

1 ALAC Comment on CCWG-Accountability Initial Draft Proposal

2 DRAFT – 21 May 2015

3 Introduction

4 The ALAC appreciates the amount of work that has gone into producing this Draft Proposal.

5 Although the ALAC is primarily represented by its five Members on the CCWG, extensive consultation
6 with and discussion among a much wider At-Large community has taken place in parallel with the CCWG
7 deliberations.

8 Although At-Large, like other parts of the community, is not unified in how accountability should be
9 addressed, this statement reflects a carefully thought out consensus of the larger group. Within the
10 comment, references will be made to the At-Large Advisory Committee (ALAC) as the body that formally
11 issues statements, but that notwithstanding, the positions presented do represent the position of the
12 wider group.

13 For clarity, the comments will be in reference either to Draft Proposal (4 May 2015 version) Section
14 numbers, and/or individual Paragraph numbers, whichever is most applicable.

15 In reply to specific questions, omission of such questions from the statement implies that the ALAC
16 concurs with the proposal and has nothing to add at this stage, or our comments in the sections
17 preceding the comments are sufficient.

18 Overview

19 In general the ALAC is supportive of the direction being taken by the CCWG and will provide guidance on
20 a number of issues, some of which the CCWG is explicitly seeking, and others where the ALAC believes
21 that reconsideration may be required.

22 Section 3: Principles

23 **Paragraph 50, Section 3.1.1.a:** The ALAC believes that in accordance with the Affirmation of
24 Commitments, ICANN has a responsibility to develop policies that fill foster user trust in the DNS. The
25 ALAC understands that ccTLDs are outside of ICANN scope in regard to this.

26 *QUESTIONS AND OPEN ISSUES:*

27 *1a) Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values
28 would enhance ICANN's accountability?*

29 Yes

30 *1b) Do you agree with the list of requirements for this recommendation?*

31 *If not, please detail how you would amend these requirements*

32 As noted, the ALAC believes that fostering trust in the DNS must be incorporated into the ICANN Bylaws.
33 This can be accomplished by adding the phrase “and to foster user trust in the DNS” to Paragraph 56 as
34 well as including it in Commitments. The reference in paragraph 107 is not sufficient since that is in
35 relation solely to competition.

36 **Paragraph 65:** The ALAC believes that it is appropriate to define the reference to Private Sector
37 leadership as explicitly meaning NOT led by the governments. And furthermore that although it is may
38 be led by the private sector (as defined here, governments do have a role to play in the ICANN
39 Multistakeholder model.

40 *QUESTIONS AND OPEN ISSUES:*

41 *3a) Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?*

42 Yes.

43 *3b) Do you agree with the list of requirements for this recommendation, including the list of which*
44 *Bylaws should become Fundamental Bylaws?*

45 With reservation noted below.

46 *If not, please detail how you would recommend amending these requirements.*

47 The ALAC recommends caution on classing any Bylaws related to reviews as fundamental without a
48 provision for altering the timing, with widespread community agreement, but without requiring a formal
49 Bylaw change.

50 **Section 4: Appeals Mechanisms**

51 **Paragraph 133, Section 13:** The ALAC notes that although independence from ICANN is required, there
52 is no such requirement with respect to independence to other parties related to the dispute. Such
53 parties could be contracted parties, or local, national or international entities related to the dispute.

54

55 *QUESTIONS AND OPEN ISSUES*

56 *4a) Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability?*

57 Yes.

58 *4b) Do you agree with the list of requirements for this recommendation? If not, please detail how you*
59 *would recommend to amend these requirements.*

60 Yes, but with caveat noted above.

61 **Section 4.2:** Regarding the enhancements to the Reconsideration Process, many recent reconsideration
62 requests involved decisions of external panels. The ALAC suggests that the proposal be explicit as to

63 whether such decisions are eligible for reconsideration and if so, how they are to be carried out (purely
64 Board reconsideration or re-chartering a new and/or expanded panel). Also to be considered should be
65 whether discrepancies between multiple panel results could be the subject of reconsideration.

66 Paragraph 156: The ALAC supports adding specific target deadlines for resolution of reconsideration
67 requests, but suggests that they be worded as to allow for extraordinary situations which might require
68 elongation of period allowed. Paragraph 159 makes such an allowance for the 60 day period but not for
69 the 120 day period.

70 *QUESTIONS AND OPEN ISSUES*

71 *5a) Do you agree that the proposed improvements to the reconsideration process would enhance*
72 *ICANN's accountability?*

73 Yes.

74 *5b) Do you agree with the list of requirements for this recommendation? If not, please detail how you*
75 *would recommend to amend these requirements.*

76 *6) Are the timeframes and deadlines proposed reconsideration process sufficient to meet the*
77 *community's needs?*

78 As noted above.

79 *7) Is the scope of permissible requests broad / narrow enough for the reconsideration process to meet*
80 *the community's needs?*

81 As noted above with regard to external panel decisions.

82 **Section 5: Community Empowerment**

83 **Section 5.1:** The ALAC has significant concerns with the concept of enforceability. With the exception of
84 removal of one or more Board members, most ALAC members do not believe that legal enforceability is
85 either required or desirable.

86 We have specific concerns on the possibility of personal liability on volunteers who are not backed by
87 any corporate employers who might have interests similar to theirs.

88 Moreover, if one looks at past cases where parts of the community were displeased with Board actions,
89 it is difficult to find instances were:

- 90 • Sufficient parts of the community were displeased so as to trigger the kinds of powers we are
91 now envisioning; and
- 92 • The situation was sufficiently severe as to warrant community action.

93 The ALAC understands that the prime intent of “enforceability” is not to take legal action, but to ensure
94 that the community has the power to convince the ICANN Board that community wishes should take

95 precedence. Nevertheless, the existence of such ultimate power is troublesome to many within the
96 ALAC and At-Large.

97 The ALAC believes that even in the unknown future, if ICANN is to be even somewhat viable, there must
98 be sufficient goodwill to ensure community empowerment, and that the threat of removal will be
99 sufficient to cover any eventuality where this is not the case.

100 If, however, the CCWG ultimately recommends empowerment that is legally enforceable for any of the
101 envisioned community powers, the following must be mandatory:

- 102 • ACs, SOs, their Unincorporated Associates (if any) and the individuals empowered to act on
103 behalf of the UA, SO or AC must be fully indemnified by ICANN against any action that might be
104 taken against them in their capacity as ICANN participants.
- 105 • ICANN must fully fund any legal or other actions taken by the above entities in enforcing the
106 powers granted herein.
- 107 • Indemnification funds must be held in escrow to ensure that they will be available without
108 requiring ICANN action to release them.
- 109 • Legal enforcement of community powers could ONLY be exercised if a critical mass of SO/ACs
110 supported such action. Individuals and/or less than a critical mass of SO/ACs could not take such
111 action and certainly would not be indemnified if such action could not be effectively controlled.
- 112 • The availability of indemnification and holding the funds in escrow must be enshrined in a
113 Fundamental Bylaw.

114

115 *QUESTIONS AND OPEN ISSUES*

116 *8) Do you agree that the introduction of a community mechanism to empower the community over*
117 *certain Board decisions would enhance ICANN's accountability?*

118 Subject to the general remarks above, yes. Enshrining the powers in the Bylaws is critical. Legal
119 enforcement of them, with the exception of Board member removal, is of far less importance.

120 *9) What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed*
121 *options? Please provide the underlying rationale in terms of required accountability features or*
122 *protection against certain contingencies.*

123 The general advice from the ALAC has been presented above.

124 Regarding Members vs Designators, the ALAC believes that Membership is the correct choice. It is a
125 simpler and well understood concept. Even if designators could achieve the same results, it is a
126 construct that is foreign to most of the community and will add another level of complexity to an ICANN
127 which is already nearly impossible to explain to newcomers or outsiders. Since both require legal status,
128 there does not seem to be anything in favor of the adoption of the Designator model.

129 That being said, if there is a mechanism to ensure that Board member removal can be enshrined in the
130 Bylaws without either a designator or membership model, the ALAC would far prefer that route. It has
131 been suggested that agreements pre-signed by Board members prior to taking their seats agreeing to
132 resign at the request of the community could accomplish that (similar to the mechanism described in
133 Paragraph 235).

134 *QUESTIONS AND OPEN ISSUES:*

135 *10) What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed*
136 *options related to the relative influence of the various groups in the community mechanism? Please*
137 *provide the underlying rationale in terms of required accountability features or protection against certain*
138 *contingencies.*

139 **Section 5.1.2 Influence in the Community Mechanism:** The ALAC would accept the Reference
140 Mechanism of 5 votes per SO, the ALAC and the GAC, and 2 votes for the SSAC and RSSAC only if the
141 SSAC and RSSAC agree. In all other matters, these ACs are according similar rights and privileges in
142 ICANN and the ALAC sees no reason to alter that at this point. Although the size of the SSAC and RSSAC
143 are “small”, so is the ASO, and there seems to be no question about according it full weighting status.
144 We note that it might not be unrelated that the SSAC and RSSAC have been allotted lesser status and
145 neither are represented in the CCWG. The SSAC has explicitly stated that it is not a chartering
146 organization SOLELY due to lack of available resources and not due to lack of interest.

147 In the absence of support for the Reference Mechanism by the SSAC and RSSAC, the ALAC supports
148 Alternative B giving all ACs and SOs 5 votes.

149 Five is the correct number to allow regional diversity to be adequately covered by those ACs and SOs
150 that are organized base no ICANN’s regions.

151 Under no circumstances would the ALAC agree to support Alternative A giving 4 votes to SOs and 2
152 votes to all ACs.

153 **Section 5.5 Power: Removing individual ICANN Directors:** Although some members of At-Large believe
154 that AC/SO-appointed Directors should either not be removable by either the community in general or
155 not solely by the AC/SO that appointed them, the majority believe that if a groups has the ability to
156 appoint a Director, they should similarly be able to withdraw that appointment. Specifically, a Director is
157 appointed not to “represent” the appointing group, but because the members of the group believe that
158 the person shares common values with the group. If that belief ceases to be correct, then it is
159 reasonable to no longer support that person as a Director.

160 The ability to remove individual Board members is crucial. Without it, the only alternative is to remove
161 the entire Board and this is a cataclysmic alternative as described under the comment to section 5.6.

162 It has been argued that being able to withdraw such an appointment will “politicize” the appointment,
163 that the Director will alter their behaviour because of it, or that the group might withdraw the

164 appointment as punishment for not voting the way they would have wished on a specific issue. The
165 ALAC believes that all of these reasons have little merit.

166 Altered behavior: Although the Director does not “represent” the group, surely the Director should
167 remain in regular contact with the group and understand where the group stands on specific issues.
168 When a vote is approaching that may go against the group, it is reasonable for the Director to approach
169 the group and explain why there are other considerations. That kind of dialog should allow the
170 occasional divergence of opinion. If this becomes a regular occurrence, perhaps the person DOES need
171 to be replaced. Moreover, it has been said that some Directors already vote differently near the end of
172 their term, hoping to encourage renewal – a characteristic which one would hopefully encourage non-
173 renewal.

174 Punishment: This rationale is interesting. We endow a group with the very onerous responsibility of
175 appointing Directors to ICANN’s Board, and we trust them to do it with care and consideration of the
176 needs of the organization. But we then presume that they may act capriciously if they don’t get their
177 way in a particular vote. If we really believe that an AC or SO would acting in that way, then ICANN
178 needs to rethink whether constituent bodies should be allowed to appoint Directors at all. Either we
179 have some level of trust that the groups will behave in a serious and thoughtful way on behalf of the
180 organization as a whole, or we don’t. We cannot have it both ways.

181 On the issue of removing NomCom appointees to the Board, the ALAC believes that this should be a
182 community decision, just as it is to remove the entire Board. The ALAC does not support having the
183 regular NomCom remove Directors (and specifically those appointed by previous NomComs). The work
184 of the NomCom is sufficiently difficult that this additional task would either come at a time when they
185 are already overwhelmed with the task of identifying and narrowing down new potential appointees, or
186 could come at a time when the NomCom is not even fully organized. Moreover this responsibility would
187 taint what should be a group that is focussing purely on finding the best candidates for the Board as well
188 as other ICANN bodies. Lastly, since the NomCom must operate in complete secrecy (regarding
189 candidates), it would be a bad plan to alter that rule for this particular task to allow full consultation
190 with the community. It would be equally bad to shroud the removal process in secrecy and NOT allow
191 consultation.

192 There is a simple solution to this. There should be a sub-committee of the NomCom appointed to carry
193 out NomCom-appointed Director removals. This committee should be composed of the representatives
194 of the SO/AC (or their Unincorporated Associations) empowered to act on behalf of the SO/Ac for all of
195 the other empowerment mechanisms. We therefore have the removal of NomCom appointees carried
196 out by the very community that desires these removals, without having to create an artificial and
197 perhaps distorting intermediary mechanism. The Bylaws restricting who can sit on a NomCom or what
198 NomCom members can do after their term must not apply to the members of this sub-committee.

199 **5.6 Power:** Recalling the entire ICANN Board: he ALAC supports this mechanism, but is concerned by the
200 lack of obvious alternatives to creating a caretaker Board without allowing for either nefarious action by
201 the outgoing “removed” Board and at the same time preventing capture by an interim Board. It is

202 because of these difficulties that the ALAC would far prefer the “surgical” approach of carefully
203 removing the Directors that the community believes are the source of ICANN’s problems while leaving a
204 core Board in which it has confidence.

205 **Section 6: Incorporating the Affirmation of Commitments into the ICANN** 206 **Bylaws**

207 Accountability and Transparency Review - Paragraphs 310-317: The wording of this section should be
208 altered to indicate that the a-e list is not prescriptive. Each review team should be given the authority to
209 decide exactly what A&T issues it will address. Based on the experiences of the ATRT1 and ATRT2, the
210 current formulation implies:

- 211 • A narrow focus of A&T as understood by particular individuals in 2009. The very existence of this
212 CCWG illustrates the “straitjacket” that the A&T review teams were controlled by forcing
213 concentration on issues that may have been of lesser importance and restricting what they
214 could look at in addition to or instead of the prescribed list.
- 215 • The requirement to review in depth the previous work and to explore new areas creates an ever
216 increasing workload that will make it very difficult for an ATRT to effectively tackle real issues
217 that are relevant at the time of its formation.