

## **ICANN Board Input - CCWG WS2 Ombuds Report**

Please find below the input from the Board on the CCWG WS2 Ombuds Report. This input factors in the need for clarity on some recommendations, as well as an assessment of the resource impact to the ICANN organization and thus the community.

The ICANN Board appreciates the opportunity to provide input to the CCWG WS2 report on the recommendations to improve ICANN's Ombuds Office. We are providing these inputs during the public comment process, and hope they assist the further deliberations by the Subgroup and CCWG-Accountability.

For reference, we note that the CCWG-Accountability Work Stream 2 provides the following recommendations on enhancing the Ombuds Office:

The Ombuds Office should:

- 1) Have a more strategic focus.
- 2) Include procedures that: distinguish between different categories of complaints; set out the kinds of matters where the Ombuds will not intervene; and deepen understanding of the Ombuds approach.
- 3) Develop a plan for a soft re-launch of the function, which should incorporate action to emphasize the importance of the Ombuds function with all relevant parts of ICANN.
- 4) Require all parts of ICANN to respond within 90 days (or 120 days with reason, including an option to request additional extension) to a formal request or report from the Office of the Ombuds.
- 5) Establish timelines for its own handling of complaints; report against these on a quarterly and annual basis.
- 6) Configure the office so that it has formal mediation training and experience within its capabilities.
- 7) Configure the office so that it has gender, and if possible other forms of diversity, within its staff resources.
- 8) Establish an Ombuds Advisory Panel.
- 9) Revise the Ombuds employment contracts to strengthen independence.
- 10) Create, as part of their annual business plan, a communications plan which would include a formal annual report, with published reports on activity, complaint trends, user satisfaction, and systemic improvements.
- 11) Publish clear guidelines when looking at Ombuds involvement in any non-complaints work.

We also note that the recommendations in this report are largely based on the external evaluator's recommendations provided to ICANN organization and the Ombuds Subgroup in July 2017. Clarity is needed as to whether the CCWG-Accountability intends for its recommendations to overtake the work of the external

evaluator, or if other aspects of the external evaluator's report still stand.<sup>1</sup> To the extent that the CCWG-Accountability is focused on the speed of implementation and hopes to avoid any Bylaws modifications or changes to the Ombudsman Framework, the ultimate focus should be on the proper implementation of recommendations in order to hold ICANN accountable to meeting their intent.

While a majority of the recommendations appear to be reasonable and productive enhancements to strengthen the office of the Ombuds, a few recommendations would benefit from additional clarification noted below. Specifically, recommendations on the notion of diversity of staff available to the Ombuds office (Recommendation 7), the proposal for an Advisory Panel (Recommendation 8), and the term of the Ombuds contract (Recommendation 9) raise important concerns for consideration.

Based on inputs from the Ombuds, we understand that the current Office of the Ombuds already has activities in place that might address some part of the recommendations as issued. In addition, the Ombuds has already started considering how some of the recommendations could be reached. For example, one way to deepen the understanding of the role and work of the Ombuds could be achieved through more regular communications, such as blog postings and other informative communications. Similarly, there are already reporting mechanisms in place, though those might be able to be better publicized or refined.

The implications on resources is an important overarching consideration that should be considered for these and all recommendations. As a general observation, ICANN operates within a specific budget based on limited funding. Recommendations that add costs to ICANN's operations result in the organization making trade-offs with other items, such as implementation of new policies, or innovation of existing programs or services. Such policies, without considering the impact on resources, may lead to a situation where the organization is unable to effectively meet community expectations with either the new recommendations or existing obligations.

The CCWG-Accountability should consider these factors and provide guidance in its final report regarding the priority, importance, and extent these recommendations (and all the CCWG's recommendations) should be implemented, and in what timeframe.

This input is intended to provide observations and information to further the CCWG-Accountability's efforts as it finalizes its full report.

---

<sup>1</sup> For example, the CCWG-Accountability's recommendations state that no changes are needed to the Bylaws relating to the Ombudsman. The external examiner, however, recommends that a more strategic focus start through clarifying the language in the Bylaws.

*Regarding Recommendation 1: More Strategic Focus*

While the concept of having a more strategic focus is sound, there is not a lot of detail in the report as to what that means. The report seems to reject the external evaluator's recommendation on developing a more strategic focus through Bylaws language. Clarification on what is intended here will be helpful.

*Regarding Recommendation 4: Required timelines for response*

The recommendations seem to propose very detailed deadlines by which the Board and other members of the community must respond to requests and reports. It is unclear what issue is being solved here. There may be for example, certain reports which require more information to fully understand the nature of the dispute and status and resolution. How would these deadlines work in practice with the rest of the community? What is the outcome if a deadline is not met?

The current Ombuds has also informed the Board that the 30-day response timeframe currently in place for the ICANN organization's inputs into reports has worked well.

*Regarding Recommendation 7: Configuring the office so that it has gender, and if possible other forms of diversity, within its staff resources.*

Per the report, the primary objective of this recommendation is to ensure that the community has choices as to whom in the Ombuds Office the community can bring their complaints and feel more comfortable doing so.

The ICANN Board agrees that consideration needs to be given on the availability of alternative resources for the Ombuds Office. While ICANN is not able to make employment decisions based on considerations such as gender, nationality, or many other protected characteristics, there are likely ways to coordinate adjunct resources to making available to the community additional, more diverse points of entry into the Ombuds Office, that can be implemented. As a preliminary note, ICANN has already provided additional inroads into the Ombudsman office. For example, female members of the senior leadership of ICANN have served as a first point of contact to raise complaints regarding harassment, where the complainant didn't feel comfortable going directly to the Ombuds. There are other inroads as well, such as the Complaints Officer, or members of ICANN's executive team that can be an initial point of contact for comfortably expressing complaints that can then be brought to the Ombuds. There might also be a need for consideration of how cultural differences impact the Ombuds Office's consideration of any individual matter, and whether supplemental resources are necessary to better serve the ICANN community.

The current Ombuds has informed the Board that he is developing a community liaison network of trusted volunteers from the constituencies to act as complaint

intake for anybody who is uncomfortable approaching the Ombuds directly. We hope this also serves as a way to address this community concern.

Additional information is needed to consider the full scope of the recommendation and any potential budgetary impact. If this recommendation seeks to have ICANN have a bigger staff in the Ombuds Office, as opposed to identifying other ways to have supplemental resources available, the resource implication and feasibility assessments could be far different. This recommendation, even if limited to a need for supplementary resources on an as-needed basis, coupled with a clearer process for intake based on the comfort level of the complainant, still imposes a potential budgetary impact.

It would be useful to have clarity on the scope and the limitations envisioned within this recommendation.

*Regarding Recommendation 8: Establishment of an Ombuds Advisory Panel.*

The recommendation to include an advisory panel is a significant change, and does not seem appropriate for implementation at this time. The Board suggests that focusing on how the Ombuds Office can be strengthened should come first, and then consideration can come later as to whether additional advisory mechanisms are needed. When reading this recommendation, the Board identified many of questions that support this conclusion. These include:

- What is the role of the broadly powered Advisory Panel in relation to the proper role of ICANN org and the Board with respect to the Office of the Ombuds?
- What is the scope of advice that the Advisory Panel is to give the Ombuds, outside of involvement on non-complaint work? Or, does the Advisory Panel only have power to contribute to the hiring, firing and evaluation of the Ombuds Office?
- How does the notion of an Advisory Panel with powers relating to selection and termination of candidates work in practice with the Section 5.2 of the ICANN bylaws, which requires the Office of the Ombuds to be independent. Is it foreseen that there is a bylaw change here?
- Would the Advisory Panel be purely advisory or more of 'wise counsel'?
- How would the proposal work with Section 5.1(c) of the Bylaws, which require 3/4s vote of the entire Board to dismiss the Ombudsman? What weight would the Board put in such Advisory Panel's recommendations on termination?
- How is the expertise of the Advisory Panel assessed in relation to the tasks it to undertake in relation to the Ombudsman?
- How can the Ombuds retain the confidentiality obligations per the ICANN Bylaws, with the role of the Advisory Panel?
- Is the 5-year evaluation cycle intended to replace the role of the Accountability and Transparency Review Team in assessing the Ombudsman as part of ICANN's accountability work?

- How are conflict of interest considerations to be assessed with regards to the Advisory Panel?

Lastly, while the report notes the Ombuds would be required to maintain its confidentiality engagements per the Bylaws, as noted above, it is unclear how in practice the advisory panel would function with the Ombuds in light of these requirements.

*Regarding Recommendations 9: Revising Ombuds employment contracts.*

The Board understands the reasoning behind the recommended changes to the Ombuds employment contract, but is concerned that the creation of a 5-year fixed term contract with strict termination limitations may not provide motivation for high performance from the Ombuds. It should be a collective goal across ICANN that the Ombuds strive for exemplary performance in service to the ICANN community, and not be rewarded through keeping a contract because the minimum performance levels have been met. Similarly, if the Ombuds is doing a good job and is gaining trust and expertise, why would there be a recommendation to only extend his/her term for up to 3 years? Further, the current Ombuds has reported to ICANN that he does not view this recommendation as a means to promote or protect the independence of the office.

The CCWG-Accountability might consider alternative ways of addressing issues it is seeking to solve, so as to not discourage high quality Ombuds and experience. It may be preferable to retain Ombuds compensation based on some objective criteria, such as delivery on the reporting goals detailed in recommendation 10 of this report.

*Regarding Recommendations 11: Publishing clear guidance when looking at Ombuds involvement in non-complaint work.*

The guidance detailed in the report is a strong enhancement and clarification for the Ombuds function, and the Board supports this recommendation.

We note that an interdependency exists between this work and the work of the Transparency Subgroup. The Transparency Subgroup recommends some specific involvement of the Ombuds in the DIDP process. To the extent the Transparency recommendation is an expansion of the role of the Ombuds, it would be valuable to apply this criteria to the Transparency report recommendation to consider requests to expand the Ombuds role.

*Acknowledgment*

We thank the CCWG-Accountability and the Ombuds Subgroup for its work on the draft recommendations and look forward to providing further inputs as appropriate during the finalization of the recommendations by the community.