NCUC statement

The NonCommercial Users Constituency (NCUC) welcomes this opportunity to comment on the CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations. We would like to thank the volunteers of the CCWG for their commitment, in terms of both time and talent, in what we know has been both a complicated and time intensive working group.

Our comments follow, ordered as responses to the twelve recommendations contained in the Draft Proposal:

Recommendation One: Establishing an Empowered Community for Enforcing Community Powers

The NCUC is unable to support this recommendation as currently constructed. Although in full support of the establishment of an Empowered Community, we believe that such a community should be based upon the balance of powers and responsibilities that currently exist within ICANN.

Advisory committees were created to advise on policy, not to create it. This proposal grants both ALAC and the GAC dual roles as decision makers within the Empowered Community while maintaining their status as advisors to the ICANN Board. This "double dipping" is structurally inappropriate, changes the balance of power within ICANN and needs to be rejected.

We note the proposal gives ALAC weight in the Community Mechanism equal to that of each of the the Supporting Organizations (SO). Currently ALAC appoints a single member to the Board, each SO two members. We do not believe the Accountability process should be used to change the current proportional power balance, a balance that has functioned well enough to have caused the NTIA to believe that ICANN is stable enough to be granted independence.

We also have concerns about allowing the GAC both to maintain its current privileged advisory position while also being allowed to participate in the Community Mechanism. ICANN's Articles and Bylaws prohibit the GAC from appointing Board members. It is counterintuitive to allow an organ that is not allowed to appoint a Board member to remove one or all of them. Yet this Proposal does precisely that.

Recommendation Two: Empower the Community Through Consensus: Engage, Escalate, Enforce

The NCUC supports this recommendation in general terms, while having some concern over specifics of the process that still need to be developed.

There is a general lack of specificity in the recommendations concerning the nature and extent of the Board's obligations to involve itself in the process (e.g. what constitutes "a

very extensive engagement") and also as to the exact nature of the required "consensus" itself. These ideas need to be further developed.

Our greatest concern, though, involves the timeline of the 3E process. Simply put, there simply is not enough time provided between steps in the process. Consideration must be given to the fact that ICANN is a volunteer community with participants spread throughout the globe. Our SOs and ACs are themselves composed of constituent parts that need to be consulted before actions by the SO or AC should ideally be taken.

The 15 day / 6 day / 7 day / 15 day / 15 day timeframe included in the escalation process does not allow the SOs and ACs sufficient time to consult with their members, component parts or other actors within the community before taking action. The proposed timelines need to be revisited and revised to ensure that community powers are able to be used in a bottom up manner with full community collaboration, support and consultation as its basis. A minimum of one week of additional time should be considered for all steps, and is particularly needed for the first two steps in the escalation process.

Recommendation Three: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

The NCUC supports this recommendation.

Not all bylaws are equal in importance and by creating two categories with different rules and procedures governing each bylaw category the CCWG recognizes this. Requiring community assent for any change to the fundamental Bylaws gives the community, including the NCUC, assurance that no fundamental change to the nature or structure of ICANN will occur without the consent of all interested parties.

The NCUC wishes to make clear its full support for making the right of inspection, per California Corporations Code §6330, a fundamental bylaw. We specifically support the plan and substantive content developed by the CCWG independent counsel Sidley Austin and Adler & Colvin and detailed in their December 10, 2015 memorandum to the CCWG entitled "Developing Bylaws Provisions for Inspection Rights". We wish to indicate our preference, per the options listed in the response to Question 6 in said memorandum, for a process whereby the initial request for Inspection may be made by a single SO / AC directly to ICANN, with the escalating community decision-making process to be invoked only if ICANN refuses or ignores the inspection request made by the petitioning SO/AC.

We also suggest that the right of inspection be included in the bullet point of Objectives in Annex 1, paragraph 5 of the Proposal.

Recommendation Four: Empowering Community Involvement in ICANN Decision-making: Seven New Community Powers

The NCUC supports this recommendation.

Although not as strong as the previous reference model, membership, we do agree that indirect enforcement of community powers through the Sole Designator model may be sufficient. The strong link between community powers and the Independent Review Process (IRP) is one of the major reasons we have come to this belief.

We support the 1) two pronged approach to the budget, 2) the proposed plan to allow the community to reject changes to standard bylaws, 3) community approval powers for changes to fundamental bylaws, 4) the proposed plan for initiating the IRP, and 5) the proposals for removing individual Board members and the entire Board. Regarding the removal of Board members appointed by a SO/AC, such removal shall be at the direction of the appointing SO/AC and should not be subject to any list of defined conditions for removal.

We support the provision that DIDP disputes are within the scope of permissible subject matter for an IRP. It should be made clear, however, that access to the IRP for this type of dispute should be allowed for all parties eligible to file a DIDP and not solely reserved for or subject to the approval of the Empowered Community itself.

Recommendation Five: Changing Aspects of ICANN's Mission, Commitments and Core Values

The NCUC supports this recommendation.

This support is contingent upon further review of the exact language developed by the drafters in response to this Draft. The Bylaws language needs to effectively restrain ICANN from acting outside its "picket fence", i.e. the subject area directly related to DNS policy-making. It is of particular concern to the NCUC that ICANN be restrained from engaging in content regulation of any type or form.

Recommendation Six: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out It's Mission

The NCUC supports this recommendation.

The proposed Bylaws language appropriately acknowledges ICANN's human rights obligations within its limited scope and mission. Recognizing the complexity of the issue, the NCUC supports inclusion of human right as a work stream 2 issue along with the suggested interim bylaw which will ensure that the recommended topics for investigation are appropriately considered and actioned upon.

Recommendation Seven: Strengthening ICANN's Independent Review Process

The NCUC supports this recommendation.

Our principle concerns with the proposed Independent Review Process (IRP) reform are related to access, impartiality and diversity. To address these issues the NCUC recommends:

1. To ensure the IRP is accessible to all, the NCUC requests that the proposed pro bono representation program be prioritized and made operational at the start of the new IRP process. We also oppose any form of "loser pay" system as the mere threat of future costs may deter less well resourced individuals or organizations from pursuing valid claims. The Community Independent Review Process, in which ICANN bears all costs, should be made available to all recognized organizational units within the ICANN community, and not just the Community Mechanism or participating SO/ACs.

2. To ensure greater diversity of both panelists and appellants a language associated with civil law jurisdictions, most practically French, should be designated alongside English as an official language for IRP proceedings.

3. To ensure impartiality, panelist training should be a collaborative process between the community and ICANN.

We support a complete review of the Cooperative Engagement Process (CEP) in Work Stream 2. As an interim measure, the NCUC proposes that, effective immediately, at the request of the requesting party all CEP proceedings be conducted in an open and transparent manner, with recordings and transcripts made publicly available immediately following the conclusion of the proceeding.

Recommendation Eight: Fortifying ICANN's Request for Reconsideration Process

The NCUC supports this recommendation.

We fully support extending both the scope of the Reconsideration Process and extending the time frame within which Requesters are allowed to file an action. We support involving the entire Board in the Reconsideration Process, as opposed to the current practice of having a small Board subcommittee rule on the Requests. ICANN's legal department needs to be removed from the Process as it has an inherent conflict of interest in the proceedings. We propose having a neutral third party, possibly the Ombudsman, provide an initial assessment to the Board as to the merit of any and all Reconsideration Requests.

The recommendations should also make clear that (in)actions of the PTI (including timing) are included within the scope of Reconsideration Process.

Recommendation Nine: Incorporation of the Affirmation of Commitments

The NCUC does not support all aspects of this recommendation.

The Affirmations of Commitments (AoC) were designed as part of the bilateral relationship between the United States government and ICANN. With the removal of American government oversight certain conditions applicable to the Affirmation of Commitments no longer exist.

The NCUC applauds the achievements of the Accountability and Transparency Review Teams (ATRT) and support their continuation as being compatible with the CCWG's mission and efforts. We do not support the continuation of the other AoC reviews.

By the nature of the parties who created it the AoCs prioritize the interests of the American government and those interests that were best placed to influence it. For example, under the AoC ICANN made a commitment that it would never make a substantial change to its approach of displaying WHOIS information. That sort of top down policy imposition is not compatible with the bottom up process that should define ICANN.

As ICANN becomes a truly independent organization we believe it is the community working through its developed and open policy processes that should develop substantive policy, rather than have it adhering to substantive policy commitments made many years ago to a government whose direction it is no longer directly and solely subject to.

Recommendation ten: Enhancing the accountability of Supporting Organizations and Advisory Committees

The NCUC does not support this recommendation.

Recommendation 10 focuses on the accountability of the SOs and ACs. Much of it is vague and nonspecific, with the bulk of the work to be done in Work Stream 2. What is proposed raises concerns and is the reason we are unable to support recommendation 10 as it is currently formulated.

The Proposal calls for periodic independent structural reviews of all SO/ACs. The NCUC supports this goal.

To implement this section the Recommendation suggests amending Article IV(4) of ICANN's Bylaws. Article IV(4) states that the Board "shall cause a periodic review of the performance and operation of each Supporting Organization". We find this unacceptable.

We do not wish to empower the ICANN Board to interfere in the governance structures of individual SO/AC's. Instead, we propose that the independent reviews should be done at the request of a majority of the SO/ACs and that any recommended changes occur only with the approval of the SO/ACs acting through the Community Mechanism.

Further, under Article IV of ICANN's Bylaws the GAC is exempt from any such accountability review. Given the empowerment of the GAC in both recommendations 1 and 10 of this Proposal we suggest that this leaves a considerable gap in ICANN's accountability regime. We propose that in view of the GAC's participation in the Community Mechanism it should and must be subject to the same accountability reviews as the other SO/ACs.

Recognizing the relative complexity and sensitivity of both of these matters the NCUC suggests that they be moved to work stream 2 for further consideration.

Recommendation eleven: Board Obligations with Regards to Governmental Advisory Committee Advice (Stress Test 18)

The NCUC does not support this recommendation. The CCWG-Accountability was not formed with a goal of increasing the role and power of government in ICANN. Yet the combined force of recommendations 1 and 11 do precisely that.

The NCUC strongly opposes raising the voting threshold for a Board override of consensus GAC advice from its current simple majority to 2/3. We are also concerned that this change to the previous reference model was done on the basis of a straw poll of the attendees during a single CCWG call, rather than in a poll of CCWG members. We question the representative and balanced nature of attendees of that call and whether the change in the voting threshold does actually represent the consensus view of the community.

The NCUC proposes that all GAC advise be required to be accompanied by a statement specifying the rationale behind the specific advice. We also request assurance that in the drafting of the applicable bylaws GAC advice will be limited to matters within ICANN's narrow and limited scope (aka "picket fence") and that the preferential treatment GAC advice is given does not cause or allow for ICANN to expand its mission or scope. It should also be specified that the only GAC advice entitled to preferential treatment is that which is reached by full GAC consensus, defined as that advice with broad support and with the lack of any formal objection.

Recommendation twelve: Committing to Further Accountability Work in Work Stream 2

The NCUC strongly supports this recommendation.

Many issues that are of core concerns to the NCUC community are scheduled to be considered in Work Stream 2. Included among these are transparency, DIDP reform, government relations, diversity, jurisdiction, whistleblower policy and the role of the Ombudsman. These are high priority issues for our community and we are disappointed that more of them were not considered as part of work stream 1.

To be effective in work stream 2 the CCWG needs to act proactively to ensure that:

1. The CCWG is able to retain independent counsel in a manner similar to that provided to it in work stream 1. The issues in work stream 2 are no less important than those considered in work stream 1. Many, such as state specific privacy issues related to transparency and documentation, are highly legal in nature and will require the retention of high quality legal counsel. This is an absolute requirement.

2, The proposed interim Bylaw should be drafted in a manner that requires the Board to implement all recommendations, including changes to ICANN's Bylaws, recommended by the CCWG, or successor working group(s), as a result of work stream 2.

3. All work contained in the work stream 2 remit must be completed and approved by the Board no later than the end of 2016.

The NCUC notes that there are several matters, such as review of the Cooperative Engagement Process (CEP), that are delegated to work stream 2 in other sections of this Proposal but are not listed as components of work stream 2 in recommendation 12. We would suggest that the Final Report consolidate all such items in one place so that the full extent of work stream 2 is more transparent and known before the CCWG requests the support of its chartering organizations.

We also note that one subgroup that has been assigned to work stream 2, that of the Office of the Ombudsman, has already been formed and activated. Although activity ceased when the topic was placed into work stream 2, we would suggest that the CCWG reactivate this group during the period following the submission of the Final Report to the chartering organizations. There is no good reason to wait until the Morocco meeting to commence work stream 2 work when such a group has already been formed and activity begun.

Submitted this 21st day of December 2015

Rafik Dammak
Chair
NonCommercial Users Constituency