

Submission from the Steering Committee of the Australian Open Government Partnership Network.

The submission may be published online.

The Steering Committee welcomes the publication of the draft National Action Plan and the opportunity to suggest areas for improvement.

Network members were encouraged to make their views known and a number of individuals and member organisations have lodged submissions or are in the process of doing so.

We echo the sentiment expressed by the Chairman of Transparency International Australia The Hon Anthony Whealy QC, that the National Action Plan is a prime opportunity for the government to rebuild trust and demonstrate that Australia truly values democracy, openness and integrity as we look to the future.

The Prime Minister on a number of occasions since the July Federal election has affirmed that restoring trust and confidence is a high priority for the Turnbull government.

There are other, tangible benefits from Open Government, expressed by UK Prime Minister Cameron when he said: "Transparency brings risks – indeed we often find that out here on a day-to-day basis – but it is absolutely critical. Time and again, history has shown us that open governments make for successful nations."

The plan should clearly and confidently state that open government is pursued by Australia because it is in our national economic, environmental and social interests.

1. Draft Plan overall

The breadth and scope of topics or themes covered in the draft is a major positive improvement on the plan envisaged during first phase consultation when government proposed a narrow range of topics for consideration.

In our submission, matters that now require attention include:

- ensuring the summary of the current situation is balanced and accurate,
- clarifying and sharpening the language so that each commitment is ambitious, concrete and clearly stated,
- incorporating milestones- action steps to be taken - that lay out the path to deliver on each commitment.

2. Summary of current situation

While the plan itself must follow the format required by the Open Government Partnership it should be written primarily for the domestic rather than an international audience.

In several parts of the text unqualified statements about Australia's record and international standing -- some examples with commentary appear below - run the risk of detracting from the credibility of the plan, play into the hands of those sceptical about any government commitment to open and transparent government, and may impact negatively on enthusiasm

and public support for the OGP initiative.

A brief acknowledgement of the broader context would avoid potential criticism that the plan fails to present an accurate picture.

Introduction

"Australia is a successful and stable democracy, with relatively low levels of corruption and a long, proud history of open government."

(Comment: The 'long proud history of open government' has been marked in recent years by excessive secrecy. For example:

In 2010 the Australian Law Reform Commission identified 506 secrecy provisions in legislation. More such provisions have been added since. None appear to have been modified or repealed. The commission recommended steps to develop a coherent principled framework for secrecy provisions deemed necessary. One provision, Section 70 of the Crimes Act, the 'unauthorised disclosure' provision, has been described by the ALRC as "seriously out of step with public policy developments in Australia and internationally." Voices urging change to this provision go back to former High Court Chief Justice Sir Harry Gibbs in 1991.

More recently secrecy provisions in the Australian Border Force Act have been particularly controversial.

Secrecy surrounds 'on water' activities of the Australian Border Force and the management of detention centers in Nauru and PNG.

According to the Human Rights Law Centre "we are witnessing an unmistakable trend in Australia of governments eroding (democratic) foundations with new laws and practices that entrench secrecy and stifle criticism and accountability."

Professor David Weisbrot of the Australian Press Council has said "Governments are restricting access to information, fortifying secrecy laws, stifling whistleblowers and undermining the confidentiality of journalists' sources."

The Australian Public Service Commissioner described the Freedom of Information Act as "very pernicious" and told a parliamentary committee that the problem was that the law had strayed from its original purpose-to provide a right of access to the applicant's personal information - showing little awareness of the act's important contribution to transparent accountable government.

The Government spent two years seeking to abolish the open government watchdog, the Office of Australian Information Commissioner, only withdrawing the bill because it did not command support in the Senate. The office continues to operate with reduced funding, with one commissioner not three as legislated, and with no Freedom of Information Commissioner.)

"In 2015, we were ranked 13th in Transparency International's Corruption Perceptions Index, and 9th in The Economist Intelligence Unit's Democracy Index."

(Comment:

Australia's ranking in the TI index has fallen six positions since 2012.

According to TI Australia "lack of action by successive governments to curb public sector corruption was the reason Australia continued to slide down the rankings."

Our ranking in the Economist Democracy Index has dropped from 6 in 2013 to 9.

Australia is 25 in the Freedom House Press Freedom Index, well down on earlier years.

Research undertaken by Network Steering Committee member Dr Johan Lidberg shows that Freedom of Information systems across Australia do not live up to best international practice. Lidberg, Johan. 2009. "The International Freedom of Information Index – a watchdog of transparency in practice." *Nordicom* 20 (1):167-182

The Right to Information Index published by the Center for Democracy Toronto and Accessinfo Europe allocates the Federal Freedom of Information Act 83 points out of 150 on over 60 criteria, with the law ranked 57 of 111 in the survey.)

Efforts to Date

References to freedom of information without mention of government initiatives to close down the OAIC, reduce funding and not appoint the full complement of statutory office holders could give a misleading impression about developments in this field. You will be aware that some are of the view that these actions could be seen to be contrary to Open Government Partnership principles.

3. Construction of Commitments.

The current text for each draft commitment includes three descriptions: a heading, a 'we will' statement, and an objective. In some cases the precise commitment is difficult to discern.

Each commitment should be clearly stated as a 'we will' statement under the heading Commitment.

The statement should be unequivocal about concrete outcomes.

Commitments to consult, investigate, or initiate a dialogue fall short of the necessary ambition and potential for transformation foreshadowed in guidance from the OGP.

4. Status Quo

The section in each commitment describing the status quo should provide a brief account of the context and the the problem or problems to be addressed.

Some (for example 4.2 National Integrity Framework) are longer than necessary and do not indicate there is a problem at all.

5. Approach to Participation and Civil Society

Embedding meaningful civil society participation in all the commitments is an essential part of the OGP process.

Civil society is ready to participate in actions to give effect to each commitment and to provide critical oversight of the delivery of the national action plan.

There are a number of commitments that do not list any non-government actors or state the intention to identify them at any stage. There are some commitments that lack any reference to civil society involvement.

6. Brief Commentary on selected draft commitments:

1.1 Improve whistle-blower protections in the tax and corporate sectors.

Whistleblower protection should go beyond tax issues and extend to those who help to disclose corporate corruption and malpractice. A recent example would be the scandals in the insurance and financial advisory industries exposed by Australian investigative journalists.

In a proper functioning whistleblower protection environment such malpractice should be exposed by government regulatory agencies.

The Commitment as drafted includes only the prospect of consultation regarding" corporate sector protections.

An unequivocal commitment would read:

"We will ensure appropriate protections are in place for people who report tax evasion or avoidance, corruption, waste, fraud and misconduct within the corporate sector."

The Milestones should outline the steps to be taken that will lead to that result. This requires more than consultation about the possibility of protections

The Status Quo section should be updated now that the Whistle While They Work 2 Project has published its first survey, results of which confirm "the burning need for comprehensive but well-informed reform of the nation's whistleblowing laws."

As a medium term goal the plan should include steps to encourage the three jurisdictions, South Australia, the Northern Territory and Queensland, that do not have explicit 'shield laws' for journalists (amendments to Evidence Acts) to protect whistleblowers that disclose via the media.

1.2 Beneficial Ownership

The commitment is to consult.

An unequivocal commitment would read:

"We will ensure the availability of adequate, accurate and timely information on beneficial ownership and control of companies (and other entities)."

The commitment should not be limited to making such information "available to competent authorities" before the public discussion and debate foreshadowed in the Milestones. There are legitimate privacy and other issues that require consideration during that process but there are arguments and international precedents that support varying degrees of public access to this type of information. The UK public register of beneficial interests for example includes details of persons with significant control. The published datasets are available for use and reuse.

The commitment should not be limited to beneficial ownership of *companies*.

Beneficial ownership of other corporate entities should also be the subject of public discussion.

2.1 Release of high value data sets

'High value' is poorly defined and an unsuitable criteria for decisions on open data release.

It is unclear what is meant by 'value' - whether that be economic, social, based on accountability or some other definition, or how 'high' is defined relatively across datasets that may contain differing combinations of value. Also where 'high value' is determined in whole or part by public servants, who may not have full knowledge of what datasets may be valuable to the community, companies or other agencies, it is a flawed approach for release that will more likely prioritise 'low hanging fruit' - datasets easy for agencies to release, or datasets deemed high value based on political or agency considerations.

A clearer approach is defined in the Public Data Policy Statement, which provides for all non-sensitive data to be released by agencies by default without insisting on a 'high value' determination.

And by the European Union Public Sector Information (PSI) Directive that is now being implemented by the member countries. The directive states that ALL information/data produced using public money should be made publicly available, unless there is a compelling reason otherwise.

(European Parliament. 2003. *European Union*. 2003/98 DIRECTIVE 2003/98/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the re-use of public sector information.)

It would be sensible to redefine this commitment around meeting the Public Data Policy Statement, with government agencies required to undertake a data inventory and publicly publish a list of all their non-sensitive data sets, together with a release timetable, centrally through data.gov.au (as suggested in the detail of the commitment). This would present members of the public, interest groups, companies and other agencies with the opportunity to specifically request changes in the release timeframes based on their perceptions of 'high value'.

The final form of this commitment should be informed by the observations in the Draft Report issued by the Productivity Commission about impediments to release of datasets.

3.1 Information management and access laws for the 21st century

The stated commitment "We will ensure our information access laws are modern and appropriate for the digital information age" stops short of the important point noted under the heading *Ambition*: that action is also required to ensure information access and management *policies and practices* are similarly modern and appropriate.

The performance of government agencies in managing Freedom of Information applications remains contentious. There are few signs of positive supportive leadership on the importance attached to FOI from ministers or senior public servants. Anecdotal evidence suggests a continuing culture of secrecy in some areas of government.

Research by Dr Johan Liberg assessing and comparing the functionality of all FOI jurisdictions during 2015 indicated vast differences in FOI delivery, with some jurisdictions displaying very poor functionality.

(Lidberg, Johan. Information access evolution: Assessing freedom of information reforms in Australia [online]. *Australian Journalism Review*, Vol. 38, No. 1, Jul 2016: 73-82. Availability: <<http://search.informit.com.au/documentSummary;dn=276586269582318;res=IELLCC>>IS SN: 0810-2686. [cited 14 Nov 16].)

The path to modern and appropriate law, policies and practice requires first a comprehensive review of the Freedom of Information Act as recommended by Dr Allan Hawke, and a close examination of current agency policies and practices.

The most recent comprehensive review of the Freedom of information Act was completed by the ALRC in 1995. The most recent review of the Archives Act was completed in 1998. Some but not all recommendations from those review reports were acted upon in 2008 (Archives) and 2010 (FOI).

Times have changed dramatically since those reports were completed.

Other relevant reports and suggestions on what could be done to improve law and practice are on the public record from within government, from experts outside government, from Australian state experience and from emerging international good practice standards. See also (Lidberg, Johan. 2013. "From Freedom to Right - where will Freedom of Information go in the era of WikiLeaks?" *Australian Journalism Review* 35 (2):73-85.)

A multi stakeholder group should be established to manage this process

The OAIC statutory functions include FOI and information policy. That office is best placed to provide support for the project and should be adequately funded and resourced to do so.

The Milestones at present outline steps to be taken to achieve an extremely limited goal, the development of a new model framework for the government to consider. The commitment as stated is broader than this.

The Milestones should outline actions that would lead to ensuring Australia has modern appropriate information management and access laws, policies and practices fit for the 21st Century.

4.1 Confidence in the electoral system and political parties

The commitment is to investigate.

A suitably ambitious commitment would instead state:

"We will ensure that public confidence in Australia's electoral system is strengthened."

Real time disclosure of donations to political parties or individual candidates and members of parliament and election campaigns is crucial to re-building and increasing confidence in political parties and politicians.

This requires a commitment to institute mandatory close to real time disclosure for all donations above a low specified level, say \$1000 in total per year, and for any repeat donations by the same donor below the specified amount.

The current disclosure system with one publication of donations per year often up to 18

months after the event fails to meet the objective of a well informed electorate and is out of line with public expectations. The latest Essential Poll reports 73% support for immediate disclosure of donations.

7. Australia's leadership internationally

The inclusion of this topic in the plan is welcome recognition of Australia's responsibility as a member of the OGP to assist international efforts to promote open government.

A commitment by Australia to host a regional meeting would be welcomed by OGP partners in the Asia Pacific.

The note refers to the intention to endorse the Joint Declaration on Open Government for the Implementation of the 2030 Agenda for Sustainable Development 'which commits us to transparency openness and accountability in our domestic and international implementation of the 2030 Agenda for Sustainable Development.'

There are five specific commitments in the Joint Declaration including a commitment by governments to "Use our Open Government Partnership National Action Plans to adopt commitments that serve as effective tools to promote transparent and accountable implementation of the 2030 Agenda for Sustainable Development."

That link between the plan and the implementation of the SDGs is not otherwise evident in the document.

Thank you for the opportunity to contribute.

Steering Committee Australian Open Government Partnership Network 16 November 2016.

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(Steering Committee member Dr Nicholas Gruen (positions held include Chair, Open Knowledge Foundation Australia) is currently traveling overseas and was unavailable before sign off on the submission.)