

Proposed Revisions to Community Anti-Harassment Policy

20-Dec-2024

Comment of the ICANN Business Constituency (BC)

The Business Constituency thanks ICANN for this consultation. Ensuring that all members of our community are, as stated in the Expected Standards of Behavior, treated *“equally, irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age, or sexual orientation”* and with *“civility both face-to-face and online”* must remain the baseline for all that engage in our multistakeholder model.

As further specified in the Expected Standards, *“participants in the ICANN process must not engage in any type of harassment. Generally, harassment is considered unwelcome hostile or intimidating behavior - in particular, speech or behavior that is sexually aggressive or that intimidates based on attributes such as race, gender, ethnicity, religion, age, color, national origin, ancestry, disability or medical condition, sexual orientation, or gender identity.”*

We open our comments with these quotes as any amendments to the Anti-Harassment Policy must not overlap with, or contradict, the Expected Standards of Behavior. While the latter governs behavior, the former should govern procedure. The BC strongly agrees that all members of this professional community must act in accordance with these Standards.

An anti-harassment policy should clearly set out the parameters of the offense and the consequent disciplinary (and/or criminal) proceedings.

The role of an Ombuds is to mediate conflicts confidentially, and to determine if formal investigation and disciplinary proceedings are necessary or if resolution can best be achieved in another manner, such as by counseling or dialogue. Their role is to resolve conflicts or concerns while acting with both fairness and impartiality, not to automatically validate any complaint; the legal more *“innocent until proven guilty”* must apply to both parties. The complainant must be treated with compassion in a confidential and secure manner. Should the Ombuds find the complaint to have merit, the alleged harasser must be informed and given the opportunity to present their version of events in the same confidential and respectful environment. If mediation is needed, rights of both parties must be balanced and due process followed.

With respect to the overall tone and content of this draft, we register both caution and concern. Harassment must not be tolerated, and we must do our utmost to ensure that everyone - the community, the staff and any third party in an ICANN-controlled space – is protected, and can act, against *“unwelcome hostile or intimidating behavior.”*

To be effective this important policy must be:

- comprehensible and targeted in scope at actual harassment, not to general disagreements, perceived slights or individual (subjective) feelings being offended;
- based on due process, including evidence, corroboration, the right to a defense, the right to appeal and confidentiality; and
- recognize the possibility that the policy itself may be abused by individuals making unfounded allegations. The policy must seek to protect and assist genuine complainants while being balanced and fair.

Absent a clear and fair procedure, we fear that this policy will serve more to demean and denigrate genuine complaints than promote a culture of respectful and acceptable behavior.

ICANN is a professional environment, where all should feel welcome and safe. By the same token, rumor and unfounded allegations can have extremely serious effects on any individual’s ability to perform their job and maintain their professional reputation.

The [BC submitted comments in 2017 during Comment on Proposed ICANN Community Anti-Harassment Policy](#). Our views at that time remain relevant today and should be considered in the context of the current review.

To help inform this current consultation, BC is also interested to know how well the current policy has worked, and whether community members feel comfortable bringing their claims forward. **Data on these points would be valuable as updates to policy are considered.**

Further to [our recommendations of 2017](#), we submit the following comments, in the order of the proposed changes:

ICANN proposed change	BC comment and suggested revision
<p>There is the potential to update the name to highlight what it attempts to promote (for example, ICANN Community Dignity and Respect Policy and Terms of Participation and Harassment Complaint Procedure). Community input via the Public Comment Proceeding is encouraged on the name.</p>	<p>There is merit in clear language, especially in a multilingual environment. While recognizing the good faith intention behind this proposal, we are concerned that it may not be sufficiently comprehensible to all in the community and could lead to confusion and even overreach.</p> <p>“Dignity” is a subjective term that may be linked, for example, to an individual’s philosophical, political, cultural or religious beliefs. While everyone has the inalienable right to their own beliefs, we cannot force others to agree, or acquiesce, to them. Including “dignity” in the name may create a false expectation that one’s own individual sense of “dignity” is paramount, and others must act in accordance with those same beliefs even if it contradicts their own. We therefore caution against the use of the word “dignity”.</p> <p>If this policy is intended to lay out our accepted definition of harassment, and the procedural steps for how it is to be addressed, we suggest that “ICANN Community Anti-Harassment Policy and Complaint Procedure” is far clearer.</p>
<p>Participants have a right to engage in the ICANN community free from behavior that demeans, humiliates, or denigrates. Every person has the responsibility to contribute to a positive environment by treating others with dignity and respect.</p>	<p>Reference should be made here to the Expected Standards of Behavior. The two texts must neither be contradictory nor duplicative.</p> <p>In the construct, “treating others with dignity”, the word “dignity” is perfectly acceptable.</p>
<p>Refrain from harassment of any type. Harassing conduct or commentary may take many forms, including, but not limited to, verbal acts, graphic depictions, written statements, physical conduct, and more. Note that harassing conduct may be made via various methods, including, in person, over the</p>	<p>Suggested revision:</p> <p>Refrain from harassment of any type. Harassing conduct or commentary may take many forms, including, but not limited to, verbal acts, graphic depictions, written statements and physical conduct, and more. Such conduct, as defined below, may be made by via various methods, including, in person, over the telephone, and/or via the Internet (in any of its applications, such as via email, Zoom, etc.). See the definition below.</p>

ICANN proposed change	BC comment and suggested revision
<p>phone, via the Internet (in any of its applications, such as via email, Zoom, etc.). See the definition below.</p>	
<p>Refrain from retaliation. Retaliation is strictly forbidden against anyone for reporting any conduct or commentary that is inconsistent with the terms set forth above ("inappropriate behavior") or for participating in an investigation of any such report or complaint.</p>	<p>This is confusing and should apply equally to both parties. "Retaliation" is undefined, and we do not know how, or by whom, this could be "strictly forbidden".</p> <p>Suggested revision: Refrain from retaliation and act in good faith. Retaliation is strictly forbidden against any person reporting conduct that they believe in good faith to be contrary to this Policy and any other person that participates in good faith in the related investigation. While the Ombuds' investigation is ongoing and the allegations unproven, retaliation against the respondent is also forbidden. Should the Ombuds conclude that the alleged conduct did occur, appropriate remedial action shall be taken as outlined below.</p> <p>Further, this Policy is not itself to be used for the purposes of retaliation. Persons who abuse this Policy by submitting vexatious and/or spurious complaints or reports shall be dealt with in an appropriate fashion with reference both to this Policy and the Expected Standards of Behavior.</p>
<p>Privacy/confidentiality?</p>	<p>Privacy. At all times the names of the complainant and respondent shall be kept confidential and shared by the Ombuds on a strictly need-to-know basis pursuant to the procedural steps in this Policy.</p> <p>Should there be a final determination by the Ombuds confirming the alleged behavior, an appropriate decision will be taken as to whether the names of the parties should be included in any public notice. The name of the successful complainant will only be made public with their express consent.</p>
<p>Intent is not a factor in determining harassment. Conduct does not have to intend to harm, be directed at a specific target, or involve repeated incidents in order for it to be deemed harassment.</p>	<p>In a diverse global community such as ICANN, a statement, joke or gesture may cause unintended offense due to cultural differences. Offense that is clearly unintended could be addressed by an explanation, admonition, warning, or call for apology. Once the alleged perpetrator has been suitably appraised of the unintended offense they caused, only persisting in similar behavior could be treated as harassment.</p> <p>We disagree that harassment can be established on the basis of one incident, and do not understand the intention behind it not being "directed at a specific target" unless you are suggesting a form of class action /representation on behalf of all who hold Specified Characteristics? We would appreciate further explanation.</p> <p>Great care must be taken to comply with due process and ensure there are appropriate checks and balances to prevent this policy from being misused as an avenue to litigate any perceived, albeit unintended, offense, or even to pursue</p>

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	<p>personal vendettas. Such misuse would serve only to negate the effectiveness of the policy, to demean the very real need to prevent, stop and sanction any form of harassment and to the risk that genuine complaints would not be brought or pursued.</p>
<p>Examples of harassment</p>	<p>Harassment is unwelcome and/or non-consensual hostile or intimidating conduct. These are extremely sensitive and personal experiences that each recipient needs to interpret on their own. The process of evaluating harassment must consider the elements of hostility and intimidation.</p> <p>Some of these behaviors are illegal in many jurisdictions and should be referred to the relevant law enforcement authority for appropriate sanction; they are outside the Ombuds’ mandate. This policy should identify when and how the Ombuds should refer the matter to law enforcement as ICANN should not insert itself into matters raising criminal liability.</p> <p>While appreciating the good faith intent, we are concerned that the overly detailed additions with extra emphasis on what might be considered sexually motivated behavior do not add to the weight of the policy; instead they could serve to detract from the serious and pressing need to combat all hostile and intimidating behavior - psychological or physical. The more the detail, the narrower the definition. We also fear unintended consequences, in that potential new community members may read this text and assume all such behaviors are daily occurrences and tolerated in our community, thus we are to be avoided, or that innocent gestures will always be heavily sanctioned.</p> <p>The draft states that these are example “but are not limited to”. Accordingly, shortening the long lists and placing more emphasis to elaborate on the definition of harassment is suggested.</p>
<p>For formal complaints to the Ombuds, the process is summarized as follows: I. Review of complaint with the following potential outcomes: a. Complainant drops or wants to return back to Ombuds-assisted mediation; b. Ombuds determines insufficient grounds to investigate; or c. Ombuds determines sufficient grounds to investigate. II. Investigation: a. Complaint upheld; or b. Complaint not upheld.</p>	<p>Suggested revisions:</p> <p>For formal complaints to the Ombuds, the process is summarized as follows: I. Review of complaint with the following potential outcomes: a. Complainant drops the complaint or wants to return back engage in Ombuds-assisted mediation; b. Ombuds determines insufficient grounds to investigate; or c. Ombuds determines sufficient grounds to investigate. II. Investigation: a. Respondent informed and brought into the process. b. Complaint upheld; or c. Complaint not upheld. d. Right to appeal</p> <p>Due process will be followed throughout including confidentiality; the need for evidence; and the right to appeal.</p>

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	<p>The appropriate role of the Ombuds is to inquire into complaints that an individual has been treated unfairly and to seek reconciliation.</p> <p>Given the severe damage to personal reputation that may occur from an accusation of (inter alia) racial or sexual harassment that may ultimately be found without merit, there must be a fully balanced due process, including confidentiality and the rights of defense and appeal.</p> <p>In the BC's 2017 submission to the Comment on Proposed ICANN Community Anti- Harassment Policy, we noted that: "The proposed policy places too much responsibility on ICANN's Ombudsperson, who would have to act as investigator, judge and jury, without the benefit of evidence or corroboration." The BC proposed an alternative process that separates investigation and decision roles: "The Ombudsperson should have the role of gathering facts, including interaction with the accuser, accused, and any witnesses or other involved individuals. "The Ombudsperson should submit their report to a recognized expert in addressing harassment in international organizations (expert to be contracted by ICANN). "This expert should determine whether a violation has occurred and may recommend to the Ombudsperson any appropriate action to take."</p> <p>The BC strongly believes that this approach should be incorporated into the current revisions being considered.</p>
Remedial action (if Complaint upheld)	The policy does not provide for a process where the complaint is not upheld. At the very least it should be a recognized possibility, a reasoned record kept and both the complainant and any witnesses clearly directed not to breach the privacy of the innocent respondent nor to engage in any "retaliation" as detailed above.
...believes they have identified inappropriate behavior toward themselves or others...	<p>Are the "others" to be consulted? While there may be very real cases of a victim feeling they cannot defend themselves (e.g. a younger colleague against a powerful older one), what happens in cases where a totally innocent exchange is overheard/seen and misconstrued? If reporting such a matter, should not the first step be to verify the facts and effect with and on the alleged victim?</p> <p>"Belief" is subjective and impossible to quantify. While at all times anyone should be able to speak to the Ombuds on any matter within the latter's purview, a full procedural investigation cannot be premised on feelings or beliefs. Evidence and facts are essential.</p>
If the Ombuds receives a complaint from an ICANN staff member ...	What would happen if the complaint concerned behavior of an ICANN staff member toward a community member? Or if a community member witnesses or has material evidence of harassment by one staff member to another?

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	Reference in this section is made to the Internal Complaint Process for staff. As part of the revision process of this public comment, this Process should be examined in relation to any changes being made to the Community Anti-Harassment Policy. The two should complement, not contradict.
If the Ombuds finds a complaint to be within the jurisdiction of the Ombuds Office...	This section must be amended for due process, including the preservation of confidentiality, which must extend to witnesses, if any, who should be advised not to discuss the matter with third parties.
...inquiries of the person who is the subject of the complaint (respondent) to obtain a response to the complaint if, in the Ombuds' discretion, the complainant has provided sufficient facts to support the allegation that inappropriate and unwanted harassment behavior has occurred	<p>This is superfluous: "if, in the Ombuds' discretion, the complainant has provided sufficient facts to support the allegation that inappropriate and unwanted harassment behavior has occurred". If the Ombuds has not so decided, why would the procedure have reached this stage? (Also, "harassment behavior" is grammatically incorrect).</p> <p>We also note that while the Ombuds should (rightly) communicate "with the complainant to clarify the facts and allegations giving rise to the complaint", the terminology pertaining to the respondent is restricted to "inquiries... to obtain a response". Surely they should also be asked for clarification of the facts?</p>
If the complaint is open to third parties, then the regular updates would go to the third party and the respondent but not the victim.	<p>(a) Which third parties and how would a complaint be "open" to them?</p> <p>(b) The use of "victim" is inappropriate as at this stage: the allegation has not been proved. The alleged victim should be referred to throughout as the "complainant".</p> <p>(c) Why would the complainant not be kept informed that a third party is discussing them with the Ombuds and the respondent? Where are the rights to privacy (etc.) of the complainant/alleged victim in this instance?</p>
The length of the evaluation process varies depending on the circumstances.	The evaluation should be conducted efficiently and effectively in the shortest practicable time frame. This open-ended wording suggests that the process could be indefinitely shelved and/or dragged out which would be detrimental to both parties.
Defense?	Where is right to a defense and its procedure?
The Ombuds will communicate the results of the investigation to the complainant and the respondent upon conclusion of the Ombuds' evaluation.	In what manner? Is there to be a public notice and if so, how and when?
Appeal?	Where is the right to appeal and its procedure?
No "corroboration" is required to support a finding by the Ombuds; the Ombuds will consider the credibility of each party in making a determination.	<p>Can witnesses also be called for the defense, or is this a one-way bar to "corroboration"?</p> <p>How can the Ombuds consider the "credibility" of every community member? This suggests that only those known personally to the Ombuds, and/or who are well-known across the community, (which, by default, is a form of corroboration –</p>

ICANN proposed change	BC comment and suggested revision
	based on what others think of them), could be so assessed: what of new, or quieter, members?
<p>The appropriate remedial action will depend on these factors:</p> <ul style="list-style-type: none"> a. the severity, frequency, and pervasiveness of the conduct; b. prior complaints made by the complainant; c. prior complaints made by against the respondent; and d. the quality of the evidence (e.g., firsthand knowledge, witness credibility, evidence). 	<p>“b. prior complaints made by the complainant”: against whom – anyone? What would happen if the evidence showed a pattern of spurious or vexatious complaints?</p> <p>“c. prior complaints made by against the respondent”: by whom and for what reason? And if those complaints were rejected for lack of merit, irrelevant to the current case or being cited as an attempt to relitigate closed matters?</p> <p>“d. the quality of the evidence (e.g., firsthand knowledge, witness credibility, evidence)”: see above comments re witnesses and corroboration.</p>
<p>... prohibiting any individual responsible for inappropriate behavior from further participation in the ICANN process (either in perpetuity or for a specified period of time); limiting the individual's participation in some manner, and/or requiring satisfaction of pre-requisites, such as a written apology as a condition of future participation.</p>	<p>As this may result in the Ombuds’ determination ending the respondent’s career and irreparably damaging their professional reputation, where is the right to appeal?</p>
<p>If a respondent refuses to comply with the remedial action identified by the Ombuds, the Ombuds will refer the matter to the ICANN Board with recommendations for consideration and action. The referral to the Board will include a discussion of the facts, claims, findings, and efforts to resolve the matter informally, and recommendation(s) of remedial action.</p>	<p>Will the respondent be consulted and involved, or again is this a decision which will affect their professional credibility and future in which they are denied any form of defense or appeal?</p> <p>Where is the specification that any such discussions must be held in camera and confidentiality of both parties guaranteed?</p>
<p>The reporting and complaint procedure will be handled in a manner to ensure confidentiality to the complainant as well as the respondent, to the extent feasible.</p>	<p>This is an afterthought and totally insufficient.</p> <p>Why the “to the extent feasible” qualifier? It is imperative that the entire process ensures confidentiality.</p>

This comment was drafted by Marie Pattullo, Tim Smith, and Mason Cole. It was approved in accord with the [BC Charter](#).