CHRISTIAN SOCIAL THINKING FOR AUSTRALIA: MAKING A DIFFERENCE?

Key challenges & responsibilities of the churches in the current social & cultural context

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1. The challenge

I am honoured to accept the invitation from the Yarra Institute for Religion & Social Policy to deliver the keynote address of this conference on Christian social thinking. You have gathered to ask the hopefully rhetorical and self-evident question whether you are making a difference. Fr Bruce Duncan, Director of the Institute, has asked me to address 'the challenges and responsibilities of the churches in the current social, ecumenical and cultural context, especially about engaging positively in helping promote human wellbeing in Australia and beyond'. Tomorrow, seven representatives of various Christian denominations will respond to my remarks in the light of their social traditions, identifying what is specific to them, and how their traditions could best contribute to a fair and inclusive society. I am delighted to be back here on the College Crescent at Melbourne University, having received my very ecumenical theological training in these surrounds at the United Faculty of Theology. I will of course speak largely from my own experience and tradition which is Catholic and Jesuit. I have one major reservation about undertaking this task. My training is in law; I know little about economics. Sadly, I think the Christian churches are all but absent from the economic debate other than making the occasional, predictable utterance about ensuring that no one is left worse off as the result of new policy measures.

One of my ongoing formation communities is my extended family. I am blessed with 20 living nephews and nieces, and 8 of the next generation. My oldest grandnephew is Liam, aged 6. His mother, one of my nieces, wrote recently with news of Liam's latest school assignment at the local convent school. He was asked to use a computer to write the instructions he would give to an intending passenger who had never been on a train before. Liam just loves trains so the mechanical instructions were unsurprisingly very detailed. What did surprise me, and his mother, were the last two points: "After you've got home, tell yourself if you liked the journey; and, if you liked the journey, ring me. You might like trains as much as me." Reflection on experience and sharing the reflection on experience in community are constitutive for those of us who find that Christian social is continuing to shape our mission. Hopefully this evening and tomorrow, we will have plenty of time from the strength of our own distinctive traditions to reflect on our experiences of engagement in the public square and to share those reflections respectfully.

Ahead of me is a generation of Australian Jesuits who dedicated the prime of their lives with chalk dust, teaching schoolboys to be generous and not to count the cost, to fight and not to heed the wounds, to toil and not to seek for rest, to labour and not to ask reward save that of knowing that they do the Lord's holy will. In an age when religious faith and observance are fragile, these Jesuits have justifiably taken pride in alumni who have persevered in faith, hope and love. They have also taken delight in those alumni who have dedicated themselves to lives of service in the Church and in the professions and in providing assistance to the poor and marginalised. For the moment that generation of Jesuit teachers enjoys the fruits of their

educational labours, seeing Jesuit alumni on the national stage of public service as prime minister, chief justice, leader of the opposition, treasurer, minister for education and minister for agriculture. But there is no cause for triumphalism. I remember when there was a huandful of Jesuit alumni in John Howard's first ministry. I told my fellow Jesuits that the Aborigines and refugees amongst whom I worked regarded the Howard government as the toughest with which they had ever had to deal. I did not think we Jesuits could simply invoke the Evelyn Waugh defence that we did not know how much tougher the government would have been without those Jesuit alumni at the table. Training in Christian social teaching does not necessarily displace class interest, national interest or personal preference. Our challenge always is to assist society's decision makers to form their consciences, inform their consciences and to those consciences be true, including the discharge of all appropriate obligations of political life including attention to the electorate's wishes, party policy, and the national interest.

2. Our context : a contemporary Catholic perspective

At my regular parish mass in Canberra on the Fifth Sunday of Lent just after the election of our new pope, I recall greeting the congregation with these words: "Good evening. My name is Frank and I am a Jesuit. I've had a good week. I hope you have too." I have been overwhelmed by the positive response by all sorts of people to the election of the first Jesuit pope. I have happily received the congratulations without quite knowing what to do with them, nor what I did to deserve them! It's still early days in his pontificate, but I think he has opened up a vast new panacea and not just for Catholics. Francis is theologically orthodox, politically conservative, comfortable in his own skin, infectiously pastoral, and truly committed to the poor. Of late, most thinking Catholics engaged in the world have wondered how you could possibly be theologically orthodox and infectiously pastoral at the one time, how you could be politically conservative and still have a commitment to the poor, how you could be comfortable in your own skin - at ease in Church and in the public square, equally comfortable and uncomfortable in conversation with fawning devotees and hostile critics. Think only of Francis's remark during the press conference on the plane on the way back from World Youth Day: "If a person is gay and seeks the Lord and has good will, who am I to judge him?" Gone are the days of rainbow sashes outside Cathedrals and threats of communion bans.

As Francis says in the lengthy interview he did for the Jesuit journal *La Civilta Cattolica* in September 2013: "We need to proclaim the Gospel on every street corner, preaching the good news of the kingdom and healing, even with our preaching, every kind of disease and wound. In Buenos Aires I used to receive letters from homosexual persons who are 'socially wounded' because they tell me that they feel like the church has always condemned them." In that interview he recalls:

A person once asked me, in a provocative manner, if I approved of homosexuality. I replied with another question: 'Tell me: when God looks at a gay person, does he endorse the existence of this person with love, or reject and condemn this person?' We must always consider the person. Here we enter into the mystery of the human being. In life, God accompanies persons, and we must accompany them, starting from their situation. It is necessary to accompany them with mercy. When that happens, the Holy Spirit inspires the priest to say the right thing.

Here is a pope who is not just about creating wiggle room or watering down the teachings of the Church. No, he wants to admit honestly to the world that we hold in tension definitive teachings and pastoral yearnings – held together coherently only by mercy and forgiveness.

He explains:

We cannot insist only on issues related to abortion, gay marriage and the use of contraceptive methods. This is not possible. I have not spoken much about these things, and I was reprimanded for that. But when we speak about these issues, we have to talk about them in a context. The teaching of the church, for that matter, is clear and I am a son of the church, but it is not necessary to talk about these issues all the time. The dogmatic and moral teachings of the church are not all equivalent. The church's pastoral ministry cannot be obsessed with the transmission of a disjointed multitude of doctrines to be imposed insistently. Proclamation in a missionary style focuses on the essentials, on the necessary things: this is also what fascinates and attracts more, what makes the heart burn, as it did for the disciples at Emmaus. We have to find a new balance; otherwise even the moral edifice of the church is likely to fall like a house of cards, losing the freshness and fragrance of the Gospel. The proposal of the Gospel must be more simple, profound, radiant. It is from this proposition that the moral consequences then flow.

If we are honest with ourselves, many of us Catholics have wondered how we can maintain our Christian faith and our commitment at this time in the Catholic Church in the wake of the sexual abuse crisis and the many judgmental utterances about sexuality and reproduction – the Church that has spoken longest and loudest about sex in all its modalities seems to be one of the social institutions most needing to get its own house in order in relation to trust, fidelity, love, respect and human dignity. Revelations out of Melbourne and Newcastle and the pending national royal commission hearings leave us with heavy hearts especially about some of our local church leadership before 1996 but we do have a spring in our step that this new Pope, together with rigorous, independent legal processes (even in the face of much media pre-judgment) and local church commitments to transparency and solicitous care of victims, including the establishment of the Truth Justice and Healing Council, provide us with the structures and leadership necessary for "cooperation, openness, full disclosure and justice for victims and survivors". The chief Christian paradox is that we are lowly sinners who dare to profess the highest ideals, and that sometimes we cannot do it on our own – we need the help of our critics and the State. Our greatest possibilities are born of the promise of forgiveness and redemption, the hope of new life emerging from suffering and even death. Out of our past failings and our present shame can come future promise and hope.

Let's be in no doubt that the Australian Catholic Church needed help from the State and from civil society so that we might get our house in order in dealing with child abuse which had been occurring at a most unacceptable rate and which had been addressed in too incremental a way. In his essay *A Catholic Modernity?* Charles Taylor suggests:

In modern, secularist culture there are mingled together both the authentic developments of the Gospel, of an incarnational mode of life, and also a closing off to God that negates the Gospel. The notion is that modern culture, in breaking with the structures and beliefs of Christendom, also carried certain facets of Christian life further than they were ever taken or could have been taken within Christendom. In relation to the earlier forms of Christian culture, we have to face the humbling realisation that the breakout was a necessary condition of the development.

Sometimes it is the state or civil society which provides a corrective or a further spur to the Church to be true to its finest ideals.

The royal commission established by the Gillard government is a very cumbersome device for dealing with the matter within the Australian federation. The commission is going to need a new generation of political patrons even before it begins its public hearings. Its remit is impossibly broad. Like the Royal Commission into Aboriginal Deaths in Custody it will pursue many tracks of academic research but the real test will be its capacity to provide satisfaction to victims and the reassurance to the community that institutional responses have been improved as best they might.

3. Professing religious faith in a secular domain & owning our history

Something crystallised for me at an appearance in March this year at the Opera House with the British philosopher A C Grayling, author of *The God Argument*, and Sean Faircloth, a US director of one of the Dawkins Institutes passionately committed to atheism. We were there to discuss their certainty about the absurdity of religious faith. Mr Faircloth raised what has already become a hoary old chestnut, the failure of Pope Francis when provincial of the Jesuits in Argentina during the Dirty Wars to adequately defend his fellow Jesuits who were detained and tortured by unscrupulous soldiers. Being a Jesuit, I thought I was peculiarly well situated to respond. I confess to having got a little carried away. I exclaimed: Yes, how much better it would have been if there had been just one secular, humanist, atheist philosopher who had stood up in the city square in Buenos Aires and shouted, "Stop it!" The military junta would have collectively come to their senses, stopped it, and Argentinians would have lived happily ever after. The luxury for such philosophers is that they never have to get their hands dirty and they think that religious people who do are hypocrites unless of course they take the course of martyrdom. It's only as Church that I think we can hold together ideals and reality, commitment and forgiveness.

As Christians, we can bring God's blessings to all in our world, even those who have no time for our Churches and not much interest in our Lord. Remember how Pope Francis ended his address to the journalists in Rome with a blessing with a difference. He said:

I told you I was cordially imparting my blessing. Since many of you are not members of the Catholic Church, and others are not believers, I cordially give this blessing silently, to each of you, respecting the conscience of each, but in the knowledge that each of you is a child of God. May God bless you!

Now that's what I call a real blessing for journalists – and not a word of Vaticanese. Respect for the conscience of every person, regardless of their religious beliefs; silence in the face of difference; affirmation of the dignity and blessedness of every person; offering, not coercing; suggesting, not dictating; leaving room for gracious acceptance. These are all good pointers for us Christians helping promote human wellbeing, holding the treasure of Christian tradition, authority and ritual in trust for all the people of God, including children and grandchildren, as we discern how best to make a home for God in our lives and in our world, assured that the Spirit of God has made her home with us.

Listeners will be aware that Paul Keating in 1998 labelled me "the meddling priest". It was not intended as a blessing. Keating had done a fabulous job delivering the 1993 *Native Title Act*,

parliament's response to the uncertainties and possibilities opened up by the High Court's *Mabo* decision. Three years later, Labor was out of office and the High Court expanded some of the uncertainties and possibilities of native title in the *Wik* decision. The Howard government legislated its response to Keating's original Act and the High Court's more recent decision in 1998. It was a poisonous political cocktail – a 4-3 decision of the High Court being considered by an unsympathetic government and a Senate where the Catholic Tasmanian Brian Harradine had the balance of power. Keating was most displeased with Howard's tinkering with his original legislation. He was also displeased with people like Noel Pearson and me who had publicly praised Harradine for improving significantly on Howard's original position.

Keating in his 2011 Lowitja O'Donoghue Oration said that the Native Title amendment law of 1998 "arose from the Coalition Government's so-called Ten Point Plan, a plan facilitated in the Senate with the support of Senator Brian Harradine under the advice of the Jesuit priest, Frank Brennan." He then said: [1]

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

This was reminiscent of Ben Chifley's remark about Bob Santamaria and the Groupers: "one of the most dangerous individuals you could have in public life was a religious fanatic."[2] He thought "the religious fanatic is worse than the political fanatic".[3] Keating was on to something when he spoke of indigenous interests and notions of justice and equity. But I don't think personal notions of justice and equity count for much in the public square of a pluralist democracy like Australia unless those notions can be rendered comprehensible and adoptable by other citizens who do not share your religious or philosophical world view. I was privileged to visit Brian Harradine at home in Hobart two weeks ago. He was assuredly a very canny politician. But I have never known him to claim any sort of divine guidance when making a political decision. I definitely make no such claim.

4. Religious Freedom under the Rule of Law

Carolyn Evans, Dean of the Melbourne Law School concluded her definitive *Freedom of Religion Under the European Convention on Human Rights* with this observation: "Religion and belief have been important sources of inspiration for moral and political development, artistic and literary endeavours, and, most importantly, for individuals seeking to live their lives meaningfully and with integrity. Undoubtedly religious freedom has certain social costs and gives rise to the potential to create conflict, but it is nevertheless worthy of far greater protection than it is currently given under the (European) Convention. If religious vitality and tolerance is undermined, European democracy and pluralism will be the weaker for it."

In 2006 Evans joined with Adrienne Stone to convene a conference on law, religion and social change at the Australian National University. The resulting book was published by Cambridge in

[1] P J Keating, Afterwords, Allen and Unwin, 2011, p. 90

2 David Day, Chifley, Harper Collins, 2001, p. 477

3 Quoted in Australian Dictionary of Biography, Volume 13, Melbourne University Press, 1993, p. 419

2008 with the title*, Law and Religion in Theoretical and Historical Context*. In the introduction, Carolyn noted, "It was not so long ago that confident predictions were being made about the eventual demise of religion… Now, however, religion is back on the public agenda both domestically and internationally. Questions about the role of religion in public life are being prompted by a range of changes in many western states."

Here are a few observations on controversial matters raised in Evans's latest book *Legal Protection of Religious Freedom in Australia* including "Exemptions from law: conscientious objection to the provision of abortion", "Non-discrimination laws: friend or foe of religious freedom?", Religious vilification, and the applicability of Sharia law.

Abortion

My views on section 8 of the *Abortion Law Reform Act 2008 (Victoria)* are well-known. Suffice to say I think a legal provision which requires a medical practitioner having a conscientious objection to aborting a post-viable, late term foetus to refer the mother to another medical practitioner known not to have the same conscientious objection is not only unprincipled; it is unworkable. While such a provision remains on the statute books, it is understandable that some critics of a Charter of Rights and Freedoms authorising such a law regard the Charter as a foil for the soft left political agenda rather than the legal protection for all rights and freedoms, including the freedom of conscience. In an evenhanded fashion, Evans describes the views of religious leaders including myself who have spoken of the "hallmarks of totalitarianism" and then quotes Dr Wendy Larcombe who argued that the provision was relatively inoffensive in that the term "refer" "should be understood in its ordinary sense rather than in the medical sense of providing a formal referral". If that's all it means, why make it a legal requirement? Evans notes, "Many women's rights groups were concerned that the referral provision was inadequate to protect properly the rights of women who need to access abortions and that the law went too far in protecting religious conscience at the expense of women's health. Both sides of the debate made rights claims and each believed that the law did not adequately protect their legitimate interests." If the law does not require a formal referral, and if a doctor has a conscientious objection to the deliberate killing of a late term, viable foetus, why not simply discharge the doctor from any further legal obligation?

Non-discrimination

Church groups in Australia have been engaged in a gruelling campaign to maintain what they regard as justifiable exemptions from the provisions of equal opportunity employment laws. Cardinal Pell makes the point nicely:[4]

Should The Greens have the right to prefer to employ people who believe in climate change, or should they be forced to employ sceptics? Should Amnesty International have the right to prefer members who are committed to human rights, or should they be forced to accept those who admire dictatorships? Both cases involve discrimination and limiting the freedoms of others, and without it neither organisation would be able to maintain their identity or do their job effectively. Church agencies and schools are not exempt from anti-discrimination law in New South Wales, and the language of 'exemptions' is misleading. Parliaments are obliged by

[4] George Pell, "Freedom of Thought, Conscience and Religion Are Fundamental Rights", 13 March 2011

international human rights conventions like the ICCPR to provide protection of religious freedom in any laws which would unfairly restrict the right of religious communities to operate their schools and services in accord with their beliefs and teachings.

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

Here 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 could 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.

During the 2009 National Human Rights Consultation, Bob Carr (ex Premier from New South Wales) told a conference convened by the Australian Christian Lobby and the Catholic 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. It is a matter for prudential political assessment. 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 religious 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 members of their faith communities. Religious special exemptions regarding employment are all the more defensible when religious personnel including religious leaders and those with the hands-on directing of religious 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.

Having successfully fought off the prospect of a national human rights Act, 20 key church leaders met with Prime Minister Gillard on 4 April 2011 to plead for freedom to employ in church agencies personnel living and acting in accordance with the religious beliefs of the sponsoring churches. After the meeting, Cardinal Pell briefed the media about the meeting. He was reported in *The Australian* having told Ms Gillard: "We are very keen to ensure that the right to practise religion in public life continues to be protected in law. It is not ideal that religious freedom is protected by so called 'exemptions and exceptions' in anti-discrimination law, almost like reluctant concessions, crumbs from the secularists' table. What is needed is

legislation that embodies and recognises these basic religious freedoms as a human right."[5] That sounds suspiciously like a Human Rights Act to me.

In their submission to the Commonwealth's recent inquiry into the harmonisation of discrimination legislation, Professors Patrick Parkinson and Nicholas Aroney observe:

> Great care needs to be taken to ensure that a focus on the first-mentioned right (freedom from discrimination) does not diminish the others (e.g. freedom of religion, association and cultural expression and practice). This can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary 'exception' to general prohibitions on discrimination. It can also happen if inadequate attention is paid to freedom of association and the rights of groups to celebrate and practise their faith and culture together.
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> These dangers are real. Some advocates for reform of anti-discrimination laws have a tendency to place a very high value on 'non-discrimination' and to concede 'exceptions' based upon freedom of religion, association or cultural expression only with great reluctance, if at all. Although they sometimes recognise that there is a need to give due weight to all human rights and to find an appropriate balance between them, it is generally not acknowledged that posing the question as one of identifying *exceptions* to the principle of non-discrimination prejudices the inquiry in favour of the right to be free of discrimination and against the rights to freedom of religion, association and culture, understood as both individual and group rights.

Evans concedes that "the extent to which religious freedom or equality norms should prevail is a question that has proved particularly controversial in recent years in Australia." She cannot see that any resolution is likely to attract a community consensus but points to the trend overseas and concludes that "the balance is likely to tilt more towards equality in coming years than it has previously". The 2011 amendments to the *Victorian Equal Opportunity Act* by the Baillieu government may point in the contrary direction. Those amendments replaced the more restrictive "inherent requirement" test for employment. The Victorian law once again permits religious bodies to be discriminating in their employment practices in relation to "religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity" provided only that the discriminatory practice "conforms with the doctrines, beliefs or principles of the religion" or "is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion". The religious school can be discriminating in their employment of the gardener or maths teacher, just as they can be in their choice of the religion teacher or principal. Attorney General Robert Clark when introducing the amendments said that the "so-called inherent requirement test would have the consequence that faith-based schools and other organisations could be forced to hire staff who are fundamentally opposed to what the organisation stands for". It would be regrettable if religious bodies were to exercise this liberty in a manner inconsistent with their own religious commitments to respecting the human dignity of all persons, including those who are gay or lesbian or not living in church authorised marriage relationships. The scrutiny of unauthorised sexual practices would need to be equally applied. I note that in the Parliamentary debate at least one Coalition member, Mr Newton Brown, warned, "I would like to put on record tonight that faith-based schools should be on notice. Yes, the election commitment to remove the inherent requirements test will be realised by this bill, as was promised by the Coalition, but make no mistake: this does not open the door for schools

[5] *The Australian*, 5 April 2011

to engage in unfettered discrimination against people that is not justified in light of an organisation's beliefs."

If all schools or even the majority of schools were faith-based, there would be a stronger case for anti-discrimination provisions applying more broadly in employment situations for teachers. When seeking to balance conflicting rights, there may be a case for permitting a fuller expression of religious liberty when alternatives exist elsewhere in society for persons seeking non-discriminatory opportunities or services. For example, the UK has now decided to insist that all registered adoption agencies within the jurisdiction, including Catholic ones, provide a non-discriminatory service such that adoption would be as readily available to a same sex couple as to a man and woman wanting to adopt a child into their family. In my opinion, it would be no interference with the rights or dignity of gay and lesbian couples if some religious adoption agencies acting on their religious beliefs gave preference to married heterosexual couples when determining adoptive parents for a child, provided always that the agency was acting in the best interests of the child. Provided only that there is a range of other adoption agencies providing services to all couples, including gay and lesbian couples, it is a case of legislative overreach for the state to insist on uniform non-discrimination for all agencies.

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. During the 2009 National Human Rights Consultation, 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 law (enacted before the Charter and therefore without the benefit of a statement of compatibility) provides[6]

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 (which incidentally I do not, and never have), there is a strong case for stopping short of religious vilification laws or for at least enacting such laws only for criminal prosecution at the behest of the Attorney General. While it is inherently racist for a person to claim membership of the best race, it is no bad thing for a religious person to claim membership of the one true religion. That is the very point of religious belief. That is what religious people do. Within the great religious traditions, there are strands which urge universal respect and love for all persons regardless of their religious affiliation. But the State overreaches itself when it adapts laws prohibiting vilification on the grounds of a physical characteristic premised on absolute equality of all persons regardless of that physical

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

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?

After the *Catch the Fires* litigation had been remitted to VCAT having been all the way to the Victorian Court of Appeal, the parties ultimately reached a confidential settlement on 22 June 2007 – five years and three months after the offending seminar, four years and four months after the VCAT proceedings had first commenced, and with legal bills presumably run up to millions of dollars. VCAT published a fairly innocuous, self-evident agreed statement by the parties.

A welcome statement of principle about religious tolerance, it highlighted the futility of the years of litigation over religious vilification. There are no grounds for thinking that such litigation does anything to foster greater religious understanding and tolerance, nor to provide greater protection and dignity for the practitioners of minority religions. There are many Australians who still carry a sense of grievance that these two religious pastors have been subjected to the full weight of the law, having had to expend much time and resources, only to have the complainants come away with a laudable joint statement about respect and difference. Ironically, the whole nation became more appraised of the views of Messrs Scot and Naliah about Islam than they would ever have imagined possible when they first started their seminars. The formal agreed published statement at the end of the *Catch the Fires* proceedings is marked by nothing other than blandness and even-handedness, coming at the end of a very rancorous public debate about the core beliefs of Islam.

Sharia

There is a place for religious law in the secular courts. Carolyn Evans looks at the use of secular law in resolving intra-religious disputes, the use or enforcement of religious law in secular courts, and the establishment of formally recognised religious courts. She concludes:

For some religious people, the opportunity to have their disputes settled by religious law will religious judges is an essential part of their culture and personal beliefs. Brothers (including some people from the same religious tradition) such an approach is a threat to the notion of equality under the law and the separation of church and state. Even when the secular legal system does not give formal recognition to religious law, it is difficult to prevent informal mechanisms to dispute resolution urging if there is sufficient demand for it in a religious community. For some, this is an argument for resisting such developments in Australia. For others, it is a warning that it is better to work with such legal systems to ensure that they comply with basic human rights and procedural fairness, rather than to keep them outside the fold where there are no such guarantees. As Australia becomes more multi-religious, these disputes are likely to become more frequent.

The recognition of universal human rights and the proper delimitation of such rights does not entail all persons being treated the same before the law of the State. Rowan Williams occasioned great controversy in his 2008 Address at the Law Courts of London entitled *Civil and Religious Law in England: A Religious Perspective*. Much as Pope Benedict later did at the UN, he set out

the claim that universalist claims to human rights and human dignity are derived from comprehensive world views informed by religious tradition. More inclusive than Pope Benedict, he broadened his attention from Christianity to include Judaism and Islam, observing:

It never does any harm to be reminded that without certain themes consistently and strongly emphasised by the 'Abrahamic' faiths, themes to do with the unconditional possibility for every human subject to live in conscious relation with God and in free and constructive collaboration with others, there is no guarantee that a 'universalist' account of human dignity would ever have seemed plausible or even emerged with clarity.

But then he went on to deal with the issue of British Muslims being able to invoke Sharia law:

I have been arguing that a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged, and that the essential liberating (and religiously informed) vision it represents is not imperilled by a loosening of the monopolistic framework. At the moment, one of the most frequently noted problems in the law in this area is the reluctance of a dominant rights-based philosophy to acknowledge the liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to 'activate' this whenever called upon.

Williams has no difficulty conceding that citizens can boast “multiple affiliations” within the nation State. There are instances when a citizen ought to be entitled to resolve a conflict within his own ethnic community or according to the laws and tradition of her own religion.

Five months later, Lord Phillips, now President of the Supreme Court of the UK, who had chaired the Archbishop of Canterbury’s lecture, gave his own endorsement:[7]

It was not very radical to advocate embracing Sharia Law in the context of family disputes, for example, and our system already goes a long way towards accommodating the Archbishop's suggestion. It is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales. So far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognise aspects of religious laws, although when it comes to divorce this can only be effected in accordance with the civil law of this country.

The State can still insist on monogamy, prohibiting the contracting of more than one marriage and criminalising bigamy. That is because the State has a legitimate interest in restricting marriage such that equal dignity and respect is accorded all parties to the marriage. There would be good reasons of public policy for the State to refuse to apply any sanction to a religious person wanting to enforce an agreement involving a polygamous marriage. State recognition of

[7] Lord Phillips, *Equality Before the Law*, East London Muslim Centre, 3 July 2008

monogamy and criminalisation of bigamy are justified even when some citizens hold religious beliefs permitting bigamy. The civil law can properly override religious belief and practice when such belief or practice is counter to the fundamental equality of all citizens. There is however a significant grey area: when Muslims (or any other persons) decide not to have their marriages performed by an authorised celebrant and registered under the Commonwealth *Marriage Act*. There may be issues with a person entering into multiple de facto marriages or even of entering into a de facto marriage with a person under the lawful marriage age. These problems should be addressed by the law in the same way whether or not any of the parties are Muslim.

Religious individuals and organisations can make a good case for opting out of the State regime when there is no risk to the fundamental human rights or human dignity of any party affected by the action. There are sure to be border line cases. My father, a retired Chief Justice of Australia, when delivering the 2012 Hal Wootten Lecture at the University of New South Wales said he found Rowan Williams' view misconceived. He observed:

Therefore a Muslim is free to adhere to the beliefs, customs and practices prescribed by Shariaa law insofar as they are consistent with the general law in force in this country. That freedom must be respected and protected but that does not mean that Islamic Sharia should have the force of law.

He joined issue with a claim by the President of the Federal Supreme Court of the United Arab Emirates that the basic principles of Islamic Shariaa are provided by "[b]oth the Koran and the Sunna [which] could be considered the constitution in other legislation systems, and therefore all other sources should agree with them. Thus, if juristic reasoning contradicts with them, it should be rendered invalid, and if customs contradict with them, they are also unacceptable; and this applies to all other secondary or ancillary sources."

Putting to one side the observation about Rowan Williams' misconception and focusing on the claim by the Muslim judge, I respectfully agree with my father who asserted, "The common law does not go so far - it leaves a gap between the mandates of the law and the conduct that we choose to engage in according to our individual moral standards. We call that gap "freedom" and it allows Australian law to protect the cultural moral values of our minorities. We value that freedom not only for the benefit of the individual but in order to maintain a free society".

The real challenge for the future is determining the width of that gap not just for individuals but also for groups bound together by religious faith which differs from the comprehensive world view of the Australian majority. We know the gap is real for Muslims; it may also be a widening gap for Christians and Orthodox Jews wanting to profess and live their faith individually and collectively while honouring the values which unite us as Australians governed by the rule of law.

5. The Same Sex Marriage Debate

The confusion over religion and politics is presently being played out in Australia over this same sex marriage debate. A while ago I wrote a lengthy letter to a bishop explaining why I disagreed with his public statements on same sex marriage and civil unions. He never even acknowledged the letter. Next time we met socially, it was a case of "Don't mention the war." It's clear. He's a bishop; I'm not. No correspondence will be entered into. How are we to formulate credible arguments in the square of a pluralistic democratic society when we don't even talk to each other? A month or two later, I was convinced by the secretariat of the Catholic bishops'

conference to appear on television to discuss same sex marriage because none of the twelve bishops approached was available. When I got there I found that the Catholic Church was the only mainstream Christian denomination represented. That was hardly fair to the others.

Before appearing on the program, I did three things. I had asked the congregation at my regular Sunday mass for comment after mass and many older parishioners said that they did not want to see any discrimination against same sex couples but they were not sure that a same sex relationship was the same as their marriage. I asked a young couple whose marriage I had recently performed with a nuptial mass what they thought and they made it very clear to me that for their generation the whole discussion was a bit of a yawn and the answer for civil law was self-evident. I called a lesbian Catholic I knew who had children with her partner and she told me that she was a lesbian and always would be; that she was Catholic and always would be; that the clergy should get over this idea that they were the gatekeepers to the gospels and the sacraments because the key message was that God is love.

I am a supporter of civil unions. Conceding that neither side of the debate is much interested in that outcome, I have concluded that we can no longer draw a line between civil unions and same sex marriage. During the recent federal election, Kevin Rudd pulled out all stops to advocate same sex marriage legislation in the Commonwealth Parliament. Tony Abbott stuck firmly to the line that his party would maintain party policy that marriage is a relationship between one man and one woman to the exclusion of others and that the party policy would be maintained unless and until the party revised its position, including whether or not to allow a conscience vote. In the Liberal Party, as distinct from the Labor Party, members are always free to cross the floor without the risk of automatic expulsion from the party – though their prospects of promotion tend to take a nosedive.

Any extension of the civil law's definition of marriage should be the preserve of the Commonwealth Parliament with all members being granted a conscience vote. Presently the 1961 Commonwealth *Marriage Act* as amended states that "marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

Under the Australian Constitution, the Commonwealth Parliament has power to make laws with respect to marriage. So too do the States. And since 1978, so too does the ACT Legislative Assembly. But if a Commonwealth law purports to cover the field, any State or Territory law does not operate to the extent of any inconsistency. Undoubtedly the Commonwealth will argue in the High Court that it has covered the field on marriage since 1961 and it should be left to do so. Advocates for "marriage equality" frustrated by the slow pace of change at a Commonwealth level have decided to pursue state and territory legislation for forms of unequal and inferior marriage recognition in the hope of providing further political pressure for the Commonwealth to act.

Marriage equality advocates are pursuing marriage inequality at a state level in the hope of pressuring the Commonwealth into marriage equality. In the process they risk blowing apart the national coherence of marriage laws put in place in 1961. History points to the wisdom of a conscience vote in the national parliament on this issue.

Introducing the Commonwealth Marriage Bill on 19 May 1960, Sir Garfield Barwick indicated that he had taken a full year to prepare the legislation and he was prepared to wait many more months to debate the bill "making with the States the several administrative arrangements

which the bill contemplates". He said: "the measure will not be treated as a party measure and …members will be free to adopt their own attitudes and to express them by their vote, freely."

Gough Whitlam, Deputy Leader of the Opposition with the carriage of the matter for the Labor Party, reminded the Parliament on 17 August 1960: "When the Attorney General (Sir Garfield Barwick) made his second reading speech on this bill, he announced that while the Government would take full responsibility for having made the proposals contained in the measure and would support them, as a government, the legislation would not be treated as a party measure, and honourable members would be free to adopt their own attitudes to it and express them freely by their votes. The Opposition has resolved to take the same course."

Tony Abbott and Bill Shorten should ensure that their members have the same conscience vote available to them on same sex marriage.

Religion is much less relevant now to the civil definition of marriage because while the crude marriage rate continues to decline (from 7.3 in 1960 to 5.5 in 2008), the proportion of civil marriages continues to increase. A century ago, 95% of marriages were church marriages; in 1969, 89% of marriages were still being performed in church. By 2010, 69% of all marriages were performed by civil celebrants.

Some strong advocates of traditional marriage, including the Australian Christian Lobby, have been suggesting that the matter should be resolved by referendum. That is a bad idea. In Australia, we expect our members of parliament to make the statutory law and our judges to shape the common law and interpret the Constitution. We the people vote by referendum only to change the Constitution. Occasionally there is a case to be made for a plebiscite when we are trying to determine a particular question to put to the people by referendum to change the Constitution. This is what we did when we wanted to determine whether we were ready to vote for a particular form of republic.

Groups like the Australian Christian Lobby should be careful what they wish for. If a referendum on same sex marriage, why not a referendum on (say) the death penalty? If the opinion polls are right, there is no doubt the way that one would go. Or a referendum on excluding boat people from Australia? Or a referendum on euthanasia? There are good reasons for avoiding the populist politics of lawmaking by direct popular vote of the people.

Writing in an academic journal and reflecting on the passage of the *Marriage Act 1961*, Barwick said: "To bring unity to the marriage law of Australia was not, however, the main task of the architects of the *Marriage Act*. Their main task was to produce a marriage code suitable to present-day Australian needs, a code which, on the one hand, paid proper regard to the antiquity and foundations of marriage as an institution, but which, on the other, resolved modern problems in a modern way." This remains our task, and it is best done by the Australian Parliament exercising a conscience vote rather than State and Territory legislatures tinkering and then leaving the matter to the High Court.

Advocates of marriage equality should note that the *Same Sex Marriage Bill 2013* being debated in the NSW Legislative Council provides: "A same-sex marriage solemnised or purporting to be solemnised in New South Wales is void if either of the parties subsequently marries some other person under Commonwealth law."[8] That's not equality; that's not marriage. The legal advice

[8] cl.19(b)

has required the State to drop the bar so low to avoid inconsistency with the Commonwealth Marriage Act which covers the field on marriage that what is proposed is a legal arrangement terminable without notice, without a period of separation, and without a court order. In these circumstances, the same-sex marriage is not dissolved; it is completely void. New South Wales Premier Barry O'Farrell is right when he says, "I believe only change enacted by the federal parliament can deliver true equality in our marriage laws. I don't want to see a return to the patchwork quilt of marriage laws that existed in this country in the 1950s and earlier." The matter should be left to the Commonwealth Parliament. It is not in the public interest to propose that the State Supreme Courts deal with dissolution of same sex marriages and the accompanying issues of property and children while the Family Court continues to deal with the dissolution of marriages and the accompanying issues of property and children.

As a Catholic priest and as an Australian citizen I think the public good would be best served by all parties in the federal parliament being granted a conscience vote on same sex marriage. I oppose same sex marriage laws being enacted in state and territory parliaments because they would be either inoperative or disruptive of a national code while providing an unequal form of marriage.

I think our federal politicians voting according to conscience and not according to party dictate will be well positioned to judge when the country is ready to make the change to marriage by including the unions of same sex couples. If and when they do, I will not lose any sleep over it and I will be delighted for those same sex couples who think it will help social support and endorsement of their faithful committed relationships. I will spare a thought for those older married Australians who remain unconvinced that a same sex marriage relationship is the same as theirs. I will remain vigilant that state laws and policies should not encourage the creation of children without a known biological father and known biological mother.

6. The Asylum and Border Protection Debate

During the 2013 federal election, we Australians were confronted with our major political parties trying to outbid each other with a 'shock and awe' campaign aimed at "stopping the boats". Some of us tried to be prophetic with our denunciations. Others pragmatically tried to temper the likely callous outcomes.

In terms of the short term solution to the loss of life at sea and the expanding trade of the people smugglers luring increasing numbers of asylum seekers to Indonesia for transit to Australia, we all need to work within the reality that all major political parties in Australia are committed to a shock and awe approach. Some of us are prepared to discuss how that shock and awe approach might be tailored to be less callous and objectionable. Others find it so objectionable as to not warrant discussion. Many of us are just deeply troubled and have no idea what to do or say, hoping the problem will go away soon. If in the midst of the evil of the present situation, I can do something to save one life or to accord proper protection to one additional refugee I will do it. I am very grateful that people schooled in Christian social teaching have been prepared to engage in ongoing dialogue on this issue.

When confronted with moral evil in public policy, church personnel always have a choice: to be prophetic sticking to the moral absolutes (like the Greens or the US style Right to Life Movement), or to be practical engaging in the compromises needed to temper the evil (like the major political parties and those who agitate better welfare measures for mothers so that they

might be less likely to choose abortion). Whichever option we take, we all need to concede that at the moment, the only political parties not wanting to embrace a short term shock and awe approach are the Greens, the DLP and the Palmer United Party. I wish them all the best, but neither Christine Milne, John Madigan nor Clive Palmer will ever be Prime Minister.

Words, actions and structures all have their part to play. During the 2013 election, the boys at St Ignatius College Riverview of their own accord wrote to Tony Abbott and all the other Jesuit alumni in the major political parties: "We feel compelled to express our disappointment that, as graduates of our Jesuit schools, you would allow those principles, cultivated in our common tradition, to be betrayed. We look for heroes among our alumni, for *insignes* (generous and influential people, as Ignatius styled them). Instead we see only allegiances to parties that trade human lives for political expediency, that choose the lowest common denominator to woo the populace, and that speak of economic problems rather than the dignity of the human person, especially the most vulnerable." This was highly prophetic language.

Riverview is a very different school from what it was in Tony Abbott's day. One structural difference is that there are now routine scholarships for indigenous Australians and for refugees. So the life experience of the boys is different. Their reflection on their school experience is different. It was this difference that helped to motivate the boys of 2013 to write. The chief author of the letter told the media that the boys had been listening to the stories of their refugee mates: "Knowing first-hand the direct conflicts they have faced and seeing politicians making decisions that aren't taking into account humanity made us very upset. We wanted to evoke the feeling of what they experienced at Riverview and try to remind them that, when it comes right down to it, it's not about making decisions based on politics. It's about trying to come back to core values."

Tony Abbott has been receiving a number of letters from students educated in Christian social teaching. Isabel Teixeira, a Year 12 student at Good Counsel College, Innisfail, daughter of a Timorese refugee, wrote him a five page letter saying, "If this proposed policy or even the current policy had been established and implemented when my father was seeking asylum from the war in Timor-Leste in the 1970s, I would not exist. However, they were not the policies of the 1970s and, as a result, my father was able to live in Australia, work as a member of parliament in both Australia and Timor-Leste, owns his own law firm and has educated his own children to understand the importance of human rights conservation. Is this not a gain for Australia? Mr Abbott, you know the facts, and if having them reiterated has still not evoked some form of recognition of the illegality of the policies, then I would like you to consider this: by you turning back these boats, carrying people who are potentially escaping situations which most Australians would consider nothing less than horrific, you are turning your back on any inkling of humanity which, through your actions, Australia maintains."

These prophetic utterances from young Catholics will not win the day on their own. But they are not useless. They are not simply romantic doodlings of out of touch do-gooders. Pope Francis has been very prophetic in his utterances on the same topic. The island Lampedusa is the European equivalent of our hellish Christmas Island. It is a lightning rod for European concerns about the security of borders in an increasingly globalized world where people as well as capital flow across porous borders. That's why Pope Francis went there on his first official papal visit outside Rome. At Lampedusa on 8 July 2013, Pope Francis said:

> "Where is your brother?" Who is responsible for this blood? In Spanish

> literature we have a comedy of Lope de Vega which tells how the people of the town of Fuente Ovejuna kill their governor because he is a tyrant. They do it in such a way that no one knows who the actual killer is. So when the royal judge asks: "Who killed the governor?", they all reply: "Fuente Ovejuna, sir". Everybody and nobody! Today too, the question has to be asked: Who is responsible for the blood of these brothers and sisters of ours? Nobody! That is our answer: It isn't me; I don't have anything to do with it; it must be someone else, but certainly not me. Yet God is asking each of us: "Where is the blood of your brother which cries out to me?" Today no one in our world feels responsible; we have lost a sense of responsibility for our brothers and sisters. We have fallen into the hypocrisy of the priest and the Levite whom Jesus described in the parable of the Good Samaritan: we see our brother half dead on the side of the road, and perhaps we say to ourselves: "poor soul…!", and then go on our way. It's not our responsibility, and with that we feel reassured, assuaged. The culture of comfort, which makes us think only of ourselves, makes us insensitive to the cries of other people, makes us live in soap bubbles which, however lovely, are insubstantial; they offer a fleeting and empty illusion which results in indifference to others; indeed, it even leads to the globalization of indifference. In this globalized world, we have fallen into globalized indifference. We have become used to the suffering of others: it doesn't affect me; it doesn't concern me; it's none of my business!

Here we can think of Manzoni's character – "the Unnamed". The globalization of indifference makes us all "unnamed", responsible, yet nameless and faceless.

Then on his recent visit to the Jesuit Church in Rome he said:

> After Lampedusa and other places of arrival, our city, Rome, is the second stage for many people. Often – as we heard – it's a difficult, exhausting journey; what you face can even be violent – I'm thinking above all of the women, of mothers, who endure this to ensure a future for their children and the hope of a different life for themselves and their family. Rome should be the city that allows refugees to rediscover their humanity, to start smiling again. Instead, too often, here, as in other places, so many people who carry residence permits with the words "international protection" on them are constrained to live in difficult, sometimes degrading, situations, without the possibility of building a life in dignity, of thinking of a new future!

Those of us schooled in the Christian tradition often contemplate the parable of the Good Samaritan, as Pope Francis did when at Lampedusa. That parable works well for one stray Jew fallen by the wayside in desperate need. It works even better when the travelling Samaritan has access to a trusting Jewish innkeeper who will offer credit on spec. It needs some imaginative discernment once you postulate hundreds fallen by the wayside, millions even more desperate in faraway places, and institutional innkeepers who have shareholders or voters to satisfy. The gospel message of charity and justice must always be prophetic, pedagogical and practical. The democratically elected leaders of a robust pluralist nation such as Australia have to accept that they cannot help everyone in need on the planet and they are elected to maintain secure borders

and a standard of living for our citizens which could not be emulated for all persons on the planet.

I had the honour of preaching at the ecumenical service for the opening of the 2010 hung parliament. In part, I said:

> As you prepare for those countless divisions in the Reps and the Senate, we all have cause to reflect this morning on that one great division called by the Son of Man coming in his glory — much like the shepherd putting the sheep at his right hand and the goats at his left. Each of us is to be judged by the times we visited the prisoner, gave food to the hungry, drink to the thirsty, a welcome to the stranger, clothing to the naked, and medical and pastoral care to the sick. As legislators you are better situated than most of us to affect the outcomes for many more prisoners, strangers, the sick, and the poor.
>
> For every prisoner you help, there will be hundreds beyond the purview of your concern. For every stranger you welcome to these shores, there will be thousands you can't; and for every poor person to whom you give a helping hand, there will be tens of thousands who need more.
>
> How then are you, how then are we to be judged? Yes, you will face your family and friends when you go home at the end of each parliamentary session. You will face the people at the next election. You have to face yourself in the mirror every morning. And many of us believe we will have to face our loving God who says consolingly, 'Truly I tell you, just as you did it to the least one of these who are members of my family, you did it to me.'
>
> As we wrestle with the demands of justice and the common good, let's always make a place and accord a respectful hearing to all our fellow citizens whatever their religious or philosophical world views. May the most reasonable of legislators accord respect to the most devout citizens of faith. May the Parliament, our airwaves, our social media platforms and our public squares be places where charity and truth temper our passion for politics while that passion enhances our commitment to truth and charity for all.

The Abbott government has been elected with a strong mandate to stop the boats. For the next few months, the new government will not be much interested in public discussion about the ethics of the policy. It will be more a matter of "whatever it takes". If the boats do stop, it might then be opportune to commence discussion about how Australia might contribute to better processing and protection of asylum seekers upstream in Indonesia and Malaysia. If the boats do not stop, the government will need to engage the community about the ethical bottom line for long term detention and banishment of refugees to countries such as Nauru and PNG. It's time to set down a few incontrovertible ethical parameters. We need to take professional advice. We need to insist on a fair go for all – those on boats, those stranded in remote camps, and those trapped in transit countries. We should not take refuge in flowery rhetoric or one line slogans.

Though most of our neighbours are not signatories to the Refugees Convention, Australia should remain a party to the Convention, and refugee advocates should stop overstating or misstating the rights protected by the Convention and the UN Declaration of Human Rights (UNDHR). Article 14(1) of the UNDHR provides: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Back in 1948, the drafters had suggested that a person have the right to be "granted asylum" – a legal right to just turn up here by boat! Australia was one of the strong, successful opponents, being prepared to acknowledge only the individual's right "to seek and enjoy asylum", because such a right would not include the right to enter another country and it would not create a duty for a country to permit entry by the asylum seeker. That's why Article 31(1) of the Refugee Convention deals as it does with the illegal entry or presence of an asylum seeker who has entered or is present without authorisation. It provides: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." The immunity from penalty is restricted to refugees "coming directly from a territory where their life or freedom was threatened". The Australian Government website is correct when it states: "International law recognises that people at risk of persecution have a legal right to flee their country and seek refuge elsewhere, but does not give them a right to enter a country of which they are not a national. Nor do people at risk of persecution have a right to choose their preferred country of protection." There is a right to leave your country. There is a right to re-enter your country. There is a right to seek asylum. But there is no right to enter another country of which you are not a national – even to seek asylum. Should you have succeeded in entering another country not your own, whether legally or illegally, you have a right to enjoy asylum if you are a refugee.

The moral argument is another matter. But it is important to be clear about Australia's international obligations under the UNDHR and the Convention on Refugees. Unfortunately even the website of the Refugee Council of Australia is wrong when it states: "The UN Refugee Convention (to which Australia is a signatory) recognises that refugees have a right to enter a country for the purposes of seeking asylum, regardless of how they arrive or whether they hold valid travel or identity documents." Given that most of our neighbours are not signatories to the Refugee Convention, there is no point in over-stating our legal obligations when we come to the moral arguments and the diplomatic negotiations that will be required to enhance the processing and protection of refugees in our region. It would be folly to abandon the international legal instruments and just rely on moral argument and diplomatic negotiations. We should maintain the safety net of law. The political atmosphere is such that the safety net will become so frayed as to be useless if refugee advocates continue to overstate and mis-state the law.

There is no doubt that the reforms of July 2008 instituted by the Rudd Government and not opposed by the Nelson Opposition contributed to a sharp increase in the arrival of boat people. The annual arrivals continued to spiral upwards – from 2856, to 6689, a brief drop to 4730, then up to 17,271, and then up again to 25,145. By the time Kevin Rudd had become prime minister for the second time in June 2013 the boat arrivals were running at 3,300 per month (40,000 per annum). There was intelligence available that the people smuggling networks were now so adept at plying their trade in Indonesia that the numbers could escalate even further. These increases were not related to increased global refugee flows nor to new refugee producing

situations in the region. There had been at least 900 deaths at sea since the 2008 reforms were instituted. Something had to be done – not just for crass political gain but for sound ethical reasons.

Since the High Court's rejection of the Gillard government's Malaysia solution, there has been a need to consider how ethically and practically to stop the boats. The lack of bipartisan agreement meant that the recommendations of the Houston panel could be only partially implemented. In the medium term, it might be possible to negotiate a regional agreement involving at least Australia, Indonesia and Malaysia. An agreement, with UNHCR backing, could provide basic protection and processing for asylum seekers transiting Malaysia and Indonesia. Asylum seekers headed for Australia could then be intercepted and promptly screened to determine that none was in direct flight from persecution in Indonesia. They could then be flown back safely to Indonesia and placed at the end of a real queue. Provided the necessary screening was done, it could then be appropriate to adopt Alexander Downer's suggestion: "Australia would fly back to Indonesia anyone who arrived here by boat without a visa. In exchange, Australia would take, one for one, UNHCR approved refugees from refugee camps in Indonesia." Such an agreement would take many months, if not years, to negotiate and implement. Admittedly, it would not provide a short term solution to stopping the boats.

Kevin Rudd's pre-election agreements negotiated with Papua New Guinea and Nauru and first announced on 19 July 2013 were aimed at stopping the boats. It was the equivalent of a "shock and awe" measure, threatening dreadful outcomes for people, hopefully deterring them from even considering getting on board a boat. During the election campaign, both major political parties tried to convince the electors that they would be able to design policies which stopped the boats.

During its last year in office, Labor had increased the humanitarian component of our migration program from 13,750 to 20,000 places - with 12,000 of those places being allocated to refugees offshore, 8,000 being available for refugees onshore and the special humanitarian program. The Coalition initially supported the increase but reversed this commitment during the election campaign. The Abbott Government says it will provide only 2,750 places for onshore applicants.

If adopting the key planks of the Rudd plan, the Abbott government could give the "shock and awe" response greater ethical coherence if they took the following seven steps:

1. Tony Abbott should continue discussions with Jakarta with an eye to a negotiated agreement with both Indonesia and Malaysia aimed at upstream improvement of processing and protection.
2. The Abbott government should return to its previous commitment to increase the humanitarian quota to 20,000.
3. Scott Morrison should order an ethical reassessment of the plight of those who came by boat to Australia after the Rudd announcement of 19 July 2013 without notice of the new shock and awe policy, bearing in mind that many of those who arrived immediately after 19 July had received no notice of the new policy. This was admitted by Minister Tony Burke when he told the media on 22 August 2013: "First week after the announcement, the figures remained very high, but let's not forget those figures include people who are already at sea".

4. Scott Morrison should undertake to care for unaccompanied minors who arrive in Australia's territorial waters until they can be safely resettled or safely returned to their family or to the guardians in transit from whom they were separated.
5. Scott Morrison should institute safeguards, including a transparent complaints mechanism, in PNG and Nauru consistent with the safeguards recommended by the Houston Panel for both Pacific processing countries and for Malaysia under the Malaysia Solution.
6. Sixth, Tony Abbott should introduce a bill to Parliament this month detailing the measures aimed at stopping the boats, thereby putting beyond legal doubt the "shock and awe measures" implemented on the eve of the election campaign without parliamentary scrutiny, and locking in the major political parties so that petty party point scoring might cease. The debate on the bill will allow both sides of the Chamber to purge themselves of the hypocrisy that has accompanied Labor's unctuous condemnation of John Howard's Pacific Solution and the Coalition's unctuous condemnation of Julia Gillard's Malaysia Solution. The bill would undoubtedly win the support of the major political parties, restoring a more bipartisan approach as existed in July 2008 when Minister Chris Evans announced "the seven key immigration values" then unanimously embraced by the Parliament's Joint Standing Committee on Migration.
7. The government should commit itself to the prompt processing onshore of Papuan asylum seekers in direct flight from West Papua. The Coalition's Policy on asylum seekers published during the election campaign states, "The Coalition will work with our regional partners to address the secondary movement of asylum seekers into our region as a transit point to illegally enter Australia through the establishment of a comprehensive Regional Deterrence Framework". Papuans fleeing persecution at home are not engaged in secondary movement. If refugees, they are in direct flight from persecution. The Abbott government should recommit to our obligation under the Refugees Convention to grant asylum to refugees who have entered Australia in direct flight from persecution.
8. While waiting to see if the boats do stop, all Australians can consider how better to contribute to protection and processing of asylum seekers in the region.

7. The Tools of Christian social teaching

The language of Christian social teaching must always be prophetic, pedagogical and practical. Our social teaching is not just words. It's reflected in words, actions and structures. One of the credibility problems for my Church today is that we proclaim a message of justice, inclusion, and non-discrimination within a structure which is sexist and without sufficient theological coherence or scriptural warrant and which has been grossly neglectful of the best interests of the most vulnerable – abused children. Christian social teaching provides us with ideas, feeds our imaginations, fires our passions, underpins our conversations, and animates our celebrations in relation to faith and justice – belief in a loving God and solidarity with our fellow human beings. Being Christian, we respond as community, not as atomized individuals. Our responses are marked by service and ritual, informed by tradition and authority, as well as reflection on lived experience.

The last three popes have armed us Catholics with some wonderful concepts for taking on the task of shaping a world bearing more the marks of the Kingdom to come.

In his 1988 encyclical *Sollicitudo Rei Socialis*, Pope John II spoke of the interdependence of the head and the solidarity of the heart. He told us, "However much society worldwide shows signs

of fragmentation, expressed in the conventional names First, Second, Third and even Fourth World, their interdependence remains close. When this interdependence is separated from its ethical requirements, it has disastrous consequences for the weakest. Indeed, as a result of a sort of internal dynamic and under the impulse of mechanisms which can only be called perverse, this interdependence triggers negative effects even in the rich countries. It is precisely within these countries that one encounters, though on a lesser scale, the more specific manifestations of under development. Thus it should be obvious that development either becomes shared in common by every part of the world or it undergoes a process of regression even in zones marked by constant progress. This tells us a great deal about the nature of authentic development: either all the nations of the world participate, or it will not be true development."[9]

Inviting us to move from the head to the heart, from thinking to taking a stand, Pope John Paul II then spoke of solidarity: "At the same time, in a world divided and beset by every type of conflict, the conviction is growing of a radical interdependence and consequently of the need for a solidarity which will take up interdependence and transfer it to the moral plane. Today perhaps more than in the past, people are realizing that they are linked together by a common destiny, which is to be constructed together, if catastrophe for all is to be avoided. From the depth of anguish and fear…, the idea is slowly emerging that the good to which we are all called and the happiness to which we aspire cannot be obtained without an effort and commitment on the part of all, nobody excluded, and the consequent renouncing of personal selfishness."[10]

Pope Benedict XVI gave us useful insights into the relationship between faith and politics in his encyclical *Deus Caritas Est*. He says:[11]

> Justice is both the aim and the intrinsic criterion of all politics. Politics is more than a mere mechanism for defining the rules of public life: its origin and its goal are found in justice, which by its very nature has to do with ethics. The State must inevitably face the question of how justice can be achieved here and now. But this presupposes an even more radical question: what is justice? The problem is one of practical reason; but if reason is to be exercised properly, it must undergo constant purification, since it can never be completely free of the danger of a certain ethical blindness caused by the dazzling effect of power and special interests.
>
> Here politics and faith meet. Faith by its specific nature is an encounter with the living God—an encounter opening up new horizons extending beyond the sphere of reason. But it is also a purifying force for reason itself. From God's standpoint, faith liberates reason from its blind spots and therefore helps it to be ever more fully itself. Faith enables reason to do its work more effectively and to see its proper object more clearly. This is where Catholic social doctrine has its place: it has no intention of giving the Church power over the State. Even less is it an attempt to impose on those who do not share the faith ways of thinking and modes of conduct proper to faith. Its aim is simply to help

[9] Sollicitudo Rei Socialis, #17

[10] Sollicitudo Rei Socialis, #26

[11] Deus Caritas Est, #28

> purify reason and to contribute, here and now, to the acknowledgment and attainment of what is just.

Pope Francis, anxious to demonstrate the continuity of our social teaching, made few changes to Benedict's draft of what was to be his last encyclical and published *Lumen Fidei* as his own first encyclical. Francis speaks of the contemporary relevance of our faith for all people, helping us to contribute to the common good: "Faith is truly a good for everyone; it is a common good. Its light does not simply brighten the interior of the Church, nor does it serve solely to build an eternal city in the hereafter; it helps us build our societies in such a way that they can journey towards hope."[12]

These concepts of interdependence and solidarity, the relationship between faith and politics, and the assurance that Christian faith can assist everyone committed to justice and the common good can be harnessed prophetically, pedagogically, and practically to formulate our proposals, actions and structures for a more just and peaceful world. They are the building blocks which come to life when we wrestle with a question such as how we might make our asylum policy more humane and more just.

Prophetic remarks need to be matched by practical suggestions. We need to come to the table of practical deliberation committed to finding a better way to treat those who risk all on boats so that they might live. By forming and informing ourselves in Christian social teaching we can contribute to a more just world prophetically, pedagogically and practically. Within the Church community we can sponsor the respectful dialogue needed so that the inevitable compromises of politics can be better tailored to justice for us all - acknowledging our interdependence and standing firm in solidarity. In the contemporary public square, much of the dialogue will be conducted using the language of human rights.

Once we investigate much of the contemporary discussion about human rights, we find that often the intended recipients of rights do not include all human beings but only those with certain capacities or those who share sufficient common attributes with the decision makers. It is always at the edges that there is real work for human rights discourse to do. It is not surprising that religious persons often have a keen eye for the neediest, not only espousing their rights but taking action for their wellbeing and human flourishing. Speaking at the London School of Economics on "Religious Faith and Human Rights", Rowan Williams, the Archbishop of Canterbury boldly and correctly asserted:[13]

The question of foundations for the discourse of non-negotiable rights is not one that lends itself to simple resolution in secular terms; so it is not at all odd if diverse ways of framing this question in religious terms flourish so persistently. The uncomfortable truth is that a purely secular account of human rights is always going to be problematic if it attempts to establish a language of rights as a supreme and non-contestable governing concept in ethics.

No one should pretend that the discourse about universal ethics and inalienable rights has a firmer foundation than it actually has. Williams concluded his lecture with this observation:

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[12] Lumen Fidei, #51

[13] Rowan Williams, *Religious Faith and Human Rights*, London School of Economics, 1 May 2008

As in other areas of political or social thinking, theology is one of those elements that continues to pose questions about the legitimacy of what is said and what is done in society, about the foundations of law itself. The secularist way may not have an answer and may not be convinced that the religious believer has an answer that can be generally accepted; but our discussion of social and political ethics will be a great deal poorer if we cannot acknowledge the force of the question.

Once we abandon any religious sense that the human person is created in the image and likeness of God and that God has commissioned even the powerful to act justly, love tenderly and walk humbly with their God, it may be very difficult to maintain a human rights commitment to the weakest and most despised in society. It may come down to the vote, moral sentiment, tribal affiliations, or the national interest. And that will not be enough to extend human rights universally. In the name of utility, the society spared religious influence will have one less impediment to limiting social inclusion to those like us, "us" being the decision makers who determine which common characteristics render embodied persons eligible for human rights protection. Nicholas Wolterstorff says, "Our moral subculture of rights is as frail as it is remarkable. If the secularisation thesis proves true, we must expect that that subculture will have been a brief shining episode in the odyssey of human beings on earth."[14]

Religion does not provide the answers to difficult questions about law, politics and economics. But religious faith and religious traditions can help key actors to purify their motives and their thinking as they wrestle with concepts and strategies posited on truth and justice. Religious faith can help the believer accord respect and dignity to all persons as he or she is involved in the complexities of the market, the State and civil society. Animated by faith, hope and love, sustained and nourished by our religious traditions, we as the community of believers can engage positively in helping promote human wellbeing in Australia and beyond. Our task is simple: out of our religious traditions we are able to stand in solidarity with all those affected adversely by prospective laws and policies; we are able disinterestedly to acknowledge the complexities of interdependence – holding in tension individual rights and entitlements together with the common good and the public interest; we participate in the public conversation respectfully with all those willing to engage, and not just with our co-religionists, "simply to help purify reason and to contribute, here and now, to the acknowledgment and attainment of what is just".

[14] Nicholas Wolterstorff, *Justice: Rights and Wrongs* Princeton University Press, 2008, p. 393