

# 3. Principles

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## 3.1 Revised Mission, Commitments and Core Values

### CCWG-Accountability Response to Public Comments

ICANN's current Bylaws contain (a) a Mission statement; (b) a statement of Core Values; and (c) a provision prohibiting policies and practices that are inequitable or single out any party for disparate treatment. These three sections are at the heart of ICANN's accountability: they obligate ICANN to action only within the scope of its limited Mission, and to conduct its activities in accordance with fundamental principles. As such, these three sections also provide a standard against which ICANN's conduct can be measured, and it can be held accountable through existing and enhanced accountability mechanisms.

The Initial Draft Proposal recommended several changes to clarify and strengthen these Bylaws provisions and to incorporate key elements of the Affirmation of Commitments. In particular, the Initial Draft Report proposed language to clarify and constrain ICANN's Mission statement, and to specify that ICANN's Mission does not include the regulation of services that use the DNS or the content those services carry or provide. The Initial Draft Report also proposed to divide the current Core Values into "Commitments" and "Core Values" and to articulate a test for balancing Commitments and Core Values to the extent necessary.

In general, commenters were very supportive of the proposed revisions to ICANN's Bylaws. The comments did reflect concerns about several aspect of the Initial Draft Report. Although we have provided a summary of all comments related to this section of the Initial Proposed Draft, annotated to reflect the CCWG-Accountability's response to those questions, we identify some of the biggest concerns below, and explain how the CCWG-Accountability addressed them.

### Elaborating an ICANN Commitment to Human Rights

The CCWG-Accountability extensively discussed the opportunity to include into a Commitment related to human rights, within ICANN's stated Mission, in the ICANN Bylaws. The group commissioned a legal analysis of whether the termination of the IANA Functions Contract would induce changes into ICANN's obligations, within its defined Mission, with regards to Human Rights.<sup>1</sup> While no significant issue was found to be directly linked to the termination of the IANA Functions Contract, the group acknowledged the recurring debates around the nature of ICANN's accountability towards the respect of fundamental human rights within ICANN's Mission.

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<sup>1</sup> The memo prepared by legal counsel is available here: <http://mm.icann.org/pipermail/accountability-cross-community/2015-July/004604.html>.

In these discussions, some participants raised the following as accountability-related reasons for including a commitment to fundamental human rights in the Bylaws:

- The NTIA criteria to maintain the openness of the Internet, including free expression and the free flow of information;
- The need to avoid extending ICANN's mission into content regulation;
- The importance of assessing the impact of ICANN policies on human rights within its defined mission.

Examples of potential Commitment formulation were:

1. *Within its mission and in its operations, ICANN will be committed to respect the fundamental human rights of the exercise of free expression and the free flow of information.*
2. *Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights.*

The group has achieved consensus on including a human rights related Commitment in ICANN's Bylaws within its defined Mission. However no particular wording currently proposed achieved consensus. Reiterating its commitment to articulate concrete proposals as part of its mandate, the CCWG-Accountability is calling for comments on this approach and the underlying requirements.

## **Private Sector Leadership and Advice Contrary to the Bylaws**

A number of government commenters strongly objected to the proposed change in existing Core Value 11 which states that ICANN, “While remaining rooted in the private sector,” should recognize “that governments and public authorities are responsible for public policy” and should duly taking into account governments' or public authorities' recommendations. After lengthy conversation, the CCWG-Accountability proposes to address these concerns in two ways:

- First, to remove confusion about the meaning of “private sector” in the ICANN Bylaws, we propose to expressly state that the private sector includes business stakeholders, civil society, the technical community and academia. Note: There is a minority view regarding the meaning of “private sector,” suggesting instead to describe the term as including business providers, business users, individual end-users, civil society, academia and the technical community.
- Second, we propose to remove the language that was read by some commenters to remove ICANN’s obligation to consult with the GAC on consensus Advice. Instead, we propose to amend Article XI of the Bylaws, to provide that each advisory committee should provide a rationale for its advice, with references to relevant applicable national or international law where appropriate. The proposed language also implements the recommendation of ATRT2 requiring ICANN to work with the GAC to facilitate the GAC developing and publishing rationales for GAC Advice at the time Advice is provided.
- Third, we propose to clarify that the Independent Review Process applies to all violations of the ICANN Bylaws, including violations resulting from ICANN’s

action or inaction based on input from advisory committees or supporting organizations.

## **Balancing and Reconciliation Test**

A number of commenters were uncomfortable with the proposed balancing test, on the grounds that it might tend to favor inaction. We agreed with this input and modified the proposed balancing test language accordingly. Specifically, we have eliminated the test for balancing Commitments, on the grounds that these reflect ICANN's fundamental compact with the community and are intended to apply consistently and comprehensively to ICANN's activities. We retained the proposed balancing test for competing Core Values.

## **Freedom to Contract**

Several commenters expressed concerns that by enumerating ICANN's powers specifically, ICANN would not be able to freely negotiate and enforce its contracts with, for example, registries and registrars. The CCWG-Accountability considered this concern, but concluded that the prohibition on regulation of services that use the Internet's unique identifiers or the content that they carry or provide does not act as a restraint on ICANN's contracting authority.

## **Revised Report on Mission and Core Values**

ICANN's current Bylaws contain (a) a Mission statement; (b) a statement of Core Values; and (c) a provision prohibiting policies and practices that are inequitable or single out any party for disparate treatment. These three sections are at the heart of ICANN's accountability: they obligate ICANN to act only within the scope of its limited Mission, and to conduct its activities in accordance with certain fundamental principles. As such, these three sections also provide a standard against which ICANN's conduct can be measured and held accountable through existing and enhanced mechanisms such as Reconsideration and Independent Review.

The relevant language in the current Bylaws was adopted in 2003. Based on community input and our discussions since January, the CCWG-Accountability concluded that these provisions should be strengthened and enhanced to provide greater assurances that ICANN is accountable to its stakeholders and the global Internet community. In particular, the CCWG-Accountability found that:

- ICANN's Mission statement needs clarification with respect to the scope of ICANN's policy authority;
- The language in the Bylaws describing how ICANN should apply its Core Values is weak and permits ICANN decision makers to exercise excessive discretion;
- The current Bylaws do not reflect key elements of the Affirmation of Commitments; and
- The Board should have only a limited ability to change these key accountability provisions of ICANN's Bylaws.

## Summary Of Recommended Changes

The proposed language for Bylaw revisions is conceptual in nature at this stage; once there is consensus about direction developed through this comment process, the legal team will need time to draft appropriate proposed language for revisions to the Articles of Incorporation and Bylaws.

The CCWG-Accountability is seeking input on a number of recommended changes to the ICANN Bylaws to address the deficiencies described above. We have deliberately attempted to minimize language changes, and in the charts that follow, we have included the existing language and provided a redline showing proposed changes. The group discussed how to balance the needs of limiting ICANN's Mission and the necessary ability of the organization to adjust to a changing environment. Below we provide a summary of the proposed changes.

1. **ICANN Mission Statement.** The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):
  - a) Clarify that ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.
  - b) Clarify 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) Clarify that ICANN's powers are "enumerated" – meaning that anything not articulated in the Bylaws are outside the scope of ICANN's authority. This does not mean ICANN's powers can never evolve – but ensures that any changes will be deliberate and supported by the community.
2. **Core Values.** The CCWG-Accountability recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):
  - a) Divide the existing Core Values provisions into Commitments and "Core Values."
    - i. Incorporate into the Bylaws ICANN's obligation to operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition. These obligations are now contained in ICANN's Articles of Incorporation.
    - ii. Designate certain Core Values as "Commitments". These values are so fundamental to ICANN's operation that they are intended to apply consistently and comprehensively. Those Commitments include ICANN's obligations to:

- 1) Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
  - 2) Limit its activities to those within ICANN’s Mission that require or significantly benefit from global coordination;
  - 3) Employ open, transparent, bottom-up, multistakeholder processes; and
  - 4) Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- iii. Slightly modify the remaining Core Values to:
- 1) Reflect various provisions in the Affirmation of Commitments, e.g., efficiency, operational excellence, and fiscal responsibility;
  - 2) Add an obligation to avoid capture.
3. **Balancing or Reconciliation Test**
- a) Modify the “balancing” language in the Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:
- These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN’s Mission that is identified through the bottom-up, multistakeholder process.*
4. **Fundamental (“durable” or “enduring”) Bylaws Provisions.**
- a) The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be adopted as “durable” or “enduring” elements of the ICANN Bylaws. Any modification to these Bylaws provisions would be subject to heightened standards including, for example, community ratification or subject to community veto.

## Discussion

To whom is ICANN accountable? For what is it accountable? Those questions were a necessary starting point for the work of the CCWG-Accountability, and the answers inform all of our recommendations. Our work on Independent Review attempts to answer the first question. The Bylaws changes recommended here are designed to answer the second. Most important, ICANN has a limited Mission, and it must be accountable for actions that exceed the scope of its Mission. In undertaking its Mission, ICANN is also

obligated to adhere to policy supported by community consensus and an agreed-upon standard of behavior, articulated through its Commitments and Core Values. Taken together, the proposed Mission, Commitments, and Core Values statement articulate the standard against which ICANN's behavior can be measured and to which it can be held accountable. Because these Bylaws provisions are fundamental to ICANN's accountability, we propose that they be adopted as Fundamental Bylaws that can only be changed with the approval of the community subject to procedural and substantive safeguards.