



Comment on Proposed ICANN Community Anti- Harassment Policy

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

Here we are commenting on **ICANN's Proposed Community Anti-Harassment Policy and Terms of Participation and Complaint Procedure**, posted at <https://www.icann.org/public-comments/anti-harassment-policy-2016-11-07-en>

General comments:

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 proposes 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.

The proposed policy should set expectations for ICANN to maintain strict confidentiality during the Ombudsperson's investigation. It should also describe what form of public notice, if any, would accompany a final determination and remedial action.

A **right of appeal** should be provided to an accused individual who believes that ICANN's determination is flawed, especially if there was no evidence other than the statement of the accuser and subjective evaluation of credibility by the Ombudsperson and/or expert. This is especially true since exclusion from ICANN activities may have a severely adverse effect on an individual's ability to perform their job and maintain their professional reputation.

The policy should be explicit about the scope of covered activities. The policy should state with precision which individuals and venues it applies to in order to avoid future confusion and disagreement over whether an alleged incident is covered.

The policy should apply to all individuals who were engaged in any official ICANN activity, or were members of any official ICANN group – including SOs, ACs, constituencies, etc. – at the time of the alleged harassment.

Alleged incidents should be covered if they occurred within a physical venue hosting an official ICANN meeting or event of any type, or in a virtual environment provided for the conduct of official ICANN activities, including email facilities or chat rooms provided for the conduct of ICANN business, policy development, and other official purposes. Finally, the policy should also apply to statements or other material placed on social media that harasses any individual in regard to their participation in ICANN business and activities.

Specific comments on text of the draft policy:

ICANN Draft Text	Business Constituency (BC) Comment
<p>1. Behave in a professional manner, demonstrate appropriate behavior and treat all members of the ICANN community in a respectful, dignified, decent manner at all times, including in face-to-face and on-line communications, irrespective of Specified Characteristics so that individuals of all backgrounds and cultures are made to feel welcome.</p>	<p>This overlaps with ICANN’s Expected Standards of Behavior. Better to refer to those Standards as something that community members should understand before interacting with community members, rather than promulgating parallel but somewhat different standards for enforcement purposes.</p> <p>The Focus of this document should not be on promoting good behavior, which is addressed in the Expected Standards, but rather on defining standards and procedures to deal with bad behavior (harassment).</p>
<p>Specified Characteristics means age, ancestry, color, physical or mental disability, genetic information, medical condition (cancer and genetic characteristics), marital status, national origin, race, religion, sex (which includes pregnancy, childbirth, medical conditions related to pregnancy or childbirth, ...</p>	<p>The reference to two specific medical conditions (cancer and genetic characteristics), could be interpreted as excluding other medical conditions and should be struck.</p> <p>Referring to specific medical conditions as “sex” does not fit with common understanding of gender characteristics and should also be removed.</p>
<p>2. 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 or gesture may cause <i>unintended</i> offense due to cultural differences. Clearly unintended offense could be addressed by an admonition, warning, or call for apology. But intent should be established before more serious sanctions are justified. Evidence of intent could include repetition of the behavior after the targeted individual made it clear that they perceived it as harassment.</p>

ICANN Draft Text	Business Constituency (BC) Comment
<p>Grabbing, groping, ... stalking</p>	<p>Activities such as grabbing, groping, or stalking may be criminal offenses under applicable law. This Policy should identify when and how the Ombudsperson should refer the matter to law enforcement as ICANN should not insert itself into matters raising criminal liability.</p>
<p>Reporting and Complaint Procedure</p> <p>2. The Ombudsperson will review and evaluate the complaint.</p>	<p>The appropriate role of the Ombudsperson is to inquire into complaints that an individual has been treated unfairly by ICANN and to seek reconciliation. We question whether the Ombudsperson has the requisite expertise to make an objective inquiry into allegations of sexual or other harassment. As noted above, the Ombudsperson’s role should be confined to investigation and fact-gathering, with the aim of delivering a comprehensive report to a recognized expert in addressing harassment in international organizations (expert to be contracted by ICANN).</p> <p>Given the severe damage to personal reputation that may occur from an accusation of racial or sexual harassment that may ultimately be found without merit, what protections of privacy are in this proposed Policy? There seem to be none. At the very least, a complainant should be required to commit to confidentiality while the investigation is under way, and any witnesses should be admonished not to discuss the matter with third parties.</p>
<p>3. No “corroboration” is required to support a finding; the Ombudsperson will consider the credibility of each party in making a determination.</p>	<p>The standard for determination is preponderance of the evidence, which may consist solely of the accusation of the accuser, versus denial by the accused, subjectively evaluated by the Ombudsperson’s perception of their credibility. In other words, a judgment may be rendered without any evidence or corroboration. This concerns us, and is the basis for our view that the investigatory and judgment roles should be separated, and that any sanctions beyond a warning or admonition should require some evidence of intent (noting further that intent to harass will be manifest in certain acts or statements even absent additional evidence).</p>

This comment was drafted by Phil Corwin, Denise Michel, Marilyn Cade, and Steve DelBianco.

It was approved in accord with the BC Charter.