

1.6.1.1 The Community Mechanism: Reference Mechanism

1. In its deliberations and in discussion with its independent legal counsel, it has become clear that ICANN as a non-profit corporation based in California can deliver the powers the CCWG is proposing for the community. To secure the delivery of these powers, however, ICANN needs to make use of membership or designator roles.
2. With the status quo, the best we could do is to incorporate variations of the proposed powers in the ICANN bylaws, but they would be unlikely to be enforceable to the degree the global multistakeholder community - or this CCWG - would expect. In preparing for the environment that emerges following the end of the post-NTIA contract, our task as a CCWG is to strengthen ICANN's accountability, not to allow it to be weakened. So the status quo is not an option.
3. California law, similar to the law of many other jurisdictions, allows for membership of non profit corporations. Members have a range of powers guaranteed in law, and the tools to enforce their rights against the corporation as well.
4. The CCWG has therefore decided to propose a **Reference Mechanism** based on membership to the community in this Public Comment report, as it is the approach that - based on analysis so far - fits requirements best. The Reference Mechanism would have the following key characteristics:
 - a. The ICANN Supporting Organisations and Advisory Committees would each become a "member" of ICANN, and through unincorporated associations would exercise the community powers set out in this part of this Report.
 - b. In their role as members, they would exercise the new community powers set out in 6.6.2-6.6.7 below. The lawyers are clear that the powers we are proposing can be realised - and enforced - with this membership model.
 - c. There would be no need for individuals or organisations to "join" ICANN or to "join" the SOs or ACs they participate in to do anything that they currently do within ICANN. Community participants would have the choice of opting in and participating in this new accountability system, or to simply keep on doing what they do today in an ICANN that was more accountable than it is today.
 - d. Our legal advisors are clear that through this structure, there would be no material increase in the risks and liabilities individual ICANN participants face today. In fact, in some respects individual participants would be safer from hostile legal action than they are today.

Our legal advisors are clear that **under California law** through this structure, there would be no material increase in the risks and liabilities individual ICANN participants face today.

- e. A set of practical questions and answers regarding unincorporated associations is also available in Appendix X (Sidley Memo (Unincorporated associations))
5. All the group's requirements can be implemented under the reference mechanism, and it has advantages in terms of enforceability. Because, according to legal counsel, the membership model provides the tightest control of the ICANN board by the community regarding the six community powers explicitly sought by the CCWG, it has been suggested as the Reference Mechanism by the group.
6. In arriving at this Reference Mechanism, the primary alternative the CCWG has investigated is a model based on "designators". In this part of the report, we refer to this as the Alternative Mechanism.
7. Designators are a construct in California law that can achieve reliable enforcement of 4 of the 6 community powers sought, specifically with respect to community approval or blocking of changes of bylaws and the selection and removal of board members. There is concern however, regarding the ease and reliability with which the other 2 community powers sought (approval of budget and strategic plan) can be enforced once created under the designator model, according to legal counsel. Legal counsel further advises that the SOs and ACs organize themselves into unincorporated associations in both corporate governance models, whether a designator or membership structure.
8. Counsel advise that the membership model creates the tightest control on the ICANN board by the community. In preparing for the environment that emerges following the end of the post-NTIA contract, our task as a CCWG is to strengthen ICANN's accountability, not to allow it to be weakened. So the status quo is not an option and the community should select either a true membership model or an empowered designator model to achieve that accountability.
9. Variations of these mechanisms were also discussed:
 - a. The notion of creating a permanent CCWG or a Community Council that was the sole "member" or "designator" was considered but rejected mainly because it created additional accountability problems and offered no accountability advantages compared with the Reference Mechanism;
 - b. The notion of all SOs and ACs collectively creating an unincorporated association that would be the single member of ICANN. However this model "would add only complexity without contributing real advantages".

- c. The notion of a first step of change (in a timeframe consistent with WS1) focusing on changes in the bylaws and current mechanisms only, while assessing the opportunity to go one step further as part of WS2.
- 10. None of the mechanism possibilities should be considered “off the table”. The work of the CCWG has proceeded quickly, and our counsel are rapidly becoming familiar with the complexities of ICANN’s history and current approach to dealing with many of these matters.
- 11. That said, the CCWG is clearly of the view that the Reference Mechanism is the currently preferred approach, and relies on this in much of what follows.