Jessica Hooper, 8 January 2021

**Consensus Call Response**

I offer my support of the Subsequent Procedures PDP WG’s Final Report, with the following exceptions:

# Areas of Non-Support:

**Topic 9: Registry Voluntary Commitments / Public Interest Commitments**

*c. New issues raised in deliberations since publication of the Initial Report, if applicable:*

*In response to the Draft Final Report, the ICANN Board commented that it was concerned that the current ICANN Bylaws language (which differs from that which existed during the 2012 New gTLD round) could “create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs).” It then asked the Working Group whether it had “considered this specific language in ICANN’s Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?”*

*During subsequent Working Group discussions, the Working Group decided not to alter its recommendations with respect to the PICs or RVCs. The Working Group will respond to the ICANN Board’s specific concerns under separate cover. In short:*

* 1. *To the extent that existing PICs are used as PICs (or RVCs) in subsequent rounds, these are specifically “grandfathered” into the current Bylaws mission.*
  2. *The Working Group also agreed that to the extent that RVCs or PICs address eligibility rules for the registration and/or renewal of domain names, these would not involve the need for ICANN to assess and pass judgement on content (as set forth in the Bylaws).*
  3. *To the extent that some registries will want to make voluntary commitments in response to public comments, Government Early Warnings, GAC Advice, etc., it is understood by the Working Group that having these commitments reflected in Registry Agreements even if they fall outside of ICANN’s core mission is consistent with the Bylaws where neither ICANN itself nor any third party under ICANN’s control is required to pass judgment on ‘content’.  In such cases, it is understood that using an independent third party as an arbiter to determine whether there has been a violation of the commitment would be consistent with ICANN’s mission even if ICANN were ultimately required to rely on that third party decision to enforce a pre-arranged contractual remedy, which could include sanctions and/or termination of the Registry Agreement.*

*In short, the PDP Working Group stands by its recommendations and implementation guidance which envisage the use of PICs / RVCs to resolve issues that arise through the public comments, objections, Government Early Warnings, GAC Advice or other concerns expressed by the community. The commitments must be enforceable through contracts entered into between registry operators and ICANN. The Working Group therefore urges the IRT to work with ICANN org to implement the recommendations and implementation guidance set forth herein in a manner consistent with ICANN’s current Bylaws.”*

Response – This section of Topic 9 was developed after the public comment period closed on the Final Report. This text has a direct impact on the Registry Agreement yet wasn’t reviewed by the community. Section C above should not be included in the Final Report as it is speculative (ex: “…it is understood”) and hasn’t gone through legal review.

Furthermore, the ICANN Board has concerns about the contradictions with the Bylaws and those concerns need to be addressed. The WG didn’t have enough time to deliberate on possible solutions. As set forth in the PDP 3.0 guidelines, a narrow-scoped PDP could be constituted to look at the Bylaw concerns from the Board more closely rather than punting it to the IRT to solve.

**Topic 23: Closed Generics**

*a. Recommendations and/or implementation guidelines*

*“It was the expectation of the ICANN Board that the GNSO would “develop policy advice concerning exclusive generic TLDs.”144 Although the Working Group has had numerous discussions about this topic, and received extensive comments from the community, including members of the Governmental Advisory Committee, the Working Group was not able to agree on “policy advice concerning exclusive generic TLDs.”*

Response – I agree with how the Final Report captures the discussions on this topic. However, there is still GAC Advice open on this topic and policy should be drafted to address those community concerns. A separate PDP should be explored for a concentrated and focused deliberation on this topic.

**Topic 35: Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets**

*Recommendation 35.2:*

*Consistent with the Application Change processes set forth under Topic 20: Application Change Requests, the Applicant Guidebook (AGB) must reflect that applicants will be permitted to creatively resolve contention sets in a multitude of manners, including but not limited to business combinations or other forms of joint ventures and private resolutions (including private auctions).*

Response – All unresolved contention between applied-for strings should be settled in an ICANN Auction of Last Resort. Private Auctions should not be included as an option for private resolutions.

*Recommendation 35.3:*

*Applications must be submitted with a bona fide (“good faith”) intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.*

* *Evaluators and ICANN must be able to ask clarifying questions to any applicant it believes may not be submitting an application with a bona fide intention. Evaluators and ICANN shall use, but are not limited to, the “Factors” described below in their consideration of whether an application was submitted absent bona fide intention. These “Factors” will be taken into consideration and weighed against all of other facts and circumstances surrounding the impacted applicants and applications. The existence of any one or all of the “Factors” may not themselves be conclusive of an application made lacking a bona fide use intent.*

Response – The bona fide intent factors are subjective and unenforceable. These factors were formulated by the WG to address gaming concerns. With private auctions still a viable resolution, these factors are irrelevant.

*Recommendation 35.5:*

*Applicants resolving string contention must adhere to the Contention Resolution Transparency Requirements as detailed below. Applicants disclosing relevant information will be subject to the Protections for Disclosing Applicants as detailed below.*

***Contention Resolution Transparency Requirements***

Specifically - *For Other Forms of Private Resolution: Where contention sets are privately resolved through a mechanism other than a private auction, the following must be disclosed…”*

Response – All private resolutions, auction or otherwise, should require the value of the transaction to be disclosed.