Religious Freedom, Section 109 of the *Constitution*, and Anti-discrimination Laws

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Many Australian anti-discrimination statutes contain special provisions to balance equality with religious freedom. However, if these religious freedom provisions in state anti-discrimination laws are narrowed too much, the laws may become inoperative by virtue of s 109 of the Australian Constitution, *which says that an inconsistency between State and Commonwealth law shall be resolved in favour of the latter. This article explores the relationship between religious freedom, s 109 of the* Australian Constitution*, and anti-discrimination laws. It concludes that, to avoid constitutional difficulty, states should ensure religious freedom provisions in their anti-discrimination statutes are at least as wide in scope and effect as that provided by the Commonwealth in its anti-discrimination statutes.*

I INTRODUCTION

One of the ways that religious freedom is protected in Australia at the moment is through recognition of the right in 'balancing clauses' that are included in laws prohibiting unjust discrimination.[1] These clauses recognise that prohibitions on unjust discrimination need to be balanced with other important rights, including the significant internationally-recognised right to religious freedom.[2] Even laws that explicitly prohibit religious discrimination recognise that in some contexts religious beliefs are a valid ground of decision-making.

In recognition of the need to protect Australians from religious discrimination, and in response to the report of a committee of inquiry into the issue,[3] the Federal government in November 2021 introduced a Bill to address these and other issues.

The Religious Discrimination Bill was, however, stalled in the Senate, and lapsed with the calling of the 2022 federal election.[4] It is now not clear whether, and in what form, the new federal Labor government will deal with these issues. It seems appropriate, therefore, to ask the question whether, even in the absence of a Commonwealth law forbidding religious

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[1] See Neil J Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 385. These clauses are sometimes described as 'exceptions' or 'exemptions' in the legislation — see Part III, below, for comment on why these terms are inappropriate. The terminology of 'balancing clause' does not refer to the form of the provisions — they do not explicitly empower courts to undertake the balancing process between different rights. But they represent a balancing process undertaken by parliaments which courts are to apply to achieve these ends.

[2] See, eg, art 18 of the *International Covenant on Civil and Political Rights*, opened for signature 19 Dec 1966, 999 UNTS 171 (entered into force 23 March 1976).

[3] See Department of the Prime Minister and Cabinet, *Religious Freedom Review* (Final Report, 18 May 2018), (also known as the 'Ruddock Report').

[4] While the Bill passed the House of Representatives on the early morning of February 10, 2022, it did so having been amended by a motion moved by the Opposition (and supported by some back-benchers from the Government crossing the floor) in a form that the Government found unacceptable. The Bill had its formal First Reading in the Senate later that day, and the Second Reading was moved, but neither major party tried to bring it on for debate before the election was called. For more details see Parliament of Australia, *Religious Discrimination Bill 2022* <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6821>.

https://doi.org/10.55803/C59X

discrimination, s 109 of the *Constitution* may provide a defence where religious bodies (including religious educational institutions) are sued for discrimination under State laws which provide narrower protections than federal law.

This paper outlines the need for, and provides some examples of, balancing clauses in discrimination law generally. It then surveys these clauses as implemented in Commonwealth and state laws on the topic, noting their similarities but also where they differ. It considers two specific examples of state laws which provide much narrower balancing clauses than provided under Commonwealth law. It then discusses the application of s 109 of the *Constitution* to this situation and argues that where these state laws impair or detract from rights of protection given by federal law, those laws will, to that extent, be inoperative. These views are supported by both judicial and academic comment. The paper considers arguments which might be made against this view, but concludes in the end that the case for s 109 inconsistency remains strong, and that where Commonwealth law provides protection for the religious freedom of individuals and organisations, state laws purporting to impair such protection cannot actually do so.

II Background

This paper is particularly concerned with what might be called 'balancing clauses' or 'exemptions', which are used in discrimination laws at both the state and federal level. These provisions recognise that a prohibition on 'discrimination' (if viewed as simply meaning 'differential treatment') must be qualified by recognition that there are other rights at stake, rights other than the right not to be differentially treated on prohibited grounds. International human rights laws recognise this; see, for example, the view of the UN Human Rights Committee in its general comment on discrimination, where the committee comments that

> not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[5]

Examples of such differential laws are provided below, in Part III (non-religious contexts) and Part IV (religious contexts).

Current laws prohibiting discrimination recognise that actions which on general grounds might be seen as 'discriminatory' should not be unlawful where the actions, and their reasons, are informed by a religious worldview which sees certain criteria as relevant to decisions, not *ir*relevant.

III Reasons For Balancing Clauses

It could be argued that there are two justifications for these balancing clauses: (1) that the right to religious freedom of religious groups and persons needs to be recognised; and (2) that a decision based on a relevant religious reason, made by a religious body or person, is not in any event 'discriminatory'. For example, to move away from the religious area for the moment, how would one describe a decision by a clothing store to only employ female staff to monitor and supervise female changing rooms?

[5] Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th sess, UN Doc CCPR/C/GC18 (10 November 1989) para 13.

Such a decision is permissible under the federal *Sex Discrimination Act 1984* (Cth) ('*SDA*'). While there is a general prohibition on discrimination based on sex in work arrangements in s 14 of the *SDA*, we read the following in s 30:

> (1) Nothing in paragraph 14(1)(a) or (b), 15(1)(a) or (b) or 16(b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with a position as an *employee*, *commission agent* or *contract worker*, being a position in relation to which it is a *genuine occupational qualification* to be a person of a different sex from the sex of the other person.[6]
>
> (2) Without limiting the generality of subsection (1), it is a genuine occupational qualification, in relation to a particular position, to be a person of a particular sex (in this subsection referred to as the ***relevant sex***) if:…
>
> > (c) the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex.[7]

Section 30 is found in Division 4 of Part II of the Act, headed 'Exemptions'. It is submitted that the terminology 'balancing clauses' is more appropriate, because where something is labelled an 'exemption' there is often an implied judgment that such provisions are a temporary and unprincipled departure from a general rule, which should be removed as soon as possible. To the contrary, provisions in Division 4 are important and enduring clauses designed to balance other important rights. In this instance, the rights being recognised are rights of 'decency' and 'privacy', rights which may be seen as historically being particularly important to women.

On the other hand, one could argue that s 30 of the *SDA* was not entirely necessary, because a decision not to employ a man in a female changing room could be said in any event not to be an act of 'sex discrimination'. Consider how the term is defined in s 5 of the *SDA*:

> (1) For the purposes of this Act, a person (in this subsection referred to as the ***discriminator***) discriminates against another person (in this subsection referred to as the ***aggrieved person***) on the ground of the sex of the aggrieved person if, by reason of:
>
> > (a) the sex of the aggrieved person; …
>
> the discriminator treats the aggrieved person less favourably than, in *circumstances that are the same or are not materially different,* the discriminator treats or would treat a person of a different sex.[8]

A decision not to employ a man in a woman's change room is indeed one that has been made 'by reason of the sex' of the applicant; and it could be said that they have received 'less favourable' treatment by not being employed. But the employer could well respond that the 'circumstances' of the potential employee *are* 'materially different' from those of a potential

[6] *Sex Discrimination Act 1984* Cth s 30(1) (emphasis added) ('*SDA*').
[7] Ibid s 30(2) (c) (emphasis in original).
[8] Ibid s 5(1)(a) (bold emphasis in original) (italics emphasis added).

female employee, precisely because human experience tells us that for many women, issues of dignity and privacy are indeed raised by having a male in a change room.

However, while this argument might be made, the wisdom of including s 30(2)(c) to avoid doubt on the issue is clear. Rather than having to enter a complex debate about the relevant 'circumstances', Parliament has made a clear provision outlining when this specific decision is not considered unlawful. Balancing clauses dealing with religious bodies play a similar role.

IV RELIGIOUS BALANCING CLAUSES

For religious groups, these issues are mainly raised by sex discrimination legislation. There may be issues under other laws, but sex discrimination laws are the main focus of this paper.[9] Religious groups will be concerned about behaviour by employees and others that contravenes strong moral prohibitions in their faith. In general terms, what might be called the 'Abrahamic' faiths (Judaism, Christianity and Islam), as understood throughout most of their history have taught that sexual relationships are only legitimately entered into between a biological man and a biological woman who have committed themselves to each other in marriage. Homosexual activity is outside those limits, as is premarital and extra-marital heterosexual sex of all kinds. The traditional understanding of, for example, the Christian Bible, is that human beings in the image of God come in two forms, male and female, and those identities are fixed and cannot be changed.[10] Not all roles in the church, or in the family, are equally open to both sexes. Many churches believe that only men are able to be appointed as priests or senior ministers.

Issues for religious bodies are then raised by discrimination laws which forbid discrimination on the grounds of sex, or marital status, or gender identity, or sexual orientation. In some of those areas it is sometimes suggested by religious groups that they are entitled to make decisions on the basis of 'conduct' so long as they do not automatically discriminate on the grounds of inherent 'identity'. But a number of decisions at the highest level from around the world hold that, if a criterion relates to a person expressing their 'identity' in sexual activity, then that criterion will be legally discrimination based on the prohibited ground of sexual orientation.[11] Explicit balancing clauses are required to protect action in accordance with faith commitments in these situations.

A *Federal Balancing Clauses in* SDA

In broad terms the *SDA* provides balancing clauses which allow some of these decisions to be made in accordance with faith commitments, even apart from arguments about whether something is actually 'discrimination' or not. The principally relevant provisions are s 37 ('Religious Bodies') and s 38 ('Educational Institutions Established for Religious Purposes').

[9] Somewhat oddly, there is a religious balancing clause in s 35 Age *Discrimination Act 2004* (Cth). A provision not very widely used in litigation, but presumably inserted to allow specific rules about 'rites of passage'. For example, an Anglican bishop only confirming someone at the age of 13, or a Jewish congregation setting an age for a bar mitzvah.

[10] See, eg, Genesis 1:27.

[11] See, in Australia, comments in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75, [57] (Maxwell P); in the UK, *Bull & Bull v Hall & Preddy* [2014] 1 WLR 3741, [52] (Hale LJ) 'Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation'; and in the US, *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez* 561 US 661 (2010). For a detailed comment as to why this US decision was wrong, see Michael W. McConnell, 'Freedom of Association: Campus Religious Groups' (2020) 97 *Washington University Law Review* 1641.

Section 37(1) states:

> Nothing in Division 1 ['Discrimination in Work]' or 2 ['Discrimination in Other Areas'] affects:
>
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
>
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
>
> (c) the selection or appointment of persons to perform duties or *functions* for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
>
> (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.[12]

Section 38 states:

> (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the *other person's sex*, *sexual orientation*, *gender identity*, *marital or relationship status* or *pregnancy* in connection with *employment* as a member of the staff of an *educational institution* that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.[13]

Section 38 provides similar balancing clauses found 'in connection with a position as a contract worker' covered under s 16(b)[14] and 'in connection with the provision of education or training by an educational institution' covered by s 21.[15]

It is not entirely clear why s 38 was considered necessary, given that s 37 was present. One explanation may be that a 'faith-based school' (a religious educational institution) may be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'[16] but not actually be currently operated by 'a body established for religious purposes'.[17] So, s 38 may protect a school where its governing documents require it to confirm to Christian or Muslim principles, for example, even though the board do not share those principles.

[12] *SDA* (n 6) s 1(a)–(d) (emphasis added). Section 37(2)(a)–(b) of the *SDA* provides that 's 37(1)(d) does not apply to an act or practice of a body established for religious purposes if the act or practice is connected with provision of *Commonwealth-funded aged care* and the act or practice is not connected with the *employment* of persons to provide that aged care' (emphasis added).
[13] Ibid s 38(1) (emphasis added).
[14] Ibid s 38(2).
[15] Ibid s 38(3).
[16] Ibid s 38(1).
[17] Ibid s 7(1)(d).

While this view seems plausible, it does not appear to be articulated in the traditional sources for determining Parliamentary intention. The second reading speech for the Sex Discrimination Bill 1983 in the House of Representatives drew attention to these exemptions:

> Clause 37 exempts acts and practices of religious bodies. Clause 38 provides for an exemption for certain practices in regard to employment and education in educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.[18]

The Explanatory Memorandum for the Sex Discrimination Bill 1983, while providing more detail, unfortunately is no clearer on this point.

> [Clause 37] provides an exemption from Divisions 1 and 2 of this Part in regard to certain activities of religious bodies including the education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order.[19]
>
> [In Clause 38] [s]ub-clause (1) of this clause provides an exemption in relation to discrimination on the ground of sex, marital status or pregnancy for the hiring or dismissal of staff for employment at an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion or creed where the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.[20]
>
> [And] [s]ub-clause (2) provides a similar exemption in relation to the hiring or dismissal of contract workers. Sub-clause (3) provides a similar exemption in relation to discrimination on the grounds of marital status or pregnancy for educational institutions with regard to their educational practices.[21]

Could *both* provisions be relied on by a faith-based school, or not? It could be argued that a school cannot rely on s 37, as its only protection is intended to be given by s 38. It seems unlikely, however, that this view is correct. Section 37 contains no such 'carve-out', which would have been easy enough to include if this was what Parliament intended.

Are the protections provided by s 38 less than those provided by s 37? Table 1 suggests that they are, slightly.

[18] Commonwealth, *Parliamentary Debates,* House of Representatives, 28 February 1984, 67 (Mick Young, Special Minister of State).
[19] Explanatory Memorandum, Sex Discrimination Bill 1983 (Cth) 10.
[20] Ibid 10-11.
[21] Ibid 10-11.

Table 1: Difference between protections provided by sections 37 and 38 of the SDA.

Area of operation	**Section 37 *SDA***	**Section 38 *SDA***
Applies to…	'any other act or practice' of the religious group	Decisions in relation to employees, contractors and students
Which type of discrimination is excluded?	'Nothing in Division 1 or 2' will apply; ie discrimination based on all the prohibited grounds 1. Sex 2. sexual orientation, 3. gender identity *4. intersex status* 5. marital or relationship status 6. pregnancy or potential pregnancy, 7. *breastfeeding* or *8. family responsibilities.*	Decisions protected are those based on 1. sex 2. sexual orientation 3. gender identity 4. marital or relationship status or 5. pregnancy
To what religious grounds does the exemption apply?	To 'an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'	To 'discriminat[ion] in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'

The result of this comparison is that it does seem that the s 38 protections are not as extensive as those under s 37. This might suggest that s 37 may be seen to be not available to schools. But this view is not inevitable. As noted above, s 37 contains no indication that it is intended to operate completely separately from s 38.

In particular, a school that was actually conducted by a religious body could legitimately argue that it should be entitled to the full range of protections under s 37, since the s 38 lesser protections are only intended to be used by schools which are only 'historically' religious, in the situation noted above, where the current management of the school does not share the religious beliefs on which the school is intended to operate. (This would give s 38 genuine work to do, as otherwise it could be argued that it would be otiose.)

It is worth noting that the view that both sections may be applicable to schools conducted on religious grounds by religious bodies seems to lie behind amendments which were introduced into Federal Parliament by Ms Sharkie (Independent) during the debate on the Human Rights Legislation Amendment Bill 2021, and cognate legislation.[22]

[22] See Commonwealth, *Parliamentary Debates,* House of Representatives, 9 February 2022, 280 (Rebekha Sharkie, Member for Mayo). The amendment repealed s 38(3) of the *SDA* and at the same time amended s 37 to make it clear that a religious school could not rely on s 37 once the relevant provision of s 38 had been removed. The amendment was notable in that it passed the House without the official support of the government, 5 members of the government crossing the floor. But as noted previously, the amended package of legislation of which this was a part did not pass the Senate prior to the prorogation of Parliament for the 2022 election.

B *State Balancing Clauses Relating to these Issues*

Protections of the sort noted here at the federal level are not always so clearly provided at the state and territory level.[23] We may take two jurisdictions where currently protections are much reduced from the federal standard — Tasmania and Victoria.

1 *Tasmania*

Section 52 of the *Anti-Discrimination Act 1998* (Tas) ('Tas *ADA*') only allows discrimination 'on the ground of religious belief or affiliation or religious activity' to be justified by *religious* views (the other grounds of discrimination, such as sexual orientation or gender identity, are not covered by this exemption). In addition, s 52(d) requires that an otherwise discriminatory decision outside the narrow area of ordination, etc, must be (i) 'in accordance with the doctrine of a particular religion; *and* (ii) 'necessary to avoid offending the religious sensitivities of any person of that religion.'[24] This seems to be the only example in Australia where *both* criteria must be satisfied.

Indeed, if it were not for the separate s 27(1)(a) (in Div 2 'Exceptions Relating to Certain Attributes') which seems to narrowly cover the point so long as 'religious institution' (otherwise undefined) includes churches, Tasmania would be the only jurisdiction prohibiting the Roman Catholic church from only ordaining male priests. As it is, that policy is allowable.

But there seems no provision allowing a church in Tasmania, when deciding whether or not to ordain a person as a priest or appoint them as a congregational minister, to decline to appoint someone who is a practicing homosexual, or who is in a heterosexual unmarried (de facto) relationship. Such a decision would arguably be contrary to paras 16(c) and (d) of the Tas *ADA*. Appointment of a member of the clergy would probably be covered by the Tas *ADA*, even though s 22(1)(a) only refers to 'employment' as a prohibited area of discrimination and ministers of religion are not usually 'employees'. The extended definition of 'employment' in s 3 picks up 'engagement under a contract for services'. It would certainly seem that the provision would prevent a church, for example, from refusing to employ a youth worker in one of these categories.

2 *Victoria*

Consider the situation that pertains in Victoria now that the recent *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) ('*Vic EOREA Act*') has commenced operation.[25] There are a number of consequences for religious bodies and schools.

Religious bodies (including schools) may not, under s 82A of the amended *Equal Opportunity Act 2010* (Vic) ('Vic *EOA*'), make staffing decisions based on whether or not the staff member agrees with the fundamental moral values being taught by the body or school; the grounds on which a staff member can be hired or fired are limited to 'religious belief' *alone* (and it seems from the way this is worded, to mean that this will apply even to someone hired as a 'religious

[23] For an overview of balancing clauses for religious groups under different jurisdictions, see Neil J Foster 'Protecting Religious Freedom in Australia Through Legislative Balancing Clauses' (14 June 2017) *Occasional Papers on Law and Religion* < http://works.bepress.com/neil_foster/111/>. See also, Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112.

[24] *Anti-Discrimination Act* 1998 (Tas) s 52(d)(i)-(ii) ('Tas *ADA*').

[25] The amending Act received the Royal Assent on 14 December 2021. Division 1 of Part 2 commenced operation on 14 June 2022. This Division contains the provisions with most impact on schools and religious bodies in general.

studies' teacher.) This rule will also apply (after a further 6 months) to any organisation 'providing services funded by the Victorian Government'.[26]

All schools and 'religious bodies' (however that is defined) can *only* make an otherwise 'discriminatory' staffing decision based on religious beliefs when it is justified in doing so by demonstrating that the 'inherent requirements' of the position require such a criterion.[27] The implication is that a secular Victorian tribunal or court will have to determine whether such requirements are applicable by examining the religious beliefs of the body or school for themselves.[28] In addition it will need to be demonstrated (again to whatever secular body has to decide) that this decision is 'reasonable and proportionate in the circumstances'.[29]

For current purposes those general impacts are enough to see the clash with Commonwealth law. Table 2 illustrates the point.

Table 2: Rights given by the Commonwealth SDA *taken away by State laws.*

Rights given by Cth law (*SDA* s37, s 38)	**Tasmanian *ADA* 1998**	**Victorian *EOA* 2010 (as amended)**
Religious body may decline to employ staff member living in de facto relationship or otherwise openly rejecting religious moral values regarding sexual relationships.	Such a decision cannot be made as no part of s 52 allows discrimination on these grounds.	Does not allow a decision to be made on this basis. *EOA* s 82A seems to only allow discrimination based on 'religious belief'. See s 82A(3): 'This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1)'.[30]
Schools run on religious grounds may decline to employ staff in above circumstances.	Again, no provision of the *ADA* allows this.	Does not allow a decision to be made on this basis. *EOA* s 83A applies to schools in relation to religious belief, but not to other grounds.

V APPLICATION OF S 109

The question, then, is whether these State laws can limit a right or privilege given by Commonwealth law. This raises issues under s 109 of the *Constitution*, which reads:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

There is, of course, a lot of jurisprudence and scholarship on this provision. But to briefly summarise: the *Constitution* has as one of its functions the allocation of law-making responsibility between the Federal and the various State and Territory Parliaments. Where there

[26]Section 82B of amended *Equal Opportunity Act 2010* (Vic) ('Vic *EOA*').
[27] Section 82A(1)(a) of amended Vic *EOA*.
[28] See Neil Foster, 'Victorian Religious Exceptions Amendment Bill Introduced' *Law and Religion Australia* (Blog Post, Oct 28, 2021) <https://lawandreligionaustralia.blog/2021/10/28/victorian-religious-exceptions-amendment-bill-introduced/> .
[29] Section 82A(1)(c) of amended Vic *EOA*.
[30] It has to be said that s82A(1) is ambiguous in specifying what prohibited ground it refers to. Still, the focus is on the 'religious belief or activity' of the complainant under s 82A(1)(b), so presumably the intention is that that ground is the only area where the limited rights given by s 82A apply.

are multiple legislative bodies, there is always the dilemma of conflicting commands. Section 109 of the *Constitution* resolves that clash in favour of the Commonwealth Parliament.

It has been suggested that there are two main ways in which s 109 can operate. In one situation, sometimes described as 'direct' inconsistency, there is an obvious clash — for example, a state law may impose an obligation to act in a way which a Commonwealth law says is unlawful. Another situation is sometimes described as 'indirect' inconsistency, and the common example given is where the Commonwealth has 'covered the field' so as to exclude State laws on a matter.

The general approach to inconsistencies was summed up most recently by the majority in *Work Health Authority v Outback Ballooning Pty Ltd ('Outback Ballooning')*[31] as follows:

> In *Victoria v The Commonwealth* ('*The Kakariki*'), Dixon J referred to two approaches which might be taken to the question whether an inconsistency might be said to arise between State and Commonwealth laws. They were subsequently adopted by the Court in *Telstra Corporation Ltd v Worthing*, *Dickson v The Queen* and *Jemena Asset Management Pty Ltd v Coinvest Ltd*.
>
> The first approach has regard to when a State law would 'alter, impair or detract from' the operation of the Commonwealth law. This effect is often referred to as a 'direct inconsistency'. Notions of 'altering', 'impairing' or 'detracting from' the operation of a Commonwealth law have in common the idea that a State law may be said to conflict with a Commonwealth law if the State law in its operation and effect would undermine the Commonwealth law.
>
> The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'. This is usually referred to as an 'indirect inconsistency'. A Commonwealth law which expresses an intention of this kind is said to 'cover the field' or, perhaps more accurately, to 'cover the subject matter' with which it deals. A Commonwealth law of this kind leaves no room for the operation of a State or Territory law dealing with the same subject matter. There can be no question of those laws having a concurrent operation with the Commonwealth law.[32]

Gageler J, while agreeing with the order of the majority, suggested a slightly different approach, as his Honour reasoned legislation was more complex than use of a clear dichotomy between 'direct' and 'indirect' inconsistency.[33] His Honour noted that even where Commonwealth law expressed a general intention to allow State law to operate:

> Few Commonwealth laws are framed to operate cumulatively upon the entire corpus of State and Territory laws. Most Commonwealth laws will have a definite area of affirmative operation which will admit of the concurrent operation of some, but not all, State and Territory laws.[34]

[31] (2019) 266 CLR 428 ('*Outback Ballooning'*).
[32] Ibid 446-7, [32]-[34] (Kiefel CJ, Bell, Keane, Nettle, and Gordon JJ) (citations omitted).
[33] *Outback Ballooning* (n 31) 456-61, [64]-[78] (Gageler J).
[34] *Outback Ballooning* (n 31) 457, [68] (Gageler J).

In the scenario we are considering, it can be argued that a right given to religious bodies and schools by Commonwealth law has been reduced or removed by State law.[35]

Section 109 renders State law inoperative where it clashes with Federal law. As noted above, one recognised type of clash is where the Federal law has 'covered the field'. This type of clash, however, is not applicable to laws currently being considered, since most discrimination laws contain 'non-field-covering' provisions.

These provisions were added following the decision in *Viskauskas v Niland*, [36] where the High Court ruled that the New South Wales provisions of the *Anti-Discrimination Act 1977* relating to racial discrimination were inoperative due to the 'covering' of the relevant field by the Commonwealth *Racial Discrimination Act 1975* ('*RDA*').

To overcome that problem, and allow State law on the area of discrimination to have concurrent operation with federal law, all Commonwealth discrimination laws since that decision have contained a 'non-field-covering' clause to make it clear that State law on the matter is to be allowed to operate generally so long as it does not directly clash with the Commonwealth law. Such a provision is to be found in s 10 of the *SDA*:

> A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the ground of sex, discrimination on the ground of sexual orientation, discrimination on the ground of gender identity, discrimination on the ground of intersex status, discrimination on the ground of marital or relationship status, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities.
>
> This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of *operating concurrently* with this Act.[37]

This means that State law on discrimination may continue to operate, so long as it is 'capable of operating concurrently' with the *SDA*. But what does this mean? Clearly where a person is bound to do an act under the Commonwealth law, but forbidden from doing it by the State law, then the State law will be inoperative.

However the further question that arises here is, suppose a person is *permitted* to do something under the Commonwealth law, but *forbidden* from doing it under State law, is there a relevant clash? In short, the authority of the High Court is that in such a case, the State law is inoperative. There can be no concurrent operation in such a situation. This is a case of 'direct', rather than 'indirect', inconsistency.

[35] A similar argument can be made in relation to ACT law; with relevant minor adaptations, it seems likely that a view reached on a clash between State and Commonwealth law under s 109, will also be applicable to the relevant provisions preventing Territory laws from clashing with federal laws.
[36] *Viskauskas v Niland* (1983) 153 CLR 280.
[37] Section 10 (2)–(3) *SDA* (emphasis added).

Viskauskas v Niland[38] deals with this precise issue. While the main ground of the decision was that the Commonwealth law 'covered the field', the court did address the situation that would arise if they had not found this.

> It appears from both the terms and the subject matter of the Commonwealth Act that it is intended as a complete statement of the law for Australia relating to racial discrimination.[39]

Their reasoning went further:

> *Even if that were not so*, the provisions of s 19 of the State Act deal with the subject of racial discrimination in relation to the provision of goods and services in terms substantially similar to those of s 13 of the Commonwealth Act. The consequences provided by the respective Acts for breaches of the sections, although in some respects similar, are not the same…[40]

In other words, even if the Commonwealth Act did not cover the field, there would be s 109 inconsistency if the two Acts had different penalties or outcomes for similar behaviour. The same reasoning would also clearly apply where the relevant area of activity was the same but different behaviour was made unlawful; for example, a religious body conducting a school faced with a claim of sexual orientation discrimination where different 'defences' applied.

One example may be seen outside the specific area of discrimination law in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd.*[41] A defence which was available under Commonwealth law would have been precluded from being raised if the relevant State law was operative. The NSW Court of Appeal held that since this was the case, the State law was inoperative to that extent. This was because of 'the existence of a right arising under a Commonwealth law and the direct impairment of its enjoyment, as a result of the operation of a State law'.[42]

One of the first High Court cases dealing with this issue was *Clyde Engineering Co Ltd v Cowburn*.[43] Commonwealth law set a maximum 48-hour week for workers; NSW law set a maximum 44-hour week. In theory both laws could have been obeyed if an employer engaged an employee for only 44 hours. But the majority of the High Court (agreeing with arguments put forward by senior counsel Owen Dixon KC) held that the right of an employer to expect a 48-hour week could not be taken away by the state law:

> Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.[44]

[38] *Viskauskas v Niland* (n 35).
[39] Ibid 292 (Gibbs CJ, Mason, Murphy, Wilson, and Brennan JJ).
[40] Ibid (emphasis added).
[41] [2006] NSWCA 238.
[42] Ibid [115] (Basten JA).
[43] (1926) 37 CLR 466.
[44] Ibid 478 (Knox CJ and Duffy J; Isaacs J agreeing at 499)

Another example of this sort of principle can be seen in *Colvin v Bradley Brothers Pty Ltd*[45] where Commonwealth law gave a right to employers to employ women on certain machines, but State law prohibited such employment. In the circumstances, the State law was inoperative, as it would have impaired the enjoyment of a right given by the Commonwealth law.

A more recent important case where this issue arose was in *Dickson v The Queen ('Dickson').*[46] The Commonwealth law made a conspiracy to steal Commonwealth property a crime in certain circumstances, but Victorian law imposed criminal liability in a broader set of circumstances. The High Court unanimously ruled that the Victorian provision was inoperative.

The Court summed up previous authority on the matter in this way:

> The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v The Commonwealth*[47] was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing*[48] as follows:
>
> 'In *Victoria v The Commonwealth*,[49] Dixon J stated two propositions which are presently material. The first was: "When a State law, if valid, would *alter, impair or detract from* the operation of a law of the Commonwealth Parliament, then to that extent it is invalid"'…[50]
>
> The passage in *Telstra* which is set out above [at 13] was introduced by a discussion of earlier authorities which included the following:[51]
>
> 'Further, there will be what Barwick CJ identified as "direct collision" where *the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided.*[52] Thus, in *Australian Mutual Provident Society v Goulden*,[53] in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question "would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act* 1945 (Cth)". A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question.[54] But that is not this case.'[55]

The Court stressed that this operation of s 109 was important 'not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen

[45] (1943) 68 CLR 151.
[46] (2010) 241 CLR 491 ('*Dickson*').
[47] Ibid 502[13] n 31.
[48] Ibid 502 [13] n 32.
[49] Ibid 502 [13] n 33 (emphasis added).
[50] Ibid 502 [13] ((French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[51] Ibid 503 [15] n 34.
[52] Ibid 503[15] n 35 (emphasis added).
[53] Ibid 503 [15] n 36. See also *Outback Ballooning* (n 31) 468 [69] (Gaegler J).
[54] Ibid 503[15] n 37.
[55] Ibid 503 [15] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).

upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies.'[56] The Court concluded that the State law was inoperative:

> The direct inconsistency in the present case is presented by the circumstance that s 321 of the *Crimes Act* (Vic) renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the *Criminal Code* (Cth). In the absence of the operation of s 109 of the *Constitution*, the *Crimes Act* (Vic) will *alter, impair or detract from* the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*, the case is one of 'direct collision' because *the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law*.[57]

These remarks are directly applicable to the situation created by the 'overlapping prohibitions' which would be set up if the Victorian and Tasmanian laws were allowed full operation in relation to religious bodies and schools. The Commonwealth *SDA* s 37 would, for example, allow a religious organisation to adopt a policy that would involve not hiring a person advocating and living out a policy that favoured sex outside marriage (arguably their 'marital status'), because hiring such a person would either inflict 'injury to the religious susceptibilities' of believers, or not be in conformity with the 'doctrines, tenets or beliefs' of the religion.

However, such an organisation, if the Victorian and Tasmanian laws described above were operative, would be acting unlawfully. It seems fairly clear that this would be a 'direct impairment' by a State law of a right given by a Commonwealth law through consideration of the operation of s 109. To adapt the language of the *Dickson* judgment,[58] the Victorian law 'would alter, impair or detract from the operation of the federal law by proscribing conduct of the [organisation] which is left untouched by the federal law' and 'the State law, if allowed to operate, would impose upon the [organisation] obligations greater than those provided by the federal law'.

As a result, it seems likely that these provisions of the State laws would be 'inoperative' in this sort of case by virtue of s 109 of the Constitution.

In *Outback Ballooning,* Gageler J summed up the law on this aspect of s 109:

> A State or Territory law is inconsistent with a Commonwealth law to the extent that the State or Territory law, if operative, would 'alter, impair or detract from the operation' of the Commonwealth law. If the Commonwealth law 'was intended as a complete statement of the law governing a particular matter or set of rights and

[56] Ibid 503-4 [19] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[57] Ibid 504 [22] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ) (emphasis added) (citations omitted).
[58] See ibid.

> duties, then for a State [or Territory] law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent'.[59]

Later in that decision his Honour expounded upon *Australian Mutual Provident Society v Goulden*,[60] where federal law was found to prevail over a state discrimination law:

> There the Court held that the *Life Insurance Act 1945* (Cth), although 'framed on the basis that it will operate in the context of local laws of the various States and Territories of the Commonwealth', 'should be understood as giving expression to a legislative policy that the protection of the interests of policy holders is to be achieved by allowing a registered life insurance company to classify risks and fix rates of premium in its life insurance business in accordance with its own judgment founded upon the advice of actuaries and the practice of prudent insurers'. In its application to regulate the life insurance business of a registered life insurance company, the prohibition in the *Anti-Discrimination Act 1977* (NSW) of 'discrimination against a physically handicapped person on the ground of his physical impairment in the terms or conditions appertaining to a superannuation or provident fund or scheme' was held to be inconsistent with the *Life Insurance Act* because the prohibition would 'effectively preclude such companies from taking account of physical impairment in classifying risks and rates of premium and other terms and conditions of insurance in the course of their life insurance business in New South Wales' and would thereby '*qualify, impair and, in a significant respect, negate the essential legislative scheme* of the Commonwealth *Life Insurance Act* for ensuring the financial stability of registered life insurance companies and their statutory funds and the financial viability of the rates of premium and other terms and conditions of the policies of insurance which they write in the course of their life insurance business'.[61]

In the circumstances being considered here, it seems clear that the area of law being considered is the question whether a religious body will be liable for discrimination on, say, grounds of sexual orientation. The policy implemented by the Commonwealth law is that in general it will, *but not* where its action is in accordance with its genuine religious commitments (to summarise the effect of sections 37 and 38.) If a state law conditions enjoyment of this privilege on satisfaction of additional requirements, or by removing the privilege altogether, as is done under Tasmanian and Victorian laws, then in doing so it has *qualified*, *impaired*, and to a significant respect *negated*, the scheme set up by the Commonwealth.

The view put above is also shared by some significant academic commentators on discrimination law.

In *Australian Anti-Discrimination and Equal Opportunity Law*[62] the authors explicitly refer to s 38 of the *SDA* and the fact that the Commonwealth law is 'more generous' to employers than some State laws:

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[59] *Outback Ballooning* (n 31) 456 [65] (Gageler J) (citations omitted).
[60] *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330.
[61] *Outback Ballooning* (n 31) 458 [69] (Gageler J) (emphasis added) (citations omitted).
[62] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed , 2018) at 81 [2.14.24] .

> Conversely, a s 109 inconsistency might exist when State and Territory anti-discrimination legislation *removes or diminishes an exception that a Commonwealth law makes*, so that the State or Territory anti-discrimination [law] prohibits conduct that the Commonwealth legislation would allow. For example, s 38 of the *SDA*…[citing the defence]. But under the Queensland and Tasmanian anti-discrimination laws, conduct of this nature is unlawful because the exceptions granted to educational institutions established for religious purposes are not as broad as those in the *SDA*, not extending to discrimination against job applicants and employees.[63]

The authors are saying that s 109 would probably invalidate these differing State provisions. The authors also propose that from an employee rights perspective, provisions of the NSW *Anti-Discrimination Act* which limit discrimination actions by excluding small businesses (in contrast to the Commonwealth *SDA* which applies to all businesses) are probably invalid as they argue the NSW Act 'purports to diminish' the right given to employees.[64] The same language can be used about this right given to religious organisations by the Commonwealth *SDA*, that the Tasmanian or Victorian laws would 'purport to diminish' the right.

An article by Tarrant made a similar point in suggesting that State laws which imposed limits on when abortions could be carried out were inoperative due to a clash with what she argued were rights granted to women by the *SDA*.[65] Tarrant noted that in *Pearce v South Australian Health Commission*[66] the Supreme Court of SA had found that a provision of that State's legislation which did not allow single women to access fertility treatments was contrary to the *SDA* and hence inoperative under s 109.

The view put forward here has been summed up by one eminent judicial commentator, Leeming, writing extra-curially:

> [C]onstitutional inconsistency may be engaged merely by a purported alteration, impairment or detraction from a right, obligation, power, privilege or immunity conferred by federal statute.[67]

However, this analysis is not accepted by all commentators. Professor Jeremy Gans provided a devastating critique of the decision in *Dickson* shortly after the decision was handed down.[68] He saw the decision as creating major problems for concurrent federal and state criminal offences. His critique of the substantive decision was based on a number of issues. On the s 109 point he suggested that the decision did not properly account for prior decisions of the High Court where similar state and federal criminal laws had been allowed to operate concurrently (such as in *McWaters v Day*[69]). He also criticised the High Court decision for

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[63] Ibid 81 [2.14.24] (emphasis added) (footnotes omitted).
[64] Ibid 81 [2.14.23].
[65] Stella Tarrant, 'Using the Commonwealth Sex Discrimination Act and s 109 of the Constitution to Challenge State Abortion Laws' (1998) 20(2) *Adelaide Law Review* 207.
[66] (1996) 66 SASR 486.
[67] Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 149.
[68] See Jeremy Gans, 'Concurrent Criminal Offences after *Dickson v R*' (Conference paper, Gilbert & Tobin Constitutional Law Conference 18th February 2011) <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2011%20Con%20Law%20Conference%20Paper%20J%20Gans_0.pdf>.
[69] (1989) 168 CLR 289.

stressing differences between the Victorian and Commonwealth offences which existed in theory, but which were not actually applicable to the facts of the specific prosecution.

He followed this up with an analysis of the later decision of the High Court in *Momcilovic v R,*[70] suggesting that in this decision, handed down only a short time after *Dickson*, the majority of the court in effect ignored the reasoning in the earlier case.[71]

While there may be much to be said for the critique offered by Gans, the fact is that the High Court continues to cite *Dickson* and clearly regards it as a controlling authority.[72] In those circumstances it seems clear that the operation of s 109 has continuing importance, and the general principle that state law cannot impair the operation of federal law by narrowing the grounds of liability seems to be still applied.

Another example in the discrimination area, handed down even prior to *Dickson,* can be seen in the decision of the Full Court of the South Australian Supreme Court in *Central Northern Adelaide Health Service v Atkinson ('Atkinson').*[73] Mr Atkinson was refused services from the Central Northern Adelaide Health Service because he was not an Indigenous person. He sued for racial discrimination. The Service responded that they were relying on a provision in the State law, s 65 of the *Equal Opportunity Act 1984* (SA) ('SA *EOA'*) which allowed special services to be provided 'for the benefit of persons of a particular race'.

However, Mr Atkinson noted that there was a similar provision in section 8(1) of the *Racial Discrimination Act* (Cth), but this applied in a narrower set of circumstances.[74] This meant that there was a clash between the *RDA* and the SA *EOA*. Conduct that would be lawful under State law, could be unlawful under the *RDA*.

> There is a tension between section 8 of the *Racial Discrimination Act* and section 65 of the *Equal Opportunities Act*. In my view a literal reading of section 65 would lead to an inconsistency with the *Racial Discrimination Act* such that section 109 of the *Australian Constitution* would have application, and as a consequence, section 65 would be inoperative.[75]

However, in the circumstances his Honour concluded that 'limitations' could be read into the State law to make it consistent with the Commonwealth law.[76] If this had not been possible, there would have been a clash between the laws and s 109 would have operated in favour of Commonwealth law.

It is interesting that an argument of the State was that s 65 of the SA *EOA* and s 8 of the Commonwealth *RDA* could both operate, on the basis that s 65 only applied to a claim under State law and s 8 would still apply to a claim under Commonwealth law.[77] But Gray J rejected

[70] (2011) 245 CLR 1.
[71] Jeremy Gans, 'Concurrent Criminal Offences After *Momcilovic v R*' (Seminar Paper, Australian Association of Constitutional Law, 21 Oct 2011).
[72] See *Outback Ballooning* (n 31) [31]. See also citation of *Dickson* by the NSW Court of Appeal in *Allianz Australia Insurance Ltd v Viksne* [2021] NSWCA 268, [39].
[73] *Central Northern Adelaide Health Service v Atkinson* (2008) 103 SASR 89 *('Atkinson')*.
[74] Any such arrangements had to be only temporary and had to comply with other requirements under the special measures exception in Article 1.4 of the relevant international Convention.
[75] *Atkinson* (n 70) 115 [106] (Gray J).
[76] Ibid 116 [112] (Gray J).
[77] Ibid 117[116] (Gray J).

this argument. Both laws clearly dealt with the topic of 'racial discrimination'. The topic of both laws was 'discrimination on the basis of race, and if the SA law could not be 'read down' then it would be contrary to the Commonwealth law by permitting actions that were unlawful under that law.[78]

Note that a similar argument was run by New South Wales in *Viskauskas v Niland* and was also rejected. For example, the court accepted that

> there is no inconsistency between a State law and a Commonwealth law simply because each authorises an inquiry into the same facts, and provides for punishment or other legal consequences for the same acts. That may be so where the statutes are made for different purposes - for example, a State law enacted for the protection of consumers might validly require an inquiry to be made into conduct, and might penalise conduct, which also amounted to racial discrimination.[79]

But in *Atkinson*, the court said that was not so here as both federal and state Acts deal with the one subject of racial discrimination.

It seems clear that in the examples being considered in this paper, the federal law and the state laws deal with the 'one subject': sexual orientation discrimination. Indeed, that this is so can be seen from the specific terms of s 10 of the *SDA* quoted above, which refers to 'a law of a State or Territory that deals with discrimination … on the ground of sexual orientation'. The Commonwealth itself, in effect, has defined its 'area of operation' in a way which makes it clear that it is the same area as the state law.

Atkinson is clear authority, then, at a superior appellate level that a 'defence' that applies in one discrimination law, but not in another, may lead to a s 109 clash. The *Atkinson* case is formally the reverse of the situation we are considering; in that case there was a defence under state law which was absent in Commonwealth law. But the logic leads to the conclusion that if there is a defence under Commonwealth law, in a law dealing with discrimination on the basis of sexual orientation, but that defence is missing from a state law on the same topic, then the state law will be inoperative under s 109 to the extent of the clash.

True, an argument might be put leading to a different outcome, by giving a different characterisation of the legislation. It could be said that the Commonwealth *SDA,* as an overall law, gives rights to individuals not to be discriminated against on the basis of protected characteristics such as sexual orientation or marital status. However, the Commonwealth has chosen not to extend this right in certain cases involving religious bodies (under s 37 *SDA*) or educational institutions (under s 38 *SDA*). But the state laws we have mentioned choose to extend the rights to those cases, and in that sense might be seen as simply broadening a protection provided by the Commonwealth, and not 'impairing' the operation of the Commonwealth law at all.[80]

The case as put seems attractive. But I would argue that it is not ultimately persuasive. As noted above, an essential part of all legislation dealing with discrimination is that it must balance important rights enjoyed by *all* parties involved. It would be a serious over-simplification to say that the *only* purpose of the *SDA* was to, in all cases, prohibit decision-making based on

[78] Ibid 117 [118] (Gray J , Kelly J agreeing at [143]).
[79] *Viskauskas v Niland* (n 35) 295 (Gibbs CJ, Mason, Murphy, Wilson, and Brennan JJ).
[80] I acknowledge that this interesting argument was put by one of the anonymous referees for my paper.

the protected characteristics. The very fact that the Act contains a number of 'exemptions' or 'balancing clauses' makes this point. Those clauses protect rights based on matters such as decency and the right to privacy as well as religious belief. A state law which impairs those rights is rightly seen as undermining the scheme carefully established by the federal legislation.

Suppose, for example, a state law provided that it would be unlawful *not* to allow the employment of a man in a woman's changing room area. That state law could (if the argument above were accepted) be characterised as extending non-discrimination rights to men who are being detrimentally treated on the grounds of sex. Yet of course to uphold such a law would undermine the interests of women in decency and privacy protected by the current provisions in s 30(2)(c) of the *SDA*, noted above. Similarly, the *SDA* scheme provides protections for religious freedom which should not be undermined by the state laws mentioned.

A case raising similar issues to those discussed here has recently been decided by the High Court, although unfortunately for the present discussion, the substantive s 109 issues were not reached. In *Citta Hobart Pty Ltd v Cawthorn*[81] the issues arose in relation to disability discrimination law. Commonwealth law states that a certain standard of providing access for disabled persons must be used in buildings. Tasmanian law imposes a higher and more expensive standard. Must a builder comply with the state law, or may they build to the Commonwealth standard?

While there were s 109 issues involved, the case was complicated, because it also raised important issues as to what body has authority to decide the question. The Tribunal before which the matter first was heard concluded that the case involved matters arising under federal law, and on authority of *Burns v Corbett*[82] that it had no jurisdiction to hear the matter because it was not a 'court'. The appeal to the Tasmanian Full Court involved this question, but it also required discussion of whether there was a s 109 issue or not.

Blow CJ in the Tasmanian Full Court seemed to adopt the argument that had been rejected by the majority in *Atkinson* and found that the Commonwealth rule only applied to cases where a breach of the Commonwealth law was involved, and hence there was no clash.[83] Other members of the court offered similar comments. On appeal the High Court upheld the decision of the Tribunal to decline jurisdiction. Once it became clear that there was a constitutional issue raised by the litigation, which was 'genuinely raised in answer to the complaint in the Tribunal and was not incapable on its face of legal argument',[84] the Tribunal were correct to dismiss the claim. The merits of the s 109 argument, however, were not canvassed in any detail, beyond all members of the court accepting that the issue was 'genuinely raised' and 'not incapable of legal argument'.

Edelman J, while agreeing that the issue did not need to be resolved, offered a few hints as to what matters might have been considered had the court been going to resolve the s 109 point:

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[81] *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 on appeal from *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15.
[82] (2018) 265 CLR 304.
[83] *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, at [5].
[84] *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward, and Gleeson JJ); this statement repeated at [35]. The majority said that a higher standard, that an argument must not amount to 'abuse of the process of that court', should not be adopted; at [41]. Compare Edelman J in dissent on this point, who said that the test as to whether a matter was a 'real question' was: 'An issue will involve no "real question" for the same reasons that it would be an abuse of process': at [51]. His Honour also used, however, the phrase 'manifestly hopeless' to sum up this test: at [52], [73].

> The s 109 issue raised by the appellants is *not manifestly hopeless*. It suffices to say that, whatever may be the strength of the argument concerning what is sometimes, awkwardly, described as 'direct inconsistency', it was not manifestly hopeless to allege that the State Act was 'indirectly' inconsistent with the Commonwealth Act on the argued basis that the Commonwealth Act was intended to be 'exhaustive' in its coverage of the relevant subject matter of disability standards. The argument is not manifestly hopeless in circumstances in which the Commonwealth Act contemplates a comprehensive regime of disability standards to be formulated by the Minister.[85]

To sum up, in general, in those areas where the prohibited grounds of discrimination set out in the Commonwealth *SDA* and State laws overlap (particularly in the specific areas of sex, sexual orientation, marital status, and gender identity), any State laws which provide a more restrictive set of criteria than the Commonwealth law would remove a liberty given to religious organisations by the Commonwealth law: the liberty to make hiring and firing determinations 'conform[ing] to the doctrines, tenets or beliefs of that religion' or doing what is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'.[86] These State laws would impair the operation of the Commonwealth law, and in respect of those overlapping grounds would be inoperative in accordance with s 109 of the Constitution.

VI APPLICATION TO TERRITORY LAW

The same general logic will apply to a Territory such as the ACT, though s 109 will not itself be relevant.

The ACT legislature, for example, derives its legislative powers from the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ('*Self-Government Act'*), which provides in s 28 that:

> (1) A provision of an enactment *has no effect to the extent that it is inconsistent with a law* defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.[87]
>
> (2) In this section:
>
> *law* means: *a law in force in the Territory* (other than an enactment or a subordinate law)…[88]

It is clear from this that a law of the Territory cannot have an effect which is inconsistent with a law of the Commonwealth. This sort of clash was discussed in the decision of the High Court of Australia in *The Commonwealth v Australian Capital Territory*[89] ('ACT *Same-Sex Marriage Case*') where the court ruled that ACT legislation establishing an institution of 'same sex marriage' (before the law of the Commonwealth had been changed) was invalid as inconsistent with the *Marriage Act 1961* (Cth).

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[85] Ibid [79] (Edelman J) (emphasis added) (citations omitted).
[86] *SDA* s 37, 38.
[87] *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28(1) (emphasis added).
[88] Ibid s 28(2) (italics emphasis added).
[89] [2013] HCA 55 ('ACT *Same-Sex Marriage Case*').

Determining whether an ACT law is inconsistent with a federal law is not merely a matter of the verbal formulation used, but, as the High Court said in the ACT *Same-Sex Marriage Case*, 'the topic within which the status falls must be identified by reference to the legal content and consequences of the status, not merely the description given to it'.[90] In this case it is not a question of 'status' but 'obligations'. Here it seems that the 'topic' can be fairly described as the question 'may a religious school use the marital status or sexual orientation of a student or teacher as part of its decision-making in employment or education'? If an ACT law precludes this, the answer would be, 'No'. But the *SDA* of the Commonwealth answers that question, 'Yes'.

VII CONCLUSION

It may be asked, if this argument is correct, why it has not been previously put to a court in the context of religious bodies, educational institutions, and discrimination law. Any answer is of course pure speculation, but it seems that at least part of the reason may be that, until recently, federal and state discrimination laws on this topic were mostly similar, and there would have been no practical benefit in relying on the federal law. Tasmania has been out of kilter with seriously restrictive provisions for some time, but for some reason no major litigation has ensued there. The major change in 'balance' brought by the recent Victorian amendments noted above, and the possibility that other jurisdictions may move to copy these, may foreshadow a greater need for religious organisations to rely on Commonwealth law for at least a minimum level of protection.

In short, it has been argued that where a State or Territory law dealing with discrimination provides a narrower balancing clause in relation to religious bodies or educational institutions than the Commonwealth law provides, the State or Territory law will, to the extent of that inconsistency, be inoperative by virtue of s 109 of the Constitution, and the religious body will be free to act within the parameters permitted by the Commonwealth law. Provision of protections for religious freedom in this way will assist in the Commonwealth meeting its internationally-mandated obligations under art 18 of the *International Covenant on Civil and Political Rights*, at least until a consensus at the federal level can be reached for agreed federal legislation protecting religious freedom more widely.

[90] Ibid [60] (French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ).