auDA comments on the Second Draft Report of the Cross Community Working Group on Enhancing ICANN Accountability

Introduction

.au Domain Administration Ltd (auDA) is the industry self-regulatory, not-for-profit manager of Australia's ".au" country code Top Level Domain. auDA is an active participant in ICANN and regularly contributes to deliberations and policy development within the ccNSO.

auDA welcomes the opportunity to provide input to the Second Draft Report of the Cross Community Working Group on enhancing ICANN Accountability (CCWG)[1].

auDA also welcomes the work of the CCWG and, specifically, the efforts of the group to deliver a model for ensuring the ongoing accountability of ICANN's operations beyond the upcoming transition of the IANA naming functions from the oversight of the US Government.

However, auDA has some questions and concerns relating to both the overall structure of the CCWG's Draft Report and a number of specific elements within it. In our view, the Report is a complex document, given that it attempts to address all accountability-related issues raised by the community. At the same time, it suffers from a paucity of detail and information in essential areas.

In auDA's previous comments to the first Draft Report of the CCWG, we stated that:

> ". . . the CCWG has developed a solution that gives rise to a number of new complexities and questions, and which may not deliver the most effective and efficient outcome regarding the future accountability of ICANN."[2]

We do not believe that these concerns have been fully addressed and that problems with the current Draft Report may not meet the expectations set by the U.S. Government's National Telecommunications and Information Administration (NTIA). Further, gaps in the draft relating to proposed accountability mechanisms may hinder the progress of associated work currently being undertaken to transfer the stewardship of the IANA functions from the USG to the multi-stakeholder community.

As this is the second public consultation on the Report, and deadlines for finalisation of the IANA transition proposal are drawing near, we ask the CCWG to address these issues as a matter of urgency.

auDA notes that these comments were developed before the recent teleconference between the CCWG and the ICANN Board, which raised a number of new issues and options. We may lodge additional comments beyond those included in this submission.

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[1] https://www.icann.org/en/system/files/files/ccwg-draft-2-proposal-work-stream-1-recs-03aug15-en.pdf

[2] http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/msg00002.html

Elements identified for consideration in Workstream 2

As a general observation, auDA notes that a number of critical issues that we believe must be either completely resolved or significantly advanced as part of current accountability reform efforts (Workstream 1 – WS1) are only being partially implemented by the CCWG and that important work on detail is being deferred as post-transition work (Workstream 2 – WS2).

In particular, although labelled by the CCWG as topics "for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition", auDA believes that additional progress is required with regard to:

- Establishing rules of procedure for the enhanced Independent Review Process;
- Defining ICANN Community Forum practical modalities;
- Clarifying understanding of the fiduciary duties of Board Directors and related expectations concerning Director behaviour for the Board;
- Further assessing the effect proposed changes will have on the delicate interrelationships within ICANN (including enhancements to government participation); and
- Defining the modalities of how ICANN integrates human rights impact analyses, within its mission.

Many of these elements are described by the CCWG at a conceptual level, supported by proposed structural elements and *principles* for operation. However, auDA believes that the CCWG has stopped short of defining important operational detail that must be available in order to allow the community (and the ICANN Board and NTIA) to make informed decisions about whether or not to support these significant changes.

auDA believes that elements of the CCWG's proposal, such as the IRP, have developed to a point where the community may be able to offer conditional support assuming refinement in WS2. However, the same is not true for significant elements of the Community Mechanism as a Sole Member (CMSM), such as the Community Forum and voting arrangements. It is critical that this detail is provided now – not later – as the current consultation and approval process, leading up to the ICANN meeting in Dublin, appears to be the final opportunity for community feedback. It is unclear how the community can offer this unqualified support without being completely clear on the proposals we are being asked to support.

auDA notes that we are not alone in this view, and that, most critically, recent comments from the NTIA follow a similar theme.

In his 21 June speech at the ICANN Buenos Aires meeting, Larry Strickling's comments[3] included:

> *The second message I want to leave you with is the importance of delivering a plan to us that has been fully validated – has the community built a record that supports the plan and provides the basis for our ultimate acceptance of it? By validation, I mean the following:*
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> - *Has the community built a record that supports the plan and provides the basis for our ultimate acceptance of it?*
> - *This record needs to clearly and convincingly demonstrate that the plan satisfies the conditions.*
> - ***This record should reflect that the community fully understands the implications of its proposal.*** *Every change in the current structure or practices will have consequences, some of which will be unintended. We will be looking to see how the community identified and mitigated any such consequences in its planning.*
> - *The record should reflect that the community considered alternatives and document the judgments and evidence that support the option that is being put forward.*
> - ***The record as much as possible needs to anticipate and answer any question anyone might have about the plan.*** *The stress testing plays an important role in this regard. This is an issue that is not just limited to justifying the plan. It also is important that the community address and answer issues in the plan and not leave them for further discussion and decision. It will be hard for us to certify a plan that leaves too many issues open for further work.*

The need for greater detail is even more important given that the CCWG is proposing that a number of these recommendations are implemented through the creation of Fundamental Bylaws that will bind ICANN and the community in the foreseeable future.

In essence, we believe that the CCWG faces two alternatives:
- As stated above, in our view, the CCWG has chosen to identify a wide range of issues and address them in principle in WS1, leaving detail to WS2.
- Alternatively, the group could focus on a narrower range of issues and attempt to have them fully defined and developed within the confines of WS1.

Choosing between these alternatives is a matter of achieving a balance between the competing pressures of thoroughness and timeliness. Although the CCWG's position appears to occupy a middle ground, auDA believes that the correct balance has not been achieved, with too many ambitions or goals unresolved to a point where decisions can be taken.

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[3] http://www.ntia.doc.gov/speechtestimony/2015/remarks-lawrence-e-strickling-assistant-secretary-commerce-communications-and-i

In simple terms, the proposed Accountability changes need to focus on a number of key issues and must be "bullet proof" and immune to criticism or mis-interpretation. This is critical for both ICANN as an organisation and for the community that will commit to participating in ICANN in a post-transition environment.

Our detailed perspectives on these issues are expanded upon below.

The Independent Review Process (IRP)

Although auDA agrees with the fundamental need for a standing, independent post-transition review process, we are concerned that there is a lack of detail regarding the IRP's operation and scope.

The Draft Report presents a description of the IRP's purpose, role, structure and proposed operating modalities. Considerations such as accessibility and costs are appropriate additional operating principles.

However, in paragraph 268 of its Draft Report, the CCWG notes that implementation of IRP enhancements "will necessarily require additional, detailed work".

The CCWG goes on to state:

> *"Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a Cross Community Working Group (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld."*

The CCWG's revised IRP provisions are one example of a change that will be underpinned by Fundamental Bylaws. Further, community members (including the ICANN Board) are being asked to express a position on a structure that will pass judgement on their actions and bind them to its findings.

As such, the community must have a greater level of detail when determining whether to support this change. Collectively, we understand what the IRP is intended to do. We understand and (generally) support the need for such a mechanism and for it to be transparent and independent. However, the proposal must be more fully formed and implementation details regarding the IRP's rules of procedure need to be clear and understandable.

auDA appreciates that this is one highly-visible area where the CCWG has sought to achieve a balance between delivering a timely set of principles and referring an appropriate amount of work to WS2. However, we do not believe this balance is quite right, particularly given that this is a critical, binding element of future accountability. We are not proposing that all detail must be developed now, but rather we think it is critical that we have an

understandable, functional and useable 'interim' IRP whilst the WS2 work is going on and we do not believe that the current proposal provides sufficient clarity on that 'interim' IRP.

Community Forum
Unlike the IRP, the concept of a Community Forum is relatively new and evolved during the CCWG's deliberations.

auDA believes that the Forum may be a critical element of the overall Accountability reform proposal. It is, itself, an operational element that has evolved from a collective realisation within the CCWG that the community must be afforded a mechanism for discussing the use of its powers, before it does so. However, we cannot support the Community Forum without additional detail.

Section 6.3 of the Draft Report does an adequate job of introducing the concept of the Forum and the reasons behind the construct. However, the Forum is afforded less than a page of the CCWG's Report – approximately nine paragraphs. There is a lack of detail regarding:

- how the Forum will operate;

- how it will be convened;

- what outcomes it may arrive at (aside from a general observation that it will have no powers); and

- how it "could" form the basis for an annual Mutual or Public Accountability Forum

The Forum would be the "front line" of community deliberation on matters of accountability. It should therefore be afforded more attention and focus than it has been. The detail in respect to the Forum concept is manifestly inadequate, resulting in a critical shortcoming of proposed accountability and transition reforms.

As an associated point, auDA notes that references in the Draft Report to "the empowered community" are not consistent and potentially confusing. We recommend that the CCWG should be very clear about its intentions when it refers to "the empowered community" as either all Internet users or "*representatives*" of the community, in the form of the SOs and ACs.

Operational impacts of the CCWG's recommendations

auDA recognises that CCWG-Accountability has undertaken a considerable amount of work in an attempt to redefine the community's roles and rights in relation to the oversight of ICANN. This is appropriate and the precise purpose for which the CCWG was established.

However, the Report would benefit from additional perspective "from the other side" – the direct operational impacts that the recommendations may have on ICANN. This includes, but is not limited to, the effect changes may have with regard to the ICANN Board's current and ongoing fiduciary responsibilities.

In Paragraph 22 of the Draft Report, the CCWG makes clear that it will be left to Workstream 2 to be responsible for:

> *"Clarifying understanding of the fiduciary duties of Board Directors and related expectations concerning Director behavior for the Board"*

auDA maintains that it is essential that the CCWG, community, ICANN Board and NTIA have a clear and current understanding of operational impacts that accountability-related recommendations could have. The input of the Board and staff will be essential in developing this.

The absence of such a collective understanding could result in solutions that:

- cannot be practicably implemented;
- could cause conflict between the Board's current responsibilities and proposed additional provisions; or
- could, in a worst-case scenario, cause operational, legal or budgetary paralysis.

Once again, this is an area where auDA does not share the CCWG's view that additional work can be deferred to Workstream 2 in the post-transition environment.

In addition, auDA holds concerns that any response from the Board to the CCWG in which the Board (appropriately) cites their fiduciary responsibilities could be interpreted as an obstructionist position and could potentially worsen the perceived "us and them" gap between the Board and community that has become apparent at various stages of the CCWG's deliberations. As stated above, the input of Board and staff is critical in this area. It should be solicited as a priority and care should be taken to maintain the collaborative and constructive nature of discussions.

Impacts upon relationships between ICANN SOs and ACs

auDA also has concerns regarding the maintenance of delicate inter-relationships between ICANN's various Supporting Organisations and Advisory Committees. Currently, the CCWG has not expressly addressed this issue, nor identified it as a priority for Workstream 2. Ours is not a concern with a specific clause or proposal of the CCWG, but rather with the entire tone and structure of the Draft Report.

In making this observation, auDA notes that the CMSM could avoid a number of earlier complications such as the need for SOs and ACs to become legal persons and also retains ICANN's status as a not-for-profit corporation based in California.

However, we cannot offer support, nor offer our full consideration, until additional detail is provided and areas of uncertainty are resolved. For example, the CMSM does not alleviate all concerns about the "power balances" between the various SOs and ACs. Notably, in part 6.2 of its report, the CCWG "anticipates" that the ccNSO, gNSO, ALAC and ASO will formally participate in the Community Mechanism. It is not clear to auDA how an accountability structure as critical as this can be implemented upon the mere presumption that the intended participants will confirm their engagement.

There is further cause for concern with the absence of any support from the GAC, SSAC and RSSAC. auDA is particularly worried about the role of governments, given that the GAC has not taken a formal position and the inherently political nature of the IANA transition from the USG to the community. Further, the SSAC has provided commentary during the CCWG process that it has concerns about ever engaging formally in the CMSM, citing issues about a potential change in its current "advisory" status.

auDA appreciates that the CMSM allows each SO and AC to choose to engage and participate at whatever time they see fit. However, the model cannot proceed on the assumption that such engagement will occur. Currently, it is "anticipated" that engagement representing 20 of 29 votes will occur. The final 9 votes remain uncommitted. auDA cannot express support for any model, when such a level of uncertainty remains. Once again, this is not a matter to be deferred to an implementation phase post-transition.

auDA is also concerned about the ways in which the CMSM, if implemented, could specifically impact upon the role of governments. Currently, ICANN's Bylaws afford the GAC a unique relationship with ICANN and the Board (as defined by Article XI of the Bylaws). Unlike the Policy Development Processes of the ccNSO and gNSO, and the advisory status of the ALAC, SSAC and RSSAC, the GAC has an exclusive, specific status, whereby the Board must acknowledge and respond to the GAC on matters of public policy. This arrangement was arrived at through considerable discussion and negotiation, over many years. However, it appears that the CMSM model could allow other sections of the ICANN community to exert influence on this relationship.

As an example - the GAC could conceivably choose to recommend the establishment of a formal, annual "High-level governmental conference" that would be convened at each end-of-year meeting of ICANN. Such meetings have occurred in the past, though on an *ad hoc* basis. This hypothetical recommendation clearly falls within the GAC's public policy mandate, as it expresses the will of governments regarding how they would like to engage with each other and ICANN.

However, convening the conference as part of an ICANN meeting would have budgetary implications – which could then be blocked as part of the community's proposed Budget veto powers, should other SOs and ACs not agree to the expenditure. Such a scenario would represent a subtle, though important shift in the dynamics between the community, governments and ICANN. At the moment, not all SOs and ACs engage with ICANN in the same way – though the CMSM would introduce the need for a degree of uniformity that does not currently exist. Further, in the specific case of the GAC, proposed changes would lead to a conflict between existing Bylaws relating to the committee's interactions with ICANN. This conflict would, at the very least, require immediate (WS1) consideration and the development of a proposal for the redrafting of this section of ICANN's Bylaws.

In summary, auDA acknowledges that a great deal of work has gone in to the development of the CMSM model. However, this is the most critical element of the CCWG-Accountability's work. The model seeks to define the future interactions and "powers" of the ICANN community. It is, by its very nature, a change in the "DNA" of ICANN and, as such, requires considerable refinement before community members can be confident in the future.

ICANN and Human Rights

auDA's final comment in this submission relates to another relatively recent inclusion in the recommendations of the CCWG. That is, the inclusion of a reference to developing and upholding a commitment to Human Rights within the ICANN environment.

As it currently stands, the CCWG has not issued any definitive advice on this topic but rather, in paragraph 152 of its 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. 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."*

This level of ambiguity is concerning and auDA notes that one of the published minority statements, included as part of the Draft Report, echoes these concerns.

To be clear, as a matter of principle, auDA does not actively oppose the acknowledgement of fundamental Human Rights as part of ICANN's Mission and Bylaws. However, establishing a common, clear and agreed definition of what these rights are is a difficult process that has long challenged numerous national, inter-governmental and multi-stakeholder organisations, including the United Nations.

auDA is concerned that the CCWG-Accountability has recommended an agreement on human rights within ICANN, though defers the discussion of these extremely sensitive details to Workstream 2.

Once again, this is precisely the type of issue where vagueness or idiosyncrasies could lead to weakness of the post-IANA transition environment and should be expanded upon.
The UN has arrived at a universal declaration on Human Rights-associated issues[4] and their 30 articles provide a reasonable starting point for deliberation and analysis of whether these can be adopted within the ICANN environment.

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[4] http://www.un.org/en/documents/udhr/