

## Annex 11—Recommendation #11: Committing to further accountability work in Work Stream 2

### 1. Summary

The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.

As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms and processes and to refine the operational details associated with some of its recommendations for Work Stream 1.

The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming [ICANN 55 Meeting](#) taking place in March 2016. It is intended that Work Stream 2 will be completed by end of 2016.

The community raised concerns that, post-Transition, there may be a lack of incentive for ICANN to implement the proposals arising out of Work Stream 2. To bridge this gap, the CCWG-Accountability recommends that the ICANN Board adopts an interim Bylaw that would commit ICANN to implementing the CCWG-Accountability Work Stream 2 recommendations. In a [letter](#) dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

### 2. CCWG-Accountability Recommendations

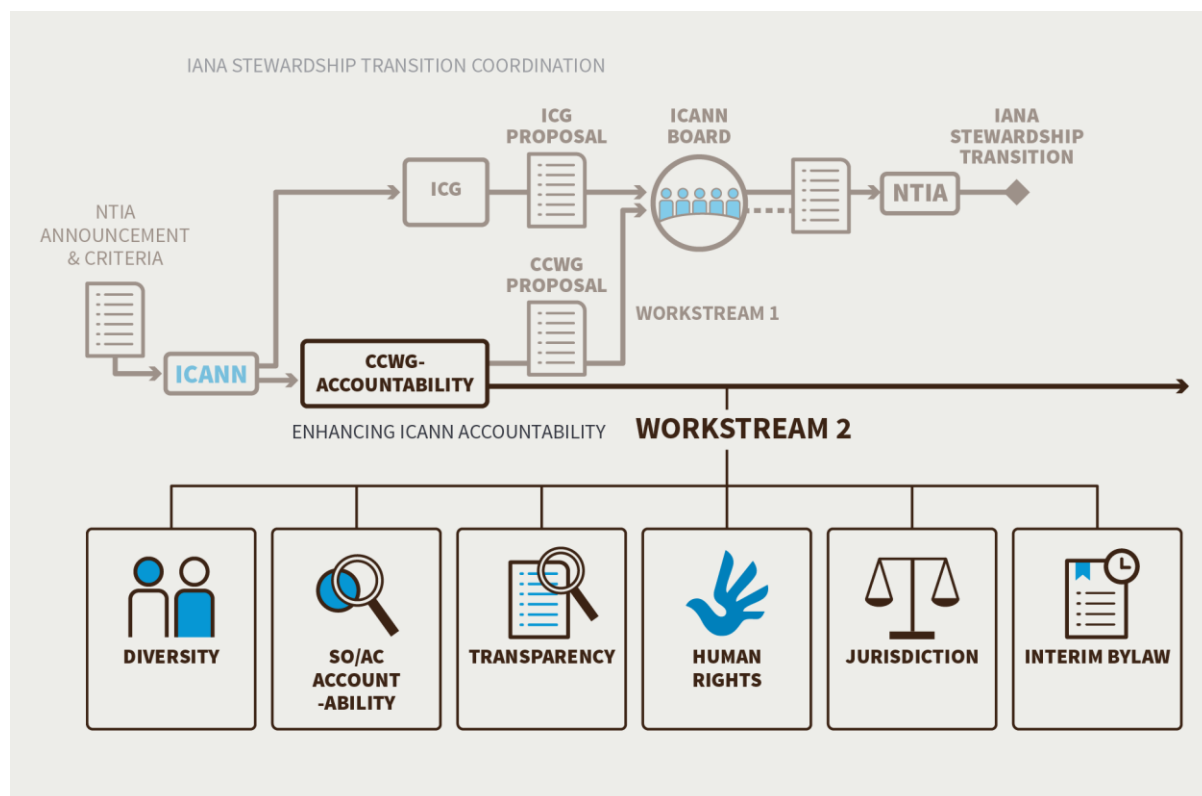
The CCWG-Accountability recommends that the Board adopt an interim Bylaw that would commit ICANN to implementing the CCWG-Accountability recommendations, and task the group with creating further enhancements to ICANN's accountability including, but not limited to, the Work Stream 2 list of issues:

- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing Documentary Information Disclosure policies (DIDP)
  - Transparency of ICANN's interactions with governments
  - Improvements to the existing Whistleblower policy
- Considering improvements to ICANN's standards for diversity at all levels
- Addressing jurisdiction related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw

In addition, the CCWG-Accountability foresees making refinements to some of the operational details of its Work Stream 1 recommendations, including but not limited to:

- Establishing rules of procedure for the enhanced Independent Review Process
- Further enhancing the accountability of ICANN's Supporting Organizations and Advisory Committees in addition to Work Stream 1 recommendations that call for incorporation of this parameter into existing structural reviews of these entities
- Defining the practical modalities for the ICANN Community Forum

### 3. Detailed Explanation of Recommendations



Commenters made the observation that general accountability requirements, such as diversity and Supporting Organization and Advisory Committee accountability, were not fully addressed. Specific criteria were developed for these two key parameters:

#### **Diversity**

Comments received on prior drafts asked that, as the community becomes empowered, for concrete steps to ensure the diversity of the views, origins and interests of the global Internet community are adequately represented through a multidimensional approach.

While acknowledging the importance of diversity in the accountability mechanisms, commenters have also expressed the view that any diversity requirement should not prevail over skills or experience requirements. In assessing diversity, the CCWG-Accountability identified that existing mechanisms were in place for entities constituting the ICANN ecosystem.

Requirements stemming from the following initiatives and governance documents were evaluated:

- [ICANN Bylaws](#)
- [The Affirmation of Commitments](#)
- [ATRT 1 recommendations](#)
- [ATRT 2 recommendations](#),
- Documents from each of the ICANN Supporting Organizations and Advisory Committees.

Analysis of the above determined that improvements are needed. During its discussions, the CCWG-Accountability considered a non-exhaustive list of criteria and sought input on the following suggestions:

- Expanding ATRT reviews into **Accountability, Transparency and Diversity Reviews**.
- Establishing threshold regarding composition of each body
- Incorporating the Structural Reviews into **Structural Accountability, Transparency and Diversity Reviews of SOs and ACs**, under the Board's supervision.

Comments received on the Second Draft Proposal revealed that incorporating the diversity component into Accountability and Transparency reviews may overburden Review Teams. Therefore, the CCWG-Accountability recommends the following actions with the view to further enhancing ICANN's effectiveness in promoting diversity:

- Including diversity as an important element for the creation of any new structure, such as the Independent Review Process (for diversity requirements for the Panel and the ICANN Community Forum)
- Adding Accountability, Transparency and Diversity Reviews of Supporting Organizations and Advisory Committees to structural reviews as part of Work Stream 2
- Performing, as part of Work Stream 2, a more detailed review to establish a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program and other ICANN outreach programs). After an initial review of the current documents, it became clear that they do not address the full concerns raised by the wider community on the issue of diversity
- Identifying the possible structures that could follow, promote and support the strengthening of diversity within ICANN
- Carrying out a detailed working plan on enhancing ICANN diversity as part of Work Stream 2
- Strengthening commitments to outreach and engagement in order to create a more diverse pool of ICANN participants, so that diversity is better reflected in the overall community and thus more naturally reflected in ICANN structures and leadership positions.

### ***Supporting Organizations and Advisory Committee Accountability***

As the community's power is enhanced, legitimate concerns have arisen regarding the accountability of the community (organized as Supporting Organizations and Advisory Committees) in enacting those powers: i.e. "*who watches the watchers*".

The CCWG-Accountability reviewed existing mechanisms for Supporting Organizations and Advisory Committees as well as governance documents (see above). Analysis revealed that mechanisms are limited in number and scope.

Having reviewed and inventoried the existing mechanisms related to Supporting Organizations and Advisory Committee accountability, it is clear that current mechanisms need to be enhanced in light of the new responsibilities associated with the Empowered Community and Work Stream 1 proposals.

The CCWG-Accountability recommends the following:

- **As part of Work Stream 1 proposals:**
  - Include the review of Supporting Organization and Advisory Committee accountability mechanisms in the independent periodical structural reviews performed on a regular basis. These reviews should include consideration on the mechanisms that each Supporting Organization and Advisory Committee has in place to be accountable to their respective Constituencies, Stakeholder Groups and Regional At-Large Organizations etc.
  - This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently states: "*The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.*"
  
- **As part of the Work Stream 2 proposals,**
  - Include the subject of Supporting Organization and Advisory Committee accountability as part of the work on the Accountability and Transparency Review process
  - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability
  - Propose a detailed working plan on enhancing Supporting Organization and Advisory Committee accountability as part of Work Stream 2
  - Assess whether the Independent Review Process (IRP) would also be applicable to Supporting Organization and Advisory Committee activities.

### **Transparency**

Transparency is considered quintessential to the viability of Community Empowerment and its associated legal framework. As such the CCWG-Accountability recommends reviewing the following to ensure appropriate safeguards are in place:

- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing Documentary Information Disclosure policies (DIDP)
  - Transparency of ICANN's interactions with governments
  - Improvements to the existing Whistleblower policy

### **Human Rights**

To ensure that adding a draft Human Rights Bylaw to the ICANN Bylaws does not lead to an expansion of ICANN's Mission or scope, the CCWG-Accountability will develop a designated Framework of Interpretation as part of Work Stream 2 and will consider the following as it elaborates on the language to be used:

- Consider which specific Human Rights conventions or other instruments should be used by ICANN in interpreting and implementing the Draft Human Rights Bylaw
- Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to Human Rights
- Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process
- Consider what effect, if any, this proposed Bylaw would have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC)
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures

### ***Jurisdiction***

Jurisdiction directly influences the way ICANN's accountability processes are structured and operationalized. The fact that ICANN today operates under the legislation of the US state of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.

The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. ICANN is a public benefit corporation incorporated in California and subject to California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is subject to a provision in paragraph 8<sup>1</sup> of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.

ICANN's Bylaws (Article XVIII) also state that its principal offices shall be in California. The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":

- Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.
- Jurisdiction of places of physical presence
- Governing law for contracts with registrars and registries and ability to sue and be sued in a specific jurisdiction about contractual relationships

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8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) **remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community**; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

- Ability to sue and be sued in a specific jurisdiction for action and inaction of staff, and for redress and review of Board Decisions, Independent Review Panel, and other Accountability and Transparency issues, including the Affirmation of Commitments
- Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression
- Meeting NTIA requirements

At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms.

This refers primarily to the process for the settlement of disputes within ICANN. This discussion involves the choice of jurisdiction and of the applicable laws but not necessarily the location where ICANN is incorporated:

- Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:
  - Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue
  - Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework
  - Consider potential Work Stream 2 recommendations based on the conclusions of this analysis

A specific subgroup of the CCWG-Accountability will be formed to undertake this work.

### ***Interim Bylaw***

The CCWG-Accountability recommends that the Board adopt an interim Bylaw which would commit ICANN to implementing the CCWG-Accountability recommendations, and task the group with creating further enhancements to ICANN's accountability including, but not limited to, the Work Stream 2 list of issues.

This interim Bylaw must be incorporated in the Bylaws as part of Work Stream 1, prior to the IANA Stewardship Transition. This interim Bylaw has been proposed to address concerns that, post transition, an absence of incentives may lead to the ICANN Board dismissing the CCWG-Accountability's proposed Work Stream 2 recommendations. However, in a [letter](#) dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

The language of this interim Bylaw provision should provide to CCWG-Accountability Work Stream 2 recommendations, when supported by Full consensus or consensus as described in the CCWG-Accountability Charter, and endorsed by the Chartering organizations, similar status to recommendations from AoC Review Teams. The Board's decision would be subject to challenge through enhanced Reconsideration and Independent Review processes

### ***Timeline***

The initial plan includes the following key milestones:

- March 2016 (ICANN55): Definition of scope of work and organization into subgroups.
- March 2016 to end of June 2016: Drafting of proposals by subgroup, under supervision by CCWG-Accountability.
- June 2016 till early October 2016: 40-day Public Comment period, including discussions during ICANN56 and/or ICANN 57.
- October - mid-January 2017: Refinement of proposals by subgroups, under supervision of the CCWG-Accountability.
- Mid-January - March 2017: Second 40-day Public Comment period, including discussions during ICANN58.
- By end of June 2017: Finalize proposals and deliver to Chartering Organizations.
- Obtain approval and deliver proposals to ICANN Board at ICANN58.

#### **4. Changes from the ‘Second Draft Proposal on Work Stream 1 Recommendations’**

Public comments revealed that a review of staff accountability should not be pursued. The development of a designated Framework of Interpretation for the proposed Human Rights Bylaw and expansion of the transparency-related issues are also noteworthy changes. The proposed solution of incorporating a review of diversity into AOC mandated Accountability and Transparency reviews was removed

#### **5. Stress Tests Related to this Recommendation**

- Stress test #11 - Major impact on corporate reputation, significant loss of authentication and/or authorization capacities.
- Stress Test #1: Change authority for the root zone ceases to function, in part or in whole.
- Stress Test #2: Delegation authority for the root zone ceases to function, in part or in whole.

#### **6. How does this meet the CWG-Stewardship Requirements?**

N/A

#### **7. How does this address NTIA Criteria?**

##### **Support and enhance the multistakeholder model**

- In-depth review of diversity and Supporting Organization and Advisory Committee accountability is planned for Work Stream 2
- Addition of an interim Bylaw will secure Work Stream 2 towards enhancing the general accountability framework

##### **Maintain the security, stability, and resiliency of the Internet DNS**



- Accountability of Supporting Organization and Advisory Committee structures and their components will help ensure one entity cannot singlehandedly change or block a process
- Addressing the question of applicable law for contracts and dispute settlements

**Meet the needs and expectation of the global customers and partners of the IANA services**

- Analysis of transparency will help contribute to ensuring visibility is given into operations of ICANN
- Development of a Framework of Interpretation for Human Rights Bylaw will help maintain limited scope of ICANN's Mission

**Maintain the openness of the Internet**

- Consolidating, enhancing diversity and Supporting Organization and Advisory Committee accountability

**NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution**

- Transparency of interactions with governments is flagged as a topic to further explore