

auDA comments on the Draft Report of the Cross Community Working Group on Enhancing ICANN Accountability

Introduction

.au Domain Administration (auDA) is the industry self-regulatory, not-for-profit manager of Australia's ".au" country code Top Level Domain. auDA is an active participant in ICANN and regularly contributes to deliberations and policy development within the ccNSO.

auDA welcomes the opportunity to provide input to the Draft Report of the Cross Community Working Group on enhancing ICANN Accountability (CCWG)¹.

auDA welcomes the work of the CCWG and, specifically, the significant efforts of the group to deliver an appropriate model for ensuring the ongoing accountability of ICANN's operations beyond the upcoming transition of the IANA naming functions from the oversight of the US Government.

auDA welcomes the CCWG's methodical efforts in attempting to meet its goals. auDA also agrees with the key "building blocks" that the CCWG has identified as the basis for ICANN's future accountability. Further, auDA supports the use of "fundamental bylaws" as a suitable mechanism for ensuring this, and the areas these bylaws are proposed to cover.

However, auDA does not support the CCWG's assertions regarding how these principles and goals should be implemented. In auDA's view the CCWG has developed a solution that gives rise to a number of new complexities and questions, and which may not deliver the most effective and efficient outcome regarding the future accountability of ICANN.

In light of this, auDA invites the CCWG to revert to its initial statement of principles and goals and reconsider alternative solutions².

¹ <https://www.icann.org/en/system/files/files/cwg-accountability-draft-proposal-with-annexes-04may15-en.pdf>

² Consistent with Paragraph 728 (10.2 Next steps) of the CCWG's Draft Report

auDA comments on the CCWG's methodology and principles

auDA welcomes and supports the CCWG's approach in attempting to deliver a model for the accountability of ICANN both at the time of transition from the stewardship of the US Government, and into the future.

From a methodological perspective, auDA agrees that it was appropriate for the CCWG to take stock of existing arrangements and the community's views of them, assess goals for the future and undertake testing to see whether proposed changes will deliver significant, sustainable improvements.

In particular, auDA agrees that it was appropriate for the CCWG³ to:

- Identify an inventory of existing accountability mechanisms;
- list contingencies ICANN must be safeguarded against; and
- develop a set of stress tests to assess whether the CCWG's proposed architecture protects against these contingencies.

auDA also agrees with the CCWG's assertion that "accountability" is comprised of a series of dimensions: transparency, consultation, review and redress⁴.

In its Draft Report, the CCWG identified⁵ four "building blocks" as principles that will underpin future ICANN accountability. These are:

- Principles that form the Mission and Core Values of ICANN;
- The Board of Directors;
- An empowered community; and
- Independent appeal mechanisms

Once again, auDA supports these principles.

³ As identified in Paragraph 06 of the CCWG's Draft Report

⁴ As identified in Paragraph 33 of the CCWG's Draft Report

⁵ Summarised in Paragraph 09 and explained in Paragraphs 926-929 of the CCWG's Draft Report

auDA comments on the CCWG's implementation details

Strengthening of existing mechanisms

auDA believes that the most efficient and effective method of implementing the principles and goals identified by the CCWG would be the refinement and strengthening of mechanisms that already exist in ICANN's governance and operational environment.

Many have been developed by the community (or received input from the community) and have been used by ICANN for a number of years as part of existing commitments to accountability and transparency. They are well-established and well-developed and therefore form a logical basis for future work.

auDA notes that the CCWG proposes a number of improvements to these mechanisms and functions and encourages the group to make these areas its primary focus as it finalises its recommendations.

Examples of the types of changes we are referring to include:

- Improvement and strengthening of ICANN's Request for Reconsideration process⁶, including a significant expansion in scope;⁷
- Bolstering the process for Independent Review⁸ to hold ICANN to a "substantive standard of behaviour rather than just an evaluation of whether or not its action was taken in good faith".⁹ That these review processes are proposed by the CCWG¹⁰ to be binding upon the ICANN Board, is a welcome improvement; and
- Refinement in the role of the ICANN Ombudsman¹¹ including direct preliminary involvement in the reconsideration process¹² (replacing the current role of ICANN's legal team).

⁶ Article IV Sec 2 of [ICANN's Bylaws](#)

⁷ Introduced by the CCWG in paragraph 13 and expanded upon in Section 4.2 (para 138)

⁸ Article IV Sec 3 of [ICANN's Bylaws](#)

⁹ Section 4.1 Paragraph 131 of the CCWG's Draft Report

¹⁰ Paragraph 133 of the CCWG's Draft Report

¹¹ Article V of [ICANN's Bylaws](#)

¹² Paragraphs 139 and 149 of the CCWG's Draft Report

Introduction of "fundamental bylaws"

auDA supports the concept of utilising "fundamental bylaws" as another mechanism for facilitating accountability. As stated by the CCWG:

*". . .some aspects of ICANN's Bylaws should be **harder to change** than others. These would be deemed Fundamental Bylaws. The Mission, Commitments, and Core Values of ICANN, or core features of the accountability tools set out in this Report, would be examples of things that the Board on its own should not be able to change"¹³*

auDA notes that the concept of fundamental bylaws that restrict the ICANN Board's ability to change these tenets is similar to the "golden bylaws" concept auDA proposed as part of our initial response to the consultations of the CWG on IANA transition.¹⁴ Although the foci of the CWG and CCWG differ, auDA supports the concept of using such mechanisms as the primary tool for delivering accountability.

Further, auDA supports the list of items that the CCWG proposes could be afforded coverage by fundamental bylaws:

- *The Mission, Commitments and Core Values,*
- *Independent Review Process,*
- *the power to veto non- fundamental bylaws,*
- *reviews required by the CWG*
- *New community powers such as recall of the Board¹⁵*

However, auDA notes the CCWG's observation that the language for underlying Bylaw provisions has not yet been reviewed by Legal Counsel and "*. . . is only conceptual in nature at this stage. . .*"¹⁶ and, accordingly, welcomes the opportunity to provide additional / revised commentary once such advice has been provided and analysed.

¹³ Paragraph 120 of the CCWG's Draft Report

¹⁴ <http://forum.icann.org/lists/comments-cwg-naming-transition-01dec14/pdfFuBxTOIQIB.pdf>

¹⁵ Paragraph 10 of the CCWG's Draft Report

¹⁶ Paragraph 49 of the CCWG's Draft Report

Concerns with the CCWG's proposed implementation plan

While auDA's supports the general principles for improved accountability identified by the CCWG, as well as a number of implementation mechanisms mentioned above, our position diverges significantly from that of the CCWG in regard to many other implementation details proposed in the Working Group's Draft Report.

To be clear, our concerns are very serious and we believe that the flaws in the CCWG's draft proposals are significant and profound.

auDA notes that the CCWG has focussed on a structure that can enforce accountability by delivering to the community the ability to sue ICANN / the ICANN Board¹⁷. While auDA accepts that this is *one* way to bolster accountability, we question whether the proposed solution:

- is worth the significant and seismic changes to ICANN's structure and to the nature of ICANN's Supporting Organisations and Advisory Committees;
- might give rise to a series of new risks and weaknesses that run counter to both the goals of the CCWG and ICANN's own Bylaw commitments; and
- might, on the whole, be inferior to an accountability solution involving changes to existing mechanisms and the introduction of fundamental bylaws that cannot be altered without the explicit support of SOs and ACs.

Delivering upon principles and the goal of legal enforceability

Taking a step back to the principles discussed previously, auDA agrees that empowerment of the community is a critical and appropriate goal. The CCWG proposes implementing this by endowing the SOs and ACs with the ability to veto changes to ICANN's Bylaws, prevent the Board from straying outside of ICANN's Mission and Core Values and, if necessary, remove Directors or spill the entire Board. auDA supports those proposals.

As stated previously, auDA believes it is possible to arrive at this outcome by making changes to ICANN's Bylaws and introducing fundamental bylaws that cannot be changed without support of the community.

auDA notes that the CCWG states:

"while the status quo has elements of a designator model, efforts to simply expand the powers of the multistakeholder community through the Bylaws would be insufficient because such Bylaws would be unlikely to be enforceable to the degree the global multistakeholder community or this CCWG-Accountability would expect".¹⁸

¹⁷ For example, identifying: ". . . approaches we can take within ICANN to make these powers legally available and enforceable" (Para. 174 of the CCWG Draft Report)

¹⁸ Paragraph 178 of the CCWG Draft Report

auDA does not agree with the CCWG's assumption about the 'degree of enforceability' expectations of the global multi-stakeholder community.

The CCWG appears to have focussed primarily upon the current inability of the community to enforce its rights through a formal legal process, to address circumstances where the ICANN Board ignores the input of the community.

auDA observes that the CCWG has seemingly identified this need for legal enforceability as a fundamental tenet of the accountability review, despite the costs, complexities and instabilities associated with delivering this goal.

auDA disagrees with the CCWG that the benefits of legal enforceability outweigh these negative side effects. Further auDA believes that the multi-stakeholder model (that ICANN is a core part of) should be allowed to perform the functions it was established for and operate with collaboration, negotiation and consensus-building. Mechanisms for escalation and arbitration should underpin the future of this model.

auDA believes that, in the extremely unlikely event that the community would to move sue ICANN, the entire system of multi-stakeholderism and the very structure of ICANN would be irreparably and irreversibly broken, rendering the ability to initiate legal action and the prospect of the community "winning" its case a moot point.

Specific concerns regarding legal enforceability

In addition to our general cost vs benefit concerns about the value of enforcing accountability upon ICANN through legal means, auDA holds specific concerns about the implications this solution will have on sections of the ICANN community.

In order to deliver legal enforceability, ICANN would either need to be radically remodelled into a membership-based organisation or SOs and ACs would need to appoint formal designators as holders of the community's powers over ICANN.¹⁹ In either case, the SOs and ACs would need to become legal entities in their own right.

Some SOs and ACs would, due to their structures, struggle to become an "unincorporated association"²⁰, as would be required to ensure legal status. As such, "shadow entities" would be required to assume this role and act upon the instructions of their responsible SO or AC. This adds a new, untested level of complexity to ICANN structures. The shadow entities would require mechanisms to ensure their ongoing funding and support and would likely require contracts between them, ICANN *and each other*, resulting in very significant and complex changes.

Further, a great number of accountability and operational mechanisms would need to be built in to ensure these shadow entities always adhered to their "parent" community's instructions. Communities would also need to enshrine systems for voting and selecting

¹⁹ As described in Paragraph 177 of the CCWG's Draft Report

²⁰ The concept of "unincorporated associations" is discussed in Paragraph 180, supporting footnotes and Appendix G of the CCWG's Draft Report.

people to participate in their shadow entity. It is unclear whether all SOs and ACs could, given their structures, develop such voting mechanisms.

In all these ways, an additional operational layer adds the need for a great number of new governance mechanisms.

Additionally, bodies such as the ccNSO Council would need to appoint designees to participate in the shadow entity. This may not be appropriate or feasible for a number of ccTLD managers whose domestic arrangements prevent them from assuming a role that involves jurisdiction in the United States.

The CCWG states that:

". . .community participants would have the choice of opting in and participating in this new accountability system or to simply keep on doing what they do today in an ICANN that is more accountable than it is today".²¹

auDA disagrees with this statement. The CCWG is proposing a model that is purporting to empower the community, but is actually disempowering some stakeholders and decreasing their ability to effectively and directly affect the operations of ICANN.

Specific concern regarding the development of additional legal entities

A further negative effect of adopting a legal / membership structure is the ability for the unincorporated association or its members to be sued themselves.

For example, Vox Populi Registry, which operates ".sucks" has recently threatened legal action²² against ICANN and "its constituent bodies" for defamation and other alleged breaches of US law.

While ICANN can currently be held to account in US courts, ICANN's constituent bodies (which are not legal entities) cannot. Should the proposal of the CCWG proceed, it would be possible for aggrieved parties to initiate action directly against SOs and ACs (or their shadow entities).

auDA believes this is a significant and unacceptable risk.

²¹ Paragraph 180 of the CCWG's Draft Report

²² <http://domainincite.com/18514-sucks-threatens-icann-with-defamation-claim-after-extortion-letters>

Conclusion

For all of the above reasons, auDA strongly believes that the implementation mechanisms proposed by the CCWG will deliver a sub-optimal outcome for ICANN and the community with regard to improving overall accountability.

Associated cost, risk and structural issues all need to be considered and weighed against any proposal and auDA is not satisfied that the need for a 'legal enforceability' solution (which would also serve to further concentrate power in the United States) is greater than the compromises and costs required to implement it.

Consequently, auDA strongly recommends that the CCWG and the ICANN community return to the fundamental principles identified as part of the preliminary stages of the CCWG's work, abandon the need for legal enforceability as a fundamental tenet of the accountability review and attempt to arrive at a solution that delivers acceptable levels of accountability and community empowerment.