To the Chairs of SOACs:

GNSO

ccNSO

ASO

ALAC

GAC

SSAC

RSSAC

23rd June 2019

Dear Chairs of SOs/ACs,

I am writing to you in your capacity as Chair of one of the ICANN Supporting Organisations or Advisory Committees.

As you know, the Independent Review Process (“IRP”) is one of the main mechanisms for ICANN accountability. It is a cornerstone of the enforceable accountability agreed at transition on the basis of the proposal of the Cross-Community Working Group on ICANN Accountability, implementation of which was an essential pre-condition for community support for the IANA Stewardship Transition Proposal.

The role of the IRP Implementation Oversight Team is to draft the Rules of Procedure for the IRP, and to make recommendations for various other aspects of the IRP relating to implementation[[1]](#footnote-1).

Drafting the Rules of Procedure has been an extended process. We were founded in January 2016, prior to transition which was concluded completed 1st October 2016, and our work is not yet finished. We reported *Interim Supplementary Rules of Procedure* in October 2018, which were approved by the ICANN Board at ICANN63 in Barcelona. The Board resolution urged us to “to deliver a set of Updated Supplementary Procedures to the Board as soon as possible”.

Unfortunately, only a small subset of members of the IOT continue to participate actively in our work, and we are struggling to remain quorate. A question has also arisen as to whether staff members from ICANN’s legal department, and from ICANN’s external legal counsel Jones Day, are eligible for full voting membership of the IOT.

I am therefore writing

1. **To invite you to propose new members to the IOT; and**
2. **To seek your guidance on whether ICANN staff and external counsel are eligible for full voting membership of the IOT.**

**Invitation to propose new members**

The IRP acts as the final appeal for disputes within ICANN on a broad but finite range of matters.

The first major limitation is that the IRP, with certain specified exceptions, only resolves disputes on the basis of whether ICANN has acted consistently with its own Articles and Bylaws; disputes with ICANN on any other basis are not eligible to be considered by the IRP[[2]](#footnote-2).

Secondly, the bylaws specifically exclude the IRP from considering disputes relating to ccTLD delegations and re-delegations, Internet numbering resources or protocol parameters, as well as some challenges by the Empowered Community to the results of a PDP.

Accordingly, the entire community has an interest in the effective working of the IRP, but in practice its work is likely to consist largely of matters relating to gTLDs.

With this in mind, we are inviting proposals for additional members from the following organisations. For your guidance, we envisage the following numbers of additional members from the affected stakeholder groups, but we are willing to consider differing numbers if you disagree:

|  |  |
| --- | --- |
| Organisation | Number of requested  additional members |
| GAC | 1-2 |
| ALAC | 1-2 |
| ccNSO | 1-2 |
| ASO | 1-2 |
| gNSO Registry Stakeholder Group | 1-3 |
| gNSO Registrar Stakeholder Group | 1-3 |
| gNSO Commercial Stakeholder Group | 1-3 |
| gNSO Non-Commercial Stakeholder Group | 1-3 |
| SSAC | 0-1 |
| RSSAC | 0-1 |

Membership of the group is not limited to qualified lawyers, but individuals with experience of either litigation process or procedures for alternative dispute resolution will tend to be more familiar with the issues the IOT needs to consider.

Existing members of the IOT will be entitled to continue to participate, but will be invited to re-designate themselves as non-voting observers if they do not wish to do so.

**Eligibility of ICANN staff members and legal counsel for membership**

The ICANN Bylaws set out the membership of the IOT as follows

“An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community… Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts[[3]](#footnote-3)”

The IOT is unanimously convinced that the support of staff from ICANN’s legal department and external counsel is necessary to the success of the IOT’s work. ICANN legal staff have information and experience relating to how IRPs are conducted and the challenges parties face that the IOT needs to consider.

The bylaws also state that the IOT shall have access to the assistance of independent counsel. During Workstream 1 of CCWG Accountability, we benefited from the advice of Sidley Austin LLP.

The IOT is, however, divided as to whether ICANN staff and external counsel ought to attend purely in a support capacity, or whether they should be full members of the group with voting rights and counting toward quorum counts.

As full members, ICANN staff and external counsel would be entitled to take a full part in all discussions of the IOT generally. This would include advancing their view on questions that require a balance to be struck between competing objectives, such as between ensuring that IRP claimants have a full opportunity to be heard, as compared with ensuring that the IRP process is not too onerous for ICANN or claimants.

If ICANN staff and external counsel only attend in a support capacity, their contributions would be limited to matters of fact and process, and neutral statements on differing viewpoints; value judgements would be reserved exclusively to community members. They would not be included in votes or consensus calls, nor in quorum counts.

In either case, the IOT’s report only constitutes a recommendation to the Board; it is not self-executing. ICANN’s legal staff will still be able to advise the Board separately concerning the community’s recommendations before the Board takes a final decision.

I therefore ask for your guidance on whether, in the light of the bylaws extract cited above, should ICANN staff and external legal counsel be invited to be full voting members of the IOT?

So that the IOT may proceed with its work without further delay, I request your nominations for membership and answer to my question by 1st September 2019.

Yours sincerely,

Malcolm Hutty

IRP Implementation Oversight Team.

1. For details of the IRP, see ICANN Bylaws section 4.3. For details of of the role of the IRP Implementation Oversight Team, see in particular clause 4.3(n) [↑](#footnote-ref-1)
2. The exceptions are certain disputes about the non-enforcement of contractual rights, and PTI service complaints by direct customers of the IANA naming functions. For details of eligible disputes, see ICANN bylaws clauses 4.3(b)(iii) and 4.3(c) [↑](#footnote-ref-2)
3. Extract from Bylaws Article 4 Section 4.3(n)(i) [↑](#footnote-ref-3)