

ALAC Comment on CCWG-Accountability Initial Draft Proposal

Introduction

The ALAC appreciates the amount of work that has gone into producing this Draft Proposal.

Although the ALAC is primarily represented by its five Members on the CCWG, extensive consultation with and discussion among a much wider At-Large community has taken place in parallel with the CCWG deliberations.

Although At-Large, like other parts of the community, is not unified in how accountability should be addressed, this statement reflects a carefully thought out consensus of the larger group. Within the comment, references will be made to the At-Large Advisory Committee (ALAC) as the body that formally issues statements, but that notwithstanding, the positions presented do represent the position of the wider group.

For clarity, the comments will be in reference either to Draft Proposal (4 May 2015 version) Section numbers, and/or individual Paragraph numbers, whichever is most applicable.

Overview

In general the ALAC is supportive of the direction being taken by the CCWG and will provide guidance on a number of issues, some of which the CCWG is explicitly seeking, and others where the ALAC believes that reconsideration may be required.

Section 3: Principles

Paragraph 50, Section 3.1.1.a: The ALAC believes that in accordance with the Affirmation of Commitments, ICANN has a responsibility to develop policies that will foster user trust in the DNS. The ALAC understands that ccTLDs are outside of ICANN scope in regards to this.

The ALAC believes that fostering trust in the DNS must be incorporated into the ICANN Bylaws. This can be accomplished by adding the phrase “and to foster user trust in the DNS” to Paragraph 56 as well as including it in Commitments. The reference in paragraph 107 is not sufficient since that is in relation solely to competition.

Paragraph 65: The ALAC believes that it is appropriate to define the reference to Private Sector leadership as explicitly meaning NOT led by the governments. Furthermore, although it is led by the private sector (as defined here), governments do have a role to play in the ICANN Multistakeholder model.

The ALAC recommends caution on classing any Bylaws related to reviews as fundamental without a provision for altering the timing, with widespread community agreement, but without requiring a formal Bylaw change.

Section 4: Appeals Mechanisms

Paragraph 133, Section 13: The ALAC notes that although independence from ICANN is required, there is no such requirement with respect to independence from other parties related to the dispute. Such parties could be contracted parties, or local, national or international entities related to the dispute.

Section 4.2: Regarding the enhancements to the Reconsideration Process, many recent reconsideration requests involved decisions of external panels. The ALAC suggests that the proposal be explicit as to whether such decisions are eligible for reconsideration and if so, how they are to be carried out (purely Board reconsideration or re-chartering a new and/or expanded panel). The CCWG should also consider whether discrepancies between multiple panel results could be the subject of reconsideration.

Paragraph 156: The ALAC supports adding specific target deadlines for resolution of reconsideration requests, but suggests that they be worded as to allow for extraordinary situations which might require elongation of the allowed period. Paragraph 159 makes such an allowance for the 60 day period but not for the 120 day period.

Section 5: Community Empowerment

Section 5.1:

The ALAC has significant concerns with the concept of enforceability. With the exception of removal of one or more Board members, most ALAC members do not believe that legal enforceability is either required or desirable.

The ALAC has significant concerns that a formalising of Legal Accountability that will open the door to litigation between the ICANN Communities and the ICANN Organisation also opens the door to third parties using the system for ICANN to self-destruct. We see it as an aberration that ICANN Community and Organisation would sue each other, resulting in every ruling causing harm to ICANN. This would be a loss-loss scenario.

We have specific concerns on the possibility of personal liability on volunteers who are not backed by any corporate employers who might have interests similar to theirs.

Moreover, if one looks at past cases where parts of the community were displeased with Board actions, it is difficult to find instances were:

- Sufficient parts of the community were displeased so as to trigger the kinds of powers we are now envisioning; and
- The situation was sufficiently severe as to warrant community action.

The ALAC understands that the prime intent of “enforceability” is not to take legal action, but to ensure that the community has the power to convince the ICANN Board that community wishes should take precedence. Nevertheless, the existence of such ultimate power is troublesome to many within the ALAC and At-Large.

The ALAC believes that even in the unknown future, if ICANN is to be viable, there must be sufficient goodwill to ensure community empowerment, and that the threat of removal will be sufficient to cover any eventuality where this is not the case.

- If we ultimately decide that legal status for AC/SOs is required to allow removal of Board members (or for any other reason), the following MUST be mandatory: ACs, SOs, their Unincorporated Associates (UA) and the individuals empowered to act on behalf of the UA, SO or AC must be fully indemnified by ICANN against any action that might be taken against them in their capacity as ICANN participants.
- ICANN must fully fund any legal or other actions taken by the above entities in enforcing the powers granted herein.
- Indemnification funds must be held in escrow to ensure that they will be available without requiring ICANN action to release them.
- Legal enforcement of community powers could ONLY be exercised if a critical mass of SO/ACs supported such action. Individuals and/or less than a critical mass of SO/ACs could not take such action and certainly would not be indemnified if such action could not be effectively controlled.
- The availability of indemnification and holding the funds in escrow must be enshrined in a Fundamental Bylaw.

In summary, enshrining the powers in the Bylaws is critical. Legal enforcement of them, with the exception of Board member removal, is of far less importance.

If a choice between Members and Designators must be made, the ALAC believes that Membership is the correct choice. It is a simpler and well understood concept. Even if designators could achieve the same results, it is a construct that is foreign to most of the community and will add another level of complexity to an ICANN which is already nearly impossible to explain to newcomers or outsiders. Since both require legal status, there does not seem to be anything in favor of the adoption of the Designator model.

That being said, if there is a mechanism to ensure that Board member removal can be enshrined in the Bylaws without either a designator or membership model, the ALAC would far prefer that route. It has been suggested that agreements pre-signed by Board members prior to taking their seats agreeing to resign at the request of the community could accomplish that (similar to the mechanism described in Paragraph 235).

Section 5.1.2 Influence in the Community Mechanism: The ALAC would accept the Reference Mechanism of 5 votes per SO, the ALAC and the GAC, and 2 votes for the SSAC and RSSAC only if the SSAC and RSSAC agree. In all other matters, these ACs are according similar rights and privileges in ICANN and the ALAC sees no reason to alter that at this point. Although the size of the SSAC and RSSAC are “small”, so is the ASO, and there seems to be no question about according it full weighting status. We note that it might not be unrelated that the SSAC and RSSAC have been allotted lesser status and neither are represented in the CCWG. The SSAC has explicitly stated that it is not a chartering organization SOLELY due to lack of available resources and not due to lack of interest.

In the absence of support for the Reference Mechanism by the SSAC and RSSAC, the ALAC supports Alternative B giving all ACs and SOs 5 votes.

Five is the correct number to allow regional diversity to be adequately covered by those ACs and SOs that are organized base on ICANN's regions.

Under no circumstances would the ALAC agree to support Alternative A giving 4 votes to SOs and 2 votes to all ACs.

Section 5.5 Power: Removing individual ICANN Directors: Some members of At-Large believe that AC/SO-appointed Directors should either not be removable by either the community in general or not solely by the AC/SO that appointed them. However, many believe that if a group has the ability to appoint a Director, they should also be able to withdraw that appointment. Specifically, a Director is appointed not to "represent" the appointing group, but because the members of the group believe that the person shares common values with the group. If that belief ceases to be correct, then it is reasonable to no longer support that person as a Director.

The ability to remove individual Board members, either by the appointing AC/SO or by a supermajority of the community, is viewed as crucial by most ALAC Members. Without it, the only alternative is to remove the entire Board and this is a cataclysmic alternative as described under the comment to section 5.6.

It has been argued that being able to withdraw such an appointment will "politicize" the appointment, that the Director will alter their behaviour because of it, or that the group might withdraw the appointment as punishment for not voting the way they would have wished on a specific issue. The ALAC believes that all of these reasons have little merit.

Politicizing: This a curious comment given the fact that the selection of Board Members by some AC/SOs is already an extremely political process.

Altered behavior: Although the Director does not "represent" the group, surely the Director should remain in regular contact with the group and understand where the group stands on specific issues. When a vote is approaching that may go against the group, it is reasonable for the Director to approach the group and explain why there are other considerations. Such a dialogue should allow the occasional divergence of opinion. If this becomes a regular occurrence, perhaps the person DOES need to be replaced. Moreover, it has been said that some Directors already vote differently near the end of their term, hoping to encourage renewal – a characteristic which one would hopefully encourage non-renewal.

Punishment: This rationale is interesting. We endow a group with the very serious responsibility of appointing Directors to ICANN's Board, and we trust them to do it with care and consideration of the needs of the organization. But we then presume that they may act capriciously if they don't get their way in a particular vote. If we really believe that an AC or SO would act in that way, then ICANN needs to rethink whether constituent bodies should be allowed to appoint Directors at all. Either we have some

level of trust that the groups will behave in a serious and thoughtful way on behalf of the organization as a whole, or we don't. We cannot have it both ways.

The process used by an AC/SO to approve removals of one or more Board members must be formally documented in that entity's operating procedures and approved by that AC/SO.

On the issue of removing NomCom appointees to the Board, the ALAC believes that this should be a community decision, just as it is to remove the entire Board. The ALAC does not support having the regular NomCom remove Directors (and specifically those appointed by previous NomComs). The work of the NomCom is sufficiently difficult that this additional task would either come at a time when they are already overwhelmed with the task of identifying and narrowing down new potential appointees, or could come at a time when the NomCom is not even fully organized. Moreover this responsibility would taint what should be a group that is focussing purely on finding the best candidates for the Board as well as other ICANN bodies. Lastly, since the NomCom must operate in complete secrecy (regarding candidates), it would be a bad plan to alter that rule for this particular task allowing full consultation with the community. It would be equally bad to shroud the removal process in secrecy and NOT allow consultation.

The original intent of the CCWG was that the community (ie the Members or Designators) would remove NomCom appointees. Legal advice indicated that since these people were appointed by the NomCom, they must be removed by the NomCom. There is a simple way to effect this. There should be a sub-committee of the NomCom appointed to carry out NomCom-appointed Director removals. This committee should be composed of the representatives of the SO/AC (or their Unincorporated Associations) empowered to act on behalf of the SO/ACs for all of the other empowerment mechanisms (ie the Members or Designators). We therefore have the removal of NomCom appointees carried out by the very community that desires these removals, without having to create an artificial and perhaps distorting intermediary mechanism. The Bylaws restricting who can sit on a NomCom or what NomCom members can do after their term may need to be reviewed for the members of this sub-committee, particularly in the expected typical case where the sub-committee may technically exist in a given year, but may never actually be convened to take any action.

5.6 Power: Recalling the entire ICANN Board: The ALAC has reservations about this mechanism. Exercising it could potentially be catastrophic for ICANN, all the more so given that to date there has not been a viable proposal on how to govern ICANN in the interim until a new Board is selected. The potential for any interim Board being subject to capture or being unresponsive to community input is high, as is the danger of not having an effective Board in place to address any unforeseen circumstances that might arise. It is because of these difficulties that the ALAC would far prefer the "surgical" approach of carefully removing the Directors that the community believes are the source of ICANN's problems while leaving a core Board in which it has confidence.

Section 6: Incorporating the Affirmation of Commitments into the ICANN Bylaws

Accountability and Transparency (A&T) Review - Paragraphs 310-317: The wording of this section should be altered to indicate that the a-e list is not prescriptive. Each review team should be given the authority to decide exactly what A&T issues it will address. Based on the experiences of the ATRT1 and ATRT2, the current formulation implies:

- A narrow focus of A&T as understood by particular individuals in 2009. The very existence of this CCWG illustrates the “straitjacket” that the A&T review teams were controlled by forcing concentration on issues that may have been of lesser importance and restricting what they could look at in addition to or instead of the prescribed list.
- The requirement to review in depth the previous work and to explore new areas creates an ever increasing workload that will make it very difficult for an ATRT to effectively tackle real issues that are relevant at the time of its formation.