

CIS's Comments on the CCWG-Accountability Draft Proposal

Centre for Internet and Society | 2016-01-29

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The Centre for Internet & Society (CIS) gave its comments on the failures of the CCWG-Accountability draft proposal as well as the processes that it has followed.

We from the Centre for Internet and Society wishes to express our dismay at the consistent way in which CCWG-Accountability has completely failed to take critical inputs from organizations like ours (and others, some instances of which have been highlighted in Richard Hill's submission) into account, and has failed to even capture our concerns and misgivings about the process — as expressed in our submission to the CCWG-Accountability's 2nd Draft Proposal on Work Stream 1 Recommendations — in any document prepared by the CCWG. We cannot support the proposal in its current form.

Time for Comments

We believe firstly that the 21 day comment period itself was too short and is going to result effectively in many groups or categories of people from not being able to meaningfully participate in the process, which flies in the face of the values that ICANN claims to uphold. This extremely short period amounts to procedural unsoundness, and restrains educated discussion on the way forward, especially given that the draft has altered quite drastically in the aftermath to ICANN55.

Capture of ICANN and CCWG Process

The participation in the accountability-cross-community mailing list clearly shows that the process is dominated by developed countries (of the top 30 non-staff posters to the list, 26 were from the 'WEOG' UN grouping, with 14 being from the USA, with only 1 from Asia Pacific, 2 from Africa, and 1 from Latin America), by males (27 of the 30 non-staff posters), and by industry/commercial interests (17 of the top 30 non-staff posters). If this isn't "capture", what is? There is no stress test that overcomes this reality of capture of ICANN by Western industry interests. The global community is only nominally multistakeholder, while actually being grossly under-representative of the developing nations, women and minority genders, and communities that are not business communities or technical communities. For instance, of the

1010 ICANN-accredited registrars, 624 are from the United States, and 7 from the 54 countries of Africa.

Culling statistics from the accountability-cross-community mailing list, we find that of the top 30 posters (excluding ICANN staff):

- 57% were, as far as one could ascertain from public records, from a single country: the United States of America.
- 87% were, as far as one could ascertain from public records, participants from countries which are part of the WEOG UN grouping (which includes Western Europe, US, Canada, Israel, Australia, and New Zealand), which only has developed countries. None of those who participated substantively were from the EEC (Eastern European) group and only 1 was from Asia-Pacific and only 1 was from GRULAC (Latin American and Caribbean Group).
- 90% were male and 3 were female, as far as one could ascertain from public records.
- 57% were identifiable as primarily being from industry or the technical community, as far as one could ascertain from public records, with only 2 (7%) being readily identifiable as representing governments.

This lack of global multistakeholder representation greatly damages the credibility of the entire process, since it gains its legitimacy by claiming to represent the global multistakeholder Internet community.

Bogey of Governmental Capture

With respect to Stress Test 18, dealing with the GAC, the report proposes that the ICANN Bylaws, specifically Article XI, Section 2, be amended to create a provision where if two-thirds of the Board so votes, they can reject a full GAC consensus advice. This amendment is not connected to the fear of government capture or the fear that ICANN will become a government-led body; given that the advice given by the GAC is non-binding that is not a possibility. Given the state of affairs described in the submission made above, it is clear that for much of the world, their governments are the only way in which they can effectively engage within the ICANN ecosystem. Therefore, nullifying the effectiveness of GAC advice is harmful to the interests of fostering a multistakeholder ecosystem, and contributes to the strengthening of the kind of industry capture described above.

Jurisdiction

All discussions on the Sole Designator Model seem predicated on the unflinching certainty of ICANN's jurisdiction continuing to remain in California, as the legal basis of that model is drawn from Californian corporate law. To quote the draft report itself, in Annexe 12, it is stated that:

"Jurisdiction directly influences the way ICANN's accountability processes are structured and operationalized. The fact that ICANN today operates under the legislation of the U.S. state of California grants the corporation certain rights

and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt. The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. ICANN is a public benefit corporation incorporated in California and subject to California state laws, applicable U.S. federal laws and both state and federal court jurisdiction."

Jurisdiction has been placed within the mandate of WS2, to be dealt with post the transition. However, there is no analysis in the 3rd Draft on how the Sole Designator Model would continue to be upheld if future Work Stream 2 discussions led to a consensus that there needed to be a shift in the jurisdiction of ICANN. In the event that ICANN shifts to, say, Delaware or Geneva, would there be a basis to the Sole Designator Model in the law? Therefore this is an issue that needs to be addressed before this model is adopted, else there is a risk of either this model being rendered infructuous in the future, or this model foreclosing open debate and discussion in Work Stream 2.

Right of Inspection

We strongly support the incorporation of the rights of Inspection under this model as per Section 6333 of the California Corporations Code as a fundamental bylaw. As there is a severe gap between the claims that ICANN raises about its own transparency and the actual amount of transparency that it upholds, we opine that the right of inspection needs to be provided to each member of the ICANN community.

Timeline for WS2 Reforms

We support the CCWG's commitment to the review of the DIDP Process, which they have committed to enhancing in WS2. Our research on this matter indicates that ICANN has in practice been able to deflect most requests for information. It regularly utilised its internal processes and discussions with stakeholders clauses, as well as clauses on protecting financial interests of third parties (over 50% of the total non-disclosure clauses ever invoked - see chart below) to do away with having to provide information on pertinent matters such as its compliance audits and reports of abuse to registrars. We believe that even if ICANN is a private entity legally, and not at the same level as a state, it nonetheless plays the role of regulating an enormous public good, namely the Internet. Therefore, there is a great onus on ICANN to be far more open about the information that they provide. Finally, it is extremely disturbing that they have extended full disclosure to only 12% of the requests that they receive. An astonishing 88% of the requests have been denied, partly or otherwise. See "Peering behind the veil of ICANN's DIDP (II)".

In the present format, there has been little analysis on the timeline of WS2; the report itself merely states that:

"The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming ICANN 55 Meeting in March 2016. It is intended that Work Stream 2 will be completed by the end of 2016."

Without further clarity and specification of the WS2 timeline, meaningful reform cannot be initiated. Therefore we urge the CCWG to come up with a clear timeline for transparency processes.