CCWG-WS2 OMBUDSMAN SUBGROUP MEETING
Thursday, October 5, 2017 - 5:00 to 6:00

>> This meeting is now being recorded.

>> Okay, thank you very much everybody. We are in the call of the sub team of the ICANN ombuds office and we will have to discuss today the point that we raised during the plenary and the first reading of this document. And it was not a success its first reading then we have to come back to the plenary as soon as possible with a new version. I guess that's the main point raised. We tried to put some information or suggestion in the draft and we also ask the reviewer to give us some of the inputs about the topic raised by the participants. But first I need I guess to ask if there are people except myself who are just on the call to be sure that the roll call will be completed. Hearing none, then I guess everybody else is on the Adobe Connect and that's great. I don't know yet but if you can have the document that we need to discuss and I guess I will try Adobe Connect in less than 1 minute.

>> We have it up on the main screen.

>> Okay. We have two types of discussions or two inputs. May I suggest that we start with the answer from [Indiscernible]. It will be I guess the best way to start the discussion and then to come back to the document. Except if you think it's best to do the other round because I think the discussion of the inputs will help us to shape the document itself after that. But I am open to discussion. And I am now in Adobe Connect and it will be a little bit easier for me. Thank you. Okay. Hearing none where's the elements of the answer from the field? In the document or it's just on the mail you sent to us?

>> It was just in the email. If you give us a minute we'll get that up on the screen. But we don't have that ready yet but we'll get that done in a minute or two.

>> Okay. Okay I'm trying to get it myself. My computer restart and I will read it to you as soon as I have it. Okay. I will read it to you and it will come to the screen. I think it's important to note that the answer was mainly the answer who came after the question raised by [Indiscernible] and I know she's not on the call but we need to try to do our best for that and this input the first are a few comments below. The first one the ICANN ombuds function is quite unusual. (Reading) so very difficult to provide [Indiscernible] with industry best practice. Second, reflecting this, the panel proposes something of a hybrid. A little like a governing body, a little like a stakeholder advisory group, a little like an expert advisory committee. It is intended to provide a breathed of perspectives to act as a sounding board and advise counsel to the ombuds office. Three, to our knowledge there is no directly comparable existing panel. The energy and water Ombudsman of Queensland is a government statutory body which is nonetheless funded by industry fees and levies. The relevant minister of the state government is the governing authority. But with no say in operation or complaint decision making. He or she takes advice from an add advisory council on approving and annual budget on appointing the Ombudsman and any proposals for change to the law. Not quite the same as the proposed ICANN panel but some similarities, 4, it is important to recognize that independence it only one aspect of an effective ombuds function and it must be considered in balance with other objectives such as credibility, accessibility, efficiency, accountability and so forth. To illustrate a private legal mediator with experience in family law matters and mid-level commercial disputes could be contracted to consider ICANN complaints. They may get sorry, they may get top marks for independence however they would likely get very poor marks for background

knowledge, technical credibility and accessibility. And in brackets it takes more than independence to achieve recommendations or decisions that will be accepted. Five, we consider the idea after external mediation/law firm and reject it because of what we considered was its poor fit with the ICANN environment, norms, very widely across the community, rapidly evolving, only some aspects governed by black letter law, need for intimate understanding of cultures and interests of different segments of the community, et cetera. Our experience of external ombuds functions such as these is that they become very legalistic to compensate for lack of knowledge and almost invariably have much higher rejection rate. The view becomes not what was fair in all the circumstances but did the person or entity that is complained about breach any rule, 6, fixed term contracts and remuneration were only considered to be one small part of the independence framework. But an obvious one that needed fixing. Seven, socializing is, I agree with Farzaneh a problematic issue. We would not support a blanket ban on the ombuds officer staff circulating at conferences and participating in what I would Kay light touch social events. It is not however appropriate for them to be seen as a regular member of one or other community group or fax nor aligned closely with staff or Board Members, et cetera. That is a matter of applying the appropriate mature professional behaviors, talking to all, circulating around the room, avoiding late night drinking sessions, absenting ones from sensitive discussions not discussing specific complaints, in other words engaging but maintaining a professional distance. I'm sorry for this bad reading but I think that it's very useful and important inputs from field and I would like to open the floor to my comments. I have not too much question but [Indiscernible] not able to amend but they were able to provide us with a writing perspective. But if you have comments or agreement it's the right time to say so if you wish. Avri, go ahead, please.

>> Thanks. This is Avri speaking. It's a fine write up. The one question I have is with the socializing. And just I'm wondering to what degree a person, an Ombudsman knows when they've crossed that line. I mean I think I've seen, you know, various occasions in the past and distant past where, you know, as an external observer I had thought perhaps the line had been crossed. Now, how how do you do that one? I understand admonishing the Ombudsman to be professional and remain aloof and in some ways, I believe it can be done. Small town doctors are friendly with everybody but somehow aloof and you don't always have to go to an outside person for shrink or whatever, lawyers. There's a certain aloofness and also a certain ability to separate themselves at times. But to what degree what is there in the training of Ombudsman I don't know if Ombudsman are like shrinks who have their own shrinks they go to make sure they're keeping themselves straight. They don't know if the Ombudsman has the structure. But that's kind of my concern with 7. It seems really good to say it but when the socializing has become friends, has gone too far and whatever, how do they know? Thanks.

>> Thank you Avri for your input and question. I may have some idea but I guess [Indiscernible] talked much with the field and may have some variable inputs and may I ask you Bernard to take the floor, please?

>> Thank you, unfortunately I didn't speak with Phil but I did exchange with him. I can't speak to the professional training of the ombuds but my understanding is that that's one of the reasons we're having this panel. I mean, right now by having this reporting directly into the board we were in a way putting the board in a difficult situation that may be hard to oversee the ombuds properly relative to these types of things. And maybe one of the points we're trying to get to with the panel is to have that experience and that responsibility there to advise the board if there are issues on that. Beyond that, I think that a notion of if you've got a review

team, if you will, that is overseeing anything in all our professional lives we know that it's a different thing when you're being over seen by a group of professionals versus sort of being left alone to yourself in the wilderness to get the job done. And this is in no way representing comments on the ombuds [Off mic] thank you.

>> Thank you Bernard. Klaus, please, you have your hand raised. You can take the floor.

>> Thank you. I understand Avri's point but on the other hand we really have to bring in here the aspect of a personality professionalism and trust. I think every Ombudsman will be different and every Ombudsman will tackle the question of socializing in a different way. And this is a job or this is an aspect of his job where he will never get it 100 percent right. There will be checks and balances. I think they are in place and if somebody as an Ombudsman goes too far to the left or right it will be dealt with. But on the other hand, we have to be I think aware about that we can never find a right into law the proper way of behavior. Because every Ombudsman has a different personality, different way to deal with it. And I think we really have to put it in the professionalism of the Ombudsman themselves. Thank you.

>> Thank you, Klaus. I guess on this point we have so you have comments on other thank you, sorry, Cheryl, please, go ahead.

>> Thank you very much. Hopefully I can be heard and not too loudly. I was a bit saturated before when I did my sound check. I just wanted to say why I think it's important that we do take good note of what Phil has said regarding socialization. And I would also like to remind all of us in this meeting, I think ICANN is well supplied with enough watch dogs that should they be concerned that there was a line crossed as Avri put it they would go to the board quickly [Indiscernible] with that said I have worked with each and every one of the Ombudsman and I

do say Ombudsman because to date it has been men. When I'm here in the role of ALAC chair, and it was in the top 6 relationship if not outright brawl with the then Ombudsman. So, we know the situation very well. I actually thought that the proactive work that happened in those early months of my leadership that did [Indiscernible] and explain to at least our community if not the wider ICANN community, the role, the purpose and everything else of the ombuds office which is hugely important and I think a lot of the improvements I have seen in understanding and use of the office since then with the successive on that [Indiscernible] has been a building upon that foundation. So, I am dead against this locking them away and keeping them at such arm's length that they don't understand what's happening in the community at all. But I do also think of all the communities ICANN's probably pretty rich in the if in doubt criticize school of thought so I think that's also a check and a balance but it brings us back to why perhaps this advisory group, the way it is currently written in the new text is important. Where it is clearly not relating to any confidential matters but it is acting as the equivalent of a review working party in the review status of other parts of ICANN. Thanks.

>> Thank you, Cheryl, Sebastian speaking. I think I would like to know if there is others who wants to comment on these 7 points or one or the other. Yeah, I guess Cheryl was I will say not all but previous I will say. But if you want to speak again, Cheryl you will be welcome. If not, I will give the floor to Herb. Please.

>> Yes, good morning everybody. I hope you can hear me okay. Trying not to wake everybody up here. So, talk about number 7. I'm just going to say one word and that's relationships. Because without relationships I would not be able to do my job. And one of the things that I'm pushing is openness and accessibility. And so, well I will use Cheryl as an example. But if I have supper and I have had supper with Cheryl, the two of us sitting alone in the corner of the

restaurant talking about chickens and if there are people that are uncomfortable with that or do not like Bernie or Cheryl and see that in some conspiracy because that's unfortunate but part of my job is doing things like that, being able to have one offs with members of the community without everybody thinking there's something amiss. And that's something that I'm promoting. So, it comes down to professionalism and also being conscious of any potential conflict of interest when it comes to complaints and stuff like that. So, relationships are critical and without those relationships I would not be able to do my job. And the other component that we're discussing about the advisory panel, it's important as Cheryl underlined that there is a board of directors and that anybody can go to the board of directors with any complaint and the board of directors can fire me. So, having the advisory panel kind of would be replacing the role of the leadership and the community whose job is to go to the board if there is an issue. So, I question about the redundancy of having that group as some sort of an overseeing body. And if there is going to be an overseeing body for the office of the Ombudsman then you probably don't need an Ombudsman, you can take those matters directly to that overseeing body and have some sort of a panel that can deal with the issues that the Ombudsman was presently dealing with. So those are just things that would have to be seriously considered as far as the future role of the office. Thank you.

>> Thank you Herb. May I conclude for the first part of the discussion and we can take that as inputs to when the implementation [Indiscernible] behavior of the ombuds person or ombuds office staff need to follow and that it's a good element to be taken into account in the future. I see that I will not read all what is on the chat but I guess one is Alberto doesn't have a microphone and I will read it at the same time I read it. There must be a balance. We need you to know ICANN to fulfill its function and for that you must have contact. Each one will find the

point and if there are deviations we can correct them. Okay. Thank you all for your inputs. I think now it's a good time with all those to go back to our report and to see how we agree for changes and I guess that's the main part of the changes are 8 I guess. No. We have some changes. May I because I think I have spoke too much already, Bernie can you help me take care of introducing the changes in the document? It will be very good for me and our colleagues too. Thank you.

>> We're doing great. Date I don't think anyone is going to be too worried about. If we carry on... All right. This part was in response to some discussion that was in the chat at the plenary about concerns folks had about changing the scope of what is covered by the Ombudsman. So, there's a request to clarify the bylaw and the framework are not being modified and also important to note these do not modify the charter or the office of the Ombudsman or the jurisdiction of the office of the Ombudsman as documented in the ICANN Ombudsman framework. Since we don't have a lot of changes I will stop after each change. Are there questions or comments? Not seeing any let's move on.

Point 5. There was some issues around having KPIs there. And I believe the result of the discussion was that just having clear time lines forehand link of complaints would be what we're really looking for. Thoughts or comments? Thank you. Moving on to point 7. Subject to practicality when dealing with gender diversity in the office has been removed as was requested at the plenary. Thoughts or comments? Thank you. Moving on. Point 8. Looks like there's been a lot of changes. There were a lot of comments. It's essentially the same thing it's just been restructured a bit to make things clearer. One of the comments I did receive from the cochairs is if you're going to have this kind of a panel, you never make it an even number. You always make it an odd number. So, you'll see that throughout this thing we've fixed it so that

it's a 5 member panel and that it's up to the choice of the community whether there are 3 peoples with Ombudsman experience and two with ICANN experience or vice versa. Any issues with that change? Seeing none... And we were asked that we make it clearer regarding the fact that the panel is not there to take on the work of the Ombudsman but rather to oversee. In the point under 8 we said how the panel should be composed and the second point is overseeing the selection process for the Ombudsman, the responsibility to the panel, recommending candidates for the position of ombuds to the board, recommending terms of probation to the board, recommend to the board firing an ombuds for cause and overseeing the external evaluation every 5 years, making recommendations regarding any potential involvement of the IOO in a non complaint work based on the criteria and recommendation 11. So basically, we've taken what we had and we've moved it around a bit to make it very clear that what the things are responsible. And right below that we've got the panel cannot be considered as being part of the ombuds office and cannot be considered additional ombuds but rather external advisors to the office. Any such advisory panel would require the ombuds to maintain its confidentiality. So those are the changes we brought to 8 from all the input we had at the plenary and various other points. Are there any questions or comments on 8? I'll leave it a little longer given it's a long one. All right. We're not seeing anything so we'll move on.

In 9, actually I didn't bring any changes. I see Klaus has his hand up. Sorry. Klaus?

>> Thank you very much, Klaus for the record. I still think that the chat we were talking about, I think it's very fuzzy and I think this whole idea is still not in a stage where I really would be happy with. But on the other hand, I trust the review process that we will be able to come to a better definition and clearer structure. But, just for the moment I just would like to ask Herb how he sees these changes and how he sees to the paragraph of the point of view of the

Ombudsman, would he be happy to live with that or not? Just to give a little bit of clarity going on that point. But, just to come to my main point, I just simply think that paragraph is just not ready yet.

>> Thank you, Klaus.

>> I don't want to jump the cue if you would like to let Jordan speak first.

>> It's up to you Herb. Go ahead then we will ask Jordan to speak. Please.

>> Very briefly, Herb for the record. Item 8 is basically taking the responsibility of all of those items which now rests with the board and moving them into an advisory panel. So, all of those items right now are pretty much taken care of by the board. Although we do delegate that such as the hiring process is not done by them but a professional firm. So, really it changes absolutely nothing in my world whether there's a panel or a committee that is doing this. Those things get done anyway as part of the functions that the board delegates down to committees and stuff. So, whether it's an outside panel or the board, all of these items are part of my world now. Thank you.

>> Okay, thank you Herb. Sebastian speaking. I will ask Jordan to take the floor.

>> Thanks Sebastian, Jordan here and I don't know if you can hear me.

>> Yeah, it's a little faint but if we yeah, go ahead.

>> I will thanks for the chance to speak. Yeah, it's okay?

>> It's okay. It's okay. Go ahead.

>> Okay. And there were two points I wanted to make. The first is about the panel itself. I've gone back and read the independent report and I've got this text. And I'm coming out on the side and liking the panel because as other people have pointed out at the moment these things are done by committees of the board or the board itself. And one of the things I think is an advantage for the ombuds function is a greater degree of independence first of all and secondly an ability for there to be an unconflicted group of people for an ombuds person in the role to provide a sounding board manner. So, at the moment obviously the ICANN board or any of its committees might be eventual decision makers over complaints or some of the consequences of complaints. So, by having a group that can make recommendations to the boards like set out here and provide a sounding board to people doing the work of the ombuds function, I think that you are actually improve the situation. It just adds a little layer removed from [Indiscernible] board. The second reason I support this staying as it is is a matter of process. We spent quite a lot of money getting an independent review done and this was one of the recommendations of that independent review. Fan we don't include this proposal in this report then the community won't be able to offer comments that take that advice into account. So, by finalizing with this in this document and going out for public comment I think we're sort of playing part of the role which we should as a CCWG and as a subgroup within it which is we've got independent advice and we don't think it's completely floored. It makes sense to give the community a chance to make comments on that output in the context of the review and work that the CCWG subgroup has done. So, I agree with the proposal and because I think it's better on process, I think we should leave this and off [Indiscernible] in there and thank you for doing it.

>> Thank you very much Jordan. Avri, please take the floor.

>> Thanks, Avri speaking. I largely agree with what Jordan said and think certainly the middle 3 bullets of recommendations to the board, recommending terms of probation to the board, recommending to the board a firing action though I don't know but very much fit with how I think it works. I think Herb is right in a sense that you don't want to replace the boards' responsibilities the overseer of the function. And those 3 most definitely don't because they're recommending to the board. In terms of the overseeing selection process and overseeing external evaluation, oversee I think is too strong a word and it does, you know, affect the oversight role. But something, you know, a notch less in terms of supervising, organizing, facilitating, what have you the first and the last bullet may bring it again into always leaving, you know, as Herb was saying the responsibility with the board but having this panel, especially because this panel does have people with Ombudsman experience. So that comes as close as I can get to this thing that I'm looking for that a counselor has a counselor that they talk to. An Ombudsman has a panel of Ombudsman that they talk to and that can help, you know, in that relationship. I actually think it's a good thing. So, I guess I would tone down the changes a little in the first and second removing the oversight word and replacing it with another. But I think the general idea is good. Thanks.

>> Thank you, Avri, Sebastian speaking. Klaus, please.

>> Klaus for the record. Just for clarification I'm not against number 8 at all. I think it's a good idea. I'm just a little bit worried about if we state it like this and people will come back and say, so how these people decide on authority want they can do and can't do. I just would like to get a little less of what I would call [Indiscernible] seems to be a little bit more specific. But, on the other hand it goes out to comment and we can [Indiscernible] that thing. So just for making it

clear I'm not against number 8 I just think it's not specific enough for me. [Indiscernible] to go unchallenged.

>> Thank you Klaus, Sebastian speaking. I will if you allow me to take the floor I will give [Indiscernible] now speaking as a participant. First of all, we tried to leave some room for implementation and the question of the number [Indiscernible] to leave some room in the implementation phase. Now we have fixed number but it must be also if not we will spend a lot of time in that discussion, how we will select ombuds people with ombuds experience and how we will select with ICANN experience and I guess that it can lead to the implementation. The second point and maybe this one is a little bit more controversial but I just want to remind you that we changed the text from the external reviewer because we wanted to avoid because it was a request and I have no problem with this request from our cochair to try not to have [Indiscernible] changes. The goal from my understanding is to have an independent from the board ombuds office. Now we are in the situation where if we do that we need [Indiscernible] changes. When we tried to avoid that it's why we have still this link to the board. Now I will not make [Indiscernible] with ICANN and but we would like to have this as light as possible and that in fact the panel takes the responsibility and the board accept those recommendation, accept those proposal. It's where I think we need to find the right balance. Now, what is the world if it's oversight, contribute, whatever we're supervising, whatever the word, we have to remind us that the report from the external review was much stronger because the thinking we could have bilateral changes. Thank you. Now taking back my hat as a rapporteur of this group I would like to give the floor to Bernie. Thank you.

>> Thank you Sebastian. I agree with everything that Sebastian has said. In the work we do with various subgroups we try to remind everyone not to go too far down the implementation

path. Every time you do that you're creating additional constraints for the people that are going to be charged with implementing these recommendations. And that's staff. So, you know, as long as there's a proper balance there it's actually going to be easier. And what we explain to people often is if you go too far down the path of implementation in your recommendations, you may be creating situations that are impossible for ICANN to accept or very difficult. Because, ICANN is implementing these things, has to consider the entire ecosystem and how it's going to fit and how we're going to do it. So, every time we go too far down that road you start removing possibilities for properly implementing this. The second point on what Sebastian was saying versus the board and bylaws changes, you know, from various discussions it's clear that having a completely independent panel versus the ombuds could create, if you will, charter responsibility issues versus the board. And that's, if you will, the second half of that changing the bylaws in that it's not a question that can't be done but it might be a much more significant change than simply adding a line in there. Thank you.

>> Thank you, Sebastian speaking. Any other comments? We have gone through all the proposed changes, are there more to come?

>> It's not really a change. I did include the points in rem days 9 for consideration by the group but they weren't included as changes. I guess the question is based on Farzaneh's 3 suggestions. Should we be including changes here after considering the input from Phil. Over to you Sebastian.

>> Thank you Bernie. I guess if I understand from the chat we are quite happy with the inputs provided by Phil the external reviewer and as a matter of transparency I would like to suggest that in one way or another maybe we take out of this document, the main document the issue

raised by Farzaneh and we put in inputs from [Indiscernible] and that will be an input people will see that there were some discussion on that. But I guess my impression is that we are now quite comfortable with the proposal here. But I want to add I saw one mail sent by Farzaneh about the question of independence. And I would like to suggest that I don't know when Phil will be able to answer but I have tried to go to the different recommendations and I have the impression that it's not just one single dot of this recommendation [Indiscernible] of the independence, if you take the different recommendation, there are questions of independence the other recommendations are a way to make the ombuds office more independent. And it's why maybe we will wait first of all Phil to answer something, [Indiscernible] as a note about this question of independence throughout to understand to understand this question of independence globally. Any comments, questions? Okay if there is no more feedback or comments I would like to go to the next item of the agenda. It's do we go for first reading at the next plenary with document with the change we discussed here and we will make a final [Indiscernible]. And if you do agree with the fact that we send to the next plenary we're supposed to be the 11th of October, we will I suggest that we send the changes maybe in the next 24 hours or so and we will give up till Monday any feedback if people disagree we'll disagree with the fact that we send it to the plenary. We need to have send that a few days ago. What is the date to send it to the plenary

>> This is a special plenary and there was a request by the cochairs to send it back for consideration the 11th. I don't think the changes are that significant that we have to adhere to the set a day rule. I think as long as I would probably say to be reasonable, 23:59 on Sunday would give us all 48 or 72 hours for everyone to look at and then we make the decision if there's

no major objections to send. Then that would give 72 hours for people to look at it before the meeting.

>> Okay. I guess it's a good [Indiscernible] we send that to the subgroup. And we give 2 days to react and then if no too strong reaction against sending it to the plenary we will send it for the first reading. Thank you, very much. And last point on the agenda, any other business? If you have... If not, I would like very much to thank you for your participation and I would like specifically to thank the two cochairs who were able to join us today. Very much appreciate it. I just want to say that the third one was willing to come also but was conflicted with a meeting and I had a change with him and I hope he will be happy with the output of this meeting. But thank you very much [Indiscernible] for your participation today and once again for the ones who participate every time, almost every time I would like very much to thank you because we would not be able to do this job without you. Thank you and talk to you soon. We will see what happens in the next plenary and we will convene again if needed. Thank you very much and bye-bye. The meeting is adjourned. Thank you.