

Comments to the CCWG-Accountability

2nd Draft Report - (Work Stream 1)

Introduction

Cyber Invasion Ltd is a security and risk management consultancy based in Dublin, Ireland. We provide security advisory services to a range of clients including Fortune 500 companies and Small and Medium enterprises.

Cyber Invasion have been heavily active in both the CWG-Stewardship and CCWG-Accountability work streams of the IANA Transition.

These comments will be presented in 3 sections, the first section will provide our analysis of Work Stream 1 measures as proposed and will analyse their merits and potential risks. Section 2 will address individual elements that require specific attention by the CCWG in order to be acceptable to Cyber Invasion, and finally the third section will be a response to the three questions posed as part of the public comment guidance.

Section 1: Examination of Work Stream 1

Accountability Mechanisms

We continue to support the four building blocks of ICANNs accountability process as defined early on in the work of the CCWG and the powers enumerated by the community to achieve those goals. We believe the powers are both deeply rooted in the multistakeholder process and in our opinion reflective of the level of accountability and transparency required of a corporation with the immense responsibility that ICANN has.

Principles

CCWG-Accountability response to public comments

We wish to thank the CCWG for its comprehensive analysis of the Public Comments from the previous round, in light of the scale and far reaching impact of much of the CCWGs work it is important to show a thorough analysis of such comments and we are pleased to see many recommendations have been incorporated into the 2nd draft.

Elaborating an ICANN commitment to Human Rights

We outline our concerns related to this subsection in Section 2 of our comments below.

Private sector leadership and advice contrary to the bylaws

We agree with the additional clarity added and addressed through the revision of the private sector led language to specify the core stakeholder groupings. We note that these stakeholder groupings may not be exhaustive and may require additions in future as part of ICANNs continuing mission as new stakeholder groupings may be identified.

We do not agree with the removal of both options specifying that advise from any SO or AC may not be in contravention of the bylaws. While respecting the concerns of the GAC on this matter we consider this to be a critical issues, as a potential compromise Becky Burr had suggested an alternative to Work Party 2 that was acceptable to many stakeholders, namely a chapeau into the descriptive bylaw outlining the formation and scope of responsibility for all Advisory Committees, we would request that the CCWG re-examines this proposal as an alternative to the current solution of including a specific standing within the IRP to address this concern.

Balancing and reconciliation test

We agree with the changes to the balancing and reconciliation test as proposed.

Freedom to contract

We strongly support the outcome of the consideration of the CCWG with regards to any impediment to ICANNs ability to contract with the contracted parties. We concur with the consensus that prohibiting the regulation of services is prudent in order to constrain ICANNs mission to its core principals.

Revised report on mission and core values

With the exception listed above in respect to Core Value 11 we support the recommendations of the CCWG to ICANNs mission and core values. In particular we support the enumeration of ICANNs powers via the bylaws, this provides an important check via the community process on bylaw changes on any scope creep in ICANNs day to day operation.

Fundamental Bylaws

Fundamental bylaws are one of the cornerstones of community empowerment, the ability of the community via the CMSM to analyse and approve any bylaw changes in addition to the board is critical to the success of the proposal. While ICANN already has strong mechanisms in place to have community input into such changes we believe that the proactive powers set out in the proposal will positively empower the community to take a leading role in the ongoing governance of ICANN.

Appeals Mechanism

Many commenters have referred to the Independent Review Process as “the rock that the accountability process will stand upon” and as such the work of the WP2 sub-team drafters cannot be underestimated.

We strongly support the core values and principals set out in the proposal for the IRP. We await further details to be defined in Work Stream 2 on some critical items to the functionality and accessibility of the IRP.

We note that the timeframe for initiation and realisation of standing for the IRP are still to be determined by the CCWG. We suggest that in its deliberation the CCWG ensures that while maintaining a workable ‘Statute of Limitations’ that affected parties are not unnecessarily prevented from imitating an IRP, we proffer an example where an entity has standing to bring an IRP action but has to confirm that it has the available funds or the alternative funding mechanisms to bring the IRP against ICANN, we suggest that a tiered timeline may be valued by some plaintiffs, a timeframe for notification of intent to file an IRP after becoming aware of an action or inaction and a subsequent timeframe to run consecutively for the official complaint to be tendered to the IRP.

On the subject of panel composition we agree that a diverse representation of legal background and training is a requirement for the selection of potential panellists, given ICANNs position of importance to the global internet ecosystem we suggest that an

extremely high standard be applied and that extensive training in the internet governance ecosystem be offered to potential panellists in order to ensure that the composition of the IRP panels will be without question as to their competence and ability to hear the complex matters that may be presented.

We support the defined term limits of 5 years with no reappointment in order to maintain the independence of the panel. We believe that this 5 year period will allow the panellists to gain the required knowledge to successfully execute their role without unduly introducing turnover and potential experience loss.

We note the current proposal states;

“Selection and Appointment: The selection of panelists would follow a 4-step process: ICANN, in consultation with the community, will initiate a tender process for an organisation to provide administrative support for IRP, beginning by consulting the community on a draft tender document.”

While we understand that administrative support will need to be offered we caution against outsourcing the IRP to the same extent as for example the current UDRP process. We suggest that the community should play an important role in the selection and evaluation of the potential IRP panellists.

We support the suggestion of the CCWG that the decision making process of the IRP should be precedential and should build a body of arbitral jurisprudence.

The accessibility of the IRP to potential complainants who lack the means to finance an IRP action independently is critical to the universal application of the process. Complainants cannot be excluded from this critical accountability measure due to their inability to raise independent financing that historically has approached a million dollars USD.

We support the examination of the DIDP process as part of the Work Stream 2 effort.

Reconsideration Process

We support the proposed enhancements to the reconsideration process.

Community Mechanism as a Sole Member

We commend the CCWG and its independent counsel on the approach of the Community Mechanism as a Sole Member (CMSM). We believe that the CMSM is the most appropriate vehicle for the community powers as enumerated in the proposal.

We have concerns regarding the role of the Advisory Committees within the CMSM that we outline in Section 2 of our comments below.

We support the ability of the CMSM to act as the designator for the NomCom appointees, we believe that this provides a logical and balanced solution to the issue of complexity around the removal of Directors appointed by the NomCom.

As outlined in Section 2 of our comments below, we strongly suggest that the CCWG reconsider the issue of voting weights in Work Stream 2 as we believe that the current proposed weighting is a fundamental shift in the balance of power within ICANN.

We agree that in order to be functional the subdivision of votes must be available to adequately reflect the diversity of opinion in for example the GNSO where a mix of contracted, non contracted, commercial and non-commercial interests are present.

We support the creation of the discussion forum known by various names throughout the process and titled the ICANN Community Forum in the proposal. It is imperative that this body remain a discussion body with no standing or decision making powers.

Community Powers

As stated above we strongly support the community powers enumerated by the community.

We support the three step process of Petition, Discussion, Decision when exercising the community powers with the exception of an AC/SO removing their appointed Director.

We believe that the appointing SO/AC should be able to remove their appointed Director without undue interference from other areas of the community. We would welcome the ability for the community to comment on such an action prior to its execution however that comment must not have any standing to delay or prevent the AC/SO in question from executing its designated power.

We have concerns with regards to the granularity of the ring fencing of the IANA/PTI budget from the overall budget veto power and have detailed out concerns in Section 2 below with regards to this topic.

As states above we support the power to remove individually AC/SO appointed directors without interference. We believe that the removal of NomCom appointed Directors should be made by the CMSM in conjunction with the broader community.

We support the power to remove the entire ICANN board as an option of last resort for the community. We support that due to the likely chaotic nature of the ICANN ecosystem at the time of such an action the normal standards of diversity may be temporarily suspended with regards to the selection of Directors for the interim board. Respectfully at a time of great unrest it will be critical to select Directors with the deepest technical and governance abilities

above all other criteria in order to preserve the Security and Stability of the DNS in such an instance. Given that the interim board will be replaced within a short period of time compared to standard Director selection we feel that this is an acceptable compromise. As part of the Work Stream 2 effort we suggest that an enhanced set of Director selection standards be developed to assist in guiding the selection of interim Directors in the case of Board recall.

Accountability Requirements

Diversity

We agree that diversity is an important issue within the ICANN ecosystem. However with regards to Work Stream 1 additions we suggest that diversity is not a direct requirement in order to implement the IANA transition. We strongly support the examination of diversity as a part of Work Stream 2.

On the current proposed inclusions in the proposal;

We would not support the expansion of the ATRT reviews to include diversity. The ATRT is an established review team with a huge existing workload, we feel that adding this additional review topic may overburden the ATRT and may lessen its ability to provide the high impact recommendations that we have come to rely upon the ATRT for.

With regards to;

“Establish threshold regarding composition of each body (will depend of the body and of the overall composition) to avoid possible blocking on certain votes. “

We don't agree to this recommendation if our reading of it is correct insofar as it is recommending establishing diversity compositions and thresholds that are prescriptive and not aspirational as part of Work Stream 1.

We support the addition of Diversity and Transparency to the Structural Reviews and would support the addition of such wording to the bylaw definition of such reviews.

We would support the establishment of a Diversity Office under the auspices of the Ombudsman. We would need further details on the role of an Election Office before we could render a comprehensive opinion on its formation and location within the ICANN corporate structure.

We support the rotation of ICANN meetings through various regions of the globe.

We note that the descriptive items that are listed for inclusion in Work Stream 1 are not well defined in the proposal and as a result it is difficult to render a complete opinion on these

issues. We suggest that this may additionally point to the need for this topic to be addressed as part of Work Stream 2.

However we note that the specific recommendations are less strongly worded than the descriptive paragraphs that precede them. We generally support the specific wording of the recommendations with regards to evaluation and identification of topics rather than conclusion on matters of diversity within Work Stream 1.

Staff Accountability

We support the comments of CENTR stating that a culture of accountability and transparency must be fostered within ICANN staff. We note that many of ICANNs staff adhere to the spirit of this, however we have seen multiple examples where performance in this area has been less than satisfactory.

We suggest that the community may have a role in reviewing and making recommendations as to staff policies in this area, however we would strongly caution against the community being given any operational role in staff management or supervision even if at a high level. We believe that this is a matter for the board to address through its relationship with the CEO.

Additionally we suggest that staff who play a direct advisory role to the ICANN board and CEO be held to an additional high standard of accountability and transparency due to their direct ability to influence key decisions.

SO and AC Accountability

While potentially not a widely shared opinion we suggest that the ICANN community as a largely self organising bottom up conglomeration of stakeholders represents the ultimate accountability for ICANN.

We suggest that the “Who watches the watchers?” question is largely philosophical as it becomes infinitely recursive at some point. We believe that as long as long as the SO and AC communities are held to standards of openness and transparency as defined in the bottom up multistakeholder process this is a self solving issue. The community, open to all to participate, will define its own standards of accountability.

Incorporation of the AoC

We are very supportive of the incorporation of the AoC into ICANNs bylaws.

We support the additional clarifications and recommendations based on the work of both ATRT and ATRT2 which have been rolled-up into the incorporation of the AoCs.

We specifically support the addition in paragraph 519 giving review teams the explicit ability to solicit and select independent experts to assist the review teams with their work.

We feel that the requirement to create a confidential disclosure framework to enable the confidential disclosure to review teams is a critical aspect of enabling a strong review structure to exist within ICANN going forward.

As a critical dependency we support the CCWGs proposal for the establishment of the IANA Function Review including the Special IANA Function Review variant as required by the CWG.

Stress Tests

The creation of the stress tests framework and the various tests that the stress tests working party has designed is a critical aspect of the proposal.

We support the findings of the stress tests in generality with specific comments on the following specific stress tests.

We support the conclusion of Stress Test 18 with regards to requiring the GAC to issue consensus advice in order to enter into discussions between the Board and the GAC to find a mutually acceptable solution.

We support the conclusions of Stress Test 11 with regards to the potential compromise of credentials. ICANN has had a mediocre history when it comes to assessment and after action reports from security incidents. We strongly support ICANN being required to pursue ISO27002 accreditation, while accepting that this would be a multiyear effort requiring potential significant capital and operational expenditure we feel that this would be a valuable exercise that would result in a well defined baseline to measure ICANNs security standards against. We support the strengthening of the SSR review as proposed by Stress Test 11.

We suggest that Stress Test 32 (NTIA-1) would be satisfied by the SO's exercising their voting powers in conjunction with the ALAC exercising its existing advisory role. We posit that elevating the ALAC to an operational role is not required to preserve the multistakeholder model that is accepted to be adequate under the current balance of power.

We examine some concerns with regards to Stress Test 35 (NTIA-4) in Section 2 of our comment below.

Work Stream 2

We support the requirement for Work Stream 2 to be incorporated into a transitional bylaw in order to ensure the implementation of Work Stream 2 items is unhindered by any organisational pushback.

We support the list of Work Stream 2 items as defined in the proposal.

Implementation Planning

We express concern over the viability of the implementation timeline. We are many months into this process and many people are approaching burnout. Recognition that volunteer burnout is a genuine issue in high intensity workloads such as the CCWG and indeed the CWG of which there is much overlap in participants should be factored into the timeline. Continued work at the extreme pace that we have been working to is unsustainable.

Consensus by exhaustion is a genuine concern as we move into the critical detail work of Work Stream 1 implementation and Work Stream 2 deliberations.

Bylaws drafting process

With respect to ICANN's legal counsel leading the bylaws drafting effort we disagree with the proposal of the CCWG.

It is our opinion that it should be the CCWG's legal counsel leading this effort, through means of qualitative analysis during the work of the CCWG we have come to realise that the current corporate governance documents are of a poor standard in many areas.

We believe that it is critical to ensure that ICANN has the highest standards of governance documents going forward and we suggest that the means to enable this is to have our independent counsel 'hold the pen' during the drafting process.

Section 2: Specific Examination of key aspects

Executive Summary, Elements for consideration in Work Stream 2

We express dismay at the manner in which the addition of a human rights clause into the bylaws was handled by the CCWG in the closing days and hours of deliberations prior to the issuance of the current proposal. A broad section of the community representing diverse and often competing elements of the ICANN community had come to a broad agreement on text for inclusion as a Work Stream 1 item. In order to ensure that this was a supported aspect the use of straw polling was used and the proposed language from Keith Drazek was

supported by a wide margin of 16 for to 4 against.¹ We respectfully disagree with the assertion contained in paragraph 152 of the draft report that “no particular wording achieved consensus”.

We call on the CCWG to reinstate this language as a Work Stream 1 deliverable. Without this re-addition we fear that the integrity of the multistakeholder process will be undermined by the reassessment of controversial and hard fought decisions that the community had agreed on.

§6.2 Community Mechanism as a Sole Member Model, Influence in the Community Mechanism

We express concern over the potential rebalancing of power between the SO/AC community as defined by the method of participation in the community mechanism. We respectfully suggest that Stress Test 35 (NTIA-4) may not have fully examined the potential impact of operationalising the advisory committees into roles that may not have been envisaged for them during their creation.

The role of the Advisory committees is clearly established in ICANN’s bylaws, Article XI² defines the role of the Advisory Committees quite clearly;

“The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.”

In particular our interpretation of the statement “Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.” is that the current role set out for the AC’s, namely one of a dual responsibility, both acting in their bylaws derived capacity in advising the board of ICANN but also acting in a new role, having voting power equal to that of the Supporting Organisations of ICANN. We suggest that this dual role is without justification, and that the role of the AC’s may be unwittingly expanded into a core operational role that was not envisaged during their creation.

¹ <https://community.icann.org/pages/viewpage.action?pageId=54692643>

² <https://www.icann.org/resources/pages/governance/bylaws-en#XI>

Additionally we note the indications from both SSAC and RSSAC expressing their unease at being required to step out of their historical roles as advisers to the ICANN board and the risk to the independence and strength of their expert advice that may be realised by the unwanted operationalisation of these groups. Given that SSAC and RSSAC combined represent fully 50% of the current AC's we suggest that the current proposal may not accurately reflect the wants and needs of the AC community and may instead be more focused on the goals of the other advisory committees who have historically sought to have an expanded role within the ICANN ecosystem.

We also note that the GAC is still divided on its participation in a voting role, the views of many governments as expressed through the GAC Input Document³ to the Paris meeting displays a diverse set of views with regards to this issue. Without GAC consensus on its participation as a voting member of the CMSM it seems prudent to us to assume that the GAC will not utilise any voting rights afforded until such time as consensus is reached at an intergovernmental level on the matter. We suggest that this may be at the very least an extremely long and protracted process and given our own outreach within the governmental community we suggest that this may be a topic that the GAC may never come to a consensus position on, potentially removing them from the matrix of participating AC's in the CMSM. Conversely many GAC members may be interested in providing GAC advise to the CMSM in addition to its current role i providing advise to the board, we ask that the CCWG analyses this option as part of its continued deliberations on the role of AC's within the voting structure and decision making process of the CMSM.

It is the expectation of many stakeholders, ourselves included, that the IANA transition, and in particular the CCWG-Accountability, will not be used as a vehicle to address perceived structural deficiencies in ICANN's current corporate structure, nor should the recommendations of the CCWG be used to enact structural reform in the balance of power between the AC's and SO's in ICANN.

We would suggest that the current proposal in effect enacts structural reform onto ICANN via the CCWG, a group which is not tasked with a structural reform of ICANN. Furthermore we ask that the CCWG reexamines the issue of having AC's as voting members as a matter of urgency, we suggest that this topic will require a great deal of research and analysis and would be best suited for Work Stream 2, our suggestion would be that the

³ <https://community.icann.org/download/attachments/54690279/23.%20%20GAC%20Input%20to%20Paris%20Meeting.pdf?api=v2>

CCWG retains the current balance of power between the SO/AC communities by forming the CMSM as a conglomeration of the SOs in voting positions and allow the AC's to advise the community mechanism in a formal manner in addition to the advising the ICANN board. This would allow the AC's to retain their current balance structure and gain an additional advisory capacity to recognise the importance of the CMSM being a body that will require expert input from various sources including the SSAC, RSSAC, ALAC and GAC to correctly inform its decision making processes. This additional power would not in our view violate Stress Test 35 (NTIA-4) and could be achieved via a bylaw amendment to Article XI.

§7.1 Community Powers, Power, Reconsider/reject Budget or Strategy/Operating Plans

We continue to have concerns over the granularity of the ICANN budget veto/reconsideration process. Specifically we are concerned about meeting the CWGs dependency in an operationally functional manner.

As per our interventions at the Paris meeting we suggest the following budget process:

1. PTI Formulates its budget for the next fiscal year using its internal processes
 - 1.1. These processes will include detailed input from the ICANN staff members who sit on PTIs board and will be privy to the financial status of the parent entity at any given time
 - 1.2. The independent directors on PTIs board will also be involved in this budget formulation process
 - 1.3. Community input may be then solicited via the CSC or another PTI level mechanism to ensure that the community and the direct customers of the PTI have no concerns as to cost overruns or unnecessary spending as part of the next fiscal years budget for PTI
2. PTI budget is sent to the parent entity for approval, this approval should be automatic except in the case of extreme unexpected financial crisis in the parent entity in which case the budget may be returned to PTI for an emergency reconsideration process
3. ICANN is compelled via a binding agreement or other legal instrument to honour PTIs budget request
4. This process will be ring fenced and explicitly not subject to the ICANN budget veto and/or reconsideration process as suggested by the CCWG

Section 3: Response to guidance questions

As part of the public comment guidance posted on <https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en> three questions were posed to commenters in an effort to guide their analysis and commentary, our response to those questions is contained below:

Do you agree that the CCWG-Accountability proposal enhances ICANN's accountability?

Yes, notwithstanding some concerns and reservations about some elements of the proposal we believe that the work of the CCWG will strengthen both ICANN's accountability and cement the bottom up multistakeholder process. We have noted some concerns expressed by other stakeholders in relation to the perceived removal of independence of Directors due to the addition of a recall of individual Directors, in contrast to these comments we feel that this measure is a critical factor in ensuring an accountable board structure.

We note with caution that ICANN's accountability to international human rights standards must be a core component in framing the future of ICANN, and as noted in our comment above we request that the CCWG reinstate the human rights text as suggested by Keith Drazek and as agreed by the CCWG at Meeting #46.

Are there elements of this proposal that would prevent you from approving it transmission to Chartering Organisations?

As an active member within the Generic Names Supporting Organisation (GNSO) we would welcome additional clarification on the concerns we expressed in our above commentary prior to transmitting a final report to the GNSO Council for approval. The proposal as it currently stands is a testament to the work put in by the members and participants and we thank everyone involved for their dedication to this momentous and epic task.

We suggest that our concerns are not dramatic and are made from a position of risk minimisation and prudence in ensuring that the CCWG is not used as a vehicle for other goals, and that our recommendations are made from the point of view of ensuring that the core goal of enhancing ICANN's accountability is not overshadowed by ulterior motives by any stakeholder. We as stakeholders are committed to ensuring that the transition away from the USG is held up as an example of the ability of the multistakeholder process to exceed expectations. We hope that this exercise will be used as an example of how consensus driven

multistakeholderism can be both effective and lead to positive outcomes through collaboration.

Does this proposal meet the requirements set forward by the CWG-Stewardship?

We express uncertainty in relation to the CWG requirement for the IANA budget. We believe that further details on the ring fencing of the IANA budget and the interrelationship between the budgetary process for PTI and ICANN as its parent entity are required before the CWG requirement for a stable budget process can be considered fully met.

Finally we thank the CCWG Members, participants, ICANN staff, our legal counsel and all of the observers and people who have assisted us in this epic journey. It is the opinion of the author that this is a turning point in the history of the internet, where the multistakeholder process is undergoing its hardest test to date and I hope that we can live up to the expectations that the world has placed upon us. With the mainstream attention that this process has gotten both in the US and internationally many people have heard the words ICANN and multistakeholder for the first time and for some it has piqued their interest. I know that the importance of the IANA transition is not lost on those of us who have spent days and weeks on conference calls and wiring emails and meeting around to world to try and come to acceptable compromises that meet the needs of everyone around this very large table.

The group should be proud of the work that we have achieved to date and hopeful for the work to come. When you can say that you have sat down at a table with human rights activists and intellectual property lawyers, governments and civil society groups, left wing think tanks and right wing think tanks, academics and business owners and that we have created something that reflects the opinions of everyone, that is in my opinion the most powerful proof of the ability of the multistakeholder process to excel in even the most challenging of circumstances.