

## **Australia's 1<sup>st</sup> Open Government National Action Plan<sup>1</sup>- old and new important matters**

Little time has been provided for responding to the Mid-term Assessment Report for Australia's 1<sup>st</sup> Open Government National Action Plan 2016 – 18.

My focus is on what, I submit, is a very important NAP Commitment, and one for which there has been seriously inadequate provision made in the proposed Action Plan – Commitment 3.1.

Before turning to the specific matters, however, it is important to note

- a number of the Government's relevant expressed roles and expectations and
- the requirements of Participating OGP Governments.

### **1. The original (and operational) OGP Articles of Governance for all member nations**

The OGP Articles of Governance (p12-13) require that

“All OGP participating governments... publish a mid-term self-assessment report at most 3 months after the end of the 1<sup>st</sup> year of action plan implementation. This report should follow OGP guidelines in assessing the government's performance in meeting its OGP commitments, “

### **2. Australia's NAP1 stated expectations**

Some 5 significant expectations for OGP Participating Governments are identified in NAP1 (p 3). They include 4 activities of relevance to the present issues, –

- “1. Endorse the high-level Open Government Declaration
2. Make concrete commitments as part of a country action plan, that are ambitious and go beyond a country's current practice.
3. Develop Country action plans to a multi-stakeholder process, with the active engagement of citizens and civil society.....”
4. Commit to self-assessment and independent reporting on the country's progress –

They are also expected “to uphold the values and principles articulated in the “Open Government Declaration” (p.20) and to consistently and continually advance open governance for the well-being of their citizens.<sup>2</sup>

**3. The relevance of Commitment 3.1 in NAP 1 and NAP2.** It's “Relevance” is described in NAP 2 in the following terms;

“This Commitment will advance the OGP values of access to information and public accountability by:

- ensuring government information access laws are modern and capable of meeting the demands of the digital age
- increasing awareness of public access rights to government information;

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<sup>1</sup> <https://ogpau.pmc.gov.au/australias-first-open-government-national-action-plan-2016-18>

<sup>2</sup> These obligations will also flow from the Public Trust obligations of Members of Parliament and Public Servants - see <https://www.accountabilityrt.org/public-office-as-is-a-public-trust-david-solomon/> -- see also the Commonwealth Ministerial Code of Conduct. [https://www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards\\_1.pdf](https://www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards_1.pdf) - paras 1,2

- improving efficiency of process access to information requests.

It should also be noted that the **Introduction** to NAP1 (p6), states that

“This National Action Plan sets out the Initial Steps the Government will take in pursuit of the aim to improve and build confidence in Australian institutions and strengthen our democracy, by upholding the principles in the Open Government Declaration to:

- promote transparency, fight corruption, empower citizens, and harness the power of new technologies to make government more effective and accountable;
- uphold the value of openness in our engagement with citizens to improve services, manage public resources, promote innovation and communities; and
- embrace principles of transparency and open government with a view toward achieving greater prosperity, well-being, and human dignity in our own country and in an increasingly interconnected world.

This Plan sets out an agenda for the next 2 years across a broad range of important areas.”

It then listed 5 items, 3 being also directly relevant to Commitment 3.1 in NAP2;

- “ Access to government information,
- Integrity in the public sector...
- Public participation and engagement”.

A further important requirement was stated (p6);

“This our first National Action Plan and the first step in an ongoing process towards more open government in Australia. One of the great strengths of the Open Government Partnership is that it promotes an iterative and continual process of improvement. The Plan provides a foundation to continue engaging with civil society to identify new initiatives and strengthen our efforts over time. There is also an opportunity going forward to work with state, territory and local governments to improve transparency and integrity at all levels of government.”

It should be noted that the statutory powers of the OAI (in particular sections 7 and 8 of the Australian Information Commissioner Act 2010 (AIC Act)) had authorised the OAI to take up such matters (see in particular sections 7 and 8 of the AIC Act). An “ongoing process towards open government in Australia “(NAP1 p6) cannot be achieved until Government acts and restores the necessary funding and the 3 statutory Commissioner Offices.

#### **4. The Government’s Actions - Halving in 2014-15 of the specific funding of the OAI’s FOI statutory functions and the abandonment of the 3 Commissioner system of management**

Australia had joined the Open Government Partnership in 2013. The Government changed later in the year. In the 2014-15 Budget the new Government attempted to abolish the OAI and, in anticipation of that, severely reduced the capacity of the OAI to discharge its statutory functions and the important 3 Commissioner Management. With the subsequent change of leadership to Malcolm Turnbull, the Government publicly committed to the OGP and , with Civil Society, developed Australia’s first NAP That, however, added significantly to the exiting extensive responsibilities of the OAI.

NAP1, however, included a critical Commitment in Commitment 3.1., –

“The Government is committed to ensuring the adequate resourcing of the O AIC to discharge its statutory functions, and provided funding for this purpose over the next 4 years in the 2016 – 17 Budget.”

That express Commitment was the result of discussions between the Government (involving the PM and C Department) and members of civil society and the Australian OGP Forum.

### **5. The operation of that Commitment?**

That Commitment has not been mentioned in NAP2. It has been explained to me, however, that an express affirmation in subsequent NAPs is not required where a Commitment made in an NAP remains incomplete – like Commitment 3.1 and the abovementioned commitment to adequately resource.

But there should be no doubt about its continued existence – and it should be publicly acknowledged as soon as possible, honoured, reviewed and the Government plans for that Commitment.

In considering these matters, it is relevant to bear in mind that, after the election in July 2016, NAP1 was submitted to the OGP on 8/12/2016. Its preparation had been taken up by Prime Minister Turnbull after he was appointed Prime Minister on 14 September 2015.<sup>3</sup> Shortly after his appointment, he made a public statement in the course of which he spoke of the importance of open government and access by the people to Government held information. ART wrote to him on 15 April 2016. <https://www.accountabilityrt.org/art-letter-to-the-pm-why-are-we-signing-up-to-open-government-while-abolishing-the-office-of-the-australian-information-commissioner/> .

His office was in charge of the development of the 1<sup>st</sup> NAP and that was well conducted including the involvement of the community and the creation and operation of the Forum of government and civil society representatives

But the 1<sup>st</sup> Budget (9 May 2017) following the 1<sup>st</sup> NA P, contained no provisions reflecting the Commitment to rectify the damage that had been done to the capacity of the OAIC to discharge its statutory duties. As a result, It was impossible for the OAIC to discharge its statutory obligations under the legislation including the OAIC legislation. This was known by those in government familiar with the review by the Auditor-General of the operation of the system including the discharge of the Attorney-General of the performance of the FOI responsibilities. Representations had also been made by the Accountability Round Table to the Prime Minister and Attorney-General Porter from their appointments<sup>4</sup> which included the Auditor-General’s Report. It brings home the reality that if the resourcing commitment is not honoured, not only would the OAIC continue to be unable to discharge a very significant part of its existing FOI responsibilities (in particular the AIC Act)<sup>5</sup> but also

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<sup>3</sup> <https://www.accountabilityrt.org/time-for-turnbull-to-step-up-on-open-government/>  
<https://www.accountabilityrt.org/open-government-partnership-our-letter-to-malcolm-turnbull/> with date of NAP 8/12/2016 and the concerns of ART

<sup>4</sup> <https://www.accountabilityrt.org/art-letter-to-new-attorney-general-re-lack-of-resources-office-of-the-australian-information-commissioner/>

<sup>5</sup> Recent light was shed on this by a submission of the OAIC responding to the Bill introduced by Senator Patrick seeking relevant reforms of the OAIC legislation. It summarised the ACI functions along with all the other functions entrusted to the OAIC and summarised the actual OAIC activities except for the ACI Functions.

the functions that had been given to it by the 1<sup>st</sup> NAP). A reply was received by the Accountability Round Table from the Attorney-General but it did not address these matters

It is essential that such matters be addressed urgently if Australia is to be able to discharge its duties as an OGP member and avoid uncertainty and serious questions about its preparedness to honour the its commitments as a member nation of the OGP. In particular, allowing the present situation to continue each year without any, or any adequate, express plans announced, including the sought details (especially OAIC funding and the appointment of Commissioners and other relevant matters) is to fail to respect, let alone honour, Australia's commitments as a participating nation in the OGP. In addition, for the NAPs to be able to function successfully, those involved from Government and Civil Society must be kept engaged and up-to-date with knowledge of what the relevant realities and plans are. Without that, adequate recruiting and resourcing will not occur and Australia will continue in the position of failing to honour its OGP membership.

**Action needed Now**

It is submitted that the time lost, and the circumstances, are such that a special effort should be made as soon as possible by the Australian Government, with Civil Society, to plan and mobilise the actions required to carrying out the resolution made in NAP1 for "ensuring the adequate resourcing of the OAIC to discharge its statutory functions."

It is submitted that there is no reason why the action could not be taken in the Next budget with an announcement of intentions in detail to rectify this problem. It does not involve the sort of sums that can create Budgetary stress (see the Auditor-General's analysis of the recent past referred to in fn. 4.).

It will enable Australia, through the OAIC to undertake a clear and important step to restore Australia to the leading position it had as a member nation of the OGP, in particular, in the area of Information Management and Access.

Yours Sincerely

Hon. Tim Smith QC, AM.

Director, Accountability Round Table