

ALAC Comment on CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations

Introduction

[Introduction saying that we appreciate the work that has gone into the creation of this 2nd Proposal.]

The ALAC is generally very supportive of the overall proposal. Although the ALAC preference was to have less “enforceability” than some other groups in ICANN, we believe that the overall direction now being taken is acceptable. That being said, the ALAC does support the concerns expressed in Sébatien Bachollet’s minority statement that the resultant complexity and multi-tiered control may make it overly difficult or impossible for ICANN to evolve. The high thresholds set to ensure difficulty in over-riding the Board may also allow certain parts of the community to have an effective veto over change that is in the public interest.

The ALAC nonetheless has a number of concerns, both at a conceptual and at a detailed level, and we will also take this opportunity to comment on a number of options provided by the minority views and minority statements within the document.

In many cases, the ALAC is of a single mind on issues. In other cases, the group is divided, and this statement will clearly identify those.

Section 3. Principles

Paragraph 154, Bullet 2: The ALAC strongly supports the minority position that end-users should be explicitly referenced. Although many user organizations can be classed as civil society, that is not true in the general case. [Need additional rationale demonstrating cases where the two are different].

[Paragraph 216: Change in Core Value 4:

To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

to

Delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN’s internal bodies and external expert bodies.

The change removes the Board’s ability to override an SO and particularly the GNSO.]

Paragraph 218: The current ICANN Core Value 5 in the Bylaws reads:

Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

It the first Draft Proposal, the CCWG recommended that this be changed to read:

Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market that enhances consumer trust and choice.

The ALAC supported this change. In the new Proposal, the corresponding core value reads:

Depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.

The ALAC disagrees with, but could accept the removal of the reference to “enhanced consumer trust and choice”. But the ALAC cannot accept the removal of the leading “Where feasible and appropriate”. ICANN has a responsibility to uphold the public interest, and to do that it must be able to make value judgements as to when the open market mechanisms are sufficient and when it must intervene. Adding the word “healthy” is not sufficient to accomplish that.

Section 4. Fundamental Bylaws

Paragraph 246: Since it takes 75% vote to alter Fundamental Bylaws, surely the same threshold should be used for altering the articles of incorporation.

Paragraph 254: The threshold to approve a change to the Articles of Incorporation should be as high as that to alter fundamental Bylaws. Also, in this paragraph, it is not clear that the threshold applies to the SO/AC votes of the entities comprising the Sole Member.

Paragraph 259: The definition of the Board threshold to approve changes to Fundamental Bylaws is unclear. Most Board votes are judged based on the number of Members voting or abstaining, but excluding those members not present. For the approval of Bylaw changes, the threshold is 2/3 of all members of the Board. Accordingly, the threshold for approving Fundamental Bylaws should explicitly be 75% of all members of the Board as “available votes” could be construed as just those present at the time.

Section 5. Appeals Mechanism

Paragraph 288, Subsection 18: The ALACs understanding of the IRP is that it is an evaluation of ICANN actions and a determination of whether the ICANN Bylaws and Articles of Incorporation were followed. The proposal text implies that the IRP will order that the breach be remedied, but does not dictate exactly what the remedy will be. The ALAC Supports this, but believes that it must be explicit that the IRP cannot dictate specific courses of action. If this interpretation is not correct and the intent is that an IRP can dictate specific remedies, then the ALAC strongly objects.

Paragraph 268, Subsection 2b: The ALAC supports the ability of the IRP to reconcile conflicting “expert panel” decisions, but notes that such decisions will not simply be a judgement that the Bylaws were not

followed. The proposal should allow for an IRP outcome that specifically addresses the IRP addressing such issues.

Section 6. Community Mechanism as Sole Member Model

Paragraph 319-334: The ALAC supports the (5x5)+(2x2) model, with the understanding that should the ICANN Bylaws be altered to no longer have the SSAC members and Chair appointed by the ICANN Board, that the SSAC would be granted a weight of 5, commensurate with the importance of security and stability in ICANN's mission.

The ALAC would also support the (7x5) model should there be any overall support for this position (and in fact, some within the At-Large Community strongly prefer this mechanism).

Under no condition would the ALAC support the (3x4)+(4x2) where the ALAC and the GAC are given less weight than the SOs.

Section 7. Community Powers

Section 7.1 Reconsider/Reject Budget: The ALAC has concerns about the ability of the community to reject budget items related to a single SO or AC. Given the apparent view of some community members that particular groups should have lesser status than others, it could follow that these groups should also be denied financial support. The Board is given the responsibility of balancing the various needs and priorities of the constituent parts of ICANN and should be given the discretion to do so.

Paragraph 380-381: At a more granular level, Paragraph 380 describes the evolving budget process with more community involvement, but without sufficient data and information, and proposes that these processes be enhanced in Work Stream 2. The ALAC supports this, but believes that the current proposal must be provide additional clarity on what such enhancements will involve.

Paragraph 381 leads off with "Accordingly, this new power would give the community...". In fact, the appropriate lead words should be "If, despite an open and transparent process, the community's direction is ignored, this new power would give the community...". Specifically, it is crucial that the real power rest with the plan and budget development process, and that the Bylaw power just be the fail-safe mechanism.

Section 7.3 Removal of and Individual Director: There must be an explicit statement (and perhaps waiver from each director) that there is no right to appeal, no right to claim unfairness to the Ombudsman, and no legal right related to libel, slander or defamation.

Paragraph 407 and 409: The process should be adjusted to allow for parallel removal of multiple directors without having to convene the ICANN Community Forum multiple times.

Paragraph 407: The At-Large Community supports the concept of removing individual SO/AC appointed Board members, but is divided over whether this power should be vested in the appointing SO/AC or with the Community Mechanism as a Sole Member.

Section 7.4 Recalling the Entire ICANN Board: The ALAC believes that an entire Board recall would be extremely damaging to ICANN operationally, and might signal to the rest of the Internet Community that ICANN is not a viable. The ALAC would far prefer relying on the surgical removal of problematic individual Board members rather than having this nuclear option.

Paragraph 424: The ALAC is concerned that some SO/ACs and the Nominating Committee may not be able to identify replacement Board members within the 120 limit prescribed in the proposal.

Paragraph 429-430 Removal of the Board by a single SO: The ALAC rejects the minority view that a single SO be allowed to remove the entire Board.

Section 8. Accountability Requirements

Section 8.1 Diversity:

Paragraph 467, Subsection 2: The ALAC strongly agrees that diversity reviews should be included in the overall ICANN review program, and perhaps even a formal component of the AoC Reviews. However, this recommendation is too prescriptive. Although the ATRT is a possible place to perform diversity reviews, some past ATRT members believe that this would place an unreasonable load on the ATRT, removing focus from its original purpose and that the ATRT members might not be the best group to perform such a review.

Paragraph 467, Subsection 3: The ALAC notes that the sentence fragment after the closing parenthesis should be removed, as it is a rationale rather than part of the recommendation.

Paragraph 465, Subsection 4: The ALAC supports this recommendation and notes that it could be a sub-task of the Review team formed as part of Recommendation 2.

Section 9 Incorporation of the Affirmation of Commitments

Paragraphs 580-587: The ALAC strongly believes that this section must be adjusted to allow the “WHOIS” RT to address the appropriate issues for the then current Directory Services and should not be limited to the wording written into the 2009 AoC. Moreover, if the terms of reference of this review need to be further adjusted in the future, it makes no sense to assign this task to the AoC RT, which will have little expertise in this area. It should be assigned to the Whois RT.

Paragraph 549: As recommended for the Whois Review, all AoC Review Teams should be responsible for recommending revision to their respective Bylaws. The responsibility should rest with those who best understand the specific issues. The ATRT could have overriding rights to do so as well, but should not be solely an ATRT responsibility.

Minority Statement from Eberhard Lisse: The ALAC does not support this statement.

Minority Statement by Sébastien Bachollet: The ALAC supports certain aspects of the minority statement submitted by Sébastien Bachollet and has incorporated those aspects into the body of its statement.

Minority Statement by Edward Morris: The ALAC rejects most of what is being proposed. The only part that may have merit is ensuring that individuals or organizations do not exercise voting rights in multiple AC/SOs or subdivisions thereof. However, this would need to be carefully examined to ensure that such restriction fixes an accountability problem and does not merely restrict individual rights.

Sébastien's Minority Statement - TO BE REVIEWED by Ad Hoc WG

1527 **For an accountable, diverse, open, transparent, multistakeholder ICANN that gives rise to confidence**

1528 As time is short, it is an individual (hoping that it will reflect the view of some At-Large participants and end-users) minority statement.

1529 Let me start first that I recognize a lot of improvements in this new version of the report of the CCWG-Accountability to be subject to the second comments period.

1530 But I still need to be convinced that some of the proposals are not putting the organization at risk.

- At risk of rigidity: more difficult if not impossible to evolve the organization in a fast evolving world.
- At risk of stagnation: too many processes and deciding bodies, to be taken into account with not enough people.
- At risk of un-governability: let's take 3 groups – The Community – The Board – The Staff – one wanting to change gears, one wanting to brake and one wanting to speed-up.

1531 **THE COMMUNITY POWERS**

1. Reconsider/reject budget or strategy/operating plans

a) It is not compatible with the budget (or strategic and operational plans) development planning. The solution must be to build consensus during the development of the budget, before the discussions and the decisions of the Board of Directors.

b) A solution for a better community participation in budget preparation (and accounts) would be, for example, to publish all financial data of the organization in **open data**.

2. Reconsider / Reject changes to ICANN « standard » Bylaws

3. Approve changes to « Fundamental » Bylaws

a) The articles of association of ICANN (Bylaws) should be divided into 3 parts

1. The Fundamental articles (validation a priori by The Community).
2. The Basic articles (validation a posteriori by The Community).
3. The articles that should go into an Operational Document (direct agreement between the Board, the staff and the AC or SO concerned).

4. Removing individual ICANN Directors

a) Removing a member of the Board, by its electoral group, due to disagreement, contradicts his/her independence.

5. Recalling the entire ICANN Board

- a) The process is very complex and will put the organization in jeopardy by
- a. **Distracting** part of the time of the participants and staff instead of advancing work related to the functions of ICANN.
 - b. Possible **capture** by one group (A single Nomcom will select half of the Board in one go – Staff with long standing knowledge)

b) **Alternative proposal**

- a. During a given year the community will be able to recall up to **7 members of the Board of Directors.**
- b. The proposed 7 allows to retain 9 members who then can stay in charge of the day-to-day business until the election of seven new members.
- c. With the annual election of 5 members, that makes up to 12 members who can be changed each year.