



Note on OGP Draft Co-creation Guidelines

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This Note¹ was prepared in response to a call for inputs from the Open Government Partnership (OGP) on a set of draft co-creation guidelines (draft guidelines) that it released on 7 October 2016.² It was drafted by the Centre for Law and Democracy (CLD), an international human rights organisation based in Halifax, Canada, which provides expert legal services and advice on foundational rights for democracy.³

According to the consultation document, the goals of the guidelines are to render existing consultation requirements more specific and easy to follow, to add to existing requirements a focus on the quality of the consultation, and to provide guidance on the ongoing dialogue between government and civil society in all three phases of the OGP National Action Plan (NAP) cycle, namely development, implementation and monitoring. These are very important goals for the OGP and the draft guidelines are largely successful in achieving them. But they could be further strengthened and CLD's suggestions in this regard are set out below.

General Comments

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² The draft guidelines are available at: https://medium.com/@opengovpart_/help-improve-the-ogps-co-creation-guidelines-9f90de318f4d#.ta7sdw4br.

³ More information about CLD and its work is available at: www.law-democracy.org.

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CLD has three general comments on the draft guidelines. First, the draft guidelines focus heavily on consultation with civil society. For example, a key mechanism for consultation is the multi-stakeholder forum, which is defined in the Glossary to the draft guidelines as a “group of government and civil society representatives”. There are a few wider references to “members of the public” but the focus throughout is on civil society and there is not a single reference to businesses or the private sector.

The OGP’s existing consultation requirements, which are set out in Addendum C to its Articles of Governance, may be contrasted with this. Even though they are much shorter (the whole of Addendum C takes up less than a page), the opening paragraph refers to the core idea of the “active engagement of citizens and civil society”, while under the heading “Breadth of consultation” the Addendum states: “Countries are to consult widely with the national community, including civil society and the private sector ...”.

CLD certainly agrees that civil society is an absolutely key external (in the sense of not being part of the State) stakeholder constituency and that this sector should occupy a prominent place in the co-creation guidelines. We also note that civil society organisations can represent all sectors of society, including the business sector. However, we believe that a more inclusive approach is warranted for a document like this. It may well be appropriate to include academics and representatives of the private sector (other than via a civil society organisation) on multi-stakeholder forums. And incorporating wider references to the public, academics and the private sector into the document would also generally improve its inclusivity.

Second, the draft guidelines are organised around what the document describes as the “four essential components of good engagement”, namely: ‘dissemination of information’; ‘channels and platforms for dialogue and co-creation’; ‘documentation and feedback’; and ‘improving participation/collaboration over time’. While this works adequately well, the last component is essentially limited in content to the simple idea of improving over time and occupies only a couple of somewhat repetitive sentences in the main body of the guidelines.

More seriously, this organisational approach leads to a slicing up of the three phases into different parts, whereas these are ultimately integrated processes (i.e. the development phase takes place over a period of time and is a joined up set of activities). This leads to broader problems in terms of allocation of items to the different components. For example, important information dissemination activities – such as publishing a draft NAP – are allocated to the ‘channels and platforms for dialogue and co-creation’ component rather than one of the more information focused components. In addition, there is very significant overlap between the first

and third components – namely ‘dissemination of information’ and ‘documentation and feedback’ – with the result that it is not clear what really belongs in each component.

CLD suggests that an alternative approach be considered, with the document structured around the three main phases of the NAP cycle, perhaps using the existing components (or a reworked version of them) as subheadings, rather than the other way around as it is now. We understand that this would entail a substantial reworking of the document, but the content would not need to change much simply to accommodate this and we believe that it would ultimately lead to a more logical and easy-to-use resource, which is a key goal of the process.

Third, although the draft guidelines formally refer to implementation and monitoring as two different phases of the NAP cycle, in fact the document consistently elides them in terms of content (i.e. it consistently sets out requirements under a dual implementation/monitoring heading rather than separate headings for implementation and monitoring). CLD believes that this problem arises because implementation and (ongoing) monitoring take place at the same time, and are often undertaken by the same actors, even if they are different activities. In that (chronological) sense they are a single phase of the NAP cycle. However, there is a third phase of the NAP cycle, which is quite distinct both chronologically and substantively, namely the formal reporting and assessment process, which comes at the end of the NAP cycle, and which involves the Independent Reporting Mechanism (IRM). This is covered under implementation and monitoring in the current text, but CLD believes that the logic and flow of the document would be improved if this were treated as a separate phase (and if implementation/monitoring were treated as one chronological phase, albeit with different elements).

Recommendations:

- The draft guidelines should be more inclusive in terms of the external stakeholders they refer to, specifically by including more references to academics, the private sector and the general public.
- Consideration should be given to using the three phases of the NAP cycle as a primary organisational structure, with the components currently occupying this role being relegated to a secondary organisational tier.
- Consideration should be given, at least for purposes of the co-creation guidelines, to recognising the reporting/assessment part of the NAP cycle as a separate phase and to treating the implementation/monitoring elements as a single phase.

Introduction

The Introduction refers to three main qualities of a strong participatory process, namely impact, transparency and integrity. There seem to be only slight differences between the first and third of these, with the third essentially setting out some of the conditions for a process to achieve impact, such as decision makers entering into the process with an open mind, rather than describing a separate quality.

CLD believes that, at least for purposes of a widespread participatory process like that envisaged by the OGP, there is another key quality, which could be described as 'engagement'. It is not enough if only a very small number of external stakeholders, who are provided with ample information, have a real impact on the decision making process, but this would satisfy all three of the qualities in the current Introduction. A democratic approach must also ensure that at least a representative range of stakeholders is engaged in participatory processes. This has important implications for the OGP, namely an obligation on States to take specific actions to reach out to a range of external stakeholders. CLD believes that this quality is not only missing in the description of key qualities, but is also significantly underrepresented in the main body of the draft guidelines (see our comments on this below).

Recommendations:

- Consideration should be given to merging the 'impact' and 'integrity' qualities of a strong participatory process.
- The key quality of 'engagement', or something along those lines, should be added to the list of qualities of a strong participatory process which are recognised in the introduction.

Dissemination of Information

As noted above, CLD believes that more attention needs to be given in the guidelines to the obligation of States to reach out to engage a representative sample of external stakeholders. This should involve elements here – in the sense of ensuring that communications are carefully tailored so as to reach new stakeholders rather than simply the 'usual suspects' – and under channels and platforms for dialogue and co-creation – in the sense of ensuring that the mechanisms for participation are suitable for a range of external stakeholders.

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The focus in terms of engagement should be on the development phase, since this is the beginning of the NAP cycle and, if stakeholders have been engaged at that point, it will be relatively easy to continue to engage them later on (subject, of course, to ongoing interest on their part). Some ideas here include moving beyond just social media channels (highlighted as a best practice in the section on developing the plan) to include mainstream media and potentially other outreach modalities, such as town halls and high profile announcements by senior politicians (which are likely to be picked up in the media as well as on social media). Targeted approaches to key sets of stakeholders – such as specifically reaching out to key private sector, academic and civil society networks and bodies – could also be envisaged. We leave it up to the drafters to decide whether these should be slotted under basic requirements or best practice. And we call on the drafters to work to include additional ideas here.

The first and third bullets under basic requirements/when developing the plan are very similar in nature and should be combined. Although technically one could distinguish between informing about the process and informing about opportunities to be involved, in practice these are essentially the same thing. The third bullet refers to the idea that notice should be at least four weeks in advance; this is not realistic in the often fast-paced process of developing NAPs and it is not necessary for all forms of involvement. The sixth bullet here talks about government communicating “to” civil society. This one-way style of communication is inconsistent with the very idea of co-creation as well as the ideas, introduced later, about true collaboration on NAPs. While this reference falls under the basic requirements, it would still be useful to introduce the idea of more of a two-way communication process (dialogue) even as a basic requirement. The reference here to civil society should also be broadened to include other stakeholders (NB the first general comment above).

The bullet under basic requirements/when implementing and monitoring the plan refers to regular reports, but does not include a reference to the formal reporting/assessment/IRM phase and the documents that are produced as part of that.

The first bullet under best practice/throughout the OGP cycle calls on the multi-stakeholder forum to communicate what seems to be pretty basic information about its remit, membership and governance on the national OGP website. This should be included under basic requirements. Indeed, it is hard to see how the multi-stakeholder forum could have any credibility or undertake the functions that are later allocated to it as basic requirements without at least meeting this basis level of openness.

The first bullet under best practice/when developing the plan fails to refer to email (and this is also not specifically mentioned under basic requirements) as an outreach tool, even though it is a key means of communication. The second bullet here calls on government to attend meetings organised by third parties. CLD believes that this should be more ambitious and call on government also to host their own meetings to this end, which could in appropriate cases be built onto other meetings/consultations that government was having.

The section on best practice/when implementing and monitoring the plan could be substantially improved. Two suggestions for inclusion here are:

- Making available the background documents that are required to assess progress. This would go beyond mere updates (as called for in the first bullet) and include links to the primary evidence of progress, as well as relevant studies, reports and assessments.
- Providing an interactive space on the OGP website where progress on implementing commitments, challenges and so on could be discussed, along with a commitment on the part of government to respond to queries within a set period of time.

Recommendations:

- Here, and under channels and platforms for dialogue and co-creation, the guidelines should include a greater focus on the obligation of States to reach out actively to engage a wider range of stakeholders in NAP processes, with a particular focus on the development phase, as the starting point for the NAP cycle. A range of options should be included here, of which some possible ideas are listed above.
- The first and third bullets under basic requirements/when developing the plan should be merged and a more flexible and realistic advance notice period for opportunities to be involved should be introduced.
- The sixth bullet under basic requirements/when developing the plan should incorporate a more dialogue-rooted concept of communications between government and external stakeholders.
- The bullet under basic requirements/when implementing and monitoring the plan should refer to the formal assessment/IRM process documents.
- The first bullet under best practice/throughout the OGP cycle should be moved to basic requirements.
- A specific reference to using email as a communication platform should be added to the document.
- The second bullet under best practice/ when developing the plan should also call on governments to host outreach meetings.
- The section on best practice/when implementing and monitoring the plan

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should be improved, including by considering the ideas mentioned above.

Channels and Platforms for Dialogue and Co-creation

A key challenge here is to unpack the relationships both between the multi-stakeholder forum and the government, and between the multi-stakeholder forum and civil society. A number of points are relevant here:

- It should be taken as a given that civil society is free to organise itself and to participate in NAP processes independently of the forum. This is mentioned in the fifth bullet under basic requirements/throughout the OGP cycle, along with another point, but it should be set out separately in its own bullet.
- It is not clear that civil society should necessarily “decide” on its representatives on the forum (as stated in the fifth bullet under basic requirements/throughout the OGP cycle). In some cases, civil society may be sufficiently well organised to do this, but this will often not be the case (noting that there may also be competition among civil society for these positions). And, as noted above, these positions should not be limited to civil society actors. The key requirement is that there should be a fair and appropriate process for deciding on the members, which provides for significant involvement of external stakeholders rather than being dominated by government.
- In terms of the core relationship between government and civil society on the forum, the basic requirements focus on government members being open with civil society representatives, for example discussing key issues with them and giving reasons for decisions. The best practice moves to having the forum act as a joint decision-making body. CLD believes that neither of these is quite right. The external stakeholders should have some sort of leverage even as a basic requirement, which should at least involve the opportunity for them to reject the process, for example for being unfair or insufficiently participatory, or the outcome, for example for resulting in an insufficiently ambitious NAP. But it is probably unrealistic to expect any such system to be a truly joint decision-making one, among other things because the commitments are ultimately made by government, which is also primarily responsible for delivering on them (the point below is also relevant here). The system of consultation would need to build in processes and mechanisms to allow for this leverage. One difference between basic and best practice could be how these processes and mechanisms function. Another could be the intensity of engagement within the forum.
- The systems described under both basic requirements and best practice seem to assume that the government representatives will be able to make decisions, but in most cases, at least for more significant issues, this is not

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how it actually works. Even if the government representatives are senior, they cannot bind government players (i.e. ministries) which they do not represent. A good NAP will need to involve a range of ministries (and even different levels of government), and not just those represented on the forum. In this case, forum members will need to take ideas and priorities to those ministries and work out a plan in collaboration with them (recognising that in some cases other ministries or government bodies may simply refuse to accept the forum's ideas). In other words, developing the NAP will involve important decisions that lie beyond the capacity of the forum to make.

The draft guidelines call for publication of a draft NAP and a commenting period of at least four weeks under basic requirements and then, under best practice for an ideation phase of developing the NAP. CLD believes that a two-stage process involving an opportunity for external (and internal) stakeholders to put forward ideas in a brainstorming process at the front end, followed by an opportunity to comment on a draft NAP later on, should be deemed to be a basic requirement of all NAP development processes.

The first bullet under basic requirements/throughout the OGP cycle calls for the multi-stakeholder forum to meet at least quarterly. This is useful but it would also be helpful to recognise that, if it is to fulfil the roles allocated to it, it will need to meet far more frequently during the development phase.

The fourth bullet under basic requirements/when developing the plan calls for at least two open meetings. Even under basic requirements, this will not be sufficient in larger countries, where regional meetings across the country would be necessary. As an alternative, using digital communications tools for remote participation could be used, but as the number of participants increases, the effectiveness of such consultation tools reduces.

The fifth bullet under best practice/when developing the plan calls for working groups to be formed to co-create each draft commitment. The logic and timing for this need to be clarified. Is the idea that very general commitments would be agreed at an earlier stage in the NAP development process, perhaps by the multi-stakeholder forum, and then refined and improved by these working groups? It is not clear that this is realistic. First, in many cases NAP commitments remain somewhat general even when the NAP is finalised, which is fine, and in this case there could appear to be no need for this procedure. Second, this procedure seems rather complex given the need to move forward with NAP development in a timely fashion.

The first bullet under best practice/when implementing and monitoring the plan calls for members of implementation working groups to be identified "through an

open call". This is probably too rigid a formula for every commitment. An alternative approach might be for the forum to play a role here.

The second bullet under best practice/when implementing and monitoring the plan calls for quarterly meetings of the implementation working groups but it should be recognised that this process would end with the delivery of the commitment (which in some cases could be quite rapid).

The third bullet under best practice/when implementing and monitoring the plan calls for a consultation on its self-assessment. A formal role for the implementation working groups could be envisaged here, given how involved they were in the process and the expertise they would naturally have vis-à-vis the commitment as a result.

Recommendations:

- The systems proposed for the multi-stakeholder forum need to be amended taking into account the points made above.
- A two-stage process involving an opportunity to submit ideas followed by an opportunity to respond to a draft NAP should be a basic requirement for all NAP development processes.
- The first bullet under basic requirements/throughout the OGP cycle should recognise that the forum will need to meet far more frequently during the period of development of the NAP.
- The fourth bullet under basic requirements/when developing the plan should recognise that larger countries will need to have more than two meetings.
- The fifth bullet under best practice/when developing the plan at least needs to be clarified and possibly even dropped.
- The means for identifying working group members under the first bullet under best practice/when implementing and monitoring the plan should include more options, potentially also by setting out a role for the forum.
- The second bullet under best practice/when implementing and monitoring the plan should recognise that the meetings of the implementation working groups would end with the delivery of the commitment.
- A formal role for the implementation working groups could be envisaged in the third bullet under best practice/when implementing and monitoring the plan.

Documentation and Feedback

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As noted above, consideration should be given to merging this with the information dissemination component (if the current organisational structure is maintained). The best practice part of this section is particularly brief, no doubt in part due to overlap with the information dissemination component.

The second bullet under basic requirements/throughout the OGP cycle calls on government to respond to questions within 20 working days, but this should be much shorter during the development phase given that it is fairly fast-moving (or should be).

The bullet under basic requirements/when implementing and monitoring the plan just calls on the government to publish a summary of comments on its self-assessment. It is also important for the government to publish its responses to those comments (as is called for in other parts of the draft guidelines).

The bullet under best practice/when developing the plan calls on the forum to publish justifications for issue areas not included in the NAP. This needs to be rethought. First, it is not clear what is meant by the phrase 'issue areas'. Second, this potentially covers an extremely broad range of actions (i.e. everything that has not been included in the NAP that potentially could have been). It might make more sense to call for justification for non-inclusion of commitments which were proposed by external stakeholders, which would at least provide clear boundaries for this activity.

Recommendations:

- Governments should be required to respond to questions far more quickly than within 20 working days during the NAP development phase.
- A reference to publishing the government's responses should be added to the call for it to publish a summary of comments on its self-assessment in the bullet under basic requirements/when implementing and monitoring the plan.
- The government should not have to justify non-inclusion of every issue that is missing from the NAP, as suggested under the bullet under best practice/when developing the plan; instead, it should just have to justify the non-inclusion of commitments which were proposed by external stakeholders.

Improving Participation/Collaboration Over Time

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As noted above, this section is extremely brief and, despite this, is somewhat repetitive. Our only comment is that consideration should be given, in the bullet, to calling for the process to move from complying with basic requirements, which all processes should do, to incorporating more best practices (instead of calling for more “requirements” to be met, as is currently the case).

Recommendation:

- This section should call on governments to move beyond basic requirements to include more best practices.