

QUESTIONS FOR DISCUSSION

1. Should ICANN have an Ombudsman?

In Istanbul it was suggested privately to me by a few people that the concept of Ombudsman really didn't fit into the multi-stakeholder model very well and that the position should be eliminated. As we review the role of the Ombudsman as part of our overall accountability scheme I'd recommend that we first need to discuss whether the community believes such a position has value and should continue to exist in light of all other proposed accountability changes.

The validity of the following questions, of course, presumes an affirmative response to the first question.

2. In a general sense, what type of questions should the Ombudsman be empowered to look at and what criteria should (s)he be allowed to use to generate a recommendation / pronounce a decision? Who should be the permitted clientele of the Ombudsman's office and who, if anyone, should be excluded from using the facilities of the Office?

As currently constituted the ICANN Ombudsman is positioned to serve as a "neutral dispute resolution practitioner" serving "as an advocate for fairness" seeking to "evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies" (ICANN Bylaws, article V, section 1 (2)). The focus is on procedural fairness as opposed to substantive outcomes. Staff and vendors

are specifically prohibited from utilizing the services of the ICANN Ombudsman (ICANN Bylaws, section 3(2)). (S)he also has no authority on “administrative matters, personnel matters, issues relating to membership on the Board, or issues relating to vendor/supplier relations” (ICANN Bylaws, article V, section 3 (2)). In addition, the Ombudsman is currently prohibited from instituting, joining or supporting “any legal action challenging ICANN structure, procedures, or any conduct by the ICANN Board, staff or constituent bodies” (ICANN Bylaws, article V, section 5).

3. What tools should the Ombudsman be expected to use / be given to use in performing her/his duties?

The Ombudsman is currently empowered to use “conflict resolution tools such as negotiation, facilitation, and “shuttle diplomacy” to achieve desired results (ICANN Bylaws, article V, section 2). S(he) also has the right to “have access to...all necessary information and records” from ICANN staff and constituent bodies to aid in the conduct of his/her duties (ICANN Bylaws, article V, section 3(3)).

4. Should the Ombudsman be completely independent of any identifiable group or interest, the Board being included as an identifiable interest? If so, what measures can be devised to assure his / her independence?

Amongst the current provisions that may be relevant to issues relating to Ombudsman independence are:

1. Selection, term and dismissal – The Ombudsman is currently appointed

to a two-year term by the Board. (S)he may be reappointed to continue in the position at the discretion of the Board for a length of time that is not specified in the Bylaws (ICANN Bylaws, article V, section 2). The Ombudsman serves at the will of the Board and may be terminated without cause upon a $\frac{3}{4}$ vote of the full Board. (ICANN Bylaws, article 5, section 1(3)).

2. Budget – The Ombudsman creates and submits a proposed budget to the ICANN President who then includes it without change in the “general ICANN budget recommended by the ICANN President to the Board” (ICANN Bylaws, section 1 (4)).

Comments received during the initial phase of public comments on the Enhancing Accountability effort included suggestions that 1) the Ombudsman be appointed by the community and 2) one which suggested s(he) be appointed by the NomCom.

5. Whom should the ICANN Ombudsman report to: the President and CEO of ICANN, a community body, the Board or a combination of offices / bodies?

The Ombudsman currently reports to the Board “as he or she deems appropriate” (ICANN Bylaws, section 4 (4)). (S)he is also required to compile and publish on the ICANN website an annual report (ICANN Bylaws, article V, section 5).

6. The Ombudsman is constructed as an informal, flexible instrument of

accountability with a high degree of confidentiality. It has been argued that this creates a process that is opaque and that the lack of transparency inhibits rather than expands accountability. Best industry practices, as defined by the International Ombudsman Association, places a strong emphasis on the confidentiality of Ombudsman work practice and procedure. What degree of transparency, and specific practices thereof, should be required of the Ombudsman as s(he) carries out her/his duties? What should be the proper balance between transparency and confidentiality?

7. What direct role, if any, would this subgroup suggest the Ombudsman should play in the Independent Review Process?

It should be noted that the Ombudsman is currently proscribed from acting in matters where the independent review process has been invoked (ICANN Bylaws, article V, section 2).

8. What direct role, if any, would this subgroup suggest the Ombudsman should play in the Reconsideration process?

It should be noted that the Ombudsman is currently proscribed from acting in matters where the reconsideration process has been invoked (ICANN Bylaws, article V, section 2).

9. What direct role, if any, would this group suggest the Ombudsman should play in the DIDP process?

Currently the Ombudsman is allowed to inspect “all necessary information and records” from ICANN staff and constituent bodies in order to assess a complaint and assist in dispute resolution. Information deemed “confidential” is prohibited from disclosure or publication by the Ombudsman (ICANN Bylaws, article V, section 3(3)).

10. Should the Office of Ombudsman have any role or obligation in protecting “whistleblowers”, internal or external, by virtue of it’s role in ensuring / promoting organizational fairness?

11. Should the title of Ombudsman be changed in the Bylaws and elsewhere to that of Ombudsperson or to another more gender-neutral term?