

**Submission by LINX in reply to
ICANN CCWG-Accountability First Public Comment**

Prepared by Malcolm Hutton

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London Internet Exchange Ltd

London Office: 21-27 St Thomas Street London SE1 9RY United Kingdom • Tel: +44 20 7645 3500

Peterborough Office: Trinity Court Trinity Street Peterborough PE1 1DA United Kingdom • Tel: +44 1733 207700

Email/SIP: info@linx.net Web: www.linx.net Fax: +44 20 7536 0720

Registered Office: Trinity Court Trinity Street Peterborough United Kingdom PE1 1DA • Registered in England and Wales: 3137929

I. About LINX

1. LINX, the London Internet Exchange, is a membership association for network operators and service providers exchanging Internet traffic. It is part of our core mission to represent our members' interests in public policy.
2. With over 600 member organisations, including most major UK ISPs and most formerly-incumbent European operators, we believe we have highly informed expertise and are well placed to reflect the views of the UK ISP industry as a whole.

II. Fundamental requirements

3. LINX strongly supports the main pillars of the CCWG proposal, which are the very essence of accountability:
 - a. That ICANN's Mission be limited and enumerated, and that it shall have no power to act outside the scope of its Mission;
 - b. That ICANN subscribe to certain Core Values and Fundamental Commitments;
 - c. That there be an independent body, the IRP, to hear complaints that ICANN has acted inconsistently with its own governing documents, and in particular that it has acted beyond the scope of its Mission;
 - d. That any materially affected party shall have the right to complain to the IRP about breach of ICANN's governing documents, and to obtain a ruling determined according to an objective standard;
 - e. That the IRP (including any appeals process established within the IRP) shall have the power to make a final determination as to whether ICANN has indeed acted inconsistently with its own governing documents;
 - f. That, in the event of a finding against ICANN, the IRP shall have the power to compel ICANN to desist.
 - g. That all the above be enforceable, if necessary in court, should ICANN ever seek to disapply them in any specific case, or in general.
4. LINX considers that the above pillars are required in order to meet the NTIA requirement that the proposal does not undermine the openness of the Internet. In the absence of these pillars, and their enforceability, we would consider that this NTIA pillar would not be met.
5. LINX also supports the proposal to grant the community the power to veto changes to the Bylaws, and the proposal that the community's positive consent should be obtained before changes to those bylaws deemed "Fundamental" shall take effect. These aspects of the proposal are necessary safeguards to give effect to the reforms overall.
6. LINX considers that the community powers to control changes to the Bylaws are required to provide assurance that the NTIA requirement that ICANN not become a governmentally or inter-governmentally led institution will continue to be met.
7. LINX considers that all these reforms must be implemented for the historic role of the NTIA in supervising ICANN and safeguarding the DNS to be transitioned to the global multistakeholder community. In the event that these reforms are not delivered, NTIA's abdication of its current role would not, in our view, constitute such a transition.

III. Single Member Model

8. The reference model in the version of the CCWG's proposal released for the first public comment was a membership model in which the existing SOs and ACs become members of ICANN. The current proposal is that there be a Single Member, which is to be a notional legal construct controlled by the SOs and ACs. Each model is in fact a variation on the same basic concept: that the legal status and rights ascribed in law to members of a corporation should be created, and reside in the community under the control of the SOs and ACs on behalf of the community. LINX supports this basic principle. We consider that which variant that is chosen (or indeed any other variant) is a second-order question.
9. If a membership model is chosen, the member will have the right to petition the court to instruct ICANN to abide by its governing documents. We are advised that if any model is chosen that does not involve membership, then nobody will have that power – at least with respect to a petition for an instruction to make the IRP available. This power is essential: ICANN cannot be allowed to refuse to enter binding arbitration in the form of the IRP.
10. That being the case, we can only support models that entail membership.
11. Our support for membership models is not due to any particular attachment to membership per se, but rests on our understanding that that is the only way to provide for a power to petition the court to make the IRP available. We cannot support any model that does not include this power.
12. We are aware that some have challenged the Single Member Model, as proposed, as too complex. We note that it follows the existing model of SOs and ACs, and that CCWG has attempted not to upset the existing balance of power. This is inevitably complex, as the existing structure is complex itself. We are doubtful that it would be helpful, or indeed feasible, to attempt to redesign this in the interests of simplicity. In any case, given the choice between a complex structure that meets the minimum standard for enforceable accountability we describe above, and a simpler one that fails to do so, we must support accountability. As Einstein said: "Everything should be made as simple as possible, but not simpler".

IV. IRP issues

Materially affected parties

13. In our view it is essential that materially affected parties have the right to complain to the IRP that they have been harmed by an ICANN policy, and that that policy is improper by reason of being outside the scope of ICANN's Mission, and so must be set aside. The limits on ICANN's Mission are for the benefit of the whole world, not merely for those that deal directly with ICANN, and therefore anybody who has actually been materially affected by a breach of those limits must have the right to vindicate them.
14. We do not consider it acceptable to limit this right to complain to those "directly affected", if this means denying to those affected by ICANN policies any right to complain merely because those policies are executed through Registries and Registrars.
15. Nor do we consider it sufficient to empower a collective community entity the right to raise such a complaint: individually affected entities must have a right to be heard and to seek redress.
16. We do not agree with those that say that extending this right to all materially affected parties creates an unprecedented and unacceptable exposure to ICANN.
 - a. This type of review is far from unprecedented. Public authorities and governments are routinely exposed to judicial review on this basis; certainly, this does constrain their freedom of action, but that is the whole idea! Even private corporations are potentially exposed to lawsuits from third parties as a result of their wrongful behaviour through the law of torts.
 - b. Nor does review in the IRP create an unacceptable exposure. The remedy being offered here is much more limited than that available in tort (or in some forms of judicial review): there is no proposal that the IRP should have the power to award damages. The only that is offered is that the IRP shall be able to restrain ICANN from continuing in wrongful behaviour. ICANN has no legitimate interest in continuing to act in breach of its governing documents, so there is no reason to object to this very limited power.

Time bar

17. CCWG proposes that the clock on the time bar to bring an IRP complaint should only start running once the materially affected party becomes aware of the action of which they wish to complain.
18. We believe that materially affected parties should have the right to complain, especially when the basis of that complaint is that ICANN has acted outside the scope of its Mission. As most entities do not closely track ICANN activities (nor do they have any reason to do so) this right would be empty if a fixed deadline were chosen.
 - a. For example, consider the case of a registrant whose domain name is suspended by a Registry in accordance with an ICANN policy.
 - i. If the registrant wishes to allege that the policy has been misapplied in their case, they should appeal against the decision by the Registry using the appeal mechanism we would expect the policy to include.
 - ii. If, by contrast, they wish to assert that the policy is an *ultra vires* extension of ICANN's authority, and contravenes the Mission, that amounts to a challenge to the policy itself, for everyone. Such an allegation should be asserted through the IRP.
 - iii. The registrant would likely have no knowledge of the policy at the time of adoption, only when it was applied to them. It is only reasonable to start the clock at that point. Starting the clock with the Board decision would effectively leave such a registrant without any recourse.
 - b. We therefore support the idea of a moving starting point.
19. We are aware that some have suggested that this moving time bar would create unacceptable lack of certainty as to whether ICANN's decisions would continue to have effect. For guidance, we look to analogous cases when the decisions of public authorities are challenged by way of judicial review.
 - a. In a judicial review on an administrative act, it is common to impose a strict timeframe for raising a complaint founded in a procedural defect (for example, failure to follow rules requiring advance public consultation). On the other hand, there is no time bar on raising a complaint that the action of the public authority is prohibited by higher law (for example, is *ultra vires* or is contrary to anti-discrimination legislation).
 - b. We can see clear analogies with ICANN here. We could support imposing a fixed time bar for raising complaints about merely procedural defects, while leaving a moving clock for complaints of greater substance (such as a complaint that an action or policy is *ultra vires*).

Development of rules of procedure

20. We welcome the CCWG's proposal that the community would keep the rules of procedure of the IRP under review, and make other recommendations for reform.
21. We support the proposal that recommendations for reform would originate from a community entity, a CCWG, and be approved by the Board.
22. We support the proposal that the Board ought not to unreasonably withhold its consent to further reform proposals developed by the community.
23. We support the standard "for the purpose of ensuring that the IRP is a fair and accessible form of independent review capable of holding ICANN to compliance with its bylaws for the benefit of the community as a whole". We believe that this sets an appropriate, usable and relatively objective standard that the Board should use to judge whether it is appropriate to withhold its consent.
24. We agree that rules generated according to this process should be subordinate to the Bylaws, but should otherwise have the effect of Bylaws within the scope of rulemaking power in the abovementioned standard.
25. We hope that this will result in financial support being made available to support meritorious claims by impecunious complainants.

Term of office

26. For the preservation of the independence of IRP panellists, we think it important that the term should be non-renewable.
27. Likewise, we support provisions prohibiting ICANN from business dealings with present or past IRP panellists.
28. We have no strong view on the length of term itself, but the proposed five years seems reasonable.

Publication of decisions

29. We agree that the IRP should publish decisions itself. A recent IRP case has shown how leaving this to ICANN can damage public confidence when ICANN makes redactions, even when these redactions follow previously agreed procedures.
30. We agree that the IRP should have the discretion as to whether to withhold information from publication in order to protect commercial confidentiality. We do not think the parties to an IRP should have an absolute right to confidentiality.
 - a. IRP applicants choose what information they submit; there being no power of *sub poena* they are on notice that information they submit material to the IRP's decision may be published in the interests of transparency of decision-making.

- b. We are sceptical of the legitimacy of ICANN’s interest in maintaining confidentiality in its own materials. As an institution acting on behalf of the global community in the public interest, there should be a strong expectation of transparency, especially when the legitimacy of its actions are challenged.
 - c. However we do accept that there may be exceptional circumstances where the interest in transparency is outweighed by other legitimate concerns. We are confident that the IRP, as a professional arbitration panel, will be able to apply its discretion to ensure the public interest is upheld.
31. We strongly support the CCWG proposal that the IRP should be required to give reasoned decisions.

Costs

32. We support the CCWG proposal that all costs other than the complainants own costs should be met by ICANN.
33. Given the very high cost of bringing an IRP complaint, we hope that something may be done in the future to assist meritorious but impecunious complainants. We do, however, agree that this can be left to Workstream 2.

V. Core Values and Commitments

34. We support the Core Values and Commitments.
35. We welcome the CCWG's proposal to separate Core Values into two classes: one that must be upheld consistently, and another where a balance is likely to be needed between competing interests. We believe the CCWG has chosen well.

Human Rights and the Public Interest

36. The CCWG proposal contain numerous safeguards that are designed to be, and that we expect to be, rights protective. These include, in particular, the restriction of ICANN's activities to enumerated elements of its Mission, and the explicit exclusion from its Mission of "the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide.". We support these safeguards.
37. While we support the concept that ICANN should act consistently with human rights, we are sceptical of the notion that the introduction of additional generalised text on this subject would improve the proposal.
38. The CCWG proposal is intended to increase certainty and predictability of ICANN's behaviour by providing a clear set of rules (embodied in the Bylaws) and an enforceable mechanism for holding it to those rules.
39. We believe that this predictability would be diminished by incorporating in the bylaws a generalised reference to a broad set of rights, many of which have no application to ICANN's activities, most of which receive markedly differing interpretations and applications in different parts of the world, and few of which can be applied without subjective balance between competing rights.
40. To the extent that human rights considerations are directly relevant to ICANN's activities these are (or should be) inscribed directly in the Core Values, where they can be seen and their application can be understood.
41. Similarly, while it is clear that ICANN exists to pursue its Mission for the benefit of the public, rather than any particular private interest (such as the interests of a particular Registry), we are concerned that the introduction of generalised text referencing the public interest could diminish the clarifying effect of the CCWG's proposal. In particular, we would very strongly object to the introduction of text that could allow the Board to argue that the enumerated Mission was complemented by a general authorisation to do anything that was, in ICANN's view, beneficial to the public interest.

Contracting power

42. We are aware that some concerns have been raised that the proposal to prevent ICANN from regulating Internet content or services might be taken to prevent ICANN from enforcing policies on the terms of gTLDs through Registry Agreements and the RAA. We agree with CCWG that this concern is misplaced.
43. We agree with CCWG that ICANN should not attempt to regulate the services provided by Internet users nor the content on such services. ICANN's proper role in developing, implementing and enforcing policy for gTLDs ought not to be used as a lever to say what users may, must or must not do, on pain of loss of the domain that supports their operations. At the same time, it is entirely appropriate for ICANN to develop policies for the uses to which particular domains are put. We see no conflict here: there is a world of difference between a policy that states that only medical doctors may register domains within *.doctor*, and a policy that states that only medical doctors may publish medical advice on the Internet, on pain of loss of the domain supporting the service where publication occurs. The former is regulation of the top level domain; that latter is regulation of the behaviour, leveraging the power at hand for enforcement. The former lies within ICANN's Mission; the latter must be prevented.

VI. Community powers

44. We support the CCWG's proposal for community powers to
 - a. Veto bylaws changes
 - b. Positively approve changes to Fundamental Bylaws
 - c. Remove individual directors
 - d. Dismiss the entire Board
45. We note that some have said that these powers, especially when implemented through a Single Member Model, would constitute a major structural change in ICANN's multistakeholder model. We disagree.
 - a. We consider that the addition of these powers gives effect to the multistakeholder model by helping to ensure that the multistakeholder community remain in overall control of the core governance of ICANN.
 - b. We consider it to be a mistake to think that these powers will be implicated in ICANN's day-to-day activities, operational activities, or the ordinary course of developing community consensus policy. These are backstop powers, which can be their own terms only be applied in specific and unusual circumstances.
46. We reiterate our previously stated concerns about the implementation of the power to dismiss the Board. We support the Minority View within the CCWG that regards as highly destabilising the continuation in office of a Board that has survived an attempt to unseat it by an entire SO.
47. We reiterate our previous doubts (from the first public comment) about the value or effectiveness of the power to reconsider/reject the Budget and Strategic/Operating Plans, but we are not strongly opposed to this power as designed. We would be opposed to greatly strengthening it.