

Israel Folau and Rugby Australia

A What Not to Do Guide to Mediation About Religious Speech

Dr Mitchell Landrigan, Adjunct Professor, Faculty of Law, University of Technology Sydney, gives us his thoughts about the strategy adopted in the Folau and Rugby Australia dispute.

Where there is a dispute, there is conflict. Rugby Australia and Israel Folau were (and still are) in dispute about Folau's April 2019 Instagram post. The matter is seemingly destined for the courts. Yet, courts and quasi-judicial tribunals are generally *not* effective forums for resolving conflict. They are forums for deciding upon, and ruling on, points of law after judges or tribunal members review facts and receive submissions from lawyers. Their decisions are binary. Rugby Australia's own procedures directed the Folau dispute to a specialist tribunal hearing. A tribunal of three found Folau to have committed a 'high level breach' of the Code. That appears to be the full extent of any formal dispute resolution about the limits of Folau's religiously motivated speech.

There are better (and cheaper) methods of dispute resolution than decisions by courts and tribunals. Consider, for example, dispute resolution by mediation. A skilled mediator can help parties to articulate their 'interests' rather than only their opposing 'positions'. A well-conducted mediation with a skilled mediator (or more than one mediator, if considered necessary) can be a more effective method of resolving disputes – and with longer lasting more beneficial effects - than a binary tribunal ruling. Mediation can involve multiple parties, each expressing and, crucially, listening to, and understanding, the perspectives of others. It is the antithesis of quasi-judicial proceedings

where arguments are presented (by lawyers) in a setting of legal conflict.

Mediation between Folau and Rugby Australia (possibly involving other stakeholders such as sponsors) could have given Folau an opportunity to explain to affected parties (say members of the LGBTIQ+ community) his perspective on his expression and, likewise, for affected parties to explain to him the possibly hurtful effect of his speech on them. The participants could have *learnt* from each other about the motivations for, and effects of, provocative and potentially hurtful religious speech. It is, of course, possible that no mediation would have been effective in resolving these differences because the parties would under no circumstances be prepared to explain their interests to each another. However, interest-based dispute resolution seems to have not been given a chance. It is as though Rugby Australia considered the Folau message to be so polarising that Rugby Australia forgot how to engage in dispute resolution other than via litigation.

It is useful to provide some background to the Folau saga. This starts on 4 April 2018. Upon tearing a hamstring, Folau wrote a biblically themed message on Instagram about his 'trials'. He responded to an online question (addressed to himself) about what happens to gay people. Folau's message at the time was similar to the one he would post on Instagram on 10 April 2019, and

which would lead to his sacking. He said gays would go to hell.

Folau reportedly met in April 2018 with Rugby Australia's representatives, including Rugby Australia's chief, Raelene Castle, to discuss Rugby Australia's concerns about the post. After the meeting, Castle addressed a press conference. While referring – pointedly - to the importance of rugby players respectfully using social media, Castle announced that Rugby Australia was proud of Folau for standing up for his religious beliefs. Castle also said that Folau had accepted at the meeting that he could have put a more 'positive spin' on his Instagram message and that he had acknowledged at the meeting that he could have conveyed the same message less disrespectfully.

It is not clear whether Castle understood the implication of her describing Folau as being an ineffective spinner of religious beliefs. A man who believes in biblical inerrancy is unlikely to react with pleasure to the notion that he conveyed a biblical message with insufficient 'spin'. Folau soon expressed his disappointment online about the message Castle conveyed at the press conference. He disagreed with her version of events. This apparent disparity of understanding between Folau and Castle about the content of 2018 meeting suggests there was no concerted effort by Rugby Australia to agree with Folau and document at the conference what Rugby Australia would

communicate afterwards. It also likely pointed to future problems in the relationship. Rugby Australia nevertheless extended Folau's playing contract for four years in late 2018, reportedly sans a social media clause.

Folau again posted a message on Instagram on 10 April 2019, condemning homosexuals to hell. It is not obvious what (if any) concern or event prompted Folau's message. His post relegated various classes of persons to hell, including homosexuals. The message could have been deeply hurtful to members of the LGBTIQ+ community (if not necessarily the atheists, who were included in the extended catalogue of sinners). Folau *may*, it should be said, have intended his message to be a positive one and to not be merely condemnatory of gay and lesbian people: he urged such people to repent. This message of repentance, however, connotes sinfulness. Even if possibly well-intentioned, this aspect of Folau's message may have exacerbated its offensiveness and hurtfulness.

Rugby Australia announced publicly, and swiftly, that Folau's online comments breached the players' Code of Conduct and that it would seek to terminate Folau's four-year employment contract. Michael Cheika – the Wallabies head coach – lamented publicly, and precipitously, that he would not be able to select Folau in the national team. Within little more than a month of the April 2019 Instagram post, Rugby Australia and Folau had appeared before a specially convened Rugby Australia tribunal hearing, before three independent experts. The tribunal handed down its ruling. It recommended that, because Folau had committed a high-level breach of the Code (and had shown no remorse or willingness to retract the post), the appropriate action from Rugby Australia was to terminate Folau's contract. It

is unclear why the tribunal chose to place any significant weight on Folau's lack of remorse, given that, in 2018, Castle had commended Folau for holding steadfastly to his religious views.

In May 2019, Rugby Australia announced that it would terminate Folau's contract. In June 2019, Folau launched a website to raise money to pay for the legal costs of his looming litigation with Rugby Australia. This website (having reportedly raised \$750,000 in four days) was 'taken down' for allegedly breaching GoFundMe's terms of service; the site also appears to have been the subject of a denial of service attack. The Australian Christian Lobby offered to host an alternative crowdsourcing site for Folau and it pledged \$100,000 towards his legal costs. In less than a day, its alternative crowdsourcing site had raised more than one million Australian dollars for Folau.

In the meantime, Folau's wife, Maria Folau, a netballer who represents the New Zealand national team Silver Ferns and now plays for the Adelaide Thunderbirds, reposted her husband's GoFundMe plea. This led to Netball Australia and Super Netball issuing a joint statement defending netball's inclusiveness. Netball South Australia shared its views about Maria Folau's reposting of her husband's plea, stating that, while Netball South Australia did not endorse the Maria Folau reposting, it did not believe that Maria Folau's endorsement of her husband's plea contravened any social media policy. ANZ, a sponsor of the Silver Ferns stated publicly that it did not support Maria Folau's views. In response to ANZ, Netball New Zealand clarified that it, too, valued diversity and explained that it did not consider Maria Folau's reposting of her husband's message to have breached any of its social media policies.

It is not at all obvious how much consideration Rugby Australia gave to the concerns of some of the parties with stakes in the Israel Folau matter and how their interests would be catered for by litigation. This point was none-too-subtly emphasised by several mostly Polynesian Christian rugby players ostentatiously expressing their religious solidarity with Folau through on-field group prayer after games during the 2019 *Super Rugby* season. Nor is it clear whether Rugby Australia ever sought to identify all the parties with possible interests in the Folau dispute (including, a major sponsor of a women's national sporting team in a neighbouring country) and whether these parties might, if given a choice, prefer there to be some attempt by Rugby Australia at private mediation.

It would seem that the interests of few if any stakeholders have been preserved by Rugby Australia's quasi-litigation. First, there are the members and affiliates of Rugby Australia – the rugby clubs, teams and players – who aim (or should aim) to be inclusive of all their members, irrespective of members' sexuality or beliefs. Folau's sacking sends a strong message to the clubs, teams and players (including his own former *Waratahs* and *Wallabies* teammates), that homophobic expression will not be tolerated. But termination of an employment contract after a tribunal decision is a blunt outcome. Those clubs, teams and players include members with strong beliefs (such as some of the Polynesian players).

Some members may now wonder about the limits of any public expression of their *own* views. Rugby Australia has not explained how people can respectfully express their religious views within a sphere of tolerable provocativeness. Rugby Australia has also, in my view, not provided the public with a

compelling narrative to account for its sacking of Folau. It could have been no more complicated than Rugby Australia explaining that it does not support its paid players publicly (cf *privately*) using religious speech to morally denounce minorities such as the LGBTIQ+ community and/or to publicly (cf *privately*) equate LGBTIQ+ people with drunks, adulterers, liars, thieves, fornicators and idolaters. Rugby Australia's sacking of Folau will also not deter him from publicly expressing similar views as an unemployed – yet still famous – former sporting star. There is the potential for Rugby Australia's termination of Folau's contract to turn Folau into a modern-day martyr of bureaucratic opposition to free religious expression. It is of note that the Anglican Archbishop of Sydney, Dr Glenn Davies, has declared Folau's 'right' to religious expression to be 'vilified'. Folau's public following may continue to grow. So may his frustration.

Secondly, there are the members of the LGBTIQ+ community, who should – rightly – take strength from Rugby Australia's strong stance against potentially harmful, even homophobic, statements from a high-profile sportsman. Yet, even some members of that community may now wonder about the limits of their own free expression and they, like rugby's sponsors, have now lost the benefits of watching a player who, at his best, is one of rugby's great players.

Thirdly, as suggested, there are the sponsors of Rugby Australia, including Qantas. The chief commercial interest of rugby sponsors (and of sports sponsors generally) is in the sponsored party – the *Wallabies* or Folau as the case may be – bringing as much economic reward as possible for the sponsor by winning matches or scoring tries. Or at least, *trying* to win games. It is a simple equation. A sponsor has no economic interest

in a team (or a player) courting controversy. Alan Joyce, the Qantas CEO, expressed this view pithily when he said 'We don't sponsor something to get involved in controversy. That's not part of the deal.'

At one level, the tribunal proceedings and the termination of Folau's contract would appear to have addressed sponsors' concerns. Yet the outcome pursued by Rugby Australia has likely resulted in the loss to the game, and possibly to sport more generally, of a marquee player. It is hard to conceive of how the termination of a player's contract over his speech could be in the sponsors' *best* interests. A better outcome would be that Folau continued to play for the *Wallabies* (or could be available to play for them) with a mediated agreement in place about his social media posts which *then*, if he breached, could be enforced (perhaps after further mediation). All of which could be achieved without a public dispute about free expression at a time when interest in rugby in Australia is ebbing.

On announcing the termination of Folau's contract 10 days after the decision of the independent tribunal, Castle advised that Rugby Australia was 'left with ... no choice but to pursue a course of action resulting in today's outcome'. This statement is telling. It suggests that Rugby Australia did not even consider mediation to be an option.

Mediation – a highly effective form of facilitated interest-based

negotiation – can bring parties together with the mutual objective of resolving disputes. It is not necessarily a one-on-one activity; mediations can involve multiple stakeholders with divergent perspectives. A skilled and experienced mediator (or, in some cases, more than one mediator) can help the parties to identify/express their interests and – critically – to understand the values and passions of the others around the table. The process can be slow, and it requires patience. Yet it has the real potential for parties who have seemingly intractably opposing 'positions' to understand the 'interests' of the others and to work towards mutually acceptable, long-term outcomes. A mediation table comprising Folau, sponsors, and representatives of the LGBTIQ+ community could have achieved a better outcome – a potentially more conciliatory one – than the situation Rugby Australia now faces. As noted, the mediation may have failed. Perhaps the parties would have no desire or willingness to listen to, or face, each other. In this case, however, regrettably, mediation as a form of dispute resolution appears to have not even been conceived of.

These are the author's (and only the author's) personal views

SAVE THE DATE
CAMLA AGM AND EOY DRINKS
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28 NOVEMBER 2019