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Submission by the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia to the inquiry into the management and assurance of integrity by consulting services

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The Justice and International Mission Cluster, Synod of Victoria and Tasmania, Uniting Church in Australia, would like to make the following supplementary submission to the inquiry into management and assurance of integrity by consulting services.

Whole-of-Government Suspension and Debarment Policies

We provide the following information in support of the Commonwealth Government developing a whole-of-government policy to provide for penalties when a consultant engages in unethical conduct or breaches the required integrity standards.

We note that Canada has a whole-of-government policy to address criminal and unethical behaviour by contractors and consultants under its *Ineligibility and Suspension Policy*.[1] The policy outlines the length of suspension from government contracts upon conviction for a variety of offences, including breaches of the Canadian *Lobbying Act*. Suspension can also apply to cases of conviction of the business for offences in overseas jurisdictions. The Canadian Government can enter into an administrative agreement with the business to shorten the suspension period. Such administrative agreements are likely to be offered where the company has cooperated with law enforcement authorities or has undertaken remedial action to address wrongdoing. However, if the business then breaches the administrative agreement's terms, the suspension period is extended.

The Canadian Government maintains a public list of companies that have been suspended from being able to gain government contracts, and people in government doing procurement are required to check the list.[2]

The US Government also has a national system to allow for the debarment of suppliers, which would include consultants, under the Federal Acquisitions Regulations, section 9.406

[1] Government of Canada, "Ineligibility and Suspension Policy", https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html
[2] Government of Canada, "Ineligible and suspended suppliers under the Integrity Regime", https://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html

Debarment.[3] The policy allows for the debarment of a supplier for a range of criminal and unethical conduct, including a clause that allows for debarment for "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."

In addition, Nonprocurement Common Rule ("NCR"): 2 C.F.R. Part 180 allows for the suspension of a supplier or consultant here "Immediate action is necessary to protect the public interest."[4]

Each US federal agency has a Suspending and Debarring Official ("SDO") with the authority to make government-wide exclusion decisions.[5]

Both the Federal Acquisitions Regulations and the Nonprocurement Common Rule provide that debarments should generally not exceed three years but allow for more extended periods of debarment, depending on the circumstances.[6] However, a contract may be awarded to an excluded supplier if a senior government official (an agency head or designee), at the official's discretion, determines in writing that there is a "compelling reason" to do so.[7]

Consultocracy

The Synod notes that in 1991 Hood and Jackson coined the term "consultocracy", meaning where unelected consultants capture the public policy-making of democratic governments.[8] Ylönen and Kuusela argued that it is important to distinguish consultocracy from other forms of public sector outsourcing. Whereas public sector outsourcings have a long history, the one characteristic feature of consultocracy is its close relationship to the different forms of expert-driven knowledge production that go deep into the heart of how societies are ruled and governed. In other words, the consultocratic forms of knowledge production are related to fields that are essential to the proper functioning of the democratic forms of government practices.[9]

The critical concern in many studies of consultocracy is whether consultocratic tendencies have reduced the openness, participation, and accountability of governance. Thus, the rise of consultocracy "parallel[s] a decline in democracy for the citizenry."[10] Consultants can evade traditional notions of democratic accountability by operating in 'institutional voids', where the norms of conventional policy-making are eroded.[11] Consultants are often able to hide behind "commercial-in-confidence" privileges, which are made worse by imprecise

[3] https://www.acquisition.gov/far/part-9#FAR_9_406_2
[4] https://www.law.cornell.edu/cfr/text/2/part-180/subpart-G
[5] World Bank Office of Suspension and Debarment, International Development Bank, International Bar Association, "Exclusion System Summary United States", 2020, https://www.worldbank.org/en/about/unit/sanctions-system/osd/brief/exclusion-survey
[6] Ibid., 6.
[7] Ibid., 6.
[8] Mutti Ylönen and Hanna Kuusela, "Consultocracy and its discontents: A critical typology and a call for research agenda", *Governance* **32(2)** (2019), 241.
[9] Ibid., 242.
[10] Ibid., 244.
[11] Marty Bortz, David Brown, Svenja Keele and Hilary Manning, "Management consultants and the social function of procurement", *Public Money and Management* (2023), 1.

project specifications.[12]

Procurement rules assume that accountability can be created through three mechanisms:

- Market competition;
- Maintain an arm's-length relationship between purchaser and provider; and,
- Output control.

In the theory, to achieve accountability, public purchasers articulate their requirements in a set of 'objective' measures divided into multiple phases capable of producing a tangible product and evaluated against value-for-money criteria.[13] These ideals are fundamental components of the new public management, which draws from a transactional ontology to assert the primacy of private-sector accountability methods.[14] New public management ideals remain a core aspect of Australian public management and administration.[15]

These market-based logics have been criticised as being implemented as an article of faith rather than a genuine way of improving public management. Such critiques argue that private sector forms of accountability are inapplicable in the public sector or have not lived up to their hype. Yet these ideals continue to permeate public management, such that they are seen as the 'new norm'.[16]

Critiques also argue that the inherent uncertainty of consulting projects, in which public servants and consultants are forced to work jointly to meet project aims, undermines the notion that transactional arms-length relationships are possible. The success of the service contract depends on the performance of both the purchaser and the provider. Further, it has been argued that the 'competitive principles' result in public servants artificially creating a series of 'discrete transactions' rather than recognising the long-term relationships between consultants and policy-makers.[17]

Bortz et al. argue that consultant procurement is socially embedded in networks of relations that cannot be understood solely through market-based forms of accountability.[18]

There is a view within the consultocracy literature that consulting practices spread a global orthodoxy of managerialism. Examples include Hilmer's role in shaping the 'employee relations' paradigm, the diffusion of Porter's ideas on national competitiveness, or Persson's influence over Australian national housing policy in the 1990s. Here, consultants become 'obligatory passage points' through which public servants must pass to complete anything.[19] Some researchers argue that consultants 'purify and translate' ideas and 'enrol' other actors into a process to shape the underlying paradigm of a policy sub-system. Consultants also manoeuvre through a network of actors and strategically deploy their ideas to shape how other people think about policy problems.[20]

Bortz et al. argue for reconsidering the conceptual basis of the consultant-policy-maker

[12] Ibid., 1.
[13] Ibid., 1.
[14] Ibid., 1.
[15] Ibid., 4.
[16] Ibid., 1.
[17] Ibid., 2.
[18] Ibid., 2.
[19] Ibid., 3.
[20] Ibid., 3.

relationship. They argue that:[21]

> *Such a reconsideration should recognise both the transactional and relational nature of consulting and, in doing so, recast the procurement of consultants in ways that reflect more democratic (rather than market-based) forms of accountability.*

However, they fail to clearly articulate what those forms of democratic accountability would be.

Ylönen and Kuusela drew from a large multi-sectoral case study from Finland as well as existing studies. They concluded that increased reliance on consultants contributes to the monopolisation and privatisation of public knowledge and ensuing dependencies, erosion of tacit knowledge and weakening of accountability.[22] They argued that the impact of the increased use of consultants is not restricted to their influence on policies. Instead, it has had a significant qualitative impact on how public administration and governance are conducted in various fields, such as auditing, organisational restructuring, human resources, and information and communications technology (ICT).[23] Their research revealed numerous instances where consultants used and benefited from their information advantages to achieve a quasi-monopoly.[24] They made the point that ownership of the knowledge from a consultancy may result in information advantages for consultants that may lead to various dependencies by government departments and rent-seeking behaviour by consultants.[25] They formed a view that government departments and agencies that contract out policy analysis face the risk of losing their specialist, in-house advisory capacity, turning them into mere contract managers and processors of the policy advice supplied by contractors.[26]

We share the concern about the rise of consultocracy. We believe it is highly desirable to rebuild the capability of the public service. Wherever possible, it should be the public service that resources the policy-making work of government.

Board of Taxation

We have been concerned about the capture of the Board of Taxation by consultancy firms and business interests. According to its original charter and as reflected on its website, the Board of Taxation is a 'non-statutory advisory body charged with contributing a business and *broader community perspective* to improving the design of taxation laws and their operation.'

However, since its inception, the board members have been primarily drawn from the business community and the legal and consultancy firms that represent them. Although the original Board of Taxation had one representative from the community and welfare sector, this is no longer the case. Although business and community perspectives might sometimes align - this is not always the case. The absence of a community member on the Board, therefore, raises questions over the extent to which a broader community perspective is, in fact, represented by the Board. It raises concern for us that the Board of Taxation is an example of consultocracy, with the Board being captured by the ideas of consultancy firms, even though they are not being employed as formal consultants on the Board.

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[21] Ibid., 7.
[22] Mutti Ylönen and Hanna Kuusela, "Consultocracy and its discontents: A critical typology and a call for research agenda", *Governance* **32(2)** (2019), 241.
[23] Ibid., 242.
[24] Ibid., 248.
[25] Ibid., 248.
[26] Ibid., 249.

A review of the current composition of the Board and its advisory panel members shows that it is mainly constituted by large corporate taxpayers and their legal and accounting consultants. The lack of breadth in the Board's composition may give rise to a perception that specific issues or options might be emphasised over others. In addition to the ex-officio representatives from the government, the current membership of the Board consists primarily of individuals who appear to have paid employment that is orientated towards corporations and high net-worth individuals paying the minimum amount of tax possible. We believe that is a need to rebalance the membership with representatives from the community that have experience with taxation law but are not in paid roles that advise corporations and high net-worth individuals on how to minimise their tax contributions.

Further, of the 48 Advisory Panel Members to the Board of Taxation, there are only four academics and one member of the Victorian Civil and Administrative Appeals Tribunal. The other 43 are made up of representatives of large corporations or businesses that advise corporations and high net-worth individuals on how to minimise their tax contributions to the Commonwealth Government revenue.

We request that the Committee recommend a rebalance of the Board and its advisory panel to provide a meaningful representation of broader community interests in tax reform and to reduce the influence of consultancy firms.

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