



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY DELHI

## COMMENTS ON THE 1ST DRAFT PROPOSAL OF THE CROSS COMMUNITY WORKING GROUP ON ENHANCING ICANN ACCOUNTABILITY

The Centre for Communication Governance reserves its final comment on the draft pending the second public comment period.

- The proposal suggests IRP panelists will be compensated by ICANN. This could affect the independence of the arbitrator. Even though the proposal maintains the panelist will be independent of ICANN, its SOs and ACs, he/she would draw remuneration from ICANN. To cite a widely followed practice, this could be an instance under the [“Non-waivable Red list”](#) in [IBA Guidelines on Conflicts of Interests in International Arbitration](#).
- Geographical diversity will purportedly be taken into consideration while forming the panel for IRP. Given that the panel would consist of only 7 members, more details on how such diversity would be accommodated will be welcome.
- The phrase “public interest” is repeated extensively through the proposal including:
  1. The “public interest” goal in the revised Mission Statement
  2. The role of “public interest” when balancing competing cores/commitments
  3. When language of AOC is imported into the proposed ICANN Bylaws, “public interest” finds mention

The proposal acknowledges that public interest has not been defined. Is the additional text – emphasizing the process through which it is identified -- sufficient, must a substantive definition be added? Commitments that ICANN shall work to the benefit of the public cannot get around the problem of defining what public interest is, given the corporation’s context-specific functions.

- The ICANN Board is not bound by community feedback when it comes to changes in ICANN Bylaws, budget, strategic/operating plans (unlike the proposed Fundamental Bylaws). This is of concern. Community feedback should be binding on the board in instances involving budgetary decisions. Will the proposed voting structure of the EC etc. be included as a Fundamental Bylaw, making it difficult to change?
- As for the voting structure for the Empowered Community, the proposal states that the same has not been decided and will up for public comment after the second draft proposal. Does the voting structure have any bearing on the viability of this proposal? We

know that 5 of the SOs and ACs in EC (Empowered Community) will have 5 votes each, however we do not know if these 5 votes reflect consensus within the communities.

- To further the previous point, Stress Test 18 proposes that the ICANN Board reply in a timely manner and find “mutually agreeable solutions” to only that GAC advice where there is consensus involved. How is this different from the existing scenario, and how does this measure enhance the Board’s accountability to GAC?
- The proposal suggests there was no consensus on whether the words “private sector-led” (say in the policy development process) should be included in the Bylaws or not. A formal definition of this term is required.
- **“Initiation of an IRP:** An aggrieved party would trigger the IRP by filing a complaint alleging that a specified action or inaction is in violation of ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values* or ICANN policies. **Matters specifically reserved to any “Members” of ICANN in the Articles or Bylaws would be excluded from IRP review. Likewise, the IRP could also not address matters that are so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board.”**

The last two sentences need further clarification. Will Stress Tests be required to understand the consequences of the last two instances in this paragraph?

- The proposed Mission provides that ICANN will be subject to international law. The only reference made to any particular convention in the proposal is with respect to WHOIS database adhering to privacy conventions. An exhaustive, or at the very least, an indicative list of applicable international treaties/conventions should be provided.
- Instances of when an IRP can be initiated also cover actions of ICANN board/staff that are against ICANN policies. ICANN policies have been defined as “legal requirements applicable to non-profit corporate and charitable organizations”. Therefore ICANN policies would include only local California laws. Can an IRP be initiated when an action of ICANN does not adhere to any international convention that the complainant is a party to?
- To further the previous point, the proposal requires that parties amicably try to resolve the dispute before arbitration is commenced. There is no clarity on the role of courts which have jurisdiction with respect to applicable California law. Will these avenues have to be exhausted first? If an IRP is initiated, does that prevent parties from approaching the courts? The only mention of courts in the proposal has been made with respect to enforcement of the IRP awards.

- As per the proposal, the Documentary Information Disclosure Policy will be enhanced only after Work Stream 2 proposals come into place. Perhaps it would be worth including this aspect within work stream 1, since it bears on the IANA transition or PTI.
- SOs will have 5 votes to ensure that diversity of views (geographical diversity) can be implemented. How will the same be ensured, what voting procedure will be followed by these SOs, can ICANN Bylaws provide for voting/consensus procedure within the SOs?