Subject: [EC] Re: Proposal at APNIC 59 AGM for EC-appointed legal representation
Date: Saturday 5 April 2025 at 17:16:20 Australian Eastern Standard Time
From: Lu Heng
To: Kenny Huang, Ph.D.
CC: EC

Please publish my reply in full alongside your letter. The lack of independent legal counsel led to a concentration of power, resulting in wasteful spending. Addressing this issue is essential to eliminating such waste.

Dear Kenny,

Thank you for your letter and the clarification provided regarding the suggestion I raised during the APNIC 59 AGM. While I appreciate the EC's consideration, I respectfully disagree with the conclusion that retaining independent legal counsel for the EC is unnecessary.

As you've highlighted, legal counsel employed within an organization has ethical obligations to uphold the organization's interests. However, best practices in governance for global non-profit organizations regularly demonstrate the prudence of independent legal advice to boards, precisely to mitigate potential conflicts arising from internal reporting structures. It is widely acknowledged in governance literature and in practical scenarios across international non-profit entities—such as ICANN and numerous healthcare organizations—that independent counsel is beneficial, especially in situations where internal counsel reports directly to the executive management.

Historically, APNIC's governance structure has vested significant power in the position of the Director General, notably exemplified when, in 1999, Paul Wilson amended APNIC's bylaws unilaterally. Such events underscore the inherent risks of a governance structure that lacks independent oversight mechanisms. In this context, reliance solely upon internal legal advice provided by counsel who directly reports to the Director General can present structural vulnerabilities and conflicts of interest.

Furthermore, global governance standards strongly advocate for clear separations of power and oversight structures that allow boards direct access to independent legal advice when deemed necessary. Far from creating unnecessary expenses, such advice can prevent costly governance issues and reinforce the fiduciary duties of board members.

While acknowledging the EC's stated confidence in the internal legal team, I maintain that establishing a formal mechanism for independent legal counsel would significantly enhance APNIC's governance robustness, transparency, and stakeholder trust.

Given the above, I believe this matter warrants further consideration rather than being prematurely closed. To facilitate broader understanding, I intend to discuss this issue publicly, including through platforms such as YouTube, to ensure our community is fully informed about the governance practices vital for the integrity and future of APNIC.

Please find attached a detailed article written by me outlining independent legal counsel and

governance best practices applicable to global non-profits, highlighting the benefits and necessity of such arrangements for organizations similar to APNIC.

Warm regards,

Lu Heng

Independent Legal Counsel and Governance Best Practices in Non-Profit Organizations

Board Members and Independent Legal Counsel in Global Non-Profits

It is neither unusual nor improper for board members of non-profit organizations to seek independent legal counsel, especially when the organization's internal legal team reports to executive management. In fact, many governance frameworks empower boards to retain outside advisers (including attorneys) to ensure their decisions are well-informed and unbiased. For example, U.S. law post-Sarbanes-Oxley explicitly requires that key board committees (such as audit committees) have the authority to hire independent legal counsel without management interference . Likewise, non-profit hospital boards are advised that while a general counsel may normally advise both management and the board, the board **"may need separate counsel in turbulent times"** – an external lawyer who can ask tough questions of management and provide an unbiased perspective . One benefit of such independent counsel is that they can challenge management when necessary and bolster the board's diligence; indeed, **"the advice of independent counsel may serve as a defense to lawsuits that may be brought against the board"** down the road . In short, retaining outside counsel is a recognized tool for boards to fulfill their fiduciary duties when potential conflicts or high-stakes issues arise.

Multiple examples can be found in global organizations where independent counsel for board members (or equivalent governing bodies) is considered best practice. In the international finance sector, for instance, regulators have underscored the importance of independent board counsel. The U.S. Securities and Exchange Commission (SEC) even codified a definition of "independent legal counsel" for mutual fund boards, emphasizing that fund directors should have **"knowledgeable independent legal counsel to advise them on an ongoing basis"** and authority to employ such advisors in carrying out their duties . This principle – that boards must be able to obtain impartial legal advice separate from management's influence – is equally applicable to non-profits and NGOs. Many large non-profit and international organizations allow or even encourage their boards (or oversight committees) to consult outside counsel when faced with complex governance questions or conflicts of interest. The National Council of Nonprofits notes that a board has broad authority to act in the organization's best interests, which generally includes hiring attorneys or other experts as needed . In practice, this means that if board members feel the need for independent legal guidance (for example, during disputes involving the CEO or Director General), they are within their rights to obtain it. Far from being rare, this is viewed as a prudent step to ensure that the board can exercise independent judgment separate from the organization's management.

Examples of Independent Counsel Usage

• **Healthcare Non-Profits:** As noted above, hospital boards often use independent counsel during periods of crisis or major change. Industry advisors counsel that having separate legal advice can help boards press management on sensitive issues and make defensible decisions . This approach has been seen in practice when hospital boards faced financial distress or compliance investigations, highlighting that independent counsel can reinforce oversight in the public interest.

• **International Governance Bodies:** In the multi-stakeholder governance model of organizations like ICANN (which oversees internet domain allocation globally), independent legal counsel has been retained to advise stakeholder groups separate from staff lawyers. For example, during ICANN's 2016 governance reforms, community working groups were supported by independent counsel alongside ICANN's own legal team . This ensured that the community's representatives had unbiased legal advice when negotiating bylaws and accountability changes. Such instances illustrate that even in global internet governance, having lawyers who **do not report to the executive leadership** but instead answer to the board or community is an accepted practice to safeguard diverse interests .

• **Mutual Benefit Organizations:** Governance best practices in member-driven organizations (like cooperatives, associations, and certain UN-affiliated agencies) often provide for boards to hire outside experts. A board's fiduciary duty to the organization can necessitate getting an independent legal opinion on contentious matters – for instance, when interpreting bylaws or assessing the legality of a CEO's actions. It is understood that the **organization's internal counsel may face loyalty conflicts**, so boards routinely budget for independent professional advice as needed. In one notable Q&A, a nonprofit governance expert affirmed that a board generally **"has the authority to hire an attorney to represent the organization"** using general funds, without needing membership approval . This underscores that engaging independent counsel is within a board's normal powers if it believes it necessary for proper oversight.

In summary, there are ample precedents of global non-profit boards retaining independent counsel to ensure their decisions are based on impartial legal advice. This is especially true in situations where the in-house counsel reports to the CEO or Director General, because the board recognizes that management's lawyer – no matter how ethical – may not be fully insulated from executive influence. Independent counsel helps the board affirm that its duty of loyalty is to the organization's mission and members, not to any one individual's agenda.

Governance Best Practices: Legal Independence and Oversight

Modern governance guidelines for non-profits and international organizations highlight the importance of independent legal oversight and clear separation of powers. Best-practice frameworks stress that the board of directors (or equivalent governing body) must be empowered to act independently of management when fulfilling its oversight role . This includes having unfiltered access to information and advice, especially legal advice. A core principle is that the organization's **general counsel represents the organization as a whole**

– not the Director General or CEO personally . In theory, the general counsel's client is the entity and its membership/mission. In practice, however, if the general counsel's reporting line and day-to-day instructions come exclusively from the chief executive, there is a risk that their advice could be swayed by what the executive wants to hear. To counteract this, governance experts recommend structural safeguards to preserve legal independence.

One widely cited best practice is to give the general counsel (GC) a **"dotted line" reporting relationship to the board** or a committee of the board (such as the Audit or Governance Committee) in addition to reporting to the CEO . In a healthy governance model, the GC should have the explicit right to bring concerns directly to the board chair or to non-executive directors **"without the prior consent of the CEO"** . As one expert notes, this privilege can even be written into the organization's statutes or policies to ensure it is respected . The rationale is that if a legal or ethical issue arises where management itself may be implicated, the GC must feel free to alert the board or seek its guidance, rather than being muzzled by loyalty to the chief executive. This dual-access structure is analogous to the practice in many corporations where the Chief Compliance Officer reports functionally to an independent board committee to avoid managerial interference . For non-profits, including international NGOs, adopting such measures can greatly improve checks and balances. It reassures stakeholders that **legal counsel can act in the best interest of the organization** and its mission, even if that means scrutinizing the actions of the leadership.

Another aspect of best practice is the separation of governance roles to prevent excessive concentration of power. Many international non-profits are moving towards models where the Board Chair is a different person than the CEO/DG, and the board (often composed of elected or otherwise independent members) has defined authority distinct from management. Corporate governance trends are instructive here: in one-tier boards (common in Anglo-Saxon contexts), companies increasingly split the roles of CEO and Chairman to **"emphasiz[e] the difference between day-to-day management responsibilities and the oversight function of the board"**, thereby creating a routine system of checks and balances . In two-tier board systems (like in Germany), the separation is even clearer by design – executives and supervisory directors sit on different boards, and the supervisory board can hire its own advisors. While non-profit organizations may not mimic corporate structures exactly, the underlying principle is the same: those tasked with oversight must be independent enough to question and guide those tasked with execution. A key guideline from the International Finance Corp (IFC) on NGO governance notes that in looking after an organization's best interests, the board should ensure proper processes to resolve internal disputes and not simply defer to management . This implies having mechanisms (like independent advice or mediation) to address issues where management and board perspectives might diverge.

In terms of formal guidelines, many non-profit governance codes encourage boards to create policies on conflict of interest and counsel independence. For example, BoardSource (a leading non-profit governance resource) recommends that boards proactively define how they will obtain independent advice when needed – whether legal, financial, or strategic. Similarly, the Australian Institute of Company Directors has published guidance applicable to non-profits emphasizing that the board **must be able to seek independent professional advice at**

the organization's expense if necessary for the fulfillment of its duties (this is often written into the board charter or bylaws). The underlying best practice across these sources is clear: **the integrity of legal governance is maintained by ensuring the board's ability to get unconflicted advice and by delineating powers so that no single individual has unchecked authority**. This not only protects the organization's interests but also protects individual board members by enabling them to demonstrate due diligence (for instance, by relying in good faith on opinions of independent legal counsel, which many bylaws including the National Association of Corporate Directors' bylaws explicitly permit).

In summary, sound legal governance in the non-profit context means empowering the board with independent advice and establishing clear lines of accountability. Internal counsel should ideally serve both management and the board in a balanced way; when that is not feasible, the board should not hesitate to enlist outside counsel. These practices align with global standards for accountability and help mitigate the risk of insular decision-making by an organization's leadership.

APNIC's Governance Structure and Concentration of Power

The Asia Pacific Network Information Centre (APNIC) provides a case study in why independent legal oversight is important. For much of the past 25 years, APNIC's governance structure concentrated extraordinary power in the hands of one individual – the Director General (DG) – and by extension, in the internal legal counsel reporting to that DG. APNIC is organized as a nonprofit corporation (APNIC Pty Ltd), and until recently the **APNIC Director General served as the sole company director and trustee of the single share of APNIC Pty Ltd** . In effect, this meant the DG was the only legal shareholder representative and had direct control over corporate decisions, subject only to the nominal approval of the Executive Council (EC). The EC functions as APNIC's governing board (elected by APNIC members), but under the old structure EC members were *not* themselves directors of the company and had no share in it . The DG held 100% of the corporate authority as the shareholder's proxy. This unusual setup was "deemed legally sound" but raised obvious perceptions of conflict . Sections of the internet community argued that having the chief executive also be the sole legal director **"represented a dangerous concentration of power"**, and they urged reforms to introduce better checks and balances . APNIC's leadership at times pushed back against these critiques, but by 2021 the organization had launched a governance review to address mounting concerns .

One tangible consequence of APNIC's old governance model was the ability of the Director General to unilaterally amend the APNIC By-laws. Normally, the APNIC By-laws (akin to a constitution for the membership organization) could only be changed by a supermajority vote of the Members. In fact, until 2023 the By-laws stipulated that a two-thirds majority of **all** members was required to pass any amendment – an almost impossible threshold as the membership grew large . However, because APNIC was legally structured as a "Special Committee of the Board" of APNIC Pty Ltd, the sole Director of that company (i.e. the DG) technically had the power to change by-laws without a member vote if needed . This power

was used only sparingly, but notably it **was** used at least once: *"in 1999 to expand the number of EC Members from five to seven"* . In other words, the DG at that time (Paul Wilson, who became Director General in 1998) single-handedly altered the governance rules to increase the size of the Executive Council. While expanding board representation can be positive, the fact that it was done via a unilateral action highlights the imbalance of authority built into APNIC's structure. No other instance of by-law change without a member vote occurred for decades after 1999 , but the theoretical ability remained – resting with one person.

Critics argue that APNIC's General Counsel and legal framework historically did not sufficiently check this concentration of power. An independent legal review published in 2023 (by Dr. Peter Felter, Cambridge University Ph.D.) described APNIC's governance as **"a grotesque structure"** unlike any other regional internet registry . The report noted that APNIC was **"100% owned, operated and controlled by just one man, Mr. Paul [Wilson]"**, and warned that the DG's legal powers were essentially unchecked . Most alarmingly, the analysis concluded that **"APNIC is ultimately controlled by one person… Ultimately the sole Director of APNIC Pty Ltd can do away with APNIC's Executive Council and it is legally questionable what, if anything, the EC could do"** to stop unilateral changes to bylaws or even the dissolution of the Council . Such a scenario paints a picture where the internal legal apparatus (which answered to the DG) might facilitate or at least not prevent executive overreach. Whether or not the DG ever intended to abuse these powers, from a governance perspective the risk was clear: too much authority vested in one role, with insufficient independent oversight from the board or counsel.

APNIC's own Executive Council eventually acknowledged the structural problem and moved to reform it. In July 2023, APNIC announced significant governance changes to **"modernize the by-laws"** and redistribute some of the Director General's power . First, all members of the EC are being made formal directors of APNIC Pty Ltd (through a new holding entity) so that the DG is no longer the sole legal director . Going forward, the EC collectively holds the single share in trust, and **"nothing can be done with the share"** (i.e. major corporate actions) without EC approval, just as before – but now the EC members have equal standing as company directors to enforce that . Second, in a landmark decision on 12 July 2023, the newly appointed directors (EC members) passed a resolution to amend the by-laws and *lower the threshold for member-approved by-law changes* from two-thirds of all members to two-thirds of votes cast . This effectively empowers APNIC's membership to change bylaws more feasibly, restoring the member community's role in governance. Notably, the EC Chair stated that the Council did **not** want to make further by-law changes unilaterally and would refrain from using its direct power unless in exceptional circumstances . In fact, the EC pre-emptively put a safeguard in place requiring a 75% supermajority of the EC (board) for any future by-law change without a member vote . These reforms, now in progress, directly tackle the long-standing criticism of concentrated authority.

What the APNIC case illustrates is how an internal legal structure can either enable or check the dominance of a single executive. For 25 years, APNIC's General Counsel ultimately reported to the Director General, who was also the sole director/shareholder representative. In such an arrangement, it would be exceedingly difficult for the General Counsel to contradict or challenge the Director General's decisions – after all, the DG effectively *was* the client and

the boss. The history of APNIC shows instances (like the 1999 by-laws change) where internal governance mechanisms were adjusted at the DG's initiative, with the legal structure readily accommodating it. Community voices and even external experts took note that this was not in line with best interests of a member-driven organization . Excessive power concentrated in one individual not only risked missteps; it also **undermined stakeholder trust**. This context sets the stage for why having independent legal counsel (answerable to the board or community) is so valuable – it provides an extra layer of accountability that APNIC was perceived to be lacking.

Mitigating Conflicts of Interest: The Case for Independent Counsel at APNIC

When an organization's internal legal counsel reports directly to executive leadership, conflicts of interest can arise between the duty to the organization (and its members) and the directives of that executive. In APNIC's case, the General Counsel has been part of the APNIC staff reporting to the Director General . This means that if a dispute or concern ever emerged about the Director General's actions, the in-house legal team would be in a precarious position – their employment is tied to the DG, yet their professional obligation is to APNIC's broader interests. **Expert commentary strongly cautions that such a reporting structure can compromise independent judgment.** The Association of Corporate Counsel notes that having a General Counsel (Chief Legal Officer) report into a peer executive like a CFO or CEO may limit the counsel's **"direct access to the CEO, board, and/or even shareholders in the event of compliance or misconduct issues."** It can also lead to **"insufficient independence of the general counsel"** and a company culture where legal concerns are subdued or filtered by management . In short, if the top lawyer's voice is chained to the executive hierarchy, the board might not hear of problems until it's too late, or may only hear a version sanitized to align with the CEO/DG's interests.

Other organizations mitigate this risk in several ways, from structural reporting changes to the use of external counsel. One approach, mentioned earlier, is to grant the General Counsel unfettered access to the board. As Egon Zehnder's governance advisors put it, even if a GC formally reports to the CEO, he or she **"must have the right to bring controversial issues to the Chairman or individual board members without the prior consent of the CEO."** This should be clearly established upon appointment or even written into the bylaws . Applied to APNIC, this would mean Mr. Wilson's General Counsel should have been empowered (and encouraged) to speak up to the Executive Council if ever APNIC's interests diverged from the DG's actions. Culturally, it requires the DG to accept that the lawyer's job at times is to tell him "no" for the good of the organization. Not every leader fosters that environment, which is why formalizing the GC's independent channel is important. Additionally, some organizations have the General Counsel dual-report: for example, reporting to the CEO but also reporting to the Board (or an EC subcommittee) on compliance matters. This dual accountability can be backed by having periodic private sessions between the GC and the board, without the CEO present – a practice common in companies to ensure the board gets unvarnished legal opinions . APNIC could consider instituting such measures so that its legal counsel is clearly working for *the entire organization's* benefit, not just executing the DG's will.

Another crucial safeguard is for the board itself (the EC, in APNIC's context) to have access to independent legal counsel whenever needed. This is, in effect, what is already happening as APNIC navigates governance reforms – the EC engaged external legal advisors to restructure the bylaws and corporate setup in 2023. Going forward, the Executive Council may benefit from formalizing a relationship with independent counsel who can advise the EC directly, separate from the APNIC staff's counsel. Many non-profits do this when facing sensitive investigations or power struggles. The independent counsel's role would not be to undermine APNIC's management, but to ensure the EC fully understands the legal dimensions of its decisions and has a second opinion if the internal counsel is in a potential conflict of interest. Recall that independent legal advice can strengthen the legitimacy of board actions; for example, if the EC had concerns about a decision by the DG, getting an outside legal opinion would both guide their response and demonstrate that they exercised appropriate care (a point that can shield them from liability) .

To contextualize why this matters, consider the allegation that Paul Wilson threatened to take unilateral actions (such as altering support for certain initiatives or enforcing policies aggressively) in ways some members felt were personal or not fully transparent. If the EC had its own counsel during such episodes, it could independently assess if those moves aligned with APNIC's official policies and the members' best interests, rather than relying on just the DG's interpretation via APNIC's internal counsel. In one reported situation, APNIC's leadership (under Mr. Wilson) considered withdrawing support from an international conference (APRICOT 2024) in a manner perceived as retaliatory by some community members . An independent board counsel could have evaluated whether such an action was legally and ethically appropriate, and advised the EC accordingly, without the pressure of loyalties to the Director General. This kind of impartial guidance helps prevent internal disputes from escalating and becoming public controversies.

Finally, it's worth emphasizing that having independent counsel is not a sign of distrust in the internal legal team or management; rather, it is a prudent step for *risk management and good governance*. Organizations as varied as universities, charities, and global federations routinely use outside counsel for certain matters (e.g. an investigation into a CEO, a major contract negotiation, or a bylaws overhaul) precisely because it provides an objective viewpoint. **The goal is to protect the organization's interests above all.** In APNIC's case, the interests of the organization include the interests of its membership community, the stability of internet resource governance, and the reputation for transparency and fairness. These can occasionally come into tension with the interests of an individual executive or the inertia of the status quo. By equipping the Executive Council with independent legal resources and by recalibrating the internal counsel's reporting lines, APNIC can mitigate conflicts of interest. This ensures that going forward, no single person – be it a Director General or anyone else – can unilaterally override the collective will without due oversight and process.

Conclusion

In conclusion, it is both common and advisable for non-profit boards, especially in global

organizations like APNIC, to retain independent legal counsel when needed. Doing so aligns with best practices in governance that call for independent oversight, balanced power, and mechanisms to manage conflicts of interest. APNIC's own history demonstrates the pitfalls of concentrating authority and counsel under one office: it created a governance system that outsiders eventually criticized as unsustainable and not fully accountable to the community . The recent reforms by the APNIC Executive Council are a positive step to address those issues, redistributing authority and enabling greater member influence in by-law changes . To build on these improvements, APNIC (and organizations like it) should embrace legal governance measures that ensure counsel independence – for example, by empowering the EC to consult external lawyers and by clarifying that internal counsel serves the **organization's** interests, not just the Director General's. These changes are not adversarial in nature; rather, they create a healthier system of checks and balances that benefits everyone: the board, the staff, the members, and the broader community that relies on APNIC to steward critical internet resources. As fiduciaries of a non-profit, APNIC's EC members have not just the right, but the duty, to seek independent advice when necessary to act in the best interest of the organization . Doing so will reinforce trust in APNIC's governance and ensure that no internal friction or conflict of interest can derail its mission.

Sources:

1. Board independent counsel advice in non-profits

2. ICANN community use of independent legal counsel during reforms

3. SEC rule on independent legal counsel for independent directors

4. Nonprofit board authority to hire outside attorneys

5. Egon Zehnder on General Counsel's board access and governance best practices

6. Egon Zehnder on separating oversight and management roles

7. APNIC governance structure and reforms – The Register and APNIC Blog

8. Legal review of APNIC structure by Dr. Felter (commissioned by LARUS)

9. ACC insights on conflicts when counsel reports to management

10. APNIC organizational staff listing (General Counsel) (indicating GC is an internal role)

11. APRICOT controversy context – Number Resource Society report

On Sat, 5 Apr 2025 at 11:46, Kenny Huang, Ph.D. <huangk@twnic.tw> wrote:

> Dear Lu Heng,
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> Thank you for your participation in the APNIC 59 AGM in Petaling Jaya, Malaysia. The APNIC Executive Council (EC) appreciates all comments and suggestions at the AGM. Among the comments you made during the meeting, we note your suggestion for the EC to retain legal advisors who are independent of the Secretariat as, in your opinion, the advice of APNIC's staff and General Counsel may be conflicted due to them being employees of

the organisation. I had responded at the AGM that the EC will take into consideration your suggestion, and this letter outlines the EC's response.

In considering your suggestion, it is important for us to have the same understanding of the basics of legal practice. Boards of Directors typically do not retain separate legal advisors. An organisation's internal legal team comprises of qualified lawyers who are bound by ethical standards, with their primary duty to the administration of justice and upholding the law. They must act in the best interests of the client they serve – their organisation – while avoiding any compromise to their integrity and professional independence. They must put the interests of the organisation above their own (or those of their colleagues).

In this regard, when APNIC's General Counsel or legal team provide advice to the APNIC EC, they do so with independence and the best interests of the organisation (which the EC serves) in mind.

The APNIC Executive Council has the utmost confidence in the APNIC General Counsel and legal team, who execute their roles with integrity and a commitment to serve APNIC.

It is also worth noting that the cost of the EC retaining independent counsel for the reasons suggested would be a significant expense, which runs counter to the EC's obligation for APNIC to operate in a financially responsible manner. We note your comments in the past and at the AGM where you have very clearly stated that APNIC should avoid unnecessary expenses; on this point we are agreed.

Given the above, the EC finds it unnecessary to engage separate legal counsel for the reasons you have suggested.

This concludes our consideration of your comment and the EC considers the matter closed. This response will be published on the APNIC website. Thank you.

Kind regards,

Kenny Huang
APNIC EC Chair

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Kind regards.
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