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Response to the 2nd Draft Proposal on Work Stream 1 Recommendations of the CCWG-Accountability

The New Zealand Government wishes to acknowledge the substantial work undertaken by the CCWG in preparing the Work Stream 1 proposals. These proposals represent a considerable time commitment from community volunteers, and we support the consultative approach the CCWG has taken to ensuring the process reflects the multistakeholder, bottom-up processes that represent the foundation of internet governance.

As noted in our comments on the proposal to transition the stewardship of the Internet Assigned Numbers Authority (IANA), we consider enhancements to ICANN's accountability and transparency are necessary for a successful IANA transition, and in order to fulfil the criteria set forth by NTIA for transition.

Without prejudice to opinions that may be formed in the development of Governmental Advisory Committee (GAC) comment on the proposal, we are broadly supportive of the recommendations put forth in the 2nd Draft Proposal. In particular, we wish to note our support for the following measures:

Measures to enhance ICANN's multistakeholder model and avoid capture

One of the challenges of the multistakeholder model is how decisions can be made in a way that balances different stakeholders' views. To achieve this, the multistakeholder model needs to recognise both the value of consensus, and the ability for minority views to be represented.

We consider the accountability measures proposed through Stress Tests 18, 33, and 34 are necessary to ensure that a balance is struck between ensuring each AC/SO can present its perspectives, while avoiding capture or the use of advisory powers to override ICANN's multistakeholder, bottom-up decisions making process.

In particular we acknowledge the balance struck in Stress Test 18, which recognises the role Governments fulfil within ICANN in articulating and protecting public interest, while avoiding a situation where split GAC advice is able to "paralyse" a decision-making process by requiring the ICANN Board to find a mutually acceptable solution between multiple parties.

We consider the proposed measures under Stress Test 18 recognises the fundamental role of governments in international internet-related public policy issues, and that from time to time the GAC may wish to give advice that covers more than one point of view. However, it also ensures that where there is clear GAC consensus on a public policy issue, the ICANN Board must give due deference to this advice and try to find "a mutually acceptable solution" between the GAC and other parties.

Clarity of advisory roles

When considering the role of governments in internet governance, the Tunis Agenda recognises not only the need for governments to participate in internet governance discussions on equal footing, but also the value of the different perspectives and competencies stakeholders bring to a discussion. ICANN's structure clearly recognises the Tunis Agenda's vision of "enabling governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues" through the SO/AC model. This separation of roles is also recognised in CCWG's Stress test 35. We consider it is important to ensure the roles of operational and advisory communities continue to be clearly defined, and support the continuation of the GAC's role as an advisory committee.

Enumerated powers

We welcome the clarification of ICANN's role in the internet governance system, in particular, that ICANN's powers are "enumerated" and cannot change without community support.

We also support mechanisms to ensure advisory committees' do not advise ICANN to act outside of its current authority. A decision to extend ICANN's role is a significant change that should only be made through the formal process for amending fundamental bylaws.

We also wish to note our concerns regarding two aspects of the accountability proposals:

ccTLD delegation/redelegation appeals process

Stress Test 21 considers a situation where a government demands ICANN rescind responsibility for management of a ccTLD from an incumbent ccTLD manager. Noting the ccNSO Policy Development Process (PDP) that is planned regarding delegation and redelegation of ccTLDs, one of the proposed accountability measures is to exclude ccTLD delegation/redelegation issues from any appeal mechanism. ccTLD delegation/redelegation has been proposed as an exclusion to the Independent Review Process (IRP) in paragraph 8, page 40 of the proposal. This recommendation is also included in the CWG-Stewardship Proposal that forms part of the proposal to transition the stewardship of the Internet Assigned Numbers Authority.

While we acknowledge the commitment of the ccNSO in developing a clearer process for ccTLD delegation/redelegation, we do not consider a potential PDP is sufficient rationale for excluding ccTLD delegation/redelegation from the IRP.

The PDP process will need to balance the expectations of both governments and ccTLD managers, and the breadth of approaches taken to ccTLDs means the PDP will not be a quick. If ccTLD delegation/redelegation is excluded from the IRP, this risks leaving both existing ccTLD managers and governments in limbo in the event of a dispute. While we recognise that the existing process for delegation/redelegation needs improvement, these decisions should still be subject to review to ensure that due process has been followed and documented.

Late addition of a fundamental bylaw on Human Rights

Page 25, Paragraph 152 of the draft report notes that "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." While we welcome a discussion of ICANN's role in respecting human rights, and the possible inclusion of human rights as a bylaw within ICANN, we have some reservations with the inclusion of text at this late stage in the CCWG process.

As indicated by the recent establishment of a Cross-Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights and the GAC Working Group on Human Rights and International Law, there is substantial community interest in developing a shared understand of ICANN's role in human rights. However, these working groups have also indicated that there is significant discussion to be had in order to develop a shared understanding of what ICANN's role should be in human rights. This is further indicated by the challenge CCWG-

Accountability has had in achieving consensus on the late addition of text to the bylaws.

We consider it is important to develop a shared understanding of ICANN's role in human rights and in developing consensus bylaw text. This process should not be rushed. We would question whether the addition of such text is a necessary for the successful transition of the IANA Stewardship role, or whether it would be more appropriate to consider this in the context of Work Stream 2, allowing further time for the community to reach consensus.