

NCUC comment to ICANN's proposed Anti-Harassment Policy

LINK: <https://www.icann.org/news/announcement-2016-11-07-en>

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The NonCommercial Users Constituency (NCUC) welcomes this opportunity to comment on the proposed ICANN anti-harassment policy.

Our comments are ordered as responses to the specific recommendations contained in the Draft Proposal for the anti-harassment policy, where there was no NCUC consensus the dissenting views are included:

1. Behavior of ICANN community

The NCUC feels the current lists of “Specified Characteristics” is unwieldy and can lead to unnecessary confusion.

Considering that ICANN legal has looked at the list extensively we can but only assume it covers all the established legal concepts that need to be included in such a policy. That being said, it is our view that the IETF anti-harassment policy¹ provides a more concise and clear overview: “race, gender, religion, age, color, national origin, ancestry, disability, sexual orientation, or gender identity.” We suggest a happy medium is sought between the IETF list and the current ICANN list.

2. Refraining from harassment of any type

The NCUC supports this recommendation in general terms, but we have three general concern and several dissenting opinions on the need for a list of ‘harassing behavior’.

First, we are concerned about the fact that the list of inappropriate conduct seems to be focused primarily on sexual harassment. Although very important, we believe the list needs to be rewritten to include harassment in a broader sense, and also include examples of unwanted behaviour on the basis of the other “Specified Characteristics” named above. The language in the IETF anti-harassment policy provides a more general list of examples of harassing behavior: “Examples of harassment include the use of offensive language or sexual imagery in public presentations and displays, degrading verbal comments, deliberate intimidation, stalking,

¹ <https://www.ietf.org/iesg/statement/ietf-anti-harassment-policy.html>

harassing photography or recording, inappropriate physical contact, and unwelcome sexual attention.”

We welcome the specific wording in the policy on the fact that the harassing behavior is ‘including but not limited to’ the examples mentioned.

Second, consensual activities should not be covered by this policy. The policy as drafted contains an important oversight, in that it implies that certain kinds of behavior are not allowed per se. It overlooks the issue of whether the parties involved in certain behaviour are willing or consenting to the activity. The policy must make it clear that consensual activities are not covered by this policy. Additionally, we believe it is important to include the notion of affirmative consent² on which to base the understanding of what constitutes harassment in general, and sexual harassment in particular. This is good common practice for anti-harassment policies, and common in anti-harassment laws.

Third, there is a need to include in this policy a specific review cycle for the whole policy, for example every 3 or 5 years. If there are already standard ICANN ways of doing this can be applied, if not the NCUC can recommend one.

Dissenting views on the need for a list:

Certain individuals argued that it is necessary to give examples for what may constitute as harassment, particularly for people who aren't very familiar with it. Others argued that such a list could be used to shut down conversations and disagreements.

3. On the reporting and complaints procedures

- The role and power of the Ombudsman needs to be changed in relation to dealing with harassment issues. We suggest an anti-harassment team, which includes 3 individuals from different genders, and geographical locations. These individuals should not be ICANN staff or ICANN community members, but rather trained professionals. This to ensure that the processing of claims can happen with a broad understanding of harassment, and ensuring that a potential victim can talk to a team member that they feel comfortable with and can relate to. Having a team of people, that have received training on handling anti-harassment issues, instead of 1 Ombudsman, will also increase the legitimacy of the decision made by such a team going through steps 1 through 4 as laid out in the current text. The team could be placed under the Ombudsman, or receive its own mandate.

- The current steps 1 through 4 of the reporting and complaint procedures need to be changed to reflect the new point of contact(s) for such complaints.

² <http://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/>

- The complaint mechanism should in its step (1) include the possibility, on the initiative of the complainant, to resolve the issue informally. In such a case, the appropriate point of contact of the anti-harassment team should reach out to the alleged harasser and bring up the inappropriate behavior, and discussing with the alleged harasser the ICANN anti-harassment policy. If so desired by the complainant, s/he should be allowed to resolve the alleged harassment through mediation (directly or indirectly supported by the team) with the alleged harasser.
- Step 3 as laid out in the current text puts disproportionate power in the hands of the Ombudsman. An anti-harassment team will address this issue, with the Ombudsman involved depending on the decision made on the mandate of the anti-harassment team.
- A clearer more granular set of steps needs to be outlined, defining the process after a formal complaint has been made. The current text does not include this. As such it leaves too much space for both the complainant and the alleged harasser to raise doubts about the fairness of the process, and having the assurance that a clear process was followed. A good example of language for such steps can be found in the APC anti-harassment³ document, which would need to be adapted to the particularities of ICANN.
- After these changes are made to steps 1 through 4, another discussion should be had about how to institute a grievance mechanism, which would include the possibility for the victim to appeal the outcome but also for the alleged harasser to do so.

Dissenting views on the need for a vexatious claims' mechanism:

There is a discussion in the NCUC about the need for having a procedure for dealing with vexatious complaints. This is particularly difficult under the current set-up, where the Ombudsman can make the final decision. This would mean that one person gets to decide whether a claim is 'false' or not, and the (alleged) victim would need to prove the incident took place. This puts too much of the responsibility of handling the complaint on the alleged victim, in a too centralized decision mechanism.

Some in the NCUC argued that a vexatious claims mechanism should fall under a general grievances procedure. Others argued that before a procedure for vexatious claims can be set up the role of the Ombudsman vis-à-vis new team needs to be changed. Others still argued that vexatious claims need to have their own subsection in the policy. This issue remains unresolved.

4. Issues unresolved by the current policy that need addressing

³ <https://listserv.syr.edu/scripts/wa.exe?A2=ind1612&L=NCSG-DISCUSS&D=0&P=6412>

The current policy does not address the issues of confidentiality and privacy. This was an issue in the last case of alleged harassment at ICANN. The policy needs to include some language on how the potential anti-harassment team, the victim and the alleged harasser are expected to act and what privacy and confidentiality measures are afforded to them. We suggest the following language to be added to the policy:

“During the investigation, the anti-harassment team will keep the personal identifiable information of the people involved confidential. The victim and the alleged harasser have a right to privacy and confidentiality, and will be asked to refrain from publicly discussing the incident with use of the full names of those involved, as long as the investigation is ongoing. Any investigation should be resolved within a reasonable time frame. As the nature and severity of the alleged harassment, and thus the extend of the investigation, might differ there is a need for flexibility but only under exceptional circumstances should an internal investigation last longer than 12 months.”

We applaud the overall policy and welcome the attention and priority it is given by all those in ICANN. We hope these comments will help further and improve the policy.