

Fundamental Bylaws

Proposed text for CCWG consideration

Authors: Becky Burr, Jordan Carter

Date: 23 April 2015

Purpose of this document

In reviewing the draft report (circulated on 18 April to the CCWG), we realized that neither Work Party defined Fundamental Bylaws per se. This means there is a gap in our draft report that has to be filled.

Accordingly this document contains draft text for consideration as an addition in the Report, inserted after the heading for section 6.3 (Fundamental Bylaws) on page 21 of the frozen Draft Report.

6.3 Fundamental Bylaws

6.3.1 What is a “Fundamental Bylaw”

- 1) ICANN’s Bylaws can generally be changed by resolution of the Board. With a 2/3 majority, the Board can change the rules of the game within ICANN.
- 2) The CCWG believes that some aspects of ICANN’s Bylaws should be **harder to change** than others. These would be deemed Fundamental Bylaws.
- 3) The core mission, commitments, and values of ICANN, or core features of the accountability tools set out in this Report, would be examples of things that the Board on its own should not be able to change.

6.3.2 Establishing Fundamental Bylaws

- 1) We therefore propose the creation of Fundamental Bylaws. They become fundamental by identifying them as such, and by defining a different (and more difficult) process to change them than the process used for general Bylaws changes.
- 2) To implement this, a new provision would be added to the Bylaws that sets out:
 - a) which sections of the bylaws are Fundamental Bylaws (i.e. a list of the articles / sections / subsections that are Fundamental)
 - b) how new Fundamental Bylaws can be defined and how existing Fundamental Bylaws can be changed or removed
 - c) that this defining and establishing clause of the Fundamental Bylaws can only be changed by the process mentioned in b) above (that it, it is listed in the provision in a) above).

6.3.3 Adding new or changing existing Fundamental Bylaws

- 1) It is important to be able to define new Fundamental Bylaws over time, or to change or remove existing ones, as the purpose of these accountability reforms would not be served if ICANN could not change in response to the changing Internet environment.
- 2) On the other hand, there appears to be consensus that ICANN should be able to expand its Mission only under very limited circumstances.
- 3) To establish a new Fundamental Bylaw or to change or remove an existing one, the following steps would be followed where the Board (or the staff through the Board) are proposing the addition:
 - a) The Board would propose the new Fundamental Bylaw or a change to / removal of an existing one through the usual process, but would need to identify it as a Fundamental Bylaw Proposal throughout the process.
 - b) The Board would need to cast 3/4 of votes in favour of the change (higher than the usual threshold of 2/3).
 - c) The new community power set out in 6.6.4 to approve changes to Fundamental Bylaws would apply. The threshold to approve the change would be set at a high bar, as for the Board.
 - d) If the change was agreed, then the new Fundamental Bylaw would appear in the Bylaws wherever it had to, and reference to the text as a Fundamental Bylaw would be added to the part of the Bylaws which lists them. In the case of an amendment, the text would be amended. In the case of a removal, the text would be removed and the reference to that part would be removed.
- 4) The CCWG welcomes feedback on whether there is a need, as part of Work Stream 1 (pre-Transition), to provide for any other means for other parts of the ICANN system to be able to propose new Fundamental Bylaws or changes to existing ones. In particular, the CCWG welcomes feedback on whether the Mission Statement should be subject to even higher bars.

6.3.4 Which of the current Bylaws would become Fundamental Bylaws?

- 1) The general approach should be to have only critical matters defined in the Fundamental Bylaws to avoid introducing unnecessary rigidity into ICANN's structures. It would harm, not help, accountability to make changes to bylaws in general face the same thresholds as are proposed for Fundamental Bylaws.
- 2) In the CCWG's view, "critical matters" are those that define the corporation's scope and mission, and the core accountability tools the community requires.
- 3) So the following would be Fundamental Bylaws in the first instance:
 - a) The mission / fundamental commitments / core values
 - b) The independent review process

- c) The manner in which Fundamental Bylaws can be amended
 - d) The powers set out in section 6.6 of this report
- 4) The CCWG is interested in views from the community about whether there are other parts of the Bylaws that should be protected by making them Fundamental Bylaws.

6.3.5 Fundamental Commitments and Core Values

- 1) Working Party 2 has developed a set of Fundamental Commitments and Core Values for the community's consideration. These are an evolution of what is already in ICANN's bylaws. This material would be a Fundamental Bylaw.
- 2) The table below compares the current draft proposals with the current language and explains the context in a third Notes column.
- 3) We are particularly interested in the community's view as to the broad approach painted: of providing an almost "constitutional core" for ICANN against which the Board and staff can be held to account – by the community, and by the various review and redress procedures that feature elsewhere in this report.
- 4) Wordsmithing or critiquing the precise wording set out isn't necessary as part of this comment period.