

**Submission by LINX in reply to
ICANN CCWG-Accountability First Public Comment**

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I. About LINX

1. LINX, the London Internet Exchange, is a membership association for network operators and service providers exchanging Internet traffic. It is part of our core mission to represent our members' interests in public policy.
2. With over 600 member organisations, including most major UK ISPs and most formerly-incumbent European operators, we believe we have highly informed expertise and are well placed to reflect the views of the UK ISP industry as a whole.

II. Responses to questions

Preliminary Question: Overall sufficiency

3. **We have confidence that if implemented fully, incorporating the changes to the CCWG proposals that we suggest below, the total package would provide sufficient enhancement to ICANN's accountability for us to support IANA Stewardship transition.**
4. We would like to emphasise that this support relies upon the existence of effective, credible, independent and enforceable mechanisms to adjudicate claims that ICANN has acted contrary to its Bylaws and, in particular, that it has acted outside its Mission, and to ensure corrective action in the event of a finding against ICANN.
5. We note that the mechanism to achieve ultimate enforceability, namely the creation of a membership model, members of which would have standing in court, is neither fully developed nor agreed in principle within the CCWG. Though we have our own doubts about whether the Reference Model is the best that can be achieved, this concern is not fundamental. What is fundamental is that the accountability changes must be legally binding and ultimately enforceable.
6. If ICANN were able to disregard its own Bylaws, or disregard IRP rulings against it (whether arbitrarily, citing a broader public interest, or even in response to the Board's understanding of its own fiduciary duty diverging from the Bylaws), then there would be no accountability worth the name. **We would not be able to support IANA Stewardship transition unless credible, independent, binding and enforceable accountability mechanisms are created.**

Revised Mission & Core Values

7. **(Questions 1a,5)** For us to support NTIA transition we need to be satisfied that ICANN cannot leverage its authority over the specified unique Internet identifiers, and particularly its policy-making authority over generic top-level domains, to achieve a general regulatory power over Internet users, behaviour and content, beyond that necessary to achieve the secure, reliable continued operation of those critical identifiers. We will only be able to support the end of NTIA's role as redress of last resort if we are satisfied that there is clear statement of the intended scope of ICANN's authority, and an effective, credible and enforceable mechanism to limit ICANN's activities to its intended scope. Accordingly, for us, this question has primary saliency.
8. **(Question 1a)** We consider it essential that ICANN adopt a Mission in its Bylaws that is sufficiently clear to be justiciable – that is, for an independent body to objectively rule on whether a particular action is authorised by the Mission or is *ultra vires*.
9. **(Questions 1a,1b)** We congratulate the CCWG on identifying this issue and proposing changes that we believe are necessary.
10. **(Question 1b)** In particular, we emphasise the importance of the following points:
 - a. We support the clarification that ICANN's Mission is limited to the enumerated powers, and we agree with the CCWG's proposed statement of what the Mission is.
 - b. We support the inclusion of an explicit statement 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.
 - c. We congratulate the CCWG on finding an imaginative way to identify certain Core Values as "Commitments" that should be adhered to absolutely, without need to balance against each other, while others may involve trade-offs. We support the chosen Commitments.
11. **(Question 1b)** We are a little concerned by the reference to the "global public interest" in paragraph 105.
 - a. We would strongly object to the inclusion of a general, unqualified commitment to the "global public interest" as this amounts to a general authorisation for the decision-maker to do whatever they feel is best in their almost unconstrained discretion. That would be inappropriate.
 - b. Paragraph 105 qualifies the "global public interest" with "identified through the bottom-up, multistakeholder policy development process and are accountable, transparent, and respect the bottom-up multistakeholder process".
 - c. In our view this improves the term, but still risks asking the ICANN community, through the PDP, to seek to fix all the troubles in the world, and inviting them to take ICANN beyond its defined mission in pursuit of the global public interest as the ICANN community sees it. We would therefore remove the reference to "the global public interest" in Paragraph 105.

Fundamental Bylaws

12. **(Question 3a)** We support the introduction of Fundamental Bylaws.
13. **(Question 3b)** We agree with the CCWG's selection of bylaws for "Fundamental" status and do not identify any omissions.
14. **(Question 3b)** We caution against excessive use of "Fundamental" status: ascribing bylaws 'Fundamental' status recklessly would force the community to use what is intended to be an exceptional mechanism more routinely. This would weaken the protection for those bylaws that do deserve entrenchment. We therefore advise approaching with caution any recommendations to give additional bylaws fundamental status.
15. **(Additional Question)** We believe the threshold suggested by CCWG for changing Fundamental Bylaws is appropriate.
16. **(Additional Question)** We are willing to be persuaded that a mechanism should be created for the Community to add or amend Fundamental Bylaws, but this should be subject to a very high threshold *within* each community. Merely requiring the unanimous support of all SOACs should not be sufficient (or perhaps even necessary): if there is only a bare majority within GNSO this should not be sufficient.

Independent Review Panel Enhancement

17. **(Questions 1,4a)** For us to support NTIA transition we need to be satisfied that ICANN cannot leverage its authority over the specified unique Internet identifiers, and particularly its policy-making authority over generic top-level domains, to achieve a general regulatory power over Internet users, behaviour and content, beyond that necessary to achieve the secure, reliable continued operation of those critical identifiers. We will only be able to support the end of NTIA's role as redress of last resort if we are satisfied that there is clear statement of the intended scope of ICANN's authority, and an effective, credible and enforceable mechanism to limit ICANN's activities to its intended scope.
18. **(Question 4a)** Broadly, we support the changes proposed by the CCWG to the IRP.
19. **(Questions 4a,4b)** In particular, we emphasise the importance of the following changes, which we consider essential to support NTIA transition:
 - a. Empowering **both** the community and individuals to bring an IRP case alleging *ultra vires* activity by ICANN, to prevent mission creep, enforce compliance with established multistakeholder policies, provide redress for due process violations, and protect the multistakeholder process through meaningful, affordable, access to expert review of ICANN actions. We cannot stress the importance of this strongly enough.
20. **(Questions 4b)** We do question the following:
 - a. The reservation of certain issues to "Members of ICANN" alone.
 - b. While we recognise that we cannot, in law, allow the IRP to "*address matters that are so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board*", we consider

the aim should be to minimise the range of matters to which this can apply, including by taking steps that would place the Board under a legal duty to follow the IRP.

- c. The IRP, not the Board, should determine what is excluded from its remit on this heading. If the Board disagrees with an IRP decision to rule on these grounds, it will disapply the IRP's ruling: this will discourage the Board from making excessive and unreasonable (and unreviewable) claims regarding its fiduciary duties.

21. Composition of Panellists, Size of Panel, Independence

- a. **(Question 4b)** We recommend that the Bylaws incorporate a duty on ICANN to appoint additional members to the Standing Panel as needed in order to prevent undue delay in IRP cases being heard.
- b. **(Question 4b)** We believe that geographic and cultural diversity of panellists is desirable in order to achieve confidence in the legitimacy of the IRP, but not at the expense of effectiveness. Especially given the very limited number of panellists proposed, we would caution against any hard rules in this regard. However, we do support a provision that geographic diversity should be taken into account when making panel selections.
- c. **(Question 4b)** We also consider that prospective panellists should only be eligible for appointment if they are willing to confirm their commitment to the Core Values. This would allay any (no doubt unwarranted, but nonetheless corrosive) suspicions that cultural diversity would lead to a lessened commitment to those Core Values.
- d. **(Question 4b)** To preserve the independence of IRP panellists, we recommend that their term should be quite long (e.g. seven years) –they can of course resign early if they so wish – and that they be barred from reappointment. The bar on future appointments to positions within ICANN should be designed to prevent them taking other remunerated work from ICANN, during or after the conclusion of their term (e.g. consultancy work), with a savings clause permitting them to undertake (after their term concludes) paid review of the effectiveness and sufficiency of the IRP process itself.
- e. **(Question 4b) Timeliness of IRP complaints.** Rules introducing time bars for IRP complaints should not prevent parties from bringing a complaint promptly when they are first affected by an ICANN action merely because that action occurred long ago.
 - i. For example, suppose that ICANN introduced a policy that no gTLD should be registered to persons engaged in the farming of sturgeon. If sturgeon farmer wished to challenge this policy as contrary to the Bylaws, *ultra vires* the Mission (regulating activities of domain registrants for purposes not connected with the DNS) and contrary to the Core Values (discriminatory), then the relevant time period should commence when the sturgeon farmer was denied a registration, not when ICANN (unbeknownst to the farmer) introduced the policy.

Reconsideration Process

22. **(Question 5).** We support the CCWG’s proposals regarding the reconsideration process.
23. **(Question 6).** No comment.
24. **(Question 7).** No comment.

Mechanisms to empower the community

25. **(Question 8)** We support the creation of new accountability powers for the community, and there needs to be some mechanism to utilise them.
26. **(Question 9)** It seems likely that the community powers could be more simply and transparently exercised by the SOACs directly than via the Reference Model, which seems unnecessarily complicated.
27. **(Question 9)** However, it appears the creation of “Membership” is necessary and unavoidable in order for the Bylaws to be binding on ICANN and enforceable, which is absolutely essential; concerns about complexity in some areas must not cloud the absolute requirement for ultimate enforceability.
28. **(Question 9)** We recommend that the CCWG consider granting the community powers to be exercised by SOACs directly, leaving only the power of enforcement to members (and putting in place whatever is needed to limit the powers of membership to enforcement of the Bylaws / of key bylaws). If this were done, we suggest that membership of ICANN could be offered to any person (natural or legal) who chose to apply for it. We are aware that this idea has had no traction within the CCWG so far, but it would appear to solve a difficult problem, and we are unaware of any convincing (or even reasoned) argument being made that it would cause any harm itself.
29. **(Question 10)** No comment.

Community Powers

30. For us to support NTIA transition we need to be satisfied that ICANN cannot leverage its authority over the specified unique Internet identifiers, and particularly its policy-making authority over generic top-level domains, to achieve a general regulatory power over Internet users, behaviour and content, beyond that necessary to achieve the secure, reliable continued operation of those critical identifiers. We will only be able to support the end of NTIA’s role as redress of last resort if we are satisfied that there is clear statement of the intended scope of ICANN’s authority, and an effective, credible and **enforceable** mechanism to limit ICANN’s activities to its intended scope.
31. In our view, the proposed changes to the IRP would achieve this goal, provided that the Board abides by IRP decisions. This gives rise to a requirement for two things, **both** of which are essential:
 - a. A mechanism by which the Board becomes legally obliged to abide by IRP decisions, as opposed to having a fiduciary duty to prefer its own opinions of what is best for ICANN over IRP rulings; and

- b. A mechanism whereby a Board that failed to abide by IRP rulings (or other specifically enumerated community powers, such as a Board spill), for any reason, could be challenged in court and a decision enforced upon it.
32. CCWG proposes four powers for the community: (i) Reconsider/Reject Budget or Strategic/Operating Plans; (ii) Reconsider/Reject Changes to ICANN Bylaws; (iii) Approve Changes to Fundamental Bylaws; (iv) Remove Individual Directors; (v) Recall Entire ICANN Board.
33. **(Question 11)** We are doubtful of the value or effectiveness of the power to reconsider/reject the Budget and Strategic/Operating Plans, but we are not strongly opposed to this power as designed. We would be opposed to greatly strengthening it.
34. **(Questions 12a, 13a, 14a, 15a)** **We strongly support the existence of the remaining powers.**
35. **(Question 12b)** We believe a time limit of two weeks to coordinate all the necessary parties to exercise the power to reconsider/reject changes to ICANN Bylaws is much too short. We suggest instead that the deadline should be the end of the next ICANN meeting that begins no sooner than one month after the Board posts notice of adoption. A bylaws provision could allow the Board to treat a Bylaws change as presumptively effective from the moment it posts notice of adoption, even though time window for the community to reject it remains open.
36. **(Question 15b)** **We believe the threshold to spill the entire ICANN Board is too high:**
- a. ICANN interacts with the different communities (Numbers, Country-Code Domains, Generic Domains, IETF) in different ways.
 - b. Some of those communities (Numbers, IETF) have additional accountability mechanisms already to preserve their independence from ICANN. The ccTLD community is likely to acquire new such mechanisms as a result of Transition.
 - c. We do not question, and indeed support, these distinctions. Nonetheless, it does mean that the gTLD community is the one that is most likely to ever need to exercise the extraordinary power to spill the ICANN Board.
 - d. We do not think the power to spill the Board should be exercised lightly, and support the requirement for a high threshold within a given community.
 - e. However, in the event that the unanimous decision of the gTLD community were to ask for a Board spill, we think it untenable and highly destabilising to ICANN that the Board remain in place merely because the ccTLD community and the numbers community were not affected by the cause of the gTLD community's complaint.
 - f. To be clear, a choice must be made: either it must be possible for one or more of the SOs to be forced to accept the continuation in office of a Board in which it has utterly lost confidence, or it must be possible for one or more SOs to be forced to accept that a new Board will be required, even though it was content with the existing one. Neither situation is desirable, the only question is which would be worse.
 - g. **In our judgement, it is far worse to impose on an entire community a Board that is unacceptable to it, than to require a community to select alternative nominees from the huge range available to it. The continuation in office of a Board that was unacceptable to gNSO would pose grave existential risk to the future of ICANN.**

- h. Accordingly, we recommend that any single SO should be able to dismiss the entire ICANN Board if it passes a vote of 'No Confidence' by a high threshold within itself (e.g. 75% or 80%).

Affirmation of Commitments

- 37. **(Question 16)** As noted in response to Question 1b, we support the CCWG's proposed changes to the Core Values. We have no other comments regarding the incorporation of items from the Affirmation of Commitments.
- 38. **(Question 17)** No comment.

Stress test items

- 39. **(Question 18)**
 - a. **GAC Advice.** We support the proposal that special Board procedures for GAC advice should only apply in respect of advice support by a consensus in GAC. We understand this to be the intent of the current provisions and current practice, and so we regard this as simply a useful clarification.