

Nominet Input and Feedback on the CCWG-Accountability Second Draft Report

Introduction

1. Nominet is the .uk Internet domain name registry. It also operates the .wales & .cymru gTLDs, and is a back-end provider for a number of Brand-gTLDs, an Emergency Back-End Registry Operator and an ICANN accredited registrar.
2. Nominet is an active participant in ICANN and is a member of the ccNSO and the GNSO Registry Stakeholder Group. As a company we have been active in the work of the cross-community working group on IANA stewardship transition for naming-related functions (CWG-Stewardship), and have followed carefully the discussions of the cross-community working group for enhancing ICANN accountability (CCWG-Accountability).
3. The following comments have been approved by Nominet's Board and are submitted by **Eleanor Bradley, Chief Operations Officer** on behalf of the company.

General Comments

4. We recognise that ICANN is at a major point in its evolution. The work of CCWG-Accountability is crucial in this process. We are pleased to note that we do not have any issues that would prevent us supporting the proposals, although we would welcome further improvements as identified below.
5. Nominet welcomes the open, thorough, careful and consensus-building approach that has been adopted in the preparation of the CCWG-Accountability second draft proposal (and, indeed, throughout the work of the cross-community working group). We strongly believe that the proposal provides a good basis on which to develop an enhanced accountability framework for ICANN both to support the transition of the IANA stewardship from the NTIA to the global multi-stakeholder community and to ensure the wider global accountability of the organisation with the ending of the ICANN-US Government Affirmation of Commitments.

Nominet's Comments on the First Draft Proposal

6. We noted in our submission on the first draft report that it was heavily reliant on complex formal mechanisms. We remain concerned that little in the current draft addresses the need to rebuild trust and confidence in ICANN. With the exception of proposed "settlement efforts" as part of the appeals mechanisms (paragraph 268 point 16 on page 41), we see little in the proposal that would seek to address concerns before it became too late.
7. As we will identify below, we believe that the detail in the different mechanisms provides some reassurance. However, we still recognise the risks associated with the use of the Community Powers, and in particular with recalling the entire Board of Directors, although we recognise that the Community Forum process might help address this, in particular weeding out frivolous use or attempts to undermine the organisation.
8. This proposal also pays little attention to the interests of parties that are not directly involved in ICANN and that might be seriously impacted by policy developed without their knowledge. We did not find any clear obligations either at the policy-development processes or at the implementation stages to do due diligence in identifying and reaching out to those who might be impacted by a decision. Deadlines for appeal, while necessary, could help entrench the advantages of ICANN community interests.

Does the CCWG-Accountability proposal enhance ICANN's accountability?

9. The draft proposal puts in place mechanisms that should provide a good measure for assuring ICANN's accountability in the future. While we still believe that the proposals could be improved by developing more practical and cooperative measures to address issues of operational accountability before they become serious concerns about confidence and trust, we acknowledge that these can and perhaps should be developed at the community level and by better Board outreach and interaction.
10. The work on mission, commitments and core values provides a good basis for building ICANN's enhanced accountability. We strongly support this analysis and the proposals in the draft. We would note two minor concerns:
 - a. Paragraph 187: we agree that ICANN is not, and should not be, a content regulator. However, we would not read into this any limitation on ICANN's responsibility not to undermine trust and confidence in the use of global identifiers. In other words, public interest commitments associated with gTLDs can still be agreed in line with community-identified concerns. Similarly, they could be proposed by gTLD applicants to meet market-specific needs. In both these cases, conditions can and probably should be built into the ICANN-applicant registry contract. This would be in line with ICANN's commitment to act in the public interest.
 - b. Paragraph 218: we regret the deletion of "that enhances consumer trust and choice" to qualify what "a healthy competitive environment in the DNS market" means. We hope that this does not undermine the importance of consumer interests in decisions related to improving competition in the market.
11. Designating the core value to "apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment" (paragraph 207) as a commitment is particularly important. However, this should not be applied to impose homogeneity that is not appropriate. So, for example, it should not seek to impose on ccTLDs the rules developed for gTLDs (recognising the national accountability that applies to ccTLDs). In addition, "documented policies" should be those agreed through recognised policy processes: as an example, ICP-1 should not be considered as a documented policy.
12. Considerable work needs to be done to ensure that ICANN meets the core value of "seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent" (paragraph 214). We note the analysis on diversity in chapter 8.1 and would agree that this is an important and urgent objective. There are significant barriers associated with the way that ICANN communicates – its documents are long, complex and stuffed with jargon and abbreviations that make them difficult for newcomers to understand; and open forum discussions can also favour native English speakers. Serious thought is needed to reduce "barriers to entry" and outreach is needed to encourage people to step up: it will not help diversity if we have too small a pool to draw on.
13. With the caveat in our input to the first draft, that high barriers to change bylaws might prevent necessary change, we support the notion of fundamental bylaws and we think that the bylaws identified in this draft are appropriate for such treatment. Similarly, the proposed process to change

fundamental bylaws (section 4.5, paragraphs 256-260) looks workable. The proposed “co-decision process” between the Board and the community could help ensure appropriate and necessary change.

14. Jurisdiction (p. 36 and section 11.3) is a complex issue. The proposal accepts the status quo for WS1 and we believe that, at least for the present, this is appropriate: we do not think that there is currently any consensus on a change of jurisdiction as part of this proposal. However, further analysis of the benefits of different jurisdictions could be useful and could be considered further as part of WS2.
15. Any decision on jurisdiction should be based on operational interests and benefits. We would oppose a change of jurisdiction that limited ICANN’s liability for the decisions or action that it takes or that changed the framework for operational integrity and the enhanced accountability framework. Any potential jurisdiction needs to be assessed against the impact a change might have on holding ICANN to account for its actions or have on the openness of the domain name system.
16. We welcome the introduction of “settlement efforts” as part of the appeals mechanisms (section 5 paragraph 268 point 16, page 41). We also welcome periodic review of the review processes, the introduction of clear processes, rules and timescales, and the introduction of precedential weight to ensure coherence between decisions. Consistency in decisions is important for justice to be done and to be seen to be done: should either party be able to appeal on grounds of inconsistency? It would be appropriate for the Panel to explain decisions how precedence had been considered.
17. We are neutral over the Community Mechanism as Sole Member model (section 6), although we recognise the benefits of not requiring communities to become legal persons (with issues for those SO/ACs that could not (or chose not) to become members).
18. The notice period for an SO/AC formally to accede to the CMSM would appear to be unnecessary and discriminatory: a community that had decided not to join because it did not think that it ought to intervene in the community process might well decide that it should do on issues of fundamental significance to its members. Could a process be adopted that would allow the SO/AC to opt in and out of votes? This would have the advantage of not automatically counting abstentions as opposition.
19. The proposal for an ICANN Community Forum (section 6.3) is good, and is in line with one of our comments in response to the first draft. A forum to promote discussion on the use of any of the community powers across the whole ICANN community should help the community as a whole to reach well-considered decisions about using its powers and ensure a common understanding of shared issues and points of disagreement. Opening the forum to a wider public would be helpful and providing an annual Public Accountability Forum could perhaps be used to encourage a wider range of views.
20. The CCWG-Accountability process should replace the AoC between ICANN and the US Government. The incorporation of the AoC reviews in the bylaws commit to putting the performance of ICANN and its accountability processes centre stage. However, ICANN is subject to numerous review processes and this can lead to review-fatigue: as such we support the idea of reducing the normal frequency of reviews from three to five yearly (paragraph 553). Given the significant changes proposed in the CCWG-Accountability’s recommendations, we would encourage an initial review no later than three years after the termination of the AoC, looking at progress in implementing reforms.

Are there elements of this proposal that would prevent you from supporting it?

21. No. We do not think that there is anything serious enough to prevent our support for the proposal. However, we do have some issues associated with some of the proposals where we would welcome additional discussion and safeguards
22. We welcome the role of the Community Forum (section 7) as part of specific Community Powers, but recognise that timescales for most of these processes are very short (paragraphs 369-372), which could limit the opportunity for meaningful discussions and inclusive participation. This could encourage gaming, or capture of, the process, or limit the opportunity for careful consideration of the issues. Given that many of the issues will be complex, a slower pace might be more appropriate (and be more likely to lead to a better outcome). In particular, we find it hard to see how the Community Forum would be able to contribute effectively in such a short timescale. Thought could be given to identifying appropriate deadlines for different circumstances. This could make the Community Forum role more useful and widen involvement beyond the few who are able to dedicate significant time to ICANN.
23. Clarification of the Community Powers to recall Board Directors is helpful: we are pleased that the current draft acknowledges the extreme nature of recalling the entire Board (paragraph 414) and the intention to develop community standards for Board members in WS2 (paragraph 413). However, for a recall of the entire Board, very tight deadlines for discussion could open the process to capture: for such a serious step, time limits could be set in the light of how much community discussion had already taken place, perhaps also invoking the Community Forum prior to the formal process being launched.
24. There do not seem to be any clear limits on how often the process to recall of the entire Board can be initiated. Given that this process by its nature will be very disruptive and could destabilise the organisation, and given that there is a process to remove individual directors, there should be quite strict limits on how frequently this particular measure can be invoked.
25. Staff accountability (section 8.2) should be the responsibility of the CEO. While we recognise that ICANN's staff provides a service to the community, and that the community might wish to flag serious concerns to the CEO, the accountability process should be through the CEO. Ultimately any breakdown of accountability and failure by the CEO to remedy such failings should be addressed by the Board. Failure by the Board to address issues with the CEO could then be raised by the community through one of the formal community mechanisms (if it cannot be addressed through one of the existing informal opportunities for discussion). Direct accountability of staff to the wider community is not healthy and neither is bypassing existing and normal chains of responsibility and we would caution against excessive community involvement in staff management issues..
26. That said, we would endorse recommendation 1 (paragraph 485), which calls for staff powers and requirements for Board approval to be documented. In recommendation 2, "the creation of a Code of Conduct, transparency criteria, training, and key performance indicators to be followed by Staff in relation to their interactions with all stakeholders" could also be useful.
27. The draft proposal correctly recognises that shifting the accountability of ICANN onto the community also throws into question the accountability of the SOs & ACs (section 8.3). However, limiting SO/AC accountability to their own constituency does not really meet concerns about ICANN's wider accountability and global public interest mandate. How do we recognise that the interests of members of ICANN constituencies will not always reflect wider public interest?

Does this proposal meet the requirements set forward by the CWG-Stewardship?

28. Overall we believe that the requirements identified by CWG-Stewardship are being addressed adequately and in line with its request. However, this will need to be confirmed by the CWG-Stewardship.
29. Including the rules defining the governance of the PTI and the structure of the CSC as fundamental bylaws is important: these mechanisms assure the day-to-day operation of the IANA post stewardship transition. For the CSC we would note that this organisation includes an operational element that might require amendment to the ccNSO and GNSO bylaws.
30. In dealing with the PTI (which will predominantly be through the ICANN-PTI contractual relationship), the accountability of the two parties should be clearly defined and related to where direct influence lies. This is probably most important in terms of the budget and resources for the PTI (or any future IANA functions operator). Defining the PTI budget is the responsibility of the PTI Board working with its customers. Hence the community right to veto the IANA budget should be very carefully defined to that this is at PTI level (eg, the PTI has not prepared a budget in line with customer expectations or requirements) or at the ICANN level should it refuse to provide the PTI with the resources it needed and which had been defined in a process with IANA customers. Undefined dual accountability could cause confusion or lead to repeated challenges.
31. Appeals affecting ccTLD delegation and redelegation issues (point 8 on page 40) need to be revisited by the ccNSO. Given the complexity of contested cases, and the importance in most cases of local decision processes, we would not wish to see a national decision overturned by an extraterritorial process. In previous consultations we have commented that any independent review or reconsideration should be limited to checking that due process has been followed and documented, and this remains our view. ICANN's role in this process also needs clarification, given that the process and decision-making role lie with the PTI. Any ICANN Board role should be agreed with the relevant direct customer community and specified in the PTI contract. We believe that the role should remain limited to assuring due process has been followed and is documented.