

LINX response to CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations Questionnaire

Recommendation 1: Establishing An Empowered Community For Enforcing Community Powers

SUPPORT

Comments:

- In order for ICANN to be effectively accountable, it is essential that the community be able to enforce its decisions, in court if necessary.
- We are willing to support the “Sole Designator” model in the form proposed, as an enforcement mechanism.
- Nevertheless, we remain convinced of the superiority of the “Single Member” model in a number of key respects.
 - The only enforcement mechanism available to a “Sole Designator” is the power to spill the Board. A “Single Member”, by contrast, has the power to directly enforce the Bylaws in court, without spilling the Board.
 - This means that a “Sole Designator” has no means of enforcing its will on matters that are not considered important enough to merit spilling the Board. In practice, there are likely to be important cases where there would have been sufficient consensus to bring an enforcement action under the “Single Member” model, but for which there would not be sufficient consensus to remove the entire Board.
 - One important community enforcement power is the power to bring a collective community complaint via the Independent Review Process, the outcome of which is supposed to be binding. However, it is not clear whether the “Sole Designator” would have the right to enforce the outcome of a Community IRP.
 - Furthermore, a “Single Member” would have the power to go to court to require that the Independent Review Process be made available, whereas a “Sole Designator” would only be able to enforce availability of the IRP indirectly by dismissing or threatening to dismiss the Board. There are likely to be cases where there would have been sufficient consensus to bring an enforcement action, but not to dismiss the Board. This is a material weakness in the proposal.

Recommendation 2: Empowering The Community Through Consensus: Engage, Escalate, Enforce

SUPPORT

Comments:

- We support the proposed engagement, escalation and enforcement process.
- However, we are concerned that the process in its current form would unduly increase the power of the Advisory Committees relative to the Supporting Organisations.

- Currently, GAC and ALAC appointed Board representatives do not have voting rights. However, these Advisory Committees do have a right to vote on the decision by the Empowered Community to exercise a Community Power. With the exception of the power an AC/SO to remove its own appointed Board Director, all of the Community Powers can be vetoed by an objection of two ACs/SOs, meaning that the GAC and ALAC together have the power to veto any attempt to exercise a Community Power.
- The *CCWG-Accountability Draft Proposal on Work Stream 1* states that its recommendations are intended to compensate for the removal of the accountability backstop historically provided by United States stewardship of the IANA function, but are not intended “to change ICANN’s multistakeholder model”. A shift in power from towards the Advisory Committees would seem to work against this objective.

Recommendation 3: Redefining ICANN’s Bylaws As ‘Standard Bylaws’ And ‘Fundamental Bylaws’

SUPPORT

Comments:

- We strongly support the proposals for redefining ICANN’s Bylaws as “Standard” and “Fundamental Bylaws”, where changes to the “Fundamental Bylaws” will face a higher threshold.
- We support CCWG-Accountabilities choice of Fundamental Bylaws.

Recommendation 4: Ensuring Community Involvement In ICANN Decision-Making: Seven New Community Powers

SUPPORT

Recommendation 5: Changing Aspects Of ICANN's Mission, Commitments And Core Values

SUPPORT

Comments:

- We support the change to the ICANN’s Mission statement. In particular, we would like to emphasise the vital importance of the following points, without which we would not be able to support the proposal:
 - The restriction that that “ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission”.
 - The proposed clarification of the scope and limitations of ICANN’s mission.
 - The inclusion of an explicit statement that ICANN’s mission does not include the regulation of services that use the DNS or the content that such services carry or provide.
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- We support the clarification that “ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties”, but emphasise the vital importance of the restriction that this be “in [service of] [support of] [furtherance of] its Mission”. This provides ICANN with the freedom to enter into and enforce contracts in furtherance of its mission, while clearly restricting the use of contracts so as to avoid their being used to attempt to regulate the content or services provided by users of the DNS.
- We continue to support the division of ICANN’s Core Values into “Commitments” and “Core Values”, where “Commitments” must be adhered to absolutely, while “Core Values” can be balanced against each other.
- We continue to support the chosen Commitments.

Recommendation 6: Reaffirming ICANN's Commitment To Respect Internationally Recognized Human Rights As It Carries Out Its Mission

SUPPORT

Comments:

- While we are willing to agree to this recommendation, and while we agree that ICANN should act in a manner that is consistent with Human Rights, we would nevertheless like to express doubts about whether the inclusion of Human Rights language in the ICANN Bylaws is the best way to ensure respect for these rights in practice.
- The best way of ensuring that ICANN respects Human Rights in practice is to consider the ways in which ICANN might act in violation of human rights, and to put in place specific, concrete restrictions prohibiting these behaviours that are relevant to ICANN. The CCWG proposal already contains numerous safeguards which protect Human Rights in this manner. These include the explicit statement that ICANN’s mission does not include the regulation of the services that use the DNS, for example.
- Including Human Rights language in the ICANN Bylaws risks undermining the certainty and predictability of ICANN’s behaviour, by importing many of the complexities and controversies of human rights jurisprudence, and could thereby weaken the much stronger and more relevant protections established in the Core Values.
- Given that legal advice sought by CCWG-Accountability found that “upon termination of the [IANA] Contract, there would be no significant impact on ICANN’s Human Rights obligations”, the advantages of including a Commitment to Human Rights in the ICANN Bylaws would appear to be largely symbolic. The disadvantages in terms of certainty and predictability, on the other hand, are potentially significant.
- We welcome, however, the clarification, aimed at preventing ‘Mission creep’, that “ICANN’s commitment to respect internationally recognized Human Rights is conducted ‘within its mission and its operations’”.

Recommendation 7: Strengthening ICANN's Independent Review Process

SUPPORT

Comments:

- We strongly support the proposals for strengthening the Independent Review Process. It is essential that there exists a truly independent body, with the ability to make independent, objective decisions; that this body has the power to quash ICANN actions which it finds to be

inconsistent with the Bylaws or Mission; and that the successful complainant has the legal right to enforce IRP decisions as the outcome of binding arbitration. While we have expressed concern about the uncertain effects of the “Sole Designator” model on the enforceability of IRP decisions, we believe that the Independent Review Process itself now meets these criteria.

- We welcome the proposal to allow any group, person or entity the right to file a complaint under the IRP provided that they are “materially affected” by an ICANN action or inaction in violation of the articles and/or Bylaws. The limits to ICANN’s Mission exist for the benefit of everybody, and therefore it is right that anyone materially affected by a breach of those limits should have the ability to seek redress.

Recommendation 8: Fortifying ICANN's Request For Reconsideration Process

SUPPORT

Recommendation 9: Incorporation of the Affirmation Of Commitments

SUPPORT

Recommendation 10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

SUPPORT

Recommendation 11: Board obligations regarding Governmental Advisory Committee Advice (Stress Test 18)

SUPPORT

Comments:

- We support the proposal that special Board procedures for responding to GAC advice should apply only where that advice is supported by a consensus in the GAC.
 - We believe that GAC advice is worthy of special consideration because it is the consensus public policy view all participating governments, united. The same rationale does not apply where it is simply the view of some governments, with other governments in disagreement.
 - According, we consider that it would be inappropriate to require the Board to negotiate with the GAC to achieve a “mutually acceptable solution” in circumstances where some governments disagree with the GAC position.
- Unfortunately we cannot support the proposal requiring a vote of two-thirds of the Board in order to reject GAC advice.
 - As Board decisions are usually taken unanimously, the new voting threshold might be supposed to be unlikely to affect the outcome of most decisions. However, changing this threshold is likely to change the behaviour of Board members, by signalling to them a change in their duty.

- At the moment, the Board is expected to act in the best interests of the corporation. While GAC advice is taken into account, Board members are entirely free to disagree with it.
- If the new rule takes effect, it will signal that the responsibility of the Board is normally to comply with GAC requests; requiring a supra-majority to oppose signals that opposition should be an extraordinary event. Individual Board members are therefore more likely to acquiesce to GAC advice despite holding misgivings, unless there is an exceptionally high level of opposition.
- This change is therefore likely to give rise to a change in the relationship of the GAC to the Board, and so of the GAC to the whole community. If it is carried out the GAC will come to expect compliance with its demands, and to take offence if they are rejected (which prospect will make it yet more difficult to resist GAC requests), while the Board will come to expect GAC leadership. By degrees, ICANN will become less and less a multistakeholder organisation, and more and more one led by government policymaking, on which the broader community may be consulted but which it is usually unable to resist.
- Stress Test 18 considers the scenario where the GAC decides to change its internal procedure for the adoption of advice to the Board from consensus to majority rule. Concerns were raised that the GAC could thereby increase government influence over ICANN, or that the ICANN Board would be forced to arbitrate among sovereign governments. The CCWG recommendation seeks to avoid these pitfalls, while maintaining the ability of the GAC to define its own internal rules and procedures.
- However, these criteria would appear to be satisfied by the simple requirement that the Board need only seek “to find a mutually acceptable solution” in the case of GAC advice supported by consensus. The requirement of a two-thirds Board majority to reject GAC consensus advice does nothing to increase the GAC’s internal autonomy, or to further protect the Board from having to arbitrate among governments. It does have the effect of substantially increasing governmental influence over ICANN – one of the pitfalls which the CCWG’s recommendation was ostensibly designed to avoid.
- The proposal that the Board should require a two-thirds supermajority was put forward for consultation in August/September 2014. This proposal met with substantial opposition from the ICANN community. It should be removed from this recommendation and, if it is, we will be happy to support the remaining provisions of the recommendation. .

Recommendation 12: Committing To Further Accountability Work In Work Stream 2 SUPPORT

Comments:

- In dividing issues between two “Workstreams” the CCWG acknowledged that Workstream 1 must include everything sufficient to ensure delivery of future for Workstream 2 supported by the community, even if the Board resists those recommendations.
- We support that objective, although we are sceptical that the CCWG’s recommendations are sufficient to ensure success in that regard.
- ICANN needs a community-based mechanism for initiating continuing reform (outside the scope of what is permitted in a PDP), for example institutional reform. In our view, ATRT teams, while useful, are neither sufficiently transparent nor sufficiently participatory in their working methods to fully satisfy this requirement. The CCWG mechanism, as practised by

this CCWG, is. This CCWG should continue in existence, albeit at a more restrained pace, to consider and implement further necessary reforms.

Additional comments

We consider that the proposal that the Board should follow GAC advice unless a 2/3 supra-majority rejects it risks being judged as violating the NTIA criterion that the IANA functions should not be under the control of a government-led or intergovernmentally-led organisation.

We consider that in all other respects the proposal meets the minimum standards set by the NTIA.

However, we consider that the CCWG proposal would not meet NTIA's criterion for preserving the openness of the Internet if the CCWG's proposal in relation to the Mission were to be weakened so as to immunise the content of PICs or other contracts with ICANN from challenge on the basis that the purpose of the provision lies outside ICANN's Mission. We further consider that this criterion could not be met without explicit language prohibiting ICANN from regulating the Internet-based services that rely upon the DNS, or the content those services carry or provide.