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The Challenge of Balancing Confidentiality and Transparency in an Ombudsman Mediation Service

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The challenge of balancing confidentiality and transparency in an Ombudsman Mediation Service

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Abstract

Mediation is becoming increasingly popular as a process of dispute resolution, with confidentiality as one of its core tenets. Where mediation is provided as part of a statutory-funded service, the confidentiality provision is complicated by the reporting requirements of the State, as funder and regulator. The issue considered in this research is how that challenge can be addressed by the Irish Financial Services and Pensions Ombudsman (FSPO).

This paper draws on international literature and practice. A range of comparator organisations were examined to establish how they address this challenge and the implications for the FSPO. The contrasting demands of confidentiality and transparency create a dialectic tension that is common when private and public interests are present and, at first look, it may seem to the outside observer that the boundaries of confidentiality and transparency are fluid and inconsistent.

However, while the findings indicate some variance in practice, they suggest a common rationality and coherent approach across ombudsman services in their use of

mediative-style processes based on shared principles, reasoned expectations and valid criteria. To arrive at these findings, two basic questions were addressed: (1) What does the Ombudsman need to be transparent about and why? (2) What information pertaining to the service needs to remain confidential and why?

This research contends that pragmatic solutions can be found to the tension inherent between the need for confidentiality and transparency in a state-funded mediation service and that these findings have relevance to other dispute resolution services.

1. Introduction and context

There is a distinction between the 'organisational ombudsman' (OO) and the 'classical ombudsman' (CO). An **organisational ombudsman** works with individuals and groups within an organisation to facilitate resolution of disputes, complaints or grievances and to identify systemic issues and drivers of conflict. The **classical ombudsman,** such as the FSPO, is generally appointed by the state or a legislative body to resolve complaints arising within a particular sector in a manner that is transparent and fair. While the transparency and confidentiality requirements differ between the organisational and classical ombudsman, both reflect the core principles of independence, neutrality and confidentiality.

Mediation is a confidential, problem-solving process that allows parties in dispute an opportunity to collaboratively engage in an effort to find a mutually agreeable solution to their conflict with the active support of an independent, neutral mediator. The ability of parties to engage in open and frank discussion about their case, secure

in the knowledge that anything said during the course of those discussions cannot be used to prejudice any subsequent proceedings against them, is an essential element of mediation.

The Irish Financial Services and Pensions Ombudsman (FSPO) is an independent public body established to resolve disputes between financial service providers and their customers in a manner that is fair, transparent and accessible. Where a consumer complaint about a financial service provider cannot be resolved through the provider's own complaints process, the complainant may submit a complaint to the FSPO, which will seek to mediate an agreement between the parties or, if this is not possible, formally investigate and, if necessary, adjudicate the complaint.

Up until 2015, the majority of complaints made to the FSPO — then the Financial Services Ombudsman (FSO) — were addressed by way of formal investigation or adjudication, with a small number of complaints being settled through mediation. However, the introduction of a dedicated FSPO Dispute Resolution Service in 2015 marked a fundamental shift in how the FSPO manages complaints, leading to approximately 70% of complaints processed through the FSPO in 2020 being managed through mediation.

The issue examined in this research is the challenge faced by the FSPO in balancing the requirements for confidentiality and transparency in its mediation service. Confidentiality is a core principle of mediation and is viewed in the literature as critical to its effectiveness (Deason, 2001; Freedman and Prigoffs, 1986; Rasnic,

2004). However, as a publicly funded, statutory body, the FSPO must ensure appropriate transparency of its mediation policies, practices and outcomes.[1]

The purpose of this research project was to explore how this tension between confidentiality and transparency can be resolved by drawing on both the theory presented in international literature, and the practices adopted by comparable services in different jurisdictions.

This article is set out as follows. Section 2 sets out the project methodology. Section 3 presents the key themes identified through the project's literature review and Section 4 examines the findings from the project's organisation review. Sections 5 concludes with a summary of the key themes emerging from the project and the implications for the FSPO and conflict resolution services generally.

2. The project methodology

The FSPO commissioned a team of independent researchers from the Kennedy Institute Workplace Mediation Research Group (KIWMRG), to address the challenge faced by the FSPO in balancing the core principle of confidentiality in mediation with

[1] Under law the FSPO is required to provide: (a) a summary of all complaints made to the Ombudsman during the preceding financial year, (b) a review of trends and patterns in the making of complaints to the Ombudsman, (c) a breakdown of the method by which all complaints made to the Ombudsman were dealt with during the preceding financial year, and (d) a summary of the outcome of all complaints concluded or terminated, including analysis of complaints that were settled during the previous financial year. (Financial Services and Pensions Ombudsman Act 2017, 25(2))

the requirement for transparency in its mediation service. This article is authored by the joint project leaders.

The project comprised of two phases: **Phase 1** involved a systematic review of the relevant literature (summary points are set out in Section 3 below). **Phase 2** consisted of a review of a range of organisational comparators presented in Section 4 below.

The first step of **Phase 2** involved a desk-based review of a selection of comparable organisations. Using a tailored template, the researchers examined the organisations' websites and associated documentation to identify if, and to what extent, they use mediation or mediative-type processes.

The subsequent direct engagement element of **Phase 2** involved semi-structured interviews with a senior representative from a selection of shortlisted organisations, agreed in advance with the FSPO. Using a tailored questionnaire, the researchers gathered information on the organisations' mediation services and their approach to the issues of confidentiality and transparency. A copy of the tailored template used for the questionnaire and a link to the research report are included in the Appendices.

Eight organisations engaged directly with this project. They included: Financial Ombudsman Service, United Kingdom (**FOS UK**); Financial Services Complaints Limited Scheme, New Zealand (**FSCL NZ**); General Insurance Ombudsman Service, Canada (**GIO**); Insurance and Financial Services Ombudsman, New Zealand (**IFSO NZ**); Ombudsman for Banking Services and Investments, Canada (**OBSI**); the Residency

Tenancy Board, Ireland (**RTB**); the Workplace Relations Commission, Ireland (**WRC**); and the Labour Relations Agency, Northern Ireland (**LRA**).

Quantitative and qualitative data collected from the organisation reviews was subjected to thematic analysis guided by themes identified in the literature and the research question at hand.

3. The theory

The theory section is structured as follows. Firstly, we explore the core concepts of confidentiality and transparency in dispute resolution as identified by the project, and with particular reference to the context of the role of the ombudsman in the mediation process. Threats to confidentiality and the boundaries of confidentiality receive particular attention in light of their significance to the project brief.

Defining the core concepts of confidentiality and transparency

Confidentiality is identified as a core principle of mediation, and a review of the literature reveals "an almost universal agreement that confidentiality is necessary to the survival of mediation as a viable form of alternative dispute resolution" (Brown, 1991:307). Confidentiality in mediation is commonly understood to mean that the detail and outcomes of the mediated discussions between the parties, and between the parties and the mediator, will not be revealed by any participant or by the mediator, and is usually "based in the notion of contract" (barristers.com.au: p4).

An important question is whether mediation confidentiality is an absolute concept (being either present or absent), or conditional. While the mediation adage 'what happens in the room stays in the room' suggests the former, the Law Reform Commission (2010) observes that the principle of confidentiality in mediation is "extremely complex" and suggests that each relationship and circumstance needs to be deconstructed "and rules devised to deal with each different aspect" (3.15). Rueben (2006) argues that confidentiality itself is largely a myth and that, in the US at least, the legal framework underpinning mediation communications needs to be clarified and consistently applied:

> Confidentiality has long been part of the mythology of alternative dispute resolution (ADR). This aspect of the mythology has come under more scrutiny in recent years, particularly in the mediation context. This is not surprising considering the popularity of mediation and the centrality of confidentiality to the mediation process. (Rueben, 2006:12)

A separate and seemingly conflicting concept is **transparency** which can be subjected to the same absolute or conditional interrogation. According to Flyverbom (2016:110) transparency is understood as "a process of ensuring accountability through the timely and public disclosure of information" with the core objective of "making processes knowable and governable". Such disclosure enables openness, accountability and trust.

The perceived, positive effects of transparency are related to the belief that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman" (Brandeis, 2014:92). Applied to mediation, transparency allows interested

parties to gain access to details of the process as well as its outcomes. In the context of publicly funded mediation, such interested parties may include state bodies, service users, the media, the general public and law enforcement agencies. However, how does transparency sit with the inherent need for confidentiality in mediation?

Balancing confidentiality and transparency

The confidentiality-transparency dilemma represents a 'dialectic tension' similar to other such tensions generated in conflict management processes, such as balancing neutrality and advocacy, participant autonomy and process control. These tensions are inevitable. The challenge is to recognise and appropriately manage them:

> The theory encourages us to ask what the two poles mean to us, how ombuds experience the tension and communicatively manage it, and with what consequences. (Bingham, 2015:28)

In exploring this theory, we examined what the oppositional poles of confidentiality and transparency mean, how ombudsman services experience and manage this tension and the implications for the decisions that they make. Freedman and Prigoffs (1986:43) refer to the tension between confidentiality in mediation and the requirements for transparency, and argue that "a confidentiality provision can be crafted with appropriate exceptions and flexibility to mitigate the disutilities of a blanket privilege".

Referring to commercial arbitration in the US, Rogers (2006:1335) argues that "increased transparency is the cure for genuine inequities, perceived inequities or

inaccurate claims of inequity". It can be argued that the same applies to mediation, particularly in the context of an ombudsman service. In the US, public outcries around the inequity of arbitration decisions and concerns about balancing private rights against public justice prompted legislative change to make rulings and outcomes more transparent by ensuring public access and participation.

Referring to arbitral transparency, Schmitz (2006:1240) proposes a two-pronged reform: (1) increase transparency by requiring published awards and reports in arbitration cases affecting public rights and interests; and (2) ensure confidentiality of arbitration participants' personal information. The potential transfer of learning from arbitration to mediation seems obvious.

Threats to confidentiality

Much can also be learned from how different organisational ombudsman services manage the dialectic tension. Traditionally, the main threats to confidentiality in organisational ombudsman services were legal action or public scandal (Howard, 2011). Howard provides practical advice to organisational ombudsmen [OO] in instances where confidentiality is threatened. He mentions, in particular, preventative actions.

> …the ombudsman office should at all times take seriously the admonition to maintain as few records as possible and that document retention and destruction policies be rigorously complied with. (Howard, 2011: 2011:14)

According to the International [Organisational] Ombudsman Association (IOA) Standards of Practice, the only exception to an ombudsman's [OO] obligation of confidentiality to an individual seeking their assistance is where there appears to be "an imminent risk of serious harm" and there is no other reasonable option to address that risk (IOA Practice Report 2015). Butenski maintains that the more dire cases of imminent risk "are few and far between and fairly straightforward" and argues that alternatives to breaching confidentiality can often be found and should always be considered (2011:45). Her advice to ombudsmen is that the determination of the exception for imminent risk should be clearly documented in advance, and a process put in place to address such circumstances.

There is some consideration in the literature to record-keeping and confidentiality. Rowe et al. (1993:332) argue that a 'purist [OO] practitioner' would "offer nearly complete confidentiality" and would not keep detailed records of complaints. In their view, the exceptional case of imminent risk to life, or of dangerous or unlawful conduct, should be anticipated in advance and robust practice codes devised and adhered to.

> The ombudsman would only keep aggregated records and records that followed a certain location or type of problem… The (minimal) case notes required to address any case would be destroyed regularly as a matter of customary practice. (Rowe et al., 1993:332)

Rowe et al (1993) suggest that, while it is appropriate for a database including demographics of clients and complaints to be maintained to satisfy a transparency

requirement or to monitor patterns of complaints, no information should be retained that would allow individuals to be identified. Biala (2012:65) identifies seven types of information that can be retained in relation to complaints in order to satisfy the requirement for transparency, without jeopardising confidentiality.[2]

Whilst much of this writing applies to the context of Organisational Ombudsman services which, as stated at the outset, differ from Classical Ombudsman services, we contend that transfer of learning does apply.

Establishing the boundaries of confidentiality in mediation

> *Witho*ut confidentiality, the mediation process becomes a house of cards subject to complete disarray by a variety of potential disruptions.
> (Freedman and Prigoffs 1986:44)

Confidentiality provides a key incentive for the parties to engage in mediation, and fear of the disclosure of sensitive information in another context would place an unacceptable restriction on the process and prove a disincentive to engagement.

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[2] Biala, K (2012:65) identifies seven categories of data that can be retained about complaints in order to satisfy the requirement for transparency without jeopardizing confidentiality:

1. Loss of productivity due to pervasive conflict
2. Unwarranted staff attrition or transfer
3. Negative publicity
4. Significant violation of policy/Code of Practice
5. Potential internal or external grievance
6. Litigation potential
7. High risk safety issue

For parties to be sufficiently candid during mediation so that the strengths and weaknesses of their respective case can be established, bargaining ranges discovered and the case settled, they must be confident that sensitive information arising from their mediated discussions is protected (Cole, 2006:1419). The mediator also must have confidence that their neutrality will not be undermined by being called to give evidence about a party in any subsequent legal process that would effectively "destroy their efficacy as an impartial broker" (Freedman and Prigoffs, 1986:38). Mediators, however, can and should be held accountable for their behaviour in mediation and certified mediators are subject to complaints procedures if they stray outside of what can be reasonably expected of them in their role.

When a mediated dispute proceeds to an adjudicative process, "confidentiality provisions perform an important role by keeping the judging function separate from the mediation function" (Deason, 2001:83):

> The positive influence of confidentiality is lost if, during the mediation, the parties and their lawyers do not have confidence in their ability to protect communications from future disclosure and in the system's protection for mediator and judicial neutrality. (Deason, 2001:84-85)

However, as suggested by Dore (2006), confidentiality clearly has its limitations. If the process, outcomes and the role played by the mediator are hidden from scrutiny, this becomes an issue. It can be problematic in a number of instances. For example, in a case where disclosure is desirable or required to ensure accountability or to protect the public good. It might also be a cause for conflict where an issue dealt

with in mediation needs to be exposed — as in a case of discrimination or a threat to public health or even where the mediator's role needs to be challenged or defended. In such cases, the opaqueness of the process serves to protect repeat offenders. This can prevent necessary collective action. It can also make it difficult to establish, in the public interest, whether public funds have been used effectively and the public interest upheld. However, Rogers (2006:1309) makes the point that it can be problematic to establish by whom, when and how public interest is to be determined.

Dore's contention that there are circumstances where the privilege afforded to mediation "should be permitted to yield" bears particular significance in the context of the ombudsman role (p512):

> Increased transparency and accessibility to at least some aspects of ADR in at least some cases would disclose information important to other potential claimants, facilitate accountability and deterrence, and encourage public confidence in ADR. (Dore, 2006:520)

The dilemma presented in this research is the challenge of balancing confidentiality and transparency in the mediation processes of a publicly funded agency. How do we preserve the confidentiality principle that is central to the effectiveness of mediation, while providing essential data on the workings and contribution of an ombudsman service? If we accept the need to qualify confidentiality to facilitate transparency, we must examine the parameters of this confidentiality.

For example, consider the following hypothetical case involving a dispute between a small business owner and their bank. The bank's failure to process an electronic

payment on behalf of the business results in an order not being filled and a resulting loss of revenue to the business. In a traditional mediation process the detail of the mediated discussions — including contextual information, admissions of fault, offers made, identifying information and any agreed outcomes — would be treated as strictly confidential, except as agreed between the parties as part of a formal mediated settlement.

If, however, over a period of time the FSPO receives repeated complaints against a named provider over its processing of online transfers, the gathering of substantive information from these complaints would enable the FSPO to identify this pattern of recurring issues to address them. If so, what information should the FSPO gather from its mediation service and how can it do so without compromising the integrity of the mediation process?

Kentra (1997) presents two forms of standard guidance for determining what should be considered confidential in mediation: the 'Model Standards', whereby the mediator maintains the reasonable expectations of the parties over what is confidential and the 'Wigmore Balancing Test', based on four qualifying questions:

I. Did the communication originate in confidence with an assurance that it would not be disclosed?

II. Is confidentiality essential to the full and satisfactory maintenance of the relationship between the parties?

III. Is the relationship between the parties one which, in the opinion of the relevant community, ought to be carefully preserved?

IV. Is the damage caused by disclosure greater than the benefit gained?

Cole (2006) argues that, in the US context, mediation confidentiality is often breached intentionally in the courts and the sanctions provide an insufficient deterrent despite "clear legislative guidance in relation to what is sanctionable behaviour". Cole argues that, because the mediator promises confidentiality to the parties, failure to sanction abuse of that confidentiality in the courts is "harmful to the integrity of the mediation process" (Cole, 2006:1450).

While a clear legal framework may protect against the intentional misuse of mediation communications, Rogers (2006:1325) argues that refinement of disclosure obligations is a more effective and practical mechanism than legally enforced, transparency reforms.

The literature clearly supports confidentiality as a core principle of mediation whilst acknowledging that public bodies are required to be transparent about their activities.

The challenge of balancing confidentiality and transparency emerges from the fact that the boundaries of these concepts remain unclear. Where do the parameters of confidentiality and transparency begin and end? There appears to be considerable scope for the individual ombudsman to determine the boundaries that suit their context within broader parameters. Having reviewed the literature, two key questions

emerge: (1) What does the FSPO need to be transparent about and why? (2) What information pertaining to the ombudsman service needs to remain confidential and why? The next section presents an overview of the findings from the organisational review.

4. **Findings from the comparator-organisation reviews**

This section presents the findings from the review of organisational comparators using a tailored template and interview schedule to provide an insight into current practices of ombudsman and other statutory services to the gathering and reporting of information from their mediation and ADR services.

Key factors in the ombudsman approach to dispute resolution

Each of the sample organisations reviewed provides a selection of services to manage disputes, ranging from the informal — through mediation, conciliation and facilitation — to the formal, as with adjudication and investigation through a tribunal. While the official role of the ombudsman is to "impartially investigate complaints" and some of the services reviewed have the authority to impose binding agreement on the Provider (OBS5 CA, OBS1 UK), there was a strong emphasis on the informal resolution of disputes throughout the organisations reviewed.

As explained by Respondent 7 (PSB2 IRL), mediation allows for a faster and more convenient process than adjudication and has "huge benefits in terms of processing times". Likewise, Respondent 1 (OBS1 UK) observes that mediation provides a more

informal approach enabling a pragmatic response which can resolve complaints quickly, and the majority of their complaints are resolved through the informal process.

While the sample organisations use different terms for their informal processes, they all confirm their use of mediation or a mediative-type process in which the mediator or dispute resolution officer (DRO) uses mediation techniques to enable both sides to openly discuss and identify the relevant issues, and to move towards resolution in a co-operative, efficient and timely manner. Also, while different terms are used for the officers managing these informal processes — mediator, ADR officer, case manager, conciliation officer, investigator and ombudsman — all of the organisations confirm that their DROs are subject to standards and codes of practice specific to the organisation in their delivery of these roles and, in some instances, to an external ADR accrediting body (OBS2 NZ; OBS3 CA; OBS4 NZ).

All of the sample organisations specify a non-legalistic, informal approach based on co-operation and fairness and underpinned by confidentiality in the first instance, and this is emphasised throughout the respective organisational literature. As explained by Respondent 4 (OBS4 NZ), the parties have already reached deadlock and exhausted the complaints processes of the provider, and so an alternative approach is required:

> *If they [the provider] have already come to a position where they have* reached deadlock in their own process and they cannot get a resolution or an outcome [to the complaint], then it's for us to try and do better for them and for the customer. We could not do that, I believe whole-heartedly, if it was a process like the court process. That's why they choose ADR.

Mediation in its purest sense involves an independent and impartial mediator facilitating a conversation that may or may not lead to an agreement. While the mediator manages the process, the parties have complete autonomy over the outcome. In purist terms the mediator does not attempt to direct the parties, nor challenge the fairness of a proposed outcome.

However, rather than 'pure mediation', some of the ombudsman services describe a common, pragmatic approach that is interrogative and consensus-based, and focused on producing a mutually acceptable outcome that is fair, and with an option to proceed to recommendation or formal determination in the event that the issues cannot be resolved informally:

> We do use mediation techniques and diplomacy to work towards a fair resolution, but we don't do pure mediation. We provide an opinion and use ADR techniques to attempt to bring the parties to an agreement... The role of the department is to investigate… In cases, for example non-financial losses we will propose a range for compensation and work with the parties to agree an amount leaving time to go back and forth. In that regard it is something more like mediation, but with an understanding of what [named organisation] believes is reasonable. [Respondent 5, OBS5 CA]

> …in terms of 'official mediation', that's not the role that our service has, but in terms of informal mediation — that is the way we resolve the majority of the complaints that we receive... it's very much that we will use whatever tools are most relevant to the parties, and particularly the complaint, to try and resolve it... most complaints would be results of a kind of variety of those methods. [Respondent 1, OBS1 UK]

The requirement for 'fair' outcomes is an important aspect of the ombudsman service. Respondent 3 (OBS3 CA), for example, employs 'impartial professionals' with

relevant industry experience — but without direct ties to specific insurance companies — to ensure that solutions reached between individuals and their insurance providers are fair. In addition, if the complaint is not resolved in mediation, the DRO can generally make a recommendation based on what they believe to be a fair outcome (OBS3 CA; OBS1 UK; OBS4 NZ; OBS5 CA) in an effort to informally resolve the case. These recommendations may be non-binding on both parties (OBS1 UK; OBS3 CA; OBS5 CA), or in the case of the OBS4 NZ, binding on the provider.

However, as explained by Respondent 1 (OBS1 UK), there is no set formula for fairness and, for recommendations to 'feel fair', the DRO needs to show that they understand what really matters to the individuals involved. Interestingly, while 'about 70%' of OBS1 UK complaints are resolved without a recommendation for compensation, a significant number settle for the amount previously offered by the provider 'if the amount offered is considered fair or more than what we would recommend'.

While the role of the DRO is independent of both parties and the emphasis is on achieving a mutually acceptable resolution to the dispute, the requirement of a 'fair' outcome requires that, in some of the sample organisations, the role of DRO is not neutral in terms of fairness. As explained in the OBS2 NZ Conciliation Guide: "A conciliator is trained in conciliation/mediation and is independent of both parties. The conciliator ensures that any agreement or resolution is reasonable and has been entered into by mutual agreement and free and informed consent."

The parameters of confidentiality in the ombudsman service

While a variety of terms are used by the organisations to describe their informal processes — mediation, guided or informal mediation, conciliation, facilitated discussions and negotiated facilitation — all identify confidentiality as an essential factor in these processes:

> It [confidentiality] is critical. Not just for a mediation but for the entire process. How can we demonstrate neutrality if we cannot offer confidentiality to a consumer? [Respondent 3, OBS3 CA]

However, this confidentiality is subject to boundaries and exceptions. Organisations with a public service duty have a responsibility to disclose issues of public interest and to ensure that their processes do not facilitate the obfuscation of important information from public view. Ombuds services have a public service remit (OBS1 UK; OBS4 NZ; OBS5 CA) and may be publicly accountable (OBS4 NZ). Also, in the context of financial service disputes, disclosure of certain types of information can provide for learning and constructive feedback, both for consumers and financial service providers. Therefore, while confidentiality in relation to the mediated discussions and offers made during the informal stage are generally accepted as an essential aspect of the ombudsman DR process, all of the organisations identified exclusions to confidentiality.

Table 1: Explicit exclusions to confidentiality (as confirmed in direct engagement)

Exclusions to confidentiality	FOS UK	FSCL NZ	GIO	IFSO NZ	OBSI	RTB	LRA	WRC
Where disclosure is required by law	✓	✓	✓	✓	✓	✓	✓	
Where express permission has been given to the mediator by one party for all or some of the information to be shared with the other party		✓	✓	✓	✓			✓
The gathering of personal information for operational purposes			✓	✓				
The use of anonymised information for appropriate learning and development purposes (for mediator and mediation service and sectoral learning)		✓	✓	✓	✓		✓	✓
The use of statistical information for reporting purposes		✓	✓	✓	✓		✓	✓
Where disclosure is required to enforce a mediation agreement		✓		✓	✓			✓
Where disclosure is required to defend a complaint of misconduct or negligence of a mediator or the mediation service							✓	

Additional stated exclusions include the provision of evidence for criminal cases (OBS5 CA) and where required by the regulator (OBS1 UK; OBS5 CA). The parameters for

confidentiality may be explicitly agreed in advance with the parties by signed agreement or letter of consent (OBS2 NZ; OBS3 CA; OBS4 NZ; PSB1 NI; OBS5 CA), by verbal agreement (OBS3 CA; OSB2 NZ; PSB1 NI; PSB3 IRL) or, as in the case of the PSB2 IRL, set out in the online application form and subsequently discussed by phone should the parties agree to proceed to mediation. In the case of OBS1 UK, which handles a significant level of complaints, operational considerations require a flexible approach in how and when confidentiality is explicitly agreed:

> In the past we used a complaints form which explained things like confidentiality and where information might be shared with another body. But increasingly, with so many cases being by phone, we don't always have a complaints form. So what we do in any case will depend on the stage we get to. [Respondent 1, OSB1 UK]

OBS5 CA issue a 'consent letter' that outlines the terms of engagement —including details of the boundaries and parameters of confidentiality — to the consumer. This letter, which sets out the role of the service and terms of engagement, is signed by the consumer but not by the financial provider, as their agreement to the terms is a condition of their membership. Prior to commencing its confidential negotiation process, OBS4 NZ requires the complainant [tbc] to sign a Complaint Form that sets out the confidentiality provisions and detailed steps of its process. OBS3 CA's online complaint form includes a declaration agreeing to the use and limited disclosure of personal information "for the purpose of resolving the complaint" and in accordance with OBS3's Privacy and Confidentiality Policy, which is available via a link from the online form. Rather than using a signed agreement, OBS2 NZ provides both parties

with a Conciliation Guide and discusses confidentiality during the intake call "including that the intake calls are confidential and part of the 'conciliation bubble'".

Managing confidentiality and transparency

As discussed above, while mediation is a confidential process, there are boundaries and exceptions to mediation confidentiality, and organisations with a public service remit have a duty to disclose issues of public interest. Also, in the context of financial service disputes, disclosure of certain types of information can provide for learning and constructive feedback, both to consumers and financial service providers (Gill et al., 2014:25).

As might be expected, all of the sample organisations gather information in relation to their services to allow for metric gathering and reporting to improve service reliability, enhance stakeholder confidence and to enable learning. OBS5 CA explicitly sets out to "enhance and reinforce" its role in "strengthening the foundations" of Canada's financial services industry "…by using its experiences in resolving disputes between firms and consumers to identify and share trends and emerging issues with government, regulators, firms and consumers to inform public policy and regulatory responses" (Strategic Plan, 2017:2). Likewise, OBS1 UK seeks to use its unique position to highlight "wide-reaching themes and challenges" to empower service users and enable sectoral learning (OBS1 UK Annual Review 2015-2016, Executive Summary):

> To give greater clarity and certainty around what we believe fairness looks like, during 2015-2016 we published around 35,000 of our ombudsmen's decisions. And we've continued to provide insight and promote discussion around problems we're consistently seeing — including ageing and vulnerability, small businesses' experience of financial services, and the never-ending evolution of scams.
>
> **OBS1 UK Annual Report 2015-2016, Executive Summary, 2015-2016**

Specific information gathered by the sample organisations from their mediation/ADR services is set out in Table 2 below.

Table 2: Types of information gathered

	FOS UK	FSCL NZ	GIO	IFSO NZ	OBSI	RTB	LRA	WRC
Where disclosure is required by law	✓	✓	✓	✓	✓	✓	✓	✓
Issues in relation to specific financial products	✓	✓	✓	✓	✓			
Service provider type	✓	✓	✓	✓	✓			
Percentage of complaints upheld	✓	✓		✓	✓	✓		✓
Type of mediated outcomes	✓		✓	✓	✓			
Anonymised case studies	✓	✓	✓	✓	✓	✓	✓	✓
Personal information for administrative purposes	✓	✓			✓	✓	✓	✓

As explained by Respondent 1 (OBS1 UK), information gathering is an essential aspect of their service:

> …it [information gathering] is something that we consider so important. We are transitioning at the moment to a new IT system for handling complaints and one of the things we were very conscious of in developing that is that it be effective in providing the insight we want from the data, because how you capture the data upfront has a real impact in terms of what you are then able to share.

While the majority of organisations reviewed are subject to Freedom of Information (FOI) requirements (OBS1 UK; OBS4 NZ; PSB1 NI; OBS5 CA; PSB2 IRL), feedback suggests that this does not significantly impact their services, other than it being an area of work to be resourced (OSB1 UK). Interestingly, although OBS5's service is not subject to FOI requirements, it voluntarily complies with FOI requests.

Adherence to Data Protection (DP) requirements is also a feature of the services (OBS1 UK: OBS3 CA; PSB1 NI; OBS5 CA; PSB2 IRL). In the case of Respondent 2 (OBS3), its DP requirements are set internally and reflect their confidentiality rules rather than being statutory based. As observed by Respondent 3, the protection of client and provider information is a critical aspect of their service:

> We have implemented a number of risk management strategies to protect confidentiality of client and firm information, including technology and database protection, password protection, information security protocols and employee agreements, confidentiality agreements, etc… This certainly increases costs but is critical and these protections would likely be implemented even if there were no regulatory obligation to do so.

Respondent 4 (OBS4 NZ) observes that transparency and confidentiality are not separate and distinct concepts and that, regardless of the size of the ombudsman service, both are essential to the service:

> …you have to have transparency in approaches [and] fully inform your members and complainants of what the approach is going to be and how it's going to run …you need transparency, of course you do, but if you didn't have confidentiality, I do not believe that most parties for these types of proceedings would willingly engage… you would then lose the good will of the membership to actually do better for their customers through our process.

This approach to safeguarding the confidentiality of the mediated discussions while ensuring transparency in relation to process and important information is reflected throughout the respondent organisations.

Reporting of case data and ombudsman decisions

There is some variance in the approach taken by the different services to the reporting of case data. OBS1 UK publishes all of its ombudsman decisions, except in "very exceptional circumstances", redacting the customer details, but not the business details. While OBS4 NZ publish all of their investigated complaints on their website, they anonymise them to ensure the confidentiality of both the complainant and the provider. OBS5 CA, on the other hand, reports overall statistics in relation to complaints, but not specific information in relation to identified firms. Similarly, while PSB2 IRL publishes general statistics and anonymised information from its mediation service, they do not disclose identifiable information:

> Yes we have a right as well, under our Act, to publish our determination orders. Mediations are confidential so the agreements reached are not published on our website... our adjudication reports are confidential, but we would have the power to [publish information], as long as someone isn't identifiable from it, we'd be fine to draw up case studies from these. [Respondent 7, PSB2 IRL]

Identifiable information obviously includes a person's full name. However, a person can also be identifiable from other information, including elements such as gender, race, religion, address, physical characteristics, their occupation or employer.

While the core role of the ombudsman service allows for the determination of complaints by formal investigation or binding determination, there is a strong emphasis on the informal resolution of complaints throughout the services reviewed. Rather than using formal mediation, the organisations take a pragmatic, flexible and person-centred approach focused on producing a mutually acceptable outcome.

Confidentiality is identified as an essential aspect of this process. A transparent and measured approach to the collection, storing, and reporting of information is considered by the respondents as essential to the effective delivery of their mediation or ADR service.

5. Discussion

In this section we present a summary of the key themes emerging from the literature and the organisation reviews. We discuss these themes as they relate to the project brief and to wider conflict management practice. We set out the implications for the FSPO and ombudsman mediation services generally. While we acknowledge the

limitations of this project, we feel it represents an important step within the broader mediation research agenda and we offer suggestions for how that agenda can be developed.

Key themes as they relate to the project brief

There is a common understanding that the ombudsman's role is the pursuit of just and fair treatment objectively, neutrally and in confidence, and the research indicates that practice bears out the theory in this regard. The importance of early resolution and informal processes features strongly in both theory and practice, and there is clear evidence of a shift towards mediation-type processes by the ombudsman services reviewed.

The confidentiality-transparency dilemma represents a naturally occurring tension that needs to be understood and proactively managed.

Mediation confidentiality has boundaries, some imposed by law, and the literature suggests that the limited number of threats to confidentiality should be anticipated and planned for in advance.

The need for transparency delineates the boundaries of confidentiality in ombudsman services, as information is legitimately required for various purposes, including, regulation, oversight, research and education. Codes of practice, reviewed in this research, outline specific circumstances where information pertaining to mediation can be revealed. They also show the boundaries of such information disclosure.

The integrity of the mediation process and the privacy and anonymity of individual service users can be maintained, while allowing for the gathering and reporting of appropriate information to ensure transparency and accountability.

Biala's (2012:65) template of information categories that can be retained by an organisational ombudsman could be used to inform other types of mediation service.

The organisations reviewed take a proactive and qualified approach to information gathering and reporting, and this includes clearly identifying the categories of data that can be retained and published.

While there is considerable variety in the governance and operation of the ombudsman services reviewed, the core mediation principle of confidentiality is commonly upheld by the sample organisations and identified by them as essential to their informal processes. However, while the role of FSPO mediator or dispute resolution officer is strictly independent and impartial in their dealings with both parties, some of the ombudsman services reviewed take a more directive or conciliation-type approach in the interest of expediency and 'fair' outcomes.

All of the respondent organisations strive to resolve issues informally, only moving to more formal investigative and adjudicative processes when a complaint cannot be resolved through the informal process. While these informal processes may not represent 'pure mediation', there is a strong emphasis throughout the sample organisations on the use of mediative-type processes that are confidential in terms of

mediated discussions and oriented towards achieving a mutually acceptable resolution.

Implications for wider dispute resolution practice

The benefits of mediation over other forms of dispute resolution, as documented in the literature, suggest the FSPO's deliberate shift in focus to mediation is in keeping with a general move towards mediative-type processes by other ombudsman and dispute resolution services.

Confidentiality is an essential element of mediation and the limited number of threats to confidentiality from, for example, legal action, public scandal or imminent risk of serious harm, can be anticipated and proactively managed in advance through risk management strategies.

There is widespread acknowledgment, both in theory and practice, that transparency is fundamental to the remit of publicly funded, dispute resolution services. Each agency must be clear about what information is needed and why, and ensure clear communication and appropriate processes to gather, store and protect information.

The privacy and anonymity of individual service users should be protected, except in limited exceptions that are clearly documented and communicated in advance. Also, service users must know in advance what information will be gathered in relation to their case and why, and where and how it will be made available.

The conclusion of our research is that it is possible to balance confidentiality and transparency, whether specifically in a host organisation or more generally in dispute resolution processes. The context and circumstances of a mediation or a mediation service can be deconstructed, and rules devised to ensure clear and appropriate boundaries of confidentiality and transparency.

Scope for building on this research

We sought to address the complex challenge of balancing confidentiality and transparency in statutory funded mediation services. We hope that this project will inform the debate and provide useful insights to other state funded organisations that provide dispute resolution services.

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