

ICANN Board's Public Comment Submission on the third Accountability and Transparency Review Team (ATRT3) Draft Report

31 January 2020

Dear ATRT3 members:

The ICANN Board appreciates the work of the members of the Third Accountability and Transparency Review Team (ATRT3). The Board recognizes and thanks the ATRT3 for their time, effort, and dedication to assemble the [Draft Report](#), taking into account ongoing work, and draft recommendations. The Board looks forward to receiving the final report and recommendations.

The Board in reviewing the Draft Report is focusing its input and comments on the following portions of the ATRT3's Draft Report: streamlining of reviews; the prioritization of recommendations; the assessment of implementation of prior review recommendations; and the issuing of recommendations and/or suggestions. This builds on the Board's focus on resourcing and prioritization as also reflected in the Board's Organizational Effectiveness Committee and the Board Caucus Group on Budgeting and Prioritization of Community Recommendations previous engagement with the ATRT3 and other review teams, notably to [discuss the Draft Proposal "Resourcing and Prioritizing of Community Recommendations,"](#) and the ICANN66 [session](#) on "Enhancing the Effectiveness of Review Recommendations and Their Implementation."

The Board also provides some other inputs in the section "Additional Observations" below and may provide the ATRT3 with additional input as the Board completes its full review of the Draft Report. This input is intended to contribute to the refinement of the recommendations, and address areas benefiting from clarification. We will strive to provide such input in a timely fashion, aware that the ATRT3 is due to submit its Final Report in April 2020.

Streamlining of Reviews

Section 10.5

The Board recognizes that the ATRT3 has spent significant time and thought on possible ways to streamline ICANN's Bylaws-mandated reviews, resulting in the proposal of two options for such improvements in its Draft Report.

The Board agrees with the ATRT3's consideration that the issues pertaining to Specific and Organizational Reviews should be addressed in a holistic fashion. This approach aligns with the Board's vision, also reflected in the Chairman's [Blog](#) "Enhancing and Streamlining ICANN's Reviews: Issues, Approaches, and Next Steps." The Board believes that streamlining must include improving the timing, duration, and cadence of the reviews. In terms of broader review enhancements, the Board believes it would be productive for the streamlining efforts to focus on several key areas, such as diversity and skill of review teams and independent examiners; lines of accountability; safeguards to transparency; prudent use of resources; and clarity on the roles

and responsibilities of review teams/independent examiners, the community, the ICANN Board, and ICANN org.

With this in mind, the Board does not consider Option 1 (as described in the Draft Report) to be viable. Option 1 does not address any of the community's stated concerns that too many reviews occur simultaneously, the reviews are too long and resource-intensive, and too many recommendations are produced. In addition, Option 1 proposes a new accountability layer on top of the recently implemented new accountability measures, which in the Board's view is not necessary considering that the community has access to a number of accountability mechanisms and processes.

The Board supports the direction of Option 2, which offers interesting considerations and will benefit from clarifications and further refinement to capture ongoing discussions identified above. The Board believes that there is currently a window of opportunity to substantially improve the effectiveness of reviews and their outcomes. The Board acknowledges the complexity associated with this streamlining work, given the range of discussions and dependencies, including the ongoing Bylaws-mandated review work. Given ATRT3's limited remaining time, the Board encourages the ATRT3 to define overarching criteria that can guide the future review streamlining work. Such criteria should focus on the intent and requirements of the Bylaws, the needs of the ICANN community, as well as ICANN's Strategic Plan. The Board envisions the future streamlining work to further evolve based on ATRT3 criteria and be informed by public comments received by ATRT3 as well as input gathered over the last few years as the community has been confronting the need to re-imagine reviews.¹

Based on the overarching criteria noted above, with regards to organizational reviews, the ATRT3 might want to consider how to bring consistency and standardization to those individual SO/AC reviews. It might be useful to consider modelling ICANN review processes on industry-standard methodologies/frameworks for assessing organizations and achieving organizational excellence (for example, [EFQM](#) or [Baldrige](#) excellence frameworks). The Board's view is that such an approach would support the effectiveness of the holistic review, as proposed by the ATRT3, by providing consistent and comparable data points. In relation to improvements, one area benefiting from further input would be how does the ATRT3 foresee the role of independent, external consultants in Option 2, considering the ATRT3 survey results of 79% of individual responses and 90% of Structure responses agree that Organizational Reviews should continue to be undertaken by external consultants?

In terms of specific reviews, consideration of overarching criteria could guide the simplification of the review processes and result in more impactful outcomes. The ATRT3 could propose and clarify several areas including, for example: guidance on how to support appropriately skilled and impartial review teams; propose strategies to help future review teams set their scope in a way that allows them to focus on issues most relevant and important to the ICANN community; and encourage review teams to improve the quality of their recommendations, including how to achieve effective and resource-conscious solutions.

¹ See, e.g., Long-Term Options To Adjust the Timeline of Reviews, Public Comment, opened 14 May 2018, <https://community.icann.org/x/7Y8zBw>; Next Steps on Reviews, Public Comment, opened 5 September 2019, <https://community.icann.org/x/9o8zBw>; Process Proposal for Streamlining Organizational Reviews, Public Comment, opened 30 April 2019, <https://community.icann.org/x/-Y8zBw>; Enhancing the Effectiveness of Review Recommendations and Their Implementation, Public Session, ICANN66, 4 November 2019, <https://community.icann.org/x/A5AzBw>.

Additionally, the ATRT3 could also consider focusing on the overarching criteria and recommend that the Board, community, and ICANN org develop streamlined review processes based on those criteria.

Prioritization of Recommendations

The Board appreciates the ATRT3's recognition that prioritizing recommendations is important. We remind the review team that, as of November 2019, there were over 300 recommendations issued by specific reviews (not including ATRT3 and SSR2 recommendations), organizational reviews and the CCWG-Accountability's WS2, that were either pending consideration by the Board, or awaiting implementation following Board action.

Section 12.4

The ATRT3's thoughts on prioritization work are very detailed, and the Board supports the proposal of a "holistic suggestion with respect to prioritization." This is the right strategy. The Board believes strongly that prioritization of review recommendations cannot take place in isolation and that the prioritization process must fit into ICANN's existing budget and planning mechanisms. Furthermore, all parts of ICANN need to take part in the prioritization – ICANN community, ICANN Board and ICANN org. Prioritization of community-issued recommendations needs to take place within the broader context of all ICANN work and must consider implications on community and ICANN org resources and bandwidth, as well as the availability of resources (including funds) whether required up-front only, or on an ongoing basis.

The Board notes a concern that the ATRT3's "guidance for the creation of a community-led entity tasked with developing a prioritization process," and the development of a standing group to perform prioritization work does not recognize existing mechanisms that could be leveraged, and is not the right approach to solving the imminent problem of prioritization and resourcing over 300 community-issued recommendations. The Board does not agree that the Empowered Community (EC) is the appropriate group to perform this prioritization work. Vesting this work in the EC would change the nature of the EC and how it performs its work. The EC relies on the actions of individual Decisional Participants to enact and enforce its powers as opposed to the collective coordination that is envisioned here. Using the EC in this manner would also require fundamental Bylaws changes that would further delay implementation. Of course, the Board's response to the outcomes of the prioritization work could be subject to EC processes, so the EC's important accountability role remains intact.

The Board also notes that the implementation timeframe recommended by ATRT2 recommendation 11.7, and supported by the ATRT3, seems implicitly linked to the prioritization work detailed in the ATRT3 Draft Report. The Board would like to encourage the ATRT3 to provide clarification on how the community role in prioritization links to the ATRT3's expected recommendation that the ICANN Board and ICANN org should provide an expected timeframe for implementation of each recommendation made through a community effort. The broader, collective prioritization effort appears to be in conflict with maintaining ATRT2's Recommendation 11.7.

Instead of creating new community structures, the Board encourages the ATRT3 to refine its recommendation to build on existing community groupings, mechanisms and processes, so as to leverage expertise, build on what has been tested and ease any additional burdens in the challenges around the prioritization and resourcing work. Given the shared sense of urgency to address the over 300 community-issued recommendations, the Board would welcome a dialogue with the ATRT3 in the very near future, to explore its ideas on potential immediate

remedies to accomplish the task of prioritizing these recommendations. This approach would allow the ATRT3 to focus its efforts on finalizing its other work. While there are many parts to this issue, the Board suggests that the ATRT3 consider recommending that the implementation shepherds (see [Operating Standards](#) Section 4.5) and the SO/AC chairs (or a designee of their choice) engage and assist the Board and ICANN org with the prioritization process, leverage existing processes, such as the annual process of planning and budgeting. This work could be based on analysis of effort versus cost that includes a comprehensive consideration of available resources (including funding and people).

The ATRT3 may also want to consider how overarching criteria for the streamlining process (as discussed in this document under Section 10.1) could inform and dovetail with the prioritization effort.

Assessment of Implementation of Prior Review Recommendations

Section 10.3

The Board believes the issue of implementation reporting, also discussed in the Draft Report, is timely. We note that the ATRT3 suggests that *“ICANN open a Public Comment proceeding on its implementation of the ATRT3 suggestions and recommendations such that the Implementation Report is available at the launch of the next ATRT type review (recognizing ATRT3 will be making recommendations with respect to Specific Reviews.)”*.

The Board would suggest the ATRT3 clarify the objective of this intended public comment in more detail. For example, if the objective is to bring increased community awareness to the progress and the outcomes of implementation work, then there may be other more suitable ways to accomplish such objective. The Board observes that if such a public comment goes ahead, improvements to timing and cadencing of reviews should allow for sufficient time to accommodate such a public comment proceeding.

In relation to implementation, the Board observes that ATRT2 recommendations did not always include guidance on outcome and measurement of success, as detailed in ICANN org’s [note to ATRT3](#) on 11 December 2019. The Board agrees with the ATRT3 that there is room for improvement in ICANN org’s clarification on how implementation has been addressed, as well as delivering clearer and more understandable reporting of implementation progress. As the ATRT3 forms its recommendations, the Board notes that the Operating Standards (Section 4.1) provide guidance for the drafting of recommendations and encourage the ATRT3 to adhere to these as closely as possible.

Overall, the Board is committed to an effective outcome-based implementation of clear and focused community recommendations, and believes that concrete fact-based problem statements and clear definition of what the desired outcome will look like, including how implementation should be evaluated by the community and the next review team, will go a long way toward more impactful outcomes. The Board strongly encourages the ATRT3 to consider this when compiling its final report.

For illustration purposes, we included several examples:

- *Re: Board Section 3.3.6, p. 42*

The Board encourages the ATRT3 to provide greater details on the desired improvements regarding the minutes of Board meetings. The ATRT3 suggests providing a summary of main discussion points covered prior to votes. The minutes produced already detail the discussion points. As such, the concrete examples of what the ATRT3 would like to see changed would be helpful in order to better understand this recommendation.

- *Re: 3.4.4 – ATRT2 Recommendation 9.1, p.46*
The Board seeks clarification on what additional steps need to be taken between the existing advice register process and the improved correspondence process. Similarly, it is unclear what “recommendation” refers to in the context of 3.4.4, since ATRT2 recommendation 9.1 refers to “advice” only; is the ATRT3 referring to recommendations coming out of PDPs?
- *Re: 3.4.5 – ATRT2 Recommendation 10.5, p.46*
The Board notes that the term “enhance” in the context of the recommendation is subjective. Concrete examples of what improvements the ATRT3 would like to see, in addition to those made since the ATRT2 Final Report was issued, would be a helpful addition.

Recommendations and suggestions

The Board notes that the ATRT3 formulated 35 recommendations, suggestions, and strong suggestions, stating that *“The ATRT3 does not consider suggestions to be less important than recommendations. The determination if an item is a suggestion or a recommendation will be finalized in ATRT3’s final report.”*

The Board understands that, under the Bylaws, the Board is obligated to act only upon recommendations issued by Specific Review teams. The Bylaws, at [Section 4.6\(a\)\(vii\)\(A\)](#), also impose an obligation on the ATRT3 to “attempt to prioritize each of its recommendations and provide a rationale for such prioritization.” While the ATRT3’s use of the terms “recommendations,” “strong suggestions,” “suggestions,” and “observations” could be a manner of expressing different levels of priority, the Board requests clarity on which of the ATRT3’s outputs are formal recommendations.

To the extent that the ATRT3 also includes categories of items other than “recommendations” in its final report, this could create confusion as this is not aligned with the Bylaws or Operating Standards. There would not be clarity on the expectation of how or when the Board is to act on suggestions, whether it would be appropriate to hold ICANN org accountable to implementation of those suggestions, or the other attributes of “recommendations.”

If the ATRT3 believes the distinction between recommendations and suggestions might be relevant for future review teams, the Board encourages the ATRT3 to include a recommendation on how to use “suggestions” versus “recommendations” in future reviews, allowing for community input, and thereby ensure broad community agreement on such an approach as well as a consistent and transparent output of all of ICANN’s future Specific Reviews.

Additional Observations

In addition to the four areas outlined above, the Board is in the process of working through all other sections of the Draft Report and would like to flag several initial observations.

Section 3.4

In connection with Board diversity, the Board believes there is a need for clarification from the ATRT3 on whether it is recommending the role of the EC be changed to allow the EC to substantively evaluate and/or override the nominations that the Nominating Committee (NomCom), the Supporting Organizations (SOs), and the At-Large Community make to the ICANN Board of Directors. (Section 3.4.7, p.46).

The EC was developed as a mechanism that would legally allow for the removal of ICANN Board members. In order to have the power to remove, that same entity must also designate directors. However, the Cross-Community Working Group on Accountability did not recommend any change to the groups that ran the Board director selection processes. As a result, in relation to the seating of the ICANN Board, the EC's authority under the Bylaws is to designate only those directors nominated by the appointing entities (See Bylaws Article 7, Section 7.2.) If the EC is now to have a role in assessing diversity of the nominees before making its designation, and possibly an opportunity to refuse to designate upon diversity grounds, this would alter or remove the nomination power from the SO/AC/NomCom. This would be a fundamental change to the ICANN Bylaws and would require substantial development to reach appropriate processes to allow for such an EC override including impact to the Board selection time frame or the possibility of Board seats going unfilled if the EC has the power for rejection at the end of the community selection processes. If the ATRT3 did not intend this change, more clarity is needed on what was intended in order to allow for full evaluation of any resulting recommendation.

In connection with Section 13 - SO/AC and Sub-structures Accountability (page 107), the Board observes that the ATRT3 intent and direction is not yet clear in the Draft Report. As the ATRT3 refines its work in this area, the Board would like to understand what the ATRT3 envisions in terms of potential recommendations or suggestions and more broadly what the intent of this section is relative to the ATRT3 scope of work.

To the extent the eventual recommendations or suggestions would be related to the SO/AC and Sub-structures, how does the ATRT3 envision socializing these with the community and would such recommendations and suggestions be intended to be passed through to the relevant community groups?

Finally, the Board notes that ICANN org has undertaken and/or plans to undertake improvements to both public comment procedures and accountability indicators. The Board encourages the ATRT3 to engage with ICANN org to ensure that any recommendations issued in the Final Report are complementary to the recently completed and ongoing improvements. The Board also notes that ICANN org is completing its analysis of the ATRT3 Draft Report and intends to submit a separate comment on operational matters.

Next Steps

The Board hopes that this input is useful and will inform the ATRT3's remaining work. The Board stands ready to discuss with the ATRT3 at any time should it wish to. As noted above, the Board will continue to review other aspects of the ATRT3 Draft Report, and may provide additional input in the weeks to come. The Board looks forward to receiving the final report in

due course. Once available, the Board will move forward with the process outlined in the Bylaws for considering the final report.

Again, the Board thanks the ATRT3 for its diligence and dedicated work on this important specific review.

Sincerely,

Maarten Botterman
Chair, ICANN Board of Directors