

Dear CCWG-Accountability,

The Board has been engaging in the work of the CCWG-Accountability, including in the intensive work over the past weeks. An enormous amount of progress has been made and we're pleased to see the public comments addressed, including the Board's provided in its 14 December comments. We've been paying close attention to the CCWG's considerations of the recommendations this month.

Based on our comments of 14 December, we're pleased to see agreement on the following Recommendations:

- Recommendation 1: Establishing an Empowered Community for Enforcing Community Powers.
- Recommendation 2: Escalation Time Frames
- Recommendation 3: Fundamental Bylaws
- Recommendation 4: Budget (IANA) and Community IRP
- Recommendation 7: Scope of IRP
- Recommendation 8: Reconsideration
- Recommendation 10: SO/AC Accountability
- Recommendation 12: WS2

However, as noted last week in the communication from Bruce Tonkin on 26 January, the Board has a few outstanding areas remaining. The Board met in Singapore on 3 Feb and discussed these outstanding areas, and as a result we provide an update of our position on the following topics:

- Recommendation 4 – Board Removal Liability Mitigation
- Recommendation 6 - The proposed Bylaw on Human rights
- Recommendation 5 - The Mission Statement
- Recommendation 9 – AoC reviews
- Recommendation 11 – GAC Advice and the Role of the Board

Our suggestions are provided in good faith and respect for all stakeholders participating in the multistakeholder process.

Recommendation 4 – Board Removal Liability Mitigation

The Board previously identified to the CCWG-Accountability that it would not support the requirement that Board members would have to, as a condition of serving on the Board, sign a waiver of rights to file suit against community members for statements made in the Board removal process. However, the Board also indicated its willingness to explore the possibility of indemnifying community members for suits based on participation in the Board removal process.

The Board then agreed that it would support indemnification for statements made in the written rationale supporting Board member removal, so long as those statements were made in good faith and with due diligence as to their veracity. On the CCWG's 26 January 2016 call, we heard the concerns of some on the CCWG that the limitation to written rationale was not far enough, and that to make this a meaningful provision the indemnification had to also cover statements made within the process leading up to the Board removal.

Hearing the CCWG's concern, , the Board has modified its position to support indemnification for public statements made in the initiation of the Community Forum and in the Community Forum process, as well as in the written rationale. The Board remains in objection to a waiver. We believe that this compromise provides the community with flexibility for good faith participation in the removal discussions with sufficient protection if their participation was challenged. ICANN staff has provided the CCWG with proposed Bylaws language to give effect to the indemnification. Particularly with the extension of indemnification to a broader set of actions, it is essential that the community be given tools to assess, from the outset, how to demonstrate that contributions are made in good faith. We expect that guidelines for the running of the Board removal processes will be developed as part of the implementation of the CCWG recommendations. ICANN provided the CCWG with some initial ideas on what those guidelines could look like.

Recommendation 6 - Human Rights

With regards to human rights, the Board has consistently expressed its support to integrate human rights appropriately into ICANN's work,

consistent with its mission and scope. The Board has also provided rationale and proposed solutions to lend confidence to the community on its commitment to human rights.

In the spirit of the compromise throughout the CCWG proceedings, the Board is modifying its position, and is supportive of inserting a commitment to respect human rights into the ICANN Bylaws. Building off of the text provided in the most recent version of Recommendation 6.¹

The Board supports the Bylaws inclusion of text as follows:

Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of human rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability (or another Cross Community Working Group chartered for such purpose by one or more Supporting Organizations or Advisory Committees) as a consensus recommendation in Work Stream 2 (including Chartering Organizations' approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.

The clause on the timing of the effective date of the Bylaws provision

¹ At the time of writing, the CCWG proposed text is: *Within its Mission and in its operations, ICANN will respect internationally recognized Human Rights. This commitment does not in any way create an obligation for ICANN, or any entity having a relationship with ICANN, to protect or enforce Human Rights beyond what may be required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations' approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.*

addressed many, though not all, of the Board's timing concerns. There were still significant concerns regarding some of the other detail, including possible interpretations that could impose human rights responsibilities on those with whom ICANN does business, or whether there are things that ICANN should affirmatively be doing today, in addition to compliance with law.

One of the most pressing concerns that remained with the language was on the potential impact on external entities. The Board remained concerned that the CCWG's attempt to exclude reach to "entit[ies] having a relationship with ICANN", could actually be interpreted in a manner that increases – not insulates – the reach of this provision. When ICANN is challenged for conduct alleged to be in violation of applicable laws on human rights, that that challenge could also reach third parties for alleged failures to protect or enforce human rights within applicable law. This could reach entities with or without contracts, and many of which (including ICANN) have *no* enforcement power when it comes to the law. This is a potential path to placing an affirmative (and out of mission) obligation to police those with whom ICANN has relationships for potential failures to protect or enforce human rights.

This language could leave the door open for those doing business with ICANN to be held to, for example, the applicable laws in the US or another place where ICANN is found to do business. The applicable law is not defined as it applies to entities with relationships with ICANN, nor is that the type of language normally included in Bylaws.

The Board supports the removal of the language that causes it concern, while allowing the CCWG to move forward with a recommendation to include a commitment in the Bylaws that ICANN treats human rights as a core value that guides the decisions and actions of ICANN:. We hope this compromise can allow this issue to be closed.

Recommendation 5 - Mission Statement

On the mission statement, the Board supports the core principles that:

- (a) ICANN shall not impose regulations on services that use the

Internet's unique identifiers, or the content that such services carry or provide.

- (b) ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of its Mission, *including PIC Specifications*.

The drafting of the bylaws related to these principles will need to take into account the comments that the Board has previously expressed around use of terms such as “regulations”, when ICANN is not a regulator, and the exact definitions of terms such as “services”, so as not to exclude services such as domain name registration and domain name registry services. It is inappropriate to include within ICANN's mission a prohibition on regulation, when ICANN is not a regulator.

We remain concerned about the grandfathering discussion and the potential limitations to ICANN's contracting and enforcement abilities.

Grandfathering

The Board's concerns with the recommendation to include “grandfathering” language within ICANN's Mission remain. These concerns exist notwithstanding the words used to describe the concept of “grandfathering”. First, as the CCWG-Accountability has continually affirmed, the CCWG-Accountability recommendations are not intended to change ICANN's mission. To this end, any suggestion that ICANN's contracting ability with registries and registrars will be changed as a result of the CCWG-Accountability's work is inconsistent and troublesome. The Board does not agree with the inference, and it does not benefit ICANN or the ICANN community to suggest, that ICANN has previously entered into contracts that go beyond its mission. This introduces uncertainty and instability into ICANN's work.

Second, grandfathering – no matter when the CCWG-Accountability wishes to impose a cutoff – could result in inconsistent contracting among different parties and raises the question of unequal treatment among contracted parties.

Finally, the uncertainty around the concept of grandfathering, and the level of detail needed to try to address that uncertainty, has carried the

CCWG-Accountability beyond the clarification of ICANN's mission that was anticipated as part of this WS1 transition work. This level of detail is beyond the scope of ICANN's readiness for the transition, and creates opportunities for vagueness and challenge that could be introduced into ICANN's contracts is unacceptable.

The Board understands that one of the concerns driving this discussion is a confirmation that the PICs would remain enforceable. As a result, the Board proposes that a reference to the viability of the PICs be added to the proposition "ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of its Mission, *including PIC Specifications.*"

Recommendation 9 – AoC Reviews

Following on from the recent email exchange to clarify the Board's concerns on Recommendation 9, the Board notes that many of its concerns can be addressed during implementation and the development of Operational Standards. The Board has a particular concern with two paragraphs in the most recent version. At paragraph 54, the Board does not support the language that states "Review Teams are established to include both a limited number of members and an open number of participants." The Board would support this language if it read "Review Teams are established to include both a limited number of members and an open number of ~~participants~~ *observers.*" The Board does not agree with a Bylaws-mandated inclusion of "participants" in these Review Teams. The Review Team composition is defined and limited because of the specificity of the review. Requiring open participation is not consistent with this purpose.

Similarly, the statement at Paragraph 57 that the Review Team would first try to find consensus among "participants", and only if that is not successful, seek consensus among members. Consensus polling should only be among the Review Team members. The Board does not support maintaining "if consensus cannot be reached among the participants" at the beginning of that paragraph.

Recommendation 11 - GAC Advice and Role of the Board

On 28 January 2016, the Board provided some inputs to the CCWG-Accountability on the evolution of Recommendation 11 and how those modification impacted the role of the Board. These inputs were provided as clarification, and focused on a few areas:

Requirement for Formal Decision

The Board understands the concern that the language on the Board making an initial determination that it intends to act inconsistently with GAC advice might be subject to interpretation. As a matter of clarification, the Board recommends that the current practice of the Board, which allows flexibility, be used when revising the language of this section, so that the Board is not subject to a changed process or new affirmative voting requirements. The current practice was established and developed after the first Accountability and Transparency Review. At that time, the Board and the GAC, through the Board/GAC Recommendations Implementation Working Group (BGRI), developed a process to lead to consultations between the Board and GAC, if ever necessary. This process document is available at <https://gacweb.icann.org/download/attachments/27132063/2013-04-07-Process%20forConsultations%20between%20ICANN%20and%20GAC.doc?version=1&modificationDate=1376102118000&api=v2>. The Board is provided flexibility: “In the event that the Board determines, through a preliminary or interim recommendation or decision, to take an action that is not consistent with GAC advice, the ensuing consultations will be considered “Bylaws Consultations”. The Board will provide written notice to the GAC (the “Board Notice”) stating, in reasonable detail, the GAC advice the Board determines not to follow, and the reasons why such GAC advice may not be followed.” The Board supports that, to the extent the Bylaws language needs to be clarified on this issue, that it is clarified to align with the current practice that has been discussed, agreed to, and is not problematic in regards to accountability.

Similarly, while the Board is required to take GAC advice into account, the Board understands that recommendation is not intended to impose any new requirements for the Board to take decisions on GAC advice. This issue can be addressed in the Bylaws drafting notes by indicating

that the Board should not be obligated to act on all GAC advice through a vote.

Considering Rationale

The Board supports that ACs should be required to provide rationale to accompany advice. The Board understands the CCWG recommendation to place an obligation on the Board, when taking a decision on a piece of advice, to consider whether the Board found the rationale sufficient. The Board would always be in a position to indicate if additional information is needed prior to completing consideration of any piece of advice. The Board does not consider this recommendation to impose a requirement that – separate from when the Board is considering advice – that the Board must provide a specific determination for each piece of advice received regarding whether the Board felt the rationale was sufficient. The Board urges the CCWG to clarify this issue for Bylaws drafting.

Uniform Treatment of AC Advice

The Board agrees with the CCWG-Accountability's clarification that, if the Board takes action inconsistent with the Bylaws – even if that action is based upon following the advice of an AC – the Board can be subject to an IRP. To the extent that the CCWG believes that it is important to specifically identify this in the Bylaws, the text used should apply to all Advisory Committees, and not solely refer to the GAC.

We believe it's essential that we flag now that our concerns continue.

Steve Crocker

Chairman, on behalf of the Board.