

# Annex 12 – Recommendation #12: Committing to Further Accountability Work in Work Stream 2

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## 1. Summary

- 1 The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.
- 2 As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:
  - Considering improvements to ICANN's standards for diversity at all levels.
  - Supporting Organizations and Advisory Committee Accountability
  - Improving ICANN's transparency with a focus on:
    - Enhancements to ICANN's existing Documentary Information Disclosure Policy (DIDP).
    - Transparency of ICANN's interactions with governments.
    - Improvements to the existing whistleblower policy.
    - Transparency of Board deliberations.
  - Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
  - Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
  - Considering enhancements to the Ombudsman's role and function.
- 3 The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming [ICANN55 Meeting](#) in March 2016. It is intended that Work Stream 2 recommendations will be published for comments by the end of 2016.
- 4 The community raised concerns that, post-transition, there may be a lack of incentive for ICANN to implement the Proposals arising out of Work Stream 2. To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability Work Stream 2 recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1

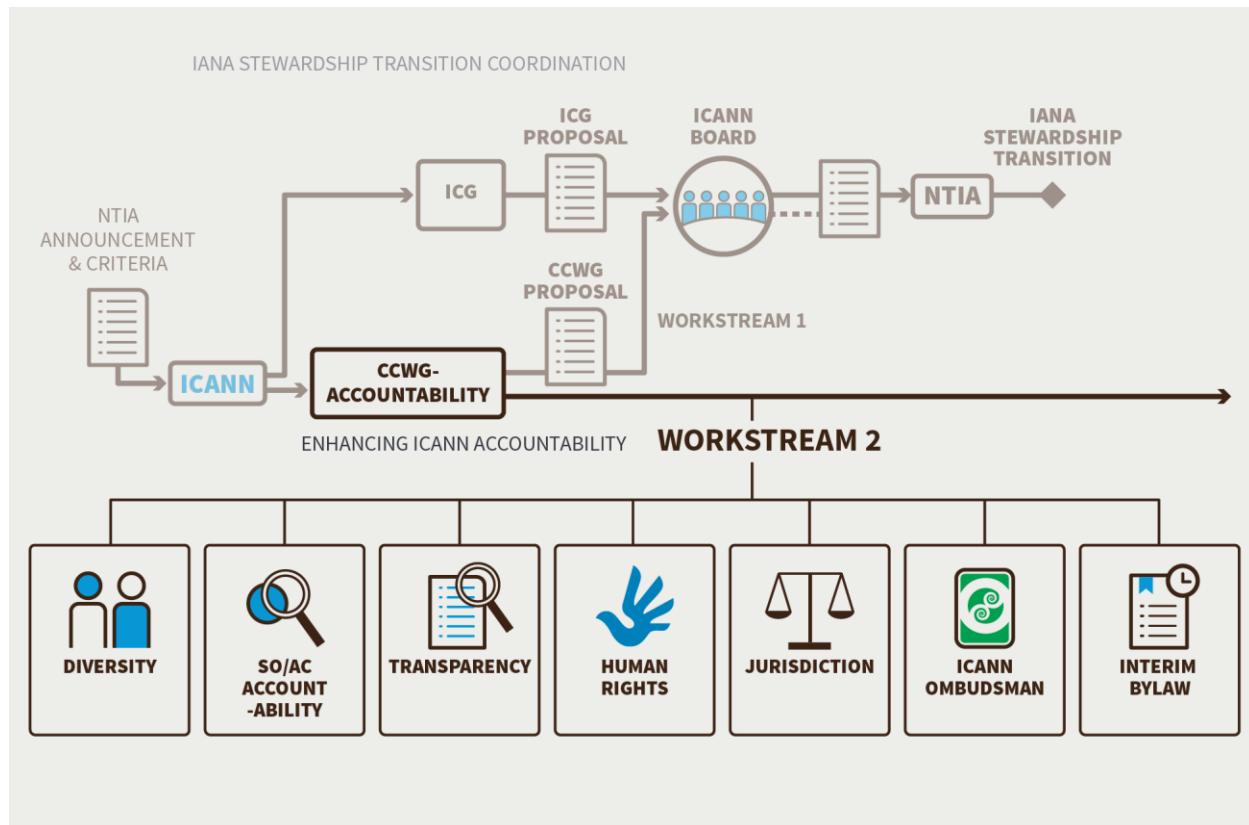
recommendations. In a [letter](#) dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

## 2. CCWG-Accountability Recommendations

- 5 The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues:
  - Considering improvements to ICANN's standards for diversity at all levels.
  - Supporting Organizations and Advisory Committee Accountability
    - Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency review process.
    - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
    - Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
    - Assess whether the IRP would also be applicable to SO and AC activities.
  - Improving ICANN's transparency with a focus on:
    - Enhancements to ICANN's existing DIDP.
    - Transparency of ICANN's interactions with governments.
    - Improvements to the existing whistleblower policy.
    - Transparency of Board deliberations.
  - Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
  - Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
  - Considering enhancements to the Ombudsman's role and function.

The CCWG-Accountability notes that further enhancements to ICANN Accountability can be accommodated through the accountability review process (see Recommendation #10) or through specific, ad hoc, cross community working group initiatives.

### 3. Detailed Explanation of Recommendations



6 Commenters made the observation that general accountability requirements, such as diversity and Supporting Organization (SO) and Advisory Committee (AC) accountability, were not fully addressed. Specific criteria were developed for these two key parameters:

#### 7 Diversity

8 Comments received on prior drafts asked that concrete steps to ensure the diversity of the views, origins, and interests of the global Internet community be adequately represented through a multidimensional approach, specifically as the community becomes more empowered. While acknowledging the importance of diversity in the accountability mechanisms, commenters have also expressed the view that any diversity requirement should not prevail over skills or experience requirements.

9 The CCWG Accountability acknowledges the specific advice received from the Public Expert Group Advisors which stresses the importance of such diversity enhancements. Maximum participation and transparent deliberations by all affected stakeholders are necessary in order to capture the diversity of views that constitute the (global) public interest in a given instance.

- 10 In assessing diversity, the CCWG-Accountability identified that existing mechanisms were in place for entities constituting the ICANN ecosystem. Requirements stemming from the following initiatives and governance documents were evaluated:
- [ICANN Bylaws.](#)
  - [The Affirmation of Commitments.](#)
  - [ATRT 1 Recommendations.](#)
  - [ATRT 2 Recommendations.](#)
  - Documents from each of the ICANN SOs and ACs.
- 11 Analysis of the above documents determined that improvements are needed. During its discussions, the CCWG-Accountability considered a non-exhaustive list of criteria and sought input on the following suggestions:
- Expanding ATRT reviews into Accountability, Transparency, and Diversity reviews.
  - Establishing threshold regarding composition of each body.
  - Incorporating the Structural Reviews into Structural Accountability, Transparency, and Diversity Reviews of SOs and ACs, under the Board's supervision.
- 12 Comments received on the Second Draft Proposal revealed that incorporating the diversity component into Accountability and Transparency reviews may overburden Review Teams. Therefore, the CCWG-Accountability recommends the following actions with the view to further enhancing ICANN's effectiveness in promoting diversity:
- Including diversity as an important element for the creation of any new structure, such as the Independent Review Process (IRP) (for diversity requirements for the panel) and the ICANN Community Forum.
  - Adding Accountability, Transparency, and Diversity reviews of SOs and ACs to structural reviews as part of Work Stream 2.
  - Performing, as part of Work Stream 2, a more detailed review to establish a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program, and other ICANN outreach programs). After an initial review of the current documents, it became clear that they do not address the full concerns raised by the wider community on the issue of diversity.
  - Identifying the possible structures that could follow, promote, and support the strengthening of diversity within ICANN.
  - Carrying out a detailed working plan on enhancing ICANN diversity as part of Work Stream 2.
  - Strengthening commitments to outreach and engagement in order to create a more diverse pool of ICANN participants, so that diversity is better reflected in the overall community and thus more naturally reflected in ICANN structures and leadership positions.

### 13 **Supporting Organizations and Advisory Committee Accountability**

- 14 As the community's power is enhanced, legitimate concerns have arisen regarding the accountability of the community (organized as SOs and ACs) in using new Community Powers, i.e., "who watches the watchers."
- 15 The CCWG-Accountability reviewed existing accountability mechanisms for SOs and ACs as well as governance documents (see above). Analysis revealed that mechanisms are limited in quantity and scope. Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that current mechanisms need to be enhanced in light of the new responsibilities associated with the Empowered Community.
- 16 The CCWG-Accountability recommends the following:

#### **As part of Work Stream 1:**

- Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews performed on a regular basis. These reviews should include consideration on the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, and Regional At-Large Organizations, etc.
- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently states: "The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness."

#### **As part of Work Stream 2:**

- Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency review process.
- Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
- Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
- Assess whether the IRP would also be applicable to SO and AC activities.

## **Transparency**

- 17 Transparency is considered quintessential to the viability of community empowerment and its associated legal framework. As such, the CCWG-Accountability recommends reviewing the following to ensure appropriate safeguards are in place:
- Improving ICANN's transparency with a focus on:
    - **Enhancements to ICANN's existing DIDP:** The CCWG-Accountability sets an objective to review and update ICANN's DIDP within two years, with the goal of justifying denials with a specific harm and limiting the scope of non-disclosure.

- **ICANN's interactions with governments:** The CCWG-Accountability is considering if ICANN should be required to compile and publicly post a quarterly report providing: the names of individuals acting on ICANN's behalf who have been in contact with a government official; the names and titles of such government officials; the date, nature, and purpose of those government contacts. In addition, it considers that a line item accounting of the amount ICANN spent on government engagement activities should be reported.
- **Improvements to the existing whistleblower policy.**
- **Transparency of Board deliberations.**

## 18 Human Rights

19 To ensure that adding a draft Human Rights Bylaw into the ICANN Bylaws does not lead to an expansion of ICANN's Mission or scope, the CCWG-Accountability will develop a designated Framework of Interpretation as part of Work Stream 2 and will consider the following as it elaborates on the language to be used:

- Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Draft Human Rights Bylaw.
- Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to Human Rights.
- Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
- Consider what effect, if any, this proposed Bylaw would have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

## 20 Jurisdiction

21 Jurisdiction directly influences the way ICANN's accountability processes are structured and operationalized. The fact that ICANN is incorporated under the laws of the U.S. state of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.

22 The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court

jurisdiction. ICANN is subject to a provision in paragraph eight<sup>1</sup> of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.

23 ICANN's Bylaws (Article XVIII) also state that its principal offices shall be in California.

24 The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":

- Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.
- Jurisdiction of places of physical presence.
- Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.
- Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP outcomes and other accountability and transparency issues, including the Affirmation of Commitments.
- Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.
- Meeting NTIA requirements.

25 At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated:

- Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:
  - Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.
  - Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.
  - Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.

26 A specific Subgroup of the CCWG-Accountability will be formed to undertake this work.

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<sup>1</sup> 8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) **remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community**; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

27 **Considering Enhancements to the Ombudsman's Role and Function**

28 Through the enhanced Request for Reconsideration process (see Recommendation #8: Improving ICANN's Request for Reconsideration Process), the CCWG-Accountability has given increased responsibility to the Ombudsman.

29 The Ombudsman can perform a critical role in ensuring that ICANN is transparent and accountable, preventing and resolving disputes, supporting consensus-development, and protecting bottom-up, multistakeholder decision-making at ICANN. ICANN's Office of Ombudsman must have a clear charter that reflects, supports, and respects the organization's Mission, Commitments and Core Values, and must have sufficient authority and independence to ensure that it can perform these important roles effectively. As part of Work Stream 2, the CCWG will evaluate the current Ombudsman charter and operations against industry best practices and recommend any changes necessary to ensure that the ICANN Ombudsman has the tools, independence, and authority needed to be an effective voice for ICANN stakeholders.

30 **Interim Bylaw**

31 The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability related to the Work Stream 2 list of issues, according to process and procedures similar to those of Work Stream 1: openness to all participants, transparency of deliberations, public comment inputs...

32 This Interim Bylaw must be incorporated in the ICANN Bylaws as part of Work Stream 1, prior to the IANA Stewardship Transition. This Interim Bylaw has been proposed to address concerns that, post-transition, an absence of incentives may lead to the ICANN Board dismissing the CCWG-Accountability's proposed Work Stream 2 recommendations. However, in a [letter](#) dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

33 Enshrining the commitment to Work Stream 2 as an Interim (Transition) Bylaw provides stronger guarantees compared to an approach that would rely on a Board resolution. A Board resolution could indeed be changed by the Board itself at any time, and the composition of the Board changes over time. Also, enshrining the process and conditions within a Bylaw (even if it is a transitional provision) triggers the ability for IRP challenge if the CCWG Accountability or the Board did not comply with the process or conditions described in the Bylaw.

34 The language of this Interim Bylaw provision should provide that the CCWG Work Stream 2 recommendations, when supported by full consensus or consensus as described in the CCWG-Accountability Charter, and endorsed by the Chartering Organizations, be considered in a similar status to Work Stream 1 recommendations. The ICANN Board's actions or inaction would be subject to challenge through enhanced Request for Reconsideration and Independent Review Processes.

35 The Bylaw would be consistent with the language described in the CCWG-Accountability Charter, and explicitly mention the NTIA criteria as a reference for the recommendations, as well as the requirement that recommendations are based on consensus.



36 The Bylaw would also describe the process outlined in the ICANN Board's resolution of 16 October 2014 (see <https://www.ICANN.org/resources/board-material/resolutions-2014-10-16-en#2.d>), such as :

- The requirement for Work Stream 2 recommendations to be consensus recommendations, endorsed by the Chartering Organizations;
- The requirement to initiate a specific dialogue in case the Board believes it is not in the global public interest to implement a recommendation, as well as the description of the steps of this dialogue
- The requirement of a 2/3 majority of the Board to determine that implementing a recommendation is not in the global public interest.

### 37 **Timeline**

38 The initial plan includes the following key milestones:

- March 2016 (ICANN55): Definition of scope of work and organization into Subgroups.
- March 2016 to end of June 2016: Drafting of Proposals by Subgroup, under supervision by CCWG-Accountability.
- June 2016 till early October 2016: 40-day Public Comment Period, including discussions during ICANN56 and/or ICANN57.
- October – mid-January 2017: Refinement of Proposals by Subgroups, under supervision of the CCWG-Accountability or other CCWG as appropriate.
- Mid-January – March 2017: Second 40-day Public Comment Period, including discussions during ICANN58.
- By end of June 2017: Finalize Proposals and deliver to Chartering Organizations.
- Obtain approval and deliver Proposals to ICANN Board at ICANN59.

## **4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

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- Interim Bylaws clarifications to address Board's concerns by highlighting that WS2 will be following similar rules as WS1: consensus recommendations, endorsement by Chartering Orgs, ability for the Board to engage in special dialogue, 2/3 threshold for such Board decision etc.
- Edits to the documents will include focus on fact that WS2 deliberations will be open to all (similar to WS1)
- List of WS2 items is “limited to” instead of “related to”. A note is added that clarifies that further items beyond this list can be accommodated through regular review cycles, or specific CCWG.
- Timeframe discussion: target dates are needed, but hard deadlines would not be appropriate or helpful.

- Agreed to incorporate PEG Advisor input to strengthen the diversity requirement
- Enhancing the Ombudsman role and function is confirmed as a WS2 item

## 5. Stress Tests Related to this Recommendation

- ST1
- ST2
- ST11

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

### 40 **Support and enhance the multistakeholder model.**

- In-depth review of diversity and SO and AC accountability is planned for Work Stream 2.
  - Addition of an Interim Bylaw will secure Work Stream 2 towards enhancing the general accountability framework.
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### 41 **Maintain the security, stability, and resiliency of the Internet DNS.**

- Accountability of SO and AC structures and their components will help ensure one entity cannot singlehandedly change or block a process.
  - Addressing the question of applicable law for contracts and dispute settlements.
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### 42 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- Analysis of transparency will help contribute to ensuring visibility is given into operations of ICANN.

- Development of a Framework of Interpretation for Human Rights Bylaw will help maintain limited scope of ICANN's Mission.
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43 **Maintain the openness of the Internet.**

- Consolidating, enhancing diversity and SO and AC accountability.
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44 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution**

- Transparency of interactions with governments is flagged as a topic to further explore.
-