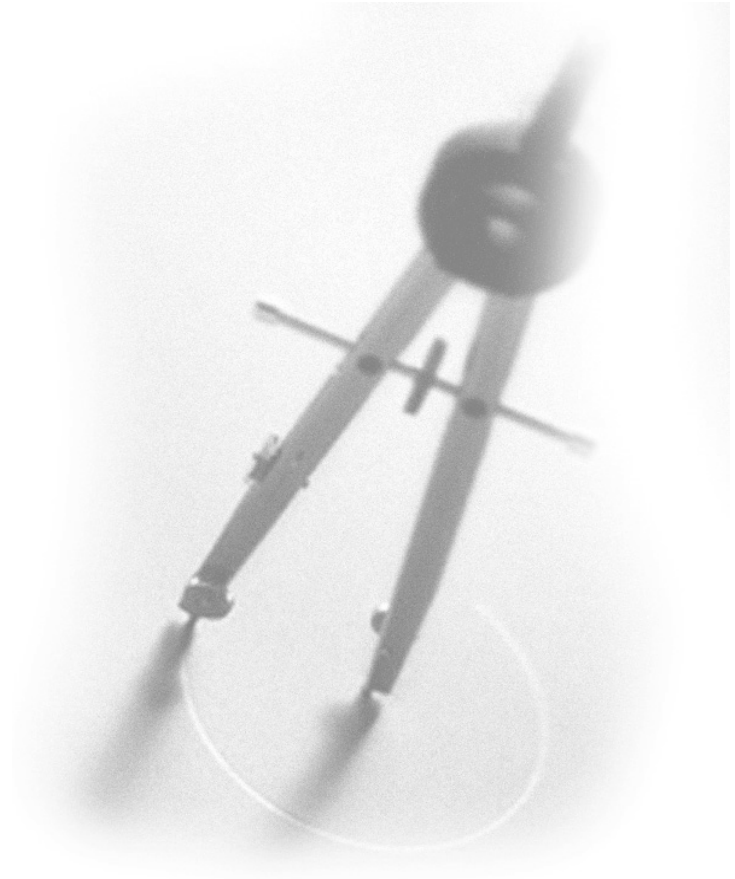**Annex 5.2 – External Evaluation of the Office of the Ombuds – CCWG-Accountability WS2 – March 2018**

Independent Assessment

Office of the Ombuds

Internet Corporation for Assigned Names
and Numbers (ICANN)

July 2017

Contents

Introduction

This review of the Office of the Ombuds 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 Ombuds 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:

INVESTIGATION

1. A review of Office of the Ombudsman materials including the Ombudsman Framework, past review reports, annual reports.

2. Meeting with the ICANN Ombuds Office WS2 Subgroup

3. Face to face interviews with community members and ICANN staff attending ICANN58 including: members of the Board, members of the Subgroup, members of constituent bodies, members of the community, senior members of staff

4. An on-line survey was undertaken (5 languages offered) seeking additional input from members of the community. In a limited period, an excellent 84 community responses were received, including 3 that we arranged to be translated.

ANALYSIS

5. Analysis and development of ideas - built upon the existing Ombudsman Framework, a review of academic and association literature about Ombuds functions and from our experience working with a range of quite different disputes resolution functions.

REPORT

6. Testing emerging ideas with the Subgroup and staff

7. Review by the Subgroup and staff of draft report and recommendations

8. Revised report provided through the WS2 processes – ultimately to the ICANN Board

Our review of the ICANN Ombuds function is set out below. The structure of the Report includes rather more explanatory material than first anticipated – because we encountered such a range of perspectives and expectations of what an ombuds function should involve.

We identified that the ICANN ecosystem has different types of complaints – with different dynamics, requiring different processes and with different possible range of outcomes.

We compared the ICANN environment and its ICANN ombuds function to a number of existing ombuds 'models' we are familiar with – in different sectors, styles of organisations and countries.

We interviewed a cross-section of experienced ICANN people and in conjunction with the WS2 Ombuds Subgroup, conducted a survey of some 84 members of the ICANN world.

We concluded that:

- the Ombuds function is valued and provides an essential 'safety valve' for fairness

- it does not however meet all expectations, with a number feeling that it does not have enough power or independence

- there is no single 'model' that can be readily applied to the ICANN ombuds function and that to deliver confidence in fairness and to meet the range of expectations, it will need to adopt a multi-faceted approach

- the current ombuds function is close to what is needed, but could use some re-configuring and strengthening

We also considered some of the suggestions that are being floated for non-complaints work that could be given to the Office of the Ombuds.

We identified five areas for improvement:

1. **Clarify role and processes – manage expectations**

   ICANN's Ombuds function is multi-faceted. To achieve clarity and to manage stakeholder expectations, 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 a suggested three groupings of potential matters: Governance; Corporation and Community

2. **Standing and authority**

   The standing of the Ombuds Office needs to be strengthened. Some of this will come from other areas of recommendation – ie. greater clarity and definition of its role, stronger perceived independence, greater transparency will all help. 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 do not see a current case for the Ombuds to have decision-making powers, we think that it should be clearer that their reports and recommendations carry weight and must be responded to (not necessarily complied with). We suggest amendments to the Bylaws to oblige timely responses.

We also think that there would be advantages if the Ombuds Office has internal mediation skills and experience.

3. Strengthen independence

There is a clear need to strengthen the perception of the Ombuds function's independence. We recommend 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 also suggest some detail change to the Ombuds

employment.

4. Strengthen transparency

As part of recognising community expectations, we recommend 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 suggest that the ICANN community 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.

Our recommendations are discussed in detail at Page 35 and a Summary of them is provided at Attachment A – Page 48.

Definitions

We found that some terms were often confused in discussions, so we provide the following definitions – in the interests of clarity.

- ADR – Alternative Disputes Resolution – generally refers to resolution outside of a court room, can include common ombuds techniques such as early assessment or investigation, shuttle negotiation, conciliation, arbitration, mediation, etc

- Community – we have used this term for the 'informal' part of the ICANN ecosystem – interested and active members, informal member groupings, working parties, etc

- Governance – means formal representative structures (including elected and some appointed members) from the Board down, designed to advise or make decisions, with some democratic or delegated authority

- ICANN ecosystem – for the avoidance of what seems to be a common confusion, we have used this term for the entire universe of ICANN – including the corporation, Board, constituent bodies, informal members and groups, etc

- Office – the group of staff/resources that deliver the ICANN function – reporting to the Ombudsperson

- Office of the Ombudsman or ICANN Ombudsman – may be used for accuracy where it refers to the ICANN Office, By-laws or the person who occupied the role historically

- Ombuds – (capitalised) refers to the ICANN role or function – we are using this as the preferred future term, replacing 'ombudsman'

- ombudsman or ombuds – (no capitalisation) refers generically to the person or the role in other domains

- Ombudsperson – 'the' ICANN Ombuds – the most senior person within the office

- Single matter – a complaint or dispute relating to a single set of circumstances or events, whether it involves an individual or a group

- Systemic matter – a fairness issue that may affect many people or groups – typically an issue with a policy, process or system

- Technical – refers to matters with a technical dimension including infotech, internet, legal, economic, contractual, etc

Current Situation
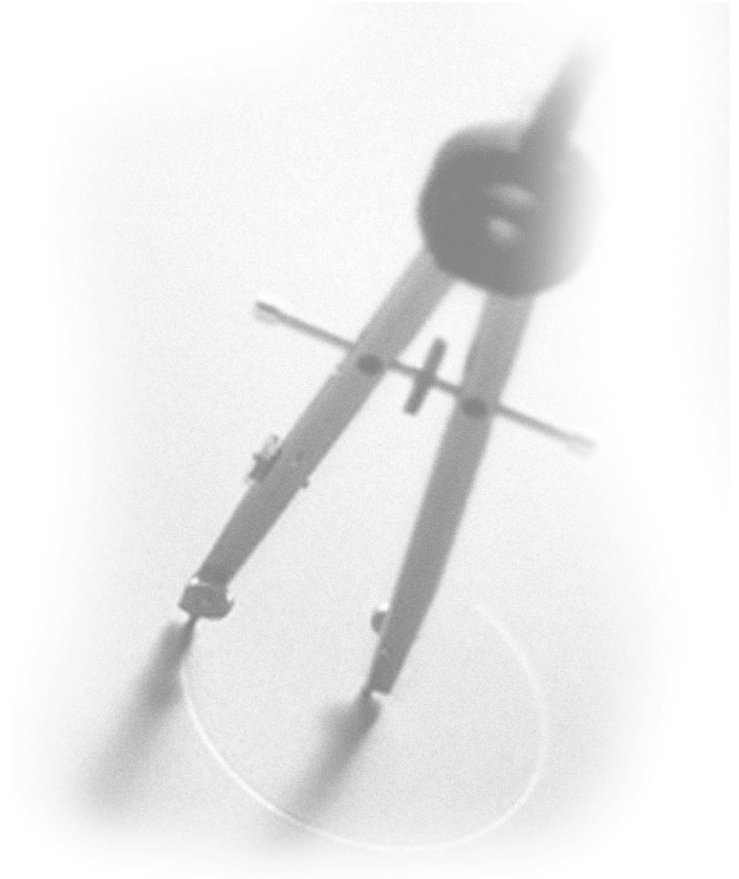
1. ICANN's mission as stated in its Bylaws is to coordinate at the overall level the global systems of unique identifiers and to ensure their stable and secure operation. Its Strategic Plan outlines its vision of "an independent, global organisation trusted worldwide to coordinate the global internet's 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 global 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, some are shaped significantly by economic or legal considerations, 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 global way of thinking. (This has particular significance for the Office of the Ombuds 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.

ICANN complaint avenues

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 ICANN 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 alternative dispute resolution 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 alternative dispute resolution 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.

Ombudsman complaint numbers
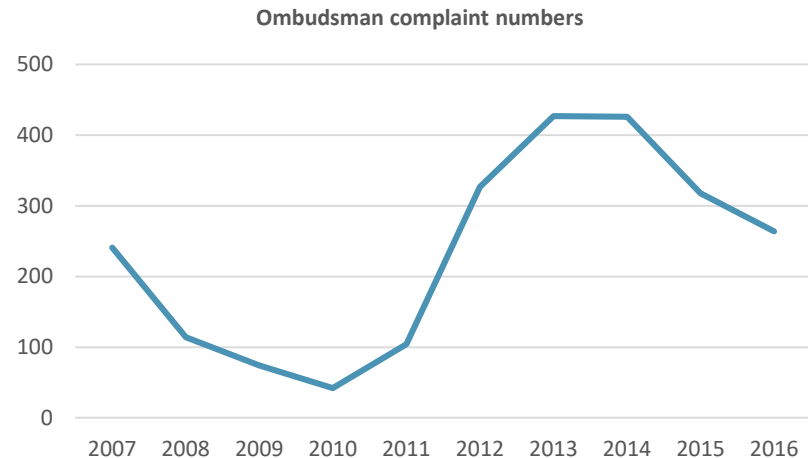
It is difficult to draw conclusions from the data, although we gather from interview that there was something of a loss of confidence in the Office during the middle years shown and there have been surges associated with particular issues. There have also been some data consistency issues which should 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.
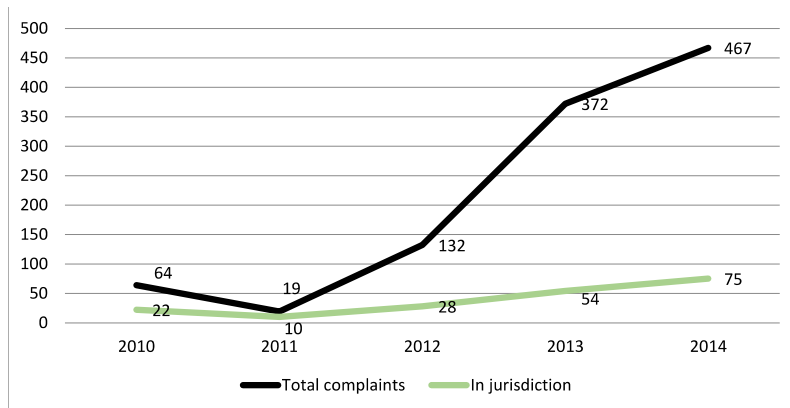
Source: Ombudsman 2014 Annual Report

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.
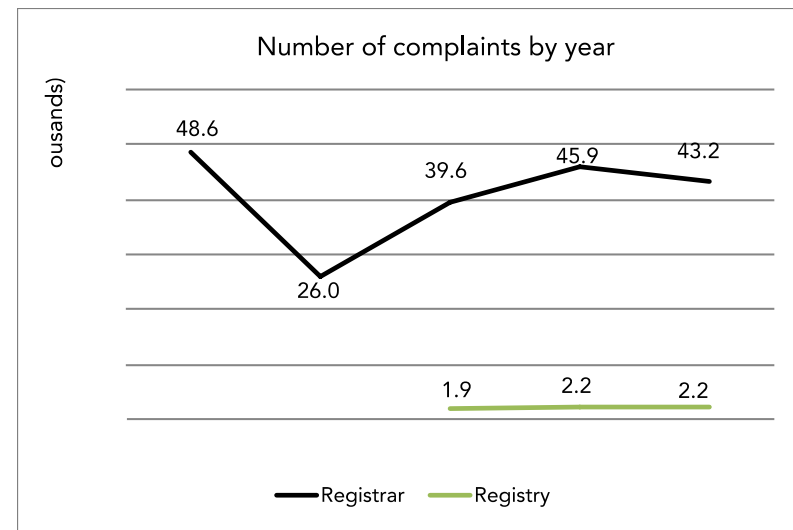
Source: Contractual Compliance 2016 Annual Report

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 US-based 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 ICANN's General Counsel, 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 Complaints Officer 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 the frontline.

There is a communique on the ICANN website that sets out some of the key intended differences between the roles of the ICANN Complaints Office and the Ombudsman - (https://www.icann.org/news/blog/clarifying-the-roles-of-the-icann-complaints-office-and-ombudsman).We are conscious that the ICANN Complaints Officer role is in its early stages of development and may well change over the coming months.

As a general rule, a community such as ICANN will have multiple paths for complaints – each configured to best suit the types of complaints that arise. Ideally, there should be coverage of all reasonably predictable complaints, although this will necessarily be an evolving situation. The table overleaf illustrates the main ICANN complaints/disputes channels as they stand at the moment.

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 Committee 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.

Placeholder – diagram of Ombuds interactions with other ICANN complaints channels – to be completed by ICANN staff

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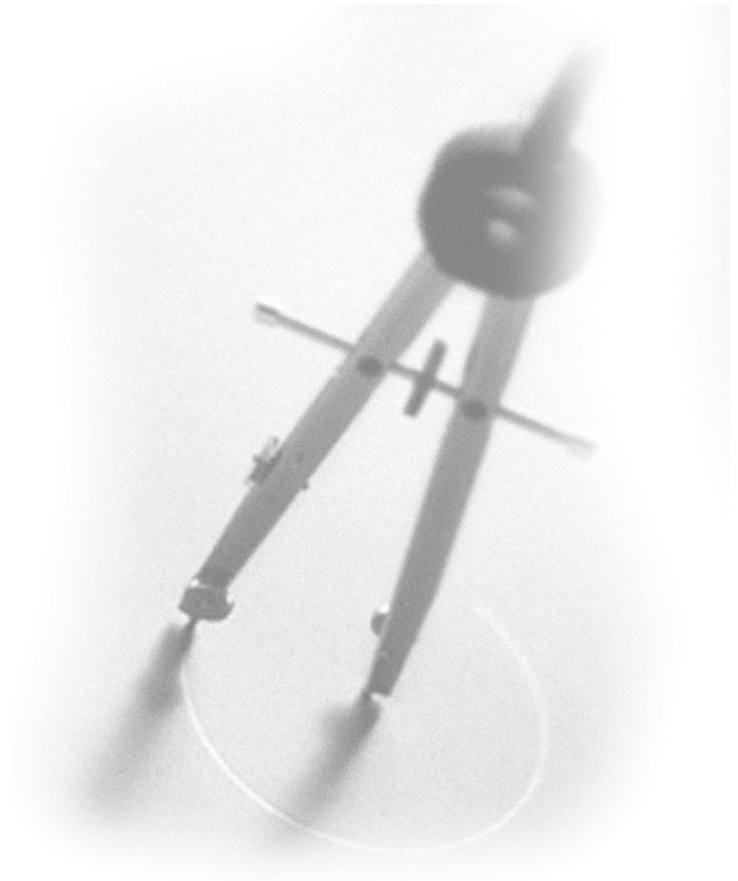
While not everyone within a community can be expected to know the detail of how an ombuds function should or is actually working, critical to the effectiveness of an ombuds function is the extent to which it provides stakeholders with confidence in the fairness of the various community systems and processes.

There were two parts 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 ICANN Ombuds 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 B.

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. A small number of our interviewees also completed a survey response.

It is of course, important to recognise that the views are unlikely to be representative of the whole ICANN community. This is a self-selecting

sample – with very high exposure to the ICANN Ombuds.

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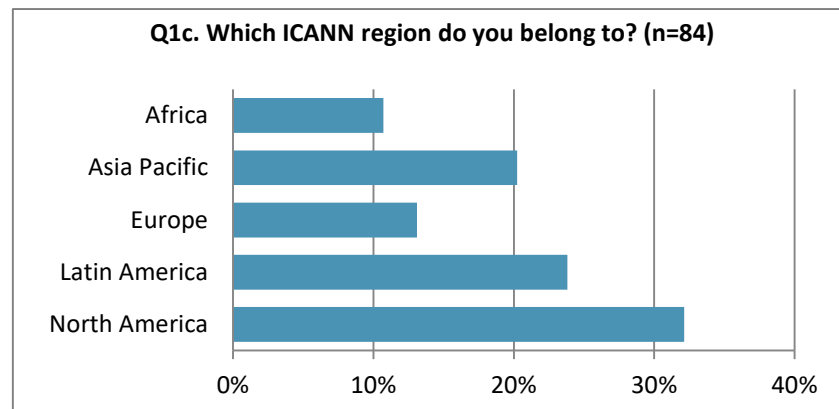
Respondent awareness

In most environments, we do not expect 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.

It cannot be assumed that the community generally have the awareness levels of our respondents. Also 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 and what to expect of it.

Importance of Ombuds function

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

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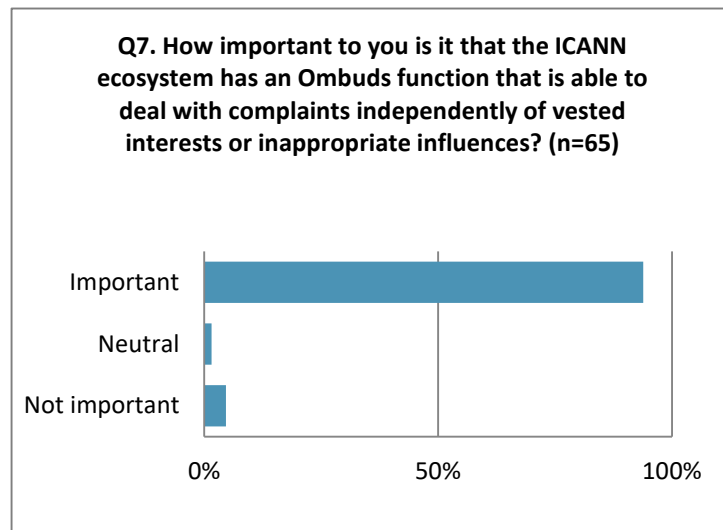
To understand survey respondents expectations of the Office of the Ombuds, there were questions that asked them to rate the importance of roles and powers that an ombuds function sometimes have.

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 Ombuds

Respondents were asked to rate stakeholder confidence in the Office of the Ombuds' 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 Ombuds 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 Ombuds 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 Ombuds had found to be outside jurisdiction.   The following charts report these respondents' views.

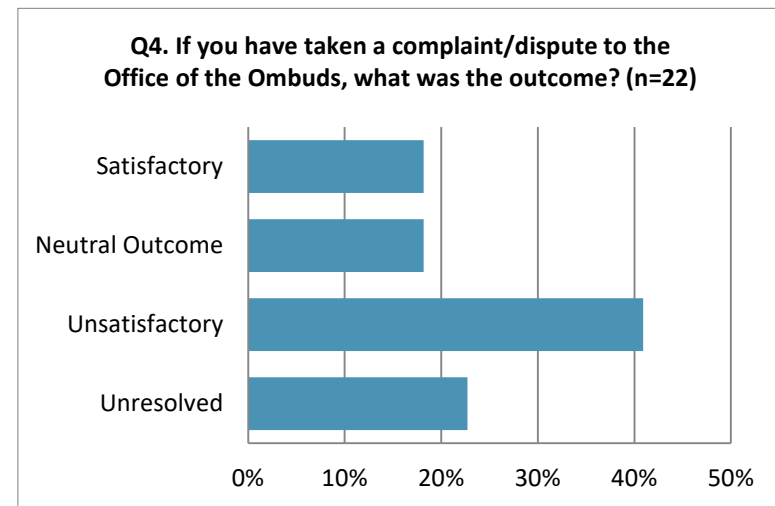**Responses where complaint was out of Ombud jurisdiction (n=16)**

Reported outcomes for in-jurisdiction complaints

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

Q4. If you have taken a complaint/dispute to the Office of the Ombuds, what was the outcome? (n=22)

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 Ombuds should be able to help with a greater range of complaints than is currently the case.

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 Ombuds 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.

Ombuds 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 Ombuds dealt with your complaint, how would you rate your experience of the process? (n=21 to 22)
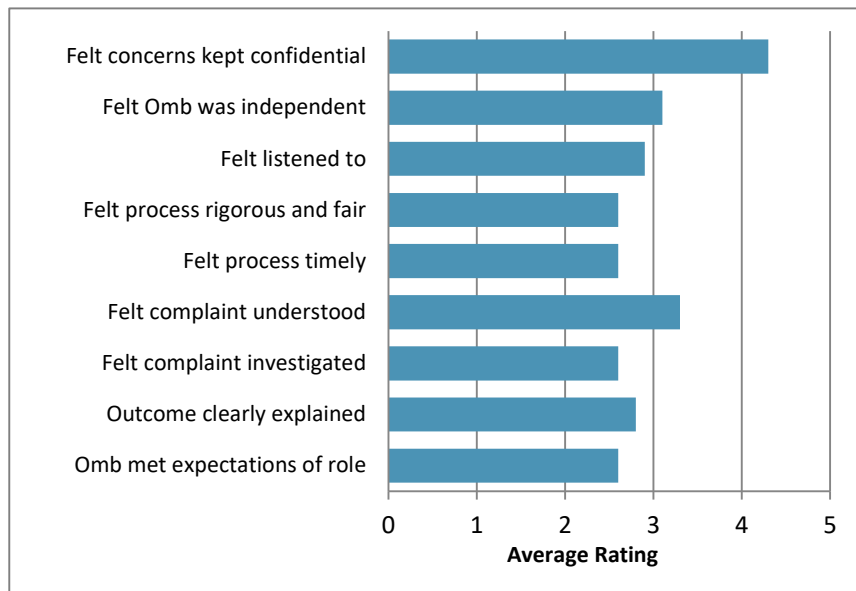
We considered these results in the context of those obtained in the survey conducted in 2008 by the first ICANN Ombudsman. Given how new the function was, it is perhaps not surprising that the 2008 survey included only 7 people who had made a complaint to the Ombudsman that was within jurisdiction. Their 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.
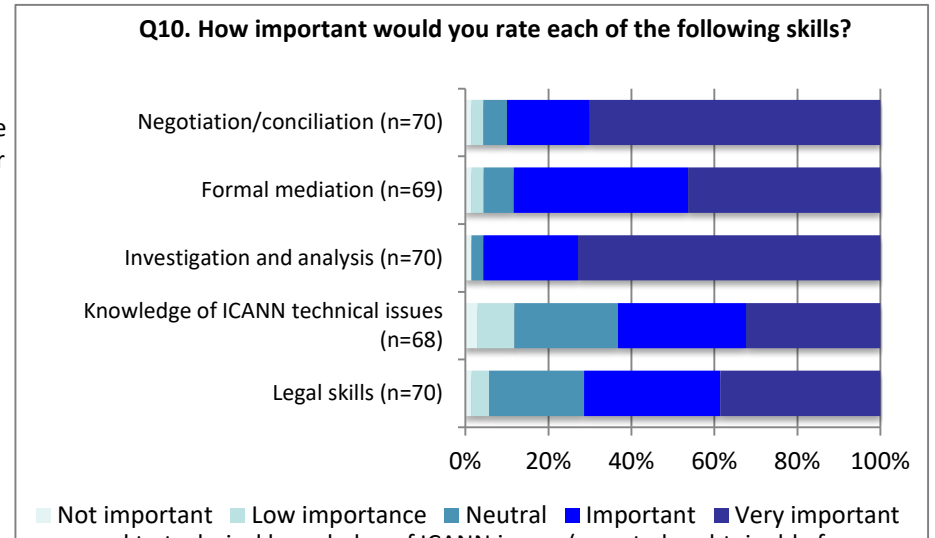
Comparing our survey – also drawn from a small sample size, albeit three times that of the 2008 survey and encompassing complainants who between them had experienced the Office of the Ombudsman as it evolved over the tenure of the three occupants of that Office - there were higher timeliness and confidentiality 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.

Ombuds 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 Ombuds 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,

Q10. How important would you rate each of the following skills?

Legend: Not important, Low importance, Neutral, Important, Very important

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 Ombuds could be looking at – and it was evident that there were a range of issues that respondents thought could be matters for the Ombuds 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 Ombuds. 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 Ombuds 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.
>
> ….
>
> 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 Ombuds plays a central role in processes of this type, this will limit the Ombuds' 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.

We discuss these two ideas in our Recommendations section.

Assessment
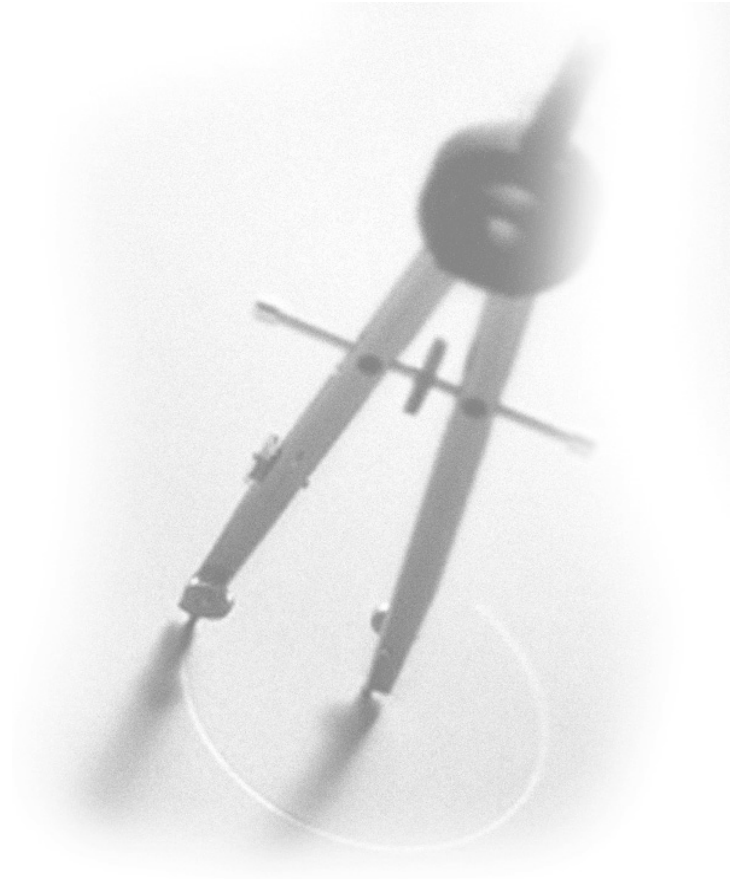
One way in which an ombuds function can be designed is to follow one of the existing models of ombuds. There are many types of ombudsman in different parts of the world and in different environments. They are almost always explicitly directed to the objective of fairness, and usually have some reference 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 particularly true for ICANN, an environment with a greater 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 for Hong Kong, Income Tax Ombudsman for 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, referring to Senior Management/ 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

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 ombuds. 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' existence and role and capabilities, with ready access to the service at low or no cost*

2. **Independence** – *the Ombuds is impartial and independent of inappropriate influence*

3. **Fairness** – *Ombuds are fair in their process – including confidentiality, giving parties a chance to put their position, providing assistance if needed, providing natural justice to both parties*

4. **Timeliness** – *Ombuds processes are responsive and provide timely outcomes*

5. **Efficiency** – *that 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** – *that 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 ICANN Ombudsman's (Frank Fowlie) 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, Ombuds' 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, 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.

Imperatives for change - discussion

cameron. ralph. khoury

Discussion
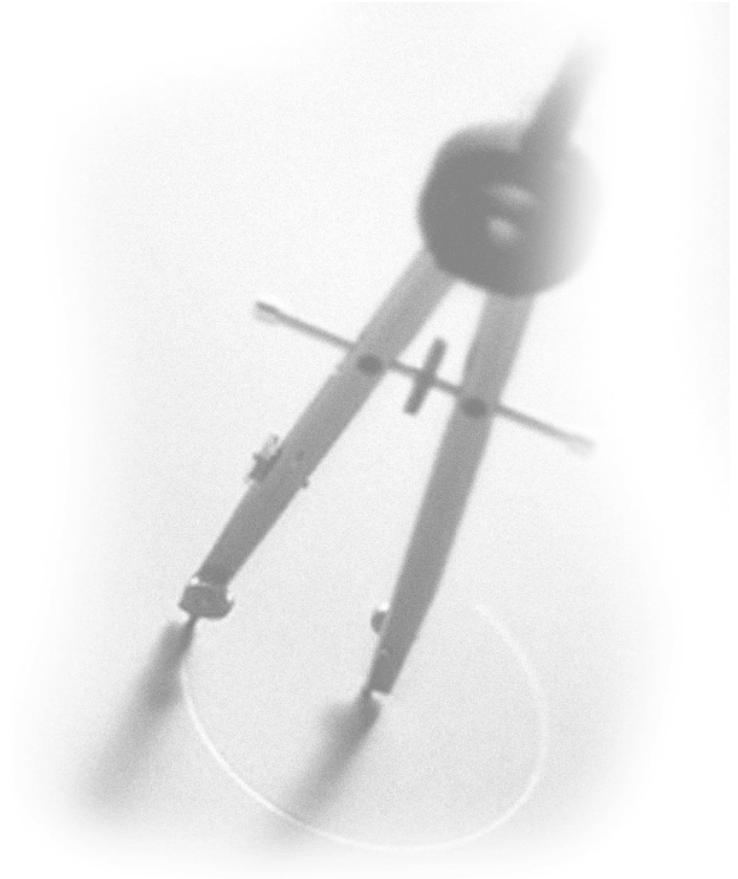
In considering this Review, we have taken into account the unique nature of the ICANN environment, the experience of the first ten years or so of the ICANN Office, interviews of ICANN community members, staff and the current and immediately preceding occupant of the Office, survey feedback from ICANN 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.

Issues we have identified include:

1. The presence of the Ombuds function 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 ICANN Ombuds 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. (See Page 25 for more description.)

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.

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 (including economic, legal or other dimensions) and unless the Ombuds 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 make a difference – '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 Ombuds 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 ICANN 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 Ombuds 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 generally 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 unelected 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 the 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 complaints that are brought to them.

We have been provided with two examples of new ideas for involving the ICANN Ombuds (see page 23) and we are aware that the Ombuds has new responsibilities as part of the Reconsideration Request process (see page 13).

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

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

There are significant tensions that need to be taken into account.

1. Much of any 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 ombuds is involved in either the design of the process or the underlying operation of it – their ability to review is diminished.

2. 'Borrowing' an ombuds' perceived independence to lend credibility to another process is not without cost - inevitably, the 'borrowing' diminishes apparent 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

process design. Risks include not fully understanding the proposal through a lack of technical expertise, not 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.

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

Similarly, instead of 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.

We have described the ICANN Ombuds 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 can get. Having specific, articulated powers is not essential, as having the ear of the CEO (or sometimes the 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 directors, often made up of equal number of industry directors and consumer directors, with an independent chair. While the industry pays for the ombuds service through fees and levies and must be consulted about that funding, the ombuds strategy, business planning and budget will be set by that independent board and they will be accountable to that board.

For an external ombuds to be credible, they must be seen to be able to 'fix things'. If they have powers to fix things (ie. change decisions, require action, order compensation, etc) – for fairness, these must be carefully documented and constrained. Similarly, their processes must be well-defined because they will be subject to scrutiny and challenge.

It is clear that these 'standard' definitions do not necessarily readily map to the ICANN environment. While some see the Office of the Ombuds as 'internal' to the ICANN ecosystem – it is clear that many members of the community see the 'inner circle' – office holders, members of high level bodies, etc – as separate ('them' not 'us') and have expectations more aligned to an 'external' ombuds.

We briefly examined whether a structurally 'external' Ombuds function would suit the ICANN environment. (Some communities or organisations employ an external 'ombuds as a service' – these are typically legal firms or specialist mediation firms). We concluded that the unique nature of the ICANN environment would not lend itself to this. We think being part of the ICANN world and being across the issues of the day, with deep knowledge of the community is essential and a fee-for-service ombuds function would not effectively deliver this.

Clearly, it is difficult for the ICANN Ombuds function to meet all of these differing sets of expectations. For clarity and to better meet expectations, we think there should be explicit pathways and distinct approaches for different groups of complaints.

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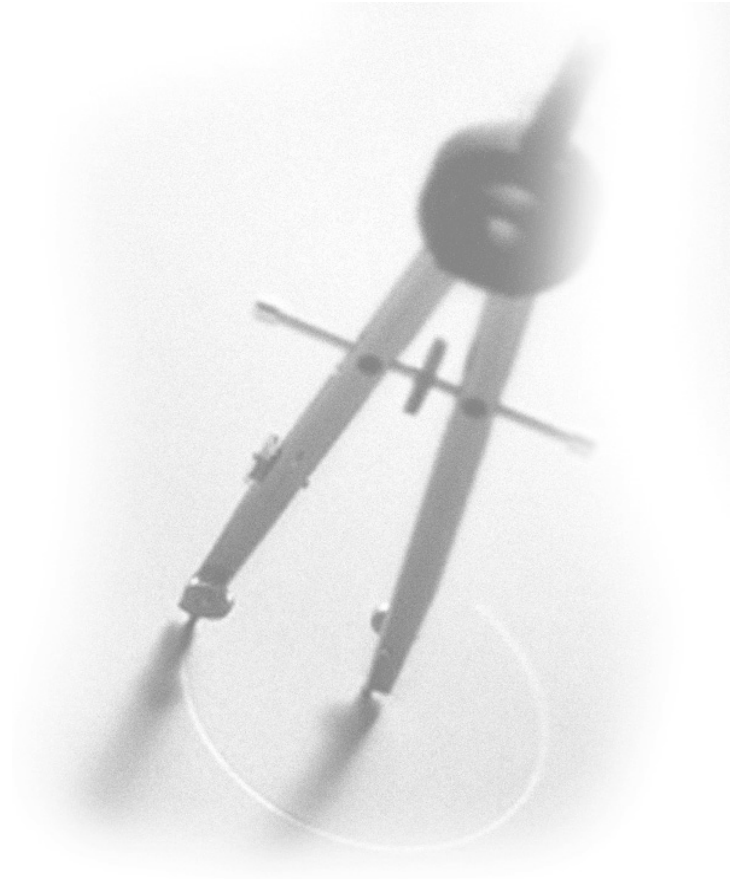
It is our view that the current ICANN Ombuds function is for the most part sound and has been contributing to a level of confidence in the overall fairness of ICANN processes.   We do not see an imperative for radical change, however this is a complicated environment and a multi-faceted approach to the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

We have segmented the opportunities for improvement under the following headings. Each group of recommendations are set out in detail in sections to follow. A summary of the Recommendations v. the suggested Criteria and our Assessment is 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 Ombuds 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 do not see a current case for the Ombuds to have decision-making powers, we 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.

We also think that there would be advantages if the Ombuds Office has internal mediation skills and experience (as had the second Ombudsman).

3. **Strengthen independence**

   There is a clear need to strengthen the perception of the Ombuds function's independence. We recommend 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 also suggest some detail change to the Ombuds employment.

4. **Strengthen transparency**

   As part of recognising community expectations, we recommend 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 suggest that the ICANN community 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 (see page 27 for description)	Current CRK assessment	Relevant Recommendations
1. Accessibility	Sound awareness of its existence, however less so as to its standing, role, capability	Re-launch of revised Ombuds function - with revised By-laws, 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	Sound. Structure and Bylaws are supportive, however some perceive Ombuds not fully free to act	Establish Ombuds Advisory Panel – widely respected ICANN community members, experienced (former) ombudsmen – manage performance oversight. Lead evaluation of function every 3 years. Remove performance pay. Term 5 + 3 year optional – capped. Avoid involvement in operations.
3. Fairness	Sound approach and processes, however expectations not managed well. Complainants often disappointed that process and possible outcomes/remedies not what they expected.	Define 3+ distinct complaints paths. Publish procedures, rights of parties. Change of Bylaws to oblige ICANN body to respond to an Ombuds written report within specified timeframe. Communications material refreshed and upgraded to enhance focus on systemic improvement.
4. Timeliness	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	Strong - No cost to parties, information provision not onerous, informal processes are low effort for parties. Some questioning of Office of the Ombuds value proposition.	Ensure Office of Ombuds has mediation skills and experience. Value proposition to come from better reporting. More own-motion enquiries. Enable Ombuds risk assessments.
6. Transparency	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	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 Ombuds Annual Reports. Ombuds Advisory Panel, establishment of KPIs for Office, more structured periodic evaluation of Office.

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 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 single 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, unless there are significant unique benefits, we do not generally support the Ombuds function 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 and diminish the

perception of independence (see discussion at Page 33).

Recommendation 1. The statement in Article 5 of ICANN's Bylaws of the Ombuds Office's Charter should be changed to give the Office a more strategic focus.

The following illustrates (this is a suggested starting point - of course, this would have to be drafted in ICANN language):

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

- *Reviewing single situations that are brought as a complaint – and making recommendations for reconsideration or changed decisions if appropriate.*

- *Arranging or personally conducting conciliation and mediation of disputes*

- *Ensuring that complaint-handling by others within the ICANN environment is fair*

- *Reviewing processes, policies and systems for fairness*

- *Publishing reports that cast light on fairness issues within the broader ICANN community*

- *Contributing to continuous improvement within the ICANN environment through input to design of policy, processes and systems*

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 Ombuds and key ICANN people):

a) Governance

Complaints about actions or omissions of the Board or Committees and other formal ICANN groupings, committees, panels, etc. Generally elected or appointed positions with some democratic or delegated authority.

b) Community

Complaints about actions or omissions of individual members of the community, including informal groupings, working groups, etc.

c) Corporation

Complaints about staff actions or omissions, generally this would be a review of a matter already put through staff or corporation processes and not resolved.

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. Careful consideration should be given to the carve outs – these should be no broader than necessary, whilst recognising that the Office will only disappoint if it takes on matters where there is no scope for the Office to add value.

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.

Recommendation 2. The Ombudsman Framework should be replaced by procedures that:

- *Distinguish between different categories of complaints and explains how each will be handled;*

- *Set out the kinds of matters where the Ombuds will usually not intervene – and where these matters are likely to be referred to another channel (with the complainant's permission); and*

- *provides illustrative examples to deepen understanding of the Ombuds approach.*

Proposed ICANN Ombuds role

The proposed ICANN Ombuds 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. Settling the detail and language will require a cooperative approach and must involve the Ombuds staff.

O

GOVERNANCE

- Complaints about Board or Director actions
- Complaints about ICANN policy decisions
- Complaints about nomination/election processes
- Complaints about governance of constituent groups
- Complaints about other decision review mechanisms

Review for fairness of process, refer process fairness concerns to relevant body with change or reconsideration recommendations, publish report on anonymised basis where issues of general application arise

CORPORATION

- Complaints about processes
- Complaints about ICANN staff conduct/behaviour
- Complaints about staff decisions
- Complaints about contracted service providers

Generally refer complaints to staff /Corporation channels and monitor to ensure response is provided, review for fairness of process, recommend re-consideration of decision, recommend CEO action re: staff, review Complaints officer data, recommend changes to process or policy, publish report on anonymised basis where issues of general application arise

COMMUNITY

- Disputes between ICANN community groups (affiliations)
- Complaints about ICANN (non-staff) individuals
- Disputes about ICANN consultative processes
- Escalated disputes from within ICANN groups
- (includes where raised by informal groups)

Generally take on complaints/disputes, review for fairness, use shuttle negotiation, conciliation and mediation to resolve, exercise disciplinary powers under anti-harassment policy, recommend changes to process or policy, publish report on anonymised basis where issues of general application arise

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

This is a vexed but not unusual issue for ombuds 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 Ombuds 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 Ombuds has 'fixed'.

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

Recommendation 3. Once ICANN has agreed to a revised configuration for the Office of the Ombuds, a plan should be developed for a soft re-launch of the function, which should incorporate action to emphasis the importance of the Ombuds function by all relevant parts of ICANN, including the Board, CEO, Community groups, Complaints Officer, etc.

We believe that there is support from the community for an Ombuds 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 Ombuds function will not generally 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 Ombuds disciplinary powers. This will enhance the Ombuds' 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 Ombuds decision powers in the future – such as the one above for matters of harassment.

As discussed earlier, we see the Ombuds as a 'wielder of influence' rather than 'wielder of power'. The Office of the Ombuds would, however, be a more effective 'wielder of influence' if the Bylaws were amended to provide that, where the Ombuds 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). (These times can of course be adjusted by ICANN to fit in with current practice if desired). Of course, the responding body should not be obliged to accept the recommendation - but must provide reasons for their position. The Ombuds' report and the response to it should be published on the Ombuds' webpage with an alert on the ICANN website or newsletters, unless there is sound reason in the Ombuds' view to not do so.

Recommendation 4. The ICANN By-laws and any relevant rules of ICANN groups should be amended to oblige all relevant parts of ICANN (should include the Corporation, the Board and Committees and any body or group with democratic or delegated authority) to respond within 90 days (or 120 days with reason) to a formal request or report from the Office of the Ombuds. The response should indicate the substantive response along with reasons.

For the Ombuds part in this improved framework of responsiveness and accountability, the Office of the Ombuds should develop its own timeliness KPIs for handling complaints.

Recommendation 5. The ICANN Office of the Ombuds should establish timeliness KPIs for its own handling of complaints and report against these on a quarterly and annual basis.

Finally to the issue of skills: it seems to us that investigation and conciliation skills are the core skill sets for the Ombuds function. Whilst legal skills may enhance an Ombuds' 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, having formal mediation training and experience within the Ombuds function would, we think, be a distinct advantage. This would better enable Ombuds to lead the parties to a resolution (and

could only assist the public standing of the Ombuds function). This should be a flexibly-framed obligation to allow for different ways of achieving this.

Recommendation 6. The Office of the Ombuds should be configured so that it has formal mediation training and experience within its capabilities.

Subject to the limitations of a very small office, given the great cultural and religious diversity within a global community, we also think it would be very useful for there to be at least gender diversity (and hopefully other forms) within the Office. Not only would this be setting a good example, but would enable a wider range of ways of responding to sometimes highly sensitive complaints.

Recommendation 7. The Office of the Ombuds should be ideally configured (subject to practicality) so that it has gender, and if possible other forms of diversity within its staff resources.

The Ombudsperson 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 Ombuds or providing advice on how to take on difficult issues. From our consultations, it is clear that this reporting structure can encourage a perception 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 Ombuds 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 a change to the reporting/ accountability structure. We suggest that an independent Ombuds Advisory Panel could be formed (approved by the Board in consultation with the community)

and populated with 3 or 4 well respected and experienced ICANN community members, together with two experienced current or former ombudsmen from other organisations.

We think that the two ombudsmen should not be ex-ICANN - rather they should be from two different environments (say an industry or government ombuds and a corporate ombuds).

To illustrate what we have in mind for the ICANN panellists, (please forgive our ignorance of the nuances) perhaps one member with extensive community experience on the user side, one with supplier and/or business experience and one Board member with an interest/experience in dispute resolution.

The aim would be to create a group capable of advising on priorities, guiding and influencing Ombuds behaviours, balancing personal biases, helping Ombuds ensure that the right balance in priorities is struck, holding the Office accountable for meeting its KPIs, overseeing evaluation of performance, assisting with selection of a successor Ombudsperson and reviewing and recommending a budget to the Board.

This panel need not be very expensive, meeting face-to-face perhaps once per year and 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 seen to diminish apparent independence, however would be much less so if in the hands of the Panel.

Typically, external ombuds functions are subject to periodic independent review (usually every 3-5 years). This is a mechanism designed to balance the need for an ombuds to have independence and autonomy in handling day-to-day matters with some accountability to the community.

(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 Ombuds function would need to be framed consistently with that initiative.)

Recommendation 8. ICANN should establish an Ombuds Advisory Panel, made up of 5 or 6 members to act as advisers, supporters, wise counsel and an accountability mechanism for the Ombuds. The Panel should be made up of a minimum of 2 members with ombudsman experience and 3-4 members with extensive ICANN experience. The Panel should be responsible for commissioning an independent review of the Ombuds function every 3-5 years.

Lastly, we think that independence could be strengthened by a stronger commitment to a fixed term for Ombuds contracts. We suggest a 5 year term with a 12 month probation period administered by the Ombuds Advisory Panel plus one possible extension of no more than a further 3 years.

Recommendation 9. The By-laws and the Ombuds employment contracts should be revised to strengthen independence by allowing for a 5 year fixed term (including a 12 month probationary period) and permitting only one extension of up to 3 years. The Ombuds should only be able to be terminated with cause.

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

Recommendation 10. The Ombuds should have as part of their annual business plan, a communications plan, including the formal annual report, publishing reports on activity, collecting and publishing statistics and complaint trend information, collecting user satisfaction information and publicising systemic improvements arising from the Ombuds' work.

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 corporation's 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 Ombuds involvement.

At this stage, based on the examples we have been alerted to, we see three possible avenues for Ombuds involvement:

- operational (where particular types of matters pass through the Ombuds office)

- particular responsibility for implementation/ monitoring of a 'fairness' policy

- 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 the policy presumption should be in the negative – ie. that the Ombuds should <u>not</u> 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.

Recommendation 11.   With input from across the community, ICANN should develop a policy for any Ombuds involvement in non-complaints work that addresses:

a)   *Whether there is unique value that the Ombuds can add through the proposed role or function?*

b)   *Whether the proposed reporting/accountability arrangements may compromise perceived independence?*

c)   *Whether the proposed role/function would limit the Ombuds ability to subsequently review a matter?*

d)   *Whether the workload of the proposed role/function would limit the Ombuds ability to prioritise their complaints-related work?*

e)   *Whether any Ombuds involvement with the design of new or revised policy or process, creates the impression of a 'seal of approval'?*

f)   *Whether the proposed Ombuds input may be seen as a 'short-cut' or substituting for full stakeholder consultation?*

We have used the two examples alongside throughout the Report and of course, have been asked if we have a recommendation for how these functions might be done – if the Ombuds is not to be made responsible.

It seems that the options are either a staff function or a community function. Generally we are neutral on the best way to do this type of work. As a general guide, if the function will require a great deal of interaction and collaboration with the Corporation, we would recommend a staff function – with obligations to consult with the community.

If on the other hand, the task is quite independent and not reliant on heavy staff input, then it could easily be the responsibility of a community body or person – with an obligation to consult with staff.

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.

EXAMPLE

We would have concerns about the Ombuds function taking on the role of Office of Diversity (as floated with us). As above, the Ombuds could assist, but we think this is better as a staff or community responsibility.

First, it will be quite a workload in the first few years. Second, this is a likely issue for complaints and the Ombuds would be unable to credibly review such a complaint, particularly if it was against guidelines or the implementation of guidelines the Ombuds had been responsible for.

Third, the process of corporation functions and various ICANN groups adopting new policy will inevitably involve those groups seeking the Ombuds 'seal of approval' – eg. "will this implementation be OK?". Again, that would compromise the Ombuds independence.

Recommendation 1. The statement in Article 5 of ICANN's Bylaws of the Ombuds Office's Charter should be changed to give the Office a more strategic focus.

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cameron. ralph. khoury

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f)   *Whether the proposed Ombuds input may be seen as a 'short-cut' or substituting for full stakeholder consultation?*

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.
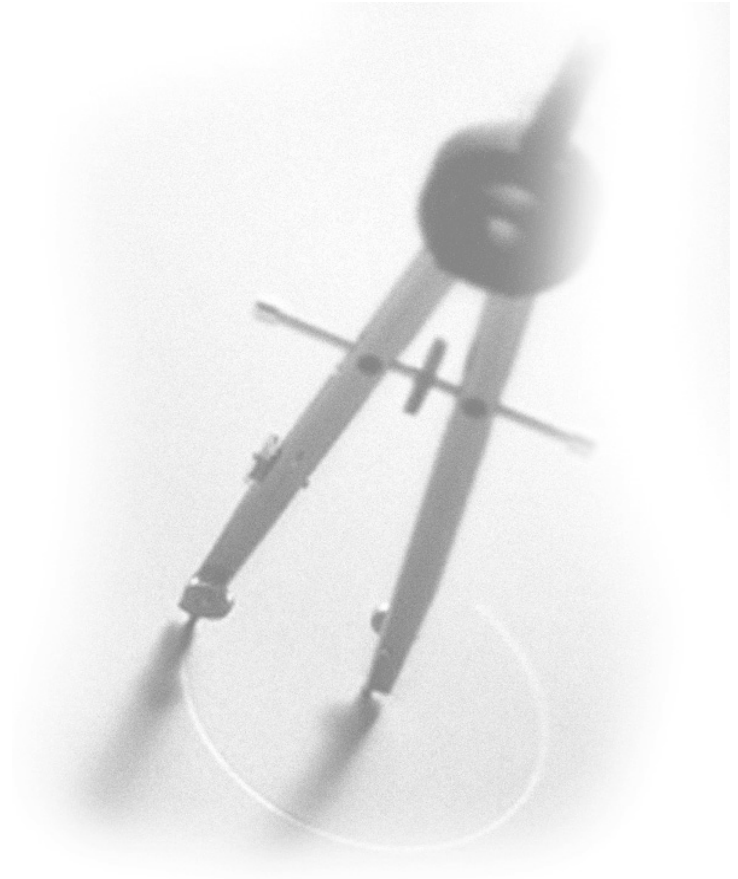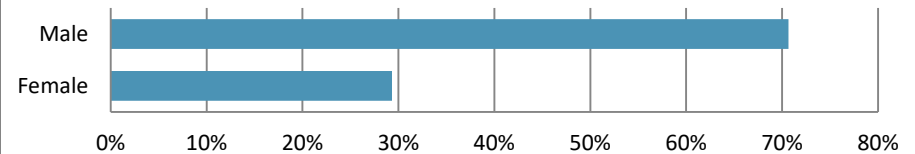
Q1. Demographics

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 (2), no sub-affiliation given (4))
RSSAC	1
SSAC	1
None given	19

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

- North America — 32%
- Latin America — 24%
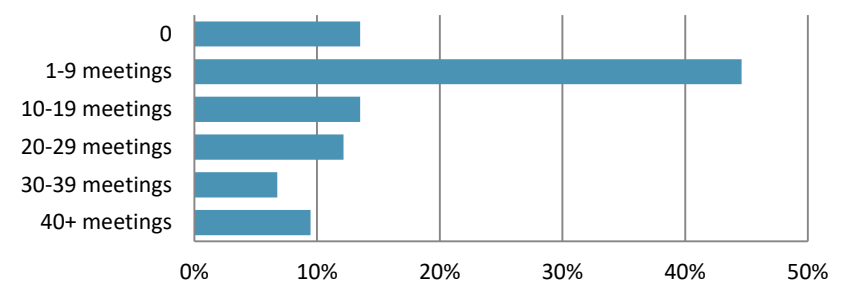- Europe — 13%
- Asia Pacific — 20%
- Africa — 11%
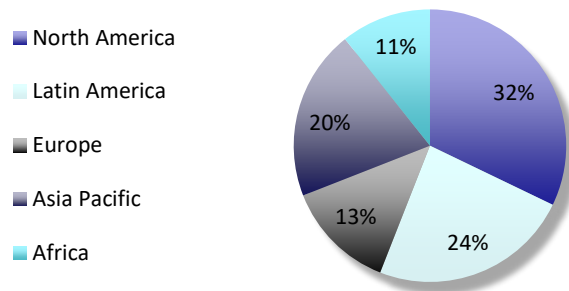
Q1d. What is your gender? (n=75)

Q1e. How many years have you been an active member of the ICANN community? (n=74)
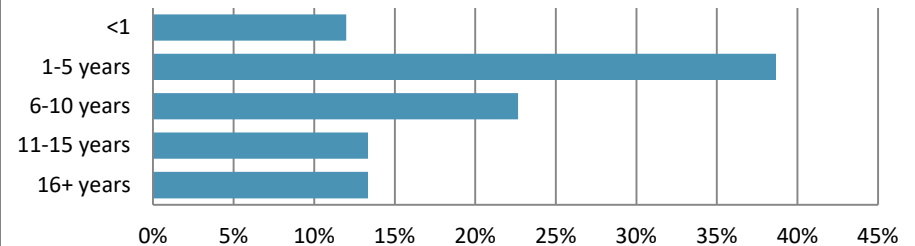
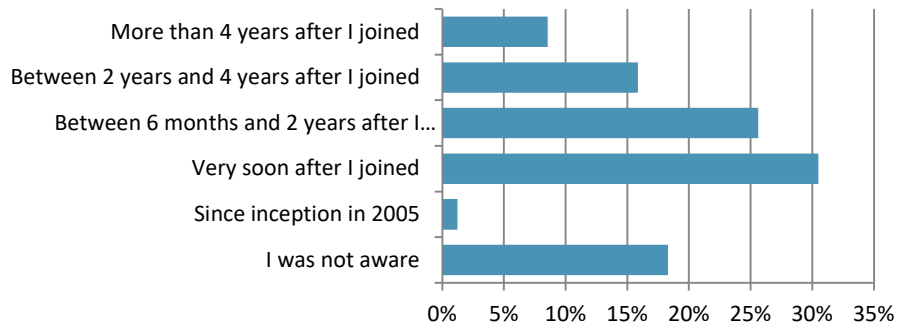**Q1f. How many ICANN meetings have you attended? (n=74)**

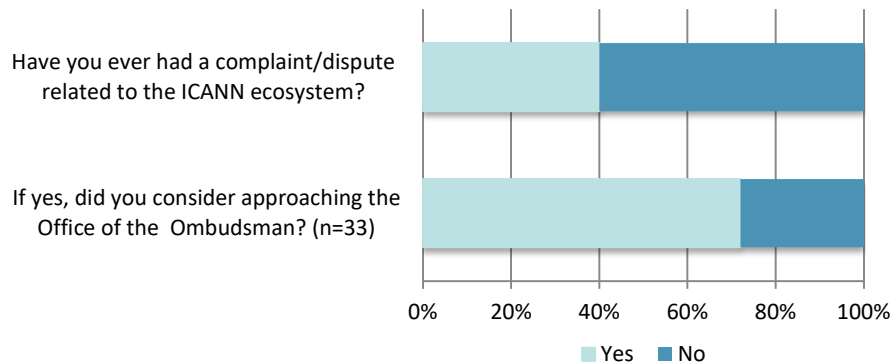**Q2. When did you become aware of the Office of the Ombudsman as an avenue for dealing with disputes or complaints within the ICANN ecosystem? (n= 82)**

Chart categories (top to bottom):
- More than 4 years after I joined
- Between 2 years and 4 years after I joined
- Between 6 months and 2 years after I…
- Very soon after I joined
- Since inception in 2005
- I was not aware

X-axis: 0% 5% 10% 15% 20% 25% 30% 35%

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

Chart categories:
- Have you ever had a complaint/dispute related to the ICANN ecosystem?
- If yes, did you consider approaching the Office of the Ombudsman? (n=33)

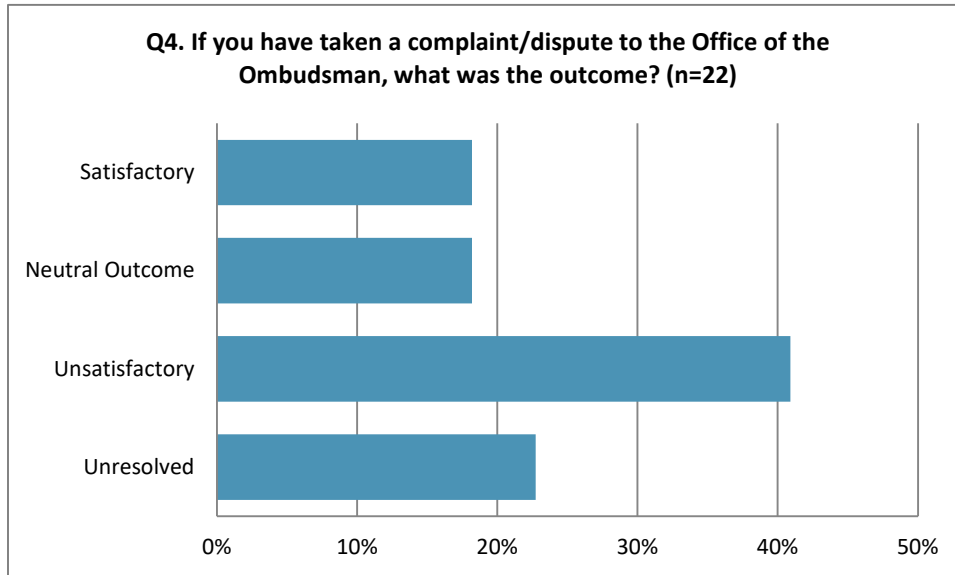X-axis: 0% 20% 40% 60% 80% 100%

Legend: ■ Yes ■ No

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. If you have taken a complaint/dispute to the Office of the Ombudsman, what was the outcome? (n=22)

| Outcome	Percentage
Satisfactory	~18%
Neutral Outcome	~18%
Unsatisfactory	~41%
Unresolved	~23%

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. For a complaint that was out of Ombud jurisdiction (n=18):
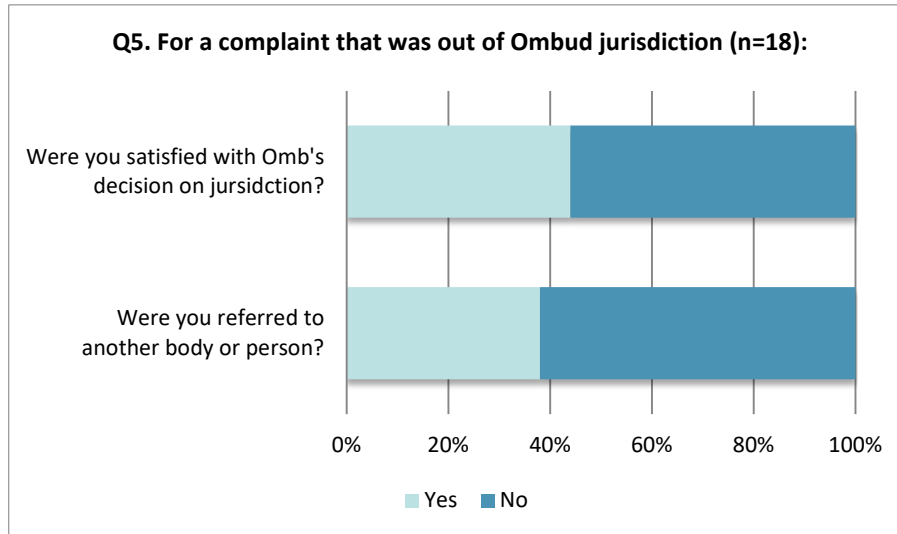

Comments:

- 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.
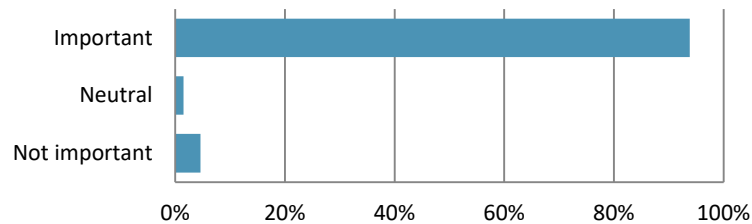
Q6. If the Ombudsman dealt with your complaint, how would you rate your experience of the process?
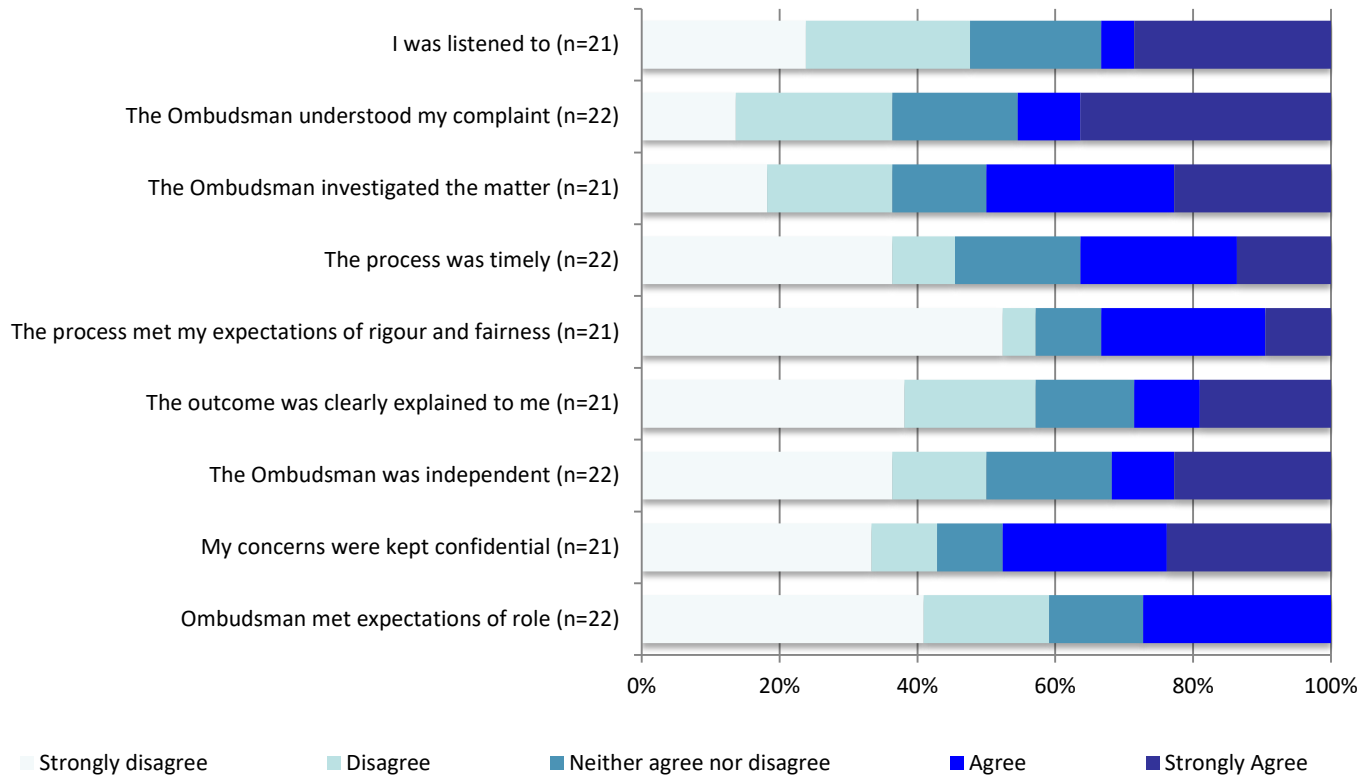
**Q7. How important to you is it that the ICANN ecosystem has an Ombuds function that is able to deal with complaints independently of vested interests or inappropriate influences? (n=65)**

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)
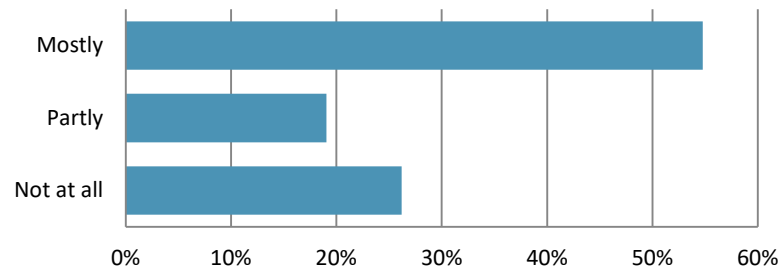

Comments as to whether expectations met:

- 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.
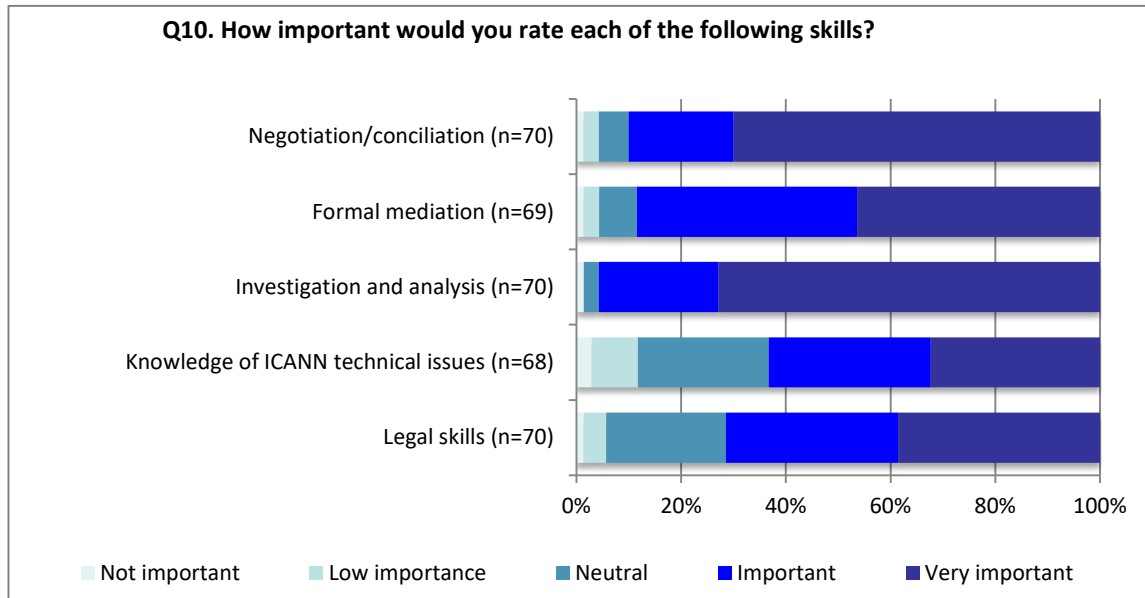- The ombudsman is not independent as he or she is contracted by ICANN.

Q9. How important are different roles and powers in ICANN going forward?
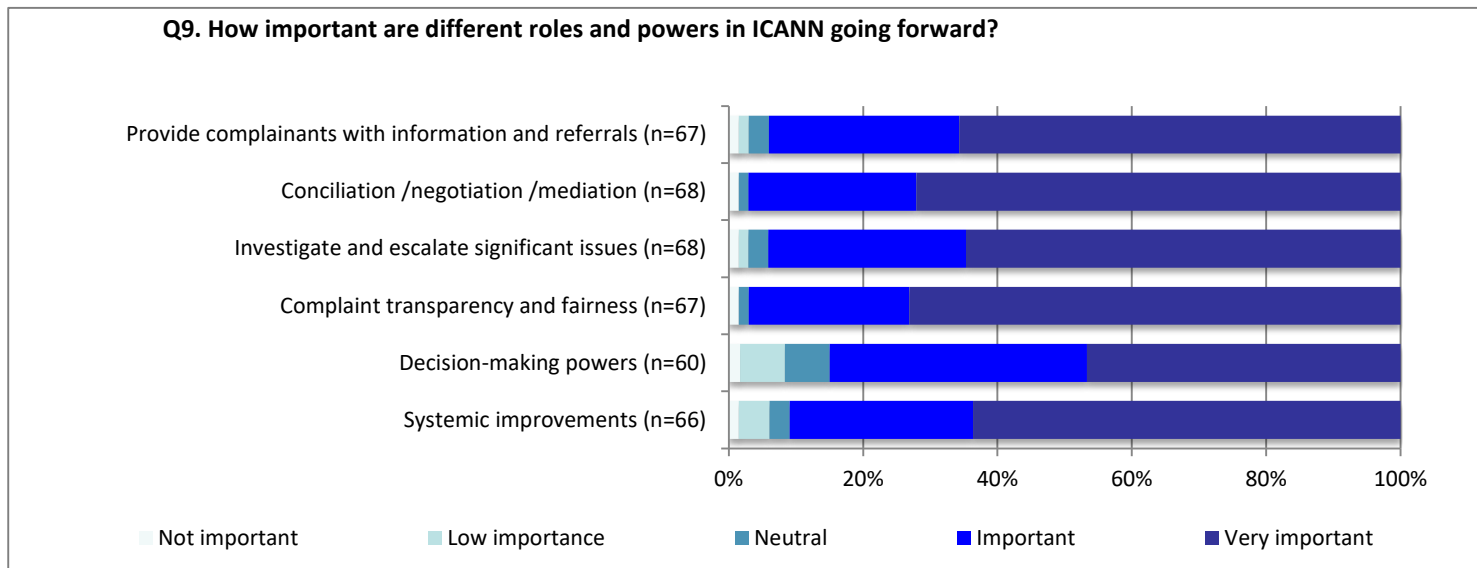
Comments:

- 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.

Q10. How important would you rate each of the following skills?

Negotiation/conciliation (n=70)
Formal mediation (n=69)
Investigation and analysis (n=70)
Knowledge of ICANN technical issues (n=68)
Legal skills (n=70)

0% 20% 40% 60% 80% 100%

☐ Not important ☐ Low importance ☐ Neutral ☐ Important ☐ Very important
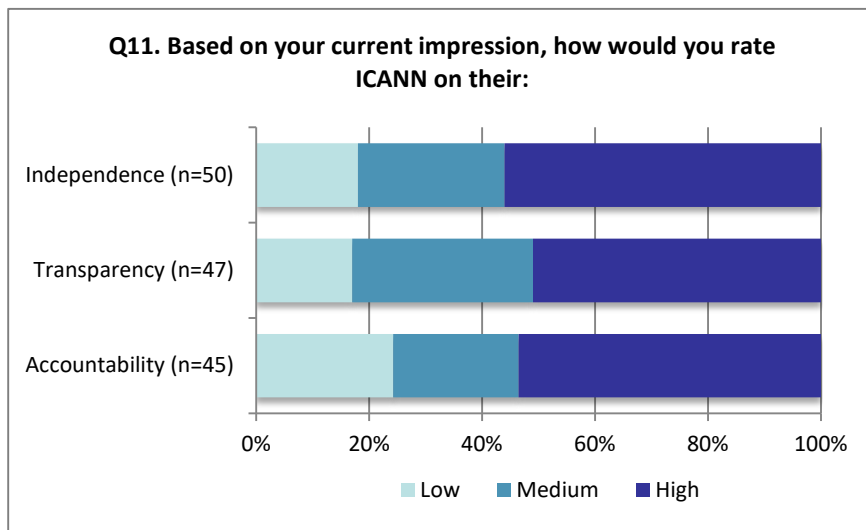
Comments:

- 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. Based on your current impression, how would you rate ICANN on their:

Category	Low	Medium	High

Independence (n=50)

Transparency (n=47)

Accountability (n=45)

0% 20% 40% 60% 80% 100%

□ Low ■ Medium ■ High

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.

Attachment C - Ombuds 'logic model'

The first Ombudsman Frank Fowlie contributed significant intellectual input to the establishment of the ICANN Ombuds. Amongst other things, he proposed a logic model for the ICANN Ombudsman function – the table shows our thinking 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	• Review single 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	• 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	• Information resources including website • Documentation of complaints pathways and processes • Complaints forms, templates etc. • Written responses to complaints • Published reports on single matters and systemic issues • Annual reports • Information for periodic evaluation
Immediate outcomes	• Point of contact for advice and making complaints • Referral point for out-of-jurisdiction complaints • Substantive response for in-jurisdiction complaints
Intermediate outcomes	• 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	• Community and stakeholder confidence in ICANN fairness • High levels of trust and strong relationships within Community
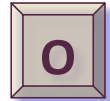
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