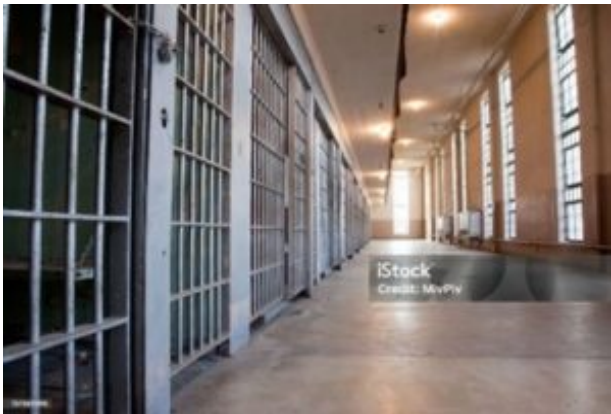


Kluwer Mediation Blog

Keeping out of prison – a lesson for mediators!

Alan Limbury (Strategic Resolution) · Sunday, September 22nd, 2024



The recent post by Ting-Kwok IU examined the Hong Kong Ordinance designed to protect children from abuse and to protect some professionals (excluding mediators) for reporting such abuse. This has put me in mind of [section 316](#) of the New South Wales Crimes Act, which makes it a crime for an adult who fails, without reasonable excuse, to report a “serious indictable offence” of which they become aware. The Act defines a serious indictable offence as one punishable by

imprisonment for life or for a term of 5 years or more. The penalty for failure to report such an offence is imprisonment for a maximum of 2 to 5 years, depending on the gravity of the unreported offence.

Further, a person who accepts any benefit for failing to report a serious indictable offence can face imprisonment for up to 7 years, again depending on the gravity of the unreported offence. It could be argued that, unless acting *pro bono*, a mediator is paid by the disputants to keep everything confidential, even the parties’ serious crimes.

However, the section provides that a prosecution for the offence of failing to report a serious indictable offence is not to be commenced against a person without the approval of the Director of Public Prosecutions (DPP) if the person became aware of the serious indictable offence in the course of practising or following a profession, calling or vocation prescribed by the Regulations.

In 1998 the Regulations prescribed a legal practitioner, a medical practitioner, a psychologist, a nurse, a social worker, a member of the clergy and a researcher for professional or academic purposes. In 2020 the Regulations were amended to add an arbitrator and a mediator. Phew!

What this means for mediators

So a mediator who, during the mediation process, becomes aware of a crime having been committed, needs to ascertain whether or not the crime is serious and, if so, to work out whether the DPP would be likely to prosecute the mediator for any failure to report it.

There is no readily available list of serious indictable offences, so it is necessary to comb through

the entire Act to see which offences are serious and which are not. My casual but by no means exhaustive inspection revealed the following offences punishable by imprisonment for 5 years or more: murder, conspiring to commit murder, sending a document threatening to kill a person [query: is email OK?], impeding endeavours to escape shipwreck, causing a dog to inflict grievous or actual bodily harm (my personal favourite!), inducing another person to request or access voluntary assisted dying, throwing rocks at vehicles or vessels, conducting an unlawful gambling operation, possession of identification plate not attached to motor vehicle or trailer, fraud, money laundering, interfering with a mine, blackmail, forgery and aiding escape from lawful custody.

The good news is that intentionally obstructing a railway, giving false or misleading information to a public authority and “selling etc materials to be manufactured” are not **serious** indictable offences. The latter is described in the legislation (possibly drafted by a lawyer) as follows:

“Whosoever, being, for the purpose of manufacture, or any special purpose connected with manufacture, employed to make, prepare, or work up, any goods, article, or material, or being for any such purpose entrusted with any such goods, article, or material, or with any tools, or apparatus, sells, pawns, purloins, secretes, embezzles, exchanges, or otherwise fraudulently disposes of the same, or any part thereof, shall be liable to imprisonment for four years.”

Only four years behind bars – yippee!

I am not aware of any prosecutions of mediators for alleged failure to report a serious indictable offence, nor whether any potential prosecutions might have been mediated.

One can imagine that mediators engaged to mediate over whether a mediator should be prosecuted for such an alleged offence risk themselves being prosecuted if, in private session, the accused mediator admits to having committed the offence.

Some advice to mediators

It is therefore worth telling the parties to any mediation in New South Wales, during the mediator’s introductory explanation of the process, that virtually everything said and done in the mediation is completely confidential and “without prejudice”, an arrangement designed to encourage the disputants to speak frankly and freely and to put all their cards on the table, but that there are some exceptions, one of which is section 316 of the Crimes Act, so it is strongly recommended that no-one confess to any serious crimes during the mediation.

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