

June 17, 2014

Re: ccNSO Comments on Enhancing ICANN Accountability

As the ccNSO Council stated in its recent submission on the IANA stewardship transition process, that process *“must take into account and provide a replacement for the role that NTIA has played in overseeing ICANN’s obligation to develop and implement consensus policies through a bottom up multi-stakeholder process, and to be accountable to all stakeholders for the outcome of its decision-making.”* Other significant ICANN constituencies – including the Business Constituency, the Intellectual Property Constituency, the Noncommercial Users’ Stakeholder Group, and both the Registry and Registrar Stakeholder Groups – have echoed this perspective. Accordingly, the ccNSO Council welcomes ICANN’s acknowledgment that *“enhancing ICANN’s accountability is a key component to the success of the IANA stewardship transition.”*

The ccNSO Council is concerned that the *“opportunity for public dialogue and community feedback”* appears designed to drive the ICANN community relentlessly to a predetermined outcome – and does not respond to the community’s near unanimous call for a genuine, bottom-up multistakeholder process. Below we discuss our concerns about the scope, design, and decision-making methodology proposed by ICANN, as well as the steps ICANN must take to ensure trust

Goal and Scope

We are concerned that this important process will fail unless its goal is clearly articulated and widely accepted. The ccNSO Council believes that this goal should be, consistent with ICANN’s 2016-2020 strategic vision statement, to *“enable ICANN to be trusted by all stakeholders”*. *Improved accountability is both a means and a prerequisite for ICANN to achieve this ambitious and welcome ambition. .*

While we agree that accountability is an evolutionary process, and the search for perfection should not become the enemy of the good, *“transparency”* and *“inclusiveness”* will never, by themselves, deliver true accountability, nor generate trust. The Affirmation of Commitments (AoC), which has been a useful list of areas of ICANN operation that need improvement, is not by its terms enforceable. The ccNSO Council is concerned that even an *“evolved”* AoC will never deliver meaningful accountability. Rather, accountability requires *“mechanisms for*

independent *checks and balances* as well as for *review and redress*.”¹ This agreed upon definition should be the foundation and reference of ICANN’s further work on Accountability. Accordingly, we propose that the goal of this process should be to ensure that a *system of checks and balances* is in place to guarantee that ICANN operates in accordance with *an agreed upon set of principles*, and that *meaningful redress* is available to those who are harmed by actions or inactions of ICANN in contravention of those principles.

Certain assumptions in ICANN’s statement on “Enhancing ICANN Accountability” appear to constrain and narrow the scope and objective of the process. While the community clearly called for a process leading to meaningful accountability across the full range of its functions, ICANN’s formulation subtly limits both the scope of the project and the available means to achieve the desired goal. For example, the paper assumes that ICANN is adequately accountable today: according to ICANN, the scope of this process is to “look at ICANN *remaining accountable* in the absence of its historical contractual relationship to the U.S. Government” and to consider the ways in which its accountability mechanisms can be “strengthened to address the absence of its historical contractual relationship to the U.S. Government.” The document specifies *the tools* the working group can propose to achieve accountability, limiting the group to examining “existing accountability mechanisms like the Affirmation of Commitments.”

Finally, while we appreciate ICANN’s “inventory” of accountability efforts, we believe that any accountability process must begin with a disinterested assessment of those efforts. For example, ICANN asserts that the “Independent Review Process allows for claims that the ICANN Board acted in a manner inconsistent with its Bylaws or Articles of Incorporation to be considered by an independent panel of neutrals.” That is not the case. As the result of a recent Bylaws amendment, the panel’s judgment that an action violates ICANN’s Bylaws – including its mission statement and core values – is ultimately irrelevant. Unless the harmed individual can prove that the Board acted in *bad faith*, ICANN’s “ultimate” accountability mechanism provides no redress.

¹ See [NETmundial Multistakeholder Statement](#)

Process Design

The ccNSO Council believes that the proposed design and architecture of the accountability process is flawed.

- Clarification of scope of this process and IANA Stewardship Transition Process. In its Interim Comments on the proposed IANA Oversight Transition Process, the ccNSO Council stated its view that the NTIA Oversight Transition Process *“must take into account and provide a replacement for the role that NTIA has played in overseeing ICANN’s obligation to develop and implement consensus policies through a bottom up multi-stakeholder process, and to be accountable to all stakeholders for the outcome of its (related) decision-making.”* By launching the second process - to enhance ICANN’s Accountability – the ccNSO Council notes that the scope of both processes overlaps, at least partially.

The ccNSO Council also notes, that *“unlike the IANA stewardship discussion, which is taking place across multiple fora, this discussion will take place entirely within the ICANN community.”* Hence, and in the view of the ccNSO Council, the two processes will involve partially different stakeholders, among others, and for example, the IETF, IAB, ISOC and ccTLD managers who are not member of the ccNSO are explicitly engaged and will have an explicit role in the IANA Oversight Transition Process, whilst their role in process to enhance ICANN’s Accountability is unclear.

Therefore, as a first step the scope of the two processes should be further clarified with the goal to reach a shared understanding among all stakeholders involved in both processes, firstly to avoid potential overlap of discussions around accountability related to the IANA Stewardship Transition, secondly, to mitigate the risk of potential divergence of proposals and thirdly to manage and timely and coordinated conclusion of both processes.

- Secondly, ICANN should be *asking* whether or not the working group approach makes sense.
- If so, ICANN should be seeking to develop community consensus on the expected outcomes and deliverables, size, make-up, and mode of operation of such a group. The most efficient approach might be to constitute a cross community working group to develop and seek public comment on proposed answers to these questions.

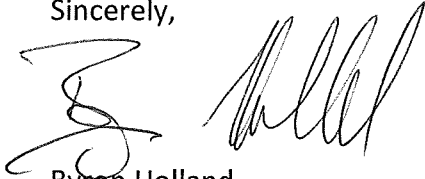
- ICANN's self-interest in the outcome of this process makes it inappropriate for ICANN to reserve to itself the right to appoint (an unspecified number of) external experts of its choosing to serve as members of the working group.
- ICANN should seek community dialogue on the proper role of the Board and staff with respect to the working group's output. For example, rather than sending the group's work product directly to the Board after public comment, the ccNSO Council believes it may be appropriate to give individual SOs and ACs the opportunity to consider, endorse or reject the recommendations as a community. Firstly, the SOs and ACs structures provide the platforms through which participants in the multi-stakeholder dialogue make their voice heard and listened to. Secondly the undertaking may not respect and reflect the different policy development processes that govern and drive policy development at ICANN and the associated accountability to the stakeholders for the outcome of ICANN's decision-making related to the policies developed through the different policy development processes.
- ICANN should be seeking input on the amount and type of resources, including independent facilitation, the group would need to support its work, and – critically – how the accountability work stream will be coordinated and harmonized with all other work streams in the critical path of the IANA transition.
- Finally, the policy vs. implementation divide should be bridged up front. Firstly, ICANN should seek community discussion about how policy questions that arise in the course of implementation will be handled. Secondly, effectuating the NTIA Stewardship Transition Process presumes that the related accountability mechanisms, if any, are in place.

These are all difficult and important questions that ICANN is not asking. Instead, the proposal indicates that ICANN will be outlining next steps and "finalizing" the process during the comment period.

The IANA stewardship transition process – including the accountability work streams – will be a defining moment for ICANN, and for multi-stakeholderism. To the extent that the process itself generates good will and trust, it will have a positive effect on all aspects of ICANN's operation, including accountability. So the question is, will ICANN facilitate a bottom-up process in support of community consensus?

The ccNSO Council appreciates and shares ICANN's desire to complete this process in a timely manner, and we commit to work with ICANN to complete the transition by September of 2015. We believe, however, that the present approach is creating resentment and frustration, which ultimately will prolong rather than expedite the process.

Sincerely,

A handwritten signature in black ink, appearing to be 'Byron Holland', written in a cursive style.

Byron Holland
ccNSO Chair