# Comments on the Cross Community Working Group (CCWG) on ICANN Accountability's Initial Draft Proposal for Public Comment

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The CCWG has strived to confront many of ICANN’s key accountability problems and on the whole it is making tremendous progress toward that goal. In these comments, I address the proposal’s treatment of ICANN’s mission and scope, its amendments to the independent review process, and its membership proposal. On the first two points, I largely agree with what the CCWG proposes; on the third (membership) I think you need to make some major revisions.

# Mission

Clearly defining ICANN’s mission and putting into place efficient and effective institutional mechanisms for enforcing those limitations is the most important element of the ICANN accountability reforms.

I applaud the recognition that ICANN’s Mission does not include the regulation of services that use the DNS or the regulation of the content these services carry or provide. I hope this can serve as a strong constraint on existing and future ICANN contracts, some of which already violate that principle. I also agree with the CCWG’s recognition that the existing bylaw language regarding the application of ICANN’s Core Values is weak and permits ICANN to exercise excessive discretion.

That being said, there are still elements in the draft that lend themselves to an expansive mission. In paragraphs 69-110, there are many references to furthering “the public interest.” These references need to be modified to refer only to a “public interest in the openness, interoperability, resilience, security and/or stability of the DNS” or a “public interest goal within ICANN’s mandate.”

Paragraph 107, which was intended to encourage ICANN to rely on competition and market mechanisms rather than top-down regulation, has also been altered in a way that suggests a more expansive vision of ICANN’s remit. The addition of the concepts “healthy” and “enhances consumer trust” introduce vague criteria that differ from and may contradict competitive market criteria. The addition of “consumer choice” is unnecessary as that value is already encompassed by a commitment to competition. In general, I prefer the original wording, with the exception of adding “in the DNS market.”

Paragraph 110 fundamentally misrepresents the role of governments in ICANN. Currently it says that “governments and public authorities are responsible for public policy.” As ICANN deals with a global arena, it should say that “governments and public authorities are responsible for public policy *in their jurisdictions*.” We also believe that the phrase “duly taking into account the public policy advice of governments” should be changed to “duly taking into account the advice of the GAC,” as it is GAC and not “governments” that formally provide advice to the board under the bylaws, and not all of its advice deals with public policy.

# Independent Review Process

I agree very strongly with the purposes of the IRP as enumerated in 133. I also agree with a standing IR Panel, though I am concerned about the selection of the standing panel by ICANN itself. The mechanisms of community approval need to be better specified, and I would suggest a veto process, similar to *voir dire* challenges in U.S. jury selection, that allows minority interests to reject judges they view as biased or inimical to their interests.

We need to know more about what kind of challenges would be reserved to members and which would be open.

My biggest concern here is that the CCWG proposal presents the IRP as something that can prevent mission creep and other violations of ICANN’s mission and core values. To make ICANN accountable for actions that exceed the scope of its Mission, the CCWG should consider having the IRP provide a means of challenging actions that expand or deviate from ICANN’s mission simply because they exceed its scope, not just because they have a negative “material affect” on the challenger. Either that, or ICANN-created restrictions on fundamental rights such as freedom of expression or privacy, must be considered “material effects” and so specified in the proposal.

# Membership

I believe that this plan does not yet have a coherent and workable concept of membership. The draft has not made clear the full implications of selecting one of the two membership models considered by the CCWG (the designator model and the SOAC Unincorporated Association model). While it expresses a preference for the SOAC model, it is not entirely clear how that model would be implemented nor how it could be implemented without major realignments of power within ICANN that are unpredictable.

The other problem with the membership proposal is the radical and rather odd rebalancing of voting power within ICANN that it proposes. Assigning an equal number of votes to GNSO, ccNSO, ASO, ALAC and GAC seems like an unfair allocation of voting power and one that works against aligning accountability with the stakeholders.

When it comes to membership, it seems incongruous to this veteran of ICANN’s policy making process to consider Advisory Committees members of the same status as Supporting Organizations. With the separation of IANA and ICANN proposed by the CWG-Stewardship, ICANN is now more focused, as it should be, on policy development for domain names. This means that the two names-oriented Supporting Organizations, the ccNSO and the GNSO, are the key arenas for policy development in the new ICANN environment, and thus they are the stakeholders with the greatest interest in ensuring that the ICANN board is held accountable. ICANN’s role as the ratifier of global policies for numbers also justifies a membership status for the ASO, as the ASO represents an extensive global community for policy development organized around Regional Internet Registries. A membership proposal that assigned 5 votes to ccNSO, GNSO and ASO makes sense.

It is the ACs that don’t really make sense in this scheme. Providing two votes to a highly technical committee whose membership is appointed by the ICANN board (SSAC) seems obviously wrong. If members are the key stakeholders for holding the board accountable, why do we have board-appointed committees afforded special membership powers? Both GAC and ALAC are also outliers in this proposal. Although one could make some case for considering ALAC a member, because it does select board members under the current regime, in terms of membership and participation ALAC is about the size of a single Stakeholder Group in the GNSO. Giving it the same weight as either GNSO or ccNSO seems woefully unbalanced. If it is to be considered a member at all it should be only two votes as proposed for the RSSAC.

It seems especially incongruous to have the Governmental Advisory Committee become a member entity equivalent to a supporting organization. The GAC does not select board members and is barred from doing so by the current bylaws. The GAC is not supposed to be a policy development entity (although it oftentimes does not seem to understand that itself), but a provider of advice to the board on the policies developed by the bottom up process. The legal status of a collection of national governments and Intergovernmental organizations forming an unincorporated association under the umbrella of ICANN seems extremely odd, and will probably prove to be unacceptable to the GAC itself. In short, the proposed membership allocation does not make sense and needs to be rethought.