

Comments of the Noncommercial Stakeholders Group (NCSG) on “Enhancing ICANN’s Accountability”

This comment, initially drafted by ARTICLE 19, is supported by and submitted on behalf of the Non-Commercial Stakeholder Group (NCSG). NCSG is the voice of civil society and nonprofit organizations in ICANN’s domain name policy making organ, the Generic Names Supporting Organization. It is composed of two constituencies, the Noncommercial Users Constituency (<http://ncuc.org>) and the Not-for-Profit Operational Concerns Constituency (<http://www.npoc.org>), as well as a number of unaffiliated individuals. The NCUC and NPOC, both constituencies under the “NCSG umbrella”, consists of civil society members from 81 different countries, including organizations and individuals.

The NCSG welcomes the opportunity to discuss the ways in which ICANN’s accountability to the broader community should be enhanced. In this submission, we respond more specifically to the questions asked by ICANN as part of the present consultation process. Our responses are guided, among other things, by our longstanding expertise in Internet governance and human rights work.

- **What issues does the community identify as being core to strengthening ICANN’s overall accountability in the absence of its historical contractual relationship to the U.S. Government?**

ICANN is in many ways a unique organisation due to its ‘multi-stakeholder’ make-up. For this reason, traditional accountability mechanisms for international organisations, private companies or public bodies are ill-suited or, at any rate, extremely difficult to implement. The AOC bottom-up mechanisms are an essential part of accountability at ICANN, but they are far from sufficient to provide strong accountability. Indeed, the lack of strong accountability mechanisms is a well-known shortfall within ICANN.

Although efforts have been made to improve the organisation’s transparency and accountability over the years, this does not go far enough. In our view, ICANN must be made subject to external & independent oversight mechanisms in order to ensure meaningful accountability of its decisions. We suggest that this could be achieved by the creation of a new external, multistakeholder and independent body that would review the Board’s decisions & actions and respond to appeals subject to rules on standing and applicable grounds for review to be defined in the upcoming process. One important feature of such body would be that at a minimum no ICANN Board member or staff should be able to sit on it, in order to safeguard its independence. Whether that body should also include elected members of any of its Advisory Committees or Supporting Organizations should be the subject of further discussion.

- **What should be the guiding principles to ensure that the notion of accountability is understood and accepted globally? What are the consequences if the ICANN Board is not being accountable to the community? Is there anything that should be added to the Working Group’s mandate?**

Accountability is not simply a notion. It is a fundamental principle of governance that ensures that those who make decisions or take action are answerable for them. Transparency should be at the heart of any

accountability process. At the same time, for accountability to be meaningful, anyone affected by those decisions or actions must be able to challenge them, i.e. have a remedy, subject to rules on standing and applicable grounds for review to be defined during the upcoming process. Equally, such remedy must be accompanied by proportionate sanctions or damages where appropriate. Accountability also requires clear rules, transparent decision-making processes, the right to a remedy and appeals processes which are independent from the initial decision-maker.

Lack of accountability breeds mistrust and inefficiency. If ICANN fails to demonstrate its commitment to meaningful accountability, it may ultimately lessen the weight of the Board's decisions vis-a-vis ICANN's constituents, customers and other stakeholders when it makes controversial decisions. By contrast, the very existence of stronger accountability mechanisms is more likely to lead to better decision-making and therefore greater credibility and legitimacy of the organisation as a whole.

- **Do the Affirmation of Commitments and the values expressed therein need to evolve to support global acceptance of ICANN's accountability and so, how? How does the Affirmation of Commitments need to evolve to support global acceptance of ICANN's accountability, and who should take part in this AoC?**

We believe that several values expressed in the Affirmation of Commitments (AOC) should be maintained and supported. In particular, we support the commitments to: (a) preserve the security, stability and resiliency of the DNS; (b) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (c) facilitate international participation in DNS technical coordination.

At the same time, we believe that the AOC should be amended to ensure that ICANN's decisions are fully consistent with human rights standards. In this regard, ICANN should guarantee that decisions related to the global technical coordination of the DNS are made in a transparent and accountable manner and crucially, "for the protection and advancement of human rights and Internet freedoms" rather than "in the public interest", which is a standard that lacks sufficient specificity in this context.

Other aspects of the By-Laws could be amended to reflect the need for the organisation to evolve and provide stronger accountability mechanisms to the wider community. For instance, the By-Laws should be amended to prohibit ICANN from engaging in regulation of content or conduct in violation of the rights to freedom of expression or privacy. The AOC would need to review adherence to this prohibition.

Finally, we reiterate that whilst the AOC constitutes an important check on ICANN's decisions and actions, it is insufficient to provide the kind of external accountability that the organisation sorely needs.

- **What are the means by which the Community is assured that ICANN is meeting its accountability commitments?**

To begin with, it is vital that the consultation process on ICANN's accountability is conducted in a transparent & inclusive manner in order to give credibility to ICANN's commitments. Secondly, the process

whereby reform proposals are accepted must be both clear and ensure meaningful participation of all stakeholders concerned. Thirdly, as noted above, in order to achieve true accountability, ICANN must accept some form of external & independent check on its actions, including the Board. Consultative processes on accountability should extend beyond the ICANN community and into the broader Internet governance ecosystem.

In addition, existing accountability & transparency processes must be strengthened on several levels. We identify below a number of ways in which this could be achieved:

Transparency of Board decision-making processes

Accountability & Transparency Review Team 1 & 2 have both made a series of recommendations, some of which have not been implemented yet, including:

- The Board's decision should be both publicised and duly reasoned. Where decisions are not unanimous, the minority opinions should be documented and attributed.
- The Board should review redaction standards for Board documents, Document Information Disclosure Policy (DIDP) and any other ICANN documents to create a single published redaction policy. Equally, a process should be put in place to regularly evaluate redacted material to determine if redactions are still required and if not, ensure that redactions are removed.
- The Board should ensure the use of Transparency Metrics and Reporting.

We believe that these and other recommendations of the ATRT 1 & 2 teams are vitally important and should be duly implemented. If the Board rejects or fails to implement particular recommendations, it should be required to give reasons for its decision or inaction.

Strengthening the role and powers of the Ombudsman

At present, the ombudsman's jurisdiction is confined to complaints about unfair treatment by ICANN, decisions, actions or inactions of ICANN's supporting organisations as well as decisions, actions, or inactions by the Board of Directors that may be inconsistent with the Articles of Incorporation or the Bylaws. The Ombudsman has investigative powers but can only use alternative dispute resolution mechanisms to resolve complaints. It cannot reverse a decision of the Board, for instance, but may make a recommendation to the Board where appropriate. The Ombudsman's jurisdiction and powers are therefore extremely limited. In particular, the Ombudsman does not have the power to make, change or set aside a policy, administrative or Board decision, act, or omission.

In order to strengthen the powers of the Ombudsman, consideration should be given to granting it powers to set Board's decisions or policies aside. At the same time, if an external oversight body with more significant powers is put in place (e.g. with powers to set Board's decisions aside), the question arises whether the Ombudsman would still serve a useful purpose. In any event, to the extent that Ombudspersons are a useful alternative dispute resolution mechanisms before matters escalate further, one possibility might be able to give the Ombudsman powers to refer a matter to the external independent body.

The ombudsman should also have clear authority to investigate any complaint brought by an employee that is related to ICANN accountability. As with all Ombudsman investigations these investigations must maintain the confidentiality of the employee source.

Strengthening the role and powers of the Independent Review of Process Panel

As stated in ICANN's consultation document, the Reconsideration Process is a mechanism to challenge staff action taken against ICANN policies, or Board actions taken without consideration of material information or based upon false or inaccurate information. In addition, the Independent Review Process allows for claims that the ICANN Board acted in a manner inconsistent with its Bylaws or Articles of Incorporation to be considered by an independent panel of neutrals.

However, these mechanisms are in our view unsatisfactory, in particular:

- Reconsideration by the Board Reviewing Committee is not independent of the board.
- The outcome of the Reviewing Process carried out by the IRPP is purely declaratory. Moreover, its rules of procedure follow arbitration rules which are well-known for their lack of transparency. It is also unclear whether the IRPP gives reasons for its declarations.
- The cost of the IRPP is prohibitive for most causes.
- The current process is only effective in the event that malfeasance can be established and thus the standard for winning an IRP is too high of a burden to provide meaningful accountability.

Accordingly, we recommend that, at a minimum, the IRPP's decisions should be both binding and contain reasons, which should be made public as a matter of principle. In addition, the full review process should accounts for errors as well as ethical lapses.

More generally, we believe that mechanisms should be established in the by-laws for dissolution of the Board in exceptional circumstances, consistent with the President Strategy Committee's Draft Implementation Plan for Improving Institutional Confidence 2009.

- **Are there other mechanisms that would better ensure that ICANN lives up to its commitments?**

If ICANN's status as a private organisation is to be retained, consideration should be given to broadening the scope of the issues that can be taken up before the local courts, in particular issues relating to the right to freedom of expression, and the rights to privacy and personal security. Another possibility would be to include a unilateral option clause that would enable a choice between the local courts or arbitration proceedings.

- **What additional comments would you like to share that could be of use to the ICANN Accountability Working Group?**

We note that the creation or improvement of strong accountability mechanisms are inextricably linked to the IANA transition process. In fact, as we stated in our response to the IANA transition consultation: “Absent the ability to openly discuss separation of policy and implementation, completing the IANA transition proposal must be contingent on first completing an acceptable proposal addressing ICANN accountability.” Therefore, we very much hope that, at a minimum, the present contribution will be taken into account as part of the IANA transition consultation.

Thank you for the opportunity to comment. The NCSG looks forward to further contributing to the development of strong accountability mechanisms both within and outside of ICANN.