Submission by the Centre for Internet & Society on CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations

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The CCWG Accountability proposal is longer than many countries' constitutions. Given that, we will keep our comments brief, addressing a very limited set of the issues in very broad terms.

Human rights
ICANN is unique in many ways. It is a global regulator that has powers of taxation to fund its own operation. ICANN is not a mere corporation. For such a regulator, ensuring fair process (what is often referred to as "natural justice") as well as substantive human rights (such as the freedom of expression, right against discrimination, right to privacy, and cultural diversity), are important. Given this, the narrow framing of "free expression and the free flow of information" in Option 1, we believe Option 2 is preferable.

Diversity
We are glad that diversity is being recognized as an important principle. As we noted during the open floor session at ICANN49: > [We are] extremely concerned about the accountability of ICANN to the global community. Due to various decisions made by the US government relating to ICANN's birth, ICANN has had a troubled history with legitimacy. While it has managed to gain and retain the confidence of the technical community, it still lacks political legitimacy due to its history. The NTIA's decision has presented us an opportunity to correct this.
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> However, ICANN can't hope to do so without going beyond the current ICANN community, which while nominally being 'multistakeholder' and open to all, grossly under-represents those parts of the world that aren't North America and Western Europe.
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> Of the 1010 ICANN-accredited registrars, 624 are from the United States, and 7 from the 54 countries of Africa. In a session yesterday, a large number of the policies that favour entrenched incumbents from richer countries were discussed. But without adequate representation from poorer countries, and adequate representation from the rest of the world's Internet population, there is no hope of changing these policies.
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> This is true not just of the business sector, but of all the 'stakeholders' that are part of global Internet policymaking, whether they follow the ICANN multistakeholder model or another. A look at theboard members of the Internet Architecture Board, for instance, would reveal how skewed the technical community can be, whether in terms of geographic or gender diversity.
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> Without greater diversity within the global Internet policymaking communities, there is no hope of equity, respect for human rights — civil, political, cultural, social and economic — and democraticfunctioning, no matter how 'open' the processes seem to be, and no hope of ICANN accountability either.

Meanwhile, there are those who are concerned that diversity should not prevail over skill and experience. Those who have the greatest skill and experience will be those who are insiders in the ICANN system. To believe that being an insider in the ICANN system ought to be privileged over diversity is wrong. A call for diversity isn't just political correctness. It is essential for legitimacy of ICANN as a globally-representative body, and not just one where the developed world (primarily US-based persons) makes policies for the whole globe, which is what it has so far been. Of course, this cannot be corrected overnight, but it is crucial that this be a central focus of the accountability initiative.

Jurisdiction, Membership Models and Voting Rights
The Sole-Member Community Mechanism (SMCM) that has been proposed seems in large part the best manner provided under Californian law relating to public benefit corporations of dealing with accountability issues, and is the lynchpin of the whole accountability mechanism under workstream 1. However, the jurisdictional analysis laid down in 11.3 will only be completed post-transition, as part of workstream 2. Thus the SMCM may not necessarily be the best model under a different legal jurisdiction. It would be useful to discuss the dependency between these more clearly. In this vein, it is essential that the Article XVIII Section 1 not be designated a fundamental bylaw. Further, it would be useful to add that for some limited aspects of the transition (such as IANA functioning), ICANN should seek to enter into a host country agreement to provide legal immunity, thus providing a qualification to para 125 ("ICANN accountability requires compliance with applicable legislation, in jurisdictions where it operates.") since the IANA functions operator ought not be forced by a country not to honour requests made by, for example, North Korea.

It should also be noted that accountability needs independence, which may be of two kinds: independence of financial source, and independence of appointment. From what one could gather from the CCWG proposal, the Independent Review Panel will be funded by the budget the ICANN Board prepares, while the appointment process is still unclear.

One of the most important accountability mechanisms with regard to the IANA functions is that of changing the IANA Functions Operator. As per the CWG Stewardship's current proposal, the "Post-Transition IANA" won't be an entity that is independent of ICANN. If the PTI's governance is permanently made part of ICANN's fundamental bylaws (as an affiliate controlled by ICANN), how is it proposed that the IFO be moved from PTI to some other entity if the IANA Functions Review Team so decides? Additionally, for such an important function, the composition of the IFRT should not be left unspecified.

While it is welcome that a separation is proposed between the IANA budget and budget for rest of ICANN's functioning, the current discussion around budgets seems to be based on the assumption that all IANA functions will be funded by ICANN, whereas if the IANA functions are separated, each community might fund it separately. That provides two levels of insulation to IANA functions operator(s): separate sources of operational revenue, as well as separate budgets within ICANN.

It should be noted that there have been some responses that express concern about the shifting of existing power structures within ICANN through some of the proposed alternative voting allocations in the SMCM. However, rather than present arguments as to why these shifts would be beneficial or harmful for ICANN's overall accountability, these responses seem to assume that shift

from the current power structures are harmful. This is an unfounded assumption and cannot be a valid reason, nor can speculation of how the United States Congress will behave be a valid reason for rejecting an otherwise valid proposal. If there are harms, they ought to be clearly articulated: shifts from the status quo and fear of the US Congress aren't valid harms. Thus, while it is important to consider how different voting rights models might change the status quo while arriving at any judgments, that cannot be the sole criterion for judgment of its merits. Further, as the French government notes:

[T]he French Government still considers that linking Stress Test 18 to a risk of capture of ICANN by governments and NTIA's requirement that no "government-led or intergovernmental organization solution would be acceptable", makes no sense. . . . Logically, the risk of capture of ICANN by governments in the future is as low as it is now and in any case, it cannot lead to a "government-led or intergovernmental organization solution".

While dealing with the question of relative voting proportions, the community must remembered that not all parts of the world are equally developed with regard to the domain name industry and with respect to civil society as those countries in North America, Western Europe, and other developed nations, and thus may not find adequate representation via the SOs. In many parts of the world, civil society organizations — especially those focussed on Internet governance and domain name policies — are non-existent. Thus a system that privileges the SOs to the exclusion of other components of a multistakeholder governance model would not be representative or diverse. A multistakeholder model cannot disproportionately represent business interests over all other interests.

In this regard, the comments of former ICANN Chairperson, Rod Beckstrom, at ICANN43 ought to be recalled:
ICANN must be able to act for the public good while placing commercial and financial interests in the appropriate context . . . How can it do this if all
top leadership is from the very domain name industry it is supposed to coordinate independently?

As Kieren McCarthy points out about ICANN:
The Board does have too many conflicted members
The NomCom is full of conflicts
There are not enough independent voices within the organization

Reforms in these ought to be as crucial to accountability as the membership model.

Transparency
The current mechanisms for ensuring transparency, such as the DIDP process, are wholly inadequate. We have summarized our experience with the DIDP process, and how often we were denied information on baseless grounds in this table: http://cis-india.org/internet-governance/blog/table-of-cis-didp-requests

We will comment further on this topic as part of Workstream 2.

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