Religious Freedom, the *Sex Discrimination Act*, and Section 109: A Surrejoinder to Butler

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In a previous article, I argued that section 109 of the Australian Constitution *would prohibit State laws imposing different and more demanding requirements on religious schools than requirements imposed by Federal laws. In a subsequent rejoinder, Nicholas Butler reached the opposite conclusion. In this surrejoinder, I return to a discussion of the High Court's jurisprudence on section 109 and conclude that Butler's critique is well-written but ultimately unconvincing.*

I. INTRODUCTION

In volume 1 of this journal, I published an article discussing the question of whether State anti-discrimination laws could validly impose different and more demanding requirements on religious schools than those imposed by the *Sex Discrimination Act 1984* (Cth) ('*SDA*').[1] In volume 2 of this journal, Nicholas Butler provided a rejoinder to my article, arguing that I was wrong to suggest that the effect of s 109 of the *Constitution* would be that such State laws would be inoperative.[2] Somewhat belatedly, I would like to continue the discussion by offering this surrejoinder.

This is not merely an 'academic' argument. There are currently significant differences between the Commonwealth *SDA* and State and Territory laws on the important issue of the extent to which religious schools may operate in accordance with their religious convictions in decisions impacted by sex discrimination laws. Such schools need to know for their ongoing operations whether they must comply with the narrower freedoms provided under State and Territory laws, or whether they may rely on the broader *SDA* provisions. Even if the *SDA* is amended to narrow its own scope, it seems likely that differences will continue and schools need guidance as to which set of laws to follow.

I argue here that the critique offered by Butler is ultimately unconvincing. The particular provisions of the *SDA* in question, ss 37 and 38, are not an extraneous addition to an otherwise absolute prohibition on discrimination. They represent a fundamental part of the architecture of the legislation, designed to recognise the key internationally recognised right of religious freedom, and to provide a mechanism to balance clashes between that right and the right to non-discrimination. If State and Territory laws undermine the rights given under the *SDA*, they will seriously impair the operation of the law.

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[1] Neil Foster, 'Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws' (2022) 1 *Australian Journal of Law and Religion* 36 ('Religious Freedom').

[2] Nicholas Butler, 'May Australian States Impose Sexual Orientation and Gender Identity Non-Discrimination Obligations on Religious Schools? A Rejoinder to Foster' (2023) 2 *Australian Journal of Law and Religion* 1 ('Rejoinder'). I note in passing that my article also commented on Territory laws, where s 109 would not be relevant but similar considerations (if my argument is correct) would mean that such Territory laws would also be inoperative. For the sake of simplicity Butler focussed on State laws, and I will also confine the current discussion to such laws.

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II. THE EARLIER ARGUMENT SUMMARISED

Briefly, my earlier article noted that provisions have been included generally in Australian anti-discrimination laws aimed at balancing the prohibitions on discrimination with other important human rights, and in particular the right of religious freedom. A key area where such provisions have been used is in laws forbidding discrimination on the grounds of sex, including sexual orientation and gender identity.

The Commonwealth *SDA* provides fairly generous protection for the religious freedom of religious bodies and schools in ss 37 and 38. In general terms, these provisions allow such bodies to operate in accordance with their religious commitments in the hiring of staff or engagement of contractors, and in the way they conduct their operations generally. However, State laws on the topic of sex discrimination do not always contain such wide protections. In the article, I noted in particular that the States of Victoria and Tasmania have quite narrow protections, and that religious organisations in those jurisdictions would be, prima facie, in breach of State laws when their activities would not be unlawful under the *SDA*.

I argued that this would mean that under s 109 of the *Constitution* such State laws would be inoperative.[3] I noted that this is not an example of 'indirect' discrimination (where one might suggest that the Commonwealth had intended to 'cover the field' with its law.) Rather, this was an example of direct discrimination, where the State law would impair the operation of the Commonwealth law by purporting to take away a right, or a liberty, given to a citizen or group of citizens by the Commonwealth.

In making this argument, I referred to a number of High Court decisions which supported this principle:

- *Clyde Engineering Co Ltd v Cowburn* ('*Clyde*'),[4] where the court ruled that the right of an employer to expect a 48-hour week from workers could not be taken away by a state law specifying a maximum working week of 44 hours;

- *Colvin v Bradley Brothers Pty Ltd*,[5] 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;

- *Australian Mutual Provident Society v Goulden*,[6] where a provision of the *Anti-Discrimination Act 1977* (NSW) relating to insurance policies and disabled persons, was found to be inoperative as inconsistent with specific insurance rules set up by Commonwealth law; and

- *Dickson v The Queen* ('*Dickson*'),[7] where the Commonwealth law made conspiracy to steal Commonwealth property a crime in certain circumstances, but Victorian law

[3] Or 'invalid' to the extent of the inconsistency, and while the Commonwealth law was in place. As Butler notes, a State law might 'revive' in operation if the inconsistency were removed.
[4] (1926) 37 CLR 466 ('*Clyde*').
[5] (1943) 68 CLR 151.
[6] (1986) 160 CLR 330.
[7] (2010) 241 CLR 491('*Dickson*').

imposed criminal liability in a broader set of circumstances. The High Court unanimously ruled that the Victorian provision was inoperative.

Other decisions at an appellate level making similar findings were referred to, including:

- *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* ('*Bitannia*'),[8] where a defence which was available under Commonwealth law would have been precluded from being raised if the relevant State law was operative, and the State law was found to be inoperative under s 109; and

- *Central Northern Adelaide Health Service v Atkinson* ('*Atkinson*'),[9] where the court ruled that an exception under South Australian discrimination law relating to 'positive discrimination' operated in wider circumstances than a similar exception provided under the *Racial Discrimination Act 1975* (Cth), and hence that the State law would have been inoperative unless interpreted to be subject to the same limits as the Commonwealth law.

I concluded that in those areas where the prohibited grounds of discrimination set out in the *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. Hence 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*.

III. THE REJOINDER SUMMARISED

Butler provides a helpful overview of my paper, and I want to acknowledge that his rejoinder is a good faith attempt to counter the arguments I have made in the best traditions of academic debate. I attempt, I hope fairly, to briefly summarise his response to my arguments. I will then explain why I am not convinced by his response.

Butler's rejoinder argues that the balancing clauses in the *SDA* are only designed to provide defences to actions taken specifically in reliance on the Commonwealth law, and hence have no operation when State law is invoked. He argues that the *SDA* provisions do not create a right or liberty for religious schools, and that the cases I rely on (such as *Dickson*) can be distinguished. He suggests that the Commonwealth law was intended to operate by allowing State laws to have their full effect, and that there is no specific intention on the part of the Commonwealth to over-ride State laws. The fact that only other parts of the *SDA* are 'over-ridden' by ss 37 and 38, and that State laws are not explicitly mentioned, is said to point to a Commonwealth intention to allow State laws full operation.

IV. SURREJOINDER

I must first express my appreciation for the points that Butler concedes that accord with my argument. He expressly notes, for example, that 'State Laws Imposing SOGI Non-Discrimination Obligations on Religious Schools Probably Impose Obligations Greater Than

[8] [2006] NSWCA 238 ('*Bitannia*').
[9] (2008) 103 SASR 89 ('*Atkinson*').

Those Imposed by Commonwealth Law'.[10] I would of course suggest that the word 'probably' could be removed, but otherwise agree.

Butler initially proposes distinguishing the important High Court decision in *Dickson* by suggesting that the legislation at issue there dealt with 'conduct' as opposed to 'circumstances'.[11] However, he concedes that in the end there is little to be made of this distinction, and that:

> To exclude certain conduct from attracting legal liability only in some circumstances, or only when that conduct is engaged in by some people or organisations, is still to exclude conduct from attracting legal liability … it is undeniable that religious schools have greater obligations under State laws imposing SOGI non-discrimination obligations than they do under the *SDA*.[12]

The distinction next proposed between *Dickson* and the position of the *SDA* obligations is that the framing of the Commonwealth law at issue in *Dickson* was the result of a 'deliberate legislative choice' made by the Commonwealth to exclude certain behaviour from criminal sanction.[13] This, he argues, shows that the Commonwealth chose to enact a law that 'confers on the Australian people a positive right to conduct themselves in a manner that falls short of constituting conspiracy according to s 11.5'.[14] He then refers to the way that the previous decision of *McWaters v Day* ('*McWaters*')[15] was distinguished in *Dickson*, saying that the court had concluded that the relevant State law there was found not to 'confer a liberty' on drivers to behave in certain ways.[16]

The language of 'right' and 'liberty' then becomes important in Butler's argument.[17] In short, he concludes that a provision such as s 38 of the *SDA* does not confer a right or liberty on religious schools to behave in accordance with their faith-based ethos. But how does he come to this conclusion? It seems that he does so by characterising ss 37 and 38 as not really an important part of the *SDA* — minor provisions with 'exemptions' which are not very significant.

The problem with this approach is that it presumes to know why the Commonwealth chose to include these provisions in the law. Clearly, in the most basic sense, the decision to include these provisions was a 'deliberate legislative choice' — the words did not just magically appear. The question is, what was the reason for the choice? Were these provisions just inserted as temporary measures designed to be soon repealed? I suggest, rather, that the reason these provisions were included in the *SDA* is that the legislation does not only aim to protect *one* human right (the right not to be subject to discrimination). Instead, the Parliament was recognising, in adding these sections, that Australia's obligations to protect human rights *also* included the right to religious freedom.

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[10] Butler (n 2) 2.
[11] Ibid 3.
[12] Ibid 4.
[13] Ibid 5, quoting *Dickson* 505 [24]–[25] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[14] Butler (n 2) 5.
[15] (1989) 168 CLR 289 ('*McWaters*').
[16] Butler (n 2) 5. We return to *McWaters* below.
[17] Ibid 6. '[T]he relevant question thus becomes whether s 38 of the *SDA* can be said to affirmatively confer a liberty': at 6.

That this approach (structuring legislation to balance different but equally important rights) accords with this common feature of discrimination laws can be seen, for example, in the judgment of French J in *Bropho v Human Rights and Equal Opportunity Commission* ('*Bropho*').[18]

In *Bropho,* the legislation (s 18C of the *Racial Discrimination Act 1975* (Cth)) prohibited 'racial vilification', but a balancing clause (s 18D) noted certain areas where that prohibition would not apply. As French J said in his overview of the statutory scheme (after describing the international law obligations underpinning the various rights):

> The *Convention* article which underpins Pt IIA of the *Racial Discrimination Act* allows States to *strike a balance* between the need to prohibit the evil of racial vilification and hatred and the need to protect freedom of speech and association within their reasonable limits. Part IIA reflects a like balance in the prohibitions imposed by s 18C and the exemptions it allows by s 18D.[19]

Later in that decision, in discussing the role played by s 18D as an 'exemption', his Honour commented:

> Section 18D places certain classes of acts outside the reach of s 18C. The broad class of acts covered is 'anything said or done reasonably and in good faith' in the circumstances described in paras (a), (b) and (c) of that section. The immunities created by s 18D were described in the Second Reading Speech and in the Explanatory Memorandum as 'exemptions'. It is important however to avoid using a simplistic taxonomy to read down s 18D. *The proscription in s 18C itself creates an exception to the general principle that people should enjoy freedom of speech and expression*. That general principle is reflected in the recognition of that freedom as fundamental in a number of international instruments and in national constitutions. It has also long been recognised in the common law albeit subject to statutory and other exceptions…
>
> Against that background s 18D may be seen as *defining the limits* of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.[20]

Redlich JA in *Christian Youth Camps Ltd v Cobaw Community Health Services*[21] made a similar point about the discrimination legislation at issue in that case:

> The exemptions in ss 75, 76 and 77 of the Act protect aspects of what may be described as the 'right to religious freedom.' … [T]he legislature, in carving out an exemption from what would otherwise be discriminatory conduct, has *struck a balance* between two competing human rights…[22]

[18] (2004) 135 FCR 105 ('*Bropho*').
[19] Ibid [62] (emphasis added).
[20] Ibid [72]–[73] (emphases added).
[21] (2014) 50 VR 256.
[22] Ibid [474] (emphasis added). His Honour was in dissent on the outcome of the case, but his comments well illustrate the scheme used in discrimination laws.

If the above is correct, then we can see that what was being accomplished in ss 37 and 38 was indeed the granting of a 'liberty' to religious groups and schools to make decisions about their operations (including staffing decisions and educational decisions) which accord with their faith commitments, as a way of recognising and 'balancing' two competing human rights. By comparing the models adopted for discrimination legislation, one can characterise the inclusion of ss 37 and 38 as a 'deliberate legislative choice'. To use the phrase adopted by French J in *Bropho*, these sections (along with other 'exemptions' in the *SDA*), 'define the limits' of the prohibition on discrimination. For State law, then, to purport to narrow this area of liberty would indeed impair the operation of the Commonwealth Act.

Butler notes the decision in *McWaters*[23] as an example of a case where what seems to be the same behaviour was made a criminal offence under Commonwealth law on narrower grounds than it was criminalised under State law, and yet the State law was found to be valid. However, on closer analysis, *McWaters* does not support this claim. The relevant State law made it an offence to drive a motor vehicle under the influence of liquor. A Commonwealth law, the *Defence Force Discipline Act 1982* (Cth), made it an offence for a person to 'drive a vehicle on service land while he is under the influence of intoxicating liquor … to such an extent as to be incapable of having proper control of the vehicle'. The respondent had been charged under the State law but argued that it was invalid, as the circumstances of the offence were covered by the Commonwealth law.

The High Court ruled that there was no s 109 clash. They did so on the basis that the Commonwealth law was clearly part of a disciplinary code intended only to apply in specific circumstances relating to the defence force. There was a provision in the Commonwealth Act which specifically dealt with the issue of 'double jeopardy', which showed that it was contemplated that the Commonwealth law could operate alongside State laws.[24] The court concluded that:

> Since the *Discipline Act* is supplementary to, and not exclusive of, the ordinary criminal law, it follows that it *does not deal with the same subject-matter or serve the same purpose* as laws forming part of the ordinary criminal law. The result is that there is no inconsistency between s 40(2) of the *Discipline Act* and s 16(1) of the State Act for the purposes of s 109 of the *Constitution*.[25]

The difference between the legislation at issue in *McWaters*, and the provisions being discussed here, is clear. Unlike the situation in that case, the prohibitions on discrimination on the basis of sex, or gender identity, or marital status, contained in the *SDA* and in the State laws on the topic, 'deal with the same subject-matter' and 'serve the same purpose'. In contrast to *McWaters*, the Commonwealth law does not target a specific sub-set of the population (such as defence members) or a geographical location (such as a defence base). It is designed, as are the State laws, to operate generally across the population for whom the legislature is responsible.

Butler refers to another s 109 decision, *Blackley v Devondale Cream (Vic) Pty Ltd* ('*Blackley*'),[26] which supports my argument. There, a State law provided for a higher 'minimum wage' for certain employees than was laid down by a Commonwealth law. By 4-1,

[23] *McWaters* (n 15).
[24] Ibid 299.
[25] Ibid 299 (emphasis added).
[26] (1968) 117 CLR 253 ('*Blackley*').

the High Court held that the State law was invalid. Butler tries to draw some comfort from the decision by noting that only 2 of the 4 judges in the majority seemed to emphasise the rights of the employers and the 'direct' inconsistency involved.[27] But whether the clash is described as 'direct' or 'indirect', the result of *Blackley* is to confirm the argument made in my article, that a State law imposing greater obligations on a citizen than a Commonwealth law operating in the same circumstances will be inoperative.

Butler then returns to highlight the differences between the law in question in *Dickson*[28] and the *SDA* provisions. But while there are differences, of course — the *Dickson* laws were criminal laws, and one of the clashes identified was that a jury trial was required under the Commonwealth law — in the end these incidental issues were not the reason for the decision. The decision there lay in the fact that by prohibiting behaviour deliberately left open in the Commonwealth law, in a law dealing with the same subject area, the State law would undermine and impair the operation of the Commonwealth scheme. The 'protections' provided by the Commonwealth *SDA* are not simply the prohibitions on discrimination, but the explicit provisions delineating religious freedom rights of religious organisations. The blanket statement that 'exceptions to discrimination laws' should always be interpreted narrowly[29] ignores the key architecture of these laws, designed to provide protections to not only non-discrimination rights, but also to religious freedom rights.

Butler concedes that if the effect of, say, s 38 is to give a liberty to faith-based schools, then s 109 would operate on any State law removing this liberty:

> If the correctly understood operation of s 38 is to create an affirmative right, liberty, power, privilege, or immunity for religious schools to engage in the SOGI discrimination addressed by that section, then a State law imposing an obligation on religious schools not to so discriminate is clearly invalid.[30]

So, he needs to show that this is not the effect of s 38. Yet in this, with respect, he fails. His strongest argument seems to be that the express purpose of s 38 is to exempt faith-based schools from certain *SDA* requirements; and that this (coupled with a failure to *explicitly* exempt those schools from State laws) somehow implies that it was not the purpose of the Commonwealth to impact State laws. But it is not necessary to show a positive 'purpose' of impacting State laws for s 109 to operate to invalidate those laws. The Commonwealth Parliament does not need to turn its mind to the impact of its laws on directly conflicting State laws — that question has already been resolved by s 109.

Indeed, s 109 will operate to invalidate State laws *even if* it can be shown that the Commonwealth Parliament would like to avoid such an outcome, if in fact the State law is directly inconsistent with a Commonwealth law. This can be seen in the decision of the High Court in *University of Wollongong v Metwally*,[31] where Gibbs CJ said:

> When a law of a State is inconsistent with a law of the Commonwealth and becomes, to the extent of the inconsistency, invalid, the invalidity is brought about by s 109 of the *Constitution* and not directly by the law of the Commonwealth …

[27] Butler (n 2) 6.
[28] *Dickson* (n 7).
[29] See Butler (n 2) 7.
[30] Ibid 10.
[31] (1984) 158 CLR 447.

> The Commonwealth Parliament cannot enact a law which would affect the operation of s 109, either by declaring that a State law, although not inconsistent with any Commonwealth law, shall be invalid, or that a State law which is inconsistent with a Commonwealth law shall be valid. If there were a direct conflict between a Commonwealth law and a State law as, for example, where one law forbids what the other commands, or one *takes away a right which the other confers*, an assertion in the Commonwealth law that it was not intended to be inconsistent with the State law would be meaningless and ineffective.[32]

So, the view of the Commonwealth Parliament is not relevant to the effect of a direct clash. Butler suggests that because the Parliament, in s 38, had explicitly excluded the operation of other parts of the *SDA* to the situation of faith-based schools, this implied that the Parliament had considered and decided not to exclude State laws by mentioning them. This is not persuasive. The fact that the Parliament could have chosen to include an explicit override of State laws, but did not do so, implies nothing. As noted above, Parliament does not need to explicitly address the impact of its laws on inconsistent State laws, because s 109 does that work automatically. Any argument from silence here must fail. In this context, State laws are not in the same 'category' as other provisions of the *SDA*, and a failure to explicitly override them in s 38 tells us nothing about Parliamentary intention on the issue, or the effect of s 109.

Butler then tries to set up a distinction between 'laws specifically identified as of a more limited application, and … laws not so identified',[33] suggesting that as the *SDA* is 'limited' (because of the balancing clauses in ss 37 and 38, and presumably other such clauses) it can be distinguished from legislation noted in the cases identified in my article, such as *Viskauskas*,[34] *Clyde*,[35] and *Bittania*.[36] But the supposed distinction seems non-existent. All legislation has areas within which it operates, and areas where it has no effect. Whether these are identified in separate 'exemptions' or in the way that obligations are drafted makes no real difference.

Butler then considers *Atkinson*,[37] which (contrary to his previous point about the limitations in the *SDA* only applying to actions taken under the *SDA*) shows that Commonwealth and State laws on the same subject area can be in conflict, and that s 109 can apply where this conflict arises. He notes:

> Facially, it does appear that *Atkinson* supports a construction of s 38 as *authorising*, rather than merely *not prohibiting*, such discrimination. If this is the correct construction of s 38, then State laws imposing SOGI non-discrimination obligations on religious schools are clearly invalid.[38]

In my view, this prima facie appearance is not changed when the case is examined more closely. Butler first tries to distinguish the situation in *Atkinson* from the *SDA* s 38 case, by noting that in *Atkinson* the Commonwealth was prohibiting certain behaviour (racial discrimination which

[32] Ibid 455–6 (emphasis added).
[33] Butler (n 2) 14.
[34] *Viskauskas v Niland* (1983) 153 CLR 280 ('*Viskauskas*').
[35] *Clyde* (n 4).
[36] *Bitannia* (n 8).
[37] *Atkinson* (n 9).
[38] Butler (n 2) 16 (emphasis in original).

did not comply with international law norms on 'special measures') which the State law permitted. In contrast, s 38 seems to permit certain behaviour which the State laws prohibit.[39]

But Butler then draws from this distinction a point that does not follow: that when the Commonwealth prohibits certain behaviour, it must intend this conduct to be prohibited in every State; whereas when it 'permits' behaviour, it does not intend that behaviour to be permitted in every State.[40] But no authority is cited for this purported s 109 'principle'. The first limb of the argument completely contradicts Butler's prior position that s 38 only operates for claims made under the *SDA*. The second is supposedly based on the fact that States are free to enact whatever rules they choose and do not need to await permission from the Commonwealth to do so. The argument is hard to follow, and in any case is not supported by any authority.

The second basis of attack on *Atkinson* is that the case may be bad law. But the only reason provided is the dissent of Bleby J, whose argument seems to be a version of the argument that I have previously noted was rejected in *Viskauskas*.[41] In that decision, the High Court accepted that there might be no inconsistency of law where the same behaviour received different treatment, if the relevant laws were not in the same area: '[w]here 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'.[42] But here it is clear that the subject of the relevant laws is 'discrimination … on the ground of sexual orientation' (as the area is explicitly referred to in s 10 of the *SDA*). The *SDA* and the relevant State laws are regulating behaviour in the same sphere of activity.

Butler then tries to draw on the decision of the Full Court of the Supreme Court of Tasmania in *Cawthorn v Citta Hobart Pty Ltd* ('*Cawthorn*')[43] that State and Commonwealth laws on disability discrimination were not in conflict where they provided different standards for building construction. As he does concede, however, this decision can have no authority, because the decision itself was overturned on appeal to the High Court.[44] I mentioned the High Court decision in my paper and noted that it provides no guidance on this point because the decision was overturned on different grounds.[45] However, while a low bar to cross, it should be noted that the majority of the court found that the s 109 argument was at least 'arguable':

> Whatever the merits of the constitutional defence, there is and could be no suggestion that the constitutional defence was not genuinely raised or is so incoherent as to be insusceptible of judicial determination on those merits.[46]

Butler's final discussion on the point reiterates his previous arguments. These may be seen to be summed up in the following:

[39] A point which I noted in my paper, as Butler also notes: Butler (n 2) 15–16.
[40] Butler (n 2) 16.
[41] *Viskauskas* (n 34). See Foster (n 1) 53.
[42] *Viskauskas* (n 34) 295 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ).
[43] (2020) 364 FLR 110.
[44] See *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216.
[45] Foster (n 1) 54.
[46] Ibid; *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, 237 [45] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

> If s 38 is said to create a right, liberty, power, privilege, or immunity for religious schools, that is limited to the right not to face legal proceedings *under the SDA* for SOGI discrimination.[47]

But the argument becomes no more persuasive simply by repetition. An alleged intention of the Commonwealth Parliament simply to excuse the operation of its own legislation on this area of discrimination, as part of protecting religious freedom, but not to have any impact on State laws which impose harsher requirements, cannot be found in either the terms of the legislation or the usual sources of evidence about Parliamentary intention.

V. CONCLUSION

I am grateful for Butler's careful and thoughtful response to my argument. But in the end, I do not find it persuasive. I maintain that where a State law dealing with discrimination provides a narrower balancing clause, or none, in relation to religious bodies or religious educational institutions than the Commonwealth law provides, the State law will, to the extent of that inconsistency, be inoperative by virtue of s 109 of the *Constitution*, and the relevant body will be free to act within the parameters permitted by the Commonwealth law, in accordance with its religious ethos.

[47] Butler (n 2) 18 (emphasis in original).