participants as the ground on which human research is conducted. The Statement identifies the values of respect for human beings, research merit and integrity, justice, and beneficence as helping to shape that relationship as one of trust, mutual responsibility and ethical equality.

The *Statement* also acknowledges that while these values have a long history, there are other values that could inform human research such as altruism, contributing to societal or community goals, and respect for cultural diversity, along with the values that inform *Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research* (NHMRC 2003): spirit and integrity, reciprocity, respect, equality, survival and protection, and responsibility

It is worth noting that the major value in the *National Statement* is respect for human beings which is a recognition of each individual's equal intrinsic worth or value. According to AHEC, respect also requires having due regard for the welfare, beliefs, perceptions, customs and cultural heritage, both individual and collective, of those involved in research. From that point of view, it is most interesting that a notion of respect for human beings and their intrinsic value is taken as the priority in developing ethical guidelines. This concept is far removed from the statements of autonomy and individualism that characterize much of the popular pluralist debate.

AHEC goes on to claim that researchers and their institutions should respect the privacy, confidentiality and cultural sensitivities of the participants and, where relevant, of their communities. Any specific agreements made with the participants or the community should be fulfilled.

The committee also doffs its cap to autonomy in asserting that respect for human beings involves giving due scope, throughout the research process, to the capacity of human beings to make their own decisions. Where participants are unable to make their own decisions or have diminished capacity to do so, respect for them involves empowering them where possible and providing for their protection as necessary. Respect for autonomy has its place, but for this AHEC it does not trump respect for the equal individual worth of each member of the human family and judgements about what is good for them.

Whether that remains the case in the future will obviously depend upon the nature of future appointments to AHEC, which is in the hands of the government of the day. However the statutory requirements for composition and for public consultation do presuppose an approach to ethics which is inclusive of, or at least open to, the range of cultures and traditions to be found in the Australian society. AHEC should not ever become captive of a particular view and especially not become captive of bigoted exclusive secularism. If it did, it would no longer meet the statutory requirements. It is worth noting as a matter of historical record that the present statutory representative nature of AHEC and the requirements in relation to public consultation arose out of reaction to previous incarnations of the national research ethics body which did become captives of bigoted and aggressive secularism.

3.4 AHEC's Values in Organ and Tissue Transplantation

In Australia, the donation of organs and tissues after death for transplantation relies on the values of altruism and solidarity that have formed the bases of a system of obtaining and using organs and tissue for transplantation. AHEC has recognized that the medical benefits of this approach to organ and tissue donation has provided a strong motivation for such a system and it is now part of Australia's social capital.

The NHMRC³⁶ has held that organs and tissues for transplantation after death should be obtained in ways that:

- demonstrate respect for all aspects of human dignity, including the worth, welfare, rights, beliefs, perceptions, customs and cultural heritage of all involved;
- respect the wishes, where known, of the deceased;
- give precedence to the needs of the potential donor and the family over the interests of organ procurement;
- as far as possible, protect recipients from harm; and

³⁶ *Organ and Tissue Donation by Living Donors: Guidelines for Ethical Practice for health Professionals*, Endorsed 15 March, 2007; *Organ and Tissue Donation after Death, for Transplantation: Guidelines for Ethical Practice by health Professionals* Endorsed 15 March, 2007

- recognise the needs of all those directly involved, including the donor, recipient, families, carers, friends and health professionals.

In the context of a system based on altruism and solidarity, it has been possible to have a process of allocation according to just and transparent processes.

The ethical issues in the donation of living organ and tissue donation principally involve concern for the donors: the autonomy and welfare of the donor takes precedence over the needs of the recipient to receive an organ or tissue. The systems in Australia, whether for the blood service, the bone marrow service, the eye bank or solid organ transplantation, have been based on altruism and solidarity and respect for human dignity, including the worth of the person and respect for their wishes.

3.5 AHEC and Care of People Who are Severely Brain Damaged

In 2008, the NHMRC released new ethical guidelines for the care of people in post-coma unresponsiveness (Vegetative State) or a minimally responsive state.³⁷ It is worth noting that the guidelines in reference to the vexed issue of withdrawing nutrition and hydration state:

“A person in PCU or MRS may be affected by other conditions, or his or her condition may deteriorate. Complications may also develop in relation to delivering some elements of maintenance care. For example, tube feeding may cause aspiration and recurrent respiratory infection; or a percutaneous endoscopic gastrostomy tube (PEG) may cause excoriation or gut inflammation. People who are minimally responsive may show signs of discomfort

“The presumption ought to be in favour of continuing maintenance care.

However, such complications may lead to some aspects of maintenance care being considered overly burdensome and they may be withdrawn after careful consultation and informing those involved about the reasons for withdrawal. The person’s previously expressed wishes are relevant to a judgement of the burdensomeness of a treatment, and should be considered.

“As with any decisions about the treatment of highly dependent patients, **decisions about withholding or withdrawing treatment and the continuing provision of artificial nutrition and hydration should be informed by a consideration of the person’s best interests including what, if anything, is known about their wishes; and it should reflect the best contemporary standards of care for people who are highly dependent.** The question is never whether the patient’s life is worthwhile, but whether a treatment is worthwhile.”

Like all of the recent AHEC documents, these guidelines begin with a statement of ethical principles. In the document that statement contains the following.

“The provision of care is an expression of our fundamental humanity and connectedness, and our common sense of obligation to promote good and do no harm. Because of their total dependence on others, people in PCU or MRS are highly

³⁷ National Health and Medical Research Council *Ethical Guidelines for the Care of People in Post Coma Unresponsiveness (Vegetative State) or a Minimally Responsive State*, Australian Government, Canberra, 2008 http://www.nhmrc.gov.au/publications/synopses/e81_82syn.htm

vulnerable and, as such, are owed a particular duty of care to promote their interests and protect them from exploitation, abuse and neglect. That duty is likely to extend over a long period of time. Decisions about the care of people in PCU or MRS should:

- (a) demonstrate respect for all aspects of human dignity, including the worth, welfare, rights, beliefs, perceptions, customs and cultural heritage of all involved;
- (b) respect, where these are known, the values, beliefs and previous wishes of the person in PCU or MRS;
- (c) recognise the needs of all those directly involved – including people in PCU or MRS, families, friends, health professionals, and other carers – to be:
 - (i) involved in decisions that affect them;
 - (ii) given accurate and timely information;
 - (iii) realistically educated about the person’s situation, care and prospect; and
 - (iv) assisted, when necessary, to deal with their own responses in their particular situations;
- (d) give due regard to justice, particularly in relation to the responsible use of resources. This includes ensuring so far as possible that there is:
 - (i) fair distribution of the benefits of or access to goods and services;
 - (ii) equality of opportunity;
 - (iii) no unfair burden on any members of the community or on particular groups; and
 - (iv) no abuse, neglect, exploitation or discrimination;
- (e) respect the basic rights of people in PCU or MRS, including:
 - (i) the right of individuals to be treated with respect;
 - (ii) the right of individuals to life, liberty, and security;
 - (iii) the right of individuals to have their religious and cultural identity respected;
 - (iv) the right of competent individuals to self-determination;
 - (v) the right to a standard of care related to individual needs;
 - (vi) the right of individuals to privacy and confidentiality;
 - (vii) the recognition that human beings are social beings with social needs;
- (f) give due regard to the rights and duties of those who care for people in PCU and MRS, and the duties of the community both to people in PCU or MRS, and to their carers (family, professional and other);
- (g) respect the goals and the limits of medical treatment.”

3.6 AHEC’s Moral Language

One of the most interesting experiences of developing national guidelines for ethical conduct in medical practice and research is that AHEC has had to develop a policy

about moral language. In the vagaries of committee process, a policy decision was made to use the words “ought” and “must”. The latter was to express exceptionless norms and the former a normative recommendation to which individual ethics committees might seek to justify permitting exceptions.

By accepting that there were occasions in which the word “must” was appropriate and thus expressing an exceptionless norm, AHEC gave effect to the idea that good may not be achieved by acts that destroy that which is good or which cause harm to individual members of the human family. In effect AHEC thus adopted a secular version of the Pauline principle or at least a pluralist principle that seemed to express the same idea.

This experience of seeing a morality expressed in a pluralist environment has been a most interesting one. The claim I make is that this is good activity, activity that seeks to identify and protect human beings, and does so from a viewpoint that listens to the different faiths, cultures and traditions within our society and seeks to reflect the Committee’s perceptions for what needs to be protected in the conduct of human research and health care clinical practices in the light of values that are derived from the society, but transcendent of the cultural and traditional differences. One of the most valuable experiences I have had in that respect was the development through consultation of guidelines for conducting research with Aboriginal and Torres Strait Islander people. The set of core values that were described seemed to contain a depth of meaning and express a greater sense of community than had otherwise been developed in NHMRC documents.

Most importantly, as I have described it, the NHMRC process does not exclude views, but in fact is required by statute law to be inclusive in its membership and responsive to public consultation in its processes. It is therefore something of a model for the formation of public policy in tolerant, inclusive, pluralist Australian society.

The Australian society of which I am proud to be a part is not a society that rejects the contribution of the religious or the non-religious, but welcomes all contributions and is confident enough in its processes to be open to suggestions from every tradition and culture, and prepared to evaluate each suggestion for its worth and merit in the shared task of pursuing the common good, but doing so in a way that is respectful of the worth and dignity of every member of the human family.

Crucial to the notion of a democracy is not only government *by* the people, but also *for* the people. That a decision reflects the majority view does not in itself make the decision democratic. Majorities can make undemocratic decisions. A majority decision that failed to respect a minority or which failed to respect and protect each individual member of the human family would not be a decision *for* the people and hence would be undemocratic.

4. Secularism and Protecting Religious Freedom

In section two, I discussed a bigoted form of secularism that has emerged as a form of belief that is intolerant of religious viewpoints and seeks to exclude them from the formation of public policy. In section three I have discussed a different form of secularism which is genuinely pluralist in that it acknowledges the place of the range of different belief systems, cultures and traditions in the task of developing public policy,

and my own experience of that form of secularism in the practical development of public policy.

In contemporary Australia society, the bigoted version of secularism is a threat to a tolerant, democratic society. Because that is so, it has become obvious that the freedom of thought, conscience and religion that we had been able to take for granted in Australia cannot now be taken for granted. Important in this new context, is the reality that Australian law does not protect freedom of thought, conscience and religion. The discussion of the possibility for a law in relation to religious freedom is thus taking place against a background in which the mood of aggressive secularism is not to protect religious freedom, but rather to curtail it.

It is therefore important to be clear about what kind of society we wish Australia to be. It is important also to acknowledge that both religious fundamentalists and aggressive secularists are opposed to Australia being a tolerant and democratic society in which everyone has a place at the table of public reason.

In a recent address to an Oxford audience, Cardinal George Pell discussed the emergence of pluralist intolerance and the trend toward the law being used to give expression to that intolerance. In his address he gave many contemporary examples in which the law is being used to oppress religion in Western society. Examples that he gave included:

- The recent Victorian *Abortion Law Reform Act 2008* which overrides the right to freedom of thought, conscience and religion by requiring doctors to either provide or at least refer for abortion, and nurses to provide abortion at a doctor's request;
- The likelihood that President Obama will keep his commitment to sign into law a proposed "Freedom of Choice Act", which will sweep away any restrictions on abortion in state laws and which will also remove any protections in legislation for doctors, nurses, and hospitals with moral objections to abortion;
- The legalisation of same sex marriage in Canada which does not allow civil celebrants the right to decline to bless such marriages;
- Anti-discrimination laws which raise serious freedom of religion issues for churches in the areas of relationship counselling, sex and relationship education in secondary schools, the hire of parish, school and church facilities, and accommodation arrangements in emergency housing, retreat, conference and aged care centres;
- Religious vilification and hate crime legislation which created the circumstances in which in separate cases in Canada last year, human rights tribunals brought charges of hate crime against the publisher Ezra Levant (for republishing the cartoons of Muhammad which were first printed in the Danish newspaper *Jyflands-Posten* in 2005), and the weekly magazine *Macleans* (for publishing an excerpt from Mark Steyn's 2006 book *America Alone* under the title "The Future belongs to Islam"). In 2006 Italian journalist Oriana Fallaci was charged with vilifying Islam in her book *The Force of Reason*, and in 2004 two Australian evangelical pastors were brought before a tribunal in the Australian state of Victoria for critical remarks about Islam which were alleged to be in breach of Victoria's "religious tolerance" legislation.
- "Contraceptive mandate" laws, passed in eighteen states of the US. usually with names such as The Women's Contraceptive Equity Act or The Women's Health

and Wellness Act, which require employer health insurance plans to cover the costs of contraceptives on the basis that failure to do so constitutes sex discrimination. Catholic health insurance usually did not cover these costs.

The Cardinal writes:

“Modern liberalism has strong totalitarian tendencies. Institutions and associations, it implies, exist only with the permission of the state and to exist lawfully, they must abide by the dictates or norms of the state. Modern liberalism is remote indeed from traditional liberalism, which sees the individual and the family and the association as prior to the state, with the latter existing only to fulfil functions that the former require but which are beyond their means to provide. Traditional liberalism understood the state to exist to assist (provide *subsidium*) to the association; the association does not exist to further the function of the state. All this is clearly articulated in the *Universal Declaration of Human Rights* (1948) which provides, for example, that parents have "a prior right to choose the kind of education that shall be given to their children"(Article 26(3)); and in the *International Covenant on Economic and Social and Cultural Rights* (1966) which provides that the state is to respect the liberty of parents ""to ensure the religious and moral education of their children in conformity with their own convictions" (Article 13(3)).³⁸

The emergence of secularism as a form of belief that has the same capacity for bigotry as any other belief system is important. Secular intolerance should be seen in the same way as religious intolerance and religious fundamentalism. It has the same capacity for harm by seeking to exclude others. The views of bigoted secularism need to be seen for what they are, especially the anti-democratic nature of a viewpoint seeking to dominate the formation of public policy and development of law on the basis that it alone has the exclusive right to be heard in the public domain. Secularism is not a neutral view. It is a view based on beliefs that exclude belief in a Deity. As such it can claim a right to be heard in a democracy, but no more a right than any other view. It also merits criticism for its bigotry.

The inclusion of the range of views within pluralism is particularly important in relation to the importance of developing inter-faith harmony and co-operation for the social and economic well-being of Australia and to safeguarding it from extremism of all kinds. The latter goal is one of the major recommendations of the Report *Religion, Cultural Diversity and Safeguarding Australia*³⁹ prepared on behalf of the Department of Immigration and Multicultural and Indigenous Affairs and the Australian Multicultural Foundation in association with the World Conference of Religions for Peace, RMIT University and Monash University.

If secularist views, as opposed to religious views, are able to lay claim to an exclusive right to be heard, then those who have religious beliefs have reason to be fearful. The Australian Human Rights Commission, therefore, ought not to be surprised that the very

³⁸Cardinal George Pell “Varieties of Intolerance: Religious and Secular” Inaugural Hilary Term Lecture, Oxford University Newman Society, The Divinity School, Oxford University, 9 March 2009 <http://www.scribd.com/doc/13065181/Varieties-of-Intolerance-Religious-and-Secular-George-Cardinal-Pell> Accessed 24/9/09

³⁹http://amf.net.au/library/file/Religion_Cultural_Diversity_Main_Report.pdf Accessed 24/9/09

people whom a Right to Religious Freedom Bill might be thought to protect, namely people who are religious, and those who represent them, might not welcome such a proposal with open arms.

Scepticism about the goals of the Australian Human Rights Commission *Freedom of Religion and Belief in the 21st Century* project have been expressed because the project takes place against a background of aggressive and very bigoted secularism. The expression of this concern by the Victorian Ad Hoc Interfaith Committee typifies religious concern about the merits of the project. The Committee submits:

“The question, Q 5.8, page 8 of the Discussion Paper, “is there a role for religious voices alongside others in the policy debates of the nation?”, is a strange question given ICCPR, Article 25.

“The presence of this question as well as questions Qs 2.3 and 2.4, page 9 when coupled with Mr Calma’s reputed comments⁴⁰ made at the launch of FRB Project,

“Does religious belief influence policies being determined in any country, particularly in our country?” he said.

Mr Calma says there is a balance to be struck between the freedom to practice a religion and not pushing those beliefs on the rest of society.”

brings the question to our minds as to whether the FRB Project is in fact predicated on the assumption that secularism is the proper default position for public discourse and that the project is not about freedom *of* religion, but rather freedom *from* religion. We are well aware that many secularists hold this opinion. It would be particularly unfortunate and certainly would undermine the credibility of the FRB Review if this was the case for this project.”⁴¹

An important element of the project should be to recognise the legitimate place of those who give expression to religious beliefs in the development of public policy. No-one in a democracy should be made to feel that public policy belongs to any particular belief system, other than belief in the nature of democracy to serve every member of the community and to represent every member of the community. It is an important feature of political victory speeches in Australia that the leader of the victorious party claims to serve not just those who elected them, but every member of the community. Protecting the openness and fairness of Australian society means not allowing any particular group to lay claim to an exclusive role in the formation of public policy and law.

The development of a law to protect religious freedom needs to have as its premise the equality before such a law of each person, no matter the beliefs that he or she may hold. It is his or her right to express those beliefs in the public forum as a contribution to public discussion, and no form of belief is to be given a superior role in the process of developing public policy.

⁴⁰ ABC Radio (<http://www.abc.net.au/news/stories/2008/09/17/2366511.htm?section=justin>) report of the launch of the FRB project.

⁴¹ Submission 1687 from the Victorian Ad Hoc Interfaith Committee to the Australian Human Rights Commission *Freedom of Religion and Belief in the 21st Century* Project http://www.hreoc.gov.au/frb/frb_submissions.html (Note that the author is a joint chairperson of the Ad Hoc Interfaith Committee and a signatory to submission 1687).

Given that religious belief is the subject of a law to protect religious freedom, it is important also that each belief system be permitted to define its own beliefs and practices and their priority within that belief system. That would seem to be part of what is meant by religious freedom.

The tension that is likely to arise in the development of a religious freedom law is the potential for conflict between religious beliefs and practices within religious institutions and their agencies, on the one hand, and, on the other, the norms of conduct adopted by the wider society. This is most evident, for instance, in the tension over applying principles of non-discrimination, so appropriate in the conduct of wider society, to a religious institution which does seek to give witness to particular beliefs and thus seeks to allocate educative or leadership roles to those who give practical expression to those beliefs, including moral beliefs about lifestyle, or which does limit roles in ministry on the basis of beliefs about gender.

The issue in those circumstances is whether beliefs and practices within the institution or its agency may be overridden by norms of conduct that are proper to the wider society. There would seem to be a difference between making and implementing policy and law for wider society and applying those policies and laws to the internal conduct of religion. Many of the fears expressed about the development of a law to protect religious freedom are based on the possibility that the law will be used to override religious beliefs and practices.

The need is for distinctions to be made between harmful practices which might be carried out in the name of religious belief or culture, such as genital mutilation, for instance, (though there is little evidence that that practice is based on religious belief but that it is more a cultural tradition), and practices that do not cause harm, such as those based on beliefs such as beliefs about the role of a minister of religion, in some religions, that limit the role according to gender, or the practice of employing people in educative or leadership roles on the basis of their giving practical witness to the beliefs and practices of the religion. Those seeking to develop a law to protect religious freedom will need to articulate some distinctions between what might properly be regarded as being defined by religious belief and beyond the scope of the law to determine, and those matters in which the law overrides religious belief and practice in order to protect other important rights, such as the right to bodily integrity or the right to freedom of association, for instance.

A matter that has emerged as a tension in this respect is the conflict between freedom of thought, conscience and religion on the one hand and legislation which requires health professionals to provide services that may be contrary to their conscientiously held moral beliefs. Those framing legislation to protect religious freedom will need to make a decision about the effect of the law with respect to conscientious objection, whether it does or does not protect it.