

I C A N N
POLICY FORUM

62

PANAMA CITY

25–28 June 2018



CCWG-Accountability WS2

Presentation of the WS2 Final Report and Implementation Advice

ICANN 62



June 2018

Agenda

1. Current Status
2. Review of recommendations
3. Review of Board Concerns and Implementation Guidance.
4. Process Going Forward
5. Questions
6. Adjournment

1. Current Status

- ⦿ The CCWG-Accountability WS2 concluded its work at its Face to Face meeting at ICANN 62 on Sunday 24 June. The WS2 Final Report and Implementation Guidance will now be transmitted to the CCWG-Accountability Chartering Organisations for approval. Once approved by the Chartering Organizations the CCWG-Accountability will forward this material to the ICANN Board for approval.
- ⦿ The WS2 Final Report has not changed since its publication for a public consultation in March 2018.

1. Current Status

The Implementation Guidance provides further clarification on the recommendations that were noted as problematic by the ICANN Board in its letter to the CCWG-Accountability on 14 May 2018. The recommendations which were noted are :

- ❖ The Ombuds Advisory Panel - 
- ❖ Transparency of Board Deliberations - 
- ❖ Transparency of Governmental Engagement - 
- ❖ Transparency of Open Contracting - 

1. Current Status

Statistics for completing WS2

- # of Members: 26
- # of Active Participants: 254
- # of Observers: 205

- Total number of meetings: 278
- Collective hours on calls and meetings: 10870 hours
- Total number of emails: 5926

- ⦿ The WS2 Implementation Oversight Team composed of the Co-Chairs and rapporteurs will continue to be available to provide assistance as needed during the approval and implementation processes.



2.1 Recommendations - Diversity

8 recommendations ICANN and all SO/AC s should implement. These are broken down into 3 main themes:

- Defining Diversity – 2 recommendations
- Measuring and Promoting Diversity – 3 recommendations
- Supporting Diversity – 3 recommendations

Recommendations are structured to allow SO/AC s to adjust the diversity requirements and conduct regular assessments to their needs.



2.2 Recommendations– Guidelines for good faith

- Complete name is - Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual ICANN Board Directors
- Simply a few optional recommendations to ensure that a representative from an SO/AC using the new accountability procedures to remove an ICANN Board Director (and following these good faith recommendations) will be indemnified if they are sued by the Director they are seeking to remove.



2.3 Recommendations – Human Rights FOI

- CCWG-Accountability-WS1 recommendations on Human Rights required a Framework of Interpretation (FOI) be accepted by ICANN prior to those recommendations coming into force. This FOI was developed in WS2.
- The FOI is a high level framework to help ICANN and SO/ACs to consider the implications of the Human Rights requirements in their work.



2.4 Recommendations – Jurisdiction

- Two sets of recommendations:
 - Recommendations to ICANN Relating to OFAC Sanctions and Other Sanctions
 - ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses
 - Approval of gTLD Registries
 - Application of OFAC Limitations by Non-US Registrars
 - General Licenses
 - Recommendations relating to Choice of Law and Choice of Venue Provisions in ICANN Registry and Registrar Agreements (these are only suggestions as these cannot be made binding using this process)



2.5 Recommendations – Ombudsman

11 recommendations which are very closely based on the recommendations made by the independent external evaluation of the office of the Ombuds:

1. Having a more strategic focus
2. Adapting its procedures
3. Communicating this to the community
4. Establishing timelines for all parts of the community to respond to requests from the Ombuds.
5. Establishing timelines for its own handling of complaints
6. Ensuring the office of the Ombuds has formal mediation training and experience
7. Ensuring diversity to those wishing to use the services of the Ombuds.
8. **Establishment of an advisory panel to increase independence***
9. Reviewing the rules of the Ombuds employment contract
10. Ensuring that an annual Ombuds report is published
11. Defining the requirements for Ombuds implication in non-complaints works

* Board concern



2.6 Recommendations – SO/AC Accountability

- ◎ **Recommendations are broken down into 3 tracks:**
 - **Track 1:** Review and develop recommendations to improve SO/AC processes for accountability, transparency, & participation that are helpful to prevent capture – Makes 29 recommendations that each SO/AC/Group **should** implement.
 - **Track 2:** Evaluate the proposed “Mutual Accountability Roundtable” to assess its viability and, if viable, undertake the necessary actions to implement it - While a small minority of CCWG participants supported this, the CCWG consensus view is not to recommend the Mutual Accountability Roundtable for formal implementation.
 - **Track 3:** Assess whether the IRP would also be applicable to SO & AC activities – The conclusion is that the IRP should not be made applicable to activities of SO/AC/Groups. The appropriate mechanism for individuals to challenge an AC or SO action or inaction is through ICANN’s Ombuds Office, whose bylaws and charter are adequate to handle such complaints.



2.7 Recommendations – Staff Accountability

Three main recommendations to address underlying issues or concerns identified through the group’s analysis:

1. Addressing the lack of understanding of the existence and/or nature of existing staff accountability mechanisms.
2. Addressing the lack of clearly defined, or broadly understood, mechanisms to address accountability concerns between community members and staff members regarding accountability or behavior .
3. Addressing the lack of service level definitions and guidelines.



2.8 Recommendations – Transparency

Sub-group made recommendations in 4 areas:

- 1. Improving ICANN's Documentary Information Disclosure Policy (DIDP) – 21 recommendations.***
- 2. Documenting and Reporting on ICANN's Interactions with Governments – 1 recommendation.***
- 3. Transparency of Board Deliberations – 3 recommendations.***
- 4. Improving ICANN's Anonymous Hotline (Whistleblower Protection) – 8 recommendations**

* Board Concern

3. Review of Board Concerns and Implementation Guidance

The ICANN Board advised the CCWG-Accountability WS2 that it had concerns regarding 4 of the recommendations:

3.1 The Ombuds Advisory Panel

3.2 Transparency of Board Deliberations

3.3 Transparency of Governmental Engagement

3.4 Transparency of Open Contracting



3.1 The Ombuds Advisory Panel

Original recommendation

ICANN should establish an Ombuds Advisory Panel made up of 5 members to act as advisers, supporters, wise counsel for the Ombuds and should be made up of a minimum of at least 2 members with ombuds experience and the remainder with extensive ICANN experience.

The Panel should be responsible for:

- Contribute to the selection process for new Ombuds which would meet the various requirements of the Board and community including diversity.
- Recommending candidates for the position of Ombuds to the Board.
- Recommending terms of probation to the Board for new Ombuds.
- Recommend to the Board firing an Ombuds for cause.



3.1 The Ombuds Advisory Panel

- Contribute to an external evaluation of the IOO every 5 years.
- Making recommendations regarding any potential involvement of the IOO in noncompliant work based on the criteria listed in recommendation 11.

The Panel cannot be considered as being part of the Ombuds office and cannot be considered additional Ombuds, but rather external advisors to the office.

Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.



3.1 The Ombuds Advisory Panel

Implementation Guidance

This implementation guidance was prepared following the Board raising concerns about the independence of the Ombuds function at the San Juan and Panama meetings. The guidance explains how the CCWG expects the recommendations to be implemented.

The Ombuds panel is not meant to be a decision making body – it is only there to assist the Board or relevant Board Committee with the specific tasks enumerated in the recommendation. The Panel is specifically prohibited from getting involved in any matter before the Ombuds; the Ombuds shall not seek, even on anonymized terms, guidance from the Panel on any matter before the Ombuds.

The Panel will only have the six specifically enumerated powers set out in the recommendation.



3.1 The Ombuds Advisory Panel

In implementing the portion of the recommendation “recommend to the Board firing an Ombuds for cause” - because under the Bylaws only the Board has the power to fire the Ombuds, the CCWG advises that the Board should implement this recommendation by preparing and publishing information about the process any ICANN community participants can use to provide the Board with feedback about, or raise concerns regarding, the performance of the Ombuds. The Panel is welcome to offer feedback on the performance of the Ombuds, but can only provide any feedback through this process (aside from the regular external evaluation). The CCWG suggests this clarification to preserve the right of the Panel to raise any concerns with the performance of the Ombuds function while not interfering with the Board’s responsibilities in managing the engagement of the Ombuds and considering concerns raised in an appropriate way.



3.1 The Ombuds Advisory Panel

In implementing the portion of the recommendation “Make recommendations regarding any potential involvement of the IOO in noncompliant work based on the criteria listed in recommendation 11”, this should only occur at the request of the Board.

Finally, a formal process to select the panel members should be created. This should ensure that candidates have extensive ICANN and/or ombuds experience, and also have complete independence from the SO/ACs. The selection process may be designed in any appropriate means to achieve independence, such as by selection by the Board, an independent recruitment firm, or other appropriate process.

Regardless of the process which is selected the ICANN Board should post details regarding the process that will be utilized.



3.2 Transparency of Board Deliberations

Original recommendation -The DIDP exception for deliberative processes should not apply to any factual information, technical reports or reports on the performance or effectiveness of a particular body or strategy, as well as any guideline or reasons for a decision which has already been taken or where the material has already been disclosed to a third party.

Implementation Guidance:

- ⦿ **For the sake of greater clarity, current publications of Board Briefing Materials appear to fulfil this requirement**
- ⦿ **Note: As ICANN organization points out, documents/information already provided to a third party (without obligation to keep as confidential) should not be withheld simply because of a deliberative process exception.**



3.2 Transparency of Board Deliberations

Original recommendation - The Bylaws should be revised so that material may only be removed from the minutes of Board meetings where it would be subject to a DIDP exception. Decisions to remove material from the minutes of Board meetings should be subject to IRP appeal.

Implementation Guidance:

- ⦿ **The basis for redaction of Board minutes and withholding information from a DIDP request should be substantially consistent. For the most part this would seem to be the case including if the CCWG-Accountability recommendations which apply to the DIDP are implemented. As such ICANN should publish a register of all redaction of Board minutes explaining the basis for the redaction . Additionally the register should explain how the basis for this redaction aligns with the DIDP exceptions and if it does not align with such an exception explain why.**
- ⦿ **Note: Re IRP appeal – this is currently in the Bylaws.**



3.2 Transparency of Board Deliberations

Original recommendation - Where material is removed from the minutes of Board meetings, the default should be to allow for its release after a particular period of time, once the potential for harm has dissipated.

Implementation Guidance - When redacting any information the Board should identify if the redacted information can eventually be released or not (ICANN should publish the list of the classes of information which can never be disclosed by law, or other reasons, such as staff employment matters etc.). If redacted information is identified as eventually being subject to release it should identify the conditions which would allow the release (this information should be included in the above mentioned Register). The CEO (or his/her designee) would annually review redacted information which is noted as being conditionally subject to release to see if the conditions for release are met, and shall release all appropriate information and update the Register accordingly. For all redactions (other than those that are part of a category that can never be disclosed), the redacted material should be disclosed during the annual Register review process in the 15th year after the redaction was first entered onto the Register.



3.3 Government Engagement

Original recommendation - In the interest of providing the community greater clarity with regard to how ICANN engages government stakeholders and to ensure that the ICANN community and, if necessary, the Empowered Community is fully aware of ICANN's interactions with governments, the CCWG-Accountability recommends that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly (but no more than quarterly) basis with regard to expenditures over \$20,000 per year devoted to “political activities”, both in the U.S. and abroad:



3.3 Government Engagement

- All expenditures on an itemized basis by ICANN both for outside contractors and internal personnel.
- All identities of those engaging in such activities, both internal and external, on behalf of ICANN.
- The type(s) of engagement used for such activities.
- To whom the engagement and supporting materials are targeted.
- The topic(s) discussed (with relative specificity).



3.3 Government Engagement

Implementation Guidance:

Note - This recommendation needs to be consistent with DIDP exceptions, specifically the exception which states:

Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party (note - the WS2 Transparency recommendations for DIDP did not mention or modify this exception which is currently included in the DIDP and as such it would be expected to stand).

The above discussion of DIDP policies is by way of explanation, and does not expand the application of this policy



3.3 Government Engagement

Overall one must recognize that ICANN is a critical actor in the DNS and has significant expertise in the area. ICANN's corporate objectives include a number of activities and programs to share this expertise with all interested parties including governments.

As such any activities where ICANN is presenting information which is publicly available or which is part of formally published ICANN position on a subject through training programs, conferences or individual meetings should not be required to be disclosed beyond the reports which are currently published by ICANN and reports regarding bilateral conversations with governments.

Note: Reporting on bilateral conversations can be found in the ICANN Quarterly Reports. Additional information on specifics of these reports can be requested via the DIDP subject to the stated exceptions. An example of such a report can be found at <https://www.icann.org/en/system/files/files/quarterly-report-08may18-en.pdf> page 29



3.3 Government Engagement

To further facilitate the community's understanding of ICANN's objectives in discussions with governments it should publish an annual Government Engagement Strategy which should describe the focus of its interactions with governments for the coming year. This document should be derived from existing documentation including but not limited to annual planning, CEO reports to the Board and correspondence with the GAC.



3.4 Open Contracting

Original recommendation - 16) Wherever possible, ICANN's contracts should either be proactively dis-closed or available for request under the DIDP. The DIDP should allow ICANN to withhold information subject to a non-disclosure agreement, however such agreements should only be entered into where the contracting party satisfies ICANN that it has a legitimate commercial reason for requesting the NDA, or where information contained therein would be subject to other exceptions within the DIDP (such as, for example, where the contract contains information whose disclosure would be harmful to the security and stability of the Internet).

Implementation Guidance:

- ⦿ **As the recommendation starts with the language "wherever possible" we would recommend that ICANN publish a document clearly stating its position on the limited use of NDAs and documenting the information that will make available on its contracted relationships, as discussed below.**

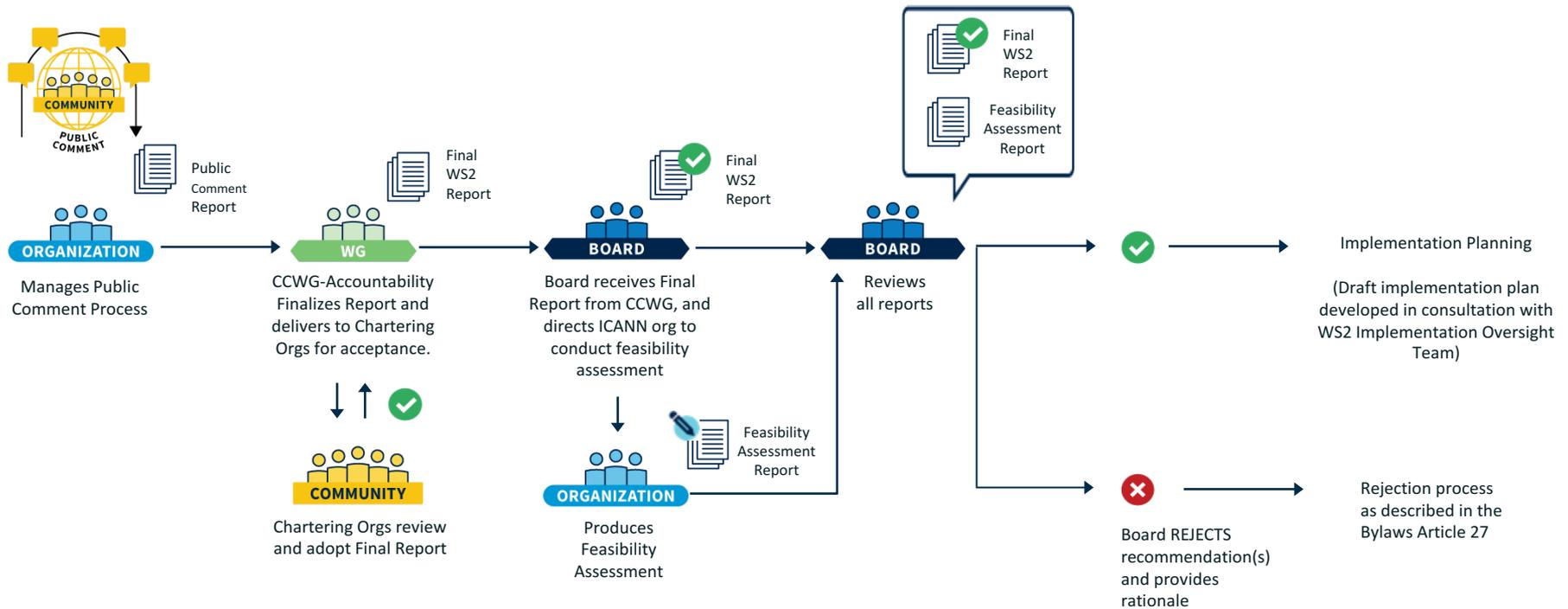


3.4 Open Contracting

- ⦿ **In the first year of implementation ICANN should publish a register of all suppliers (name of supplier, country or origin and actual annual amount) it pays 500,000\$US or more per fiscal year broken down by categories (eg, computer equipment, software, telecommunication services, contracting etc.). Starting in the second year of implementation ICANN should lower this threshold to 250,000\$US. The Board should review this threshold amount on a regular basis to effectively ensure transparency.**
- ⦿ **In scoping ATRT4 or future ATRT reviews SO/ACs should consider if the information provided in the above Register meets their requirements. Should they feel the need for adjustments they should request the review consider this.**

4. Process Going Forward

Board Deliberation



4. Process Going Forward - Setting Expectations on Implementation and Funding

WS2 implementation will be funded through general operating funds.

- ⦿ Unlike WS1 implementation, WS2 recommendations will not be funded out of the ICANN Reserve Fund
- ⦿ Implementation resourcing will need to be prioritized over an appropriate amount of time, weighing other existing and planned activities or community recommendations against available funding, and prioritizing efforts accordingly.
- ⦿ WS2 Recommendations accepted by the Board will move to implementation planning. The WS2 Implementation Plan will detail the timing, specific costs and resource allocations, and will be produced in consultation with the WS2 Implementation Advisory Panel.
- ⦿ As appropriate, implementation planning efforts will be coordinated with existing planning cycles, and subject to Public Comment as a part of those efforts. All ICANN Operating Plans are subject to review and revision based on changes to funding or activity assumptions and priorities.
- ⦿ WS2 recommendations will be tracked as they are implemented for appropriate WS2 implementation reporting,

5. Questions?

- All CCWG-Accountability-WS2 material can be found on its wiki at

<https://community.icann.org/display/WEIA/WS2+-+Enhancing+ICANN+Accountability+Home>

6. End of Presentation

- Thank You
- Any questions on WS2 can be sent to WS2 to acct-staff@icann.org who will respond or dispatch to the person responsible.