

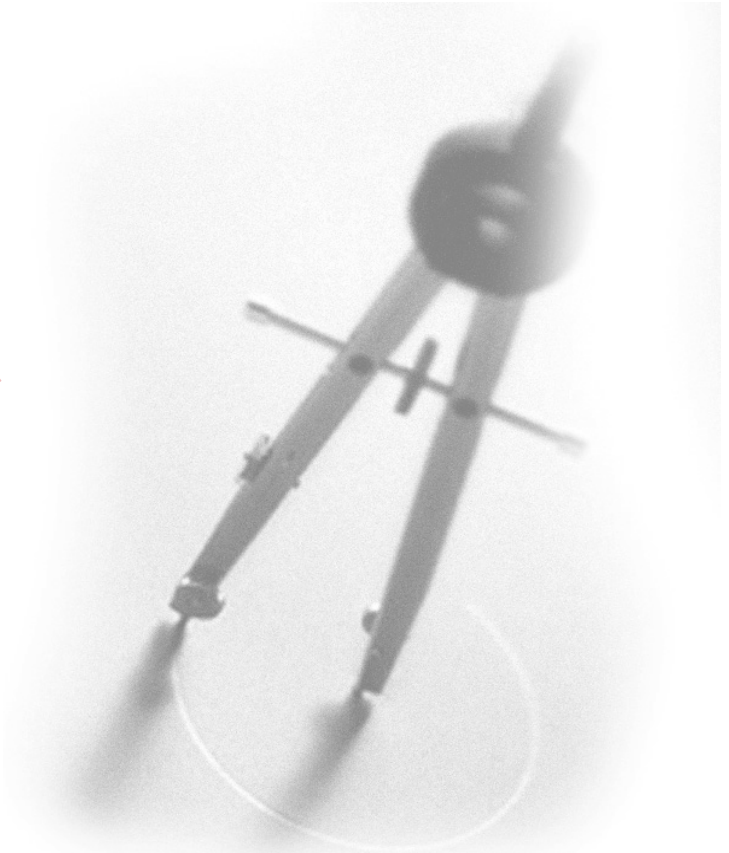
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Review of Office of the Ombudsman

Internet Corporation for Assigned Names
and Numbers (ICANN)

May 2017



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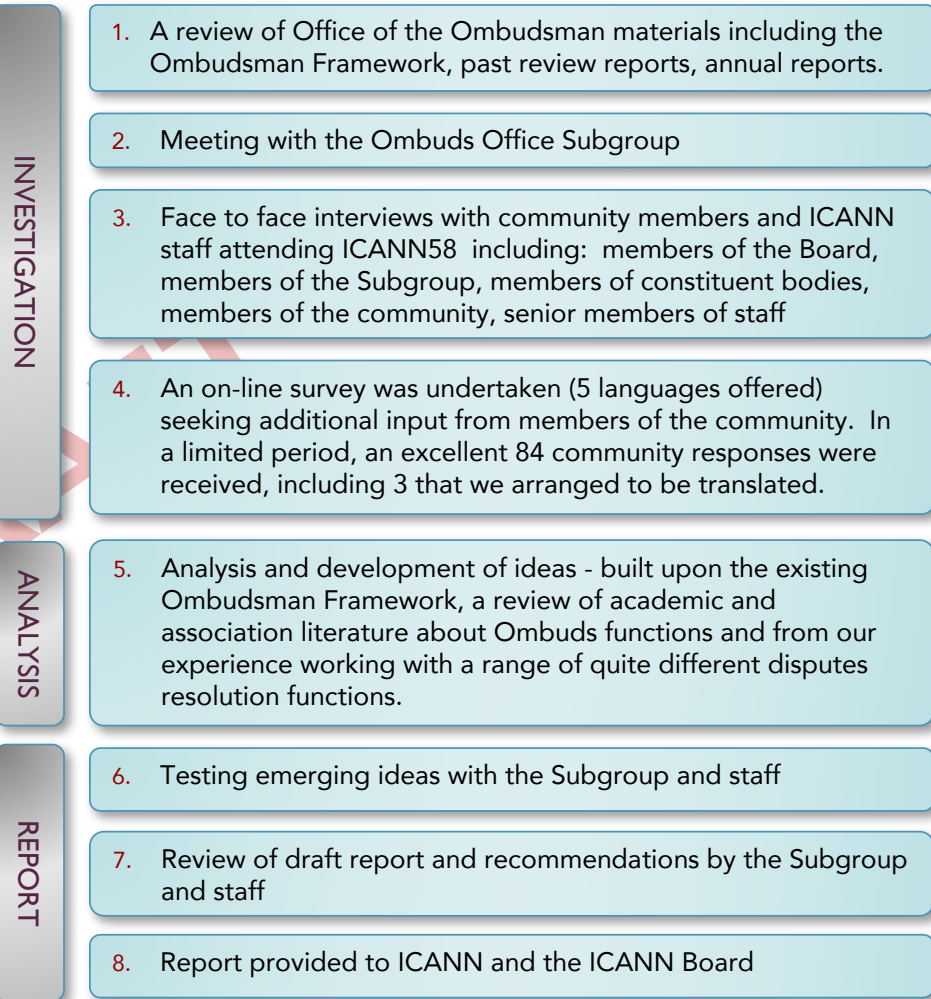
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This review of the Office of the Ombudsman is being undertaken by ICANN as one element of the overall objective of enhancing ICANN accountability launched alongside the IANA stewardship transition. It is supported by the Work Stream 2 process and in particular the Ombuds Office Subgroup within that process.

The aim of the review is to reflect on the extent to which the Office of the Ombudsman is currently serving the needs of the ICANN multi-stakeholder community and to provide recommendations as to the roles, responsibilities and structure of the Office under the enhanced accountability and transparency framework that is being furthered by the Work Stream 2 process.

The Office of the Ombudsman is mandated by ICANN's Bylaws and was established in 2004. The Ombudsman is a full time appointment and reports directly to the Board. The current Ombudsman, Herb Waye, is the third Ombudsman to be appointed.

Our process included:



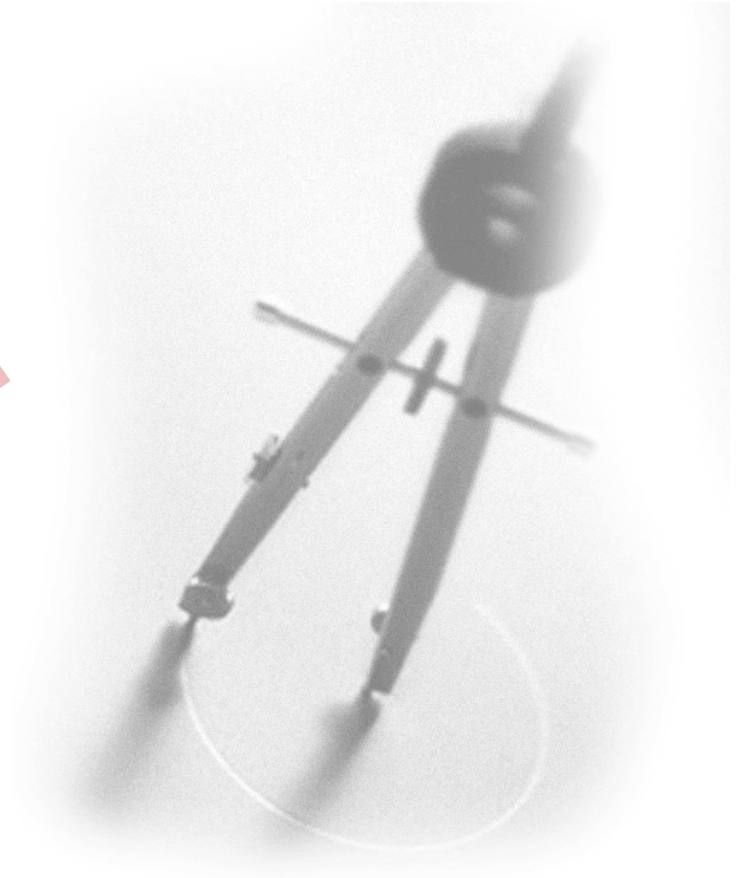
Executive Summary

This version of the Report is a first draft – its aim is to obtain feedback and guidance from staff and the WS2 Subgroup. Once we have that in-principle feedback, specific, detailed recommendations will be provided and an Executive Summary will be inserted.

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Current Situation



1. ICANN's mission as stated in its Bylaws is to coordinate at the overall level the global internet's systems of unique identifiers and to ensure their stable and secure operation. Its Strategic Plan outlines its vision of "an independent, global organisation trusted worldwide to coordinate the global internet's systems of unique identifiers to support a single, open globally operable internet".
2. ICANN is guided by core declared values including diversity, fairness, integrity, creativeness, effectiveness, responsiveness and transparency.
3. To deliver on its mission and vision, ICANN has developed a unique multi-stakeholder model of governance, peopled by volunteers, that includes the ICANN Board, Board committees, Supporting Organisations, Advisory Committees and a complex web of subgroups including business constituencies and end users organised in geographical groupings.
4. In considering organisational and community design, it is critical to remember that the ICANN ecosystem is, in the scheme of systems of international organisation, extremely young. There is little in the way of precedent to follow, no obvious previous comparable area of international administration and coordination to copy from.
5. It is a unique and highly fluid network of organisations, communities of interest and individuals. It operates in an environment of rapid growth, of technological and political change and as a consequence members of the ICANN community almost continuously confront new issues.
6. Some features change organically as participants and markets evolve behaviours, a few characteristics evolve through government or regulatory action (or inaction) and many aspects evolve through a laborious process of community consultation. Some aspects of standards and policy are highly technical, others more values-driven.
7. The ICANN community is one of great passions and firmly held beliefs – and capable of expressing these in a robust way. It is also capable of quite some suspicion and mistrust – perhaps not surprising when one considers the cultural, language, political and commercial interest differences that exist within this ecosystem.
8. The enhancement of accountability within ICANN is an important issue in the community. For many we spoke to, it has much to do with shifting from a North American way of thinking to a more international way of thinking. (This has particular significance for the Office of the Ombudsman as the common North American models of Ombudsman differ in important respects from models that exist elsewhere in the world.)

ICANN complaint types

From our discussions with stakeholders, we identify a number of different types of complaints that arise or may arise in the ICANN environment.

1. Complaints that corporation staff have not treated a member of the community fairly. These complaints can span matters from travel reimbursement issues to complaints about failures by the Contractual Compliance Department to enforce contracted party obligations.
2. Complaints about policy settings. An example of this is the policy that frames arrangements with contracted parties - a complaint might assert that ICANN policy facilitates unfairness by contracted parties.
3. Complaints about significant ICANN processes, for example, the new gTLD application process.
4. Complaints that ICANN governors (Board and ICANN community committees) have not treated a member of the community fairly. For example, disputes can arise about elections and membership of committees.
5. Complaints about the conduct of an ICANN contracted party such as a Registrar.

6. Complaints that members of ICANN community have not treated each other fairly, including alleged harassment or breaches of standards of behaviour – or disputes between groups of ICANN community members.
7. Complaints about the inadequacy of redress avenues – discussed below.

The next pages discuss the avenues available within ICANN for resolution of the various complaint types.

1. Office of the Ombudsman

The scope and functioning of the Office of the Ombudsman is defined by ICANN's Bylaws and procedures made pursuant to those Bylaws.

a) Bylaws

Article 5 of the Bylaws specifies the charter of the Ombudsman shall be to act as "a neutral dispute resolution practitioner" for members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly or inappropriately. "The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints ... clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results."

The Bylaws entrench some independence measures. The Ombudsman reports to the Board and presents the Office's proposed budget direct to the Board. The Ombudsman is only able to be dismissed by a Board vote with a 75% majority. The Bylaws prohibit any impeding of contact between the Ombudsman and the ICANN community.

Section 5.3(c) sets out matters that are excluded from the Ombudsman's jurisdiction:

- internal administrative matters,
- personnel matters,
- issues relating to membership on the Board, or
- issues related to vendor/supplier relations.

The Ombudsman has a broad right of access to information to enable evaluation of complaints but may not publish confidential information.

The Bylaws oblige the Ombudsman to build awareness of the function through routine interaction with the ICANN community and online availability. ICANN staff and the Board are also required to assist in promoting awareness by directing ICANN community members who voice problems or concerns to the Ombudsman.

Section 5.3(d) authorises the Ombudsman to make reports to the Board and to post these to ICANN's website unless the Ombudsman determines that this is not appropriate. A consolidated annual report must be prepared. This must include a description of trends or common elements of complaints and recommendations of steps to minimise complaints

b) Ombudsman Framework

Section 5.3(c) obliges the Office of the Ombudsman to develop procedures for complaints handling. These can include the discretion not to accept or to decline to act on a complaint or question that is insufficiently concrete or that are related to ICANN's interactions with the community and are not appropriate for the Ombudsman's review. The Ombudsman Framework was developed by the first Ombudsman to address this requirement.

The Framework reserves to the Ombudsman the discretion to decline a complaint where:

- the complainant knew or ought to have known of the decision being complained of;
- the subject matter of the complaint primarily affects a person other than the complainant and the complainant does not have sufficient interest in it;
- the complaint is repetitive, trivial, vexatious, frivolous, non-substantive, otherwise abusive or not made in good faith;
- further action by the Ombudsman is not necessary to resolve the complaint;
- the complaint is abandoned or withdrawn by the complainant; or
- the complainant revokes the ADR process by engaging in either a formal review process or outside legal process.

Where jurisdiction is declined, the Ombudsman must inform the complainant.

The Framework also specifies that the Ombudsman does not have the power to make, change or set aside a policy, administrative or Board decision, act or omission, although the Ombudsman does have the power to investigate and use ADR techniques to try and resolve the complaint. Where the Ombudsman investigates and decides that successful resolution is unlikely, the Ombudsman shall advise the complainant of the formal review procedures.

c) ICANN Community Anti-harassment Policy and Terms of Participation, March 2017

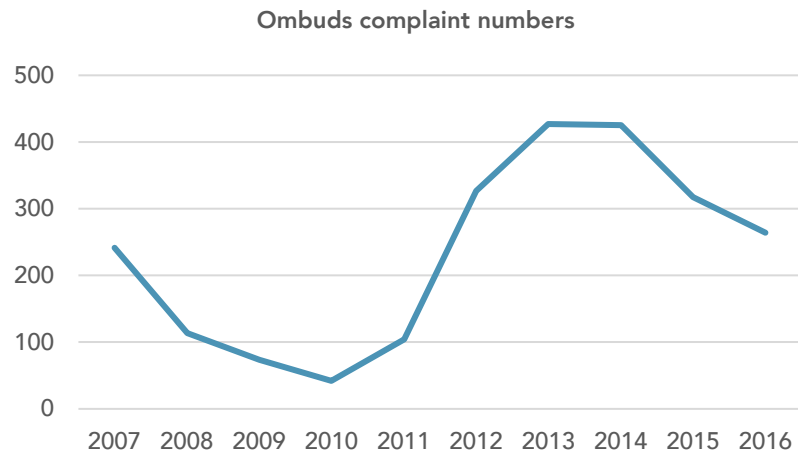
A recent innovation, ICANN now has a specific policy that sets out the Ombudsman's role, process and powers where a community

complaint is made about inappropriate behaviour. The Ombudsman will make inquiries to ascertain the facts and will determine whether inappropriate behaviour has occurred and, if so, what remedial action is appropriate.

This may include limiting the individual responsible for the behaviour from participation in the ICANN process and/ or requiring a written apology as a condition of future participation.

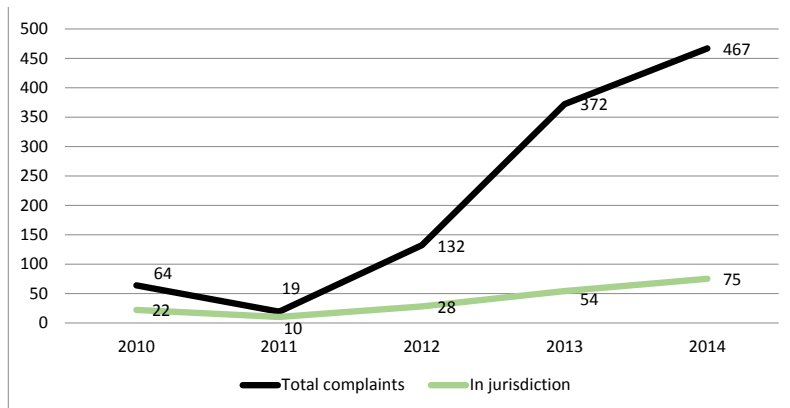
d) Caseload

The volume of complaints have varied over the life of the Office and in the early years were affected by some spamming campaigns. The complaint numbers below are for the 10 calendar years to 2016 and so are not consistent with historical Annual Report figures.



It is difficult to draw conclusions from the data, although we gather from interview that there was something of a loss of confidence in the Office during the middle years shown and there have been surges associated with particular issues. There have also been some data consistency issues which should be addressed for the future with the implementation during 2016 of a new case management system.

The numbers in the chart on the previous page include complaints that were found to be out of jurisdiction. There is not consistent data for this for the whole of the 10 year period above, however the chart below shows, for a 5 year period, the large percentage of complaints that have been categorised as outside jurisdiction.



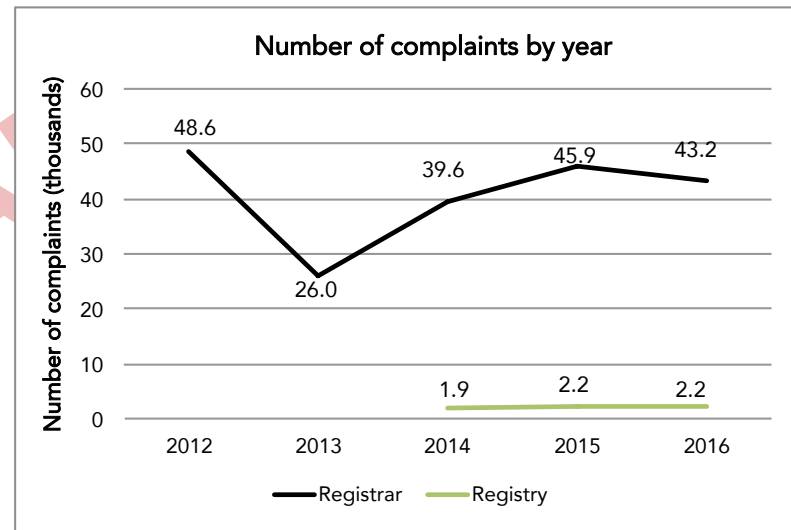
Source: Ombudsman 2014 Annual Report

Most commonly, complaints that are outside jurisdiction relate either to registrar decisions or to the transfer of domain names

and the outcome for the majority of complainants is that their complaint is referred elsewhere.

2. Contractual Compliance

This Department is responsible for ensuring that ICANN's contracted parties fulfil the requirements in their legal agreements.



Source: Contractual Compliance 2016 Annual Report

As the chart above illustrates, Contractual Compliance receive a very large volume of complaints - about matters such as domain transfers, domain deletion, domain renewal, customer service issues, Whois format etc.

3. Reconsideration Requests

Consistent with Section 4.2 of the Bylaws, ICANN's Board Governance Committee can be asked to reconsider an action or inaction by the ICANN Board or staff. There are a few prerequisite criteria:

- The person requesting reconsideration must have been adversely affected.
- The action or inaction must have been in contradiction of ICANN's mission, commitments, core values or established policies or have been taken without consideration of material information or in reliance on false or inaccurate information.
- The request cannot be in relation to a matter excluded under the Bylaws (excluded matters include disputes regarding country code top-level domain delegations, internet numbering resources, protocol parameters etc.

The Board Governance Committee has some power to summarily dismiss Reconsideration Requests and, where this power is not exercised, makes recommendations to the Board about the merits of Reconsideration Requests. As a result of a recent change to the Bylaws, the Ombudsman now has a role in the process and provides the Board Governance Committee with their evaluation of the merits of the Reconsideration Request. The current Ombudsman is in the process of retaining a legal firm to provide expert advice to assist him in this role.

In recent times, there have been around 15 to 30 Reconsideration Requests per year. Numbers are expected to further increase as a

result of Bylaw changes made last year. In part because of this, the Board passed a resolution in February 2017 that responsibility for Reconsideration Requests should be moved from the Governance Committee to a new Accountability Committee of the Board. This is currently the subject of community consultation.

4. Independent Review Process

Section 4.3 of the Bylaws obliges ICANN to have an independent third party review process to ensure (amongst other things) that ICANN does not exceed its Mission and otherwise complies with its Articles of Association and Bylaws. Again there are some exclusions.

This is intended to be a mechanism for resolving disputes that is an alternative to legal action. ICANN has appointed the International Centre for Dispute Resolution as the third party to arbitrate these disputes.

ICANN's website lists about 20 disputes as utilising this channel.

5. Complaints Officer

The complaints landscape for ICANN has recently changed again with the appointment of a Complaints officer for ICANN (the corporation). The intention is that this person, reporting to the CEO, will have responsibility for overseeing the handling of complaints about actions of the corporation, reporting on them and facilitating their resolution.

We understand the role is intended to be very operational, across all types of complaints within the corporation and very much a part of the CEO's commitment to continuous improvement. The role is to ensure that complaints across the corporation are recognised, handled well and consistently, reported on, facilitated if necessary and that the information is used to guide systemic improvement.

This role is a quite common feature of service organisations – in effect being the second line of response to service complaints – analogous to a Customer Service department where matters are escalated if they are unable to be resolved at frontline.

There is a communique on the ICANN website that sets out some of the key intended differences between the two roles - (<https://www.icann.org/news/blog/clarifying-the-roles-of-the-icann-complaints-office-and-ombudsman>).

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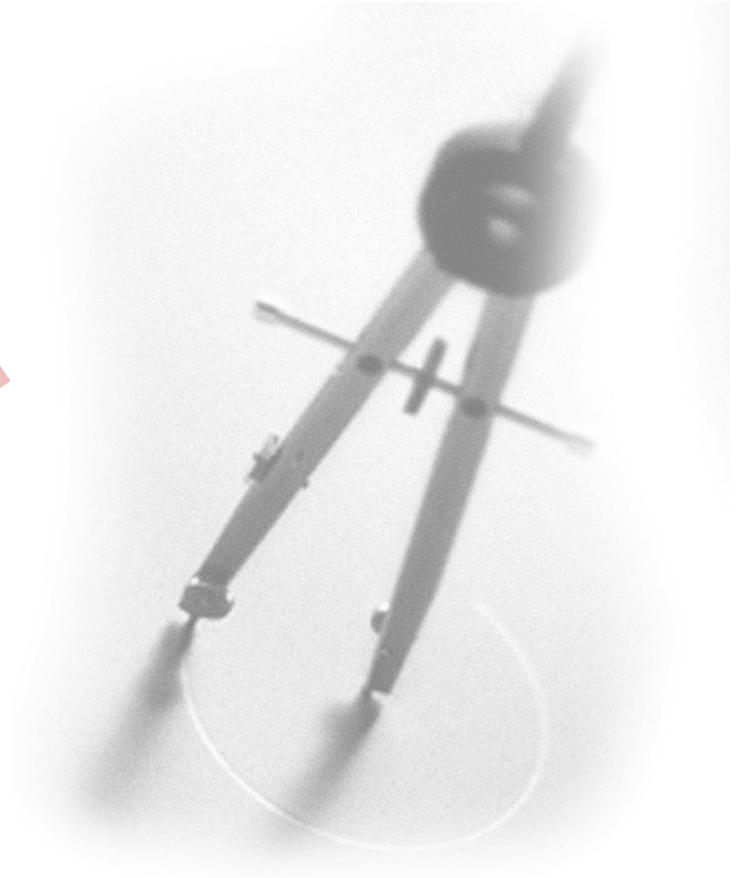
Comparison of complaint handling channels

	Office of Ombudsman	Compliance Department	Reconsideration Request	Independent Review Process	Complaints Officer
Who can be complained about	Board /staff/ community body or member	Contracted party	Board/ staff	Board/ staff	Staff
Decision maker	Ombudsman – reporting to the Board	Staff	Ombudsman/ Board Governance Committee/ Board	Third party, expert arbitrator	Staff
Nature of process	Confidential process except as needed to pursue complaint, with complainant's agreement	Confidential process except as needed to pursue complaint, with complainant's agreement	Documents posted to website including request, Governance C'ttee recommendation, Board decision	Proceedings conducted on record, filed documents and decisions posted to ICANN website (trade secret confidentiality may be possible)	Transparency is the default but this may be restricted by the complainant
Formality	Informal	Informal	Some formality	Highly formal – international arbitration rules of procedure apply	Informal
Likely timeframe (absent any special urgency)	Initial response within 1 – 2 days	1 - 2 weeks	Up to 135 days	Intended to conclude within 6 months but in practice often much lengthier	Intended to be quick
Cost	No charge	No charge	Extraordinary costs can be recovered from requestor (but in practice this has not occurred)	Fees and cost orders made	No charge

Whilst these alternative avenues of complaint clearly enrich the accountability framework, it complicates understanding of the role of the Office of the Ombudsman. The Office can operate both as an alternative avenue for these other pathways and as a point of escalation for other avenues eg. someone dissatisfied with the summary dismissal of a Reconsideration Request by the Governance Committee or a person dissatisfied with an Independent Review Panel decision.

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ICANN community views



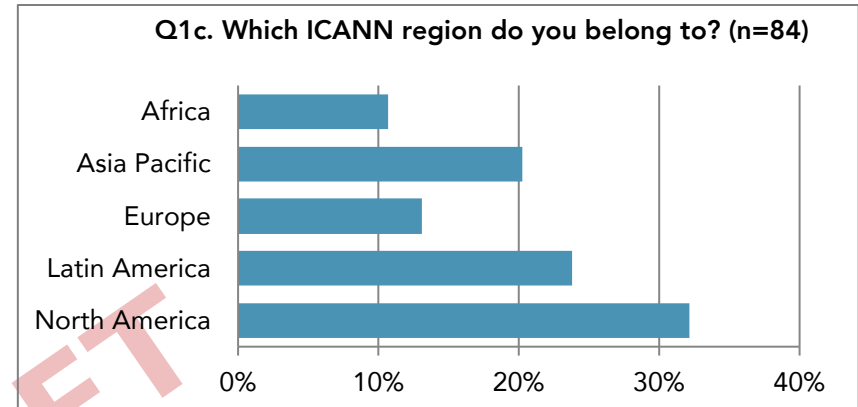
While not everyone within a community can be expected to know the detail of how an Ombuds function should or is actually working, critical to the effectiveness of an Ombuds function is the extent to which it provides stakeholders with confidence in the fairness of the various community systems and processes.

There were two limbs to our investigation of stakeholder perspectives. We reached out to the community and interviewed a number of stakeholders – some suggested and some volunteered. With the assistance of the Subgroup and ICANN staff, we also developed a survey to test the ICANN community's expectations and experience of the Ombudsman function. The survey was confidential to the Reviewers and was open for a little over two weeks. We received responses from 84 community members – we understand that this is an excellent response rate for ICANN. More detail of the survey results are reproduced at Attachment xx.

Respondent demographics

Based on advice from those experienced with ICANN surveys, we were satisfied that we received input from a reasonable cross-section of the community. There was representation from the 5 ICANN regions, although it is difficult to assess proportionality as the community is not 'registered' or strictly defined.

The gender split was 71% male/29% female – which we understand is not unusual. Respondents' experience ranged also from those quite new to ICANN participation and those with many years of involvement. Around 40% of respondents said they had had a complaint/dispute related to ICANN and 60% had not. Note that a small number of our interviewees also completed a survey response.



Respondent awareness

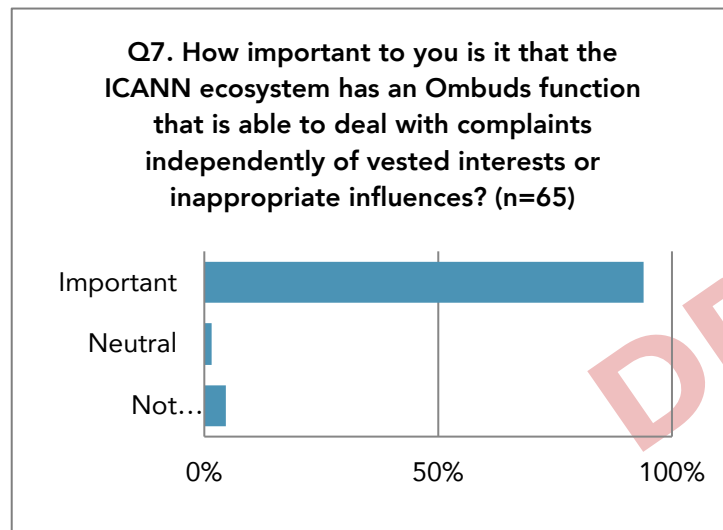
In most environments, we do not expect particularly high general awareness of the existence of Ombuds functions – as it is usually only important to members of a community when they have a problem. In ICANN, however, awareness initiatives such as presence at meetings led us to expect that the Office enjoys a sound level of awareness.

This impression was supported by the survey responses. Only 18% indicated that they had not been aware of the existence of the Office prior to the survey and 56% said they had become aware of the Office either very soon after joining or within 2 years.

We caution, however, that there is a difference between general awareness of the existence of the Office and a higher-level awareness of what it is for, what it can do, what to expect of it.

Importance of Ombudsman function

The survey affirmed the clear message from the interviews of the importance to the community of having a dedicated ICANN Ombuds function.



To understand survey respondents expectations of the Office of the Ombudsman, there were questions that asked them to rate the importance of roles and powers that an ombuds function sometimes have.

While the 'typical' functions of providing information, investigation, trying to resolve disputes, escalating important matters, conducting own-motion enquiries and providing transparency all rated with very high importance, it was noteworthy that the greatest diversity of view was around whether the Ombuds function should have decision-making powers or should be able to make binding orders. In our view, this is one of the most fundamental differences present in the range of possible designs for an Ombuds function.

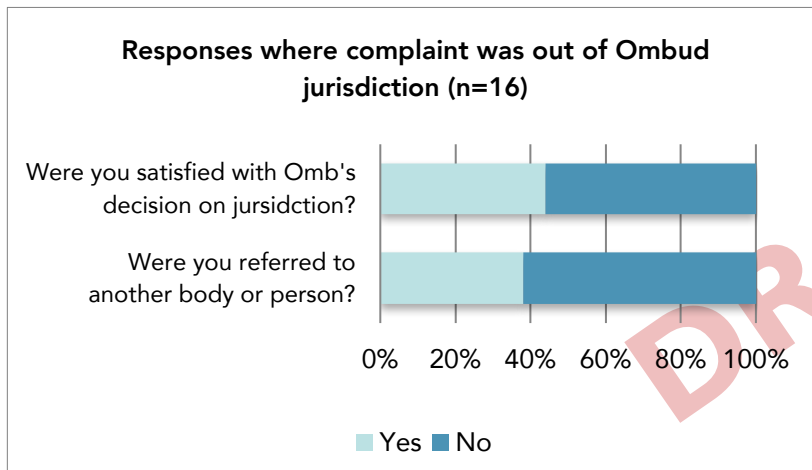
Confidence in the Office of the Ombudsman

Respondents were asked to rate stakeholder confidence in the Office of the Ombudsman's independence, transparency and accountability. These three confidence elements were rated similarly, with around 1/3rd rating confidence as High, around 1/3rd rating it as Medium or Low and around 1/3rd unable to answer.

Again to test confidence in the Office, the survey asked respondents who had personally had a complaint if they had considered taking it to the Ombudsman and if not why not. Some 28% of the 32 respondents to this question had not considered the Ombudsman as a pathway – sometimes citing ignorance of the Ombudsman's remit, or more commonly and more troubling, that they believed that the Ombudsman was ineffectual.

Out of jurisdiction complaints

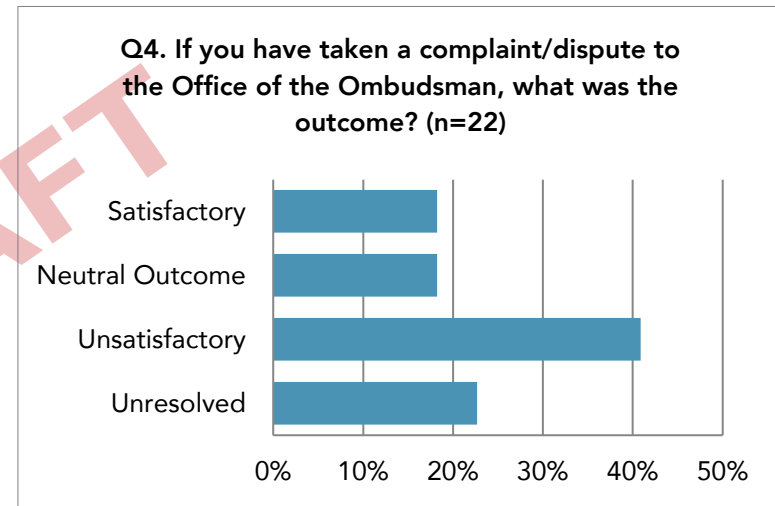
16 survey respondents (19% of all respondents) reported that they had experienced a complaint that the Office of the Ombudsman had found to be outside jurisdiction. The following charts report these respondents' views.



Here we caution that our sample size was small and may well be quite unrepresentative. In recent years, out-of-jurisdiction complaints outnumber in-jurisdiction matters by around 6 times and our sample size is nothing like that. Based on experience in other settings, we would expect a much lower level of satisfaction with out-of-jurisdiction complaints. So, it may not be a fully representative sample. Nevertheless, the results do suggest some expectation that the Ombudsman should be able to help with a greater range of complaints than is currently the case.

Reported outcomes for in-jurisdiction complaints

Around 1 in 5 respondents who had taken a matter to the Ombudsman reported a satisfactory outcome – another 1 in 5 reported a neutral outcome and the remaining 64% reported an unsatisfactory or unresolved outcome.



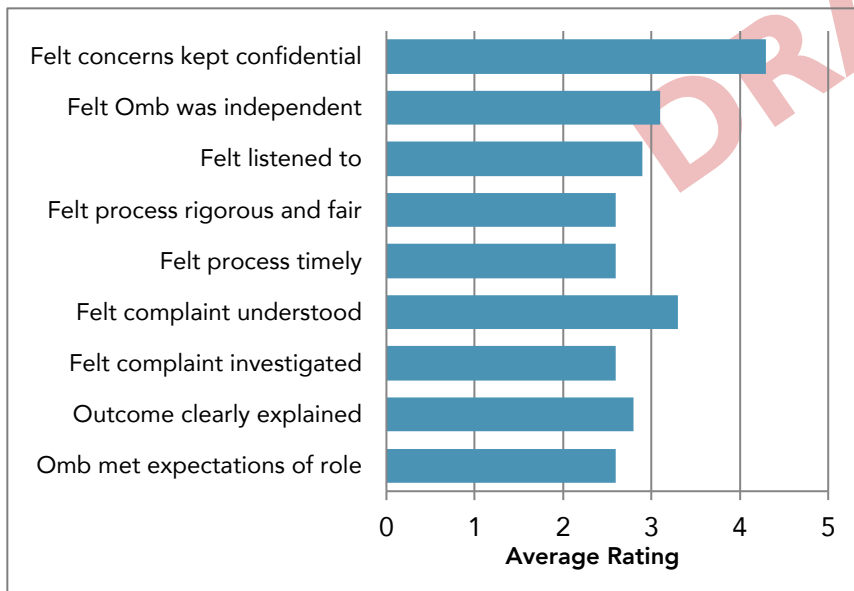
This can be a significant issue for overall confidence levels. The results suggest that only 1 in 5 of those who do have their matter handled by the Office of the Ombudsman are likely to speak positively to others about their experience. Whilst this result appears disappointing, our experience is that complainants can have high – often unrealistically high - expectations of what can be achieved through an ombuds function, and can be very disappointed when those expectations are not realised.

Ombudsman processes for in-jurisdiction complaints

Whilst not discounting the importance of outcome satisfaction ratings, we find that process ratings are a more important indicator of how well the function is operating.

The survey asked a number of detailed questions about the user's experience of the process – including listening, understanding of the issues, depth of investigation, timeliness, confidentiality, independence, rigour and fairness, etc.

Q6. If the Ombudsman dealt with your complaint, how would you rate your experience of the process? (n=21 to 22)



We considered these results in the context of those obtained in the survey conducted in 2008 by the first ICANN Ombudsman. Given how new the function was, it is perhaps not surprising that the 2008 survey included only 7 people who had made a complaint to the Ombudsman that was within jurisdiction. Their average responses to the 2008 survey (converted here from a 10 point to a 5 point rating scale) were as follows:

- Extent Ombudsman met timeliness expectations: 2.5 rating
- Extent Ombudsman met confidentiality expectations: 3.7 rating
- Extent Ombudsman met overall expectations: 3.1 rating

The 2008 survey also asked respondents to rate other dimensions relevant to the Office of the Ombudsman's handling of their complaint ie. professional manner, respect, explaining the Ombudsman's jurisdiction, providing an appropriate referral and updating or corresponding with the complainant. These ratings could not readily be compared with the process ratings derived from our survey. Suffice to say, that the 2008 survey produced average ratings of these other dimensions in the range of 3 to 3.5. (again when converted to a 5 point scale).

The conclusion in the 2008 report was that people were "generally satisfied" with the Office of the Ombudsman. But, as cautioned in the Third Party comment on the Client Survey, the number of respondents to the survey who had experienced an in-jurisdiction complaint was very small and that free text comment was quite negative.

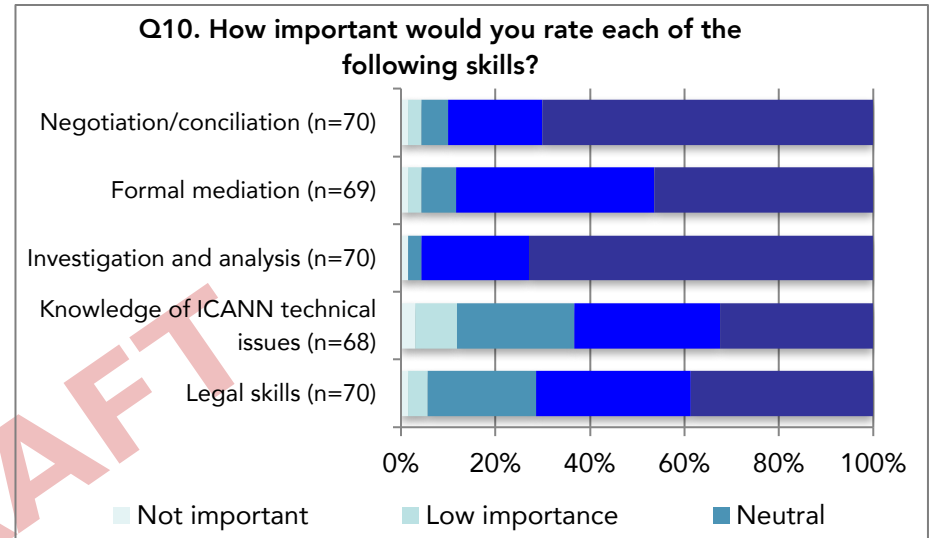
Comparing our survey – also drawn from a small sample size, albeit three times that of the 2008 survey and encompassing complainants who between them had experienced the Office of the Ombudsman as it evolved over the tenure of the three occupants of that Office - there were higher timeliness and confidentiality ratings and a lower 'overall' rating for in-jurisdiction complaints than for the 2008 survey.

Our survey found considerable variation between respondents in their ratings, with almost diametrically opposed commentary on some questions (see Attachment). This is not uncommon where respondents self-select; often they do so because they have either had a very good or very bad experience. Those who have had a more 'middle of the road' experience may be less motivated to respond to a survey.

Taking all these issues into consideration and based on our experience of other environments, our conclusion is that our survey results do not point to a particular process problem for in-jurisdiction complaints handled by the Office of the Ombudsman. However, the satisfaction levels are a little lower than we are accustomed to seeing.

Ombudsman Office skillset

To further test what respondents were looking for from the Ombuds function, we asked respondents to rate the importance of a range of possible skills for an Ombudsman function to possess. Here the most interesting response was those that had lesser importance. Rated most highly were negotiation/ conciliation, investigation and analysis. A wider diversity of views applied to legal skills with some thinking that this was not an advantage at all,



and to technical knowledge of ICANN issues (seen to be obtainable from others) and formal mediation skills.

Additional area of unfairness

We also asked respondents to identify possible areas of potential unfairness that the Ombudsman could be looking at – and it was evident that there were a range of issues that respondents thought could be matters for the Ombudsman to take an active interest in. The focus here was on more action on bullying, gender biases, community gTLD applications and hidden conflicts of interest. To this list, we would have to add some of the dissatisfaction we saw with out-of-jurisdiction decisions.

Our interviews with the ICANN community included briefings about policy initiatives that contemplate the possibility of new functions for the Office of the Ombudsman. These projects involve issues of integrity or fairness where there is a sense that the involvement of an ‘honest broker’ would strengthen the operation or credibility of the policy or process concerned. Examples of these ideas include:

1. Diversity

Work Stream 2 includes a project to enhance ICANN diversity and identify possible structures that could follow, promote and support that strengthening.

The Diversity subgroup is in the process of drafting a paper that reports on the extent of diversity within the ICANN community. Recommendations under consideration include the establishment of an Office of Diversity and Inclusion within ICANN to gather, analyse and report on data about diversity and make concrete proposals to enhance diversity - eg. minimal diversity requirements for panels during ICANN events and diversity enhancement metrics for inclusion in ICANN’s strategic plan.

In the course of our interviews, it was mooted that the Office of the Ombudsman could fulfil the role of Office of Diversity as an added-on to its current functions.

2. Document Disclosure

Work Stream 2 includes a project to improve ICANN’s Documentary Information Disclosure Policy (DIDP). The Transparency subgroup has released a paper for public

consultation that proposes better access rights including procedures for lodging requests, clearer information about how requests will be processed and clearer timeframes for responding to requests. The paper (page 10 - 11) proposes:

“ A further recommendation is that the Ombudsman’s mandate regarding transparency should be boosted to grant the office a stronger promotional role, including specific steps to raise public awareness about the DIDP and how it works and by integrating understanding of transparency and the DIDP into ICANN’s broader outreach efforts.

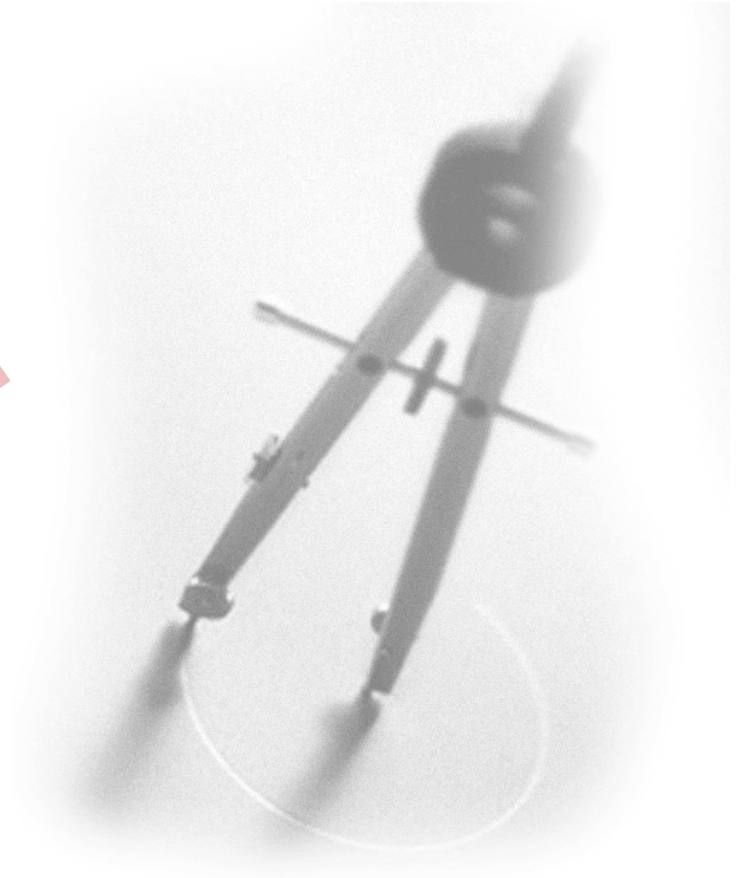
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Monitoring and evaluation are also essential to a successful right to information policy, and either the Ombudsman or the Complaints Officer should be tasked with carrying out reasonable measures to track and report basic statistics on the DIDP’s use, such as the number of requests received, the proportion which were denied, in whole or in part, the average time taken to respond, and so on.”

There is awareness, however, that if the Ombudsman plays a central role in processes of this type, this will limit the Ombudsman’s ability to be a ‘house of review ‘ should a subsequent complaint arise. This is undoubtedly true and suggests the need for caution in broadening the role.

Assessment

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Types of Ombuds functions

One way in which an Ombuds function can be designed is to follow one of the existing models of Ombudsman. There are many types of ombudsman in different parts of the world and in different environments. They are almost always explicitly directed to the objective of fairness, and usually have some reference to fairness in their mission or terms of reference.

Their configuration, sources of authority, structures, investigative powers, techniques and remediation powers vary considerably. The language and terms used also vary – including any attempt to categorise them. Labels used in one part of the world may not be recognised in other parts.

Some ombuds (or dispute resolution services) are much more legalistic than others. Some have little or no formal powers beyond persuasion. Some put great emphasis on formal mediation processes while others emphasise summary binding decisions based on a desk review of written material. Some have a focus on customer service relations while others focus on systemic improvement of processes. Some can order significant compensation and others can 'stand in the shoes' of the original decision-maker and replace their decision.

It is a niche, complex domain and for this review, we do not think that an academic analysis of all possible variations of ombudsman types is necessary. We have simplified down to a few categories for the purposes of explanation.

The table overleaf provides a summary of the key features of four different types of ombuds functions. Note that the descriptions generalise to what we have observed as the most typical features. Even within these categories there are variations.

On our analysis, in its current role, the ICANN Ombuds function would be classified as a blend of an internal ombudsman (in the sense of being internal to the community) and an executive ombudsman – (external to the Corporation - serving users of the corporation's services).

There is value in recognising that there are many different ways to design an Ombuds function and potential to borrow aspects from any of them. As we invariably conclude in all of our assignments – each environment has unique requirements and characteristics and must develop its own model of an Ombuds function. This is the more so for ICANN, an environment with more claim to unique requirements than most.

Type	Description	Examples	Source of authority	Structure	Complainants	Investigative powers	Techniques	Remediation powers
Legislative	Appointed by government (national, state, provincial or municipal level) to ensure fair treatment of the population	Ombudsman, Hong Kong, Income Tax Ombudsman, India	Typically a specific piece of legislation	Independent of the departments or agencies, reporting to the elected government, funded by government	External users of government services	Extensive powers to enquire, including 'own motion'	Require documents, interviews, require responses, mediation	Recommendations to the agency, public reporting, reporting to the elected government
Internal / organisation	Deals with complaints arising from within the organisation – usually those that have not been able to be resolved previously.	United Nations Ombudsman Service, Merck & Co.	An internal policy, job description or charter	Often a small independent office within the organisation, funded by CEO or Board	Internal members that have not been able to resolve a matter through normal channels or have no confidence in them	Mainly informal enquiries, can request document trail	Review personnel files, other documentation, shuttle negotiation, conciliation	Persuasion, recommendation, reporting to the CEO
Executive	Appointed by an agency as an internal dispute resolution resource for complaints generated by customers or an external community	Internal Bank or Newspaper Ombudsman, ICANN Ombudsman	An internal policy or charter, constitution or rules of the organisation or community	Small independent office within organisation, funded by organisation, reporting to CEO or Board	Customers or members of community seeking fairness review of decision, sometimes a step before going to an external ombudsman	Mainly informal enquiries, can request document trail	Review documentation, shuttle negotiation, conciliation, mediation, recommendation to CEO/Board	Persuasion, recommendation, reporting to the CEO/Board, some have delegated compensation power
Industry /sector	Typically established to be an independent review of complaints previously dealt with – and to identify systemic service issues.	Financial Ombudsman Service UK, Telecommunications Industry Ombudsman Australia, Financial System Mediator Armenia	Membership of ombudsman scheme a condition of a license/approval to operate – compliance is a contractual obligation of membership	Separate legal structure, funded by industry through fees and levies – sometimes subject to regulatory oversight, periodic independent reviews	Customers of member firms, generally must have first taken complaint to firm first who are dissatisfied with firm response	Require written response from firm, can review documents, can interview parties, can refer case to independent expert	Most resolved through negotiation, conciliation or mediation – but can generally make a binding decision	Can generally order compensation be paid, change of a decision or restitution of a previous position

Possible evaluation criteria

Another way to approach the design of an Ombuds function is by way of assessment against a set of standards, with the assumption that where there are gaps – the system can be strengthened. Of course, there are as many ways to define the criteria or measures that an ombudsman function should be held to as there are different models of ombudsman. There are many versions that we are aware of – including:

- The International Standards Organisation (ISO) standards 10002 (complaints handling in organisations) and 10003 (dispute resolution external to organisations)
- International Ombudsman Association Standards of Practice
- United States Ombudsman Association Governmental Ombudsman Standards
- Benchmarks for Industry-based External Dispute Resolution Schemes (Australia)
- African Ombudsman and Mediators Association - OR Tambo Minimum Standards for Effective Ombudsman Institution and Cooperation
- The first ICANN Ombudsman, Frank Fowlie identified 54 detailed criteria that he considered to be applicable in the ICANN context (see below).

To generalise once again, most of the standards that we are familiar with, including the latter, address in different degrees of detail, the following key dimensions:

1. **Accessibility** – *people are aware of the Ombuds, its role and capabilities and they can readily access the service at low or no cost*
2. **Independence** – *the Ombuds is impartial and independent of inappropriate influence*
3. **Fairness** – *the Ombuds are fair in their process – including confidentiality, giving each party reasonable chance to put their position including providing enough assistance to allow a complainant to do so, providing natural justice to both parties*
4. **Timeliness** – *Ombuds processes are responsive and provide timely outcomes*
5. **Efficiency** – *the effort required by parties are kept to a practical minimum and that the costs are kept reasonable*
6. **Transparency** – *within the constraints of confidentiality, the Ombuds report on the issues, providing guidance to others and for the future,*
7. **Accountability** – *the Ombuds function is effectively held accountable for delivering on these standards*

This is not an exhaustive catalogue of the dimensions of the various Ombuds standards, however for our purposes, this brief list captures the essential themes and we will use it for discussion purposes.

The first Ombudsman's summary of Evaluation Criteria and Standards applicable to the ICANN Ombuds function

- 1 Alignment
- 2 Autonomy – arm's length – Independence
- 3 Due process – Natural Justice Principles applied
- 4 Sufficient resources
- 5 Access to Information, documents, staff
- 6 Community buy-in
- 7 Clear mandate
- 8 Recourse – moral suasion – public criticism
- 9 Accessibility (promotion – availability to the community)
- 10 Power of own motion
- 11 Annual report
- 12 Established terms of reference (TOR)
- 13 Qualified – knowledgeable incumbent
- 14 Advisory group
- 15 Active public relations campaign – community education
- 16 Structural autonomy and accountability ✓
- 17 Filing system
- 18 Database
- 19 Balanced time management
- 20 Reporting relationship with advisory and budget group

- 21 Review of start up policy – TOR
- 22 Independence
- 23 Impartiality and fairness
- 24 Credibility of the review process
- 25 Confidentiality
- 26 Independence established by higher jurisdiction
- 27 Independence – Separate from the organisation it reviews
- 28 Independence – Appointed by super majority
- 29 Independence – Long fixed term – reappointment possible
- 30 Independence – For cause removal by supermajority
- 31 Independence – High fixed salary
- 32 Independence – Appropriate budget – accountability of spending
- 33 Independence – Sole authority to hire staff
- 34 Independence – Someone can always exercise the ombudsman role
- 35 Independence – Decisions not reviewable
- 36 Impartiality and fairness – Qualifications
- 37 Impartiality and fairness – Supermajority to hire or remove
- 38 Impartiality and fairness – No conflict of interest in activities
- 39 Impartiality and fairness – Direct access to

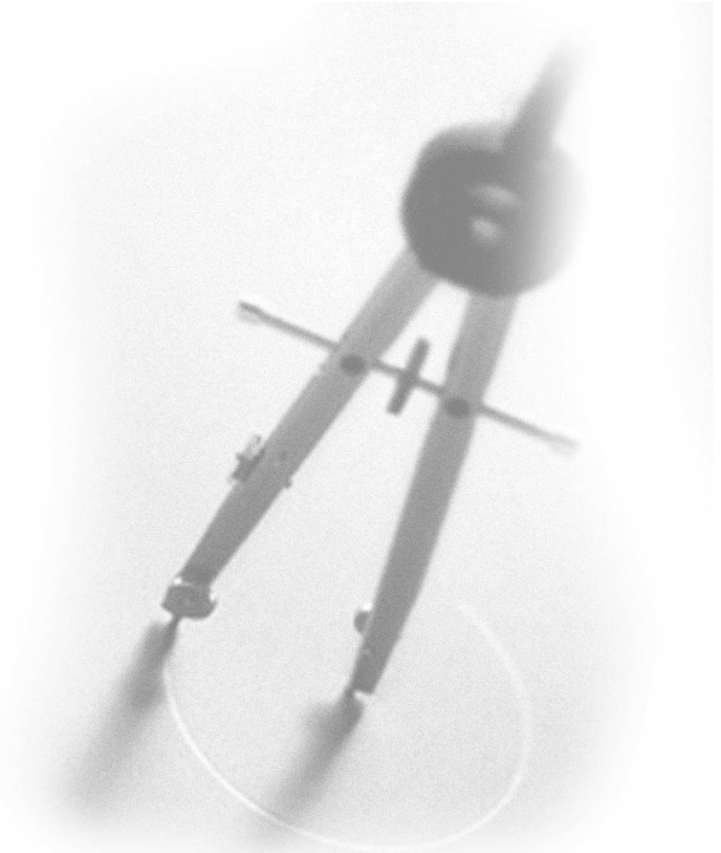
- ombuds no fee required
- 40 Impartiality and fairness – Power of recommendations and public criticism
- 41 Impartiality and fairness – Required to consult on adverse findings
- 42 Impartiality and fairness – Ombuds is an advocate for fairness, not the parties
- 43 Credible review – Broad jurisdiction
- 44 Credible review – No parties exempt from complaining
- 45 Credible review – Organisation not permitted to impede
- 46 Credible review – Grounds for review are broad, and focus on fairness
- 47 Credible review – Reports problems and recommendations, has ability to publish
- 48 Credible review – Findings not reviewable
- 49 Credible review – Ombuds cannot make binding orders
- 50 Confidentiality – Ombudsman has power to decide level of information to be disclosed
- 51 Confidentiality – Ombudsman will resist testifying
- 52 Broad range of enquiry available
- 53 Discretionary power to refuse complaints and to publicize
- 54 Identify complaint patterns and trends

Brief assessment

Suggested Ombuds Effectiveness Criteria	Brief CRK assessment
1. Accessibility – people are aware of the Ombuds’ existence and role and capabilities, with ready access to the service at low or no cost	Sound awareness of its existence, however less so as to its standing, role, capability, webpage and in-person presence at conferences.
2. Independence – the Ombuds is impartial and independent of inappropriate influence	Sound. Structure and Bylaws are supportive, however some perceive Ombuds not fully free to act – this is deduced (rightly or wrongly) from eg. limited number of Ombuds reports, a perception that the Board not always responsive where Ombuds report is issued, Ombudsman’s at risk pay and limited period of tenure/ re-appointment vulnerability.
3. Fairness – Ombuds are fair in their process – including confidentiality, giving parties a chance to put their position including providing assistance if needed, providing natural justice to both parties	Sound approach and processes, however expectations not managed well. Scope of complaints within jurisdiction narrowed from by-laws. Complainants often disappointed that process and possible outcomes/remedies not what they expected – seen as ‘unfair’.
4. Timeliness – that Ombuds processes are responsive and provide timely outcomes	Good turnaround for most complaints – however some matters where insufficient clarity to the complainant as to the status or where the Ombuds cannot assist.
5. Efficiency – that the effort required by parties are kept to a practical minimum and that the costs are kept reasonable	Strong - No cost to parties, information provision not onerous, informal processes are low effort for parties (although some interviewees were not sure that the value to the community warrants cost).
6. Transparency – within the constraints of confidentiality, that the Ombuds report on the issues, providing guidance to others and for the future,	Somewhat limited – Statistics no longer publicly reported (last website published report is for the year ending 30 June 2014). Confidentiality cited as reason not to report more fully on nature of complaints (most recent investigation report was published in March 2012). Only one own-motion report as to a systemic issue has been undertaken during the 12 year period of the Office. No response apparent.
7. Accountability – that the Ombuds function is effectively held accountable for delivering on these standards	Limited – Users not currently providing regular feedback. Reporting to Board/ Committees is regular but not as analytical as we have seen. Lack of ombuds knowledge in oversight Board committees (Governance and Compensation Committees) limits ability to set KPIs and evaluate. Absence of wise counsel and meaningful oversight means Ombuds effort can seem to follow personal interests, preferences or skills of occupant of Office.

DRAFT

Imperatives for change - discussion



In considering this Review, we have taken into account the unique nature of the ICANN environment, the experience of the first ten years or so of the ICANN Office, interviews of ICANN community members, staff and the current and immediately preceding occupant of the Office, survey feedback from ICANN community members (including more than 20 community members who have used the Office), a review of the Bylaws, Ombuds Framework and other relevant documents including Ombudsmen reports and correspondence pertaining to 10 recent complaints, a review of some of the literature, an analysis of how the ICANN Ombuds fits in to established models, an analysis of evaluation frameworks and our own assessment of the effectiveness against a simplified evaluation criteria.

Our conclusions are that:

1. The presence of the Office of the Ombudsman adds value to the ICANN environment and is seen as important by the majority of stakeholders we received input from.
2. The current complaints handling 'reach' or scope of the Office is broadly sensible for the environment but is not well understood in the community.
3. The current Ombuds function has both 'internal' and 'executive' or 'industry' roles and is multi-faceted (different complaint populations, techniques, powers) but this is also not clear to the community.
4. There are differing expectations in the community of what an Ombuds function can do – some seeing the Office as doing what it is supposed to do and others seeing the current operation as quite ineffectual.
5. The operation and philosophy of the current operation is weighted to the characteristics of an internal ombuds function (informality, minimum process, looking for low key resolution of matters) however many of its stakeholders view it as more like an executive or industry ombudsman with attendant expectations of greater independence, formality, predictable process, remediation powers and transparency.
6. There is an expressed expectation from some that the Ombuds function should have 'powers' and should be able to 'fix stuff' – while others do not see this as part of their role.
7. There is desire to utilise the independence and fairness-remit of the Office outside of traditional complaints handling to assure the integrity of related processes – but recognition that this limits the ability of the Office to conciliate subsequent disputes should they arise.
8. In the sections below, we discuss some of the design tensions that apply in the ICANN environment.

Limitations of Ombuds functions

We often hear the view expressed that an Ombuds function should be able to 'fix' an unfair decision. We understand the frustration, however there are practical limits to any Ombuds function having the powers to revisit an organisation's decisions.

Frequently, the decisions being made are highly technical (legal or otherwise) and unless the Ombudsman has deep expertise in that area of technicality, their capacity to become the replacement decision-maker is limited.

In other cases, the original decision is required to be made by a democratically elected body and an unelected Ombuds, no matter the grounds cannot credibly set aside such a decision.

Often an Ombuds role is designed to be more about identifying opportunities for improved practices – to avoid future problems – than changing past situations. But some executive-style Ombuds also facilitate a decision-maker's re-examination of a past situation or an apology, explanation, customer service goodwill 'gesture' or (as in the case of a Bank Ombudsman) the awarding of compensation.

At one level, ICANN's environment is no different to any other ombuds environment. People want a visible, accessible, independent Ombuds with standing, with a clear role, who has fair processes and one who can 'fix' things.

It is this last dimension that has the greatest impact over time in our experience on the perceived effectiveness of an Ombuds. As one of our respondents put it ". . . otherwise, what is the point?" If an Ombudsman cannot fix things, then they will lose standing, will be seen to be professional apologists whose sole role is to placate

complainants. People will stop using them. People will say bad things about them. Good people will not want to do the job.

For members of this community, part of the challenge is to recognise that there are a number of limitations to what an Ombuds can reasonably be expected to be able to 'fix' in the ICANN environment.

We do not think that it would be appropriate for the Ombudsman to be making replacement technical decisions themselves – even if they could identify some unfairness. The credibility of technical decisions relies heavily on the credentials of those making them. The Ombuds may sensibly be able to require a technical body to revisit the decision or the policy or process.

Equally, we do not think that compensation powers are generally appropriate in the ICANN complaints landscape. We think that loss would be very difficult to establish and measure. There are already established processes for some matters that can be utilised as an alternative to court proceedings. We are also aware that some disputes involving commercial players could involve very large sums of money – inappropriate for a single decision-maker.

We also think that some of the disputes between groups or individuals, while lending themselves to alternative dispute resolution, are unlikely to be satisfactorily resolved by an ombuds "finding" for one party or the other.

We can see greater value possible from the Ombuds Office contributing more to systemic improvement based on their learnings from individual matters.

Design considerations for new functions

There is an attraction to utilising the Office of the Ombudsman for integrity-related processes. This could either be as a 'stamp of approval' (eg. this process or policy has been approved as sound by the Ombudsman) or as a 'gatekeeper' who checks, and so provides assurance about, the appropriate application of a process to an individual matter.

However, there are significant tensions that need to be taken into account.

1. Much of an ombuds function's value is derived from its perceived independence and its ability to take a 'fresh, uninvolved second look' at a matter (or policy or process). To the extent that the Ombudsman is involved in either the design of the process or the underlying operation of it – their ability to review is diminished.
2. 'Borrowing' the Ombudsman's perceived independence to lend credibility to another process is not without cost - inevitably, the 'borrowing' consumes some independence. The question for any organisation is what is the risk/benefit ratio?
3. It is difficult for an ombuds function to give a 'stamp of approval' to a process design. Risks include not fully understanding the proposed process through a lack of technical expertise, the difficulty of anticipating all possible scenarios of unfairness in advance, of being drawn into unreasonable timelines and a rushed judgement or being expected to be 'part of the 'team'.
3. If the ombuds is asked to be a part of the implementation of a process (eg. by vetting applications or decision-maker

responses), it becomes even clearer that the Ombuds cannot credibly provide an avenue of review.

4. In either case, there is also a generalised risk of close involvement with management or governance decision-making. An ombuds independence is in part a function of its structure and in part of its 'separation' from the day-to-day decision-making of the organisation. The closer it is perceived to be, the more its perceived independence will be diminished.

In general, we accept that it is for the organisation to decide about this type of involvement, however we do urge organisations to be clear about what the benefits and risks are. We also encourage organisations to avoid ad-hoc decision-making about the 'current idea' but to establish some principles to guide this and future decisions.

There are also ways in which some of these risks can be mitigated with careful design of the Ombudsman's involvement.

For instance, rather than being asked to 'endorse' a new policy, an Ombudsman can be asked to provide a risk-assessment – eg. what are the parts of this new policy or process that may give rise to concerns of unfairness and what are the ways in which that risk could be mitigated. The responsibility remains with management or the group implementing, however the Ombudsman's valuable input is accessed without implying a 'guarantee'.

Similarly, instead of being placed in an operational vetting role, the Ombuds can have input to the design of the process or the guidelines that will be used by others or could be asked to periodically review a sample of matters for fairness.

Ombuds Office structural issues

We have described the ICANN ombudsman function as a combination of internal and external in configuration. This is part of the reason that there are varied expectations amongst stakeholders.

To take independence as an example, in an internal ombuds environment, having an ombuds reporting to the Board or CEO is as independent as things get. Having specific, articulated powers is not essential as having the ear of the CEO or Board provides all the power that may be needed. Documented processes are less important because the idea is that the Ombuds can 'stroll the corridors of power' and use relationships and suasion to achieve results.

For an external ombudsman, the emphasis is different. For a complainant from 'outside', the access to the CEO or Board is not necessarily seen as 'independent' – in fact can be seen as the opposite. For credibility, external ombuds functions often need quite separate legal and governance structures. For example,

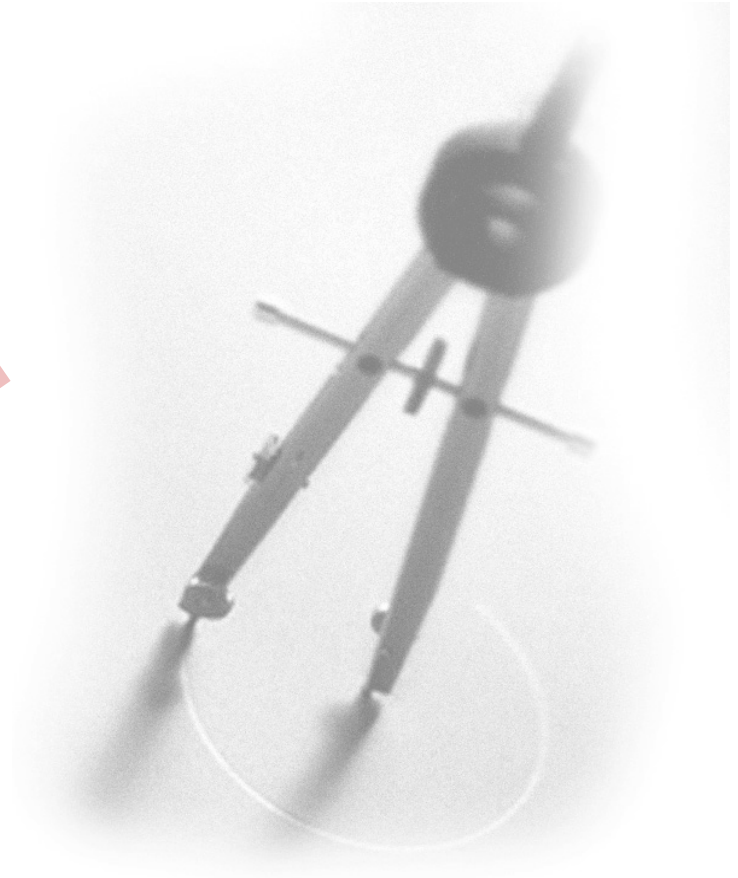
'industry' ombuds will often have an independent Board of governors, often made up of equal number of industry directors and consumer directors, with an independent Chair. Their strategy, business planning and funding may be set by that Board and they will be accountable to that Board.

To be credible as 'external', they must be seen to be able to 'fix things'. If they have powers to fix anything – these must be carefully documented and constrained. Similarly, their processes must withstand scrutiny and challenge, be predictable.

It is clear that these 'standard' definitions do not necessarily readily map to the ICANN environment. While some see the Ombudsman as 'internal to the community' – it is clear that many members of the community see the 'inner circle' – governors, members of high level bodies, etc - as 'them' not 'us'. Clearly, it is difficult for the ICANN ombuds function to meet these differing sets of expectations.

DRAFT

Recommendations



It is our view that the current ICANN Ombuds function is for the most part sound and has been contributing to a level of confidence in the overall fairness of ICANN processes. We do not see radical change as needed, however this is a complicated environment and a multi-faceted approach to the Ombuds role will be needed to meet the range of expectations.

We have segmented the opportunities for improvement under the following headings. Each set of recommendations are set out in detail in sections to follow. A summary of the Recommendations v. the suggested Criteria and our Assessment overleaf.

1. Clarify role and processes – manage expectations

ICANN's Ombuds function is multi-faceted. To achieve clarity it needs both an overall 'umbrella' conception of its role (as 'keeper of fairness') and a set of practical distinctions as to how it will deal with complaints (and when it won't) from the main three groupings of potential matters: Governance; Community and Corporation

2. Standing and authority

The standing of the Office needs to be strengthened. Some of this will come from other areas of recommendation – eg. greater clarity and definition of its role, stronger perceived independence, greater transparency. Recommended rule-changes (below) will assist. Standing is also a product of sustained effort by many to support the Office and keep the Ombuds function in the consciousness of the community.

While we did not see a current case for the Ombuds to have

decision-making powers, we did think that it should be clearer that their reports and recommendations must be responded to (not necessarily complied with). We suggest amendments to the Bylaws to oblige timely responses.

Although not essential, we also think that there would be advantages if the Ombudsman is a trained mediator (as was the second Ombudsman).

3. Strengthen independence

There is a clear need to strengthen the perception of the Ombuds function's independence. We have suggested the addition of an Ombuds advisory panel – independent of the Board - to take some of the oversight work currently done by the Governance Committee and to add a system of guidance and support for the Ombuds. We have also suggested some detail change to the Ombuds employment.

4. Strengthen transparency

As part of recognising community expectations, we have recommended a refreshed focus on reporting and transparency and a greater emphasis from the Office on public reporting.

5. Policy for non-dispute roles

In dealing with proposals for the Ombuds taking on other 'honest-broker' roles, we have suggested that ICANN should avoid responding in an ad-hoc way and develop a set of principles or a policy to set out the basis for any such roles.

Recommendations c/w Criteria and assessment

Key Ombuds Effectiveness Criteria	Current CRK assessment	Recommendations
1. Accessibility – that people are aware of the Ombuds and they can readily access the service at low or no cost	Sound awareness of its existence, however less so as to its standing, role, capability	Re-launch of revised Ombuds function - with refreshed website, graphics for complaint paths, what to expect, more information about complaints that are outside jurisdiction and where these can be directed.
2. Independence – that the Ombuds is impartial and independent of inappropriate influence	Sound. Structure and Bylaws are supportive, however some perceive Ombuds not fully free to act	Establish Ombuds Advisory Panel – elder statesmen, experienced (former) ombudsman – manage performance oversight. Lead evaluation of function every 3 years. Remove performance pay. Term 5 + 3 year optional – capped.
3. Fairness – that the Ombuds are fair in their process – including confidentiality, giving each party reasonable chance to put their position including providing enough assistance to allow a complainant to do so, providing natural justice to both parties	Sound approach and processes, however expectations not managed well. Complainants often disappointed that process and possible outcomes/remedies not what they expected.	Define 3+ complaints paths. Publish procedures, rights of parties. Change of Bylaws to oblige ICANN body to respond to an Ombudsman written report within specified timeframe. Communications material refreshed and upgraded to enhance focus on systemic improvement.
4. Timeliness – that Ombuds processes are responsive and provide timely outcomes	Good turnaround for most complaints – however some matters where insufficient clarity to the complainant as to the status/ where the Ombuds cannot assist.	Establish timeliness KPIs eg. for providing initial written response to complaint (outside jurisdiction/ outlining intended action, for resolution of complaint etc), usual resolution timeframe for different types of complaints.
5. Efficiency – that the effort required by parties are kept to a practical minimum and that the costs are kept reasonable	Strong - No cost to parties, information provision not onerous, informal processes are low effort for parties. Some questioning of Office of the Ombudsman value proposition.	When recruiting new Ombudsmen, mediation training should be regarded as preferable. Value proposition to come from better reporting. More own-motion enquiries. Enable Ombuds risk assessments.
6. Transparency – within the constraints of confidentiality, that the Ombuds report on the issues, providing guidance to others and for the future,	Limited – Statistics no longer publicly reported. Confidentiality cited as reason not to report more fully on nature of complaints. Only one own-motion report as to a systemic issue has been undertaken during the 10 year period of the Office.	Oblige Complaints Officer to share complaints data with Ombuds. Ombuds to be more proactive in own motion investigating. Reporting to be more fulsome, more robust, more frequent.
7. Accountability – that the Ombuds function is effectively held accountable for delivering on these standards	Limited - Users of Office not currently asked to complete feedback forms. Reporting to Board/ Board Committees is regular but not highly analytical). Lack of Ombuds expertise by oversight Board committees.	Written feedback forms to be provided to users of Office and results collated and analysed in Ombudsman Annual Reports. Ombuds Advisory Panel, establishment of KPIs for Office, more structured evaluation of Office.

1. Clarity of roles and processes

We have observed and discussed a number of ways in which the ICANN community have different conceptions of the Ombuds role. Better understanding of what the roles are is the clear first step to managing expectations.

ICANN's Ombuds function is multi-faceted. What it can sensibly do with one type of complaint from one part of the ICANN world – will not necessarily apply in another. It will not be straightforward to achieve that clarity of understanding.

We think it needs both an overall 'umbrella' conception of its role (as in the By-laws) and a set of practical distinctions as to how it will deal (and when it won't) with different sources and types of complaints within the ICANN ecosystem (within the Framework).

The current purpose (in the Bylaws) of problem-solver, while essential, can be built upon to give the Ombuds function a more strategic focus. We think it should be seen as the independent 'keeper of fairness' – with a greater emphasis on continuous improvement of the fairness of ICANN processes and decision-making. The aim is to make it clearer that the Office has a role to identify systemic improvements that arise out of individual matters it is involved in.

Further to this dimension of the proposed role, with safeguards, we think that the Office can be called upon to have input to policy, system and process design when appropriate – not by giving a stamp of approval, but by providing a fairness risk assessment.

On the other hand we do not generally support the Ombudsman being drawn into operational roles as part of other complaints or review processes. This will only serve to limit her or his ability to review any related matters (see discussion at Page 30).

As a companion to this high level role definition, we think that the Ombuds function should set out its approach to different types or groups of complaints at a very practical level. We have suggested three groupings of complaints (the groupings should be tested and validated by the Ombudsman and key ICANN people):

- a) Governance
- b) Community
- c) Corporation

The idea is illustrated in the diagram below. The intention is that for each grouping, the Ombuds website sets out how those complaints will be dealt with including the specific jurisdiction carve outs, the preferred techniques and processes and possible outcomes. Clearer processes and procedures would also we think help address an issue that emerged during our surveying – that several respondents did not know what had happened to their complaint, whether it was still on foot or not.

If in-principle agreement – put draft Recommendations here.

Suggested ICANN Ombudsman purpose

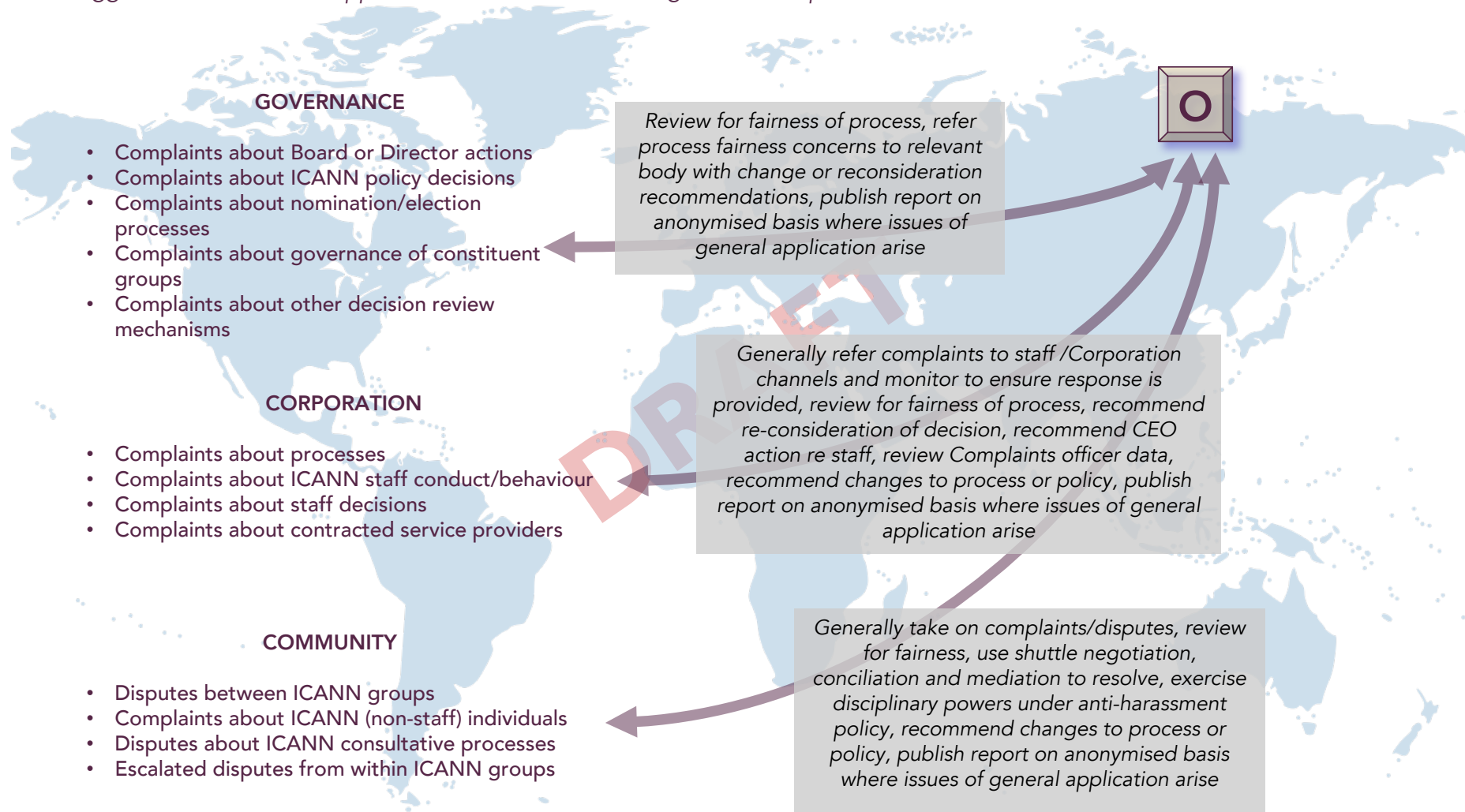


The purpose of the ICANN Ombudsman function is to ensure that ICANN rules, policies, processes, systems, governance and behaviours are fair and and seen to be fair through:

- Reviewing individual matters that are brought as a complaint – and making recommendations for reconsideration or changed decisions as appropriate.
- Arranging or personally conducting conciliation and mediation of disputes
- Reviewing processes, policies and systems for fairness
- Ensuring that complaint-handling by others within the ICANN environment is fair
- Publishing reports that cast light on fairness issues with the broader ICANN community
- Contributing to continuous improvement within the ICANN environment through input to design of policy, processes and systems

Proposed ICANN Ombudsman role

The proposed Ombudsman role needs to be tailored to the nature of the complaint. We set out here our suggestions for the usual approach for the 3 different categories of complaints we have identified.



2. Standing and authority

A number of the comments we received at interview and from the questionnaires indicated a sense from observers that the Office of the Ombudsman did not have sufficient 'standing' within ICANN.

This is a vexed but not unusual issue for ombudsman functions all over the world. It is also somewhat amorphous – in large part a function of the stakeholders' perception of many subtle signals – eg. how the Ombudsman is treated, the way they speak at forums, how their reports are framed and the language used, how the senior executives and the Board speak about them, how the permanent selections are carried out and how stories circulate about what the Ombudsman has 'fixed'.

It will take concerted effort from many players to adopt and promulgate a new ombudsman 'model'.

We believe that there is support from the community for an Ombudsman function that is more forthright, more obviously active and pro-active, more willing to make reports and clear recommendations. We do however, recognise that this Ombudsman function will not be a 'wielder of power' – rather a wielder of influence – as the By-laws state – "an advocate for fairness".

For community disputes that involve harassment, the new Anti-Harassment Policy and Terms of Participation gives the Ombudsman disciplinary powers. This will enhance the Ombudsman's ability to satisfactorily resolve a complaint where a community member has suffered from inappropriate conduct.

We have not advocated for enforcement-type powers for other community complaints or governance complaints, however we do think it would be sensible for the By-laws to leave open the

possibility of enabling selective Ombudsman decision powers in the future – such as the one above for matters of harassment.

As discussed earlier, we see the Ombudsman as a "wielder of influence' rather than 'wielder of power'. The Office of the Ombudsman would, however, be a more effective "wielder of influence' if the Bylaws were amended to provide that, where the Ombudsman issues a written report recommending process change, a response to that report must be provided by the relevant part of ICANN (whether this is the Board, the corporation or a community body or group).

We would suggest that the Bylaws should specify that response is required within 90 days (or 120 days with reason). Of course the responding body should not be obliged to accept the recommendation - but must provide reasons for their position. The Ombudsman's report and the response to it should be published on ICANN's website, unless there is sound reason in the Ombudsman's view to not do so.

Finally to the issue of skills: it seems to us that investigation and conciliation skills are the core skill sets for the Ombudsman. Whilst legal skills may enhance an Ombudsman's confidence in dealing with such matters as Reconsideration Requests and in writing investigation and own motion reports, there is equally a risk that legal training could encourage an overly formal approach.

On the other hand, formal mediation training would, we think, be an advantage. We think that this training could assist an Ombudsman to lead the parties to a resolution (and could only assist the public standing of the Ombudsman).

3. Independence

The Ombudsman currently reports to the Board through the Governance Committee and has her or his remuneration set by the Board's Compensation Committee. These Committees are not expert in the dispute resolution space and (it seems to us) have struggled to devise a meaningful framework of accountability and performance oversight.

Nor are these Committees well placed to operate as a sounding board, encouraging the Ombudsman or providing advice on how to take on difficult issues. From our consultations, it is clear that this reporting structure can encourage an assumption that the Board and the Committees are more interested in defending the organisation than supporting an Ombuds challenge to it.

We think that this reporting structure also paves the way for subtle differences of emphasis in how any particular Ombudsman goes about their business - something that was remarked upon in our survey. That difference might reflect their personal philosophy, their personal skillset and preferences and also their relationship with the CEO or Board which may impact their sense of how far they would be 'allowed' to go.

These are perfectly understandable biases of an individual, however they can make quite a difference to the way the function is seen and the extent to which members of the community have confidence in it.

One of the intended impacts of our recommendations is to create more of a public framework of expectations around the Ombuds function – so that personal preferences are seen to play less of a part in what gets done.

With this in mind, we suggest change to the reporting structure.

We suggest that an independent Ombuds Advisory Panel could be formed and populated with (say) 2 or 3 ICANN elder statespersons (possibly including a Board representative), together with one or two experienced current or former ombudsmen from other organisations. The aim would be to create a group capable of advising on priorities, guiding and influencing Ombuds behaviours, balancing personal biases, helping Ombudsman ensure that right balance is struck, overseeing evaluation of performance, assisting with selection of successor Ombudsmen.

This panel need not be very expensive, generally meeting by teleconference, perhaps every two months or so. We think this initiative would be well received by those that are sceptical of the independence of the current arrangements and should act as an enormously helpful resource for the Ombuds. We also think that the Ombuds at risk performance pay is a risk to apparent independence, however would be much less so if in the hands of the Panel.

(We understand that the Board is considering its oversight of accountability mechanisms more generally and is beginning consultation with the ICANN community about the establishment of a new Board Accountability Mechanisms Committee. Our proposal for a panel to oversight the Office of the Ombudsman would need to be considered in context of that initiative.)

Lastly, we think that independence could be strengthened by a stronger commitment to a fixed term for Ombudsman contracts. We suggest a 5 year term with a 12 month probation period administered by the Ombuds Advisory Panel plus one possible extension that is capped at 2 years.

4. Transparency

We think that the Office of the Ombudsman should provide more transparency as to its operations as a way of enhancing understanding and building confidence in its remit. Whilst generalised information via the Ombudsman blog helps with general awareness, where there is specific information about the approach to a particular complaint or category of complaint, we find that this builds a more detailed understanding of the Ombuds function – and its limits.

In the early years of the Office, there were generally 2 or 3 anonymised investigation reports published on the website per year. We think that the Office should try and identify at least this number for publication each year. Other complaints resolved through conciliation (ie. without an investigation report) could also be used as the basis of an anonymised case study that is published on the website – this is a tool commonly used by other Ombuds functions to enhance understanding of the Office's approach to commonly occurring complaints and the type of outcome likely to be achieved.

In making these suggestions, we recognise that even anonymised publication can sometimes infringe confidentiality and that confidentiality must be inviolate. However a strong focus on 'quietly' resolving problems is limiting the extent to which the Office has profile, standing and can shine a light on issues.

Transparency is also enhanced by the collation of survey feedback from users of the Office and the collation, analysis and public reporting of this data in Annual Reports. Regular surveying would also enhance the Office's understanding of community expectations and perceptions and so position the Office to respond to these.

Lastly, we note Annual Reports used to be published on the Ombudsman's webpage but this has not occurred since 2014. We understand that one is planned for July this year, which is important we think.

By way of comparison, external Ombudsman functions typically prepare and publish on their website detailed Annual Reports with statistical and narrative analysis of users of the Office, types of complaints, referrals of out-of-jurisdiction complaints, outcomes for in-jurisdiction complaints, mode of resolution, timeframes, trends, systemic issues, outreach activity, survey feedback etc.

We think that the Office should research other Ombuds function reports with a view to adopting a more detailed, analytical report in the interests of enhanced transparency.

5. Other functions

In our discussion of this topic, we concluded that some caution is needed in assigning non-complaints functions to the Ombuds – for reasons of maintaining the ability to independently review a matter for a complainant, for the risk that the Ombuds comes to be seen as part of the corporations’ line of control (a staff function) and for the general perception of the Ombuds independence and integrity.

That said, we understand that the Ombuds is seen as an honest broker and a valuable part of the ICANN community and we can see why ideas for involving the Ombuds Office would arise. We can also imagine that there may be functions which, on balance would benefit from the Ombuds involvement.

At this stage, based on the examples we have been alerted to, we see three possible avenues for Ombuds involvement – either transactional (where particular types of matters pass through the Ombuds office), particular responsibility for implementation/monitoring of a ‘fairness’ policy or in design (where the Ombuds is asked to ‘approve’ a new or revised policy or process for fairness.

It is difficult for outsiders to weigh up the potential cost or risk to benefit of involving the Ombuds. Equally, it is difficult to anticipate every future circumstance in which this might become an issue.

To avoid ad-hoc consideration of these issues and the risk of inconsistency, we recommend that ICANN develop a brief policy covering the Ombuds potential involvement in these non-complaint parts of ICANN life. This could become part of a revised Ombuds Framework or sit independently.

We think that that the policy presumption should be in the negative – ie. that the Ombuds not take on non-complaints roles

unless certain tests are met. This is more likely to ensure that the cost/benefit assessment will be properly addressed.

For transactional ‘fairness testing’ the policy should address:

1. Value-add – eg:

- Whether the Ombuds is likely to have sufficient content expertise to understand and evaluate transactions;
- If the Ombuds is uniquely placed to add genuine value by way of comment.

2. Reporting – eg:

- Whether the proposed function reports to Corporation management and there is a risk that the role will be seen as answerable to and part of management;
- If the proposed function reports to the Board or Committee, whether that will be seen as sufficiently independent.

3. Reviewable – eg:

- Whether it is likely that the Ombuds would be expected to review a matter that he or she had been involved in originally;
- Whether that involvement would be a substantive and/or perceived conflict of interest.

5. Other functions

For implementation/monitoring of a 'fairness' policy, the following tests should be added to the above:

4. If the function is primarily a management responsibility, whether there is sufficient separation of the Ombudsman's role
5. Where the Ombuds is being asked to monitor implementation, is there sufficient discretion for the Ombuds to prioritise their own work program – ie. this should not become like an 'internal audit' function that adds routine workload to the Office

For Ombuds involvement with design of new or revised policy or process, we think that there should be an avoidance of any impression of a 'seal of approval'. Input should take the form of a 'fairness risk assessment'. Also:

6. The Ombuds input is not seen as a 'short-cut' or substituting for full stakeholder consultation
7. The Ombuds ability to review matters that have been through the process or where the policy applies will not be compromised

EXAMPLE

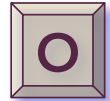
We think it would be appropriate for the Ombuds to have input to the design of the proposed new DIDP and to provide information or refer people to it, but not to be expected to replace management's responsibility to implement, promote and routinely report on it. The Office could conduct an 'own-motion' review of the operation of the function after a time, but this should be at its own discretion taking into account its other priorities.

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Attachment A - Ombuds 'logic model'

The first Ombudsman proposed a logic model for the ICANN Ombudsman function – the table shows our recommendations tested against that model.

Ombuds objective	To ensure that ICANN rules, policies, processes, systems, governance and behaviours are fair and and seen to be fair.
Key functions	<ul style="list-style-type: none"> • Review individual complaints or disputes and where appropriate investigate to gain deeper understanding of facts • For out-of-jurisdiction complaints, advise complainant if another person or body who can assist with complaint • Use ADR techniques to resolve complaints or disputes • Review for fairness and recommend improvements to processes • Exercise specific responsibilities re Reconsideration Requests and allegations of harassment • Provide transparency through active reporting • Provide ad-hoc advice on fairness matters to the community
Supporting Activities	<ul style="list-style-type: none"> • Improve awareness of complaints avenues • Improve understanding of principles of fairness and their application • Contribute to ICANN debate and discussion in areas of expertise
Outputs	<ul style="list-style-type: none"> • Information resources including website • Documentation of complaints pathways and processes • Complaints forms, templates etc. • Written responses to complaints • Published reports on individual matters and systemic issues • Annual reports • Information for periodic evaluation
Immediate outcomes	<ul style="list-style-type: none"> • Point of contact for advice and making complaints • Referral point for out-of-jurisdiction complaints • Substantive response for in-jurisdiction complaints
Intermediate outcomes	<ul style="list-style-type: none"> • Improved understanding of principles of fairness in ICANN context • Strengthened fairness of processes and behaviours • ICANN community and corporation held to account for fairness
Final outcomes	<ul style="list-style-type: none"> • Community and stakeholder confidence in ICANN fairness • High levels of trust and strong relationships within Community

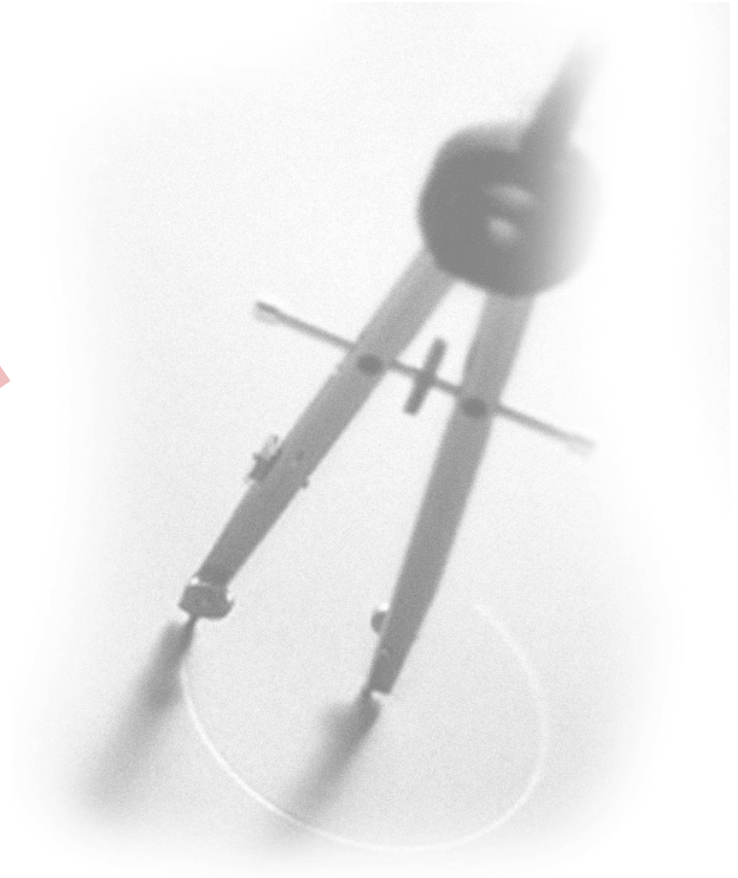


Survey results - May 2017

This collates the 84 community responses we received. The survey did not require a response to all questions, just to those that were relevant to the respondent. For each question, we have indicated the number of responses we received.

There were a number of opportunities to provide free text comments. Some comments were lengthy – we have extracted from the survey the essence of these. Not all comments have been included and some detail has been omitted – some were not relevant to the question, to preserve confidentiality or if the comment was personal to an incumbent Ombudsman rather than about the Office. We have also lightly edited some language issues in comments and, in a few cases, listed the comment under a different question where this made more sense.

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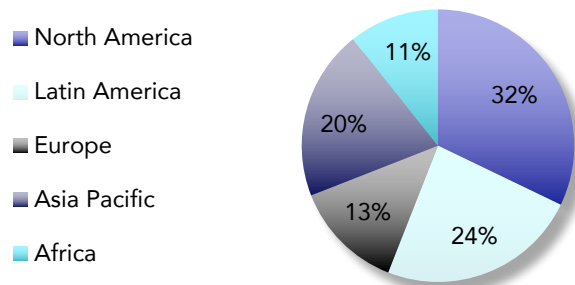


Q1. Demographics

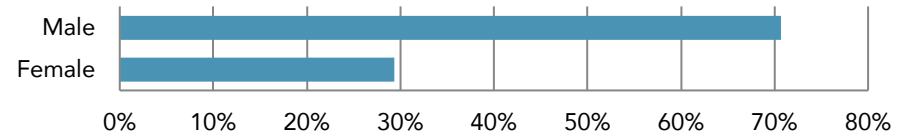
Q1b. What is your affiliation within the ICANN community? (n=84)

Affiliation	Number (sub-affiliation)
ASO	1
At large	20 (AFRALO (5), EURALO (1), LACRALO (12), NARALO (2))
Board director	1
Board member	1
ccNSO	4
GAC	1
GNSO	35 (BC (4), Contracted party (14), IPC (1), NCSG (5), NCUC (5), NPOC (1), NPOCC (1), no sub-affiliation given (4))
RSSAC	1
SSAC	1
None given	19

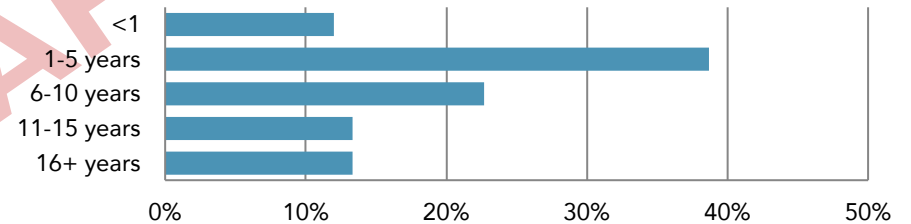
Q1c. Which ICANN region do you belong to? (n=84)



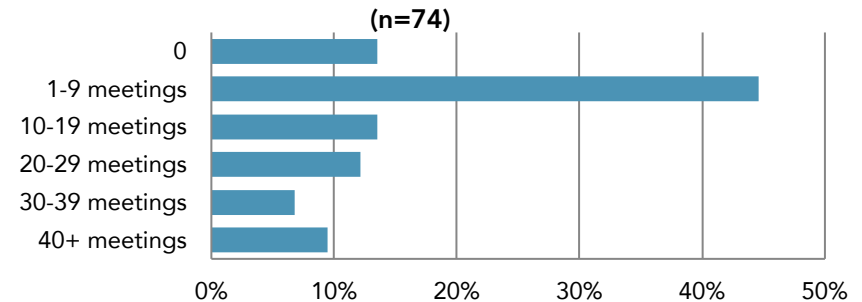
Q1d. What is your gender? (n=75)



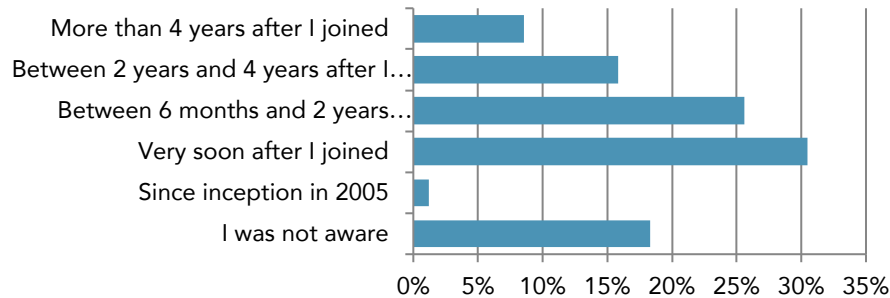
Q1e. How many years have you been an active member of the ICANN community? (n=74)



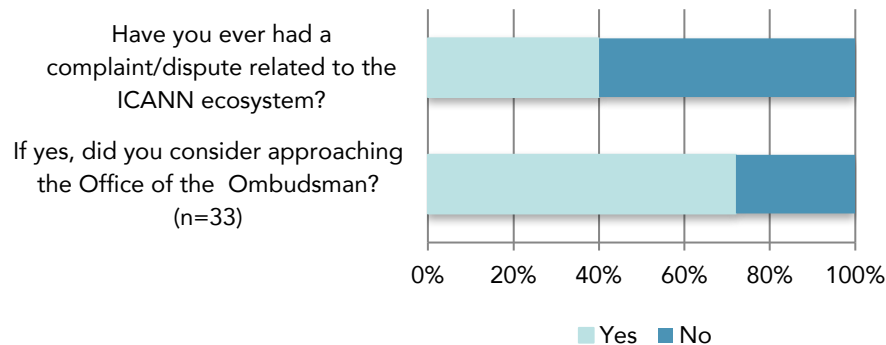
Q1f. How many ICANN meetings have you attended? (n=74)



Q2. When did you become aware of the Office of the Ombudsman as an avenue for dealing with disputes or complaints within the ICANN ecosystem? (n= 82)



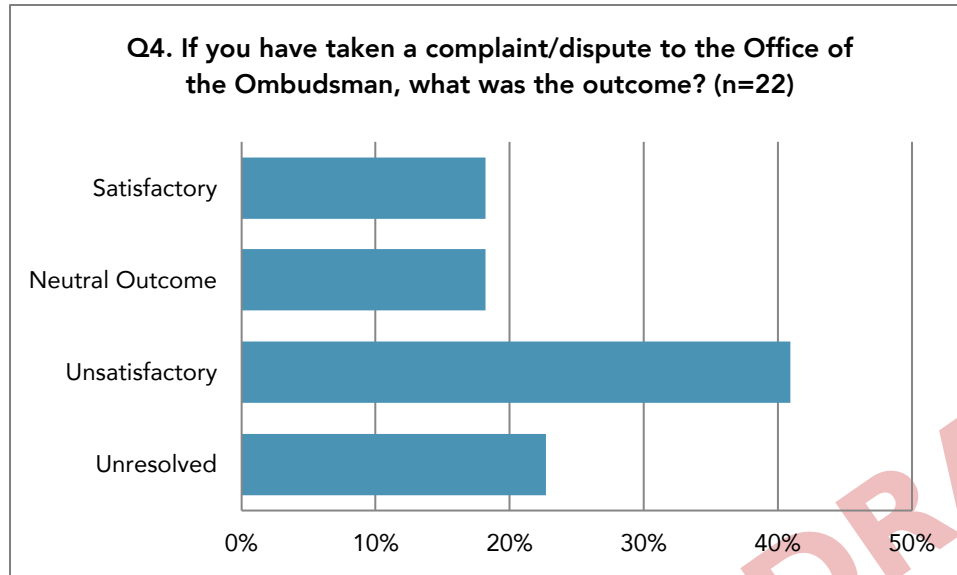
Q3. Have you had a complaint/dispute related to the ICANN ecosystem? (n=82)



If you had a complaint/dispute but did not approach the Office of the Ombudsman, why not?

- Dispute resolution policy and mechanisms at the time were adequate.
- Complaint was dealt with through participation in working groups.
- It did not exist at the time.
- I had also heard about how ineffectual the Ombudsman often was, without much real authority to produce change or take action.
- I am not sure if they dealt with my issues.
- Back then when I had the complaint/dispute; I had never fully understood the role/functions of the Office of the Ombudsman. That was why I did not approach them.
- It was solved internally within my constituency.
- It became clear that the Office either had no power or was encouraged not to wield it.
- We did not think that the Ombudsman would be able to help to resolve the problem.
- Felt that nothing would be done by him. He made no effort to know us or seem open to dialogue.
- I felt my constituency would not change their position regardless.
- I have a problem with information being gathered about me.
- There wasn't an Ombudsman at that point in time.

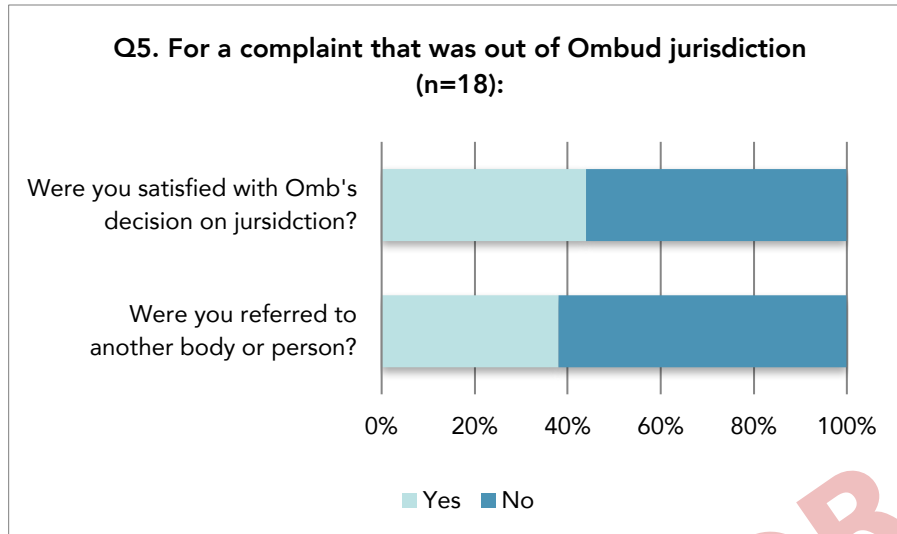
Q4. Outcomes



Comments

- The Ombudsman's office promptly dealt with and resolved the issues raised, as appropriate.
- The Ombudsman obtained an apology from the person I complained about.
- The outcome in my opinion was sensible and I agreed with the suggestion they made but the complainer did not.
- Very satisfactory.
- The outcome was an Ombudsman report delivered to the ICANN Board, that remained unheard and with no practical impact or consequence.
- No unfairness found, after no thorough investigation.
- To let things cool off, and then provide a new framework for looking at things.
- Neutral, the issue was unsatisfactorily engaged.
- A waste of time
- The Ombudsman suggested a response. It's not known to me whether there was engagement with the other Party. The issue remained so I looked for other ways to solve the issue.
- Adverse for me, but the better question is what was the process and where was it documented, if at all?
- Disappointment and frustration, as the Office acted, rather than as an Ombud, as an institutional means of placating complainants and protecting the ICANN Board, Staff, and corporation.
- Lots of talks, at the end an uneasy compromise that in fact did not solve the problem.
- The outcome not satisfactory. There was a breach of confidentiality with information provided to the Ombudsman.
- I got an insincere apology from the offending party.
- He sat on it.
- It is more than a year, and my complaint is still unresolved.
- In progress.
- Nothing.
- The Office agreed that it had jurisdiction but failed to act, simply pushing paper until we gave up.
- The whole community was involved looking for a solution, however the Ombudsman made a suggestion not a decision. The suggestion was a good one in my view, but generated further problems since those complaining did not accepted the proposal.
- The issue was under the purview of the Ombudsman but it just wasn't handled satisfactorily.

Q5. Complaints - out of Ombudsman jurisdiction

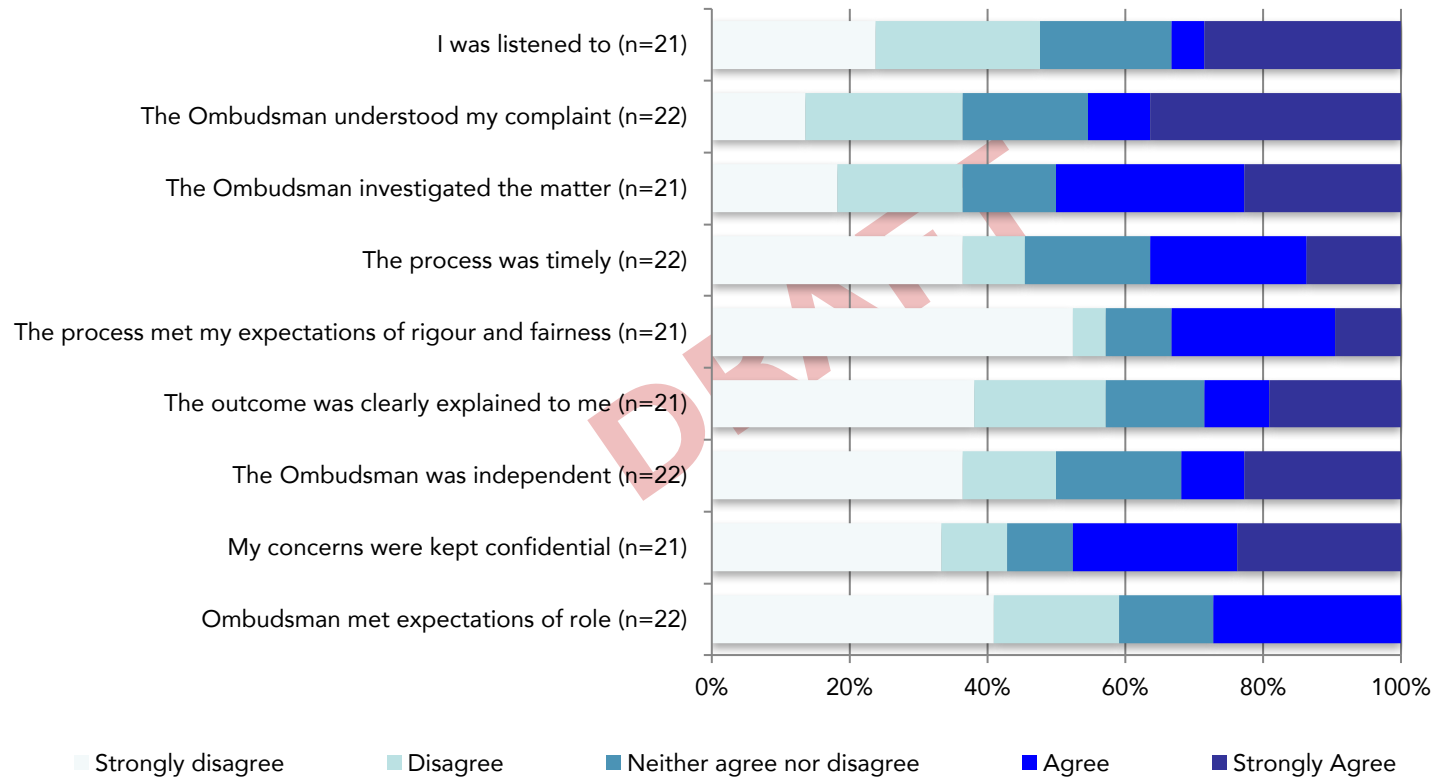


Comments:

- It was Ombudsman's jurisdiction but expected actions were not taken.
- I believe the office (or the person in charge) was neither impartial nor independent or was too timid to act against ICANN, the corporation.
- No, all the interventions or answers to our problems were vague and imprecise. The Ombudsman failed to help us and we continued exactly the same as before consulting them.
- There was no outcome and that was very annoying and frustrating. If someone takes the time to file a complaint, there should be an outcome.
- We had a violation of ICANN's Bylaws and the Ombudsman Office claimed it didn't have jurisdiction.
- We felt that every time the complaint was against ICANN and ICANN staff, the Ombudsman did everything to avoid getting involved and referred us to the very people we complained about.
- The Office failed to issue any decision at all.
- Useless. The Ombudsman said it didn't have jurisdiction to deal with a violation of ICANN Bylaws, so we had to go to an IRP at great expense for an independent panel to say that ICANN violated its Bylaws.

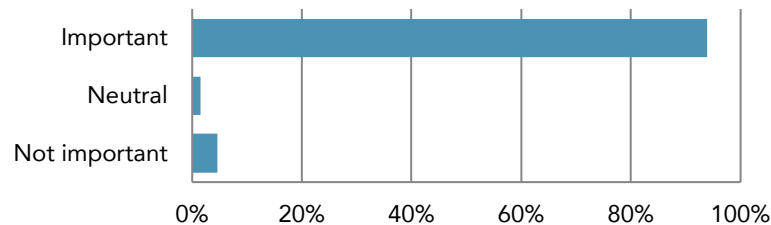
Q 6. Experience of process

Q6. If the Ombudsman dealt with your complaint, how would you rate your experience of the process?

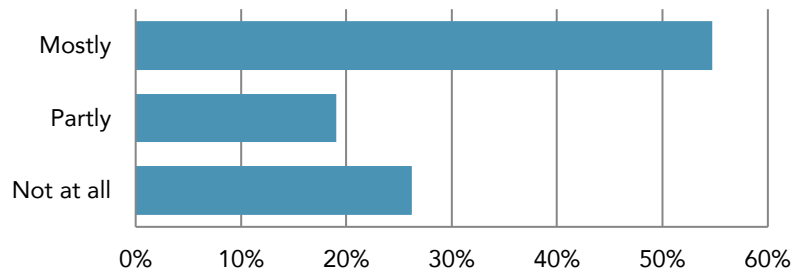


Q 7- 8. Expectations of role

Q7. How important to you is it that the ICANN ecosystem has an Ombuds function that is able to deal with complaints independently of vested interests or inappropriate influences? (n=65)



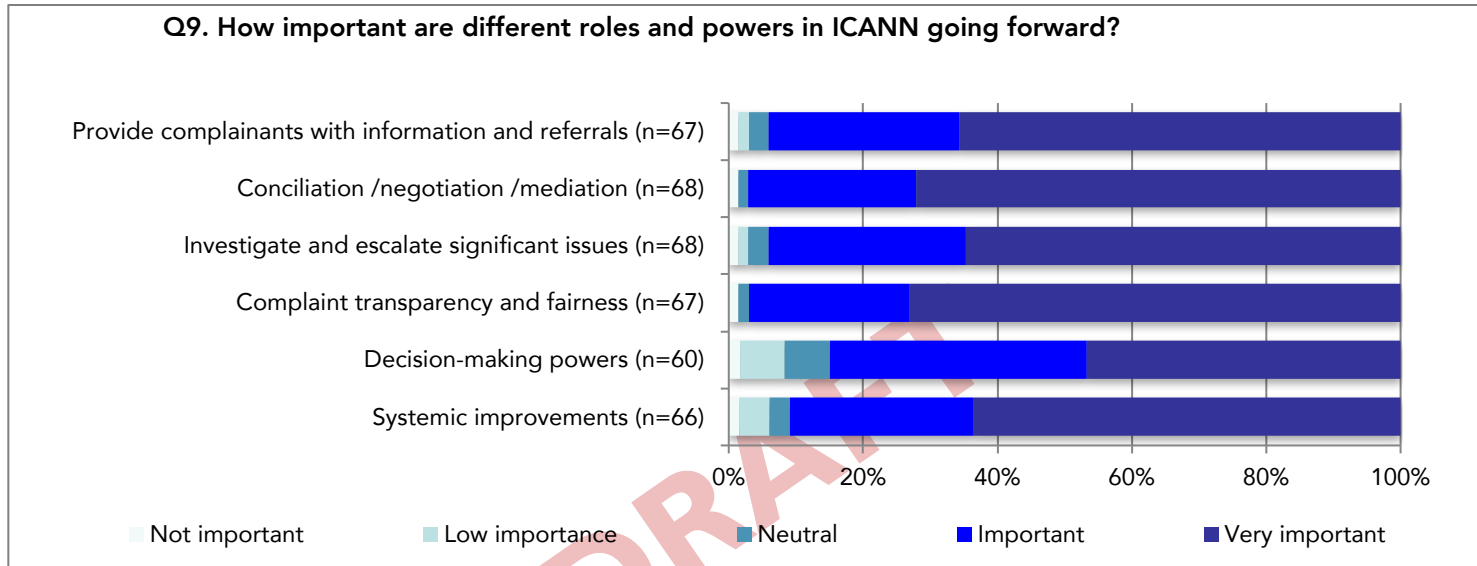
Q8. Does the current Office of the Ombudsman meet your expectations of the role? (For example, for independence, confidentiality, impartiality, effectiveness of the dispute resolution process.) (n=42)



Comments as to whether expectations met:

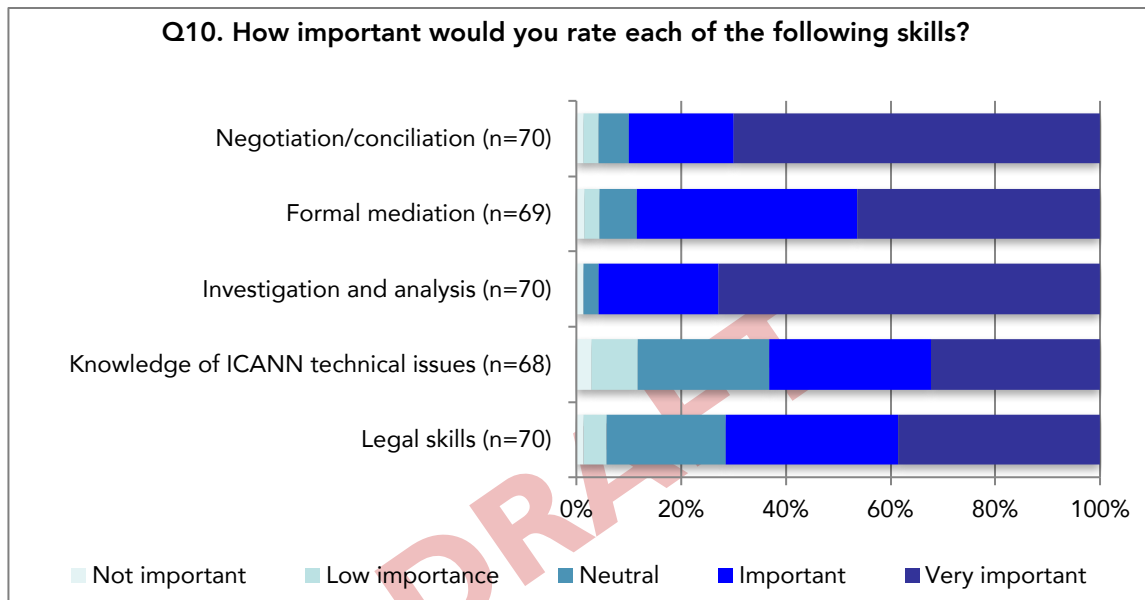
- Yes, mostly.
- Needs sound processes and procedures as to how it operates.
- Independence from the Board has to be absolute. He has to have power to intervene in a timely way, not after the fact.
- The environment needs to support the Ombuds so he has real standing in the ICANN ecosystem.
- The Office is important to assist with disputes.
- Should take on more cases and not find ways to not take them on. Err of the side of doing more, not less.
- Ombudsman is a tool of the Board to deflect criticism. A joke.
- Ombudsman must be picked from the community; he/she should have strong record of advocacy within ICANN and enjoy general respect and be vigorous, vocal and proactive in the exercise of his/her duties
- Little is heard of any case - if any ever were reported.
- It is a very important role for the purpose of fulfilling ICANN's mission, especially in relation to internal functioning in accordance with the principles of equity, transparency and trust in the system.
- I have serious doubts about confidentiality.
- The office of the Ombudsman must deliver a fair, speedy, enforceable and unbiased disputed resolution mechanism. If the decisions are not enforceable then there is no point in approaching the ombudsman.
- Does not appear to act in any way independently nor offer a place for complainants to go when the ICANN ecosystem has failed.
- The ombudsman is not independent as he or she is contracted by ICANN.

Q9-10. Importance of ICANN roles and skills



Comments:

- When it comes to decision-making powers, the Ombudsman's powers should be equal to that of others.
- The Ombudsman office should not act as law enforcement body - particularly given the subjective and often ad hoc nature of ICANN policy.
- Whether the Ombuds should have decision-making powers will depend on the overall role of the Ombuds within the organisation.
- The office should be strengthened.
- In my experience, it's not typical that the Office of the Ombudsman are decision makers. More often than not they are facilitators and reporters.
- Office as point of first contact should have transparent policies for when to investigate and when to hand-off to others (ICANN legal, whatever).
- Rather than provide monetary compensation, I would recommend that the Ombudsman have the power to refer a matter or recommendation for compensation to an outside independent review for adjudication.
- Urgent and enforceable orders are necessary, else the purpose of the mechanism will be defeated.
- ICANN must resist the urge to make the Ombudsman the investigator of problems and also the same entity that is responsible for doling out punishments. For example, this proposal was put forth as part of the sexual harassment policy.



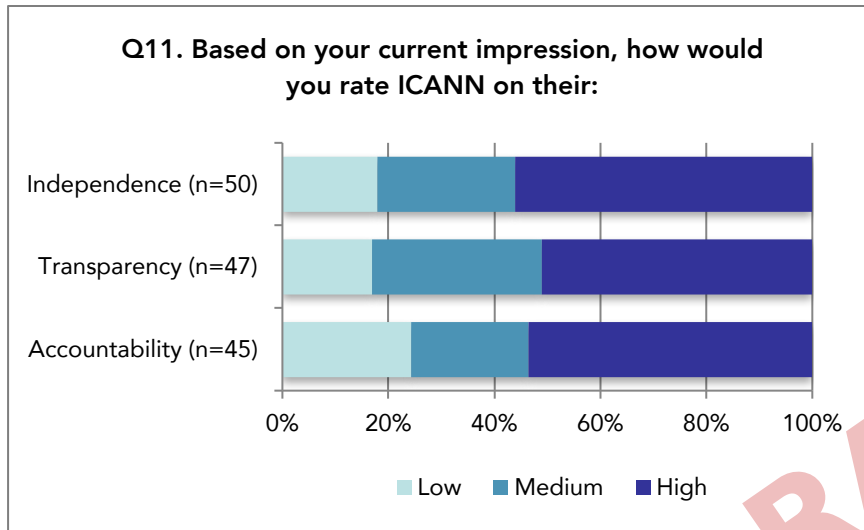
Comments:

- It could be useful to provide feedback about where processes are failing but I don't believe that the Ombudsman itself should be responsible for devising process or policy change.
- It would be a mistake to give a direct role of mediation or of negotiation. This direct involvement in the solution of the problem, will lower its role that needs to be "above the parties" and always on the side of the weaker stakeholder. I would prefer a role in which the problems are clearly analyzed, possible remedies are identified and suggested to the Board, and the possibility (but only in the case the Board will not act or will take the wrong decision) to overturn Board decisions when the

general interest of the whole ICANN communities system are endangered.

- While the Ombudsman needs an excellent grasp of the milieu and how ICANN operates, a detailed knowledge of the domain name system is not required. These are people functions that we are examining here. Legal knowledge is useful, but I am not convinced that being a lawyer per se leads to better investigation, listening, trust, and conciliation or mediation efforts. In fact, the contrary may be true. Trust is extremely important.
- An Ombudsman must be confident, proactive, knowledgeable, diplomatic, transparent and professional.

Q11-13. Perception of Ombudsman



Q12. Comments about whether the ICANN Office of the Ombudsman has changed over the time

- The more I get to know ICANN the more I realize that the Ombuds is a decoration that is there to make ICANN.org look good.
- Yes we are improving.
- Yes, it seems to me that each office holder seems to have operated with a different view of the priorities.

Q13. Can you give any examples of unfairness issues that you have experienced or have knowledge of that would be appropriate for the ICANN Office of the Ombudsman to examine?

- Community gTLD applications.
- Gender issues
- Bullying behaviours on email lists.
- Hidden conflicts of interest

Q14. Further comments relevant to the ICANN Ombuds function?

- It is an important function to maintain equity and trust, and also to prevent and avoid major conflicts.
- The office and this survey are waste of time and money
- The Ombuds should have a diverse staff and a good mix of cultural views.
- The remit (scope) needs to clearly spelled-out in ways that are easy to understand.
- The Ombuds role is necessary and appropriate. I am aware of a certain unease as to his/her jurisdiction and authority. However, I consider that is an inevitable component of the function; I am not against improvements and strengthening of the Ombuds' role, but I would not expect that to eliminate complaints, going forward.
- Transparency is hard to evaluate in situation where complaints being sent to an Ombudsman are deemed to be confidential.
- I think a panel of stakeholders would do a better job than a single person.
- We never designed the Ombudsman to be a formal part of the appeals process of dispute and objection proceeding. For it to be inserted into that process is a danger to due process. It is secret and that's utterly unfair to parties involved. It should be clear what goes into the Ombudsman office - - and what does not.
- For an ICANN that is no longer formally depending on a single government and that has moral obligations towards the global community, the higher risk is to fall into the hands of some strong stakeholders that have financial interests and direct returns on some decisions of the Board. To prevent this kind of highjack a strong, really independent and brave Ombudsman is an essential component.

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