

Will the religious freedom bill protect future Folaus?

What's the deal with this bill? Is it a Christians-only thing? *Crikey* answers these questions and more.

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ATTORNEY-GENERAL CHRISTIAN PORTER (IMAGE: AAP/MICK TSIKAS)

The Great Religious Freedom Bills have arrived. For 118 years, our freedom to believe whatever we like — and practise those beliefs as we wish — was only legally protected in the form of the explicit right to religious freedom in the Australian Constitution. But that era is about to end. No doubt you've been feeling the suppression of your religious freedom all these years.

I'll need more than a few hours to fully digest this unprecedented legislation. For now, here are some answers to a few key questions.

What's the deal?

The religious discrimination bill is modelled on existing federal laws that prohibit discrimination on the basis of sex, age and disability.

The law will prohibit discrimination against a person in relation to employment, education, goods or services and a few other activities, on the ground of their

“religious belief or activity” — meaning the holding (or not holding) of a religious belief, or the engaging (or not engaging, or refusing to engage) in lawful religious activity. That’s direct discrimination.

It also outlaws indirect discrimination, where an unreasonable condition or requirement is imposed on a person that will disadvantage them because of their religious belief or activity. For example, requiring your employees to not post their religious beliefs on social media.

Is this a Christians-only thing?

No! Not only is the law designed to offer equal protection to every religious belief and activity no matter how wacky, it even extends to atheists! You can’t be discriminated against for not believing in God, or for believing that God is an iced vovo.

What about the religious freedom to discriminate?

Fully preserved and extended. As we know, religious organisations, including schools, have always had full exemptions from anti-discrimination laws, because, you know, religion. The bill’s drafters were alive to this and have ensured that none of this new protection to hold and express our faiths or non-faiths will affect the ability of a church school to kick us out or refuse to employ or marry us, on the grounds of our religious belief or activities.

This, according to the government, is “consistent with the principle that legitimate differential treatment is not discrimination”. Um, that is literally what it is, but anyway.

All “religious bodies” are exempt. It won’t be discrimination to, say, sack a teacher for being Muslim (or not), if it’s in good faith (that’s quite funny actually) and may reasonably be regarded as being in accordance with the religion’s doctrines, etc. Apart from schools and charities, this includes any body that is conducted in accordance with the teachings of a particular religion, unless it solely or primarily engages in commercial activities.

So, the Christian baker?

No, he still has to sell cakes to the gays. Unless he’s such a Christian baker that the commercial side of his activities isn’t the main game. If the cakes are really a side hustle to his main pursuit of turning water into wine, then it would be a different story.

What about Folau?

If this law had been in force at the time, and Rugby Australia had revenue of more than \$50 million, then it couldn’t have sacked him for his anti-gay posts unless it could prove that that was necessary for it to avoid “unjustifiable financial hardship”. If it turned over less than \$50 million, no problem, fire away.

Weird? I'd say so. Apparently our entitlement to religious freedom is partly dependent on how much money our employer makes. Government bodies are exempted from this distinction; they cannot suffer financial hardship by definition, so they can sack their Folaus, too.

What about Folau's cousin?

You'll recall Israel's preacher cousin lost his job with a religious school because of religious differences. He would still be fully sackable; institutional religious freedom still trumps individual religious freedom.

What does it really mean for employers?

Apart from the weird \$50 million line, there are major consequences. It's not that big a deal to say that you can't refuse to employ someone, or sack them, because of their religious beliefs or non-beliefs. However, the indirect discrimination rule has a wide potential reach.

Take the institution of Friday night drinks. In many workplaces, it has a semi-formal or even formal significance as a workplace gathering. That can be a problem for Jewish employees who observe the Sabbath, because they need to get home before sunset on Fridays. While it's obvious that it would be wrong to interfere with that on any basis, will it still be OK to maintain Friday night drinks in a way that necessarily excludes those employees and therefore discriminates against them? I ask, because it's one of the specific examples given in the government's explanatory document.

Another example might be catering. Many religions have dietary requirements, of course, and many employers are careful to cater to them. Would it now be unlawful discrimination to not ensure that every employee's faith-based food needs are met each time any catering is provided (for example, must each office kitchen provide for kosher and halal rules)? Which does also beg the question of why a person who is vegetarian because of their religion is deserving of specific legal protection that other vegetarians don't get, unless vegetarianism is actually a religion, which I don't know because the bill doesn't define what a religion is.

The law provides for a reasonableness test, which has a number of specified factors. In practice, it's going to be impossible for employers to know whether they're OK or not, given the infinite variety of religious beliefs and practices and their inherent personal subjectivity. Minefield ahoy.

Do we need this?

Nope. The case for this law has not been established at all.