



Re the draft National Action Plan: has a significant matter been overlooked

To Dr Kennedy, Deputy Sec, Innovation and transformation

Dear Dr Kennedy

In this submission, the Accountability Round Table (<https://www.accountabilityrt.org/about/>) writes to draw attention to a critical matter that appears to have been overlooked in the preparation of the NA P and is yet to be addressed.

In making this submission, we rely upon this letter and the attached document.

In that document, we detail and discuss relevant background information including

- the actions taken by the Attorney-General in and between 2014 and 2016, to abolish the Office of the Australian Information Commissioner (OAIC), the independent statutory body created by the Parliament in 2010, and,
- when the Attorney-General was unable to secure the passage of the required abolition Bill, how he used the Executive Government's powers to significantly reduce the OAIC's financial, physical and human resources so as to achieve the primary objective of preventing the OAIC carrying out the majority of the statutory FOI functions and responsibilities that had been given to it by the Parliament in 2010 to strengthen open and accountable government.

It should be noted that the provisions of the 2010 legislation had anticipated the purposes and objectives of the Open Government Partnership (OGP).

Further, in and between 2014 and 2016, Australia was a participating nation in the OGP. We submit that the Government's actions, in that period have rejected those purposes and objectives of the OGP.

We also detail and discuss the reality that the OAIC will continue to be unable to address the critical statutory functions and powers given to it by the Parliament in 2010. It will, also, be unable to perform its proposed NAP obligations and duties. The Government's actions will

- seriously hinder the implementation of Australia's proposed NAP , and
- result in the continuation for at least two years of Australia's serious breaches of Australia's commitments and obligations as a participating nation in the OGP which commenced with the attempt to abolish the OAIC in 2014.

It will also result in the proposed NAP failing to meet the OGP standards and requirements.

In addition, it will leave unresolved, and allow to continue, the serious concerns that have been publicly raised about the above actions of the Attorney-General constituting breaches of two fundamental constitutional principles that underpin our democracies – the separation of powers and the rule of law.

We submit that the issues can, and must be, speedily addressed.

Accountability Round Table

Hon Tim Smith QC

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Chair Accountability Round Table



Submission – The Draft National Action Plan

Has a critical matter been overlooked?

1. Objectives and guiding principles

We join in recognising the importance of the opening proposition in the draft NAP that

“it is important that Australia boost its efforts to become even more open, transparent and accountable and improve public engagement”

and the statement of objectives that follows

“This is crucial as we seek to:

- build a better society for all Australians and be more responsive to the expectations of the community;
- stimulate economic growth and innovation;
- foster collaboration between government, business, academia, non-government organisations and the community; and
- continue efforts to stamp out corruption, fraud and misconduct.”

We also join in recognising Australia’s international role in supporting anticorruption measures, empowering citizens and enhancing transparency and integrity (Draft NAP p.72 – 3)

But what principles should guide us? As previously put to the Government,¹ there is one overarching principle – the long-standing ethical and common-law principle that should

¹ Referred to in the ART response early this year to the Government Vision Statement – to be found at <https://ogpau.wikispaces.com/Vision+for+open+government+in+Australia> . Also see the ART response to the Government initial Background Statement to be found at https://ogpau.wikispaces.com/file/view/Background%20of%20Open%20Government%20in%20Australia_ART

guide all those holding public office and those engaged with them in their performance of their public office. That principle is – that public office is a public trust² and that those engaged in discharging that public trust must place the public interest first and ahead of any personal interests or other private interests.

2. The OAIC and Australia’s NAP Commitments.

Most, if not all of the proposed NAP commitments, directly or indirectly, concern our right to know the information held by government on our behalf and our right to privacy. If the proposed Commitments are accepted, the OAIC will inevitably have a direct and significant role to play in the implementation of proposed commitments.

As stated in the draft NAP (p9),

“The Office of the Australian Information Commissioner was established in 2010 to promote access to government information”

That is true, but there are at least two aspects to that purpose – addressing the right of the people to privacy and the right of the people to access information held by government on their behalf. As to the latter, the OAIC has some 11 FOI statutory functions related to it latter. We will endeavour to explore that aspect in subsequent submissions. For the purpose of this submission, we draw attention to the express recognition of the OAIC, having a role in respect of the following proposed commitments.

- *Commitment 2.2: to build and maintain public trust to address concerns about data sharing* (p. 32): “lead agency” - DPMC, Australia Bureau of Statistics and the OAIC). 8 other government actors.
- *Commitment 3.1: information management and access laws for the 21st century* (p.40); “lead agency” - Attorney-General; OAIC a government “actor” with DPMC and tNational Archives of Australia.
- *Commitment 3.2: understand the use of freedom of information* (p.41) – “lead agency” - Australian Information Commissioners and Ombudsmen - OAIC a government actor.(p.42)

[final.pdf/576294751/Background%20of%20Open%20Government%20in%20Australia_ART_final.pdf](#) .. The Government has not sought to respond to the ART response on this issue or to discuss address it in any way. It remains unclear as to whether the Government accepts the principle as a guiding principle or not and why it has not referred to it in the NAP. Has it also been overlooked?

² <https://www.accountabilityrt.org/audit-of-the-implementation-of-the-freedom-of-information-act-1982> text to endnote 3

When one considers the OAIC's Privacy and FOI functions³ and their purposes, they anticipated those of the OGP. It's important role has also been recognised in its involvement to date in the deliberative and consultation processes for the draft NAP. It is very important that it can and should play an important role in the implementation of any NAP.

But that on any view, will involve a significant increase in the workload of the OAIC.

3. Can the OAIC perform its important role in the implementation of the NAP?

3.1 The recent history. The draft NAP tells us very little about the OAIC and even less about its recent history. When that history is considered, however, it appears that the OAIC, as resourced since 2014, has not been able to perform most of its statutory duties, all important, because of a lack of financial, physical and human resources. As to the latter, instead of having three people appointed to discharge the three key statutory roles of Information Commissioner, Privacy Commissioner, and Freedom of Information Commissioner, there has been, since 31 July 2015, one person, Mr Pilgrim, appointed to the first two Commissioner positions mentioned (on a three month "Acting" basis some five times). Over that period, no Freedom of Information Commissioner has been appointed. In a very recent development, Mr Pilgrim has been appointed to the above first two Commissioner positions for two years. But still, the Attorney-General has not recommended the appointment of anyone to the position of Freedom of information Commissioner.⁴

There has been one positive development. It was announced in May this year by the Attorney-General that the Government was abandoning its two-year attempt to abolish the OAIC.⁵ It was also said that the Government would return to the OAIC its FOI functions that had been moved to other agencies including the Attorney-General's Department. At the recent Estimates Committee hearing⁶ when asked to explain what had occurred, the Attorney-General responded

³ (see Submission (<https://www.accountabilityrt.org/audit-of-the-implementation-of-the-freedom-of-information-act-1982>; text and endnote 8

⁴ <https://www.oaic.gov.au/media-and-speeches/statements/commissioner-appointments>

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http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201617/Office-AIC

⁶ <https://www.accountabilityrt.org/wp-content/uploads/2016/11/Submission-2C-OAIC-Audit-2-Nov-2016-Copy-edited.pdf>

“a policy was made in a previous financial year, essentially for reasons of economy. That decision was revisited more recently and reversed, and I’m glad that it was” (p 66)

He did not elaborate on the “reasons of economy”

Unfortunately, however, it appears from the Budget information, that no additional resourcing has been provided to enable the OAIC to discharge the functions that have been returned.⁷ Thus the capacity for the OAIC to play its important role in the implementation of the proposed NAP has been further significantly reduced.

3.2. . *The present capacity of the OAIC’s resources.*⁸

We submit that the reality is that, as presently resourced, the OAIC cannot perform its own statutory functions, particularly its FOI functions. Further, unless

- that is rectified, and
- additional funding is provided for the NAP responsibilities,

the OAIC will not be able to perform the responsibilities identified for it in the above NAP commitments, and generally, if the present draft NAP is accepted.

Since the 2014 – 15 Budget, the OAIC appears to have had

- adequate resources to address its Privacy functions but
- seriously inadequate resources with which to address its FOI functions.

An examination of the reports on the activities and actions of the OAIC revealed on its website since then reveals far more attention and action being given to the Privacy functions than the FOI functions.

It is not surprising that, as a result, notwithstanding the general positive statements made about the FOI operations of the OAIC at the recent Estimates Committee hearing⁹,

⁷ ibid

⁸ For details see Submission - (<https://www.accountabilityrt.org/audit-of-the-implementation-of-the-freedom-of-information-act-1982>)

⁹ <https://www.accountabilityrt.org/wp-content/uploads/2016/11/Submission-2C-OAIC-Audit-2-Nov-2016-Copy-edited.pdf>

Commissioner Pilgrim focused on what were described as “regulatory functions” of the OAIC. No express details were given. From other evidence, the “regulatory functions” appear to comprise processing

- requests for review of government departments and agencies agency decisions denying access to information and
- complaints about the processes of such departments and agencies.

That these are the FOI functions being performed by the OAIC was indirectly confirmed at the hearing when Commissioner Pilgrim was asked about whether the Canberra office should be opened and he replied that it would not be opened and sought to justify that by saying that the Information Commissioner FOI reviews can be “sufficiently carried out through the office in Sydney” and that there was “not a need to re-open an office in Canberra”. The reality is that they may be able to process the review and complaint applications via modern technology and/or in writing but not ideal for conciliation on which they heavily rely. That and most of the other statutory functions require a presence in Canberra.

The situation is that, since 2014 the OAIC has not been able to perform its other FOI functions, including promoting access to government information or own motion investigations (none conducted since 2014). That was the still situation at the time of the 2016 – 17 Budget when it was announced by the Attorney-General that the Government was not going to abolish the OAIC and was returning to it the functions that had been passed on to other agencies (including his Department). At the same time, no additional funding was provided in the Budget for discharging the returned functions and the Budget papers revealed a proposed increase of staff of only three people.

By this latest action, the capacity of the OAIC to discharge its FOI functions has been set back even further..

To these, as already noted, must be added the reality that, instead of having three Commissioners discharging the critical Commissioner functions we have had, since late 2015, just one and there is no OAIC office in Canberra.

4. The present plans for future resourcing of the OAIC?

The most recent Budget and subsequent evidence before the recent Estimates Committee Hearing indicate that the then intention of the Attorney-General, and presumably the Government, was to maintain the above described approach for at least two years.

This would seem to indicate that at least at that point, the issue of the OAIC not having sufficient financial, physical or human resources to perform the roles proposed for it in the NAP was either not on the table or was yet to be considered. Since then there has been no indication that the issue is being addressed.

It seems that we have a major implementation problem. If there is no plan in place then it needs to be addressed by the Government and civil society as a matter of urgency.

If, however, a financial plan is in place, it needs to be published and discussed before we can complete the NAP consultation process.

5. Other important reasons for action.

There are other important reasons why these issues need to be addressed.

The events described have given rise to serious questions about the above-mentioned conduct of the Attorney-General in and since 2014 breaching the fundamental constitutional principles of the separation of powers and the rule of law¹⁰. It should be noted that “strengthening the rule of law” is one of the commitments OGP participating nations undertake.¹¹ In addition, the Attorney-General’s Department website states that it

“has primary responsibility for supporting the Australian Government in protecting and promoting the rule of law.

The rule of law underpins the way Australian society is governed. Everyone – including citizens and the government – is bound by and entitled to the benefits of laws.”¹²

Further, for some three years prior to Australia becoming a participating nation in the OGP in 2013, our OAIC, and, therefore Australia, had been carrying out statutory commitments and objectives that mirrored those of the OGP. This continued until May 2014 when the Attorney-General brought the Bill to Parliament to abolish the OAIC and

¹⁰ OGP Articles of Governance, <http://www.opengovpartnership.org/Articles>

¹⁰ <https://www.ag.gov.au/About/Pages/Ruleoflaw.aspx>. p17

¹¹ OGP Articles of Governance page 21; <http://www.opengovpartnership.org/Articles>

¹² <https://www.ag.gov.au/About/Pages/Ruleoflaw.aspx>

began the saga of the action taken by him on behalf on the Government to find ways to achieve the ultimate objective of preventing the OAIC perform the majority of the statutory functions given to it.

Since then, the OAIC has tried to do what it can but has been prevented doing so by our Attorney-General's strategy of denying adequate resources for the FOI functions. As a consequence, Australia, although a participating nation in the OGP, has been rejecting its OGP commitments and objectives.

In relation to the proposed draft National Action Plan, the OGP Articles of Governance¹³ state

“Commitments in country action plans should be ambitious in nature. An ambitious commitment is defined as 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”

For over two years now, however, Australia, by its actions, has rejected the OGP grand challenges and the commitments and objectives expected of participating nations. This appears to be set to continue under the proposed draft NAP unless we provide the resources needed to enable the OAIC to discharge both its statutory FOI functions and its OGP commitments and objectives. If they are not provided, our first NAP will inevitably fail the OGP's requirements as will the performance of it.

Further, Australia's reputation and leadership potential in the Open Government Partnership will, despite our previous proud history, be more seriously damaged.

Looking at the history one could well imagine conspiracy theorists¹⁴ taking the position that what has occurred is not an oversight but a deliberate plan which the government, or key sections of it, have pursued for close to 2 ½ years. After all, not long ago, one senior member of the public service publicly described the Commonwealth FOI system as “very pernicious”¹⁵

They would be strengthened in their view by the lack of openness of the reason given Attorney-General for the Government's past approach to the OAIC at the recent Estimates hearing – he mentioned “reasons of economy” but did not say what those

¹³ op. cit., p 17

¹⁴ Cf. <http://www.canberratimes.com.au/national/public-service/did-australia-sign-up-to-the-open-government-partnership-knowing-it-doesnt-quality-20160402-gnwsqp.html>

¹⁵ http://foi-privacy.blogspot.com.au/2015/10/public-service-chiefs-foi-very.html#.WCZQuDr_qYE

reasons were or what the Government's then objectives were. There is also his response when asked about the reasons for not appointing a person to the FOI Commissioner position. His response was wide enough to possibly cover both the complaint and review functions of the OAIC but did not go further. Was that an oversight or did he deliberately ignore all the other key statutory FOI functions that the OAIC is supposed to perform under its legislation in addition to the review and complaints functions to which he did refer?.¹⁶

Should it be sought to raise "reasons of economy" as the justification, the 2014 – 15 Budget information indicated that the savings the Government had anticipated making by abolishing the OAIC were, in the budget context, small – a little over \$2.50 M each year for the next four years.¹⁷ The cost of restoring the capacity to perform the FOI functions should be relatively insignificant in Australia's budget and should be significantly outweighed by the benefits that will flow to our economy, society and Democracy from government that is open and accountable.

5. What should be done?

But let us focus on Australia's commitment to the OGP and address this most unfortunate situation.

We submit that what is required is a public statement as soon as possible by the Government stating that the matters raised need to be addressed and

- clarifying the position of the Government on the issues raised in this submission, in particular, the intended resourcing, financial and human, of the OAIC to cover all its statutory functions and proposed NAP functions and when that will be addressed,
- stating that the interim Working Group will review the draft NAP to recommend changes to all aspects of the present draft which are in conflict with, or fail to address, the objectives and principles of the OGP and
- stating when that will be addressed.

We also submit that the statement should be made by the Prime Minister and the Minister in Charge. Further, the draft NAP should be revised to reflect the public statement..

¹⁶“The reason is that there is already, in the absence of a freedom of information commissioner, a comprehensive architecture for freedom of information applications and review of such freedom of information decision-making”.
[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F62329d4c-8d92-49bc-b22c-b9371dd27824%2F0003;page=4;query=\(Dataset%3Acommsen,commrep,commjnt,estimate,commbill%20SearchCategory_Phrase%3A%22committees%22\)%20Dataset_Phrase%3A%22estimate%22;rec=1](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F62329d4c-8d92-49bc-b22c-b9371dd27824%2F0003;page=4;query=(Dataset%3Acommsen,commrep,commjnt,estimate,commbill%20SearchCategory_Phrase%3A%22committees%22)%20Dataset_Phrase%3A%22estimate%22;rec=1)

¹⁷

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201617/Office-AIC

Regrettably, but necessarily, until that is done the consultation on Australia's NAP should be put on hold. Once a revised draft NAP has been finalised, we submit that the revised timetable for the revision and finalisation of the revised NAP be prepared by the Interim Working Group.

In view of the long unnecessary delays that have occurred since Australia joined the OGP in 2013, this is most unfortunate. But the due discharge of our OGP obligations and commitments must be, and be seen to be, carried out if we are to honour our ultimate obligation to put the public interest first.

A handwritten signature in black ink, appearing to read 'Tim Smith', written in a cursive style.

Accountability Round Table (ART)

Hon Tim Smith QC
Chair of ART