

# CCWG Accountability

## Mailing List Discussions

### Week: 8 January - 15 January 2015

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#### CCWG accountability ([archives](#))

- **Non-Profit & Public-Benefit Legal Structure**
  - The CCWG considered membership-based organizations and raised issues of membership layers and powers these might generate. Statutory provisions of California public benefits corporation with members, and designed to make the Board accountable, were flagged for consideration.
  - A contributor encouraged the group to consider expanding discussion to the benefits of other jurisdictions. It was reiterated that no current plan exists to change the status of the organization.
- **High Level Statement for CWG Stewardship**
  - High Level Statement for the CWG Stewardship group shared on the mailing list, comments taken. The statement was sent to CWG on 8 January as public document - see [here](#).
  - The CCWG calls the CWG Stewardship's attention to: 1) Independent Review of board actions; 2) Independent certification for delegation and redelegation requests; 3) Independent Appeals Panel.
- **Judicial/Arbital function (see also WA1 below)**
  - The CCWG discussed the suggestion that the Board's scope of authority be defined to allow for a standard against which to measure a dispute. Articles of Incorporation and Bylaws are currently the primary documents that guide dispute resolution. Although the process in place calls for IRP panels to apply a defined standard of review to IRP requests, list discussion suggests the standard may be insufficient as it based on good faith and permits no real redress.
  - The non-binding nature of the current independent review and cost of bringing an IRP also described as problematic.
  - Contributors referred to an April 2013 bylaws change that weakened the standard of review, although the change was implemented after [public comment](#).
  - The group reached the agreement that there is a need for better tools and improvements in defining the appropriate standard of review (a suggestion for a dedicated group of jurists).
  - It was noted that this discussion was in line with ATRT2 rec. 9.2, and that analysis of the ASEP and One World Trust reports might also be useful in this context. There was also discussion about redress and review mechanisms, and the meaning of these terms.
  - Attention was called on the difference between redress and review.

- **WA4 Initial accountability Scenarios**
  - A [draft](#), which compiles 21 scenarios, was shared on the list for comment.
- **How Board Members are Appointed & Democracy**
  - There is interest in mechanisms used to appoint Board members, the selection criteria and inherent democracy (if any).
  - The groups selecting Board members are open to participation, however, there is limitation in level of participation of members in these selecting bodies and degree of geographic diversity.
- **Definitions - Community & Representation**
  - To whom does “Community” refer?
  - Reference made the WSIS and NETmundial stakeholders definitions.
  - Some argue “Community” encompasses 1) individuals from Civil Society, Private Sector, Technical Community (including academics), and Governments – who participate directly in the various ICANN working groups, i.e. the ICANN Community – and 2) the wider community of individuals i.e. members of the groups which comprise the ICANN community.
  - Others believe Civil Society, Private Section, Technical Community (including academics, governments) do not map appropriately the multistakeholder groups in ICANN.
  - How does ICANN define representation? Does belonging to a community make you a member of ICANN? What is the accepted number for representation?
- **Definitions – User**
  - User: an owner of domain name, or just any Internet user?
- **Definitions – Consensus**
  - What does consensus support entail?
  - The [GNSO principles](#) and [ICG guidelines](#) were referred to.
- **Definitions - Public & Public Interest**
  - The group has been debating the meaning of public Interest and if trying to come up with a definition is important, and possible.
  - “Public” can either be construed as Internet users or as all human beings.
  - The fundamental responsibility of the Board is to exercise their judgment to act in what they believe to be the best interest of the global public interest, taking into account the interest of the Internet Community as a whole.
  - The ICANN community is the primary feedback mechanism for determining the global public interest.
  - Do Board members represent their communities or the public interest? Global public interest [guidelines](#) intended for Board

members were issued to that end and as a result of ATRT1. Suggestion that Bylaws could be enhanced to incorporate the notion in the governance guidelines.

- **Legal Advice**

- It is argued that under California law, Board members owe a legal duty of loyalty to corporation, thus creating of paradox of trying to do public governance via a private corporate. The CCWG also questioned what the Board action would be when confronting a community consensus to take an action that could put the corporation at risk of a lawsuit. There may be a tension between protecting the interests of the corporation and those of the global public.
- CCWG was reminded that ICANN will comply with terms of agreements it enters into and that major agreement changes are published for public comment.
- Members a considering requesting legal advice from a subject matter expert in California Law not for profit corporate law to shed light on the above. This party would need to be external to the ICANN sphere.

- **Scoping (also debated within WAs)**

- The CCWG offered edits to the [scoping document](#). The document offers a problem statement and has sections on to whom should ICANN be accountable, what is accountability, and what is the purpose of ICANN's accountability.
- Edits were made to WS1 and WS2. Although laid out in the Charter, the evolving nature of these two definitions was emphasized as needed.

## **Work Area 1: Existing Accountability Mechanisms (including ATRT 1 & ATRT 2 Recommendations)**

- WA 1 discussed the [inventory](#) of ICANN's accountability mechanisms circulated by ICANN staff.
- Some have expressed the opinion that mechanisms labeled "redress" ought to be categorized as "review": the Reconsideration Request, IRP and the Ombudsman make recommendations to the Board but have no authority to set aside a decision (i.e. lack redress)
- Is it possible to provide redress where a review has found that a decision has violated the bylaws etc. and where the review has recommended that ICANN provide redress? In general when one of the existing accountability mechanisms finds fault in a decision by the Board, the Board would be seeking to provide some form of redress to the complainant. The Board still does have discretion to approve or not approve any specific recommendation for redress.
- The inventory fails to mention transparency mechanisms as well as the Cooperative Engagement Process (CEP) that precedes the IRP.

## Work Area 2: Review Input from Public Comment and Categorize Items into Work Streams 1 & 2 (WS1 WS2)

- A suggestion was made to include a measure or mechanism to replace the AoC, either: a) A new AoC, or some other document, between ICANN and the community. b) A new AoC or some other document between the IANA functions manager and the community.
- Edits made to the [inventory](#) were flagged.

## Work Area 4: Identify Contingencies (especially in relation to Work Stream 1)

- An [initial list](#) was shared with the WA, which was [augmented](#) following discussions the CCWG call and WA4 discussions.
- The need for scenarios to be all-inclusive was emphasized so that there can be a robust debate about appropriate stress tests.