

Comments by the Centre for Internet and Society on Draft New ICANN By-laws

- *To:* comments-draft-new-bylaws-21apr16@xxxxxxxxx
- *Subject:* Comments by the Centre for Internet and Society on Draft New ICANN By-laws
- *From:* Pranesh Prakash <pranesh@xxxxxxxxxxxxxx>
- *Date:* Sun, 22 May 2016 02:02:31 +0530

Please treat these as the final comments by the Centre for Internet and Society on the 'Draft New ICANN Bylaws'.

Submission by the Centre for Internet and Society on Draft New ICANN By-laws

Prepared by: Pranesh Prakash, Vidushi Marda, Udbhav Tiwari and Swati Muthukumar.

We at the Centre for Internet and Society are grateful for the opportunity to comment on the draft new ICANN by-laws. Before we comment on specific aspects of the Draft by-laws, we would like to make a few general observations:

Broadly, there are significant differences between the final form of the by-laws and that which has been recommended by the participants in the IANA transition process through the ICG and the CCWG. They have been shown to be unnecessarily complicated, lopsided, and skewed towards U.S.-based businesses in their past form, which continues to reflect in the current form of the draft by-laws.

The draft by-laws are overwrought, but some of that is not the fault of the by-laws, but of the CCWG process itself. Instead of producing a broad constitutional document for ICANN, the by-laws read like the worst of governmental regulations that go into unnecessary minutiae and create more problems than they solve. Things that ought not to be part of fundamental by-laws – such as the incorporating jurisdiction of PTI, on which no substantive agreement emerged in the ICG – have been included as well. Simplicity has been seen as a sin and has made participation in this complicated endeavour an even more difficult proposition for those who don't choose to participate in the dozens of calls held every month.

On specific substantive issues, we have the following comments:

Jurisdiction of ICANN's Principal Office

Maintaining by-law Article XVIII, which states that ICANN has its principal office in Los Angeles, California, USA, these Draft by-laws make an

assumption that ICANN's jurisdiction will not change posttransition, even though the jurisdiction of ICANN and its subsidiary bodies is one of the key aspects of post transition discussion to be carried out in Work Stream 2 (WS2). Despite repeated calls to establish ICANN as an international community based organisation (such as the International Red Cross or International Monetary Fund), the question of ICANN's future jurisdiction was deferred to WS2 of the CCWG-Accountability process. All of the new proposed by-laws have been drafted with the assumption that ICANN will indefinitely remain a California public benefit corporation. Examples of this include the various references to the California Civil Code in the by-laws and repeated references to entities and structures (such as public benefit corporations) in the fundamental by-laws of the ICANN that are predicated on Californian incorporation.

This would make redundant any discussion in WS2 regarding jurisdiction, since many aspects of jurisdiction are dependent on primary place of incorporation, and any changes to those cannot be implemented without upending the decisions relating to accountability structures made in WS1, and embedded in the by-laws.

CIS suggests a provision expressly be inserted in the by-laws to allow changes to the by-laws in WS2 insofar as matters relating to jurisdiction are concerned, to make it clear that there is a shared understanding that WS2 decisions on issues of jurisdiction should not be made redundant.

Jurisdiction of the Post-Transition IANA Authority (PTI)

The structure of the by-laws and the nature of the PTI in Article 16 make its Californian jurisdiction integral to the very organisation as a whole and control all its operations, rights and obligations. This is so despite this issue not having been included in the CWG report (except for footnote 59 in the CWG report, and as a requirement proposed by ICANN's lawyers, to be negotiated with PTI's lawyers, in Annex S of the CWG report). The U.S. government's requirement that the IANA Functions Operator be a U.S.-based body is a requirement that has historically been a cause for concern amongst civil society and governments. Keeping this requirement in the form of a fundamental by-law is antithetical to the very idea of internationalizing ICANN, and is not something that can be addressed in Work Stream 2.

CIS expressed its disagreement with the inclusion of the U.S.-jurisdiction requirement in Annex S in its comments to the ICG. Nothing in the main text of the CWG or ICG recommendations actually necessitate Californian jurisdiction for the PTI. Thus, clearly the draft by-laws include this as a fundamental by-law despite it not having achieved any form of documented consensus in any prior process.

This being a fundamental by-law would make shifting the PTI's registered and principal office almost impossible once the by-laws are passed.

No reasoning or discussion has been provided to justify the structure, location and legal nature of the PTI. The fact that the revenue structure, by-laws and other details have not even been hinted at in the current document, indicate that the true rights and obligations of PTI have been left at the sole discretion of the ICANN while simultaneously granting it fundamental by-law protection. This is not only deeply problematic on front of delegation of excessive responsibility for a key ICANN function without due oversight but also leads to situation where the community is agreeing to be bound to a body whose fundamental details have not even been created yet, and yet is a fundamental by-law.

CIS would therefore suggest that the PTI related clauses in the by-laws be solely those on which existing global Internet community consensus can be shown, and the PTI's jurisdiction is not something on which such consensus can be shown to exist. Therefore the by-laws should be rewritten to make them agnostic to PTI's jurisdiction.

Further, CIS suggests that the law firm appointed for PTI be non-American, since U.S.-based law firms capable law firms in Brazil, France, and India.

We would also like to note that we have previously proposed that PTI's registered office and ICANN's registered office be in different jurisdictions to increase jurisdictional resilience against governmental and court-based actions.

Grandfathering Agreements Clause

A fair amount of discussion has taken place both in the CCWG mailing list about Section 1.1 (d) (ii), which concerns the inclusion of certain agreements into the scope of protection granted to ICANN from its Mission and Objective statement goals. CIS largely agrees with the positions taken by the IAB and CCWG in their comments of demanding the removal of parts B, C, D E and F of Section 1.1(d) (ii) as all of these are agreements that were not included in the scope of the CCWG Proposal and a fair few of these agreements (such as the PTI agreement) have not even been created yet. This leads to practical and legal issues for the ICANN as well as the community as it restricts possible accountability and transparency measures that may be taken in the future.

CIS as its suggestion therefore agrees with the IAB and CCWG in this regard and supports the request by them that demand by these grandfathering provisions be removed.

Inspection Rights

Section 22.7 severely limits the transparency of ICANN's functioning, and we believe it should be amended.

(a) It limits Inspection Requests to Decisional Participants and does not allow for any other interested party to make a request for inspection. While the argument has been made that Californian law requires inspection rights for decisional participants, neither the law nor CCWG's recommendations require restricting the inspection rights to decisional participants. CIS's suggestion is to allow for any person in the public to make a request for examination, but to have to declare the nature of the public interest behind requests for non decisional participants, so that an undue number of requests are not made for the purpose of impairing the operations of the organisation.

(b) The unclear but extremely limited definition of 'permitted scope', which does not allow one to question any 'small or isolated aspect' of ICANN's functioning, where there is no explicit definition of what constitutes the scope of matters relevant to operation of ICANN as a whole, leaving a loophole for potential exploitation. CIS suggests the removal of this statement and to allow only for limitations listed in Section 22.7 (b) for Inspection Requests.

(3) There is no hard deadline provided for the information to be made available to the querying body, thus allowing for inordinate delays on the part of the ICANN, which is open to abuse. CIS suggests the removal of the clause 'or as soon as reasonably practicable thereafter' in this section.

(4) The need for insisting that the material be used only for restricted purposes. CIS suggests that as a step towards ICANN's transparency, it is essential that they allow the use of the information for any reason deemed necessary by the person demanding inspection. There is no clear reason to require restriction to EC proceedings for non-confidential material. This requirement should be removed.

Work Stream 2 Topics

Section 27.2, which covers necessary topics for WS2, currently does not include key aspects such as PTI documents, jurisdictional issues, etc. In this light, we suggest that they be included and a clause be inserted to indicate that this list of topics is indicative and the CCWG can expand the scope of items to be worked on in WS2 as well as make changes to work completed in WS1 (such as these by-laws) to meet WS2 needs as well.

FOI-HR

Section 27.3 (a) requires the FOI-HR to be approved by "(ii) each of the CCWG-Accountability's chartering organizations.." which is inconsistent with the CCWG proposal that forms the basis for these by-laws. The requirement of formal approval from every Chartering Organisation in the current draft is inconsistent with Annex 6 of the CCWG proposal, that has no such requirement.

CIS strongly advocates for a change in the bylaw text to align with the intent of the CCWG Accountability report, and to reflect that the process of developing the FOI-HR shall follow the same procedure as Work Stream 1.

Contracts with ICANN

Section 27.5 currently states that "Notwithstanding the adoption or effectiveness of the New by-laws, all agreements, including employment and consulting agreements, entered by ICANN shall continue in effect according to their terms."

As the section currently stands, there is a possibility that prior to the creation of by-laws, agreements that may be in contravention of the by-laws may be brought forth intentionally before the commencement of the operation of ICANN's Mission statement in the said by-laws. The clause may be updated as follows to avoid this -

"Notwithstanding the adoption or effectiveness of the New by-laws, all agreements, including employment and consulting agreements, entered by ICANN shall continue in effect according to their terms, provided that they are in accordance with ICANN's Mission Statement."