

Public Knowledge Contributions¹ on the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)

Public Knowledge is a nonprofit public interest organization promoting freedom of expression, Open Internet, human rights online, and access to affordable communications tools and creative works. Public Knowledge has worked for almost two decades to shape policy on behalf of the public interest at the intersection of intellectual property, telecommunications, and Internet law.

We have closely followed the transfer of the Internet Assigned Numbers Authority (IANA) Functions from the stewardship of the U.S. National Telecommunications and Information Administration (NTIA) to the global multistakeholder community since the NTIA first announced its intent to do so in March 2014². During this time we have made pronouncements in support of the IANA transition on several occasions, including in our media outreach³, Congressional testimony⁴, blog posts⁵, and resource materials⁶.

We offer our comments on the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Proposal on Work Stream 1 Recommendations. Separately, we are also submitting comments to the Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority.

Firstly, we would like to commend the CCWG-Accountability for all of their hard work over many months to ensure that sustainable accountability measures are set in place prior to the transfer of the IANA Functions from the purview of the NTIA to the global multistakeholder community. We believe that the accountability reforms set forth in this proposal to ensure that ICANN remains accountable in the absence of its contractual relationship with the U.S. Government are essential. We strongly support the components enumerated and developed under Work Stream 1, specifically (i) the desire and practice of involving and empowering the multistakeholder community, (ii) the effort to clarify ICANN's Mission and

¹ Submitted by Carolina Rossini, Vice President of International Policy and Melanie Penagos, International Policy Associate

² NTIA Announces Intent to Transition Key Internet Domain Name Functions (March 14, 2014) available at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

³ House DOTCOM Bill Sets New Requirements for IANA Transition (June, 10, 2015) available at <https://www.publicknowledge.org/press-release/house-dotcom-bill-sets-new-requirements-for-iana-transition>

⁴ Testimony of Carolina Rossini Project Director, Internet Governance and Human Rights Program at the Open Technology Institute at New America Foundation Before the Subcommittee on Communications and Technology Committee on Energy and Commerce House of Representatives Congress of the United States of America (April 2, 2014) available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Rossini-CT-ICANN-2014-4-2.pdf>

⁵ Will Multistakeholderism Prevail By September 2015? (May 12, 2015) available at <https://www.publicknowledge.org/news-blog/blogs/will-multistakeholderism-prevail-by-september-2015>

⁶ The Transfer of IANA Functions to the Global Community available at <https://www.publicknowledge.org/assets/uploads/blog/IANAonepager.pdf>

incorporate Affirmations of Commitments into existing accountability measures, as well as (iii) the provision of clear rights to stakeholders with respect to the consideration and development of the ICANN budget and the ICANN Board.

While this proposal puts forth many positive and welcome improvements, we take this opportunity to highlight some of our concerns to achieve the overall goal of enhancing ICANN's accountability. Some of the initial concerns we present at this opportunity are in regards to the voting allocations within the Sole Member Model, the community power to remove individual ICANN Board members or recall the entire ICANN Board of Directors, and elaborating ICANN's commitment to human rights.

Voting Allocations within the Sole Member Model

While the Sole Member Model seems to be a good and legal alternative structure, we are concerned with the recommended voting allocations and the proposed distribution of powers. In the current proposal, the Address Supporting Organizations (ASO), Country Code Names Supporting Organizations (ccNSO), Generic Names Supporting Organizations (GNSO), At-Large, and Government Advisory Committee (GAC) are entitled to 5 votes per group, while the Security and Stability Advisory Committee (SSAC) and the Root Server System Advisory Committee (RSSAC) are entitled to 2 votes per group.

We fear that the recommended voting structure may disproportionately empower certain groups, such as the Government Advisory Committee, with a proposed designation of 5 votes within the Sole Member Community Mechanism. These new voting allocations would empower the GAC beyond their advising role. In this regard, and taking into consideration NTIA's concern of replacing their role with a government or intergovernmental organization, we ask if there are other forms that could be put in place to better balance the voting structure in favor of other stakeholders, with a special focus on the technical community. We should clarify here that we understand the importance of government participation at this instance, however it is important to mention that even within the technical organizations involved in this process there are government representatives, such as in the RSSAC⁷. We believe that technical groups, who are vital for the security and stability of the Internet, should have a greater say, rather than governments who are responsible for making political decisions. We feel that this arrangement would be more reflective of the current balance of power and roles and responsibilities.

Community Power to Remove Individual ICANN Board Members or Recall the Entire ICANN Board of Directors

We support the proposed community powers, including the power to remove members of the ICANN Board of Directors, as an additional check on the ICANN Board, elaborated in paragraph 405 of the

⁷ Root Server System Advisory Committee (RSSAC) Representatives available at <https://www.icann.org/resources/pages/rssac-4c-2012-02-25-en>

proposal: "This power would allow for the removal of a Director before his or her fixed term comes to an end, with no rules set as to limitations on such removal or requirements for a particular cause for such removal. It is expected that this power would only be exercised in cases of serious difficulty with a particular Director."⁸ However, we are concerned that the minimum criteria - beyond what is set by corporate law - to initiate this process has not been identified. Although we support the intention to develop these standards as part of Work Stream 2⁹, we believe that a basic outline of minimum standards should accompany this proposal to set community and professional expectations minimally at this point. Furthermore, we believe that best practices could be gained from the corporate world in regards to the basic expectations for the removal of individual directors.

Beyond this, we also support the proposed community power to recall the entire ICANN Board and its implementation to be set out in the ICANN Bylaws, as indicated in paragraph 415¹⁰. However, our concerns and suggestions on gathering and adopting best practices outlined above are also valid for the removal of the entire ICANN Board.

Elaborating ICANN Commitment to Human Rights

We support the inclusion of a commitment to human rights within ICANN's Bylaws and commend the formulation of a CCWG-Accountability Working Party on Human Rights¹¹ to elaborate this commitment, as stipulated in paragraph 152 of the proposal:

"The group has achieved consensus on including a human rights related Commitment in ICANN's Bylaws within its defined Mission. However no particular wording currently proposed achieved consensus. Reiterating its commitment to articulate concrete proposals as part of its mandate, the CCWG-Accountability is calling for comments on this approach and the underlying requirements."¹²

⁸ See paragraph 405 of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Proposal on Work Stream 1 Recommendations (August 3, 2015) available at <https://www.publicknowledge.org/documents/ccwg-accountability-2nd-draft-proposal-on-work-stream-1-recommendations>

⁹ As stated in paragraph 413 of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Proposal on Work Stream 1 Recommendations (August 3, 2015) available at <https://www.publicknowledge.org/documents/ccwg-accountability-2nd-draft-proposal-on-work-stream-1-recommendations>

¹⁰ With the exception of the ICANN President who serves as an ex officio member. See paragraph 415 of Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Proposal on Work Stream 1 Recommendations (August 3, 2015) available at <https://www.publicknowledge.org/documents/ccwg-accountability-2nd-draft-proposal-on-work-stream-1-recommendations>

¹¹ CCWG-Accountability Working Party 4 on Human Rights available at <https://community.icann.org/pages/viewpage.action?pageId=54693514>

¹² See paragraph 152 of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Proposal on Work Stream 1 Recommendations (August 3, 2015) available at <https://www.publicknowledge.org/documents/ccwg-accountability-2nd-draft-proposal-on-work-stream-1-recommendations>

We believe that elaborating this commitment is important for the purposes of enhancing ICANN's accountability and would speak to a key NTIA requirement to maintain the openness of the Internet, including the exercise of free expression and the free flow of information¹³. We have recently started to directly participate in the Working Party on Human Rights and deeply appreciate the work that has been done so far in this regard.

We believe that the human rights-related language, as specified in the Universal Declaration of Human Rights¹⁴ and the NETmundial principles¹⁵, should be high-level, while clarifying that the Bylaw pertains to fundamental rights and the public interest, in order to prevent any misreading from other entities or groups who define "rights" differently - as specific stakeholder interests.

Finally, we support the further development of ICANN's human rights commitment in Work Stream 2, including "Defining the modalities of how ICANN integrates human rights impact analyses, within its mission" (paragraph 22), and look forward to contributing further comments on this matter. Human Rights assessments are consolidated traditions of other fields, including climate change and access to medicine, and those fields should serve as inspirations for methodologies and best practices.¹⁶

We thank you for this opportunity to comment on the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Proposal on Work Stream 1 Recommendations and express our gratitude to the CCWG-Accountability, once again, for all of their efforts.

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¹³ See paragraph 148 of Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) 2nd Draft Proposal on Work Stream 1 Recommendations (August 3, 2015) available at <https://www.publicknowledge.org/documents/ccwg-accountability-2nd-draft-proposal-on-work-stream-1-recommendations>

¹⁴ Universal Declaration of Human Rights available at <http://www.un.org/en/documents/udhr/>

¹⁵ NETmundial Principles available at <https://www.netmundial.org/principles>

¹⁶ Note that the UN Guiding Principles on Business and Human Rights have emerged as the global standard for companies' management of their human rights impacts. Under the Guiding Principles, companies are expected to "know and show" that they do not infringe on human rights through their operations or business relationships. Human rights impact assessments represent a key first step in meeting this expectation. For a literature review on the subject, see: http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf