

Religious Discrimination legislation would hit big companies harder than small business

Written by Michelle Grattan, Professorial Fellow, University of Canberra

The Morrison government's draft religious discrimination legislation, unveiled by Attorney-General Christian Porter at Sydney's Great Synagogue on Thursday, imposes heavier obligations on large companies than those on other businesses.

Big companies - those with revenue of at least \$50 million - would face tougher rules in relation to indirect discrimination relating to "dress, appearance or behaviour which limit religious expression".

Where a large company imposed such conditions it would have to prove that compliance with the condition was necessary "to avoid unjustifiable financial hardship to the business".

"If the business is unable to demonstrate that the condition is necessary to avoid unjustifiable financial hardship, the condition is not reasonable, and is therefore discriminatory, whether or not it would otherwise be unreasonable under the general reasonableness test," the explanation of the legislation says.

Read more: [*Why the Israel Folau case could set an important precedent for employment law and religious freedom*](#)

Overall, the legislation is limited, giving "shield" protection rather than a "positive right to religious protection". Some critics in the churches and on the Coalition backbench have said it should go further.

Porter rejected their case, saying that in consultations he had had "it appeared people had not thought through the positive rights approach — including those in church groups who were calling for it".

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In relation to the issue of rugby star Israel Folau, dismissed by Rugby Australia after a social media post, based on the Bible, saying homosexuals would go to hell, Porter said that “for a large employer a rule that has the effect of restricting someone from making a statement of religious belief outside work is not to be considered reasonable unless it can be first shown that the rule was necessary to avoid unjustifiable financial hardship to the employer.

Obviously this is meant to deal with the trend of large employers setting general non communication rules that may unreasonably limit free religious expression in an employee’s own time.

A large organisation in Rugby Australia’s position might argue its restrictive rule was necessary to protect its ‘brand’ and so avoid unjustifiable corporate hardship - and was reasonable in all the circumstances.

Someone in Mr Folau’s position would likely argue the opposite but this provision offers a procedure to engage that protection. Importantly, no statement of belief in this context is reasonable if it is malicious or if it harasses, vilifies, incites hatred or violence or advocates for the commission of a serious criminal offence.

Read more: [**Explainer: does Rugby Australia have legal grounds to sack Israel Folau for anti-gay social media posts?**](#)

The legislation is designed to protect against both direct and indirect and indirect discrimination.

Direct discrimination is where a person is treated less favourably because of their religious beliefs or activity.

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Indirect discrimination is "where an apparently neutral condition has the effect of disadvantaging people of a particular religious belief", such as an employer requiring all workers to attend Friday afternoon meetings, which could disadvantage Jewish workers who leave early to observe the Sabbath.

Complaints could be made to the Human Rights Commission. Where a complaint could not be conciliated, a person could resort to the federal court.

The draft legislation will be out for consultation in coming weeks, with the aim of a final draft going to parliament in October.

Under the government's draft religious discrimination legislation, big companies would face tougher rules in relation to indirect religious discrimination.

Michelle Grattan does not work for, consult, own shares in or receive funding from any company or organization that would benefit from this article, and has disclosed no relevant affiliations beyond their academic appointment.

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