INTERNATIONAL OMBUDSMAN INSTITUTE

MEDIATION

THE USE OF MEDIATION AS AN EFFECTIVE TOOL IN COMPLAINT INVESTIGATION

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INTRODUCTION

The mediation process, which is a tool that enables personal interaction and respectful and direct dialogue for promoting dispute resolution, has existed in many countries for several decades as an alternative to the legal procedure and as a language capable of uniting disputing parties.

In 2008, the Israeli Ombudsman began to use mediation as part of his toolbox for complaint handling. He became acquainted with the many advantages of the process as an effective and useful tool for handling complaints in appropriate cases and as a tool for complementing the classic complaint investigation procedure.

An expansion of the toolbox at the disposal of the ombudsman institution made it possible to tailor the investigation to the particular complaint and thus handle more accurately each and every case, both from the point of view of the complainant and that of the public authority.

Over the years, the mediation procedure at the Office of the Ombudsman (Office) has gradually become institutionalized, constituting a regulated method of complaint handling. This institutionalization includes the establishment of a team of trained mediators, the compilation of a mediation work manual and the characterization of the mediation process in the Office's computerized system. Furthermore, clear criteria for determining the suitability of a complaint for mediation have been laid down, and multifarious extra- and intra-organizational informational activities have taken place.

The vast knowledge and experience accumulated by the Office have shown that the integration of public mediation processes into the work of the ombudsman institution enhances the complainant's satisfaction with the complaint-handling procedures, strengthens the public authority's public service consciousness and fortifies the complainant's faith in the public authority. A further advantage lies in the fact that the service is provided free of charge (as is the investigation of all complaints filed with the Office).

It should be pointed out that public mediation is a branch of mediation with special characteristics that differ from classic mediation, and thus the fact that one of the parties is a public authority and not a private individual requires the mediator to pay particular attention and make the necessary adaptations.

In this Best Practice Paper (BPP), we shall firstly review the main characteristics of the mediation process and its methodology. We will then detail the criteria for determining whether a complaint is suitable for mediation, giving illustrative examples of successful mediations conducted by the Office's team of mediators. After this, we will elaborate on the actions that should be taken on the intra- and extra-organizational level, and will review the barriers existing at the stage of receiving the consent of the parties and the ways of overcoming these barriers. Finally, we shall elaborate on the advantages and disadvantages of online mediation.

The aim of the BPP is to explain the principles of the mediation process and the importance of its use in the handling of appropriate complaints. It also aims to detail the stages that must be followed in order to integrate successfully the mediation model within ombuds institutions. The mediation process presented here is the procedure that has been adopted by the Ombudsman of Israel; it is possible that other methods are used by different ombuds institutions around the world.

It is important to point out that the information contained in this document does not substitute an in-depth study of the field of mediation, via relevant professional training.

As a pioneer and leader in the field of public mediation, the Office wishes, by virtue of this BPP, to share the vast knowledge and experience that it has accumulated in this field with ombuds institutions around the world.

THE CHARACTERISTICS AND METHODOLOGY OF MEDIATION

Characteristics of mediation

Mediation is an alternative dispute resolution mechanism. Mediation enables the parties, via the mediator - a neutral person - to express all their interests relating to the dispute, thus resolving the dispute in a relatively swift and optimal manner in the course of one or a few sessions. Mediation is therefore a process aimed at attaining a compromise between the disputants, not on the basis of legal opinions and arguments, but on the basis of interests and problem-solving[1].

The following is a review of the principle characteristics of mediation:

(1) VOLITION

Mediation is a voluntary procedure throughout - starting with the consent of the parties to mediate and ending with their actual participation in the mediation sessions. The parties are thus full partners in finding a solution and have control over every stage of the process.

The mediators must inform the parties that they are permitted to pull out of the mediation process at any stage and return to the regular complaint investigation procedure.

(2) CONFIDENTIALITY AND PRIVILEGE

The **duty of confidentiality** applying to the mediation process is a fundamental element of the procedure. Its aim is to ensure open and honest dialogue between the parties and to secure a shield of protection around the documents presented in the course of the procedure, the information shared in both joint sessions and private meetings and the communications of the parties[2].

Confidentiality of the process can be attained in the following ways:

a) On the level of the relations between the parties themselves - The parties must sign a confidentiality clause in the agreement to participate in the mediation. A confidentiality clause

[1] Michal Alberstein, Theory of Mediation, p. 181, footnotes 2,3.
Stephen B. Goldber, Frank E. A. Sander, Nancy H. Rogers and Sara R. Cole, *Dispute Resolution: Negotiation, Mediation, and other Processes* (Aspen Law and Business Publisher, 1999), 303.
Carrie J. Menkel-Meadow, Lela Poter Love, Andrea Kupfer Scheneider and Jean R. Sternlight, *Dispute Resolution: Beyond the Adversarial Model* (Aspen Publishers, 2005), 266.
[2] The principles of confidentiality and privilege in the mediation process are viewed differently by different Ombuds institutions

in the agreement between the parties will enable them to delineate the boundaries of the confidentiality, determine if the confidentiality will apply to the settlement only (if signed) or also to the stages of the negotiations, and to lay down sanctions, if any, should the confidentiality be violated[3].

b) On the level of the relations between the parties and the mediation team - The mediation team must make it clear to the parties, both at the stage of receiving their consent to participate in the process and at the commencement of the mediation session that the duty of confidentiality applies to the process. In order to ensure the confidentiality of the mediation process within the Office, the mediation team is kept separate from the rest of the complaint investigation staff, both on the HR level and on the technical level. The mediator will not investigate the complaint in the regular channel (and vice versa); if the mediation process fails, the complaint will be returned to the regular complaint procedure and information conveyed at the stages of receiving the parties' consent or during the stages of the mediation will not be accessible to the complaint investigator[4].

c) On the technical level, all the material gathered within the framework of the mediation process (such as documents presented by the parties, notes made by the team of mediators or minutes of the meetings) are isolated in the computer system, as will be detailed below, and only the mediation team and the Office's senior management have access to this information.

The **concept of privilege**, which waives the duty to disclose evidence in a court proceeding, is an exception to the legal rule that lays down the duty of every person to appear in court to testify or give evidence. The concept of privilege is the offshoot of the duty of confidentiality and complements it. The amalgamation of these two principles makes it possible to establish a

[3] It should be pointed out that public mediation process raises questions relating to confidentiality – does this duty apply to all the staff of the public authority or only to the representatives taking part in the mediation? These issues become even more relevant, when the representative is required to inform other people in order to implement the solution reached during the procedure. Under these circumstances, it is suggested that the parties sign an expanded confidentiality clause, which also applies to other people who were not present at the mediation process.

[4] This raises the question of what happens at the investigation stage following a failed investigation, if any one of the other parties discloses any part of the mediation to the investigator (to use as evidence to support their position). This is a very complex issue, concerning mainly public mediators. It has implications relating to the confidentiality of mediation sessions and to the extent of the confidentiality – for example, if the confidentiality applies only to the representative of the public body who took part in the mediation session or also to other persons within the body who did not take part. The Israeli Ombudsman has encountered this issue on one occasion only and does not have any sanctions.

relationship of trust between the parties, without them fearing that the information communicated to each other will be disclosed outside the mediation room, including in court.

It is recommended that every ombuds institution examine if the concept of privilege is anchored in its country's legislation or case law, in a way that enables optimal adherence to the principles of mediation[5]. In this context, it should be pointed out that there is an ongoing discussion as to the independent obligation of the mediators to uphold the concept of privilege where both the disputing parties agree to waive it. Some argue that this is a right belonging to the parties and that therefore if they choose to waive it, it is possible to disclose what occurred during the mediation process; conversely, those who believe that the mediator has an independent obligation to uphold the concept of privilege, argue that this is in line with the obligation of the mediator to remain neutral and thereby ensures the trust of the parties (and of the general public) in the process.

Conducting a mediation procedure

The mediation process can involve one session, at the end of which a settlement may be reached, or it may require several sessions in order to reach a settlement, depending on the circumstances and the complexity of the case. The mediation process should be commenced at the earliest opportunity and should reach its conclusion within a reasonable length of time. However, if there arises substantial doubt as to the possibility of concluding the process within a reasonable period of time, the mediation team should consider transferring the case to the regular investigation channel.

(1) STAGES OF THE MEDIATION PROCEDURE

a) Receiving the consent of the parties (Intake)

The mediation team must contact the parties (the complainant and representatives of the public authority) and receive their consent to participate in a joint session in the framework of mediation. As to whom the mediation team should contact first (the complainant or the public authority), there is no one answer to this question, since it all depends on the circumstances of

[5] For example, the concept of privilege in the mediation process complies with Section 30 of State Comptroller Law, 5718-1958 [Consolidated Version], which provides that reports, opinions, or any other document prepared by the Ombudsman in the discharge of his duties, and any information received by him in the discharge of his duties, shall not serve as evidence in any legal or disciplinary proceeding.

the case and whether the mediation team is already acquainted with the representatives of the public authority. At any rate, during the intake stage it is possible that expectations will be raised and disappointment felt (especially on the part of the complainant) if the other party refuses to mediate. It is thus important to make clear at this stage that the procedure is voluntary and as such, the parties may agree or disagree to take part in the mediation session; the consent of one party does not obligate the other party.

b) The mediation process

Stage 1 – Opening statement: The mediators inform the parties of the authority of the Office and the principle characteristics of mediation: volition, confidentiality and privilege. The mediators emphasize that it is forbidden to use any information communicated in the framework of the mediation and clarify that the notes that they take are for internal purposes only. The mediators also emphasize that if the parties reach agreement, they will help them draw up a mediation settlement.

The mediators explain to the parties the structure of the procedure and its stages from start to finish, and clarify that respectful and relevant discourse is a prerequisite to the success of the procedure.

Stage 2 – Presentation of the parties' perspectives: The complainant starts by presenting the circumstances of the case that led to the filing of a complaint with the Office, thus allowing the expression of his/her feelings. The mediation team repeats the main points, mirroring and reframing them. The representatives of the public authority are then permitted to give their version of the story, taking into account the claims of the complainant; the mediators then mirror what was said. As a rule, it is preferable at this stage that the mediators refrain from intervening or interrupting one or other of the parties, allowing them to "pour out their hearts".

Stage 3 – Intermediate summarization: The mediators briefly summarize what has been communicated so far in the mediation process. This stage generates a transition from the events of the past to an identification of the interests and the creation of options for solutions - the ensuing forward-looking stages.

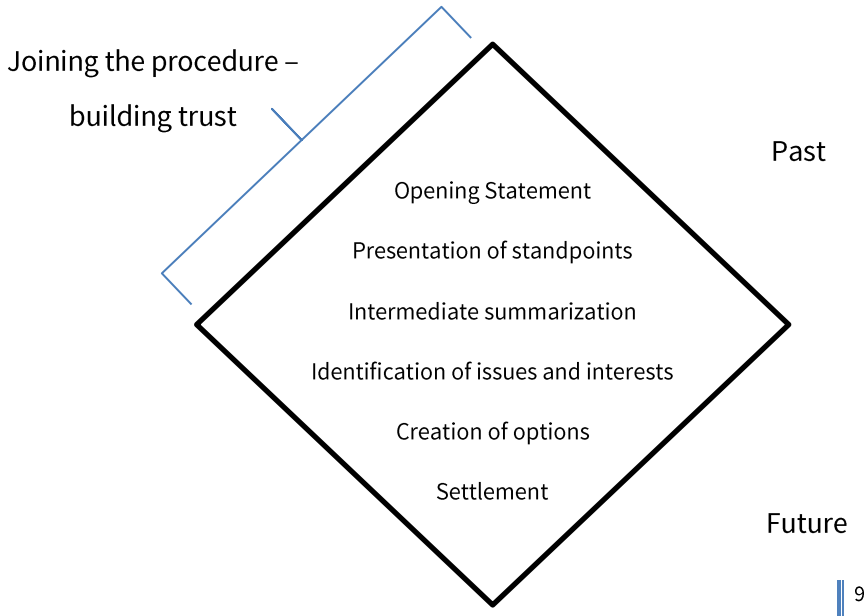
Stage 4 – Identification of the issues and interests of the parties: This is the essential part of the process, where the mediators try to shift the dialogue from a discourse on standpoints to a discourse on interests and issues. The mediators will help the parties conduct open dialogue and will ask them questions (whether at a joint session or a private meeting), with the aim of understanding the extent of the dispute and the underlying interests of the parties.

Stage 5 – Creation and estimation of options: At this stage, the mediators assist the parties in understanding if there are creative solutions that can resolve the dispute between them. As a rule, the solutions will come from the parties themselves, but it is perfectly feasible that there will arise situations in which the mediators may suggest solutions, based on their experience. At any rate, the mediators must make it clear to the parties that the final decision regarding the solution is theirs alone.

Stage 6 – Settlement: If the parties manage to reach agreement, the mediators will help them draw up the terms of the settlement in writing. The mediators may ask the parties to sign the settlement, or alternatively may write a summary of the meeting detailing the terms agreed upon by the parties. At all events, it is suggested that in their summary the mediators include a clause repeating the principle of confidentiality and the prohibition against exposing the information conveyed in the mediation room.

If the parties do not succeed in reaching an agreement, the mediators will inquire of the complainant if there are grounds for transferring the complaint for further investigation in the classic channel.

The following model illustrates the stages of the mediation procedure detailed above:



(2) PRIVATE MEETINGS

As early as the stage of the opening statement, the mediators must make it clear to the parties that an inseparable part of the mediation process is the conducting of private meetings.

The private meetings are, among other things, a tool at the mediator's disposal for empowering and reducing the inherent power gaps in public mediation, where on the one hand there is a complainant and on the other representatives of the public authority.

The dialogue in the private meeting increases the trust of the parties in the mediators, enabling them to disclose information that they may have been unwilling to disclose at the joint session. It also enables the mediators to perform factual or legal reality testing with the parties, and discuss with them openly solutions/options raised in the framework of the process.

During the private meetings, the time allocated for the meeting must be considered so as not to create a situation in which the party waiting loses patience (particularly in frontal meetings). It is also important to grant a similar amount of time to the other party. At the start of the private meeting, the mediators must clarify that everything communicated during the meeting will remain confidential, unless agreed otherwise, and at the end of the meeting they must ask the party which information may be disclosed to the other party. When returning to the joint session, or to a private meeting with the other party, the mediators must thank the waiting party for their patience.

(3) CO-MEDIATION

The Office's mediators conduct the mediation sessions in twos.

Discussions on the question as to whether or not to co-mediate[6] have unveiled a number of advantages to co-mediation. Firstly, this mediation enables the mediators to set an example for the disputants as to how to hold a discussion and cooperate. The management of the process is also easier in twos - for example, one of the mediators can be active and ask questions, write down the communications of the parties and mirror them, while the other mediator can maintain eye contact with the disputants and pay attention to their body language. When there is fruitful cooperation between the mediators, they will exchange roles during the mediation, thus complementing each other. An additional advantage is that in practice, a team of two mediators in the mediation process helps to preserve neutrality and balance, since obviously every mediator comes to the mediation

[6] Keryn Foley, *To Co-Mediate or Not to Co-Mediate – That is the Question*, 29(1) BOND L. REV. 95 (2017).

room with their worldview and life experience. For example, if one of the mediators identifies a bias or the taking of a stand by the other mediator, they will raise the issue and restore a balance. Furthermore, co-mediation enables the holding of concurrent private meetings, with each mediator conducting a separate meeting with one of the parties, thus saving time and preventing the need for one of the parties to wait.

In co-mediation, it is acceptable for the mediators to hold a meeting between themselves to discuss ideas, brainstorm, coordinate ways of action and receive new insights that will improve the process. Co-mediation also enhances the possibility of matching the mediators with the parties with regard to age, sex, religion and ethnic origin.

Alongside the advantages however, co-mediation entails challenges pertaining to the relationship between the mediators: different styles, a dominant mediator who often takes over the process and leaves the other mediator on the sidelines, lack of respect between the mediators - all these are likely to be manifested in the co-mediation process and thwart it.

It should be pointed out that when the mediation process was first incorporated into the work of the Office, it was decided to adopt co-mediation as a strategic measure, since the Office found that its advantages outweighed its disadvantages. The dialogue and cooperation between the mediators in the mediation process prove themselves effective and constitute a model that promotes the process; it is thus recommended to adopt the co-mediation model.

(4) THE LOCATION OF THE SESSION

In classic mediation (which is not online), thought must be given to the location of the session. As said, the nature of the mediation process requires the mediator to remain neutral, a fundamental prerequisite for gaining the trust of the parties in the mediator and consequently in the process itself. The choice of the location is thus in no way technical. The host of the session will enjoy clear advantages, such as familiarity with the surroundings and a strong feeling of comfort. The host also has the choice of "backdrop", which can enable them to show less respect for the other side, or cause the other side a feeling of discomfort, for example through accessibility difficulties; this backdrop can also prevent the holding of private meetings in a manner that will respect the privacy of the other party.

The joint session should therefore ideally take place at the offices of the ombudsperson, a neutral venue that enhances the trust of the parties in the mediation process and the mediation team, thus

giving the mediators control over the proceedings. The neutrality of the location also increases the commitment of the parties to the process.

Over the last two years, with the spread of the global Covid-19 pandemic and the ensuing demand for social distancing, online mediations have received primary status over the classic, frontal processes and this will be elaborated on later.

CRITERIA FOR DETERMINING THE SUITABILITY OF COMPLAINTS FOR MEDIATION

Every ombudsman institution that wishes to include the mediation process in its toolbox must lay down characteristics and criteria that will help it to determine if a complaint is suitable for handling by mediation.

The following is a list of the characteristics defined by the Office. They will be illustrated by examples of successful mediations conducted by the Office's team of mediators.

(1) ONGOING RELATIONSHIP BETWEEN THE PARTIES

Frequently, the relationship between the individual and representatives of the public authority is not a one-off interaction but is continual. Here mediation plays an important role in merging the fabric of the relationship between the complainant and the representatives of the authority.

An example of this is the case of an estate agent who had for several years been working in collaboration with a public authority dealing with public housing, in the framework of a project for locating apartments for public housing. In the mediation process conducted by the Office, the complainant claimed that the public authority was refusing to pay him agency fees for two apartments that he had located for it. According to the complainant, the public authority had notified him that it was terminating its business arrangement with him on account of, among other things, his offensive language towards a staff member of the authority. The complainant contended that this decision had harmed his income. In the course of the mediation session, the representatives of the authority explained to the complainant their criteria for paying agency fees to agents, and explained why the complainant did not meet them. They also explained to him how agents were expected to work with the authority. The complainant emphasized the importance to him of continued business relations with the authority. At the end of the meeting, it was agreed that the complainant would apologize to the representatives of the authority for the things he had said and that the parties would continue to collaborate as previously.

(2) THE COMPLAINT STEMS FROM THE NEED OF THE COMPLAINANT TO RECEIVE RECOGNITION FOR EMOTIONAL HARM CAUSED TO THEM OR UNDISCLOSED INFORMATION OR FROM THEIR DIFFICULTY IN PRESENTING FACTUAL FINDINGS ("ONE PERSON'S WORD AGAINST THE OTHER")

The authorities are highly involved in the daily lives of the individual, and every person is required to engage with public bodies from time to time. Sometimes the interaction between the individual and the public authority does not yield the desired result and ends in dispute. In most cases, this is a negative experience for the individual, sometimes even hurtful. Many complaints received by the Office deal with friction or disagreements of this kind, and the mediation process enables the parties to give their version of the events that led to the complaint being filed and heightens the complainant's satisfaction, strengthens the authority's service consciousness and the faith of the complainant in the public authority.

An example of this is the case of a woman suffering from a chronic illness. She complained to the Office about the staff member of a government authority whose services she had required. According to her, the staff member had raised his voice to her, humiliated her, treated her disrespectfully and been inconsiderate of her physical condition. Furthermore, he had even smoked in her presence. The ministry denied the complainant's claims, and when this was brought to her knowledge she was clearly deeply hurt, both by the way the staff member had treated her and by the response of the relevant ministry. In light of the circumstances, the Office suggested conducting a mediation session between the complainant and the ministry's representatives. At the mediation session, which was attended by the staff member and his superior, the complainant described her painful experience and the harm caused to her emotionally, as well as the affront to her dignity, at the hands of the staff worker.

The staff member, in his turn, described his difficult working conditions, his work environment and daily workload. Notwithstanding, the representatives of the government ministry apologized to the complainant for her negative service experience and the complainant left the session feeling satisfied.

(3) THE COMPLAINT REFERS TO SEVERAL AUTHORITIES OR PUBLIC BODIES AND THE COMPLAINANT "SLIPS THROUGH THE NET"

The individual is frequently faced with a problem that requires the combined and coordinated handling of several public bodies. Sometimes, each public body to which they turn relating to the

problem throws the responsibility for solving the problem on one of the other public bodies, which in turn shirks responsibility. It thus becomes impossible to solve the problem and the individual feels frustrated and helpless in face of the bureaucracy and lack of information as to whom to turn. Experience teaches that in cases of this kind, a mediation process that involves all the relevant parties can lead to a comprehensive solution.

An example of this is the case of a complainant who filed a complaint about nuisances from the municipal market situated near his home. The complainant claimed that in the evenings the market undergoes a character-change and turns into a meeting-place for youngsters, generating noise nuisances that extend into the early hours and disturb his sleep. The complainant pointed out that he had contacted the municipal hotline on many occasions, but had not received an appropriate response and had constantly been referred to the Police. Although the Police did come to the site, the pub owners would turn down the volume of the music and then turn it up again as soon as the police officers left.

At a session attended by the complainant, representatives of the municipality, representatives of the Police, and mediators from the Office, the representatives of the municipality and the Police clarified the times during which music would be allowed on the site of the market and agreed to continue the format of increased enforcement and the distribution of reports for making a noise. It was also agreed that representatives of the Police and the municipal inspection department would visit the site in order to assess the volume of the noise and speak to business owners on the site where necessary. The parties expressed their satisfaction with the arrangement to the mediation team and in the follow-up conducted by the mediators, they were informed that the relevant persons had implemented the terms of the settlement reached during the mediation and that the neighborly relations between the complainant and the pub owners had improved significantly.

(4) NEGOTIATION IN A FINANCIAL MATTER

Where the individual owes money to the public authority, they generally do not have the legal knowledge and appropriate tools for settling the debt. As a result, the debt keeps accruing arrears payments; furthermore, the individual feels greater fear and helplessness regarding the possibility of turning to the authority, raising the appropriate arguments and negotiating on the debt.

An example of this is the complaint of a lawyer representing a legally incompetent person (ward) who had inherited land. The lawyer claimed that he had for several years been trying to register the

property under the name of the ward in the Land Registry, but had been prevented from doing so because of liens that had been placed on the property following the failure of the previous owners to pay the authority the levies required by law. The lawyer contended that over the years the debt had accumulated high rates of interest and that there were no grounds for demanding these sums when his client attempted to pay the original debt (without paying interest and linkage differentials). According to the lawyer, he had contacted the municipality many times and had even asked to negotiate the matter with them, but had not received a relevant answer. The Office suggested that the parties mediate, and a mediation session took place between the lawyer, the treasurer of the authority and its legal advisor. After two sessions, during which the sums of the nominal debt and the interest that had accumulated over the years were clarified, the parties decided on the sum that the ward would pay the municipality. It was also agreed that after the payment had been made and the required approvals been obtained, the liens would be lifted and it would be possible to register the property on the ward's name.

A further example of negotiation in a financial matter is the case of a private company that had signed a contract with a public authority. The company filed a complaint with the Office after the public authority refused to settle a debt on invoices to the sum of 100,000 NIS (approx. 30,000 US Dollars). The invoices had been sent to the public body many years prior to the filing of the complaint, but, although the private company had sent reminders, the debt had not been settled. The complaint was transferred to a mediation process. At the joint session, representatives of the private company insisted on the invoices being paid in full and described how they had behaved towards the public body. The representatives of the public body, on their part, insisted that it was impossible to evaluate the resources invested by the private body over the years in carrying out the work, and at a certain stage even claimed that a legal procedure would be easier for them, since the court would simply reach a decision for them.

The mediation team made a mediator's suggestion - the representatives of the private company would convey to the public company all the documents at its disposal that testified to the work having been carried out, thus making it possible to estimate the difference in calculations between the two sides, without committing the public authority in advance to paying any sum. The representative of the private company updated the mediation team that the parties had acted in accordance with the mediation settlement and in the end, a sum had been received for covering the unpaid invoices.

In this case, the mediation team managed to bring the sides together for a joint session and create a mechanism for direct dialogue, which led the sides to an optimal resolution of the dispute without the need to turn to the courts or waste additional public monies. Other achievements of no less importance in this case were the acquainting of the parties with the mediation process at the Office and their satisfaction with the procedure.

(5) DISPUTE REQUIRING CREATIVE SOLUTION

The investigation of a complaint will determine if a complaint is justified or not, but sometimes a complaint requires thinking creatively, outside the box, in order to find a solution that is satisfactory to the parties.

An example of this is the case of a complainant whose deceased father had been an entrepreneur and had built a cultural center in his town of residence. After his death, the municipality had perpetuated his work by placing a memorial stone in a park situated next to the cultural center. In time, the municipality decided to renovate the park, the memorial stone was destroyed and in its place a concrete art wall was set up, on which were hung paintings representing prominent sites and institutions of the town from the past and present. The complainant asked the municipality to continue perpetuating the work of her deceased father by means of the memorial stone in the park, but her request was rejected. Instead, the municipality suggested placing in the park a metal sign bearing her father's name, for a limited period of time, and on condition that the complainant donate a sum of money in accordance with an internal procedure of the municipality relating to commemorations. Prior to the joint mediation session, the mediation team visited the park with the complainant and her husband. During the visit, the complainant tearfully described the work of her deceased father and his contribution to the town. The team was impressed by the special art wall that had been set up in the park, detailing the names of the sites and institutions in its area and describing their history. At the mediation session attended by the complainant, her husband and senior representatives of the municipality, the mediation team managed to patch things up between the parties. At the end of the session, it was settled that the father's name would be added to the sign set up near the art wall, subject to receiving the necessary approval.

This joint discussion, during which all the interests of the disputants were unveiled, contributed to finding a creative solution that did not involve spending large sums of money.

A point to be considered is that while mediation provides a solution to the individual problem, the mediation process in an individual case is sometimes beneficial to other people as well. This is so in cases where the public body reaches the conclusion that it must change its conduct not only towards the party to the mediation but towards the public in general that has encountered similar problems.

For example, the deceased husband of a complainant had owned a disability badge for a vehicle and parking space that the municipality had allocated to him near his home. A short time after he passed away, the complainant received a fine for parking on the designated parking space. The complainant went to the offices of the municipality to enquire about the fine, but according to her the representative of the municipality called her a law-breaker, alleging that she should have notified the municipality of her husband's decease. The complainant's children eventually paid the fine and turned to the Office on her behalf.

At the joint session, the complainant's daughter described the sequence of events, and especially the humiliation felt by her mother, both from receiving the fine and from the attitude of the municipality representative towards her. The session also disclosed that there was no interfacing between the data of the Population and Immigration Authority and the Licensing Office and the data held by the municipality, and thus the municipality had been unaware of the complainant's husband's demise. At the end of the mediation process, the representatives of the municipality admitted that they should have been more sensitive, even though they had acted in accordance with the law. As a result, of the mediation process, the municipality formulated a procedure creating a direct interface with the Licensing Office. In view of the importance of the matter and after the Office had contacted the relevant persons, the procedure was sent out to all local authorities.

INTRA-ORGANIZATIONAL LEVEL

Another important step in incorporating the mediation model within the ombudsman institution is performing a range of activities on the intra-organizational level, as follows:

(1) TRAINING STAFF MEMBERS TO BE MEDIATORS AND APPOINTING A MEDIATIONS COORDINATOR

In order to handle complaints by mediation, the ombuds institution must train complaint investigators to be mediators, in addition to their regular work as complaint investigators.

The mediation team of the Israeli Ombudsman Office today comprises some 16 mediators - 14 lawyers and 2 social workers. The mediators took part in both a basic theoretical course and practicum. The latter is a course lasting about four months, during which the participants conduct actual mediation sessions between disputants in claims filed with the small claims court.

The fact that there are mediators from different backgrounds and fields of education (for example lawyers, social workers) makes it possible to allocate a file to the mediators who are best qualified for handling the case.

Thus, in a case involving emotional complexity, preference is given to a mediator with a background in counselling. An example of this is the case of a man with disability whose parents contacted the Office following the failure to find a daycare facility that met his needs. At a joint session attended by representatives of the designated daycare center, representatives of the local authority, the parents and the Office's mediators, the parties decided that since the son had been staying at his parents' house for some time, it was necessary to construct a gradual integration program, enabling him to return by degrees to the daycare facility that suited him. It was agreed that the responsible persons at the daycare center, together with representatives of the local authority, would go to the parents' home in order to construct the said program for their son. The mediators from the Office were trained social workers; their background and training contributed immensely to mirroring the distress of the parents and assisting in finding an appropriate solution, which led eventually to the professional sources constructing a gradual program, enabling the son to return to the daycare facility on a full-time basis.

The Office takes heed of multi-cultural sensitivity in the mediations that it conducts. In cases where there is felt a need for understanding the cultural dialogue and background of the disputants and allowing them to be expressed in the framework of the mediation, a mediator who speaks the

language and has knowledge of the culture will be chosen. This was so in the case of a complainant from a Bedouin settlement in the south of the country, who complained that the local council had failed to arrange transportation for her son, a minor with a hearing impediment, who attended a school for children with special needs. Due to the refusal of the council to pay for transportation, the son frequently missed school. On its part, the council contended that it had not received the necessary approval for financing the transportation since there was a suitable school for the child in closer proximity to the family's place of residence.

At a joint session that was conducted online and was attended by the mother, her lawyer, representatives of the Department of Education in the council and representatives of the Office, the mother explained in her mother tongue, Arabic, the need that had arisen to move her son to a school that was relatively far away - the result of a dispute between clans that made it impossible for her son to go to a school that was closer to home. She also emphasized her son's desire to go to school. The son himself joined the discussion, using sign language, and his mother translated his words for the rest of the participants. The presence of a mediator who speaks Arabic and understands the nuances of the way of life and culture of the complainant, enabled the mother to feel free to express herself, without the language and cultural barrier acting as an impediment to the joint dialogue[7]. Furthermore, the participation of the son in the process was empowering, making it possible for him to express himself directly. During the session, several options were discussed for including the child in the existing transportation arrangements to his school and at the end of the meeting, the representatives of the council informed the mediation team that an appropriate solution had been found, in collaboration with the mother and son.

(2) ORGANIZATIONAL STRUCTURE OF THE MEDIATION TEAM

At the head of the mediation team stands the **Mediations Coordinator** who is responsible, among other things, for locating the complaints that are suitable for handling via mediation. The Coordinator also examines the suitability for mediation of complaints suggested by staff members of the Office; gives professional guidance and support to the mediation team in mediation files; allocates the files to the appropriate mediators; conducts mediations; constructs a work program and coordinates the data gathered from mediation files; increases exposure of the mediation tool both intra-organizationally and extra-organizationally; holds meetings with public bodies; advises

[7] The Office comprises staff members who speak a variety of languages – Hebrew, Arabic, English, Russian, Ukrainian, Amharic, Tigrinya, French, Spanish

public bodies and strives to incorporate the mediation tool within the bodies; and works to enhance cooperation with the public authorities and with community mediation and dialogue centers (the latter will be discussed in greater detail below).

(3) CHARACTERIZATION OF THE MEDIATION MODEL IN THE COMPUTERIZED SYSTEM

The ombuds institution must characterize the mediation model in the intra-organizational system. This will not only help the ongoing work of the mediators, but will preserve the characteristics of mediation.

In characterizing the mediation model in the Office, the referral of a file to mediation is performed via a designated key in the computerized system. By pressing this key, the staff member who suggests the file for mediation opens a dialogue box that they are required to fill in, regarding the parameter by which they decided to refer the file to mediation[8].

The suggestion of the staff member is transferred online to the Mediations Coordinator and the decision whether or not a file is suitable for mediation is registered, with reasons, in the file and conveyed, via email, to the person who suggested the file for mediation and to the relevant head of department.

Where the file is found suitable for mediation, a special mediation file is opened that is completely isolated in the system, so that every action taken in the file is accessible only to the mediation team, the mediations coordinator and the Office's senior management. This is particularly important in cases where the mediation process was unsuccessful and it is necessary to transfer the file for investigation in the regular channel.

The development of the system and the issue of isolation required the investment of considerable resources on the part of the Office's program developers. The isolation of mediation files enables the monitoring of the work of the mediation team on the one hand, and preserves, as said, the characteristic of confidentiality, which is a fundamental principle of the mediation process.

[8] In accordance with the criteria detailed on pages 13-18, in the section dealing with the criteria for determining the suitability of complaints mediation.

During the mediation team's handling of a file, the team must give updates on the following matters:

i. if the consent of the parties has been obtained and when
ii. if mediation was conducted and how (classic/by phone/online)
iii. the reasons for the termination of the process (where relevant)

At the end of the process, the team must also prepare a report summarizing the main actions taken in the mediation file.

Upon closure of the mediation file, the relevant head of department receives an automatic update of the results of the file handling: success/failure/termination of mediation/failure to receive the consent of all the parties/transfer to a community mediation and dialogue center[9].

(4) INFORMATIONAL ACTIVITY FOR STAFF MEMBERS

The ombuds institution must carry out information campaigns for its staff and organize study days on the topic of mediation. The Office, for example, holds study days during which the mediation team gives TED talks and shares examples of successful mediations. In this way, the general staff of the Office is acquainted with the field of mediation and its advantages.

(5) COMPILATION OF A WORK PROCEDURE THAT REGULATES THE WORK OF THE MEDIATORS

Compilation of a work procedure that details the steps for handling a complaint from the start - from the moment it is identified as a complaint suitable for mediation - to the completion of the process, including defined time spans at the stage, among others, of receiving the consent of the parties (intake stage). The Office has compiled a work procedure that regulates the work of its mediators.

[9] See subsection (2) on p. 20

EXTRA-ORGANIZATIONAL LEVEL

The activity carried out on the intra-organizational level is not sufficient and thus it is necessary at the same time to promote cooperation with other public authorities with which ongoing work relations exist, in order to acquaint them with the mediation process and make it accessible to them.

The aim of the extra-organizational activity is two-fold: firstly, as said, to inform the authorities of the advantages of mediation and create "mediation trustees" within them; secondly, to act as a professional resource for these bodies or government authorities that are interested in incorporating the mediation process within their bodies.

(1) INITIATING MEETINGS WITH REPRESENTATIVES OF PUBLIC AUTHORITIES

The Office will generally make contact with the head of public complaints in the relevant authority and suggest a joint meeting. At the meeting, the Office will enumerate the advantages of the process and describe successful mediation cases conducted by it; it will also ask to receive a "contact person" for examining the cases that the Office suggests be handled via mediation.

The premise is that as a result of the authority's representatives' experiencing the mediations conducted by the Office, a "mediations trustee" will eventually be appointed in the authority and a basis of trust in the mediation process on the part of the authority's representatives will be founded. Sometimes, the fruitful cooperation even leads to the authority's representatives' turning to the Office on their own initiative and suggesting that a particular complaint be handled via mediation.

(2) COLLABORATION WITH COMMUNITY MEDIATION AND DIALOGUE CENTERS

Community mediation and dialogue centers help to resolve disputes between individuals and groups. Over the last few decades, some 50 dispute resolution centers in the community have been established in Israel. These centers work systematically and in collaboration with all services, organizations and groups with the aim of advancing a social vision based on the values of patience and tolerance, acceptance of the other, multi-culturalism and resolution of disputes via dialogue and agreement.

The following are suggestions for enhancing cooperation with these organizations:

a) Initiating meetings with the directors of community mediation and dialogue centers in order to learn about the work of the centers.

b) In cases where the Office is authorized to investigate the complaint but a private party is also involved[10], it is possible to conduct a mediation process in which the complainant, representatives of the local authority, the private party, a mediator from the Office and a mediator from the community mediation and dialogue center participate.

   The advantage of adding a mediator from the community mediation and dialogue center is that, if it is necessary to monitor implementation of the settlement reached, the community mediator will undertake to monitor and reinforce the settlement.

   This occurred in the case of a complainant, an immigrant from the former Soviet Union, who does not speak Hebrew. She complained about the failure of the authorities to deal with her repeated complaints about noise from a Talmudic college situated near her home. In this case, a Russian-speaking mediator from the Office participated in the session, together with a mediator from the community mediation and dialogue center, representatives of the authority, the complainant and a representative from the Talmudic college. At the session, a scheme for dealing with the noise was agreed upon between the complainant and the representative of the college, and it was also settled that the community mediation and dialogue center would continue with a mediation session between the complainant and the representative of the college, with the aim of bringing the parties to a settlement and monitoring its implementation.

c) In cases where the Office is not authorized to investigate the complaint - especially in complaints against a person or private body - it is possible, after receiving the consent of the complainant, to refer the handling of the complaint to the community mediation center for the purpose of conducting a mediation process between the parties.

   An example of this is the referral of a complaint stemming from a dispute of many years standing between two neighbors who had filed mutual complaints with the local council. The neighbor

[10] The Office is not authorized by law to investigate complaints against private bodies.

who filed the complaint with the Office (complainant) complained about the nuisance created by chickens belonging to his neighbor, while the latter complained about offences committed by the complainant under the animal (dogs) husbandry laws. Since it was clear that the main dispute concerned the relations between the neighbors, and certain aspects of it were even pending in court following the filing of lawsuits, the Office referred the handling of the complaint to the community mediation and dialogue center, after receiving the complainant's consent. Following a mediation that was conducted between the parties by the director of the community mediation center, the director notified the Office that a creative solution had been found - the neighbor with the chickens would move them to a different plot in the place where they lived and a petting area for youth at risk would be set up there. The parties gave their consent and revoked their lawsuits; the complainant even agreed to run the petting area.

d) Active participation in conferences of the mediation centers. Contact should be made with organizations dealing with mediation and an active part should be taken in conferences organized by the mediation centers.

For example, in 2020 the 13th Mediation Conference on the theme "Prevention and Conflict Resolution in Normal Times and Times of Crisis" was held online. The head of the Office of the Ombudsman[11] led the panel that discussed "Mediation as a Tool for Resolving Public Complaints". The goal of the panel was to present mediation as an effective tool in the investigation of public complaints, to describe the mediation activity within the Office and its connection with the community mediation centers, and to inspire other public bodies to develop the mediation tool within its units for handling public complaints.

(3) PUBLICITY IN THE GENERAL PUBLIC

It is recommended to publicize in the media and on social networks the advantages of the mediation process and examples of successful mediation proceedings (subject to the duty of confidentiality). For example, in recent years the Office has published information pamphlets about mediation, which it distributes at the meetings it initiates and at conferences in which it participates. It also had made a short promotional video in Hebrew, Arabic and English that is shown at the different study days and conferences and on social networks. Furthermore, the Office publishes an annual report, which includes examples of successful mediations conducted by the

[11] Dr. Esther Ben-Haim, Adv., Head of the Israeli Office of the Ombudsman.

Office's team of mediators. We frequently discover that complainants and public authorities ask for the complaint to be handled via mediation after hearing about this tool from the publicity initiated by the Office. Having said this, however, it is of course at the discretion of the Office to decide how to handle the complaint.

BARRIERS

At the stage of receiving the parties' consent, attention must be paid to the fact that there are barriers and negative incentives that may prevent the parties from participating in mediation processes:

- **Preference for a familiar procedure**

The investigation of complaints is similar in essence to a legal procedure in which an objective source hears the sides of the parties and reaches a decision. This is different from mediation, where each party is responsible for managing the process and for its outcome. Representatives of the public body generally prefer an investigation procedure with which they are familiar, by means of correspondence, as opposed to a mediation process with open discussion between disputants, which is less predictable than an investigation procedure.

- **Lack of knowledge** - The claim that "the case is unsuitable"

Representatives of the public authority generally claim that they recognize the advantages of mediation but do not feel that the case in question is suitable for a variety of reasons, such as: the complainant has had their chance; the complainant should not receive preferential treatment over other complainants; by the authority's agreeing to mediate, the complainant is led to believe that it acted illegally or that it is willing to acquiesce and compromise.

In addition, when the parties are not sufficiently familiar with the range of solutions that can be reached within the mediation process, they are likely to object to the procedure and make do with a decision as to whether or not the complaint is justified in the framework of a regular complaint investigation.

- **Negative mediation experience**

In cases where one or other of the parties has experienced a mediation process that has left a negative impression on it, a barrier is set up that daunts it from participating in further mediations.

- **Fear of "double work"**

When the suggestion to mediate is made after the investigation of the complaint in the regular format, the representatives of the public authority are likely to argue that they have already

invested extensive resources in answering the Office and that devoting more time to a mediation process amounts to "a waste of public monies".

- **Negative incentive**

Sometimes the representatives of the public authority prefer not to mediate but to receive the Office's decision as to whether or not the complaint is justified in the framework of the regular investigation procedure. This stems from their desire not to take responsibility for the decision regarding the complaint.

- **The public service decision-making process**

Sometimes, in light of the dynamics of the mediation process and the fact that it is impossible to predict the developments and solutions that will arise during the sessions, and in light of the public service decision-making procedures, it is possible that the disputant on behalf of the public authority is not authorized to make decisions in the course of the session. The representatives of the public body will thus prefer to choose the classic investigation, so as to avoid the need to go through the mechanism for receiving the necessary approvals for assenting to the terms of a mediation settlement.

- **Lawyers representing public authorities**

Sometimes lawyers representing public authorities prefer the regular investigation procedure, involving the sending of a formal written answer, with documents and references, as opposed to mediation and joint dialogue.

- **Contacting an unknown entity**

In cases where there is no "mediation trustee" in the public authority, receipt of the authority's consent will sometimes be dependent on the extent to which the specific representative contacted believes in dialogue and is familiar with the nature of mediation and its advantages. On the other hand, turning to the wrong person can thwart entering the mediation process and maybe even block the possibility of conducting future mediations with that authority.

OVERCOMING THE BARRIERS

In order to overcome the barriers detailed above, the following actions should be taken:

(1) **Initiating meetings with representatives of the public authorities.** An explanation of the mediation process and its advantages, and the response to questions asked, will provide the necessary information, will contribute to the feeling of assurance and will assist in receiving informed decisions.

(2) A **guiding questionnaire**, which helps the public authority make a decision regarding its participation in a mediation process, can dissipate the authority's concern about "double work".

(3) At the intake stage, it is important to **coordinate precisely the expectations of the parties**, prior to the mediation, with the aim of clarifying the nature of the procedure in general, explaining the limitations of authority of the ombuds institution and emphasizing that the results of the procedure depend upon the parties themselves and the dynamics between them, thus making it impossible to predict its outcome.

(4) At the end of the mediation session, it is suggested to send out a **satisfaction survey** to learn of the participants' feelings, to highlight a specific negative experience and neutralize it, and to learn more general lessons for the future.

(5) **Identification of the participants on behalf of the public authority.** On the one hand, the mediation team cannot decide for the public authority who will participate on its behalf in the mediation process. On the other hand, since it is important that those participating have the authority to make decisions, this issue should be addressed as early as the intake stage. The online mediation process makes it easier for senior staff members of the authority to participate in the mediation from the start, and where necessary at a later stage in the course of the mediation process.

(6) The **appointment of "mediation trustees" in the public authority** serves to overcome the said barriers, such as lack of knowledge, negative experience in mediations and contacting an unknown entity.

ONLINE MEDIATION PROCESSES

The year 2020 will no doubt go down in the annals of global history as the "Year of Covid-19" - the year in which a pandemic spread like wildfire throughout the world, killing millions of people. The sudden change in our regular lifestyle also required a change of perception in our relations with others: no longer was it possible to meet in person, to shake hands, to embrace, to communicate via body language; instead, there was social distancing and communication with others via screens. Restrictions in movement and congregating that were imposed in the different states, and the need to adapt swiftly to a new reality in order to stay healthy, led to a sharp soar in the use of online means of communication - notwithstanding that these were also previously in use to a certain extent - in multifarious fields, such as education, employment and even daily personal communication.

Under these circumstances, the mediation process was adapted to the online reality. These adaptations disclosed several advantages, alongside the difficulties and dilemmas regarding the use of the online platform in mediation processes, as will now be detailed.

Advantages of the online mediation process

(1) AVAILABILITY OF THE PARTIES AND THE SAVING OF RESOURCES

One of the main difficulties encountered in the classic mediation process is the availability of the parties. A frontal mediation session requires the parties to make themselves available for several hours. The Office's mediation team has frequently come up against the objection of one of the parties, usually representatives of the public authorities, to devoting precious work hours to a mediation process. Online mediation considerably reduces the number of work hours required for the sessions, thus encouraging more public authorities to agree to mediate. Via the online platform, it is relatively easy to add participants who are authorized to make decisions in real time, thus advancing the reaching of a settlement between the parties. In addition, the possibility of opening

"waiting rooms"[12] makes it easier for the parties, especially representatives of the public authority, to manage their time efficiently and promote pertinent dialogue without being pressured by time.

(2) RESTRICTION OF THE FEELING OF POWER DISPARITIES BETWEEN THE PARTIES

The parties on the online platform do not feel they are sharing the same space. The complainants are in their own homes and familiar environment, their physical comfort zone, which can dispel their fears of a conflict with the representatives of the public authority, give them the feeling of security and contribute to the willingness of the parties to communicate openly. There are cases in which the knowledge that there is no need to meet face to face with the other side has a calming effect, assisting in overcoming objections.

(3) SOLUTION FOR PERSONS WITH MOBILITY DISABILITY AND FOR PEOPLE LIVING IN THE PERIPHERY

The fact that it is possible to conduct mediation on an online platform can provide a solution for persons with mobility disability or for people living in remote areas. A disputant who has a mobility disability or lives in a remote place is not likely to consent to mediate at the intake stage, simply because of the difficulty in reaching an unfamiliar or remote place for a meeting within the framework of a frontal mediation. Online mediations overcome this barrier.

Disadvantages of the online process

(1) LIMITED ABILITY TO RECEIVE NON-VERBAL MESSAGES FROM THE PARTIES

In online mediations, it is difficult to get a full, non-verbal impression of the parties, including body language and preliminary hints of escalation of emotions. Furthermore, leaving the online process is easier than in a frontal session, and the mediator frequently lacks the necessary time for handling crises arising during it. The control of the mediator over the online process is restricted when one of the parties decides to terminate the session, in contrast with the possibility for them, in a frontal session, to cope with the distress or crisis and handle it without stopping the session. It is thus important in online mediation to develop an ability to identify crises in advance and handle them

[12] On an online platform it is possible to split the participants up into separate “waiting rooms”, enabling the mediation team to conduct separate meetings with each of the parties. During the separate meeting with one of the parties, the other party can get on with their affairs and thus save time.

swiftly, by holding private meetings in separate rooms to prevent the sudden, one-sided abandonment of the session by one of the parties.

(2) COMMITMENT OF THE PARTIES TO THE PROCESS

To the extent that the investment in the process is lessened, so is the feeling of commitment to it. As is natural, when the parties are required to go to a frontal session and devote to it several hours of their time, they feel greater commitment to the process. In order to overcome this disadvantage, effort needs to be taken at the intake stage, to coordinate expectations with precision, to enhance the faith of the parties in the mediation process, to acquaint the parties with the mediators prior to the joint session via private online meetings with each of the disputants, and to work to create constructive dialogue during the mediation session.

(3) TECHNOLOGY AND TECHNICAL AIDS

In online mediations, the mediator and the parties must have the technological competence to operate the program. If one of the sides displays a lack of technological proficiency that is likely to constitute a significant barrier, it is necessary to consider avoiding conducting the mediation online. An additional disadvantage of online mediation is the fact that it is not available to populations that do not have a computer or smart phone.

(4) DATA SECURITY, CYBER DEFENCE AND PROTECTION OF PRIVACY

Online mediation raises the issue of data security and cyber defense, as well as the issue of protection of privacy. Since each of the parties is situated in a different space, it is difficult to ensure that other people are not participating and listening in to the conversation or recording it.

To overcome the issue of data security, the parties must be informed that it is forbidden to record the session, and that it is likewise forbidden to bring in other people who are not party to the mediation, without receiving the consent of the other participants.

It is also worth considering requiring the parties, prior to the session or at its outset, to sign a document whereby they undertake not to record or share the content of the mediation session.

In addition, it is recommended to make use of a platform that enables the host (who should be the mediation team) to have control over the recording of the meeting.

An example of online mediation (one of many conducted by the Israeli Office) is the case of a complainant who went to the municipal taxes department at the municipality to settle his municipal tax debt, after a lien had been placed on his bank account. After the complainant had paid the debt, the head of the department refused to lift the lien because of another debt with the debt collections agency. The complainant asked to speak to the department head and was shown into the latter's room, while activating the camera on his mobile phone. According to him, the department head spoke to him in a humiliating fashion, and even threatened and cursed him. At the joint mediation session that was conducted online, the complainant declared at the outset of the meeting that he was not interested in dialogue with the head of department. The mediation team permitted the two parties to give their version of the events and after the complainant repeated the sequence of events as described in his complaint, the department head said that the complainant had entered his room in a demonstrative manner, threatening him and waving at him his mobile phone; after this he had even published the video recording of the conversation on the municipality's Facebook page, while humiliating the deputy head.

In light of the tension in the interaction between the parties, the mediation team decided to open separate online meeting rooms. During the meetings with each side, the mediation team was able to reflect the feelings and viewpoint of the other side; furthermore, different suggestions for resolving the dispute were raised by each of the parties - such as mutual verbal apologies by both parties, or apology subject to the parties signing a waiver on future claims - but the parties rejected these solutions. Eventually, the municipality's legal advisor, who also took part in the session, suggested that the complainant and department head hold a meeting at which a joint photo of them would be taken and then posted on the official Facebook page of the municipality, together with text testifying to the conclusion of the issue. There is no doubt that only the separate conversations made it possible for the mediation team to bring about a conciliation and the parties' resolution of the dispute.

While the virtual space was already in wide use prior to the Covid-19 pandemic and online mediation sessions took place before it, it seems that as a result of the pandemic the world of mediation has seen fit to adopt online mediations to a greater extent and to recognize their advantages. The removal of logistic barriers and the considerable saving of resources - time, work hours and travelling - no doubt make it easier to obtain the consent of the parties to mediate. The many online mediations that have taken place since the outbreak of Covid-19 have shown that the parties do not hurry to leave the online mediation process, even though it is easier to do so on this

platform since leaving requires only the pressing of a button. Moreover, it would seem that the online mediation process has not affected the parties' level of commitment to the process.

It can thus be seen that the advantages of online mediation considerably outweigh its disadvantages. Online mediation enables the Office's mediation team to acquaint other public bodies with the process, as well as other communities in the geographical periphery; it also makes the process accessible to persons with disabilities.

It appears there is consensus that even after the world returns to a welcome routine and it becomes possible to resume classic, face to face mediation processes, the online mediations will continue to play an important role. Notwithstanding, it is necessary to establish rules regarding online mediations.

SUMMARY

Mediation is not only a profession, but also a philosophy of life and language that should be learnt and adopted. It is an understanding that the reaching of an agreement is the optimal way not only for resolving a specific dispute, but also for creating interaction between the complainant and the representatives of the authority that is likely to diminish future conflict, enhance the public's trust in the authority and increase the service-consciousness of the authority. It is therefore important for every ombuds institution to recognize the importance of mediation as a central tool in its toolbox for complaint handling and make it its goal to keep increasing the number of complaints handled by mediation. It should also spread the word about classic and online mediation with the different public authorities.

Mediation as a designated channel for complaint handling contributes immensely to the ombudsman institution on the intra-organizational level and in addition, mediation tools can be used in the classic investigation of complaints, thus being of double benefit to the organization.

It is furthermore important to encourage the public body to appoint an appropriately trained "mediation trustee" in every public authority. This trustee will acquaint the staff of the authority with the mediation tool and will make its use accessible to them. Preferably, the "mediation trustee" should be aware of the complaints filed directly with the public authority, should lay down the characteristics of complaints that are suitable for mediation and conduct mediation processes accordingly. The trustee should also coordinate engagement with the mediation team in the ombuds institution and be authorized to decide in which cases the authority will agree to mediate and who will represent it.

Once the mediation process has been integrated within ombuds organizations around the world, it will be possible to create databases, conduct joint learning and even train mediators via the IOI.

It must of course be taken into consideration that the incorporation of mediation procedures and the "mediation language" within the work of the organization's staff is a process that takes time, the investment of resources and of course, patience. Notwithstanding, there is no doubt that the incorporation of the mediation procedure will reap fruits and improve the handling of complaints, thereby achieving optimal results.

ANNEX

This paper is based on the experiences and practice of the author this paper, the State Comptroller and Ombudsman of Israel. Since many of our members have experiences in the field of mediation and dispute resolution, the IOI also wants to shine light on practices from other Ombudsman offices. The following sidebar stories (listed in alphabetic order by country) include feedback and observations from IOI member institutions.

OBSERVATIONS FROM ARGENTINA

The Ombudsman Office of the Province of Santa Fe — Argentina was created by law 10.396, in 1990, and it's been developing mediation and other adequate conflict solving procedures for the last thirty years. Based on our experience, we want to share some thoughts on mediation.

The approach adopted by the State Comptroller and Ombudsman of Israel on his Best Paper Practice on Mediation is interesting and challenging. We fully share his idea about the importance of the job done by an Ombudsman Office and the usefulness of having a toolbox full of procedures helping to achieve social peace.

We prefer a renewed vision of the original Alternative Dispute Resolution (ADR) movement, initiated by the 70s of last century, starting from the name referring to it as "adequate" instead of "alternative". Otherwise, we might wrongfully have the idea that a court based process is the main and primary form of problem-solving leaving any other as an alternative to it.

On the contrary, we enforce the idea that a court based decision should be the last "alternative" to deal with conflict after trying any one of the non-adversarial mutually satisfying procedures, such as facilitation, conciliation, mediation, med-arb, arb-med, or any other, based on a non-confrontational approach to it.

One basic matter must be regarded as differential in the view of mediation carried on at Israeli Ombudsman Office to the one held at our local Ombudsman Mediation Centre: our Mediation Centre is a community based one. Anyway, we also have the right and possibility to call any public agency and ask them to attend a mediation procedure, to which it can obviously refuse, continuing on our part with the established investigation.

And together with it, we have a Victim and Witness Assistance Centre which works hand to hand with the Mediation Centre whenever there is a situation that might have criminal basis or consequences.

In a certain way, the Israeli approach is better, as it offers the possibility of confronting the authority and leading it to convene and agree with particular individuals, which is forbidden by law in the Province of Santa Fe, unless an administrative Act allowing it is passed by the corresponding authority. On the other hand, as a community mediation center, we deal with the common citizen and their everyday problems derived from living in a modern society, which keeps us near the people. This reinforces the idea that we are "at hand" whenever they need us, either for a simple case or for a complex multiparty conflict. In that way, we are called to action when certain situations occur, as for example: illegal occupation of private factories, public places and squares, city and country roadblocks, or environmental pollution.

On this basis, we fully share the characteristics of mediation presented by our distinguished colleague about volition and confidentiality. This last one being understood in its widest and most comprehensive way. We include — in perfect accordance with the author – the concept of "privilege" as the necessary complement to confidentiality. Although confidentiality is fully achieved by law from the creation of the Ombudsman Office (arts. 42, 43, law 10396), when dealing with a mediation procedure we — anyway — adopt a reassurance clause for all the participants making them sign a confidentiality agreement on the first meeting with each party.

In general terms, we adhere to the mediation procedure held by the Israeli Ombudsman with certain flexibility given to the mediator as to when to start with a joint or a separate session. It is also left to the discretion of the Mediation Centre Director, whether it is better to mediate or co-mediate, taking into consideration the individuals involved or the complexity of the case.

There is a point on which we would like to focus: it is about a term generally referred to by different authors, which is that of "neutrality", referring to the mediator as a "neutral" third party or person.

We are convinced that as human beings we are permanently biased, whether by our family education, social position, life experiences and many other causes. This makes us lose our neutrality in every situation we have to deal with. This internal feeling — conscious or unconscious — can appear in our job as mediators, inevitably affecting our role.

We normally tend to be on the "weak" side – whatever this may mean – when we are dealing with conflict solving through mediation. Which is the weak part in a mediation? Is it a woman confronting a man? A consumer against a company? A common citizen facing a Government member? An employee dealing with his employer? Aren't all these words or situations immediately leading our thoughts in favor or against one of the parties involved? How far are

our thoughts and behaviors affected by our personal experience and prejudices?

Consequently, we prefer to refer to the attitude we must assume during the mediation process as that of an “impartial” third person participating in the conflict solution. Mediators are not a third party involved in the conflict. A mediator understands the feelings and thoughts of the parties, but they doe not share them. They might be personally moved by one side’s story, but they should not be biased or influenced by it. In their most internal and deep feeling they are naturally and humanly touched, moved and inclined to support the “weak” but this should not affect the job, keeping them impartial. That is to say, they must avoid changing the rules of procedure, or imbalance the necessary balance the mediation process needs to achieve its goal in a mutually satisfactory way, leading to a long term agreement sustainable in time.

In our mediation team, we need people with feelings, emotions and experience, but we should not accept anyone who cannot keep themselves aside the parties, without taking part in favor or against anyone. We know and understand that the concept of neutrality has been widely and commonly accepted by authors and practitioners, but we insist on the difference between both concepts.

Something relatively new that we are introducing in our Office is a victim - offender program for youth criminal justice from a restorative perspective. We already have some experience in the field of criminal mediation but we have been summoned by the Court and the provincial Security Ministry to develop a full program on this subject and provide the necessary tools to tackle the serious problem of the deep social conflicts to which a traditional legal approach cannot provide a solution.

As a member of the Board of Directors of the Ibero-American Ombudsman Federation (FIO), we share the same challenge of dealing with juvenile offenders with other Latin American countries. This led us to join in a team for the study of this problem and other social conflicts in our countries, with special focus on local realities and cultural differences. The results of these studies will be publicly available at the FIO's website.

As a conclusion, we must congratulate the Ombudsman and State Comptroller of Israel for his initiative and courage to introduce mediation in his Office and to keep it through all these years. We should encourage Ombudsman all around the world to follow these examples and promote the use of mediation and other procedures derived from the ADR movement in our everyday work, for the best of our community.

OBSERVATIONS FROM THE NETHELANDS

INTRODUCTION

The Israeli Ombudsman's paper on the subject of mediation is a valuable document. It explains how the instrument is used in Israel and promotes the debate about how it can be deployed effectively in a wider context.

The Dutch National Ombudsman has been deploying 'mediation' in handling complaints involving improving contacts between citizens and government since 2009. Before any mediation happens, confidential intake interviews are held with both the member of the public and government. Based on these interviews, the complaint handler decides with the mediator whether mediation will be appropriate. The aim of mediation is to bring about a positive shift in contacts between government and citizen. This may be because both parties feel that they have been heard and listened to each other, have not experienced any bias, different points of view have been highlighted, interests have been identified, if it results in increased mutual understanding, if the situation has not escalated further and if concrete agreements have been reached.

COMPARISON OF ISRAELI AND DUTCH MEDIATION PRACTICE

Much of the document *Mediation: the use of mediation as an effective tool in complaint investigation* chimes with our own thoughts. Conflicts between citizens and government involving a long-term relationship lend themselves perfectly for mediation: Israel is no different from the Netherlands in that respect. In the Netherlands, mediation interviews are also confidential and participation is voluntary. However, this does not mean that if one party decides to halt the interview, an alternative approach will automatically be pursued for dealing with the complaint (see under Differences: mediation as a choice). Other obvious differences relate to the nature of mediation as an instrument, the position of mediator, reasons for not deploying mediation (e.g. damage compensation), quality and operational management and aftercare.

DIFFERENCES

The role of the ombudsman

The Dutch National Ombudsman has deliberately coined the term 'ombudsmediation' rather than mediation alone to highlight the fact that this is a complaint-handling tool applied by the

Ombudsman. Rather than involving a mediation process, this is in principle about a once-only mediation interview. The position of a mediator (even if it concerns an officially registered mediator) is no different from that of any other member of staff. This means that mediators are automatically subject to the organization's internal complaint regulations rather than the complaint and disciplinary law that applies to registered mediators.

Mediation as a choice

When the Ombudsman accepts a complaint for processing and a mediation interview appears to be the most effective way of tackling the complaint, it is in no way automatic that the complaint will be handled in a different way if the mediation proves unsatisfactory from the citizen's point of view. The parties are informed about this during the intake interviews. There are some exceptions to this.

Reasons for not deploying mediation

Not all complaints involving a disrupted relationship between citizen and government can be effectively resolved by means of mediation. Experience shows that the chance of successful mediation is lower if one of the following (non-exhaustive list of) reasons against it applies:

- the applicant is insistent and does not appear capable of self-reflection
- the applicant appears unreliable in terms of contact
- the applicant threatens to go public
- the applicant is determined to be proved right and needs a judgment from the ombudsman
- the applicant is looking for damage compensation
- the applicant is not open to the other side of the story (despite the arguments not being unreasonable).

If one or more of these aspects apply, the complaint handler and mediator will discuss whether mediation is appropriate. This means that, unlike the Israeli Ombudsman, the Dutch National Ombudsman does not apply mediation as a tool for the purpose of negotiations about (the level of) damages. Complaints about claims (including rejected claims) are handled with some reluctance because only the courts have the authority to make binding decisions about damage compensation. For such cases, the Ombudsman has drawn up a Damage Compensation Guide stipulating key rules on properly dealing with claims for damages (see Appendix).

Quality and operational management

The Israeli Ombudsman has organized operations around the instrument effectively: there is a mediation coordinator and the confidential nature of the information is guaranteed with regard to digital storage. This is not (yet) the case in the Netherlands. However, efforts are made to ensure continuous learning and development at individual and group level within the pool of mediators. For example, the mediators attend internal peer-review meetings at least four times annually and attend an external training course every year.

Aftercare

Partly in order to ensure compliance with the agreements made between citizen and government, the Israeli Ombudsman works in alliance with 'community mediators and dialogue centres'. This kind of working relationship does not exist in the Netherlands. The Dutch Ombudsman would be interested in hearing more about the dos and don'ts in this regard.

IN CONCLUSION

The Dutch National Ombudsman would like to thank the Israeli Ombudsman for his initiative and hopes that his document opens up a discussion about the form, nature and conditions under which the instrument can be effectively deployed worldwide in order to improve relations between citizens and government.

For the 'ombudsmediation' that is practiced in the Netherlands, there appear to be two factors that are crucial for the success of mediation:

- Having the confidence and ability to tell the story honestly, which may involve emotions. This makes it clear what really matters to someone.
- Being capable of listening to what the other party has to say. This makes it possible to move the parties closer together.

The Dutch National Ombudsman would be interested in hearing of success factors in other countries and cultures.

APPENDIX:

Damage Compensation Guide

Any sizeable organization like the government will inevitably occasionally cause damage or serious loss for citizens, businesses and institutions. For this reason, the government regularly receives requests for compensation for damages or loss. All kinds of considerations can play a role in how these requests are handled, such as the legal framework, the political context or the financial and organizational repercussions. The National Ombudsman believes that it is important when handling claims that the government not only considers the legal aspects of the claim, but also issues of propriety: how can the government deal properly with claims for damages?

This Damage Compensation Guide provides a list of 16 important rules for dealing properly with claims for damages. These rules serve as a guide for government in ensuring that this appropriate handling actually happens in day-to-day practice.

The National Ombudsman occasionally receives complaints about claims being rejected. He generally adopts a tentative approach in handling these complaints because only the courts are authorized to make binding decisions about claims for damages. For the National Ombudsman, the Damage Compensation Guide provides a framework for assessing the proper treatment of claims by government in specific cases. These rules are not additional rules of law that citizens can invoke in the courts.

What constitutes proper handling of claims for damages? There are four ways, in which government can appropriately handle requests for damage compensation. Firstly, by adopting an attitude focusing on resolving the conflict from which the claim arises and preventing any escalation. An appropriate approach to claims for damages also involves the government adopting a lenient attitude, seeking to find possibilities for reaching a suitable solution, even in cases for which there is no immediate legal basis. Moreover, it is important for the government to be tentative with regard to litigation and adopt a proactive attitude.

Approach aimed at resolving conflict

(1) The government should make every effort to identify the conflict that underlies the claim and endeavor to resolve that conflict in an appropriate way.

(2) The government must always be aware that financial redress is only part of the solution: a timely response, sufficient focus on the reasons as to why the citizen incurred the loss or damage, convincing reasons for choices made and offering an apology are at least as important.

(3) The government authority insured for damages must itself maintain the relationship with the citizen and always be the one who assesses the merits of the claim, even if an insurer has already adopted a specific point of view with regard to it.

Lenient approach

(4) The government must be aware that some claims are small in size and that it must be reasonable in honoring them. In such cases, the government adopts a lenient approach and will not invoke precedent, equal treatment or compatibility rules without good reasons.

(5) The government should apply a lenient approach in cases where it is determined that it has made mistakes, but the citizen has difficulties providing hard evidence for the extent of the damage or loss.

Tentative approach to litigation

(6) The government should avoid legal proceedings as far as possible. Other forms of dispute resolution, such as effective negotiation and mediation can prove useful here.

(7) The government's use of legal remedies must be proportional to the identity of the citizen and the nature of the damage or loss involved. In the case of reasonable claims that are not too large and relatively weak counterparties, the government should be more reticent in its tendency to litigate.

(8) If a court judgment has been issued in legal proceedings (on appeal) that is of relevance for other similar cases, the government should not seek litigation in the other cases.

(9) The government should be reticent in resorting to appeal if its proceedings against a citizen have failed in the courts. In that case, it should carefully assess what an appeals court judgment would add in the case in question or what other material difference it might make.

(10) In the event of a test case in the general interest, the government should reach agreement with the citizen concerned about the payment of their legal costs by the government.

(11) If a citizen becomes involved in legal proceedings as a result of the government failing to show due reticence in terms of litigation and wins the case, the government will determine whether it would be reasonable to provide additional compensation on top of the standard payments.

Proactive attitude

(12) The government should adopt a proactive attitude in government negotiations that serve the general interest in cases where individual citizens are likely to be unreasonably disadvantaged, by taking measures in advance to compensate for this disadvantage.

(13) The government should pay interest compensation on request in the event of losses caused by delays and do so at its own initiative if possible, and should not force the citizen to resort to legal proceedings for that reason.

(14) In the event that the government acknowledges its liability but disputes the level of damages determined, it should in any case pay the damage amount it acknowledges in order to ensure that any legal proceedings pursued concern the additional amount only.

(15) Within the framework of legal proceedings, the government should, at its own initiative, provide the citizen with all the information required to litigate on an equal footing.

(16) If necessary, the government should inform the citizen of the most appropriate way of submitting a claim.

OBSERVATIONS FROM NEW ZEALAND

The New Zealand Ombudsman does not currently conduct mediation. The below are general observations from the New Zealand Office of the Ombudsman drawing on mediation in the wider New Zealand context.

Mediation is an effective tool for resolving complaints, ensuring the mana (dignity) of the parties is upheld, and parties are able to have their concerns heard and understood. Mediation can also result in systemic change, by highlighting process and policy issues in a 'human' way to the organisation involved.

Having a smaller population, mediation and investigation teams in New Zealand are not necessarily kept separate. Mediators are bound by obligations of confidentiality, so where a case does not resolve the mediator may simply pass the complaint file to an investigator, and not be involved in further case discussions. Having mediators and investigators on the same team can be beneficial for providing different perspectives on cases, and sharing skills and approaches.

As part of receiving the parties' consent to enter the process, it is important for the parties to understand what other complaint processes are available through the Ombudsman, and the potential outcomes of those processes. This will inform whether the parties choose to engage with the mediation process. Other crucial parts of the intake stage include the mediator:

- Building rapport with the parties;
- Obtaining a high-level understanding of the issues;
- Explaining the mediation process and confidentiality;
- Arranging logistical matters, such as the date and venue of the mediation.

During the process, a pure model of mediation would avoid the mediator suggesting solutions to the parties. This is because solutions could appear biased in favour of one party, or if the solution does not work out, the parties may come back and blame the mediator. An alternative practice is for the mediator to ask parties questions to make sure they have shared all potential solutions for their shared problems, or to share examples of public findings made in other complaints that have been investigated by the Ombudsman.

With the parties' permission, mediation outcomes can be anonymised and published. This encourages other parties to consider mediation, and promotes resolution of complaints.

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