

Report by Accountability  
Structures Expert Panel (ASEP)

October 2012

# Basis for ASEP Review

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- ICANN's Articles of Incorporation, Bylaws, and Affirmation of Commitments, calling for:
  - Open and transparent governance
  - Accountability to multi-stakeholder community
  - Effective, efficient, open and inclusive reconsideration and review of ICANN decisions

# Scope of ASEP Review

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- **ATRT Recommendations 23/25**
  - Researched development and use of Reconsideration & Review structures
  - Reviewed Improving Institutional Confidence (IIC) Recommendations and community comment
  - Understood community concern and lack of consensus on IIC recommendations

# Guiding Principles

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## The Four Es:

- Enhancing effectiveness of structures
- Efficiency in process
- Allowing expeditious resolution
- Enhancing community's ease of access to accountability structures

The Board must always act with objectivity and fairness in the best interests of ICANN, but in doing so take account of the legitimate needs, interests and expectations of stakeholders material to the issue being decided. Staff must act in same manner.

# Guiding Principles (cont.)

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- Bring fresh perspective to ICANN, accounting for today's circumstances
- Build on prior recommendations where possible
- Make improvements; give ICANN a base for future consideration & improvement
- Focus on enhancement and clarifications to structures, not restrictions

# Guiding Principles

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- Create stability through building of precedent
- Where possible, reduce burden and costs to those accessing structures
- Accountability structures should not preclude any party from filing suit against ICANN in court of competent jurisdiction

# Current Accountability Structures

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- Ombudsman, Bylaws, Art. V
- Reconsideration Request - considered by Board Governance Committee (BGC), Bylaws, Art IV, Section 2
- Independent Review - administered by International Centre for Dispute Resolution, Bylaws, Art IV, Section 3

# Current Accountability Structures

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- No change recommended to role of Ombudsman
  - Ombudsman undertaking own review of work in line with international standards
  - Ability to bring claims of unfairness across ICANN community seems to be working well
- Reconsideration and Independent Review processes to remain, but improvement required



# Key Recommendations

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# Summary of Recommendations

## RECONSIDERATION

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- Improve access - add claims for consideration of inaccurate material information
- Define key terms, such as “material information”, “materially harmed”
- Modify time limits for submissions
- Include terms and conditions in request form
- Allow for urgent review in place of stay
- Allow for summary dismissal when warranted
- Allow “class” filings/consolidation
- Require allegations of standing

## INDEPENDENT REVIEW

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- Create omnibus standing panel
- Define key terms
- Introduce optional cooperative engagement and conciliation phases to narrow issues and improve efficiency
- Require submission form with terms and conditions
- Introduce: (i) time limits for filing and decision; (ii) and page limitations for argument
- Eliminate in-person proceedings absent real need
- Allow “class” filings/consolidation
- Require allegations of standing

# Reconsideration Process

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# Reconsideration Process Recommendations

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## **Form of Reconsideration Model**

- BGC to continue reconsideration of Board's prior decisions.
- The full BGC, and not a subset, should remain as the body considering Reconsideration Requests.

# Reconsideration Process

## Recommendations

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### What May Be Reconsidered?

- Staff action: Policies that can be basis for challenging staff action/inaction should be those that are approved by the Board (after community input) that will impact the community in some way.
  - For those processes/procedures that are not policies, complaints regarding staff action/inaction are more appropriately addressed to ICANN management, or the Ombudsman if unfairness can be alleged.

# Reconsideration Process

## Recommendations

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### What May Be Reconsidered?

- Board action: Grounds for Reconsideration should be expanded to include both:
  - If information was available at time of Board decision, but not presented to Board, except where the requestor could have submitted but did not submit the information, and the information could have formed the basis for the decision.
  - If the requestor can demonstrate that inaccurate/false/misleading information was presented to, and formed the basis for, the challenged Board action or inaction, if it materially and adversely affected a party.
    - Requires more than allegation of inaccuracy; requestor must demonstrate inaccuracy and the causal connection between the inaccuracy and the challenged Board decision.

# Reconsideration Process

## Recommendations

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### **What May Be Reconsidered?**

- Standard for “materially harmed” and “adversely impacted”
  - Aggrieved party must demonstrate: a loss or injury suffered (financial or non-financial) that is directly and causally connected to challenged Board or staff action or inaction.
  - Aggrieved party must set out the loss or injury and the direct nature of that harm in specific and particular details.
  - The relief requested must be capable of reversing the alleged harm.
  - Injury or harm caused by third parties as a result of acting in line with the challenged decision is not a sufficient ground for reconsideration.
  - The impact of the injury or harm must be in itself of sufficient magnitude to justify the reconsideration and not exacerbated by the actions or omissions of a third party.
  - The request may be summarily dismissed, with due notice in the request form, if the facts relied on do not evidence “harm” or “impact”.

# Reconsideration Process Recommendations

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## What May Be Reconsidered?

### ● Define “Material Information”

- “Material information” = Facts that are material to the Board’s decision.

### ● Revise Reconsideration Request Form to Incorporate Definitions

- The Reconsideration Request form should include terms and conditions and be modified to call for information specific to the definitions laid out here.



# Reconsideration Process

## Recommendations

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### **Clarification of Process - New Time Limitations**

- For Board actions, Requests must be filed within 15 days of posting of the resolution at issue, or from the initial posting of the rationale (if rationale is not posted with resolution).
- For staff actions, requests should be received within 15 days of the staff action/inaction taking effect.
- The BGC must issue recommendation on the Request within 30 days of filing, or as soon thereafter as feasible. The feasibility of time limits depend on issues such as the complexity of the request, the number of requests pending simultaneously, or similar situations.
- The Board to issue determination on the BGC recommendation within 60 days of receipt or as soon thereafter as feasible; circumstances that delay the Board action should be published on the website.

# Reconsideration Process Recommendations

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## **Clarification of Process - Page Limitations**

- Incorporating a page limitation for the submission of argument is not anticipated to curtail any of the principles identified.
- Efficiency, expeditiousness and ease of access will be enhanced by limiting argument (legal submissions) to no more than 25 pages of double-spaced, 12-point font.
- Requestors may submit all facts necessary in the request form, without limitation, to demonstrate why the decision should be reconsidered.

# Reconsideration Process Recommendations

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## **Clarification of Process - BGC Role in Considering Staff Action/Inaction**

- When a reconsideration request is brought to challenge a staff action/inaction, BGC should have delegated authority from the Board to make the final determination.
- In these situations, as the staff action/inaction was not initially a matter before the Board, there is no need for the Board as a whole to review these recommendations.
- The BGC may determine if it is appropriate to take a recommendation of this type to the Board, and the BGC retains the authority and discretion to do so.
- This vesting of responsibility to the BGC may necessitate a modification to the BGC Charter.

# Reconsideration Process Recommendations

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## **Clarification of Process - Summary Review and Dismissal**

- The BGC should have the power to dismiss a reconsideration request summarily; there is no benefit to continue process when there is no substance to request or if it is frivolous, querulous or vexatious.
- Reconsideration Request form should be modified to put requestors on notice of the potential for a summary dismissal.
- A question similar to the following must be included in the form: “Please state specifically the grounds under which you have the standing and the right to assert this claim.” This question may be tailored to address the definition of “materiality” that will be incorporated into the Request Form.

# Reconsideration Process Recommendations

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## **Clarification of Process - “Stay” Not Feasible; Provide for Urgent Review Instead**

- A stay adds – not diminishes – uncertainty to the process. ICANN is not able to grant the relief to third parties that normally accompany a stay in other scenarios, such as a right to a bond in the event the stay is improperly taken.
- Many people or entities, not just a Requestor, rely upon the Board’s action. The ASEP does not view this lightly; it is important to note that ICANN is to be accountable to all, not just those aggrieved by a particular decision.

# Reconsideration Process Recommendations

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## **Clarification of Process - “Stay” Not Feasible; Provide for Urgent Review Instead (cont.)**

- Provide a right to apply to the BGC for urgent reconsideration.
- An request for urgent consideration must be made within two business days (calculated at ICANN’s headquarters in Los Angeles, California) of posting of the resolution at issue; must set out why the matter is urgent for reconsideration; and must demonstrate a likelihood of success in the resolution of a request for reconsideration.
- The BGC must respond in two working days or as soon as feasible thereafter as to whether the matter is urgent.
- If the matter is deemed as urgent, the requestor will be given an additional two business days to complete the submission of a Reconsideration Request. The BGC must consider this issue as a matter of urgency within seven days thereafter.

# Reconsideration Process Recommendations

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## **Clarification of Process - Hearings Not Required**

- No hearing is required in the Reconsideration Process. However, the BGC retains the absolute discretion to call people before it to provide additional information.
- Complainants may request an opportunity to be heard by the BGC; the BGC decision on such a request to be heard is final.
- This should be included in the Request form.

# Reconsideration Process

## Recommendations

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### **Clarification of Process - Combined/Consolidated Request**

- “Class” type filings may be appropriate within the reconsideration process. The definition of the standard for review of the feasibility of “class” treatment should be “Is the alleged causal connection and the resulting harm the same for all of the complaining parties?”
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has been materially harmed and adversely impacted by the action/inaction giving rise to the request.
- As needed, the BGC shall have the ability to consolidate the consideration of reconsideration requests if they are sufficiently similar.



# Reconsideration Process Recommendations

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## **Clarification of Process - Third Party Participation in Process**

- All material information relevant to the request should be provided through the requestor.
- However, if information comes to the BGC through another channel the BGC should provide that information to the requestor and post it on the ICANN website.

# Reconsideration Process

## Recommendations

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### **Effect Of Outcomes - No Right to “Appeal” Decisions on Reconsideration**

- The Board’s decision on the BGC’s recommendation is final (i.e., not subject to a Reconsideration Request).
- In the event the matter is about Staff action/inaction, the BGC’s determination is final.
- Notice of this should be made clear to those seeking reconsideration through the introduction of a Terms and Conditions section in the form provided for the submission of Reconsideration Requests.

# Reconsideration Process

## Recommendations

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### **Effect Of Outcomes - Precedential Value of Decision**

- **Board Action:** When a reconsideration request is about Board action, the concept of “precedent” is not relevant, as the question focuses on whether or not the Board considered material information in a specific instance.
- **Staff Action:** When the request is about staff action, the BGC consideration of violation of the policy should have precedential value. The fact of precedential value carried by prior recommendations on Reconsideration should be noted in the Reconsideration Request form.

# Reconsideration Process

## Recommendations

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### **Metrics to Identify Effectiveness**

- It is difficult to identify metrics to show that the Reconsideration process adds value, as it should not be based solely upon how many requests are filed or how many requests succeed. The fact of use of the process may show that the availability of the process as means to make sure the Board and staff act appropriately is of value. When the process is invoked, it will be important to evaluate if the BGC/Board performed the process in a consistent and transparent manner.
- For complaints of staff action, a proposed metric is: If the BGC determines that staff did not follow a policy, did staff properly re-evaluate and follow policy thereafter?

# Independent Review Process (IRP)

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# Independent Review Process Recommendations

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## **Independent Review - Omnibus Standing Panel**

- The ASEP recommends establishing an omnibus standing panel of six-to-nine members, taking account of geographic diversity. Each member should receive an annual retainer, and a small per-diem fee as they are called for service.
- Each IRP panel will be selected from among the omnibus standing panel members.
- The expertise desired on the standing panel include jurisprudence, judicial experience, alternative dispute resolution, and knowledge of ICANN's mission and work.
- For consistency in IRP panel decisions and administration of proceedings, due care must be given in the selection of panelists to assure a broad range of experience and meeting of objective criteria for service.

# Independent Review Process Recommendations

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## **Independent Review Panel – Omnibus Standing Panel (cont.)**

- The standing panel should have a Chair that may, at his/her discretion, serve on any or all selected panels during his/her tenure (not to exceed three years) as another measure of continuity throughout the proceedings. There should be administrative support for the standing panel.
- Appointment periods for the panelists should be staggered to allow for continued review of whether the panel has the correct number of members and the required skills and capacity.

# Independent Review Process Recommendations

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## **Independent Review - Size of IRP Panel**

- While the parties can request that an IRP be heard by a one- or three-member panel, the Chair of the standing panel retains the right to decide on the size of the panel and make recommendations on who will be on the panel, based upon issues such as the complexity of the matter alleged and whether any particular expertise is called for.
- The terms and conditions section of IRP submission form will describe the panel selection process.



# Independent Review Process Recommendations

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## **What May Be Subject of IRP? – Complainant must be “materially harmed”:**

- The complainant must demonstrate, in specific and particular details, the injury or harm suffered (financial or non-financial) that is a directly and causally connected to the Board’s alleged violation of the Bylaws or Articles of Incorporation.
- The decision of the panel (as reviewed and acted upon by the Board) must be capable of reversing the injury alleged by complainant.
- Injury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for independent review.
- The impact of the injury or harm must be in itself of sufficient magnitude to justify the review and not exacerbated by the actions or omissions of a third party.
- The request may be summarily dismissed, with due notice in the IRP submission form, if the facts relied on do not evidence “injury” or “harm” as defined.

# Independent Review Process Recommendations

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## **What May Be Subject of IRP? - Material Standing Requirement:**

- There has to be some definition of locus to ICANN. The person or entity bringing an IRP against ICANN must be able to specifically identify how it has been directly impacted by an ICANN Board decision, and not by the actions of third parties.
- This will be called for in the IRP submission form.

# Independent Review Process Recommendations

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## **Clarification of Process – Time Limitations**

- A reasonable but not excessive limitation must be imposed. The request must be filed within 30 days of the posting of approved minutes (and accompanying Board Briefing Materials) that demonstrate the requestor's contention that ICANN violated its Bylaws or Articles of Incorporation. If the request is not filed within that time, the requestor is time barred.

# Independent Review Process Recommendations

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## **Clarification of Process - Time Limitations (cont.)**

- It is generally recommended that an IRP conclude to determination within four-to-six months of filing.
- The IRP Panel will retain ultimate responsibility and control of the timing of each IRP and the schedule for the parties to follow.
- The form for requesting an IRP should include a term and condition that the IRP Panel sets the timetable for the proceeding and violations of the IRP Panel's timetable may result in an appropriate order.

# Independent Review Process Recommendations

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## Clarification of Process - Cooperative Engagement

- It is recommended that the complainant initiate a period of cooperative engagement with ICANN prior to seeking independent review.
- The cooperative engagement mechanism will be an opportunity for ICANN and the complainant, in good faith and without outside counsel, to discuss the ways in which the party alleges the Board has violated ICANN's Bylaws or Articles of Incorporation and to determine if the issue can be resolved without an IRP, or if the issues can be narrowed.
- When the cooperative engagement is initiated, ICANN will designate a representative for the discussions, and in-person consultation is recommended, if reasonable.

# Independent Review Process Recommendations

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## **Clarification of Process - Cooperative Engagement (cont.)**

- The cooperative engagement period should last for approximately 14 days.
- Cooperative engagement is not mandatory, but recommended.
- All matters discussed during cooperative engagement are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
- Cooperative engagement period should be initiated prior to a requestor incurring fees for preparing filings for an IRP.

# Independent Review Process Recommendations

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## **Clarification of Process – Conciliation**

- Upon the filing of an IRP a period of good faith conciliation is recommended, to resolve or narrow the remaining issues.
- A conciliator will be appointed by Chair of the omnibus standing panel from among the standing panel members (if the creation of a standing panel is adopted).
- The conciliator will receive a limited per-diem fee.
- The conciliator will not serve on the IRP panel.
- The IRP panel chair may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues.
- The conciliation period should last for approximately three weeks.
- All matters discussed during conciliation are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

# Independent Review Process Recommendations

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## **Clarification of Process - Effect of Not Using Cooperative Engagement or Conciliation**

- Neither cooperative engagement nor conciliation is required, but if IRP complainant does not avail itself in good faith of cooperative engagement or conciliation AND the IRP complainant is not successful, the IRP panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.
- ICANN is expected to participate in the cooperative engagement and conciliation processes, as requested, in good faith.
- This should be included as a term and condition in the IRP submission form.



# Independent Review Process Recommendations

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## Clarification of Process - Summary Review and Dismissal

- An IRP should be summarily dismissed for lack of standing, lack of substance., being frivolous or vexatious.
  - Allowing a claim to proceed and use community resources when there is no merit to the claim is not an enhancement to accountability and is not in the interest of the community.
- Notice of the option of summary dismissal must be in the IRP Form. A question similar to the following must be included: “Please state specifically the grounds under which you have the standing and the right to assert this claim and the specific grounds on which you rely.”
- A question may be tailored to address the definition of “materiality” that will be incorporated into the IRP.

# Independent Review Process Recommendations

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## **Clarification of Process - Page Limitations**

- Written submissions of legal argument to the IRP Panel should be limited to 25 pages, double spaced and in 12-point font (both requestor and ICANN are subject to the same limits). This does not include evidence.
- All necessary evidence to demonstrate the claims that ICANN violated its Bylaws or Articles of Incorporation should be submitted in the IRP form.

# Independent Review Process Recommendations

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## **Clarification of Process - Expert Submissions Allowed**

- The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence by exchange of the written objections with written rebuttals filed within 14 days of receipt of the written expert evidence.

# Independent Review Process Recommendations

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## **Clarification of Process - In-Person Hearings Not Authorized**

- The nature of the IRP panel is to determine if ICANN followed its Bylaws or Articles of Incorporation, which does not seem to lend to hearings.
- In general, there should not be an in-person hearing. The parties should maximize electronic communication in their submissions.
- If there is need for a hearing, in the discretion of the IRP Panel, the hearing should be limited to argument only; all evidence (including witness statements, expert statements, etc.) shall be submitted in writing.

# Independent Review Process Recommendations

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## **Clarification of Process – Panel Selection**

- Once the size of the panel is determined, the parties may agree on panel selection process.
- Panelist selection must be completed within 21 days after the completion of the conciliation phase (or if no conciliation phase, the filing of the IRP).
- If the parties have not agreed on the selection at that time, the Chair of the standing panel shall complete selection of panelists within seven days.
- This will be identified in the IRP filing terms and conditions.

# Independent Review Process Recommendations

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## **Clarification of Process – Combined/Consolidated Proceedings**

- “Class” type filings may be appropriate within the IRP process. The definition of the standard for review of the feasibility of “class” treatment should be “Is the causal connection between the circumstances of the complaint and the harm the same for all of the complaining parties?”
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has standing and has been materially impacted by the Board action in violation of the Articles of Incorporation or Bylaws that gives rise to the request.
- As needed, the IRP Panel shall have the ability to consolidate IRP requests if they are sufficiently similar.

# Independent Review Process Recommendations

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## **Clarification of Process - Third Party Participation**

- If third parties believe that they have information to provide to the IRP, that information should be provided through the claimant.

# Independent Review Process Recommendations

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## **Clarification of Process - A Defined Standard of Review Must Be Incorporated**

- The IRP should be subject to a defined standard of review, including: (i) did the Board act without conflict of interest in taking its decision; (ii) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; (iii) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
- If a complainant demonstrates that the Board did not make a reasonable inquiry to determine it had sufficient facts available, Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the complainant will have properly stated grounds for review.



# Independent Review Process Recommendations

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## **Effect of Outcomes - Outcomes of the IRP Process are Final**

- The declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value.
- If an IRP is later initiated on the same issue, the prior decision may serve as grounds for a summary dismissal.
- The terms and conditions within the submission form must note that the ultimate Board decision following on from the IRP determination is final and creates precedent.

# Future Work & Next Steps

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# Next Steps

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- The ASEP recommends that ICANN Community carefully consider the recommendations.
- If comments are received that suggest modifications to these recommendations would further ICANN's accountability and transparency, the ASEP will take those into consideration.
- The ASEP encourages a further schedule of review of the accountability structures once there is experience with the structures as modified.
- The ASEP also encourages future consideration of adoption of new accountability structures as would serve the global public interest.

# The Experts

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# Accountability Structures Expert Panel



## **Mervyn King**

- **Senior Counsel and former Judge of the Supreme Court of South Africa**
- **Professor Extraordinaire at the University of South Africa on Corporate Citizenship**
- **Chair of King Committee on Corporate Governance (S.A.)**
- **Former Chair, UN Committee on Governance and Oversight**
- **Chairman of the International Integrated Reporting Council**

# Accountability Structures Expert Panel



## **Graham McDonald**

- **40 year legal career**
- **Inaugural Australian Banking Ombudsman**
- **Served 22 years as a Presidential Member of Australia's Administrative Appeals Tribunal**
- **On board of AuDA**

# Accountability Structures Expert Panel

## **Richard Moran**



- **CEO and Vice Chair, Accretive Solutions**
- **Director on several Boards**
- **Active with the National Association of Corporate Directors, working with boards to improve effectiveness**
- **Business author and radio host**