**Comment on the Third CCWG-Accountability Draft proposal on Work Stream 1 Recommendations**

After the ICANN Board’s intervention with respect to the Second CCWG-A’s proposal, the third proposal represents something of a compromise between the CCWG-A’s `Sole Member’ model of Accountability and the Board’s Multi-stakeholder Enforcement Mechanism (MEM) proposal. The third proposal settles on the `Sole Designator’ model of accountability. In order to assess whether this proposal meets the basic criteria of accountability, I propose to apply an accountability test to the third proposal. The test consists of six questions, as follows.

**Accountability Test**

The test is derived from the essential question of accountability: **who** is accountable to **whom**, for **what**, by **which** standards and **why**?[[1]](#footnote-1)

The test consists of six questions, as follows.

1. Is there an accountable actor clearly defined?
2. Is there an accountability forum, to which the accountable actor is responsive?
3. Is the relationship between the accountable actor and the accountability forum one of holding the accountable actor to account, where the accountability forum’s view is decisive? Or is the relationship merely advisory, where the accountable actor’s view ultimately prevails?
4. Is it clear for what issues the accountable actor is being held to account?
5. Is it clear by what standards the accountable actor is being held to account?
6. Are there clear reasons as to why the accountable actor is being held to account in the manner specified in the proposal?

**Ad Question 1**

The Board of ICANN, individually and severally, is the accountable actor. This is clearly defined.

**Ad Question 2**

The Empowered Community is the accountability forum. The Empowered Community consists of the three Supporting Organisations, the At-Large Advisory Committee and the Governmental Advisory Committee. As such it represents ICANN’s key stakeholders and with the inclusion of governments is multi-stakeholder in character. The ICANN Board will be required in the Bylaws to respond to the actions of the accountability forum, whether it agrees with the claims the Empowered Community makes or not. The ICANN Board as accountable actor will not be able to simply ignore the Empowered Community as accountability forum.

**Ad Question 3**

The accountability forum holds the accountable actor to account through exercise of the Community Enforcement Mechanism, based on the `Sole Designator’ model, which under California law, enables the Empowered Community to appoint or remove individual ICANN Board Directors or the entire Board. The accountability forum’s views and actions can be enforced in the Californian courts of law, and hence are decisive and not merely advisory. Equally the ICANN Board can defend its decisions in court. However, the proposal envisages this recourse to the courts as a last resort and provides for an extensive process through which the Empowered Community can exercise its accountability function through consensus and the steps laid down to engage, escalate and enforce in Recommendation #2.

**Ad Question 4**

The issues for which the accountable actor is being held to account are contained in seven community powers:

* Rejecting ICANN’s Strategic/Operating Plan and Budget and IANA Functions Budget
* Rejecting changes to ICANN Standard Bylaws
* Approving changes to Fundamental Bylaws and Articles of Association
* Removing individual ICANN Board Directors
* Recalling the entire ICANN Board
* Launching a Community Independent Review Process
* Rejecting ICANN Board decisions relating to IANA Functions, including the triggering of Post-Transition IANA Separation.

However, the proposal variously refers to five, six and seven community powers in its recommendations and diagrams. This needs to be clarified. But the point remains – there are clear issues for which the accountable actor is being held to account. They are not nebulous or excessive.

**Ad Question 5**

The Third Proposal takes a number of steps to clearly specify ICANN’s Mission, Commitments and Core Values and to constitute them as Fundamental Bylaws. This makes it clear to the accountable actor, the ICANN Board, by which standards they are being held accountable, were the Empowered Community as accountability forum to claim that they, individually or severally, were in violation of ICANN’s Bylaws. In addition, the proposal recommends reaffirming ICANN’s commitment to respect internationally recognised Human Rights as it carries out its mission. The proposal also makes recommendations on strengthening ICANN’s Independent Review Process and improving ICANN’s Request for Consideration Process, which are essential to ensure that the ICANN Board, as an administrative body, is alive to the requirements of fairness and administrative justice in its decision-making processes that affect the rights and interests of stakeholders. The proposal recommends incorporating the Affirmation of Commitments entered into by the US Government and ICANN into ICANN’s Bylaws.

**Ad Question 6**

The proposal makes it clear that in the absence of the existing relation of accountability between the US Government and ICANN, which the IANA transition will precipitate, the best form of accountability for the new independent ICANN will be accountability to the ICANN community. There is quite simply no other possible practical form of accountability available, especially since the US Government will not consider an intergovernmental multilateral approach, nor is individual direct membership of ICANN by Internet users globally a practical possibility.

Recommendation #10 recognises that the Supporting Organisations and Advisory Committees that constitute the Empowered Community need to enhance their own accountability and proposes that this be subject to regular review. Further steps regarding this are also put forward for consideration in Work Stream 2.

**In Conclusion**

The Third CCWG-Accountability Draft proposal on Work Stream 1 Recommendations does pass the Accountability Test here presented. I wish to commend all stakeholders for their dedicated participation in the complex and often trying process of developing the Third Proposal on Enhancing ICANN’s Accountability. It is a remarkable achievement of patience and consensus-building. However, I strongly advise that only minimal adjustments be made to the Third Proposal from here on in. In all complex multi-stakeholder processes, there is a limited window of opportunity to bring a process to completion. No process occurs in a vacuum. So attention needs to be paid to developments in the external environment as well as to the internal dynamics of the Cross-Community Working Group – maintaining a high level of mobilisation for an indefinite period is simply not feasible. To quote the I Ching hexagram 64:

Before completion. Success.

But if the little fox, after nearly completing the crossing,

Gets his tail in the water,

There is nothing that would further.

I recommend that the Third Proposal be submitted to the Chartering Organisations and the Board for their approval, so that there can be no further delay in finalising the proposal for submission to the US Government.

Willie Currie

An Advisor to the Cross Community Working Group-Accountability

December 18, 2015

1. M. Bovens, R.E Goodin & T. Schillemans. 2014. *The Oxford Handbook of Public Accountability.* Oxford University Press. [↑](#footnote-ref-1)