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## ***FREEDOM OF CONSCIENCE AND RELIGION***

**BY RICHARD MOON**

**IRWIN LAW, 2014**

**240 PP**

**ISBN 978 1 55221 364 3**

### I INTRODUCTION

It might seem strange to review a Canadian book in an Australian law review. Strange, unless one considers the subject matter with which the book deals: the legal protection afforded to freedom of conscience and religion. It is well-known that Australia remains the last Western democracy without a comprehensive mechanism for the treatment of fundamental human rights and freedoms, either constitutionally or legislatively. And while Australia has made many attempts to remedy this gap in its treatment of rights and freedoms, the result has been, as I have called it in previous work, a case of ‘déjà vu all over again.’<sup>1</sup> What is perhaps most interesting about these failed attempts at a comprehensive treatment of rights and freedoms is that the most recent attempt, in 2009-10, when faced with the possibility of some protection for freedom of conscience and religion, it was not those opposed to religion playing any part in the public square who led the charge against comprehensive rights protection, but religious groups themselves.<sup>2</sup> That fact always astounds anyone to whom I relate this story outside of Australia (it ought, of course, to astound Australians, too, but it rarely seems to, as does the lack of any comprehensive protection of rights and freedoms itself).

Why would religious groups oppose the very thing that the citizens of other countries, perhaps less free than Australia, would dearly cherish, were it possible?<sup>3</sup> Reduced to their simplest form, these groups provide two reasons: first, a fear that placing the power to invalidate legislation in the hands of the judiciary would have dire

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<sup>1</sup> Paul Babie and Neville Rochow, ‘Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom’ (2010) *Brigham Young University Law Review* 821.

<sup>2</sup> Ibid 845–53.

<sup>3</sup> See, eg, Vietnam, Decree 92, and its regulation of religion and its practice: International Buddhist Information Bureau *Government Decree 92 tightens controls on religions in Vietnam* (29 November 2012) Que Me: Action for Democracy in Vietnam <[http://www.que.me.net/eng/news\\_detail.php?numb=1955](http://www.que.me.net/eng/news_detail.php?numb=1955)>.

consequences for the freedom of religion. How? The answer to that is the second reason: that any protection of rights would contain not only a protection for freedom of conscience and religion but also of equality and, it is claimed, judges would use their new found power to establish a priority of rights, placing equality at the pinnacle of that pyramid and use it to ‘trump’ all other rights, especially freedom of conscience and religion.<sup>4</sup> That would likely have the effect, again, so it is claimed, of invalidating the exemptions from anti-discrimination legislation carved out for religious groups and those holding religious views to discriminate in furtherance of one’s faith and its doctrines.<sup>5</sup>

For these reasons, it is not only appropriate in an Australian law review, but necessary, to review Richard Moon’s *Freedom of Conscience and Religion*.<sup>6</sup> Necessary, because some perspective is sorely needed on the way in which not only human rights, including equality, but also freedom of conscience and religion can be constitutionally protected in one document and live equably with one another following judicial treatment of the relationship between them. And there could be no better person to whom to turn in attempting to find this needed perspective than Richard Moon, Canada’s leading authority on the protection of freedom of conscience and religion. Moon’s thorough, careful and thoughtful analysis injects some much-needed dispassion into what has become an increasingly passion-driven approach, on both sides of the debate, to religion in Australia’s public forum.

## II RELIGION AND SOCIETY

In the Introduction, Richard Moon covers the range of ways in which religion is found in Canadian society and the treatment of religious freedom by Canadian law. In doing so, he provides an outline of the attempt by the Canadian courts to present a principled account of religious freedom, its justification and treatment under the *Canadian Charter of Rights and Freedoms*,<sup>7</sup> as well as addressing the issue of state neutrality towards religion and its limits.<sup>8</sup>

Having set this important background to what religious freedom is and how a constitution might treat it, Moon turns to the specific points of contact between a society and religion that characterise not only Canada, but any contemporary society, including Australia’s: government support for religion; the restriction and accommodation of religious practices; the autonomy of religious organisations, religious schools or

<sup>4</sup> On these reasons see Babie and Rochow, above n 1, 845–53.

<sup>5</sup> On these exceptions see Laura Krieg and Paul Babie, ‘The Space for Religion in Australian Society: An Assessment of the Impact of Australian Anti-Discrimination Legislation on Religious Freedom’ in Hilary Regan (ed), *Child Sexual Abuse, Society and the Future of the Church* (ATF Press, 2013) 83–115.

<sup>6</sup> Indeed, and books like it from other national jurisdictions which have taken similar approaches to that found in Canada are equally worthy of consideration in Australia.

<sup>7</sup> *Canada Act 1982* (UK) c II, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’).

<sup>8</sup> Richard Moon, *Freedom of Conscience and Religion* (Irwin Law, 2014) ch 1.

education, parents and children; and freedom of conscience.<sup>9</sup> The interested reader finds a fuller exploration of the role played by religion in the Canadian public sphere in another recent Canadian book edited by Solange Lefebvre and Lori G Beaman entitled *Religion in the Public Sphere: Canadian Case Studies*.<sup>10</sup> Any Australian would be well-served by reading both Moon's and Lefebvre and Beaman's assessment of the issues surrounding the place of religion in the Canadian public sphere and in Canadian law simply for what it tells us, through comparison, about the protection of religious freedom generally in western democratic states.

In order to provide a response to Australian religious concerns with the constitutional protection of fundamental rights and freedoms generally and freedom of religion specifically, the remainder of this review considers Moon's assessment of the protection of religious freedom pursuant to the *Canadian Charter of Rights and Freedoms*, which comprises the largest section of the book.

### III CHARTER OF RIGHTS AND FREEDOMS

The *Canadian Charter of Rights and Freedoms* contains three provisions relevant to the protection of religious freedom, and which will be of interest to Australians seeking to understand the Canadian approach:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

...

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Extensive Canadian case law has interpreted the interplay of these sections, and Moon summarises and assesses the effect of that interaction. Clearly, as we might expect from what we know about the Australian position, the central consideration here is the relationship between freedom of religion and equality.<sup>11</sup> The approach adopted by the Supreme Court of Canada to the protection of conscience and

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<sup>9</sup> Ibid chs 2–7.

<sup>10</sup> Solange Lefebvre and Lori G Beaman (eds), *Religion in the Public Sphere: Canadian Case Studies* (University of Toronto Press, 2014).

<sup>11</sup> Ibid ch 3.

religious freedom in s 2(a) of the *Canadian Charter of Rights and Freedoms* involves two stages: first, ‘that section 2(a) is breached any time the state restricts a religious practice in a nontrivial way’ and, second, ‘the state must justify the restriction under section 1 and the [*R v*] *Oakes*<sup>12</sup> test, and this is said to involve a balancing of competing interests, the individual’s freedom to practise his religion weighed against the state’s ability to advance what it understands to be the public good.’<sup>13</sup>

While the courts have dealt with s 15 *Canadian Charter of Rights and Freedoms* claims involving possible violations of equality rights, they have not used the s 15 right as part of the s 1 balancing of the s 2(a) right to religious freedom against the public interest, as required by *Oakes* and s 1. Rather, Moon concludes:

The issue in most freedom of religion cases is whether a religious individual or group should be exempted from ordinary law. An exemption will be allowed only when its impact on state policy will be relatively minor. This would seem to involve a pragmatic trade-off of interests rather than a principled reconciliation of rights.<sup>14</sup>

In other words, while it may at first blush appear that there is some substance to the claim made by some of Australia’s religious groups that the protection of both equality and religion in one constitutional document may produce unwanted outcomes for the latter right, the Canadian experience with these two rights demonstrates that the equality right is not the source of such outcomes – rather it is a pragmatic means of accommodating any fundamental rights found in the *Canadian Charter of Rights and Freedoms* and the public interest. That is a matter of the s 1 *Oakes* test, which balances interests, rather than a trumping of religion specifically by equality.

Indeed, equality itself, based upon a mere textual reading of ss 1 and 15 of the *Canadian Charter of Rights and Freedoms*, is subject to such pragmatic balancing – a position supported by the Supreme Court of Canada in its equality jurisprudence.<sup>15</sup> While a pragmatic balancing of this sort may be lamented, is it any worse than the ad hoc and piecemeal approach to the ‘protection’ of religious freedom currently achieved through exemptions for religion found in Australian state and territory anti-discrimination legislation? While there is no doubt that some might see it that way, surely a positive, constitutionally entrenched, protection for religious freedom provides a more robust foundation for this fundamental right than a legislatively tenuous exemption from equality itself. Lest we forget that constitutions tend to have greater longevity than legislation. In short, at least for Australia, if not for Canada, the contest between a pragmatic trade-off of rights versus their principled reconciliation may be a distinction without a difference.

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<sup>12</sup> *R v Oakes* [1986] 1 SCR 103 (‘*Oakes*’).

<sup>13</sup> Moon, above n 8, 132.

<sup>14</sup> *Ibid* 138.

<sup>15</sup> *Ibid* 136–7.

#### IV CONCLUSION

Richard Moon ultimately concludes that

[t]he challenge for the courts is to fit this complex conception of religion [both an aspect of an individual's identity and as a set of judgments made by the individual about truth and right] into a system of constitutional rights that distinguishes between immutable or deeply rooted traits that must be respected by the state as part of a commitment to human equality and choices or commitments that are protected as a matter of human liberty but subject to laws that advance the public interest. Because religion can be seen through both lenses, as cultural identity and personal commitment, this shifting by the court between equality- and liberty-based conceptions of section 2(a) may be unavoidable.<sup>16</sup>

And this conclusion, offered by Canada's leading expert on the matter, following an extensive and careful review of the entire corpus of *Canadian Charter of Rights and Freedoms* jurisprudence on freedom of religion, may serve Australia well in any future debates about the protection of human rights through the *Australian Constitution* generally, and freedom of religion and equality specifically.

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<sup>16</sup> Ibid 201.

