

# Appendix A – Documenting Process of Building Consensus

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- 1 The Draft Proposal on Work Stream 1 Recommendations was developed in a bottom-up, multistakeholder approach, which included multiple “readings” of each recommendation. Each draft was posted publicly and open to comment by CCWG-Accountability members and participants. The Draft Proposal on Work Stream 1 Recommendations was circulated for review and comment by the CCWG-Accountability on 20 November 2015, with a first reading taking place during the 24 November 2015 plenary meeting. A final reading took place on 26 November 2015.
- 2 Following the final reading, the Draft Proposal on Work Stream 1 Recommendations was sent to the CCWG-Accountability for a 24-hour period to note any errors, comments, or statements for the record. Chartering Organizations’ approval is requested by early January to deliver to the ICANN Board by mid-January 2016.
- 3 The CCWG-Accountability is pleased to provide its Chartering Organizations with the enhancements to ICANN's accountability framework it has identified as essential to happen or be committed to before the IANA Stewardship Transition takes place (Work Stream 1) for consideration and approval as per its Charter.
- 4 The Draft Proposal on Work Stream 1 Recommendations is the result of extensive work by the CCWG-Accountability’s 28 members, 172 participants and a team of highly qualified legal advisors over the past year, which included over 185 calls or meetings, two public consultations and more than 10,150 email messages. It represents a carefully crafted balance between key requirements, specific legal advice and significant compromises by all who participated. It also includes diligent attention to the input received through the public comment proceedings.
- 5 The final proposal has received the consensus support of the CCWG-Accountability. Minority viewpoints were recorded from members Robin Gross (GNSO, NCSG) and Eberhard Lisse (ccNSO). These viewpoints are provided below for Chartering Organization consideration.
- 6 **Minority statements or objections will be noted below if/when they are received.**

## Minority Views

### 1. Dissenting Opinion of Member Robin Gross (GNSO-NCSG)

- 7 The CCWG-Accountability make a number of helpful recommendations to improve organizational accountability at ICANN, however one aspect of the plan is deeply flawed: changing the role of ICANN's Governmental Advisory Committee (GAC) from purely an “advisory” role to a “decision making” role over fundamental matters at ICANN, including its governance. Consequently the proposal marginalizes the role of Supporting Organizations (SO's) compared to today's ICANN governance structure. The degree of governmental

empowerment over ICANN resulting from the proposal's community mechanism is dangerous to the success of the proposal's political acceptance as well as to its ultimate impact on a free and open Internet.

- 8 The creation of a community mechanism to hold ICANN accountable on key issues made a critical error by departing from the existing power balance between SO's and AC's as determined by relative board appointments. Instead, the proposed community mechanism elevates the AC's relative to the SO's compared with today's balance on ICANN's board of directors, which does not currently provide a decision making role to GAC, and which retains the primacy of the Supporting Organizations on key decisions, particularly those within the SO's mandate. The devaluing of the Supporting Organizations in ICANN's key decisions was a common theme in both previous public comment periods, however the recommendations not only failed to address this widespread concern, but went even further in devaluing SO's in the community mechanism in the 3rd report. The community mechanism failed to take into account the appropriate roles and responsibilities of the various SO's and AC's, and the dangers inherent in changing those roles with a "one size fits all" approach to critical decision making. These points were raised in NCSG's Public Comment submission of September 12, 2015: <https://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00053.html>
- 9 Additionally, NCSG objects to the proposed departure from ICANN's typical 30-day public comment period on the 3rd report for CCWG-Accountability. The 3rd report's public comment only allows for 9 days of public comment after the language translations are scheduled to be published, which is far too short of a public comment period for a report of this significance and with so many important changes since previous drafts.

## 2. Minority Opinion of Member Eberhard Lisse (ccNSO)

- 10 Dear Co-Chairs
- 11 I am Managing Director of Namibian Network Information Center (Pty) Ltd, the country code Top Level Domain ("ccTLD") Manager of .NA. I created .NA and have 24 years uninterrupted service and corresponding experience as the ccTLD Manager for .NA.
- 12 I am appointed by ICANN's country code Names Supporting Organization ("ccNSO") as a Member to the Cross Community Working Group on Enhancing ICANN Accountability ("CCWG Account-ability").
- 13 The CCWG Accountability submits a "Draft Proposal on Work Stream 1 Recommendations" ("Third Draft Proposal") which in terms of its Charter must focus on
- 14 *[...] mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.*
- 15 The Third Draft Proposal does **not** do so.
- 16 Accordingly I do not agree with and hereby formally record my Objection to the Third Draft Proposal:
  1. I fully support, adopt and incorporate herein the Objection voiced by the Member appointed by the GNSO to the CCWG, Ms Robin Gross  
I join with her in her Minority Opinion. In particular I underline the serious concerns of Ms Gross regarding the proposed increase to the powers of Advisory Committees ("AC") and their proposed elevation to the same status and powers as Supporting Organizations ("SO").
  2. The Third Draft Proposal is entirely silent on accountability measures for ICANN relating to its dealing with ccTLD managers.

This omission is fatal.

3. I still have very strong concerns about the way the CCWG Accountability has dealt with ICANN's Accountability to Human Rights.

Anything more restrictive than

*Within its mission and in its operations, ICANN will respect fundamental human rights, inter alia the exercise of free expression, free flow of information, due process and the right to property.*

is unacceptable.

4. The questions

- under what statutory powers this transfer will occur,
- what in fact it is that is transferred, and
- what is not transferred

remain unanswered.

And they **must** be answered in order for any transfer of the functions and/or the root zone to occur.

5. I have previously placed on record my observations regarding the legitimacy of the way in which the CCWG has conducted itself during its deliberations which has been, more often than not, in violation of its own Charter.

I renew my Objection against this exclusionary process<sup>1</sup>.

6. The entire proposal has been cobbled together in extreme haste.

We (the representative Members of the CCWG) have been subjected to an arbitrary, self-imposed and entirely unrealistic timetable and deadline.

7. Regrettably, the Third Draft Proposal bears the fruit of this extreme haste. It is overly complex, hard to understand even by many of members and participants of the CCWG Accountability themselves.

8. Even after its publication the Third Draft Proposal contains significant errors and material inaccuracies.

The version put out for public comment stated (in Appendix A):

*As of 29 November 2015, the proposal has received the consensus support of the CCWG-Accountability with no objections or minority statements recorded for Chartering Organization consideration*

This is simply **untrue**.

The CCWG was unambiguously on notice since 2015-11-02 of the Objections and Minority Opinions of two SO Chartered Members (Ms Gross and myself) and Ms Gross' Minority Opinion was in fact submitted on 2015-11-29<sup>2</sup>.

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<sup>1</sup> I renew my Objection to the previous "Draft Recommendations" from 2015-06-03 and to the "Draft Proposal" from 2015-07-30 and incorporate them by reference herein.

<sup>2</sup> Although no deadline was provided for its inclusion despite repeated requests for the dissenting statement submission process to be explained I feel submitting my own Minority Opinion today still did not allow for sufficient time to thoroughly peruse the more than 300 pages split into 28 different files.

9. The Third Draft Proposal has subsequently been declared to be **dynamic** and subject to changes and additions.

This is procedurally fatal, since no reasonable reviewer could produce an opinion on a proposal which is subject to change after its publication.

10. The **drastic** shortening of public comment periods is another example of the apparently intentional exclusivity of the process.

Even if the previous fatal flaws did not exist, this would, in itself, be fatal to the legitimacy of the CCWG process and the Third Draft Proposal.

Fortunately the Final Proposal, if any, can still be subjected to a proper public comment period.

11. I submit that the Third Draft Proposal simply adds additional layers of bureaucracy without achieving much, if anything.

12. The IANA transition involves novel and unsettled questions that may implicate the interests of a wide array of entities. This includes both the public and private sector and engages both domestic US and international interests.

The CCWG Accountability should be result driven and provide its considered views on the important issues presented by the transition in a more reasoned and full discussion instead of rushing to produce something to meet a self-imposed deadline for which there is simply no justification.

13. Repeatedly the NTIA found it necessary to advise, and did so in no uncertain terms, that the CCWG was not meeting the terms of reference set by the NTIA.

I submit that the Third Draft Proposal still does not meet these.

14. I fully support, adopt and incorporate herein the views expressed with such stark clarity by Philip Corwin in his visionary and prescient article of November 2014 in which he stated<sup>3</sup>:

*The result of this -awed approach will be that, if the CWG-Stewardship group has completed its work by July 2015, the CCWG will be under intense internal and external institutional and political pressure to agree that it has "done enough" to meet the woefully low bar set by this Charter for Work Stream 1 mechanisms, with decisions on all remaining work deferred for later.*

17. In the presence of these Objections it follows that the proposal does not have Full Consensus and I submit these minority viewpoints to be added to the Third Draft Proposal as required by the Charter.

18. I urge ccTLD Managers to reject this proposal and the NTIA not to accept it as is.

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<sup>3</sup> [http://www.circleid.com/posts/20141110\\_accountability\\_group\\_charter\\_sets\\_the\\_bar\\_too\\_low/](http://www.circleid.com/posts/20141110_accountability_group_charter_sets_the_bar_too_low/) (accessed 2015-12-01)