

Comments on ICANN CCWG-Accountability Work Stream 1 proposals for Accountability enhancements

Revised Mission, Commitments & Core Values

On changes to ICANN's Mission, Commitments and Core Values :

The proposed changes would indeed enhance ICANN's Accountability. However, ICANN's adherence to the Accountability framework would depend on the commitment of the ICANN Board and its Members, Constituencies and its participants, Executive and Staff to the notions of Accountability, which ought to exceed the legal commitments of the organization and its constituents. Accountability standards would have to become inherent to the organization. This needs to be achieved by an ongoing process which could begin with an elaborate exercise in work stream 2

Fundamental Bylaws

Changes to Core Values related to Global Public Interest and the multistakeholder model of governance should be subject to even higher thresholds of Board AND Community assent.

Fundamental Bylaws would minimise the likelihood of misdirections in ICANN governance. On the need for such changes as part of Work Stream 1, it is not necessary to rush these changes as a part of the pre-transition proposals. The proposals for fundamental bylaw changes require deeper deliberations, more thoroughly done as part of Work Stream 2, which ICANN could irrevocably commit to facilitate and sufficiently empower.

Independent Review Panel Enhancement

IRP by these proposals, is somewhat enhanced. But it requires a larger Judicial process within, that would be unlimited in its scope. Just to define unlimited, such a Judicial process would bring even the organization's core values and fundamental bylaws within its Judicial remit. Such a body could hear challenges against the constitution of NomCom, Board, hear a challenge against the appointment of a Board Member or against the balance prevailing between ACs and SOs. ICANN requires an internal judicial process way above the existing redressal mechanisms.

Reconsideration Process Enhancement

Reconsideration process must be above any possible tendency on the part of the organization at various levels to adhere to defensive postures on wrong decisions or indecisions, actions or inactions, by the Community, Staff and Board, however unfair and wrong. Reconsideration ought to move beyond being a review of whether a certain process was followed in a decision and become an elevated framework for reconsideration within which comprehensive reviews would be made for fair and binding directives.

Reconsideration process is a Board Governance Committee process that is a peer review process in matters relating to action / inaction by the Board and it becomes an Executive Review process in matters concerning Staff Action/Inaction. Due to the 'peer' review nature of the process, it is an internal process, or almost a self-evaluation process. When an issue reaches this process, the BGC ought to have an unrestrained scope and a total willingness to correct a wrong decision / inaction by all available means. This is how the Reconsideration process needs to be designed and understood by Staff, Board and the Community.

The Ombudsman process is defined as an independent process, hence the independence of the Ombudsman needs to be total and complete. The Ombudsman could be empowered to investigate complaints against ICANN at any level, and with this end, the office of the Ombudsman needs to be constituted as unrestrained and uncontained.

The Accountability design process could cross examine the role of an independent Judiciary in a balanced Democracy to find if certain features of a balanced governance structure could be drawn in the design of the reconsideration processes in ICANN Governance.

Mechanism to empower the Community

A general comment is that the overall design has to have sufficient safeguards to ensure that the exercise of balancing the powers of the Board should not result in a situation of constant challenges between the Board and the Community.

Community powers over Board decisions provide a safeguard against the abuse of position and power by an accidental ICANN Board constituted of members with unworthy motives. However, it needs to be emphasized that the communities to be balanced and become

accountable within, so as to ensure that the community powers are exercised in a fair and balanced manner.

Power: reconsider/reject budget or strategy/operating plans

Community could have the powers to reject a budget or strategic plan, but the entire organization could work in such a way that the community would not take recourse to such a course of action as to stall or reject a good budget or a good strategic plan. Such Community powers could remain unused in a system wherein the community participates and offers supportive inputs to the process of formulating a budget or strategic plan with a willingness to accept some differences of opinion that the Board may have.

Such powers become relevant only when there is a misappointed Board superciliously acting in a manner that is harmful to the mission of ICANN, and even in such situations the exercise of such powers by a Community that is not short-sighted, misguided by narrower motives or altogether captured.

Power: reconsider/reject changes to ICANN "standard" Bylaws

The Community needs to be empowered to reconsider/reject changes to the standard ICANN bylaws. In the proposal as presented, there is an imbalance in the manner in which the 29 Community votes are distributed. ccNSO predominantly comprises Government participants, or at least comprises participants more prone to be influenced by Governments and by this subjective observation, ccNSO votes could be counted as quasi-governmental votes. The 5 ccNSO votes added to the 5 GAC votes makes a total of 10 out of 29 votes, which could skew the multi-stakeholder process, considering the fact that the presence of Governments in the multi-stakeholder process is not restricted to the visible roles and positions.

This imbalance is amended in the short term by increasing votes for other stakeholder groups. Long term amendments are outlined as part of the comments in the section on WorkStream2.

Power: approve changes to "Fundamental" Bylaws

The community needs to have the powers to propose / approve / reject a change to the fundamental bylaws. Subject to the cautions and observations expressed as above.

Power: Recalling individual ICANN Directors

It is good to empower the Community with these powers. Subject to the cautions and observations expressed as above.

Power: Recalling the entire ICANN Board

So long as an eco-system prevails within ICANN wherein the Community is not “captured”, the provision of powers to recall the entire ICANN Board is notionally appropriate if acknowledged as Titular powers to be invoked during an unlikely disaster.

Incorporating the Affirmation of Commitments into the ICANN Bylaws

The incorporation into ICANN's Bylaws of the Affirmation of Commitments principles and reviews would enhance ICANN's accountability.

Inputs for the proposed work plan for the CCWG-Accountability Work Stream 2

The various proposals for IANA transition favor an Internal Solution with concentration of policy and oversight functions within ICANN. The proposals for an Internal Solution to IANA Transition originate from Trust in the promise that ICANN holds to evolve further as an organization that would function in Global Public Interest in a manner that National Governments, related organizations, Business and Civil Society Stakeholders would find inherent fairness in its actions with minimal complaints.

If a framework is laid down for fundamental bylaws during work stream 1, the same could be more thoroughly examined and a firm foundation established during Work Stream 2. Such an exercise could begin with a question on whether ICANN’s core mission is as narrow as it is confined to be in the present thinking. Work Stream 2 could examine if ICANN’s core mission could be more appropriately articulated. For instance Working Draft 87 “Preserving and enhancing the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet” could be reexamined to be worded as “... openness of the Internet, particularly the DNS”; Working Draft Clause 60 ICANN shall not undertake any other Mission not specifically authorized in these Bylaws and Working Draft Clause 88 “Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN’s Mission” introduce constraints on what ICANN could do to serve the Internet. These proposed clauses need to thoroughly examined so as to be dropped.

(In the Work Stream 1 proposal, there is insufficient emphasis in the articulation of the mission of Coordination “policy development ... related to these technical functions”. This needs to be the core function and it needs to be defined as policy development “surrounding” the technical functions.)

All this presupposes and requires ICANN to have a sufficiently broadened Accountability framework of higher ethical standards over and above the legally binding obligations. These comments are in read with:

<http://forum.icann.org/lists/comments-cwg-stewardship-draft-proposal-22apr15/pdfUBLo1BODeP.pdf>

The organization as a whole could be strengthened structurally and administratively from an Accountability point of view and the Accountability framework needs to be broadened in tune with the enhanced trust implied by the proposals for the internal solution.

Work Stream 2 could be an unlimited exercise, exploring such possibilities as a Structural separation of the business functions from the organization's broader policy roles. Affirmation of Commitments Section 8(b), says "ICANN commits to remain a not for profit corporation" The shape of a Not for profit corporation is not large enough for the mission of ICANN. "Some felt that the concept of private sector leadership is inconsistent with the multistakeholder model." The not for profit corporation model needs to be reexamined in detail during Work Stream 2.

A solution to a seemingly impossible problem could arise by exploring a structural separation of ICANN business affairs from the ICANN Community, Policy and Oversight. The non-profit corporation under California laws could be home to the Registries and Registrars and structurally separate and elevate policy and oversight to a higher governance framework of relative legal immunity, holding and directing IANA, as well as owning and overseeing the Names Corporation as part of its broader responsibilities. (Working Draft, Clause 108 talks about "introducing and promoting competition in the registration of domain names". It requires to be emphasized that ICANN ensures not only healthy competition in the DNS environment but also reasonably fair ethical practices.)

Workstream2 could so explore an organizational framework suitable for Internet Policy particularly related to DNS, independent of commercial uncertainties, somewhat in a manner that would annul criticism about the DNS policy under a California Corporation.

When re-examining everything for long term changes for a balance within the Community process, it is necessary to define the broad classes of the stakeholder groups in the ICANN multi-stakeholder process. Is it Business + Government + Civil Society ? Or, Business + Government + Civil Society + International Organizations + Scientific/Academic Community ? Or more number of broader classes? What are the sub-classes of these stakeholder groups ? For example, what is Business? Registries + Registrars ? Registries + Registrars + IXPs + ISPs ? These + Internet Infrastructure providers ? What is Civil Society ? Once the Community arrives at a

definition that paves way for a reasonable balance, the votes between stakeholder groups could be assigned for an approximate balance.

Work Stream 1 proposals provide fixes and corrections to the existing Accountability framework. This stream of improvements are more guided by the notion of accountability as some sort of a legally binding affirmations with corresponding proposals somewhat punitive measures for accountability lapses.

Work Stream 2 could strip the Accountability framework of legally binding codes of behaviour and take such clauses elsewhere. The broader accountability framework for an organization of this magnitude of purpose and responsibility could have to be disconnected from notions of legal enforceability and penal community processes.

While rules and procedures provide a legally enforceable framework for administrative practices, the Accountability framework is one that is above the legal notions. Such a framework would articulate values and ethical standards that would exalt the organization to such a high level that the penalty for deviation from the obligations would effectively be that of being named as an organization void of standards and jurisprudence. Accountability framework is not to be visualized as a document with clauses for individuals, applicants, contracted parties or governments to take ICANN to a Court of Law, but more as a framework of values that ICANN (and its Board Members, Executive Staff, Community leaders) would be very, very careful not to slip down from.

The Accountability exercise could be one that would exalt the values and commitments of the Corporation wherein an individual member of the Board or Constituency or Staff or the whole Board would amend or step down on realization of serious Accountability lapses on their part even before the Community initiates a punitive process.

Accountability of ICANN and its participants has to extend well beyond processes and legal requirements and become a higher process inherent to ICANN and its people.

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(Comments as an individual)

