

## **NCSG COMMENTS TO THE GNSO COUNCIL ON THE RECOMMENDATION 6 CROSS-COMMUNITY WORKING GROUP REPORT AND RECOMMENDATIONS**

The NCSG reiterates its support for concerns raised in the ALAC statement filed in response to the release of the Recommendation 6 Community Working Group (“CWG”) Report on the Implementation of Recommendation 6 (the “CWG Report”). The ALAC statement and the NCSG’s endorsement of it are archived online at <http://forum.icann.org/lists/cwg-report-rec6/>.

In particular, the NCSG wishes to draw the Council’s attention to the following points from the NCSG-supported ALAC statement, to the effect that in implementing new gTLDs and in relation to Recommendation 6, ICANN should:

- Completely eliminate the term "morality and public order";
- Replace the existing resolution dispute mechanism with processes defined by recommendations 3 and 4 from the CWG Report;
- Limit objection criteria to specific principles of international law and treaty;
- Deny national law as a sole criteria for objections based on these criteria;
- Resolve disputes of this nature early in the application process;
- Require individual government objections to be made either through the Community Objections Process or through one of the ALAC and the GAC;
- Include safeguards to ensure transparency and accountability with respect to an Independent Objector;
- Uphold a gTLD creation process that encourages "the true diversity of ideas, cultures and views on the Internet".

In addition, the NCSG notes that the CWG has recently filed a response to the ICANN Board, in reply to certain specific questions put to the CWG by the Board at the Cartagena meeting. These questions, as contained in Board resolution 2010.12.10.21, related to (1) the roles of the Board, GAC, and ALAC in the objection process, (2) the incitement to discrimination criterion, and (3) fees for GAC and ALAC-instigated objections. The NCSG supports generally the clarifications made by the CWG in its response to these questions, as submitted on 7 January 2011.

**The NCSG strongly recommends that the GNSO Council endorse those recommendations made by the CWG that constituted Full Consensus and Consensus in the CWG, and consider as soon as possible a GNSO position on those recommendations that were the subject of Strong Support within the CWG.**

The following are additional NCSG comments on the CWG Report and recommendations, which we hope will clarify the reasons for our recommendation to the Council.

### (1) Overall Rationale for Support

- Those CWG recommendations that received Full Consensus reflect substantial participation across all ICANN ACs and SOs. Even though the GAC participants were not formally representing either a GAC or individual country view, their participation was a milestone in ICANN cross-community dialogue and provided a very useful governmental perspective to the group and informed its recommendations. The CWG Report is also being considered by GAC members as ICANN moves toward implementing new gTLDs. As such, the NCSG believes that the GNSO – which was the body that formulated the original Recommendation 6 – must weigh in at this time.

### (2) Name & Scope of Objection Categories

- The term “Limited Public Interest Objections” (as used in the current version of the draft Applicant Guidebook, or “AGB”) was not discussed or recommended by the CWG. The NCSG recommends that the Council consider supporting the term “Objections Based on General Principles of International Law”, which was recommended with Strong Support within the CWG.
- On the specific issue of the legal standards that need to be satisfied in order to bring a successful objection (i.e. the “incitement” and “instigation” criterion), the NCSG recommends that the Council support wording and standards that make it clear a higher threshold than mere incitement to or promotion of certain conduct is the baseline standard. First, it is strongly suggested that a single gTLD – in and by itself – cannot incite anyone to do anything. Incitement is a term that incorporates various elements that relate to content/context, a function that falls outside ICANN’s purview. The wording ‘incitement to or promotion of’ appears to offer a relaxed standard and given the significance of these objections it should not be acceptable. NCSG is of the opinion that the bar should be raised and should include terminology that does not require ICANN to have to check content when dealing with such objections. To this end, it is recommended that these types of objections should be based on a two-prong system: **incitement**

**and instigation.** This provides a higher bar to substantiate objections and has the following advantages:

1. it does not require ICANN to go into the process of checking content/context of the gTLD; and,
  2. it ensures that the bar is high in order to substantiate such objections; and
  3. it is in line with principles of international law and international criminal law.
- On the listing of different categories of discriminatory behavior, the NCSG recommends that, for the sake of clarity and certainty, the Council support the recommendation that the full list of possible discriminatory acts, as listed in the CWG Report, be used instead of a single, general catch-all category.

### **(3) Costs for GAC & ALAC Objections**

- The NCSG supports the CWG recommendation that costs be at least lowered for objections filed by the GAC or ALAC, on the ground that such objections (if any) would first have gone through the GAC's and ALAC's own internal processes to ensure validity such as to represent a consensus of the relevant AC. The Council should also consider the possibility of supporting the removal entirely of objection fees from such GAC or ALAC objections.

### **(4) The Independent Objector ("IO")**

- Some NCSG members believe that the IO office should be removed entirely from the new gTLD process because it is ripe for abuse. On the assumption, however, that some IO function remains in the final AGB, the NCSG urges the Council to support a more detailed framework for such an office – including metrics for selecting, renewing and measuring the performance of the IO. In this regard, the NCSG notes that although CWG recommendation 10.1 is recorded as a Divergent recommendation, it nonetheless received support from a simple majority of CWG members. The NCSG believes that the suggestions contained in CWG recommendation 10.1 represents an important step forward in ensuring fairness, transparency and accountability on the part of the IO, in particular, as regards linking the IO's function more directly to enabling truly harmed groups to file valid rather than abusive or frivolous objections. The NCSG agrees with the CWG that the IO should not be

used to facilitate secret objections, but should operate transparently. For accountability purposes, any objections raised by an IO must be triggered by at least one party who publicly claims it will be harmed by the creation of a tld.

**(5) Role of “Dispute Resolution Service Providers” (“DRSPs”) & the ICANN Board**

- Although some NCSG members support the elimination from the new gTLD process of a third party DRSP, to the extent that ICANN elects to retain the services of such a provider, the NCSG urges the Council to support a process that limits these services to purely administrative functions (e.g. ensuring compliance with procedural formalities). In line with the CWG Full Consensus recommendation that the Board retain ultimate responsibility for approving or denying a new gTLD application that has been subject to a Recommendation 6 objection process (even though, in making such a determination, the Board will be free to rely on the advice of independent experts), the NCSG recommends that the Council advise the Board to ensure that any and all independent experts have been properly vetted and a full search for appropriate experts in a particular case has been conducted (as opposed to relying solely on experts appointed on a non-transparent basis by the DRSP).
- The NCSG notes that it does not support the use of the term DRSP and is using it solely because of the language in the current AGB. The NCSG recommends that the Council support the following description of the Recommendation 6 objection process: (i) that the objection process is not a dispute resolution process as the latter term is commonly understood, but rather an expert determination as to whether a proposed string contravenes international law principles; (ii) upon such expert determination – which need not be an adversarial, trial-like process – the Board then has to decide whether or not to approve or deny the application; and (iii) the Board may make its decision based not only on the expert determination, but also on other factors such as Internet security and stability issues.

Respectfully submitted,  
The Non-Commercial Stakeholder Group (NCSG)  
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