

[As revised by Sidley and Adler, 12/11/2015]

CCWG-Accountability - Draft Proposal on Work Stream 1 Recommendations Webinars of 2 December 2015

1. Charter - Question: Where is the 5 out of 6 approval threshold for Chartering Organizations. Is it in the CCWG Charter? I could not find it there

- Answer: This is not in the charter but the CCWG-Accountability Co-Chairs have stated that they would not forward the proposal unless there was consensus from the Chartering Organizations. Any significant comments from the Chartering Organization would need to be considered and addressed in a supplementary report issued for their consideration.

2. Charter - Question: What happens if less than 50% of the Chartering Organization support either the entire proposal or any of the recommendations? Would the CCWG- Accountability still submit the final proposal if less than 50 % of the Chartering Organization support the entire proposal or any of the recommendations? The question is what is the threshold which permits the CCWG-Accountability to submit the proposal or any recommendations to the ICANN Board?

- Answer: This is not in the Charter but the CCWG-Accountability Co-Chairs have stated that they would not forward the proposal unless there was consensus from the Chartering Organizations. Any significant comments from the Chartering Organization would need to be considered and addressed in a supplementary report issued for their consideration.

3. Charter - Question: Apart from the Chartering Organizations who else should be involved in approving / commenting to the Third CCWG Proposal?

- Answer: Only the Chartering Organizations can approve the proposal as per the CCWG-Accountability Charter. The CCWG-Accountability is encouraging community to channel their input through Chartering Organizations to inform

their discussions. The CCWG-Accountability also welcomes individual comments from community members.

4. Process - Question: What are the objectives of those calls/ webinars, other than providing information and comments on how these recommendations could be implemented

- Answer: A full range of call are being organized to inform the community of proposed recommendations (webinars, SO or AC dedicated calls etc). There is no competition with the CCWG-Accountability. All are welcome to organize conference calls.

5. General - Question: What is the annex on the NTIA conditions again please?

- Answer: Refer to annex 14: Meeting NTIA's Criteria for the IANA Stewardship Transition

6. Recommendation 2 - Question: In several instances a 7-day time limit is applied to SOs and ACs. This seems very impractical considering the size and diversity of SOs and ACs so it seems possible that it may be impossible to exercise Community Powers because of this restriction. How has the CCWG dealt with this issue?

- Answer: The problem is that on the one hand we need to have the use of the Community Powers in a workable timeframe. On the other hand, we have to be reasonable and realistic about SO/AC decision-making timeframes. What is in the report is our current proposal. If feedback indicates that timeframes are too tight, we will probably need to lengthen them. If there is need to lengthen them, the number of steps involved will to be reconsidered.

7. Recommendation 2 - Question: What are the thresholds for a court action? Is court action a community power or not?

- Answer: ~~No, it is not a Community Power but rather an enforcement mechanism. While the Empowered Community (the legal entity that will be created to designate directors and exercise other Community Powers) will have the ability to seek enforcement in court of certain Community Powers, the CCWG-Accountability considers this to be an enforcement mechanism related to Community Powers rather than a Community Power itself.~~ The CCWG-Accountability recommendations are premised on the expectation that the ICANN Board will abide by the community decisions and only in the case where they do not is enforcement required. As detailed in the explanation of the Sole Designator, the power to remove individual ICANN Board Directors or the entire Board is a Statutory Power of a designator under California law. As an example, if the Empowered Community, after following the escalation process, came to the decision to remove the entire Board and ~~the-replace it with a new Board-refused,~~

and the outgoing Board attempted to resist in some manner, then the Sole-Designator, on instructions of the Empowered Community, could request that a court with jurisdiction enforce the Empowered Community's decision ~~to remove the Board~~. For other powers or any other failure of the Board to follow its own Bylaws, an Independent Review Process (IRP) decision that is not accepted by the Board ~~could be appealed by Sole Designator to a court with jurisdiction~~ may be enforced either directly by court action instituted by the Empowered Community or through the indirect enforcement mechanism of Board removal (which is further enforceable through court action). The participating SOs and ACs would direct the Empowered Community to take enforcement action through the decision-making processes, escalation procedures and decision thresholds outlined in the Proposal.

8. Recommendation 4 - Question: If an appointing SO/AC removes, is this SO/AC protected from suit by the removed director?

- ~~• Answer: This is considered an implementation question.~~
- Answer: In the Sole Designator model, the SO/AC with the right to select a director has the right to remove the director (after the consultation process set forth in the Proposal) through action by the Empowered Community (the legal entity that will be created to designate directors and exercise other Community Powers) who must act as the SO/AC instructs with respect to director selection and removal. A director so selected has no separate claim to his or her board seat. Therefore it is unlikely that a director would have a cause of action on which to bring suit against the SO/AC for removal. In the implementation phase, indemnification and other provisions will be considered to provide further protection to the SOs/ACs and any other appropriate parties (such as SO/AC officers) regarding any potential legal claims that might arise.

9. Recommendation 4 - Question: Is the removing SO/AC (director) indemnified by ICANN - assume they can be sued as unincorporated CA association and that individual offices of SO/AC would also be named. Should there be protection/indemnification for SO/AC and its officers on this removal process in order to prevent chilling effect? Will ICANN defend? If not, SO/ACs may not want to risk removal.

- Answer: ~~This is considered an~~ As noted in response to Question 8 directly above, it will be difficult for a removed director to develop a legal claim premised on wrongful removal since directors selected by the SOs and ACs have no independent claim to their board seat. To protect against other types of claims (for example, defamation), in the implementation ~~question~~ phase, consideration will be given to appropriate indemnification provisions and other protections should a claim arise. This may include requiring a formal agreement signed by ~~Director~~ each director before

they ~~come into service would be required which would~~ seated on the Board with appropriate covenants not to sue to protect the Empowered Community and the appointing SO/AC.

10. Recommendation 4 - Question: if it is a clear statutory and Bylaw right for an appointing SO/AC to remove the directors they appoint with or without cause, and it only happens after a lengthy proscribed process, what is the cause of action?

- Answer: There is no need for a specific cause for action. There is rather a requirement to provide a clear rationale why the action is being undertaken.

11. Recommendation 4 - Question: Is there any legal protection for SO/ACs and their officers exercising director removal by way of indemnification or agreement by ICANN to defend a suit by the removed director? Alternatively, can directors sign an agreement not to sue SO/AC when each takes office? Otherwise it seems community may be reluctant to exercise the power(s).

- Answer: ~~This is considered an~~ Please see the answers to Questions 8 and 9 above. In the implementation question. The current thinking from lawyers is that phase, consideration will be given to appropriate indemnification provisions and other protections should a claim arise. This may include requiring a formal agreement signed by ~~Director~~ each director before they ~~come into service would be required which would~~ are seated on the Board with appropriate covenants not to sue to protect the Empowered Community and the appointing SO/AC.

12. Recommendation 4 - Question: Does the very clear / distinct separation between IANA and ICANN budget represent a change in this draft?

- Answer: It does. In fact, the notion of a caretaker budget would explicitly include IANA Functions funding.

13. Recommendation 6 - Question: Historically it is believed that the Human Rights are violated by governments alone but it is world renowned companies do too. There should be a more explicit commitment on Human Rights within ICANN's Bylaws to legally do everything possible to ensure that the Human Rights of end users are not violated while using protocols, unique identifiers, among other resources. Include this if possible.

- ~~Answer:~~ Answer: We note that this is a comment rather than a question. The exact wording of the Human Rights recommendation was the result of extensive and detailed discussions by Work Party 4 and the result of consensus by the CCWG-Accountability. Including a Bylaw ~~on enforcement on~~ that requires ICANN to take action against others to enforce Human Rights would ~~—be overstepping—~~ ~~or overstep~~ ICANN's Mission.

14. Recommendation 6 - Question: Why not include a more specific reference such as the UDHR?

- **Answer:** This was an issue which was widely discussed by Work Party 4. It was agreed that no particular reference to any Human Rights instrument would be made and that such references would be fleshed out as part of Work Stream 2, as needed.

15. Recommendation 6 -- Question: On Human Rights--> do we not amend the Bylaws until the framework of implementation is decided? I can imagine Directors would be concerned about how to comply with "applicable law" when there is no framework yet.

- **Answer:** The Bylaw on Human Rights will be included as part of Work Stream 1. We will also be including an interim Bylaw that will take care of ensuring that the Framework of Interpretation is developed in order to be able to fully implement the proposed Bylaw on Human Rights. Our lawyers have advised us that ICANN and its Board are already required to comply with applicable law, including all applicable human-rights laws, regardless of whether these requirements are stated explicitly in the Bylaws.

16. Recommendation 6 - Question: Is the last sentence of the Bylaw text necessary: its commitment means it has to deliver on that i.e. enforce its commitment by correcting any failure to respect rights.

- **Answer:** See annex 6 *Recommendation #6: Reaffirming ICANN's Commitment to respect internationally recognized Human Rights as it carries out its Mission* for more details. This sentence was included to avoid broadening ICANN's mission. Our intent is to avoid ICANN becoming the police for anything. Having ICANN commit to respect Human Rights does not create any additional obligations for ICANN.

17. Recommendation 7 - Question: ~~must~~Must the aggrieved party in an IRP be, in fact, a Supporting Organization?

- **Answer:** No. The aggrieved party is any materially affected party by the specific decision. The proposed IRP is also available as a power to the Empowered Community to challenge decisions by the ICANN Board that are not consistent with ICANN's Bylaws and articles of incorporation.

18. Recommendation 7 - Question: ~~in~~In slide 15 how is the term "applicable law" defined? What domicile is used for this definition?

- **Answer:** "Applicable law" refers to any law in any jurisdiction that relates to human rights and applies to ICANN. For ICANN's US operations that includes

both State and Federal law.

19. Recommendation 11 - Question: The recommendation includes a statement that the GAC has the autonomy to refine its Operating Procedures to specify how objections are raised and considered (e.g. disallowing a single country to continue an objection). This is not a Bylaws change presumably so where will this be captured? Although this is treated in the explanatory text as being limited to a change to operating procedures where a single Government is abusing its position there is no limit to this situation. What safeguard is there that, in disallowing certain views, the GAC could not effectively change the definition of "formal objection".

- **Answer:** As stated in Recommendation 11-: The Government Advisory Committee has the autonomy to refine its Operating Procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the Board for which the Government Advisory Committee seeks to receive special consideration, the Government Advisory Committee has the obligation to confirm the lack of any formal objection.

20. Recommendation 11 - Question: My concern is that "formal objection" could be redefined. Are you saying that all disallowed views will nevertheless be reported to the Board?

- **Answer:** As stated in Recommendation 11: The Government Advisory Committee has the autonomy to refine its Operating Procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the Board for which the Government Advisory Committee seeks to receive special consideration, the Government Advisory Committee has the obligation to confirm the lack of any formal objection.

21. Recommendation 11 - Question: How does this provision on 2/3 rejection relate to the provision applicable to Board action on GNSO policy advice where GNSO policy advice and GAC advice conflict?

- **Answer:** The Board requires 2/3 to reject a GNSO Policy recommendation today. A majority of Board equals 9 votes. 2/3 represents 11 votes.

22. Recommendation 11 - Question: The manner in which this ST 18 is drafted gives rise to considerable problems to GAC in the sense that the entire GAC could be captured or hijacked by one single Government who formally disagrees to the

potential consensus which may lead that no full consensus issue could be sent to ICANN Board as one single government could on its own interest formally object to a potential consensus issue and blocked that.

- **Answer:** We note that this is a comment rather than a question. As stated in Recommendation 11: ~~The, the~~ Government Advisory Committee has the autonomy to refine its Operating Procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the Board for which the Government Advisory Committee seeks to receive special consideration, the Government Advisory Committee has the obligation to confirm the lack of any formal objection.