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Tania Sourdin

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**Mediator disclosure obligations**

Confessions, confessions ... mediator obligations when someone `fesses up

Tania Sourdin¹

Steve Lancken recently addressed issues surrounding the responsibility of neutrals in relation to mediation confidentiality in the *ADR Bulletin*.² This topic is one which is often raised in the context of mediator and party obligations and a topic that Lancken acknowledges is important but 'not easy'. One issue that was raised related to confidentiality when a criminal offence (or the threat of an offence) had been disclosed and this topic is worthy of further discussion.

What if someone discloses during a mediation that they have committed a murder? What if someone discloses at a mediation that they intend to commit a crime? What are the obligations of the mediator? Are your answers different according to the 'crime' (for example, murder compared to an intention to commit a tax fraud), any jurisdiction you are working in, or the professional obligations you may have as a mediator (or as part of another profession – for example legal or counselling). I recently had cause to make further enquiries about these scenarios (which I commonly raise in mediation training) as a result of two very different prompts.

The issue arose initially in the context of developing standards for family dispute resolution practitioners in the family law area where there were substantive issues about what might constitute 'abuse'.³ The issue also arose in consultations conducted around Australia in the Family Dispute Resolution Standards project, where practitioners spoke about their uncertainty in terms of their obligations if there was some evidence that a crime had been committed by a party involved in the mediation.⁴ Here the issues were linked to ethical obligations

and professional standards. However, the issue also arose whilst conducting training courses when it became abundantly clear that there were significantly different obligations upon mediators in different states of Australia (and New Zealand) in terms of reporting criminal activities, or planned criminal activities, which parties had 'confessed' to during the course of a mediation.

The issues have not yet been fully explored by mediators in the context of ethical or other standards. This differs from many other more established professions where the 'rules' appear to be somewhat clearer. Recently, in the Family Dispute Resolution Standards project which developed draft practice standards for facilitative family practitioners, this issue was raised in terms of general ethical obligations:

The family facilitative practitioner shall disclose a participant's threat of suicide to the appropriate authorities, or a participant's threat of violence against any person to the threatened person and/or the appropriate authorities if the family facilitative practitioner believes there is a reasonable possibility that such threat may be acted upon."⁵

The Draft Standards that may apply to the family law area do not, however, grapple with how or when practitioners should or could report to police or others in relation to non-violent crime or where a crime may have already been committed (except in relation to the abuse of children – see below).

Confusion?

It is not surprising that there is considerable confusion about mediator reporting obligations in Australia when one considers the labyrinth of

legislation that could potentially apply to mediators. At the most basic level, it is an offence in most jurisdictions in Australia to conceal a serious offence. If a person does so, they may be liable for a prison term of up to two years.

However, the legislative provisions relating to concealment of an offence are drafted in different terms across Australia. In some jurisdictions, a person is liable if they receive a benefit for not disclosing information. In other States, a person escapes liability for not disclosing information if they have a reasonable excuse for the non-disclosure.

The relevant principles – a mediator's obligation to 'not disclose' versus the statutory offence for non-disclosure or ethical obligations to disclose – are untested in Australian and New Zealand courts. There is some guidance from Australian cases that refer to some key principles, including legal professional privilege in *Baker v Campbell*⁶ and contractual obligations in *A v Hayden*,⁷ where the question was explored as to whether the Commonwealth could contravene a contractual obligation to keep parties' identities secret for the purpose of assisting the police with a criminal inquiry.

There are other cases that have dealt with these issues in the context of biomedical ethics (rather than statutory obligations), where for example doctors and other members of the 'helping' professions are faced with similar dilemmas in a range of contexts, such as whether psychologists or counsellors should report circumstances where they believe there is a reasonable prospect that a crime will be committed, or even whether data obtained from Nazi experimentation can be used by members of the medical profession.

One case frequently referred to by counsellors and psychologists in terms of defining their obligations to report a criminal threat or potential criminal threat is the US *Tarasoff* case.⁸ In *Tarasoff* a psychologist working at an American University Medical Centre was informed by a patient that he

wanted to kill his girlfriend. The psychologist informed the campus police and his supervisor. The patient then went on to murder his girlfriend. The Californian Supreme Court concluded that the actions taken by the psychologist were not sufficient and stated that:

When a therapist determines, or pursuant to the standards of his profession should determine, that his

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patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.⁹

The Court concluded that the special relationship that existed was based on the professional background and obligations of the therapist involved. Essentially, the Court referred to 'clinical' experience. Notably the *Tarasoff* case has not been fully embraced by all US jurisdictions.

However, could such obligations ever be imposed upon mediators? At present, this seems unlikely, although the draft Family Dispute Resolution Practice Standards have clearly moved in this direction. In addition, it may be that in many jurisdictions of Australia there are already obligations imposed

by legislation that could require mediators to report offences or threatened offences.

What does the legislation say?

All Australian jurisdictions have some legislative provisions relating to the concealment of an offence, but New Zealand does not. Most Australian legislation appears to have

been founded upon what has been previously described as 'misprison of felony' legislation.

The Victorian and New South Wales Crimes Acts¹⁰ have created offences for concealing a serious indictable offence. Both Acts set out three conditions under which a person will be liable for concealing such information. The first two conditions are substantially the same in both Acts. A person will be liable if they know or believe that an offence has been committed and have information which might be of material benefit in securing a prosecution or conviction.

The third condition differs in each Act. To be liable under the Victorian Act, a person must 'accept a benefit' for not disclosing the information. To be liable under the New South Wales Act, a person must 'fail without reasonable excuse to disclose' the information to an appropriate authority.

The New South Wales Act¹¹ contains a saving provision for legal practitioners, who are excluded from liability under the relevant provision if



they obtain information during the course of practising their profession. The Victorian Act contains no such saving provision. Some New South Wales legislation expressly limits the liability of mediators carrying out mediation under certain legislation (such as s 242 of the *Aboriginal Land Rights Act 1983*, ss 109 and 137 of the

Wales, that is not expressly defined to include practising law).¹⁶

In Victoria, Western Australia and the Australian Capital Territory, certain mediators are afforded the same immunity as judges.¹⁷ Under some Australian legislation, mediators are exonerated from liability if they act in good faith.¹⁸

The variations between jurisdictions around Australia suggest that mediators acting in different States may have different obligations. In some States there is a requirement that the mediator receives a benefit. Would the payment of mediator fees be sufficient?

Many Australian jurisdictions have legislation requiring information acquired during the course of a mediation to be kept confidential and many statutes provide that such information is inadmissible in later court proceedings.¹⁹ Certain Acts contain an exception for a person who reasonably considers that it is necessary to disclose the information or document for the purpose of preventing or minimising injury or damage

to any person or property.²⁰

The Mediation Act²¹ of the Australian Capital Territory provides that a mediator must not disclose any information obtained in a mediation session, except in circumstances as set out in the relevant legislation. One of the listed exceptions is if the disclosure is necessary to report to the relevant authorities the commission of an offence involving violence or the threat of violence or intentional property damage.

The variations between jurisdictions around Australia suggest that mediators acting in different States may have different obligations. In some States there is a requirement that the mediator receives a benefit. Would the payment of mediator fees be sufficient? In other States a 'reasonable excuse' provision operates. What is reasonable would no doubt be related to the ethical obligations that may be in place, the circumstances surrounding the confidentiality and the mediation (including a consideration of the mediator's training and expertise).

To confuse the issue still further, the obligations may vary pursuant to federal legislation. For example, in the family law area, specific provisions relate to mediator obligations concerning the circumstances

Administrative Decisions Tribunal Act 1997, and s 27 of the *Community Justice Centres Act 1983*).

In Western Australia and Tasmania,¹² to be liable under the relevant legislative provisions, a person would have to receive a 'benefit upon an agreement' to:

- a) compound or conceal the crime; or
- b) abstain from, discontinue or delay prosecution or withhold evidence.

The relevant Northern Territory and Queensland legislation¹³ is in substantially the same terms as that described above for Western Australia and Tasmania.

Under other Tasmanian legislation, and in the Australian Capital Territory, a person is liable if they know another person is guilty of a crime, receive or assist that person, and do so to help the person escape punishment.¹⁴

In South Australia, a person is liable if they know or believe another person has committed an offence and act with the intention of impeding investigation or assisting the principal offender to escape apprehension or prosecution.¹⁵ As in New South Wales, there is an escape clause in the South Australian legislation for acting with reasonable excuse (although, unlike in New South

surrounding the abuse (or potential abuse) of children. Section 19N of the *Family Law Act 1975* (Cth) applies to appointed mediators and provides that:

- (2) Evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies while the person is acting as such a person is not admissible:
- (a) in any court (whether exercising federal jurisdiction or not); or
 - (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.
- (3) Subsection (2) does not apply to the following:
- (a) an admission by an adult that indicates that a child has been abused or is at risk of abuse;
 - (b) a disclosure by a child that indicates that the child has been abused or is at risk of abuse;

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

The section does not deal specifically with the scenario where a mediator has been informed about a criminal act or potential criminal act which may not involve the actual or potential abuse of a child – this is one of the reasons why the draft Family Dispute Resolution Practice Standards seek to expand upon this issue. However, in addition there are definitional problems about what might constitute ‘abuse’. Despite actively managed approaches to facilitated cases involving allegations of violence and child abuse that have been developed in the Magellan Project²² in Melbourne and the Columbus Project²³ in Western Australia, there is still confusion about what might constitute ‘abuse’. For example, during consultations as part of the Family Dispute Resolution Practice Standards Project one senior family dispute practitioner commented ‘... what

constitutes abuse? If a mother of a very young child prevents the father from having access to the child – and a parental attachment does not form – is that emotional abuse? Is it reportable?’

Similar issues arise in the context of reporting threats and criminal activity. Most legislation specifies what may constitute reportable criminal activity – there are references to a ‘crime’, ‘offence’ or an ‘indictable offence’. However, these vary from State to State and within jurisdictions. By way of example, under s 44 of the *Crimes Act 1914* (Cth), it is an offence to compound or conceal any *indictable* offence for benefit:

Any person who asks receives or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person, upon any agreement or understanding that he will

compound or conceal any indictable offence against the law of the Commonwealth or a Territory, or will abstain from, discontinue, or delay any prosecution for any such offence, or will withhold any evidence thereof, shall be guilty of an offence.

Conclusions

Steve Lancken has referred to the principle ‘above else ... do no harm’ in the context of mediator confidentiality and this is perhaps one way of mediators grappling with the issue of when and how to report serious crimes or potential threats. It is clear that there are significant differences between States and that for this reason the issues of reporting need to be attended to in standards that may apply to mediators working in a range of

jurisdictions. Another way of considering this is by ensuring that any standards developed refer to a range of ethical codes and not just those that exist in the lawyer-client area.

The central tenets of ethical obligations in the medical area may also be of some utility in the further development of standards. In the medical area there are said to be four commonly accepted principles that underpin ethical obligations:

1. Beneficence – the welfare of the person is central. This principle is extended to ‘one ought to prevent evil and harm, one ought to remove evil and harm, and one ought to do or promote good’.
2. Non-maleficence – ‘primum non nocere’ (first do not harm).
3. Autonomy – respect for right of

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4. Justice – avoidance of discrimination on the basis of rule, colour, religion or national origin.

Another core issue relates to how mediators obtain guidance when faced with these types of ethical, moral and legal dilemmas. It is likely that the multidisciplinary nature of mediation means that mediators, in the absence of a single professional body, are likely to receive feedback and advice that represents their professional or other affiliations. ●

Tania Sourdin is Professor of Law and Dispute Resolution, La Trobe University and can be contacted at t.sourdin@latrobe.edu.au.



Endnotes

1. Some background research work for this article was undertaken by Serryn O' Regan, a senior researcher at La Trobe University.

2. Lancken S 'The Responsibility of the neutral in respect of mediation confidentiality' *ADR Bulletin* (2004) 7(2).

3. The issue of abuse and what might constitute abuse in the family area may be the subject of another lengthier discussion – however some principles and ethical issues that emerge in the family law context also arise in the context of threatened or actual criminal conduct despite the provisions of s 19N of the *Family Law Act 1975* (Cth).

4. I thank those practitioners who have raised these concerns.

5. Sourdin T, Fisher T, Moloney L, *Draft Practice Standards for Facilitative Family Dispute Practitioners*, La Trobe University, August 2004 – funded by the Commonwealth Attorney General's Department.

6. (1983) 153 CLR 52.

7. (1984) 156 CLR 532.

8. *Tarasoff v Regents of University of California* 17 Cal 3d 425, 551 P 2d 334, 131 Cal Rptr 14 (Cal 1976).

9. Above note 8.

10. *Crimes Act 1958* (Vic) s 326; *Crimes Act 1900* (NSW) s 316.

11. *Crimes Act 1900* (NSW) s 316(4); *Crimes (General) Regulation 2000* (NSW) s 6.

12. *Criminal Code* (WA) s 136; *Criminal Code Act 1924* (Tas) s 102.

13. *Criminal Code Act* (NT) Sch,

s 104; *Criminal Code Act 1899* (Qld) Sch 1, s 133.

14. *Criminal Code Act 1924* (Tas) Sch 2, s 6; *Crimes Act 1900* (ACT) s 181.

15. *Criminal Law Consolidation Act 1935* (SA) s 241.

16. *Criminal Law Consolidation Act 1935* (SA) s 241(2)(b).

17. For example, *Magistrates' Court Act 1989* (Vic) s 108A; *Supreme Court Act 1935* (WA) s 70; *Mediation Act 1997* (ACT) s 12; *Retail Leases Act 1994* (NSW) s 66C.

18. For example, *Evidence Act 1958* (Vic) s 21N; *Administrative Decisions Tribunal Act 1997* (NSW) s 109; *Supreme Court Act 1970* (NSW) s 110R.

19. For example, *Evidence Act 1958* (Vic) s 21M; *Administrative Decisions Tribunal Act 1997* (NSW) ss 107, 108.

20. *Evidence Act 1958* (Vic) s 21M(1)(f); *Administrative Decisions Tribunal Act 1997* (NSW) s 108.

21. *Mediation Act 1997* (ACT) s 10.

22. Brown T, Sheehan R, Frederico M and Hewitt L 'Resolving family violence to children: The evaluation of project Magellan: A pilot project for managing Family Court residence and contact dispute when allegations of child abuse have been made,' *Report*, Monash University and the Family Court of Australia, 2001.

23. Murphy P, Kerin P and Pike L, 'Columbus pilot project: Catalyst for an emerging model of an integrated Family Court system in Western Australia', *Family Matters*, No 64, Autumn 2003, pp 82-86.

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