

## **Comment on CCWG-Accountability Second Draft Proposal on Work Stream 1 Recommendations for Enhancing ICANN's Accountability**

The CCWG-Accountability's Second Draft Proposal on Enhancing ICANN's Accountability is a considerable improvement on the First Proposal. In particular the introduction of the Sole Member model is a major advance on the reference model of the first proposal.

Having been a participant observer in the deliberations of the CCWG-Accountability at their meetings in Buenos Aires and Paris, I can confidently say that this is a proposal that, with a few minor adjustments, is ready to go. The various critiques raised by the Community, the Board and the NTIA with respect to the first proposal have been thoroughly discussed and debated by CCWG-Accountability. Indeed it is in response to the broad criticism raised with respect to the first proposal that the CCWG-Accountability produced the Sole Member Model.

### **Board demand for Impact Assessment of CCWG-A proposal**

It is worth repeating Sidley Austin LLP and Adler and Colvin's response to the Board-commissioned Jones Day Impact Analysis of the Second Proposal:

- The Analysis does not identify any legal flaws or legal "workability" issues with respect to the viability of the community mechanism as sole member (CMSM or Sole Member), the community powers, accountability and review mechanisms, or other key elements of the Second Proposal,
- The Analysis does not identify any significant issues that the CCWG, its working groups and/or its advisors have not already considered.

In addition, Sidley Austin point out that:

The conclusions of CCWG's deliberative bottom-up consensus-seeking multi-stakeholder process deserve a significant degree of deference. The CCWG and its work groups, with the advice of independent legal counsel and input from Board members, ICANN staff and internal counsel, engaged in an inclusive and open process involving numerous lengthy calls and face-to-face meetings. This work included extensive discussion, analysis, stress testing and consideration of public comment regarding options and alternatives similar to and in many instances identical to those that the Jones Day Analysis has identified.

I wish to note that it is unfortunate that the ICANN Board felt the need to commission an impact analysis to second guess the Community process. This does not redound to the Board's credit but rather adds to the climate of suspicion regarding the motivation of the Board in relation to the IANA transition and reinforces perceptions among the community to the effect that the Board is unwilling to cede any power to the Community, however minimal. To make a suggestion in response to the CCWG-Accountability's First Proposal that the CCWG should conduct an impact assessment and then to follow it up with the Board commissioning its own Impact Analysis shows a profound disrespect and lack of trust in the Community's deliberative process, however magnanimous the Board may appear to be in making the Jones Day Impact Analysis publicly available. Some may say this is too harsh a criticism. However, I have only to point to the complete lack of reference in the Jones Day Impact Analysis to the CCWG-A Second Proposal's extensive Stress Tests to demonstrate the absurdity of the exercise. Why is there this absence and what does it say about the Jones Day analysis?

A second point is that the Jones Day analysis does not include any impact assessment of the status quo continuing (without NTIA as accountability backstop) as a scenario whose impact should also be assessed in parallel to the CCWG-A's Second Proposal and Jones Day's own preferred proposal. This is a point also made by Sidley Austin. In addition to this, Jones Day's preferred membership model is an embrace of a Sole Designator model and by doing this is entering the terrain of debate within CCWG-Accountability and putting its thumb on the scale. To quote the Bard in 'Hamlet', 'this is mitching mallecho; it means mischief'.

I don't want to go too much into the political uses of regulatory impact assessments with regard to the Information and Communications Technology sector. Suffice to say that they are a European invention that have had unintended consequences in other parts of the world where they have been applied. In South Africa, they are beloved by incumbent telecom operators which want to delay and prevent any regulatory procedure that may negatively impact on their own significant market power. So the incumbent wireline operator in South Africa used its demand that the communications regulator conduct a regulatory impact assessment into the effects of unbundling the local loop to delay the implementation of the unbundling the local loop sine die. By analogy, in ICANN's case it appears that the incumbent power – the Board – has made the demand for a regulatory impact assessment front and centre of its response to the CCWG-A proposals. Apart from the impracticability of being able to do so in the time available, it is perhaps at best, merely indicative of the Board's own anxiety with respect to the coming change of power relations in ICANN and at worst, a sign that the Board intends to resist any democratisation of power within ICANN, transition or no transition.

A last point on this issue. What weight of evidence should be attached to an impact assessment such as Jones Day's? We are not dealing here with an environmental impact assessment where there is hard scientific data to include in the evidence. We are dealing with governance and accountability, which is in the realm of the social and the political. That means that we are dealing with human behaviour in a complex system with multiple variables, well beyond the purchase of a randomised control trial. Judging by the number of words such as 'would', 'could' and 'likely' in Jones Day's analysis, we are primarily in the space of the speculative. Granted the Board has procured this advice for themselves, but if this is the quality of advice they are receiving, the Community and the NTIA should be very worried.

### **Trust-based vs Sanctions-based Accountability**

It may help to elucidate the accountability question by reference to the work of US political scientist, Jane Mansbridge. She draws a distinction between trust-based and sanctions-based accountability. In a context such as South Africa today, there is a massive problem of corruption at all levels of governance – private and public sector. Here strict sanctions-based accountability is required much, as Mansbridge points out, the Government of Denmark undertook from the end of the seventeenth century to the mid-nineteenth. She argues that sanctions-based accountability follows the dictum of philosopher David Hume: to 'design institutions for knaves'. As she puts it:

Sanctions-based accountability is most appropriate in contexts of justified distrust. Yet it also creates distrust, which then undermines the foundation of trust-based accountability. Trust-based accountability which relies heavily on giving an account, is most appropriate in

contexts of justified trust. (It is) important to get the mix right, because sanctions-based accountability not only stems from distrust; it creates distrust.<sup>1</sup>

What Mansbridge proposes is for principals to put a lot of effort into selecting the right people as agents and then to let them get on with the job. However, she does not say that they can then do what they like but insists that there be a set of sanctions available to deal with problems that may arise. She argues that a system of accountability based on selection and justified trust should constitute the core, and the sanctions regime should constitute the small periphery. This is essentially what the CCWG-A is proposing. The principal (the Community in its various forms) selects from a broad field of candidates members of the Board as their agents, whether directly through the SOs and At Large or indirectly through representation on the NomCom. The CCWG-A now proposes that the Community through the Community Membership Mechanism has the power to remove a Board member or the whole Board. The CCWG-A view is that this power would be rarely used. Up until now only the Board could remove a Board member. Not even the NTIA could do so directly but only indirectly through its contractual power over the IANA function.

Larry Strickling did raise, in his remarks at the ICANN meeting in Buenos Aires in June 2015, his puzzlement over why when the community selects the Board, 'community leaders go from prophet to pariah simply by joining the ICANN Board'. He expressed the concern 'that until the community solves this issue, all the other accountability tools will fall short of delivering the outcomes the community wants.' I want to suggest a number of reasons for this problem. First, the community may have the power of selection but not the power of sanction. This leads to an unaccountable state of affairs, plain and simple. The CCWG-A proposal remedies this accountability deficit. Second, this lack of the power to sanction has led to the Community questioning Board decisions over a considerable period of time without being able to activate any threat of sanctions - which has led to what Mansbridge would call a state of 'justified distrust'. One also has to wonder about the role of the CEO and the staff in this and to ponder upon whether this Community distrust has anything to do with staff capture of the Board. So Strickling is right when he sees a problem with the selection process but the problem is not to do with the NomCom and SO/AC's choosing the wrong people, it lies with the lack of the power for the Community to sanction those they select. In short, the introduction of the Community power to sanction the Board should restore the balance between trust-based and sanctions-based accountability in ICANN.

On its own this is not enough. But without it, there will not be any viable accountability system at ICANN. There also need to be concrete steps towards a system of mutual accountability, where account holders can give an account to a Community accountability forum of their actions and discuss them in an open and frank manner. This may well be the way to manage any review of ICANN's strategic plan and budget by the Community as well as changes to Bylaws and Fundamental Bylaws. There needs to be attention paid to SO/AC accountability and to staff accountability as proposed for CCWG-A's Work Stream 2.

To sum up, the CCWG-Accountability's Second Proposal on Enhancing ICANN's Accountability should not be tampered with on any of the substantial matters it puts forward. These have been thoroughly debated and subjected to stress testing by the Community. They represent a constitutional moment for ICANN, a political decision by the multi-stakeholder Community and the proposal should be respected as such. The ICANN Board needs to tread very carefully here. If it were to trample on the Community proposal or be perceived as trampling on the Community proposal, the consequences

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<sup>1</sup> Jane Mansbridge: 'A Contingency Theory of Accountability' in Mark Bovens, Robert E. Goodin & Thomas Schillemans *The Oxford Book of Public Accountability* Oxford University Press 2014

for any enhancement of ICANN's accountability system and the IANA transition would be extremely dire.

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9 September 2015