

Comments in response to the CCWG-Accountability's Second Draft Proposal on Enhancing ICANN Accountability (Work Stream 1 Recommendations)

12 September 2015

Introduction

About InternetNZ

InternetNZ is a multi-stakeholder membership-based Internet community organisation in New Zealand, which serves the local Internet community in a range of ways including as the designated manager for the .nz country code Top Level Domain.

Staff and members of InternetNZ have been leaders in global domain name policy matters since before ICANN was formed. As an organisation we participate in global Internet Governance debates with a fused technical community/civil society mandate and interest.

The position set out here has been developed across the InternetNZ group and is the organisation's position, not an individual one.

The Second Draft Proposal

We thank the CCWG-Accountability- all those who have participated in this process - for crafting a well-considered set of revisions that have strengthened and improved the initial draft proposal.

In respect of the questions identified as key for public feedback, InternetNZ believes the Second Draft Proposal:

- considerably enhances ICANN's accountability
- contains no elements that would prevent us from approving its transmission to Chartering Organisations
- meets the apparent requirements set out by the CWG-IANA, so long as final changes do not fundamentally alter it
- deals with the minimal set of changes necessary prior to the IANA Stewardship Transition, except in respect of the proposed late addition of language regarding human rights in the ICANN bylaws.

We expand on these points in what follows, with brief comments organised by chapter in the CCWG-Accountability's report for simplicity of consideration by the group.

Timing

While the Proposal in its current state is fundamentally sound, implementable and complete, InternetNZ recognises that the parallel debates on the IANA Stewardship Transition have occupied the time and attention of the global multistakeholder community. People have had the need to complete that process before turning their full attention to the accountability debate.

Now that attention is focused on this Proposal, the tenor of discussion and debate shows that the community is seeking further levels of detail and assurance about the proposal.

This puts the CCWG-Accountability into something of an impossible position:

- Substantial new detail to meet some people's concerns will require a further round of consultation.
- The absence of such detail could lead some who would generally support the proposal to instead reject the proposal, potentially threatening overall consensus.

The impossibility of the CCWG-Accountability's position is heightened by the prospect of alternative proposals being presented as part of this public comment process. If substantially different alternatives are proposed and achieve some degree of community support, the chances of consensus around any single model diminish considerably.

InternetNZ recognises the scale of the challenge the CCWG-Accountability faces. It is obliged to try and balance a range of competing desires in its work. It will not wish to delay its work for further discussion in an environment of real pressure from many stakeholders for a speedy resolution.

Maintaining a consistent focus on the requirements it has developed, and ensuring it completes a viable proposal that can deliver them, is the best prospect of a successful outcome to the Work Stream 1 effort. Further debate and discussion throughout the community may be required to arrive at overall consensus.

Comments on specific chapters

This section of our comments provides brief views on key matters in the Proposal, organised in the same chapter layout as the Proposal for ease of matching comments with Proposal content. Not all chapters have comments.

Fulfilment of Requirements

- InternetNZ believes the Proposal meets the NTIA's requirements and the CCWG-Accountability's dependencies, so long as it maintains a membership model. This is because the creation of some form of membership changes the fiduciary relationships inside the ICANN system to allow for effective Independent Review, and to allow the community to enforce its rights in respect of the powers.
- Any replacement of membership by a model that does not deliver these requirements (of true Independent Review and of enforceability by the community) would lead to a very clear problem: the consensus behind the Names section of the Transition proposal would need to be tested again, and the United States government would have to persuade Congress that ICANN should be allowed to become the steward of the IANA functions without sound accountability in place. Neither of these challenges would be easy to deal with. Fortunately, they are also not necessary – at the time of finalising this, no legal issues had been identified with the CCWG-Accountability's proposal.

Chapter 1: Background

- InternetNZ supports the set of items dealt with in this Proposal as meeting the criteria established for Work Stream 1 – that is, necessary to assure ICANN's accountability can be maintained and improved following the transition of IANA stewardship.

Chapter 3: Principles

- InternetNZ welcomes the updated Mission etc content, and supports the proposed changes compared with the first Proposal except in respect of human rights.
- InternetNZ is concerned by the proposed inclusion of language regarding Human Rights in the bylaws. There is extensive work underway in the ICANN community to develop the right approach to recognising and respecting human rights. There is no need to deal with this as part of Work Stream 1, nor in a hasty manner late in the Proposal's development.

Chapter 4: Fundamental Bylaws

- InternetNZ supports the approach to fundamental bylaws set out.
- InternetNZ does not believe that ICANN's location needs to be included as a fundamental bylaw – it accepts the CCWG-Accountability's rationale on that point.

Chapter 5: Appeals Mechanisms

- InternetNZ supports the improvements to Independent Review set out in the Proposal, and notes these improvements are dependent on the existence of a membership system within ICANN. Without such, the ICANN Board as a matter of fiduciary responsibility cannot agree to the

incorporation of a system which gives independent decision-making to another party. The loss of such improvements would seriously weaken ICANN's soon-to-improve accountability.

Chapter 6: Community Mechanism as Sole Member

- InternetNZ regards the Community Mechanism as Sole Member as a thoughtful and robust synthesis in response to the real and legitimate concerns raised about the Reference Model in its first draft proposal. Thanks to the CCWG-Accountability and its advisors for consolidating around a proposal.
- As mentioned elsewhere the critical benefits of this model are the allocation of authority to the global multistakeholder community, and the changed nature of fiduciary responsibilities within the ICANN system.
- Without a model of this type, independent review cannot be assured, and the community powers set out in chapter 6 cannot be sensibly enforced. As such, we support it as an absolutely essential centrepiece of the Proposal.
- In respect of **6.2 – influence in the community mechanism** – InternetNZ sees Support Organisations (ASO, ccNSO, GNSO) as the actual operational stakeholders within ICANN. They are independent of ICANN, not reliant on the corporation for participation or resources, and rely for their successful operations on the conduct of ICANN's business. As such we do not support a balance of influence that gives equality to SOs and ACs. ACs are not direct customers of the IANA services and as such, should have less influence than the SOs.
- InternetNZ supports the opt-in opt-out nature of decision-making in the CMSM. However it would be comfortable with an alternative approach where all are deemed to be participating, so long as any abstentions of such votes do not count in the counting of votes. InternetNZ does recognise however that this may create problems for other SOs or ACs and looks forward to their comments.
- In respect of **6.3 – an ICANN community forum** – InternetNZ sees this as integral to the accountability improvements the Proposal will help to generate. This is one area where we urge the CCWG-Accountability to rapidly include more detail regarding the operational details for the forum. We do not believe such details will jeopardise finalising a Proposal at the ICANN Dublin meeting, since the forum will remain advisory.

Chapter 7: Community Powers

- InternetNZ supports the community powers set out in this Chapter - they provide an important set of improvements to ICANN's accountability.
- It is important that the Discussion phase of the powers is fully explored in further detail as noted above (the ICANN community forum).

- These reserve powers are mainly designed to shape behaviour by decision-makers rather than to be exercised on a regular basis. The behaviour they shape is greater consistency between ICANN's actions and the needs of the global multistakeholder community. The high thresholds proposed along with the diverse set of stakeholders that would need to agree to their use ensures the powers will not be lightly used, or become a means to disrupt ICANN's operation.
- On the Budget power (7.1) we would welcome the CCWG-Accountability clarifying that in respect of the IANA Budget, the veto power being separate from ICANN's budget is intended to mean that any veto of the ICANN Budget would not prevent ICANN funding increased or decreased IANA budget requirements. That is, even though the source of funds for the IANA budget is ICANN, the IANA budget is treated as a cost centre outside the ICANN budget for this purpose.

Chapter 8: Accountability Requirements

- On 8.1 - **Diversity** - InternetNZ believes that a lack of participatory diversity is a critical failure in the ICANN system generally, and that resolving it is not a matter for Work Stream 1 - it does not meet the requirement established for inclusion as a WS1 matter. Indeed it is not a problem limited to accountability - it is relevant across all parts of ICANN.
- That said, InternetNZ accepts the concrete WS1 matters in para 442 of the proposal as being achievable, except for the first bullet point - we cannot comment on that due to its lack of specificity.
- On 8.2 - **Staff accountability** - InternetNZ believes the Chief Executive is the person with the responsibility to assure staff accountability. It is in turn the Board's responsibility to hold the CEO accountable for requiring accountability from staff. We are pleased to see no proposed actions for WS1. We support no actions by the CCWG-Accountability on this in WS1, and we recommend tabling the proposed WS2 actions for Board consideration - not as further development tasks for the CCWG-Accountability's WS2 work.

Chapter 9: Incorporation of the Affirmation of Commitments

- InternetNZ supports the AOC being terminated as part of the stewardship transition, along with the incorporation of the relevant carryover concepts as set out in this section.
- InternetNZ supports the changed reviews as proposed, noting that ICANN will propose further changes to the WHOIS/Directory Services review. While this is not a WS1 matter (as the review can be fixed through other means) we do not oppose a pragmatic change as part of this process.

Chapter 10: Stress Tests

- InternetNZ congratulates the CCWG-Accountability for the extensive and intensive programme of stress testing it has subject ICANN's accountability to. This has materially shaped the proposal and helped to ensure it is suitable for requirements.
- On **10.3 – requiring consultation re GAC advice** – InternetNZ strongly supports the proposed addition to Article XI s2 cl J as shown. Without this change, governments could agree to change GAC operating principles, offer advice on a narrow majority, and expect the same sort of treatment of that advice as is today offered to advice developed by consensus. While governments should and must remain free to determine how the GAC will operate, there is no justification in allowing what could amount to a self-selected increase in governmental influence in ICANN through not making this change. In our view, not making this change would put at risk the Proposal's ability to meet the NTIA criteria.

Chapter 11: Work Stream 2

- InternetNZ recommends that the CCWG-Accountability ask its legal advisors to develop a transitional bylaws provision in line with the recommendation in para 1031 of the Proposal. We also note that crafting a workable bylaw to achieve the aim set out is not going to be easy.
- If the finalisation of the WS1 proposal extends, it is reasonable to extend the timetable for WS2.

Chapter 12: Implementation Plan and Timing

- InternetNZ recommends that the CCWG-Accountability have its own counsel conduct the bylaws drafting process. Given the subject matter of the changes, ICANN may find it difficult to contribute meaningfully in the drafting process. Further, if CCWG-Accountability counsel work with CWG-IANA counsel to prepare changes for the Names Proposal and ICANN accountability improvements together, the chances of unintended consequences or interactions are diminished.

Declaring our involvement

InternetNZ staff and contractors have participated in the process of assembling this transition. Jordan Carter has been a CCWG-Accountability member, and functioned as a Rapporteur for a Work Party in the CCWG.

With many thanks for your consideration,

InternetNZ

12 September 2015

For further information please feel welcome to contact any of the following:

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