



Review of Political Donations

Joint Select Committee on Electoral Matters

Further submission of the Accountability Round Table.

1. Relevant matter relating to previous submission of the Accountability Round Table to JSCEM.

We refer to our previous submissions to the current JSCEM inquiry and their accompanying material.

In this submission, we seek to address the reference made to JSCEM by the Government pursuant to Commitment 4.1 of the National Action Plan (NAP) under the Open Government Partnership (OGP, which Australia joined in 2013). This Commitment is directly relevant to the Terms of Reference for JSCEM's current inquiry into Australia's federal political donations regime.

The NAP records that

“The Government has asked Parliament's Joint Standing Committee on Electoral Matters to investigate a range of matters relating to the conduct of the 2016 federal election, with particular attention to:

- Donations to political parties and other political entities, including the extent of donations being received from foreign sources and the options available to Parliament to regulate these types of donations. JSCEM will also be asked to look at the current donations disclosure regime.”¹

The NAP goes on to refer to civil society having raised during the public consultation process, “a range of matters and areas for potential improvement”

¹ P.45; <http://ogpau.pmc.gov.au/2016/12/07/australias-first-national-action-plan-submitted>).

to address Commitment 4.1 “particularly in regards to political donations”. It also notes that those “civil society comments” had been passed on to “the JSCEM for its consideration as part of its enquiry”.

The NAP also records that:

- the Department of Finance and the Australian Electoral Commission are the two “lead agencies” for Commitment 4.1; and
- that this Committee “and the Parliament of Australia” are the “Government/Parliament...actors”.

Usually, there are “non-government actors” identified in the NAP as involved in the implementation of each of the Commitments. This is provided as part of the information needed to enable the Commitments to be considered, and decisions made to implement them, through a co-creative partnership between Government and civil society, as required under the OGP system. Instead, this NAP states, “The Parliamentary Committee is anticipated to engage with political parties, non-government organisations and the public”.

The stated Milestones in the NAP also indicate that it is not presently intended that the normal co-creative partnership consideration by the Government and civil society, in relation to the proposed Report of the JSCEM, will occur. Rather, what is planned is that the Government will consider the recommendations of the Committee and that the “Parliament and other relevant stakeholders” would then address the Government’s decisions” – all to occur this year.

The OGP-NAP, however, clearly involves the Committee in the implementation process for Commitment 4.1. The Committee has been engaged to take part in, and contribute to, the consultation process and to thereby assist in the discharge of Australia’s performance of its obligations as a participating member of the OGP.

This is not usual practice. Accordingly, it is necessary to identify, accurately and completely, the relevant OGP values, guiding principles and objectives that should guide this review by JSCEM in relation to:

“donations to political parties and other political entities, including the extent of donations being received from foreign sources and the options available to Parliament to regulate these types of donations.”

While fulfilling this obligation, the Committee is asked to “look at the current donations disclosure regime”.

2. The political funding system and the regulation of it – what values, principles and objectives are to be applied and addressed in fulfilling Commitment 4.1?

2.1 Long-standing ethical and legal principles

There is an ancient ethical and legal principle (at common law) that is relevant to Commitment 4.1. As explained by Sir Gerard Brennan AC, KB, QC in the speech he made when presenting the Accountability Round Table (ART) Integrity Awards for the 43rd Parliament:

“It has long been established legal principle that a member of Parliament holds “a fiduciary relation towards the public” and “undertakes and has imposed upon him a public duty and a public trust”. The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee. As Rich J said:

“Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit”.²

This principle applies to all holders of public office: elected and appointed.

In the past 20 to 30 years, the public office public trust principle seems to have been forgotten and, as a result, has been overlooked in assessing the conduct and performance of our Public Trustees and the systems under which they operate, including that for political donations.

As it happens, however, the values, objectives and commitments of the OGP reflect, and give effect to, the public office public trust principle. The ART maintains that this principle should be the starting point, the foundation of all recommendations made by JSCEM to reform all aspects of Australia’s federal political donations regime.

² Brennan, G (2013) Presentation of Accountability Round Table integrity-awards. Retrieved from <https://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/> . For a more recent analysis of the principle, our Democracy and the OGP progress see Tim Smith *Democracy at the cross roads*. Retrieved from <https://www.accountabilityrt.org/cairns-tropical-writers-festival-tim-smith-on-democracy-at-the-crossroads/oncdustn> (I thought there might be some people involved who would be interested in reading more and , who knows, might want to pursue the public trust principle and/or want to learn more about the OGP!) That was what I had in mind but if you think it will do any harm or if there is better material available we should pull it out.

3.The Open Government Partnership principles, objectives and commitments.

3.1 The OGP's Articles of Governance - stated principles, objectives and commitments.

The Articles identify “four core open government principles” (refer page 18). To address the above issues the following appears to be relevant; -

“Transparency: Government-held information (including on activities and decisions) is open, comprehensive, timely, freely available to the public, and meets basic open data standards (e.g. raw data, machine readability) where formats allow”.

“Citizen Participation: Governments seek to mobilise citizens to engage in public debate, provide input, and make contributions that lead to more responsive, innovative and effective governance.”

“Public Accountability: Rules, regulations and mechanisms in place call upon government actors to justify their actions, act upon criticisms or requirements made of them and accept responsibility for failure to perform the respect to laws or commitments.”

Major relevant objectives identified in the OGP Articles of Governance³ include;

- **“Fight Corruption”**. The Background and Objectives Statement (p.2) states that the OGP:
“aims to secure concrete commitments from governments to their citizenry to ... fight corruption”
- **“Ambitious commitments”**. Participating governments (p.3 item 2) are expected to:
“Make concrete commitments, as part of a country action plan, that are ambitious and go beyond a country’s current practice”.

An “ambitious commitment” is:

“one that, once completed, will show a demonstrable advancement from action plan to action plan in the grand challenge areas proposed by the OGP through openness, transparency, civic participation and accountability” (p17).

³ OGP Articles of Governance. Retrieved from https://www.google.com.au/?gws_rd=ssl#newwindow=1&q=open+government+partnership+articles+of+governance.

The OGP's Articles of Governance (refer pp. 20-22) also spell out the commitments made by all nations that become members of the Open Government Partnership. They include:

- Accepting the "... *responsibility for seizing this moment to strengthen our commitments to ... fight corruption ...*" (p20); and
- Implementing the "... *Highest standards of professional integrity throughout our administrations*" (p21).

That proposition is developed in the text that follows: relevantly -

"Accountable government requires high ethical standards and codes of conduct for public officials. We commit to having robust anticorruption policies, mechanisms and practices ensuring transparency in the management of public finances and government purchasing, and strengthening the rule of law"

In addition to these commitments to:

- "increasing deterrents against bribery and other forms of corruption in the public and private sectors, as well as to sharing information and expertise" (p21).

and to:

- "...*lead by example*⁴ and contribute to advancing open government in other countries by sharing best practices and expertise and by undertaking the commitments expressed in this declaration on a non-binding, voluntary basis."

ART submits that the above objectives and commitments, which Australia as a participating nation in the OGP is expected pursue, may be summarised relevantly for Commitment 4.1 as follows. They are to:

- seize the moment to implement the Commitments ambitiously and lead by example⁴;
- act with the highest standards of professional integrity;
- ensure that government-held information is open comprehensively and freely available to the public; and
- fight corruption with robust anti-corruption policies, mechanisms and practices, including increasing deterrents against bribery and other forms of corruption in the public and private sector.

3.2 The NAP and its stated values, objectives, and commitments.

⁴ Emphasis added

Does the NAP's content and implementation of Commitment 4.1 take up and administer the OGP values, objectives, and obligations.

The title of Commitment 4.1 is "Confidence in the electoral system and political parties". It identifies "Increasing Public Integrity" as the relevant "OGP Grand Challenge". It doesn't articulate the content of that commitment. But it is defined in the OGP Articles of Governance (page 17) and is as follows:

"2. Increasing Public Integrity – measures that address corruption and public ethics, access to information, campaign finance reform, and media and civil society freedom."

The "Relevance" of the Commitment is described in the NAP as follows:

"This commitment will advance the OGP values of accountability, transparency and access to information by:

- reducing the risk of undemocratic behaviour and conduct, which leads to the perception or reality of corrupt behaviour by politicians and political parties; and
- increasing public confidence in Australian democracy."

The "Ambition" is simply described as follows:

"To ensure that public confidence in Australia's electoral system continues to be strong"

ART questions the assumption that, when the NAP was published late last year, public confidence in our electoral system "continues to be strong".

Public confidence in our democracy and its electoral system, especially in relation to how the system is funded through political donations, has been low for some time and is still declining.

In 2012, then Shadow Minister Malcolm Turnbull, speaking at the Woodford Festival, commented that it had never been easier to lie to the people because of the 60 second news cycle and that they were being treated with contempt.

<https://www.youtube.com/watch?v=jqCWyFAuCqg>. This is something the public has been aware of for some time, and accounts in large part for the steady decline of the people's trust in our members of parliament, those assisting and involved with them, and our democratic political institutions and processes. Further, since the publication of the NAP late last year, many issues involving members of parliament (individually and collectively) have seriously impacted on and increased that general lack of trust and confidence.

The stated NAP "Ambition" for Commitment 4.1 proposes no more than maintenance of the present level of public confidence. If that is all we aim to do we will fail to address the opening Objective expressed in Commitment 4.1 – "To enhance integrity and confidence in Australia's electoral system". For Australia to honour its OGP obligations in implementing Commitment 4.1, the

Government, other members of parliament and civil society, must enact the required “Ambition” by taking steps to ensure that public confidence in the funding of Australia’s electoral system, its members of parliament and political parties is restored. The obvious starting point is in the area of political donations.

It is important to note that what is stated in the NAP is not intended to be finite and unchangeable. We are not restricted by it; for it is a “living document”⁵ and what ultimately matters is that we ensure that in implementing the Commitment 4.1 we honour our obligations as a participating nation in the OGP.

To sum up, in order to honour our obligations to reform the present framework for donations to members of parliament, political parties and other political entities (associated entities and third party entities), and to do so in accordance with Australia’s membership of the Open Government Partnership, we have to ambitiously take up the Grand Challenge of Increasing Public Integrity by developing and implementing measures that will address public ethics and the risks of corruption, access to information, campaign finance reform and media and civil society freedom.

Finally, all political actors and civil society must act decisively and “seize the moment” by committing to reduce significantly the risk of corruption and undue influence that currently exists in the area of political donations (and related matters) by recommending the implementation of a system that fosters “the highest standards of professional integrity” in the federal political donations system.

The ART submit that these are Australia’s obligations as a participating nation in the OGP.

Accountability Round Table

The Hon. Tim Smith QC
Chair, Accountability Round Table

⁵ Articles of Governance (p 12)- "as living documents, action plans may be updated as needed based on ongoing consultations with civil society. Any updates must be duly noted in the official version of the action plan on the OGP website."

<https://www.accountabilityrt.org/about/>