



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

Comments on the 3rd CCWG-Accountability - Draft Proposal on Work Stream 1 Recommendations

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The Centre for Communication Governance (CCG) appreciates the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) for all its hard work and effort in preparing this third draft proposal. At the outset, we would like to note that the shortened comment period reduces the engagement of the community and affects ability to adequately respond to many important aspects of the proposal at this crucial juncture. (This has been raised in the Minority Opinion of Member Robin Gross and we support the same.) It must be highlighted that such changes in procedure and compression of timelines not only depreciates the work of the CCWG Accountability but also affects the quality and legitimacy of the multistakeholder engagements at this crucial juncture.

Further, our support of these recommendations is contingent on the concerns and clarifications being addressed. We do not support this draft as the final proposal. Therefore, we find it necessary that this proposal be treated as a provisional one, until the Community's comments are reflected in the text of the proposal.

Finally, we would like to flag that certain parts of the proposal still mention 'members' and 'CMSM', which need to be edited to reflect the shift to the Sole Designator Model.

Please find our comments to each recommendation below:

Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers

CCG supports this Recommendation subject to certain considerations, clarifications and/or changes-

Empowered Community and its powers:

We support the Empowered Community established through the Sole Designator model, and understand that it is closest to ICANN's present organizational structure. The statutory rights, community powers and the additional right to inspect, together empower the Sole Designator to hold ICANN accountable. When it comes to enforcing statutory rights, the Empowered Community can petition the Board's refusal, in a court that has jurisdiction, to force the Board to comply. However, the 'statutory rights' of a designator mentioned here, refers only to the right to appoint and remove individual directors, and remove the entire board. However, it is the seven community powers that need protection, should the board refuse to comply with the Community's decision to use a power. With that in mind, we appreciate and support the preconditions listed in Paragraph 18 of Annex 01, particularly about constituting the empowered community and its rules as fundamental bylaws. Additionally, while the right to remove the entire board does exist, we highlight the need for exercising caution and not solely relying on this provision, as it is a last-resort measure and highly unlikely to actually be exercised.

Inspection Rights:

Additionally, CCWG-Accountability also proposes giving the Sole Designator the power to inspect ICANN's financial records, as the community stressed the necessity for this. We support the Sole Designator model with additional inspection rights, as laid down in the memo prepared by CCWG-Accountability legal counsel. We prefer the simplified process where SO/ACs directly make a written demand to ICANN for the requested documents. Unlike the exercise of community powers which requires engagement and escalation before using the power, the process of exercising the right to inspect is much simpler. The comments submitted by the ICANN Board detail a much more elaborate procedure, including a community forum and support from multiple Decisional Participants. However, we believe that in the interest of increasing transparency, access to the relevant documents should be a relatively simple process.

We also note that when developing a confidentiality regime to detail what kind of information can be excluded from inspection, care must be taken that the exceptions are not overly broad. Such exceptions can end up excluding a lot more information than necessary. In the interest of transparency, it must be avoided here.

Role of Advisory Committees:

CCWG-Accountability anticipates that the Sole Designator shall consist of the 5 decisional participants- ASO, GNSO, ccNSO, ALAC and GAC. First, we object to the Supporting Organizations and Advisory Committees being given equal power when operating in the post-transition structure, where the powers are significantly enhanced. In the empowered community, the decisional participants have the seven community powers, the power to appoint and remove directors, remove the entire board and inspect financial records. CCWG-Accountability has been clear about organising a mechanism in line with current Supporting Organisation and Advisory Committee structures. However, giving ACs the same powers as SOs is not in line with the current structure. This is particularly true in the case of the Governmental Advisory Committee. GAC already has a privileged advisory status among other ACs. Members of GAC acknowledge that it is ‘first among equals’ and do not wish to let go of that status. At present, GAC does not function like a designator: it does not have the right to appoint directors (unlike ALAC). Changing GAC’s role from ‘advisory’ to one of ‘decision making’ elevates it above the SOs and ACs, since it will have a dual status in addition to its privileged advisory status. This alters the current structure of ICANN, and is of concern.. We note that the GAC Communiqué at the end of the Dublin Meeting clearly states that the role of Governments should remain the same. That would mean GAC should retain its non-decisional advisory position.

Second, the second draft proposal described the procedure for Chartering Organizations to join and leave the Empowered Community (Paragraphs 337-339). This text is missing in the third draft proposal, and must be incorporated to ensure that a clear procedure exists.

Confirmation of participation:

We further reiterate that in order to facilitate transparency, it is necessary to know which organizations are going to be Decisional Participants. So far, the CCWG-Accountability has been working on the presumption that 5 Chartering Organizations will participate, but it is necessary to get a confirmation from these bodies. There must be a time limit within which this decision is communicated to the public, as support for this Recommendation may hinge on which bodies are being vested with these powers.

Addressing NTIA Criteria:

CCWG-Accountability has stated that the fifth NTIA criteria (of not replacing NTIA with a government-led organisation) is addressed by maintaining the advisory role of governments in the SO/AC structure (Paragraph 30 of Annex 01). However, it needs to be pointed out that the

proposed mechanism only increases the government's role within the organisation, by giving it a dual role- recommendatory and voting. This Recommendation does not address the NTIA criteria.

Recommendation #2: Empowering the community through consensus: engage, escalate, enforce

CCG partially supports this Recommendation subject to certain considerations, clarifications and/or changes-

Decision-making shifted from voting model to consensus model:

We support the shift to a consensus-based decision-making model. We recognize that the consensus model also counts 'votes', and that the difference between the two models may largely be a matter of semantics. However, the proposed model gives greater importance to objections, which is necessary in deciding whether to exercise a community power. As per this model, if two or more Deciding Participants object to using a particular community power, the escalation process is terminated, thereby ensuring that a community power is exercised only when there is adequate support from the Empowered Community. This focus on objections also addresses the concern of capture by one or more SO/AC, since it would only take 2 Deciding Participants to object to end this process. Further, by requiring more than one objection, it ensures that objection from one participant cannot terminate this process- no single SO/AC has that power.

Escalation process conducive to engagement

This process is a great step forward for ICANN accountability, as it facilitates consultation and engagement between the ICANN Board and the Empowered Community. It requires a Conference Call and a Community Forum before the power can be exercised, giving the Empowered Community and the Board multiple opportunities to attempt to resolve the conflict. In the interest of transparency, we recommend that whenever a decision is made, transcripts must be published which, in adequate detail, capture the reasons behind the particular decision. Finally, some clarity is sought over the exact nature of the ICANN Board's obligation during this process.

However, these **concerns** prevent us from fully supporting this Recommendation-

Single Voice per Decisional Participant:

The change to a consensus model also means that the weighted/fractional voting system proposed in the 2nd draft has been dropped in favour of a single decision system wherein each

SO/AC will decide its position internally through a process of its choosing, and express the outcome of this process as its decision. We do not support this change. As was stated by CCWG-Accountability in its previous draft, multiple votes allow for greater diversity, reflecting the balance of views within each Decisional Participant (Paragraphs 341-342 of the second draft proposal). Block voting, as is now proposed, would only represent the views of the majority and is against the multistakeholder process.

Powers of Supporting Organisations and Advisory Committees :

As stated in the previous Recommendation, giving ACs the same powers as SOs is not in line with ICANN's present structure. The two ACs in this context are the ALAC and GAC. In the present structure, the GNSO, ASO and ccNSO each appoint 2 directors to the Board, while ALAC appoints one director and GAC appoints none. We support the Minority Statement by Robin Gross. Changing GAC's role from advisory to one of decision-making elevates it above the SOs, as well as the ACs, since it has a privileged advisory status. Were it to be given community powers as well, it would have the power to appoint/remove directors, which is clearly outside its mandate. We support weighted voting (voices of support/no support in a consensus system) that take into account this present structure. Accordingly, if the SOs are given, say, 4 votes each, ALAC should get 2, and GAC should remain advisory, like RSSAC and SSAC. We note that the GAC Communique at the end of the Dublin Meeting clearly states that the role of Governments should remain the same. That would mean GAC should retain only its advisory position.

Unrealistic timelines:

The timelines provided for the Escalation Process are extremely tight, and seem unrealistic. This entire process is initiated upon a conflict between the Board and the Empowered Community. It requires considerable coordination within and among Decisional Participants, and with the ICANN Board. Whether it is getting support for the Community Petition in 6 days, deciding whether to hold a Community Forum in 7 days or organising and holding the Community Forum in 15 days, the proposed timeline is not conducive to the purpose for which the Escalation Process has been recommended. We strongly recommend that these timelines be extended to facilitate cooperation and coordination between the relevant parties.

Further, we recommend that the unless it can be clubbed with an ICANN meeting, the Community Forum should always be virtual. This can be bent if the community believes it is extremely necessary to meet face-to-face, like in the case of deciding whether to exercise the

power to recall the entire Board, as provided by CCWG-Accountability. While there is some indication of an expectation of this in Paragraph 17 of Annex 02, it needs to be stated clearly, leaving no room for ambiguity.

What constitutes Resolution?

Throughout the Escalation process, the Empowered Community and the ICANN Board have multiple opportunities to try to resolve the issue. However, we seek a clarification over what exactly would amount to Resolution. What threshold of agreement is necessary for an issue to be considered ‘resolved’ and the escalation process terminated?

Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

CCG supports this Recommendation to split ICANN bylaws into ‘Fundamental Bylaws’ and ‘Standard Bylaws’, and mandate that public consultations be undertaken before any changes are made to either standard bylaws or fundamental bylaws. The Empowered Community also has the power to reject changes to standard bylaws. Consultation being an essential component of accountability, this Recommendation increases ICANN’s transparent and consultative nature. Further, this allows diverse viewpoints to be raised, which would help ensure that decisions benefit the public and not just a set of stakeholders.

Fundamental Bylaws being more difficult to amend, require a 75% approval from the ICANN Board as well as approval from the Empowered Community (which is measured by the approval of 4 or more SO/ACs and not more than one objection). We support the joint decision process, as neither the Board nor the Empowered Community can amend the bylaws unilaterally. The relationship between fundamental bylaws and accountability is indirect, but important, as it involves the community in the decision-making process, consequently increasing the difficulty in amending these provisions. It also helps create a sense of stability in the ICANN structure. We agree with CCWG-Accountability that only the most critical provisions should be given this protection, to prevent a rigid structure.

Recommendation #4: Ensuring community involvement in ICANN decision-making: seven new Community Powers

CCG supports this Recommendation as it enhances ICANN Accountability by giving the Empowered Community these seven powers. In a multistakeholder model, collaboration is

essential for effectiveness, and this is further enhanced by a clear framework that allows the community to review decisions made by the ICANN Board. Further, we support the principle of not allowing any stakeholder to singlehandedly exercise any power, or block the use of any power. This directly addresses concerns about capture.

We do, however, seek a few clarifications:

We support the increase in community inclusion in the budget and strategic/operating plan development. At present, community input is already sought in the development phase. The power to Reject ICANN's Budget or Strategic/Operating Plan increases consultation and transparency. However, we are concerned by the text: "A Budget or Strategic/Operating plan could only be challenged if there are significant issue(s) brought up in the Engagement Phase that were not addressed prior to approval." What would constitute a 'significant issue' needs to be clarified. Further, what happens if a significant issue was raised prior to approval but was not addressed satisfactorily? The Empowered Community should retain the power to challenge such a budget or operating/strategic plan in such an instance.

Under the Power to Remove Individual ICANN Board Directors, a new director must be appointed to replace the director who was removed by the Empowered Community. A time limit for the appointment of this replacement director needs to be clearly provided.

Finally, we reiterate our concerns about the timeline in the escalation stage of each power. We believe that such a tight timeline is not conducive to achieving the cooperation and coordination that is necessary for the exercise of such powers.

Recommendation #5: Changing aspects of ICANN's Mission, Commitments and Core Values

CCG does not support this recommendation as is, due to the following reasons:

First, the proposal is incomplete in its recommendation and there are parts that require to be complete before the community can be expected to fully accept this recommendation. Particularly, the role of ICANN's mission with regard to the root zone, where additional text is awaited from the RSSAC. Second, Annex 05 of the Proposal which provides a comparative table of the changes is unclear in that the provisions under the 'existing bylaws' also show red line language change. We kindly request that this be clarified. Third, the proposed language under 'Section 2. Commitments and Core Values', specifically with reference to the public policy advice of governments and public authorities, should be aligned and duly modified to reflect the nature of participation of the GAC based on its final decision. We also reserve our final comments for

the legal text drafted as the proposal clearly states that “the proposed language for Bylaws revision is conceptual in nature at this stage”, and that “the legal team will need time to draft appropriate proposed language for revisions to the Articles of Incorporation and Bylaws.”

We appreciate that amendment of the bylaw language is required to ensure that ICANN’s Mission, Commitments and Core Values correspond with the accountability and transparency recommendations made in the proposal. However, there still continues a significant discussion on the substantive content of this recommendation and it would not be possible to completely support the same until such discussion is concluded with consensus.

Recommendation #6: Reaffirming ICANN's Commitment to respect internationally recognized Human Rights as it carries out its mission

CCG supports this Recommendation. The draft bylaw clarifies ICANN’s obligation to respect internationally recognized human rights, without creating any additional obligation to protect or enforce human rights beyond what is already required by applicable law. While this bylaw doesn’t do much by itself, it is supplemented by an interim bylaw that commits to the development of a framework of interpretation for implementing the draft bylaw. We support the inclusion of this interim bylaw as it commits ICANN to developing certain operationalization measures that have been identified and reserved for Work Stream 2, thereby calming concerns about lack of incentive to implement accountability proposals post the transition. We do not believe that the draft bylaw text expands ICANN’s obligations in any way. Inclusion of this commitment is necessary at this stage, as ICANN’s policies have implications on human rights, be it privacy and data retention concerns stemming from WHOIS or free speech concerns from new gTLDs. However, we would recommend including a brief explanation of what exactly constitutes the ‘applicable law’, to ensure there is no misunderstanding about what CCWG-Accountability is proposing.

We support this staged approach to addressing the commitment to Human Rights, as we recognise that there wasn’t enough time to fully develop all the concerned issues in Work Stream 1. However, it is necessary for there to be some form of commitment at this stage, as leaving Human Rights entirely at the mercy of Work Stream 2 is a risky proposition. Therefore, including a commitment to Human Rights and allocating the necessary implementational issues to Work Stream 2 achieves the necessary balance.

Recommendation #7: Strengthening ICANN's Independent Review Process

CCG supports this recommendation. The Independent Review Process is a process to ensure that ICANN does not act beyond its Mission, and complies with its Articles of Incorporation and bylaws. We would like to highlight the paramount importance of the independence of this panel from ICANN for it to serve its function impartially and justly, without undue interference or influence. To support and enhance this independence we recommend that the detailed rules of procedure for implementation also addresses the appointment of independent support staff that is separate from ICANN staff. We also note that the enhancements provided in the previous drafts still stand, with the aim of ensuring that the IRP produces consistent and coherent results and the process is more accessible, affordable, transparent and efficient. It is important to note that details of operation and implementation will be contingent upon the work of the Independent Review Process Sub-Group Process (Paragraph 3 of [Annex 07](#)), and development of the detailed rules for implementation by the ICANN community through the CCWG-Accountability (Paragraph 41 of [Annex 07](#)). Here we recommend that CCWG-Accountability should enlist the help of experts when developing these detailed rules for implementation.

Recommendation #8: Fortifying ICANN's Request for Reconsideration Process

CCG supports this recommendation. We appreciate the CCWG-Accountability for having proposed several measures to fortify the Request for Reconsideration process, such as expanding the scope of permissible requests, increasing the time for filing such requests and transparency-enhancing measures in the decision-making process.

Recommendation #9: Incorporation of the Affirmation of Commitments

CCG partially supports this recommendations subject to certain considerations, clarifications and/or changes.

The [Affirmation of Commitments](#) (AoC) is a 2009 bilateral agreement between ICANN and the NTIA. After the termination of the IANA agreement, the AoC will be the next target for elimination, as it is the last vestige of NTIA oversight. While the elimination of the agreement is simple enough (can be terminated by either party after giving 120-days' notice), there are some provisions that are worth preserving. To do so, the CCWG-Accountability recommends adding certain ICANN commitments from the AoC to the bylaws. This also includes four types of review processes, to ensure that Community Reviews is an integral part of the accountability and transparency framework. While these are provisions worth preserving, it must be noted it can curtail the policy development processes within ICANN. This particularly affects WHOIS

related aspects, and new gTLD related processes. We recommend that a condition be inserted that the said provisions will not limit the policy development processes and said reviews be in conjunction with any such processes.

Recommendation #10: Enhancing the accountability of Supporting Organizations and Advisory Committees

CCG supports this recommendation. We note that in the Post-transition ICANN, SOs and ACs will have several new powers as part of the Empowered Community. Therefore, it is necessary to ensure that these organisations are accountable and transparent themselves. In Work Stream 1, this is proposed to be achieved by including the review of SO/AC accountability mechanisms in the independent structural reviews performed regularly. We also think it is necessary that the reviews must consider the various dimensions of accountability of the SO/AC, such as the accountability of the SO/AC to their respective communities as well to the ICANN community, in addition to the global internet community as a whole. We also acknowledge that the bulk of this discussion shall take place in Work Stream 2, including the proposal to add SO/AC accountability to the Accountability and Transparency Review Process.

Recommendation #11: Board obligations with regards to Governmental Advisory Committee Advice (Stress Test 18)

We support the changes made to Stress Test 18 in this draft of the proposal, subject to some clarifications:

According to this Recommendation, the ICANN Board will always consider GAC advice. However, when this advice is backed by a full consensus within GAC (defined as the absence of a formal objection), GAC's special advisory status comes into play: if the Board takes a decision inconsistent with any GAC advice, it must state in writing the reasons for doing so, and then work with GAC to find a mutually acceptable solution. We support the requirement of full consensus, and support the inclusion of the definition as well. Allowing the exercise of GAC's special advisory power for advice backed by anything less than a full consensus would further elevate GAC's position within ICANN. This would alter the present structure of ICANN, and also possibly be against NTIA's principle of not replacing the current U.S. role with a government-led solution. Further, it would require the Board to decide between countries offering diverse views, a position the Board should not be put in. We also support Paragraph 29 of Annex 11, which allows GAC to refine its operating principles to specify how objections are raised and considered. They could accordingly decide, for example, whether a single country

can continue to object on the same issue in the absence of other countries supporting it. Disallowing continuous objections from a single country would ensure that the exercise of the special advisory power is not held hostage by a single country. It is important for GAC to have this autonomy in its internal operations.

However, we are concerned by the provision which only allows Board disagreement with GAC consensus advice to come in the form of a Board vote with two-thirds in favour of rejection. Clarification is sought over what happens to GAC consensus advice that falls short of the two-thirds requirement (and only achieves a simple majority, for example). Would this advice become binding on GAC? If that is the intention of the CCWG-Accountability, it needs to be made explicit.

Recommendation #12: Committing to further accountability work in Work Stream 2

CCG supports this recommendation. Some of the key aspects of enhancing ICANN's accountability are shifted to Work Stream 2 with a timeline that extends beyond the IANA transition. These topics include mechanisms to enhance ICANN's transparency, improve diversity at all levels, jurisdiction and accountability, developing a framework of interpretation for draft bylaw on human rights, and enhancing the Ombudsman's role and function. The additions made in this 3rd draft proposal are the framework for interpretation and expanded transparency issues. We support the interim bylaw committing ICANN to implementing CCWG-Accountability Work Stream 2 recommendations has also been proposed. The protection provided by this interim bylaw cannot be over emphasised. This recommendation is of crucial importance, as it sets the stage for Work Stream 2, calming concerns about lack of incentive to implement accountability proposals post the transition. We also recommend that the scope and timeline of the Work Stream 2 be clearly defined with tangible goals and outcomes.