From: David Farrar, Adam Hunt, Kenneth Johnson and Lucy Elwood, Directors, DNCL

To: Joy Liddicoat, Keith Davidson and Jamie Baddeley

Date: 17 June 2017

Re: SUBMISSION ON PROPOSED CHANGES TO INTERNETNZ

This Submission is made on behalf of the Board of DNCL, except David Moskovitz (who has chosen not to be involved as he will be voting on the decision in his capacity as a Councillor).

In addition, the DNCL Board is aware of the following:

- Adam Hunt prepared a "A Dissenting Opinion" paper for the INZ Council meeting dated 27 May; and
- David Farrar has shared with us a draft of a submission he is making in his personal capacity.

We ask that the points in those documents also be considered as feedback from the DNCL Board, as the DNCL Board agrees with their content.

In addition to this joint submission, individual DNCL directors may make submissions in their capacities as InternetNZ members.

THE CURRENT ROLE OF DNCL

Consistent with InternetNZ's core strategic goal, DNCL's work to date has focused on ensuring .nz is "a world-class ccTLD that meets the needs of the local Internet community".   This is a relatively discrete role, but an important one. In our view, as InternetNZ's activities expand into new areas, it is crucial that this role continues.

As required by the SoE and SoDaG, we "operate, maintain, develop and enforce the policy framework for the .nz ccTLD" and "monitor and hold accountable NZRS's performance against SLA standards for the operation of .nz".

The findings of the organisational review working group confirm that DNCL has performed its role well and its contribution has been valuable to .nz. For example, the proposal states:

- All three organisations are doing good work and our people are highly regarded by stakeholders and members;
- We are a credible steward of .nz; and
- People value the independence of .nz policy and regulation.

In terms of the current structure, InternetNZ has previously celebrated the merits of the .nz policy and regulatory function sitting within DNCL and the importance of DNCL being sufficiently independent from InternetNZ's other functions. For example:

- InternetNZ has published TLD Principles, which among other matters state:

    "We also note that a critical success factor for .NZ, and one to continue InternetNZ's support of in the global environment, is the separation between the operations of a TLD and the setting of the policy framework under which it operates."

"In dealing with TLD issues, it is important to note the widely acknowledged success of the .NZ governance model, and the recognition it has achieved internationally as a competitive and stable model for administering a TLD."

"InternetNZ is well respected in the ICANN environment because it is seen as a principled advocate for a coherent point of view. It operates the .NZ ccTLD in a manner consistent with the principles set out in this paper."

- InternetNZ's submissions on the transfer of the IANA functions stressed that:

"Accountability is vital; bright-line separation and transparency help to achieve that."

In a blog post on this issue InternetNZ stated:

"Our own experience in managing the .nz TLD through a web of contracts and agreements, and the stewardship body (InternetNZ Inc) being very firmly accountable to its members in reality and in law works well. Clear rules and clear lines of accountability don't encourage disputes – muddle or "hoping for the best" does. Our experience also shows an accountability system is perfectly compatible with multi-stakeholder policy and decision-making.

OUR FEEDBACK ON THE CURRENT PROPOSAL

In our view, the proposal which InternetNZ has presented is under-researched, weak and unconvincing. In particular, we are very concerned that the design objectives and process undertaken to develop the proposal outlined in the consultation paper has not taken into account the following factors to the extent we believe necessary:

- The alignment between InternetNZ's current structure and internationally recognised regulatory best practice.
- The quasi-judicial decision-making nature of the DNC's office (e.g. she decides how to sanction registrars for breaches of .nz policies), and the corresponding need for independence which is inherent in the proper performance of the DNC role. We find it astonishing that this point is not focussed on to any material extent in the proposal.
- The need for .nz to continue be managed in a credible fashion. For example, it is not clear that the proposal has considered the degree to which the current DNCL structure maintains stakeholder confidence, protects against inappropriate bias or conflicts of interest in the development of .nz policies, ensures robust policy development and ensures a robust approach to the implementation of those policies. It is very difficult to see how the proposed structure (of a direct management reporting line and an advisory board) could achieve this to the same extent. Also, the proposed structure would be more likely to involve costly peer reviews and other consultant fees.
- The very real potential for InternetNZ's reputation at a global level to suffer. We think there will be perception and brand risk that results if the proposed change to .nz goes ahead. In the ccNSO and gTLD community the InternetNZ group has an enviable reputation, partly due to our structure. Abolishing the independence of DNCL would be particularly notable to our international community and stakeholders as the InternetNZ group stressed at some length the advantages of our structure during the IANA stewardship debates.
- The increased risk of regulation and Government intervention (such as legislative change). We consider the risk of this will be higher appreciably under the proposed model,

particularly if there are concerns about a policy process or a DNC decision. While .nz is not currently regulated by the Government, the NZ Government could pass legislation to cover .nz operations, and .nz would then need to apply this in addition to any ICANN requirements. The Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains make it clear that "ultimate public policy authority over the relevant ccTLD rests with the relevant government or public authorisation; how this authority is exercised is determined by applicable law."
- The potential reputation damage within the local (nz) Internet community that could result from essentially reversing almost entirely the structural safeguards put in place after 2000 to protect registrants and registrars such as registry SLA, fee setting, and the like.

We believe that the discussion paper radically overstates the day-to-day barriers faced within the InternetNZ group. While there have been issues, the current structure could work "harder" to address those. If difficult conversations need to be had, we're willing to have them. If policies and procedures need to change, we're willing to change them.

Actually, we suspect the culture could be turned around faster without radical structural change (which will cause a culture dip, in addition to threatening the independence and credibility of .nz). Of relevance, while there has been a drive to improve culture, the DNCL Board has never received any particular mandate for substantial change from InternetNZ or received any particular direction in relation to specific cultural issues, duplication of workload or others of the issues discussed in the proposal.

We are also concerned:

- By the absence of any analysis at all – never mind any convincing analysis – as to whether there is a causative link between the present structure and any particular issues, or how any such issues will be addressed by the proposed structural change. In the absence of any such anaylsis, what is being proposed is change for change's sake.
- By the lack of detail in the proposal regarding how the expert advisory group would be put in place and give "a degree of independence to the .nz policy function".
- That there does not appear to have been stress testing of the sort of scenarios that could arise, and the types of pressures and potential conflicts of interest that could occur under the new structure. For example, what mischief could occur if the CE is underperforming or gets captured by a particular stakeholder group on a particular issue? While the proposed structure might seem workable with the current set of Councillors and could work with the right person as CE, what are the risks that a different CE or a differently elected group of Councillors could stray into inappropriate areas? What are the checks and balances that prevent against this? If a CE does go rogue it would be very difficult for Councillors to identify this, where all of the reports they receive come from only that one CE.
- That the proposed changes will not deliver their intended outcomes. In our collective experience, which comes from working with a variety of organisations and within a variety of structures, changing the structure of the organisation alone will not in and of itself provide clarity and consistency for employees, members or stakeholders or allow InternetNZ to be more responsive. There are countless of examples of single organisations with "silo" issues. The reality is that cultural change can be driven across one single entity or a group structure. In our view, this should not be the reason for a complete organisational restructure.

- That the calibre of individuals that would be interested in sitting on a domain name policy/advisory group will be lower than the calibre of individuals interested in being a Director of DNCL.

We do not believe that the need for independent and transparency are as important in respect of the operations of NZRS. Registry functions could be insourced or outsourced by InternetNZ, depending on registry performance, cost and other drivers from time to time. Compared to DNCL's work in the oversight and development of .nz policies, the management of the registry (whether by InternetNZ directly) or by a separate subsidiary is more operational in nature. It does not carry the same potential for conflicts of interest, and the corporate structure could be changed as appropriate from time to time. We understand part of the rationale for the creation of NZRS was that the registry functions were occupying a disproportionate amount of Council agenda time. Perhaps, if this occurs again in the future, a separate Council sub-committee of the InternetNZ Council could be established in respect of NZRS operations to reduce some of the full Council workload.

AN ALTERNATIVE PROPOSAL

While we are not convinced – certainly by the position paper – that change is necessary, we perceive that Council wants it. If after all submissions have been considered there continues to be a mandate for structural change, then we would encourage Council to explore afresh another of the options considered by the working group namely Option "2. Retaining the status quo with increased representation by the InternetNZ CE on the subsidiary boards and some other adjustments."

There is little information in the papers provided on the extent to which this option was considered, or to what extent "deep" changes were considered. As no options analysis was provided, we are not aware of what changes were proposed under this option. However, we believe it would have more merit than the proposed consultation option.

We believe this option could quickly be implemented and would more effectively meet the needs of .nz and address the concerns we outlined above. In addition, it could meet the design objectives of the current organisational review project.

For example, we could imagine this option being implemented as follows:

- The membership of the DNCL Board could promptly be changed. As a streamlined function appears desirable, we suggest:
    o The new CE of the re-scoped InternetNZ entity be appointed as Chair of DNCL.
    o The Council representative could be removed, as Council interests would be represented by the new CE.
    o Two additional directors could round out the DNCL Board with the particular individuals chosen to ensure there is an appropriate skill mix at the Board. These directors could be appointed from the existing pool of DNCL directors or otherwise. (Our interests in this submission are concerned with the ongoing credibility of .nz, not of maintaining our personal positions as directors.)

- The quorum provisions of the DNCL constitution could require that the CE (or his or her delegate) must be present at each DNCL Board meeting.
- InternetNZ could promptly reissue its SoE with a streamlined set of delegations and functions.
- The current SoDaG could be revised.
- InternetNZ expectations and delegations to the DNCL should mandate:
    o That significant day to day operations of DNCL are delegated to the InternetNZ Group CE. For example, that all decisions such as all finance, property, HR, group policies, security advice, international travel and other decisions are to be delegated to the InternetNZ Group CE.
    o DNCL's sole focus is to be the effective oversight and administration of the .nz domain space on behalf of InternetNZ, including:
        ▪ Managing the operation of the .nz domain name space;
        ▪ Maintenance and review of .nz policies; and
        ▪ Managing the DRS.
    o DNCL's budget, business plan and dividend policy (if any) is to be approved by the InternetNZ Council.
- The delegations from the DNCL Board to DNCL staff should ensure:
    o All DNCL's operations comply with InternetNZ's group policies for all corporate matters (e.g. financing, HR, legal, audit, health and safety, travel, marketing etc);
    o Any additional local or international activities of DNCL to be subject to approval from the InternetNZ Group CE / DNCL's chair.

This structure would:

- Unlock the benefits of your current proposal and deliver the same drivers;
- Retain stakeholder confidence;
- Ringfence DNCL's operations to .nz areas, with any work outside of those areas requiring InternetNZ Council or InternetNZ Group CE approval;
- Ensure credible management of .nz;
- By maintaining 2 independent, non-executive directors on the DNCL Board, ensure there continues to be a path for:
    o Any issues of InternetNZ Group CE performance or stakeholder capture to be escalated to Council;
    o Independent decision making for .nz; and
    o Perceptions of conflict of interest to be managed.

Under this alternative proposal, as with the current consultation proposal, the CE of the expanded InternetNZ entity would broadly still be responsible for leading InternetNZ, the functions of NZRS and DNC. But in respect of DNCL's operations this individual would undertake that leadership responsibility through appointment as a Chair of a small DNCL Board, rather than as a line manager.

Based on the streamlining of the functions recommended above, a number of other personnel changes would be required and these would align with the changes outlined in the consultation proposal. In particular:

- The current DNC role could still be disestablished, as the changes above would represent a significant change to the DNC role and the role would be redundant. Under our proposed structure above, some of the current DNC's responsibilities would vest with the DNCL Board (of which the new CE of expanded InternetNZ was Chair) and others with InternetNZ.

However, we urge InternetNZ to consider a slightly longer transition period to enable the new Chief Operating and Policy Officer to be trained, given this is a new appointment.
- The DNCL Officer Manager position could, as per the consultation proposal, be changed to report to the DNCL Chief Operating and Policy Officer.
- The current DNCL Communications Advisor could, as per the consultation proposal, have a changed reporting line to the InternetNZ Communications Manager.

CLOSING

Thank you for considering this submission and all other feedback received with an open mind.

The decision that Council is making is very important to the ongoing future of InternetNZ and the credibility of .nz. Our overall view is that it demands more critical thinking than is obvious from the papers with which we have been provided.

If you would like any additional information in relation to DNCL's feedback on the current consultation proposal then the current Directors of DNCL would be very happy to discuss our views in person with Councillors.

David Farrar, Chair

Lucy Elwood, Director

Adam Hunt, Director

Kenneth Johnson, Director