

# PDP 3.0 Improvement #9: Clarification to Complaint Process in GNSO Working Group

## Introduction

Improvement #9 of the PDP 3.0 initiative primarily aims to provide further guidance on the process (formerly called “appeals process”) under Section 3.7 of the GNSO Working Group Guidelines, which forms Annex I of the [GNSO Operating Procedures](#). To date, few Section 3.7 processes have been initiated during the deliberation of GNSO Policy Development Process (“PDP”) Working Groups (“WGs”); notable instances are the IGO-INGO Access to Curative Rights Protection Mechanisms PDP WG (“IGO-INGO PDP WG”) and the Review of All Rights Protection Mechanisms PDP WG (“RPM PDP WG”). Due to the lack of detailed guidance, the GNSO’s experiences with Section 3.7 processes were mostly long and counter-productive, taking excessive amounts of time and energy from all parties involved.

The implementation plan for Improvement #9 aims to enable a GNSO PDP WG to move forward more efficiently during and after the process. The implementation plan seeks to clarify that a Section 3.7 process does not stop ongoing work in a WG according to its timeline and work plan. The implementation plan also seeks to provide further details in relation to the process, but at the same time discourage any litigiousness.

To facilitate the implementation of Improvement #9, staff collaborated with a small team of current and former Councilors and developed this paper, which draws on “lessons learned” from previous GNSO experiences with Section 3.7 processes. It first summarizes the issues and problems that the GNSO has encountered when conducting Section 3.7 processes. Following the problem statement, this paper then includes detailed suggestions to improve the process, as well as proposed revisions to the relevant language in the GNSO Working Group Guidelines. In addition, this paper notes the difference between the process in Section 3.7 and the challenge mechanism in Section 3.6 regarding consensus designation.

The GNSO Council may use this paper as a starting point to further develop materials to assist working group leaders and members, as well as the GNSO Council to effectively handle Section 3.7 processes in the future.

## 1. What is Section 3.7

### 1.1 Current Definition in the GNSO Working Group Guidelines

In the GNSO Working Group Guidelines, Section 3.7 reads as follows:

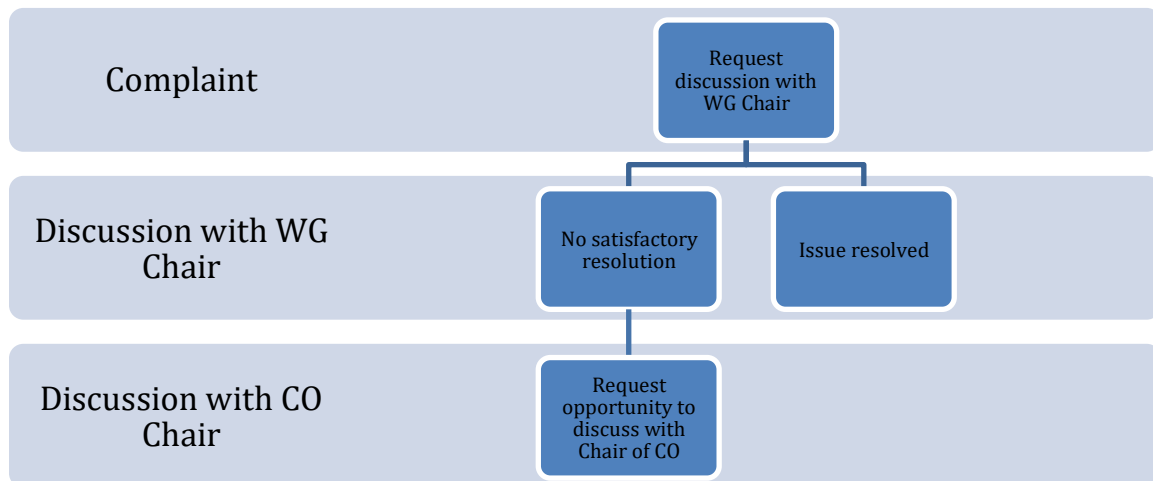
#### ***3.7 Appeal Process***

*Any WG member that believes that his/her contributions are being systematically ignored or discounted or wants to appeal a decision of the WG or CO should first discuss the circumstances with the WG Chair. In the event that the matter cannot be resolved satisfactorily, the WG member should request an opportunity to discuss the situation with the Chair of the Chartering Organization or their designated representative.*

*In addition, if any member of the WG is of the opinion that someone is not performing their role according to the criteria outlined in Section 2.2 of this document, the same appeals process may be invoked.*

In general, Section 3.7 deals with “behavior issues” in a WG. It provides a procedure for a WG member to address his/her perception of unfair treatment in the WG and seek conflict resolution. It allows a member to challenge someone who is not performing his/her role in a WG, including the chair, co-chairs/vice chairs, secretary, liaison, members, and staff. It also provides a procedure for a WG member to appeal a decision of the WG or the GNSO Council, which is the representative body of the GNSO as the Charting Organization (CO) of GNSO PDP WGs.

In the Working Group Guidelines, the current escalation procedure under Section 3.7 is very simple and not formalized. See graphic below.



Section 3.7 notably refers to the ‘Chair’ (singular) of a WG. This does not conform to the reality of current PDP WG leadership structures, some of which involve multiple co-chairs or a single chair and vice chair(s) forming a leadership team. For this reason, it is recommended that a clarifying interpretative note be added to the Working Group Guidelines to specify that references to ‘Chair’ shall include PDP WG co-chair(s) and vice chair(s) that form the WG leadership.

### 1.2 Renaming the Appeal Process “Complaint Process”?

Since ICANN is not a court or other legal body with the capacity, resources, or mandate to litigate internal or external disagreements, it should be made explicit in the Working Group Guidelines that any

litigation-minded behavior or approach should be avoided in this process. In addition, the use of the word “appeal” seems misleading -- one can appeal a decision but one does not appeal a behavior issue or situation, which is the focus of Section 3.7.

Therefore, it is suggested that the GNSO Council should consider renaming the title of Section 3.7 “Complaint Process” to clarify the purpose of this section and to discourage WG members from taking a litigation-minded approach in raising behavior issues in a WG.

Throughout this implementation document, the use of the word “appeal” and other legal sounding language is minimized unless it is appropriate for the specific context. Other synonyms, such as “complaint”, “disagreement”, and “challenge” will be used instead. It is recommended that this change be reflected in the future revisions of the GNSO Operating Procedures and Working Group Guidelines.

## 2. Problems Encountered in Section 3.7 Complaint Process

Reflecting on the GNSO experience dealing with Section 3.7 complaints, particularly the experience in the IGO-INGO and RPM PDP WGs, staff consulted with a small team of former and current Councilors and identified some of the weaknesses and gaps in the current complaint process as follows.

### 2.1 No Specific Guidance on the Complaint Submissions

The Working Group Guidelines do not specify any time bar or other limitation for filing Section 3.7 complaints. There is no clarity on the required documents submitted for the proceedings and the level of detail for these documents. Furthermore, there is no guidance on the conditions and circumstances under which a WG member may file a subsequent complaint with respect to the same, or a similar, topic.

Without specific guidance, the same WG member, for example, could file a Section 3.7 complaint across different WGs concurrently, focusing on related issues or targeting the same person(s). The current Guidelines cannot stop any WG member from submitting lengthy documentation/evidence with pages of narrative and appendices. If the parties involved in the internal WG disagreement treat the Section 3.7 complaint process in the fashion of a formal litigation, it will likely result in a time-consuming process for everyone and distract the WG(s) from its ongoing work.

### 2.2 No Details as to How a Complaint Proceeding Should Be Conducted

The Working Group Guidelines provide virtually no guidance on how a proceeding should be conducted. A non-exhaustive list of questions below are left unanswered:

- Who may/must attend the teleconferences/meetings related to the complaint proceeding? Who may/must observe them?
- How many teleconferences/meetings may/must take place before escalating to the next step?
- Which relevant teleconferences/meetings must be recorded, transcribed and/or published?
- What is the role of the GNSO Council liaison to the WG in the proceeding?
- At what point should the matter be raised with the GNSO Council?

- May the parties involved in a Section 3.7 complaint be represented by legal counsel? If so, may a complainant insist that all communications in relation to the complaint be directed at their legal counsel?
- At what point in the proceedings, if any, should ICANN Legal be notified and/or involved? What support, if any, can ICANN Legal provide to the WG leadership and the GNSO Chair?
- At what point in the proceedings, if any, should the ICANN Ombudsman be notified and/or involved? What should be done if one or both parties object to the involvement of the ICANN Ombudsman? If the ICANN Ombudsman is not an appropriate office within ICANN org, is another office appropriate?

### 2.3 No Recommendations for Remedial Actions

The Working Group Guidelines do not suggest any potential conflict resolution method to WG leadership and the GNSO Chair, who are on the receiving end of the complaints. There is no guidance as to what standards to apply and the available remedies. There is no clarity on further escalation if the discussion with the GNSO Chair does not resolve the matter such that the complainant remains dissatisfied.

As a result, the WG leadership and the GNSO Chair do not know what appropriate actions they could or should take at each step of the process to facilitate the resolution of the disagreement. The situation also becomes more complicated when a WG has multiple co-chairs or vice chairs who have differing views on the complaint raised under Section 3.7.

### 2.4 Summary of Problems Encountered

The lack of guidance makes it difficult to efficiently address a Section 3.7 complaint. There is also no mechanism to prevent the potential abuse of the complaint process and the blocking of progress in one WG or across multiple WGs.

To address the issues facing the complaint process as summarized above, proposed guidance in the following sections has been put forward for consideration by the GNSO Council. Some of the proposed guidance may result in the amendment of relevant language in the GNSO Working Group Guidelines in the GNSO Operating Procedures, which will be covered in Section 6 of this implementation document.

At the same time, it is important to note that a certain amount of flexibility should be retained in dealing with complaints to allow for different types of disagreements and a broad range of resolution methods and remedies to suit the particularities of each WG and situation.

## 3. Who Should and Should Not Be Involved in the Section 3.7 Proceedings

Section 3.7 of the GNSO Working Group Guidelines specifies information about the participation of the WG leadership, the GNSO Chair, and the designated representative of the GNSO Chair in Section 3.7 proceedings. On the receiving end of a complaint, these individuals are expected to act in a neutral fashion and endeavor to resolve the disagreement.

However, one cannot ignore the fact that these individuals are often representatives of their own affiliated entities and may be seen as having an interest in the outcome of the complaint. The issue becomes more complex when they are one of the parties involved in the disagreement. For example, a complaint may claim that the WG leaders were not performing their role, and accordingly ask for their recusal from the proceedings.

To prevent the appearance of bias and to effectively handle the proceedings in a neutral manner, it seems imperative to involve, at an appropriate time, other actors that have a pertinent role to play except in the case of conflict of interest (e.g., any of the positions listed below is a party of a Section 3.7 complaint proceeding). In fact, additional individuals were involved, to varying degrees, in the past Section 3.7 proceedings in GNSO WGs.

### 3.1 GNSO Council Members

As the manager of GNSO PDPs, the Council has an appropriate and important role to play in a Section 3.7 complaint proceeding. The GNSO Council leadership, the GNSO Council liaison to the PDP WG, and current/former GNSO Councilors should also support the WG leadership and GNSO Chair in the resolution of a WG disagreement.

#### 3.1.1 GNSO Council Leadership

Section 3.7 notably refers to the GNSO Chair. This reference does not conform to the reality of the current GNSO Council leadership structure, which consists of one GNSO Chair and two GNSO Council Vice Chairs. The GNSO Chair does not make decisions alone without consulting with the two Vice Chairs. For this reason, the GNSO Council Vice Chairs should have the same level of involvement in a Section 3.7 proceeding as the GNSO Chair. For example, when the GNSO Chair is informed of the complaint, the Vice Chairs should be made aware concurrently. The GNSO Chair should consult with the Council Vice Chairs on all decisions; any decision by the GNSO Chair should take into consideration the feedback/input from the Vice Chairs. In other words, the GNSO Council leadership should act as one team during the proceeding. The Council leadership's decisions should be taken and communicated as decisions by a collegial body, without the need for divulging each person's personal views.

#### 3.1.2 GNSO Council Liaison to the PDP WG

While the GNSO Council liaison to the PDP WG is not explicitly mentioned in the body of Section 3.7 text, the role description of liaisons in PDP 3.0 Improvement #5 ([GNSO Council Liaison Supplemental Guidance](#)) does give them certain responsibility in the event of disagreements, including but not limited to:

- Assist the WG Chair as required with his/her knowledge of WG processes and practices;

- Assist or engage when the WG faces challenges or problems, and will notify the Council of efforts in this regard;
- Assist the WG Chair in suspected cases of abuse of ICANN's Expected Standards of Behavior and/or restricting the participation of someone who seriously disrupts the WG.

In addition, GNSO Council liaisons are explicitly mentioned in [Section 3.6, footnote 5](#) regarding their facilitation role when a working group member disagrees with the WG Chair's consensus designation.

Therefore, the GNSO Council liaison to the WG should be a crucial actor in a complaint proceeding from the very beginning. The Working Group Guidelines should explicitly note that when a WG member files a Section 3.7 complaint, the GNSO Council liaison will be notified right away.

The GNSO Council liaison's task in the proceeding seems to be twofold:

- 1) report the status of the proceeding to the GNSO Council and GNSO Council leadership; and
- 2) facilitate the disagreement resolution in consultation with the WG leadership and GNSO Council leadership.

Regarding status reporting, the Council liaison should inform the full GNSO Council of a Section 3.7 complaint when it is filed. While a Section 3.7 complaint should not stop the ongoing work in a PDP (as it is often related to behavior issues), the complaint will likely have an impact on the overall status and condition of the WG. As the manager of GNSO PDPs, the Council should be made aware of a Section 3.7 complaint at the earliest opportunity, and the GNSO Council liaison should consider the potential effect of the complaint when assessing the timeline and work plan of the PDP in collaboration with the WG leadership and support staff (see details about the process in Improvements #11, #12, #16, and #17<sup>11</sup>).

Nevertheless, the GNSO Council may not need to know the full extent of the complaint. The GNSO Council liaison should provide written records to the GNSO Council leadership first, giving a modicum of privacy in the hope of resolving the disagreement at the WG leadership level.

Liaisons' facilitation role becomes especially important when a member(s) of the WG leadership is a party involved in the disagreement, or when the WG leaders are unable to arrive at an agreed approach for handling the complaint. Under those circumstances, the GNSO Council liaison should step in and be appointed to handle the relevant Section 3.7 proceeding.

### **3.1.3 Complaint Committee**

For each Section 3.7 complaint proceeding, an ad-hoc "Complaint Committee" should be formed and include primarily current and former GNSO Councilors.

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<sup>11</sup> GNSO Project Work Product Catalog; Project Status and Condition Change Procedure & Flowchart; Project Change Request Form; Resource Reporting for PDP Working Group

GNSO Councilors' involvement would be helpful as they not only can provide a wide range of experience and expertise, but also have the knowledge of the GNSO Operating Procedures (especially the members of the former GNSO Council leadership). They can be somewhat removed from the internal WG disagreement and be able to provide advice in an objective manner. If they are members in the affected WG, they may be able to provide additional insight and information regarding the circumstances that give rise to the disagreement.

A formal selection process for a Complaint Committee may not be needed. The WG leadership, in consultation with the GNSO Council leadership and the Council liaison, may invite current or former Councilors to join the Complaint Committee, with the aim of gathering balanced views and input to facilitate the resolution of the disagreement. In specific circumstances, non-Councilors may also be invited to join the Complaint Committee on a case-by-case basis and according to specific criteria set by the WG leadership, in consultation with the GNSO Council leadership and Council liaison. Those criteria may include, but not limited to: 1) have conflict resolution expertise and experience as a neutral mediator; 2) have in depth knowledge of the WG activities and insights into the discord that gave rise to the complaint.

With the support from such a Complaint Committee, the WG leadership will not be left alone to carry out the often complicated, time-consuming duty related to Section 3.7 complaints. Even when the WG leadership are a party involved in the disagreement or are unable/unwilling to make a decision (e.g., due to concerns of legal action or internal disagreement), members of the Complaint Committee can advise and assist in handling the proceeding in consultation with the GNSO Council leadership and GNSO Council liaison.

Note that in Section 5 of this implementation document there are specific suggestions for the point of intervention by the Complaint Committee.

### 3.2 ICANN org Resources

Besides the GNSO Council, resources from the ICANN org may be helpful in playing an advisory role during a Section 3.7 proceeding. WG leadership, in consultation with the GNSO Council leadership, Council liaison, and the Complaint Committee, may consider using this non-exhaustive list of resources to suit the particularities of each complaint situation.

#### **3.2.1 ICANN Legal Staff**

As ICANN Legal represents the ICANN org, they have no authority to (and without limiting the foregoing) represent any community volunteer in a GNSO working group disagreement, offer interpretation on any internal GNSO rules/procedures/guidelines, or be a mediator to facilitate conflict resolution.

However, on a case-by-case basis, ICANN Legal may be able to provide advice within their mandate that may facilitate the resolution of the disagreement. For example, ICANN Legal offered advice regarding

the enforceability of ICANN's Expected Standards of Behavior and suggested ways to address perceived violations<sup>12</sup>.

### **3.2.2 ICANN Complaints Officer**

The Complaints Officer handles complaints regarding the ICANN org that do not fall into existing complaints mechanisms, such as Contractual Compliance, Request for Reconsideration, and the Ombudsman. This may include complaints about how a request has been handled, the ICANN org providing an inadequate level of staff support, a process that appears to be broken, insufficient handling of an issue, or something that may be an indication of a systemic issue, among other things.

Since Section 3.7 deals with complaints arising from things that happen in the GNSO WGs, not the ICANN org, the Complaints Officer would not usually be expected to have a relevant role to play in the proceedings.

However, one exception is when the complaint concerns the performance of a WG support staff member. In such circumstances, the Complaints Officer may be brought into the proceeding to help research, review, and analyze facts related to the complaint about the staff member, assisting the WG and the GNSO Council in resolving the matter.

### **3.2.3 ICANN Conflict Resolution Staff**

ICANN org recently hired a Conflict Resolution Specialist, who will act as a neutral party, utilizing structured communication techniques to share problem-solving responsibility. The Conflict Resolution Specialist will assist the community within the policy/advice development process by facilitating dialogues where a consensus view may have slowed, while also providing conflict resolution guidance for the entire ICANN community.

Since this position is new and the Conflict Resolution Specialist takes on assignments at the request of ICANN's Policy Development Support SVP, it may be premature to consider the involvement of this ICANN org staff member in Section 3.7 proceedings without further investigation.

However, WG leadership and the GNSO Council should be aware of this potential ICANN org resource and discuss with ICANN org the appropriateness of this ICANN staff's involvement in Section 3.7 proceedings, and if appropriate, when this staff person can be called upon (e.g., as a further escalation point if any party in the proceeding recommends?).

## **3.3 ICANN Ombudsman**

According to the ICANN Bylaws, the Ombudsman is an informal dispute resolution office for any member of the ICANN community who may wish to lodge a complaint about ICANN staff, Board, or problems in constituent bodies. The purpose of the Ombudsman's office is to ensure that members of

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<sup>12</sup> See examples here: <https://www.icann.org/en/system/files/correspondence/jeffrey-to-drazek-09mar19-en.pdf> & <https://www.icann.org/en/system/files/files/expected-standards-behavior-advice-enforcement-09mar19-en.pdf>



the ICANN community are treated fairly. The Ombudsman is impartial and will attempt to resolve complaints about unfair treatment, using techniques such as mediation, shuttle diplomacy and, if needed, formal investigation. The Ombudsman cannot advocate for any party involved in a dispute, but will investigate without taking sides in an informal but flexible process. Elements of confidentiality may be invoked when the Ombudsman is involved in a proceeding.

As the Ombudsman is an established, official complaint mechanism in ICANN, it should remain separate from the Section 3.7 complaint process within the GNSO. However, the Section 3.7 complaint process is not mutually exclusive to and does not impact any other conflict resolution mechanisms that may be available to the GNSO community.

With his/her expertise and experience, the Ombudsman is a valuable resource if the WG leadership and the GNSO Council cannot resolve the matter to the satisfaction of the parties involved in the disagreement. Especially when the discussion with the GNSO Council leadership does not resolve the disagreement, it seems appropriate to lodge the issue and engage with the Ombudsman as a further escalation step.

The WG leadership, in consultation with the GNSO Council leadership, the GNSO Council liaison, and the Complaint Committee, should determine the appropriate time, if any, to lodge the issue and engage with the Ombudsman. All necessary information and records should be relayed to the ICANN Ombudsman to enable his/her informed evaluation of the complaint and effective provision of assistance. The Ombudsman can then attempt to resolve the disagreement in a manner of his/her own choosing. The outcome of the Ombudsman's review should be shared with the GNSO Council and the WG.

### 3.4 External Legal Counsel

The involvement of an external legal counsel in a GNSO WG disagreement seems to be highly inappropriate and counterproductive, and is not at all consistent with either the spirit or the content of the Working Group Guidelines, which have as their aim the facilitation of consensus.

Imagine that a party in a Section 3.7 proceeding appoints a lawyer in the matter, sends highly formal documentation to the other parties in the proceedings, and requests that all communications to the complainant be transmitted to his/her lawyer. This creates an awkward, if not intimidating situation for the parties being addressed in the complaint. Concerns can understandably arise about potential lawsuits by the party that has legal representation, casting a chilling effect on the discussions during the proceeding. Other parties may fear that communications made during the proceeding could be used against them in legal actions.

ICANN is not a court or other legal body with the capacity, resources, or mandate to litigate internal disputes. Not all parties involved in the Section 3.7 proceeding may be able to afford external legal counsel, and neither should they hire one for a WG matter.

It should be made explicit in the Working Group Guidelines that the GNSO strongly discourages the representation of any party by external legal counsel. This clarification is crucial in view of ICANN's Expected Standards of Behavior and the spirit of fairness and collegiality of the multistakeholder volunteer community.

## 4. Criteria for Complaint Submission

Section 3.7 in the GNSO Working Group Guidelines provides essentially three grounds for a complaint:

- (i) where a Working Group member "believes that his/her contributions are being systematically ignored or discounted";
- (ii) where a Working Group member wishes to "appeal a decision of the Working Group or Chartering Organization"; and
- (iii) where a Working Group member "is of the opinion that someone is not performing their role according to the criteria outlined in Section 2.2".

Nevertheless, the guidelines provide little information on the criteria for a complaint submission. To prevent potential abuse of the process, the following guidance is developed to help clarify the requirements and empower the WG leadership to reject complaints that do not address the requirements. The GNSO Council may define, modify, add, or remove the specific criteria at its discretion.

### 4.1 Succinctness

In the complaint, the aggrieved WG member should be asked to **succinctly** identify the factual circumstances and provide the background that explains the ground(s) for the complaint. Succinctness is key here. As a matter of first priority, the WG leadership simply needs the information to determine whether the issue is validly raised under Section 3.7. Litigation-style correspondence or documentation should be strongly discouraged.

A word limit should be specified for the submitted materials during all stages of a Section 3.7 proceeding, including the initial filing of the complaint and the subsequent challenge to WG leadership's determination (see Section 5 in this implementation document for details). As a general guideline, the submitted material at each stage of the Complaint process should not exceed 1,000 words total.

### 4.2 Public Knowledge Among Other WG members

To prevent potential abuse of the Section 3.7 complaint process, the GNSO Council may consider asking a complainant to demonstrate that there is public knowledge among other WG members of the circumstances giving rise to the complaint.

Since Section 3.7 usually deals with sensitive behavior issues pertaining to personal perceptions, obtaining expressed support from others regarding those issues can be odd and/or difficult. However, if a complainant can at least explain that not just him/herself, but other WG member(s) also recognize the existence of the circumstances that give rise to the complaint or the decision to be challenged, the requirement of “public knowledge” for filing a Section 3.7 complaint should be met.

#### 4.3 Timeliness of Submission

It is important to note that a Section 3.7 proceeding should not be treated as the first avenue when dealing with a disagreement. Preventative measures, as detailed in Section 6 of this implementation document, should be carried out with the aim of resolving a disagreement in a timely fashion and prevent its escalation. In other words, when a disagreement happens or a disagreement with a WG decision occurs, WG members should try other resolution methods first and should not turn to Section 3.7 proceeding first for lodging complaints and appeals.

However, if a disagreement has been going on for some time in a WG but has not been resolved after exhausting other possible solutions, a Section 3.7 complaint should be initiated, especially if such disagreement has become public knowledge. This is to ensure that a problem in a WG is not left unaddressed for a prolonged period of time, which may result in greater negative impact on the overall status and condition of the WG, including delay or suspension of its ongoing work.

Therefore, as a general guideline, a Section 3.7 complaint should be initiated within two (2) months from when the circumstances giving rise to the complaint have become public knowledge. This suggestion is inspired by the Appeals Procedure in the Internet Engineering Task Force<sup>13</sup>.

Furthermore, it is also important to prevent rapid succession of filing of subsequent complaints in one WG or multiple WGs. Therefore, the GNSO Council shall consider asking the complainant to confirm that the circumstances giving rise to the complaint had not previously been the basis for another Section 3.7 complaint that is still pending in any GNSO WG.

#### 4.4 Suggested Template and Questions

The GNSO Council may consider developing a form to facilitate the submission of a Section 3.7 complaint. It will be helpful to set the correct expectation right from the outset of a proceeding.

The complaint submission should address the following questions and should not exceed the specified word-limit:

- Name and working group affiliation of the complainant;
- Specification of the ground(s) for the complaint (multiple choice - select ground (i), (ii), and/or (iii));

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<sup>13</sup> See RFC2026, Section 6.5.4: <https://datatracker.ietf.org/doc/rfc2026/>

- Description of the circumstances giving rise to the complaint (not exceeding 1,000 words total), including but not limited to:
  - detailed and specific description of the facts of the disagreement;
  - explanation that those circumstances are public knowledge among other WG members, including how long they have been public knowledge;
  - supporting/explanatory materials and rationale;
- Confirmation that the circumstances giving rise to the complaint had not previously been the basis for another Section 3.7 complaint that is still pending in any GNSO WG (“yes” or “no” question - this is to prevent rapid succession of filing of subsequent complaints in one WG or multiple WGs).

#### 4.5 Assessment of Complaint Submission

The WG leadership should determine whether a Section 3.7 complaint has met the criteria set forth above. If the complainant disagrees with the assessment by the WG leadership, the GNSO Council liaison, in consultation with the GNSO Council leadership, should step in and reassess.

If a complaint does not address all requirements, the complainant will be given a reasonable amount of time to resubmit the complaint. Failure to resubmit a complete complaint will result in the automatic termination of the proceeding.

## 5. Proposed Procedure of a Section 3.7 Proceeding

Section 3.7 of the GNSO Guidelines provides virtually no procedural guidance for the conduct of complaint proceedings, which resulted in the long and arduous experience when complaints were filed in GNSO WGs previously.

The following proposed procedure is suggested to enable an efficient handling of a complaint with minimum impact to the overall progress in a WG.

### 5.1 How does a Section 3.7 Proceeding look in “broad strokes”?

In general, the parties involved in a Section 3.7 complaint shall always first discuss the matter with the WG leadership, who will involve the GNSO Council liaison and the Complaint Committee, as well as other relevant resources, in the discussion.

If the disagreement cannot be resolved in this way, any of the parties involved may bring it to the attention of the GNSO Council leadership. The GNSO Council leadership shall attempt to resolve the disagreement and consult with the GNSO Council liaison, the Complaint Committee, the WG leadership, and other relevant resources.

If the disagreement is not resolved to the satisfaction of the parties at the GNSO Council leadership level, any of the parties involved may officially lodge the issue and engage with the Ombudsman. The Ombudsman shall attempt to resolve the disagreement in a manner of his/her own choosing.

At all stages of the complaint process, the individuals or bodies responsible for making decisions (i.e., WG leadership, GNSO Council leadership, GNSO Council liaison, Complaint Committee) have the discretion to define the specific procedures they will follow in the process of making their decision.

In all cases a decision concerning the disposition of the disagreement, and the communication of that decision to the parties involved, must be accomplished within a reasonable period of time. The proposed procedure intentionally and explicitly does not establish a fixed maximum time period that shall be considered "reasonable" in all cases.

## 5.2 A Detailed Process Flow of a Section 3.7 Proceeding

The following is a detailed process flow of a Section 3.7 proceeding, which serves as an example for consideration by the WG leadership, GNSO Council leadership, GNSO Council liaison, and Complaint Committee when handling a disagreement. There is flexibility to modify and adapt this process flow to suit the particularities of each WG and situation, allowing for different types of disagreements and a broad range of resolution methods and remedies.

### 5.2.1 Review of Complaint (WG leadership to determine if a complaint addresses requirements)

- A complainant should submit the Section 3.7 complaint to the WG leadership or the GNSO Council liaison to the WG. The receipt of a complaint by any one member of the WG leadership will constitute receipt by all members of the WG leadership. The receiving WG leadership member or the GNSO Council liaison will circulate the complaint to all members of the WG leadership.
- After the receipt of the complaint, the WG leadership shall determine, within a reasonable time period, whether it addresses all of the requirements as set forth above in Section 4 of this implementation document.
- If the WG leadership determines that the complaint addresses all of the requirements as set forth in Section 4 above, the WG and the GNSO Council will be informed about the complaint.

### 5.2.2 Complaint Committee Formation (a group of GNSO Councilors to provide guidance and input to the WG leadership and GNSO Council leadership in resolving the disagreement)

- An ad-hoc Complaint Committee, consisting of current/former GNSO Councilors, will be formed within a reasonable time period after the GNSO Council has been informed about the submission of a Section 3.7 complaint.
- The WG leadership, in consultation with the GNSO Council leadership and the GNSO Council liaison, shall decide on the composition of the Complaint Committee and invite the selected Councilors based on their willingness/availability.

**5.2.3 Dialogue Regarding the Complaint & Complaint Committee Feedback (a dialogue to facilitate the resolution of the disagreement at the WG leadership level)**

- A dialogue, either in person or via teleconference, will be organized within a reasonable time period.
- The parties involved in the disagreement, WG leadership, and GNSO Council liaison will be invited to attend the dialogue; Complaint Committee members are also welcome to attend, if available.
- The dialogue will be recorded and transcribed and be made available to those who participated in the dialogue and the Complaint Committee. Depending on the role of ICANN org resources (see Section 3) and the Ombudsman in the proceeding, the recording and transcript of the dialogue may also be made available to them.
- Following the dialogue, the Complaint Committee will be asked to provide feedback, opinions, or comments on the merits of the complaint within a reasonable time period, including suggested remedial actions if warranted. They are welcome to take into consideration the feedback, views, and inputs exchanged during the dialogue. The WG leadership may also invite ICANN org resources (see Section 3) and the Ombudsman to provide feedback, if they have an appropriate role to play at this stage.

**5.2.4 Working Group Leadership Determination (WG leadership decides how to resolve the disagreement)**

- Within a reasonable time period following the feedback received from the Complaint Committee, the WG leadership shall decide whether to accept the complaint and provide remedial actions OR reject the complaint.
  - In taking its decision the WG leadership should consider:
    - Circumstances giving rise to the complaint, including supporting/explanatory materials and rationale;
    - Whether the dialogue has occurred;
    - If the dialogue has occurred, the feedback, views, and input exchanged during the dialogue;
    - If the dialogue has not occurred, whether there have been reasonable efforts among all invited parties to participate in the dialogue;
    - The feedback, views, and inputs received from the Complaint Committee (as well as ICANN org resources and Ombudsman, if any);
    - Other factors deemed relevant by the WG leadership.
  - The WG leadership team should use good faith efforts to arrive at an agreed approach for handling the matter. If they are unable to do so among themselves, the GNSO Council liaison should step in and, in consultation with the GNSO Council leadership and the Complaint Committee, issue a determination.
  - The parties involved in the disagreement, the WG, and the GNSO Council will be informed about the WG leadership's determination.
-

**5.2.5 Challenge of the WG Leadership Determination (escalate the complaint to the GNSO Council leadership if the disagreement cannot be resolved at the WG leadership level)**

- If the WG leadership's determination does not resolve the disagreement, any of the parties involved in the disagreement may bring it to the attention of the GNSO Council leadership to challenge the WG leadership's determination.
- The challenge must be submitted directly to the GNSO Chair, with the GNSO Council leadership in copy.
- The challenging party must identify the specific grounds on which the challenge is based, including why he/she claims the WG leadership's determination is incorrect. An opportunity to provide further supporting material, if any, will be allowed. The challenge material must not exceed 1,000 words total.
- The challenge materials will be published on the WG mailing list, and the GNSO Council will be informed about the escalation of the proceeding.

**5.2.6 Dialogue Regarding the Challenge & Complaint Committee Feedback (a dialogue to facilitate the resolution of the disagreement at the GNSO Council leadership level)**

- A dialogue, either in person or via teleconference, will be organized within a reasonable time period.
- The parties involved in the disagreement, the GNSO Council leadership, and the GNSO Council liaison will be invited to attend the dialogue; Complaint Committee members are also welcome to attend, if available.
- Dialogue will be recorded and transcribed, but be made available to those who participated in the dialogue, the Complaint Committee, and the WG leadership. Depending on the role of ICANN org resources (see Section 3) and the Ombudsman in the proceeding, the recording and transcript of the dialogue may also be made available to them.
- Following the dialogue, the Complaint Committee, as well as the WG leadership, will be asked to provide feedback, opinions, or comments on the merits of the challenge within a reasonable time period, including suggested remedial actions if warranted. They are welcome to take into consideration the feedback, views, and inputs exchanged during the dialogue. The GNSO Council leadership may also invite ICANN org resources (see Section 3) and the Ombudsman to provide feedback, if they have an appropriate role to play at this stage.

**5.2.7 GNSO Council Leadership Determination (GNSO Council leadership decides how to resolve the disagreement)**

- Within a reasonable time period following the feedback received from the Complaint Committee, the GNSO Council leadership shall decide whether to accept the challenge and provide remedial actions OR reject the challenge.
- In taking this decision, the GNSO Council leadership should consider:
  - Circumstances giving rise to the complaint, including supporting/explanatory materials and rationale;
  - Challenge materials relevant to the WG leadership's determination as provided by the complainant;

- Whether the dialogue has occurred;
  - If the dialogue has occurred, the feedback, views, and inputs exchanged during the dialogue;
  - If the dialogue has not occurred, whether there have been reasonable efforts among all invited parties to participate in the dialogue;
  - The feedback, views, and inputs received from the Complaint Committee and WG leadership (as well as ICANN org resources and Ombudsman, if any);
  - Other factors deemed relevant by the GNSO Council leadership.
- The parties involved in the disagreement, the WG, and the GNSO Council will be informed about the GNSO Council leadership's determination.

#### **5.2.8 Escalation to Ombudsman (escalate the complaint to the Ombudsman if the disagreement cannot be resolved at the GNSO Council leadership level)**

- If the disagreement cannot be resolved by the GNSO Council leadership, any of the parties involved may officially lodge the issue and engage with the Ombudsman as a further escalation step.
- The Ombudsman will attempt to resolve the disagreement in a manner of his/her own choosing, and share with the GNSO Council and the WG the outcome of his/her review.

### 5.3 Abuse of the Complaint Process

Penalties will be imposed for abuse of the process by any of the parties involved in the disagreement. In the event a party is deemed to have abused the process, they shall be subject to a bar from utilizing the Section 3.7 complaint process up to five (5) years.

A party may be deemed abusive based on the following factors, including but not limited to:

- presented materials primarily for improper purposes including, but not limited to, harassment, causing unnecessary delay, or needlessly increasing the workload of the WG leadership and/or the GNSO Council; or
- presented materials contain a deliberate and material falsehood.

The determination of abusive complaint shall be made by the Complaint Committee, in consultation with the WG leadership and GNSO Council leadership.

### 5.4 Termination of the Proceeding

The complaint process is not mutually exclusive to and does not impact any other conflict resolution mechanisms that may be available to WG members. If the issue raised in the complaint has been resolved at any point during the proceeding, such complaint shall be deemed withdrawn and the proceeding will be terminated.

## 6. Preventative Measures



While a Section 3.7 complaint should not stop the ongoing work in a PDP, as one can see in Section 5 of this document, the proceeding will likely require substantial amount of time and effort from all parties involved. As the process requires extra attention and effort from the WG leadership, GNSO Council leadership, GNSO Council liaison, and Complaint Committee, their workload may not always permit a swift handling of the complaints. Affected WG members may also feel self-restrained in their involvement in the WGs during the proceedings.

Therefore, it is in the best interest of everyone if a Section 3.7 proceeding does not happen often. WG leaders, WG members, and GNSO Council liaisons should all do their part to prevent the escalation of a disagreement and contribute to its timely resolution by using their reasonable best efforts.

Implementation of several related PDP 3.0 improvements may serve as the “preventative measures” to prevent the circumstances giving rise to a Section 3.7 complaint, namely:

- (i) where a Working Group member "is of the opinion that someone is not performing their role according to the criteria outlined in Section 2.2";
- (ii) where a WG member "believes that his/her contributions are being systematically ignored or discounted"; and
- (iii) where a Working Group member wishes to “appeal a decision of the Working Group or Chartering Organization”.

### 6.1 Ways to help members, leaders, and liaisons perform their role in a WG

Several PDP 3.0 improvements seek to clarify the role and responsibilities of WG leaders, members, the GNSO Council liaisons, complementing the criteria outlined in Section 2.2 of the GNSO Working Group Guidelines. With these clarifications, WG leaders and members, as well as GNSO Council liaisons should have a clearer understanding of what is expected of them to perform their respective roles in a WG. They also help the WG and the GNSO Council hold the leaders, members, and liaisons accountable and mitigate issues early on.

**Improvement #1** creates a **Statement of Participation**, which seeks affirmative commitment from WG members before they can participate in a WG.

**Improvement #2** provides a **comparison table**, which identifies three different WG models and clarifies expectations for how members, participants, and observers should participate in each WG model.

**Improvement #3** includes a **skills guide** that lists resources, tips, and suggestions that help ensure new WG members are sufficiently prepared for full participation in a WG.

**Improvement #5** provides a **handover briefing** to assist a new GNSO Council liaison in getting up to speed with the liaison role. Its supplemental guidance also details the job duty of a liaison with suggestions for best practices.

**Improvement #6** clarifies expectations for WG leaders that facilitate the selection of WG leadership positions based on the required skills and expertise.

**Improvement #13** develops a regular review process of WG leadership by the GNSO Council, including a survey to be completed by WG members as well as escalation steps if the WG leadership continues to fail.

## 6.2 Ways to prevent members' contributions from being ignored or discounted

Several PDP 3.0 improvements provide important reminder that all WG members should act in accordance with ICANN Expected Standards of Behavior, which is the first step to ensure that WG members' contributions are not ignored or discounted during WG deliberations. They also provide specific guidance on consensus building and suggestions on how to effectively take WG members' contributions into account.

**Improvement #1's** Statement of Participation seeks WG members' agreement to, for example:

- treat all members with civility
- be respectful of their time and commitment
- act in a reasonable, objective, and informed manner
- not disrupt the work of the WG in bad faith
- listen to the views of all stakeholders and working to build consensus
- adhere to the ICANN Community Anti-Harassment Policy and Terms of Participation and Complaint Procedures

In **Improvement #3's** skills guide, WG members are expected to "actively and constructively participate in the consensus decision making process" and provide commitment to:

- facilitate consensus by listening, explaining, mediating, proposing clear actions, and helping other members
- avoid blocking consensus by looking beyond the stakeholder group or constituency affiliation of other Working Group members and judging proposals / positions on their merits
- avoid re-litigating closed issues or deliberate obfuscation

**Improvement #6's** expectations for WG leaders compels WG leaders to encourage and enforce WG members' adherence to the ICANN Expected Standards of Behavior. WG leaders are also expected to:

- encourage representational balance
- ensure WG documents represent the diversity of Working Group views
- be a neutral and impartial leader
- build consensus
- balance WG openness with effectiveness

**Improvement #5's** supplemental guidance clarifies that liaisons should assist the WG leadership in consensus building and enforcing adherence to the ICANN Expected Standards of Behavior.

Furthermore, liaisons are also expected to alert the Council if a behavior issue in a WG is prolonged or intensified. The following actions by liaisons may help de-escalate issues so that the disagreement does not lead to the eventual filing of a Section 3.7 complaint. The GNSO Council liaison:

- is the person upon whom the Working Group relies to convey any communications, questions or concerns to the GNSO Council
- assists or engages when the WG faces challenges or problems, and notifies the Council of efforts in this regard

**Improvement #4's** consensus playbook serves as guidance that helps WG leaders and members to carry out consensus building, seeking to prevent the very situation where "someone's contributions are being systematically ignored or discounted". **Improvement #2's** comparison table provides guidance on the consensus designation process in three different WG models.

### 6.3 Ways to prevent a decision from being appealed

If a decision is made in a thoughtful, diligent, and collaborative manner, the likelihood of a decision being appealed by a WG member will decrease. Covering the project management aspects, **Improvements #11, #12, and #16** provide a suite of GNSO project work products to guide the progress of all GNSO Council-managed projects, facilitating the decision-making in WGs in a disciplined way and helping the Council detect issues early on.

The following items have been created for implementing Improvements #11, #12, and #16.

GNSO project work product catalog is a list of staff-managed work products, including timeline and work plan, that help document and guide the progress of a WG from start to finish.

Next generation project list helps the GNSO Council evaluate the appropriate health of Council-managed projects in terms of their schedule, tasks, activities, action items, and risks.

Project status and condition change procedure and its flowchart assist WG and Council leadership in assessing the state of a project and determine when disruptions require Council attention.

Project change request form is a formal request from a WG to the GNSO Council to modify any deliverable or baseline delivery date of a WG.

In addition to these project management tools, **Improvement #14** also leads to the creation of a checklist to assist PDP WGs in performing its due diligence before submitting a data gathering request to the GNSO Council, making sure any WG decision to request data is not taken lightly.

**Improvements #5 and #6** enumerate WG leadership and GNSO Council liaisons' responsibility of using these tools to manage the WG progress, to assess the status and condition regularly, and to make specific decisions.

As mentioned previously, **Improvements #2, #4, and #9** provide additional guidance to facilitate the consensus decision making process in WGs, seeking to prevent the very situation that a WG decision is being appealed by an aggrieved individual.

## 7. Difference Between Section 3.6 and Section 3.7

In the GNSO Working Group Guidelines, Section 3.6 also provides a challenge process. However, it is a separate and specific procedure that empowers WG members to challenge consensus designations made by WG leadership.

Like Section 3.7, Section 3.6 notably refers to the 'Chair' (singular) of a WG, which does not conform to the reality of current PDP WG leadership structures. It is recommended that a clarifying interpretative note be added to the Working Group Guidelines to specify that references to 'Chair' shall include PDP WG co-chairs and vice chair(s) that form the WG leadership.

According to Section 3.6, if the disagreement on the designation given to position by the WG leadership or any other consensus call persists, WG members may follow these steps sequentially:

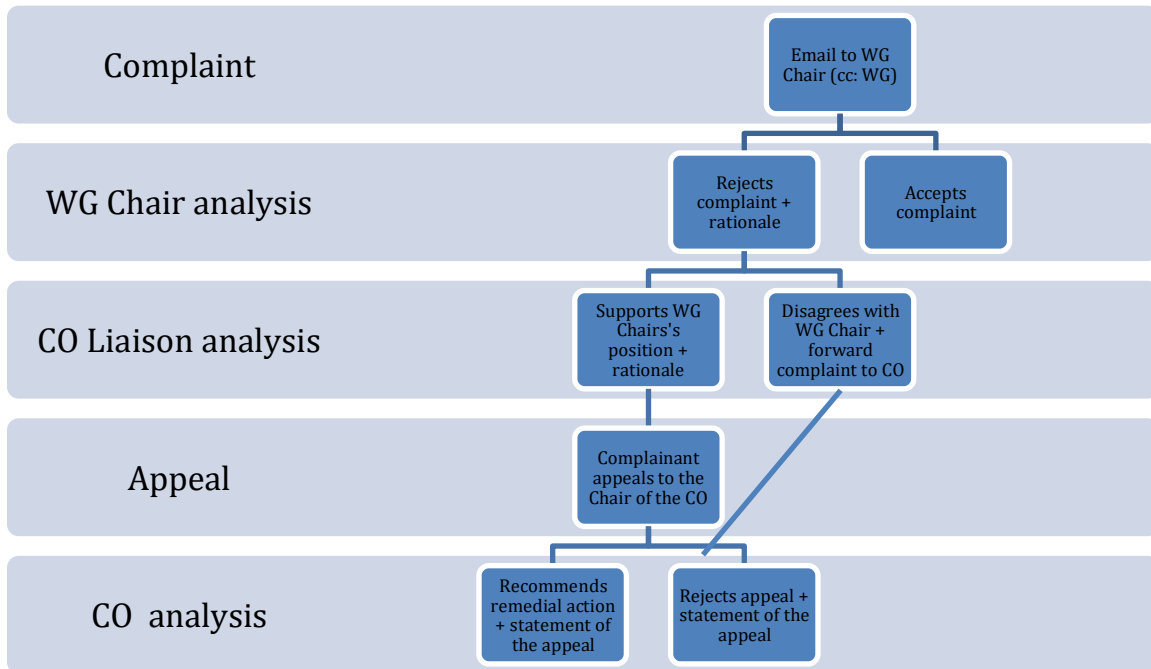
1. Send an email to the WG leadership, copying the WG, explaining why the decision is believed to be in error.
2. If the WG leadership still disagrees with the complainants, they will forward the challenge to the Chartering Organization (CO) liaison(s), i.e., the GNSO Council liaison to the PDP WG.<sup>14</sup> The WG leadership must explain his/her/their reasoning in the response to the complainants and in the submission to the GNSO Council liaison. If the members of the WG leadership do not agree on the matter, this shall be noted and explained in following step 3.
3. If the GNSO Council liaison supports the WG leadership's position (where WG leadership have an agreed position), the GNSO Council liaison will provide a response to the complainant, setting out the reasoning for the response. If the GNSO Council liaison disagrees with the WG leadership, the GNSO Council liaison will forward the challenge to the GNSO Council (as the CO). Should the complainant disagree with the GNSO Council liaison's support of the WG leadership's determination, the complainant may challenge the GNSO Chair or their designated representative. If the GNSO Chair, in consultation with the Council leadership, agrees with the complainant's position, the GNSO Chair should recommend remedial action to the WG leadership. This step should be completed in no more than one month.
4. In the event of any challenge to WG leadership's consensus designation, the GNSO Chair will ensure that a statement of the challenge is included in the PDP WG Final Report and/or Board report. This statement should include all of the documentation demonstrating completion of all

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<sup>14</sup> In the GNSO PDP WG/Team context, the Chartering Organization (CO) is the GNSO, acting through the GNSO Council. The logical interpretation of CO liaison in this context is therefore the GNSO Council liaison to the PDP WG.

of the above steps, and should include statements from the GNSO Chair and GNSO Council liaison.<sup>15</sup>

This challenge process is summarized in the graphic below. It is more formalized than the complaint process for Section 3.7 in the GNSO Working Group Guidelines.



To date, the Section 3.6 procedure has not escalated beyond step 1 in any WG.

As the Section 3.6 procedure only applies to challenges regarding consensus designation by the WG leadership, it is unrelated to other complaints under Section 3.7, which mostly deal with behavior issues in a WG. A challenge under Section 3.6 may cause a PDP to be suspended, while Section 3.7 complaints should not stop the ongoing work in a WG.

As illustrated above, Section 3.6 provides a phased approach with distinct steps that may lead to resolution. However, no timing or deadline is assigned to the different steps. The phased approach may lead to unnecessary delays if the WG leadership and/or the Council liaison need time to develop a rationale in response to the challenge.

While there is logic in requiring the WG leadership to provide a rationale when rejecting a challenge to consensus designation, it should be clarified why the Council liaison needs to perform such an assessment.

<sup>15</sup> <https://gns0.icann.org/sites/default/files/file/field-file-attach/annex-1-gns0-wg-guidelines-24oct19-en.pdf>, p10

It may be worth conducting a mock challenge process by the GNSO Council to make sure that the GNSO Working Group Guidelines provide sufficient guidance for the PDP WG leadership and GNSO Council liaisons to carry out their responsibilities to the PDP WG. However, streamlining the process under Section 3.6 is out of scope for PDP 3.0 improvement #9.

## 8. Proposed New Text for Section 3.7 in GNSO Working Group Guidelines

To reflect the guidance provided in the previous sections of this implementation document, Section 3.7 of the GNSO Working Group Guidelines needs to be amended as a result. To recap, the proposed new text in the GNSO Working Group Guidelines should reflect the following:

- Rename the section 3.7 “Complaint Process” and use “complaint”, “disagreement”, “challenge”, and “conflict” instead of “appeal”;
- Clarify that Section 3.7 does not deal with disagreement with regard to the consensus designations by WG leadership;
- Emphasize that Section 3.7 complaints should not stop the ongoing work in a WG;
- Make explicit that any litigation-minded behavior or approach should be avoided in this process;
- Clarify that a Section 3.7 complaint should not be treated as the first avenue when dealing with a disagreement and mention the preventive measures in Section 6 of the implementation document;
- Replace “WG Chair” with “working group leadership”, which includes PDP working group co-chair(s) and vice chair(s) that form the leadership team;
- Replace “CO” with “GNSO”, as GNSO is the Chartering Organization of GNSO PDP Working Groups;
- Replace “Chair of the Chartering Organization” and “their designated representative” with “GNSO Council leadership”, which consists of the GNSO Chair and the two GNSO Council Vice-Chairs;
- Add the criteria for complaint submissions in accordance with Section 4 of the implementation document;
- Clarify the role of GNSO Council leadership, GNSO Council liaison to the working group, and Complaint Committee in Section 3.7 complaint proceedings;
- Explicitly note that when a working group member files a Section 3.7 complaint, the GNSO Council liaison will be notified right away;
- Mention the advisory role of ICANN org staff -- Legal, Complaint Officer, and Conflict Resolution Specialist -- in Section 3.7 complaint proceedings;
- Note that when the working group leadership and the GNSO Council leadership cannot resolve the disagreement to the satisfaction of the parties involved, the Section 3.7 complaint may be escalated to the Ombudsman who will then attempt to resolve the disagreement in a manner of his/her choosing;

- Explicitly note that the GNSO strongly discourages the representation of any party in a Section 3.7 proceeding by external legal counsel;
- Include the steps of Section 3.7 proceeding in accordance with Section 5.1 of the implementation document and mention the detailed process flow in Section 5.2 as an example;
- Note the penalties for abusive complaints;
- Note the termination of the proceeding.

The proposed new text for Section 3.7 of the GNSO Working Group Guidelines is as follows:

### **3.7 Complaint Process**

Disagreements are possible at various stages during the policy development process (PDP) in the GNSO, including conflict arising from behavior issues of individuals involved in a working group. Such disagreements must be resolved in a timely manner so that it does not stop the ongoing progress in a working group. Such disagreements must also be resolved by a process in view of ICANN's Expected Standards of Behavior and the spirit of fairness and collegiality of the multistakeholder volunteer community. Any litigious behavior or adversarial approach shall be avoided in the process of resolving disagreements.

This section of the GNSO Working Group Guidelines specifies the complaint process that shall be followed to deal with working group disagreements. Notwithstanding, the GNSO Council may modify the complaint process and its various components on a case-by-case basis at its discretion.

This complaint process does not deal with the challenges of working group leadership<sup>16</sup>'s consensus designation, which is a separate procedure as detailed in Section 3.6 of the GNSO Working Group Guidelines.

The Section 3.7 proceeding will likely require substantial amount of time and effort from all parties involved. Members and leaders of GNSO working groups and the GNSO Council should all do their part to prevent the escalation of a disagreement by using their best efforts to try to resolve disagreements in a timely manner.

This section of the GNSO Working Group Guidelines should be read together with the implementation document of [PDP 3.0 Improvement #9](#), which aims to provide further guidance on the complaint process.

The GNSO Council shall review the complaint process under Section 3.7 after it has been completed, or on an annual basis if no complaint process is invoked.

#### **3.7.1 Complaint Submission Criteria**

Any working group member may invoke the complaint process under Section 3.7 of the GNSO Working Group Guidelines based on any of the following grounds:

- (i) The working group member believes that his/her contributions to the working group are being

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<sup>16</sup> The current GNSO working group structure often involves multiple co-chairs or a single chair and vice chair(s) forming a leadership team.

systematically ignored or discounted;

(ii) The working group member wishes to appeal a decision -- which does not include working group leadership's consensus designation -- of the working group or the GNSO Council;

(iii) The working group member is of the opinion that someone is not performing their role according to the criteria outlined in the Section 2.2 of the GNSO Working Group Guidelines.

All complaint processes must be initiated within two (2) months of the public knowledge of the circumstances giving rise to the complaints.

All complaints must specify the ground(s) of the complaint and include detailed and specific facts of the disagreement, with supporting/explanatory materials and rationale.

All submitted materials in the complaint process must be succinct and not exceed the 1,000 word-limit as determined by the GNSO Council.

The complainant shall not submit a new complaint under Section 3.7 based on the same circumstances that give rise to another complaint that is still pending in any GNSO working group.

The complainant should submit the complaint to the working group leadership or the GNSO Council liaison to the working group. The working group leadership should determine whether the complaint has met the criteria set forth above. If the complainant disagrees with the assessment by the working group leadership, the GNSO Council liaison, in consultation with the GNSO Council leadership, should step in and reassess.

If a complaint does not address all requirements, the complainant will be given a reasonable amount of time to resubmit the complaint. Failure to resubmit a complete complaint will result in the automatic termination of the proceeding.

### **3.7.2 Role of GNSO Council, ICANN org, and Ombudsman**

The GNSO Council, as the manager of GNSO policy development processes, has an appropriate and important role in a complaint proceeding.

Except in the case of conflict of interest, the following individuals/bodies from the GNSO Council have **decision-making** power in addition to the working group leadership:

- **GNSO Council leadership** consisting of the GNSO Chair and two GNSO Council Vice Chairs; and
- **GNSO Council liaison to the working group;** and
- **Ad-Hoc Complaint Committee** consisting of current/former GNSO Councilors.

The GNSO Council Leadership shall act as one collegial body during the complaint process, and the GNSO Chair shall consult with the two GNSO Council Vice Chairs on all decisions.

The GNSO Council liaison to the working group should be notified immediately when a Section 3.7 complaint is submitted and be tasked with: 1) status reporting to the GNSO Council and 2) facilitation of the disagreement resolution in consultation with the working group leadership and GNSO Council leadership. In particular, when a member(s) of the working group leadership is a party involved in the disagreement, or when the working group leadership is unable to arrive at an agreed approach for



handling the disagreement, the GNSO Council liaison should step in and be appointed to handle the relevant complaint process.

For each Section 3.7 complaint proceeding, an Ad-Hoc Complaint Committee should be formed to provide a balanced view and input to facilitate disagreement resolution. The working group leadership, in consultation with the GNSO Council leadership and GNSO Council liaison, may invite current or former GNSO Councilors to join the Ad-Hoc Complaint Committee. In specific circumstances, non-Councilors may also be invited to join the Complaint Committee based on specific criteria set by the WG leadership, in consultation with the GNSO Council leadership and Council liaison..

The following ICANN org resources may play an **advisory role** during the complaint process, including, but not limited to:

- **ICANN Complaints Officer**, who may assist in handling complaints concerning performance issues of working group support staff;
- **ICANN Conflict Resolution Staff**, who will act as a neutral party, utilizing structured communication techniques to share problem-solving responsibility.

The working group leadership, in consultation with the GNSO Council leadership and the GNSO Council liaison to the working group, may consider using these ICANN org resources to suit the particularities of each complaint situation.

The ICANN Ombudsman is an established dispute resolution mechanism in ICANN that remains separate from the Section 3.7 complaint process within the GNSO. However, the working group leadership, in consultation with the GNSO Council leadership, the GNSO Council liaison, and the Complaint Committee, may determine the appropriate time, if any, to involve the Ombudsman in the process. In particular, when the working group leadership and GNSO Council cannot resolve the disagreement to the satisfaction of the parties involved in the matter, the working group member should officially lodge the issue and engage with the ICANN Ombudsman, who will attempt to resolve the disagreement in the manner of his/her own choosing.

### **3.7.3 External Legal Counsel**

The GNSO strongly discourages the representation of any party in a Section 3.7 complaint process by external legal counsel.

### **3.7.4 Complaint Proceeding Procedure**

The working group member(s) involved in a Section 3.7 complaint shall always first discuss the matter with the working group leadership, who will consult with the GNSO Council liaison and the Complaint Committee, in the discussion. The working group leadership may also involve other resources, such as the GNSO Council leadership, relevant ICANN org staff, and Ombudsman, in the discussion.

If the disagreement cannot be resolved at the working group leadership level, any of the parties involved in the disagreement may bring the complaint to the attention of the GNSO Council leadership. The GNSO Council leadership shall attempt to resolve the disagreement and consult with

the GNSO Council liaison, the Complaint Committee, the working group leadership, and other resources deemed appropriate by the GNSO Council leadership.

If the disagreement is not resolved to the satisfaction of the parties at the GNSO Council leadership level, any of the parties involved may officially lodge the issue and engage with the Ombudsman. The Ombudsman shall attempt to resolve the disagreement in a manner of his/her own choosing.

At all stages of the complaint process, the individuals or bodies responsible for making decisions -- i.e., working group leadership, GNSO Council leadership, GNSO Council liaison to the working group, and Complaint Committee -- have the discretion to define the specific procedures they will follow in the process of making their decision.

In all cases a decision concerning the disposition of the disagreement, and the communication of that decision to the parties involved, must be accomplished within a reasonable period of time. The proposed procedure intentionally and explicitly does not establish a fixed maximum time period that shall be considered "reasonable" in all cases.

An example of a detailed process flow of a complaint proceeding is provided in Section 5.2 of the implementation document of PDP 3.0 Improvement #9. There is flexibility to modify and adapt this process flow to suit the particularities of each working group and complaint situation, allowing for different types of disagreements and a broad range of resolution methods and remedies.

### **3.7.5 Abuse of the Complaint Process**

Penalties will be imposed for abuse of the complaint process by any of the parties involved in the disagreement. In the event a party is deemed to have abused the process, they shall be subject to a bar from utilizing the Section 3.7 complaint process up to five (5) years.

A party may be deemed abusive based on the following factors, including but not limited to:

- presented materials primarily for improper purposes including, but not limited to, harassment, causing unnecessary delay, or needlessly increasing the workload of the working group leadership and/or the GNSO Council; or
- presented materials contain a deliberate and material falsehood.

The determination of abusive complaint shall be made by the Complaint Committee, in consultation with the working group leadership and GNSO Council leadership.

### **3.7.6 Termination of the Complaint Process**

The complaint process is not mutually exclusive to and does not impact any other conflict resolution mechanisms that may be available to working group members. If the issue raised in the complaint has been resolved at any point during the proceeding, such complaint shall be deemed withdrawn and the proceeding will be terminated.

## Annex 1 - Reference to GNSO Operating Rules and Procedures (Version 3.5 - 24 October 2019)

### **3.7 Appeal Process**

Any WG member that believes that his/her contributions are being systematically ignored or discounted or wants to appeal a decision of the WG or CO should first discuss the circumstances with the WG chair. In the event that the matter cannot be resolved satisfactorily, the WG member should request an opportunity to discuss the situation with the chair of the Chartering Organization or their designated representative.

In addition, if any member of the WG is of the opinion that someone is not performing their role according to the criteria outlined in Section 2.2 of this document, the same appeals process may be invoked.