

To Jamie Baddeley, Joy Liddicoat and Keith Davidson

Submission by Debbie Monahan on the proposed structural changes to the InternetNZ Group

I have been the .nz Domain Name Commissioner since the role was established in 2002. In this role I was responsible for establishing the .nz policy framework based on the SRS Working Group Final Report – the ‘Hine Report’ – and creating the Domain Name Commission and its functions and processes.

The ongoing success of .nz is very important to me and I acknowledge that the personal stake I have in this means that I am predisposed to supporting the current structure. That said, if there were clear and justifiable reasons for change then I would be willing to accept those and work to ensure a successful implementation. I do not see such analysis in the proposal document released.

To me, it is clear that Council wants change. Indeed, from the start of this review the language that has been used is “the case for change”. I consider issues around the culture, duplication of resources and inability to work across groups to be inflated with no real examples provided to demonstrate the problem and the impact it has. At the same time, the potential impact of any change has largely been ignored with no assessment of risk and mitigation of those provided.

To me, this proposal document and work is not a good basis for Council to make such a significant decision on. More work should be done to identify the costs and risks associated of this change before any decision is made to proceed. That said, from comments made in the presentation, Council is determined to change how the InternetNZ Group operates and so I make the following comments in response to the consultation paper.

Independence of DNCL

DNCL is responsible for ensuring the policy framework for .nz operates in the best interests of the Local Internet Community and for overseeing the performance of NZRS in respect of their .nz operations. These responsibilities are a key part of InternetNZ meeting its strategic goal of .nz being a world class ccTLD that meets the needs of the Local Internet Community.

Functions within DNCL’s responsibilities include maintaining and developing the policy framework and enforcing its requirements on relevant parties. This is appropriate as it is pointless having a policy framework if measures are not in place to ensure it is complied with.

DNCL’s record shows that it performs its duties well, a point acknowledged in the proposal. The independence of DNCL’s operations was also valued by staff and stakeholders in the surveys and was something identified as needing to be retained. The proposal as presented does not retain this independence for DNCL and has the potential to undermine confidence in .nz procedures and decision making.

No detail has been provided on how the Domain Policy Advisory Group would operate but it would appear from the title that it would be ‘Advisory’ only rather than a governance / decision making body. The title also suggests that it would relate to domain name policy rather than to the compliance and regulatory functions of DNCL.

It is important that the compliance and regulatory functions of DNCL have a decision making process that is independent of the InternetNZ CE, otherwise it is InternetNZ making the decision and there is nothing independent about that. InternetNZ has a wide scope of interests and stakeholders and it may arise that what is in the best interests of .nz in a particular case introduce a conflict for InternetNZ that causes unreasonable compromises in the decision making. DNCL has a clear, narrow mandate that

allows the focus to be remain clearly where it needs to be, something demonstrated by DNCL over the years including publicly sanctioning NZRS when they breached the rules.

The DNC's ability to sanction, along with other actions, is specifically covered in the .nz policies. Any decisions made are at my sole discretion giving a quasi-judicial aspect to the role that should not be ignored or underestimated and which must by its nature retain independence.

It is important that decisions made around .nz compliance be made by DNCL, or an equivalent, and that it continues to do so in an open and transparent manner enabling all parties to have confidence in the .nz domain name market.

This independent regulator model has served .nz well – a point even noted in InternetNZ's own TLD Principles published at <https://internetnz.nz/content/tld-principles> and backed up in all submissions made by the InternetNZ Group submissions as part of the IANA review.

Legal protections for InternetNZ

Over the years DNCL has sanctioned both registrars and registrants and has implemented policy changes that not everyone is happy with. Despite many threats of legal action, DNCL has not been subject to any court proceedings. The due process approach to investigations, sanctions and policy development taken by DNCL limit the grounds for legal action but even if taken and successful, the legal structure of DNCL protects the assets of InternetNZ.

There have been times however, when DNCL has chosen to deliberately take steps that may lead to legal action. One examples of this is issuing warning notices around 24/7 Hosting telling people not to do business with them. Though confident of a successful defence of 'truth' and 'protecting the public' the notices were defamatory and opens DNCL up to the risk of legal proceedings. These actions are warranted however, and it would be disconcerting if a one organisation structure stop such responses to events as InternetNZ's assets as a whole would be vulnerable.

Policy and Compliance Interaction

Good compliance regimes result from a clear understanding of the policy, something helped by those undertaking the compliance work also being involved in the development of the policy. Likewise, issues identified during operational procedures can be beneficial to consider then reviewing and developing policy.

There is a strong relationship between undertaking .nz operational work, including compliance, and the development and review of .nz policy. This has been demonstrated on a number of occasions including the creation of specific policy covering resellers following the office having to deal with problems relating to 24/7 Hosting.

A more recent example of this interaction has been the implementation of the Provisional Address Masking Option (PAMO) as a result of the WHOIS review. Submissions received, along with meetings with some of the submitters, resulted in DNCL introducing a limited privacy option while the WHOIS review was being concluded.

DNCL has started preparing for the Registrant Privacy Option what will come into effect in November 2017. This is an important change for .nz and one where there has been a lot of concern about how it will be implemented and if we have got it right. Monitoring issues arising from this new .nz option will be key for the office and it is important that any real problems identified are addressed, including by way of further policy amendment if required.

It is imperative that policy and compliance remain united in respect of .nz to ensure it continues to be as robust and successful as it is now.

Governance

The proposal notes the changing significance of the Internet for New Zealanders. Given the importance of the Internet in everyone's lives, rigorous standards of governance must surely be the number one objective. If that involves the separation of functions to operating entities and independence within those operating entities then a large number of governors is inevitable. How those governors interact across the group is a different matter that should be addressed in other ways than structurally removing them.

There is real value to the organisation in having independent, professional directors on the DNCL Board. The skills they bring and contributions they make mean that on occasion fees can be saved by not having to obtain professional advice from outside the organisation. Of greater importance though, is the quality of decision making leading to a high performing Board.

It is noted that the proposal calls on Council to undertake a review of the structure and size of Council. This isn't due for a year however, and even then there is no guarantee it will actually take place. In the meantime, the skilled, quality independent professional directors are not part of the key .nz operations and I believe this has the potential to undermine .nz at a time when a significant change in introducing the Registrant Privacy Option is about to happen and its implementation needs to be closely monitored.

Other General Comments on Proposal

The proposal as presented does not appear to me to meet the very design principles that were developed for the review and which are included in the paper. Independent professional governors and ensuring the independence of .nz policy and management of registrars are clearly not met by removing the two subsidiary Boards on which those independent professionals sit, or by removing totally an independent decision maker for .nz compliance. I also consider the good reputation of .nz and maintaining current functions to the high quality they are now are seriously compromised for the reasons outlined in this submission.

It is noted that the proposal calls for the DNCL Communications Advisor to report to the InternetNZ Communications Manager. If this proceeds, it isn't known how the office space will be structured but I would expect all teams to be located close to each other. It is here that the proposal for this reporting line change falls over. The DNCL Communications Advisor works to develop material for registrars and registrants focusing on what the current issues are. It is more important that the person in that role is part of the DNCL team than a communications team so that they can more effectively do their job.

If this proposal goes ahead, the first stage is to appoint a new Chief Executive for the group. I strongly believe this role should be externally advertised. I'm aware of the desire to minimise disruption but consider that in this case InternetNZ would be better served by 'testing the market' as the role will be significantly different than that done by any one of the three current CEs and you don't know who else is out there that may be a perfect fit for the new position.

Transition

Though no timeframe for the first phase was specified, the language used in the proposal leaves the impression that it will happen relatively quickly. I do not believe true consideration has been given to the scale of changes required and how to manage the process.

For example, as noted above the current policies reference the DNC's ability to exercise sole discretion in deciding on sanctions. This is a deliberate distinction from DNCL as it is an individual responsibility. In the absence of a Domain Name Commissioner who will be making those decisions and how does the policy need to be amended to reflect this?

That isn't the only policy change required though. The .nz policies include references to DNCL, NZRS and InternetNZ that will need to be reviewed and amended as required to fit any new structure.

Under the .nz Policy Development Process, all changes to .nz policy are subject to public consultation, then once finalised there is a one month notice period before the changes are implemented. InternetNZ should not be seen to breach their own .nz policies.

Other considerations include the Authorisation and Connection Agreements. Currently one is with DNCL and one with NZRS – do they merge and become one or is InternetNZ the signatory on both? How is the SLA managed?

All agreements signed by DNCL will need to be reassigned. This includes the Authorisation Agreements, the Moderation Agreements with .nz moderators, the Whitelisting Agreements, Expert and Mediators - the list goes on. All these aspects need to be identified and worked through.

The proposal is badly lacking any analysis of the cost or risks associated with this proposed change.

DNCL has recently undertaken a restructure to ensure all staff positions were relevant to the current and future work plan. This created a new position of Chief Operations and Policy Officer which has been incorporated into the proposal. Though the timing is difficult, this review of the DNCL operations has led to clear functions being delegated across the team and should make things easier in the future. The position has been filled but the new person doesn't not start until towards the end of July. I have advised my team that if this proposal goes ahead, I will not be applying for the new CE role. This will mean that DNCL will be exposed at a senior level so consideration will have to be given to how this is managed as there will be significant change required by DNCL to fit in with the structure as is proposed.

Preferred model

As noted above, my preference is for the current structure to remain. I acknowledge that time has moved on since the SRS structure was implemented back in 2002 based on the Hine Report. There were good reasons for taking those positions back then and, with the exception of the size of governance, there are no real reasons expressed in the consultation paper as to why they are no longer relevant.

A focus should go on identifying improvements that can be made to the current model. This could look at reviewing how the different governance bodies interact and how they make decisions across them. There has never been such a review undertaken so trying to resolve issues around the size and function of governance by going straight to a change in structure seems to me to be a flawed process. It is noted that the proposal calls on Council to undertake a review of the structure and size of council. This isn't due for a year however, and even then there is no guarantee it will actually take place. In the meantime, the skilled, quality independent professional directors are not part of the key .nz operations.

I believe the current model with independent directors should be retained until appropriate changes are made to Council so if this proposed change does proceed it should only be at that date. This gives time for all the risks associated with the change to be identified and mitigated and also means that the design principles around independent, professional directors is met.

If Council decides that change should be sooner rather than later, then I would like to suggest two other possible alternatives for consideration (in order of preference):

1. Retain DNCL as a separate legal entity responsible for .nz policy and compliance. This will ensure the ongoing independence of the regulator. Other non .nz related responsibilities could be allocated to the InternetNZ CE as desired.
2. Revert back to the model in 2002 where there was an Office of the Domain Name Commissioner that was part of InternetNZ but where the Commissioner reported to the .nz Oversight Committee that had delegated powers from Council to be responsible for the .nz policy and compliance. A disadvantage of this model over that of a separate legal entity is that InternetNZ's assets are not protected in the case of any legal action arising from a decision made around .nz.

I thank you for reading and considering the comments made in this submission. I would be more than happy to discuss any aspect of it with anyone on Council.

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