



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY DELHI

**COMMENTS ON THE 2ND DRAFT PROPOSAL OF THE CROSS
COMMUNITY WORKING GROUP TO DEVELOP AN IANA
STEWARDSHIP TRANSITION PROPOSAL ON NAMING RELATED
FUNCTIONS**

The second draft proposal offered by the Cross-Community Working Group on Naming-related Functions (CWG) is a significant departure from the version placed for public comment in December 2014. It raises several questions, which we hope the CWG will address in the coming weeks. The proposal lacks a clear justification as to why an external oversight mechanism – in the form of a Multistakeholder Review Team – has been done away with. The community had offered its views and questions on the nature of the MRT, none of which seem relevant any longer. How has the CWG factored in inputs from the first round of public comments? This remains unclear.

“The public consultation on the CWG-Stewardship’s initial transition proposal of 1 December 2014 confirmed that the respondents were very satisfied with the current arrangements and that any new arrangements should maintain ICANN, as the IFO at the time of transition [...]”

The CWG is yet to place an analysis of public comments – independent of that provided by ICANN staff – to justify this conclusion. The statement raises an important question: if ICANN has indeed been performing its role well as the current IANA functions operator, does that mitigate the need for external oversight? Accountability, in legal terms, is a prospective concern. The need for accountability is not diluted by past performance, however favourable, of the IANA functions operator. Rather, oversight is intended to check any future misconduct or abuse of power/ responsibility. In creating an ICANN affiliate (Post Transition IANA) and effectively replacing the NTIA-ICANN contract with an ICANN-PTI one, the CWG has skipped a couple of steps.

The proposal does not explain how the CWG has concluded ICANN to be the ultimate custodian of IANA functions oversight, and how this selection has been made. ICANN's performance as a good IANA functions operator is marginal to the larger question of oversight. The recommendations of the Cross-Community Working Group to Enhance ICANN Accountability – a group which has had all but six months to draft its proposal – need further exploration. Relying entirely on the CCWG's work, which is without precedent, may not be the best possible way forward. There needs to be a mix of external and internal multistakeholder oversight mechanisms that render the IANA functions operator accountable to the larger community. Currently, the “internal” proposal is embedded too closely to US policies and laws to support this goal.

Second, the need for creating an ICANN “affiliate” to perform IANA functions has not been clearly explained. The goal of “functional separation” is undercut by the fact the PTI will be a wholly owned subsidiary of ICANN, and hence subject to legal and operational management by the parent corporation. There is no exposition of legal advice relating to this separation annexed to the report. If the goal is functional separation, what is the need to maintain a corporate link between ICANN and the PTI? What is the legal and policy justification to hand over the right of selecting future IANA functions operators to ICANN? These important questions, regrettably, have been left unexplained by the CWG.

Our last comment pertains to changes in root zone management. If US oversight and approval of changes to the root zone will be done away with post-September, what are the checks in place for the system that follows? The root zone is a critical internet resource, and if private entities will assume control over what was once the function of the US government, their accountability to the global community becomes paramount.

Questions on the draft proposal:

1. What will be the composition of the PTI Board?
2. Will the PTI also be subject to California law, being an affiliate of ICANN?
3. Will PTI Board members be liable in the event US or foreign courts “pierce the corporate veil”?

4. What will be the consequence of an unfavourable IANA Functions Review? This is not specified currently in the draft proposal.
5. What were the CWG's reasons to do away altogether with the requirement of "authorisation" to root zone changes?
6. Will the NTIA-ICANN contract be substituted *pari materia* with the ICANN-PTI one?
7. What does the CWG mean when it says "the IFO's comprehensive costs should be transparent for any future state of the IANA Function." What legal or policy mechanisms have been introduced in this proposal to introduce such transparency?