

# ALAC Comment on CCWG-Accountability Initial Draft Proposal

DRAFT – 02 June 2015

## 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.

In reply to specific questions, omission of such questions from the statement implies that the ALAC concurs with the proposal and has nothing to add at this stage, or our comments in the sections preceding the comments are sufficient.

## 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 fill foster user trust in the DNS. The ALAC understands that ccTLDs are outside of ICANN scope in regard to this.

### *QUESTIONS AND OPEN ISSUES:*

*1a) Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values would enhance ICANN's accountability?*

*Yes*

*1b) Do you agree with the list of requirements for this recommendation?*

*If not, please detail how you would amend these requirements*

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

36 | **Paragraph 65:** The ALAC believes that it is appropriate to define the reference to Private Sector  
37 | leadership as explicitly meaning NOT led by the governments. And furthermore that although it is may  
38 | be led by the private sector (as defined here, governments do have a role to play in the ICANN  
39 | Multistakeholder model.

40 | ~~QUESTIONS AND OPEN ISSUES:~~

41 | ~~3a) Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?~~

42 | ~~Yes.~~

43 | ~~3b) Do you agree with the list of requirements for this recommendation, including the list of which~~  
44 | ~~Bylaws should become Fundamental Bylaws?~~

45 | ~~With reservation noted below.~~

46 | ~~If not, please detail how you would recommend amending these requirements.~~

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

## 50 | **Section 4: Appeals Mechanisms**

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

54 |

55 | ~~QUESTIONS AND OPEN ISSUES~~

56 | ~~4a) Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability?~~

57 | ~~Yes.~~

58 | ~~4b) Do you agree with the list of requirements for this recommendation? If not, please detail how you~~  
59 | ~~would recommend to amend these requirements.~~

60 | ~~Yes, but with caveat noted above.~~

61 | **Section 4.2:** Regarding the enhancements to the Reconsideration Process, many recent reconsideration  
62 | requests involved decisions of external panels. The ALAC suggests that the proposal be explicit as to

63 whether such decisions are eligible for reconsideration and if so, how they are to be carried out (purely  
64 Board reconsideration or re-chartering a new and/or expanded panel). Also to be considered should be  
65 whether discrepancies between multiple panel results could be the subject of reconsideration.

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

## 70 *QUESTIONS AND OPEN ISSUES*

71 *5a) Do you agree that the proposed improvements to the reconsideration process would enhance*  
72 *ICANN's accountability?*

73 *Yes.*

74 *5b) Do you agree with the list of requirements for this recommendation? If not, please detail how you*  
75 *would recommend to amend these requirements.*

76 *6) Are the timeframes and deadlines proposed reconsideration process sufficient to meet the*  
77 *community's needs?*

78 *As noted above.*

79 *7) Is the scope of permissible requests broad / narrow enough for the reconsideration process to meet*  
80 *the community's needs?*

81 *As noted above with regard to external panel decisions.*

## 82 **Section 5: Community Empowerment**

83 **Section 5.1:** The ALAC has significant concerns with the concept of enforceability. With the exception of  
84 removal of one or more Board members, most ALAC members do not believe that legal enforceability is  
85 either required or desirable.

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

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

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

93 The ALAC understands that the prime intent of “enforceability” is not to take legal action, but to ensure  
94 that the community has the power to convince the ICANN Board that community wishes should take

95 precedence. Nevertheless, the existence of such ultimate power is troublesome to many within the  
96 ALAC and At-Large.

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

100 If, however, the CCWG ultimately recommends empowerment that is legally enforceable for any of the  
101 envisioned community powers, the following must be mandatory:

- 102 • ACs, SOs, their Unincorporated Associates ~~(UA)(if any)~~ and the individuals empowered to act on  
103 behalf of the UA, SO or AC must be fully indemnified by ICANN against any action that might be  
104 taken against them in their capacity as ICANN participants.
- 105 • ICANN must fully fund any legal or other actions taken by the above entities in enforcing the  
106 powers granted herein.
- 107 • Indemnification funds must be held in escrow to ensure that they will be available without  
108 requiring ICANN action to release them.
- 109 • Legal enforcement of community powers could ONLY be exercised if a critical mass of SO/ACs  
110 supported such action. Individuals and/or less than a critical mass of SO/ACs could not take such  
111 action and certainly would not be indemnified if such action could not be effectively controlled.
- 112 • The availability of indemnification and holding the funds in escrow must be enshrined in a  
113 Fundamental Bylaw.

114

#### 115 ~~QUESTIONS AND OPEN ISSUES~~

116 ~~8) Do you agree that the introduction of a community mechanism to empower the community over~~  
117 ~~certain Board decisions would enhance ICANN's accountability?~~

118 ~~Subject to the general remarks above, yes. Enshrining~~In summary, enshrining the powers in the Bylaws  
119 is critical. Legal enforcement of them, with the exception of Board member removal, is of far less  
120 importance.

121 ~~9) What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed~~  
122 ~~options? Please provide the underlying rationale in terms of required accountability features or~~  
123 ~~protection against certain contingencies.~~

124 ~~The general advice from the ALAC has been presented above.~~

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

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

135 *QUESTIONS AND OPEN ISSUES:*

136 *10) What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed*  
137 *options related to the relative influence of the various groups in the community mechanism? Please*  
138 *provide the underlying rationale in terms of required accountability features or protection against certain*  
139 *contingencies.*

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

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

150 Five is the correct number to allow regional diversity to be adequately covered by those ACs and SOs  
151 that are organized base no ICANN’s regions.

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

154 **Section 5.5 Power: Removing individual ICANN Directors:** Although some members of At-Large believe  
155 that AC/SO-appointed Directors should either not be removable by either the community in general or  
156 not solely by the AC/SO that appointed them, the majority believe that if a groups has the ability to  
157 appoint a Director, they should similarly be able to withdraw that appointment. Specifically, a Director is  
158 appointed not to “represent” the appointing group, but because the members of the group believe that  
159 the person shares common values with the group. If that belief ceases to be correct, then it is  
160 reasonable to no longer support that person as a Director.

161 | The ability to remove individual Board members is viewed as crucial by most ALAC Members. Without it,  
162 the only alternative is to remove the entire Board and this is a cataclysmic alternative as described  
163 under the comment to section 5.6.

164 It has been argued that being able to withdraw such an appointment will “politicize” the appointment,  
165 that the Director will alter their behaviour because of it, or that the group might withdraw the

166 appointment as punishment for not voting the way they would have wished on a specific issue. The  
167 ALAC believes that all of these reasons have little merit.

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

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

178 Punishment: This rationale is interesting. We endow a group with the very onerous responsibility of  
179 appointing Directors to ICANN’s Board, and we trust them to do it with care and consideration of the  
180 needs of the organization. But we then presume that they may act capriciously if they don’t get their  
181 way in a particular vote. If we really believe that an AC or SO would acting in that way, then ICANN  
182 needs to rethink whether constituent bodies should be allowed to appoint Directors at all. Either we  
183 have some level of trust that the groups will behave in a serious and thoughtful way on behalf of the  
184 organization as a whole, or we don’t. We cannot have it both ways.

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

196 There is a simple solution to this. There should be a sub-committee of the NomCom appointed to carry  
197 out NomCom-appointed Director removals. This committee should be composed of the representatives  
198 of the SO/AC (or their Unincorporated Associations) empowered to act on behalf of the SO/Ac for all of  
199 the other empowerment mechanisms. We therefore have the removal of NomCom appointees carried  
200 out by the very community that desires these removals, without having to create an artificial and  
201 perhaps distorting intermediary mechanism. The Bylaws restricting who can sit on a NomCom or what  
202 NomCom members can do after their term ~~must not apply to~~ may need to be reviewed for the members

203 of this sub-committee, particularly in the expected typical case where the sub-committee mat  
204 technically exist in a given year, but may never actually be convened to take any action.

205 **5.6 Power: Recalling the entire ICANN Board:** The ALAC has reservations about this mechanism.  
206 Exercising it could potentially be catastrophic for ICANN, all the more so given that to date there has not  
207 been a viable proposal for how to govern ICANN in the interim until a new Board is selected. The  
208 potential for any interim Board being subject to capture or being unresponsive to community input is  
209 high, as is the danger of not having an effective Board in place to address any unforeseen  
210 circumstances that might arise. he ALAC supports this mechanism, but is concerned by the lack of  
211 obvious alternatives to creating a caretaker Board without allowing for either nefarious action by the  
212 outgoing “removed” Board and at the same time preventing capture by an interim Board. It is because  
213 of these difficulties that the ALAC would far prefer the “surgical” approach of carefully removing the  
214 Directors that the community believes are the source of ICANN’s problems while leaving a core Board in  
215 which it has confidence.

## 216 **Section 6: Incorporating the Affirmation of Commitments into the ICANN** 217 **Bylaws**

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

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