

## **InternetNZ comments in response to the Initial Draft Proposal of the Cross Community Working Group on Enhancing ICANN Accountability**

**3 June 2015**

### **Introduction**

InternetNZ is a multi-stakeholder membership-based Internet community organisation in New Zealand, which serves the local Internet community in a range of ways including as the designated manager for the .nz country code Top Level Domain.

Staff and members of InternetNZ have been leaders in global domain name policy matters since before ICANN was formed. As an organisation we participate in global Internet Governance debates with a fused technical community/civil society mandate and interest.

We note for transparency an interest in the work of the CCWG in the sense that our Chief Executive, Jordan Carter, has participated in the work of the CCWG including as a rapporteur. The position set out here has been developed across the InternetNZ group and is the organisation's position, not an individual one.

We congratulate the CCWG for the work it has done in preparing this proposal. We are supportive of the direction that is set out in the Initial Draft Proposal, and have no additions to or subtractions from the proposals to suggest.

This comment provides some high level context in which we set out our support for the membership model the CCWG has proposed, and then proceeds to answer the questions the CCWG has specifically sought responses to.

**In summary, InternetNZ supports the SO/AC Membership model as the best way to empower the whole community, and broadly supports the specific initiatives proposed by the CCWG.**

## InternetNZ supports the SO/AC Membership Model

When the IANA Functions Contract between the NTIA and ICANN terminates, a clear chain of legally enforceable accountability for ICANN will come to an end. Today, the ultimate sanction for poor performance by ICANN or abuse of its position at the core of the Internet's domain name system, is the assignment of its functions to another organisation.

The demise of such a clear, enforceable accountability tool is the most important driver for the CCWG's work. The IANA Stewardship Transition is recognition that ICANN should no longer be accountable to the United States government: it should be accountable to the global multistakeholder community.

To make this accountability a reality, the CCWG must develop a proposal that delivers meaningful accountability to that community. Such accountability must be, as the current mechanism is, legally watertight and, should matters require it, enforceable in a court of competent jurisdiction.

Its nature as an unbroken chain of accountability is one underlying reason why InternetNZ supports the membership model proposed by the CCWG. Another reason is that InternetNZ is a membership organisation, and as such is well familiar with the governance framework that the membership model would allow.

Those are underpinnings that should not detract for the most important reason why InternetNZ supports this model.

By locating real power in essentially the Supporting Organisations and Advisory Committees that make up the ICANN community, the membership model at the heart of the CCWG's proposal gives the community the ability to hold ICANN to account.

In this model, the community in its SOs and ACs, rather than its selected ICANN Board members, become the 'owners' of ICANN and the determiners of its future. Power is shared and broadened, away from representatives to participants. The powers the CCWG suggests are not 'hopes' but are 'realities', and the very fact they have a chain of legal enforceability reduces the likelihood of people resorting to the courts, or unclear authorities leading to deadlock in ICANN.

We note that there has been considerable discussion on the CCWG email list regarding the importance of enforceability.

InternetNZ regards enforceability as an essential ingredient in accountability: accountability does not exist if the tools that purport to allow it can be ignored by the party being held accountable.

We note that the new accountability framework being proposed by the CCWG and its implementation provides an opportunity to improve the accountability of all parts of the ICANN community. For instance, there are lessons SOs and ACs

should take on with regard to being able to remove Council members or an entire Council if required. This would be more important in a situation where the SOs and ACs function as members of ICANN.

Overall, we note that the details of implementation, including the role of unincorporated associations as legal 'packages' through which the SOs or ACs act, are still being developed and we look forward to the conversation on that, as well as the overall settlement, in Buenos Aires later this month.

Finally: this first PC is a chance for organisations to state their positions. We have done so in the full knowledge that the CCWG has to come to consensus around recommendations, or else place the entire IANA stewardship transition at risk. InternetNZ reiterates its support for that transition, and signals its recognition that compromise by all participants, including ourselves, will be required in that process of consensus building.

## Responses to Questions

The following comments follow the scheme of questions presented at <https://www.icann.org/public-comments/ccwg-accountability-draft-proposal-2015-05-04-en> - with the questions numbered as per that website as of 1 June 0200UTC.

We note that that page does not present the CCWG's questions about the community mechanism itself, and so we have added those in with no numbers in the below to avoid confusion.

### Public Comment Input Framework

Do you believe the set of Work Stream 1 proposals in this interim report, if implemented or committed to, would provide sufficient enhancements to ICANN's accountability to proceed with the IANA Stewardship transition? If not, please clarify what amendments would be needed to the set of recommendation.

Yes, the proposals are sufficient to allow the IANA Stewardship transition to occur, as long as they are in essence implemented, and as long as the framework within which the proposals are implemented is one that is enforceable (see discussion above).

Do you have any general feedback or suggestion on the interim Work Stream 1 proposals?

No.

## Revised Mission, Commitments & Core Values

1. Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values would enhance ICANN's accountability?
2. Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.

Yes to both:

- The changes would improve the clarity of ICANN's mission and make it easier for the community to ensure that the organisation doesn't engage in scope creep.
- The reconciliation test set out on page 17 of the report is also an improvement on the current language in the Bylaws.
- Making these parts of the bylaws hard to change without broad community support would also help give assurance that ICANN won't engage in scope creep.

## Fundamental Bylaws

3. Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?

Yes. In the context of a membership model, making some parts of the bylaws harder to change - and the authorisation of such changes being more broadly done than simply by the Board - would be a meaningful enhancement to ICANN's accountability in the post-contract environment.

4. Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

Yes - the requirements set out are reasonable, and the proposed list of Fundamental Bylaws is appropriate.

The membership model on which this new accountability system rests should also be Fundamental, whether it is set out in the Bylaws or the Articles.

## Independent Review Panel Enhancement

5. Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

We broadly support the direction set out but have not scrutinised the proposal in depth. We offer the following comments:

- It is important to ensure that the IRP process cannot be used in a frivolous or vexatious way, and we will review more detailed proposals in the next Public Comment with that concern in mind.
- We suggest a “first cab off the rank” approach to the allocation of panellists – both for one-member and three-member panels (in the latter case, the third panellist). A guaranteed rotation of panellists avoids any panellist or subset having undue influence in the development of the precedentiary body of case work the system will create, and avoids complainants choosing a particular panellist for any reason.

We also query the interaction of the Ombudsman with the IRP and suggest the CCWG give further thought to this. There must be clarity for the community as to when each (IRP or Ombudsman) is the right forum to use.

## Reconsideration Process Enhancement

6. Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements. Are the timeframes and deadlines proposed herein sufficient to meet the community's needs? Is the scope of permissible requests broad / narrow enough to meet the community's needs?

We broadly support the direction set out but have not scrutinised the proposal in depth. It is important to ensure that the reconsideration process cannot be used in a frivolous or vexatious way, and we will review more detailed proposals in the next Public Comment with that concern in mind.

## Mechanism to empower the Community

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

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

Note - these questions are from page 43 of the Public Comment report, but did not appear on the web page.

InternetNZ supports a community mechanism along the lines outlined by the CCWG. We have made broad comments in support of the approach in the first part of this comment.

InternetNZ supports making use of the powers that can be granted to members in a non-profit public benefit corporation under California law. The powers proposed for members in the CCWG's report are powers we support and that can best, most reliably & most simply be delivered by a membership option.

### **Influence in the Community Mechanism (was "Mechanism to empower the Community")**

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

InternetNZ supports the proposed share of influence in the community mechanism, noting that it provides a broad cross-section of the Internet community with the ability to hold ICANN to account.

We ask the CCWG to carefully consider whether it is appropriate to give a fully appointed AC (the SSAC) influence in this system, but await with interest the SSAC's own comments on this matter, and the comments of the GAC as to the workability of the model.

We prefer the Reference Mechanism, not the alternatives presented.

### **Power: reconsider/reject budget or strategy/operating plans**

8. Do you agree that the power for the community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Yes, InternetNZ supports this power as an enhancement to ICANN's accountability. We are in support of the requirements set out. We note that the annual budgeting process will need to be adjusted to make provision for this power, and consider that that falls naturally into a broader improvement in the budget process that could be part of Work Stream 2.

### **Power: reconsider/reject changes to ICANN "standard" Bylaws**

9. Do you agree that the power for the community to reject a proposed Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Yes, InternetNZ supports this power as an enhancement to ICANN's accountability. We are in support of the requirements set out – this will be a straightforward change to the bylaws adoption/amendment process.

### **Power: approve changes to "Fundamental" Bylaws**

10. Do you agree that the power for the community to approve any fundamental Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Yes, InternetNZ supports this power as an enhancement to ICANN's accountability. We are in support of the requirements set out: we support the "co-decision" model that this represents, with the Board and the community mechanism together having to approve changes to Fundamental Bylaws.

## **Power: Recalling individual ICANN Directors**

11. Do you agree that the power for the community to remove individual Board Directors would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Yes, InternetNZ supports this power as an enhancement to ICANN's accountability. We are in support of the requirements set out.

We suggest that there be common requirements on all appointing bodies as to the thresholds that must be met (75% in the proposal) to remove a director.

We do not take a stance in this comment regarding the best method of allowing the Nominating Committee to remove directors it has appointed, but we do support such directors being able to be removed when the community petitions for this to occur.

## **Power: Recalling the entire ICANN Board**

12. Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Yes, InternetNZ supports this power as an enhancement to ICANN's accountability. We are in support of the requirements set out. The CCWG must carefully consider the threshold – 75% is the highest that is viable otherwise the power will become only theoretical.

## **Incorporating the Affirmation of Commitments into the ICANN Bylaws**

13. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments principles would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

14. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments reviews would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Yes, InternetNZ supports the incorporation of the AOC principles and reviews in the bylaws as an enhancement to ICANN's accountability. We are in support of the requirements set out.



## Bylaws changes suggested by Stress Tests

15. Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Yes, InternetNZ supports these changes - in particular the one relating to ICANN's response to GAC advice. It is important that unilateral action by an SO or AC not lead to a change in the balance of influence in the ICANN system. The proposed change as set out in para 387 achieves this in a way that does not constrain GAC's ability to organise itself.

## Items for Consideration in Work Stream 2

The CCWG-Accountability seeks input from the community regarding its proposed work plan for the CCWG-Accountability Accountability Work Stream 2? If need be, please clarify what amendments would be needed.

InternetNZ has no specific additions to suggest at this stage.

With many thanks for your consideration,

# *InternetNZ*

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For further information please feel welcome to contact any of the following:

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