

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

Introduction

The ALAC greatly appreciates all of the efforts of the CCWG-Accountability in creating this proposal.

The ALAC is generally supportive of the overall proposal. Although the ALAC preference was to have less “enforceability” and a lighter-weight proposal 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 Sébastien Bachollet’s minority statement that the resultant complexity and multi-tiered control may make it overly difficult or impossible for ICANN to evolve. This complexity and the lack of detail in many parts of the proposal also raises the concern that we may not be able to complete the proposal in the time required. It was for this reason that the ALAC suggested that the CCWG consider a Community Mechanism as a Single Designator model which would have decreased the number of “moving parts” in the proposal and increased the possibility that it could be completed on time. 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, a particularly worrisome issue. For the reasons outlined above, the ALAC also looks very favourably on the new proposal made by the Board at the 02 September 2015 CCWG-Board meeting. This will be addressed in more detail at the end of this statement.

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

Since the provisions in Article I of the Bylaws will be used by IRPs to determine whether ICANN is operating within its mandate and according to its Bylaws, it is extremely important that they be explicit and clear, ensuring that IRP Panes do not interpret them in ways that were not intended. There are a number of proposed changes where the ALAC either disagrees with the new wording, or believes that it is not sufficiently clear.

Paragraph 154, Bullet 2 (and referencing paragraphs 205 and 234): The ALAC strongly supports the minority position that Users or End-Users must be explicitly referenced. Although many user organizations can be classed as civil society, that is not true in the general case. All definitions of “civil society” say that it encompasses a variety of not-for-profit organizations. At-Large is increasingly made includes unaffiliated individuals, as well as [...]

Paragraph 187, “ICANN shall have no power...”: There are those who claim that the top-level domain name itself is content and that ICANN should not exercise any control over what TLDs are allowed. Using this interpretation, the new mission restriction prohibits ICANN from exercising any control over new TLDs (including confusingly similar, for example). This is not acceptable.

Paragraph 199, “Preserve and enhance the neutral and judgment free operation of the DNS...”: The ALAC has concerns regarding what this means operationally? Does this mean that ICANN can no longer make any judgement calls over TLDs to be used (such as confusingly similar or other decisions made in the new gTLD process or in approving IDN ccTLDs? Does this mean ICANN will actively try to stop sovereign nations from filtering, or for that matter, outlaw spam blacklists? The wording seems far to open ended and subject to future interpretation.

Paragraph 207, Discriminatory treatment: The first Draft proposal implied that this principle will replace Bylaws Article II, Section 3. The current draft is silent on this. If Article II, Section 3 is to be removed, the ALAC strongly objects. The phrase “unless justified by substantial and reasonable cause” might be inferred by some to be implied in “discriminatory”, but the ALAC believes that it must be explicit.

[Paragraph 216: Change in Core Value 3:

The ALAC does not support removing the phrase “To the extent feasible and appropriate, particularly when adding the reference to external expert bodies. ICANN must have the ability to rationally judge what policies it adopts and that unilateral role of the ICANN Board (with the support of the community using its new powers) cannot be delegated. The Bylaws give the Board the ability to reject policy recommendations and even to set policy in exceptional situations when the Internet security and stability is at stake.]

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.

In 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.

But 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.

Moreover, the ALAC notes that the reference to Consumer trust is removed. The Affirmation of Commitments says that ICANN will “promote competition, consumer trust, and consumer choice in the DNS marketplace”. This is a general statement and not just in reference to the expansion of the name space. This commitment must be put in the Bylaws and not omitted and the commitment must clearly reference all gTLD and not just those associated with name space expansion. Leaving it to the Consumer Trust Review to monitor, and then only for the name space expansion, is not sufficient.

Paragraph 226, Balance: The ALAC believes that this statement must include the caveat the balance is secondary to the public interest, security and stability as stated in its commitments and core values.

Section 4. Fundamental Bylaws

Paragraph 246: Since it takes a 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 judges 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

Section 6.1, SO/AC Membership Model: There must be a limitation of the minimum number of ACs and SOs that are “opted in” in order for the CMSM to be allowed to function. Any less than three implies that ICANN may be captured. The value three presumes the current number of SO/ACs and might need

to change if the number of SO/ACs changes. This threshold would similarly need to be reviewed if the overall mix of SO/ACs changed – as might happen if the gNSO were to split into multiple SOs just as the DNSO did.

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.

Paragraph 348-356, Community Forum: The description of the Community Forum, augmented by the phrase “would have no standing” in paragraph 354, denigrates this functional body. The description needs to be strengthened.

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 description seems to envision that a process will be convened for each director to be removed. 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 day 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, some believe that 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 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 agrees that the CCWG process has been extremely compressed, but does not agree that it was arbitrary or uncalled for, nor the ALAC support this statement’s conclusions.

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 this 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.

Board Proposal – 02 September 2015

At the time this statement is being drafted (04 September 2015) details of the Board proposal have not yet been released. Based on what was said at the meeting, and in the distributed notes, the ALAC is generally supportive of the proposal. In particular, we believe that by reverting to the written specification of WS1 in the CCWG Charter, focusing on the issues that are mandatory to effect the IANA transition, we may have a more manageable task to accomplish facilitating the IANA transition.

While it would have been far preferable to have seen some of these ideas earlier in the process, it is not clear that they would have been better received or thoughtfully discussed then.

It is clear that we need further details and an evaluation from the CCWG legal counsel. But pending those, the ALAC believes that the new proposal must be fully evaluated and cautiously offers its support.