

Nigel Waters submission
13 November 2016

Following my participation in the webinar on 8 November, I provide the following input, based on my 30 years experience as a privacy and information policy practitioner and advocate.

Commitment 1.2 re Beneficial Ownership Register

I support this action, provided it is limited to beneficial ownership of legal entities. Such a register should be available to the public, not just competent authorities – those accepting the benefits/protections of incorporation have to accept a loss of financial privacy (privacy rights under Australian laws do not and should not apply to legal entities other than natural persons).

Question arises as to whether the register will leverage existing requirements under AML-CTF legislation for reporting entities to record beneficial owners of all bank accounts (including those belonging to individuals). Notwithstanding the potential for unscrupulous individuals to ‘hide’ corporate activities, it is important to uphold the current position that individual’s financial affairs are NOT routinely made public or any further erosion of financial privacy of individuals. May need to be some further discussion/changes around the use of trusts etc.

The Privacy Commissioner should be identified as a relevant actor for this commitment.

Commitment 2.2 re public trust in data sharing

Good recognition of privacy issue – but uncritical inference that Privacy Act 1988 is an adequate means of addressing it. There are many weaknesses both in privacy legislation and in the powers, resources and capability of Australian privacy regulators. The recently introduced proposal for ‘re-identification’ prohibition (*Privacy Amendment (Re-identification Offence) Bill 2016*) appears badly thought out and drafted – it could add unnecessarily to perception of privacy laws as a bureaucratic impediment. Inclusion of ABS as a lead agency is now questionable given their mishandling of privacy concerns over 2016 census.

There should also be express recognition that privacy does not just mean confidentiality and security (a common misunderstanding). Privacy principles also include justification for collection and sharing of personal information, and as far as possible informed consent in the first place. This also requires an acknowledgement that some data sharing may not be acceptable/allowed – may not always be able to convince individuals to grant consent.

The recent draft report of the Productivity Commission on ‘big data’ (*Data Availability and Use*, November 2016) shows a poor understanding of privacy and wider trust issues. While it is a significant ‘input’ to the OGP discussion, I caution against acceptance of its draft recommendations without further consideration of the critiques which will inevitably be made of the draft report in coming months.

Other NGO actors involved in this 'workstream' must include privacy advocates (such as the Australian Privacy Foundation (APF), Electronic Frontiers Australia (EFA) and Councils of Civil Liberties (CCLs)).

Milestone 4 – improve privacy risk management capability – is very important – despite existing guidance, privacy impact assessment is not done frequently enough or well enough – I attach a chapter from a 2012 book *Privacy Impact Assessment* (ed. Wright & De Hert, pub. Springer) in which I address these issues.

Commitment 3.1- modernise Information Access laws

I support this objective provided it doesn't swing the balance away from privacy protection where personal information is concerned, other than where it is used as an excuse for withholding 'business information'.

The FOI Act was undermined in 1988 when the concept of 'personal affairs' as a reason for withholding was replaced with 'personal information' to align with the then new Privacy Act – this allowed agencies to withhold information because it included anodyne information about public servants carrying out their functions which should be publicly available for accountability.

There is a wider problem with the FOI Act including two regimes with different objectives – access to and correction of one's own personal information (which should logically sit solely in the Privacy Act) vs access to information about the workings of government (transparency and accountability) which should be the primary focus of the FOI Act, and where reasons for withholding should be trimmed back – including spurious claims of privacy for public servants in the performance of their duties.

There is an urgent need to counter a disturbing continuing persistence by even some senior public servants to see FOI laws as incompatible with good governance and an impediment to 'frank and fearless' advice. There also needs to be reversal of recent cuts to the resources and constraints on independence of the Information Commissioner. The welcome advances in the 2010 FOI Act amendments have lasted barely five years before being undermined. To be effective (a fundamental objective of the OGP), FOI laws need a well resourced 'champion' with guaranteed independence.

Harmonisation of privacy and FOI laws across all Australian jurisdictions (by levelling to highest common standards) should be a high priority – current inconsistencies are a major impediment to a clear public understanding of the laws, rights and obligations, and all too often lead to spurious claims that privacy prevents uses and disclosures of information which is clearly in the public interest. Commitment 3.2 already addresses monitoring of information access laws across all jurisdictions, and COAG processes should also be used to advance the cause of harmonisation of information laws, and we understand that the OGP has a project on sub-national jurisdictions. I understand that Information Commissioners from a number of Australian jurisdictions are currently engaged in an inventory/review which could inform OGP work in this area.

The Commonwealth Attorney-General's Department is arguably conflicted in having responsibility for information laws as well as for national security and law enforcement – the interests of which will always prevail over human rights considerations where there is a tension. Consideration should be given to moving responsibility for information laws to a more 'neutral' department or agency which could be a more enthusiastic champion of such rights.

Commitment 4.2 - improving integrity

Current calls from across the political spectrum for a 'federal ICAC' need to be recognised with the case for a new body at least on the table for discussion. Agencies such as the ACLEI, AFPs' FACC, ASIC etc all have an important role but it should not be assumed that they will be able between them to adequately address all the challenges faced in ensuring integrity and combatting corruption in both the public sector and the corporate world

Commitment 5.1 – consultation and engagement

I strongly support the multi-stakeholder approach, and welcome the opportunities for early engagement to date. Privacy interests should be expressly included in stakeholder consultation arrangements – obvious candidates for inclusion are APF, EFA and Councils for Civil Liberties. Also, while Transparency International will not generally hold a privacy brief, I am surprised that it does not appear in any of the lists of OGP stakeholders I have seen.

Thank you for the opportunity to provide this input. I applaud the process adopted to date in the development of the Action Plan, and look forward to making further contributions.

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