

**OGP RESPONSE POLICY CASE  
REVIEW AND RESOLUTION  
OF CHRISTOPHER SNOW'S LETTER OF CONCERN,  
DATED SEPTEMBER 6, 2016  
AGAINST THE GOVERNMENT OF AUSTRALIA**

**1. SUMMARY OF THE CONCERN**

On 6 September 2016, Chris Snow, an individual participant in the Australian OGP process, sent a letter of concern to the OGP Steering Committee Co-Chairs regarding the consultation process and the Interim Working Group (IWG) appointed by the Department of the Prime Minister and Cabinet (PM&C) to help draft Australia's first OGP action plan. The letter claims that the consultation process was limited to a few civil society organizations (CSOs), with negligible or no public and private sector input, that the October 31 deadline for submitting the NAP was government imposed and that the government created a government-organized non-governmental organization (GONGO) in the form of the Interim Working Group (see Annex 1). The letter also raises concerns over the practices of some the non-government members of the IWG. The letter asks OGP to act on all concerns raised and review Australia under the OGP Response Policy for manipulation of the OGP process by the government in terms of civil society participation and for failing to meet OGP guidelines requiring countries to develop their action plan through a multi-stakeholder process, with active engagement of citizens and civil society.

**2. DETAILS OF THE CLAIMS MADE IN THE LETTER OF CONCERN**

**Claim 1: Failure to meet consultation requirements**

General argument of the claim: The consultation process was limited to a few civil society organizations with negligible or no public and private sector input. The 31 October 2016 deadline to submit the NAP was government-imposed and a needless rush, resulting in insufficient time to properly consult civil society, particularly the public and private sector which is required to fulfill the OGP consultation requirement that participants must develop their nation action plan (NAP) through a multi-stakeholder process, with the active engagement of citizens and civil society. (Reference: p 2. of letter to the Australian IWG accompanying the concern letter)

**Claim 2: Manipulation of the OGP process by creating a GONGO within the interim multistakeholder group for OGP**

General argument of the claim: By selecting the non-government members of the IWG appointed to help co-draft and finalize the NAP, the government created a government organized non-government group (GONGO) and therefore manipulated the OGP process in terms of civil society participation. To support this claim, the complainant notes that with no known prior involvement in OGP, one of the non-government members, the President Elect of the Law Council of Australia was appointed non-government Co-Chair of the IWG and that the Law Council is a "monopolistic organization especially when it or its constituent members, draft legal regulations or laws in collaboration with attorneys-general." It is also notes that two other members are

members of the OGP Australia Civil Society Network Steering Committee which displays “oligarchical behavior.” (Reference p1. of concern letter).

### **3. ESTABLISHING THE RELEVANCE OF THE LETTER OF CONCERN TO OGP’S RESPONSE POLICY**

The purpose of the Response Policy is to uphold OGP’s principles and values, as articulated in the Open Government Declaration (the Declaration). We note that the policy is intended to be used only for exceptionally egregious cases. (Response Policy, Rationale).

According to OGP’s Response Policy, the following types of issues may form a relevant concern: [...]

1. Introduction of new/revised policies or actions that significantly reduce access to information for citizens and civil society.
2. Introduction of new/revised policies or actions that significantly reduce the space for non-governmental organizations to work independently, voice critiques, and/or receive funding from domestic or international sources (e.g. new NGO laws).
3. Manipulation of the OGP process by governments in terms of civil society participation (e.g. only inviting GONGOs to participate in consultations).
4. Introduction of new/revised policies, laws, or practices, or actions, that significantly reduce enjoyment of fundamental freedoms, notably freedoms of expression and peaceful assembly, and freedom to associate.
5. Introduction of new/revised policies or actions that significantly reduce online or offline media freedom, or threaten media ownership and independence.

(Response Policy, The Types of issues That May Form a Relevant Concern)

Both claims made in the concern letter relate to the issue of manipulation of the OGP process in terms of civil society participation. There is no evidence provided in the concern letter to suggest the existence of other triggers listed as possible basis for a Response Policy review.

### **4. ESTABLISHING THE VERACITY OF THE CLAIMS**

#### **Claim 1: Failure to meet consultation requirements**

Claim 1 regarding the participation in the OGP consultation process in Australia being limited to a number of CSOs, with negligible to no participation opportunities allowed to the public and private sectors and insufficient time provided for inputs could be related to the manipulation of the OGP process by government in terms of civil society participation. The substance of the complainant’s letter, and the publicly available information about the OGP consultation process in Australia, through the [national OGP website](#), however, indicates the concerns relate to the quality and breadth of the consultations rather than a case of deliberate, intentional, concerted attempt of manipulation or exclusion of specific groups.

The Response Policy, however, is not OGP’s avenue of redress for concerns related to the quality of the consultations, the time provided and the breadth of engagement. Instead, such concerns are properly addressed by OGP’s Acting Contrary to Process review mechanism provided for in Article II of OGP’s Articles of Governance. Article II provides in pertinent part as follows:

Should the Support Unit or IRM process find that a participating government repeatedly (for two consecutive action plan cycles) acts contrary to OGP process or its Action Plan commitments (addenda B and C), and fails to adequately address issues raised by the IRM, the SC may upon recommendation of the Criteria and Standards (CS) sub-committee review the participation of said government in OGP.

There is good reason for not using the Response Policy when the Acting Contrary to Process and IRM reviews are the appropriate avenues of redress. It avoids having the Response Policy pre-empt and/or duplicate those other mechanisms. Those reasons for restraint in triggering a Response Policy review apply in force to the facts of this case.

Here, the IRM is yet to begin its mid-term assessment of Australia's NAP (which was submitted to the OGP Support Unit in December 2016). The IRM's assessment will include a detailed investigation of the quality and the breadth of the consultation process. The assessment will also reflect on the extent to which Australia met/meets both the minimum requirements and the best practices stipulated in OGP's guidelines and guidance documents, including Addendum C of OGP's Articles of Governance (the Guidelines for Public Consultation on Country Commitments) which outlines clear guidelines and principles for developing NAPs.

As the scope of the intended IRM's assessment makes clear, the concerns complainant details in Claim I will be fully vetted in the IRM assessment. Pending that assessment, even an Acting Contrary to Process review would be premature. In theory, such a review could proceed following the IRM assessment, depending on what the IRM assessment reveals. In no case, however, are the alleged claims about the consultation process the proper subject of a Response Policy review.

The Support Unit carried out an investigation of this concern because of the Response Policy's current mandate to take a flexible case-by-case approach in the policy's initial implementation. The factual investigation was based on publicly available information about the OGP consultation process in Australia (all of which is subject to verification in IRM's upcoming assessment). The factual investigation found that there is no merit to complainant's allegations. The details of the investigation are set out below.

Based on Addendum C of OGP's Articles of Governance (p.19),<sup>1</sup> the IRM assesses several aspects of a participating country's consultation process, as outlined in the left-hand column in Table 1 below. The data in the right hand column has been populated based on publicly available information about the Australian consultation process. It has not been validated by the IRM nor is it meant to preempt the IRM's findings.

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<sup>1</sup> OGP's new Participation and Co-creation Standards were released in February 2017 and at the time of writing the report, the IRM is evaluating how countries will be assessed on their consultation process based on these new standards. As this case refers to consultation in 2016, the old consultation guidelines apply.

Table 1: Publicly Available Information on Process Requirements to be Assessed by the IRM

OGP process requirements as per Addendum C of OGP Articles of Governance (pre-February 2017) assessed by the IRM in its reports	Information available about the Australian process
1. Were timeline and process available prior to consultation?	Yes, through the national OGP website which was initially available on: <a href="http://ogpau.govspace.gov.au/">http://ogpau.govspace.gov.au/</a> and later migrated to <a href="http://ogpau.pmc.gov.au/">http://ogpau.pmc.gov.au/</a> after the submission of the National Action Plan in December 2016
a. Was the timeline available online?	Yes (see links provided below)
b. Was the timeline available through other channels?	Cannot be confirmed at this time.
c. Provide links to any timelines	<a href="http://ogpau.pmc.gov.au/2015/11/17/consultation-stage-1-preparation-framework-and-history">http://ogpau.pmc.gov.au/2015/11/17/consultation-stage-1-preparation-framework-and-history</a> <a href="http://ogpau.pmc.gov.au/2015/12/14/consultation-stage-2-commitments-drafting-and-live-event">http://ogpau.pmc.gov.au/2015/12/14/consultation-stage-2-commitments-drafting-and-live-event</a>
2. Was there advance notice of the consultation?	Yes
a. How many days of advance notice were provided?	<p>The overall timeline for online consultations which began ran from Jan - March 2016 (first phase) was provided in updates on 14 November 2015 and 14 December 2015 respectively. See: <a href="http://ogpau.pmc.gov.au/2015/11/17/consultation-stage-1-preparation-framework-and-history">http://ogpau.pmc.gov.au/2015/11/17/consultation-stage-1-preparation-framework-and-history</a> and <a href="http://ogpau.pmc.gov.au/2015/12/14/consultation-stage-2-commitments-drafting-and-live-event">http://ogpau.pmc.gov.au/2015/12/14/consultation-stage-2-commitments-drafting-and-live-event</a></p> <p>For the in-person drafting event in Canberra on 11 April 2016, that was open to all those who had proposed a commitment online, a notice of <b>16 days</b> was provided. See: <a href="http://ogpau.pmc.gov.au/2016/03/23/engagement-update-22-march">http://ogpau.pmc.gov.au/2016/03/23/engagement-update-22-march</a></p>
b. Was this notice adequate?	Mixed response from stakeholders based on engagement with the OGP Support Unit. Several civil society stakeholders felt that the notice for consultations were not adequate for participants to come prepared or

	for participants outside Canberra.
3. Did the government carry out awareness-raising activities? (Provide any links to awareness-raising activities)	<p>Awareness raising sessions were conducted in four locations across Australia:  <a href="http://ogpau.pmc.gov.au/2015/11/30/register-attend-ogp-australia-information-session">http://ogpau.pmc.gov.au/2015/11/30/register-attend-ogp-australia-information-session</a></p> <p>In addition, the twitter #OGPAu was used to raise awareness on different phases of the OGP consultation process.  <a href="https://twitter.com/search?q=%23OGPAu%20%40pmc_gov_au&amp;src=typd">https://twitter.com/search?q=%23OGPAu%20%40pmc_gov_au&amp;src=typd</a></p> <p>An engagement specialist was hired by the government to help facilitate the consultation process and simultaneously raise awareness of OGP amongst different stakeholder groups. More information available here: <a href="http://ogpau.pmc.gov.au/2016/03/11/engagement-update-11-march">http://ogpau.pmc.gov.au/2016/03/11/engagement-update-11-march</a></p>
4. Were consultations held online? (Provide any links to online consultations)	<p>Yes. The consultation was held at: <a href="http://ogpau.wikispaces.com/">http://ogpau.wikispaces.com/</a>. Note that the subscription to the wiki expired in 2017 after the NAP submission. A summary of some of the proposals can be found here: <a href="http://ogpau.pmc.gov.au/2016/03/11/engagement-update-11-march">http://ogpau.pmc.gov.au/2016/03/11/engagement-update-11-march</a> and <a href="http://ogpau.pmc.gov.au/contribute-process/public-consultation">http://ogpau.pmc.gov.au/contribute-process/public-consultation</a></p>
5. Were in-person consultations held?	<p>Thematic teleconferences were held for those who had suggested commitments online: <a href="http://ogpau.pmc.gov.au/2016/03/24/ogpau-theme-teleconference-times">http://ogpau.pmc.gov.au/2016/03/24/ogpau-theme-teleconference-times</a></p> <p>In-person drafting in Canberra in April 2016, attended by the OGP Support Unit</p>
6. Was a summary of comments provided? (Provide any links to summary of comments)	<p>All proposals received were available on the now expired wiki: <a href="http://ogpau.wikispaces.com/">http://ogpau.wikispaces.com/</a>.</p> <p>Summary available here: <a href="http://ogpau.pmc.gov.au/contribute-process/public-consultation">http://ogpau.pmc.gov.au/contribute-process/public-consultation</a></p>

During the second phase of the consultation, which resumed after a pause brought about by the general elections in June called shortly after the April consultation workshop, there was [open call for expressions of interest for the Interim Working Group](#) and the draft terms of reference were publicly available via the national OGP website. The criteria for selecting the appointed members was made available online.

Once the [Interim Working Group was established](#), the agenda for the meetings, minutes and outcomes were shared through the national OGP website. The IWG had 4 in-person meetings, 2 telephonic meetings, and online

communications to provide input and help inform the drafting of the national action plan based on the proposals received in the first phase of consultation and government priorities identified through discussions within the government's inter-departmental committee for OGP. The following consultation activities were conducted to get wider stakeholder input before the finalization and submission of the NAP.

- Online webinar and public information sessions in 5 cities:  
<http://ogpau.pmc.gov.au/2016/11/15/outcomes-ogp-public-information-sessions>
- 18- day online public comment period on the draft NAP (originally 14 days but later extended by 4 days after some complaints about two weeks being too short a time frame were received):  
<http://ogpau.pmc.gov.au/2016/10/31/have-your-say-australia%E2%80%99s-first-open-government-national-action-plan>

Pursuant to OGP guidelines, all countries are expected to meet all the process requirements outlined in Table 1 above and adopt best practices to the extent possible, making improvements over time. The IRM assesses a country as having acted contrary to OGP process if it finds during its assessment that there is no evidence to suggest that a country has followed any of the steps above and that the national action plan is assessed as having been developed without consulting civil society. The IRM has found that on average countries complete 3.8 of the 6 steps in the consultation process listed above. Seven countries during the first five years of OGP, have been found acting contrary to OGP process for developing NAPs with no consultation. It is to be noted that the Steering Committee has further raised the bar for minimum requirements on co-creation and participation in OGP as of September 2016, with the new standards taking effect from February 2017.

Based on the publicly available information about the Australian process and the Support Unit Staff's engagement with actors on the ground, there is nothing in the Australian case that suggests that Australia would be found acting contrary to OGP process for failing to meet minimum requirements in place at the time or makes it stand out vis-a-vis other OGP participating countries to merit a review under the Response Policy instead of the standard IRM assessment which will evaluate the level of engagement of civil society during the NAP development process, the adequacy of the timelines, and the openness of the multistakeholder forum (here, the IWG), and will provide recommendations which should inform improvements to the process going forward.

Through both stages of the consultation, while there were ongoing concerns raised by the members of the Australian Open Government Network and other civil society members on the limited reach of the consultation process, inadequate notice, the need to use alternative means to reach out to more stakeholder groups, raising the scope and ambition of the NAP and the need for more genuine co-creation between government and civil society, particularly in the pre-election period (Jan – June 2016), there is no evidence provided in the concern letter or elsewhere on the record to suggest any egregious violations of OGP values and principles during the process that would require the Response Policy to be applied before the IRM assessment is carried out as per its usual cycle.

Nor is there any evidence to suggest any deliberate attempt by the government to exclude specific civil society groups, members of the public or the private sector from the consultation process and manipulate the OGP process in terms of civil society participation or from the IWG.

The government's response to claims of manipulation of the process can be found here:  
[http://www.opengovpartnership.org/sites/default/files/Australia\\_Response-Policy\\_Letter-Government20161031.pdf](http://www.opengovpartnership.org/sites/default/files/Australia_Response-Policy_Letter-Government20161031.pdf)

## **Claim 2: Manipulation of the OGP process by creating a GONGO within the interim multistakeholder group for OGP**

The concern letter states that by selecting the non-government members of the IWG appointed to help co-draft and finalize the NAP, the government created a government organized non-government group (GONGO) and therefore manipulated the OGP process in terms of civil society participation. To support this claim, the complainant notes that with no known prior involvement in OGP, one of the non-government members, the President Elect of the Law Council of Australia was appointed non-government Co-Chair of the IWG and that the Law Council is a "monopolistic organization especially when it or its constituent members, draft legal regulations or laws in collaboration with attorneys-general." It also notes that two other members of the IWG are members of the OGP Australia Civil Society Network Steering Committee which displays "oligarchical behavior." (Reference p1. of concern letter).

The following are some of the publicly available definitions of GONGOs.<sup>2</sup>

- **Wikipedia:** A government-organized non-governmental organization (GONGO) can be created for any sound political or social purpose, however, in reality, it would be functioning as a mechanism of the government to further its domestic political interests and realize its economic and foreign policy objectives. Sometimes, GONGOs are created to solicit international aid, or mitigate specific humanitarian issues. Though not necessarily confined to the developing countries, most often, GONGOs are set up by undemocratic governments to maintain some level of control of the GONGO's personnel, purpose, operation or activities. This control is often not seen in a positive light, as it compromises the spirit of an NGO by introducing hidden to participating actors and the public non-disclosed government's intentions.
- **The Law Dictionary:** Government-generated organization that is like an NGO; typically established to publicize issues the government wants noticed. Not a traditional NGO. See [here](#).
- **International Encyclopedia of Civil Society:** A GONGO is, simply put, an organization that is created directly or indirectly, by action of a government or one of its agencies. Thus its roots are official, in other words, inspired or created by state initiative. Normally one of the characteristics of an authentic NGO is that it is a product of an initiative emerging somewhere from civil society, as an attempt by a group of citizens to address a perceived social need, one which they deem important. More details [here](#). (See pages 779 - 782)

The primary trigger for the GONGO claim in the concern letter appears to be the fact the non-government members of the IWG were selected by the government rather than through a process of self selection by civil society. As per the above definitions, the non-government members of the IWG would need to have been

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<sup>2</sup> For further reading, see: Hasmath, R., Hildebrandt, T. and Hsu, J. (2016) "Conceptualizing Government-Organized Nongovernmental Organizations", Paper Presented at Development Studies Association Annual Meeting (Oxford, UK), September 12-14. See [here](#). Note: This paper also describes SONGOs (State Organized) and PONGOs (Party Organized)

appointed with the specific purpose of furthering the government's political, economic, or foreign policy interests or have demonstrated that they collectively worked/are working together to do so to validate the Complainant's concern. There is no evidence provided in the concern letter or other reports to suggest that this was/is indeed the case.

The criteria used by the Department of Prime Minister and Cabinet in selecting non-government members of the IWG are described in the [call for Expressions of Interest in the IWG](#), published on 18 August 2016 . The terms of reference for the IWG and requirements from members are also described in the call.

As per the process described, in assessing the nominations received for the members and the civil society co-chair, PM&C would consider:

- the breadth and diversity of representatives (across demographics, geographic regions, and access to a variety of sectors and industries);
- experience in open government, using open data and engaging with stakeholders and/or government; and
- for co-chairs, experience in chairing similar groups.

The government announced via the OGP Australia website, that [40 nominations were received](#) which were assessed using the specified criteria and [published the names of the selected candidates](#) on 31 August 2016. No specific feedback or rationale was provided for why the selected candidates were picked over other candidates beyond meeting the selection criteria mentioned above. This points to a potential area of improvement in the process, in line with OGP best practice. Nevertheless, no other public complaints or queries, other than those put forth in the concern letter, appear to have been raised regarding the appointment of the specific individuals selected by the government.

It must be noted that self selection by civil society is the best practice in establishing forums, as per OGP guidance. Several countries continue to opt for processes where non-government members of the forum are selected by the government, similar to the approach adopted by Australia. The pros and cons to this approach are outlined in the [OGP Multistakeholder Forum handbook](#). All countries are encouraged to move towards best practice over time, however failure to meet best practice is not a condition for triggering the Response Policy.

In its response to the claim made in the concern letter, the [Government](#) notes that "selection of non-government members by the Government based on selection criteria is common practice and in line with OGP guidance." (See page 1, point 2). Further, the government notes in its response that "PM&C has endeavored to be as transparent as possible in reporting the activities of the Interim Working Group. Agendas, papers and minutes from Interim Working Group meetings were published on the OGP Australia blog and members of the public were encouraged to provide input and feedback through the blog or via email."

The availability of the agendas, input papers and minutes of IWG meetings can be verified through the OGP national website. As the [minutes of the first meeting indicate](#), the group agreed to consider proposals on commitments beyond the OGP grand challenge areas previously selected by the government (see item 4a in the minutes) and also discussed the need to record dissenting opinions (item 3).

[Minutes from the IWG workshop held on 7 October 2016](#) also note areas where non government members of the working group suggested further improvements on the scope of the draft action plan. As noted earlier in the



report, the government also conducted information sessions and provided a period of public comment to solicit feedback for the draft NAP, beyond the IWG members. While the openness of the Australian multistakeholder forum (IWG) and the level of engagement of civil society by the government will be assessed by the IRM at a later stage, there is no evidence to suggest that the intent behind selecting the non-government members of the IWG was to create a GONGO as claimed in the concern letter.

Furthermore, based on the background information available on individual non-government members of the IWG, the Support Unit's knowledge about the positions taken by them within the OGP process; and the publicly available information on the policy positions of the two-specific organizations named in the concern letter - the Law Council of Australia and the Australian Open Government Partnership Network (4 members of the latter which were included in the IWG based on their meeting the selection criteria); there is no evidence to suggest that the individuals or the organizations they represent can be categorized as GONGOs.

Brief bios of the non-government members of the IWG, taken from the [OGP Australia Website](#), is provided below:

- **Ms. Fiona McLeod SC (co-chair of the IWG):** Fiona is the President-elect of the Law Council of Australia and has also previously served as the President of the Australian Bar Association, as Chair of the Victorian Bar, and as a member of the Law Council Executive Board.
- **Dr. Ken Coghill:** Ken is an Associate Professor at Monash University with research and teaching interests in government accountability and governance. He is also a former Member of Parliament in Victoria, and Deputy Chair and Treasurer of the Accountability Round Table, which advocates for transparency as a key factor of accountability. Ken has written extensively on Commonwealth, State and Territory government accountability and parliamentary reforms.
- **Mr. Mark Zirnsak:** Mark is the Director of the Social Justice Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia. In this role, he has advocated for transparency, accountability and open government, including through his involvement in Publish What You Pay Australia, Transparency International Australia and as a member of the Secretariat for the Tax Justice Network in Australia.
- **Ms. Maree Adshead:** Maree is the CEO of the Open Data Institute Queensland, a node of the international Open Data Institute. She has held a number of industry representative roles, including as past Chair of the Technology Council of the Chamber of Commerce and Industry Queensland, and past Chair of the Australian Information Industry Association Queensland.
- **Mr. Peter Timmins:** Peter is the Interim Convener of the OGP Civil Society Network, a coalition of civil society organizations and individuals committed to making government work better through transparency, participation and accountability. He also has considerable experience engaging with freedom of information and privacy laws, including as a member of the Australian Law Reform Commission Advisory Committee for the Inquiry into Secrecy Laws and Open Government in Australia, and the NSW Information and Privacy Advisory Committee.
- **Ms. Katherine Szuminska:** Kat is the Co-Founder and Director of the OpenAustralia Foundation and also sits on the Steering Committee of the OGP Civil Society Network. The OpenAustralia Foundation uses technologies and tools to encourage public participation in the political process, and to advocate for more transparency and accountability in government.

Articles and blogs below indicate that **individual members of this group, including members of the Australian Open Government Network that have been named in the concern letter, have taken public positions**

**criticizing the government**, including on OGP process and content proposed for the NAP in the phase prior to elections and continued to push the government on the scope and ambition of the content during the post-election phase after the IWG was established.

- *Reference to Open Australia Foundation, an IWG member, engaged in a public dispute with the Australian Taxation Office: <http://www.themandarin.com.au/69684-banned-foi-lobby-group-will-sit-on-new-open-government-board/>*
- *Article by Tim Smith, David Harper and Stephen Charles, Accountability Round Table (Note: Ken Coghill, on the Interim Working Group is an Executive Member of the Accountability Round Table): <http://www.canberratimes.com.au/national/public-service/did-australia-sign-up-to-the-open-government-partnership-knowing-it-doesnt-quality-20160402-gnwsqp.html>*
- *Blog posts by the Australian Open Government Network calling on the government to be more ambitious and improve its consultation: <https://opengovernment.org.au/news/page/2/>*

The concern letter also names the Law Council of Australia, whose President-elect serves as the Co-Chair of the IWG, for being a “monopolistic organization especially when it or its constituent members, draft legal regulations or laws in collaboration with attorneys-general.” As per the government response, the Law Council of Australia is the “peak national representative body of the Australian legal profession. It works for the improvement of the law and administration of justice. The Law Council of Australia seeks to work productively and effectively with governments and national regulators, but will proactively engage in lobbying the Government on issues relevant to the profession.”

As the [Law Council’s website](#) notes, part of their activities include “work to influence government, parliament and key stakeholders on behalf of our Constituent Bodies and the legal profession.” There are publicly available records of instances where the Law Council’s public positions on issues of justice differ from the government or parliament (see [here](#) and [here](#) for example) and [media reports](#) to suggest that while the Council intends to work collaboratively with government it would fight the government on other issues.

Assessing the concern letter’s claims about the inclusiveness of the Law Council and the AOGPN’s’ own approaches in dealing with their membership or in working with government in other areas are not within the purview of the Response Policy.

Finally, it must be noted that while OGP’s Response Policy rules give as an example of concerns the participation only or predominantly of GONGOs, the creation of a working group selected by government cannot in and of itself be treated as the creation of a GONGO because a working group’s purpose, role and activities are not similar in nature to an NGO.

Professor Anna Karin Lindblom, a renowned legal authority on non-governmental organizations (NGOs), identifies four criteria as helpful to determining whether an organization is a GONGO or a true NGO. According to Lindblom, an NGO is an organization that; 1) is non-governmental; 2) has an aim that is not-for-profit; 3) does not use or promote violence or have clear connections with criminality; and 4) has a formal existence with a

statute and a democratic and representative structure, and normally, although not necessarily, enjoys legal personality under national law.<sup>3</sup>

Applying this definition to the group that the concern letter characterizes as a GONGO, it is clear that the members of the IWG constitute neither a GONGO nor an NGO because they do not constitute a formal organization at all, but rather a collection of individuals. In sum, there is no evidence to substantiate the GONGO claim made in the concern letter.

## **5. SUPPORT UNIT ENGAGEMENT WITH CHRIS SNOW**

Mr. Snow has participated in the Australian OGP process and previously been in contact with various members of the OGP Support Unit in the period between June - September, with emails addressed to OGP Co-Chairs (Emails dated: June 6, June 9, June 19, June 21, July 1, July 6, August 24, August 25, September 5). The emails have requested that the Co Chairs:

- Reach out to the Australian Government in regards to the claim by the government about caretaker conventions not allowing them to proceed with OGP consultations during the caretaker period
- To request the Prime Minister to appoint a Public Interest Advisory Council, selected by a non-partisan groups of parliamentarians, to take charge of developing and negotiating public opinion on the OGP NAP with the government
- To ask the Australian government take as much time needed to complete the public consultation to satisfaction, including delaying beyond October 31, 2016
- To investigate the Australian OGP Civil Society Network's Steering Committee for its oligarchical behavior

While it is generally the Steering Committee's position not to comment on national level disputes around OGP process, unless they are formally raised via OGP's Response Policy and dealt with by the Criteria and Standards subcommittee (C&S), the summary and attachments sent in Mr. Snow's previous exchanges addressed to the Co-Chairs were forwarded to the Governance and Leadership subcommittee upon his request. All materials forwarded to the Support Unit have been taken into account in drafting this report.

OGP Support Unit staff, including the Asia Pacific Regional Civil Society Coordinator, the Director of the Civil Society Engagement Team and the CEO have had multiple exchanges over email and phone, clarifying the scope of Steering Committee interventions, what falls within the national dialogue process of OGP, rules of delay and review of participation status, the timeline of IRM assessments and the opportunities to provide feedback on the national process. SU staff spent considerable time and effort on advising Mr. Snow on the rules of OGP as well as on the nuances of the dialogue and negotiation process involved in the consultation processes across OGP countries. Mr. Snow was repeatedly encouraged to engage with the government and other civil society stakeholders and to explore how he can come to a middle ground or work through issues he is not in agreement on with other stakeholders. Mr. Snow, also reached out to the current civil society Co-Chair of OGP, Mr. Mukelani Dimba on the issue and received similar advice.

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<sup>3</sup> [1] See Non-governmental organizations in international law (Cambridge Univ. Press, Jan. 4, 2006).

## **6. ASSESSING THE IMPACT OF AN OGP INTERVENTION**

The report found no evidence to support the claim that the government has manipulated the OGP process in terms of civil society participation, or the claim that the IWG could be considered a GONGO, based on the current literature and available information on its selection, positions of individual members vis-a-vis government positions, and the agenda and minutes of meetings. Furthermore, the review process found that, at minimum, a basic consultation took place during the development of the NAP. The IRM will, in line with OGP process, thoroughly assess the quality and scope of the consultation process and provide recommendations which should inform improvements to the process, in line with OGP requirements and best practices, going forward.

The goal of the Response Policy is to ensure OGP's credibility by ensuring that participating countries uphold OGP values and principles. Nothing in the Australian process suggests that these values and principles were violated. The Criteria and Standards Subcommittee considers that the facts presented in the complaint letter, do not constitute a real threat to OGP's credibility or signal Australia's inability or unwillingness to uphold or make progress on advancing OGP values and principles.

## **7. RESOLUTION**

In sum, the issues raised in Mr. Snow's concern letter are not cognizable under the Response Policy as concerns about violations of OGP processes are properly the subject of IRM review, and OGP's Acting Contrary to Process review. The Response Policy is for cases of egregious violations of OGP's principles and values that would undermine OGP's credibility if left unaddressed and that cannot adequately be addressed by the IRM and Acting Contrary to Process review mechanisms. The issues raised by Mr. Snow both fall within the ambit of IRM's regular review; and, theoretically, the scope of the Acting Contrary to Process review mechanism.

Furthermore, even if the issues raised by Mr. Snow were cognizable under the Response Policy, they would not warrant OGP intervention. A comprehensive factual investigation and review of the record shows no factual support for Mr. Snow's allegations and no violation of OGP's values and principles by the Government of Australia.

Accordingly, we resolve that the concern filed by Mr. Snow against the Government of Australia be dismissed as of the date of this report.

Dated June 22, 2017

### **Annex 1:**

Letter of Concern: [http://www.opengovpartnership.org/sites/default/files/Australia\\_Concern\\_Sept16.pdf](http://www.opengovpartnership.org/sites/default/files/Australia_Concern_Sept16.pdf)