

CCWG-Accountability WS2 Plenary



18 October 2017
19:00 UTC

Agenda

- 1. Introduction, update to SOIs, reminder on standards of behavior**
- 2. Review of Agenda**
- 3. Administration**
- 4. Legal Committee Update**
- 5. Second reading of the draft recommendation of the Ombuds sub-group**
- 6. First reading of the final recommendations of the Transparency sub-group.**
- 7. Second reading of the final recommendations of the Human Rights sub-group.**
- 8. First Reading of the draft recommendation of the Jurisdiction sub-group.**
- 9. AOB**
- 10. Next Plenaries**
- 11. Adjournment**

ICANN Expected Standards of Behavior

Those who take part in ICANN's multistakeholder process, including Board, staff and all those involved in SO and AC councils, undertake to:



Act in accordance with ICANN's Bylaws. In particular, participants undertake to act within the mission of ICANN and in the spirit of the values contained in the Bylaws.



Adhere to ICANN's conflict of interest policies.



Treat all members of the ICANN community equally, irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation; members of the ICANN community should treat each other with civility both face-to-face and online.



Respect all members of the ICANN community equally and behave according to professional standards and demonstrate appropriate behavior. ICANN strives to create and maintain an environment in which people of many different backgrounds and cultures are treated with dignity, decency and respect. Specifically, participants in the ICANN process must not engage in any type of harassment. Generally, harassment is considered unwelcome hostile or intimidating behavior – in particular, speech or behavior that is sexually aggressive or intimidates based on attributes such as race, gender, ethnicity, religion, age, color, national origin, ancestry, disability or medical condition, sexual orientation or gender identity.



Protect the organization's assets and ensure their efficient and effective use.



Act fairly and in good faith with other participants in the ICANN process.



Conduct themselves in accordance with ICANN policies.



Support the maintenance of robust mechanisms for public input, accountability, and transparency so as to ensure that policy development and decision-making processes will reflect the public interest and be accountable to all stakeholders.



Listen to the views of all stakeholders when considering policy issues. ICANN is a unique multistakeholder environment. Those who take part in the ICANN process must acknowledge the importance of all stakeholders and seek to understand their points of view.



Work to build consensus with other stakeholders in order to find solutions to the issues that fall within the areas of ICANN's responsibility. The ICANN model is based on a bottom-up, consensus-driven approach to policy development. Those who take part in the ICANN process must take responsibility for ensuring the success of the model by trying to build consensus with other participants.



Promote ethical and responsible behavior. Ethics and integrity are essential, and ICANN expects all stakeholders to behave in a responsible and principled way.



Facilitate transparency and openness when participating in policy development and decision-making processes.



Act in a reasonable, objective and informed manner when participating in policy development and decision-making processes. This includes regularly attending all scheduled meetings and exercising independent judgment based solely on what is in the overall best interest of Internet users and the stability and security of the Internet's system of unique identifiers, irrespective of personal interests and the interests of the entity to which individuals might owe their appointment.

3. Administration

- **ICANN 60.**
 - Face to Face plenary is Friday 27 October 8:30 to 17:00 local time (04:30 – 13:00 UTC)
 - High interest presentation on WS2 Monday 30 October 10:30 - 12:00 local time (06:30 – 08:00 UTC).
 - **Note we need to have 1 rapporteur per sub-group present at this session to answer questions from the community.**
 - Rapporteurs please confirm your presence to staff by Thursday 19 October 23:59 UTC.
 - In cases where there are co-rapporteurs please confirm to staff which co-rapporteur will be delegated to answer questions with your confirmation of presence.

3. Administration

- **ICANN 61**
 - Reminder we will hold the usual pre-conference face to face on 9 March
 - Reminder of funding rules.
 - Confirmation of travel funding dates:
 - Begin accepting applications Thursday 12 October
 - Close applications Sunday 19 November 23:59 UTC
 - Submit final list to ICANN Monday 27 November

5.1 Ombudsman – changes since last

Second reading of the draft Recommendations – If it passes this second reading it will go to public consultation.

5.2 Ombudsman – changes

The IOO sub-group approved the objectives of all the recommendations made by the external evaluator but did modify some of the implementation requirements to allow for more flexibility and speed in implementation, especially when considering Bylaws changes. **It is also important to note that these do not modify the Charter of the Office of the Ombudsman (section 5.2 of the ICANN Bylaws) or the Jurisdiction of the Office of the Ombudsman as documented in the ICANN Ombudsman Framework.**

5.3 Ombudsman – Rec 5 and 7

- 5 - The ICANN Office of the Ombuds should establish ~~KPIs~~ **timelines** for its own handling of complaints and report against these on a quarterly and annual basis.

- 7 - The Office of the Ombuds should be ideally configured ~~(subject to practicality)~~ so that it has gender, and if possible other forms of diversity within its staff resources (The primary objective of this recommendation is to ensure that the community has choices as to whom in the IOO they can bring their complaints to and feel more comfortable doing so).

5.4 Ombudsman – Rec 8

- 8 - ICANN should establish an Ombuds Advisory Panel:
- Made up of 5 members to act as advisers, supporters, wise counsel for the Ombuds and should be made up of a minimum of at least 2 members with ombudsman experience and the remainder with extensive ICANN experience
 - The Panel should be responsible for:
 - Contribute to the selection process for new Ombuds which would meet the various requirements of the Board and community including diversity.
 - Recommending candidates for the position of Ombuds to the Board.
 - Recommending terms of probation to the Board for new Ombuds.
 - Recommend to the Board firing an Ombuds for cause.
 - Contribute to an external evaluation of the IOO every 5 years.
 - Making recommendations regarding any potential involvement of the IOO in non-complaint work based on the criteria listed in recommendation 11.
 - The Panel cannot be considered as being part of the Ombuds office and cannot be considered additional Ombuds, but rather external advisors to the office.
 - Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.

6. Transparency – Final Report

First reading of the final recommendations. If it passes this first reading it will be presented for a second reading at the face to face meeting 27 October.

6.2 Transparency – Changes to recommendations - DIDP

2) The DIDP should include a documentation rule whereby, if significant elements of a decision-making process take place orally, or otherwise without a lasting paper-trail, the participants should be required to document the substance of the conversation, and include it alongside other documentation related to this decision-making process.

~~2) The DIDP should include a duty to document, whereby ICANN staff are required to create and maintain full and accurate records, in an accessible form, so as to be able to be used for subsequent reference, containing adequate and proper documentation of the office or authority's organization, functions, policies, decisions, decision-making processes, procedures, and essential transactions.~~

4) The DIDP should impose clear guidelines on ICANN for how to process requests, including delegating a specific employee **or employees** ~~or team~~ with the responsibility of responding to DIDP requests, including a commitment to provide reasonable assistance to requesters who need it, particularly where they are disabled or unable to identify adequately the information they are seeking.

6.3 Transparency – Changes to recommendations - DIDP

5) The DIDP should commit to complying with requesters' reasonable preferences regarding the form in which they wish to ~~access~~ receive ~~the~~ information ~~under request~~ (for example, if it is available as either a pdf or as a doc), if ICANN either already has that information available in the requested format, or can convert it to the requested format relatively easily.

8) In cases where information subject to request is already publicly available, ICANN staff should direct requesters, with as much specificity as possible, to where the information may be found. ~~In other words, if the processing of a DIDP request reveals that the information has already been published, staff should include information about where this information may be found in their response to the requester.~~

6.4 Transparency – Changes to recommendations - DIDP

12) Where an exception is applied to protect a third party, the DIDP should include a mechanism **for ICANN staff to contact**ing this third party to assess whether they would consent to the disclosure.

15) ICANN should consider future processes to expand transparency at ICANN legal, including through clarification of how attorney-client privilege is invoked.~~The DIDP exception for attorney-client privilege should be narrowed so that information will only be withheld if its disclosure would be harmful to an ongoing or contemplated lawsuit or negotiation, and explicitly mandate the disclosure of broader policy-making advice received from lawyers.~~

6.5 Transparency – Changes to recommendations - DIDP

16) Wherever possible, ICANN's contracts should either be proactively dis-closed or available for request under the DIDP. The DIDP should allow ICANN to withhold information subject to a non-disclosure agreement, however such agreements should only be entered into where the contracting party satisfies ICANN that it has a legitimate commercial reason for requesting the NDA, or where information contained therein would be subject to other exceptions within the DIDP (such as, for example, where the contract contains information whose disclosure would be harmful to the security and stability of the Internet).

~~16) ICANN should consider adopting open contracting, whereby all contracts above \$5,000 are automatically disclosed, and non-disclosure clauses are limited in their application to the legitimate exceptions found in the DIDP.~~

6.6 Transparency – Changes to recommendations - II. Documenting and Reporting on ICANN’s Interactions with Governments

In the interest of providing the community greater clarity with regard to how ICANN engages government stakeholders³⁷ and to ensure that the ICANN community and, if necessary, the Empowered Community is fully aware of ICANN’s interactions with governments, the CCWG-Accountability recommends that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly (but no more than quarterly) basis:

- All expenditures **over \$20,000** on an itemized basis by ICANN both for outside contractors and internal personnel devoted to “political activities”³⁸ both in the U.S. and abroad

7.1 Human Rights FOI Final Report

Second reading of the final report. If it passes this second reading it will be accepted as such for the final WS2 report.

7.2 Human Rights FOI Final Report

Recap of major milestones:

- Sub-group approved draft recommendations for plenary consideration at its 2 December 2016 meeting.
- Plenary approved draft recommendations for public consultation at its 11 January 2017 meeting.
- Sub-group approves final recommendation for plenary consideration at its 29 August 2017 meeting. This includes:
 - Response to all public comments made on draft recommendations
 - Final recommendations with minority opinion.

7.3 Human Rights FOI Public Consultation on draft Recommendations

- 11 respondents
- No significant changes made to the draft recommendations
- Decision by the sub-group to not take on the comments from several governments generated a minority opinion.

7.4 Human Rights FOI – Proposed Compromise language

HUMAN RIGHTS SUBGROUP REPORT – COMPROMISE PROPOSAL

To be inserted in “Considerations” section of document in: *“Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw”* (proposed language in red):

7.5 Human Rights FOI – Proposed Compromise language

With regards to the UN Guiding Principles for Business and Human Rights, no consensus was reached as to their suitability for interpreting the Core Value. However with regard to the implementation of the Core Value certain aspects of the UN Guiding Principles for Business and Human Rights could be considered as a useful guide in the process of applying the Human Rights Core Value. There are certain Guiding Principles that may not be suitable for ICANN and others that might be applicable, depending on the circumstances. However, it is beyond the scope of this document to provide a detailed analysis of the Guiding Principles and their application, or not, in particular situations. To the extent that ICANN the Organization is a business, it could consider certain aspects of the Guiding Principles as a useful guide when applying the Human Rights Core Value to its business activities.

7.6 Human Rights FOI – Proposed Compromise language

In any case, a conflict between any Guiding Principle and an ICANN Bylaw provision or Article of Incorporation must be resolved in favor of the Bylaw or Article. The use of the Guiding Principles as potential guidance has to be carefully considered by each SO and AC as well as ICANN the organization.

The "UN Guiding Principles for Business and Human Rights" is a non-binding document developed to provide guidance for business organizations.

Foot note: The "UN Guiding Principles for Business and Human Rights" is a non-binding document developed to provide guidance for business organizations.

8.1 Jurisdiction – Draft Recommendations

First reading of the draft recommendations. If it passes this first reading it will be presented for a second reading at the face to face meeting 27 October.

If it fails to pass a second reading at the 27 October meeting it cannot be included in the final report.

If it fails to pass a first reading at the 18 October meeting it would require exceptional circumstances to have it pass a second reading at the 27 October meeting.

8.2 Jurisdiction – OFAC Recommendation

Comment regarding recommendation:

During the preparation of this Recommendation, the Subgroup considered an email where a registrar declined to do business with a potential reseller, based on the registrar's policy of not doing business with people with Iranian passports. The Subgroup also learned that this registrar, which had been registering domains for a number of Iranian nationals, refused to continue to do business with them. The Subgroup has concluded that, to the extent these instances are related to OFAC, the concerns raised by these instances are adequately covered in the Recommendation already without any additional changes. This is not in any way a comment on the validity of these particular concerns. The Subgroup will consider creating "stress tests" based on these scenarios.

8.3 Jurisdiction – OFAC Recommendation

- **ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses**

For ICANN to enter into a Registration Accreditation Agreement (RAA) with an applicant from a sanctioned country, it will need an OFAC license. Currently, “ICANN is under no obligation to seek such licenses and, in any given case, OFAC could decide not to issue a requested license.”

(Application Terms, Section 4) This uncertainty could discourage residents of sanctioned countries from applying for accreditation.

The Subgroup recommends that the above sentence should be amended to require ICANN to apply for and use best efforts to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN’s efforts, including ongoing communication with the potential registrar.

8.4 Jurisdiction – OFAC Recommendation

- **Approval of gTLD Registries**

In the 2012 round of the New gTLD Program, it was difficult for residents from sanctioned countries to file and make their way through the application process. The AGB (Applicant Guidebook) states: “In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.”

The Subgroup recommends that ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant is otherwise qualified (and is not on the SDN list). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

8.5 Jurisdiction – OFAC Recommendation

- **Application of OFAC Limitations by Non-US Registrars**

It appears that some non-U.S. based registrars might be applying OFAC sanctions with registrants and potential registrants, based on a mistaken assumption that they must do simply because the registrar has a contract with ICANN. Non-U.S. registrars may also appear to apply OFAC sanctions if they “cut and paste” registrant agreements from U.S based registrars containing OFAC provisions. While ICANN cannot provide legal advice to registrars, it can bring awareness of these issues to registrars.

The Subgroup recommends that ICANN clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

8.6 Jurisdiction – OFAC Recommendation

- **General Licenses**

OFAC “general licenses” cover particular classes of persons and types of transactions. ICANN could pursue general licenses to cover transactions integral to ICANN’s role in managing the DNS and contracts for Internet resources, e.g., registries/registrars entering into RAs/RAAs, Privacy/Proxy Accreditation, support for ICANN funded travelers, etc. This would enable individual transactions to proceed without needing specific licenses. A general license would be developed with the U.S. Department of the Treasury, which must amend OFAC regulations to add the new license. This regulatory process may be a significant undertaking.

The Subgroup recommends that ICANN take steps to pursue one or more OFAC “general licenses.” ICANN should first prioritize a study of the costs, benefits, timeline and details of the process. ICANN should then pursue general licenses as soon as possible, unless it discovers significant obstacles. If so, ICANN should report this to the community and seek its advice on how to proceed. If unsuccessful, ICANN needs to find other ways to remove “friction” from transactions between ICANN and residents of sanctioned countries. ICANN should communicate regularly about its progress, to raise awareness in the ICANN community and with affected parties.

8.7 Jurisdiction – Choice of Law

- **Choice of Law and Venue Provisions in the Registry Agreement**

The Subgroup identified several alternative approaches for the RA, which could also apply to the RAA:

1. **Menu Approach.**
2. **“California” (or “fixed law”) Approach.**
3. **Carve-out Approach.**
4. **Bespoke Approach.**
5. **Status Quo Approach.**

These are discussed on the following slides.

8.8 Jurisdiction – Choice of Law

1. Menu Approach. The Subgroup supports a “Menu” approach, where the governing law would be chosen before the contract is executed from a “menu” of possible governing laws. The menu needs to be defined; this could best be left to ICANN and the registries. The Subgroup discussed a number of possible menus, which could include (a) one country, or a small number of countries, from each ICANN Geographic Region, plus (b) the status quo (no choice of law) and/or (c) the registry’s jurisdiction of incorporation and/or (d) the countries in which ICANN has physical locations.

The Subgroup has not determined what the menu items should be, but believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA, which likely suggests having a relatively limited number of choices on the menu. The Subgroup has also not determined how options will be chosen from the menu, e.g., the registry could simply choose from the menu, or it could be negotiated with ICANN.

8.9 Jurisdiction – Choice of Law

2. **“California” (or “fixed law”) Approach.** A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.
3. **Carve-out Approach.** A third possible option would be a “Carve-Out” approach, whereby parts of the contract that would benefit from uniform treatment are governed by a uniform predetermined law (e.g., California) and other parts are governed by the law of the registry’s jurisdiction or by a law chosen using the “Menu” approach.
4. **Bespoke Approach.** In the “Bespoke” approach, the governing law of the entire agreement is the governing law of the Registry Operator.
5. **Status Quo Approach.** A fifth possible approach is to retain the status quo, i.e., have no “governing law” clause in the RAA.

8.10 Jurisdiction – Choice of Law

- **Choice of law provision in registrar accreditation agreements**

The options for the RAA are essentially the same as for the RA.

- **Choice of venue provisions in registry agreements**

Under the RA, disputes are resolved by “binding arbitration,” pursuant to ICC rules. The RA contains a choice of venue provision stating that the venue is Los Angeles, California as both the physical place and the seat of the arbitration.

When entering into contracts with registries, ICANN could offer a list of possible venues for arbitration rather than imposing Los Angeles, California venue. The registry that enters into a registry agreement with ICANN could then choose which venue it prefers at or before the time of execution of the contract.

8.11 Jurisdiction – Dissenting Opinions and other comments

- The Government of Brazil and Parminder have filed dissenting opinions and other comments.

9. AOB

10. Next Plenaries

- Face to Face - Friday 27 October 08:30 Local

Adjourned.