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Australia - Interim Working group - Request for policy response review

Chris Snow <casnow@ozemail.com.au> 5 September 2016 at 18:34
To: Sanjay Pradhan <sanjay.pradhan@opengovpartnership.org>
Cc: Paul Maassen <paul.maassen@opengovpartnership.org>, Shreya Basu <shreya.basu@opengovpartnership.org>

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Open Government Partnership

Open Government Partnership

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Copy: Sanjay Pradhan, CEO

For forwarding to the Co-chairs

Dear Co-chairs

Attached is a letter sent yesterday for consideration at today's inaugural meeting of Australian Interim Working Group (IWG).

The principal concerns are that:

1. The Department of rime minister and cabinet (PM&C) set the criteria for non-government membership
2. PM&C selected the non-government members
3. With no known prior involvement, the president elect of the Law Council of Australia was appointed non-government co-chair – the Law Council is demonstrably, as the letter shows, a monopolistic organization especially when it or its constituent members, draft legal regulation laws in collaboration with attorneys-general
4. Two of the IWG members are members of the OGP Australia Civil Society Network's steering committee, the oligarchical behaviour of which I've previously complained- and repeated it in the letter. Two other appointees are members f the Network
5. The letter has not been posted on the OGP Australia website although a letter from one civil society organization has.

I'm in no doubt that PM&C has created a non-government group within the IWG – a government organized non-government group (GONGO). That, with all other concerns I've previously raised, constitutes grounds for a policy response review, the specific ground being:

"Manipulation of the OGP process by governments in terms of civil society participation (e.g. only inviting GONGOs to participate in consultations)."

Civil society participation has been limited to a few civil society organizations – the public and private sectors have been allowed, respectively, negligible and no participation.

I now ask you to act on all the concerns expressed.

For the record, I submitted an Express of Interest for membership of the IWG but as "civil society participation had been dropped from the eligibility criteria it was highly unlikely that I was be selected because my skills are in communication and research. So I made the EOI conditional. When the conditions were rejected, my interest in the IWG waned. The conditions were:

1. All expressions of interest by non-government persons and nominations of government members being assessed, and members of the IWG selected, by a bi-partisan panel of Members of Parliament on which no party has a majority or an independent body.
2. The payment to non-government members of fees and allowances consistent with, respectively, the provisions of the remuneration Tribunal's Determinations 2015/20 and 2015/11

   http://remtribunal.gov.au/offices/part-time-offices
3. The abandonment of the Government-imposed deadline of 31 October for finalizing Australia's bid for membership of the OGP
4. The adjournment of the IWG pending the convening of a conference or conferences, funded by the Government, of interested non-government persons and organizations to

determine the structure and functions of non-government participation in the OGP project, the conference or conferences to, non-exclusively:

(1) be convened and overseen by the non-government members of the IWG

(2) be preceded by a major, national public awareness program of at least three months' duration

(3) be held in as many places as appropriate to allow fair and reasonable opportunity for all citizens, civil service organizations and private sector organizations to participate.

Yours sincerely

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Members
Interim Working Group
Open Government Partnership Australia
Department of Prime Minister and Cabinet
Canberra

4 September 2016

by email

Dear Members

This letter is for consideration at the IWG's meeting tomorrow.

During the past few months, multiple serious concerns have been raised about the OGP membership bid process and substance. The concerns are detailed in correspondence to the Prime Minister and between officers of the Department of Prime Minister and Cabinet (PM&C) and me. Other "civil society" participants also have raised concerns. The correspondence should be made available by PM&C to the IWG, particularly my letters dated 5 May 2016 and 19 August 2016 to the Prime Minister.

The first attempt, beginning in November 2015 at developing a membership application was black-marked by a rushed approach within an unrealistic, seven-month timeframe. Main concerns were: the Government's unilateral selection of two of the five "grand challenges"; negligible publicity, leading to negligible public involvement (only about 140 persons attending public briefings in Brisbane, Sydney Canberra and Melbourne) and no private sector involvement; irregularities in voting for and the preparation of 18 commitments from 210 suggestions considered at a workshop on 11 April; commandeering by PM&C of all that material; an attempt by PM&C to prepare and submit a National Action Plan (NAP) to Cabinet by 30 June without further consultation with non-government participants; PM&C's incorrect claim that the NAP was a policy matter and could not be considered under the caretaker government arrangements.

Despite the changed approach there still are considerable concerns about the process, principally (from a list of 15): the selection criteria for and selection of non-government IWG members being determined by PM&C when an independent body was seen as essential; the omission from the criteria of "citizen engagement"; a lack of publicity, limiting expressions of interest in IWG positions; a failure to appoint an independent chairperson of the IWG; no

known criteria for selecting government members and no statement about their qualifications and expertise.

One result has been the appointment to IWG of non-government members dominated by members of civil society organizations – the public and the private sectors do not appear to be represented or, if so, marginally.

Additionally, three officers of two organizations with demonstrable records of not involving citizens or members in their activities have been appointed.

As the Appendix shows, the Open Government Partnership Civil Society Network (the Network), has what I've been told was effectively a self-appointed steering committee. The committee has operated as an oligarchy with members not being consulted about matters, except once, despite assurances that the system would be changed.

The Law Council and its constituents, the state and territory law societies (Institute in Victoria), in summary, have a long history of no or negligible consultation of the public or, particularly, clients, especially in the development of legal regulation laws.

Further, the 31 October deadline for the IWG's deliberations is not fixed. The correct position is at:

http://www.opengovpartnership.org/how-it-works/calendars-and-deadlines

Conclusions are:

1. The "civil society" group within the IWG is a government organized non-government organization (GONGO).
2. The influence of anti-citizen participation organizations cannot be discounted.
3. The project again is being needlessly rushed and has a two-month timeframe. There is no fixed deadline.
4. There will be insufficient time to properly consult civil society, particularly the public and private sectors, so as to fulfil the "public consultation" requirement for development of the NAP. These requirements are:

   "To join OGP countries must: .....Deliver a National Action Plan with concrete open government reform commitments developed with public consultation" (OGP brochure)

   and

   "OGP participating countries commit to develop their national action plans through a multi-stakeholder process, with the active engagement of citizens and civil society." (OGP brochure)

A major public awareness program would be needed to adequately inform the public – and the private sector – about OGP sufficiently for them to properly participate. Based on my professional communication and research experience, that's not possible in the currently available time.

IWG should recognize these serious flaws in the process and:

1. Abandon the Government-imposed deadline of 31 October for finalizing Australia's membership bid.
2. Adjourn its proceedings pending a conference or conferences, funded by the Government, of interested non-government persons and organizations to determine and report to the Government the structure and functions of non-government participation in the project, the conference or conferences to, non-exclusively:
   (1) be convened and overseen by a panel of six non-government participants with the requisite expertise and selected by a bi-partisan panel of three Members of Parliament – one each from the Government the Opposition and the cross-benches
   (2) be preceded by a major, national public awareness program of at least three months' duration
   (3) be held in as many places as appropriate to allow fair and reasonable opportunity for all citizens, civil service organizations and private sector organizations to participate.

Yours sincerely

*Chris Snow

*A non-government participant in the OGP process since March 2016 as a result of 11 years of advocacy for improved consumer rights in legal regulation, residential tenancies and government and service provider consultation. The advocacy began after being a victim of a major fraud in the trust accounts of an Adelaide law firm and has led to the development of a Public Advocacy Council proposal. The proposal has been submitted to PM&C but would be submitted to the proposed conference of non-government persons and organizations.

Appendix

The Network

As Peter Timmins may verify, several times I have challenged the workings of the Open Government Partnership Civil Society Network (the Network) on the ground that its steering committee, reportedly, in effect self-appointed at the Network's only known meeting, was operating as an oligarchy: all decisions were made without consulting members except one, despite several assurances that the decision-making process would be changed to include members.

Given this approach, the Network cannot be said to practice membership engagement - the equivalent of citizen engagement.

Also noteworthy is that the Network is a loose collection of civil society organizations and a few individuals and therefore not representative of civil society. It has not sought to include the general public or the private sector under its umbrella and it is not even representative of civil society organizations.

That has allowed Network members to gain positions of power - two steering committee members have been appointed to the IWG. Further, two general members also have been appointed.

The Law Council

The Law Council and its constituent members, the law societies of the states and territories (Law Institute in Victoria) rarely consult the public or clients as part of their activities and if so the consultation is negligible. This has been especially so in the development and administration of legal regulation laws.

Legal regulation is the responsibility of the states and territories. As discovered through victimization*, observation, advocacy and study during the past 11 years, they are developed and administered by a lawyer monopoly of attorneys-general and the law societies/institute. Only negligible client participation has ever been allowed, as shown by:

1. During the early 2000s a national regulatory model, which each state and territory except SA adopted, was developed by the Law Council and its constituents without any known consultation with the public/clients.
2. There was none during the 2007-08 debate about the South Australian version (which became deadlocked and lapsed largely as a result of lobbying by victims of the trust account fraud mentioned earlier).
3. In 2009, COAG, prompted by the Law Council, created a National Legal Profession Taskforce to develop a "national" legal regulation law. It operated for two years.

   Taskforce members were the heads of Attorneys-General/Justice Departments in NSW, Victoria and the ACT – and the CEO of the Law Council. A consultative

group was established to advise the Taskforce – it had 17 lawyers but only one consumer advocate.

When the consultative group effectively collapsed, requests to create a client panel to advise the Taskforce were refused and instead a sunset research project established. Respondents were restricted to a small group of representatives of legal aid organizations and about 12 private clients, each of whom had made submissions to the Taskforce i.e. there was no attempt to obtain a representative sample of clients. There was also an unrepresentative and otherwise flawed on-line survey.

Key parts of the Taskforce's legislation providing independence in the disciplinary, compliance audit and trust account audit regimes, were overturned by COAG without reference to some Consultative Group members: one, a former Queensland Legal Services Commissioner, saying the amendment was a "sure sign that the professional bodies which urged the amendment are more responsive to practitioners' concerns than those of the general public." *(John Briton, "Between the idea and the reality falls the shadow", revised paper (July 2016) to Australia and New Zealand Legal Ethics Colloquium, Melbourne, 4 December 2015).*

4. Amendments in 2013 to the SA legal regulation law were issued for public comment – for three weeks, Easter intervening!

5. There was no public consultation about the (ill-named) Legal Profession Uniform Law, essentially the COAG legislation, which came into force in July last year in NSW and Victoria, and

   (1) debate in both parliaments was guillotined after second readings.

The result has been self-regulation. The system contrasts with that in England and Wales where since 2008, following two government and one major independent inquiry, legal regulation has been lay-controlled. Lawyer organizations are representative bodies only. Successive governments have re-endorsed the system. Legal challenges by the lawyer organizations have failed. Any time this system has been raised in Australia it has been ignored by attorneys-general and lawyer organizations. The COAG Taskforce did not consider it. Client participation is not allowed.

Trust accounts

As one example of client exclusion, the Law Council currently is opposing a proposal, raised during the Government's anti-money laundering deliberations, that lawyers should disclose suspicious trust accounts transactions. The opposition is based on the ethic of client confidentiality.

The states and territories have slightly different trust account systems but essentially they are variations of a common theme, as follows.

The long-established system is based on clients being forced to deposit certain up-front fees and costs and certain other money e.g. house sale/purchase funds, in trust accounts. There is no security for these accounts. Funds can be stolen at any time.

The interest earned on the funds is stripped and partly used to substantially finance the legal regulatory system (Australia and South Africa are the only common law countries in which lawyers do not fund legal regulation).

Interest also is paid into fidelity funds/accounts which are used to compensate victims of trust account frauds. Substantial amounts of the interest ($80m in 2014-15, peaking at $120m several years previously) are granted to legal aid organizations – blatant double-dipping because clients already contribute to legal aid via general revenues (a fact not mentioned by the Law Council during its recent campaign for the Federal Government to provide an extra $200m for legal aid).

Ethically, the interest stripping is a breach of lawyers' fiduciary duty to protect clients' assets, a point never known to have been mentioned by the lawyer organizations.

But this only applies to small and medium clients. Major clients (known as "sophisticated clients") are able to use "controlled money accounts" for their up-front fees and costs and other funds, no doubt often involving mega-millions. The interest earned on these funds is not stripped – it accrues to the client's account. Major clients therefore are able to avoid contributing to regulatory costs and making double-dipped contributions to legal aid. Lawyers clearly want this system to continue – it keeps their major clients from becoming unhappy.

Small and medium clients are either not told about these accounts or denied service if they try to use them.

A solution to this – apart from the abolition of up-front fees and costs and trust accounts generally – would be to create a single, national trust account with funds deposited by clients and disbursed only in accordance with their written instructions. France introduced such a system about 30 years ago and claims to have eliminated money laundering. The Bar Council of England Wales three years ago established a similar system with a similar aim.

Apparently it was considered during the COAG Taskforce deliberations but not adopted because the states and territories couldn't decide how to divide the money. That is, they squabbled about clients' funds, clients having no say in it.